

## Extract of briefing for Members Business Debate 21 March 2023

### A9 DUALLING

- **The Scottish Government remains firmly committed to completing the dualling of the A9 between Perth and Inverness.**
- **We have already invested over £430m to date delivering the dualling programme.**
- Road users are already benefiting from the dualled sections between Kincaig and Dalraddy and Luncarty and the Pass of Birnam, which opened in September 2017 and August 2021 respectively Work ongoing to determine the most suitable procurement options for the remaining sections.
- The procurement for the section between Tomatin and Moy has resulted in no award being made. Having carefully reviewed this tender, Ministers have concluded the bid does not represent best value at the current time.
- This project will be re-tendered with modified terms and conditions to encourage an improved tender competition with a target of making an award before the end of 2023.
- The only section not to have started the statutory process is the **Pass of Birnam to Tay Crossing project** and **we plan to announce a preferred route in Spring this year.**
  
- Work to determine the most suitable procurement options for the remaining sections of the A9 dualling will look at a number of factors including how the project can be delivered most efficiently by the industry, whilst minimising disruption to road users and helping to support economic recovery post-COVID.
- Transport Scotland's work to determine the best procurement route for the remainder of the programme has also been impacted by recent and ongoing economic volatility. While this work is ongoing and expected to conclude by Autumn this year, it is now clear that the A9 Dualling Programme will not be completed in full by 2025.

### CURRENT STATUS

- The A9 Dualling Programme **will upgrade 80 miles** (129 kilometres) of road from single to dual carriageway.
- Transport Scotland's **£3 billion programme** (at 2008 prices) is designed to deliver economic growth through improved road safety and reliable and quicker journey times, as well as better links to pedestrian, cycling and public transport facilities.
- The Programme was split into 11 sections for the purposes of planning, local engagement and statutory consents.
- At present, two sections Kincaig to Dalraddy and Luncarty to Pass of Birnam of the programme are complete.
- **Procurement of a third section, between Tomatin and Moy, has resulted in no award being made.**
- Having carefully reviewed this tender, Ministers have concluded the bid does not represent best value at the current time.

- This project will be re-tendered with modified terms and conditions to encourage an improved tender competition with a target of making an award **before the end of 2023**.
- The design and development phase is well advanced for the remaining eight sections, seven of which are going through the statutory process, and one of which (Pass of Birnam to Tay Crossing) is approaching preferred route option status.
- Of the seven in the statutory process, four schemes: Tay Crossing to Ballinluig, Pitlochry to Killiecrankie, Glen Garry to Dalwhinnie, and Dalwhinnie to Crubenmore have published Made Orders. Two further projects namely Crubenmore to Kincaig and Dalraddy to Slochd have also received Ministerial approval to publish the Made Orders.
- Following a Public Local Inquiry held in January 2020 and recommendations made by the Reporter in November 2022, Scottish Ministers confirmed that the statutory procedures for the A9 Dualling Killiecrankie to Glen Garry scheme can be completed.
- **This significant milestone decision means that 92% of the programme has Ministerial decisions to make Orders and complete the statutory process.**
- Delivery of the remaining sections of the dualling programme can only commence if approved under the relevant statutory procedures and thereafter a timetable for progress can be set.
- The statutory right for individuals to have their say on our proposals cannot be set aside and it is essential that vital feedback is taken into account as we develop our plans.

## **A9 INVESTMENT**

- The £3bn investment (at 2008 prices) to dual the A9 between Perth and Inverness is one of the biggest transport infrastructure projects in Scotland's history.
- We have already invested over £430m delivering the programme.
- Road users are already benefiting from the dualled sections between Kincaig and Dalraddy and Luncarty and the Pass of Birnam, which opened in September 2017 and August 2021 respectively.
- We have already invested over £430 million to date delivering the programme with work ongoing to determine the most suitable procurement options for the remaining sections.
- This is a complex exercise which looks at a number of factors including how the programme can be delivered most efficiently by the industry within the original cost estimate, whilst minimising disruption to road users and helping to support economic recovery post-COVID. We will of course update Parliament when this work is completed, expected in Autumn this year.
- Transport Scotland's normal practice is to compare costs to estimate based on the reference date applying for the estimate, to provide like for like comparisons.
- The estimate for the A9 Dualling Programme remains £3bn at 2008 prices and performance against this estimate will be further reviewed once the procurement strategy and programme are confirmed for the remaining elements of the programme.

## **TS CONSTRUCTION CONTRACTS**

- Procurement options to deliver the A9 Dualling Programme are currently being investigated to provide the optimal solution for constructing the remaining sections of this large programme of works following completion of the statutory procedures
- A market consultation exercise was undertaken in 2021 and 2022 to inform assessment of procurement options for the remaining sections when the statutory process is complete.
- Determination of the optimal procurement approach for delivery of the remaining sections of the A9 Dualling Programme is ongoing. This is a complex exercise which is considering a pipeline of work in a form that can be delivered by the industry, supports the economic recovery post COVID whilst minimising disruption to users of this lifeline route.
- The work is considering both a revenue funded procurement model as a means for delivery of the remaining sections along with a capital funding approach. Each funding option has its own risk and opportunity profiles which are being considered in the options assessment.
- As part of this exercise, given the recent fluctuations in the economic environment referenced by the Deputy First Minister in the December 2022 budget statement, work is currently underway to assess the impact of market changes on the potential procurement approaches available.
- Going forward, Transport Scotland will reassess their construction contracts in light of current market conditions. We will carefully consider how to get the best balance between achieving cost certainty, making our contract attractive to the market, achieving appropriate risk allocation between contracting parties and improving collaboration between Transport Scotland and the contractor.
- In particular, Transport Scotland is engaging with the Civil Engineering Contractors Association, on how elements of its standard terms and conditions for such projects may be modified to encourage more bidders to participate.  
In doing so, we recognise that the construction market has changed in recent years and we want to work together with our supply chain to address their concerns, whilst securing a good deal for the Scottish taxpayer.
- This work is expected to conclude in Autumn 2023 and an update on a renewed timescale for completion will be provided to the Scottish Parliament at that time.

### **A9 SECTION UPDATE**

- The A9 Dualling Programme will upgrade 80 miles (129 kilometres) of road from single to dual carriageway. Scottish Government is investing £3 billion programme & the road was split into 11 sections for the purposes of planning, local engagement and statutory consents.

	<b>Section</b>	<b>Status</b>	<b>Information</b>
P1	A9 Luncarty to Pass of Birnam	Delivered	-
P2	A9 Pass of Birnam to Tay Crossing	In Design	Advice being prepared for the Cabinet Secretary on the preferred route option. Background briefing also being prepared.
P3	A9 Tay Crossing to Ballinluig	Orders made	The Ministerial decision to proceed to make the orders was received 2 March 2021. Made Orders were published on 26 November 2021
P4	A9 Pitlochry to Killiecrankie	Orders made	Ministerial decision to proceed to make the orders was received 11 Feb 2020. Made Orders were published on 26 November 2021
P5 <sup>1</sup>	A9 Killiecrankie to Glen Garry	Statutory Process Underway	Draft Orders published on 28 November 2017 and 183 objections were received (the majority relate to concerns about the Killiecrankie Battlefield). Public Local Inquiry was held January 2020 and in November 2022 Scottish Ministers confirmed that the statutory procedures can be completed. Work is progressing to publish made orders.
P7	A9 Glen Garry to Dalwhinnie	Orders made	Ministerial decision to proceed to make orders was received 31 May 2019. Made Orders were published on 30 July 2021
P8	A9 Dalwhinnie to Crubenmore	Orders made	Ministerial decision to proceed to make orders was received November 2020. Made Orders were published on 30 July 2021
P9	A9 Crubenmore to Kincaig	Statutory Process Underway	Ministerial Decision to proceed to make orders was received 17 January 2022 and preparations to make the orders are progressing.
P10	A9 Kincaig to Dalraddy	Delivered	-
P11	A9 Dalraddy to Slochd	Statutory Process Underway	Ministerial decision to make orders was received 15 November 2021 and preparations to make the orders are progressing.
P12	A9 Tomatin to Moy	Preparation for new Procurement underway	A decision was taken not to make an award under this procurement. Having carefully reviewed this tender, Ministers have concluded the bid does not represent best value at the current time. This project will be re-tendered with a target of making an award by the end of 2023.

<sup>1</sup> Originally two separate projects were identified, but these were later combined into a single project referenced as P5

## **Extract of Briefing re A9 Tomatin to Moy Website Update 6 April 2023**

To make the Minister aware of our intention to publish a news item on Transport Scotland's website related to the A9 Dualling: Tomatin to Moy project.

It is recommended that the Minister notes our **intention to publish the news item in Annex A on Transport Scotland's website and to provide a full briefing on the A9 Dualling: Tomatin to Moy project in the near future**

### **Context and Issues**

Further to a Parliamentary Statement delivered by the former Minister for Transport on 8th February, we are urgently progressing the procurement of the main construction contract for the A9 Dualling: Tomatin to Moy project, with the aim of achieving a contract award by the end of 2023.

During the statement, Ms Gilruth confirmed that work had begun on updating our contract terms and that work to commence the new procurement was underway. As part of this process we have been engaging with the Civil Engineering Contractors Association (CECA) and with selected CECA member contractors to support the process of updating our contract terms and conditions which is part of attracting more bidders to this new procurement process.

In order to ensure equal treatment of all potential bidders and ensure transparency we propose to publish a news item (attached in Annex A) on Transport Scotland's website, to advise other contractors that this process is ongoing and inviting any other interested contractors to get in touch for more information. [redacted]

We plan to provide a full briefing and handling plan on the project in a future submission on the new procurement and the project's business case. In order to meet the commitment to achieve a contract award by the end of 2023 we anticipate the timeline and key decision points for commencing the new Tomatin to Moy procurement are as follows:

- 3-5 April: Gateway Review (currently underway)
- 3-14 April: Conclude engagement with construction industry on principles of changes in risk allocation (further engagement on details of drafting may continue to publication of the contract notice)
- 19 April: Investment Decision Making (IDM) board for "proceed to procurement" decision
- 20 April: Submission to Ministers (including statement of position of Accountable Officer and identifying if written Ministerial Direction is required to proceed to publish Contract Notice/undertake procurement)
- 27 April: Ministerial decision on submission (accompanied by written Ministerial Direction if relevant)
- 28 April: Publication of Contract Notice

Given the issues with the previous Tomatin to Moy procurement, it is essential that we undertake this engagement with the market to update our contract terms in advance of publishing the contract notice for the new procurement. It should be

noted that once the contract notice is published we will be unable to undertake any market engagement.

### **Sensitivities**

The current profile of the A9 Dualling Programme means that it is likely that publication of this news item will be picked up by the media. Any media enquiries received will be dealt with as noted above.

Should we receive any questions relating to this, we would intend to use the Q&A that was prepared as part of the handling plan for the Parliamentary Statement, subject to the normal approvals process for media enquiries

### **Bute House Agreement Implications**

As the A9 Dualling Programme, and A9 Tomatin to Moy project, is not explicitly referenced within the Bute House Agreement, it falls within the group of projects and programmes covered by the statement that:

“work on other trunk roads projects and programmes under construction, design, development or procurement will continue and be subject to the normal statutory assessment and business case processes.”

The advice within this submission is therefore consistent with the provisions of the Bute House Agreement.

[redacted]

In conclusion, it is recommended that the Minister:

**Notes our intention to publish the news item in Annex A on Transport Scotland’s website and to provide a full briefing on the A9 Dualling: Tomatin to Moy project in the near future.**

[redacted]

### **ANNEX A - NEWS ITEM – TS WEBSITE ONLY**

#### **Industry engagement is key to new A9 Tomatin to Moy procurement**

Transport Scotland is moving ahead with industry engagement ahead of the new procurement for the A9 Dualling: Tomatin to Moy contract.

Following the announcement on 8<sup>th</sup> February that a new procurement would be launched for the Tomatin to Moy section of the A9 Dualling, Transport Scotland officials have been working at pace to update contracts in preparation for the new procurement.

This work has already involved consultation with the Civil Engineering Contractors Association Scotland (CECA Scotland) and other industry partners. The consultation

aims to help Transport Scotland understand how its standard design and build contracts may be modified to become more attractive to construction industry suppliers to help generate greater competition in future procurement exercises, delivering better value for the public purse.

