

Section 5

AMENDMENTS TO NEC ENGINEERING AND CONSTRUCTION CONTRACT 3RD EDITION

Z1 Amendments to Core clauses and Main Option clauses

Z1.2 The Core clauses, Main Option clauses and the Secondary Option clauses are amended as follows

Clause 11.2(4) Delete and substitute:

"The Contract Date is the date of the Call-Off Contract."

Clause 11.2(5) At the end of first bullet point insert: "the requirements of this contract or".

Clause 11.2(10) Delete "the *Adjudicator*" and replace with "the Adjudicator".

Clause 11.2 Insert the following new definitions

"(34) Act is The Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009.

(35) Adjudicator means an independent person appointed to act as an adjudicator in accordance with clause W2.2.

(36) Background IPR means IPR owned by the *Contractor* or a Subcontractor or other third party and which is not assigned to the *Employer* pursuant to clause 22.1.

(37) The Call-Off Contract is the form of agreement issued pursuant to the Framework Agreement executed by the *Employer* and the *Contractor* under which the *Contractor* has agreed to Provide the Works.

(38) Change of Control means

- a change in the ownership of the *Contractor* or the Holding Company where such change relates to fifty percent or more of the issued share capital of

the *Contractor* or the Holding Company (as applicable) and/or

- in the case of an unincorporated *Contractor* there is any change in the management personnel of the *Contractor*, which alone or taken with any other change in management personnel not previously notified to the Employer, equates to a change in the identity of fifty percent (50%) or more of the management personnel of the *Contractor*.

(39) Connected Persons means all and any of the *Contractor's* employees, directors, contractors, agents, Subcontractors, suppliers, shareholders, professional advisers (including lawyers, auditors, financial advisers, accountants and technical consultants) or underwriters.

(40) Construction Industry Scheme means the provisions of Chapter 3 of Part 3 of the Finance Act 2004 (Construction Industry Scheme) together with any regulations made pursuant to these provisions, including the Income Tax (Construction Industry Scheme) Regulations 2005.

(41) Dispute means any dispute, controversy or claim arising out of or in connection with this contract.

(42) Diversity Infraction means any breach by the *Contractor* of its obligations specified in clauses Z11 and (where applicable) Z16 and Z17 of this contract and/or any failure by a Subcontractor to implement and comply with the Equality and Diversity Strategic Plan.

(43) Documentation means all documents, items of information, data, reports, drawings, specifications, plans, software, designs, inventions and/or other material produced or supplied by or on behalf of the *Contractor* in the performance of this contract.

(44) Equality Act means the Equality Act 2010.

- (45) Framework Agreement means the framework agreement reference tfl_scp_001430 between Transport for London and the *Contractor* and known as the Major Projects Framework or MPF.
- (46) Holding Company means any company which from time to time directly or indirectly controls the *Contractor* where "control" is as defined by Section 1124 of the Corporation Tax Act 2010.
- (47) Independent Report means an independent report by an individual or body
- whose organisation, systems and procedures conform to,
 - ISO Guide 65:1996 (EN 45011:1998), and
 - general requirements for bodies operating product certification systems, and
 - who is accredited to audit against forest management standards by a national or international body whose organisation, systems and procedures conform to ISO Guide 61 General Requirements for Assessment and Accreditation of Certification Bodies.
- (48) Indirect Subcontractor means any subcontractor or subconsultant of whatever tier beneath any Subcontractor appointed in relation to the *works*.
- (49) IPR means intellectual property rights including patents, trade marks, service marks, trade names, design rights, copyright (including rights in computer software and databases), moral rights, rights in know-how, rights in domain names and other intellectual property rights, (including any professional, manufacturer's or supplier's warranties and/or indemnities) in each case whether registered or unregistered, and including applications for the grant of any such rights and all rights or forms of protection having equivalent or similar effect anywhere in

the world.

(50)

Legal Timber means in respect of which the organisation that felled the trees and/or provided the Timber from which the wood supplied under the contract derived

- had legal rights to use the forest,
- holds a register of all local and national laws and codes of practice relevant to forest operations and
- complied with all relevant local and national laws and codes of practice including environmental, labour and health and safety laws and paid all relevant royalties and taxes.

(51)

Losses mean any expenses, liability, losses, claims, proceedings, compensation and costs whatsoever or howsoever arising.

(52)

Minimum Records means all information relating to the Contractor's performance of and compliance with clause Z16 and the implementation of, and compliance with, the Equality and Diversity Strategic Plan by each Subcontractor and Indirect Subcontractor.

(53)

Nominating Authority means the President or Vice President or other duly authorised officer of the London Court of International Arbitration.

(54)

Notice of Adjudication means any notice given by a party to the Dispute to the other party or parties thereto requiring reference of a Dispute to the Adjudicator in accordance with clause W2.1. The Notice of Adjudication includes:

- the nature and a brief description of the Dispute,
- details of where and when the Dispute arose and
- the nature of the redress which is sought.

- (55) Pay Less Notice means the notice referred to in clause 51.2B.
- (56) Prevention Event has the meaning ascribed to that term in clause 19.1.
- (57) Recycled Timber means recovered wood that has been reclaimed or re-used and that has been in previous use and is no longer used for the purpose for which the trees from which it derives were originally felled. The terms 'recycled' and 'reclaimed' are interchangeable and include, but are not limited to the following categories: pre-consumer recycled wood and wood fibre or industrial by-products but excluding sawmill co-products (sawmill co-products are deemed to fall within the category of Virgin Timber), post-consumer recycled wood and wood fibre and drift wood. Recycled or reclaimed Timber must be capable of being evidenced as such to the *Employer's* satisfaction in order to satisfy this definition.
- (58) Referral Notice means a notice referring a Dispute to the Adjudicator in accordance with clause W2.5.
- (59) Relevant Employment Vacancy means an employment vacancy within the *Contractor's* organisation relating to the *services*.
- (60) Relevant Protected Characteristics, as at the Contract Date, include: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation.
- (61) Senior Representative means a representative of a Party at senior executive level.
- (62) Statutory Undertaker means any governmental or local authority or statutory undertaker
- which has any jurisdiction with regard to the *works* including without limitation any jurisdiction to

control development of the site or any part of it,

- with whose requirements the *Employer* is required to comply or
- with whose systems and/or utilities the *works* will be associated.

(63)

Sustainable Timber means Timber, which in order to meet the *Employer's* criteria for sustainable timber, must be

- Recycled Timber or
- Sustainably Sourced Timber or
- a combination of Recycled Timber and Sustainably Sourced Timber.

(64)

Sustainably Sourced Timber means Timber sourced from organisational, production and process methods that minimise harm to ecosystems, sustain forest productivity, ensure that both forest ecosystem health and vitality, and forest biodiversity is maintained. In order to satisfy this definition, Timber must be accredited to meet the Forest Stewardship Council (FSC) or equivalent. Where it is not practicable to use Forest Stewardship Council (FSC) standard accredited timber, the *Employer* will accept Timber accredited through other schemes approved by the Central Point of Expertise on Timber (CPET), as listed below

- Canadian Standards Association (CSA),
- Programme for the Endorsement of Forest Certification (PEFC) or
- Sustainable Forestry Initiative (SFI),

or such other source as the *Contractor* may demonstrate to the *Employer's* satisfaction is equivalent.

(65)

TfL Group means Transport for London ("TfL"), a statutory body set up by the Greater London Authority Act 1999 and

any of its subsidiaries and their subsidiaries.

(66)

Timber means wood from trees that have been felled for that purpose, but excludes any item where the manufacturing processes applied to it has obscured the wood element, (by way of example only, paper would not be treated as timber). Where the term Timber is used as a generic term it includes both Virgin Timber and Recycled Timber.

(67)

Virgin Timber means Timber supplied or used in performance of this contract that is not Recycled Timber."

Clause 12.2

Delete the existing wording and replace with

"12.2

This contract and any non-contractual obligations arising out of or in connection with it is governed by and shall be construed in accordance with the *law of the contract* and, without prejudice to clause W2, the parties submit to the exclusive jurisdiction of the courts of England and Wales."

