

DATED

2012

(1) HALTON BOROUGH COUNCIL

- and -

(2) [NOTE: NAME OF BOARD TO BE DETERMINED]

[DRAFT]

GOVERNANCE AGREEMENT

relating to the construction, operation, tolling
and maintenance of the Mersey Gateway bridge
on behalf of Halton Borough Council

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BETWEEN:

- (1) **HALTON BOROUGH COUNCIL** of ("**Council**"), Municipal Building, Kingsway, Widnes, Cheshire WA8 7QF; and
- (2) [] a company registered in England and Wales (Registered No:[]) and with its registered office at [**location of registered office to be confirmed**] ("**Board**").

BACKGROUND:

- A The Council has promoted a project ("**Project**") for the procurement of a new crossing over the River Mersey within the Council's area ("**Mersey Gateway Crossing**") to relieve the congested Silver Jubilee Bridge ("**Silver Jubilee Bridge**" or "**SJB**").
- B The Council has been required by the Department for Transport ("**DfT**") in the terms of a funding agreement in respect of the Project to form the Board to manage delivery of the Mersey Gateway Crossing and take responsibility for tolling of both the Mersey Gateway Crossing and the Silver Jubilee Bridge.
- C The Council has procured pursuant to a notice published in the OJEU on 22 October 2011 (2011/S 204-332052) a design, build, finance, maintain and operate agreement ("**Project Agreement**") in respect of the Mersey Gateway bridge and related infrastructure, and a Demand Manage Participation Agreement, in respect of the delivery of revenue collection services relating to tolling on both the Mersey Gateway Bridge and the Silver Jubilee Bridge, and, where this provides value for money, delivery of demand management services ("**DMPA**").
- D The Board shall enter into both the Project Agreement and the DMPA as the primary counterparty to the selected contractors, and the Council shall also enter into these agreements to support delivery of the Project by the Board and for other purposes as set out in those agreements.
- E The Council and the Board have entered into this agreement ("**Agreement**") to set out the terms under which the Board will manage the Project on behalf of the Council.

IT IS AGREED:

1. DEFINITIONS

1.1 Definitions

In this Agreement unless the context otherwise requires:

"**Allowable Charges**" has the meaning ascribed to it in the DMPA;

"**Availability Support Grant**" means the grant provided by the DfT to the Council in respect of this Project pursuant to the terms of the Funding Letter;

"**Board Cost Model**" means the cost model specifying the costs of the Board and the Board Service Fee payable to the Board in each Month as set out in Appendix 1 to Schedule 7, subject to any amendments to such costs pursuant to clause 15 (*Changes*) and Schedule 8

(*Market Testing and Benchmarking*) or as otherwise amended in accordance with the terms of this Agreement.

"Board Default" means one of the following events:

- (a) the court has made an order that the Board be wound up pursuant to powers granted to it under section 125 of the Insolvency Act 1986 or a resolution is passed pursuant to section 84 of the Insolvency Act 1986 for the solvent or insolvent voluntary winding-up of the Board or the Board is otherwise wound-up;
- (b) any receiver or receiver manager is appointed in respect of the Board or possession is taken by or on behalf of any creditor of any property that is owned by or is in possession of the Board;
- (c) any voluntary arrangement is made for the composition of debts or a scheme of arrangement approved under the Insolvency Act 1986 or Companies Act 1986 in respect of the Board;
- (d) the Board is the subject of an administration order or an administrator is otherwise appointed in respect of the Board.
- (e) any event occurs, or proceedings are taken with respect to the Board, in any jurisdiction to which it is subject, or in which it has assets, which has an effect equivalent to, or similar to, any one of the events mentioned in limbs (a) to (d) above;
- (f) the abandonment or repudiation of this Agreement by the Board;
- (g) a material failure of the Board to comply with the terms of any Rectification Plan;
- (h) a breach by the Board of any of its obligations and/or warranties under this Agreement which materially and adversely affects the performance of the Services, including any persistent breach of such obligations and/or warranties the cumulative effect of which is to materially and adversely affect the performance of the Services;
- (i) the Board acting outside its delegated powers or approvals, including any failure to comply with the procedures relating to Restricted Matters set out in this Agreement;
- (j) failure to obtain or maintain any insurances which the Board is required to maintain or take out pursuant to the Project Documents;

"Board Project Documents" means those Project Documents listed in Schedule 9;

"Board Service Fee" means the monthly fee payable by the Council to the Board calculated pursuant to Part 2 of Schedule 7;

"Board's Final Staff List" means the list of all the Board's and Sub-Contractor's personnel engaged in, or wholly or mainly assigned to, the provision of the Services or any part of the Services at the Service Transfer Date;

"Board's Provisional Staff List" means the list prepared and updated by the Board of all the Board's and Sub-Contractor's personnel engaged in, or wholly or mainly assigned to, the provision of the Services or any part of the Services at the date of the preparation of the list;

"Board Stakeholder Engagement" means any engagement with Stakeholders carried out by the Board in accordance with Clause 6.9 and Part 1 of Schedule 2;

"Conditions Precedent" means each of the conditions precedent to the Effective Date which are listed at Clause 2.2;

"Contract Period" has the meaning given to it in Clause 2.1;

"Council KPIs" means the following key performance indicators against which the Council shall measure performance by the Board of its duties in respect of delivering the Project Objectives:

- (a) [the performance indicators specified in the Project Agreement;]
- (b) [the Key Performance Indicators as defined and specified in the DMPA;]
- (c) [**Note: other key performance indicators measuring the performance of the Services by the Board to be confirmed once Services finalised**];
- (d) [achievement of local employment and training opportunities as part of the Project;
- (e) achievement of diversity targets;
- (f) achievement of accessibility requirements.]

"Council Policies" means the policies set out in Part 1 of Schedule 3 (*Council Policies*) as may be amended from time to time;

"Council Service Provision Fee" means the monthly fee payable by the Board to the Council as calculated pursuant to Part 1 of Schedule 7 (*Payment*);

"Council Stakeholder Engagement" means any engagement with Stakeholders carried out by the Council in accordance with Clause 6.8 and Part 2 of Schedule 2;

"Council Toll Policies" means the policies in respect of Tolling set out in Part 2 of Schedule 3 (*Council Policies*) as may be amended from time to time;

"Data Protection Legislation" means the Data Protection Act 1998, the Data Protection Directive (95/46/EC), the Regulation of Investigatory Powers Act 2000, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (SI 2000/2699), the Electronic Communications Data Protection Directive (2002/58/EC), the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2426/2003) and all applicable laws and regulations relating to the processing of personal data and privacy, including where applicable the guidance and codes of practice issued by the Information Commissioner;

"DfT" has the meaning given to it in Recital B;

"DMPA" has the meaning given to it in Recital C;

"DMPA Company" means [insert details of selected DMPA Company];

"Effective Date" means the date upon which all of the Conditions Precedent have been satisfied or waived in accordance with Clause 2.2;

"Employee Liability Information" means the information that a transferor is obliged to notify to a transferee under Regulation 11(2) of TUPE:

- (a) the identity and age of the employee;
- (b) the employee's written statement of employment particulars (as required under section 1 of the Employment Rights Act 1996);
- (c) information about any disciplinary action taken against the employee and any grievances raised by the employee, where a Code of Practice issued under Part IV of the Trade Union and Labour Relations (Consolidation Act 1992 relating exclusively or primarily to the resolution of disputes applied, within the previous two years;
- (d) information about any court or tribunal case, claim or action either brought by the employee against the transferor within the previous two years or where the transferor has reasonable grounds to believe that such action may be brought against the Board arising out of the employee's employment with the transferor;
- (e) information about any collective agreement that will have effect after the Service Transfer Date in relation to the employee under regulation 5(a) of TUPE;

"Employment Liabilities" means all claims, including claims without limitation for redundancy payments, unlawful deduction of wages, unfair, wrongful or constructive dismissal compensation, compensation for sex, race, disability, age, religion or belief, gender reassignment, marriage or civil partnership, pregnancy or maternity, or sexual orientation discrimination, claims for equal pay, compensation for less favourable treatment of part-time workers, and any claims (whether in tort, contract, statute or otherwise), demands, actions, proceedings and any award, compensation, damages, tribunal awards, fine, loss, order, penalty, disbursement, payment made by way of settlement and costs and expenses reasonably incurred in connection with a claim or investigation (including any investigation by the Equality and Human Rights Commission or other enforcement, regulatory or supervisory body), and of implementing any requirements which may arise from such investigation and any legal costs and expenses;

"Environmental Information Regulations" means the Environmental Information Regulations 2004 (SI 2004/3391), together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such regulations;

"Expiry Date" means the day falling [60] years from the date of Financial Close of the Project Agreement;

"Financial Close" has the meaning given to it in the Project Agreement;

"FOIA" means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time, together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act;

"Funding Letter" means the funding letter from the DfT to the Council, in the form annexed at Schedule 6, as amended from time to time in accordance with its terms and this Agreement;

"Government" means the government of the United Kingdom and **"Government Department"** shall be construed accordingly;

"Green Restricted Matter" means a Restricted Matter which is identified as "Green" in the third column (*Matter categorisation*) of Schedule 1;

"Intellectual Property" means Intellectual Property (as defined under the Project Agreement) and Intellectual Property (as defined under the DMPA);

"Interest Rate" has the meaning given to it in the DMPA;

"Liquidity Maintenance Reserve" means the bank account in the name of the [Council] having account number [] and sort-code [] and held with [Bank] to be operated in accordance with clause [] of this Agreement;

"Mersey Gateway Crossing" has the meaning given to it in Recital A;

"Month" means a calendar month, provided that:

- (a) in the case of the month in which the Effective Date falls, it means the period from the Effective Date to the end of such calendar month;
- (b) in the case of the month in which the Expiry Date or Termination Date occurs it means the period from the start of such calendar month to the Expiry Date or Termination Date, as relevant;

"Monthly Subscriptions" has the meaning given to it in the DMPA;

"OCIP Insurances" has the meaning given to it in the Project Agreement;

"Orange Restricted Matter" means a Restricted Matter which is identified as "Orange" in the third column (*Matter categorisation*) of Schedule 1;

"Order" means the River Mersey (Mersey Gateway Bridge) Order 2011;

"Performance Audit" has the meaning given to it in clause 5.5;

"Project" has the meaning given to it in Recital A;

"Project Agreement" has the meaning given to it in Recital C;

"Project Company" means [Note: to insert details of Project Company proposed by preferred bidder];

"Project Documents" means the Project Documents (as defined under the Project Agreement), the DMPA Documents (as defined under the DMPA), the Funding Letter [Note: to list any other documents which are key to delivering the Project, this may depend upon individual bidder solutions], copies of which have been initialled by the Parties for the purposes of identification;

"Project Objectives" means:

- (a) to relieve the congested Silver Jubilee Bridge, thereby removing the constraints on local and regional development and better provide for local transport needs;
- (b) to apply minimum toll charges to both the Mersey Gateway Crossing and the Silver Jubilee Bridge consistent with the amount required to satisfy affordability constraints;
- (c) to improve accessibility in order to maximise local development and regional economic growth opportunities;
- (d) to improve local air quality and enhance the general urban environment;
- (e) to improve public transport links across the River Mersey;
- (f) to encourage the increased use of cycling and walking;
- (g) to restore effective network resilience for road transport across the River Mersey;

"Red Restricted Matter" means a Restricted Matter which is identified as "Red" in the third column (*Matter categorisation*) of Schedule 1, and any matter which does not relate directly to performance by the Board of its obligations pursuant to this Agreement;

"Relevant Employees" means those employees who are named in the Board's Final Staff List and whose contracts of employment transfer with effect from the Service Transfer Date to the Council or a Replacement Service Provider by virtue of the application of TUPE;

"Relevant Transfer" means a relevant transfer for the purposes of TUPE;

"Replacement Services" means any services that are identical or substantially similar to any of the Services and which the Council receives in substitution for any of the Services following the termination or expiry of this agreement, whether those services are provided by the Council internally or by any Replacement Service Provider;

"Replacement Service Provider" means any third party supplier of Replacement Services appointed by the Council from time to time;

"Restricted Matter" each matter listed in the first column (*Restricted Matters*) of Schedule 1;

"Restricted Matter Party" means in respect of a Restricted Matter, the parties listed against such Restricted Matter in the second column (*Restricted Matter Parties*) of Schedule 1;

"RUCO" means the A533 (Silver Jubilee Bridge) Road User Charging Scheme Order 2008;

"Services" means the services to be carried out by the Board pursuant to the terms of this Agreement;

"Service Transfer Date" means the date on which the Services (or any part of the Services), transfer from the Board or Sub-Contractor to the Council or any Replacement Service Provider;

"Silver Jubilee Bridge" or **"SJB"** has the meaning given to it in Recital A;

"Staffing Information" means in relation to all persons detailed on the Board's Provisional Staff List, in an anonymised format, such information as the Council may reasonably request including the Employee Liability Information and details of whether the personnel are employees, workers, self-employed, contractors or consultants, agency workers or otherwise, and the amount of time spent on the provision of the Services;

"Stakeholder" means those external stakeholders in the Project which the Council has agreed to liaise with in accordance with the requirements for Council Stakeholder Engagement or the requirements for Board Stakeholder Engagement

"Stakeholder Engagement Report" has the meaning given to it in Clause 6.9.1;

"Sub-Contractor" means the contractors or service providers engaged by the Board to provide goods, services or works to, for or on behalf of the Board for the purposes of providing the Services to the Council;

"Support Services" means the services to be provided by the Council to the Board in accordance with Clause 9, as set out in Schedule 5 (*Support Services*);

"Termination Date" means any date of early termination of this Agreement in accordance with the terms of this Agreement;

"Toll" shall have the meaning ascribed to it in the DMPA, and **"Tolls"** and **"Tolling"** shall be construed accordingly;

"Toll Collection Account" means the bank account in the name of the Council having account number [] and sort-code [] and held with [Bank] to be operated in accordance with clause [] of this Agreement;

"Toll Enforcement Regulations" means the [draft] toll enforcement regulations [to be] made by the Secretary of State on [], allowing the Council to enforce the tolls imposed pursuant to the Order and the RUCO;

"Toll Revenue" has the meaning given to it in the DMPA;

"TUPE" means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended, replaced, consolidated or re-enacted from time to time;

"Working Day" means a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London;

"Year" means as period of twelve (12) consecutive Months starting on 1 April, with the exception of:

- (a) the first Year, which shall commence on the Effective Date and end on 31 March first occurring thereafter; and
- (b) the final Year, which shall commence on 1 April and end on the Expiry Date or the Termination Date, as relevant.

