

Schedule 26

Administration of Third Party Claims

1. Introduction

1.1 Although liability for Highway Claims has been passed to the Service Provider under the Contract, and the Service Provider has provided an indemnity to the Authority in respect thereof under Clause 66 (*Indemnity*) of the Contract, the Authority requires the Service Provider to maintain a robust approach to defending Highway Claims in accordance with the Authority's own approach, and in order to maintain the Authority's reputation in respect of minimising the number and value of Highway Claims as much as reasonably practicable.

1.2 In general, a robust approach to the defence of Highway Claims will comprise adherence to the principle that Highway Claims that have a realistic prospect of being defended should be taken to trial, and a decision to settle, pay or compromise a Highway Claim should not be made by the Service Provider on purely economic grounds, but should be reviewed by all appropriate employees involved, and should fully take into account the following considerations:

1.2.1 the likelihood of successfully defending such Highway Claim, taking into account the grounds of the Highway Claim, the circumstances of the incident giving rise to the Highway Claim and any relevant precedents or other relevant considerations;

1.2.2 the likelihood of future Highway Claims of the same or a similar nature being made, including whether such payment, settlement or compromise will set any adverse precedents in respect of the likely conduct or outcome of such future Highway Claims;

1.2.3 whether the grounds for such Highway Claim is previously unlitigated or infrequently litigated, either in general within English law or within the locality, and is therefore not one for which the result can be easily predicted;

1.2.4 whether the Highway Claim is or is likely to be part of a general increased trend in the amount of Highway Claims made in the locality because of the activities of any claims lawyers in the locality; and

- 1.2.5 any proposals that the Service Provider would or has put forward pursuant to Paragraphs 3.1(g) and/or 3.1(h) of this Schedule 26.
- 1.3 In addition, the procedures to be followed by the Service Provider when handling any Highway Claim should as a minimum comply with the following:
 - 1.3.1 claimants or potential claimants that have contacted the Service Provider about a Highway Claim or potential Highway Claim, who the Service Provider believes (acting reasonably) do not have any legal representation, should be sent a claim form with an explanatory leaflet explaining the requirements necessary in order for them to pursue a Highway Claim;
 - 1.3.2 when the Service Provider becomes aware of a Highway Claim or potential Highway Claim, the Service Provider shall undertake a thorough site investigation of the site implicated, to identify, measure and photograph in colour any defect implicated, using a suitable measuring tool which shows the depth and width of any defect;
 - 1.3.3 ensuring that Highway Claims are proactively managed utilising an appropriate electronic case management system;
 - 1.3.4 ensuring that appropriate performance management information is captured and regularly reviewed;
 - 1.3.5 ensuring that Highway Claims are allocated a realistic reserve as soon as they are received, rather than the reserve being set on a worse case scenario, and reviewing the level of the reserve as the claim progresses, with the reserve being split into property damage, personal injury, own costs and third party costs;
 - 1.3.6 use of an appropriate case strategy document that illustrates activity to be undertaken when handling the Highway Claim, and includes the claims handler decision making process for determining and/or denying liability;
 - 1.3.7 appropriate fraud triggers should be developed by the Service Provider and utilised in respect of each Highway Claim, and where such fraud triggers indicate that fraud may be present in a Highway Claim, such Highway Claims should be dealt by an appropriately authorised member of staff;

- 1.3.8 in appropriate circumstances, legal costs claimed by a claimant in respect of a Highway Claim should be reviewed and challenged by a suitably experienced costs specialist to ensure that appropriate rates, number of hours and disbursements have been included, and that such are supported by documentary evidence where applicable;
- 1.3.9 where a Highway Claim is to be taken to full trial, the Service Provider should ensure that any evidence provided in court is given by personnel with suitable experience of the Services, who are trained and familiar with court procedures; and
- 1.3.10 following a trial, where appropriate a summary of lessons learned should be undertaken and documented, and used to improve risk management if applicable. In addition, on a regular basis an independent review and/or audit of files should be undertaken, to share lessons learned with individual employees or to identify wider areas for improvement in risk management.
- 1.4 The Authority will be responsible for dealing with all Highway Claims in respect of which the incident giving rise to the Highway Claim arose before the Service Commencement Date. However, the Authority will require cooperation from the Service Provider, by providing information, records and employees, to assist the Authority in its conduct of Highway Claims for which it retains responsibility.
- 1.5 The Service Provider will be responsible for dealing with all Highway Claims in respect of which the incident giving rise to the Highway Claim arises on or after the Service Commencement Date.
- 1.6 Each Party acknowledges a responsibility to respond to all requests for information, factual reports and attendances at court where necessary by either Party concerned with the conduct of a Highway Claim pursuant to the Protocol under Part 2 of this Schedule 26.
- 1.7 The Service Provider acknowledges the requirement to comply with its responsibility for discharge of the Council's statutory obligations in respect of the inspections, maintenance and repair of the Project Network in order to provide a defence under section 58 Highways Act 1980 as required under the Contract.
- 1.8 The Service Provider shall ensure that any surveyors and inspectors, including the Independent Surveyor and the Independent Bridge Inspector, are skilled, qualified

