

**SUBJECT TO CONTRACT**

**BASIC SERVICES AGREEMENT**

[Name & address of counterparty] (the “**Customer**”)

[Date]

Dear Sirs,

**Basic Services Agreement relating to [ ] (“the Project”)**

Network Rail Infrastructure Limited of Kings Place, 90 York Way, London N1 9AG (“**Network Rail**”) has agreed with the Customer to provide the services set out in Part B of Schedule 1 to this Agreement (the “**Services**”) on the terms set out below (the Schedules and this letter are collectively referred to as “**this Agreement**”). The Customer has confirmed it will fund Network Rail's costs on the terms and conditions contained in this Agreement.

**Obligations of the Customer**

1. The Customer shall provide to Network Rail within [ ] weeks of the date of this Agreement the information specified in Part A of Schedule 1. Where no information is specified, the Customer shall provide such information as Network Rail may reasonably request from time to time as necessary to enable it to comply with its obligations under this Agreement.
2. The Customer shall ensure that any information or instructions provided to Network Rail by or on behalf of the Customer are prepared and given in such a diligent and professional manner and with such clarity and in such detail as is necessary for Network Rail to comply with its obligations under this Agreement. The Customer shall make reasonable endeavours to comply with its obligations under the Programme.

**Obligations of Network Rail**

3. Network Rail shall carry out the Services:
  - (a) exercising the reasonable skill, care and diligence as may be expected of a properly qualified and competent person engaged in carrying out services of a similar size, nature, type, scope and complexity to the Services;
  - (b) in compliance with all relevant law and Necessary Consents (as defined in Paragraph 7);
  - (c) in accordance with Railway Group Standards produced pursuant to the Railway Group Standards Code published by the Rail Safety and Standard Board Limited or imposed by the Office of Rail Regulation;
  - (d) having regard at any particular time to Network Rail's obligations, purposes and duties as operator, renewer, maintainer and developer of the Network;
  - (e) in accordance with the terms of this Agreement.
4. Network Rail shall progress the Services with due diligence and having due regard to the key dates for performance of the Services, as set out in Part D of Schedule 1.
5. Network Rail shall provide the Customer with regular reports on the progress of the Services including any revisions to the estimated cost of the Services set out in Part F of Schedule 1 (“**Estimated Costs**”) in a format and at intervals to be agreed between the parties.
6. Network Rail shall use reasonable endeavours to provide the Services for the Estimated Costs but without prejudice to the other terms of this Agreement, the Customer shall pay all Network Rail Costs reasonably and properly incurred by Network Rail.

**Necessary consents**

7. Network Rail shall make applications for, and use reasonable endeavours to obtain, those consents which are necessary for the Project as listed in the Services or as may be agreed between the parties from time to time (“**Necessary Consents**”).
8. Network Rail shall have no liability to the Customer under this Agreement as a result of
  - (a) any Necessary Consent not being granted; or

- (b) any delay in granting any Necessary Consent; or
- (c) the terms upon which any Necessary Consent is granted;

except to the extent that it is as a result of negligence or of a breach of this Agreement by Network Rail.

9. Network Rail's obligation to use reasonable endeavours to obtain any Necessary Consent, is conditional upon Network Rail receiving in full the documentation and assistance it may reasonably require and request from the Customer.

#### **Access and possessions**

10. The time and date of any access to Network Rail's network (the "**Network**") shall be agreed in writing with Network Rail, and the Customer and/or its representatives must be accompanied by Network Rail's staff or appointed contractors at all times.
11. Except as otherwise agreed in writing by Network Rail, access to the Network by the Customer or its representatives in accordance with Paragraph 10 shall be limited to visual inspection or visual survey only and neither the Customer nor its representatives shall carry out any works or intrusive activity in respect of the Network, or to bring any equipment (other than small handheld tools) onto the Network. If this Paragraph 11 is breached, the Customer shall be liable to Network Rail for any loss, damage, costs and expenses suffered by Network Rail (other than as a result of Network Rail's negligence), including any disruption caused to the operations of Network Rail or any train operator.