1.2 Interpretation

In this Agreement, except where the context otherwise requires:

- 1.2.1 the masculine includes the feminine and vice-versa;
- 1.2.2 the singular includes the plural and vice-versa;
- 1.2.3 a reference in this Agreement to any Clause or Schedule is, except where it is expressly stated to the contrary, a reference to such Clause or Schedule to this Agreement and all references to Parts, Sections, Paragraphs, Annexes or Appendices are references to Parts, Sections and Paragraphs contained in and Annexes and Appendices to the Schedules;
- 1.2.4 except where it is expressly stated otherwise, a reference in a Schedule to a Part, Section, Annex or Appendix is a reference to a Part or Section of, or Annex or Appendix to, that Schedule (as the case may be);
- 1.2.5 except where it is expressly stated otherwise, a reference in a Schedule, a Part or Section of a Schedule or an Annex or Appendix to a Schedule to a Paragraph is a reference to a Paragraph in that Schedule, Part, Section, Annex or Appendix (as the case may be);
- 1.2.6 the Schedules to this Agreement (including any Annexes or Appendices thereto) are an integral part of this Agreement and reference to this Agreement includes reference thereto and reference to any Schedule includes reference to any Annex or Appendix thereto;
- 1.2.7 save where stated to the contrary, any reference to this Agreement or to any other document shall include any permitted variation, amendment, or supplement to, or substitution, novation or assignment of, such document;
- 1.2.8 any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted and shall include any legally binding codes of practice (within the meaning of section 21(1) of the Interpretation Act 1978) made thereunder;
- 1.2.9 references to any documents and/or items being "in the agreed form" means such documents and/or items have been initialled by or on behalf of each of the Parties for the purpose of identification;
- 1.2.10 reference to a person includes any individual, firm, partnership, corporation, government, governmental body, authority, emanation, agency or instrumentality, unincorporated body of persons or association and their successors and permitted assignees or transferees;
- 1.2.11 headings are for convenience of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.12 headings and words in parentheses and italics after a Clause reference or a reference to a Schedule are for convenience and reference only;
- 1.2.13 all references to time of day shall be a reference to whatever time of day shall be in force in England and Wales;
- 1.2.14 any reference to "**day**" shall, unless otherwise stated, mean the period of time which begins with one midnight and ends with the next;

- 1.2.15 the words "**herein**", "**hereto**" and "**hereunder**" refer to this Agreement as a whole and not to the particular Clause, Schedule, Part, Section, Paragraph, Annex or Appendix in which such word may be used;
- 1.2.16 any reference to a public organisation or representative shall be deemed to include a reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative in whole or in part;
- 1.2.17 references to "**Parties**" mean the Parties to this Agreement and references to a "**Party**" mean one of the Parties to this Agreement;
- 1.2.18 references to "**sub-contractors**" are to contractors or sub-contractors of any tier;
- 1.2.19 references to drawings are references to drawings appearing or listed in the Schedules hereto having the revision numbers set against the relevant drawing numbers in the relevant Schedule;
- 1.2.20 all monetary amounts are expressed in pounds sterling;
- 1.2.21 references to "including" and "include" shall be construed as "including without limitation";
- 1.2.22 references to [a numbered Clause] to [another numbered Clause] shall be construed as including both numbered Clauses and all Clauses in between them; and
- 1.2.23 wherever provision is made for the giving or issuing of any notice, endorsement, consent, approval, certificate or determination by any person, then unless otherwise specified, such notice, endorsement, consent, approval, certificate or determination shall be in writing, and the words notify, endorse, consent, approve, certify or determine and cognate expressions shall be construed accordingly.

2. COMMENCEMENT AND DURATION

Duration

- 2.1 Subject to Clause 2.2, the rights and obligations of the Parties to this Agreement shall come into effect on the date of this Agreement and shall terminate on the earlier of:
- 2.1.1 the Expiry Date; and
- 2.1.2 the Termination Date
- ("Contract Period").
- 2.2 Save for Clauses 1 to 3, 14 to 26, 27 and 28 this Agreement shall only be effective from the date upon which ("**Effective Date**") the following Conditions Precedent have either been satisfied or waived by the Council (at the Council's sole discretion):
- 2.2.1 the Board has executed each of the Board Project Documents, and such documents have been executed by all relevant counterparties to the same;

- 2.2.2 the Council has executed the Project Agreement and the DMPA;
- 2.2.3 the OCIP Insurances have been procured and are either in place, or the Council provides written confirmation from [*insurance broker*] that such insurances will be in place on or before the Effective Date;
- 2.2.4 a certified copy of all documents relating to the constitution of the Board (including, without limitation, all contracts entered into by shareholders, Articles of Association and memorandum), which shall be in the same, or substantially similar form, to those set out in Schedule (*Board Constitution*); and
- 2.2.5 the DfT has provided a final Funding Letter.

3. LGCA CERTIFICATE

Certification Requirements

- 3.1 The Certification Requirements are intended to be satisfied by the Council with respect to this Agreement before the end of the period relating to such agreement within which the Certification Requirements must be satisfied for the agreement to be a certified contract for the purposes of the Local Government (Contracts) Act 1997.

Board Consent

- 3.2 The Board hereby consents to the issue by the Council of a certificate under Section 3 of the Local Government (Contracts) Act 1997 in respect of this Agreement.

Relevant Discharge Terms

- 3.3 The Parties agree that the relevant discharge terms relating to this Agreement for the purposes of section 6 of the Local Government (Contracts) Act 1997 shall be as follows:
 - 3.3.1 in the event of making a determination or order on an application for judicial review or audit review (within the respective meanings of section 5(4) and 8(1) of the Local Government (Contracts) Act 1997 the result of which is that this Agreement does not have effect or is otherwise unenforceable (against either the Council or the Board), then the Council shall pay to the Board the sum equivalent to the amount of compensation payable by the Board:
 - 3.3.1.1 to the DMPA Company pursuant to Clause 41.3 (*Voluntary Termination by the Board*) of the DMPA calculated as at the date of such determination; and
 - 3.3.1.2 to the Project Agreement pursuant to Clause 68.3 (*Voluntary Termination by the Board*) of the Project Agreement calculated as at the date of such determination; and
 - 3.3.2 the Council shall pay the Board the sums referred to in Clause 3.3.1.1 and 3.3.1.2 within [sixty (60)] Business Days of such determination or order; and
 - 3.3.3 any payment of compensation in accordance with this Clause 3.3 shall be in full satisfaction of any claim of the Board in relation to the termination of this Agreement and shall be the sole remedy of the Board against the Council in the circumstances contemplated by Clause 3.3.1.

4. PROJECT DOCUMENTS

Execution of Project Documents

4.1 The Board shall:

4.1.1 on or about the date of this Agreement, enter into the Board Project Documents;

4.1.2 subject to Clause 4.1, during the term of the Agreement, enter into such other Project Documents as may be required, for the purposes of the on-going procurement and/or operation of the Mersey Gateway bridge or the Silver Jubilee Bridge.

4.2 The Council shall on or about the date of this Agreement enter into the Project Agreement and the DMPA.

Amendments to, and entry into new, Project Documents

4.3 The Board shall not:

4.3.1 enter into any contracts or agreements or other ancillary documents, including any replacement Project Documents;

4.3.2 materially amend the terms of any Project Document; or

4.3.3 terminate any Project Document,

without the consent of the Council, such consent not to be unreasonably withheld or delayed, save that the Board shall not be entitled to enter into, amend or terminate any Project Documents ("**Proposed Action**") where the Proposed Action:

4.3.4 would materially adversely affect the Council;

4.3.5 would be contrary to the Project Objectives or would (on the balance of probabilities) significantly reduce the ability of the Board, the DMPA Company, the Project Company or any other sub-contractor to support the Project Objectives;

4.3.6 the Proposed Action would breach any Legislation;

4.3.7 the Proposed Action would increase the Council's liabilities during the term of this Agreement;

4.3.8 the Proposed Action would be likely (on the balance of probabilities) to require the Board (or the Council) to increase the overall level of Tolls above the amounts permitted by this Agreement;

4.3.9 where the DfT has raised valid objections that such Proposed Action would be in breach of the Funding Letter; or

4.3.10 [**Note: others to be determined**];

4.4 Where the Council objects to such Proposed Action then the Board shall not proceed with such Proposed Action, and shall liaise with the Council to determine any amendments

required such that the Council shall agree to the Proposed Action. For the avoidance of doubt, the Council shall not be required to consent to any Proposed Action where there is a valid right of objection pursuant to Clause 4.1.

- 4.5 Where the Council does not object to a Proposed Action within [20] Working Days of being given notice of such Proposed Action, the Board shall be entitled to proceed.
- 4.6 The Board acknowledges the terms of the Funding Letter and undertakes:
 - 4.6.1 to comply with the terms of the Funding Letter to the extent that any obligation of the Council pursuant to the terms of the Funding Letter is performed, in whole or in part, by the Board pursuant to the terms of this Agreement;
 - 4.6.2 to carry out the Services pursuant to this Agreement in a manner which is consistent with the terms of the Funding Letter;
 - 4.6.3 have due regard to the Council's obligations pursuant to the Funding Letter and not to do (or omit to do) anything which may, reasonably, be expected to put the Council in breach of the terms of the Funding Letter.

5. CO-OPERATION AND RESTRICTED MATTERS

- 5.1 The Council undertakes to the Board that it shall not wilfully impede the Board in the performance of its obligations under this Agreement (having regard always to any other operations or activities carried out by the Council for the purposes contemplated by this Agreement or any other of the Council's statutory duties or functions);
- 5.2 Each party agrees to co-operate, at its own expense (but without being compelled to incur material expenditure) with the other party in the fulfilment of the purposes and intent of this Agreement.

Consultation on Restricted Matters

- 5.3 The Board shall, in providing the Services pursuant to this Agreement consider and have regard to comments received from:
 - 5.3.1 the Council;
 - 5.3.2 the DfT;
 - 5.3.3 HMT; and
 - 5.3.4 any Stakeholder who the Board is required to consult in accordance with the terms of this Agreement,

and notwithstanding the generality of the foregoing, the Board shall not do anything which amounts to a Restricted Matter without complying with the procedure set out in Clause 5.4;

Restricted Matter Procedure

- 5.4 Where any action (including any omission) or decision of the Board is, or relates to, a Restricted Matter ("**Restricted Action**"), the following procedure shall apply:
 - 5.4.1 where a Restricted Matter is a Red Restricted Matter the Board shall:

- 5.4.1.1 where it wishes to carry out a Restricted Action, notify each relevant Restricted Matter Party, of the proposed Restricted Action, providing sufficient detail of the proposed Restricted Action for the Restricted Matter Parties to be able to understand the effect of the proposed Restricted Action.
- 5.4.1.2 have due regard to all comments received from Restricted Matter Parties in respect of such Restricted Action, and amend the Restricted Action appropriately to reflect such comments. Where such amendments are made, the Board shall notify all relevant Restricted Matter Parties of the revised Restricted Action and Clauses 5.4.1.1 and 5.4.1.2 shall apply *mutatis mutandis*;
- 5.4.1.3 only proceed with a Restricted Action where each relevant Restricted Matter Party has expressly consented to such Restricted Action. Restricted Matter Parties shall be entitled to consent to a Restricted Action, subject to conditions, in which case the Board shall only be entitled to proceed with such a Restricted Action where the Board:
- (a) complies with all material requirements of such conditions; and
 - (b) all other Relevant Matter Parties have consented to the Board complying with such conditions.
- 5.4.2 where a Restricted Matter is an Orange Restricted Matter the Board shall:
- 5.4.2.1 within [x] Working Days of determining that it wishes to carry out a Restricted Action, consult with the relevant Restricted Matter Parties, providing sufficient detail of the proposed Restricted Action for the Restricted Matter Parties to be able to understand the effect of the proposed Restricted Action. The Board shall provide each Restricted Matter Party sufficient time to respond to such consultation as may be reasonable ("**Restricted Matter Consultation Period**"), having regard to the nature of the Restricted Action, the consideration that may be required by the Restricted Matter Parties and any urgency in proceeding with the Restricted Action.
- 5.4.2.2 the Board shall have due regard to all comments received from Restricted Matter Parties during the Restricted Matter Consultation Period, in determining whether to proceed with the Restricted Action, and any amendments reasonably required to the Restricted Action;
- 5.4.2.3 provided that the Board has complied with the requirements of Clauses 5.4.2.1 to 5.4.2.2, the Board shall be entitled to proceed with a Restricted Action relating to an Orange Restricted Matter, notwithstanding that any relevant Restricted Matter Party has objected to such Restricted Action;
- 5.4.3 where a Restricted Matter is a Green Restricted Matter the Board shall notify each relevant Restricted Matter Party in respect of the proposed Restricted Action within [x] Working Days of the Board determining to make such Restricted Action. For the avoidance of doubt, where a Restricted Matter is a Green Restricted Matter the Board shall not be required to consult with any Restricted

Matter Party save to the extent that consultation is required by any other express term of this Agreement in respect of the Relevant Restricted Action.