Following this initial engagement exercise, Transport Scotland is now inviting other potential bidders across the construction industry to engage with it to provide their views on the changes Transport Scotland is considering making to its standard contract terms. Parties interested in taking part in this way can register their interest by contacting Transport Scotland's Project Manager Nick Conroy at [A9Dualling@transport.gov.scot](mailto:A9Dualling@transport.gov.scot)

Nick Conroy, Project Manager said, "Understanding the views of the market is an invaluable part of any procurement process. We regularly engage with industry stakeholders in our work, and it's important that we listen to the industry to better understand the challenges they face in delivering critical infrastructure projects such as this. I look forward to further discussions with delivery partners in this next phase of engagement."

**Letter issued to Fergus Ewing MSP 11 April 2023**

**Minister for Transport**  
Kevin Stewart MSP



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11 April 2023

Dear Fergus

**A9 Dualling Programme: Tomatin to Moy**

During the Member's debate on the 21 March 2023 on A9 Dualling, you asked my predecessor about whether the risk sharing reconsiderations would be applicable to the new procurement planned for the A9 Dualling: Tomatin to Moy project.

I can confirm that Transport Scotland is currently considering changes to the risk allocation in the terms and conditions being prepared for use on the new procurement of the A9 Dualling: Tomatin to Moy project, to improve the attractiveness of this opportunity to the market.

As part of this process Transport Scotland has consulted with The Civil Engineering Contractors Association (CECA) and several of its members to better understand contractor attitudes to construction risk in current market conditions.

Yours sincerely



Kevin Stewart



## **Extract of A9 Tomatin to Moy Factual Briefing 28 April 2023**

To set out the status of the A9 Dualling Case for Investment at the time of the original procurement for the A9 Dualling: Tomatin to Moy project “the Project”.

Provide an overview of headline facts regarding the Project which have been updated in advance of a new procurement.

The Cabinet Secretary is invited to:

- a. note the contents of this briefing and confirm if a further meeting would be helpful.

### **Context and Issues**

The Project is the most northerly section of the A9 Dualling Programme and consists of 9.6km of dual carriageway upgrading of the existing single carriageway. Upon completion, the Project will result in 33km of continuous dual carriageway between Slochd and Inverness. The completed route will generate economic growth, improve journey times and reliability and improve road safety.

An initial procurement was launched for the project in August 2021 with the publication of a Contract Notice. Three economic operators submitted a complete and compliant Single Procurement Document (SPD) submission and were subsequently invited to participate in a competitive dialogue procurement procedure.

Two of the three Participants subsequently withdrew from the procurement process at different stages and one tender submission was received from the only remaining bidder.

Following evaluation of the submitted tender, the price of which was significantly higher than expected, the former First Minister, former Deputy First Minister, former Cabinet Secretary for Net Zero and Transport, and former Minister for Transport concluded that award of the contract at that time would not represent best value for the taxpayer.

On 8 February 2023 the former Minister for Transport made a statement to Parliament providing an update on the outcome of the procurement for the Project and the position of the wider A9 Dualling Programme. In the course of that statement, the Minister committed to undertaking a new procurement for the Project as soon as possible, with the aim of making a contract award by the end of 2023.

A summary timeline of key dates and decision points is provided in Table 1 below.

**Table 1**

<b>Milestone</b>	<b>Date</b>
Safety Cameras introduced on A9 Perth to Inverness	October 2014
A9 Dualling Programme Case for Investment (BCR 1.12)	2016
Value of Time Changes published	September 2017

Project Economic Assessment	December 2018
Further revisions to appraisal parameters	January 2019
New National Transport Strategy Published	February 2020
Climate Change Plan Update (inc 20% km reduction commitment)	December 2020
Initial update of A9 Programme economic case: BCR reduced from 1.12 to 1.03	June 2021
Project Proceed to Procurement IDM paper circulated	June 2021
IDM approval to proceed to Procurement	July 2021
Model scenario for 20% km reduction finalised	August 2021
RouteMap for 20% Car km Reduction published	January 2022
Further update of A9 Dualling Programme economic case (incorporating model and appraisal changes): BCR reduced from 1.03 to 0.59	April 2022
Significant change in wider economic conditions affecting inflation and cost of borrowing assumptions	Autumn 2022
Decision not to award Tomatin to Moy contract	February 2023
Commitment to commence new procurement for the Project	February 2023
Project detailed cost estimate revision	March 2023
Expected completion of further updated A9 Dualling Strategic and economic case	Summer 2023

## Background to 2021 Procurement Decision

The procurement for the project has followed standard HMT business case guidance and the Scottish Public Finance Manual. This involves updating assessments at each stage of the process – the Strategic Case (2016) that allows a move to detailed analysis, the decision to proceed to procurement (June 2021) and the final decision (now).

The A9 Dualling Case for Investment (CFI) published in 2016 built upon the evidence base of the first STPR and confirmed the case for investment in the A9 Dualling Programme. The CFI anticipated the programme would deliver a significant contribution to the Government's Purpose of increasing sustainable economic growth. In addition, the A9 Dualling Programme was expected to contribute to the national objectives of promoting journey time reductions between the Central Belt and Inverness.

At the time of the previous Proceed to Procurement decision, the justification for the project within the Outline Business Case (OBC) was based on the 2016 CFI.

It was expected that the updated A9 Programme OBC would be available in Autumn 2021, ahead of the anticipated contract award for the Project. At the time of the Transport Scotland Investment Decision Maker (IDM) paper in June 2021, following which the decision to proceed to procurement was made, a review of the A9 Programme Economic Case at that time had shown a reduced BCR, although it remained positive (i.e. above 1.00) when Wider Economic Benefits and Driver Frustration was included.

## Transport Scotland's Terms and Conditions

Further to the previous procurement competition which resulted in no award and the Parliamentary Statement on 8 February, Transport Scotland has engaged with The Civil Engineering Contractors Association (CECA) and some of its member contractors to discuss Transport Scotland's standard design and build contract terms and conditions, with a view to understanding how Transport Scotland can amend its current procurement and contracting models.

The strategy for the new procurement has been developed, based on feedback from the market engagement, using a modified version of Transport Scotland's terms and conditions which removes some of the risk transfer from the contractor.

As the A9 Dualling Programme, and A9 Tomatin to Moy project, is not explicitly referenced within the Bute House Agreement, it falls within the group of projects and programmes covered by the statement that:

*“work on other trunk roads projects and programmes under construction, design, development or procurement will continue and be subject to the normal statutory assessment and business case processes.”*

The following table summarises a comparison of the BCR and cost estimates for the two procurements:

**Table 2**

<b>Item</b>	<b>Dec 2018 Project Economic Assessment</b>	<b>2021 Procurement</b>	<b>2023 Procurement</b>
Project cost	£229.8 million (Q4 2013 prices)	£197 million	£246 million
Project BCR	0.305	0.408	0.25
Programme BCR	1.04	1.04	0.59

The Design Manual for Roads and Bridges (DMRB)<sup>2</sup> Stage 3 Economic Assessment dated December 2018 assumed a total scheme cost of £229.8m at Q4 2013 prices including VAT and an allowance for optimism bias and risk. This presented an overall Benefit to Cost Ratio (BCR) of 0.305 for the Project.

Following a detailed cost estimate refinement exercise in October 2020 to inform the pre-tender estimate of the Project and to limit the reliance on historic inflation factors, the “most-likely” cost estimate for the Project in 2020 prices, was determined to be £197m including VAT and an allowance for risk and optimism bias. Using this updated cost estimate, the economic performance of the scheme was re-evaluated, and presented an updated BCR of 0.408. This represented an improved position against the previous 2018 assessment.

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<sup>2</sup> Design Manual for Roads and Bridges (DMRB), is a suite of documents containing requirements and advice relating to the design, assessment and operation of trunk roads, including motorways, in the United Kingdom.

Although the updated BCR for the Project was still below 1.00, the Case for Investment was clear that the overall benefits to be realised were to be considered at a programme scale (i.e. Perth to Inverness) and encapsulate all individual projects in the A9 corridor.

A detailed cost estimate revision and refinement exercise was conducted in March 2023, following the announcement of a new procurement for the Project, to inform the updated pre-tender estimate of the project. The “most likely” cost for the Project, at a Q4 2023 price base (i.e. the estimated date of contract award) was determined to be £246 million.

Using this 2023 updated pre-tender project estimate, the economic performance of the Project was re-evaluated as part of the OBC. The updated analysis demonstrates low value for money, and a reduced position from the original Design Manual for Roads and Bridges Stage 3 economic assessment with a BCR of 0.25.

As the Project is one component of the wider A9 Dualling Programme, the Project has previously relied on the strength of the business case for the wider A9 Dualling Programme. Although work is continuing to update the Strategic and Socio-Economic Cases for the A9 Dualling Programme, emerging findings in respect of both cases indicate changes from the position reported in the CFI.

Emerging findings from the work to update the Strategic Case recognises a continuing need for an intervention to deliver Scottish Government policy. However, the findings also indicate that while the proposed intervention of dualling the A9 between Perth and Inverness would provide a range of transport, safety and wider economic benefits, an underlying tension has emerged between the Programme and more recent government policies to reduce car use, the wider work on sustainable transport modes and reduction of carbon to address the climate change crisis. As a result the emerging findings indicate that the Strategic Case has deteriorated.

Emerging findings from the work to update the Socio-Economic Case confirms that the Value for Money assessment of the Programme has reduced significantly from that reported in the CFI. Based on updated traffic forecasts, which take account of changes in Scottish Government policies including the implications for traffic volumes of the 20% reduction in car kilometres, the updated value of time in Transport Appraisal Guidance and including the reduction in road accidents since the deployment of the average speed camera scheme in 2014, the BCR of the programme has fallen significantly from 0.78 to 0.37 when Wider Economic Benefits and Driver Frustration are excluded, and from 1.12 to 0.59 when Wider Economic Benefits and Driver Frustration are included. A comparison of the various updates are summarised in table 3 below.

**Table 3**

<b>Item</b>	<b>CFI position (2016)</b>	<b>Updated position (2021)</b>	<b>Emerging position (2022)</b>
BCR excl WEB*	0.78	0.63	0.37
BCR incl WEB	1.12	1.03	0.59

\*Wider Economic Benefits and Driver frustration

In conclusion the Cabinet Secretary is invited to:

- b. note the contents of this briefing; and
- c. confirm if a further meeting would be helpful to discuss the content of this briefing.

**Alison Irvine**

Transport Scotland

### **Extract of A9 Tomatin to Moy Procurement Update Briefing 26 May 2023**

To provide a summary update in relation to the new procurement for the A9 Dualling: Tomatin to Moy project ('the Project').

To seek a decision on the proposed timetable to commence the new procurement of the Project.

It is recommended that you:

- a. Note the preparations that have been undertaken in relation to the new procurement for the Project;
- b. Approve the recommendation that sufficient time is taken to ensure that amended contract terms and conditions proposed for use are sufficiently robust and should not lead to unanticipated consequences, noting that adopting this recommendation would mean the new procurement would be expected to commence in Autumn 2023 and contract award occur in Summer 2024; and
- c. [redacted]

### **Context and Issues**

As outlined within the Parliamentary Statement delivered by the former Minister for Transport on 8 February 2023, and further to the briefing note issued to the Minister on 6 April 2023, Transport Scotland has been working at pace to prepare for a new procurement for the Project and undertaking work to update the terms and conditions of its Design and Build contract.

As part of the process to update the contract terms and conditions, Transport Scotland has engaged with The Civil Engineering Contractors Association (CECA) and with contractors, as set out in the above mentioned Parliamentary Statement.

The engagement has focussed on understanding how Transport Scotland can amend its current procurement and contracting models to make the new procurement as attractive as possible to the market, to ensure appropriate risk allocation, to achieve cost certainty and improve 'in-contract' collaboration between Transport Scotland and the supply chain.

The market engagement has confirmed that contractors' appetite for risk is less than has previously been the case and the current high level of investment in other industries, in particular the energy industry, together with other clients offering more

favourable terms and conditions, leaves contracts that place all risk on the contractor, such as Transport Scotland's current Design and Build contract, as unattractive options.

It has been concluded from these discussions that the new procurement competition will be unlikely to attract more bidders unless significant amendments are made to the contract terms and the associated risk profile.

Whilst the market feedback has indicated that contractors would accept a modified version of Transport Scotland's standard terms and conditions (with heavily amended risk allocation) on this Project, given the significant modification that the changes being considered will mean, it is considered that additional time should be taken to fully review the terms and conditions to ensure a robust contract and a full appreciation of how each of the amended risks may impact the public purse. It is also imperative to consider how each of the risks will be managed internally and mitigated, if necessary, to reduce the risk to an acceptable level in line with Scottish Government risk management processes.