#### **Variations**

12. Any variations to this Agreement (including to the Services) shall only be effective if agreed by both Parties in writing. Any variations shall be paid for by the Customer.

#### **Intellectual Property**

13. Network Rail hereby grants to the Customer a non-exclusive, royalty-free and irrevocable licence to use for the purposes of the Project any intellectual property in the Deliverables (as defined in Part C of Schedule 1) which is owned by Network Rail, Network Rail shall use its reasonable endeavours to procure the grant to the Customer of a similar licence to use any intellectual property rights in the Deliverables owned by any third party.

#### **Network Rail Costs<sup>1</sup>**

14. The Customer shall pay to Network Rail all reasonably and properly incurred Network Rail Costs in accordance with the terms set out in Paragraph 13 and Schedule 2.
15. Within (10) ten Working Days (being any day (other than a Saturday or Sunday) on which banks are open for business in England) after the end of each payment period, Network Rail shall submit an invoice to the Customer. The Customer shall pay each invoice in full within twenty (20) Working Days from receipt. If the Customer wishes to dispute the amount set out in the invoice it shall notify Network Rail within fifteen (15) Working Days of delivery of the invoice specifying the disputed amount and the grounds on which it claims that such amount is not due and payable. Late payment of any amount due and payable under any invoice shall carry interest from the due date to the date of payment at the rate of three months LIBOR plus 2% per annum. All amounts are inclusive of value added tax, which will be charged at the applicable rate.

#### **Limitation of Liability**

16. Save as otherwise expressly provided in this Agreement, neither party shall be liable in respect of any costs, claims, damages, demands, losses, expenses or liabilities ("**Losses**") payable under or in connection with this Agreement except where:
- (a) the aggregate amount of all Losses suffered by the relevant party exceeds £10,000. For the avoidance of doubt, (i) in such an instance all Losses can be claimed not just the Losses in excess of £10,000 and (ii) after payment of such Losses, no further claim shall be made until the earlier of any further Losses suffered being in excess of £10,000 or completion of the Services or termination of this Agreement; or
  - (b) the Losses are incurred as a result of, or give sums unpaid by the Customer's obligations under Paragraphs 14 and 30.
17. Network Rail's maximum aggregate liability to the Customer for any reason arising under, or in connection with, this Agreement or the Project including but not limited to breach of contract, in

<sup>1</sup> Where the Customer requests a capped Costs Estimate, Network Rail will use a mechanism in line with the DSA clauses 12.5 to 12.11

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tort (including negligence), or for breach of statutory duty shall not exceed an amount equal to the total of the higher of £100,000, or a sum equal to the aggregate of Agency Costs, Contractors' Costs and Personnel Costs included in the Estimated Cost, as at the date of this Agreement (the "**Network Rail Cap**").

