**Dated:**

**NETWORK RAIL INFRASTRUCTURE LIMITED**

**and**

**[INSERT FULL REGISTERED NAME OF COUNTERPARTY]**

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# ASSET PROTECTION AGREEMENT[1] in relation to [insert name of project]

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[1] This agreement should only be used with Third Parties who are seeking to invest in the railway. It should NOT be used for Outside Party projects.

**Subject to contract**

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**Subject to contract**

**This Agreement** is made on:

**Between**

(1) **Network Rail Infrastructure Limited** registered in England and Wales under company number 02904587 whose registered office is at Waterloo General Offices, London, SE1 8SW (**Network Rail**); and

(2) **[Registered name of customer]** registered in [insert legal jurisdiction] under company number [insert number] whose registered office is at [insert registered address] (**Customer**)[2]

(together the **Parties,** references to **Party** shall be construed accordingly).

**Whereas**

(A) The Customer wishes to procure the design and construction of certain works which are described in this Agreement, using its own arrangements.

(B) Network Rail is prepared to enter into the arrangements set out in this Agreement so as to facilitate the design and construction of the Works, which impact upon Network Rail's network and/or property, by or on behalf of the Customer.

**It is agreed**

## 1 Definitions and Interpretation

1.1 In this Agreement the following words and expressions shall have the following meanings unless the contrary intention appears:

**Access Agreement** means an access contract or an access agreement as defined in the Act;

**Act** means the Railways Act 1993 as amended;

**Additional Expense** has the meaning given in clause 11.1;

**Affiliate** means in relation to any company:

(a) a company which is either a holding company or a subsidiary of such company; or

(b) a company which is a subsidiary of a holding company of which such company is also a subsidiary,

(and holding company and subsidiary shall have the respective meanings given to them in section 1159 of the Companies Act 2006);

**APA Construction Certificate** means the certificate acknowledged by countersignature of the agreed form by Network Rail in accordance with clause 10.6, confirming that the Construction Completion Criteria have been satisfied;

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[2] For local/combined authorities or partnerships, replace all text with "[Name of customer] whose principal place of business is at [ ] (**Customer**)". For any other contracting entities not registered in Companies House (overseas based customers or Trusts) seek advice from your local CSM or Corporate Commercial.

**APA Final Certificate** means the certificate acknowledged by countersignature of the agreed form by Network Rail in accordance with clause 10.9, confirming that the Final Completion Criteria have been satisfied;

**Approval in Principle** means the issuance of the certificate referred to in Standard NR/L2/CIV/003 and recorded in form NR/L2/CIV/003/FORMA, once completed and fully endorsed NR/L2/CIV/003/FORMA remains valid for three years provided construction work begins within that time;

**Area of Work** means any area under the control of the Customer for the purpose of carrying out the Works;

**Asset Management Plan** has the meaning given in the Standard NR/L2/MTC/089 and prepared and approved in accordance with form NR/L2/MTC/089/AMP003;

**Asset Status Report** has the meaning given in the Standard NR/L2/MTC/089 and prepared and approved in accordance with the form NR/L2/MTC/089/AMP009;

**Booked** means, in relation to any Possession, the registration of such Possession in Network Rail's possession planning system, subject to Network Rail's annual and quarterly planning processes and the other provisions of Part D of the Network Code;

**CDM Regulations** means the Construction (Design and Management) Regulations 2015;

**Change in Law** means the application to any Party after the later of the Commencement Date or issue of Approval in Principle of any Legal Requirement which was not reasonably foreseeable as at such date:

(a) which did not so previously apply; or

(b) the change of any Legal Requirement applying to that Party (including any such Legal Requirement ceasing to apply, being withdrawn or not being renewed),

other than in relation to corporation tax (or any other tax of a similar nature replacing corporation tax on profits or gains) or value added tax;

**Change in Standards** means the coming into effect, after the Commencement Date or the issue of Approval in Principle if later, of a Railway Industry Standard or of any amendment thereto, or of a Network Rail Standard or of any amendment thereto with which the Customer is obliged to comply, such Change in Standards to be applied after the design for the Works have received Approval in Principle only where the change has been made for safety reasons, pursuant to a Mandatory Variation;

**Checker** has the meaning given in Standard NR/L2/CIV/003;

**Collateral Warranty** means a warranty from each Contractor in favour of Network Rail in the form set out in Schedule 6;

**Commencement Date** means the date of this Agreement;

**Commission** means, subject to any derogations agreed pursuant to clause 2.14, the carrying out and completion, in relation to the Works, of the activities set out in Standard NR/L2/TRK/001/mod13, Standard NR/L2/CIV/003 and Standard NR/L2/INI/CP0075 so that the

Works can be accepted for operational use (also known as entry into operational service and taking into use) and **Commission**, **Commissioning** and **Commissioned** shall be construed accordingly;

**Competent Authority** means any local, national or supra-national agency, authority, department, inspectorate, minister, ministry, official, court, tribunal or public or statutory person (whether autonomous or not), whether of the United Kingdom or not, which has, in respect of this Agreement, jurisdiction over either of the Parties or the subject matter of this Agreement;

**Completion Criteria** means the Construction Completion Criteria, Final Completion Criteria and in the case of the Defects Identification and Completion Certificate and the Taking Over Certificate, the criteria set out in paragraphs 8(b) and 8(c) of Schedule 3;

**Confidential Information** has the meaning given in clause 23.1;

**Construction Completion** shall occur on the Construction Completion Date;

**Construction Completion Certificate** means the certificate referred to in Standard NR/L2/MTC/089 and recorded in form NR/L2/MTC/089/AMP014;

**Construction Completion Criteria** means:

(a) those project specific criteria set out in paragraph 8(a) of Schedule 3; and

(b) the issue of the Construction Completion Certificate;

**Construction Completion Date** means the date on which Network Rail countersigns the APA Construction Certificate in accordance with clause 10.6;

**Construction Phase Plan** has the meaning prescribed in the CDM Regulations;

**Contract** means any contract between the Customer and its Contractor;

**Contractor** means any person to whom a Contract for the whole or any part of the design and/or construction of the Works is let and for whom the Customer is the employer;

**Control Period** means the period following an ORR access charges review over which the financial framework determined by ORR at such access charges review as being required by Network Rail to operate, maintain, renew and enhance its infrastructure is to be implemented;

**CSM-REA Regulations** means the Commission Implementing Regulation (EU) No 402/2013 of 30 April 2013 on the common safety method for risk evaluation and assessment and repealing Regulation (EC) No 352/2009 (as amended);

**Customer Cap** means an amount equal to 10% of the Estimated Works Cost as at the Commencement Date as varied from time to time in accordance with clause 12.7(d) to (f);[3]

**Daily Liquidated Damages Sum** means the amount stated in paragraph 10 of Schedule 3;

[3] The cap should be a percentage of the cost of the Works which impacts on the infrastructure save where this is inappropriate.

**Defects Identification and Completion** shall occur on the Defects Identification and Completion Date;

**Defects Identification and Completion Certificate** means the certificate referred to in Standard NR/L2/MTC/089 and recorded in form NR/L2/MTC/089/AMP016;

**Defects Identification and Completion Date** means the date on which Network Rail countersigns the Defects Identification and Completion Certificate in accordance with clause 10.8;

**Depot** means the light maintenance depot (as defined by section 83 of the Act) the subject of the Works, or any replacement of the same;[4]

**Depot Access Conditions** means:

(a) the National Depot Access Conditions (December Standard); and

(b) the Annexes to the National Depot Access Conditions relating to a Depot;

as each is modified or amended in respect of the Depot from time to time in either case with the approval of the ORR;

**Depot Change** means the procedures contained in the Depot Access Conditions;

**Depot Facility Owner** means the facility owner (as defined in section 17 of the Act) for the Depot that enters into a lease of a Depot with Network Rail to operate the Depot and becomes the Infrastructure Manager of the Depot after Taking Over;

**Design Data** means all drawings, reports, documents, plans, software, formulae, calculations and other data whatsoever in any medium prepared by or on behalf of the Customer relating to the design and construction of the Works;

**Detailed Technical Requirements** means the specification for the Works, appended to a contract, which creates and defines obligations between the Project and a design and/ or construction organisation, in the form of technical requirements for the Project reference: [insert document reference];

**DFO (Depot Facility Owner) Safety Management System** means those systems set out in paragraph 13 of Schedule 3;

**Direct Costs** means direct costs reasonably incurred in relation to the Project including in the case of the Customer, any costs paid to any Contractors and other parties [and the costs set out in paragraph 14 of Schedule 3][5], but excludes loss of production, loss of profit, loss of revenue, loss of contracts or any indirect or consequential loss arising out of or in connection with this Agreement;

[4] Note that the Depot drafting included within the APA relates to Network Rail's regulated light maintenance depots. Where works are being undertaken at any other type of depot that Network Rail owns and is not leased under a long lease to another party, additional drafting will need to be incorporated into the APA.

[5] Parties to set out any project specific costs that will be incurred by the Customer that should be treated as direct costs, for example, costs incurred in relation to a co-operation agreement.

**Direction** means any direction, requirement, instruction or rule legally binding on either of the Parties, and includes any modification, extension or replacement of any such direction, requirement, instruction or rule for the time being in force, but shall not include:

(a) the exercise of a discretion under any contract or other obligation binding on the Party in question or the enforcement of any such contract or obligation; or

(b) any direction issued by the ORR pursuant to section 16A of the Act;

**Dispute** means any dispute or difference of whatsoever nature arising under, out of, in connection with or in relation (in any manner whatsoever) to this Agreement;

**Engineering Access Statement** has the meaning given in the Network Code;

**Enhanced Assets** means any assets operated and/or maintained by or on behalf of Network Rail which have been created or enhanced by the carrying out of any works and/or services forming part of the Works;

**Environment Plan** has the meaning given in International Standard ISO14001;

**Escalation Procedure** means the procedure for the escalation of disputes set out in Schedule 4;

**Estimated Cost** means the estimate of the Network Rail Costs as set out in paragraph 5 of Schedule 3, updated from time to time in accordance with this Agreement;

**Estimated Works Cost** means the estimated costs of the Works to the Customer up to Final Completion as set out in paragraph 6 of Schedule 3, as updated from time to time in accordance with this Agreement;

**Existing Asset Obligation** means any statutory or contractual obligation as at the Commencement Date for Network Rail to carry out works in relation to any land or asset owned by Network Rail;

**Final Certificate** means the certificate referred to in Standard NR/L2/MTC/089 and recorded in form NR/L2/MTC/089/AMP017;

**Final Completion** shall occur on the Final Completion Date;

**Final Completion Criteria** means:

(a) those project specific criteria set out in paragraph 8(d) of Schedule 3; and

(b) the issue of the Final Certificate;

**Final Completion Date** means the date on which Network Rail countersigns the APA Final Certificate in accordance with clause 10.9;

**Force Majeure Event** means an event or sequence of events beyond a Party's reasonable control (each Party having acted in accordance with Good Industry Practice and having taken necessary measures to address potential risks) preventing or delaying it (acting reasonably) form performing its obligations under this Agreement;

**Functional Specification** means the Customer's functional specification for the Works;

**Good Industry Practice** means in relation to the performance of any activity to which this standard is applied, the exercise of that degree of skill, diligence, prudence and foresight as would reasonably be expected from a properly qualified and competent person engaged in carrying out works or services of a similar size, nature, scope, type and complexity, complying with all Legal Requirements and applicable British, European and International standards and published codes of practice;

**Implementation Programme** means the programme for the Works as set out in paragraph 7 of Schedule 3 as updated from time to time in accordance with this Agreement and incorporating the requirements of the Construction Phase Plan as defined in the CDM Regulations;

**Indirect Loss** means loss of production, loss of profit, loss of revenue, loss of contracts, liabilities incurred under other agreements (save costs paid by the Customer under the Contract) or any indirect or consequential loss arising out of or in connection with this Agreement;

**Infrastructure Manager** has the meaning given in the Railways and Other Guided Transport Systems (Safety) Regulations 2006 (**ROGS**);

**Insolvent** in relation to either Party means:

(a) such Party stopping or suspending or threatening to stop or suspend payment of all or a material part of its debts, or becoming unable to pay its debts, or being deemed unable to pay its debts under section 123(1) or (2) of the Insolvency Act 1986, except that in the interpretation of this paragraph section 123(1)(a) of the Insolvency Act 1986 shall have the effect as if for £750 there were substituted £10,000;

(b) any person presenting a winding-up petition which is not dismissed within 14 (fourteen) days of service of the petition on that Party;

(c) a receiver, manager, administrative receiver or administrator being appointed in respect of such Party;

(d) such Party ceasing or threatening to cease to carry on all or a material part of its business, except for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation on terms approved by the other Party before that step is taken (which approval shall not be unreasonably withheld or delayed); or

(e) any event occurring which, under the law of any relevant jurisdiction, has an analogous effect to any of the events listed above;

