

Detailed Default Risk Allocation in the Asset Protection Agreement

Introduction

It may be unclear to an investor or developer (particularly if new to the railway), how the risks differ between building on the operating railway compared with building on high street, highway or off network environments. Where works are promoted and delivered on the railway by Third Parties, Network Rail undertakes “asset protection” to address safety and operational risks to the railway from the works. The Third Party Asset Protection Agreement (APA) reflects the risk allocation approved by the Office of Rail and Road (ORR) as a “fair balance of risk between Network Rail and investors”, when Third Parties undertake works on the railway.

Whilst there is guidance to using the Third Party template agreements, including the APA, this does not detail the specific risks taken by the Third Party and Network Rail under an APA. Network Rail would like to make it easier for Third Parties to use the template APA, so has provided the Default Risk Allocation Table below to help Third Parties understand where the risks lie and who takes responsibility for them. The risk allocation is designed so that the consequences of any project risk would be felt by the party best able to mitigate or control the risk. This table specifies the key risks and whether they fall directly to the sponsoring customer (the Third Party promoting and delivering the works or their contractor), to Network Rail directly, or to the Industry Risk Fund. The high level principles of risk allocation in Third Party Agreements are also provided in the Appendix for completeness.

This risk allocation assumes that the sponsoring customer will pay into the Risk Funds to cover the cost of low-probability, high-impact risks that neither party can either foresee, or control and/or which, Network Rail is not funded to support, thereby removing a barrier to investment. The Risk Funds enable Network Rail to stand in front of certain industry risks and Network Rail risks, which are incorporated into the APA and help to fund those contractual liabilities it takes relating to such risks e.g. asset defects not picked up in survey work, safety critical events, operational emergencies, possessions cancelled by Network Rail, changes in law and standards etc. There is more information on the Risk Funds in Appendix G of the Stakeholder Relations Code of Practice – Investing in the Network.

The following represents the default risk allocation reflected in the template Asset Protection Agreements. Asset Protection covered by these agreements can support work feasibility, design development, detailed design or implementation when the third party Customer is undertaking procurement of the works.

Ref:	Risk Category	Risk Allocation
1	Specification: <ul style="list-style-type: none"> - Scope - Technical Specification - Commercial Specification - Operational Performance 	S
2	Business Case	S
3	Concept and Feasibility Design	S
4	Detailed Design (including compliance with Standards, Law etc.)	S
5	Design Approval	S
6	Asset operational performance (new works asset)	S
7	Operating Costs: <ul style="list-style-type: none"> - After taking into use, but before acceptance - After acceptance, but before RAB/Asset Register inclusion - After RAB/Asset Register inclusion (at the end of the Control Period) 	S S N
8	Project Programme Timescales <ul style="list-style-type: none"> - Preparation - Management 	S S
9	Payment to NR <ul style="list-style-type: none"> - Bankruptcy/insolvency/default - Non-NR negligence/breach claims costs 	S/I S/I
10	Possessions <ul style="list-style-type: none"> a) Booking accuracy/error, by: <ul style="list-style-type: none"> - NR - Other b) Cancellation, by <ul style="list-style-type: none"> - NR for Network Operation Issue - NR for other reasons - NR due to train operator - others 	N S S/I N/I S* S
11	Possessions Management Staff	S
12	Safety Liability <ul style="list-style-type: none"> - site safety management - network operational safety 	S N
13	CDM Client	S
14	Environmental - Contamination (clean up costs, project impact costs) <ul style="list-style-type: none"> 1) on NR Land <ul style="list-style-type: none"> - Existing and active - Existing and dormant - New (due to project) 2) On third party land, before or after transfer, existing or new from enhancement, active or dormant. 	N S S S

Ref:	Risk Category	Risk Allocation
	3) Unlicensed storage (disposal/project impact) <ul style="list-style-type: none"> - on NR Land -Existing -New from project - on third party land, existing or new 	N S S
15	Ground Condition – mining subsidence, geological condition, buried services etc.	S
16	New Land Requirement /Purchase <ul style="list-style-type: none"> - for NR ownership - suitability – area, location, constraints etc. 	S S
17	Public Liability Issue – damage to property, loss of profit, benefit, business etc. to: <ul style="list-style-type: none"> - NR property - Non-NR property 	S S
18	Construction “All Risks” Cover	S
19	Professional Indemnity Issue (damage to property, loss of profit, benefit, income, business arising from error, omission, negligence) to: <ul style="list-style-type: none"> - NR by the Customer/Third Party - NR by the Customer’s/Third Party’s contractor - NR by NR - Third Party by Third Party or Third Party’s contractor - Third party by NR - Other by Third Party or Third Party’s contractor - Other by NR 	S S N/S/I S N/S S N/S
20	Latent Defect Created by Project Within warranty: <ul style="list-style-type: none"> - Prior to acceptance - After acceptance Outside warranty: <ul style="list-style-type: none"> - Prior to acceptance - After acceptance 	C/S C/S S S
21	Asset Defect (existing, but not seen in survey work) <ul style="list-style-type: none"> - Renewal required for O, M & R - Renewal required for enhancement only 	N S/I
22	Force Majeure “Relief Events”	S/I
23	Funding <ul style="list-style-type: none"> - Provision of funding - Cost of funding - Agreed Contribution by NR to project 	S S N
24	Taking into Use	S
25	Acceptance of Assets	S
26	Completion	S
27	Consents, wayleaves, easements etc.	S
28	TWA (O)	S
29	Change of Law	S/I
30	Change of Group Standards	S/I
31	Change of NR Company Standards (Safety, Group, Law)	S/I

