Highways Maintenance Efficiency Programme

The Form of Contract for Highway Maintenance Services

Notes for Guidance

Version 2 July 2015

Department for Transport
Great Minster House
33 Horseferry Road
London SW1P 4DR
Telephone 0300 330 3000

Email: highwaysefficiency@dft.gsi.gov.uk

Website: www.dft.gov.uk/hmep/index.php

Images on cover sheet courtesy of HMEP

REVISION SCHEDULE

HIGHWAYS MAINTENANCE SERVICES CONTRACT

Rev	Date	Details	Prepared by	Reviewed by	Approved by
2	June 2015	Review and update following release of NEC3 TSC 2013 and Sector Feedback.	Peter Higgins for Thomas Telford Ltd	ADEPT/HTMA Reference Group	Matthew Lugg OBE HMEP

This Programme is supported by the following organisations:

CONTENTS

FOREWORD

ABOUT THE HIGHWAYS MAINTENANCE EFFICIENCY PROGRAMME

The Highways Maintenance Efficiency Programme (HMEP) is a sector-led transformation initiative that will maximise returns from investment and deliver efficiencies in highway maintenance services. The Programme started in April 2011 with sponsorship from the Department for Transport and is intended to run until 2020.

The Programme is offering local highway practitioners benefits from different ways of working. The vision is that, over time, those involved in highways maintenance delivery, the local authorities as clients and their service providers, be they from the private or public sector will adopt an ambitious and longer-term approach to enable them to:

- continuously find new and improved ways of delivering services to highway users and managing highways assets,
- make use of collaborative partnerships to improve processes and outcomes, and
- deliver a sustainable balance between meeting the needs of highways users, improving quality and minimising costs.

The guidance and efficiency toolkits developed by the Programme have been overseen by the HMEP Programme Board comprising key personnel who support the Programme's aims and ambitions. This ensures that:

- the Programme is truly being driven by what the whole sector needs and wants ("by the sector for the sector"),
- the solutions identified by the sector are relevant, realistic, repeatable, scalable and sustainable, and
- HMEP is benefits-led, driving true transformation of the sector with tangible efficiency gains and a lasting legacy.

As a transformation initiative, HMEP is targeting the ways local highway authorities conduct their business. It invites the sector to adopt new ways of working to deliver efficiency savings through:

- **Collaboration & Change** – looking at how alliances between authorities, and clients and their providers, can be formed to deliver efficiencies in the delivery of highway maintenance services. Other projects are looking at changing business processes, for instance by applying LEAN thinking to the processes behind service delivery and how services or processes can be streamlined to realise efficiencies.

- **Procurement, Contracting and Standardisation** – advising on the routes to procurement, enabling authorities to determine how their current service is aligned to current thinking and which is the best procurement option to realise their future service ambitions. It also provides the tools so that efficiencies can arise through the use of, for instance, a standardised form of contract and highway maintenance specification which are better aligned to the activities that local highway authorities undertake.

- **Asset Management** – by providing advice to the sector in the form of updated asset management guidance, for both a simplistic and, where appropriate, more complex life-cycle planning tool, to determine whole-life asset costs, thus moving away from a reactive to a longer-term approach for maintaining highways assets; to provide training specifically targeted at practitioners to help them move towards an asset management approach and to adopt the new HMEP guidance and tools.

- **Benchmarking & Performance** – collecting, sharing and comparing performance data on customer/quality/cost both to help understanding to show how effective local highway authorities are in delivering value for money services and to drive targeted efficiencies.

Products and tools are being developed for each of these themes and are being designed to be interdependent, but complementary, so that authorities can maximise their returns from their investments.

ABOUT THIS SUITE OF CONTRACT DOCUMENTS

This suite of contract documents is part of the HMEP Procurement, Standardisation & Contracting theme. Entering into a contract is a time-consuming process and there have been many developments in how they should be undertaken in recent years. This HMEP suite of documents compiles the current thinking around procurement and offers tools by which term maintenance services can be procured. It aims to remove the burden of maintaining the many bespoke forms of contract that authorities use and replace them with standard examples, based on current good practice within the sector and is expected to be used in conjunction with the HMEP Standard Specification and Standard Details for Local Highway Maintenance to procure term service maintenance contracts or highway maintenance services. The suite comprises:

- Official Journal of the European Union (OJEU) Procedures and Notes for Guidance,
- Pre-qualification Questionnaire and Notes for Guidance,
- Instructions for Tenderers and Notes for Guidance,
- The Form of Contract for Highway Maintenance Services.

These documents are located at http://www.dft.gov.uk/hmep/efficiency/standard-form-of-contact.php

The suite of contract documents takes practitioners through the procurement stages from advertising the intention to procure to the contract documentation needed to formalise the contractual relationships. It guides strategic thinking around the different considerations when completing these stages.

In sequence, the first document, the OJEU, would be used to advertise an impending contract. The second document comprises the Pre-qualification Questionnaire which is used to determine the merits of those service providers that should be invited to tender from those that should not. The third, the Instructions for Tenderers, gives the data necessary for the *Contractor* to return the tender in the required format. Finally, the form of contract provides the *conditions of contract* and details the Parties' contractual obligations and requirements for performance. These documents will give local highway authority officers the guidance they need to make the right choices while maintaining as much flexibility as possible to increase the scope of works.

Standardisation is one of the key facets of the Programme that will contribute to delivering efficiencies. Local highway authorities need to be aware that any variation to HMEP's standard forms, particularly the Form of Contract, has to be considered carefully and will introduce the need to consult, check and seek appropriate contract and or legal advice. The benefit of an un-amended standard form to both Clients and Contractors is that both will become familiar with its use rather than determining how any bespoking has transferred risk when assessing the impact of any changes. Every change introduced increases uncertainty which the Contractor has to consider and which potentially leads to an increase in cost. Anything that generates inefficiencies and higher than average costs for construction activities would be considered contrary to the HMEP guiding principles. As a consequence of the greater understanding of un-amended standard forms, Contractors should in time give more competitive prices.

STANDARD FORM OF CONTRACT FOR HIGHWAY MAINTENANCE SERVICES 2nd EDITION

The 2nd Edition of the HMEP Contract offers amendments and additions to the NEC 3 Term Service Contract (TSC) (dated April 2013) and comprises the HMEP Form of Agreement, the Contract Data Parts 1 and 2, a template for the Service Information as well as associated guidance. A separate HMEP Price List and HMEP Method of Measurement also form part of the HMEP suite of documents to enable a term service contract to be procured.

HOW WILL THIS HELP YOU DELIVER MORE EFFICIENT SERVICES?

This suite of documents is aimed at local highway authorities to help guide them when procuring highway maintenance services. It is targeted at the Head of Procurement and Head of Highway level to guide their strategic thinking around the different considerations when completing their contract documents. The HMEP Contract 1st Edition was based on the initial findings from a survey of the sector in October 2011 and examples of current contracts obtained from those authorities that have most recently procured highway maintenance services. The HMEP Contract 1st Edition has subsequently been reviewed and updated to take account of current best practice, the recent publication of an updated NEC TSC contract and the Highway

Term Maintenance Association's paper 'Obtaining Value from Constrained Budgets' (2012) to provide comprehensive contract advice to the sector.

COMMENTS AND FEEDBACK

The HMEP Programme Board would welcome any comments and feedback on this suite of documents so that it may be reviewed, improved and refined to give the sector the best advice possible. If you wish to make a comment, please send an email to highwaysefficiency@dft.gsi.gov.uk with the header "Feedback on the HMEP Suite of Contract Documents".

1. INTRODUCTION

1.1 This guidance is for *Employers* who enter into a Highways Maintenance Services contract with a *Contractor* for the purpose of providing services over a term of years for the maintenance of its highways.

1.2 In this guidance terms identified in the Contract Data are in *italics* and defined terms have capital initials.

1.3 The contract provides a flexible template for local authority highways maintenance arrangements. The *Employer* may amend it to suit their specific requirements.

1.4 The contract has been designed to accommodate a wide range of term service maintenance arrangements for highways including but not limited to reactive, routine, cyclical, preventative, emergency and winter maintenance and minor schemes.

1.5 It is flexible as it provides for the *Employer* who chooses to

- retain his own in-house resource and take the lead in the planning and ordering of highways services from a term maintenance *Contractor,* or
- outsource a part or all of its functions to a *Contractor* who takes the lead in planning and delivery of the *service*.

1.6 The contract is based on the standard form of NEC3 Term Service Contract (“TSC”), which has been amended using Option Z to incorporate the best practice and local authority user requirements for highways from throughout the UK. This contract avoids unnecessarily amending the core clauses of the TSC in order to minimise risk and maximise efficiency from standardisation.

1.7 The contract is for the provision of services by a *Contractor* over a term of years (*service period*) rather than for a one-off project. Additional defined terms have been added to afford alignment of the contract administration with Financial Years. This makes the issue of Task Orderis for core services and their alignment to annual budgets more straightforward. However, the ability remains to intrinsically order (and tender) elements of predicable service i.e. management team. This is explored further in the guidance notes to the Service Information.