**Intellectual Property** means all intellectual property rights in any part of the world in respect of any documentation or information provided to the Customer by Network Rail, including any patent, patent application, trade mark, trade mark application, registered design, registered design application, utility model, trade name, discovery, invention, process, formula, specification, copyright (including rights in computer software and database and topography rights), know how or unregistered design right;

**Interest Rate** means the greater of either Bank of England's base rate plus 2% per annum or 2.5% per annum;

**Interfacing Project** means a project which has an interface with the Project as initially listed (if known) as part of paragraph 11 of Schedule 3 as updated in accordance with clause 3.8;

**Isolation** means planned arrangements for a predetermined period for the interruption of traction electricity between defined locations;

**Land and Noise Claim** means a claim against Network Rail made for common law nuisance or pursuant to the Land Compensation Act 1973 or any regulation made pursuant to that Act (including the Noise Insulation (Railways and Other Guided Transport Systems) Regulations 1996) and which is attributable to the design, carrying out or completion of the Works or the subsequent correct and proper operation of the completed Works (or relevant part) as part of the Railway;

**Legal Requirement** means any of the following:

(a) any enactment to the extent that it applies to that Party;

(b) any regulation made by the Council or the Commission of the European Union to the extent that it applies to that Party or a decision taken by the Commission of the European Union which is binding on that Party to the extent that it is so binding; and/or

(c) any interpretation of law, or finding, contained in any judgement given by a court or tribunal of competent jurisdiction in respect of which the period for making an appeal has expired which requires any legal requirement falling within paragraph (a) or (b) above to have effect in a way which is different to that in which it previously had effect;

**Liquidated Damages Payment Date** means the date stated in paragraph 9 of Schedule 3 as amended from time to time in accordance with this Agreement;[6]

**Losses** means any costs, claims, damages, demands, losses, expenses, or liabilities incurred by the relevant person;

**Mandatory Variation** means any Variation necessitated by:

(a) any Specific Change in Law; and/or

(b) any Change in Standards for safety reasons;

**Necessary Consents** means all approvals, permissions, consents, licences, certificates, registrations and authorisations (including Network Rail Consents and Regulated Change) whether statutory or otherwise, which are required from time to time for the purposes of carrying out the Works;

**Network** means the railway facilities of which Network Rail or an Operator is the facility owner (as defined in section 17(6) of the Act);

**Network Change** has the meaning given in the Network Code;

[6] The Liquidated Damages Payment Date recognises that the date on which LDs become payable may not be the same date as the relevant completion date. The date should be the date the Customer would start incurring financial losses.

**Network Code** means the code setting out the rules applying to all regulated Access Agreements;

**Network Licence** means the licence to operate the Network granted to Network Rail pursuant to section 8 of the Act;

**Network Operation Issue** means the following events or circumstances, in so far as not reasonably foreseeable at the Commencement Date that requires Network Rail to act immediately or with urgency:

(a) any Safety Critical Event;

(b) any Operational Emergency;

(c) any Direction of a Competent Authority (excluding such issue arising as a consequence of the Works except to the extent that it is as a result of negligence by Network Rail);

(d) any change in the Network Licence; and/or

(e) any contractual commitment of Network Rail existing on or prior to the Commencement Date under any Access Agreement,

provided that in each case such issue affects or is affected by the Works;

**Network Rail Cap** means the higher of:

(a) £100,000; or

(b) a sum equal to the total of Agency Costs, Contractors' Costs and Personnel Costs (all as defined in Schedule 2) in the Estimated Cost as at the Commencement Date. As varied from time to time in accordance with clause 12.7(d);

**Network Rail Consents** means those consents to be granted by Network Rail in relation to the Works, as set out in Schedule 7;

**Network Rail Costs** has the meaning given in Schedule 2;

**Network Rail Requirements** means the Requirements for the Safety Management of Third Party Works set out in Standard NR/L2/CIV/095 current at Approval in Principle, plus the further requirements specified in paragraph 4 of Schedule 3 or otherwise notified in writing by Network Rail to the Customer from time to time;

**Network Rail Safety Management System** means those systems set out in paragraph 13 of Schedule 3;

**Network Rail Standard** means a standards document issued by Network Rail from time to time in relation to the Network as a whole and which applies to the performance of the Works or Services under this Agreement, as published on the website https://standardse-networkrail.msappproxy.net/;

**Operational Emergency** means any situation or circumstance which Network Rail reasonably considers requires immediate or urgent action in order to maintain or restore the effective operation of the Network or any part of it;

**Operator** means an operator of passenger or freight trains which has entered into an Access Agreement with Network Rail;

**ORR** means the Office of Rail and Road established pursuant to section 15(1) of the Railways and Transport Safety Act 2003;

**PACE** means the Network Rail standard NR/L2/P3M/201 entitled Project Acceleration in a Controlled Environment (PACE) as amended from time to time;

**PACE Phase A** means the project initiation phase as set out in PACE;

**PACE Phase 1** means the development and project selection phase as set out in PACE;

**PACE Phase 2** means the project design phase as set out in PACE;

**PACE Phase 3** means the project delivery phase as set out in PACE;

**PACE Phase 4** means the project close phase as set out in PACE;

**Payment Period** means each of thirteen consecutive periods in a calendar year starting on 1st April, each such period being 28 days in length, save that the length of the first and last period in the year shall be such as shall be adopted by Network Rail;[7]

**Planned Construction Completion Date** means the date by which the Works are planned to satisfy the Construction Completion Criteria as set out in the Implementation Programme as amended from time to time in accordance with this Agreement;

**Possession** means planned safety arrangements which control or prevent the normal movement of rail traffic on the Network between defined locations and for a pre-defined period (including any speed restriction);

**Possession Plan** means the possession plan agreed in accordance with clause 6.10, and as revised from time to time;

**Project** has the meaning given in paragraph 1 of Schedule 3;

**Quality Plans** means the design quality assurance procedures and the works quality assurance plan, each as referred to in the Standards;

**Railway** means the Network and the provision of railway services as defined in section 82 of the Act in connection with the Network;

**Railway Industry Standards** means Railway Industry Standards produced pursuant to the Railway Group Standards Code (or equivalent predecessor documents, including previous versions of the Railway Group Standards Code) defining mandatory requirements in respect of the mainline railway in each case as published by the Rail Safety and Standards Board Limited or imposed by the Office of Rail and Road. Such standards can be accessed on the website https://www.rssb.co.uk/standards-catalogue/;

[7] Depending on the Commencement Date the first and last Payment Periods may be more or less than 28 days so as to synchronise the remaining Payment Periods with Network Rail's financial cycle. The definition replicates that for Accounting Period in the ORR's Network Code which can be found on Network Rail's website.

**Railway Interoperability Regulations** means The Railways (Interoperability) Regulations 2011 (as amended);

**Regulated Change** means Network Change and / or Station Change and / or Depot Change to the extent that each is required in connection with the Project;

**Relief Event** means an event where:

(a) Network Rail takes or requires any action to be taken pursuant to clause 9.2; or

(b) any delay to the Works is caused by a Network Operation Issue (or would have been caused in the absence of remedial action taken by the Customer to avoid any such delay); or

(c) any Booked Possession is cancelled or altered (including as a result of any default by any Operator); or

(d) any contractor from an Interfacing Project interferes with, hinders or obstructs a Contractor from carrying out the Works provided that the Customer has carried out its responsibilities under clause 8.7 in accordance with Good Industry Practice; or

(e) a Variation is being implemented in accordance with clause 12.7(a) to 12.7(c);

**Representative** means the person appointed by each Party to manage the delivery of Services and Works under this Agreement;

**RISQS** means the Railway Industry Supplier Qualification Scheme managed by RSSB;

**RSSB** means the Rail Safety and Standards Board Limited;

**Safety Authorisation** means the relevant party's safety authorisation, as amended from time to time (as defined in the Railways and Other Guided Transport Systems (Safety) Regulations 2006);

**Safety Critical Event** means risk to the health and safety of any individual or risk of damage or destruction to any property, or any incident which may reduce the safety integrity levels of any item of infrastructure;

**Safety Management System** means the management structure and controls within the Customer's and Contractor's organisations through which the Customer and its Contractors ensure they are capable of understanding Railway related risks and providing or procuring the provision of a safe system of working on or about the Railway;

**Safety Plan** means the documented management system by which the relevant Contractor demonstrates how it will conduct the Works in compliance with the relevant Safety Management System and the requirements of this Agreement;

**Service Level Obligations** means the levels of service set out in Schedule 10;

**Services** means the services to be performed by or on behalf of Network Rail pursuant to this Agreement as set out in paragraph 3 of Schedule 3;

**SFO (Station Facility Owner) Safety Management System** means those systems set out in paragraph 13 of Schedule 3;

**Specific Change in Law** means any Change in Law which applies expressly to:

(a) the railway industry, a particular section of the railway industry or the provision of services to the railway industry and not to other transport modes or industries, including any changes to either Network Rail's Safety Authorisation or the Customer's Safety Authorisation or Safety Certificate as appropriate (as these terms are defined in ROGS) or Standards required by any Change in Law; or

(b) the Works,

which occurs after the Commencement Date or Approval in Principle if later and which is not reasonably foreseeable as at such date;

**Standards** means Railway Industry Standards and Network Rail Standards as these are updated and/or amended from time to time;

**Station Access Conditions** means the National Station Access Conditions 2013 (England and Wales) together with the station specific annexes applicable to the relevant stations the subject of the Works or any replacement of the same;

**Station Change** means the procedures contained in Parts B and C (as applicable) of the Station Access Conditions;

**Station Facility Owner** means the party that enters into a station lease with Network Rail to operate the station and becomes the Infrastructure Manager of the station after the Taking Over of the Works;

[**Surety** means [complete name of Surety]][8]

**Taking Over**[9] means the taking over by Network Rail of responsibility for maintenance of the Works (or the relevant part of the Works where as detailed in paragraph 12 of Schedule 3, not all of the Works will be taken over by Network Rail) and shall occur on the Taking Over Date and **Taken Over** shall be construed accordingly;

**Taking Over Certificate** means the certificate referred to in Standard NR/L2/MTC/089 and recorded in form NR/L2/MTC/089/AMP015;

**Taking Over Date** means the date on which Network Rail countersigns the Taking Over Certificate in accordance with clause 10.7;

**Variation** means any change or variation to:

(a) the Works;

[8] Network Rail reserves the right to request a surety following internal credit review noting that no surety will normally be required where the Customer is a TOC, local authority or other public sector body.

[9] Where there are no works being Taken Over by Network Rail, references to Taking Over throughout this Agreement to be reviewed and amended accordingly.

(b) the Services; or

(c) any change or variation to the Detailed Technical Requirements after the design for the Works have received Approval in Principle[10] that affects either the Implementation Programme or the Estimated Works Cost,

in accordance with clause 12 and, for the avoidance of doubt, includes a Mandatory Variation;

**Work Package Plans** has the meaning given in Standard NR/L2/OHS/0044 insofar as the same have been identified in Network Rail's opinion (acting reasonably) as those which impact on Network Rail's Network and/or property;

**Working Day** means any day (other than a Saturday or Sunday) on which banks are open for business in England;

**Works** means the whole of the design and construction works as described in the Works Requirements;

**Works Commencement Date** means the latest of:

(a) the Commencement Date;

(b) the date upon which the relevant Necessary Consents have been approved for the element of the Works;

(c) the completion of any preliminary works required to be carried out by the Customer agreed with Network Rail and pursuant to clause 8.1;

(d) the date on which all the requirements of clauses 2.9, 2.10, 2.12 and 2.13 and paragraph 1.1 of Schedule 9 have been satisfied;

(e) the date of receipt of evidence confirming that the Customer has taken out the insurances required by clause 20;

(f) provision of Collateral Warranties;

(g) approval of the Asset Management Plan;

(h) approval of the Customer's and Contractor's safety management arrangements in accordance with the Safety Management System; and

(i) unless agreed otherwise, agreement of the Implementation Programme;

**Works Contract** means a contract with a Contractor for the performance of the Works or part of the Works; and

**Works Requirements** means the specification which sets out a description of the Works in paragraph 2 of Schedule 3, which shall include the technical description of the Enhanced Assets and Network Rail's Requirements in respect of the Works and is based on the Functional Specification, all as developed and approved in accordance with this Agreement.

[10] If both Parties agree that a later trigger date is appropriate, it should replace the reference to Approval in Principle.