- 5.4.4 where any matter is ancillary to a Restricted Matter then it shall be classified as part of such Restricted Matter and Clause 5.4 shall apply in respect of such matter.
- 5.4.5 Where a matter is ancillary to more than one Restricted Matter, or a Restricted Action would relate to more than one Restricted Matter then such matter shall be deemed to be the highest classified of such Restricted Matters (where a Red Restricted Matter is most highly classified, and a Green Restricted Matter is least highly classified), and Clause 5.4 shall apply in respect of such matter.

Performance Management

- 5.5 The Council shall audit the performance of the Services by the Board and compliance with its other obligations under this Agreement ("**Performance Audit**"), in accordance with this Clause 5:
 - 5.5.1 each Year, within one (1) Month of the anniversary of the Effective Date;
 - 5.5.2 at the Council's discretion, at any point where the Board notifies the Council of Board Default in accordance with Clause 5.13, or where the Council has otherwise determined that a Board Default has arisen or, acting reasonably, believes that a Board Default is likely to arise;
 - 5.5.3 whenever otherwise required by the terms of this Agreement;
- 5.6 Where the Council intends to carry out a Performance Audit, it may request from the Board, and the Board shall provide, as soon as reasonably practicable:
 - 5.6.1 such information as may be reasonably required by the Council to determine whether the Board is performing the Services in accordance with this Agreement;
 - 5.6.2 any reports in respect of performance of the Services received by the Board pursuant to the terms of the Project Agreement or the DMPA, including, but not limited to:
 - 5.6.2.1 any KPI Rectification Plan produced pursuant to the DMPA;
 - 5.6.2.2 any increased monitoring of performance of the DMPA Company pursuant to clause [19.9] of the DMPA; and
 - 5.6.2.3 [**Note: others to be determined**];
- 5.7 Where the Council carries out a Performance Audit, it shall review the performance of the Services and other obligations of the Board under this Agreement, by reference to:
 - 5.7.1 the performance by the Board against any actions, targets and requirements of the Annual Business Plan;
 - 5.7.2 whether the Board has met any income, or expenditure targets as specified in:
 - 5.7.2.1 any Rectification Plan; or

- 5.7.2.2 the Annual Business Plan;
- 5.7.3 performance of the Board against any Council KPIs;
- 5.7.4 any material breaches of this Agreement by the Board which have been identified; and
- 5.7.5 any material breaches of the Project Agreement, the DMPA or any other Project Document by either the Board, the Project Company, the DMPA Company or any other counterparty to the relevant Project Document, which has not been rectified or enforced in accordance with the terms of such agreement.

(together the "**Performance Requirements**").

5.8 Where one or more Performance Requirements have not been satisfied, the Council shall promptly notify the Board of such failure, specifying clearly the nature of each such failure, and the Board shall, within twenty (20) Working Days (or such other period as the Parties may reasonably agree, having regard to the nature of the failure to meet the Performance Requirements and the urgency of any required rectification) develop a rectification plan ("**Rectification Plan**") in respect of rectifying performance of the relevant Performance Requirements, including:

- 5.8.1 any performance, income or other targets to be met;
- 5.8.2 the timescales in which they will be met;
- 5.8.3 The costs to be incurred in meeting the Rectification Plan, and who will bear such costs;
- 5.8.4 Any amendments required to the DMPA, Project Agreement or other Project Documents to comply with the Rectification Plan;
- 5.8.5 Any amendments required to this Agreement;
- 5.8.6 any performance required by a third party in order to comply with the Rectification Plan, including any action to be performed by the Council, the DfT or HMT, in order to rectify the Performance Requirements,
- 5.8.7 and the Board shall notify the Council of the proposed terms of such Rectification Plan ("**Draft Rectification Plan**").

5.9 The Council shall review the Draft Rectification Plan and provide comments to the Board within twenty (20) Working Days (or such other period as the Parties may reasonably agree, having regard to the nature of the failure to meet the Performance Requirements and the urgency of any required rectification). The Board shall take into account such comments, but shall only be required to implement such comments where and to the extent that they relate to:

- 5.9.1 any Restricted Matter which forms part of the Draft Rectification Plan;
- 5.9.2 any amendments required to the Project Documents or to this Agreement;
- 5.9.3 any action required to be taken by the Council, DfT or HMT pursuant to the terms of the Rectification Plan, including any costs to be incurred,

- 5.9.4 in which case the Board shall be required to fully reflect such comments in the finalised Rectification Plan, and once the Rectification Plan has been amended to reflect such comments the Board shall notify the Council of such revised Rectification Plan.
- 5.10 The Board shall implement the Rectification Plan in accordance with its terms, at the sole cost of the Board (subject to any costs which the Council has expressly agreed to incur).
- 5.11 Where a failure to meet any Performance Requirement ("**Performance Failure**") continues following implementation of a Rectification Plan in accordance with its terms then the Board shall propose, agree and implement further Rectification Plans in accordance with this Clause 5, save that, where a single Performance Failure, or Performance Failures arising from the same cause, continue to arise following implementation of two Rectification Plans in respect of such Performance Failure, then the Council may at its discretion deem such continued failure to rectify the Performance Failure a Board Default.
- 5.12 Where:
- 5.12.1 the Board fails to implement a Rectification Plan materially in accordance with its terms; or
 - 5.12.2 the Board is in material breach of this Agreement which cannot be rectified, or would cause the Council to be in breach of any of its legal duties or obligations; or
 - 5.12.3 there is a deemed Board Default pursuant to Clause 5.11
- then the Council shall be entitled to:
- 5.12.4 exercise any rights of the Board under the Project Documents on behalf of the Board, to the extent that this is required to ensure continued compliance with the terms of this Agreement; or
 - 5.12.5 terminate this Agreement for Board Default in accordance with Clause 5.13; or
 - 5.12.6 [require the replacement of one or more Executive Directors, in accordance with Part 2 of Schedule 4];
- 5.13 Where a Board Default occurs or the Board believes that such a Board Default is likely to occur then the Board shall notify the Council promptly providing details of such Board Default (or potential Board Default).
- 5.14 Following any notification pursuant to Clause 5.13, the Council shall notify the Board of any action that the Council requires the Board to take, including rectification of any Board Default which is capable of rectification.
- 5.15 Where any Board Default is not rectifiable, or has not been rectified within a reasonable period of notification of the requirement to rectify by the Council pursuant to Clause 5.14, then the Council shall be entitled to terminate this Agreement on [x] days' notice.
- 5.16 Upon termination for Board Default:
- 5.16.1 the Board shall, on the election of the Council, take all necessary steps to novate or transfer to the Council, or such other party as the Council may nominate, such

Project Documents and assets as the Council may reasonably require in order to continue to deliver the Project at nil cost.

- 5.16.2 no compensation shall be payable to the Board, save that where termination of this Agreement would also lead to termination of the Project Agreement or the DMPA then the Council shall pay, or procure the payment of, on behalf of the Board, any termination sums due to the Project Company or the DMPA Company, but only to the extent that the Board is unable to pay such termination sums.
- 5.17 Upon termination of this Agreement, save as otherwise expressly provided for in this Agreement:
 - 5.17.1 termination shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination;
 - 5.17.2 termination of this Agreement shall not affect the continuing rights and obligations of the Council and the Board under any provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of termination.
 - 5.17.3 the Board shall procure the transfer to the Council at nil cost of all Intellectual Property required by the Council for the provisions of the Services.

6. SERVICES

Supervision and management of construction of Mersey Gateway

- 6.1 The Board shall supervise the construction and operation of the Mersey Gateway Crossing and associated infrastructure in accordance with the terms of the Project Agreement, and otherwise comply with and perform the obligations of the Board under the Project Agreement in an effective, efficient and economic manner.
- 6.2 The Board shall supervise the Tolling of the Mersey Gateway Crossing and Silver Jubilee Bridge:
 - 6.2.1 for the term of the DMPA, in accordance with the terms of the DMPA, and otherwise comply with and perform the obligations of the Board under the DMPA in an effective, efficient and economic manner;
 - 6.2.2 for the Contract Period, so as to ensure that the Tolling is carried out in an effective, efficient and economic manner, in accordance with the terms of:
 - 6.2.2.1 Clause 8 of this Agreement; and
 - 6.2.2.2 the requirements of the Funding Letter.
- 6.3 The Board shall otherwise ensure that:
 - 6.3.1 During the term of the Project Agreement:
 - 6.3.1.1 The Board complies with its obligations under the Project Agreement; and

- 6.3.1.2 The Project Company complies with its obligations under the Project Agreement;
 - 6.3.2 During the term of the DMPA:
 - 6.3.2.1 The Board complies with its obligations under the DMPA; and
 - 6.3.2.2 The DMPA Company complies with its obligations under the DMPA,
- in each case, such that the Services are performed:
- 6.3.3 in an efficient, effective and safe manner;
 - 6.3.4 in accordance with Good Industry Practice;
 - 6.3.5 in a manner that is not likely to be injurious to health or to cause damage to property;
 - 6.3.6 in such a manner as:
 - 6.3.6.1 not to detract from the image and reputation of the Council as highway [or tolling] authority;
 - 6.3.6.2 to enable the Council to discharge its statutory duties;
 - 6.3.7 in compliance with:
 - 6.3.7.1 the Order, the RUCO and the Toll Enforcement Regulations;
 - 6.3.7.2 all applicable Legal Requirements.
- 6.4 The Board shall continuously seek improvements to the procedures and processes used in the performance of the Services.
- 6.5 The Board shall provide reports to the Council in a format and frequency as may be agreed by the Council, acting reasonably, and having regard to the stage of construction or operation of the Mersey Gateway Crossing in respect of:
- 6.5.1 during the term of the Construction Period (as defined in the Project Agreement) under the Project Agreement, the progress of construction, including the occurrence of any Compensation Events or Relief Event or similar events under the terms of the Project Agreement;
 - 6.5.2 during the remainder of the term of the Project Agreement, the operation of the Mersey Gateway Crossing and associated infrastructure, including the performance of services under the Project Agreement and the occurrence of any [Compensation Events or] Relief Events or similar events under the terms of the Project Agreement;
 - 6.5.3 during the term of the DMPA, the operation of the Tolling, including the occurrence of any [Compensation Events or] Relief Events or similar events under the terms of the DMPA;

- 6.5.4 costs incurred by the Board, including any additional costs arising from the operation of the Project Documents, including from any Compensation Events that may arise under the Project Agreement or the DMPA;
- 6.5.5 any delays in the programme for the construction and/or operation of the Mersey Gateway Crossing;
- 6.5.6 performance against key performance indicators and other performance measures within the Project Agreement and DMPA, including any reports required pursuant to Clause 5.6;
- 6.5.7 performance against the Council KPIs.

Annual Business Plan

- 6.6 The Board shall within [x] Working Days of [date] in each year of this Agreement produce and provide to the Council an annual business plan ("**Annual Business Plan**") showing:
 - 6.6.1 detailed projects of the following year's project income and expenditure;
 - 6.6.2 projections of the following 5 years' income and expenditure;
 - 6.6.3 how the Board intends to establish and maintain the liquidity reserve required by the Funding Letter;
 - 6.6.4 the Board's proposals for management and marketing of the tolls, including:
 - 6.6.4.1 all relevant information provided by the DMPA Company pursuant to the terms of the DMPA;
 - 6.6.4.2 details of how the information provided pursuant to Clause 6.6.4.1, and any recommendations of the DMPA Company have been taken into account within the Annual Business Plan and any matters which the DMPA Company has undertaken to perform pursuant to the terms of the DMPA;
 - 6.6.4.3 any recommendations of the DMPA Company which the Board has chosen not to taken into account within the Annual Business Plan or otherwise progress, and the reasons why the Board has made such a decision;
 - 6.6.4.4 details of the current discount scheme from Tolling for local residents ("**Local Discount Scheme**"), including any information relating to the proposed application of the Local Discount Scheme that may be provided by the DMPA Company, and details of any other discount schemes or variations to the tolling of Users which the DMPA Company have proposed or implemented;
 - 6.6.4.5 [**Note: others to be determined**];
- 6.7 Following receipt of the Annual Business Plan, the Council shall review and provide comments to the Board within [x] Working Days. The Board shall consider comments received from the Council, but shall only be required to take into account such comments to the extent that they relate to any Restricted Action or any requirement of the Business Plan

which if it were implemented would be a Restricted Action, in which case the provisions of Clause 5.4 shall apply mutatis mutandis.

