

**ANNEXURE 5**

**FORM OF CUSTODY AGREEMENT**

**DATED**

**20[ ]**

**SHEFFIELD CITY COUNCIL (1)**

**AMEY HALLAM HIGHWAYS LIMITED (2)**

**NCC GROUP ESCROW LIMITED (3)**

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**CUSTODY AGREEMENT**

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**THIS DEED** is made on

20

**BETWEEN:**

- (1) **THE SHEFFIELD CITY COUNCIL** of Town Hall, Sheffield, S1 2HH (**the Authority**);
- (2) **AMEY HALLAM HIGHWAYS LIMITED** (company registration number 08121168 ) whose registered office is at The Sherard Building, Edmund Halley Road, Oxford OX4 4DQ ("**Service Provider**");
- (3) **NCC GROUP ESCROW LIMITED** (company registration number 03081952) whose registered office is at Manchester Technology Centre, Oxford Road, Manchester M1 7EF ("**Custodian**").

**WHEREAS:**

- (A) The Authority and the Service Provider have agreed the terms on which the Service Provider will carry out the Services within the Contract and, accordingly, have entered into the Contract.
- (B) The Base Case is required for determining the financial consequences of certain events under the Contract.
- (C) The Authority and the Service Provider wish to provide, inter alia, for the safe custody of the Base Case and, accordingly, the parties have agreed to enter into this Deed.
- (D) This Deed is the "Custody Agreement" contemplated by the Contract.

**NOW IT IS AGREED** as follows:

**1. DEFINITIONS AND CONSTRUCTION**

**1.1 Definitions**

In this Deed (including the Recitals) the following terms shall, unless the context otherwise requires, have the following meanings:

**"Base Case"** means the Base Case used to calculate payments under the Contract and as delivered to the Custodian pursuant to Clause 2.1 of this Deed;

**"Contract"** means the contract made between (1) the Authority and (2) the Service Provider for the rehabilitation, maintenance and operation of the Project Network pursuant to the Government's private finance initiative; and

**"Integrity Testing Service"** means those tests detailed in Schedule 1 insofar as they relate to the Base Case and as may be updated by the Custodian from time to time.

## **1.2 Construction**

Save to the extent that the context or the express provisions of this Deed otherwise require:

- 1.2.1 unless the context otherwise requires, words and expressions defined in the Contract have the same meanings in this Deed as in the Contract;
- 1.2.2 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Deed;
- 1.2.3 all references to Clauses or to the Schedule are references to clauses of or the Schedule to this Deed;
- 1.2.4 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.5 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.6 any reference to time of day shall be reference to London time;
- 1.2.7 the words "herein", "hereto" and "hereunder" refer to this Deed as a whole and not to the particular clause in which such word may be used;
- 1.2.8 words importing the singular include the plural and vice versa;
- 1.2.9 words importing a particular gender include all genders;

- 1.2.10 "person" includes any individual partnership, firm, Authority, body corporate, government, government body, authority, agency, unincorporated body of persons or association;
- 1.2.11 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- 1.2.12 references to "Party" means a party to this Deed and references to "Parties" shall be construed accordingly;
- 1.2.13 all monetary amounts are expressed in pounds sterling;
- 1.2.14 references to the word "includes" or "including" are to be construed without limitation; and
- 1.2.15 the obligations of any Party under this Deed are to be performed at that Party's own cost and expense except as otherwise specified or agreed in writing between the Parties.

## **2. DELIVERY AND CUSTODY OF THE BASE CASE**

### **2.1 Verification**

- 2.1.1 Prior to the initial delivery and any subsequent delivery of the Base Case to the Custodian by the Service Provider in accordance with Clause 64 of the Contract the Authority and the Service Provider will verify the identity of two copies of the then current Base Case on disc which shall be copies of the Base Case which can be found at Schedule 5 of the Contract (as amended from time to time) in accordance with the terms of the Contract.
- 2.1.2 Upon the delivery of the Base Case to the Custodian, the Custodian shall perform such tests as are set out in its Integrity Testing Service and shall deliver a copy of the test report to the Parties.