1.2 In this Agreement, unless the context otherwise requires:

(a) references to a statute, treaty or legislative provision or to a provision of it shall be construed, at any particular time, as including a reference to any modification, extension or re-enactment at any time then in force and to all subordinate legislation made from time to time under it;

(b) references to any agreement or document include its schedules and attachments and references to **paragraphs**, **clauses**, **recitals** or **Schedules** are references to such provisions or parts of this Agreement;

(c) references in the singular shall include references in the plural and vice versa, words denoting any gender shall include any other gender and words denoting natural persons shall include any other persons;

(d) headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;

(e) references to an agreement, deed, instrument, licence, code or other document (including this Agreement), or to a provision contained in any of these, shall be construed, at the particular time, as a reference to it as it may then have been amended, varied, supplemented, modified, suspended, assigned or novated;

(f) the words **include** and **including** are to be construed without limitation;

(g) a reference to a **law** includes common or customary law and any constitution, decree, judgment, legislation, order, ordinance, regulation, statute, treaty or other legislative measure (and **lawful** and **unlawful** shall be construed accordingly);

(h) a reference to a **Party** means a party to this Agreement and includes its successors in title, permitted assigns and permitted transferees and **Parties** shall be construed accordingly;

(i) reference to a **person** includes any person, firm, body corporate, corporation, government, state or agency of a state or any association, trust or partnership (whether or not having separate legal personality) or two or more of the foregoing;

(j) a **regulation** includes any regulation, rule or official directive of any governmental, intergovernmental or supranational body, agency, department or regulatory, self-regulatory or other authority or organisation;

(k) a reference to **writing** includes any email transmission and any means of reproducing words in a tangible and permanently visible form; and

(l) the words in this Agreement shall bear their natural meaning.

1.3 Unless expressly stated to the contrary, any reference in this Agreement to the right of consent, approval, acceptance or agreement shall be construed such that such consent, approval, acceptance or agreements shall not be unreasonably delayed or withheld. The Parties acknowledge that:

(a) the withholding or delaying of the giving of consent, approval, acceptance or agreement by the Customer under this Agreement which would place Network Rail in breach of the

law, the Network Licence, any Standard or any contract (other than a Contract) would be unreasonable;

(b) nothing in this Agreement shall require Network Rail to give or procure the giving of any consent, approval or acceptance which would be contrary to the protection, safety and efficient operation of the Railway and the safety of persons or property on or near the Railway; and

(c) notwithstanding any other provision of this Agreement, in performing its obligations and exercising its rights under this Agreement Network Rail shall retain sole discretion in relation to safety in its role as Infrastructure Manager or as owner and operator of the Network in accordance with the Network Licence.

## 2 Obligations of the Customer

2.1 The Customer shall act in good faith towards Network Rail in respect of this Agreement.

2.2 The Customer shall observe and perform its obligations including those set out in Schedule 8 and Schedule 9 in accordance with the terms of this Agreement including carrying out actions or providing information as reasonably requested from time to time by Network Rail. If any delay is caused to the provision of the Services or Network Rail incurs any costs or losses as a result of breach of contract or negligence by the Customer, then the Customer shall pay to Network Rail all costs or losses directly and reasonably incurred by Network Rail as a result of the Customer's breach or negligence.

2.3 The Customer will design the Works exercising the reasonable skill, care and diligence as may be expected of a properly qualified and competent designer engaged in designing works of a similar size, scope and complexity to the Works. The Customer will construct the Works exercising the reasonable skill, care and diligence as may be expected of a properly qualified and competent contractor engaged in carrying out works of a similar size, scope and complexity to the Works.

2.4 The Customer shall design, carry out and complete the Works in accordance with:

(a) Good Industry Practice;

(b) Legal Requirements;

(c) Standards (but subject always to limb (d) below);[11]

(d) any Change in Standards;

(e) such derogations from the Standards as may be applicable from time to time and as Network Rail and/or the relevant Competent Authority may approve or consent to in writing and by expressly referring to it, being aware that its approval or consent to the matter in question constitutes a derogation;

[11] The definition of Change in Standards makes it clear that Changes in Standards after Approval in Principle will only be applied for safety reasons (and will then be treated as a Mandatory Variation).

(f) all other relevant current British or European codes, regulations and standards (to the extent that there are no conflicts or inconsistencies within them or between them and any other requirements of this Agreement);

(g) Network Rail's Requirements;

(h) the Safety Authorisation;

(i) Necessary Consents;

(j) the Works Requirements;

(k) the Safety Management System, or in respect of a relevant part of the Works as set out in paragraph 13 of Schedule 3:

(i) the Network Rail Safety Management System:

(ii) where the Works relate to a station, the SFO Safety Management System, or

(iii) where the Works relate to a Depot, the DFO Safety Management System;

(l) the terms of this Agreement; and

(m) in accordance with the approved Asset Management Plan which will take into account such other conditions:

(i) as Network Rail may reasonably consider necessary to prevent, address, alleviate or comply with (as applicable) a Network Operation Issue;

(ii) as Network Rail may reasonably consider necessary relating to the efficiency, whole life cost and safety of the Works and the Railway and with clause 8 and Schedule 9; and

(iii) to enable construction of the Works in a manner which minimises disruption to the Railway and enables future construction or maintenance to be carried out on the Network constituting the Works (as far as reasonably possible) in a way which minimises costs and disruption to the Network.

2.5 The Customer and Network Rail shall meet on a regular basis as agreed between the Parties.

2.6 Information or instructions provided to Network Rail by or on behalf of the Customer in connection with the Project shall be prepared and given in such a diligent and professional manner and with such clarity, in such detail and in a timely manner as is necessary for Network Rail to comply with its obligations under this Agreement.

2.7 The Customer will update Network Rail periodically of the status of the Works confirming that all planned programming and possessions interfaces will be met.

2.8 The Customer shall be responsible for construction of the Works at its own risk and cost.

2.9 The Customer shall appoint a Representative to act on its behalf for the operation of these provisions of this Agreement. Any restriction placed by the Customer on its Representative's authority must be notified to Network Rail in writing to be effective. The Representative may

delegate its authority by notice in writing specifying the identity of the delegate and specifying the authority so delegated.

2.10 The Customer shall satisfy itself that the Checker has provided the Customer with the necessary level of assurance that the Checker has carried out its duties in accordance with the applicable Standards.

2.11 The Customer may subcontract all or part of its obligations under this Agreement. Notwithstanding the appointment of any Contractor and/or contractor the Customer shall remain liable for the performance of its obligations.

2.12 The Customer shall procure that each Contractor which is involved in the design, carrying out and completion of the Works meets the Network Rail Requirements [and holds a current relevant registration and qualification with RISQS[12]] for all relevant classes of work to be carried out by that Contractor.

2.13 The Customer shall:

(a) obtain Network Rail's written acceptance prior to the appointment of Principal Designer (as defined in the CDM Regulations), such acceptance not to be unreasonably withheld or delayed;

(b) not appoint a Contractor without obtaining Network Rail's prior written acceptance to the selection of the Contractor and of the relevant Works Contract;

(c) prior to commencing the design or construction of the Works, procure that each relevant Contractor produces a Quality Plan, Environment Plan, an Asset Management Plan and a Safety Plan specific to the Works and demonstrate how this integrates with the Customer's Safety Management System;

(d) obtain the prior acceptance of Network Rail before appointing a Checker appropriate to the checking category allocated to the Works by the Customer; and

(e) procure that each Contractor shall provide Network Rail with a Collateral Warranty for design and construction together with a copy of their associated Contract (from which the Customer shall first be entitled to redact any cost information) prior to the Works Commencement Date.

2.14 The Customer shall carry out the Works in accordance with PACE or an equivalent process (approved by Network Rail (such approval not to be unreasonably withheld)) which incorporates the key requirements agreed with Network Rail. Where an equivalent process does not include some PACE equivalent products and Network Rail require such products to be incorporated, then the Customer shall incorporate such PACE products as necessary. Where an alternative process to PACE is being used for the Works pursuant to this clause 2.14, any reference in this Agreement to PACE procedural requirements shall be interpreted to mean the equivalent process in the alternative process.

[12] Delete if RISQS qualification is not required for any classes of work by any Contractor. If deleted, the sponsor must instead undertake / provide assurance that the proposed Contractor(s) have formally demonstrated organisational competence to design and carry out works on the Network

## 3 Obligations of Network Rail

3.1 Network Rail shall act in good faith towards the Customer in respect of this Agreement.

3.2 Network Rail will perform the Services in accordance with:

(a) Good Industry Practice;

(b) Legal Requirements;

(c) Standards (including, for the avoidance of doubt, the Network Licence, the Network Code and the Station Access Conditions or the Depot Access Conditions as may be applicable from time to time);

(d) Necessary Consents;

(e) the Asset Management Plan; and

(f) the terms of this Agreement including Schedule 8, Schedule 9 and Schedule 10.

3.3 Network Rail shall perform the Services and its other obligations under this Agreement so as to meet the Service Level Obligations. The Service Level Obligations are included for reporting purposes and are without prejudice to any other Network Rail obligations set out in this Agreement.

3.4 Network Rail shall at the cost of the Customer make available to the Customer, within a reasonable time, the Network Rail data and information, including the Asset Status Report(s), (except for data and information which is confidential or commercially sensitive or already in the public domain) which is already in Network Rail's possession and which the Customer reasonably requires and has requested to carry out the Works. Where Network Rail is required by the Customer to provide any such information in relation to the design of the Works by the Customer, it shall in good faith provide information which is in all material respects the most complete and accurate understood to be in its possession, and 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.

3.5 If Network Rail determines subsequent to the date of delivery that such information was inaccurate or incomplete in any material respect, it shall promptly notify the Customer and shall use its reasonable endeavours to make any changes necessary to correct such inaccuracies or incompleteness. Notwithstanding the foregoing or any other provision in this Agreement, Network Rail does not warrant the accuracy or sufficiency of data and information provided to the Customer and the Customer shall be responsible for verifying the accuracy and assessing the sufficiency for its purposes of all data and information provided.

3.6 Network Rail shall appoint a Representative to act on its behalf as a single point of contact for the operation of the provisions of this Agreement. Any restriction placed by Network Rail on its Representative's authority must be notified to the Customer in writing to be effective. The Representative may delegate its authority by notice in writing specifying the identity of the delegate and specifying the authority so delegated.

3.7 Network Rail and the Customer shall meet on a regular basis as agreed between the Parties.

3.8 Network Rail shall, in a format and at intervals to be agreed between the Parties:

(a) provide the Customer with regular reports on the progress of the Services;

(b) report on Network Rail Costs incurred to date and forecast with a view to identifying at an early stage whether costs are likely to exceed the Estimated Cost; and

(c) update the list of Interfacing Projects.

3.9 Network Rail shall liaise with the Station Facility Owner or the Depot Facility Owner (as applicable) on safety matters.

3.10 Network Rail shall notify the Customer of Interfacing Projects identified from the information provided by the Customer in accordance with clause 8.7 as the Works progress and shall provide advice on the Customer's proposals for mitigating and controlling risks from the Works on Interfacing Projects in accordance with its Network Licence.

3.11 With regard to clause 2.4(c), if a Customer requests a derogation to a Network Rail Standard, Network Rail shall at the cost of the Customer identify similar examples of derogations that have been adopted elsewhere. Such information shall be provided as soon as reasonably practicable and in any event within twenty-five (25) Working Days of such request.

## 4 Necessary Consents

4.1 Unless otherwise agreed under clause 4.2 (and in the case of Network Rail Consents, in accordance with the process outlined in Schedule 8) the Customer:

(a) subject to clause 4.1(b) is responsible for applying for and using reasonable endeavours to obtain all Necessary Consents in a format agreed between the Parties and in line with the requirements of the Implementation Programme; and

(b) shall apply for all Necessary Consents except where it has been agreed by Network Rail that Network Rail shall make applications for and use reasonable endeavours to obtain those Necessary Consents specified in paragraph 1.3 of Schedule 7 as revised in accordance with clause 4.

4.2 Where it is identified in Schedule 7[13] that Necessary Consents are required, the Parties shall discuss and agree who will make the appropriate application(s) and whether these should be obtained before the Works Commencement Date. Where the Parties do not agree who will make the appropriate application(s) for other Necessary Consents, then it will be the Customer's responsibility to do so.

4.3 Network Rail does not warrant that the list of Necessary Consents set out in Schedule 7 are definitive or exhaustive and the Customer must make its own enquiries in respect of the same.

4.4 Network Rail's obligations in relation to obtaining any Necessary Consents for which it is responsible are conditional upon Network Rail receiving in full the documentation and assistance related to the relevant Necessary Consents which it may reasonably require and has requested from the Customer.

4.5 The Customer shall prepare in accordance with the Implementation Programme (and in accordance with any requirements which Network Rail may have and at the appropriate times

[13] The content of Schedule 7 should be amended by agreement to reflect the requirements of a specific Project.

within the design and construction processes) all the documentation required to enable Network Rail to make submissions for any Necessary Consents and when necessary modify the design or construction processes to ensure that such consent is obtained and provide Network Rail with a copy of all such relevant documents so prepared.

4.6 Subject to clause 4.2, where Network Rail has agreed to apply for a Regulated Change consent, in accordance with the Implementation Programme the Customer shall provide Network Rail with the following information: a draft form of application or proposal as relevant for any Regulated Change which may be required in respect of the Works (which for the avoidance of doubt shall make reference to all relevant consequential documentation required in respect of the Works, including any lease(s) of the sites of the Works) which may be required in respect of the Works for approval by Network Rail.

4.7 Network Rail shall not object to the Regulated Change in the formal procedure for approval of the same which Network Rail has approved under clause 4.6.