An indicative timetable for the new procurement was set out in a submission to the Minister on 6 April 2023, which included publication of a Contract Notice at the end of April 2023 and contract award by the end of December 2023.

To reflect that additional time should be taken to fully review the revised terms and conditions it is considered that the target dates for publication of the Contract Notice and contract award should be Autumn 2023 and Summer 2024 respectively. This additional time period will also allow further engagement with the industry, increasing the prospect of the new procurement generating effective competition.

Given the significant public, political, media and industry interest in the Project and wider A9 Dualling Programme, it should be anticipated that this update to the timetable for the Project will be received negatively and is likely to attract criticism.

The former Minister for Transport set out the Government's firm commitment to the A9 Dualling Programme in the February Parliamentary Statement and this overall position has not changed. [redacted]

As the A9 Dualling Programme, which includes the A9 Tomatin to Moy project, is not explicitly referenced within the Bute House Agreement, it falls within the group of projects and programmes covered by the statement that:

*“work on other trunk roads projects and programmes under construction, design, development or procurement will continue and be subject to the normal statutory assessment and business case processes.”*

The advice within this submission is therefore consistent with the provisions of the Bute House Agreement.

Noting the significant changes to risk allocation under the updated contract terms, a full quantitative risk analysis is underway to fully quantify, agree and mitigate these new risks borne by Transport Scotland. Whilst the risk quantification process will

allocate a value to each of the risks (which will be proportionate to construction tender price) for budgeting purposes, the risk held by Transport Scotland for each of the risks will effectively be an uncapped liability.

It is expected that the level of contingency/risk allocation will change significantly from that on previous projects as a consequence of the proposed revised risk allocation. Given the above, it is necessary to take the time to ensure the updates to the contract are robust and the new liabilities arising from the final amendments are mitigated as far as possible, with highly competent processes in place to manage and reduce the risk during contract as far as is reasonably practicable.

Taking additional time for the new procurement of the Project is considered to be justified in light of the need to balance the risk of failing to achieve a competitive procurement through insufficient bidders, with the risk that changes to terms and conditions that are not sufficiently robust may lead to unanticipated adverse outcomes, and the consequential reputational impact that either of these would have on Scottish Ministers and Transport Scotland, as well as the delivery of the A9 Dualling Programme.

In conclusion you are invited to:

**Note the preparations that have been undertaken in relation to the new procurement for the Project;**

**Approve the recommendation that sufficient time is taken to ensure that amended contract terms and conditions proposed for use are sufficiently robust and should not lead to unanticipated consequences, noting that adopting this recommendation would mean the new procurement would be expected to commence in Autumn 2023 and contract award occur in Summer 2024; and**

[redacted]

## **Background lines**

### **Background and Context**

#### **The Scottish Government remains firmly committed to completing the dualling of the A9 between Perth and Inverness.**

- The £3bn investment (at 2008 prices) to dual the A9 between Perth and Inverness is one of the biggest transport infrastructure projects in Scotland's history.
- We have already invested over £430m delivering the programme.
- Road users are already benefiting from the dualled sections between Kincaig and Dalraddy and Luncarty and the Pass of Birnam, which opened in September 2017 and August 2021 respectively.
- It is a matter for parliament to consider calls for an inquiry – our focus remains on delivering the remainder of the dualled sections as efficiently as possible.

- The former Minister for Transport provided an update to Parliament on the A9 Dualling on 8 February 2023, setting out the reasons why, following a difficult and complex procurement procedure, Ministers decided not to award the contract for the Tomatin to Moy section of the A9 Dualling programme.
- At the time, Ministers concluded that award of the contract did not represent best value for the taxpayer.
- The price of this tender was significantly higher than expected – even allowing for the real world impacts of the volatile economy.

**Transport Scotland is already taking the necessary preparatory steps for the urgent new procurement of the Tomatin to Moy project**

- Transport Scotland has been engaging with industry partners The Civil Engineering Contractors Association (CECA) and contractors, since February 2023 to consider improvements that can be made to both its contract delivery strategy and procurement mechanisms, to maximise interest and market engagement in the future procurement.

**Design work is progressing on the rest of the programme, with ministerial decisions to complete the statutory process confirmed for seven of the remaining eight schemes.**

- Work to determine the most suitable procurement options for these sections of the A9 dualling is ongoing.
- This is a complex exercise which looks at a number of factors including how the project can be delivered most efficiently by the industry, whilst minimising disruption to road users and helping to support economic recovery post-COVID.
- As part of this exercise, in light of recent fluctuations in the economic environment, work is also underway to assess the impact of market changes on the potential procurement approaches available.
- On 8 February 2023 the former Minister indicated that this work is expected to conclude in Autumn 2023 and an update on a renewed timescale for completion will be provided to the Scottish Parliament at that time.

**The only section not to have started the statutory process is the Pass of Birnam to Tay Crossing project, where work is ongoing to identify a preferred route option following the innovative co-creative process with the local community.**

- The Minister for Transport is expected to meet the Birnam to Ballinluig A9 Community Group on 05 June 2023 to discuss their concerns prior to a decision be made on the preferred route option for this section.



## **Extract of Discussion Paper for meeting on 16 June 2023**

To set out background information for the Cabinet Secretary for Transport, Net Zero and Just Transition and the Minister for Transport on the status of the A9 Dualling Programme ('the Programme'), including the arrangements for the new procurement of the A9 Dualling: Tomatin to Moy project ('the Project').

It is recommended that you:

- Note the status update on the Programme and the Project;
- Note the planned next steps, options and anticipated timetable for the procurement of the Project; and
- Note that a handling plan will be provided outlining recommendations for updating Parliament.

### **Context and Issues**

On 12 October 2022, while the first procurement competition for the Project was ongoing, a Ministerial discussion was held with Officials on the approach to the remainder of the Programme, triggered by work undertaken on the Strategic and Socio-Economic Cases (Case for Investment) for the Programme. In that discussion Officials provided an update on:

- Recent work undertaken in relation to the Strategic and Socio-Economic Cases for the Programme and the emerging findings from that work;
- Emerging findings from work undertaken to consider options for procurement of the remaining elements of the Programme; and
- An outline of possible implications for those emerging findings of market changes following the UK Government's "mini-budget."

A commitment to continue discussions was agreed.

The Programme was subsequently reviewed by the Executive Team in Investment Assurance Mode on 25 October 2022. The Board noted concern with the current findings of the Business Case and did not endorse the case as currently framed.

Subsequently, on 7 December 2022, a Briefing was submitted to the then Deputy First Minister/Acting Cabinet Secretary for Finance seeking a ministerial decision on the proposed next steps for the Programme. This paper also confirmed that the current published target date of 2025 for completion of the programme should no longer apply. Following discussions with Officials, the then Deputy First Minister/Acting Cabinet Secretary for Finance approved the recommended next steps, which consisted of:

- Maintaining sufficient progress with statutory processes to secure the statutory authorisations and eliminate the risk of these lapsing;
- Maintaining flexibility in how the Programme is progressed and minimising delays to completion of the Programme;
- Enabling early consideration of alternative delivery options and hence minimising the delay to the point at which decision making on particular delivery options can take place, following normal business case processes

and subject to suitable market conditions prevailing and budget availability permitting; and

- Demonstrating that the Scottish Government remains committed to completion of the Programme by continuing to take forward certain elements of the Programme.

On 2 February 2023 two briefings were issued to the then First Minister, the then Deputy First Minister/Acting Cabinet Secretary Finance, the then Cabinet Secretary for Net Zero, Energy and Transport and the then Minister for Transport. The first briefing updated on the outcome of the procurement process for the Project and recommended that in view of only one tender being received, for a value significantly higher than expected, Ministers should not make a contract award. Ministers confirmed their decision not to award the contract on 3 February 2023. The second briefing provided advice on proposals for re-tendering the Project at the earliest opportunity; proposals for a Parliamentary Statement on the Programme; and options to take forward a review of the Programme timetable.

Following the above advice, a Parliamentary Statement was delivered by the then Minister for Transport on 8 February 2023 confirming that:

- The Tomatin to Moy contract would not be awarded at that time as the submission received was not considered to provide best value for the taxpayer;
- That the Project would be subject to a new procurement competition, in support of which Transport Scotland would engage with the industry on possible changes to contract terms and conditions, with the firm aim of awarding a contract by the end of 2023;
- The target completion date of 2025 for the Programme was not achievable; and
- A further update on the new timescale for completion of the Programme would be provided to Parliament in Autumn 2023.

Following on from the Parliamentary Statement, Transport Scotland officials began considering ([redacted]) whether it would be possible to make amendments to the standard Transport Scotland contract terms (informed by market engagement) in order to reflect changes in the market and improve market interest for the new procurement.

In addition, officials continued with work to update the Strategic and Socio-Economic Cases for the Programme. In discussions with the Cabinet Secretary for Net Zero and Just Transition and the former Minister for Transport in April 2023 in respect of a prospective early commencement of the new procurement for the Project, officials noted that pending completion of this work it would be necessary to seek a written authorisation in order to proceed with the Project, due to the uncertainty regarding the value for money position of the Programme.

As work on proposals to amend the risk allocation applying in Transport Scotland's standard terms and conditions progressed, it was considered necessary to review the proposed changes in further detail in order to ensure that the effect of the changes was fully understood and that the contract would still provide appropriate protections for Ministers and the taxpayer. A briefing was submitted to the former

Minister for Transport on 26 May 2023, providing a summary update on the new procurement of the Project and seeking approval for a proposed timetable for the new procurement which would allow further time for the contract review work to conclude. Following the above, and the resignation of the former Minister for Transport from his ministerial role, further considerations and discussions have been held with regards to the proposed timetable of the new procurement, final decision making on which remains to be confirmed.

Work is currently ongoing in relation to four discrete packages:

- Preparation for a new procurement of the Project;
- To identify a preferred route option for the Pass of Birnam to Tay Crossing section following the innovative co-creative process with the local community;
- Assessment of options for delivery of the remaining elements of the Programme, including preparation of an Outline Business Case for the Programme, setting out the Strategic, Socio-Economic, Commercial, Financial and Management Cases; and
- In support of the above, completion of statutory processes for the remaining elements of the Programme.

Advice on the options for delivery of the remaining elements of the Programme is in preparation. Ministerial decision making on those options will be informed by the Outline Business case, which is also in preparation. Following conclusion of this work, a further update on the Programme will be provided to Parliament in Autumn 2023, setting out the new timescale for completion. This is as proposed by the then Minister for Transport in her statement to Parliament on 8 February 2023.

In relation to the new procurement of the Project there are three options in view. These options are listed below, with Options B and C both involving a change to existing risk allocations, detailed advice on which will follow in due course:

- **Option A** - Undertake a new procurement based on Transport Scotland's standard terms and conditions;
- **Option B** - Undertake a new procurement based on a modified version of Transport Scotland's terms and conditions, which includes changes in risk allocation resulting in increased risk being retained by Scottish Ministers;
- **Option C** - Undertake a new procurement based on the industry preferred New Engineering Contract <sup>3</sup>(NEC), which entails changes to contract administration practices as well as changes in risk allocation resulting in increased risk being retained by the Scottish Ministers.

**Option A** – Whilst this option would permit the earliest commencement of the new procurement of the Project, anticipated to be two weeks from Ministerial approval to proceed to procurement, the market engagement feedback on this option was significantly negative [redacted]. This option is therefore considered to present a high

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The NEC suite of contracts were first published in 1993 as an innovative way of managing construction contracts, designed to facilitate and encourage good management of risks and uncertainties, using clear and simple language, with well-defined roles and responsibilities. The NEC4 ECC is now the most favoured construction contract (by both contracting authorities and contracting market) in the United Kingdom.

risk of being unsuccessful in attracting the increased interest from the market necessary to achieve a competitive procurement. There is also a high risk of significant reputational damage for the Scottish Government and Transport Scotland if this option is progressed; due to the delay to the commencement of the new procurement and that no changes to contract terms have materialised. This option would therefore likely be perceived as a failure of the market engagement and possibly a lack of genuine intent from the Scottish Government and Transport Scotland in that engagement. Officials therefore **do not recommend progressing the procurement on the basis of this option.**

**Option B** - This option is considered to have a lower prospect of success in achieving additional market interest than Option C, dependant on the degree of risk transfer provided. Officials consider that, if Ministers were minded to pursue this option, it would be possible to publish the contract notice in late July/August 2023. However, it is unlikely to be perceived by the industry as being the 'step change' required to attract their interest and hence may not garner sufficient competition.