Stakeholder Engagement

- 6.8 The Council undertakes to the Board to engage with stakeholders in accordance with its obligations as set out in Part 2 of Schedule 2 (Stakeholder Engagement):
- 6.8.1 on a monthly basis report to the Board ("**Council Stakeholder Engagement Report**"), setting out details of:
 - 6.8.1.1 the outcomes of any Council Stakeholder Engagement carried out in the preceding Month;
 - 6.8.1.2 any actions which the Council has determined, or undertaken, to take to reflect any responses received during such Council Stakeholder Engagement;
 - 6.8.1.3 updates in respect of outcomes or actions set out in previous Council Stakeholder Engagement Reports;
- 6.9 The Board undertakes to the Council to engage with stakeholders in accordance with its obligations as set out in Part 1 of Schedule 2 (Stakeholder Engagement), and shall:
- 6.9.1 on a monthly basis report to the Council ("**Stakeholder Engagement Report**"), setting out details of:
 - 6.9.1.1 the outcomes of any Board Stakeholder Engagement carried out in the preceding Month;
 - 6.9.1.2 any actions which the Board has determined, or undertaken, to take to reflect any responses received during such Board Stakeholder Engagement;
 - 6.9.1.3 any actions which the Board has determined, or undertaken, to take to reflect any actions or undertakings set out in the Council Stakeholder Engagement Report
 - 6.9.1.4 updates in respect of outcomes or actions set out in previous Stakeholder Engagement Reports or Council Stakeholder Engagement Reports;
 - 6.9.2 consider any comments provided by the Council in respect of Board Stakeholder Engagement, and take such comments into account (acting reasonably) in carrying out future Board Stakeholder Engagement and performing the Services;
 - 6.9.3 consider any comments provided by the Council arising from any Council Stakeholder Engagement and take such comments into account (acting reasonably) in carrying out future Board Stakeholder Engagement and performing the Services;

7. POWERS AND DELEGATION

7.1 To the extent that such powers are required for the purposes of delivering the Services (including, but not limited to and requirements for the performance by the DMPA Company of obligations under the DMPA or the Project Company under the Project Agreement), the Council shall:

7.1.1 procure the renewal, replacement or extension of the RUCO on the same, or similar, terms prior to any expiry or termination of the RUCO, so as to ensure that the powers set out in the RUCO continue for the term of this Agreement;

7.1.2 procure the renewal, replacement or extension of the Toll Enforcement Regulations on the same or similar, terms prior to any expiry of termination of the Toll Enforcement Regulations, so as to ensure that the powers set out in the Toll Enforcement Regulations continue for the term of this Agreement;

7.2 The Council shall release and indemnify the Board against all costs, losses, claims and expenses arising from, associated with, or as a consequence of, any failure by the Council to comply with Clause 7.1, provided that:

7.2.1 the Council shall not be responsible for or be obliged to indemnify the Board against any cost, loss, claim or expense arising out of:

7.2.1.1 any injury, loss, damage, cost or expense caused by the negligence or wilful misconduct of the Board occurring after the date of this Agreement;

7.2.1.2 any breach by the Board of its obligations under this Agreement

7.2.2 where exercise by the Board of a right under the Project Agreement or the DMPA would (in the opinion of the Council, acting reasonably) reduce any cost, loss, claim or expense, then the Council shall be entitled to step-in and exercise such right on behalf of the Board, provided that the Council's indemnity at clause 7.2 shall include any costs, losses, claims and expenses arising from the exercise of such right. The Board shall be entitled to take over the exercise of such right at any time, provided that where the Board takes over the exercise of a right from the Council, then the Council shall be released from the indemnity at clause 7.2 where and to the extent that any cost, loss, claim or expense cannot be mitigated as a result of such step-in by the Board.

7.3 The Council and the Board both acknowledge that the levying of tolls on the SJB is a requirement of the Funding Letter, and each party undertakes to the other not to vary tolling on the Silver Jubilee Bridge such that this is no longer the case without the express consent of:

7.3.1 the DMPA Company;

7.3.2 the Project Company;

7.3.3 the DfT,

provided that such consent shall not be unreasonably withheld, taking into account any amendments to the DMPA, Project Agreement and Funding Letter, respectively.

7.4 The Council undertakes to the Board to perform all of its obligations pursuant to the terms of the Project Documents to which it is a party, to support delivery of the Project Objectives through such Project Documents.

7.5 The Board shall ensure that it performs the Services in accordance with current Council Policies so far as they are relevant to the powers, obligations or duties of the Crossings Board.

7.6 For the Contract Period:

7.6.1 the Council shall delegate to the Board, to the extent required for the performance of the Board's obligations pursuant to this Agreement,

7.6.2 the Council undertakes to the Board to delegate to the Project Company in accordance with and pursuant to the terms of the Project Agreement,

7.6.3 the Council undertakes to the Board to delegate to the DMPA Company in accordance with and pursuant to the terms of the DMPA,

7.6.4 the Council undertakes to the Board to delegate to any contractor replacing the Project Company or the DMPA Company, on similar terms to those specified in the Project Agreement or the DMPA (as the case may be),

in each case the relevant powers, rights and obligations under:

7.6.5 the Order;

7.6.6 to the extent that they are capable of delegation, the powers under the RUCO;

7.6.7 to the extent that they are capable of delegation, the powers under the Toll Enforcement Regulations; and

7.6.8 any other statutory power that are capable of delegation, and which are required for, as the case may be:

7.6.8.1 the Board to efficiently perform its obligations under the Governance Agreement; or

7.6.8.2 to comply with the requirements of the Project Agreement and/or the DMPA in respect of delegation of powers.

7.7 To the extent that any delegation of power made pursuant to Clause 7.6 requires renewal or amendment during the Contract Period in order to meet the requirements of Clause 7.6, then the Council shall either:

7.7.1 renew or amend such delegation of power; or

7.7.2 indemnify the Crossings Board in respect of all costs, losses or expenses arising from such failure to renew or amend such delegation.

8. TOLLING

8.1 The Board shall act as the agent of Council, and not as principal, in:

- 8.1.1 collecting toll revenue (or procuring the collection of toll revenue through the arrangements set out in the Project Documents) on behalf of the Council; and
 - 8.1.2 managing the setting of tolls on behalf of the Council,
- in respect of both the Mersey Gateway Crossing and the Silver Jubilee Bridge the "**Toll Obligations**").
- 8.2 The Board may only sub-contract performance of the Toll Obligations in accordance with the terms of the DMPA (including any replacement DMPA procured in accordance with the terms of this Agreement), or otherwise with the consent of the Council (such consent to be at the sole discretion of the Council).
 - 8.3 In performing the Toll Obligations during the Contract Period:
 - 8.3.1 the Board shall provide the Annual Business Plan to the Council in accordance with Clause 6.6 of this Agreement;
 - 8.3.2 the Board shall ensure that in performing the Toll Obligations it complies with Clause 5.4 in respect of any Restricted Action which may be required to carry out such Toll Obligations;
 - 8.3.3 the Board shall comply with the Council Toll Policies;
 - 8.3.4 where the Board sub-contracts performance of any Toll Obligations pursuant to Clause 8.2 (or otherwise with the consent of the Council), the Board shall procure that such sub-contractor does not carry out any Restricted Action save to the extent that the Board is entitled to carry out such Restricted Action, and the Board undertake that it shall procure that either the Board, or such sub-contractor on behalf of the Board, has fully complied with the requirements of Clause 5.4 in respect of such Restricted Action, and that such Restricted Action is permitted to be carried out pursuant to the terms of this Agreement;
 - 8.4 The Board shall co-operate with the Council, in respect of any proposed adjustment to the Availability Support Grant pursuant to the terms of the Funding Letter, and shall provide the Council with all reasonable support required to negotiated such adjustment, including:
 - 8.4.1 promptly providing the Council with all information:
 - 8.4.1.1 requested by the Council; or
 - 8.4.1.2 otherwise identified by the Board,as may be reasonably necessary to support the Council in negotiating such adjustments with the DfT and HMT;
 - 8.4.2 promptly providing such forecasts or financial information that may be required by the Council or DfT to support the negotiation of any such adjustment;
 - 8.4.3 provide such other reports and presentations that may be required to support the negotiation of any such adjustment; and

- 8.4.4 procure the attendance of any officers, directors, employees or consultants of the Board at any meeting where they may reasonably be required to attend in respect of the negotiation of such adjustment,
- 8.5 The Council shall, in advance of any negotiation of an adjustment to the Availability Support Grant provide the Board with reasonable notice of such proposed negotiation, and to the extent that the Council is reasonably able to do so, provide the Board with sufficient notice of any reports, information, meeting attendance or other support required pursuant to Clause 8.4 to allow the Board to provide such support in an efficient manner, provided that any failure to provide such notice shall not relieve the Board from its obligations pursuant to Clause 8.4;
- 8.6 The Board shall procure that all Tolls, Monthly Subscriptions and Allowable Charges ("**Collected Funds**") by the Board, the DMPA Company or any sub-contractor of the Board or the DMPA Company (each a "**Toll Collecting Party**") are collected on behalf of the Council, and shall be deposited promptly into the Toll Collection Account provided that:
- 8.6.1.1 [the Board shall be entitled to set-off such Collected Funds against any monies properly payable by the Council to the Board pursuant to this Agreement];
- 8.6.1.2 where Collected Funds are deposited by any Toll Collecting Party in an account other than the Toll Collection Account the Board shall ensure that such sums are promptly transferred to the relevant Toll Collection Account, subject to any right of set-off pursuant to the terms of this Agreement, or which has otherwise been expressly agreed by the Council;
- 8.7 The Board shall implement and manage any local discount scheme to reflect the Council's requirements (as revised from time to time by the Council), taking account of:
- 8.7.1 available monies for such scheme, including the level of Toll Revenue received;
- 8.7.2 any requirements of the Funding Letter;
- 8.7.3 the advice of the DMPA Company;
- 8.7.4 any legal restrictions that may apply to the implementation of discount schemes.
- 8.8 The Board shall recommend to HBC the level of Tolls (including discount schemes) to be set for both the Silver Jubilee Bridge and the Mersey Gateway Crossing, having regard to:
- 8.8.1 ensuring that the Project Objectives are met;
- 8.8.2 ensuring Tolls are set in compliance with the requirements of the Funding Letter.
- 8.8.3 ensuring that Tolls (including any discount schemes) are set in accordance with all applicable legislation.
- 8.9 Subject to the Restricted Matters, the Board shall determine the level of Tolls (including discount schemes and Allowable Charges) in accordance with the Council Toll Policies, save that the Council may object to such change and require the Board (and any DMPA Company) to levy Tolls and Allowable Charges at rates specified by the Council ("**Council Toll Level**"), provided that the Council indemnifies the Board against all losses incurred as a result of the proposed Council Toll Level.

- 8.10 The Board shall be entitled to take into account the advice of the DMPA Company pursuant to the DMPA in determining the level of Tolls and discounts to be applied and shall provide copies of such advice to the Council when requesting any change in tolls or discount levels, whether pursuant to a Restricted Matter or otherwise.
- 8.11 Where the Council either
- 8.11.1 determines not to; or
- 8.11.2 is otherwise unable to,
- ensure continued tolling of the Silver Jubilee Bridge (including, but not limited to, where it is unable to renew or replace the RUCO), the Council shall indemnify the Board against all costs and losses arising from the ability to toll users of the Silver Jubilee Bridge, including, but not limited to:
- 8.11.3 the effect of any funding withdrawn due to breach of the Funding Letter;
- 8.11.4 any additional costs incurred by the Board under the Project Agreement or DMPA as a result of changes in travel patterns and/or reduced toll income arising from such failure to toll, including any costs, losses or expenses of the DMPA Company or Project Company which may become payable by the Board as a result of such failure;

9. STAFFING AND SUPPORT

- 9.1 For a period of three (3) Years from the Effective Date ("**Initial Support Services Period**"), the Council shall provide the Support Services to the Board subject to payment by the Crossings Board of the Council Service Provision Fee.
- 9.2 The provisions of Schedule 8 (*Market testing and benchmarking of Support Services*) shall apply in respect of benchmarking and market testing of the provision of the Support Services and:
- 9.2.1 the Board shall market test the provision of all Support Services in accordance with Part 1 of Schedule 8 prior to the end of the Initial Support Services Period;
- 9.2.2 the Board shall be entitled to market test or benchmark the provision of Support Services by the Council or any other service provider at any time during the Contract Period, in accordance with the provisions of Schedule 8.
- 9.2.3 the Board shall ensure that all contracts entered into in respect of the provision of Support Services allow for market testing and benchmarking in accordance with this clause 9.
- 9.3 Save for Support Services provided pursuant to Clause 9.1, the Board shall not be obliged to procure any Support Services from the Council.

10. WORKS TO SILVER JUBILEE BRIDGE

- 10.1 The Council shall carry out the Council Silver Jubilee Bridge Works in accordance with Part 1 of Schedule 10 (*Silver Jubilee Bridge Works*) and shall indemnify the Board against all costs, losses, liabilities or expenses of the Board which may arise from any failure to carry out the Council Silver Jubilee Bridge Works in accordance with Part 1 of Schedule 10 (*Silver*

Jubilee Bridge Works), save that where the Board's liability in respect of completion of such works is limited under the terms of the Project Agreement and/or the DMPA, the Council's liability pursuant to this indemnity shall be limited to the same extent, to the extent that such cost, loss, liability or expense arises pursuant to the terms of the Project Agreement and/or the DMPA, as the case may be.