Clause 12.4

Delete the existing wording and replace with

"12.4

Without prejudice to the terms of the Framework Agreement, this contract supersedes any previous agreement, arrangement or understanding between the *Employer* and the *Contractor* in relation to the matters dealt with in this contract and represents the entire understanding and agreement between the *Employer* and the *Contractor* in relation to such matters. The *Employer* and *Contractor* acknowledge and agree that each of them has not relied upon any prior representation by the other in entering into this contract."

Clause 12.5

Insert a new clause:

"12.5

A period of time stated in days is a period calculated in accordance with Section 116 of the Act."

Clause 12.6

Insert a new clause:

"12.6 If any provision of this contract is held by any court or competent authority to be void or unenforceable in whole or in part, the other provisions of this contract and the remainder of the affected provisions shall continue to be valid."

Clause 12.7 Insert a new clause:

"12.7 A reference in these *conditions of contract* to any applicable law or statutory requirement includes

- subject to secondary Option X2 (if applicable), that law or statutory requirement as from time to time amended, re-enacted or substituted and
- any orders, rules, regulations, schemes, warrants, bye-laws, directives or codes of practice raised under any such law or statutory requirement."

Clause 12.8 Insert a new clause:

"12.8 Failure by the *Employer* to exercise his rights under this contract does not constitute waiver of those rights nor any of them nor does any such failure relieve the *Contractor* from any of his obligations under this contract. The waiver in one instance of any right, condition or requirement does not constitute a continuing or general waiver of that or any other right, condition or requirement."

Clause 12A Insert a new clause:

"Contract Administration Management System

12A Notwithstanding clauses 13.1 – 13.2

- the parties agree to utilise a web-based contract administration management system for the project as more particularly described in the Works Information ("CAMS"),
- all communications provided for in the contract are

to be made exclusively through the CAMS ("CAMS Communications") except for any categories of communications which the *Project Manager* notifies the *Contractor* from time to time are not to be made exclusively through CAMS and

- unless the *Project Manager* gives an instruction suspending the operation of the CAMS, CAMS Communications are only effective if made through the CAMS and the parties following any procedure necessary to give effect to the CAMS.

Where a CAMS Communication refers to an attachment that cannot be included with that communication, the attachment is sent via a method complying with clause 13.1."

Clause 13.1

Delete and substitute:

"If and to the extent that clause 12A is not applicable to the contract, each instruction, certificate, submission, proposal, record, acceptance, notification, reply and other communication which this contract requires is communicated in a form which can be read, copied and recorded. Writing is in the *language of this contract*. Other than signed documents which have been electronically scanned, notifications, instructions and quotations for compensation events under this contract are not effective if made by electronic format ('for information' copies of notifications may however be issued electronically)."

Clause 14.1

Delete and substitute:

"14.1

Neither a communication from the *Employer*, *Project Manager* or *Supervisor* nor the *Project Manager's* or the *Supervisor's* review or acceptance of a communication from the *Contractor* or of his work changes the *Contractor's* responsibility to Provide the Works or his liability for his design."

Clause 14.5

Insert a new clause:

"14.5

The *Project Manager* is for relevant purposes the "specified person" as defined in section 110A(6) of the Act."

Clause 16.1

After the bullet points, delete the first sentence and replace with:

"The *Contractor* may give an early warning by notifying the *Project Manager* of any other matter which could increase total cost to the *Contractor* or the *Employer*."

Clause 17.1

Delete and substitute:

"The *Contractor* examines the Works Information and all other documents forming this contract and warrants to the *Employer* that he is not aware, as at the Contract Date and if Option X23 applies, as at the date of the Notice to Proceed, of any ambiguity or discrepancy within or between any of the contract documents which might adversely affect the carrying out of the *works* for the tendered Prices in accordance with the *conditions of contract*."

Clause 17.2

Insert a new clause:

"17.2

The *Project Manager* or the *Contractor* notifies the other as soon as either becomes aware of an ambiguity or inconsistency in or between the documents which are part of this contract. The *Project Manager* gives an instruction resolving the ambiguity or inconsistency. Such instruction is not a compensation event where the *Project Manager* assesses

- that the ambiguity or inconsistency in question is one for which the *Contractor* is responsible under this contract or
- that a prudent and experienced contractor familiar

with works similar to the *works* would have identified such an ambiguity or inconsistency at the Contract Date from the information then available to him or

- if Option X23 applies, that a prudent and experienced contractor familiar with works similar to the Stage Two *works* would have identified such an ambiguity or inconsistency at the date of the Notice to Proceed from the information then available to him."

Clause 19.1

Insert a new second paragraph before "and which":

"and which is not

- an event of insolvency identified in clause 91.1 of the *Contractor* or any Subcontractor or supplier,
- a shortage of labour, Plant and Materials or Equipment or
- an event attributable to any fault of the *Contractor* or any of his employees or agents or any Subcontractor or supplier or any of their employees or agents"

After "and which" delete the second bullet point and insert the following:

- "a prudent and experienced contractor familiar with works similar to the *works* and exercising the foresight appropriate to such a contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it,
- if Option X23 applies, a prudent and experienced contractor familiar with works similar to the Stage Two *works* and exercising the foresight

appropriate to such a contractor would have judged at the date of the Notice to Proceed to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and

- the *Contractor* can demonstrate that he did not allow for it in his tender,"

In the final paragraph insert at the beginning "then this is a "Prevention Event" and".

Clause 22

Delete and replace with:

"22

Intellectual Property Rights

22.1

The Parties agree that the IPR in all Documentation and works that is created wholly or mainly in connection with the performance of this contract (including IPR created by a Subcontractor or sub-subcontractor of any tier) vests in the *Employer*. The *Contractor* procures that each Subcontractor (or sub-subcontractor of any tier) assigns such IPR to the *Employer*.

22.2

In respect of Background IPR, the *Contractor* grants (in respect of his own Background IPR) and procures the grant of (in respect of a Subcontractor's or other third party's Background IPR) a non-exclusive, world-wide, perpetual, irrevocable, royalty free licence (including the right to sub-licence) to the *Employer* to use the Background IPR for all purposes.

22.3

The *Contractor* agrees to provide to the *Employer* or any person nominated by the *Project Manager* immediate access to all Documentation in whatever form requested by the *Project Manager* at any time but at the latest on termination or expiry of this contract.

22.4

The *Contractor* promptly notifies the *Employer* upon becoming aware of an infringement, alleged infringement

or potential infringement of any IPR (including any claims, demands or actions (collectively "Claims") relating to the same) which affects or may affect the provision or use of the *works*.

22.5 Subject to the *Employer's* proper observance of its obligations under this contract, the *Contractor* indemnifies the *Employer* against all Claims and Losses that arise from or are incurred by reason of any infringement or alleged infringement of any IPR.

22.6 The *Employer*, at the request of the *Contractor*, gives the *Contractor* all reasonable assistance for the purpose of contesting any such Claim. The *Contractor* reimburses the *Employer* for all Losses incurred in doing so and/or the *Contractor* shall conduct any litigation and all negotiations at its own expense arising from such Claim. The *Contractor* consults with the *Employer* in respect of the conduct of any Claim and keeps the *Employer* regularly and fully informed as to the progress of such Claim.

22.7 The *Contractor* has no right (save where expressly permitted under this contract or with the *Employer's* prior written consent) to use any trade marks, trade names, logos or other intellectual property rights of the *Employer*.

22.8 IPR in all items supplied and owned by the TfL Group to the *Contractor* remains the property of the TfL Group. The *Employer* grants to the *Contractor* a non-exclusive, non-transferable, revocable licence to use all IPR owned (or capable of being so licensed) by the *Employer* and required by the *Contractor* in order to Provide the Works. Any such licence is granted for the duration of this contract solely to enable the *Contractor* to comply with its obligations under this contract."