4.8 Network Rail shall have no liability to the Customer under this Agreement, provided that Network Rail shall be obliged to make any reasonable appeal against any decision in respect of Regulated Change if reasonably requested to do so by the Customer, as a result of:

(a) any Necessary Consent not being granted;

(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 a breach of this Agreement by Network Rail and in which case Network Rail will be liable for the Direct Costs incurred by the Customer.

4.9 The Customer in applying for any relevant Regulated Change shall administer any application for Network Change in accordance with the procedure set out in the Network Code and

(a) where the Regulated Change applies to a station, any proposal for Station Change in accordance with the procedures set out in the Station Access Conditions, or

(b) where the Regulated Change applies to a Depot, any proposal for Depot Change in accordance with the procedures set out in the Depot Access Conditions.

4.10 In the case of agreement of the Regulated Change before the Commencement Date the Regulated Change and the estimated Regulated Change costs shall be as listed in paragraph 1.2 of Schedule 7. Where a Regulated Change, that Network Rail is undertaking, has not been agreed before the Commencement Date, then the Parties shall agree and set out the Regulated Change estimate within 20 Working Days (or such other period as may be agreed in writing) of agreement of the Regulated Change up to the limit set out in paragraph 5(a) of Schedule 2. If they are not included at the Commencement Date, as soon as the estimate has been agreed, the Parties shall set it out in paragraph 1.3(c) of Schedule 7.

4.11 In conducting any discussions or negotiations with Operators in relation to Regulated Change Network Rail, subject to any reasonable confidentiality requirements, will:

(a) allow the Customer and its representatives to attend relevant meetings with any train operator;

(b) provide the Customer with copies of all relevant correspondence; and

(c) have due regard to the Customer's comments (if any) in relation to Regulated Change.[14]

4.12 Network Rail shall act in accordance with its Network Licence and its obligations as Infrastructure Manager and under the Network Code and Station Access Conditions and Depot Access Conditions (as appropriate) in considering in a timely manner the Customer's applications for the Network Rail Consents. Network Rail shall use its reasonable endeavours to:

(a) obtain or issue (as appropriate) the Network Rail Consents as soon as reasonably practicable; and

(b) liaise with all relevant third parties, so that as far as practicable, Network Rail Consents are granted on reasonable terms.

4.13 Notwithstanding any approval, acceptance, consent, comment, confirmation, acknowledgment or endorsement which Network Rail may be required to provide pursuant to this Agreement, the responsibility for the design and construction of the Works shall remain solely at the risk and cost of the Customer and Network Rail shall have no liability whatsoever, whether in contract, tort or otherwise for such design and construction or for any errors or omissions contained in the documents relating thereto.

4.14 Subject to the relevant lessee acting in good faith, Network Rail agrees to use its reasonable endeavours to negotiate, agree and (subject to the relevant parties reaching agreement on the terms and conditions) grant any leases or licences of the sites of the relevant part of the Works.

4.15 Subject to clauses 6.1 to 6.4, this Agreement does not constitute a consent under any property document between the Customer and Network Rail nor grant (or compel Network Rail to grant) any interest in any Network Rail property.

## 5 Programming of Work[15]

5.1 The Parties shall co-operate as set out in this clause 5 in the planning and development of an Implementation Programme, including any enabling works and the utilisation of Possessions to facilitate both the safe and efficient execution of the Works and operation of the Network.

5.2 Within ten (10) Working Days of a written request from the Customer, Network Rail shall inform the Customer of the anticipated timescales for booking Possessions to assist the Customer in preparation of the Implementation Programme. As soon as reasonably practicable and in any event prior to the date by which Network Rail needs to initiate the booking process for possessions as advised to the Customer, the Customer shall submit a detailed Implementation Programme for acceptance in principle by Network Rail. Such programme shall be co-ordinated with the Construction Phase Plan and shall include:

(a) submission and acceptance dates and activity duration for:

[14] This clause should be replaced with 'Not used' when the Customer is a train operating company.

[15] The booking process for possessions may take a number of months. Discussions should take place between Network Rail and the Customer to determine the likely timescales for obtaining possessions and the relevant prior notice periods required by Network Rail under the Asset Management Plan process.

(i) Design Data;

(ii) survey works;

(iii) enabling works;

(iv) Possessions forming a proposed Possession Plan in accordance with clause 6.10;

(v) Work Package Plans; and/or

(vi) works inspection, testing and Commissioning plans;

(b) plans to address any Interfacing Projects to the extent that Network Rail has provided sufficient information to the Customer to enable the Customer to plan around Interfacing Projects;

(c) identification of the activities dependent on possession working, including the provision of key information requirements and obtaining Necessary Consents for which the Customer is responsible;

(d) the Planned Construction Completion Date;

(e) the anticipated Taking Over Date;

(f) the anticipated Defects Identification and Completion Date; and

(g) the anticipated Final Completion Date.

5.3 Network Rail shall review the Implementation Programme and use reasonable endeavours to provide the Customer with written comments or request further information that Network Rail requires in order to comment on or accept the Implementation Programme within ten (10) Working Days[16] of receipt of the Implementation Programme, provided always that Network Rail shall only be entitled to comment on the Implementation Programme insofar as the same impacts on the Network and/or property and/or on the carrying out of the Services. If Network Rail requests further information it shall use reasonable endeavours to provide comment on or acceptance of the Implementation Programme within ten (10) Working Days of receipt of such information.

5.4 If Network Rail does not accept the proposed Implementation Programme, the timings or any section of it, the Customer shall consult further with Network Rail and shall submit a revised proposed Implementation Programme (or any section of it) for acceptance by Network Rail in accordance with the process set out in clause 5.3.

5.5 Network Rail and the Customer shall jointly review the accepted Implementation Programme from time to time and shall endeavour to agree what (if any) action needs to be taken in order to achieve the established dates for Possessions, Construction Completion, Taking Over, Defects Identification and Completion and Final Completion. If in the reasonable opinion of Network Rail, after consulting with the Customer, the actual progress does not conform to the accepted Implementation Programme or some of the Booked Possessions dates are unlikely to

[16] Time period to be adjusted, if necessary, to reflect complexity of Project and where there is an extensive requirement for data etc.

be achieved, the Customer shall (if Network Rail so requests in writing) produce a revised programme (subject to the acceptance of Network Rail on reasonable grounds where the revisions are material, provided always that Network Rail shall only be entitled to comment on the Implementation Programme insofar as the same impacts on the Network and/or property and/or on the carrying out of the Services) in order to achieve the established Possession dates and to achieve the completion dates as soon as reasonably practical.

5.6 Network Rail's ability to provide the Services in accordance with the Implementation Programme is dependent upon the Customer meeting the agreed Implementation Programme. If the Customer is unable to meet the agreed Implementation Programme the Customer shall keep Network Rail informed of the anticipated delay, ensuring that Network Rail is provided with as much notice as reasonably possible of the likely impact and Network Rail shall use reasonable endeavours to provide the Services so as to minimise the impact of the delay upon the agreed Implementation Programme.

5.7 If either, (1) the Parties agree pursuant to clause 5.5 that the established dates for Possessions are not likely to be achieved, or, (2) Network Rail fails to make available (or cancels) any Possession, then without prejudice to the liability of Network Rail in the case of a cancelled or delayed Possession which is the fault of Network Rail (or any person acting on behalf of Network Rail), the Customer shall consult with Network Rail regarding the availability of alternative Possessions and Network Rail shall:

(a) use its reasonable endeavours to obtain alternative Possessions where possible; and

(b) keep the Customer fully informed in a timely manner of its efforts in that respect.

5.8 As the Works progress, the Customer shall revise and update the Implementation Programme set out in paragraph 7 of Schedule 3.

5.9 The provisions of clauses 5.2, 5.3 and 6.9 to 6.16 (inclusive) shall apply together with any necessary conforming changes to any such revised Implementation Programme submitted for acceptance, provided that the Customer shall act in respect of further consultation with Network Rail and the submission of any further revisions.

5.10 Where the Implementation Programme is revised and updated for any reason then the Liquidated Damages Payment Date shall be adjusted to reflect such revision.

5.11 Where the Service Level Obligations set out in Schedule 10 refer to "a reasonable period of time" or "as soon as reasonably practicable", the Parties shall agree the relevant period of time in respect of such Service Level Obligations once the Parties have sufficient information to determine the scope of such Service Level Obligations.

## 6 Access to the Network and obtaining Possessions

6.1 Prior to the Works Commencement Date Network Rail shall provide the Customer, its agents and employees with reasonable access to areas of land in which Network Rail has an interest (subject to clauses 6.3 and 6.4) solely for the purpose of:

(a) carrying out site surveys relating to the Works and any protective works referred to in clause 7.2 which must be carried out before the Works Commencement Date;

(b) carrying out a survey of the condition of the relevant land and assets and recording the condition in a dilapidation condition survey in accordance with Standard NR/L2/MTC/089 and recorded in accordance with form NR/L3/MTC/089/AMP10; and

(c) the storage of materials on those areas notified by Network Rail to the Customer in writing prior to the Works Commencement Date (as may be varied by Network Rail in its absolute discretion from time to time).

Save as aforesaid the Customer shall not be allowed access to any land belonging to Network Rail for or in connection with the Works prior to the Works Commencement Date (except where the Customer already has access rights under the terms of an existing agreement).

6.2 From the Works Commencement Date until the earliest of:

(a) issue of the APA Final Certificate;

(b) the date of abandonment of the Works; or

(c) the termination of this Agreement,

Network Rail shall provide the Customer, its agents and employees with access to areas of land in which it has an interest (subject to clauses 6.3 and 6.4) for the purpose of carrying out the Works.

6.3 The grant of any access by Network Rail is subject to:

(a) the Customer first making prior arrangements with Network Rail; and

(b) the Customer complying with this Agreement, including the Network Rail Requirements, any relevant Necessary Consents and any other conditions which Network Rail (acting reasonably, subject to clause 1.3(b) and 1.3(c)) considers necessary to prevent, address, alleviate or comply with (as applicable) a Network Operation Issue.

6.4 Where any land in which Network Rail has an interest has been leased or licensed to a third party or is the subject of rights held by a third party, the Customer shall not be entitled to access pursuant to this clause 6 until the written consent of the third party has been obtained by Network Rail (at the cost of the Customer). Network Rail shall liaise with any such third party with a view to procuring a right of access.

6.5 [The Customer shall obtain Network Rail's or the Station Facility Owner's (where the Works relate to a station) or Depot Facility Owner's (where the Works relate to a depot) prior written approval to the nature and quantity of any plant, equipment and materials to be stored on the Network.] The storage of [such] plant, equipment and materials shall be at the sole risk of the Customer and Network Rail shall have no liability to the Customer whether under this Agreement, in tort or howsoever arising in respect of any damage, theft or vandalism of such stored plant, equipment and materials. The Customer shall take such security measures as are reasonably necessary and are required by Network Rail to prevent such materials being used to vandalise the Railway.[17]

[17] Delete wording in square brackets if the Customer is the Station Facility Owner or the Depot Facility Owner.

6.6 Network Rail shall at all times have unlimited access to the Area of Work for the purpose of monitoring the Works or as it may consider necessary to prevent, address, alleviate or comply with (as applicable) a Network Operation Issue.

6.7 Planned Network Rail inspections shall be agreed and documented in Standard NR/L2/MTC/089 and recorded in accordance with form NR/L3/MTC/089/AMP011 Supplementary Inspections.

6.8 In exercising its rights under this clause 6 Network Rail shall not unreasonably interfere, hinder or obstruct the carrying out of the Works by the Customer, its agents and employees. In exercising such rights Network Rail shall comply with any relevant safety requirements, rules and regulations in force from time to time as notified to Network Rail by the Customer.

6.9 When planning the Implementation Programme and at intervals thereafter, the Customer shall consult with Network Rail regarding the availability of Possessions. Network Rail shall notify the Customer on the programming implications of Possessions required to carry out the Works together with the cost implications of Possessions (which shall include details of the costs attributable to and payable by the Customer in relation to disruptive Possessions linked to one or more Interfacing Projects) in respect of compensation and other payment rates payable by Network Rail under any relevant Access Agreement.

6.10 The Customer shall minimise the disruptive possessions requirements in consultation with Network Rail. Once a proposed Possession Plan is established, Network Rail will undertake consultation on behalf of the Customer in accordance with Part D of the Network Code to gain approval for the relevant Possessions. Network Rail's obligations under clauses 6.11 to 6.14 (inclusive) shall be subject at all times to its compliance with its obligations under the Network Code and any relevant Access Agreement.

6.11 Network Rail shall use all reasonable endeavours to obtain and make available to the Customer the Possessions necessary in order to carry out the Works in accordance with the Implementation Programme (subject and without prejudice to Network Rail's requirements in respect of the timing of applications thereof).

6.12 For stand-alone disruptive Possessions, Network Rail shall review the Possessions requirements and, subject to the availability of such Possessions, shall consult with relevant Operators by formally proposing an update or supplement to the Engineering Access Statement, as appropriate. Following the relevant timescales for consultation and having received no adverse comments from Operators, Network Rail shall enter the Possession in the Possession Planning System and give it a confirmed reference number, and shall add the Possession to the relevant version of the Engineering Access Statement and subsequently enter it into the confirmed period Possession Plan.