and fully trained, not only in respect of the method and quality of surveys and inspections to be carried out, but in respect of giving evidence in Court.

- 1.9 The Service Provider shall use reasonable endeavours to ensure that the conduct of all Service Provider Parties towards or in the presence of persons affected by the carrying out of the Contract or otherwise coming into contact with the Service Provider's employees in the course of their carrying out the Contract, whether in respect of the conduct of Highway Claims or otherwise, is at all times considerate and respectful, in accordance with the requirements of any relevant Council Policies and such as to uphold the image and reputation of the Council.

2. Insurance Claims Protocol

Dealing with Highway Claims

- 2.1 This section 2 of this Schedule 26 (the Protocol) is intended as a reasonable and practical working arrangement for dealing with those claims which are to be dealt with under the Civil Procedure Rules and Pre-Action Protocols. The application of the Civil Procedure Rules and Pre-Action Protocols shall take precedence over this Protocol.

Highway Claims Pre-Service Commencement Date

- 2.2 Where a Highway Claim is made in respect of which the incident giving rise to the Highway Claim arose before the Service Commencement Date, this shall be administered by the Authority. The Service Provider shall support the Authority by providing any reasonable assistance required in relation to the conduct of any Highway Claim in order to allow the Authority to comply with the provisions of all applicable Pre-Action Protocols and the Civil Procedure Rules, including but not limited to:

2.2.1 the provision of any documents, data or other information held by the Service Provider to which the Authority has no reasonable means of access; and

2.2.2 access to, and the release from normal duties for such period as is required by the Authority (acting reasonably) of, any employee required to provide information or act as a witness for the Authority,

as further detailed in this Protocol.

- 2.3 Where a Highway Claim is received by the Service Provider, or any correspondence preceding or superseding any Highway Claim, which relates to the incident giving rise to the Highway Claim arising before the Service Commencement Date, an acknowledgement (the "**Letter of Acknowledgement**") will be sent by the Service Provider to the Claimant or the Claimant's representative (as appropriate) as soon as reasonably practicable but in any event no longer than five (5) Business Days following receipt of such Highway Claim or correspondence. The Service Provider shall ensure that any the Letter of Acknowledgement:
- 2.3.1 acknowledges the Highway Claim or correspondence in accordance with the requirements of any applicable Pre-Action Protocols and/or Civil Procedure Rules;
 - 2.3.2 does not make any statement to the Claimant accepting or implying negligence or responsibility on the part of any party; and
 - 2.3.3 states that the Claimant should contact the Authority in all future correspondence relating to the Highway Claim.
- 2.4 The Service Provider will forward the letter of claim or any other correspondence received from the Claimant or the Claimant's representative (as applicable), together with a copy of the Letter of Acknowledgement, to the Authority and/or any other party as advised by the Authority as having responsibility for the conduct of Highway Claims on behalf of the Authority, as soon as reasonably practicable but in any event no longer than five (5) Business Days after the Letter of Acknowledgement has been sent to the Claimant or the Claimant's representative.
- 2.5 The Service Provider shall, as soon as reasonably practicable but in any event no later than ten (10) Business Days before the expiry of any relevant time limits within the Civil Procedure Rules or Pre-Action Protocols, secure the release of copies of all information and data, including but not limited to files, notes, records, statements and charts, which they have in their possession or control and which is relevant to any Highway Claim to the Authority, having due regard to the Service Provider's duty of confidentiality owed to any third party, including those arising under the Data Protection Act.
- 2.6 The Authority may require that factual reports and/or witness statement are obtained from any relevant witness concerned as soon as possible (or where applicable, by the relevant insurer on behalf of the Authority) through the carrying out of interviews

with such relevant witness. The Service Provider may require the presence of a representative of the Service Provider at any such interviews. Such factual reports and/or witness statements shall be shared between the Parties.