**Option C** - This option is considered to have a higher prospect of success in achieving additional market interest than Option B, even with a similar risk share profile as Option B. The market preference in terms of contract strategy during earlier engagement was clearly for an NEC contract, however further market engagement is necessary to determine the attractiveness of this option for the future procurement of the Project. Officials consider that, if Ministers were minded to pursue this option, it would be possible to publish the contract notice in late July/August 2023. [redacted]

In relation to the procurement strategy for the Project, we are currently considering a 'targeted competitive dialogue procedure<sup>4</sup>'. The full details of this will be outlined in a future briefing regarding the proceed to procurement decision, however, it is currently anticipated that this procedure would result in the following timeline, subject to there being no unforeseeable delays during the procurement process:

- Ministerial approval in principle of amendments to contract risk profile and form of contract to be adopted– June 2023
- Conclude Outline Business Case for A9 Dualling Programme – early July 2023
- Internal governance procedures, including assessment by Accountable Officer of position of Project in relation to Accountable Officer tests – July/August 2023
- Contract Notice publication – late July/August 2023
- Contract Award – April/May 2024

We are currently looking at options to reduce this timescale as much as possible, however, it is very unlikely that significant time savings against the timeline outlined above will result.

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Competitive Dialogue is a procedure outlined under the Public Contracts (Scotland) Regulations 2015. It allows tenderers to discuss and submit solutions for consideration of the client after being successful at the selection stage. It allows negotiation to ensure proposed solutions meets the client's needs.

It is also considered necessary to continue engagement with the market to further explore market appetite.

The then Minister for Transport set out the Government's firm commitment to the A9 Dualling Programme in the February Parliamentary Statement and this overall position has not changed, particularly given that this commitment has recently been strongly reiterated by the First Minister.

Given the indicated timescales for all Options other than Option A (which officials advise against for the reasons given in paragraph 15) involve some degree of change to the commitment outlined in the then Minister for Transport's statement to Parliament, it is recommended that Parliament is updated on the timescales for the procurement.

Given the significant public, political, media and industry interest in the Project and wider Programme, it should be anticipated that any such update to the timetable for the Project will be received negatively and is likely to attract criticism. However, this may be ameliorated by reference to developing a revised approach to the contract in consultation with the industry which is expected to support an improved tender competition. A full handling plan will be developed and provided.

As the A9 Dualling Programme, which includes the Project, is not explicitly referenced within the Bute House Agreement, it falls within the group of projects and programmes covered by the statement that:

*“work on other trunk roads projects and programmes under construction, design, development or procurement will continue and be subject to the normal statutory assessment and business case processes.”*

The advice within this submission is therefore consistent with the provisions of the Bute House Agreement.

Decisions regarding the Programme and/or the Project each have significant financial implications and these will be outlined fully in future relevant submissions.

[redacted]

In conclusion you are invited to:

- **Note the update on the Programme and the Project;**
- **Note the planned next steps, options and anticipated timetable for the procurement of the Project; and**
- **Note that a handling plan will be provided outlining recommendations for updating Parliament.**

**Lawrence Shackman**

Transport Scotland Director of Major Projects

[redacted]

## **Extract of A9 Tomatin to Moy Ground Investigation Website Update Briefing 14 July 2023**

To make the Minister aware of our intention to upload ground investigation information on Transport Scotland's website related to the A9 Dualling: Tomatin to Moy project.

**That you: Note our intention to publish the content in Annex A as an update to the existing Tomatin to Moy project page on Transport Scotland's website**

### **Context and Issues**

Further to a Parliamentary Statement delivered by the then Minister for Transport on 8 February, we are urgently progressing the procurement of the main construction contract for the A9 Dualling: Tomatin to Moy project, with the aim of achieving a contract award as soon as possible.

During the statement, Ms Gilruth confirmed that work had begun on updating our contract terms and that work to commence the new procurement was underway. As part of this process Transport Scotland has been engaging with the Civil Engineering Contractors Association (CECA) and with contractors to support the process of updating the terms and conditions to help attract more bidders to engage and participate in the new procurement process.

As part of the ongoing market engagement exercise, several contractors have expressed an interest in how 'ground' risk is allocated under the proposed contract, and have requested sight of the historic ground investigation reports to inform their view on whether this would be an acceptable risk to hold. In order to ensure equal treatment of all potential bidders (and noting that the bidders who participated in the previous procurement exercise already hold this information), [redacted]

The aim of providing these documents is to give the industry a thorough understanding of the extensive nature of investigations already undertaken throughout the design and development phase of the project, from 2015 to 2022. We will publish the relevant investigation documents on Transport Scotland's website on the existing Tomatin to Moy project page. [redacted]

The current profile of the A9 Dualling Programme means that it is likely that publication or changes to any content or items regarding the project will be picked up by the media. However, we do not consider that the provision of detail to support market engagement and develop Transport Scotland's terms and conditions should be perceived in a negative manner.

Should we receive any enquiries or questions, we would intend to use existing lines and Q&A, which would be subject to the standard internal approval process for media enquiries.

As the A9 Dualling Programme, and A9 Tomatin to Moy project, is not explicitly referenced within the Bute House Agreement, it falls within the group of projects and programmes covered by the statement that:

“work on other trunk roads projects and programmes under construction, design, development or procurement will continue and be subject to the normal statutory assessment and business case processes.”

The advice within this submission is therefore consistent with the provisions of the Bute House Agreement.

[redacted]

In conclusion, it is recommended that you:

- **Note our intention to publish the content in Annex A as an update to the existing Tomatin to Moy project page on Transport Scotland’s website**

[redacted]

## **ANNEX A - UPDATE TO TS WEBSITE**

### **Required actions:**

- New text to be added to the bottom of the Overview on this page A9 Tomatin to Moy | Overview | Transport Scotland with a hyperlink to a new publications page to house the site investigation documents

*As part of our ongoing A9 Dualling: Tomatin to Moy industry engagement exercise, we are sharing factual information produced as part of site investigations undertaken throughout the design and development phase of the project*

*View the Site Investigation Documents [hyperlink to new page under TS publications]*

- New page under TS Publications to be created

### **TITLE**

*Site Investigation – A9 Dualling - Tomatin to Moy*

### **BODY**

*Multiple phases of Site Investigation have been carried out to support the A9 Dualling: Tomatin to Moy project since 2014, undertaken in accordance with relevant industry standards (BS EN 1997-2:2007 and BS 5930:2015). This has included more than 2,000 peat probes and 3,000 exploratory holes. The data obtained through these investigations will help Transport Scotland to minimise the ground risks for the project.*

*The information obtained shows a number of different types of superficial deposit beneath the project, including peat, river terrace deposits, alluvial deposits and glacial deposits. Bedrock was encountered at varying depths through the site, typically described as gneiss, semi pelite, microdiorite, psammite and microgranite. Shallow peat deposits have also been encountered on site.*

*As part of its market engagement exercise, Transport Scotland has made this information available to provide an understanding to the industry of the extensive nature of investigations already undertaken to date. The information is available to download below.*

*[include individual hyperlinks below] – Names of documents*

- Text added to aforementioned new page that introduces documents
- Upload documents to open in new tab with appropriate corresponding text labels

### **Extract of A9 Dualling note of meeting 19 July 2023**

#### **Minutes of Cabinet Secretary for Transport, Net Zero and Just Transition meeting with Transport Scotland regarding the A9 Dualling 16:00 to 17:00 on 19 July 2023**

##### **Attendees:**

Ms McAllan, Cabinet Secretary for Transport, Net Zero and Just Transition (Cab Sec)

[redacted] Cab Sec Private Office

Roy Brannen (RB), Director General Net Zero

Alison Irvine (AI), Chief Executive, Transport Scotland

Lawrence Shackman (LS), Director of Major Projects, Transport Scotland,

[redacted] Head of Project Delivery, Transport Scotland

[redacted] Development Management and Trunk Road Casualty Reduction Manager, Transport Scotland

[redacted] Special Advisor

[redacted] Special Advisor

##### **Minute**

Cab Sec opened the meeting by asking for an update on work to progress both the completion of the overall A9 dualling programme and specifically the commencement of the new procurement for the Tomatin to Moy section of the dualling programme. Cab Sec also asked for a discussion on some of the points that arose in discussions at the summit meeting that had taken place in Inverness the previous day.

Officials outlined the work in progress on completion of the overall A9 dualling programme, including preparation of an Outline Business Case for the Programme and the progress of that through consideration by Transport Scotland Investment



Decision Makers and planned consideration of it by Executive Team in Investment Mode (ETIM). It is anticipated that advice to Ministers on the findings of the assessment of options for completion of the A9 dualling programme will be issued to Ministers in short order following consideration at ETIM. Cab Sec noted the importance of receiving this advice as soon as possible.

Discussion of the Outline Business Case for the Programme noted the importance of considering both quantitative and qualitative costs and benefits when assessing the value for money offered by the dualling programme.

Officials then outlined the work in progress on the planned new procurement for the Tomatin to Moy section of the A9 dualling programme. It was confirmed that advice is intended to be issued shortly on the proposed contract form and risk allocation to be adopted. This will be issued separately and earlier than advice on the proceed to procurement decision, which will be issued in short order following consideration of the Outline Business Case for the Programme by ETIM. The outcome of the consideration by ETIM is required to inform the advice on proceeding to procurement. Cab Sec noted the importance of receiving this advice as soon as possible.

Discussion of the timetable for the new procurement outlined the factors constraining the various stages of prequalification, tender and tender evaluation and the need to specify the expected date of contract award in the contract notice published to initiate the procurement. Officials confirmed that the timetable being developed was based on the shortest duration considered achievable that would also be sufficiently attractive to potential bidders to provide an effective tender competition.

[redacted]

Officials also noted that the handling plan for the update to Parliament would include proposals to reinvigorate stakeholder engagement.

### **Actions**

- **Action: TS to progress necessary governance reviews by officials to enable advice on the options for completion of the A9 Dualling Programme and the proceed to procurement decision for Tomatin to Moy to be issued to Ministers.**
- **Action: TS to issue advice on the proposed contract form and risk allocation for the new Tomatin to Moy procurement.**
- **Action: [redacted]**

**Extract of A9 Tomatin to Moy Contract Strategy Briefing 25 July 2023**

A decision is requested before 27 July to allow preparations to be made ahead of advice on proceeding to procurement being provided to Ministers.

To outline a proposed contract strategy including risk profile and contract form for the A9 Dualling Tomatin to Moy project ('the Project').

To seek approval of the proposed contract strategy including risk profile and contract form for the A9 Dualling: Tomatin to Moy project main construction contract.

It is recommended that **you approve**:

- **the use of an amended NEC4<sup>5</sup> Engineering and Construction Contract (ECC) for the Project; and**
- **the proposed risk profile for the project, which results in more risk being held by the Scottish Ministers than under previous contracts for similar projects.**

It is recommended that **you note**:

- a. The extensive market engagement that has taken place to inform the contract strategy for the Project;
- b. That the adoption of the proposed contract strategy will result in an amended risk profile from previous Transport Scotland major infrastructure works contracts and therefore increases the risk liability held by Scottish Ministers, thereby reducing outturn cost certainty;
- c. That potential contingent liabilities (such as those set out in paragraph 27 below) may exist and that should these be found to exist these will be dealt with in line with the Scottish Public Finance Manual;
- d. The final risk profile for the Project will be confirmed in advice to Ministers ahead of contract award (which will take account of any adjustment that may be necessary during the procurement phase); and
- e. That approval to proceed to procurement for the Project will be the subject of a separate future submission and is therefore not discussed further in this submission.

## **Context and Issues**

As outlined within the Parliamentary Statement delivered by the then Minister for Transport (Ms Gilruth) on 8 February 2023, and further to advice issued to the former Minister (Mr Stewart) on 26 May 2023, Transport Scotland has been engaging with The Civil Engineering Contractors Association (CECA) and with industry contractors to understand how its terms and conditions could be amended to encourage more bidders to participate in the new procurement for the Project.

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<sup>5</sup> The NEC, first published in 1993, is designed to facilitate and encourage good management of risks and uncertainties, using clear and simple language, with well-defined roles and responsibilities. The NEC4 is now the most favoured construction contract (by both contracting authorities and contracting market) in the United Kingdom. It has many forms and whilst it can be used unamended, like many contract forms it can also be modified to amend the standard risk profile to fit a client's specific project requirements.