1.8 Main Options: A (Priced contract with Price List), C (Target contract with Price List) or E (Cost reimbursable contract) may be used. These are the New Engineering Contract (“NEC”) Term Service Contract (TSC) main Options that largely prescribe the mechanism for payment. This HMEP adaptation is different from a standard NEC3 TSC in that the main Option selection can be identified in Contract Data for each *service* component. This allows multiple main Options to be used in combination to best align with the various risk profiles presented by the various *service* components.

1.9 Choice of the appropriate main Option depends upon the risks specific to each *service* component or Task. For example, it is unlikely to be appropriate to use main Option A for providing “emergency” services such as attending road traffic accidents and making safe barriers. In this example it would be difficult for any *Contractor* to price for his risk and it may add a significant premium to the price. This type of service component may be best administered under Option E cost reimbursement.

1.10 The contract achieves clear single point responsibility and accountability through the appointment of a *Service Manager*. The *Service Manager* may be directly employed by the *Employer* or engaged as a consultant. In either case it is important that the individual is a strong leader, suitably qualified and experienced with a good understanding of their own obligations and the duties of the Parties to this contract.

1.11 The Parties and others associated with this contract need to have a clear understanding of its provisions and what is expected of them and each other. In order to maximise the benefits from use of this contract, all users should understand the duties of the *Service Manager*, the *Employer* and the *Contractor*.

1.12 The *Service Manager*, the *Employer* and the *Contractor* benefit if they work together to establish mutual trust and co-operate, sharing risk and rewards appropriately as provided for in the contract.

1.13 The philosophy of the NEC suite and applying the use of this HMEP contract is summarised in its objectives as follows:

- clarity and simplicity,
- flexibility, and
- a stimulus to good management.

1.14 Clarity and simplicity is achieved by NEC using a simple structure, simple language, simple procedures and clear risk allocation. The TSC provides a range of main and secondary Options that allow the *Employer* to select an appropriate strategy and allocate risks to suit.

1.15 Flexibility is an important characteristic of NEC which can be used for any highways service, under various contract strategies and operates on any scale. The TSC can be used for annual planned or reactive maintenance as well as for minor schemes delivered over a term of years.

1.16 Stimulus to good management is achieved through clarity of role definition, joint decision-making, proper motivation, a forward-thinking culture and controlled outcomes in terms of cost, time, quality and function of the completed project.

1.17 The NEC suite provides for back-to-back contracts for main *Contractors*, *Subcontractors* and consultants. The use of back-to-back NEC contracts throughout the Supply Chain is encouraged as it mitigates risk, standardises procedures, provides compatible communication timescales and achieves consistency in language and record keeping.

1.18 The NEC provides procedures for managing interfaces between the Parties and for the clear allocation of risk.

1.19 NEC3 procedures comprise effective management processes that if operated properly will contribute significantly to the achievement of the *Client*'s *objective* as set out in the Partnering Information.

1.20 Joint decision-making is enhanced by the *Service Manager* and *Contractor* giving each other early warning of problems and risks. This collaborative approach uses proactive foresight to identify solutions to mitigate and avoid risk and other problems before they come to fruition. This maximises the opportunity for the project team as a whole to influence events and should also help minimise the occurrence of disputes.

1.21 The NEC3 preference for early co-operative intervention differs from traditional contracts some of which adopt a more arms-length and reactive approach relying less upon co-operation and more upon the serving of formal notices by the Parties.

1.22 If efficiencies are to be realised, the *Employer* takes the lead on collaborative working and facilitates innovation and *service* improvement with the *Contractor* and his supply chain.

1.23 This may be achieved by Early Contractor Involvement (ECI), the integration of teams and systems and by fostering working relationships that are characterised by early problem solving and adopting a “no blame” culture.

2. KEY FEATURES

2.1 This contract provides the following key features:

- uses a standard suite of contract documents that implements highways best practice from throughout the UK,
- provides for a collaborative approach between the *Employer* and the *Contractor,*
- offers flexibility for the *Employer* to select services and choose appropriate contract options according to his individual requirements and approach to risk,
- provides for annual and medium-term pre-planning of services at both a strategic and operational level,
- lists the overriding objectives for the service that are tailored to suit the particular local authority requirements (*Client objective* as set out in the Partnering Information),
- provides an option for a direct link between performance and payment as well as a mechanism for extensions to the *service period*,
- two options for ordering *service* that may be used in isolation or combination:

  1) Service Information – set out what is required and by when / what frequency and

  2) Task Orders – the *Service Manager* instructs *service* as and when it is required,
- uses an integrated approach to the supply chain, and
- enables second tier subcontracts to be procured on back-to-back terms to mitigate supply chain risk and flow down good management procedures when it is appropriate,

3. USE OF THIS GUIDANCE

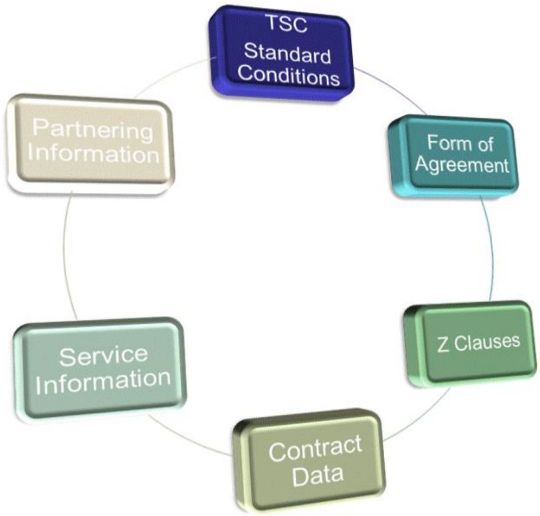
3.1 There is no substitute for reading the contract; specifically the Form of Agreement, the TSC *conditions of contract*, the Contract Data (which incorporates the HMEP z-clauses), the Service Information, the Partnering Information and the schedules appended to the contract. As with any contract, the above documents should be read and developed together.

3.2 This guidance is intended to provide assistance to those responsible for preparing contracts and administering its terms. This is not a contract document and its guidance should not to be relied upon for legal interpretation of the meaning of the HMEP contract.

3.3 This guidance should also be read in conjunction with the TSC guidance notes and flow charts published by Thomas Telford.

3.4 This guidance will be updated from time to time and made available on-line.

4. STRUCTURE OF THIS CONTRACT



4.1 The contract comprises the following documents:

- Form of Agreement,
- TSC *conditions of contract*,
- the Contract Data with main and secondary Options (including Z clauses),
- the Service Information, and
- the Partnering Information.

4.2 The Form of Agreement incorporates the various contract documents and is the document that is signed by the Parties. The Form of Agreement provided envisages that the Parties will execute the document "as a deed". This has certain legal implications, most notably that the Parties will be able to bring actions for breach of the contract for a period of 12 years after the relevant breach. It is usual for highways term maintenance contracts to be executed as a deed but, if a local authority decides that a particular contract can simply be signed, the signature section of the form should be amended.

4.3 The main and secondary Options are the Options stated by the *Employer* in Contract Data part one and comprise:

- Main Options A, C, or E, and
- Secondary Options W2, X2, X4 or X13, X12, X17, X18, X19, Y(UK)2, Y(UK)3 and Z.

4.4 Contract Data part one is completed by the *Employer* and part two is completed by the *Contractor*.

4.5 Under the un-amended TSC, the expectation is that a single main Option of either A, C or E applies to the provision of the whole of the *service*. This HMEP contract allows for different parts of the *service* known as '*service* components' to be carried out under different main Options.

4.6 If more than one main Option applies to the *service*, care is required to ensure there are clear distinctions between the different *service* components. For example if reactive maintenance is carried out on a cost reimbursable basis (main Option E) or planned maintenance is carried out on the basis of rates, prices and amounts in the Price List (main Option A). The same type of work may be paid for on a different commercial basis depending on the main Option used.

4.7 The choice of main Option may be confusing and lead to unintended consequences; if the *Contractor* receives a higher profit from providing the *service* on a cost reimbursable basis, he may favour leaving Defects to be reported by the public and vice versa. If multiple main Options are used then a clear definition of each *service* component needs to be provided by the *Employer* in Contract Data part one.

4.8 The Service Information is information that describes the *service* and states any constraints on how it is provided. It is to be completed by the *Employer* based upon each individual local authority's requirements in accordance with NEC guidance current at the time of preparing the contract.

4.9 The Partnering Information is information setting out the *Client*'s *objective* and how the Partners work together alongside Others in a spirit of mutual trust and co-operation.

4.10 There are footnotes and comments throughout the contract that act as a prompt for each local authority to consider the available options and make appropriate choices.