Clause 24.2 In the first sentence delete "an employee" and replace with "any person under his control."

In the second sentence delete "the employee" and replace with "such person".

Clause 25.3

The following amendment to clause 25.3 applies only if stated to apply in the Contract Data.

Delete the last sentence of clause 25.3 and replace with:

"The *Project Manager's* assessment is without prejudice to any other rights and remedies the *Employer* may have arising from the Contractor's failure to meet a Key Date."

Clause 26.3

Delete the first bullet point.

Delete "or" after the third bullet point and insert the following bullet points after the last bullet:

- "in the opinion of the *Project Manager* they do not adequately reflect, or are not consistent with, the terms of this contract,
- they do not comply with the requirements for payment terms under the *law of the contract* from time to time including any applicable law, directive or requirement of the European Union,
- the proposed subcontract conditions do not include all of the key flow down provisions listed in the Works Information, or
- they do not comply with a requirement identified in the Works Information."

Clause 26.5

Insert a new clause:

"26.5

On or before the *starting date* the *Contractor* notifies the *Employer* of the name, contact details and details of the legal representatives of each Subcontractor and Indirect Subcontractor ("the Subcontractor Contact Information"), to the extent that such information has not already been provided by the *Contractor* to the *Employer* under this contract. The *Contractor* promptly notifies the *Employer* of

any change to the Subcontractor Contact Information and provides the name, contact details and details of the legal representatives of any Subcontractor or Indirect Subcontractor who is engaged after the *starting date*."

Clause 27.5

Insert a new clause:

"27.5

The *Contractor* gives notice to the *Employer* within 10 days if there is a Change of Control."

Clause 33.1

In the first sentence delete "The" and replace with "Subject to the provisions of the Works Information regarding access, the".

Clause 35.2

In the first sentence after "the *Employer*" insert "and Others".

Clause 50.1

Insert a new paragraph at the beginning of the clause:

"The *Contractor* submits an application for payment to the *Project Manager* in the form prescribed by the Works Information not less than fourteen days prior to each assessment date. The application states the sum that the *Contractor* considers to be due to him at the payment due date and the basis on which that sum is calculated."

Clause 50.4

In line two delete "on or before the assessment date" and substitute "in accordance with clause 50.1".

Clause 50.8

Insert a new clause:

"50.8

If a performance bond required by this contract is not procured by the *Contractor* and delivered to the *Employer* in accordance with Option X13 then one quarter of the Price for Work Done to Date is retained in assessments of the amount due and is not payable to the *Contractor* until such performance bond has been delivered."

Clause 50.9

Insert a new clause:

"50.9

In addition to any other rights of the *Employer* whether at law or equity under this contract, whenever

- under this contract any sum of money is recoverable from or payable by the *Contractor* or
- any damages, costs, charges, expenses, debts, sums or other amounts are reasonably and properly owed to, or incurred by, the *Employer* or any member of the TfL Group under or arising out of this contract,

then the same may be set-off and/or deducted from any sum then due or which at any time thereafter may become due to the *Contractor* under this contract."

Clause 50.10

Insert a new clause:

"50.10

If the *Contractor's* employment is terminated under clause 91.1 because the *Contractor* has become insolvent within the meaning of Section 113 of the Act (R10A), the *Employer* need not pay any sum due to the *Contractor* other than any amount due to him under clause 90.4 either

- where the *Contractor* becomes insolvent prior to the prescribed period before the final date for payment, provided that the *Employer* or *Project Manager* issues a Pay Less Notice notifying the *Employer's* intention not to pay such sum or
- in any event, if the *Contractor* becomes insolvent after the prescribed period before the final date for payment."

Clause 51.1

Delete the first sentence and replace it with:

"The *Project Manager* certifies a payment not later than five days after each payment due date."

Clause 51.1A

Insert a new clause:

"51.1A	<p>The date on which payment becomes due is the later of</p> <ul style="list-style-type: none"> • the assessment date and • fourteen days after the date of receipt by the <i>Project Manager</i> of the <i>Contractor's</i> application for payment in accordance with clause 50.1. <p>The final date for payment is twenty eight days after the date on which payment becomes due."</p>
Clause 51.1B	Insert a new clause:
"51.1B	<p>The <i>Project Manager's</i> certificate is the <i>Employer's</i> notice of payment specifying the amount due at the payment due date (the notified sum) and stating the basis on which that sum is calculated."</p>
Clause 51.1C	Insert a new clause:
"51.1C	<p>Not later than five days after receipt of the payment certificate the <i>Contractor</i> delivers to the <i>Employer</i> (copied to the <i>Project Manager</i>) a VAT invoice in the amount of the certificate with a copy of the certificate attached. The <i>Contractor</i> issues a corrected VAT invoice, where required, within one day of receipt of a Pay Less Notice."</p>
Clause 51.2	<p>Delete and substitute:</p> <p>"Subject to clause 51.2B, if either Party fails to pay a sum or any part of it due to the other Party by the final date for its payment, interest is paid on the late payment. Interest is assessed from the final date by which the late payment should have been made until the date when the late payment is made, and is included in the first assessment after the late payment is made."</p>
Clause 51.2A	Insert a new clause:
"51.2A	<p>If a certificate is not issued by the <i>Project Manager</i> in accordance with clause 51.1, the sum to be paid by the</p>

Employer is, subject to clause 51.2B, the sum stated as due in the *Contractor's* application in accordance with clause 50.1."

Clause 51.2B

Insert a new clause:

"51.2B

If either Party intends to pay less than the notified sum, he notifies the other Party not later than one day (the prescribed period) before the final date for payment by stating the amount considered to be due and the basis on which that sum is calculated. A Party does not withhold payment of an amount due under this contract unless he has notified his intention to pay less than the notified sum as required by this contract. In the case of the *Employer*, the notice may be given on his behalf by the *Project Manager*."

Clause 51.3

In the second bullet point delete "the *Adjudicator*" and replace with "the Adjudicator".

Clause 51.5

Insert a new clause:

"51.5

If the *Employer* is or at any time up to the making of the final payment under this contract becomes a 'contractor' for the purposes of the Construction Industry Scheme, his obligation to make any payment under this contract is subject to the provisions and requirements of the Construction Industry Scheme and the *Contractor* complies with the provisions of the Works Information regarding the Construction Industry Scheme."

Clause 60.1

Amend as set out below:

60.1(5)

After "Others" insert "(which for these purposes does not include any Statutory Undertaker)".

60.1(5A)

Insert a new sub-clause:

"60.1(5A)

Statutory Undertakers

- do not work within the times shown on the Accepted

Programme or

- do not work within the conditions stated in the Works Information,

provided that the *Contractor* is not entitled under this sub-clause 60.1(5A) to any change to the Prices to the extent that the *Contractor* has failed to comply with clause Z4."

60.1(18)

60.1(19)

Delete the existing wording and substitute:

"(19)

An event which is a Prevention Event and is not one of the other compensation events stated in this contract provided that the *Contractor* is not entitled under this clause 60.1(19) to any change to the Prices."

60.1(20)

Insert a new sub-clause:

"(20)

The *Contractor* exercises his right under the Act to suspend performance, whether or not the event has been notified by the *Contractor* within the period specified in clause 61.3."

Clause 61.3

In the second paragraph replace "becoming" with the words "when he becomes aware or ought reasonably to have become".

At the end of the second paragraph include the words "The *Employer* may, in his absolute discretion, assess a change to the Completion Date or a Key Date (but not a change to the Prices) in the absence of a notice from the *Contractor* in accordance with this sub-clause."

Clause 63.3

At the end of the second sentence insert:

"provided always that the delay is only assessed as giving rise to a change in the Completion Date or a Key Date if and to the extent

- that the compensation event is the principal cause of the delay and
- the *Contractor* demonstrates that the compensation event has caused or (in the case of future delay) will cause delay to the Completion Date or a Key Date.

"The *Project Manager* may, subject to agreement with the *Contractor*, assess and fix an earlier Completion Date or Key Date if the effect of the compensation event is to reduce the time required for Completion or meeting a Key Date ."