## **2.2 Safe Custody**

The Custodian shall hold all copies of the Base Case delivered in accordance with Clause 2.1 in safe custody and stored in a vault or secure deposit facility. The Custodian has the right to make such copies of the Base Case as may be necessary solely for the purposes of this Agreement.

## **2.3 No Obligation**

The Custodian shall have no obligation or responsibility to any person whatsoever, to determine:

- 2.3.1 the existence, relevance, completeness, accuracy, effectiveness or any other aspects of the Base Case; or
- 2.3.2 that whatever is deposited or accepted by it for deposit is or is not the Base Case.

## **2.4 Obligations of the Service Provider**

- 2.4.1 The Service Provider shall ensure that the Base Case as delivered to the Custodian is capable of being run on Microsoft Excel Version 2003 for the Windows operating system along with all available optional functions (when loaded onto an appropriate personal computer) in accordance with the Contract. With the agreement of the Authority, the Service Provider shall be entitled to prepare an updated Base Case which runs on a different version of Microsoft Excel, or on alternative software, or on a different operating system.
- 2.4.2 The Service Provider shall provide to the Authority a copy of any decryption key and/or password provided to the Service Provider in order to access the data.



### **3. RELEASE OF MODEL**

#### **3.1 Instructions and Signatures**

3.1.1 The Custodian shall hold the Base Case to the order of the Authority and the Service Provider and shall act upon but only upon the joint instructions of both:

- (A) the Authority Representative for the time being (or such substitute(s) as the Authority may appoint and notify to the Custodian in writing) for and on behalf of the Authority; and
- (B) the Service Provider Representative (whose identity and authorisation shall be notified by the Service Provider to the Custodian from time to time in writing) for and on behalf of the Service Provider.

3.1.2 The Authority and the Service Provider shall provide the Custodian with sample signatures for their respective signatories, updated as necessary if the identities of the signatories change.

#### **3.2 Release**

The Custodian shall, upon receiving duly signed instructions from both the Authority and the Service Provider (but only upon receiving such instructions), release one copy of the Base Case to the person either named in such instructions or previously identified in writing by the Authority and the Service Provider provided all fees due and payable under this Agreement to the Custodian have been paid.

#### **3.3 Records**

3.3.1 The Custodian shall maintain a record of any release made pursuant to Clause 3.2, including details of the person to whom such release was made and the date of the same.

3.3.2 The Authority and the Service Provider shall be entitled, at reasonable hours and upon giving the Custodian reasonable notice, to inspect the records kept in accordance with Clause 3.3.1.

#### **4. CONFIDENTIALITY**

The Custodian agrees for itself, its directors, officers, employees, sub-contractors and agents to maintain all information in whatever form coming into its possession or to its knowledge under or in connection with this Deed in strictest confidence and secrecy, not to make use of the same other than for the purposes of this Deed and not to disclose such information other than in accordance with the terms of this Deed.

#### **5. REMUNERATION**

##### **5.1 Fees**

The Service Provider shall be responsible for the payment to the Custodian of such fees as are agreed between the Authority and the Service Provider with the Custodian for the performance by the Custodian of its obligations in accordance with this Deed.

##### **5.2 VAT**

The Service Provider shall pay to the Custodian any VAT properly payable hereunder in respect of the Fees paid by it under this Deed provided that it shall first have received from the Custodian a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

##### **5.3 Initial Fees**

In consideration for performing its obligations under this Deed, the Custodian shall be paid in accordance with Schedule 2.

##### **5.4 Invoices**

The Custodian must submit to the Service Provider an invoice showing sums due to the Custodian under this Deed, and the Service Provider shall also at the same time provide a copy of the invoice to the Authority.

##### **5.5 Payments**

The Service Provider is liable to pay to the Custodian all sums properly due from it to the Custodian under this Deed within thirty (30) Business Days

following receipt by the Service Provider of the Custodian's invoices in accordance with Clause 5.4.

## **6. TERMINATION**

### **6.1 Termination by Custodian**

6.1.1 Unless the Authority and the Service Provider otherwise agree, this Agreement shall automatically terminate upon release of the Base Case in accordance with Clause 3.