- 10.2 The Board shall either carry out, or procure the carrying out of, the Board Silver Jubilee Bridge Works, whether pursuant to the terms of the Project Agreement or otherwise, [in accordance with Part 2 of Schedule 10 (Silver Jubilee Bridge Works).]

11. PAYMENT AND FEES

- 11.1 Within [fifteen (15)] days following the last day of each Month in each Year, the Board shall deliver to the Council a report ("**Monthly Payment Report**") setting out the payments and payment deductions in respect of such Month ("**Relevant Month**"). The Monthly Payment Report shall show, in respect of the Relevant Month:

11.1.1 the Board Service Fee payable by the Council to the Board, setting out the payments and payment deductions due;

11.1.2 any Council Service Provision Fee due from the Board to the Council in respect of Support Services provided pursuant to clause 9;

11.1.3 the information contained in the Monthly Payment Report provided pursuant to clause 27.1 of the DMPA and shall set out the Board's view of the figures specified in the DMPA Company Monthly Invoice (as defined in the DMPA) and the Board Monthly Invoice (as defined in the DMPA) and any amounts which the Board proposes to dispute pursuant to the terms of clause 27.8 of the DMPA;

11.1.4 the information contained in the Monthly Payment Report provided pursuant to clause 51.1 of the Project Agreement and shall set out the Board's view of the figures specified in the invoice provided by the Project Company pursuant to clause 51.2.1 of the Project Agreement and any amounts which the Board proposes to dispute pursuant to the terms of clause 51.6 of the Project Agreement;

11.1.5 any Disputed Amounts (as defined in the DMPA and Project Agreement respectively) which have become due and payable by the Council to the DMPA Company or Project Company (as the case may be);

11.1.6 subject to clauses 11.1.3 to 11.1.5, the amounts payable in respect of the Relevant Month by the Council to the DMPA Company and Project Company.

- 11.2 If either Party disputes any amounts shown in the Monthly Payment Report, then the provisions of clause 11.8 (Disputed Amounts) shall apply.

- 11.3 As soon as practicable (and in any event within [ten (10 days)] following the last day of the Relevant Month, the Board shall deliver to the Council an invoice ("**Board Monthly Invoice**") in respect of the Relevant Month. This Board Monthly Invoice shall show:

11.3.1 the Board Service Fee due from the Council to the Board;

11.3.2 the Council Service Provision Fee due from the Board to the Council;

- 11.4 If any Dispute under clause 11.2 has not been resolved by the date the Board Monthly Invoice is issued in accordance with clause 11.3 then the Board Monthly Invoice shall reflect the amount payable specified by the Board and on resolution of the Dispute, any amount owed from one Party to the other shall be invoiced in accordance with clause 11.8 (*Disputed Amounts*).
- 11.5 If the Board fails to issue any Board Monthly Invoice or Monthly Payment Report the Council may itself prepare such report or invoice and the report or invoice so prepared shall be deemed to have been issued by the Board.
- 11.6 Subject to clause 11.11 (Set-off), the Council shall pay to the Board the amount of the Board Monthly Invoice, not later than the date that is the later of:
- 11.6.1 twenty (20) days after the Council has received such Board Monthly Invoice in respect of the Relevant Month; and
- 11.6.2 twenty (20) days after the Council has received the Monthly Payment Report in respect of such Relevant Month.
- 11.7 All payments under this Agreement shall be made in pounds sterling for value on the due date to the bank account of the recipient specified in the invoice or debit note, quoting the invoice or debit note number against which payment is made.
- 11.8 Either Party shall have the right to dispute, in good faith, any amount specified in a Monthly Payment Report, invoice or debit note referred to in this Agreement or otherwise payable under this Agreement ("**Disputed Amount**"). The Parties shall use all reasonable endeavours to resolve a dispute in respect of a Disputed Amount within thirty (30) days of such dispute arising. If they fail to resolve it within thirty (30) days, either Party may refer the matter to clause 19 (*Dispute Resolution*). Following resolution of a Dispute, any amount agreed or determined to be due shall be included as an adjustment in the next monthly invoice. The amount agreed or determined shall accrue interest at a rate per annum equal to the [Interest Rate] plus one (1) per cent per annum from the day after the date on which payment would have been due (in the absence of the Dispute).
- 11.9 The Parties shall pay interest on any undisputed amount payable under this Agreement not paid on the due date, for the period from the day after the due date to (and including) the date of payment, at a rate per annum equal to the Interest Rate plus two (2) per cent per annum.
- 11.10 The right of either Party to receive interest in respect of late payment of any sum shall be without prejudice to such other rights as that Party may have under this Agreement.
- 11.11 Set-off**
- The Council shall be entitled to retain or set off any amount owed to it by the Board under this Agreement which has fallen due and payable against any amount due from the Council to the Board under this Agreement.
- 11.12 [Mechanics of mandate on Toll Collections Account and the Liquidity Maintenance Reserve from the Effective Date to ensure payments can be made to
- 11.12.1.1 withdraw, apply, transfer or set off all or any part of the monies standing to the credit of the Toll Collections Account for the purposes set out in this Agreement, including any payments due and payable from the Council to the Board [and any payments due and

payable by the Council to the DMPA Company and/or Project Company pursuant to the terms of the DMPA and/or the Project Agreement];

11.12.1.2 withdraw, apply, transfer or set off all or any part of the monies standing to the credit of the Liquidity Maintenance Reserve on behalf of the Board for the purposes specified in this Agreement for such Liquidity Maintenance Reserve;

11.12.2 at any time where there is no Board Default outstanding, the Council shall ensure that no other party is mandated to withdraw monies from the Toll Collections Account or the Liquidity Maintenance Reserve;]

12. FINANCIAL SUPPORT AND MANAGEMENT OF FUNDS

12.1 The Board will apply any Board Service Fee received solely for the following purposes:

12.1.1 payments of Council Service Provision Fees;

12.1.2 payment of insurance premia in respect of any insurances which the Board is required to take out pursuant to the terms of this Agreement or otherwise;

12.1.3 payment of costs reasonably incurred by the Board in providing the Services;

12.1.4 payment of other costs and expenses expressly incurred pursuant to the terms of this Agreement; and

12.1.5 payment of sums due to the DfT pursuant to the terms of the Funding Letter, to the extent that these are payable by the Board.

The Board shall, acting prudently, apply any remaining Board Service Fee, after it has made disbursements in accordance with Clause 12.1 for purposes consistent with the Board's delegated powers, in particular to:

12.1.6 manage the Board's cash flows in accordance with good business principles and in particular taking into account any expected future changes in costs and/or revenues over the Contract Period; and

12.1.7 managing the Board's risk in the Project over the Contract Period, including (subject to Restricted Matters) procuring or carrying out additional works or services which may be required in respect of the Project;

12.2 The Board shall manage its finances on a prudent basis.

12.3 Where insufficient toll revenue is collected by or on behalf of the Council to pay:

12.3.1 the Unitary Charge or other sums payable by the Council pursuant to the Project Agreement;

12.3.2 the Service Subsidy or other sums payable by the Council pursuant to the DMPA;

12.3.3 all other costs properly incurred, or to be incurred, by the Board pursuant to the terms of this Agreement; and

12.3.4 all costs to be borne by the Council in respect of the Project,

then:

12.3.5 where there are sufficient reserves available within the Liquidity Maintenance Reserve which could be prudently utilised to support such payments then the Board shall permit the Council to utilise the Liquidity Maintenance Reserve in order to make such payments or make such payments on behalf of the Council using funds within the Liquidity Maintenance Reserve.

12.3.6 where there are not sufficient reserves available within the Liquidity Maintenance Reserve which would be prudently utilised pursuant to clause 12.3.5 then the Board shall notify the Council as soon as reasonably practicable of any lack of such reserves, and advise the Council of any funding that may be required to:

12.3.6.1 meet temporary cash flow shortages as a result of lower than expected toll revenues;

12.3.6.2 manage any longer term cash flow issues that may require additional funding for the term of the Project Agreement and/or DMPA;

12.3.6.3 comply with the requirements of the Funding Letter

and the Council shall consider how such cash flow shortfall can most effectively be managed, including whether it is appropriate for the Council to borrow additional monies to contribute to the balance in either the Liquidity Maintenance Reserve or the Toll Collections Account, whilst ensuring that any such borrowing is:

12.3.6.4 in compliance with the Prudential Code and any other restrictions that may apply to the Council from time to time; and

12.3.6.5 provide overall value for money to the Council in respect of the Project Objectives, taking into account the impact of any such borrowing on the Council

12.4 The Council undertakes to the Board to pay:

12.4.1 all Availability Support Grant received by the Council from the DfT in accordance with the Funding Letter;

12.4.2 the sum of £120 million ("**Council Support Payment**") which the Council has agreed to contribute to the Project in accordance with the terms of the Funding Letter,

into the Toll Collections Account for use solely in accordance with the terms of this Agreement.

13. BOARD GOVERNANCE REQUIREMENTS

- 13.1 The Board undertakes to the Council, and the Council undertakes to the Board, not to vary any of the Board's documents relating to the constitution and operation of the Board (including, without limitation, all contracts entered into by shareholders, Articles of Association and Memorandum) without the consent of the Council (such Consent to be at the sole discretion of the Council).
- 13.2 The Directors of the Board shall be appointed in accordance with Schedule (Board Constitution) and carry out their duties in accordance with that Schedule;
- 13.3 The Council undertakes to:
- 13.3.1 exercise all voting rights and powers of control available to it in relation to the board so as to give full effect to the terms of this Agreement, including where appropriate, but without limitation, the carrying into effect of such terms as if they were embodied in the articles of the Board.
 - 13.3.2 procure that all third parties, directly or indirectly under its control shall refrain from acting in a manner which is likely to hinder the Board from carrying out the Services in accordance with this Agreement.
 - 13.3.3 Generally use reasonable endeavours to promote the interests of the Board where they are consistent with the terms of this Agreement.
- 13.4 The Board shall be responsible for and shall release and indemnify the Council on demand from and against all claims, costs, losses and expenses which may arise out of or in consequence of breach of the undertaking in clause 13.1.

14. EMPLOYEES

14.1 Transfer of Employees to the Board

The Council and the Board confirm their understanding and agreement that the commencement of the provision of the Services by the Board on the commencement of this Agreement is not intended or expected to give rise to a Relevant Transfer.

14.2 Employment Exit Provisions

- 14.2.1 This Agreement envisages that subsequent to its commencement, the identity of the provider of the Services (or any part of the Services) may change (whether as a result of expiry or termination of this Agreement, part or otherwise) resulting in a transfer of the Services in whole or in part ("**Subsequent Transfer**"). If a Subsequent Transfer is a Relevant Transfer then the Council or Replacement Service Provider will inherit liabilities in respect of the Relevant Employees with effect from the relevant Service Transfer Date.
- 14.2.2 The Board shall and shall procure that any Sub-Contractor shall on receiving notice of termination of this Agreement or at any time within the period of 12 months prior to the Expiry Date at the Council's request provide in respect of any person engaged or employed by the Board or any Sub-Contractor in the provision of the Services, the Board's Provisional Staff List and the Staffing Information together with any additional information required by the Council, including information as to the application of TUPE to the relevant employees. The Board

shall notify the Council of any material changes to this information as and when they occur and shall provide an updated Staff List and Staffing Information at the Council's request.