6.13 For disruptive Possessions linked to one or more Interfacing Projects, Network Rail shall establish whether the Possessions already planned for site activities in relation to the Interfacing Project are potentially compatible with the further separate site activities proposed by the Customer.

6.14 Where proposed Possessions are confined to periods when there is no scheduled train service, pursuant to the Engineering Access Statement, Network Rail shall promptly enter such Possessions into the Possession Planning System.

6.15 Network Rail shall keep the Customer advised of the progress of the procedures referred to in clauses 6.12 to 6.14 (inclusive) and in particular shall advise the Customer as soon as reasonably practicable of any objections to the proposed Possession Plan in which any affected Operator persists to object and in the light of which the Customer may wish to revise the Works Requirements or intended method of working or to revise the Possession Plan.

6.16 Within twenty (20) Working Days after completion of the consultation on the proposed Possession Plan, Network Rail shall confirm in writing to the Customer:

(a) that the relevant Possessions have been obtained, whereupon the Possession Plan shall be deemed to be agreed and the Possessions shall be deemed to be Booked; or

(b) that the relevant Possessions have not been obtained, in which case Network Rail shall furnish the Customer with details where the Possession Plan and as a consequence the Implementation Programme or any section of it has not been accepted and subsequently within a reasonable timeframe, a supporting analysis (including as to the merits of bringing an appeal), following which the Customer shall consult further with Network Rail and submit a revised proposed Implementation Programme for acceptance by Network Rail.

6.17 Subject to clause 3.10, if requested by the Customer, Network Rail shall identify and notify the Customer of any Interfacing Projects of which it is aware which may affect the Works.

6.18 The Customer shall make the detailed arrangements for the Possessions, their management, interface with Interfacing Projects and the procurement of all necessary resources to facilitate their availability to the Contractor. The Customer shall attend all relevant planning meetings, including train movements meetings for the Booked Possessions.

6.19 The Customer recognises in relation to any Possessions not forming part of the Possession Plan that:

(a) the availability of such Possessions is confined to periods when there is no scheduled train service, unless (by exception) longer periods can be made available; and

(b) in the event of any additional Possessions not being available, the Implementation Programme may require revision.

6.20 Network Rail shall give the Customer as much notice as is reasonably practicable in respect of any cancellation or alteration of any Booked Possession in order to enable the Customer and each Contractor to minimise or mitigate any wasted costs. Network Rail shall provide to the Customer the reasons for any cancellation or alteration. If as a result of a cancellation or alteration of a Possession any additional Possession shall be required, clause 5.7 shall apply.

6.21 If Network Rail cancels or alters a Booked Possession, Network Rail shall compensate the Customer in accordance with clause 13.

## 7 Ground Movement Precautions and Protective Works

7.1 Any required enabling works, such as protective works, form part of the Works and form part of the Implementation Programme.

7.2 Prior to commencing construction of the Works, the Customer shall take all measures and carry out such protective works as may be necessary by reason of the Works:

(a) to protect the safety and continuity of the Railway;

(b) to protect Network Rail's land, works and structures against instability or physical damage and the relevant operational track against distortion arising from anticipated ground movement due to the construction of the Works; and/or

(c) to prevent, address, alleviate or comply with (as applicable) any Network Operation Issue.

7.3 The Customer shall select such methods to be used for the execution of the Works as shall minimise ground movement so far as is reasonably practicable during and after construction of the Works and avoid ground movement which would be anticipated to cause physical damage (other than damage of a superficial nature) to Network Rail's land, works and structures.

7.4 If Network Rail or the Customer reasonably believes that any ground consolidation works or the working of any mines or minerals is likely to cause damage to the Works or any adjoining land, works or structures of Network Rail by reason of subsidence or if such working causes damage to the Works or any such land, works or structures, Network Rail and the Customer shall notify and consult with each other with a view to agreeing the measures necessary to be taken, before taking any steps to prevent, guard against or make good such damage.

7.5 At any time after the expiry of fifteen (15) Working Days of the issue of any notice under clause 7.4, Network Rail may take such steps to prevent, guard against, limit or make good damage to the Works or Network Rail's land, works or structures as Network Rail considers necessary for the protection and safety of the Railway.

7.6 Notwithstanding clause 7.4, if Network Rail reasonably considers (subject to clause 1.3(c)) that immediate measures must be taken for the protection and safety of the Railway, it may take such measures without prior consultation with or notice to the Customer.

## 8 Carrying out the Works

8.1 The Customer shall not commence construction of the Works prior to the Works Commencement Date.

8.2 For the purposes of the Works, under the CDM Regulations the Customer is the only Client (as defined in the CDM Regulations).

8.3 [For the purposes of the Works, under the CSM-REA Regulations the Customer is the Proposer (as defined in the CSM-REA Regulations).][18]

8.4 [For the purposes of the Works, under the Railway Interoperability Regulations the Customer is the Project Entity (as defined in the Railway Interoperability Regulations).][19]

8.5 The Customer shall comply with clauses 6, 7, 8, 9 and 10 and Schedule 9 in carrying out the Works.

[18] If the CSM-REA Regulations are not applicable to the Works, replace the text with 'Not used.'

[19] If the Railway Interoperability Regulations are not applicable to the Works, replace the text with 'Not used.'

8.6 After consulting with Network Rail the Customer shall prepare a Construction Phase Plan for the Works and submit it to Network Rail. Network Rail shall examine and comment to the Customer having due regard for the Implementation Programme, on the elements of such Construction Phase Plan relating to works in the Railway environment. The Customer shall amend the Construction Phase Plan to take account of any comments made by Network Rail on the Construction Phase Plan and submit further Construction Phase Plans to Network Rail as necessary.

8.7 The Customer is responsible for developing and carrying out the Works, including refining and updating the Works Requirements and Implementation Programme, and deriving from these the Possession Plan and Necessary Consents including Network Rail Consents and the requirements for any information from Network Rail. The Customer will regularly update and make Network Rail aware of any requirements for information including in relation to the Interfacing Projects, in order to allow Network Rail to comply with its obligations under clause 3.10. As the Works progress, the Customer shall manage the arrangements between the Works and any Interfacing Projects in respect of any matters for which the Customer is responsible under this Agreement. In particular, the Customer is responsible for mitigating and controlling risks for the Works in relation to any Interfacing Projects.

8.8 The Customer shall supply to Network Rail copies of the approved drawings together with supporting design and check certificates and contract documents for Network Rail's use during the carrying out of the Works.

8.9 Without prejudice to Network Rail's other rights under this Agreement, where the Customer is unable to fulfil any of its obligations under this clause 8 and such failure adversely impacts on Network Rail's business activities or the delivery of Network Rail's obligations:

(a) Network Rail may (acting reasonably) issue a notice stating the steps to be taken to address the issue and requiring the Customer to remedy the situation within a specified time, taking into account these circumstances; and

(b) in the event that the Customer is not able to or does not comply with the notice, Network Rail shall take such steps as it reasonably considers appropriate to address the position and the Customer shall reimburse Network Rail in respect of all resulting Losses.

8.10 Whilst the Customer has control or use of the Area of Work including whilst carrying out snagging and/or rectification of defects during the period for a Works Contract between the Construction Completion Date and Final Completion, in the event of acts of trespass or vandalism occurring on the Area of the Works or its approaches or due to the Works which endanger safety on the Railway or the safety of persons or property on or near the Railway, Network Rail may take immediate action at the cost of the Customer to safeguard the Railway and/or such persons and property in accordance with clause 9.2(a) to clause 9.2(c).

## 9 Safeguarding the Railway

9.1 Network Rail and the Customer shall liaise generally on all safety matters arising out of the Works if, and to the extent that, they affect the Railway.

9.2 Notwithstanding any other provision of this Agreement but subject to clause 13, Network Rail may at any time take whatever action Network Rail considers necessary to prevent, address, alleviate or comply with a Network Operation Issue, including requiring the Customer and any

Contractor to suspend the carrying out of the Works for such period and/or take such measures as Network Rail may require, provided that:

(a) Network Rail's decision to take such action at that time is reasonable, taking into account all relevant circumstances (subject to clause 1.3(c));

(b) Network Rail shall (if practicable) consult with the Customer prior to taking any such action; and

(c) Network Rail shall in any event notify the Customer as soon as reasonably practicable after taking any such action.

9.3 Network Rail shall notify the Customer of any suspension pursuant to clause 9.2 as soon as reasonably practicable. Such notification shall contain such relevant information relating to the suspension as is available, including an estimate of the period of suspension. Network Rail shall promptly provide the Customer with any further information it receives or becomes aware of which relates to the suspension and provide an update on the estimate of its duration, and shall notify the Customer as soon as practicable (and in any event giving at least two (2) Working Days' notice) when the Works can be resumed.

9.4 If pursuant to clause 9.2 Network Rail requires action to be taken by any Contractor, the Customer shall upon notification procure that the Contractor responsible for the relevant part of the Works complies with Network Rail's requirements. If the Customer is not immediately available for any reason, Network Rail shall be entitled for the purposes of clause 9.2 to issue instructions directly to the Contractor and the Customer shall procure that any such direct instructions shall be treated as instructions from the Customer under the relevant contract. Network Rail shall supply to the Customer a copy of such instructions as soon as reasonably practicable following their issue.

9.5 The Parties shall with reasonable diligence exchange information and otherwise act reasonably to co-operate with each other so far as it is necessary to enable Network Rail or the Station Facility Owner (where the Works relate to a station) or the Depot Facility Owner (where the Works relate to a Depot), acting reasonably, to manage their respective Infrastructure Manager responsibilities during the construction of the Works and for a period of twelve (12) months thereafter.

## 10 Inspection, Construction Completion, Taking Over and Final Completion

10.1 Without prejudice to clause 6, Network Rail [and the Station Facility Owner (where the Works relate to a station)] [and the Depot Facility Owner (where the Works relate to a Depot)][20] shall be entitled to inspect the Works at any time prior to the Final Completion Date.

10.2 Except where set out in the Works Requirements, the Customer shall at its own cost and to the satisfaction of Network Rail, acting reasonably, make good any property of Network Rail which may have been damaged or interfered with in the course of delivering the Works or as a result of the Works and shall remove all surplus material brought on to Network Rail's land by the Customer or any Contractor.

[20] Delete the words in square brackets where the customer is a Station Facility Owner or a Depot Facility Owner or if the works are not taking place on a Station or Depot.

10.3 If the whole or part of the Works fails to comply in any material respect with the requirements of clause 2.4, the Customer shall carry out such remedial works of construction or design as may be required so that the Works do so comply. Network Rail may reasonably require the Customer to carry out or repeat any demonstrations or tests for the whole or any part of the Works to evidence that the Works (or any part) comply.

10.4 The Customer shall take such action during the construction of the Works and during the period up to the Final Completion Date as Network Rail may reasonably require to remedy any deficiencies and defects in the Works identified by Network Rail and the Customer (including those set out in a Defects Identification and Completion Certificate).

10.5 The Customer shall at its sole cost and expense, repair, maintain, renew and replace the Works prior to the Taking Over Date.

10.6 The Customer shall notify Network Rail in writing and provide the draft APA Construction Certificate once the Customer considers that the Works have been completed in accordance with the agreed drawings, specification and design and the Customer believes the Construction Completion Criteria have been met. Network Rail shall comply with the procedures set out in Standard NR/L2/MTC/089 and Network Rail shall acknowledge the Construction Completion Criteria have been met by countersigning the agreed form APA Construction Certificate.

10.7 The Customer and Network Rail shall follow Standard NR/L2/MTC/089 and the process set out in form NR/L2/MTC/089/AMP015 and at the appropriate stage the Customer shall issue the Taking Over Certificate which shall be countersigned by Network Rail.

10.8 The Customer and Network Rail shall follow Standard NR/L2/MTC/089 and the process set out in form NR/L2/MTC/089/AMP016 and at the appropriate stage the Customer shall issue the Defects Identification and Completion Certificate which shall be countersigned by Network Rail.

10.9 The Customer shall notify Network Rail in writing and provide the draft APA Final Certificate once the Customer considers that the whole of the Works satisfies the Final Completion Criteria. Network Rail shall acknowledge that Network Rail is satisfied that all parts of the Works comply in all respects with this Agreement, and in particular that all deficiencies, snagging and defects in the Defects Identification and Completion Certificate have been rectified in compliance with clause 10.4 and the health and safety file has been accepted by Network Rail by countersigning the agreed form APA Final Certificate. If Network Rail considers that the whole or any part of the Works does not comply as aforesaid, it shall notify the Customer in writing together with full details of its opinion why the APA Final Certificate shall not be countersigned by Network Rail.

10.10 The legal and beneficial title in the Works shall vest in Network Rail unless otherwise detailed in paragraph 12 of Schedule 3.

10.11 Issue of the APA Final Certificate does not release the Customer from any obligations or liabilities in respect of the Works or any defects in the Works.