6.1.2 The Custodian may terminate this Deed on giving thirty (30) days prior written notice to both the Authority and the Service Provider, after any failure by the Service Provider to pay any amount payable by it on the day the same is due, provided the default is then continuing unremedied.

6.1.3 Notwithstanding the provisions of Clause 6.1.1, the Custodian may terminate this Deed by giving not less than ninety (90) days prior written notice to the Parties.

6.1.4 Either party may pay to the Custodian any amount owing to the Custodian by the other party. On termination of this Agreement the Service Provider and/or the Authority (as appropriate) shall remain liable to the Custodian for payment in full of any fees and interest which have become due but which have not been paid as at the date of termination.

### **6.2 Termination by Authority and the Service Provider**

The Authority and the Service Provider may terminate this Deed by jointly giving not less than ninety (90) days prior written notice to the Custodian.

### **6.3 Savings**

6.3.1 Termination of this Deed shall be without prejudice to any accrued rights and obligations hereunder as at the date of termination and shall not affect the obligations of the Custodian under Clause 4 (*Confidentiality*) and this Clause 6 (each of which shall survive

termination) or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination. Save as provided in this Clause 6.3.1, all rights and obligations of the Parties under this Deed shall end and be of no further force and effect upon termination.

6.3.2 Notwithstanding any breach of this Deed by any Party and without prejudice to any other rights which any Party may have in relation thereto, the other Parties may elect to treat this Deed as in full force and effect and to enforce their rights hereunder.

#### **6.4 Delivery Up**

On termination of this Deed the Custodian will deliver all copies of the Base Case held by it in equal or (where it is not holding an even number of copies) approximately equal numbers to the Authority (for the attention of the Authority Representative) and to the Service Provider (for the attention of the Service Provider Representative).

#### **6.5 New Custodian**

If this Deed is terminated, the Authority and the Service Provider shall each use all reasonable endeavours to appoint a mutually acceptable new custodian on terms as nearly identical to those contained in this Deed as possible, subject to such modifications as the new custodian shall deem necessary and which shall be acceptable to the Authority and the Service Provider (acting reasonably).

### **7. LIMITATION OF LIABILITY**

#### **7.1 Limit**

The Custodian shall not be liable for any loss caused to any other Party either jointly or severally arising out of or in connection with this Deed except to the extent that such loss or damage is caused by breach of this Deed or the negligent acts or omissions of the Custodian, its officers, employees, agents or sub-contractors and, in each case, the Custodian's total liability in respect of all claims arising under or by virtue of this Deed shall not (except in the case of claims for fraudulent misrepresentation, personal injury or death) exceed the sum of [REDACTED].

## **7.2 Consequential Loss**

The Custodian shall not, in any circumstances, be liable to any other Party either jointly or severally for indirect or consequential loss of any nature whatsoever whether for loss of profit, loss of business or otherwise.

## **7.3 Reliance**

The Custodian shall be entitled to rely upon any written request, waiver, consent, receipt or other document (absent manifest error) furnished to it pursuant to this Deed by the Parties without further enquiry.

## **7.4 Indemnity**

7.4.1 Save for any claim falling within the provisions of Clause 7.1, the Service Provider and the Authority jointly and severally agree at all times to indemnify and hold harmless the Custodian in respect of all of its legal and all other costs, fees and expenses incurred directly or indirectly as a result of being brought into or otherwise becoming involved in any form of dispute resolution proceedings or any litigation of any kind between the Service Provider and the Authority in relation to this Agreement to the extent that this Agreement does not otherwise provide for reimbursement of such costs; and

7.4.2 the Service Provider shall assume all liability and shall at all times indemnify and hold harmless the Custodian and its officers, agents, sub-contractors and employees from and against any and all liability, loss, damages, costs, legal costs, professional and other expenses and any other liabilities of whatever nature, awarded against or agreed to be paid or otherwise suffered, incurred or sustained by the Custodian, whether direct, indirect or consequential as a result of or in connection with any claim by any third party(s) for alleged or actual infringement of Intellectual Property Rights arising out of or in connection with all and any acts or omissions of the Custodian in respect of the Custody Agreement as contemplated under this Agreement provided that the Service Provider's total liability in respect of all such claims shall not exceed the sum of [REDACTED].

