

## Section 274 Agreements – Highways Act 1980

The following note sets out the basic framework and principles involved in the process of:

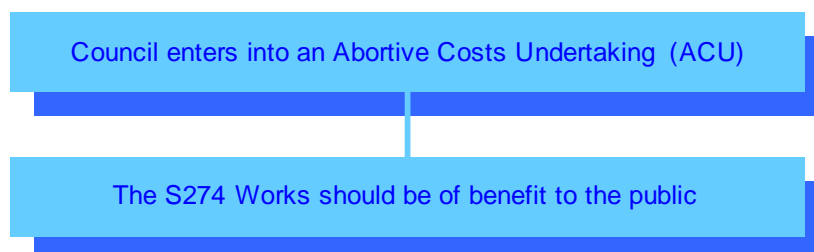
- ❖ Determining the form of a s274 agreement
- ❖ Satisfying conditions precedent
- ❖ Providing suitable mechanisms for cost recovery
- ❖ Dealing with any land conveyance necessary for dedication to public highway
- ❖ How the works would be carried out
- ❖ Basic formats of s274 agreements with draft core documents

### Statutory Framework

1. Agreements for the public sector funding of works by Councils on the strategic road network are made under section 274 of the Highways Act 1980.
2. A s274 agreement is essentially a financial mechanism; it is not a contract to carry out works. .
3. Usually the provisions will be in the form of a typical agreement where the HA is to be Employer. Details of this type of agreement are given later in this guidance.
4. This guidance gives advice on the application of the s274 process and the steps which will need to be taken by the Council when such an agreement is contemplated. The guidance applies to any part of the strategic road network.
5. A Council may enter into a s274 agreement with Secretary of State for Transport (referred to in this guidance as the Secretary of State), for work to the Strategic Road Network (SRN).

### The Process

6. There are a number of 'conditions precedent' which must be met before the HA can enter into a s274 Agreement on behalf of the Secretary of State for Transport.
7. The following chart sets out the basic principles of these conditions precedent:



## 8. Abortive Costs Undertaking

- a. Before the HA can expend any resources beyond initial discussions to establish the commencement of the s274 process, the HA must first secure indemnification from the Council for all costs it might incur.
- b. The mechanism by which such indemnification can be achieved is via a legal agreement in the form of an Abortive Costs Undertaking (ACU).
- c. The ACU is an agreement between the Council and the HA, binding the Council to fund all work by the HA to enact the s274 Agreement. It ensures that the HA cannot be out-of-pocket should the process be stalled by the Council prior to formal completion of the s274 Agreement itself.
- d. The ACU can take two forms:
  - i. An undertaking by the Council to pay any and all abortive costs incurred by the HA, backed by a surety/bond; or
  - ii. A financial deposit provided by the Council into an Escrow Account. Such initial deposit being equal to 1.5x the estimated value of the work to be undertaken by the HA to bring a s274 agreement to the point of it being signed by both parties. All unused monies (including any interest) from the Escrow Account to be returned to the Council upon conclusion.
- e. The HA has no preference which option is used, but in the interests of speed and efficiency, option dii above is generally the most rapid to set up.

## 9. Benefit

- a. The HA and the Council must be satisfied that the proposed works covered by the s274 Agreement will be of benefit to the public/users of the SRN.

### **Contractual Arrangements for the s278 Works**

#### 10. Contractual Arrangements for undertaking the work are as given below :-

The Highways Agency will be the Employer for the works which will be carried out on the SRN, with the Council funding the whole costs of the Works through the mechanics of the s274 Agreement.

### **Costs to be paid by the Council**

11. It is a fundamental principle of all s274 agreements that the Council must bear the full cost of administering the process, designing and implementing the works. These will normally include:
  - a. An administration fee. This covers the design, preparation and supervision of the works and the administrative expenses of the HA and its agents. The initial fee calculation will generally be expressed as a percentage of the estimated works costs (excluding VAT) though actual costs will be used where these can be identified. The level of administration fee will vary according to the nature and complexity of the tasks required under this heading. The need or otherwise for orders and public inquiries and the cost of the works are therefore among the factors that will be taken into consideration. Councils should be aware that low value schemes may require a higher percentage fee

to cover HA costs. As a guide, Councils can expect to pay an initial fee followed by adjustment up or down when actual costs are known;

- b. Costs incurred in meeting any claims arising from the works, including claims under Part I of the Land Compensation Act 1973 (as amended by the Local Government Planning and Land Act 1980); legal costs involved and the costs of any Highway or Traffic Regulation Order;
  - c. The cost of the contractual works for scheme implementation.
  - d. In all cases, regardless of the nature of the works, a sum equal to the non recoverable VAT incurred on the costs listed above;
  - e. A commuted lump sum to cover future maintenance of all new trunk road infrastructure. [link or annex for the current HA commuted sum requirements].
12. Provision will usually be made for one payment of the estimated costs, with adjustments in the light of final outturn. Payment in advance will be required in order to ensure that the HA remains in funds.

### **Form of agreement**

13. Appendix B to this guidance sets out the key elements likely to feature in a s274 agreement. The HA's legal advisers will supply the first draft of the proposed agreement to the Councils solicitors or other appointed representatives. Copies of the principal type of s274 agreements are attached in Appendices A.
14. The terms of the agreement will indicate the conditions to which the agreement will be subject, one of which will be a requirement that the Council shall have secured the necessary agreement and permissions as well as due authorisation for the Secretary of State to carry out the works. It will also regulate the amount and timing of the payments by the Council to the HA and any relevant adjustments in the light of outturn costs; provide for termination of the agreement on either side, subject to payment of the HA's abortive costs; and specify the works in question while permitting the Secretary of State to vary the works as necessary.