4.11 Z clauses are the additional conditions and comprise the following:

ZM AMENDMENTS TO THE CORE CLAUSES

ZM1 Identified and defined terms
ZM2 Fair payment
ZM3 Other responsibilities
ZM4 The *Contractor's* design
ZM5 Starting and the *service period*
ZM6 Accepting Defects
ZM7 Assessing the amount due
ZM8 Reasons for termination
ZM9 Intellectual Property
ZM10 Confidentiality
ZM11 TUPE
ZM12 Freedom of Information
ZM13 Data Protection
ZM14 Right to Provide the Service
ZM15 Unincorporated joint venture
ZM16 Human Rights' Act
ZM17 Local Government Ombudsman
ZM18 Assignment
ZM19 Corrupt Gifts
ZM20 Limitation of the *Contractor*'s liability for his design to reasonable skill and care
ZM21 Price adjustment for inflation
ZM22 Efficiency Savings
ZM23 Service Improvement Plan

ZA AMENDMENTS TO MAIN OPTION A CLAUSES

ZA1 Identified and defined terms
ZA2 The *Contractor*'s discount

ZC AMENDMENTS TO MAIN OPTION C CLAUSES

ZC1 Identified and defined terms
ZC2 The *Contractor*'s share
ZC3 Assessing compensation events

ZE AMENDMENTS TO MAIN OPTION E CLAUSES

ZE1 Identified and defined terms
ZE2 Assessing compensation events

ZZ AMENDMENTS

If the *Employer* wishes to add further clauses then these are added as 'ZZ' clauses.

5. COMPLETING THE CONTRACT

5.1 Most of the clauses in the contract are self-explanatory, but some provisions benefit from further explanation and are addressed separately below.

5.2 Schedules 1 and 2 provide a checklist of actions, which may be helpful to read and complete before the contract is issued.

5.3 Fair Payment Charter

- Fair and transparent payment is essential to achieving successful integrated working between the *Employer,* the *Contractor* and his suppliers. The *Employer* is committed to meeting the principles of fair payment.
- The NEC Panel published the Fair Payment Charter in June 2008 to allow its users to implement the Office of Government and Commerce fair payment practices in NEC Contracts. It is based upon their "*Guide to Best Fair Payment Practice".*[1]
- The *Employer* signs the Fair Payment Charter at the outset. The *Contractor* and his suppliers subsequently engaged sign the Fair Payment Charter before they are appointed.

5.4 Transfer of Undertakings (Protection of Employment) and Pensions

- The *Employer* needs to obtain his own independent legal advice in relation to the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") provisions, in particular with regard to what staff will be eligible to transfer pursuant to the TUPE at the *starting date*. Relevant staff may be eligible to transfer from the *Employer* and/or from the existing *Contractor* and perhaps their *subcontractors*.
- The provisions set out in Schedule 1 of the form of contract deals primarily with the arrangements regarding the TUPE transfer of employees at the end of the contract. The treatment of employees transferring at the start of the contract will depend on a mixture of relevant terms in any existing contracts and the application of the TUPE regulations. In contrast, the pensions provisions set out in Schedule 1 will apply in relation to any staff transferring from the local authority to the new *Contractor* at the start of the contract.

5.5 Main Options A, C & E (see also Risk Management)

- The *Employer* must choose at least one of the main Options - A, C or E. The *Employer* may use more than one main Option concurrently and as appropriate for different parts of the *service*, referred to throughout the contract as '*service* components'.
- This flexible approach to the selection of main Option(s) provides each local authority the ability to tailor a strategy that best fits their risk profile that may vary from one *service* component to the next. For example, the risks associated with emergency

[1] See further details at http://www.neccontract.com/documents/OGC_v3%201.pdf

maintenance can differ significantly from the risks associated with planned or cyclical maintenance. In this example, it may not be appropriate to use the same main Option for both *service* components.

- If different main Options apply, for example, to mobilisation, management, planned, emergency or winter maintenance, these are listed in Contract Data part one, each as a different *service* component and each with a single corresponding main Option identified. Each *service* component is defined in more detail in Contract Data part one. It is important that the *Employer* provides clear differentiation of the *service* components before the contract is signed.
- All main Options have amendments to facilitate the consideration of payment by reference to each Financial Year (in order to fit with local authority budgetary requirements.
- The *Contractor* provides forecasts of the total Defined Cost of the *service* for each Financial Year, updated at the intervals (probably monthly) set out in the Contract Data.

5.6 Short commentary on main Options in relation to pricing and payment:

Main Option A (Priced contract with price list)

- The *Contractor* provides a Price List (probably as part of an initial tender) setting out his rates, prices and amounts for individual items.
- The list of items (which the *Contractor* has priced) will probably have been provided by the *Employer* as part of the tendering process.
- The *Contractor* provides a volume based discount on the prices for the part of the service stated in the discount table. The *Employer* specifies the part of the service that is to be subject to discount e.g. bituminous surfacing. Care should be taken to ensure clear identification of the relevant Price List and Service Information elements. For ease of evaluation the *Employer* may also state the cumulative Price for Services Provided In Year ranges.

  At the time of tender the *Contractor* completes the discount table in Contract Data part two setting out the discount to be applied to the prices in the Price List that relate to that part of the service subject to discount.
- The Price for Services Provided In Year for the part of the service stated in the discount table is divided into increments falling within each of the cumulative Price for Services Provided In Year ranges stated in the discount table. The *Contractor's* discount equals the sum of the products of the increment within each cumulative Price for Services Provided In Year range multiplied by the discount percentage.
- At each assessment date the *Service Manager* assesses the *Contractor's* discount. The *Contractor's* discount is deducted from the amount due. The first banding in the discount table "Less than £ [……..]" is likely to attract a 'zero/nil' discount percentage. The *Contractor* tenders a *discount percentage* against each of the bandings of cumulative Price for Services Provided In Year.

When the cumulative Price for Services Provided In Year exceeds a banding then that element that falls within the next banding attracts the associated *discount percentage* and so on.

Main Option C (Target contract with price list)

- Main Option C allows for the *Contractor* to provide a Price List setting out his rates, prices and amounts for individual items, in the same way as under Option A. However the amount due is not calculated using the Price List.
- Instead the Price List is used to set a target, calculated by summing all the Price List items completed in year (simplified you could think of this as the aggregate of all Task Orders completed in year). This is known as the total of the Prices In Year or 'target price'.
- The *Contractor* is paid based on the change in the amount due from one payment assessment to the next. In main Option C the Price for Services Provided to Date is based on the total Defined Cost which the *Service Manager* forecasts he will have paid out plus the Fee and has no direct link to the Price List.
- The Price for Services Provided In Year is the total Defined Cost in the relevant Financial Year plus the Fee. This defined term helps with annual reporting and is also important given the *Contractor's* share calculation is performed each Financial Year.
- At the end of each Financial Year the difference between the Total of the Prices In Year (sum of the Price List items completed) and the Price for Services Provided In Year (all the Defined Cost plus Fee) is shared between the Parties in accordance with the ranges and percentages specified in Contract Data part one.

Option E (Cost reimbursable contract)

- The *Contractor* may be required to provide a Price List of tendered rates, prices and amounts for individual items. Such rates, prices and amounts can be used to forecast the Price for Services Provided In Year. However, regardless of this forecast, the *Contractor* is paid based on the change in the amount due (largely comprising of the Price for Services Provided to Date) from one payment assessment to the next.
- The Price for Services Provided to Date is based on the total Defined Cost which the *Service Manager* forecasts he will have paid plus the Fee. In this way payment to the *Contractor* under main Option E is identical to main Option C, it just doesn't have a *Contractor*'s share calculation for 'pain/gain'.

5.7 ZM20 – Limitation of the *Contractor's* liability for his design to reasonable skill and care

- This Option is taken from the NEC3 Engineering and Construction Contract, and terms amended to be consistent with the TSC. If used, it limits the *Contractor's* liability for defects in the *service* due to his design to that of "*reasonable skill and care*". Note however, that the common law duty on the *Employer* to demonstrate a failure to exercise reasonable skill and care by the *Contractor* is reversed so that the *Contractor* has to prove that he did use reasonable skill and care in carrying out his design.

5.8 ZM21 Price Adjustment for Inflation is used only with Options A and C where the Prices in the Price List are used.

- ZM21 incorporates an amended index for the calculation of adjustments to tendered rates, prices and amounts specific to highways maintenance. The index has been developed by the Building Cost Information Service in conjunction with the Highways Term Maintenance Association.

- These new Highways Term Maintenance Indices reflect the inflationary impact on 21 resource cost indices, measured at monthly intervals.
- The *Employer* includes ZM21 if he wishes to allocate to himself the risk of price adjustment due to inflation. If ZM21 is not included then the *Contractor* would need to consider this risk when he prices the Price List.
- Nonetheless the *Contractor* may still price inclusive of some perceived risk at tender if he thinks that recovery for inflation (using the indices) against his actual cost will be more or less than the adjustment to the Price based on price adjustment indices.
- *Employers* may include inflation as an item in the Risk Register – it is helpful if the Parties consider how to mitigate against the risk of price inflation. Both Parties may benefit commercially from mitigation of this risk if it is shared under main Option C.
- There are two options for the indices that can be adopted:

  Option 1 using nine predefined work category indices (that reflect a fixed allocation of the underlying 21 resource cost indices within each work category), or

  Option 2 using bespoke work category indices reflecting the *Employer's*, or the Parties', allocation of the 21 resource cost indices to the categories of work used for the purposes of the contract.