Clause 63.4

At the end of the clause delete the full stop and insert:

"and the *Employer* has no financial liability to the *Contractor* other than amounts claimable and recoverable under this contract."

Clause 70.1

Delete and substitute:

"70.1

No payment is made to the *Contractor* on account of Plant and Materials which are outside the Working Areas unless immediately on payment and without any further act being necessary title passes to the *Employer* and the *Contractor* ensures that the Plant and Materials are clearly tagged, identified as the *Employer's* and set aside for the *Employer*. Risk in such Plant and Materials does not pass on payment."

Clause 82.1

Add at the end of the clause after "Plant and Materials":

"and (when required) undertakes the removal and disposal of debris. The *Contractor* bears the cost of dismantling and replacing any Plant necessary to affect such replacements or repairs. The *Employer* in his sole and absolute discretion is entitled to decide not to replace and/or repair any loss and/or damage to the *works*, Plant and Materials."

Clause 83.1

Delete clause 83.1 and replace with the following new

clause:

"83.1

The *Contractor* is responsible for and indemnifies the *Employer*, his employees and agents against all Losses incurred in respect of

- death or injury to any person,
- loss or damage to property (including property belonging to the *Employer* or for which he is responsible) and
- any other loss damage (other than the *works*) cost or expense including but not limited to that incurred or suffered by the *Employer* due to losses arising under its contracts with Others which arise out of or in the course of or by reason of the *Contractor's* performance, non-performance or part performance of this contract

to the extent that such Losses are due to any negligence, breach of contract, breach of statutory duty, error, act, omission, or default by the *Contractor*, his employees, Subcontractors, Indirect Subcontractors or agents or due to matters, circumstances or events which are at the *Contractor's* risk."

Clause 83.2

Delete clause 83.2 and replace with the following new clause:

"83.2

The *Contractor's* indemnity under sub-clause 83.1 remains in force for the duration of this contract and continues to survive the expiry or termination of the *Contractor's* appointment under this contract and/or the expiry or termination of this contract. Without prejudice to the survival of any other clauses or schedules, the clauses or schedules of this contract necessary to give effect to the *Contractor's* indemnity under clause 83.1 also survive expiry or termination of the *Contractor's* appointment under this contract and/or the expiry or termination of this

contract."

Clause 83.3

Add new clause 83.3 as follows:

"83.3

The *Contractor* is not responsible for and does not indemnify the *Employer* for Losses to the extent that such Losses are caused by the negligence of the *Employer*, his employees or agents."

Clause 84.1

Delete "Insurance Table" and substitute with "Insurance Table set out in **Schedule 14** to the Framework Agreement."

At the end of the clause insert:

"Subject to clause 84.4, the insurances provide cover from the *starting date* until the Defects Certificate or a termination certificate has been issued, whichever is the later (or for such other period as stated in the Contract Data)."

Clause 84.2

Delete the "Insurance Table" in its entirety. Insert "not used".

Clause 84.3

Insert a new clause as follows:

"84.3

The insurance requirements under this contract do not relieve the *Contractor* from any of his other obligations and liabilities under this contract".

Clause 84.4

Insert a new clause:

"84.4

(1) The *Contractor*, at his own cost, takes out and maintains professional indemnity insurance with a limit of indemnity of not less than the sum stated in **Schedule 14** to the Framework Agreement for any one occurrence or series of occurrences arising out of any one event, in relation to the *works* provided always that

- such insurance is in place from the Contract Date until no less than twelve (12) years after Completion

of the *works*,

- the insurance premiums in respect of the insurance are at all times the responsibility of the *Contractor* and
 - if such insurance ceases to be available to the *Contractor* (and/or design and build contractors engaged in services of a similar size, nature and complexity as the *Contractor*) at commercially reasonable rates and terms (such non availability to be confirmed by an independent insurance agent operating in the UK market), excluding any increase in premiums attributable to the actions, omissions, claims record, error or defaults of the *Contractor*, the *Contractor* immediately notifies the *Employer* and the *Contractor* and the *Employer* then meet and the *Contractor* outlines the steps he intends to take to manage such risks. If the steps proposed by the *Contractor* are not reasonably acceptable to the *Employer*, the parties shall agree an alternative method of managing such risk.
- (2) The *Contractor* carries out his obligations under this contract and ensures that his servants or agents carry out their respective obligations in such manner that all requirements, terms, conditions, stipulations and provisos of the insurance required by clause 84.4 (1) are at all times fully complied with."

Clause 84.5

Insert a new clause:

"84.5

The *Contractor* provides insurance covering loss or damage to motor vehicles and liability to third parties arising out of the use of motor vehicles used in connection with the *works*. Such insurance shall contain an indemnity to principals clause. The minimum amount of cover/indemnity provided by such insurance shall be the replacement cost in respect of loss or damage and the

amount required by the applicable law in respect of third party liability."

Clause 85.4

After the words "Any amount not recovered from an insurer..." insert "(including, excesses or deductibles)".

Clause 85.5

Insert a new clause:

"85.5

In relation to all claims made under insurances obtained by the *Employer* (as set out in the Contract Data Part One) the following provisions apply.

- (1) Unless the *Employer* otherwise decides, the *Contractor* authorises the *Employer* to submit all claims and the *Employer* submits and administers all claims.
- (2) Without prejudice to any other right, remedy or power of the *Employer*, the *Contractor* must provide such information, documents and records in connection with such claims as the *Employer* requires forthwith on demand, regardless of whether the *Employer* is submitting or administering the claim.
- (3) Without prejudice to any other right, remedy or power of the *Employer*, the *Contractor* authorises insurers to pay monies under the insurances to the *Employer*.
- (4) The *Employer*, after receipt of monies paid under the insurances, allocates and pays to each party insured that portion of the monies received for the purpose of rectifying the loss that each party insured has suffered. The deductible is borne pro rata by each such party."

Clause 85.6

Insert a new clause:

"85.6

The *Contractor* effects any insurances which it is required

to provide under this contract promptly with a reputable insurer or insurers accepted by the *Project Manager* and authorised to underwrite such risks in the United Kingdom."

Clause 85.7

Insert a new clause:

"85.7

The *Contractor* promptly notifies the *Project Manager* in writing of any claim, event, fact, matter or circumstance which may give rise to the right to make any claim on any insurance."

Clause 85.8

Insert a new clause:

"85.8

The *Contractor* does not compromise, surrender, release, settle or waive any claim or potential claim which the *Contractor* has or may have the right to bring, or has brought, under any insurance without the prior consent of the *Project Manager*."

Clause 85.9

Insert a new clause:

"85.9

The *Contractor* does not by any act or omission exclude, limit, reduce, vitiate, prejudice, lose or forgo any of the *Contractor's* and/or the *Employer's* rights to make or proceed with a claim against any insurer."

Clause 85.10

Insert a new clause:

"85.10

If the *Contractor* is informed that any insurer providing insurance required by this contract intends to cancel or change any term of any insurance required by this contract, the *Contractor* promptly notifies the *Project Manager* of such intention."

Clause 85.11

Insert a new clause:

"85.11

The *Contractor* promptly notifies the *Project Manager* in writing of any anticipated or actual event or circumstance which may lead or has led to any insurance required by this contract lapsing or being terminated or the cover under

it being reduced or modified."

Clause 85.12

Insert a new clause:

"85.12

To the extent that the *Contractor* is entitled to bring any claim or claims under any insurance relating to this contract then the *Contractor* deals with all such claims promptly and diligently and (subject to the requirements of this contract) in accordance with all insurer requirements and recommendations."

Clause 85.13

Insert a new clause:

"85.13

The *Contractor* acknowledges that the *Employer* has the right to control and to supervise all dealings with the press, television, reporters, and any other media in relation to any incident, event, claim or action arising in connection with this contract."