- 14.2.3 At least 28 days prior to the Service Transfer Date, the Board shall and shall procure that any Sub-Contractor shall prepare and provide to the Council and/or, at the direction of the Council, to the Replacement Service Provider, the Board's Final Staff List, and updated Staffing Information, which shall be complete and accurate in all material respects. The Board's Final Staff List shall identify which of the Board's and Sub-Contractor's personnel named are Relevant Employees.
- 14.2.4 The Council shall be permitted to use and disclose the Board's Provisional Staff List, the Board's Final Staff List and the Staffing Information to any tenderer or other prospective Replacement Service Provider for any services that are substantially the same type of services as (or any part of) the Services.
- 14.2.5 The Board warrants that the Board's Provisional Staff List, the Board Final Staff List and the Staffing Information (the "**TUPE Information**") will be true and accurate in all material respects and that as at the Service Transfer Date no persons are employed or engaged in the provision of the Services other than those included on the Board's Final Staff List. The Board shall indemnify the Council and any Replacement Service Provider in respect of any costs, claims, liabilities, expenses or damages arising from any inaccuracies in or omissions from the TUPE Information.
- 14.2.6 The Board shall and shall procure that any Sub-Contractor shall ensure at all times that it has the right to provide the TUPE Information under Data Protection Legislation.
- 14.2.7 Any change to the TUPE Information which would increase the total employment costs of the staff in the six months prior to termination of this Agreement shall not (so far as reasonably practicable) take place without the Council's prior written consent, unless such changes are required by law. The Board shall supply to the Council full particulars of such proposed changes and the Council shall be afforded reasonable time to consider them.
- 14.2.8 In the six months prior to termination of this Agreement, the Board shall not and shall procure that any Sub-Contractor shall not materially increase or decrease the total number of staff listed on the Board's Provisional Staff List, their remuneration, or make any other change in the terms and conditions of those employees without the Council's prior written consent.
- 14.2.9 The Board shall indemnify and keep indemnified in full the Council and at the Council's request each and every Replacement Service Provider against all Employment Liabilities relating to:
- 14.2.9.1 the termination by the Board or any Sub-Contractor of the employment of any of its/their employees (including but not limited to the Relevant Employees) on or before the Service Transfer Date;
- 14.2.9.2 any act or omission of the Board or any Sub-Contractor in respect of the Relevant Employees in the period up to and including the Service Transfer Date;

- 14.2.9.3 any person who is or has been employed or engaged by the Board or any Sub-Contractor in connection with the provision of any of the Services;
 - 14.2.9.4 any trade union or staff association or employee representative (whether such claim arises as a result of any act, fault or omission of the Board and/or any Sub-Contractor);
 - 14.2.9.5 any breach by the Board or any Sub-Contractor of its/their obligations under Regulations 13 or 14 of TUPE; or
 - 14.2.9.6 any claim by any person other than a Relevant Employee that their contract of employment or any liabilities, rights or obligations thereunder has transferred from the Board or any Sub-Contractor to the Council or to any Replacement Service Provider on the Service Transfer Date pursuant to TUPE (including any Employment Liabilities arising from the termination of such person's employment whether before on or after the Service Transfer Date).
- 14.2.10 The parties shall co-operate to ensure that any requirements to inform and consult with the employees and/or employee representatives in relation to any Relevant Transfer will be fulfilled.
- 14.2.11 The parties agree that the Contracts (Rights of Third Parties) Act 1999 shall apply to clause 14.2.2 to 14.2.10, to the extent necessary to ensure that any Replacement Service Provider shall have the right to enforce the obligations owed to, and indemnities given to, the Replacement Service Provider by the Board or the Council in its own right under section 1(1) of the Contracts (Rights of Third Parties) Act 1999.
- 14.2.12 Despite clause 14.2.11, it is expressly agreed that the parties may by agreement rescind or vary any terms of this Agreement without the consent of any other person who has the right to enforce its terms or the term in question despite that such rescission or variation may extinguish or alter that person's entitlement under that right.

15. CHANGES

15.1 Changes to the Services

- 15.1.1 The Council has the right to propose changes to the Services in accordance with this clause 15.1. If the Council requires a change to the Services, it must serve a written notice ("**Council Change Notice**") on the Board.
- 15.1.2 The Council Change Notice shall set out the change in the Services required in sufficient detail to enable the Board to provide the Council with a detailed breakdown of the financial and other implications of implementing the change to the Services.
- 15.1.3 As soon as practicable and in any event within [] Working Days after having received the Council Change Notice, the Board shall deliver to the Council its response ("**Response**") setting out:

- 15.1.3.1 whether relief from compliance with obligations under this Agreement is required;
 - 15.1.3.2 any impact on the provision of the Services;
 - 15.1.3.3 any amendment required to this Agreement or to any other Project Document as a result of the change in Service;
 - 15.1.3.4 any estimated change in the costs of the Project that result from the change in Services including any change in the Board Service Fee;
 - 15.1.3.5 any required changes to the Council Support Services and any consequent change in the Council Service Provision Fee;
 - 15.1.3.6 any loss of revenue that results from the change in Services;
 - 15.1.3.7 any capital expenditure and/or operational expenditure that is required or no longer required as a result of the change in Service; and
 - 15.1.3.8 any regulatory approvals or other consents or permissions which are required.
- 15.1.4 As soon as practicable after the Council receives the Response, the Parties shall discuss and agree the issues set out in the Response.
- 15.1.5 If the Parties cannot agree on the contents of the Response then the dispute will be determined in accordance with Clause 19 (*Dispute Resolution*).
- 15.1.6 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to Clause 19 (*Dispute Resolution*), the Council shall:
- 15.1.6.1 confirm in writing the Response (as modified); or
 - 15.1.6.2 withdraw the Council Change Notice.
- 15.1.7 If the Council does not confirm in writing the Council Change (as modified) within 30 days of the contents of the Council Change having been agreed in accordance with paragraph 15.1.4 above or determined pursuant to paragraph 15.1.5 above, then the Council Change Notice shall be deemed to have been withdrawn.

15.2 Changes to the Project Agreement and/or DMPA proposed by the Board

- 15.2.1 The Board shall not propose a Board Change pursuant to schedule 19 of the Project Agreement or schedule 10 of the DMPA without first obtaining the written consent of the Council.
- 15.2.2 Without prejudice to clause 15.2.1, if the Board wishes to propose a Board Change under the Project Agreement and/or the DMPA, it must:
 - 15.2.2.1 send a copy of the draft Board Change Notice to the Council; and

15.2.2.2 if so requested by the Council within [] Working Days of receipt of the draft Board Change Notice in accordance with clause 15.2.2.1, meet with the Council to discuss the content of such draft notice.

15.2.3 Following a request by the Council pursuant to clause 15.2.2.2, the Board and the Council shall meet within [] Working Days to discuss the draft Board Change Notice. For the avoidance of doubt, the Council shall not be required to accept any such proposed Board Change, save to the extent that the Board is required to progress such a Board Change pursuant to the terms of the Project Agreement or DMPA.

15.3 Changes to the Project Agreement and/or DMPA proposed by the Council

15.3.1 The Council may require the Board to propose a Board Change in accordance with the provisions of schedule 19 of the Project Agreement and/or schedule 10 of the DMPA (as relevant) by issuing a written notice of the same to the Board including reasonable details of, and justification for, the proposed change.

15.3.2 If so requested by the Board within ten (10) Working Days of receipt by it of the notice referred to in clause 15.3.1, the parties shall meet to discuss the proposed Board Change.

15.3.3 As soon as reasonably practicable following such meeting, or otherwise if a meeting is not requested, the Board shall propose and pursue such change pursuant to schedule 19 of the Project Agreement and/or schedule 10 of the DMPA (as relevant).

15.4 Changes to the Project Agreement/DMPA proposed by the Project Company/DMPA Company

15.4.1 The Board shall not accept, reject or comment upon any Project Company Change Notice it receives from the Project Company pursuant to schedule 19 of the Project Agreement or DMPA Company Change Notice it receives from the DMPA Company pursuant to schedule 10 of the DMPA without the prior written consent of the Council.

15.4.2 The Board shall provide the Council with copies of all Project Company Change Notices and DMPA Company Change Notices received by the Board pursuant to schedule 19 of the Project Agreement or schedule 10 of the DMPA as soon as reasonably practicable after the Board receives such a notice.

15.4.3 If so requested by the Council within [] Business Days of receipt by the Council of the Project Company Change Notice or DMPA Company Change Notice, the Council and the Board shall meet to discuss such notice.

15.4.4 Within [] Working Days of the meeting pursuant to clause 15.4.3, the Council shall inform the Board, at its absolute discretion, whether it requires the Board to accept (with or without comment and/or amendment) or reject the Project Company Change Notice or DMPA Company Change Notice as the case may be.

16. ENTIRE AGREEMENT

16.1 This Agreement, together with the documents referred to in it, constitutes the entire agreement and understanding between the Parties in respect of the matters dealt with in them

and supersedes any previous negotiations, communications, representations, understanding or agreements between the Parties relating to such matters.

16.2 Each of the parties acknowledges and agrees that:

16.2.1 in entering into this Agreement, and the documents referred to in it, it does not rely on, and will have no remedy in respect of, any statement, representation, warranty or understanding (whether negligently or innocently made) of any person (whether party to this Agreement or not) other than as expressly set out in this Agreement and the only remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement.

16.2.2 this Clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

17. FURTHER ASSURANCE

Each party will at its own cost and expense use all reasonable endeavours to do or procure to be done all such further acts and things and execute or procure the execution of all such documents as may from time to time be necessary for the purpose of giving effect to the provisions of this Agreement.

18. GOVERNING LAW AND ENFORCEMENT

18.1 Governing law

This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by the laws of England and Wales.

18.2 Jurisdiction of English courts

18.2.1 Subject to Clause 19 (*Dispute Resolution*), the courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to non-contractual obligations) arising out of or in connection with this Agreement or a dispute regarding the existence, validity or termination of this Agreement (a "**Dispute**").

18.2.2 The parties agree that the courts of England are the most appropriate and convenience courts to settle Disputes and accordingly no party will argue to the contrary.

19. DISPUTE RESOLUTION

Where a Dispute is referred to the Disputes Resolution Procedure, the provisions set out in schedule 11 (*Dispute Resolution Procedure*) shall apply.

20. VARIATIONS

20.1 No variation, alteration or waiver of any of the provisions of this Agreement, except as otherwise provided in this Agreement, shall be effective unless it is in writing and signed by

or on behalf of the party against which the enforcement of such variation, alteration or waiver is sought.

20.2 No waiver under this Clause 19 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement, unless (and then only to the extent) expressly stated in that waiver.

20.3 No failure or delay by any party to exercise any right or remedy will operate as a waiver of it nor will any partial exercise preclude any further exercise of the same, or of some other right or remedy. All such rights and remedies are several and cumulative and not exclusive of each other.

21. NO PARTNERSHIP

21.1 The Parties to this Agreement are not partners nor is the Board able to act as the agent of the Council except to the extent expressly set out in this Agreement, and in particular:

21.1.1 the Board shall not hold itself out as having authority or power to bind the Council in any way;

21.1.2 no provision of this Agreement shall be construed as a delegation by the Council of any statutory authority to the Board (or to the DMPA Company) save where expressly set out.

22. NOTICES

22.1 All notices under this Agreement shall be in writing and shall be served by sending the same by recorded delivery post, facsimile, electronically or by hand, or by leaving the same at:

22.1.1 the Council

Address:

Facsimile:

Email:

Attention:

22.1.2 the Board

Address:

Facsimile:

Email:

Attention:

22.2 Any Party may change its nominated address, email address or facsimile number to another address or facsimile number in England or Wales by not less than five (5) Working Days prior written notice to the other Party;

- 22.3 Notices shall be deemed to have been received:
- 22.3.1 if sent by hand or recorded delivery post, when delivered to the addressee;
 - 22.3.2 if sent by facsimile, upon sending, subject to:
 - 22.3.2.1 confirmation of uninterrupted transmission by a transmission report; and
 - 22.3.2.2 there having been no telephonic communication by the recipient to the sender (any such telephonic communication to be confirmed in writing) that the facsimile has not been received in legible form:
 - (a) within three (3) hours after sending, if sent on a Working Day and between the hours of 9.00am and 4.00pm; or
 - (b) by noon on the next following Working Day if sent after 4.00pm on a Working Day but before 9.00am on the next following Working Day.
 - (c) provided that any notice (other than a routine notice) given by fax shall be confirmed by letter sent by hand or post, but without prejudice to the original facsimile notice if received in accordance with this Clause 22.3.2
 - 22.3.3 if sent as an electronic communication, when received by the receiving party in readable form.

23. SEVERABILITY

If any term of this Agreement shall be held to any extent to be illegal or unenforceable:

- 23.1 that term shall to that extent be deemed not to form part of this Agreement; and
- 23.2 the remainder of this Agreement shall not be affected.

24. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

A person who is not party to this Agreement shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement. This Clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

25. CONFIDENTIALITY

- 25.1 Subject to Clause 25.2, each party undertakes to comply with the requirements of any confidentiality undertaking set out in the Project Documents and Funding Letter (including the provisions of Clause 16 of the DMPA and Clause 30 of the Project Agreement)
- 25.2 Where information which is confidential (or deemed confidential pursuant to the terms of the Project Documents or the Funding Letter) is provided by one party ("**Providing Party**") to another party ("**Receiving Party**") pursuant to this Agreement, the Providing Party shall notify the Receiving Party that such information is confidential (or deemed confidential) and specify any restrictions on distribution ("**Distribution Restrictions**") which apply in respect

of such information including any applicable provisions under the Project Documents or Funding Letter, and the Receiving Party shall be deemed to have complied with this Clause 25.2 provided that:

25.2.1 the Receiving Party only uses and distributes such information in accordance with the terms of any disclosed Distribution Restrictions;

25.2.2 the Receiving Party complies with the applicable terms of the relevant Project Document or Funding Letter.

26. FREEDOM OF INFORMATION

26.1 Each Party acknowledges that the other is subject to the requirements of the FOIA and the Environmental Information Regulations and shall facilitate compliance with each others information disclosure requirements pursuant to the same.

26.2 The Board shall procure the compliance by the DMPA Company and the Project Company with the requirements of the DMPA and Project Agreement in respect of FOIA and the Environmental Information Regulations to the extent required for either or both of the Board and the Council to comply with the requirements of the FOIA and the Environmental Information Regulations.

26.3 Each Party shall comply with the Council Policies in respect of Freedom of Information.

27. BOARD RECORDS

27.1 The Board shall:

27.1.1 at all times maintain a full record of particulars of the costs of performing the Services, including those provided pursuant to the terms of the Project Agreement and the DMPA;

27.1.2 when requested by the Council, provide a summary of any of the costs referred to in Clause 27.1.1, including details of any funds held by the Board specifically to cover such costs, in such form and detail as the Council may reasonably require to enable the Council to monitor the performance by the Board of its obligations under this Agreement;

27.1.3 provide such facilities as the Board may reasonable require for its representatives to visit any place where the records are held and examine the records maintained under this Clause 27; and

27.2 Compliance with the above shall require the Board to keep books of account in accordance with best accountancy practice with respect to the Agreement showing in detail:

27.2.1 administrative overheads;

27.2.2 payments made to under the Project Agreement and the DMPA, including payments made by the Project Company and the DMPA Company to sub-contractors under such agreements;

27.2.3 capital and revenue expenditure;

27.2.4 such other items as the Council may reasonably require to conduct cost audits for verification of cost expenditure or otherwise,

and the Board shall have (and procure that the Project Company and the DMPA Company shall have) the books of account evidencing the items listed in Clauses 27.2.1 to 27.2.4 available for inspection by the Council (and any expert) upon reasonable notice, and shall present a report of these to the Council as and when requested.

