

Explanatory notes to Template Agreements

Background

This document, and the detailed Explanatory Notes to individual Template Agreements linked to it, is intended to be read in conjunction with our guide **Investing in the Network**.

Investing in the Network is a Network Rail guide, intended to be consistent with ORR's Policy Framework for Investments. This document will assist all parties interested in taking forward projects involving Network Rail's "Stakeholders". Stakeholders include parties who will actually contract with Network Rail, referred to in the Template Agreements as "Customers". The notes are intended to:

- help explain how to choose which form of template agreement should be used;
- explain project governance principles and risk allocation principles built into the template agreements; and
- describe the individual template agreements in general terms, to help Stakeholders to understand the project governance principles, and intent behind clauses more clearly. This is intended to help to keep transaction cost and time to a minimum.

Investing in the Network describes the investment process (**part 1**) and outlines the contractual framework (**part 2**). **Its appendices** provide further information on:

- the investment process;
- the Guide to Railway Investment Projects (which describes GRIP project controls);
- risk management;
- services provided by Network Rail;
- decision criteria used for assessing promoters' reasonable requirements;
- Network Rail's licence obligations;
- contact details;
- regulated change processes;
- approval in principle; and
- the structure of template agreements.

Explanatory Notes should not be viewed as part of the Agreements and are only for general guidance purposes. As such, they cannot cover every situation or question that potential Stakeholders might have. Network Rail has attempted to provide simple and clear explanations of what the Agreements include.

Project Governance

Project Governance should be central to any agreement as it sets out the parameters under which the parties will work together. It enables the parties to establish their objectives and then tightly define the scope, time and costs required to achieve those objectives. The roles and responsibilities, and, in particular, the obligations, of each party must then be clearly set out to avoid ambiguity or conflict and facilitate efficient delivery.

The risks inherent in a project should be allocated to the party most able to understand, manage and assume them and, where appropriate, funding and suitable incentives are built into the agreement to compensate a party for assuming and /or managing the risk. Monitoring arrangements are essential to check progress, identify problems or issues early and take appropriate action if necessary.

Finally, appropriate procedures should be established to make sure that any variations are managed effectively and fairly and also to provide remedies in the event that a party fails to meet its obligations.

Network Rail, as infrastructure manager and asset owner has overarching responsibilities which affect the treatment of issues and which are dealt with in these template agreements. For example, Network Rail's safety responsibility means that it may have to make changes to scope, or timing, and whilst the Stakeholders cannot have rights to object, Network Rail would consult with them to minimise the impact on cost and programme of the scheme. However, the template agreements may allow for covering additional costs where appropriate.

a. Roles and Responsibilities

The roles and responsibilities of the parties should be agreed and clearly established in an agreement. This enables the risks inherent in the agreement to be correctly allocated to the party best qualified to manage and/or assume them.

b. Project Requirements (Scope / Cost / Time)

The Stakeholder requirements for a project must be clearly articulated and understood by the parties. Any specific emphasis placed on these project requirements must be strictly defined and recorded in the agreement. The Stakeholder requirements will dictate what services Network Rail will provide and the level of resources required to meet the project timescales. Further information on services provided by Network Rail is contained in Appendix D to Investing in the Network

c. Monitoring

The template agreements allow monitoring mechanisms to be put in place to check that the parties fulfil their obligations. Understanding how the project is progressing against the Project Requirements, the issues arising affecting the Stakeholder business case if known (such as risks and variations where applicable) are key for the Stakeholder and are managed through the meeting and reporting requirements.

d. Controls

The template agreements allow control mechanisms to be put in place to check that the parties fulfil their obligations. The business case for the project rests with the Stakeholder. Therefore decisions which have a material impact on the business case need to be agreed by the Stakeholder and Network Rail, as the infrastructure manager and asset owner. Appropriate procedures are required to make sure that any variations are managed effectively and fairly and will meet the Project Requirements, whilst facilitating the Roles and Responsibilities.

e. Risk and Incentives

Both the Stakeholder and Network Rail should have a clear understanding of the risks inherent in the project. The template agreements provide the framework for allocating risks to the parties and the incentive framework for managing and funding such risk allocation in line with the Roles and Responsibilities. They also provide means for redress in the event that a party fails to fulfil its obligations. Further information on risk is contained in the Risk Allocation Principles section below and in Appendix C to Investing in the Network.

Risk Allocation Principles

The following high level principles have been used to underpin and determine the financial allocation of risk within the enhancement template agreements:

- the Customer funds the direct incremental costs of the scheme, including non-Industry Risk;
- 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;
- 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;
- 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);
- 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);
- 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);
- 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;

- 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
- 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.

The decision flow chart at Appendix A to this document can be used to determine the precise enhancement template agreement required by the Customer.

Use of Detailed Explanatory Notes

Network Rail has provided more detailed Explanatory Notes on the different forms of enhancement template agreements. The rationale for this is to explain the purpose of and link the project governance principles to each clause so that their intent can be more clearly understood by the Stakeholder. These are in the following documents:

1. [Development Services Agreement - Explanatory Notes](#)
2. [Implementation Agreements \(FP\) - Explanatory Notes](#)
3. [Implementation Agreement \(EC\) - Explanatory Notes](#)
4. [Asset Protection Agreement - Explanatory Notes](#)
5. [Basic Asset Protection Agreement - Explanatory Notes](#)
6. [Basic Implementation Agreement \(FP\) - Explanatory Notes](#)
7. [Basic Implementation Agreement \(EC\) - Explanatory Notes](#)
8. [Basic Services Agreement - Explanatory Notes](#)

The Explanatory Notes are relatively high level overview of each of the enhancement template agreements, particularly designed for the Stakeholder to use at the beginning of the process, when Network Rail may not have appointed a Commercial Scheme Sponsor to the Stakeholder's project. It is not possible to cater for every question or possible situation. However, once appointed, the Commercial Scheme Sponsor should be able to assist the Stakeholder with any questions relating to their particular project.

Appendix A