Clause 85.14

Insert a new clause:

"85.14

If and to the extent that the *Contractor* receives payment in respect of any damage or destruction following an insurance claim in respect of damage or destruction of the *works* the *Contractor* shall apply the same to remedy the damage or destruction."

Clause 90.2

In the "Termination Table" in the *Employer's* "Reason" column, after the words "A reason other than" delete "R1-R21" and substitute "the reasons listed in this Termination Table".

In the "Termination Table" in the *Employer's* "Reason" column, after "R1-R15 or R18" add "or R10A or R22 or R24 or R26 - R27 or R29".

In the "Termination Table" in the *Employer's* "Reason" column, after "R17 or R20" add "or R23 or R25 or R28".

In the "Termination Table" in the *Contractor's* "Reason"

column, after, after "R1-R10" add "R10A,".

Clause 90.4

At the end of the clause add:

"or (where payment is due to the *Contractor*) within three weeks of receipt of the VAT invoice. Within 5 days of issue of the payment certificate the *Contractor* delivers to the *Employer* a VAT invoice in the amount of the certificate."

Clause 91.1

Add the following bullet point at the end of the clause:

- "If the other Party has become insolvent as defined in section 113 of the Act (R10A)."

Clause 91.7

In the fourth bullet point after "experienced" insert "and prudent contractor familiar with works similar to the *works* and exercising the foresight appropriate to such a".

Clause 91.8

Add a new clause:

"91.8

The *Employer* may terminate the contract if the *Contractor* is in breach of clause Z7 (Conflict of Interest) and/or clause Z8 (Corrupt Gifts, Fraud and Payment of Commission), or if there is a Change of Control (regardless of whether or not the notice required by clause 27.5 is given by the *Contractor*) (R22)".

Clause 91.9

Add a new clause:

"91.9

In the event that any court or other competent authority declares or orders that this contract is ineffective or shortened pursuant to the *law of the contract* from time to time including any applicable law, directive or requirement of the European Union (R23).

Notwithstanding the declaration or order, the provisions of clauses 90-93 shall continue in full force and effect along with any other provisions of this contract necessary to give effect to them. In addition, any provisions of the contract which by their nature or implication are required to regulate, determine or limit the Parties' rights and liabilities

that have accrued at the date the contract became ineffective or shortened shall survive the declaration or order as aforesaid."

Clause 91.10

Add a new clause:

"91.10

The *Employer* may terminate if

- this contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72 of the Public Contract Regulations 2015 where the modification is due to a default by the *Contractor* (R24) or where the modification is due to any other reason (R25),
- at the Contract Date the *Contractor* has been in one of the situations referred to in regulation 57(1) of the Public Contract Regulations 2015, including as a result of the application of regulation 57(2) of the Public Contract Regulations 2015, and should therefore have been excluded from the procurement procedure (R26) or
- in a procedure under Article 258 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union declares that this contract should not have been awarded to the *Contractor* in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive where the infringement is due to a default by the *Contractor* (R27) or where the infringement is due to any other reason (R28)."

Clause 91.11

Add a new clause:

"91.11

The *Employer* may terminate if any circumstances arise which entitle the Framework Employer to terminate the

Framework Agreement, save that the *Employer* is not entitled to terminate the *Contractor's* obligation to Provide the Works pursuant to this clause by reason of Clause 20.3 of the Framework Agreement but for the avoidance of doubt this proviso does not limit or restrict the *Employer's* right to terminate the *Contractor's* obligation to Provide the Works for any reason under clause 90.2 of the *conditions of contract* (R29)."

"91.12

The Employer may terminate if the Employer decides not to proceed with the project or funding for the project is curtailed (R30).

Clause 92.2

In procedure P2 after "assign the benefit of" insert "and/or enter into a novation of".

Main Option Clauses

Option A: Priced contract with activity schedule

Where the Contract Data indicates that main Option A applies, the following amendments to the Shorter Schedule of Cost Components apply.

First paragraph

After the words: "An amount is included only in one cost component and only if it is incurred in order to Provide the Works." insert the following: "To the extent that there are Maximum People Rates, Maximum Plant and Equipment Rates or Maximum Staff Rates (as such terms are defined in the Framework Agreement) equivalent to each cost component the *Contractor* does not recover any more for a cost component than the equivalent amount ascertained using the Maximum People Rates, Maximum Plant and Equipment Rates or Maximum Staff Rates (as such terms are defined in the Framework Agreement), or any applicable lower rates tendered by the *Contractor* in his Proposal for this contract."

Option E: Cost reimbursable contract

Where the Contract Data indicates that main Option E applies, the following additional

amendments to the core clauses and main Option E apply. Where there is a discrepancy or conflict between this clause and any other clauses in this Schedule 2 this clause prevails.

Clause 11.2(25)

Delete and substitute:

"11.2(25)

Disallowed Cost is the cost which the *Project Manager* decides

- the *Contractor* is unable to demonstrate has been reasonably and properly incurred by the *Contractor* for the purposes of this contract,
- is not justified by the *Contractor's* accounts and records,
- should not have been paid to a Subcontractor or supplier in accordance with his contract,
- was incurred only because the *Contractor* did not
 - comply with the requirements of the Works Information,
 - give an early warning which this contract required him to give or
 - follow a requirement of this contract,
- was incurred as a result of any breach of contract or default by the *Contractor*,
- results from paying a Subcontractor more for a compensation event than is included in the quotation or assessment for the compensation event accepted by the *Project Manager*,
- the *Contractor* did not comply with the requirements of clauses Z4.1 and Z4.2

and the cost of

- correcting Defects after Completion,
- correcting Defects caused by the *Contractor* not

complying with a constraint on how he is to Provide the Works stated in the Works Information,

- Plant and Materials not used to Provide the Works (after allowing for reasonable wastage) unless resulting from a change to the Works Information,
- resources not used to Provide the Works (after allowing for reasonable availability and utilisation) or not taken away from the Working Areas when the *Project Manager* requested,
- preparation for and conduct of an adjudication or proceedings of the courts and
- profit payable to the *Contractor's* subsidiary, affiliate or parent company or a company with the same parent company where such parent or other company is a Subcontractor."

Clause 26.4

In the first line after the words "proposed contract data" insert "or (if an NEC contract is not proposed) equivalent commercial data".

Delete the first bullet point.

Schedule of Cost Components - first paragraph

After the words: "An amount is included only in one cost component and only if it is incurred in order to Provide the Works." insert the following: "To the extent that there are Maximum People Rates, Maximum Plant and Equipment Rates or Maximum Staff Rates (as such terms are defined in the Framework Agreement) equivalent to each cost component the *Contractor* does not recover any more for a cost component than the equivalent amount ascertained using the Maximum People Rates, Maximum Plant and Equipment Rates or Maximum Staff Rates (as such terms are defined in the Framework Agreement), or any applicable lower rates tendered by the *Contractor* in his Proposal for this contract."

Shorter Schedule of Cost Components - first

After the words: "An amount is included only in one cost component and only if it is incurred in order to Provide the

paragraph

Works." insert the following: "To the extent that there are Maximum People Rates, Maximum Plant and Equipment Rates or Maximum Staff Rates (as such terms are defined in the Framework Agreement) equivalent to each cost component the *Contractor* does not recover any more for a cost component than the equivalent amount ascertained using the Maximum People Rates, Maximum Plant and Equipment Rates or Maximum Staff Rates (as such terms are defined in the Framework Agreement), or any applicable lower rates tendered by the *Contractor* in his Proposal for this contract."

Dispute Resolution

Option W2

Delete option W2 and replace with:

W2.A

The *Employer*, *Contractor* and the *Project Manager* follow the procedure set out in W2.A, W2.B and W2.1-W2.26 for the avoidance and resolution of Disputes.

W2.B.1

Subject to clause W2.1, any Dispute may in the first instance be referred in writing from the referring party to the Senior Representatives by notice in writing to the other party. The written notice from the referring party gives brief written particulars of the Dispute, the relief sought and the basis for claiming the relief sought (including the provisions of this contract that are relevant to the Dispute). The written notice also identifies the referring party's Senior Representative.