10.12 In the case of any part of the Works to be the subject of a lease, the Customer shall not use or operate and shall not permit any third party to use or operate such Works (or any part thereof) prior to the date of the grant of the lease for the relevant Works (or, where agreed in writing by Network Rail, the execution of an agreement for lease).

10.13 Subject to clause 10.12, the Customer shall not use or operate and shall not permit any third party to use or operate the Works prior to the Construction Completion Date for the relevant Works (other than for testing as agreed with Network Rail).

10.14 The Customer is carrying out and constructing the Works at its own risk in the full understanding that the grant of additional track access rights and rights of use is subject to the procedures set out in the Act.

## 11 Additional Expense

11.1 If, in consequence of the Works and/or any Regulated Change, Network Rail incurs additional cost and expense in connection with the repair, maintenance, improvement, operation or alteration of the Railway which would not have been incurred but for the Works and/or the Regulated Change (**Additional Expense**), then the provisions of this clause 11 shall apply.

11.2 In applying for the Regulated Change, the relevant Party shall also agree the calculation of the Additional Expense (obtaining approvals where necessary) and shall, where applicable, recover any contribution to the Additional Expense from a third party.

11.3 The Customer shall pay the Additional Expense, as an annual sum, for the life of the relevant Enhanced Assets or until the end of the Control Period (subject to such reasonable time necessary to take account of the Enhanced Assets in the regulatory settlement for the next Control Period) in which the Taking Over Date occurs, if sooner, where the Additional Expense is greater than £50,000 per annum after deduction of any sums paid to Network Rail by a third party. For the avoidance of doubt, where the Additional Expense is greater than £50,000, the Customer shall be required to pay the entire Additional Expense and not just the Additional Expense in excess of £50,000.

11.4 The Additional Expense shall be calculated as follows:

(a) where the Regulated Change has been obtained and the Additional Expense has been calculated prior to the Works Commencement Date, the Customer shall pay the calculated Additional Expense which is set out in paragraph 5.1 of Schedule 2;

(b) where the Additional Expense has not been calculated prior to the Works Commencement Date:

(i) within 20 Working Days (or such other period as may be agreed in writing) of agreement of Regulated Change or the completion of PACE Phase 2 (whichever is the later), Network Rail shall estimate a fixed sum payable each year and if such fixed sum is accepted by the Customer, this shall be the agreed Additional Expense and Network Rail shall not be entitled to claim any other sums pursuant to this clause 11; or

(ii) where the Parties cannot agree the Additional Expense pursuant to clause 11.4(b)(i) then the matter shall be referred to the Escalation Procedure and the Additional Expense shall be the sum agreed through resolution under the Escalation Procedure,

and such Additional Expense shall be paid by the Customer to Network Rail within twenty (20) Working Days of receipt of an invoice from Network Rail setting out the amounts due.

## 12 Variations

12.1 Prior to the issue of the APA Construction Certificate either Party may request from the other Party a Variation (**Variation Request**). The Variation Request shall include a description of the proposed Variation together with any changes required to the Detailed Technical Requirements and state which Party is intended to be responsible for funding the proposed Variation. Any such Variation Request may be withdrawn by the requesting Party at any time prior to the written agreement of the Variation under clause 12.6 below. If the requesting Party withdraws a Variation Request, it shall reimburse the other Party for all Direct Costs reasonably and properly incurred by the other Party in relation to the proposed Variation prior to its withdrawal.

12.2 Where the Customer issues a Variation Request, Network Rail shall notify the Customer within ten (10) Working Days of receipt of the Variation Request whether it objects to the implementation of the proposed Variation on one or more of the following grounds:

(a) that it would infringe or be contrary to any Legal Requirement or Direction of a Competent Authority or existing contractual obligation;

(b) that it would cause any existing Necessary Consent (which is not capable of modification) to be revoked;

(c) that it would require a new Necessary Consent, which Network Rail (using reasonable endeavours) believes that it cannot obtain;

(d) the responsibility for funding the Additional Expense resulting from the implementation of the Variation is not agreed;

(e) the responsibility for funding the Variation is not agreed;

(f) that it would materially hinder an Interfacing Project;

(g) that it would materially affect the ability of Network Rail to perform its role as Infrastructure Manager or as owner and operator of the Network in accordance with the Network Licence; or

(h) that the proposed Variation, if implemented, would result in a change to the essential nature of the Works or would place material additional risk on the Project (including an increased design risks) that cannot be adequately compensated for by the payment of additional money,

and the Parties will meet to discuss Network Rail's concerns and the Customer will either revise and reissue the Variation Request or withdraw the Variation Request. If Network Rail requires further information in order to make a decision under this clause 12.2, the Customer shall provide such information on request and the time period of ten (10) Working Days referred to above shall commence on receipt of such additional information.

12.3 Following any Variation Request and subject to clause 12.2, Network Rail shall consult with the Customer and where the Party responsible for funding the Variation is agreed, shall provide to the Customer within a reasonable time and to a reasonable level of detail (to the extent applicable):

(a) any additional Services;

(b) any requirement for any Additional Expense, to the extent this is known;

(c) an updated Estimated Cost;

(d) in the case of a proposed alteration of the Works or Services details of any Necessary Consent that must be obtained or amended for the proposed Variation to be implemented and Network Rail's reasonable assessment of the latest date by which any such Necessary Consent must be obtained or modified for the matters set out in this clause 12.3 to remain valid;

(e) in the case of a Variation under clause 12.7, an explanation of why the Variation is necessary and reasonable in the circumstances; and/or

(f) any changes required to the Detailed Technical Requirements and any consequential changes needed in order to meet the Works Requirement,

provided that where the information contained in any Variation Request made by the Customer is inadequate to enable Network Rail to respond, the Customer shall provide the necessary information on request. Where the Parties do not agree which Party will be responsible for funding the Variation and/ or any Additional Expense, the matter shall be referred to the Escalation Procedure.

12.4 Within fifteen (15) Working Days of the receipt of the information set out in clause 12.3 (or such longer period as may be agreed by the Parties acting reasonably), the Customer shall notify Network Rail:

(a) where the Variation was requested by Network Rail:

(i) that it has no objection to the proposed Variation and/or agrees the information provided under clause 12.3; or

(ii) acting reasonably that it objects to the Variation and/or does not agree the information provided under clause 12.3 together with its reasons for doing so. For the avoidance of doubt it shall be unreasonable for the Customer to object to:

(A) a Variation to the Service Level Obligations requested by Network Rail where the Project's scope and/or Implementation Programme has materially changed rendering the Service Level Obligations set out in Schedule 10 to be potentially unachievable; or

(B) a Variation requested by Network Rail as a consequence of changes to the Detailed Technical Requirements after the design for the Works have received Approval in Principle;[21]

(b) where the Variation was requested by the Customer:

(i) that it agrees the information provided under clause 12.3; or

[21] If both Parties agree that a later trigger date is appropriate, it should replace the reference to Approval in Principle.

(ii) acting reasonably that it does not agree with the information provided under clause 12.3 together with its reasons for doing so.

12.5 Following the issue of a notice by a Customer pursuant to clause 12.4(a)(ii) or 12.4(b)(ii), Network Rail shall meet with the Customer within a further fifteen (15) Working Days (or such longer period as may be agreed by the Parties acting reasonably) to agree the Variation Request or the matters referred to in clause 12.3 and shall supply to the Customer any further information or revisions to the information already provided under clause 12.3 as may be reasonable.

12.6 Upon the agreement or determination of the Variation Request and the matters referred to in clause 12.3, the Parties shall confirm in writing that they agree to the implementation of the Variation and which party shall fund the Variation (including any Additional Expense) all in accordance with such agreement or determination (subject to obtaining or amending any Necessary Consents). Subject to clause 12.8, no Variation shall be effective unless agreed in writing by the Parties.

12.7 Notwithstanding any provision in this Agreement, where Network Rail reasonably considers that a Variation is necessary:

(a) to avoid, address or alleviate a Network Operation Issue;

(b) to carry out any works necessary due to any Existing Asset Obligation;

(c) to address, alleviate or comply with (as appropriate) a Mandatory Variation; or

(d) to address, alleviate or comply with (as appropriate) a Change in Law, direction of a Competent Authority arising as a consequence of the Works or any requirement of the Network Licence to the extent it is not a Mandatory Variation,

Network Rail shall be entitled to vary the Services, Construction Completion Date and/or Final Completion Date and the Customer shall vary the Works to the extent that is reasonable in the circumstances and the Customer shall not be liable for the costs arising from clause 12.7(a) to 12.7(c).

12.8 Where Network Rail considers a Variation is necessary under clause 12.7, it shall submit a Variation Request to the Customer pursuant to clause 12.1 and provide the information listed in clause 12.3. Clause 12.4 shall apply except that the Customer may not object to the proposed Variation itself, but may challenge the information provided under clause 12.3 and any issues arising from such information. For the avoidance of doubt, the Customer may propose alternative options to undertaking the Variation and request Network Rail to further revise the information provided in clause 12.3. Where Network Rail has to act immediately in the case of clauses 12.7(a) and 12.7(b) to protect the safety and operation of the Railway, Network Rail shall not be obliged to serve a Variation Request prior to commencing the Variation but shall as soon as practicable, provide to the Customer the information set out in clause 12.3. If the Parties do not agree the information provided under clause 12.3 (whether provided before or after commencement of the Variation), the Dispute shall be referred to the Escalation Procedure. Upon agreement or determination, clause 12.6 shall apply.

12.9 If agreement on any matter under this clause 12 is not reached within a reasonable period of time, or as otherwise specified, either Party may refer such matter for resolution in accordance with the Escalation Procedure.

## 13 Compensation and Relief

13.1 Where a Relief Event occurs the Customer shall be:

(a) entitled to recover from Network Rail additional Direct Costs reasonably and properly incurred by the Customer as a result of any delay or disruption to the Implementation Programme; and

(b) relieved from its obligation to pay additional Network Rail Costs incurred to the extent caused by a Relief Event.

13.2 The Customer shall notify Network Rail of any Relief Event as soon as reasonably practicable and shall provide a revised Implementation Programme (if appropriate). Network Rail shall notify the Customer of any Relief Event within a reasonable period of time of becoming aware of the same and provide reasonable details of the relief required under this clause 13. In respect of each Relief Event the Parties shall seek to agree the Direct Costs and the additional Network Rail Costs which shall be funded in accordance with clause 13.4, together with any revisions to the Implementation Programme (including any changes to the Construction Completion Date and/or Final Completion Date), taking into account the likely effect of delay in the progress of the Works.

13.3 Promptly following the agreement (or determination in accordance with clause 24) of the amount of the Direct Costs, the Customer shall deliver an invoice to Network Rail in respect of any Direct Costs incurred by the Customer as a result of the completion of the Implementation Programme being delayed or disrupted due to the relevant Relief Event and Network Rail shall pay that sum within twenty (20) Working Days. Should any amount not be paid within such period (except any amount determined not to be payable pursuant to clause 24), such amount due shall bear interest thereon at the Interest Rate from and including the due date for payment to and including the date of actual payment.

13.4 In calculating the additional Direct Costs payable or Network Rail Costs not payable as a result of a Relief Event:

(a) no claim shall be made by the Customer unless such Direct Costs exceed £10,000 in aggregate in respect of the relevant Relief Event and are notified to Network Rail prior to the Taking Over Date;

(b) the Customer shall not be entitled to any compensation or relief to the extent that any delay or cost incurred as a result of the occurrence of a Relief Event is due to the negligence, breach or default of the Customer, or the breach or default of any Contractor appointed by the Customer (other than Network Rail);

(c) any Direct Costs paid by Network Rail shall not be included in the calculation of Network Rail's maximum aggregate liability under clause 17.2 unless the Relief Event is the cancellation or alteration of a Booked Possession occurring as a result of the negligence or breach of this Agreement by Network Rail; and

(d) any Direct Costs and any relief from the Network Rail Costs shall be limited to the actual costs incurred by the Customer (if any) and/or the additional Network Rail Costs incurred by Network Rail in rectifying the Relief Event, and shall not include consequential effects of the Relief Event on the Project.

13.5 Save as set out in this clause 13, neither Party shall have any other right or remedy whether under or in connection with this Agreement against the other for any Relief Event.

## 14 Intellectual Property

14.1 If the Customer creates or develops any Intellectual Property which is necessary for Network Rail to use for the purposes of: (1) the reinstatement, extension, modification, operation or maintenance of the Works, or, (2) in order for Network Rail to comply with the obligations on its part under the Network Licence in relation to the Works, the Customer shall grant or procure that there is granted to Network Rail an irrevocable, royalty-free and non-exclusive licence to use, reproduce, modify and/or enhance any such Intellectual Property for the purposes of clause 14.1(a) and clause 14.1(b) in connection with the Works, such licence to include the right for Network Rail to grant sub-licences (other than in respect of proprietary software which is not specifically prepared for the Works), provided that:

(a) the sub-licensee shall be prohibited from entering into any assignment or further sub-licence;

(b) any such sub-licence shall impose confidentiality obligations upon the sub-licensee which are no less onerous than the confidentiality obligations upon Network Rail under this Agreement; and

(c) such sub-licence is obtained prior to the Works Commencement Date.