- These indices should be used in place of indices such as Retail Price Index or Baxter's indices, which have been shown not to properly reflect changes in the costs of the different elements of people, Equipment, Plant and Materials comprised in the rates and prices for highways activities.
- If in doubt, Option 1 above provides a more straightforward approach.

5.9 Secondary Option X18 Limitation of liability

- If Option X18 applies, the *Employer* specifies in the Contract Data if a limit on the liability of the *Contractor* applies, and, if it does, what that limit is. If the Contract Data is left blank, the *Contractor's* liability is unlimited. If it is unlimited, a premium is paid by the *Employer* for transferring this risk, so it is recommended that a limit of liability is considered.
- Other factors to be considered when assessing the risk associated with any limitation of liability may include the credit-worthiness of the *Contractor*, other forms of guarantee provided under the contract by a parent company or a bond provided by a bank and the total forecast price.
- If the *Contractor* is required to maintain professional indemnity insurance, the *Employer* may cap the *Contractor's* liability at the level of the minimum amount of cover that is provided for professional indemnity insurance as stated in the Contract Data.

5.10 Secondary Option X19 – Task Orders

- The contract envisages that works and services to be carried out by the *Contractor* are specified in the Service Information and instructed by Task Orders. However some fixed work may be included within the Service Information and worded so as to automatically be required e.g. management sums, mobilisation etc. This is explored further in the guidance notes in the Service Information.

- Additional defined terms have been added to align the contract with Financial Years. This makes Task Ordering of core services under annual budgets more straightforward.
- Note that Task Orders should be discussed with the *Contractor* before issue, and issued so as to provide the *Contractor* with sufficient work. The piecemeal issue of Task Orders by the *Employer* without proper annual planning and discussion with the *Contractor* makes it difficult for the *Contractor* to plan his workload and deliver innovation and efficiencies.

5.11 Insurance

- The *Employer* states the insurance amounts and any excess in the Contract Data part one. The excess is the amount that the *Contractor* will be required to pay (this may reduce the cost of the premium).
- If design is provided by the *Contractor* or his consultant then professional indemnity insurance may need to be included in the Contract Data part one.

5.12 Additional *Employer* risks

- The *Employer* sets out his additional *Employer* risks in the Contract Data. It is up to the *Employer* to decide if there are additional *Employer* risks. Examples of additional risk may include annual events such as a “marathon” or “major schemes”, a “river crossing” or “contamination” of land.
- In order to avoid any payment of a premium for risk the *Employer* should carefully consider all the *service* risks before completing the Contract Data part one. Clear definition of the additional *Employer’s* risks before starting will enable more realistic pricing and avoid problems that may later escalate into disputes.
- It is important additional *Employer’s* risks are not confused with items to be included in the Risk Register. The latter is achieved through parts 1 and 2 of Contract Data. Inclusion of risks in the Risk Register in either part of Contract Data in no way affects the allocation of risk.
- To change the allocation of a risk requires an entry to the additional *Employer’s* risks section or a z-clause amendment to the list of compensation events.

6. TASK ORDERS

6.1 A Task Order is a document setting out precisely what the *Contractor* is required to do, when he is to do it and the price for doing it. The Task description is works and/or services that are within the scope of *services* set out in the Contract Data part one and Service Information.

6.2 The contract does not obligate the *Employer* or *Service Manager* to issue Task Orders. Except for works intrinsically ordered within the Service Information, the *Contractor* does not provide works and or services unless a Task Order is issued by the *Service Manager*.

6.3 A Task Order may create a specific Task within the overall scope of the *services* for example, for

- mobilisation,
- management,
- planned maintenance,
- reactive maintenance (including emergency repairs,
- winter maintenance, and
- demobilisation.

A Task Completion Date and a priced list of items for the Task are required to be included in a Task Order.

Where available prices for items are taken from the tendered Price List. The prices for items in the Task price list which are not taken from the Price List are assessed in the same way as compensation events, i.e. using forecast Defined Cost plus the Fee, or alternatively if both the *Service Manager* and the *Contractor* agree, the rates and prices in the Price List may be used as a basis of assessment instead.

6.4 The *Contractor* is required to carry out the works or services detailed within a Task Order. The *Employer* is required to pay in accordance with the relevant main Option.

6.5 For core services that are not introduced through the Service Information, the *Service Manager* would usually issue Task Orders as follows:

- before or soon after the start of each Financial Year,
- for as many of the service components as practicable,
- bundling similar works and services together in Task Orders, and
- rationalising the number of Task Orders issued to the *Contractor*. This may require consideration of the control and management of individual projects, design works, budget codes etc., service components etc.

6.6 The Parties recognise that greater efficiencies will come from adopting a collaborative approach, the efficient use of shared resources and the avoidance of duplication of effort.

6.7 Where the *Service Manager* is able to issue Task Orders early in the Financial Year this brings forward the decision-making and maximises the *Contractor's* opportunity to deliver the services efficiently.

6.8 A Task Order should comprise all the information required compliant with clause X19.2 prior to being issued. A Task Order that does not include all the information required by the contract can cause ambiguity and problems in its administration.

6.9 It is anticipated that Task Orders are prepared by the *Service Manager* in close consultation with the *Employer*. The contents of a Task Order are discussed with the *Contractor* before the Task is issued.

6.10 The specific form and layout of a Task Order is for the *Service Manager* to decide however it is sensible to have a standard template to ensure compliance and consistency is achieved. As a minimum it will comply with X19.2 and include the following:

Task Order Date

The date when the Task is instructed by the *Service Manager*.

Who is it issued by and who is it issued to

The instruction is a formal communication and subject to clause 13 requirements. As such the name and addresses of the *Contractor* and *Service Manager* should be clearly identified.

The Applicable main Option and *service* component

The main Option used e.g. A, C or E should be stated. However it is important to note this will be predetermined by Contract Data part one in the related '*service* component' main Option choice. Whilst it is administratively convenient to reference the main Option here, it is not an opportunity to 'choose' a main Option.

What is to be done?

A detailed description of the work in the Task to be provided by the *Contractor* and a proposed service breakdown structure.

Where it is to be done?

The location of where in the Affected Property the Task is to be carried out.

When it is to be done?

A Task start date and Task Completion Date and any specific requirements as to what should be included by the *Contractor* in the Task Order programme.

Are there any special requirements or constraints?

It is good practice to reference the Service Information where specification, standard detail or constraints exist which specify, describe or constrain how the work in the Task is to be provided.

The Task Order should include full specification and any constraints for services that it requires that are additional to the existing Service Information.

A priced list of items and the total of the Prices for the Task Order

A priced list of items of work in the Task in which items taken from the Price List are identified separately from other items.

The total of the Prices for the Task, if Option A or C is used, or the forecast total of the Prices for the Task if Option E is used. Apportionment of the Price into multiple Financial Years if expenditure is committed over more than a single Financial Year. The Price may be a lump sum if Option A is used or the target price if Option C is used.

Are any actions delegated by the *Service Manager*?

Confirmation of who the *Service Manager*'s delegates are with respect to the Task Order. The *Service Manager* may delegate his actions in accordance with clause 14.2 of this contract by first notifying the *Contractor*. This would need to be a separate notification to comply with clause 13.7. For example the *Service Manager* may wish to delegate a team member the authority to instruct changes to the Task, notify compensation events and accept quotations in relation to Task Order compensation events.

7. PERFORMANCE MANAGEMENT

7.1 The provisions for performance management are set out in the Partnering Information. The *Employer* should specify, or the Parties should agree, Key Performance Indicators that reflect the *Employer's* strategic goals and the *Client's objective*.

7.2 The Parties aim to minimise the number of Key Performance Indicators which should meet the following key requirements:

- easy to understand,
- align performance against the objectives,
- readily available,
- easy to collect,
- clear and objective,
- simple to evaluate, and
- set realistic targets.

7.3 If indicators are too complex or targets are unrealistic the *Contractor* may focus on specific areas of the *service* rather than the improving overall performance and may add a premium to his Price for this risk. If a target set for any indicator does not focus the behaviour of the Parties towards the *Client's objective*s then it should not be used.

7.4 The data required to assess performance against each indicator should be easy to collect and interpret.

7.5 When evaluating performance against the targets set for Key Performance Indicators the data should be available at source and it should not require processing, which adds time and increases cost.

7.6 Clause ZM23 Service Improvement Plan sets out how the *Contractor* is to propose improvements in the provision of the *service* and how in turn the *Service Manager* replies. ZM23 further prescribes how often the Parties should formally meet to discuss and agree actions and take decisions on how to improve performance.

8. RISK MANAGEMENT

8.1 Good risk management is essential to the efficient delivery of the *service*.

8.2 Before starting to Provide the Service, the appropriate allocation of risk between the Parties is fundamental for effective risk management. It may be achieved by identifying, in the Contract Data part one, any additional risk which the *Employer* is best placed to manage.

8.3 The early warning provisions afford a proactive system of risk notification, mitigation and avoidance. The provisions include the maintenance of a contemporary Risk Register that tracks proposals, solutions and actions identified at collaborative risk reduction meetings. The early warning provisions clearly identify obligations and motivate the identified people. The concept is to apply foresight collaboratively to mitigate problems and shrink risk.