## **8. STEP-IN**

### **8.1 Commencement**

The Custodian shall, from time to time:

8.1.1 permit the Authority to perform or discharge any obligation of the Service Provider under this Deed, where the Service Provider is in breach of the same; and

8.1.2 permit the Service Provider to perform or discharge any obligation of the Authority under this Deed, where the Authority is in breach of the same.

### **8.2 Consent**

8.2.1 The Service Provider consents to the performance or discharge of its obligations by the Authority pursuant to Clause 8.1.1.

8.2.2 The Authority consents to the performance or discharge of its obligations by the Service Provider pursuant to Clause 8.1.2.

## **9. INTELLECTUAL PROPERTY RIGHTS**

9.1 Service Provider warrants that it is the sole owner of copyright and Intellectual Property rights in the combination of programming instructions in the Base Case, that the use of such instructions by the Authority under the terms of this Deed shall not infringe any copyright or any other intellectual property rights of any person and that it has authority to enter into this Deed.

9.2 The Authority, Service Provider and the Custodian agree that the Base Case shall remain the confidential property of the Service Provider and all copyright and Intellectual Property rights in the Base Case will remain with the Service Provider.

## **10. NOTICES**

10.1 Any notice to be given or served by one party to the other party under this Deed shall be served as follows:

10.1.1 Such notice shall either be delivered personally or by first class pre-paid post or by facsimile transmission to the relevant address or facsimile number as set out in Clauses 10.1.2, 10.1.3, or 10.1.4 (as the case may be) or to such other address or facsimile number as a party may have notified in writing to the other party by not less than five (5) Business Days prior notice. Service shall be deemed to have been effected as follows:

- (A) if personally delivered, at the time of delivery to the addressee;
- (B) if sent by first class pre-paid post on the second (2nd) Business Day after it is put in the post; and
- (C) if sent by facsimile transmission, it shall be deemed to be received where there is a confirmation of uninterrupted transmission by a transmission report and where there has been no telephonic communication by the recipient to the sender (to be confirmed in writing) that the facsimile has been received in legible form:
  - (1) within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; and
  - (2) by 11am on the next following next Business Day, if sent after 4pm on a Business Day but before 9am on that next following Business Day.

10.1.2 For the purposes of Clause 10.1.1 the Service Provider's details are:

Position: Group Financial Controller

Address: Sherard Building, Edmund Halley Road, Oxford, OX4  
4DQ

Facsimile: 01865 401994

Attention: [REDACTED]

10.1.3 For the purposes of Clause 10.1.1 the Authority's details are:

Position: Authority Representative

Address: Howden House, Sheffield S1 2SH

Facsimile No: 01142 734015

Attention: [REDACTED]

10.1.4 For the purposes of Clause 10.1.1 the Custodian's details are:

Address:

Facsimile No:

Attention:

10.2 In proving service under this Clause 10 it shall be sufficient to prove that personal delivery was made, or as the case may be, that the letter was properly addressed and posted or, as the case may be, the facsimile transmission was properly addressed and despatched.

10.3 A party shall notify the other parties to this Agreement, within 30 days of its occurrence, of any change of name, registered office, contact address or other contact details, and any material change in circumstances that may affect the validity or operation of this Agreement.

## **11. ASSIGNMENT**

### **11.1 Binding on Successors and Assigns**

This Deed shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted transferees or assignees.

### **11.2 Restriction on Assignment**

11.2.1 The Authority and the Service Provider shall only be entitled to assign or transfer any part of their respective rights or obligations under this Deed in accordance with the provisions of Clause 85 of the Contract.

11.2.2 The Custodian shall only assign or transfer any part of their rights or obligations under this Deed with the prior written consent of the others (such consent not to be unreasonably withheld).



11.2.3 Each of the Authority and the Custodian consents to an assignment by the Service Provider of its rights hereunder as security for any loan made to or for the benefit of the Service Provider under the Financing Agreements.

## **12. AGENCY**

### **12.1 No Delegation**

No provision of this Deed shall be construed as a delegation by the Authority of any of its statutory authority to the Service Provider or the Custodian.