Ref:	Risk Category	Risk Allocation
32	Change in NR Company Standards (other)	N
33	Network Code - Network/Station/Depot Change - Possessions over-run (Schedule 8)	S/I S/I
34	Tax and VAT Liability	S
35	Industrial Action	S
36	Network Operation Issue (no damage) - No Fault - Fault of contractor - Fault of NR - Fault of Customer/Third Party	I S N/I S
37	Provision of asset information	S
38	Asset Information Known to be Incorrect by NR	N/S
39	Interfacing Projects – interface with other Works/contractors in geographical area	S/I
40	Land Claims (post acceptance)	C/S/I
41	Noise Claims - Before acceptance - After acceptance	S C/S/I

Key:

N: Network Rail Fee Fund provides liability cover in the event of breach of the relevant enhancement agreement by Network Rail.

S: Sponsoring Customer (third party promoter) risk, directly or indirectly via the sponsor Customer's enhancement contractor.

C: Enhancement Contractor (from NR)

I: Industry Risk Fund.

*Cost recovered is passed to Customer.

Appendix - High Level Principles of Risk Allocation in Third Party Agreements

Principles of Risk Allocation in 3rd party agreements

1. The Customer funds the direct incremental costs of the scheme, including non-Industry Risk;
2. Where an Asset Protection Agreement is used, the Customer should transfer design construction risks to its contractors, or should manage those risks itself where it cannot transfer them;
3. Where Network Rail is delivering under a Development Services Agreement or an Implementation Agreement, it will assume any risks inherent in the contracts with their Contractors;
4. The Customer's liability to Network Rail for non-Industry Risk should be capped at an appropriate level (although liability for payment obligations, death and personal injury, negligence (except design) and fraud is uncapped);
5. Network Rail's liability for contractual breach and negligence is capped at the level of the value of the Works and or Services being provided (although liability for death, personal injury and fraud is uncapped);
6. Network Rail should not be required to take risk resulting in substantial extra costs unless funded through the Risk Funds (see Appendix C to Investing in the Network);
7. Network Rail should be entitled to charge:
 - Costs reasonably and properly incurred by Network Rail (or a fixed amount if an implementation Agreement (Fixed Price) is used) subject to any agreed assumptions;
 - Network Rail Fee to contribute towards funding contractual liabilities;
 - Industry Risk Fund to contribute towards funding generic rail industry risks; and
 - Additional expense to be incurred in connection with incremental maintenance costs, etc. arising from the project.
8. Liquidated Damages - Network Rail will seek to agree an acceptable programme with the Customer. Network Rail will put in place personnel and processes to manage to this programme. However, slippage may still occur, with potential knock - on costs to the Customer. Network Rail will pay liquidated damages which are calculated on a pre-estimate of the Customer's loss which will be negotiated by the parties acting reasonably. Liquidated Damages will be payable from a date (to be agreed by the parties) which recognises the date when the Customer would start incurring financial losses. This may not be the same as the completion date – for example if it is a phased project or assets are taken into use prior to “completion”. Where it is not possible to agree a genuine pre-estimate of the Customer's losses then provision may need to be included which caps any Customer losses payable in respect of delay. If a Customer cannot demonstrate a pre-estimate of losses, no Liquidated Damages will be included in the agreement
9. Network Operation Issue - A network operation issue may be an operational emergency or safety critical event. However, it can include changes in law, directions of competent authorities such as the ORR, cancelled possessions and changes in the Network Licence requirements which affect the Customer's project. The project may also be affected if engineering records required for the project are also required in order to deal with one of the Network Operation Issues already mentioned. The Customer will not be liable for costs arising from a Network Operation Issue.

Source: “Template Agreements - Explanatory Note Overview”