8.4 Allocating risk to a Party less well placed to manage it adds significantly to the final Price paid for the *service*. Best practice indicates that better value for money is achieved when risk is allocated to the Party best placed to manage it.

8.5 Great care has to be taken by the *Employer* in using the alternative main Options A, C, E or any combination and in choosing the most appropriate secondary Options and completion of the Contract Data part one, as these decisions allocate risk between the Parties.

For example, if main Option A is chosen for emergency or reactive services then a premium is likely to be paid by the *Employer* to transfer this risk to the *Contractor*. Under this main Option the *Contractor* is paid for the risk whether it occurs or not (for example his costs for an exceptionally long and hard winter even if it turns out to be short and mild).

If "*unlimited*" is stated against secondary Option X18 (Limitation of liability) should the *Contractor* perceive that there is a high probability and impact relating to his risk in delivering the *service* then he may add a significant premium to his tendered price.

8.6 A feature of all NEC contracts is the requirements for giving early warnings (see core clause 16). The *Contractor* and the *Service Manager* are required to give an early warning notice to each other as soon as either becomes aware of any matter which could:

- increase the total of the Prices,
- interfere with the timing of the *service*,
- impair the effectiveness of the *service*, or
- increase the *Contractor's* total cost.

Notice is given regardless of whether the matter is a compensation event. Early warning matters are recorded by the *Service Manager* in the Risk Register.

8.7 The provisions in this contract encourage the Parties to work together to resolve problems at an early stage. The Parties are obliged to warn of any matter which could affect the provision of the *service* under this contract and to meet on a regular basis to discuss how best to manage the risk.

8.8 Risk matters are entered into the Risk Register and the Parties attend a risk reduction meeting to discuss the issues and decide how to deal with them. Examples might be a sharp rise in the cost of oil affecting the price of bituminous surfacing, or a potential conflict of interest.

8.9 Following notification of an early warning, the *Contractor* or the *Service Manager* may instruct the other to attend a risk reduction meeting. The purpose of the risk reduction meeting is to discuss how the problem can be avoided or the effects reduced. Any decisions should focus on what action is to be taken next and who is to take that action.

8.10 The *Contractor* and *Service Manager* consider which risks have been eliminated or have passed and can be removed from the Risk Register or whether anything has changed that may affect decision-making. The Risk Register is revised to reflect the decisions made.

8.11 proposals and solutions can be referred to in the management of current risks. One approach is to include a status column to the Risk Register and mark risks as being ‘current’ or ‘avoided/passed’.

8.12 This approach to risk is different from that adopted on some traditional highways contracts whereby the Parties are not required to co-operate, and resort to serving formal notices on each other and passing the blame. A *Contractor* may receive compensation for addressing issues raised by way of the early warning system. On the other hand, if he fails to give an early warning of an event which subsequently arises and that he was aware of, then the *Contractor’s* compensation is assessed as if he had given an early warning.

8.13 A timely early warning provides an opportunity for the whole team to work collaboratively with foresight to identify the most efficient manner of resolving, mitigating or avoiding the risk.

9. SUPPLY CHAIN

9.1 This contract provides for the early identification of strategic supply chain partners through their identification as Partners by naming them in the Schedule of Partners. The Schedule of Partners will comprise not just the *Contractor*'s direct *Subcontractors* but also other suppliers, specialists or professional advisers engaged in the provision of the *service*.

9.2 The Partnering Information sets out how the *Contractor* works with Others and his own *Subcontractors* whom are also likely to be Partners. The contract sets out the requirements in relation to the *Contractor*'s engagement of his *Subcontractors* and requires the *Contractor* to obtain the *Service Manager's* acceptance of any proposed *Subcontractor*.

9.3 The *Contractor* is required to submit the proposed *conditions of contract* for each sub-contract unless an NEC contract is proposed or the *Service Manager* has agreed that no submission is required.

9.4 The *Contractor*'s existing supply chain, which may include subsidiaries owned by a parent or group company, may not necessarily provide best value. This contract provides for a transparent approach to the procurement of the *Contractor*'s *Subcontractors*.

9.5 It is helpful if the *Contractor* notifies the *Service Manager* before the *starting date* if any of the *service* is to be provided by an in-house or subsidiary company (a company with the same parent company) or the parent company.

9.6 It is recommended that the *Contractor* provides an evaluation or analysis for any *service* that is procured by *Subcontractors* irrespective of whether or not one of the *Subcontractors* is a parent or group company or a strategic Supply Chain partner or not.

9.7 The Parties agree to work together to procure the strategic supply chain and when appropriate subcontracts or supplier contracts are placed, they are on "back-to-back" NEC terms and consideration given as to their inclusion within the Schedule of Partners.

9.8 Back-to-back terms may include the choice of the same main and secondary Options for the subcontract *conditions of contract*, but the *Employer* accepts that back-to-back terms may not always be appropriate, for example the Fee (level of overhead or profit earned) or the level of *Employer*'s liability or third-party insurance cover.

9.9 The *Contractor* aims to allocate risk in the most appropriate way down through his supply chain, so as to avoid the addition of unnecessary premiums for risk increasing the prices. The *Employer* may not accept a subcontract or supplier contract if it places risk inappropriately with the supply chain; an example may include inappropriate payment terms.

9.10 The *Contractor* sets targets and provides appropriate incentives within his contracts with his *Subcontractors* and suppliers that are consistent with his own contract with the *Employer* and compatible with the *Client*'s *objective*.

9.11 The *Contractor* treats his supply chain as part of the integrated team and from time to time they may be invited to meetings by the *Employer*.

9.12 The *Contractor* complies with the following best practice requirements for management of the supply chain:

- identifies them early,
- provides for early involvement,
- works collaboratively with them,
- integrates and develops shared services,
- engages them on back-to-back terms when it is appropriate,
- develops commercial transparency (open book working) when using Option C or E,
- pays them on time in accordance with the Fair Payment Charter,
- ensures that Prices and Fees are at open market or competitively tendered,
- ensures that they are committed to the *Client*'s *objective*s,
- considers them for inclusion in the Schedule of Partners
- shares and allocates risk appropriately,
- does not compromise quality or health and safety, and
- guarantees the availability of frequently used items, for example items of Plant and Materials spares.

10. VALUE MANAGEMENT

10.1 The *Contractor* carries out the *services* in a manner that achieves value for money for the *Employer*, improving performance year on year, generating efficiencies, mitigating risk and eliminating waste in order to reduce the total cost.

11. PRICING TASK ORDERS

11.1 The *Service Manager* consults the *Contractor* about the contents of a Task Order before he issues it. The consultation may include the *Contractor* assisting the *Service Manager* in the pricing of the Task Order, particularly where items in the Task price list are not taken from the Price List. In the case of main Option C, the total of the Prices for a Task may be informally referred to as the 'target price' for the Task.

11.2 The target price is intended to be a realistic assessment of the outturn cost. Items making up the Task price list are taken from the Price List.

11.3 If the work in the Task comprises items that are not taken from the Price List then these items are assessed in the same way as compensation events. This means non Price List items are assessed using forecast Defined Cost plus Fee (i.e. rates, Prices or amounts at competitively tendered or open market prices with appropriate deductions as set out in the contract, for example, for Supply Chain national agreements or rebates) or alternatively, if both the *Service Manager* and the *Contractor* agree, the rates and Prices in the Price List may be used as a basis of assessment instead.

11.4 For items not taken from the Price List, that are assessed using forecast Defined Cost, the forecast includes risk allowances for cost matters which have a significant chance of occurring and are at the *Contractor's* risk under the contract (clause 63.7). The exercise of pricing a Task Order could be compared with an estimator's analysis and the approach similar to that employed at tender. In the case of non-Price List items in particular, a detailed build-up of forecast Defined Cost is likely to follow the structure of the Schedule of Cost Components and include commentary over the components of People, Equipment, Plant and Materials, Charges, Insurance and *Subcontractors*.

11.5 The *Employer* should make budgetary provision for those risks that he is liable for. These will be those risks: identified in clause 80 *Employer'*s Risks and potentially added to under Contract Data part one through 'additional *Employer'*s risks', and risks that come to fruition that qualify as compensation events.

11.6 The *Employer* should also consider the implication of price adjustment for inflation (clause ZM21) as this impact risk, as can a number of the secondary Options.

11.7 The level of detail in the Service Information and Price List has a major impact on the allocation of risk. The drafting approach to these documents significantly influences the financial risk allocation. A 'lump sum / performance specification' presents a different financial risk to a more granular 'rate and re-measurable quantity' approach. The Price List can accommodate either approach or be a hybrid of both.

11.8 It is important to remember that the presentation of how the Task Order has been priced may be subject to further requirements stipulated in the Service Information. For example the Service Information may require the pricing of Task Orders to be broken down into work themes, budgetary codes or breakdown structures.

11.9 The *Employer* may prepare independently a market test comparator (MTC). This would afford a comparison between the MTC and the total of the Prices for the Task Order. The MTC uses the same quantities or amounts applied to the Prices in the Task Order. It is calculated using historical open market rates, prices and amounts.