### **12.2 No Agency**

Save as otherwise provided in this Deed, no Party shall be or be deemed to be an agent of any other Party nor shall it hold itself out as having authority or power to bind any other Party in any way.

### **12.3 Independent Contractor**

The Parties shall at all times be independent contractors and nothing in this Deed shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

## **13. WHOLE AGREEMENT**

This Deed and the relevant provisions of the Contract constitute the whole agreement and understanding of the Parties as to the subject matter hereof and there are no prior or contemporaneous agreements between the Parties with respect thereto.

## **14. WAIVER**

Failure by any Party at any time to enforce any provision of this Deed or to require performance by the other Parties of any provision of this Deed shall not be construed as a waiver of such provision and shall not affect the validity of this Deed or any part hereof or the right of the relevant Party to enforce any provision in accordance with its terms.

## **15. COUNTERPARTS**

This Deed may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the Parties shall constitute a full and original instrument for all purposes.

## **16. SEVERABILITY**

If any condition, Clause or provision of this Deed not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Deed shall not be affected thereby.

## **17. COSTS AND EXPENSES**

Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Deed.

## **18. AMENDMENTS**

No amendment to this Deed shall be binding unless in writing and signed by the duly authorised representative of the Parties.

## **19. THIRD PARTY RIGHTS, GOVERNING LAW AND JURISDICTION**

### **19.1 Third Party Rights**

This Agreement is not intended to create any right under the Contracts (Rights of Third Parties) Act 1999 which is enforceable by any person who is not a party to this Agreement and the rights of any third party under the said act are hereby expressly excluded.

### **19.2 Law**

This Deed shall be governed by and construed in all respects in accordance with English Law.

### **19.3 Jurisdiction**

The Parties each submit to the jurisdiction of the English Courts as regards any claim or matter arising in relation to this Deed.

**IN WITNESS WHEREOF** the Parties have executed and delivered this Deed on the date first written above.

**EXECUTED AND DELIVERED** )  
as a Deed by the affixing of )  
the common seal of **THE** )  
**SHEFFIELD CITY COUNCIL** )  
in the presence of: )

**SIGNED** as a **DEED** by  
**AMEY HALLAM HIGHWAYS LIMITED**  
acting by a Director

Director

In the presence of:

Signature of witness

Name (in BLOCK CAPITALS)

Address

**SIGNED** as a **DEED** by  
**NCC GROUP ESCROW LIMITED**  
acting by a Director

Director

In the presence of:

Signature of witness

Name (in BLOCK CAPITALS)

Address

## **SCHEDULE 1**

### **INTEGRITY TESTING SERVICE**

The integrity testing service checks that the deposited material contains a Base Case. The results of the integrity testing are recorded in a test report along with details of all the items lodged. This Test Report is forwarded to all parties.

Integrity Testing consists of the following checks:

1. Each item of media deposited is virus checked where appropriate. The anti-virus software used shall be listed in the test report.
2. Checks are made to ensure that each item of media can be read without error.
3. If the data has been encrypted or password protected in any way then checks are made to ensure that the data can be accessed using the decryption key or password provided by the Service Provider.
4. Checks are made to see if compression has been used, in which case tests are undertaken to ensure that the data can be decompressed. The compression utility used shall be listed in the test report.
5. Sample data is viewed to ensure that the deposit contains a Base Case.
6. If necessary the Service Provider will be contacted to notify them of any problems found during Integrity Testing and they will be requested to correct these.

## SCHEDULE 2

### THE CUSTODIAN'S FEES

**1. 1. Initial Fee:** [REDACTED]

(Payable before commencement of work)

**2 Annual Fee:** [REDACTED]

(Payable upon completion of this Agreement and each anniversary of the execution of this Deed)

**3 Release Fee:** [REDACTED]

(Payable on each occasion that the Base Case is released by the Custodian)

**4. Scheduled Update Fee:** [REDACTED]

Scheduled Update Fee (2<sup>nd</sup> and subsequent scheduled deposits in any one year, payable on completion of this Agreement and on each anniversary thereafter)

**5. Unscheduled Update Fee:** [REDACTED]

Unscheduled Update Fee (per unscheduled deposit)

Fees are valid up until 31 October 2012, when they will be subject to review by the Custodian