27.3 The Board shall maintain or procure that the following are maintained:

27.3.1 a full record of all incidents relating to health, safety and security which occur during the term of the Agreement; and

27.3.2 full records of all maintenance procedures carried out during the term of the Agreement,

and the Board shall have the items referred to in Clauses 27.3.1 and 27.3.2 available for inspection by the Council upon reasonable notice, and shall present a report of them to the Council, as and when requested.

27.4 For the purposes of:

27.4.1 the Local Government Finance Act 1982 (and any other legislation relating to the inspection, examination and auditing of the Council's accounts);

27.4.2 the examination and certification of the Council's accounts; and/or

27.4.3 an examination pursuant to the Local Government Act 1999 of the economy, efficiency and effectiveness with which the Council has performed its function,

the District Auditor and the Audit Commission may examine such documents as he or it may reasonably require which are owned, held or otherwise within the control of the Board and may require the Board to produce such oral or written explanations as he or it considers necessary.

27.5 The records referred to in this Clause 27 shall be retained for a period of at least [five] years after the Board's obligations under the Agreement have come to an end.

27.6 Upon termination of the Agreement, and in the event that the Council wishes to enter into another agreement for the operation and management of the Project the Board shall (and shall ensure that the Project Company and DMPA Company) comply with all reasonable requests of the Council to provide information relating to the Board's costs of operating and maintaining the Project.

27.7 The Board shall:

27.7.1 provide to the Council copies of its annual report and accounts within 30 days of publication;

27.7.2 provide to the Council a copy of the [Financial Model (as defined in the Project Agreement) and the DMPA Financial Model (as defined in the DMPA)] at Financial Close and (as the same may be amended) within 30 days of any amendment thereto;

27.7.3 use all reasonable endeavours to assist the Council in its preparation of any report required by the DfT or HM Treasury from time to time.

28. SOLE REMEDY

28.1 Nothing in this Clause 28 shall prevent or restrict the right of the Council to seek injunctive relief or a decree of specific performance or other discretionary remedies of the court.

IN WITNESS whereof the Parties hereto have executed this Agreement as a deed.

The Official Seal of **HALTON BOROUGH**)
COUNCIL hereunto affixed in the presence of) *SEAL*
the Authorised Signatory)

Signature

Name (block capitals)



Executed as a deed by [] acting by:)
Signature

Name (block capitals)
Director

Signature

Name (block capitals)
Secretary/Director

SCHEDULE 1: RESTRICTED MATTERS

| Restricted Matter | Restricted Matter Parties | Matter categorisation | Restricted Matter obligations |
|--|----------------------------------|------------------------------|--------------------------------------|
| An increase (by the Board or the DMPA Company on behalf of the Board) of any relevant Standard Toll Fare (as defined in the DMPA) such that such Standard Toll Fare is more than 20% greater than the relevant Base Tolling Fare (as defined in the DMPA) | Council | Red | |
| An increase (by the Board or the DMPA Company on behalf of the Board) of any relevant Standard Toll Fare (as defined in the DMPA) such that such Standard Toll Fare is between 0% and 20% greater than the relevant Base Tolling Fare (as defined in the DMPA) | Council | Orange | |
| Any reduction by the Board, or the DMPA Company on behalf of the Board, of any Tolls. | Council | [Orange] | |
| A decision by the Board, or the DMPA Company on behalf of the Board, to not vary the Standard Toll Fare in accordance with the Council Toll Policies | Council | [Orange] | |

| | | | |
|--|---------|----------|---|
| Providing advice or consulting with other toll operators for profit, where the Board can demonstrate that provision of such services shall not interfere with compliance with all duties and obligations under this Agreement and shall be compliant with Law. | Council | [Red] | Board to confirm that proposals are in compliance with applicable Council Policies. Where entering into such an arrangement with a third party would lead to a breach of any Law then the Board shall not proceed with such arrangement. |
| [Any material change to, introduction of, or withdrawal of, a discount scheme proposed by the Board] | Council | [Orange] | |
| Any non-material changes to any Project Document to which the Council is not a party | Council | [Green] | |
| Any material change to any Project Document to which the Council is not a party, which does not adversely affect the Council | Council | [Orange] | |
| Any material change to any Project Document to which the Council is not a party which has an adverse effect on the Council | Council | [Red] | |

SCHEDULE 2: STAKEHOLDER ENGAGEMENT

Part 1: Board Engagement

[Note: to set out any requirements for engagement between the Board and external stakeholders such as the Mersey Gateway Group]

Part 2: Council Engagement

[Note: to set out the requirements for engagement between the Council and external stakeholders.]

SCHEDULE 3: COUNCIL POLICIES

Part 1: Council Policies

[Note: relevant Council policies to functions of the Board to be listed.]

Part 2: Council Toll Policies

The Board shall procure that the DMPA Company shall comply with the provisions of Part 1 of Schedule 6 to the DMPA.

SCHEDULE 4: BOARD GOVERNANCE

Part 1: Definitions

1. In this Schedule 4 unless the context otherwise requires:
 - "**Appointments Committee**" shall mean the committee of the Directors appointed pursuant to paragraph [4.3] of Part [3];
 - "**Board of Directors**" means the board of directors from time to time of the Board;
 - "**Chair**" shall mean the chairman of the Board of Directors as appointed in accordance with paragraph 16 of Part 2;
 - "**Director**" shall mean any director for time being of the Board including where applicable an alternate director.
 - "**Executive Director**" shall mean a Director appointed in accordance with paragraph 4 of Part 2 of this Schedule 4;
 - "**Non-Executive Director**" shall mean a Director appointed in accordance with paragraph 11 of Part 2;
 - "**Type of Non-Executive Director**" shall mean either a Council Non-Executive Director or an Independent Non-Executive Director.
2. Words and expressions defined in or for the purposes of the Companies Act 2006 shall, where the context permits, bear the same meanings in this Schedule 4.

Part 2: Appointment/Removal of Directors and the Chair

1. The Council shall appoint the initial Executive Directors on or before the Effective Date.
2. Following the Effective Date, the Appointments Committee shall determine any replacement Executive Director ("**Replacement Executive Director**"), following the resignation or removal of an Executive Director, and the Council shall appoint such Replacement Executive Director as an Executive Director, promptly following such notification.
3. If the Council either:
 - 3.1 removes an Executive Director in accordance with its right as shareholder of the Board, then the Council shall be responsible for and indemnify the Board against any and all claims by such Director for unfair or wrongful dismissal or other compensation arising out of such removal and against any losses, costs or expenses suffered or reasonably incurred as a result thereof; or
 - 3.2 determines not to appoint a Replacement Executive Director determined in accordance with paragraph 2, then the Council shall be responsible for and indemnify the Board against any and all losses, costs or expenses suffered or reasonably incurred as a result thereof.
4. There shall be appointed at any one time be no more than three (3) executive directors ("**Executive Director**") who shall each be:
 - 4.1 a senior member of the executive team of the Board;
 - 4.2 employed by the Board (or seconded to the Board by the Council pursuant to the requirement for Support Services);
5. The Executive Directors appointed by the Council shall at all times include the chief executive and finance officer of the Board (or where no employee has such titles, such employees as fulfil the role most closely analogous to that of chief executive and/or finance officer, as the case may be) and one other senior officer with experience that the Council may determine is most relevant to the current stage of the Project. Where any Executive Director ceases to be an employee of the Board (or a secondee from the Council to the Board) the Council shall remove such Executive Director from their role as a Director.
6. The Council shall appoint the initial Non-Executive Directors on or before the Effective Date;
7. The Council shall be entitled to remove or substitute any Executive Director (and the terms of employment of such Executive Directors shall ensure that the Board is entitled to dismiss such Executive Director) following a Board Default in accordance with the provisions of clause 5.12.6, and paragraph [5] above shall not apply for the period following such removal until the Board has appointed a replacement member or members of the executive team.
8. Following the Effective Date, the Appointments Committee shall determine any replacement Independent Non-Executive Director ("**Replacement Independent Non-Executive Director**"), following the resignation or removal of an Non-Executive Director or the expiry of their term of office, and the Council shall appoint such Replacement Non-Executive Director as a Non-Executive Director, promptly following such notification.

9. The Council shall be entitled to remove or substitute Council Non-Executive Directors without referral to the Appointments Committee, and shall promptly:
 - 9.1 remove any Council Non-Executive Director who is no longer a member of the Council;
 - 9.2 notify the Appointments Committee if any Independent Non-Executive Director becomes a member of the Council or otherwise does not, to the Council's knowledge, continue to comply with the requirements set out in Part 5 (*Non-Executive Director Requirements*);
10. If the Council either:
 - 10.1 removes a Non-Executive Director in accordance with its right as shareholder of the Board, then the Council shall be responsible for and indemnify the Board against any and all claims by such Director for unfair or wrongful dismissal or other compensation arising out of such removal and against any losses, costs or expenses suffered or reasonably incurred as a result thereof; or
 - 10.2 determines not to appoint a Replacement Independent Non-Executive Director determined in accordance with paragraph 8, then the Council shall be responsible for and indemnify the Board against any and all losses, costs or expenses suffered or reasonably incurred as a result thereof.
11. The Council acknowledges that appointment of Directors in accordance with this Schedule 4 is a requirement of the Funding Letter.
12. There shall be appointed at all times no more than [four (4)] non-executive directors of whom:
 - 12.1.1 2 Directors shall be independent of the Council ("**Independent Non-Executive Director**") and
 - 12.1.2 2 Directors shall be council members of the Council ("**Council Non-Executive Director**".

(together the "**Non-Executive Directors**"). Each Non-Executive Director shall be appointed for a term of three (3) years.
13. No Director shall at any time be affiliated with any contractor (which term shall be deemed to include employment by, directorship of, or material shareholding in such contractor) pursuant to the terms of the Project Documents, including the Project Company, DMPA Company, any funder, or any key sub-contractor, and where the Council becomes aware that any Director is so affiliated the Council shall remove or substitute such Director as soon as reasonably practicable in accordance with the requirements of this Schedule [4]. .
14. Non-Executive Directors shall not be remunerated, save in respect of their costs and reasonable travel expenses incurred in carrying out their duties as Directors.
15. Executive Directors shall not be remunerated, save pursuant to the terms of their contract of employment with the Board, or where they are seconded by the Council, their contract of employment with the Council.
16. The Council shall appoint a Chair from the Non-Executive Directors, for a period of 24 months, and the first such Chair shall be appointed for a period of 24 months commencing on the Effective Date. The first such Chair shall be a Council Non-Executive Director and the

post of Chair shall then alternate between Independent Non-Executive Directors and Council Non-Executive Directors.

17. In the event that any Chair vacates his office as Chair for any reason before the expiry of the 24 month period for which he was appointed, the Council shall appoint another Director of the same Type of Non-Executive Director to replace him until the expiry of the 24 month period
18. If the Chair for the time being is unable to attend any meeting of the Board of Directors, the Council shall appoint another Non-Executive Director of the same Type of Non-Executive Directors to act as chairman in his place at such meeting.

Part 3: Board Meetings and Committees

1. The quorum for board meetings shall be one Executive Director and one Non-Executive Director.
2. The Chair shall have a casting vote.
3. The Board of Directors shall (and the Council shall exercise its powers in respect of the Board to ensure that insofar as it is legally able during the term of this Agreement, the Board of Directors shall) meet at regular intervals of a month, or as may otherwise be required to ensure that the Board is capable of making all decisions required to comply with its legal and financial commitments, including any obligations pursuant to the Project Documents and the Board shall ensure that no less than [seven days] written notice is given to each of the Directors, such notice to be accompanied by an agenda specifying the business to be transacted together with copies of any documents to be tabled at the meeting (or if such copies are not available, with full details of such documents).
4. Subject to the express requirements of this Agreement, the Board of Directors shall be entitled to form committees to make decisions, provided that:
 - 4.1 such committees shall have equal numbers of Executive and Non-Executive Directors, or shall be constituted such that neither Executive Directors or Non-Executive Directors can make decisions that bind the Board of Directors without the consent of at least one Non-Executive Director and one Executive Director (as the case may be)
 - 4.2 the Board of Directors shall form an audit committee, which shall meet at least quarterly, and shall have the obligations set out in Part [6] (*Audit Committee*) and shall be constituted on the basis set out therein;
 - 4.3 the Board of Directors shall form an appointments committee ("**Appointments Committee**") consisting of the Non-Executive Directors, which shall be responsible for selecting the Executive Directors and other senior officers of the Board in accordance with this Agreement.