- 2.7 The Service Provider shall ensure that its Personnel co-operates in any activity reasonably required by the Authority in relation to any Highway Claim for which the Authority is responsible, and shall release any Personnel as are reasonably required by the Authority in order to:
- 2.7.1 assist the Authority in undertaking a full investigation into any Highway Claim, including location and provision of any relevant documentation;
 - 2.7.2 prepare any factual reports and/or witness statements under Paragraph 2.6;
 - 2.7.3 undertake any general preparation for any court hearing; and
 - 2.7.4 attend at any court hearing for the purposes of giving evidence.

Highway Claims During the Contract

- 2.8 Where a Highway Claim is made in respect of which the incident giving rise to the Highway Claim arose on or after the Service Commencement Date, the Service Provider will be responsible for conduct of that Highway Claim in accordance with the indemnity provided by the Service Provider under Clause 66 (*Indemnity*) of the Contract. The Authority will support the Service Provider by providing any reasonable assistance required in relation to the conduct of any Highway Claim in order to allow the Service Provider to comply with the provisions of all applicable Pre-Action Protocols and the Civil Procedure Rules, including but not limited to:
- 2.8.1 the provision of any documents, data or other information held by the Authority to which the Service Provider has no reasonable means of access; and
 - 2.8.2 access to, and the release from normal duties for such period as is required by the Service Provider (acting reasonably) of, any employee required to provide information or act as a witness for the Service Provider,
- as further detailed in this Protocol.
- 2.9 Where a Highway Claim is received by the Authority, or any correspondence preceding or superseding any Highway Claim, which relates to an incident giving rise

to the Highway Claim arising on or after the Service Commencement Date, an acknowledgement (the 'Letter of Acknowledgement') will be sent by the Authority to the Claimant or the Claimant's representative (as appropriate) as soon as reasonably practicable but in any event no longer than five (5) Business Days following receipt of such Highway Claim or correspondence. The Authority shall ensure that any such Letter of Acknowledgement:

- 2.9.1 acknowledges the Highway Claim or correspondence in accordance with the requirements of any applicable Pre-Action Protocols and/or Civil Procedure Rules;
 - 2.9.2 does not make any statement to the Claimant accepting or implying negligence or responsibility on the part of any party; and
 - 2.9.3 states that the Claimant should contact the Service Provider in all future correspondence relating to the Highway Claim.
- 2.10 The Authority will forward the letter of claim or any other correspondence received from the Claimant or the Claimant's representative (as applicable), together with a copy of the Letter of Acknowledgement, to the Service Provider and/or any other party as advised by the Service Provider as having responsibility for the conduct of Highway Claims on behalf of the Service Provider, as soon as reasonably practicable but in any event no longer than five (5) Business Days after the Letter of Acknowledgement has been sent to the Claimant or the Claimant's representative.
- 2.11 The Authority shall, as soon as reasonably practicable but in any event no later than ten (10) Business Days before the expiry of any relevant time limits within the Civil Procedure Rules or Pre-Action Protocols, secure the release of copies of all information and data, including but not limited to files, notes, records, statements and charts, which they have in their possession or control and which is relevant to any Highway Claim to the Service Provider, having due regard to the Authority's duty of confidentiality owed to any third party, including those arising under the Data Protection Act.
- 2.12 The Service Provider may require that factual reports and/or witness statement are obtained from any relevant witness concerned as soon as possible (or where applicable, by the relevant insurer on behalf of the Service Provider) through the carrying out of interviews with such relevant witness. The Authority may require the

presence of a representative of the Authority at any such interviews. Such factual reports and/or witness statements shall be shared between the Parties.

2.13 The Authority shall ensure that its personnel co-operates in any activity reasonably required by the Service Provider in relation to any Highway Claim for which the Service Provider is responsible, and shall release any personnel as are reasonably required by the Service Provider in order to:

2.13.1 assist the Service Provider in undertaking a full investigation into any Highway Claim, including location and provision of any relevant documentation;

2.13.2 prepare any factual reports and/or witness statement under Paragraph 2.12;

2.13.3 undertake any general preparation for any court hearing; and

2.13.4 attend at any court hearing for the purposes of giving evidence.

2.14 Where the Authority takes over conduct of a claim in accordance with Clause 66.4.6 of the Contract, the Service Provider shall be responsible for its own costs up to the date of such action by the Authority.