## 15 Network Rail Costs

15.1 The Customer shall pay to Network Rail all reasonably and properly incurred Network Rail Costs and any other sums due under this Agreement, in accordance with the terms set out in this clause 15 and Schedule 2. For the avoidance of doubt, costs incurred by Network Rail as a result of a breach by or negligence of its Contractors are not reasonably and properly incurred Network Rail Costs.

15.2 Within ten (10) Working Days after the end of each Payment Period throughout the carrying out of the Works and Services, Network Rail shall submit an invoice (with an attached breakdown and including any supporting information reasonably requested by the Customer) to the Customer in respect of the Network Rail Costs applicable to such Payment Period (or any preceding Payment Periods, if not previously invoiced). Subject to clause 15.3, payment by the Customer to Network Rail shall be without set-off, retention, counterclaim, abatement or any other deduction and shall be due twenty (20) Working Days after the date of issue of the invoice (**due date for payment**).

15.3 Where the Customer intends to withhold all or part of payments of any amount claimed by Network Rail in the invoice, notice must be given to Network Rail not later than five (5) Working Days before the due date for payment under clause 15.2. The notice shall state the amount to be withheld, the basis on which that amount is calculated and the grounds for withholding payment. Unless such notification to withhold payment has been received from the Customer, the amount to be paid is that stated in the invoice which shall become due in accordance with clause 15.2.

15.4 Should any invoice not be paid by the due date for payment in accordance with clause 15.2 (except in respect of any amount determined not to be payable pursuant to clause 24), interest

shall be payable on the amount due calculated from the due date for payment up to and including the actual date of payment at the Interest Rate.

15.5 The Customer will not be liable for Network Rail Costs for any part of the Works and Services which have already been included in Network Rail's business plan and approved for the Project by Network Rail's Board prior to the Commencement Date, or in respect of Network Rail Costs of any Variation, the date of agreement of such Variation. [22]

## 16 Value Added Tax

16.1 Unless stated otherwise, all amounts referred to in this Agreement shall be deemed to be exclusive of VAT.

16.2 Where any taxable supply for VAT purposes is made under or in connection with this Agreement by one Party to the other the payer shall, in addition to any payment required for that supply, pay upon presentation of a valid tax invoice such VAT as is chargeable in respect of it.

16.3 Where under this Agreement one Party has agreed to reimburse or indemnify the other in respect of any payment made or cost incurred by the other Party, the first Party shall also reimburse any VAT paid by the other which forms part of its payment made or cost incurred to the extent such VAT is not available for credit for the other Party, or for any person treated as a member of the same VAT group as the other Party under sections 25 and 26 of the Value Added Tax Act 1994.

16.4 Where under this Agreement any rebate or repayment of any amount is payable by one Party to the other, and the first Party is entitled to issue a valid VAT credit note, such rebate or repayment shall be paid together with an amount representing the VAT paid on that part of the consideration in respect of which the rebate or repayment is made and the first Party shall issue an appropriate VAT credit note to the other Party. When a credit is allowed to a Party and that Party is able to recover all the tax on the supply by the first Party as input tax, both Parties can agree not to adjust the original VAT charge in accordance with HMRC VAT Notice 700 paragraph 18.2.1.

## 17 Limitation of Liability

17.1 Save as otherwise expressly provided in this Agreement, neither Party shall be liable in respect of any 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 and Final Completion and termination of this Agreement); or

(b) the Losses are incurred as a result of, or sums are unpaid under, clauses 15, 16 or 22.2.

[22] Following Network Rail's reclassification in 2014 as an arm's length body of government, it is no longer permitted to finance the acceleration of renewals and other works from one financial year to an earlier one. Therefore any such works included in Network Rail's business plan will only be funded by Network Rail if they are delivered in the same financial year as provided for in the business plan. The cost of any such works delivered in an earlier year would be for the account of the Customer.

17.2 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 tort (including negligence), or for breach of statutory duty, or for liquidated damages payable pursuant to clause 17.5, shall not exceed an amount equal to the Network Rail Cap. Notwithstanding the Network Rail Cap, where, in respect of the same event, Network Rail recovers any sums under any contract entered into by Network Rail, 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 any contract and paid to the Customer shall contribute to the Network Rail Cap insofar as the Network Rail Cap has not already been reached. Any sums recovered by Network Rail under an insurance policy and paid to the Customer shall not contribute to the Network Rail Cap. 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).

17.3 Clause 17.2 shall not apply to Losses incurred by the Customer as a result of:

(a) any liability in respect of 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) fraud or fraudulent misrepresentation of Network Rail.

17.4 Any Losses suffered by either Party shall, for the purposes of clause 17.1, be reduced to the extent that they are caused by or contributed to by that Party's own negligence or breach of its obligations under this Agreement.

17.5 Subject to the limit of liability in clause 17.2, to the extent that the [Construction Completion Date][23] has not occurred by the Liquidated Damages Payment Date due to the fault of Network Rail, then Network Rail shall pay to the Customer the Daily Liquidated Damages Sum for each day from the Liquidated Damages Payment Date until the date the [Construction Completion Date] has occurred or the date that it is determined under the Escalation Procedure that the [Construction Completion Date] has occurred. The Customer shall notify Network Rail as soon as reasonably practicable upon becoming aware that such a delay to the [Planned Construction Completion Date] may occur or has occurred. The Customer is not entitled to claim any other Losses in relation to delay to the achievement of any of the Completion Criteria except pursuant to this clause 17.5.

17.6 The Customer's maximum aggregate liability to Network Rail for any reason arising under, or in connection with, this Agreement or the Project shall not exceed an amount equal to the Customer Cap. Notwithstanding the Customer Cap where, in respect of the same event, the Customer recovers any sums 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 any contract and paid to Network Rail shall contribute to the Customer Cap insofar as the Customer Cap has not already been reached. Any sums recovered by the Customer under an insurance policy (including any insurance maintained by a contractor employed by the Customer) and paid to Network Rail shall not contribute to the Customer Cap.

[23] This definition should relate to when the Customer and Network Rail agree that relevant criteria should have been satisfied to prevent the Customer incurring losses. It is anticipated that in normal circumstances this will be the Construction Completion Date, but this may not always be the case.

The Customer shall use reasonable endeavours to make and diligently pursue a claim but this shall not include an obligation on the Customer to take legal action.

17.7 Clause 17.6 shall not apply to:

(a) any Losses incurred by Network Rail due to any design services provided by the Customer or any Contractor (other than Network Rail) which are in breach of the terms of this Agreement, recovery of which Losses shall instead be capped at £[10 million];[24]

(b) the Customer's payment obligations under clauses 4.10, 11, 15, 16, 17.8, 22.2 or Schedule 2;

(c) any Losses incurred by Network Rail due to the negligence, fraud or fraudulent misrepresentation by the Customer or by any Contractor appointed by the Customer (other than Network Rail);

(d) 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;

17.8 The Customer shall reimburse Network Rail in respect of all Losses and/or Direct Costs arising in respect of Land and Noise Claims up to the limit set out in paragraph 5(c) of Schedule 2 except where Network Rail incurs any Direct Costs and/or Losses above the amount set out in paragraph 5(c) of Schedule 2 as a result of the Customer's negligent non-compliance with the provisions of this Agreement relating to noise abatement and land issues, in which case the Customer shall pay such sums to Network Rail. Where the Parties cannot agree a limit prior to the Commencement Date, the Parties shall agree and set out the limit within 20 Working Days of the completion of PACE Phase 2 or, by agreement in writing, a later date prior to the Works Commencement Date.

17.9 In no circumstances shall Network Rail or the Customer be liable to one another for any Indirect Loss (without prejudice to any express payment or indemnity obligation of either Party under this Agreement).

17.10 The Customer hereby acknowledges that Network Rail shall have no liability to the Customer in contract, tort (including in respect of negligence) or otherwise for any failure to achieve any dates (whether interim or final) set out in the Implementation Programme prior to the Final Completion Date except as set out in clause 17.5.

## 18 Indemnity

18.1 The Customer shall indemnify Network Rail for any Losses, injury or damage whatsoever to property real or personal, arising under any statute or at common law to the extent that in each case in so far as such Losses, injury or damage arise out of or in connection with the carrying out of Works.

18.2 Subject to clause 17.6 and 18.1, the Customer shall indemnify Network Rail and keep Network Rail indemnified against any Losses arising from:

[24] This cap should reflect the Contractor's professional indemnity insurance. Where the Contractor's PI insurance is different, the cap should correspond to the Contractor's PI level unless the Parties agree otherwise (acting reasonably). However, for the avoidance of doubt, the Customer shall be liable up to the cap regardless of any payment from an insurer.

(a) claims against Network Rail by any third party in relation to the carrying out of the Works and/or the subsequent existence and/or operation of the completed Works (where ownership of the Works is not transferred to Network Rail);

(b) any third party breach of the CDM Regulations in respect of the Works (except as a result of the negligence of Network Rail or a breach by Network Rail of its obligations under this Agreement); and

(c) the Customer or any of its employees, agents or sub-contractors infringing or being held to have infringed any Intellectual Property rights in the course of or in connection with this Agreement.

In respect of any Losses subject to the indemnity in this clause 18.2, Network Rail shall take all reasonable steps to prevent, mitigate and restrict the circumstances which have given or may give rise to such Losses.

18.3 Network Rail, upon becoming aware of any claim in respect of which it may be entitled to indemnification under clause 18.2, shall give written notice to the Customer as soon as reasonably practicable, and in any event within fifteen (15) Working Days of it reasonably appearing that Network Rail may be entitled to indemnification pursuant to this clause 18.

18.4 Subject to Network Rail obtaining the prior written consent of its insurers, the Customer shall be entitled to resist any such claim in the name of Network Rail and shall have the right to conduct any defence, dispute, compromise or appeal of such claim or negotiations. Network Rail shall give the Customer all reasonable co-operation, access and assistance for the purpose of considering and resisting such claim.

18.5 Where the Customer is responsible for conducting any claim pursuant to clause 18.4, it shall keep Network Rail fully informed and consult with it about the conduct of such claim and shall not pay or settle such claim without the consent of Network Rail, provided that Network Rail shall be entitled to pay or settle any claim on such terms as it in its absolute discretion considers fit without prejudice to any other rights or remedies Network Rail may have if:

(a) the Customer fails to notify Network Rail of its intention to dispute any claim within fifteen (15) Working Days after receipt of the notice referred to in clause 18.3;

(b) the Customer fails to comply in any material respect with the provisions of this clause 18; or

(c) Network Rail waives the indemnity contained in this clause 18 by notice in writing to the Customer.

18.6 The obligations of the Customer under clause 18.2:

(a) are in addition to and not in substitution for any other indemnity, guarantee or any security which Network Rail may at any time hold; and

(b) may be enforced by Network Rail at its discretion without first having recourse to any other such indemnity, guarantee or security, without taking any steps or proceedings against the Customer or any other person, and without resorting to any other means of payment.

## 19 Force Majeure Events

19.1 Subject to clauses 19.2 to 19.6, each Party shall be relieved from liability for non-performance of its obligations under this Agreement (other than any obligation to make payment) to the extent that it is not able to perform or suffers or causes delay in performing (acting reasonably) such obligations by reason of a Force Majeure Event.

19.2 Each Party shall at all times following the occurrence of a Force Majeure Event:

(a) take all reasonable steps to prevent and mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Force Majeure Event as soon as practicable and use all reasonable endeavours in accordance with Good Industry Practice to remedy its failure to perform; and

(b) not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to any failure to comply with its obligations under clause 19.2(a).

19.3 On the occurrence of a Force Majeure Event, the affected Party shall serve notice on the other Party as soon as reasonably practicable and in any event within ten (10) Working Days of it becoming aware of the relevant Force Majeure Event. Such notification shall identify the particular event claimed to be a Force Majeure Event and provide such relevant information as is available, including the date of occurrence of the Force Majeure Event, the effect of the Force Majeure Event on the ability of the affected Party to perform, the action being taken in accordance with clause 19.2(a) and (where possible) an estimate of the effects on the Implementation Programme, the Completion Date and the Liquidated Damages Payment Date. The affected Party shall provide the other Party with any further information it receives or becomes aware of which relates to the Force Majeure Event.

19.4 The affected Party shall notify the other Party as soon as practicable once the performance of its affected obligations can be resumed (performance to continue on the terms existing immediately prior to the occurrence of the Force Majeure Event).

19.5 As soon as practicable following the notification described in clause 19.3, the Parties shall use all reasonable endeavours to agree appropriate terms or modifications to the Implementation Programme (including those needed to properly take into account any changes to the Completion Date and the Liquidated Damages Payment Date required by Network Rail under clause 19.1) to take into account the effects of the Force Majeure Event and to facilitate the continued performance of this Agreement and the progress of the Works and Services.