11.10 If differences are identified in the comparison, they could be discussed jointly between the Parties. If the rates, prices or amounts used to calculate the total of Prices for the Task Order are shown by comparison with the MTC to be too high or too low, the Parties may agree to review the pricing of the Task Order.

12. OPEN BOOK COST MANAGEMENT

12.1 It is important that the *Employer* identifies what records it requires and verifies that the proposed *Contractor* is able to meet these requirements, preferably as part of the procurement process, so that both Parties are entirely clear about the records that will be maintained, and their transparency.

12.2 Having confidence in the transparency of the information provided is essential to the development of a relationship of trust between the *Employer* and the *Contractor*. Once there is trust in the information being provided, the *Employer* can build up an understanding of the true costs of providing highways services on the highways network and can work with the *Contractor* to reduce costs and improve efficiency over the *service period*.

12.3 It may be impossible or counter-productive to monitor all the costs all of the time, but the availability of records will enable sample audits to be undertaken by the *Employer,* its agents, advisors or auditors as and when required.

12.4 The Service Information sets out the requirements for the *Contractor* to maintain records of his Defined Cost. The principle of open book cost management applies to the contract irrespective of whether or not main Options A, C or E is used. Despite payment under main Option A being predominantly concerned with Price rather than Defined Cost, Defined Cost still has a very prominent role under main Option A in the assessment of compensation events and the pricing of Task Orders. The *Contractor* is required to maintain records on an “open book” basis, that is on the basis that records of Defined Cost are maintained in a transparent and easily accessible form and made available to the *Service Manager* and *Employer* as required by the contract.

12.5 Open book cost management is the sharing of cost information, some of which may be *Commercially Sensitive Information*. Information which is commercially sensitive is identified by the *Contractor* in the Contract Data part two.

12.6 Open book cost management allows costs to be managed effectively, for efficiencies to be realised and wastage reduced. It allows for a better understanding of cost and the implications of decision-making and informs forward investment.

12.7 There is a significant difference between price and cost. Price includes risk which is paid to the *Contractor*, whether or not the risk materialises. Cost is the actual cost properly incurred; so included in cost is only the risk that has materialised.

12.8 The SCC and SSCC provide a narrative to allocate cost between various components, that is People, Equipment, Plant and Materials, Charges, Manufacture and Fabrication, Design and Insurance. All the *Contractor*’s costs that are not included in the Defined Cost are treated as included in the Fee.

12.9 It is important that the *Employer* sets out his requirements for open book cost management in the Service Information, listing the accounts and records that are provided by the *Contractor* for validation of his cost.

12.10 It is up to the *Service Manager* to assess and decide what the *Employer* should pay the *Contractor* in accordance with *conditions of contract*. For example, what is necessary "*for meeting the requirements of the law*" under clause 13 (i) of the SCC will vary from country to country. There may be an element of negotiation with the *Contractor*. Whatever is decided, the allocated cost must not conflict with the *conditions of contract*.

12.11 The contract provides that the *Contractor* is required to provide the *Service Manager* and the *Employer* with access to accounts and records. The contract provides that the *Service Manager* may have:

> "access to inspect the accounts and records which he is required to keep and if necessary to justify Defined Cost including payments made to *Subcontractors* in accordance with this contract."

It is important that the *Employer* decides:

- what accounts and records the *Contractor* is required to keep,
- where they should be located, and
- how long they are to be kept.

12.12 Open book accounting is often overlooked when *Employers* prepare tender documents. This might be because the people preparing the documents are not commercial and do not have a good understanding of open book accounting. Yet competitive tendering provides a valuable opportunity for the *Employer* to obtain helpful cost and accounts data before being committed to a contract.

12.13 It is important that the Invitation to Tender (ITT) gathers evidence in the form of typical accounts and records so that the *Employer* understands the *Contractor's* approach to cost. It is not possible to list the accounts and records to be provided in this guidance as it will vary for each *Employer.* It also depends upon the *service* to be provided by the *Contractor,* but a few of the typical records may include:

- tender appraisal/reports,
- quotations,
- purchase orders,
- invoices,
- credit notes,
- delivery notes,
- statements,
- employment contracts,
- human resources policies,
- attendance records,
- timesheets,
- site diaries,
- labour allocation sheets,
- payslips.

12.14 The *Employer* sets out in the Service Information his additional requirements for validating cost. This should include details of what components of cost are validated and also how, when and who does it. The NEC provides that there is no protracted period for settlement of the account. The Price for Services Provided to Date in respect of Task Orders should be easily identified and records maintained for convenient consideration in applications for payment and payment assessment.

12.15 Validation of cost may be carried out either monthly, quarterly, annually or randomly, and it typically includes a check against all of the components of cost, *Subcontractors* and the Fee. It may be carried out by a person employed by the *Employer* or an independent consultant. If any actions of the *Service Manager* are delegated to others then the *Contractor* is notified in accordance with clause 14.2 of the contract.

12.16 The *Employer* sets out his requirements for validation of cost in the Service Information; it will typically include a cost validation plan and a template report with findings including any corrective actions to be implemented by the *Contractor*.

13. DISPUTE RESOLUTION AND AVOIDANCE

13.1 The dispute resolution provisions of the NEC are included without amendment and further guidance is available in the standard TSC guidance notes.

13.2 Often the *Employer* may choose to include an additional Service Information requirement that prescribes a dispute resolution hierarchy, adding for example, an additional procedural step(s) and referrals of matters to which the *Service Manager* and *Contractor* cannot agree.

13.3 The purpose of a dispute resolution hierarchy is to try to ensure that differences are dealt with at an appropriately lower level but escalated to prescribed "higher levels" if resolution is not achieved at the relevant lower level.

13.4 Escalation prior to dispute can also help protect the working relationship between the *Service Manager* and the *Contractor*. In the event neither is prepared to change their interpretation of a matter, then escalation to e.g. directors, can open up new resolutions that may not be within their remit.

13.5 However caution should be taken not to disempower or weaken the perceived *Contractor*'s agent or *Service Manager*'s authority. If either role appears 'weak' then the other may make a habit of escalating matters through the added hierarchal layers. One example is to 'refer to directors'. Whilst this may be appropriate in some circumstances, it would become unworkable if all matters in contention were escalated in this way.

13.6 Dispute resolution hierarchies and resolution techniques such as adjudication and mediation have the potential to avoid costly legal disputes and, for this reason alone, are to be encouraged. Note too that the Parties are required to notify each other of any anticipated disputes so that they can be avoided. Ideally the issues will perhaps be the ongoing topic of one or more early warnings.

13.7 Either Party may at any time give a notice of adjudication to the other. Adjudication is the NEC's default method of dispute resolution prior to litigation should it fail.

13.8 Adjudication is designed to be a swift and relatively low cost method of dispute resolution. The process sees the appointment of an expert third party who is likely to be skilled in the topic of the dispute. This keeps costs down as the need to call experts is reduced. The Adjudicator will give a decision based on the *conditions of contract* that the Parties have signed.

13.9 The Adjudicator makes his decision which is binding on the Parties, within four weeks of receiving the information. This period may be extended but only if the Parties agree.

There are no court costs and the entire process is private and does not form public record.

13.10 It is vital that contentious issues are dealt with fully and head on at the earliest opportunity. Contentious matters that are left or ignored, often due to a perceived stigma of ‘being in dispute’, can be much more damaging and costly than progressing with the recognised best practice of dispute resolution.

13.11 If an adjudication notice is received, the matter should be immediately brought to the attention of the appropriate officers and directors. The receiving Party’s legal department should also be notified.

13.12 Strict timescales apply to adjudication and no delay is acceptable in dealing with a notice.

13.13 Parties are encouraged to use the early warnings and risk management provisions in this contract to mitigate against the risk of disputes.

13.14 Mediation may also be considered as a quick and cost-effective form of dispute resolution and may be used by the Parties if agreed.