## OFFICIAL – SENSITIVE – Commercial

The market engagement, which has taken place over several rounds with individual contractors, has indicated the following key points:

- Contractors' appetite for risk is less than it has been in previous years;
- The current high level of investment and consistent pipeline of work in other industries, in particular the energy industry, together with other clients and contracting authorities offering more favourable terms and conditions, leaves contracts that place all risk on the contractor, such as Transport Scotland's current Design and Build contract terms and conditions (Transport Scotland's bespoke T&Cs), as unattractive options in the current market;
- The new procurement competition would be very unlikely to attract more bidders than have tendered for recent Transport Scotland road procurements unless significant amendments were made to both the risk profile and contract form;
- Some contractors did indicate a willingness to bid using an amended risk profile with Transport Scotland's bespoke T&Cs, however, it was concluded that this was very unlikely to attract more contractors than those who participated in the previous failed procurement. This would therefore be unlikely to achieve the level of competition desired; and
- A preference for NEC terms and conditions with minimal amendments, which reduces the risk held by contractors considerably.

[redacted]

### Risk Allocation

Based on this engagement with the market, [redacted] it is considered necessary for a revised risk allocation, outlined in the table below, to be adopted for the Project in order to secure a successful competition:

<b>Risk</b>	<b>Proposed NEC T&amp;Cs</b>	<b>TS Bespoke T&amp;Cs (existing)</b>
Adverse weather (time and cost for defined events)	✓	Time only
Inconsistencies / Conflict / Ambiguities	✓	×
Delays caused by third parties	✓	×
Archaeological Finds	✓	✓
Changes in Law (specific changes)	✓	×
Protestor action	✓	50% share of costs
Unforeseen physical conditions	✓	×

✓ means the Scottish Minister's risk, × means Contractor's risk

A brief explanation of each risk is provided below:

**Unforeseen physical conditions** - The contractor would be liable for any costs associated with ground (physical) conditions which could reasonably have been

foreseen by an experienced contractor having regard to the ground investigation reports which will be provided in the contract and publicly available information (including information obtainable from visual inspection). The contractor would not be entitled to any extension of time for such reasonably foreseeable conditions. Scottish Ministers would however be liable for any delay and consequential costs associated with dealing with physical conditions where the contractor is able to demonstrate that ground conditions present could not reasonably have been foreseen (having regard to the foregoing). [redacted]

**Adverse weather** – The contractor would be responsible for delays and costs caused by poor weather affecting construction operations, unless it can be proven that the delay has been caused by a weather event with a probability of occurring less frequently than once in ten years (exceptionally adverse weather). This is a standard NEC contract clause. There is a weather station situated near the site that would be used to provide measurements. Where it is established that exceptionally adverse weather has occurred, Scottish Ministers would be liable for any delay and consequential costs arising as a consequence of such weather.

**Changes in Law** – The contractor would be liable for delay or other costs arising from all general changes in law (i.e. not those which impact upon road and bridge construction). Scottish Ministers would be liable for delay or other costs arising from changes to legislation after the contract award date which only impact upon road and bridge construction.

**Delays by Third Parties** – The contractor would be responsible for consulting with a number of third parties (for example SEPA, the Highland Council, landowners, BEAR Scotland etc) on specific aspects of its detailed design and construction operations. Scottish Ministers would be liable for costs arising due to delays caused by third parties, providing the timescales set out in the contract for such consultations have been exceeded. Another third party where there may be some risk for the Scottish Ministers of liability for extra cost is the work of Statutory undertakers. The contractor would be responsible for coordinating the work of Statutory Undertakers (utility companies). The Scottish Ministers would however be liable for any delay and consequential cost whereby delay (assessed against timescales set out in the contract) is caused by a Statutory Undertaker. The utilities associated with this Project are not considered to be particularly high risk as apparatus from only three statutory undertakers are affected by the works due to the site's remote location.

**Protestor Action** – the contractor would be responsible for using best endeavours to secure the site and the works in line with good industry practice. The Scottish Ministers would be liable for the delay and costs arising from disruption of the works caused by protestors. It is noted that from market engagement undertaken, the market does not bear the risk of Protestor Action on contracts offered by other Contracting Authorities. This specific risk in the context of the Project is considered to be mitigated already given all objections to the Project were resolved avoiding the need for a Public Local Inquiry during the statutory process, and positive relationships maintained with the local community.

**Archaeological Finds** – the contractor will be responsible for working under an archaeological watching brief. Scottish Ministers will be liable for costs arising from

delays caused by any finds of historic value or importance. Following advance archaeological investigations undertaken in Spring 2022, the risk of unexpected finds is considered to be very low. It is noted that this is the same position as the existing Transport Scotland Bespoke T&Cs.

**Inconsistencies within contract** – The contractor is responsible for delivering the works in line with Transport Scotland’s requirements. If such requirements contain conflicts, inconsistencies or ambiguities, Scottish Ministers will be liable for the delay and any additional costs arising as a result of clarification of such inconsistencies in the event that Transport Scotland’s requirements set out in the Scope require to be adjusted.

The contractual assessment of the contractor’s entitlement to any additional time or money is based on the assumption that the contractor reacts competently and promptly to minimise the cost and additional time arising from a compensation event. This mitigates against the Scottish Ministers being exposed to excessive cost and delay as a result of such an event and also incentivises the contractor to actually take the mitigation measures it is assumed as having taken.

It should also be noted that TS’ existing contract provides for both construction and maintenance (for a 5 year period) of the works. There will be no material difference in the requirement for the contractor to be responsible for a 5 year period of maintenance of completed works and landscape/planting establishment as a result of moving to NEC4 contract terms. The contract may however be structured differently from the existing Transport Scotland contract in this regard. [redacted]

Having engaged with the industry in relation to the above key risks, it is considered that without this adjusted risk profile, Transport Scotland will be unlikely to attract more bidders to the procurement competition. On this basis, **it is recommended that an NEC contract which reflects the above risk allocation is used for the Project.**

In recent years, Transport Scotland and Scottish Ministers have been subject to significant criticism from the UK contracting market as a result of the terms and conditions used on its major infrastructure projects.

This was further emphasised during evidence given by CECA during the Citizen Participation and Public Petitions Committee of 14 June 2023, which heard Transport Scotland labelled as “..the worst client to work for in the UK” due to its terms and conditions. Within its written evidence submission, the Chief Executive of CECA Scotland also noted:

*“It is the contracting industry’s strongly held belief that TS must totally abandon its existing bespoke contract and move over to using the NEC suite of contracts if it is to regain the interest of the wider UK contracting industry in delivering future Scottish road improvements and enhancements, such as the dualling of the A9”.*

Media has since picked up this thread around Transport Scotland’s design and build contract and this is often cited negatively.

## OFFICIAL – SENSITIVE – Commercial

As the A9 Dualling Programme, which includes the Project, is not explicitly referenced within the Bute House Agreement, it falls within the group of projects and programmes covered by the statement that:

*“work on other trunk roads projects and programmes under construction, design, development or procurement will continue and be subject to the normal statutory assessment and business case processes.”*

The advice within this submission is therefore consistent with the provisions of the Bute House Agreement.

[redacted]

The adoption of an NEC4 ECC contract with amended risk allocation as outlined in section 13 will increase the risk liability held by the Scottish Ministers from what it has been previously and this is expected to have an impact on outturn cost.

Previously, Transport Scotland’s contracts passed nearly all risk to the contractor whilst the risk share associated with the proposed risk profile is based on a 56:44 (Scottish Ministers/ Contractor) share of in-contract risk based on a quantified risk analysis (QRA) process. It is important to note that despite the relatively large proportion of risk to be held by Scottish Ministers, it is expected that tender prices received will be less compared to what they would have otherwise been using the Transport Scotland bespoke T&Cs (given that contractors would not have to price for as many risks as previously they would have).

To robustly and effectively manage the risk now proposed to be held by the Scottish Ministers, an audited QRA process will be used and a budget line agreed based on modelling of the QRA . During contract, risks will be reviewed and updated on a monthly basis (in addition to day-to-day risk management) in line with Scottish Government’s risk management process and any risks materialising would be drawn down from the risk budget line.

It should be noted that whilst the risk quantification process will allocate a value to each of the risks (which will be proportionate to the construction tender price), it is possible that some of the risks (e.g. public utilities and ground risk/ physical conditions depending on the value), proposed to be held by Transport Scotland will form uncapped liabilities and as such may be considered contingent liabilities. These liabilities are those where Scottish Ministers hold an obligation (i.e. Scottish Ministers under the proposed contract would be obligated to pay costs) in the event that an unforeseen risk occurs requiring a sum over and above the assessed and held risk allowance sum. It is not expected that contingent liabilities will arise routinely, given the significant mitigations in place, however ultimately the allocation of risk proposed would require Scottish Ministers to carry these risks. The balance to this is the theory that Scottish Ministers should receive lower tender prices since contractors are no longer carrying these contingent liabilities. Where contingent liabilities are present, these would require to be dealt with in accordance with the Scottish Public Finance Manual prior to contract award.

## OFFICIAL – SENSITIVE – Commercial

All steps will be taken to ensure that where it is considered that any contingent liability exists, the total contingent liability is restricted to a minimum. It should, however, be noted that in the situation a contingent liability is considered to exist, there is likely to be a requirement (given the value is likely to be in excess of £2.5million) to seek the prior approval of Parliament via the Finance and Constitution Committee prior to contract award.

In addition to the financial impacts associated with the contract risk profile proposal, there are also financial impacts associated with the adoption of a new contract form.

Whilst it is difficult to compare and forecast with any certainty the costs excluding contractual spend associated with adopting a new form of contract ( Transport Scotland having only used such a contract on a small scale previously), it is estimated that it will cost an additional £3m over the life of the new contract compared to using the previous TS contract . This additional cost includes spend on a management system, risk support, contract drafting, legal advice and the Project Manager role during contract. Whilst this indicates an increased cost for the NEC4 contract, this is largely down to the anticipated additional costs of developing a new contract and works scope as well as the expected higher level of governance that will inevitably apply on the first major use of a new contract form by Transport Scotland. It is considered that these costs can be justified given the need to attract bidders and create competition, via the use of the NEC4 contract.

Subject to receiving the Cabinet Secretary and Minister's approval, the following will be undertaken:

Complete the drafting of the contract;

Further work on risk mitigation including:

- i. Consideration of advance enabling works and advance public utility diversions: and
- ii. Work on capping limits for risks where possible.

In conclusion you are invited **to approve:**

- **the use of an amended NEC4 Engineering and Construction Contract (ECC) for the Project, and;**
- **the proposed risk profile for the project, which results in more risk being held by the Scottish Ministers than under previous contracts for similar projects.**

[redacted]

**Extract of A9 Tomatin to Moy Cabinet Secretary note to First Minister 28 July 2023**

To provide an update on the A9 Programme ‘the Programme’ and the A9 Dualling: Tomatin to Moy project (‘the Project’) and to outline the next steps and intended timeline.

I attended a public event on the progress of the A9 Dualling, run by the Highland News Group on 18 July in Inverness, which has resulted in a significant amount of correspondence. During that event, I reiterated the Scottish Government’s commitment to providing an update on the timetable for the A9 Dualling Programme to Parliament as soon as possible, by Autumn at the latest.

Since the above public event I have arranged to meet with Fergus Ewing MSP and Laura Hansler, the lead representative of the A9 Dual Action Group, on 29 August. Ms Hansler is the petitioner on behalf of the A9 Dual Action Group, to the Citizens Participation and Public Petition Committee, which has led to the CPPPC leading an enquiry into the safety of the A9 and the progress of the A9 Dualling, an evidence session for which was held on 14 June 2023.

A background summary is provided in Annex A which outlines progress to date. Work is currently ongoing by officials in relation to four discrete packages:

- Urgent preparation for a new procurement of the A9 Dualling: Tomatin to Moy Project;
- To identify a preferred route option for the Pass of Birnam to Tay Crossing section following the innovative co-creative process with the local community;
- Assessment of options for delivery of the remaining elements of the Programme, including preparation of an Outline Business Case for the Programme, setting out the Strategic, Socio-Economic, Commercial, Financial and Management Cases; and
- In support of the above, completion of statutory processes for the remaining elements of the Programme.

**Tomatin to Moy Project**

In respect of the procurement for the Tomatin to Moy Project, officials have provided advice to me on the proposed contract risk profile and contract form, which has the aim of attracting more bidders to participate in the new procurement to generate improved competition, following an extensive market engagement process. I accepted this advice on 27 July. This results in an amended risk profile and contract form for the new procurement which has the aim of attracting more bidders to participate in the competition.