W2.B.2

Within 14 days of receipt of the notice pursuant to clause W2.B.1, the responding party provides the referring party with a brief written response. The response includes identification of the responding party's Senior Representative.

W2.B.3

The Senior Representatives meet and try to reach agreement to resolve the Dispute referred to them

pursuant to clause W2.B.2.

W2.B.4

If the Senior Representatives are unable to, or fail to, reach agreement to resolve the Dispute within 14 days after the date of the response under clause W2.B.2, court proceedings are not commenced unless and until the Dispute has first been referred to adjudication (and an Adjudicator's decision has been obtained) in accordance with the procedure in clauses W2.1-W2.24 and notice has been given in accordance with clause W2.26.

W2.B.5

Each Party bears its own costs and expenses in relation to any reference of a Dispute to the Senior Representatives. Discussions amongst the Senior Representatives and any documents prepared or exchanged in relation to the reference of the Dispute to the Senior Representatives (including, for the avoidance of doubt, the notice under clause W2.B.1 and any response under clause W2.B.2) are without prejudice and the Parties do not make use of or rely upon any without prejudice statements in any proceedings.

W2.1

Notwithstanding the provisions of W2.A and W2.B, either Party may give notice at any time of its intention to refer a Dispute to adjudication under the procedure set out in this clause W2 by giving a Notice of Adjudication to the other parties to the Dispute.

W2.2

Should either Party give a Notice of Adjudication then immediately thereafter the parties to the Dispute endeavour to agree upon a person whom they would consider suitable to act as the Adjudicator.

In the event of the parties to the Dispute failing to agree upon a suitable person who is able to act as the Adjudicator the referring party requests the Nominating Authority to select a person to act as the Adjudicator.

The Nominating Authority communicates the selection of the Adjudicator to the Parties within 4 days of receiving a request to do so.

W2.3

Any person requested or selected to act as the Adjudicator in accordance with clause W2.2:

- is a natural person acting in his personal capacity; and
- is not an employee of any of the parties to the Dispute and declares any interest, financial or otherwise, in any matter relating to the Dispute.

W2.4

The terms of remuneration of the Adjudicator are agreed by the parties to the Dispute and the Adjudicator with the object of securing the appointment of the Adjudicator within 7 days of the Notice of Adjudication. If any party to the Dispute (but not all parties to the Dispute) rejects the terms of the remuneration of the Adjudicator the same are settled (and binding upon the parties to the Dispute) by agreement between the Nominating Authority and the Adjudicator (provided that the level of the Adjudicator's remuneration does not exceed the level originally proposed to the parties to the Dispute by the Adjudicator). If all the parties to the Dispute reject the terms of remuneration proposed by an Adjudicator another person is selected as an Adjudicator in accordance with clause W2.2.

W2.5

Where the Adjudicator has been selected in accordance with clause W2.2 the referring party refers the Dispute in writing to the Adjudicator by the Referral Notice in accordance with clause W2.6 within 7 days of the date of the Notice of Adjudication. Upon receipt of the Referral Notice, the Adjudicator must inform every Party to the dispute of the date that it was received.

W2.6

The Referral Notice includes:

- the facts relied upon by the referring party in support of its claim(s);
- a statement of the contractual and/or other basis relied upon by the referring party in support of its claim(s);
- a calculation of the specific monetary amount (if any) that the referring party is seeking to recover in relation to each and every claim that is the subject matter of the Dispute; and
- is accompanied by copies of, or relevant extracts from, this contract and such other documents on which the referring party relies.

W2.7

If a matter disputed by the *Contractor* under or in connection with a subcontract is also a matter disputed under or in connection with this contract, the *Contractor* may, with the consent of the *Employer*, refer the subcontract dispute to the Adjudicator at the same time as the main contract referral. The Adjudicator then decides the disputes together and references to the parties for the purposes of the Dispute are interpreted as including the Subcontractor. The parties to the Dispute agree to consider and endeavour to agree in good faith and in accordance with the general obligation under clause 10.1 any reasonable request by the Adjudicator for additional time to decide the main contract and subcontract disputes.

W2.8

The parties to the Dispute may jointly terminate the Adjudicator's appointment at any time. In such a case, or if the Adjudicator fails to give notice of his decision within the period referred to in clause W2.11, or if that period is extended in accordance with clause W2.12 or by agreement by the parties to the Dispute within such

extended period, and the parties to the Dispute do not jointly extend time for his decision to be made in accordance with clause W2.11, or if at any time the Adjudicator declines to act or is unable to act as a result of his death, disability, resignation or otherwise, a person is appointed to replace the Adjudicator in accordance with the provisions of clause W2.2. In the event of the parties to the Dispute failing to jointly appoint a person willing and suitable to act as replacement Adjudicator within 3 days, any party to the Dispute may apply to the Nominating Authority to appoint a replacement Adjudicator.

W2.8A

The Nominating Authority and its employees and agents are not liable to any Party for any act or omission unless the act or omission is in bad faith. The Parties also agree that any employee or agent of the Nominating Authority is similarly protected from liability.

W2.9

The referring party sends copies of the Referral Notice and the documents referred to in clause W2.6 to the other Party at the same time as he sends them to the Adjudicator.

W2.10

The Party not making the referral may send to the Adjudicator within 14 days of the date of the referral, with a copy to the other Party, a written statement of the contentions on which it relies and any materials it wishes the Adjudicator to consider.

W2.11

The Adjudicator reaches his decision and gives notice of the decision to the parties to the Dispute within 28 days of the date of receipt of the Referral Notice mentioned in clause W2.5, or such longer period as is agreed by the parties to the Dispute after the Dispute has been referred to him.

W2.12

The Adjudicator may extend the period of 28 days referred

to in clause W2.11 by up to 14 days, with the consent of the Party by whom the Dispute was referred.

W2.13

The Adjudicator's decision is binding upon the parties to the Dispute and the Adjudicator unless and until the Dispute is finally determined by legal proceedings, by arbitration (if the parties otherwise agree to arbitration) or by agreement. The Adjudicator may on his own initiative or on the application of a Party correct his decision so as to remove a clerical or typographical error arising by accident or omission. Any correction of a decision must be made within five days of the delivery of the decision to the Parties. As soon as possible after correcting a decision in accordance with this paragraph, the Adjudicator must deliver a copy of the corrected decision to each of the Parties to the contract. Any correction of a decision forms part of the decision. The Adjudicator may in his decision allocate his remuneration and expenses between the Parties in accordance with W2.22. If the Adjudicator's decision changes an amount notified as due, payment of the sum decided by the Adjudicator is due not later than seven days from the date of the decision or the final date for payment of the notified amount whichever is the later.

W2.14

The Adjudicator:

- acts impartially and as an expert (not as an arbitrator) in the conduct of the reference and in reaching his decision;
- considers any relevant information submitted to him by any of the parties to the Dispute and makes available to them any information to be taken into account in reaching his decision provided in accordance with the procedure (if any) which the Adjudicator may decide;
- reaches his decision in accordance with the *law of*

the contract,

- may take the initiative in ascertaining the facts and the law in relation to the Dispute;
- may review and revise any action or inaction of the *Project Manager* or *Supervisor* related to the Dispute and/or alter a quotation which has been treated as having been accepted; and
- may with the consent of the parties to the Dispute seek legal or technical advice from consultants whose appointment by the Adjudicator (including terms of remuneration) is subject to the approval of the parties to the Dispute.

W2.15

The Adjudicator decides in his discretion on the procedure to be followed in the adjudication. In particular he may, but is not obliged to:

- convene meetings upon reasonable notice to the parties to the Dispute at which such parties and their representatives are entitled to be present;
- submit lists of questions to the parties to the Dispute to be answered in such meetings or in writing within such reasonable time as he requires;
- require the parties to the Dispute to provide him with such information and other facilities as he reasonably requires for the determination of the Dispute;
- otherwise take such action and adopt such procedures as do not conflict with any of the provisions of the contract and are reasonable and proper for the just, expeditious and economical

determination of the Dispute.