18. Notwithstanding the Network Rail Cap where, in respect of the same event, Network Rail recovers any sums under an insurance policy taken out in relation to the Services, it shall pay such sums (if and to the extent that such recovered sums relate to loss suffered by the Customer and not by Network Rail itself) to the Customer. For the avoidance of doubt, any sums recovered by Network Rail under such insurance policy and paid to the Customer shall contribute to the Network Rail Cap insofar as the Network Rail Cap has not already been reached. Network Rail shall use reasonable endeavours to make such recovery (which shall include an obligation to make and diligently pursue a claim but shall not include an obligation on Network Rail to take legal action).
19. Paragraph 17 shall not apply to any Losses incurred by the Customer as a result of any liability in respect of (a) death or personal injury resulting from a negligent act or omission or breach of statutory duty by Network Rail or any employee of Network Rail and/or (b) the fraud or fraudulent misrepresentation of Network Rail (or its contractor employed to carry out the Services).
20. Any Losses payable by either party shall, be reduced to the extent that they are caused by or contributed to by the other party's own negligence or breach of its obligations under this Agreement.
21. The Customer's maximum aggregate liability to Network Rail for any reason arising under, or in connection with, this Agreement shall not exceed an amount equal to 10% of the Estimated Costs as at the date of this Agreement (the "**Customer Cap**"). Notwithstanding the Customer Cap where, in respect of the same event, the Customer recovers sums under an insurance policy (including any insurance maintained by a contractor employed by the Customer) or under any contract entered into by the Customer, it shall pay such sums (if and to the extent that such payments relate to loss suffered by Network Rail and not by the Customer itself) to Network Rail. For the avoidance of doubt, any sums recovered by the Customer under such insurance policy or contract and paid to Network Rail shall contribute to the Customer Cap insofar as the Customer Cap has not already been reached. The Customer shall only be required to use reasonable endeavours to make such recovery (which shall include an obligation to make and diligently pursue a claim but shall not include an obligation on the Customer to take legal action) and only if and to the extent that such payments relate to loss suffered by Network Rail and not by the Customer itself.
22. Paragraph 21 shall not apply to:
  - (a) the Customer's payment obligations under Paragraphs 12, 14, 30 and Schedule 2;
  - (b) any Losses incurred by Network Rail due to the negligence or fraudulent misrepresentation by the Customer or by any contractor appointed by the Customer (other than Network Rail); and
  - (c) any liability in respect of death or personal injury resulting from a negligent act or omission or breach of statutory duty by the Customer or any employee of the Customer.
23. In no circumstances shall Network Rail or the Customer be liable to one another for any indirect or consequential loss (including loss of profit) howsoever arising (without prejudice to any express payment obligation of either party under this Agreement).
24. In the course of providing the Services, Network Rail may supply to the Customer data and information, which does not form part of the Deliverables. This information shall be in all material respects the most complete and accurate understood by Network Rail to be in its possession. Network Rail shall notify the Customer of the status of the accuracy and completeness of such information on the date of delivery to the best of Network Rail's knowledge and belief. Notwithstanding any other provision in this Agreement, Network Rail does not warrant the accuracy or sufficiency of data and information provided to the Customer which does not form part of the Deliverables and the Customer shall be responsible for verifying the accuracy and assessing the sufficiency of that data and information.
25. The Customer agrees and acknowledges that:
  - (a) where the Services involve Network Rail reviewing and approving documents supplied by the Customer or its contractor (whether for compliance against any industry standard or otherwise), such reviewing and approving shall not limit the responsibility of the Customer for those documents or such contractor to the Customer in respect of those documents, subject to the terms of any future agreement with Network Rail; and

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- (b) where the Services involve Network Rail in preparing or evaluating any proposed development train timetable, the operability of any such development train timetable will be subject to external factors (including evolving development, network capacity and access rights under the Network Code) and can only be modelled against the assumptions made at the relevant stage of development.

### **Termination**

- 26. Either party may by serving notice on the other party terminate this Agreement with immediate effect if:
  - (a) the other party is in persistent and material breach of this Agreement (provided that the party wishing to terminate shall first notify the other party of any remediable breach and its intention to terminate, and shall allow the other party a period of twenty (20) Working Days to remedy such breach); or
  - (b) the other party becomes insolvent.
- 27. If revisions to the Estimated Costs in accordance with Paragraph 5 exceed the original Estimated Costs and the parties fail to agree an increase in the Costs Estimate, the Customer may terminate this Agreement by written notice of not less than twenty (20) Working Days.
- 28. In any event the Customer may terminate this Agreement by written notice of not less than two (2) calendar months.

### **Consequences of Termination**

- 29. Upon issue or receipt of any notice of termination, Network Rail shall reduce expenditure under this Agreement as rapidly as possible and take immediate steps to bring to an end the performance of the Services in an orderly manner and shall pass to the Customer a complete set of any documents, manuals or other information which the Customer may require in connection with the Project and which at the time of termination are in the possession or under the control of Network Rail.
- 30. Upon termination of this Agreement:
  - (a) the Customer shall pay Network Rail:
    - (i) the Network Rail Costs incurred up to the date of termination; and
    - (ii) (except where termination is due to Network Rail's default or insolvency) the costs and expenses reasonably incurred by Network Rail in terminating this Agreement; and
  - (b) all obligations of the Parties under this Agreement shall cease except for:
    - (i) the provisions of Paragraphs 17, 18, 19, 21, 31, 32 and 35; and
    - (ii) any obligations arising as a result of any antecedent breach of this Agreement or any accrued rights.
- 31. If, in its reasonable opinion, Network Rail has completed the Services, it shall notify the Customer giving the Customer at least twenty (20) Working Days' notice of its intention to treat the Services as having been completed and paragraph 30(b) shall apply.