Officials have intimated that further advice will follow shortly, subject to internal governance procedures as outlined in paragraph 8 below, which will set out the envisaged timeline for the proposed new procurement of the Project. Officials have noted that the procurement timeline requires to give the market sufficient time to be able to understand the requirements of the Project and price the works accurately, otherwise there is a risk that bidders will be unwilling to participate or alternatively



run the risk of returning significantly higher priced tenders. I have emphasised that the advice should reflect a timescale that is as short as possible while still considered deliverable with the market.

#### A9 Dualling Programme - procurement

Officials have confirmed the work to inform the advice on the options for delivery of the remaining elements of the Programme is in the advanced stages of preparation including an Outline Business Case.

This advice will be subject to Officials' internal governance procedures, which include Investment Decision Making Boards, review by SG Executive Team (ET) in Investment Mode and satisfactory completion of Accountable Officer assessments prior to advice being issued to Ministers. The application of these governance procedures follows the principles of the Scottish Public Finance Manual and gives assurance that the advice provided is robust and has been developed with the necessary rigour to support decision making by Ministers.

Following receipt of Officials' advice and Ministerial consideration and decision making, a further update on the Programme will be provided to Parliament in Autumn 2023, setting out the new timescale for completion. This will deliver the commitment made by the then Minister for Transport in her statement to Parliament on 8 February 2023.

The following sets out a summary of the next steps and timeline for advice to Ministers for decision making:

- A9 Dualling Tomatin to Moy – Proceed to Procurement (Advice to Ministers) – subject to internal governance – anticipated mid-late August;
- A9 Dualling Programme Procurement options (Advice to Ministers) - subject to internal governance - anticipated late August;
- Publication of Tomatin to Moy contract notice – Late August subject to approval;
- Decision by Cabinet on wider A9 Dualling Programme procurement – anticipated mid/late September; and
- Statement to Parliament – late September/early October.

The then Minister for Transport set out the Government's firm commitment to the A9 Dualling Programme in the February Parliamentary Statement and this overall position has not changed. You have reiterated this commitment as First Minister on several occasions, as have I, including at the recent public event in Inverness referenced above.

Decisions regarding the Programme and/or the Tomatin to Moy project each have significant financial implications and these will be outlined fully in future relevant submissions. Progressing with the Tomatin to Moy project is based on additional capital funding being allocated to deliver it as a Design and Build contract, with construction occurring over FY 24/25, 25/26, 26/27 and 27/28. The Outline Business Case for the Programme will include assessment of options for funding the

remainder of the Programme using the traditional capital route and a resource funded route based on use of the Mutual Investment Model.

## Conclusions

There are clearly a number of key tasks on which Officials are working at pace to deliver on over the coming weeks. I have stressed the urgency of moving forward on these in order that we can obtain the appropriate advice to commence the procurement of Tomatin to Moy at the earliest opportunity, and also to be able to reach our decisions on the wider programme such that I can provide an update to Parliament in the early autumn.

## **MMc**

### **Annex A – Background**

#### **Background**

On 12 October 2022, while the first procurement competition for the Project was ongoing, a Ministerial discussion was held with Officials on the approach to the remainder of the Programme, triggered by work undertaken on the Strategic and Socio-Economic Cases (Case for Investment) for the Programme. In that discussion Officials provided an update on:

- Recent work undertaken in relation to the Strategic and Socio-Economic Cases for the Programme and the emerging findings from that work;
- Emerging findings from work undertaken to consider options for procurement of the remaining elements of the Programme; and
- An outline of possible implications for those emerging findings of market changes following the UK Government's "mini-budget".

A commitment to continue discussions was agreed.

The Programme was subsequently reviewed by the SG Executive Team in Investment Assurance Mode on 25 October 2022. The Board noted concern with the current findings of the Business Case and did not endorse the case as currently framed.

Subsequently, on 7 December 2022, a Briefing was submitted by Officials to the then Deputy First Minister/Acting Cabinet Secretary for Finance seeking a ministerial decision on the proposed next steps for the Programme. This paper also confirmed that the current published target date of 2025 for completion of the programme should no longer apply. Following discussions with Officials, the then Deputy First Minister/Acting Cabinet Secretary for Finance approved the recommended next steps, which consisted of:

- Maintaining sufficient progress with statutory processes to secure the statutory authorisations and eliminate the risk of these lapsing;
- Maintaining flexibility in how the Programme is progressed and minimising delays to completion of the Programme;

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- Enabling early consideration of alternative delivery options and hence minimising the delay to the point at which decision making on particular delivery options can take place, following normal business case processes and subject to suitable market conditions prevailing and budget availability permitting; and
- Demonstrating that the Scottish Government remains committed to completion of the Programme by continuing to take forward certain elements of the Programme.

On 2 February 2023 two briefings were issued by Officials to the then First Minister, the then Deputy First Minister/Acting Cabinet Secretary Finance, the then Cabinet Secretary for Net Zero, Energy and Transport and the then Minister for Transport. The first briefing updated on the outcome of the procurement process for the Project and recommended that in view of only one tender being received, for a value significantly higher than expected, Ministers should not make a contract award. Ministers confirmed their decision not to award the contract on 3 February 2023. The second briefing provided advice on proposals for re-tendering the Project at the earliest opportunity; proposals for a Parliamentary Statement on the Programme; and options to take forward a review of the Programme timetable.

Following the above advice, a Parliamentary Statement was delivered by the then Minister for Transport on 8 February 2023 confirming that:

- The Tomatin to Moy contract would not be awarded at that time as the submission received was not considered to provide best value for the taxpayer;
- That the Project would be subject to a new procurement competition, in support of which Transport Scotland would engage with the industry on possible changes to contract terms and conditions, with the firm aim of awarding a contract by the end of 2023;
- The target completion date of 2025 for the Programme was not achievable; and
- A further update on the new timescale for completion of the Programme would be provided to Parliament in Autumn 2023.

Following on from the Parliamentary Statement, Transport Scotland officials began considering ([redacted]) whether it would be possible to make amendments to the standard Transport Scotland contract terms (informed by market engagement) in order to reflect changes in the market and improve market interest for the new procurement.

In addition, officials continued with work to update the Strategic and Socio-Economic Cases for the Programme. Officials held discussions with myself and the former Minister for Transport in April 2023 in respect of a prospective early commencement of the new procurement for the Project. Officials noted that since the Project relies on the wider A9 Dualling Programme to demonstrate value for money, pending completion of work to update the Strategic and Socio-Economic Cases it would be necessary for the Transport Scotland Accountable Officer to seek a written authorisation from Ministers (in terms of section 15 of the Public Finance and Accountability (Scotland) Act 2000) if Ministers wished to proceed with the

procurement of the Project, due to the uncertainty at that time regarding the value for money position of the Programme.

As work on proposals to amend Transport Scotland's standard terms and conditions progressed, officials considered it necessary to review the proposed changes in further detail in order to ensure that the effect of the changes was fully understood and that the contract would still provide appropriate protections for Ministers and the taxpayer. A briefing was submitted to the former Minister for Transport on 26 May 2023, providing a summary update on the new procurement of the Project and seeking approval for a proposed timetable for the new procurement which would allow further time for the contract review work to conclude. Following the above, and the resignation of the former Minister for Transport, further considerations and discussions have been held with regards to the proposed timetable of the new procurement, which will be the subject of further advice to Ministers as outlined earlier in this paper.

### **Extract of A9 Tomatin to Moy Publication of Contract Notice Briefing 24 August 2023**

A decision is requested before 29 August to allow appropriate briefing to be provided ahead of the Parliamentary Statement on 5 September.

To provide a summary of the preparations that have been undertaken in relation to the new procurement for the A9 Dualling: Tomatin to Moy project ('the Project').

To seek approval to proceed to procurement for the A9 Dualling: Tomatin to Moy project ('the Project') with the publication of a Contract Notice through the Public Contracts Scotland Portal.

To outline plans to update Parliament on the timescale for the new procurement.

**The Cabinet Secretary and Minister for Transport are invited to:**

- **Approve the commencement of the new procurement for the Project with the publication of a Contract Notice;**
- **Approve the payment of a portion of unsuccessful bidders' costs (up to a capped limit of £200k per bidder); and**
- **[redacted]**

### **Context and Issues**

On 8 February 2023, following a previous unsuccessful procurement process, the then Minister for Transport (Ms Gilruth) made a statement to Parliament committing to undertaking a new procurement for the Project as soon as possible, with the aim of making a contract award by the end of 2023.

As described in draft advice to the Cabinet Secretary in June 2023 and outlined in advice from the Cabinet Secretary to the First Minister dated 28 July, in April 2023 Transport Scotland officials noted that, it was likely that Transport Scotland's

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Accountable Officer would need to seek a written authorisation from Ministers (in terms of section 15 of the Public Finance and Accountability (Scotland) Act 2000) if Ministers wished to proceed with the procurement of the Project, due to the uncertainty at that time, regarding the value for money position of the Programme while work on the outline business case for the A9 Dualling Programme, including the Strategic and Socio-Economic Cases continued.

Since the original publication of the case for investment in 2016, the policy context has changed, most notably with the second National Transport Strategy (NTS2) and National Planning Framework 4, which recognises the Global Climate Emergency as well as the National Strategy for Economic Transformation.

An updated Strategic and Socio- Economic case has now been completed. The current value of money case for the A9 Dualling Programme has a standard benefit cost ratio of 0.81, which includes driver frustration and wider economic benefits. There is a strong supporting strategic case and significant unmonetarised benefits which improve the position to a marginally positive value for money assessment.

Value for Money considers both the monetised and non-monetised benefits and disbenefits against the costs in line with HMT Green Book. Not all impacts of an intervention can be monetised, but these are still important effects, particularly when they impact on the government's policy position. Whilst this has always been the case within Scottish Transport Appraisal Guidance (STAG) it is an approach that is being increasingly adopted across UK Government, particularly in the context of rural areas and the levelling up agenda. There is also considerable academic research to support the approach of taking a wider view of value for money than focussing on benefits than can be accurately monetised.

Subsequently, the Outline Business Case and value for money assessment (Summary note included in Annex B) for the A9 Dualling Programme were considered at Executive Team in Investment Assurance mode on 27 July and 22 August. Executive Team have now endorsed the value for money assessment made by Transport Scotland's Accountable Officer. Further advice to Minister's will be provided on the procurement options for the wider A9 Dualling Programme in due course.

Given the above, the Accountable Officer concluded on 24 August, following detailed assessment, that the Programme satisfies value for money considerations, on which basis recommendations may be made to proceed to procurement for the Tomatin to Moy Project.

Following a significant market engagement exercise (with The Civil Engineering Contractors Association (CECA) and contractors), Transport Scotland identified an amended contract strategy (approved by the Cabinet Secretary for Transport, Net Zero and Just Transition on 27 July 2023) and a more streamlined procurement processes for the proposed new procurement competition for the Project.

The contract strategy for the proposed new procurement is based on an amended NEC4 Engineering and Construction Contract (ECC) with a fixed price payment mechanism. The detail of the contract strategy is contained within the submission A9

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Dualling: Tomatin to Moy – Contract Strategy dated 25 July. The proposed contract strategy has recognised market feedback and is expected to be more attractive to the market given the amended form and risk profile from previous procurements.

Having considered several procurement options including competitive procedure with negotiation; early contractor involvement (ECI); and competitive dialogue models and considering feedback from the market (which clearly indicated a preference for a shortened procurement process) the proposed new procurement will be taken forward based on a streamlined competitive dialogue process. This route provides a significantly reduced timescale, and cost certainty at contract award stage.

Publishing a Contract Notice in early September will allow a two-month pre-qualification period, following which we intend to shortlist a maximum of three economic operators to participate in the streamlined competitive dialogue process in November 2023.

Noting the significantly reduced timescales associated with this streamlined dialogue process, the earliest possible contract award, subject to no unforeseen circumstances, is expected to be early Summer 2024). It is important that bidders are provided sufficient time to engage with the procurement process to achieve a successful outcome.

While the shortened competitive dialogue procedure mitigates a small portion of the bidders' high upfront costs, market intelligence has suggested each tenderers bid costs would still be in the region of £350-700k which remains a concern for some contractors. To maximise competition in this procurement, it is proposed that a bid cost reimbursement mechanism is included to permit unsuccessful bidders to reclaim a portion of their bid costs (up to a capped limit of £200k) where they have submitted a compliant tender. A Participation Agreement would also require to be signed by the parties involved in the competition and this has been developed for inclusion within the Tender Documents which set out the protocol.