- W2.16 The Adjudicator is not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith. The Parties also agree that any employee or agent of the Adjudicator is similarly protected from liability.
- W2.17 All meetings are private and save as required by law the Adjudicator and the Parties keep confidential the Dispute, all information of whatever nature provided to him by or on behalf of any Party and his decision.
- W2.18 Notice of the Adjudicator's decision (stating that it is given under clause W2) is in writing and includes a summary of the Adjudicator's findings and a statement of the reasons for his decision.
- W2.19 The Parties to a contract to which the Dispute relates continue to observe and perform all the obligations contained in such contract, notwithstanding any reference to the Adjudicator, and insofar as the same is consistent with any safety review procedures to which the parties to the Dispute are bound, give effect forthwith to the Adjudicator's decision in every respect unless and until as hereinafter provided the Dispute is finally determined by a court in any legal proceedings, by arbitration (if the parties otherwise agree to arbitration) or by agreement. Any party to the Dispute may apply to any appropriate court for enforcement of the Adjudicator's decision. Neither any form of enforcement of the Adjudicator's decision nor any form of challenge to the enforcement of the Adjudicator's decision nor any dispute arising out of or in connection with such enforcement or challenge are regarded and treated as a Dispute for the purposes of this option W2.
- W2.20 In any case where the Adjudicator is appointed as a replacement pursuant to clause W2.8, the parties to the

Dispute each send to the Adjudicator, as soon as reasonably practicable, copies of all documents supplied by them to the Adjudicator he replaces.

W2.21

After the giving of a Notice of Adjudication, the Parties may seek to agree how the Adjudicator allocates the costs and fees excluding his remuneration and expenses which are dealt with in W2.22 below of the adjudication as between the Parties. If such an agreement is reached between the Parties, they notify the Adjudicator who allocates costs and fees in accordance with such agreement. The Parties agree to be bound by the Adjudicator's allocation of costs and fees and to pay such costs and fees in accordance with the Adjudicator's direction unless and until the direction of the Adjudicator is set aside or revised by a court pursuant to any legal proceedings.

W2.22

Subject to any agreement of the Parties, the Adjudicator allocates payment of his remuneration and expenses as between the Parties. Unless the Parties otherwise agree, the Adjudicator awards the payment of his remuneration and expenses on the general principle that costs should follow the event, except where it appears to the Adjudicator that in the circumstances this is not appropriate in relation to the whole or part of his remuneration or expenses. The Parties agree to be bound by the Adjudicator's allocation of payment of his remuneration and expenses and pay such remuneration and expenses in accordance with the Adjudicator's direction unless and until the direction of the Adjudicator is set aside or revised by a court pursuant to any legal proceedings.

W2.23

All notices, written submissions and any other written communications between the parties to the Dispute and the Adjudicator are either delivered by hand, sent by facsimile or sent by first class pre-paid post or recorded

delivery and in each case are copied simultaneously (delivered or sent as aforesaid) to the other Parties. Copies by way of confirmation of all communications by facsimile between the parties to the Dispute and the Adjudicator are also sent by first class post not later than the business day next following the date of the original facsimile transmission.

W2.24 All information of whatever nature provided to the Adjudicator by any party to the Dispute is copied to the other parties simultaneously.

W2.25 Any court or the Adjudicator takes into account any failure to comply with clause 10.1 when making any award (including an award of costs and/or expenses).

W2.26 If either Party is dissatisfied with the Adjudicator's decision on a Dispute then either party may notify the other Party of the matter which he disputes and state that he intends to commence court proceedings for the final determination of the Dispute. Court proceedings may not be commenced unless this notification is given within six weeks of the notification of the Adjudicator's decision.

SECONDARY OPTION CLAUSES

Option X15 (Limitation of the *Contractor's* liability for his design to reasonable skill and care) Delete X15.1 and substitute:

"The *Contractor* is not liable for Defects in the *works* due to his design so far as he proves that he used all the reasonable skill care and diligence normally used by an appropriate and competent professional designer experienced in carrying out design works similar to those included in the *works* in connection with projects of a similar size, scope and complexity and at a similar location to the *works*."

Option X13 If the Contract Data indicates that Secondary Option X13

(Performance Bond)	<p>applies, delete "in the form set out in the Works Information" and replace with "in the form set out in Schedule 5 to the Framework Agreement".</p> <p>If the Contract Data indicates that Secondary Option X13 applies, delete "If the bond ... within four weeks of the Contract Date" and replace with "If the bond was not given before the Contract Date, it is given to the <i>Employer</i> within 14 days of the <i>Employer's</i> request".</p>
Option X16 (Retention)	Insert a new clause:
"X16.3	<p>Where under this contract the <i>Employer</i> is entitled to withhold money from the <i>Contractor</i> as a retention, the retention monies are retained by the <i>Employer</i> without obligation to invest and without creating any fiduciary obligation or duty on the part of the <i>Employer</i> to the <i>Contractor</i> or any other person with whom the <i>Contractor</i> has contracted."</p>
Option X18 (Limitation of Liability)	<p>Insert at the start of clause X18.1:</p> <p>"Without prejudice to the <i>Employer's</i> entitlement to delay damages (Option X7), or damages for low performance (Option X17),"</p>
Option X18.4	<p>In the second bullet point delete the word "and" and replace with ",".</p> <p>In the third bullet point delete the full stop and insert "and".</p> <p>Add a new fourth bullet point:</p> <ul style="list-style-type: none"> • "the matters listed in X18.6."
Option X18.6	Insert new clause X18.6:
"X18.6	The limitations in X18.1, X18.2, X18.3 and X18.4 do not apply to any liability for:

- death or bodily injury,
- Losses caused by fraudulent acts or acts of a criminal nature or
- Losses against which the *Contractor* is entitled to an indemnity under any policy of insurance to be maintained under this contract up to the minimum amount of cover or level of indemnity required by this contract for the relevant insurance."

Option X21:

Single Point Design Responsibility

"X21.1

In this Option, "***Employer's Design Information***" means any drawings, proposals, specifications, method statements, designs, plans, schemes or other documents, or concepts prepared or developed by the *Employer* and included in the Works Information.

X21.2

Delete clause 21.1 and substitute:

"The *Contractor* is responsible for the design of all of the *works*."

X21.3

The *Contractor* is deemed to have scrutinized, prior to the Contract Date, the *Employer's Design Information*. The *Contractor* is responsible for the design of the *works* and for the accuracy of such *Employer's Design Information* except as stated in clause X21.4 below.

X21.4

The *Employer* is not responsible for any error, inaccuracy or omission of any kind in the *Employer's Design Information* as originally included in the contract and is not deemed to have given any representation of accuracy or completeness of any data or information, except as stated below.

The *Employer* is responsible for the correctness of the following elements of the *Employer's Design Information*

- data and information stated in the Works

Information as being the responsibility of the *Employer*,

- definitions of intended purposes of the *works* or any part thereof and
- criteria for the testing and performance of the completed *works*.

X21.5

Where there is a mistake, inaccuracy or discrepancy in or omission from the *Employer's* Design Information, the *Contractor* informs the *Project Manager* in writing of his proposed amendment to remove the mistake, inaccuracy, discrepancy or omission. Within two weeks, the *Project Manager* may consent to the *Contractor's* proposed amendment or comment in writing on such an amendment provided that the *Project Manager* does not unreasonably withhold his consent to a proposed amendment. The *Contractor* takes account of such comments and resubmits his proposed amendment to the *Project Manager*. Such process is repeated until the *Project Manager* accepts the *Contractor's* proposed amendment.

X21.6

The following shall not give rise to a compensation event:

- anything which is the *Contractor's* responsibility as set out in this Option X21,
- any comment, failure to comment or delay in commenting by the *Project Manager* in connection with this Option X21 (which shall also not be treated as an act of prevention or breach of contract by the *Employer*) or
- any discrepancy, mistake, inaccuracy in, or omission from, the *Contractor's* design and/or the *Employer's* Design Information."