Part 4: Appointment Committee

1. The Appointments Committee shall assess the role of each Executive Director:
 - 1.1 Every three (3) Years following the appointment of such Director;
 - 1.2 Following a decision by the majority of the Non-Executive Directors to review such role;
 - 1.3 On any date identified in a review carried out pursuant to paragraph [2] below; or
 - 1.4 following a request by the Council.
2. In assessing the role of the Executive Director, the Appointments Committee shall take into consideration:
 - 2.1 the Annual Business Plan produced by the Board;
 - 2.2 the scope and nature of the role of such Executive Director;
 - 2.3 such other information as the Appointments Committee shall deem appropriate,
 - 2.4 to determine whether the role of the Executive Director is appropriate in light of the Services to be performed in the following 3 year period.
3. Following such review, the Appointments Committee shall determine:
 - 3.1 Whether to propose the extension of the role of such Executive Director, in which case, such Executive Director shall continue in their role;
 - 3.2 Whether to require the Executive Director to re-apply for their position, and whether the role of such Executive Director shall be amended, following such review; or
 - 3.3 Whether a further review of the role is required in a shorter period than three (3) years, in which case, the Executive Director shall be offered a fixed term contract for such term, and the Appointments Committee shall notify the Board of Directors of the proposed extension of term.
4. The Appointments Committee shall also be entitled to review the role of any other senior member of staff employed by the Board following the publication of the Annual Business Plan to determine whether the staffing of the Crossings Board is appropriate for its proposed purposes in the following Year, and may make recommendations to the Board regarding such employees.

Part 5: Non-Executive Director Requirements

1. The Non-Executive Directors shall, so far as this is consistent with their fiduciary duties as Directors of the Board, comply with Nolan Principles in carrying out their duties as directors, taking into account the nature of the Board as a wholly owned subsidiary of the Council;
2. The Nolan Principles are as follows:

Selflessness

- 2.1 Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity

- 2.2 Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

Objectivity

- 2.3 In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability

- 2.4 Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness

- 2.5 Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty

- 2.6 Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership

- 2.7 Holders of public office should promote and support these principles by leadership and example.
3. The Council shall at the request of the Board, provide training to Directors on compliance with these principles.

Part 6: Audit Committee Procedures

[Note: to be agreed, reflecting existing HBC procedures where appropriate.]

SCHEDULE 5: SUPPORT SERVICES

Part 1: Administrative Support and Payroll

[Note: to be agreed.]

Part 2: Staff Secondments

[Note: to be agreed.]

Part 3: IT Support and Office Services

[Note: to be agreed]

Part 4: Office Space

[Note: to be agreed.]

Part 5: Other services

[Note: to be agreed.]

SCHEDULE 6: FUNDING LETTER

[Copy of agreed form funding letter to be inserted once finalised with DfT.]

SCHEDULE 7: PAYMENT

Part 1: Council Service Provision Fee

1. The monthly Council Service Provision Fee ($CSPF_m$) for Month m shall be calculated on the following basis:
2.
$$CSPF_m = ASPF_m + SSF_m + ITOSF_m + OR_m + OSF_m$$
3. where:
 - 3.1 $ASPF_m$ means the agreed Administrative Support and Payroll Fee payable in Month m , for performance of the Support Services listed in Part 1 of Schedule 5, as calculated in accordance with Part 1 of Schedule 5.
 - 3.2 SSF_m means the agreed Staff Secondment Fee payable in Month m , for provision of the staff secondments listed in Part 2 of Schedule 5, as calculated in accordance with Part 2 of Schedule 5.
 - 3.3 $ITOSF_m$ means the agreed IT and Office Services Fee payable in Month m , for performance of the Support Services listed in Part 3 of Schedule 5, as calculated in accordance with Part 3 of Schedule 5.
 - 3.4 OR_m means the Office Rent payable in Month m , for provision by the Council to the Board of the office space detailed in Part 4 of Schedule 5, as calculated in accordance with Part 4 of Schedule 5.
 - 3.5 OSF_m means the Other Services Fee payable in Month m , for provision of other Support Services as may be detailed or agreed pursuant to Part 5 of Schedule 5, as calculated in accordance with Part 5 of Schedule 5.

Part 2: Board Service Fee

1. The monthly Board Service Fee (BSF_m) shall be calculated on the following basis:
2. $BSF_m = BIC_m + CSPF_m$
3. where:
 - 3.1 BIC_m means the Board's internal costs relating to the provision of the Services in Month m [as set out in **[the Board Cost Model]**];
 - 3.2 $CSPF_m$ means the Council Service Provision Fee for Month m, as calculated in accordance with Part 1 above;

APPENDIX 1: BOARD COST MODEL

[Note: to be inserted]

SCHEDULE 8: MARKET TESTING AND BENCHMARKING OF SUPPORT SERVICES

Part 1: Market testing

Section 1: Separation of functions

1. The Council shall ensure that, where the Council, or any subsidiary of the Council, tenders for any of the market tested Support Services ("**Support Services Tender**"), that an information barrier is maintained between those representatives of the Council participating in this Market Testing procedure, and those representatives of the Council who are engaged in the Support Services Tender.

Section 2: Review

2. At least [x] weeks before the proposed market testing date, the Board shall:
 - 2.1.1 consider any changes required to the relevant services; and
 - 2.1.2 determine the appropriate manner of advertising the services required and the means of identifying prospective tenderers;
 - 2.1.3 determine the tender requirements which must include:
 - 2.1.3.1 a statement of the tender validity period;
 - 2.1.3.2 details of the tender evaluation criteria;
 - 2.1.3.3 the terms and conditions under which the relevant Support Services will be contracted;
 - 2.1.3.4 information relating to employees and their conditions of employment;
 - 2.1.3.5 the information that tenderers are required to provide;
 - 2.1.3.6 how many tenders are required for the market testing to be valid;

Section 3: Grouping of Services

3. Unless the Board can demonstrate to the Council that best value for money is likely to be achieved for the Board if market tested services are tendered separately or in particular groupings, or if any market tested service is divided into separate parts, the grouping of any market tested services shall be left to the discretion of tenderers on the basis that the tender requirements shall specify that:
 - 3.1.1 tenderers may submit tenders for all or any of the market tested services; and
 - 3.1.2 if a tenderer submits a tender for a group or groups of market tested services, then it may be required to provide all or any of the services in such group or groups.
4. The Board shall be responsible for compiling the list of tenderers and for selecting the tenderers from the list of prospective tenderers on the basis of their:
 - 4.1.1 financial standing;

- 4.1.2 technical and managerial experience and ability (taking into account any relevant references).
5. The Council shall have a right to prevent the selection of any person as a prospective tenderer if it reasonably believes that such person does not (or could not reasonably, be considered to) comply with any of the criteria referred to in paragraph 4 of this part 1.
 6. The Council shall, in its absolute discretion, have the right to prevent the selection of any person as a tenderer on the grounds that the prospective tenderer has committed a Prohibited Act (as defined under the Project Agreement or as defined under the DMPA).
 7. The Council shall have a right to review the list of prospective tenderers. The Board shall provide the Council with an explanation of the reasons behind the non-inclusion on the list of prospective tenderers of any person identified as suitable by the Council, if so requested by the Council.
 8. The Board shall provide any prospective tenderer which is unsuccessful in being selected with an explanation of the reasons behind its non-selection, if so requested by the person in question.
 9. The Board shall determine which compliant tender in respect of any market tested service represents the best value for money.
 10. On making this determination, the Board shall supply to the Council a copy of its tender evaluation, together with sufficient supporting information concerning the tender evaluation to enable the Council to analyse and understand the basis for the Board's determination.
 11. If the Council does not agree with the Board's determination, the Authority may, within 15 Working Days of being provided with the tender evaluation, dispute such determination and, if the parties do not resolve such dispute within a further 15 Working Days, the dispute shall be dealt with in accordance with Clause 19 (*Disputes Resolution Procedure*).

Part 2: Benchmarking

1. Where the Board is entitled to benchmark any Support Services this Part 2 shall apply. The Board shall be entitled to benchmark any Support Service, or any combination of Support Services either:
 - 1.1 where the Board determines that such Support Services are not being provided on a value for money basis, in which case the Board shall carry out the Benchmarking exercise at its own cost; or
 - 1.2 where the Council notifies the Board that it believes one or more Support Services is not being provided on a value for money basis, in which case the Council shall pay the costs of the Board in carrying out such exercise.
2. Any benchmarking exercise ("**Benchmarking**") shall be carried out sufficiently in advance of the date by which a replacement service provider would be required to commence provision of the relevant Support Services ("**Benchmarking Date**") to reasonably enable the Board to comply with all of the obligations in respect of Benchmarking set out in paragraph 4 below in advance of such Benchmarking Date.
3. The Board shall ensure that all contracts entered into for the provision of Support Services (including the terms of any arrangement with the Council pursuant to clause 9.1) shall entitle the Board to carry out a Benchmarking exercise on reasonable notice, and allow for an adjustment of any fees payable under such contracts to reflect the outcome of such Benchmarking.
4. A Benchmarking of any Support Service shall be carried out as follows:
 - 4.1 The intent of such Benchmarking shall be to determine the amount of the Performance Cost in respect of such Support Service for the period from the Benchmarking Date.
 - 4.2 The Benchmarking shall consist of an exercise undertaken by the Board on the basis of an objective comparison to determine whether the Board is paying a fair market price for the provision of the relevant Support Service and, if not, what the price should be from the Benchmarking Date. Such exercise shall be carried out by comparing the standards, service level specifications, method statements, scope and prices of the Support Service in question with the standards, specifications, scope and prices of similar services provided within the preceding 12 month period by comparable reputable organisations possessing similar degrees of skill and experience as the current service provider and assuming the imposition on such organisations of obligations and liabilities not materially more or less onerous than those imposed on the current provider of the relevant Support Services.
 - 4.3 The parties agree that any Benchmarking shall be carried out in good faith and on an "open book" basis.
 - 4.4 The manner and timing of any Benchmarking and nature of the comparative material to be researched (including the way in which such research is obtained) ("**the Benchmarking Exercise**") shall be determined by the Board, acting reasonably, given the nature of the Support Services to be benchmarked.
 - 4.5 The result of the Benchmarking (or determination pursuant to a referral under paragraph 4.4) shall become final and binding on the parties and any adjustments shall be made to the Board

Service Fee from the Benchmarking Date to reflect the extent to which the Board is not paying a fair market price for the provision of the relevant Support Services. For the avoidance of doubt, if the Benchmarking determines that the Board is paying a fair market price pursuant to paragraph 4.1 or, as the case may be, paragraph 4.2, this Agreement shall continue without adjustment to the existing Board Service Fee.

- 4.6 Should the Board seek the appointment of a new entity to provide a Support Service which has been Benchmarked pursuant to this paragraph 4 from the Benchmarking Date, the Council shall not unreasonably withhold or delay its consent to such new service provider.

SCHEDULE 9: BOARD PROJECT DOCUMENTS

1. the Project Agreement, in a form substantially similar to that annexed to this Agreement;
2. the DMPA, in a form substantially similar to that annexed to this Agreement;

[Note: list to be finalised once preferred bidder selected.]

SCHEDULE 10: SILVER JUBILEE BRIDGE WORKS

Part 1: Council Silver Jubilee Bridge Works

[Note: to be inserted]

Part 2: Board Silver Jubilee Bridge Works

[Note: to be inserted.]

SCHEDULE 11: DISPUTES RESOLUTION PROCEDURE

1. Where a Dispute arises, a party with a claim ("**the Claiming Party**") may propose in writing ("**Dispute Notice**") to the other party ("**the Responding Party**") that this Dispute Resolution Procedure is used to attempt to resolve the claim. The Responding Party shall respond to such Dispute Notice within [3] Working Days of service of the Dispute Notice ("**the Objection Deadline**") if the Responding Party wishes to dispute that such Dispute should be classed as a Dispute.

The Escalation Procedure

2. Where the Dispute Resolution Procedure applies, the parties shall first attempt to resolve the Dispute pursuant to paragraphs 2 and 3 (the "**Escalation Procedure**") first informally by either party referring the matter in dispute to the other party's representative as soon as reasonably practicable, and the representatives shall seek to resolve the Dispute, as soon as reasonably practicable. In the event that parties' representatives are unable to resolve the Dispute within three Working Days of reference to them (or such longer period as the parties, acting reasonably, may agree as appropriate for the scale and nature of the Dispute) then either party shall be entitled to refer the dispute to the other party's Chief Executive (or other senior representative nominated by that Party for the purpose of this Escalation Procedure) ("**Senior Representative**") for resolution between the parties' Senior Representatives.
3. Both parties shall be entitled to make oral and/or written representations prior to any of the meetings taking place at either escalation level referred to above.

Mediation

4. If the parties are unable to resolve the Dispute within the Escalation Procedure, then if both parties agree the Dispute shall be referred to mediation. Any reference to mediation shall be made in accordance with the procedures of the Centre for Effective Dispute Resolution ("**CEDR**").
5. The mediation shall be conducted by a single mediator appointed by the parties or, if the parties are unable to agree on the identity of the mediator within 14 days after the parties have agreed to proceed with a mediation, or if the person appointed is unable or unwilling to act, the mediator shall be appointed by CEDR on the application of either party.
6. The mediation shall be conducted in English and if the parties cannot agree on the location for the mediation then it shall take place at the offices of CEDR.
7. Mediation is without prejudice to the rights of the parties in any future proceedings.
8. If the parties are unable to resolve the dispute following the Escalation Process, either party may submit the matter to the Courts of England and Wales for final determination.