### **Confidential information**

- 32. Neither party shall disclose any confidential information save as required by any enactment, requirement of any regulatory authority or pursuant to any judicial or arbitral process, or in the case of Network Rail as required by its statutory duties or Network Licence (which is the licence to operate the Network granted to Network Rail pursuant to section 8 of the Railways Act 1993). On termination of this Agreement, the Customer shall either destroy or, if reasonably requested to do so, return any confidential information within its possession or control that belongs to, or was provided by, Network Rail.

### **Escalation and dispute resolution**

- 33. Should any dispute arise out of or in connection with this Agreement, then the parties' project managers shall initially discuss and attempt to resolve the dispute. If the project managers are unable to resolve the dispute to the satisfaction of both parties, the dispute shall be escalated to the parties' appropriate senior managers for resolution. If the senior managers are unable to resolve the dispute to the satisfaction of both parties, it shall be escalated to the parties' appropriate directors for resolution. If the parties are still unable to reach agreement then either party may refer the matter to adjudication in accordance with Paragraph 34.

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34. Either party may refer to adjudication any dispute arising out of or in connection with this Agreement in accordance with the Housing Grants, Construction and Regeneration Act 1996. The adjudicator shall be agreed between the parties and failing agreement within five (5) Working Days of receipt by one party of a proposal by the other the adjudicator shall be nominated at the request of either party by the President or Vice President for the time being of TECBAR.

### Freedom of Information

35. If either party receives a request for the disclosure of information relating to the Services and/or this Agreement (the "**Project Information**") under the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 (together the "**Information Acts**") it shall comply with such request in accordance with the relevant Information Act to the extent it is obliged to do so and provided that no exemption from disclosure in the relevant Information Act applies. Prior to making such disclosure it shall give the other party the reasonable opportunity to make representations as to why the disclosure should not be made (including but not limited to any exemptions from disclosure that may apply) and shall inform the other party of any disclosure made. For the purpose of clause 43(2) of the Freedom of Information Act 2000, the parties acknowledge and agree that the disclosure by it of any commercially sensitive Project Information is likely to prejudice the interests of the parties.

### Miscellaneous

36. Any notice pursuant to this Agreement shall be in writing and shall be duly and validly served if delivered by hand or sent by first class post to the registered office of the relevant party. Any notice sent by post shall be conclusively treated as having been served two (2) Working Days after posting.
37. Neither party may assign or charge its rights or interests under this Agreement without the prior written consent of the other party (not to be unreasonably withheld or delayed).
38. No general terms and conditions contained in any purchase order or other document customarily required by either Party in connection with a request for works or services shall be binding on the Parties.
39. Neither party intends that any term of this Agreement should be enforceable, by virtue of the Contracts (Rights of Third Parties) Act 1999, by any person other than Network Rail or the Customer.
40. This Agreement constitutes the entire agreement between the parties relating to the subject matter of this Agreement and supersedes any previous agreements between the parties. Each party acknowledge that in entering into this Agreement it is not relying upon any statement or representation not set out in this Agreement.
41. This Agreement shall be governed by and construed in accordance with the laws of England. Save as expressly provided otherwise, the parties agree that the courts of England and Wales shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this Agreement.

Yours faithfully

Signed:.....

duly authorised for and on behalf of Network Rail Infrastructure Limited

We agree to the above.

Signed:.....

duly authorised for and on behalf of [the Customer]

Dated:.....