2.15 The Service Provider or their nominated organisation will handle any Highway Claim for which it is responsible in accordance with the requirements of the relevant Pre-Action Protocol and Civil Procedure Rules.

2.16 Where the Service Provider develop any standard documentation, including any claim forms, to be issued to members of the public on receipt of a Highway Claim, the Service Provider shall first submit the same to the Authority under the Review Procedure.

Notifications and Publicity

2.17 The Service Provider shall give the Authority notification as soon as reasonably practicable but in any event within two (2) Business Days in respect of any Highway Claim it has received or has been notified that it is likely to receive where any death or personal injury has arisen, and/or where the potential value of such claim is above [REDACTED] (Indexed) (excluding costs).

2.18 In accordance with Clause 103 (*Public Relations and Publicity*) of the Contract, the Service Provider shall not by itself, its employees or agents (and shall procure that the

Key Sub-Contractors shall not) communicate with representatives of the press, television, radio or other communications media on any matter concerning Highway Claims, without the prior written approval of the Authority.

3. Claims Meetings and Claims Report

3.1 Claims Report

The Service Provider shall issue a report (the Claims Report) to the Authority no later than five (5) Business Days prior to each Claims Meeting arranged pursuant to Paragraph 3.2. Each Claims Report shall include, but not be limited to, the following information in respect of the Service carried out in the previous three (3) Months, including but not limited to:

Part 1: Claims Information

- a) details of new Highway Claims received by the Service Provider or by the Authority and forwarded to the Service Provider, together with an estimation of the likely total value of damages to be payable under such Highway Claims;
- b) a statement of the status of Highway Claims being progressed at the time of the Project Report by the Service Provider together with an estimation of the likely total value of damages to be payable under such Highway Claims and a summary of how this has changed from previous Claims Reports;
- c) details of any forthcoming Court hearings in respect of any Highway Claims;
- d) details of any concluded Highway Claims;
- e) details of the results of concluded Court hearings in respect of any Highway Claims;
- f) details of the amount of Highway Claims (expressed as a total for the Contract Year and as a percentage of all Highway Claims received by the Service Provider in that Contract Year) that have been repudiated by the Service Provider before being lodged with any court and which have not been further pursued by the Claimant, or which have been discontinued by the Claimant;

- g) any patterns emerging from Highway Claims received by the Service Provider which identify any potential issues with any Project Network Parts or with the delivery of the Services;
- h) consideration of any proposed changes required to the Service in order to reduce the incidence of Highway Claims, or any proposals for changes to the administration of Highway Claims;
- i) a résumé of the reasons for any delay in the conduct of any Highway Claims with details of the actions and timetable to be taken to mitigate such delays;
- j) a summary statement of any Changes requested by the Authority or by the Service Provider which may impact on the conduct of Highway Claims or could potentially increase the amount of Highway Claims received;
- k) details of any outstanding information required from the Authority and/or the Service Provider in respect of Highway Claims;
- l) details of any changes in the Personnel or any other organisation dealing with Highway Claims;
- m) a list of any items for resolution after the previous meeting that are outstanding at the date of the Claims Report, including details of how the Service Provider plans to address these and the timescale for doing so, and detailing how any items outstanding at the date of the previous Claims Report but addressed in the interim period have been addressed;
- n) any other details or information relating to Highway Claims that the Authority may reasonably require;

Part 2: Service Delivery Information

- o) statistics to show how the Service Provider has complied with the Civil Procedure Rules and Pre Action Protocol timescales in response to Highway Claims, together with an explanation for any failure to meet such timescales;
- p) benchmarking any of the Highway Claims statistics against any other organisations as notified by the Authority to the Service Provider, together with a commentary on the performance of the Service Provider when compared with such other organisations;

- p) a description of customer complaints made in relation to the Service which relate to the conduct of Highway Claims;
- q) any information which the Authority may reasonably require in relation to the insurances which the Authority is required to carry itself, including information required on renewal of its policies or on change of insurance provider;
- r) details of any innovation introduced by the Service Provider in relation to the Service and/or the conduct of Highway Claims described in a written report intended to reduce the number of Highway Claims made;
- s) the number of insurance claims received by the Service Provider in respect of the carrying out of the Service, summarising all relevant details including but not limited to the type and cause of claim and location at which the incident occurred; and
- t) any other details or information relating to the Project that the Authority may reasonably require.