This practice is only generally used where there are particular reasons for doing so, such as the location of the project or significant bid expenditure which is over and above usual bid costs (i.e., the Forth Replacement Crossing). The market engagement was unanimous in expressing the significant costs associated with Transport Scotland's typical competitive dialogue procurement process and whilst the new procurement will follow an expedited procurement process (which it is hoped will reduce bid costs), some bidders have already expended significant amounts of money on the original procurement process and will require to commit further significant expenditure to make a bid in the new procurement with no guarantee of a successful outcome. An announcement on the wider A9 Dualling Programme timetable and procurement has yet to be made (noting that a commitment for an update in Autumn 2023 has been made) and whilst the Scottish Government has been clear in its commitment to dual the A9, the market is still nervous about the certainty of the A9 Dualling Programme proceeding.

Whilst this approach could attract an additional cost of up to £400k (based on two unsuccessful bidders, out of the intended invite for three bidders to participate in dialogue), there still remains a significant risk, despite the expedited procurement

process and the substantial amendments to the contract strategy, that there is insufficient competition. This holds a significant reputational risk to both Transport Scotland and Scottish Ministers and it is considered that paying a portion of unsuccessful bidders' costs in order to mitigate the risks of another failed procurement is justified and proportionate.

[redacted]

As the A9 Dualling Programme, and A9 Tomatin to Moy project, is not explicitly referenced within the Bute House Agreement, it falls within the group of projects and programmes covered by the statement that:

*“work on other trunk roads projects and programmes under construction, design, development or procurement will continue and be subject to the normal statutory assessment and business case processes.”*

The advice within this submission is therefore consistent with the provisions of the Bute House Agreement.

The statutory processes for the Project, as for all roads projects, include engagement with the relevant Local Authority (The Highland Council in this case) and Transport Scotland has engaged with the relevant Local Authority throughout the development of the Project to ensure that the needs of The Highland Council are reflected in the contract documents. This engagement is expected to continue throughout the procurement process and through the construction phase of the project as is normal practice for significant infrastructure projects of this size and nature.

It is therefore considered that the proposed recommendations and next steps within this submission are aligned with the principles of the Verity House Agreement.

A detailed cost estimate revision and refinement exercise was conducted in July 2023 to inform the updated pre-tender estimate of the project. **The “most likely” cost for the construction contract, at a Q2 2024 price base (i.e., the estimated date of contract award) was determined to be approximately £150 million.**

**This results in a new overall scheme cost estimate of approximately £254 million** (most likely scenario), which includes all historic costs, design, preparation costs, land costs, advance works costs, contractor risk, employer's risk, optimism bias, inflation and non-recoverable VAT, **resulting in an expected total forward budget requirement of approximately £201million.** Based on the procurement timetable outlined in paragraph 17 above and subject to no unforeseen circumstances, it is expected that the new road will open to traffic in Autumn 2027 with the maintenance and defects period concluding in Autumn 2032.

The above funding is indicative based upon the most-likely construction estimate and significantly exceeds the allocation previously provided in the CSR Refresh published in May 2022. The actual funding allocation required will be confirmed once the procurement has concluded and the most economically advantageous tender

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return value is known. Any decision to proceed with the award of the contract is dependent on adequate budget being provided to Transport Scotland in future years.

[redacted]

In conclusion **the Cabinet Secretary and Minister for Transport are invited to:**

- **Approve the commencement of the new procurement for the Project with the publication of a Contract Notice;**
- **Approve the payment of a portion of unsuccessful bidders' costs (up to a capped limit of £200k per bidder); and**
- **[redacted]**

[redacted]



## Extract of Fergus Ewing MSP and A9 Action Group meeting Briefing 29 August 2023

### Agenda

Item
1. Welcome
2. Discussion on A9 Dualling Programme and Safety
3. Any other Business
4. Actions

### A9 Dualling Programme

#### Key Messages

- **At £3 billion (at 2008 prices), dualling the A9 between Perth and Inverness is one of the largest and most challenging infrastructure programmes in Scotland's history.**
- **This Government remains firmly committed to completing the dualling of the A9 between Perth and Inverness which is both a national and a local priority.**
- **The A9 Dualling Perth to Inverness programme will bring benefits to road users, communities and businesses who live along or use this important route between central Scotland and the Highlands and Islands, including improved public transport and active travel links, as well as provide safer roads for drivers and local communities, reducing frustration and driver stress.**
- **Upgrading the safety and reliability of the A9 between Perth and Inverness will unlock the economic potential of the Highlands and Islands and we will work with contractors and local partners to create meaningful and lasting social value benefits wherever possible.**
- **The A9 Dualling Programme underlines the Scottish Government's commitment to connecting Scotland's cities with a high quality transport system that is safer for users, generates economic growth, whilst also improving connectivity for our rural communities who rely on essential road infrastructure to thrive.**

#### Delivery

Top Lines

#### Overall Programme

- The Scottish Government remains firmly committed to completing the dualling of the A9 between Perth and Inverness. The £3bn investment (at 2008 prices) is one of the biggest transport infrastructure programme's in Scotland's history.
- We have already invested over £430m delivering the programme with road users already benefiting from the dualled sections between Kincaig and Dalraddy and Luncarty and the Pass of Birnam, which opened in September 2017 and August 2021 respectively.
- Design work is progressing on the rest of the programme, with ministerial decisions to complete the statutory process confirmed for seven of the remaining eight schemes.
- Work to determine the most suitable procurement options for these sections of the A9 dualling is at an advanced stage.
- This is a complex exercise which looks at a number of factors including how the project can be delivered most efficiently by the industry, whilst minimising disruption to road users and helping to support economic recovery post-COVID.
- This work is expected to conclude in Autumn 2023 and an update on a new timescale for completion will be provided to the Scottish Parliament following this.
- The only section not to have started the statutory process is the Pass of Birnam to Tay Crossing project, where work is ongoing to identify a preferred route option following the innovative co-creative process with the local community.
- The former Minister for Transport, Kevin Stewart MSP, met the Birnam to Ballinluig A9 Community Group on Monday 05 June to discuss their concerns and the new Minister will also meet the Group in the coming weeks prior to a decision be made on the preferred route option for this section.
- An announcement on the preferred route option is expected to be made this Autumn.

### Tomatin to Moy

- Transport Scotland is urgently preparing for the new procurement of this contract. The new procurement was announced in a Parliamentary Statement on the 8 February 2023.

- Following the Statement, Transport Scotland immediately began taking the necessary preparatory steps to procure the construction contract for the Tomatin to Moy project and work is progressing as a matter of urgency.
- Transport Scotland has engaged with industry partners, The Civil Engineering Contractors Association (CECA) and contractors, to consider improvements that can be made to both our contract delivery strategy and procurement mechanisms, to maximise interest and market engagement in the new procurement. This work will result in a change to the contract strategy to include both a new form of contract (an amended NEC4 Engineering and Construction Contract (ECC), a form of contract favoured by the industry) as well as a more balanced approach to the sharing of risk between the Scottish Ministers and the contractor

## Progress To Date Lines

### Kincraig to Dalraddy

- The £35 million contract for the first section of the A9 Dualling to be constructed between Kincraig and Dalraddy was awarded to a joint venture of Wills Bros Civil Engineering and John Paul Construction. This section was made fully operational to traffic in September 2017.
- This includes a new 7.5 km non-motorised user facility was provided to support active travel in the area. The facility includes four links to the local community and surrounding area, via underpasses that connect the local estates and the village of Kincraig. This section forms part of a wider route to join up the communities of Aviemore and Kingussie which will be completed as the dualling progresses.
- As is standard on Transport Scotland's Design and Build contracts, the Kincraig to Dalraddy contract places an obligation on the Contractor to rectify any defects arising due to workmanship identified within the first 5 years following completion of the road.
- In addition, the Contractor is also required to complete certain tasks within that five-year period, such as replacement of white lining and landscape planting establishment works.
- It is not unusual that such works will require traffic management measures to be installed to be able to be carried out safely.
- Whilst this section became fully operational in September 2017, as completion was achieved in March 2018 the five-year defects notification period ended in March 2023.
- Progress of defect rectification work has been affected by inclement weather and supply chain issues, and whilst the works undertaken in June 2023 have helped to reduce the extent of remaining works, we continue to work closely with the Contractor to fully complete these. Works remaining include:
  - repairs to drainage kerbs in laybys
  - renewal of white lines across the full site
  - repairs to concrete surrounds on a small number of communications chambers.

## Luncarty to Pass of Birnam

- Luncarty and the Pass of Birnam opened fully to traffic on 28 August 2021.
- The contract for the second section of the A9 Dualling between Luncarty and Pass of Birnam was awarded to Balfour Beatty on 21 September 2018.
- The Luncarty to Pass of Birnam project widens 9.5km of the A9, providing 15km of continuous dual carriageway between Inveralmond roundabout in Perth and the Pass of Birnam.
- This £96m investment improves journey times and reliability, and improve road safety by providing safe overtaking opportunities and a reduction in driver frustration. More significantly, will generate economic growth, supporting businesses, communities and tourism throughout Scotland by improving access to and from the Highlands.
- The project will contribute to the programme aim of supporting sustainable overall benefits to communities, including:
  - Creation of jobs opportunities and work placements – targeting the local area and those not in education or employment, including individuals with barriers to employment.
  - Ongoing engagement with universities, colleges and local schools to support Transport Scotland’s Academy9 Schools Programme to promote STEM (Science Technology Engineering and Mathematics) subjects and engineering as a career.
  - Providing work placement opportunities to local secondary school pupils and college/ university students interested in perusing a career in construction.
  - Employment opportunities for apprentices and graduates.
  - Supporting sustainable employment opportunities by upskilling existing workforce via new qualifications.
  - Supporting the local economy via SME sub-contract opportunities.
  - Provision of volunteer days with local community organisations.

## Design and Development

### Top Lines

#### **General**

- We are dutybound to properly follow the correct statutory planning process which rightly includes consultation with communities, landowners and others with a direct interest in the scheme. The statutory right for individuals to have their say on our proposals cannot be set aside and it is essential that vital feedback is taken into account as we develop our plans.
- Delivery of major infrastructure projects follows several consecutive stages: development of proposals, public and stakeholder consultation, statutory processes, procurement of works contracts and, finally, detailed design and construction.
- The A9 Dualling Programme is particularly complex in that it features 11 separate projects following the promotion process which have then been considered in various combinations to determine the most efficient approach to procurement and construction to both protect the public purse and minimise disruption to road users.

#### **A9 Design and Statutory Progress**

- Design work is progressing on the remaining sections of the programme, with ministerial decisions to complete the statutory process confirmed for eight of the remaining nine projects. This means that over 92% of the programme now has Ministerial decisions to make Orders and complete the statutory process.
- The only section not to have started the statutory process is the Pass of Birnam to Tay Crossing project, where work is ongoing to identify a preferred route option following the innovative co-creative process with the local community.
- The former Minister for Transport, Kevin Stewart MSP, met the Birnam to Ballinluig A9 Community Group on Monday 05 June to discuss their concerns and the new Minister will also meet the Group in the coming weeks prior to a decision be made on the preferred route option for this section.
- An announcement on the preferred route option is expected to be made this autumn.
- With Tomatin to Moy being procured separately as an individual Design and Build contract, of the seven remaining projects which have ministerial decisions to complete the statutory process, Orders have been made for four of the projects (Tay Crossing to Ballinluig, Pitlochry to Killiecrankie, Glen Garry to Dalwhinnie, and Dalwhinnie to Crubenmore). Transport Scotland is taking forward the necessary preparatory work to make the Orders for the three other projects which have ministerial decisions (Killiecrankie to Glen Garry, Crubenmore to Kincairdie, and Dalraddy to Slochd) to achieve publication next year.
- Subject to there being no challenge following publication of made Orders for these three projects this would complete the statutory process for seven of eight the remaining projects that make up the programme. This will allow Transport Scotland to acquire land included in the Compulsory Purchase Orders which is required to build and maintain each of the projects.