### **Timing of agreement – interaction with other procedures**

15. As section 274 of the Act does not in itself authorise the HA to carry out trunk road works, other authority in the form of publication of Orders may be necessary. For example this would be required where improvements change the routing options for motorists at junctions.
16. In many cases the proposed highway works will be ones which the Secretary of State for Transport is authorised to carry out under his general powers in Part V of the Highways Act 1980. Otherwise, authorisation will involve the making of Orders under, for example, sections 10 or 14 of the Highways Act 1980. In these cases the Orders can be made only following public advertisement of a draft and, where a public inquiry has taken place, consideration of the Inspector's report. The Secretary of State for Transport cannot fetter the exercise of his discretion with regard to the making of such Orders. Accordingly, where authorisation to execute the works requires the making of a statutory Order, the agreement will need to be conditional on that authorisation being obtained and on the Secretary of State for Transport deciding to implement it. In any case where the Secretary of State for Transport's land

acquisition powers under Part XII of the Highways Act 1980 are to be used, the agreement will need to be conditional upon the successful processing of an Order under those powers.

### **Steps to be taken by the Council**

17. Councils contemplating a s274 agreement should make an early approach to the appropriate HA contact to open preliminary discussions. It is important that approaches of this sort are made in good time in view of the stages which have to be completed before an agreement can take effect and the relevant trunk road works carried out. On the other hand, it is desirable, if the HA is to give a reliable indication of its view on the possibility of an agreement, that the proposals should be sufficiently worked up for trunk road implications to be assessed and the location and nature of works determined.
18. If it is established in the initial discussions that the HA is prepared to consider further the possibility of a s274 agreement, the next step will be for the Council to submit further details. In particular, he will need to provide :-
  - ❖ An assessment of the extent of the proposed works including outline plans;
  - ❖ Budget costs (including Utility Company costs) based on suitable professional advice;
  - ❖ a proposed timescale; and
  - ❖ In the case where a Council initiates the preliminary design process, the name of a consultant approved by the HA to design the works.
  - ❖ Where the Council instigates any part of the design process, they should ensure compliance with all aspects of the Construction (Design & Management) Regulations 1994.
  - ❖ Where the Council instigates any part of the design process, they should ensure that appropriate Road Safety Audits are carried out at specified stages of the process.
  - ❖ All aspects of design must comply with the latest version of the Design Manual for Roads and Bridges.
  - ❖ Should a 'design departure' be proposed, then it would have to go through the formal HA Departure Approval process before it could be accepted as part of the final design.
  - ❖ Information to be supplied by the Council for preparation of the agreement (not an exhaustive list):
    - Councils full name and address
    - Contact details if different to the above
    - Names and addresses of parties to the Agreement
    - Details of Councils Solicitors
    - Location of site and 6 copies of plan showing site
    - 6 copies of General Layout plan of works showing limit of works
    - Detailed description of the highway works
    - Estimated cost of the highway works

- Estimated value for any commuted sum payment

### **Arrangements for the carrying out of the works**

19. Since the Secretary of State for Transport is legally responsible for all road works on the strategic network, it follows that it will usually insist on acting as formal employer of the contractor carrying out those works. Similarly, any consultant engaged in design and supervision will be employed by the HA rather than the Council. The HA will consider allowing the Councils consultants to design the works subject to approval of the consultants' competence but will need to arrange for the work to be independently validated at the Councils expense.
20. It should normally be stressed that, if the estimated cost of the works contract (including VAT) exceeds the threshold for EC advertising the contract must be advertised under EU Official Journal procedures and responses considered in the usual way.
21. The HA may, on seeing further details, conclude that the Councils proposals should not be taken forward. Should there nevertheless appear to be a realistic prospect of achieving an acceptable solution following further discussions, the HA will secure an undertaking to cover abortive costs before going further. Only at this stage would the HA proceed to the stage of drawing up further information and documentation or a s274 agreement.
22. Preparatory work may have to be carried out on a contingency basis. It is however desirable, notwithstanding the risk of abortive costs, for such work to begin as early as possible to avoid delay at later stages.
23. Once the HA has the information necessary to prepare a first draft of an agreement, its legal advisors will normally expect to issue that draft within about four weeks. Progress thereafter will inevitably depend on the complexity of the works involved and the Councils ability to provide any further details necessary to allow the agreement to be completed.
24. It should be noted that any works on the SRN will require coordination in terms of programmed execution, so as to avoid conflict with any other planned works to the SRN.

## Appendix A

### Key Features in a Section 274 Agreement

Provide for the Secretary of State for Transport to carry out the Works to which the said authorisation pertains

Give the financial mechanisms by which the Council funds the whole of the Works including VAT together with any other contingent expenditure properly incurred by the HA but which it cannot otherwise recover

Give the mechanisms which set out the obligations of the Council in respect of payments to the HA

Provide a mechanism by which the Council shall meet the Secretary of State's administration costs

Make provision for a commuted sum payment in respect of future maintenance of additional infrastructure

Give provisions for the termination of the agreement by either party including recovery of the Secretary of State's abortive costs

Provide a mechanism for imposing interest on sums overdue

Provide a schedule of the works to be undertaken

Include plans depicting the works