SCHEDULE 1 – CHECKLIST FOR CONTRACT DATA

No	Item	Guidance	Tick (✓)
1	(a) What main Option(s) apply?	Choice of main Options A, C and/or E or a combination of these Options	☐
	(b) What secondary Options apply?	Choice of secondary Options X2, X4, X18, X19, Y(UK)2, Y(UK)3 and Z. *Employer* may also consider other secondary options including X17 for low performance damages. X17 relates to low performance against a service level table.	☐
	Is more than one main Option to be used?	For example, the *Employer* may wish to use a different main Option for different *service* components where components have different risk profiles, as follows: *service* component 1 = [1] MOBILISATION/ MANAGEMENT/ DEMOBILISATION, main Option A *service* component 2 = [2] EMERGENCY/ WINTER MAINTENANCE, main Option E *service* component 3 = [3] PLANNED MAINTENANCE, main Option A *service* component 4 = [4] MAJOR SCHEMES, main Option C	☐
3	Who is the *Service Manager*?	The *Service Manager,* after notifying the *Contractor,* may delegate any of his actions for which he is responsible under NEC3 TSC core Clause 14.2.	☐

4	What is the *service period*?	A minimum period of at least 5 years is recommended for the *service period*, in order to justify the *Contractor's* investment and justify the *Employer's* decision to transfer the service and set up a new arrangement.	☐
5	What is the *period for reply*?	Different response times may be required from the *Service Manager* dependent upon the urgency, for example, if a response is required from the *Service Manager* in order for the *Contractor* to make safe at a Road Traffic Accident. A table of suggested priority rankings is set out in the contract as a starting point. The *Employer* is free to set out his own priorities in the contract.	☐
6	What other matters will be included in the Risk Register?	It is recommended that *Employer* hold a pre-contract risk workshop to identify the risk which may affect the delivery of the service in the first Financial Year, for example 1) works by others, 2) diversions due to motorway closures, 3) increase in toll charges for river crossings, 4) annual events such as a marathon, and 5) fuel shortages.	☐
7	What is the *starting date*?	If the *service* is time-sensitive it may be necessary to set a specific time for the handover of the service so that there is no gap in the provision of the service, for example, “Monday 1st April 2013 at 00:00:00.”	☐
8	What is the *interest rate*?	The *interest rate* percentage is applied to late payments under the Late Payments of Commercial Debts (Interest) Act 1998 (the “Act”). There is a statutory requirement to pay interest on late payments; in this contract the cost of borrowing is based upon the current Bank Base Rate which is adjusted monthly by the Bank of England, dependent upon global economic factors. It is important that *Employer*s	☐

		consider the interest rate percentage carefully to ensure that it reflects reasonably the cost of borrowing at the time of going to tender. Under the Act there is a requirement to provide a "substantial remedy" for late payment, failing which the default rate of 8% above the Bank of England base rate applies. From the limited case law on this Act, it appears that an *interest rate* of at least 4% to 5% above the Bank of England Base Rate should be considered by *Employer*s to avoid the default provisions applying.	
9	Insurance – what level of cover is required?	What are the risks? Who is responsible for insuring the risk? Will the *Employer's* existing policies respond? What Equipment or Materials are provided to the *Contractor* by the *Employer*, for example, gritting equipment and/or salt? Is the level of cover sufficient to cover depots that may be leased to the *Contractor*? The *Employer* needs to consider his specific risks and the appropriate level of cover, referring to his insurance advisors as necessary.	☐
10	If there are any additional *Employer* risks, what are they?	The *Employer* needs to identify his risks specifically. For example, if there is a new bridge crossing, the *Employer* may hold the risk relating to an increase in toll charges for an existing crossing. Note, if an *Employer's* risk event occurs it is a compensation event under this contract.	☐
11	If more than one main Option applies, that is A, C & E, what Option applies to which part of the service?	Set out the *Service* part and briefly identify what is included and the main Option that will apply. It is important to ensure clarity in defining different parts of the *service* avoiding potential for duplication or ambiguity and also so that Defined Cost may be recorded and compared accurately with the Price. In the following	☐

example, management (*Service* part 2) includes the people responsible for day-to-day management of the service:

***Service* part**	***Service*[2]**	**Main Option**
1	Mobilisation/ demobilisation	*C*
2	Management	*C*
3	Emergency maintenance	*E*
4	Winter maintenance	*C*
5	Planned routine or cyclical	*A*
6	Major schemes	*C*

2 The *services* are set out in more detail in the Service Information.

12	What is the *Contractor*'s share, if main option C applies?	This depends upon the risk profile for the service to be provided by the *Contractor*; there is no standard requirement. Great care should be taken in setting the risk profile as it will drive the *Contractor*'s behaviour. In relation to cost overruns, it will be very important to establish, on the basis of the *Employer*'s predicted budget, what level of cost overrun is affordable. Above this level, the *Contractor's share percentage* may need to be "100%", but the *Employer* should remember that a premium will be paid as the *Contractor* is likely to add a significant amount to his price for this risk. In relation to cost saving against the target, what additional payment would the *Employer* be willing to accept, bearing in mind that payment of a *Contractor*'s share may be viewed as equivalent to a bonus which needs to be justified? Given the sensitivity of these arrangements, it is recommended that the *Contractor*'s *share percentages* are discussed with bidders during the tender stage so that they are not viewed as a penalty. Other potential consequences include bidders including contingencies in their tendered rates, prices and amounts, or are otherwise encouraged to include substantial addition for risk when agreeing a target price for individual Task Orders. Set out below is one hypothetical example of how the *Contractor*'s *share percentage* might be completed.	☐

Share range	***Contractor*'s share percentage***
Less than **110%**	**50%**
Greater than **110%**	**100%**

13	Commercially Sensitive Data	The *Contractor* sets out in Contract Data part two what is *Commercially Sensitive Information*, for example, staff payslips or terms and conditions of employment.	☐

SCHEDULE 2 – CHECKLIST FOR SERVICE INFORMATION

No	Item	Guidance	Tick (✓)
1	Delegated Actions		
	(a) Is delegation of statutory functions required?	For example, under the Highways Act 1980, Road Traffic Regulations Act 1984, New Roads and Street-works Act 1991, Cycle Tracks Act 1984, Traffic Calming Act 1992 and Town Police Clauses Act 1847. If delegation of these statutory powers is not required the Z clause can be stated to "not apply" in the Contract Data and the Z clause deleted.	☐
	(b) What actions are to be delegated by the *Service Manager*?	It is recommended that there is a single *Service Manager* and he be at a senior management level such as Director and that he delegates his actions for different *Service* parts to others.	☐
2	Pre-planning delivery of the service		
	(a) Who takes the lead in preparing the Annual Plan and Medium Term Plan? Is it the *Contractor* or the *Employer*?	The reference is to the Annual and Medium Term Plan for the *service*.	☐
	(b) What number of years is required for the Medium Term Plan?	This depends on the ability of the *Employer* to forecast the services, taking account of economic, political and financial drivers. *Employers* should match the period covered by the relevant local authority's medium term financial plan.	☐
3	*Operations Board*	What are its responsibilities – are they different from those set out in the contract?	☐

	(a)	How often should it meet, weekly or monthly?	....	☐
	(b)	How many representatives are required from each Party?	....	☐
	(c)	How many people are required from the *Contractor*?	....	☐
	(d)	How many people are required from the *Employer*?	....	☐
	(e)	What are its objectives?	The objectives for the *Operations Board* are set out in the Service Information and otherwise agreed by the *Strategic Board*.	☐
4	*Strategic Board*		What are its responsibilities – are they different from those set out in the contract?	☐
	(a)	How often should it meet, monthly or quarterly?	....	☐
	(b)	How many representatives are required from each Party?	....	☐
	(c)	How many people are required from the *Contractor*?	....	☐
	(d)	How many people are required from the	....	☐

		Employer?	....	
	(e)	What are its objectives?	The objectives for the *Strategic Board* are set out in the Service Information and otherwise agreed by the *Strategic Board*.	☐
5	Is the list of the accounts and records to be provided by the *Contractor*?		Sets out the evidence required to support Defined Cost and applies to main Options C and/or E. Records are to be listed in the Service Information – Schedule 6.	☐
6	Mobilisation/demobilisation			
	(a)	Is the *Employer* satisfied with what is asked for from the *Contractor*?	The *Employer* reviews his requirements and refers to the Service Information clause SI 408 and Schedule 9 & 10.	☐
	(b)	What is the maximum sum payable for mobilisation, management and demobilisation?	Referring to the Service Information clause SI 408, the *Employer* amends the contract as required (refer to Schedules 9 & 10). For example, if Option C is used, it may be appropriate to consider a sum of 10% above the target price; for example, if the target price tendered for mobilisation was £185k then the amount entered into the contract would be £203.5k.	☐
	(c)	What are the *Employer's* demobilisation requirements?	Is the list of requirements for the *Contractor's* demobilisation that is set out in the Service Information sufficient?	☐
	(d)	What are the *Employer's* policies and procedures?	Refer to the Service Information clause Si 200. Are there any relevant policies and/or procedures that should be included or incorporated by reference? For example, any polices for complaints, ombudsman or whistle blowing should be listed in Schedule 13.	☐

SCHEDULE 3 – GUIDANCE ON PARTNERING INFORMATION

The following guidance gives some suggested text for the partnering Information used under Option X12. It should be amended and added to as appropriate to reflect the partnering requirements of the specific contract.

1. PURPOSE

1.1 The purpose of this document is to set out how the Partners work together with other members of the supply chain and others involved in the contract in a spirit of mutual trust and co-operation. The new BS11000-[1] sets out a methodology for developing collaborative working when with a number of different stakeholders. It is based on the concept that companies working together often achieve much more than if they work alone. There are many benefits to be gained from collaborative working including:

- efficiencies leading to reduced cost,
- less duplication and a reduction in waste,
- integration of teams and systems,
- common strategies and objectives,
- maximising innovation throughout the supply chain,
- mitigation of risk through joint management.

2. OBJECTIVES[3]

2.1 The Employer's aims are for the contract to operate as a partnering relationship in which:

- there is joint decision making about policy and procedures,
- responsibility and accountability of the Partners is clear,
- the Partners understand the needs of others,
- the Partners work together to deliver mutually agreed outcomes, and
- the relationship works as if it is an integrated single organisation.