- **A9 Dualling – Current Status and sections update**

- The A9 Dualling Programme will upgrade 80 miles (129 kilometres) of road from single to dual carriageway.
- Transport Scotland’s £3 billion programme (at 2008 prices) is designed to deliver economic growth through improved road safety and reliable and quicker journey times, as well as better links to pedestrian, cycling and public transport facilities.
- The Programme was split into 11 sections for the purposes of planning, local engagement and statutory consents.
- At present, two sections Kincaig to Dalraddy and Luncarty to Pass of Birnam of the programme are complete.
- Procurement of a third section, between Tomatin and Moy, has resulted in no award being made.
- Having carefully reviewed this tender, Ministers have concluded the bid does not represent best value at the current time.
- As details of the tender submitted are and remain confidential it would not be appropriate to comment further.
- Transport Scotland is already taking the necessary preparatory steps for the urgent re-tendering of the Tomatin to Moy project, with the aim of achieving a contract award before the end of 2023
- Design work is progressing on the rest of the programme, with ministerial decisions to complete the statutory process confirmed for seven of the remaining eight schemes, covering over 92% of the length to be dualled. Delivery of the remaining sections of the dualling programme can only commence if approved under the relevant statutory procedures.
- The statutory right for individuals to have their say on our proposals cannot be set aside and it is essential that vital feedback is taken into account as we develop our plans.
- The only section not to have started the statutory process is the Pass of Birnam to Tay Crossing project, where work is ongoing to identify a preferred route option following the innovative co-creative process with the local community. Work is progressing on announcing a preferred route for this section which is expected to be made in the autumn.

	<b>Section</b>	<b>Status</b>	<b>Information</b>
P1	A9 Luncarty to Pass of Birnam	Delivered	-
P2	A9 Pass of Birnam to Tay Crossing	In Design	The former Minister for Transport, Kevin Stewart MSP, met the Birnam to Ballinluig A9 Community Group on Monday 05 June to discuss their concerns and the new Minister will also meet the Group in the coming weeks prior to a decision be made on the preferred route option for this

			section. Work on the assessment of the preferred route option is complete and currently subject to our internal governance procedures. An announcement on the preferred route option is expected to be made this Autumn.
P3	A9 Tay Crossing to Ballinluig	Orders made	The Ministerial decision to proceed to make the orders was received 2 March 2021. Made Orders were published on 26 November 2021
P4	A9 Pitlochry to Killiecrankie	Orders made	Ministerial decision to proceed to make the orders was received 11 Feb 2020. Made Orders were published on 26 November 2021
P5 <sup>6</sup>	A9 Killiecrankie to Glen Garry	Statutory Process Underway	Draft Orders published on 28 November 2017 and 183 objections were received (the majority relate to concerns about the Killiecrankie Battlefield). Public Local Inquiry was held January 2020 and in November 2022 Scottish Ministers confirmed that the statutory procedures can be completed. Work is progressing to publish made orders.
P7	A9 Glen Garry to Dalwhinnie	Orders made	Ministerial decision to proceed to make orders was received 31 May 2019. Made Orders were published on 30 July 2021
P8	A9 Dalwhinnie to Crubenmore	Orders made	Ministerial decision to proceed to make orders was received November 2020. Made Orders were published on 30 July 2021
P9	A9 Crubenmore to Kinraig	Statutory Process Underway	Ministerial Decision to proceed to make orders was received 17 January 2022 and preparations to make the orders are progressing.
P10	A9 Kinraig to Dalraddy	Delivered	-
P11	A9 Dalraddy to Slochd	Statutory Process Underway	Ministerial decision to make orders was received 15 November 2021 and preparations to make the orders are progressing.
P12	A9 Tomatin to Moy	Procurement expected to get underway shortly	A decision was taken not to make an award under the previous procurement, concluded in February 2023. Having carefully reviewed this tender, Ministers have concluded the bid does not represent best value at the current time. This project

<sup>6</sup> Originally two separate projects were identified, but these were later combined into a single project referenced as P5

			will be re-tendered with a target of making an award by the end of 2023.
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## Sensitivities

- The former Minister for Transport, Jenny Gilruth MSP, provided an update on the A9 Dualling Programme to Parliament on 8 February 2023, including that the target date of 2025 for completion of dualling was unachievable; that work to confirm a new timescale for completion was ongoing and an update to Parliament would be provided in Autumn 2023 and that the recent procurement exercise for the Tomatin to Moy section resulted in no award and would be subject to a new procurement with the aim to award a contract by the end of 2023.
- Following the statement to Parliament, there was an increase in correspondence from the public along with widespread negative reporting and commentary from national, local, UK and trade media, focusing on the confirmation that original 2025 target completion date will not be delivered, including various reports highlighting Fergus Ewing MSP's call for an inquiry.
- A Scottish Unionist and Conservative Party debate was held on Wednesday 22 February 2023 with opposition motion criticising the Government.
- A Members' Business debate was also held on 21 March 2023 regarding Road Improvements and the Dualling of the A9.
- Citizen Participation and Public Petitions Committee held evidence session on 14 June 2023 for the A9 action group petition PE1992: Dual the A9 and improve road safety.
- CECA, a contracting body responded to the Citizen Participation and Public Petitions Committee criticising Transport Scotland's contracts which has been picked up by several media outlets.
- A GIQ was lodged on 12 June and then subsequently withdrawn, this has been raised and questioned by various MSPs since then including at FMQs. 2 FOI requests received requesting correspondence in relation to withdrawn GIQ.
- Issues that have been identified through recent correspondence and parliamentary questions include:
  - The lack of certainty around a new date is being received negatively. Ministers continue to confirm commitment to complete the dualling and continue to confirm that an update to Parliament will be provided following completion of the complex exercise to consider the factors influencing the most efficient delivery mechanisms for the Programme, whilst minimising disruption to road users and helping to support economic recovery post-COVID.
  - Concerns around road safety on the A9 following the high number of fatalities over the last year. Ministers continue to confirm progress with the £5m of additional short term road safety measures being implemented, including road safety campaigns, with the current focus of campaign work being overseas visitors to Scotland.



- The Scottish Parliament's Citizen Participation and Public Petitions Committee launched a public consultation on 9 August on the most effective interim safety measures and a national memorial to those who have lost their lives on the A9. The consultation was launched via a joint media release with petitioner Laura Hänsler and committee chair Jackson Carlaw MSP

## **A9 Dual Action Group Petition**

The A9 Dual Action Group has submitted a petition to the Scottish Parliament, as follows:

*PE1992: Dual the A9 and improve road safety*

*Calling on the Scottish Parliament to urge the Scottish Government to deliver on the commitment it made in 2011, and address safety concerns on the A9 by:*

- *publishing a revised timetable and detailed plan for dualling each section;*
- *completing the dualling work by 2025; and*
- *creating a memorial to those who have lost their lives in road traffic incidents on the A9.*

As at 17 July 2023, the petition had received 3,865 signatures. Background information on the petition states:

*A social media awareness campaign called "A9 Dual Action Group", was formed to highlight the following issues:*

- *The exponential rate of fatalities. The A9 has now become a road barely fit for purpose with an unsustainable influx of traffic on the infrastructure.*
- *In 2011, the Scottish Government pledged as "priority" an ambitious dualling scheme to be completed by 2025, between Perth to Inverness in its entirety. Since then, 59 people have lost their lives on the Perth to Inverness section of the A9 (based on figures provided by Transport Scotland).*
- *Whether there should be an investigation into the procurement procedure associated with this project.*
- *The need for mandatory safety features to be deployed on the A9 before any further loss of life.*

*The Action Group are also concerned that, more than 10 years after being labelled a priority, it is looking increasingly likely the Scottish Government will fail to deliver on their commitment to complete the A9 dualling project by 2025.*

The Citizen Participation and Public Petitions Committee is considering this petition and has taken evidence from the A9 Dual Action Group (Laura Hänsler), The Civil Engineering Contractors Association (Grahame Barn) and Transport Scotland (Lawrence Shackman, Robert Galbraith and Morag Mackay).

**Extract of Additional Material provided for meeting 29 August 2023**

**Major Projects  
Transport Scotland**

George House, 36 North Hanover Street, Glasgow, G1  
2AD  
lawrence.shackman@transport.gov.scot



Sarah Fyfe  
By email – sarah.fyfe@hnmedia.co.uk

Our ref:  
202300369667

Date:  
24 August 2023

Dear Sarah Fyfe

**A9 Dualling Programme**

Thank you for your continued support and interest in the A9 Dualling Programme and for providing your summary of the action points raised at the recent A9 Summit on 18 July, which was attended by the Cabinet Secretary for Transport, Net Zero & Just Transition and Transport Scotland officials. Those that attended the event demonstrated a clear consensus in favour of the dualling programme and I trust the Cabinet Secretary's presence and contributions at the Summit equally demonstrate her and the Government's commitment to dualling the A9 between Inverness and Perth. As this is a matter for which Transport Scotland's Major Projects Directorate has responsibility, your email has been passed to me to respond.

The programme is both a national and a local priority and represents one of the largest and most challenging infrastructure programmes in Scotland's history. I can assure your readers that my colleagues and I, together with a range of specialist advisors, are working hard to conclude work to determine the most suitable procurement options for the remaining sections of the A9 dualling programme. I can confirm this work is firmly on track to enable an update to be given to Parliament in the autumn, as promised earlier this year. This update will include a new timescale for completion.

Turning now to your specific points, I have responded to each in turn using your headings for clarity below:

[redacted]

**Dualling:**

- a) A final date for the completion of the dualling programme.*
- b) A detailed schedule for the completion of each of the remaining sections.*
- c) Information on contract type – clearly state if sections will be paid for as the government can afford or a lump sum.*
- d) Join a locally based A9 working group to meet every quarter.*

Details of proposals relating to points a) to c) above are expected to be set out in the aforementioned parliamentary update in the autumn.

With regards to point d), stakeholder engagement is central to how we deliver major infrastructure projects and the design and development phase has already involved significant community, landowner, business and other stakeholder engagement as well as statutory consultation as part of the ongoing Orders process. Following confirmation of decisions on the approach to delivery of the remaining sections of the programme, we will set out our proposals for facilitating and supporting stakeholder engagement across all stakeholder groups with interests in the work taking place throughout the A9 Perth to Inverness corridor.

I hope you find the above information helpful and I would be grateful if you would publish this letter in full so your readers may see the response to the various points you and others have raised.

Yours sincerely



**Lawrence Shackman**  
Director of Major Projects

**Extract of Fergus Ewing MSP and A9 Dual Action group note of meeting 29 August 2023**

**Meeting with Fergus Ewing MSP and [redacted] of the A9 Dual Action Group –  
Minute of Meeting**

Tuesday 29 August 2023 – 16:00 to 16:45

**Attendees**

Màiri McAllan (Cab Sec), Cabinet Secretary for Net Zero and Just Transition  
Fiona Hyslop (MfT) MSP, Minister for Transport  
Fergus Ewing MSP (FE)  
[redacted] A9 Dual Action Group  
Lawrence Shackman (LS), Transport Scotland, Director of Major Projects  
[redacted] Transport Scotland, Head of A9 Dualling Programme  
[redacted] Transport Scotland, Road Safety and Development Manager  
[redacted] Special Advisor  
[redacted] MfT Private Office, Private Secretary  
[redacted] Cab Sec Private Office, Private Secretary  
[redacted] Special Advisor  
[redacted] Transport Scotland, Project Administrator

**Discussion Points**

[redacted]

Cab Sec outlined ongoing work to prepare for the new procurement. FE referred to comments made by Transport Scotland at the petitions committee evidence hearing, in particular that the contract used by Transport Scotland is no longer viable with the market. Cab Sec confirmed that the new contract will be based on the New Engineering Contract and that changes have been made to make the contract more attractive.

FE questioned whether TS is confident that external parties will agree. Transport Scotland highlighted extensive consultation with contractors to alter the risk profile in the contract. FE plans to discuss with industry members to understand the views of contractors following the consultation and highlighted the large volume of ongoing work in Scotland, other than roads projects, and concerns that contractors can choose more attractive options with other clients.

FE highlighted concerns around funding being made available to deliver the A9, expressing opinion around the credibility of future promises. FE outlined a view that funding must be found over a period of years to deliver the programme.

[redacted] added a view that funding is overly centralised, and highlighted that spend on active travel is not always appropriate for rural environments. [redacted] advised that three people previously involved with the scheme have stated there is “no political will” to complete project. Cab Sec confirmed that the Scottish Government is committed to the project. There was a further discussion around the impact of the Bute House Agreement and Cab Sec confirmed that the Bute House Agreement does not impact the commitment to dual the A9.

**OFFICIAL – SENSITIVE**

Cab Sec confirmed that the A9 Dualling programme has been a longstanding commitment for SNP. FE expressed a view that work streams such as active travel will likely need to be deprioritised to progress the A9 Dualling Programme.

Timetable and funding for the remainder of the programme was discussed. The Cab Sec reaffirmed commitment to give an update to Parliament this autumn.

[redacted]

FE thanked all attendees and Cab Sec summarised the actions and closed the meeting.