Option X22:

Better Information Management (Not Used)

Option X23:

Two Stage Contracting

"X23.1

Definitions

X23.1.1

- (1) Notice to Proceed is a notice from the *Project Manager* to the *Contractor* in accordance with clause X23.5 and includes supplemental Contract Data and other information for Stage Two.
- (2) Project Cost is the total paid or to be paid by the *Employer* to the *Contractor* and Others for the items included in the Stage Two Forecast Prices.
- (3) Stage One and Stage Two have the meanings given to them in the Works Information.
- (4) Stage Two Forecast Prices is the amount stated in the Contract Data unless the amount is later changed in accordance with this contract.
- (5) Pricing Information is information which specifies how the *Contractor* prepares his assessment of the Prices for Stage Two, and is in the document which the Contract Data states it is in.

X23.2

Forecasts

X23.2.1

The *Contractor* provides detailed forecasts of the total Defined Cost of the works to be done in Stage One for acceptance by the *Project Manager*. Forecasts are prepared at the intervals stated in the Contract Data from the *starting date* until the issue of a Notice to Proceed.

Within one week of the *Contractor* submitting a forecast for acceptance, the *Project Manager* either accepts the forecast or notifies the *Contractor* of his reasons for not accepting it. A reason for not accepting the forecast is that

- it does not comply with the Works Information or
- it includes work which is not necessary for Stage One.

The *Contractor* makes a revised submission taking account of the *Project Manager's* reasons.

X23.2.2

The *Contractor* prepares forecasts of the Project Cost in consultation with the *Project Manager* and submits them to the *Project Manager*. Forecasts are prepared at the intervals stated in the Contract Data from the *starting date* until Completion of the whole of the *works*. An explanation of the changes made since the previous forecast is submitted with each forecast.

X23.3

Proposals for Stage Two

X23.3.1

The *Contractor* submits his design proposals for Stage Two to the *Project Manager* for acceptance in accordance with the submission procedure in the Works Information.

X23.3.2

The submission includes the *Contractor's* forecast of the effect of the design proposal on the Project Cost and the Accepted Programme.

X23.3.3

If the *Project Manager* does not accept a submission he gives his reasons. A reason for not accepting a *Contractor's* submission is that

- it does not comply with the Works Information
- it will cause the *Employer* to incur unnecessary costs to Others or
- the *Project Manager* is not satisfied that the Prices or any changes to the Prices have been properly assessed.

The *Contractor* makes a revised submission taking account of the *Project Manager's* reasons.

X23.3.4

The total of the Prices for Stage Two is assessed by the *Contractor* using the Pricing Information stated in the

Contract Data.

The *Contractor* submits the total of the Prices for Stage Two to the *Project Manager* in the form of revisions to the Activity Schedule. The Activity Schedule includes the Price for Work Done to Date in Stage One.

X23.3.5 The *Contractor* obtains approvals and consents from Others as stated in the Works Information.

X23.3.6 Any additional Works Information provided by the *Contractor* for his design in Stage One becomes Works Information for the *Contractor's* design.

X23.3.7 The *Contractor* completes any outstanding design during Stage Two.

X23.4 **Key people**

X23.4.1 The *Contractor* does not replace any *key person* during Stage One unless

- he is instructed by the *Project Manager* to do so or
- the person is unable to continue to act in connection with this contract.

X23.5 **Notice to Proceed to Stage Two**

X23.5.1 The *Project Manager* issues a Notice to Proceed to Stage Two when

- the *Contractor* has completed the *works* for Stage One,
- the *Contractor* has obtained approvals and consents from Others as stated in the Works Information,
- changes to the Stage Two Forecast Prices have been agreed or assessed by the *Project Manager*,

- the *Contractor* has met the conditions stated in the Works Information,
- the *Project Manager* and the *Contractor* have agreed the total of the Prices for Stage Two and
- the *Employer* (in its absolute discretion) has confirmed the *works* are to proceed.

X23.5.2 The Notice to Proceed and any information provided with the Notice to Proceed is not a compensation event.

X23.5.3 If the *Project Manager* does not issue a Notice to Proceed to Stage Two for any reason, he issues an instruction that the work required in Stage Two is removed from the Works Information. This instruction is not a compensation event and the *Contractor* is not entitled to any claim for loss of profit, business or opportunity arising from any such omission, whether or not the *Employer* appoints another contractor to complete the Stage Two *works*.

X23.5.4 If the *Project Manager* does not issue a Notice to Proceed to Stage Two the *Employer* may appoint another contractor to complete the Stage Two *works*.

X23.5.5 If the *Project Manager* does not issue a Notice to Proceed to Stage Two, if clause 93.2 A4 applies the relevant amount due on termination uses the first forecast of the Defined Cost for the *works* for Stage One and not the first forecast of the Defined Cost for the whole of the *works*.

X23.5.6 From and including the date of issue of a Notice to Proceed any *works* not completed in Stage One are completed as Stage Two *works*.

X23.5.7 The assessment of the Price for Work Done to Date for *works* provided prior to the date of issue of a Notice to Proceed is by reference to the main Option applicable to Stage One and the assessment of the Price for Work Done to Date for *works* provided from and including the date of

issue of a Notice to Proceed is by reference to the main Option applicable to Stage Two.

X23.5.8

From and including the date of issue of a Notice to Proceed, in the *Contractor's* applications for payment and in the *Project Manager's* assessments of the Price for Work Done to Date and payment certificates, the Price for Work Done to Date for Stage One and the Price for Work Done to Date for Stage Two are separately identified.

X23.6

Changes to the Stage Two Forecast Prices

X23.6.1

Before a Notice to Proceed is issued, if one of the following events happens, the *Project Manager* and the *Contractor* discuss different ways of dealing with changes to the Stage Two Forecast Prices which are practicable

- the *Project Manager* gives an instruction changing the *Employer's* requirements stated in the Works Information or
- additional events stated in the Contract Data.

X23.6.2

The *Project Manager* and the *Contractor* agree changes to the Stage Two Forecast Prices within four weeks of the event arising which changes the Stage Two Forecast Prices. If the *Project Manager* and the *Contractor* cannot agree the changes to the Stage Two Forecast Prices the *Project Manager* assesses the change and notifies the *Contractor* of his assessment.

X23.6.3

From and including the date of issue of a Notice to Proceed, if the Prices for the Stage Two *works* are adjusted by implementation of a compensation event the *Project Manager* adjusts the Stage Two Forecast Prices by an equivalent amount and notifies the *Contractor* of the adjustment.

X23.7

Stage Two Forecast Prices Incentive

X23.7.1 Clause X23.7.2 does not apply unless the Contract Data states that it applies.

X23.7.2 If a Notice to Proceed is issued, following completion of the whole of the *works* and the ascertainment of the final Price for Work Done to Date for Stage Two the *Project Manager* makes an assessment of the *Contractor's Incentive Share*.

The *Contractor's Incentive Share* is the product of the *incentive percentage* applied to the difference between the Stage Two Forecast Prices and the final Price for Work Done to Date for Stage Two. If the final Price for Work Done to Date for Stage Two exceeds the Stage Two Forecast Prices no incentive share amount is payable to the *Contractor*.

The *Contractor's Incentive Share* (if any) is included in the final amount due.

If the *Contractor's* obligation to Provide the Works is terminated for any reason before completion of the whole of the *works* the *Contractor's Incentive Share* is not payable and the *Contractor* has no claim for any such amount.

Option X24 Reference Design Activities (Not Used)

Option Y(UK)1: Project Bank Account (Not Used)

Z2 Warranties

Z2.1 The *Contractor*, within fourteen (14) days of the *Employer's* request, duly executes and delivers to the *Employer* deeds of warranty in the form attached at **Schedule 8** or **9** to the Framework Agreement (as applicable) in favour of

- any member of the TfL Group notified to the *Contractor* by the *Employer*,