3.2 Claims Meeting

The Authority shall arrange a meeting (the **Claims Meeting**) to take place no less frequently than every three (3) Months (or at more frequent intervals as may be required by the Authority acting reasonably). The purpose of the Claims Meeting shall be to (as appropriate):

- a) review the Claims Report;
- b) record and review any delays, claims, incidents or issues arising in relation to Relief Events, Compensation Events, Events of Force Majeure and Excusing Causes, to the extent that such have had an impact on the Required Insurances, on Highway Claims or on the Service Provider's indemnity under clause 66.1 of the Contract;
- c) consider and report on the effect of any Change or Change in Law or Change in Highway Standards, or discuss the effect of any proposed Change or anticipated Change in Law or proposed Change in Highway Standards, which would have any effect on Highway Claims; and
- d) review and discuss any other relevant matter.

- 3.3 The Claims Meetings shall be attended by the Authority Representative and the Service Provider Representative. They shall each procure the attendance of appropriate persons in relation to the agenda of the meeting and who have the necessary knowledge and authority to discuss the subject matter and to make decisions (as appropriate).
- 3.4 The Authority Representative shall minute the Claims Meetings and shall distribute minutes within five (5) Business Days of the relevant Claims Meeting to all attendees of the Claims Meeting. The Service Provider shall respond to the Authority with any amendments to the minutes of the Claims Meeting within twenty (20) Business Days, following which:
- 3.4.1 where no comments have been received by the Service Provider within the timescale indicated, the minutes shall be accepted as drafted;
- 3.4.2 where comments have been made by the Service Provider which are accepted by the Authority, the minutes shall be amended to reflect such comments and redistributed to all attendees within five (5) Business Days of receipt of such comments; or
- 3.4.3 where comments have been made by the Service Provider which are not accepted by the Authority, such comments shall be discussed at the next occurring Claims Meeting.

4. Other Claims

- 4.1 Where any other civil proceedings are brought against the Authority in respect of which the incident giving rise to those civil proceedings arose before the Service Commencement Date, including but not limited to employment law, employee liability or motor insurance claims, the provisions of Paragraphs 2.2 to 2.7 inclusive shall apply to the conduct of such claims by the Authority and the assistance provided by the Service Provider *mutatis mutandis* in respect of such claims.

5. Retention of Documents

- 5.1 The Service Provider shall ensure, notwithstanding the requirements within the Contract to return all Assets at the termination or expiry of the Contract, that it retains a copy of all documents which relate to or could be relevant to any future Highway Claim, for a period of seven (7) years from the date of the termination or expiry of the Contract.

6. Retention of Funds

- 6.1 No later than twelve (12) Months prior to the Expiry Date of the Contract, the Authority shall notify the Service Provider of the figure it considers should be retained by the Authority in order for it to meet the liability for Highway Claims made, settled or determined after the Expiry Date of the Contract for which the Service Provider is responsible under the terms of this Contract (the **Retained Highway Claims Sum**), which shall:
- 6.1.1 be calculated by the Authority on the basis of actuarial advice based upon the previous five (5) years of Highway Claims having been notified by the Service Provider to the Authority in the Claims Reports, but also taking into consideration any Changes in Law, precedents or trends relating to the level at which claims against highway authorities are being settled or determined, and also taking into account the extent to which Highway Claims made settled or determined after the Expiry Date will be provided for under the Required Insurances; and
 - 6.1.2 detail the assumptions and calculations which have been used to determine the Retained Highway Claims Sum.
- 6.2 Where the Service Provider wishes to challenge the Retained Highway Claims Sum, the Service Provider shall notify the Authority of such challenge and giving detailed reasons for such challenge within three (3) Months of receipt of the notice from the Authority pursuant to Paragraph 6.1, and shall also refer the matter to the Dispute Resolution Procedure.
- 6.3 During each of the final six (6) Months of the Term, where the Retained Highway Claims Sum has not been challenged by the Service Provider or has otherwise been determined pursuant to the Dispute Resolution Procedure, the Authority shall be entitled to retain from the Monthly Payment an amount equal to one-sixth of the Retained Highway Claims Sum, provided that where the determination of the Retained Highway Claims Sum pursuant to the Dispute Resolution Procedure takes place later than six (6) Months prior to the Expiry Date, the Authority shall be entitled to retain an equal proportion of the Retained Highway Claims Sum from the Monthly Payment for each Month of the Term which remains following such determination. Where any such amount is greater than the Monthly Payment due in

the Month, the Authority shall be entitled to demand from the Service Provider payment of any shortfall.