2.2 This is a medium to long term contract and it is important that there is on-going investment in the development of an efficient business and working relationship by the Partners. The Partners invest time and resource to continuously develop the relationship.

2.3 The Partners agree to work together with the supply chain and others to achieve the following Objectives (subject to any agreed changes during the *service period*)

2.3.1 quicker and more cost effective procurement,

[3] The *Employer* changes the list of objectives which should be clear, concise and achievable to suit its own particular requirements.

2.3.2 encouraging innovation and promoting continuous improvement,

2.3.3 sharing learning and best practice,

2.3.4 integration of *Employer* and Partners' teams and the strategic supply chain,

2.3.5 effectively pre planning and managing the *service* within budget,

2.3.6 generating efficiencies with savings year on year,

2.3.7 providing a fair approach to the supply chain,

2.3.8 encouraging collaboration throughout the supply chain,

2.3.9 achieving a fair allocation of risk avoiding payment of a premium for the transfer of risk that cannot be managed,

2.3.10 strong *Client* leadership and management,

2.3.11 governance at both strategic and operational levels to drive delivery,

2.3.12 (where appropriate and practicable) local apprenticeship schemes and other training initiatives,

2.3.13 providing incentives for good performance,

2.3.14 mitigating the risk of disputes through early warning and a collaborative approach, and

2.3.15 [the *Employer* sets out any additional objectives for the *service*].

2.4 Each Partner complies with the following best practice requirements for management of their *Subcontractors* and suppliers:

2.4.1 identifies them early,

2.4.2 provides for early involvement,

2.4.3 works collaboratively with them,

2.4.4 when it is possible engages them on back to back terms unless justification of alternative terms is provided to the *Service Manager*;

2.4.5 encourages them to provide commercial transparency (if Option C or E is used),

2.4.6 pays them on time in accordance with the Fair Payment Charter,

2.4.7 ensures they are committed to the achievement of the *Client*'s *objectives*, 2.4.8 shares risk equitably,

2.4.9 does not compromise quality or health and safety, and

2.4.10 allows them to earn a fair and predictable profit.

3. COLLABORATIVE WORKING

3.1 The Partners work together with the supply chain and others to integrate and or share resources to meet the *Client's* objective.

3.2 The Partners recognise that a collaborative culture at both a strategic and operational level offers significant benefits particularly in a long-term relationship over a term of the *service period*.

3.3 The Partners agree to develop relationships which are:

- supportive, friendly but business-like,
- proactive rather than reactive,
- interdependent,
- flexible where all Partners are prepared to change,
- open and transparent,
- sharing best practice for all to benefit,
- respectful of differences, and
- providing a fair and equitable sharing of risk.

3.4 The Partners work together with the supply chain to achieve value for money and continuous improvement in the delivery of the service recognising that all will benefit from improvements in efficiency.

4. MANAGEMENT OF PERFORMANCE

4.1 The Partners measure performance in accordance with the contract and demonstrate that the *Client's* objective is being achieved.

4.2 The table of Key Performance Indicators in Schedule 1 set out the frequency of measurement and the target performance.

4.3 From the starting date until the end of the *service period* the *Contractor* reports to the *Service Manager* his performance against the targets for each of the Key Performance Indicators.

4.4 The *Contractor* keeps records of his performance against the Key Performance Indicators, includes the forecast final measurement against each indicator and his reports are provided at intervals of not less than [monthly][4] on dates agreed with the *Service Manager*.

4.5 The Partners keep under review the Key Performance Indicators and may agree to amend the Key Performance Indicators in accordance with this contract. The *Service Manager* notifies the Partners of any changes to the Key Performance Indicators.

4.6 Performance against the Key Performance Indicators is reviewed [quarterly][5] by the *Service Manager* in conjunction with each Partner.

4.7 The Partners review annually performance against each target in relation to the Key Performance Indicators. The *Employer's* expectation is that the target for each Key Performance Indicator improves over the service period.

4.8 If a Partner fails to meet a Key Performance Indicator target he provides an action plan setting out proposals for improvement and submits it to the *Service Manager*.

5. VALUE FOR MONEY

5.1 Value for money is the cashable gains from efficiencies that result if the service is provided to the same level of quality for a reduced cost whilst meeting the *Client's* objective. Examples of value for money include changes that reduce waste, improve the quality of the service and or reduce the cost of Providing the Service.

5.2 The Partners use the Local Highways Efficiency Toolkit prepared by the Measurement Development Group of the Highways Efficiency Liaison Group or any successor publication to demonstrate value for money.

5.3 The *Contractor* notifies the *Service Manager* as soon as he becomes aware of any matter which could provide greater value for money.

5.4 The Partners work together to keep within the budget for each Financial Year and optimise expenditure on planned or cyclical maintenance in order to reduce any requirements for emergency or responsive maintenance.

[4] *Employer* amends as required.
[5] *Employer* amends as required.

SCHEDULE 1 – KEY PERFORMANCE INDICATORS [6]

No	Description	Criteria	Frequency of measurement	Target performance	
1	[Customer and or *end* user satisfaction]				
2	[*Service* Standards (improvement)]				
3	[Reduced capital & whole life cost]				
4	[Zero Defects]				
5	[Safety-reduced accidents]				
6	[Predictability (time and cost)]				
7	[Efficiency (value for money and innovation)]				
8	[Sustainability]				

[6] Examples have been provided from a highways alliance, the list to be amended or added to as required by the *Employer*.

ACKNOWLEDGEMENTS

This second edition of the HMEP Form of Contract has been drafted in response to sector feedback since the launch of the first edition in July 2013. HMEP commissioned Thomas Telford to undertake a review of the feedback and to draft the second edition to align the contract to current thinking and experiences. The second edition was drafted by Peter Higgins of PD Consult as a sub-consultant to Thomas Telford with guidance from a HMEP review team comprising members of the Highways Term Maintenance Association (HTMA) and the Association of Directors of Environment, Economy, Planning and Transportation (ADEPT). The updated HMEP Contract was reviewed by Local Highway Authority Client and Procurement officers on 30th January 2015.

The first edition of the HMEP Form of Contract was developed and drafted by the Collaborative Working Council (CWC) based on the results of a survey of the sector in October 2011. The resulting HMEP Form of Contract was specifically aimed at highways term maintenance procurement. Its development was guided by a HMEP Project Board comprising wide sector representation as indicated below.

HMEP would like to extend its thanks to all those involved in the original release and continued development of its form of contract to meet the needs of the highways maintenance sector.

REVIEW TEAM – HMEP CONTRACT 2nd EDITION

The HMEP Programme Board would like to acknowledge the help and support it has received from those listed below when undertaking the review of its contract and preparing this second edition.

Matthew Lugg OBE	HMEP Advocate
Gary Thompson	HMEP Project Manager
Peter Higgins	Thomas Telford
David Whitton	Association of Directors of Environment, Economy, Planning and Transportation (ADEPT) Peer Review Leader (Devon County Council)
Paul Davis	ADEPT (Devon County Council)
Steve Ashley	Highways Term Maintenance Association (HTMA)
David Binding	HTMA
Ian Colyer	HTMA
Peter Theobald	HTMA

And to extend thanks to the Local Highway Authority review group comprising officers from the following authorities:

Bristol City Council	Cambridgeshire County Council	Central Bedfordshire Council
East Sussex Council	Gloucestershire County Council	North Somerset Council
Solihull Metropolitan Council	Surrey County Council	Telford & Wrekin Council
Warwickshire County Council		

A legal review was provided by John Hughes D'Aeth, Mark Kaye and David Dennison of Berwin Leighton Paisner.

ACKNOWLEDGEMENTS

The HMEP Programme Board would like to acknowledge the help and support it has received in preparing this document from those listed below.

HMEP PROJECT BOARD

Matthew Lugg OBE	Project Board Chair & Former President of Association of Directors of Environment, Economy, Planning and Transportation (ADEPT)
Anthony Radford-Foley	Technical Advisory Group (TAG)
Martin Duffy	Chartered Institution of Highways & Transportation (CIHT)
Peter Higgins, Andy Warrington	Institution of Civil Engineers (ICE)
Kevin Melling	Association for Public Service Excellence (APSE)
Peter Hyde	Highways Term Maintenance Association (HTMA)
Steven Dennis	Transport for London (TfL) – Transforming London Highways Management
Trevor Collett	London Technical Advisory Group (LoTAG)
John Reed	Association of Directors of Environment, Economy, Planning and Transportation (ADEPT)
Sue Housley	Highways Agency (HA)
Noel Foley	Association of Consulting Engineers (ACE)
Gary Thompson	HMEP Project Manager

In addition to the above organisations the Board would like to acknowledge support from all the local highway authorities, contractors, consultants and the NEC that took part in the consultations.

SUPPORT CONSULTANTS

CWC

Joe Dowling	Director, CWC Group Ltd
David Bowen	Associate Director, CWC Group Ltd
Ian Stuart	Project Manager, CWC Group Ltd
Martin Howe	Partner, Bevan Brittan LLP

URS Infrastructure and Environment Ltd

John Cole	Project Manager