**SCHEDULE 1 – DETAILS OF PROJECT**

- A Information to be provided by Customer
- B Scope of Services
- C Deliverables to be provided ("**Deliverables**")
- D Key dates for delivery of the Services
- E Necessary Consents:
  - (a) to be obtained by Network Rail
  - (b) to be obtained by Customer
- F Estimated Cost

**SCHEDULE 2 – COSTS**

**1. DEFINITIONS**

The following terms shall have the following meanings when used in this Agreement:

**Agency Costs** means the cost to Network Rail of any Agency Personnel engaged in connection with the Services multiplied by 1.5, plus the properly incurred expenses and disbursements charged to Network Rail by such Agency Personnel;

**Agency Personnel** means those personnel who have entered into a contract for services with Network Rail to provide services in connection with the Services;

**Contractors' Costs** means the costs to Network Rail of any contractors engaged by Network Rail in connection with the observance and performance of its obligations in relation to the Services, plus the properly incurred expenses and disbursements of those contractors;

**Expenses and Disbursements** means the expenses and disbursements incurred by Network Rail in relation to the Services, in connection with:

- (a) printing, reproduction and purchase of documents, drawings, office consumables, maps and records;
- (b) travelling expenses in accordance with Network Rail's policies;
- (c) all technical, commercial and professional fees, costs and disbursements excluding Contractors' Costs and Agency Costs;
- (d) all internal and external legal and other costs, charges, and expenses properly incurred by Network Rail in connection with the preparation, negotiation and enforcement of any supplemental leases, licences (including in respect of intellectual property) and other documentation entered into by Network Rail and relating to the Services (including this Agreement);
- (e) insurance costs; and
- (f) any other disbursements or expenses reasonably and properly incurred by Network Rail in connection with the Services (other than Necessary Consent Costs). The Customer's prior approval must be obtained for any such disbursements or expenses over £5,000;

**Hourly Rate** means in respect of each member of Network Rail's Personnel in any particular band the rate set out in Paragraph 2 as the same may be adjusted from time to time in accordance with Paragraph 3, which rate will be payable in respect of all worked hours spent by Network Rail's Personnel in connection with the Services;

**Necessary Consents Costs** means the costs incurred by Network Rail in connection with any Necessary Consent for the Project;

**Network Rail Costs** means Agency Costs, Contractors' Costs, Expenses and Disbursements, Network Rail Fee, Necessary Consents Costs, Personnel Costs and Possessions-Related Costs to the extent that they arise from or are a consequence of the performance of the Services and Deliverables;

**"Network Rail Fee"** means an amount equal to 5% of the aggregate Agency Costs, Contractors' Costs, and Personnel Costs as set out in the Estimated Costs as at the date of this Agreement as revised as result of an agreed variation under paragraph 12;

**"Network Rail's Personnel"** means any employees and/or officers of Network Rail;

**"Personnel Costs"** means the sum of the relevant Hourly Rate multiplied by the number of hours spent by each member of Network Rail's Personnel in connection with the performance of Network Rail's obligations under this Agreement; and

**"Possessions-Related Costs"** means sums Network Rail will be obliged to pay to any train operator pursuant to Schedules 4 and/or 8 of the relevant Access Agreement (as defined in the Railways Act 1993).

**2. HOURLY RATES [UP TO 31<sup>st</sup> MARCH 2010]**

Banding	Non London	London
1	£112.71	£115.62
2	£82.87	£85.80
3	£61.67	£64.57
4	£43.10	£46.01
5	£34.47	£37.40
6	£27.17	£30.11
7	£22.55	£25.45
8	£17.90	£20.82

**3. ADJUSTMENT OF HOURLY RATES**

Network Rail shall adjust the Hourly Rates annually on 1 April to reflect the increase in the retail price index for the year ending the preceding November.

**4. REVIEW**

As from time to time requested by the Customer, Network Rail shall provide to the Customer reasonable access to and evidence and records of all amounts payable by the Customer under this Schedule 2 (other than the Hourly Rates) together with such other information and records as the Customer may reasonably require (having at all times regard for Network Rail's confidentiality and contractual obligations), which may be reviewed and audited by or on behalf of the Customer.

**5. TERMS OF PAYMENT<sup>2</sup>**

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<sup>2</sup> Any particular terms of payment to be inserted.