19.6 If the consequences of such Force Majeure Event are continuing for a period not less than 42 calendar days and the Parties have not agreed appropriate modifications in accordance with clause 19.5, then either Party may terminate this Agreement with immediate effect by written notice to the other Party. Upon termination the provisions of clause 22 shall apply.

## 20 Insurance

20.1 The Customer shall take out and maintain or procure that the Contractor takes out and maintains a policy of insurance (naming Network Rail as joint insured) for all risks insurance for the full reinstatement value of the Works together with design works and services and shall maintain such policy up to and including the earlier of the date of termination of this Agreement and the

Taking Over Date. Prior to naming Network Rail as the joint insured, the Customer shall or shall procure that the Contractor shall (as applicable) provide a copy of the proposed all risks insurance policy to Network Rail for Network Rail's approval.

20.2 The Customer shall take out and maintain or procure that the Contractor takes out and maintains professional indemnity insurance of not less than £[insert figure][25] to cover any one claim against the Customer for any negligent act, error or omission in the carrying out of the Works (including in respect of the negligent acts, errors or omissions of a Contractor or consultant of any tier and having a design responsibility) for a period of 12 years from the Taking Over Date provided that such insurance continues to be generally available in the insurance market on commercially reasonable terms.

20.3 The Customer shall take out and maintain or procure that the Contractor takes out and maintains public liability insurance of not less than £155 million[26] to cover any loss, cost, expense, liability, action, demand, claim or proceeding whatsoever arising under any statute or at common law in respect of personal injury or damage to any property arising as a result of the Works and shall maintain such policy up to and including the earlier of the date of termination of this Agreement and the date on which the APA Final Certificate is issued.

20.4 Whenever reasonably requested by Network Rail, the Customer shall provide evidence, by way of a broker's letter or equivalent evidence, to the reasonable satisfaction of Network Rail that the insurances referred to in this clause 20 are being maintained in accordance with the provisions of this clause 20 and that payment has been made in respect of all premiums due under such policies.

## 21 Suspension and Termination

21.1 In this clause 21 a **Customer Termination Event** means:

(a) a material breach of this Agreement by the Customer;

(b) the Customer failing to obtain any approval, acceptance or consent required from Network Rail under the terms of this Agreement (save where such approval, acceptance or consent is expressed not to be unreasonably withheld or delayed and is so withheld or delayed by Network Rail, or where such failure can be remedied by the Customer, or where there is an outstanding appeal);

(c) the Customer failing to commence construction of the Works within twelve (12) months from the Commencement Date (other than due to the breach by Network Rail of its obligation under clause 3.2);

(d) abandonment of the whole or any part of the Works by the Customer at any time after commencement of the carrying out of the Works for a period of at least fifteen (15) Working Days; or

(e) (save in relation to a disputed payment in respect of which a notice of intention to withhold payment has been given pursuant to clause 15.3) the Customer failing to pay

[25] Typically £5m to £10m professional indemnity cover is required, dependent upon the scale, complexity, value and risk of the Works.

[26] £155m is the minimum level of public liability insurance required by the ORR.

Network Rail any sum in excess of £10,000 which is due and payable to Network Rail under this Agreement.

21.2 In the event of a Customer Termination Event, Network Rail may inform the Customer by notice (**First Notice**) providing full details of the Customer Termination Event. If within twenty (20) Working Days of receipt of the First Notice in Network Rail's reasonable opinion, the Customer does not take satisfactory steps to rectify the Customer Termination Event, Network Rail may by a further notice (**Second Notice**) terminate this Agreement. Any termination pursuant to the Second Notice shall become effective on a date to be specified therein, not being more than twenty (20) Working Days after the date of service of the Second Notice.

21.3 If the Customer Termination Event is not (in the reasonable opinion of Network Rail) capable of being rectified, Network Rail shall in the First Notice terminate this Agreement without being required to serve a Second Notice, provided that the First Notice shall in such case state that the termination is being made without any further notice being served.

21.4 If either Party becomes Insolvent, the other Party shall be entitled by notice in writing to the first Party to terminate this Agreement with immediate effect.

21.5 If there is a material breach of this Agreement by Network Rail, the Customer may inform Network Rail by notice (**First Notice**) providing full details of such breach. If within twenty (20) Working Days of receipt of the First Notice Network Rail does not take satisfactory steps to rectify such breach, the Customer may by a further notice (**Second Notice**) terminate this Agreement. Any termination pursuant to the Second Notice shall become effective on a date to be specified therein, not being more than twenty (20) Working Days after the date of service of the Second Notice.

21.6 If the breach by Network Rail is not (in the reasonable opinion of the Customer) capable of being rectified, the Customer may in the First Notice terminate this Agreement without being required to serve a Second Notice provided that the First Notice shall in such case state that the termination is being made without any further notice being served.

21.7 If the whole or substantially the whole of the Works is suspended otherwise than:

(a) as a result of a material breach of this Agreement by Network Rail; or

(b) in circumstances where clause 9.3 or 19.1 applies,

and that suspension continues for an uninterrupted period of three months or in aggregate for a period of six months, Network Rail shall be permitted to give notice to the Customer of its intention to terminate this Agreement. If the performance of the Works has not been resumed on or before the expiry of twenty (20) Working Days after delivery of such notice, Network Rail shall be permitted to terminate this Agreement with immediate effect by further notice in writing to the Customer, provided such failure to resume the performance of the Works is not due to the circumstances set out in (a) or (b) above.

21.8 If the Customer is in default over payments of amounts properly due to Network Rail, and no notice of intention to withhold such amounts has been given pursuant to clause 15.3, Network Rail may suspend performance of any or all of the Services subject to Network Rail first giving the Customer not less than five (5) Working Days' notice of such intention and stating the grounds for suspension. Such right to suspend performance shall cease once the Customer makes payment of the amount due.

## 22 Consequences of Termination or Completion

22.1 Upon termination of this Agreement or completion of the Works, as applicable, the obligations of the Parties shall cease except for:

(a) any obligations arising as a result of any antecedent breach of this Agreement or any accrued rights; and

(b) the provisions of clauses 9, 11, 14, 15, 16, 22.2, 23, 24, 27 and paragraph 5(c) of Schedule 2 which shall survive the termination or expiry of this Agreement and continue in full force and effect along with any other clauses or schedules to this Agreement which are necessary to give effect to them.

22.2 If this Agreement is terminated for any reason prior to Final Completion, the Customer shall pay:

(a) the Network Rail Costs up to the date of termination;

(b) except where termination is due to Network Rail's negligence or breach or Network Rail's insolvency under clauses 21.4, 21.5 and 21.6 or a Force Majeure Event under clause 19: and

(c) an amount equal to the reasonable and proper costs and expenses incurred by Network Rail as a result of or in connection with such termination:

(i) the reasonable and proper costs incurred by Network Rail in removing all plant, equipment and those materials not incorporated into the Works and in reinstating or procuring the reinstatement of the Works (or such part thereof as may exist as at the date of termination) and of the relevant part or parts of the Network affected by the Works to the extent necessary to make the same safe and secure and enable Network Rail to meet its contractual, statutory and Network Licence obligations; and

(ii) such additional amount as is required to put Network Rail in the same after tax position (taking into account the amount of any relief, allowance, deduction, set-off or credit relating to tax available to Network Rail in respect of the payment received or the payment of the costs incurred) as it would have been in if the payment had not been a taxable receipt in Network Rail's hands.

22.3 Termination of this Agreement is without prejudice to the rights of either Party which accrued before or as a result of such termination.

22.4 The Customer shall not be entitled to any payment or compensation or other rights or remedies in respect of loss of profits, revenue or goodwill in connection with the suspension or termination of this Agreement.

## 23 Confidential Information

23.1 **Confidential Information** means in relation to any Party (**Provider**), all information of a confidential nature relating to it or its Affiliates which is supplied by or on behalf of the Provider (whether before or after the Commencement Date), either in writing, orally or in any other form or which is obtained through observations made by the Party receiving such information and includes all analyses, compilations, notes, studies, memoranda and other documents which

contain or otherwise reflect or are derived from such information, but excludes information which:

(a) the Provider confirms in writing is not required to be treated as confidential;

(b) the receiving Party can show was in its possession or known to it (by being in its use or being recorded in its files or computers or other recording media) prior to receipt from the Provider and was not previously acquired by the receiving Party from the Provider under an obligation of confidence; or

(c) was developed by or for the receiving Party at any time independently of this Agreement;

23.2 Subject to clauses 23.3 and 23.4, the Parties shall:

(a) at all times keep all Confidential Information confidential to the Party receiving it and shall not disclose such Confidential Information to any other person; and

(b) procure that its Affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information,

except with the other Party's prior written consent.

23.3 Each Party shall, without the prior written consent of the other Party, be entitled to disclose Confidential Information:

(a) that is reasonably required by that Party in the performance of its obligations pursuant to this Agreement, including the disclosure of any Confidential Information to any employee, contractor (of any tier), agent, officer, or adviser to the extent necessary to enable that Party to perform its obligations under this Agreement;

(b) to enable a determination to be made pursuant to clause 24;

(c) to its lenders or their professional advisers, any rating agencies, or its insurance advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;

(d) to the extent required by the Act or any other applicable Legal Requirement or pursuant to an order of any court of competent jurisdiction, any parliamentary obligation or the rules of any stock exchange or governmental or regulatory authority having the force of law;

(e) to register or record any Necessary Consents and to effect any property registration that may be required;

(f) for the purpose of the examination and certification of either Party's accounts;

(g) in relation to disclosure by Network Rail, in order to fulfil its Network Licence obligations or assist in the planning or execution of other maintenance, renewal or enhancement projects;

(h) to the Health and Safety Executive;

(i) to any Affiliate of either party; or

(j) to the extent it has become available to the public other than as a result of any breach of an obligation of confidence,

provided that any such disclosure is made in good faith.

23.4 Where disclosure is permitted under clause 23.3(a), 23.3(c) or 23.3(i), the Party making such disclosure shall require that the recipient of the information is subject to the same obligation of confidentiality as that contained in this Agreement.

23.5 If this Agreement is terminated, each Party shall:

(a) return to the other Party all of the Confidential Information then within its possession or control;

(b) destroy such Confidential Information using a secure and confidential method of destruction; or

(c) unless reasonably requested to return it, retain such Confidential Information but so that the Party in question shall only be required to return any such information if that Party can readily identify and locate such information. If a Party elects to retain any such Confidential Information the provisions of this clause 23 shall remain in full force and effect in relation to such Confidential Information notwithstanding the termination of this Agreement.

23.6 Save as required by law or regulation, neither Party shall issue any press release in relation to the matters contemplated by this Agreement without the prior written consent of the other Party (such consent not to be unreasonably withheld or delayed) as to both the content and the timing of the issue of the press release.

## 24 Escalation and Dispute Resolution[27]

24.1 If a Dispute arises under out of or in connection with this Agreement, either Party may refer such Dispute to the Escalation Procedure in accordance with Schedule 4 or to the extent that such Dispute involves a construction contract within the meaning of section 104 of the Housing Grants, Construction and Regeneration Act 1996 (as amended from time to time), to an adjudicator for adjudication in accordance with the following provisions:

(a) the Scheme for Construction Contracts SI No. 2333 of 2011 shall apply; and

(b) if the Parties are unable to agree on a person to act as adjudicator, the adjudicator shall be nominated at the request of either Party by the President or Vice President for the time being of Technology and Construction Bar Association.

24.2 If a Dispute is referred to an adjudicator, neither Party may commence any further proceedings until twenty (20) Working Days after the decision of the adjudicator in relation to such Dispute has been given.

24.3 The decision of an adjudicator properly appointed in accordance with this Agreement will be binding until referred to the courts for final determination or the Parties decide otherwise, and in

[27] A mediation option is available on request.

any proceedings the courts shall have full power to open up, review and revise any certificate, opinion, decision, instruction, direction, valuation, requisition or notice given or made under this Agreement and any determination of an adjudicator, including an award as to costs.

24.4 In the event that any Dispute or difference of any kind whatsoever shall arise between:

(a) the Customer and any Contractor; or

(b) Network Rail and any contractor appointed by Network Rail in relation to the Project,

which is substantially the same or connected with issues in any Dispute between Network Rail and the Customer, either Party shall be entitled to require that the other Party shall be joined as a party to any determination pursuant to the relevant contract and the other Party shall permit and co-operate in such joinder.

## 25 Notices

25.1 Any notice, objection or communication to be given under this Agreement shall be in writing and shall be duly given if signed by a duly authorised person on behalf of the Party giving such notice, objection or communication. Any notice objection or communication shall be delivered by hand, by first class post or by email transmission to the relevant postal or email address set out in Schedule 1 and shall be deemed to have been received:

(a) if sent by hand or by recorded delivery, at the time of delivery (and for the purpose of this clause 25 delivery by hand shall include delivery by a reputable firm of couriers);

(b) if sent by prepaid first class post, from and to any place within the United Kingdom, two (2) Working Days after posting unless otherwise proven; or

(c) if sent by email, at the time evidenced by the electronic message delivery receipt.

25.2 If in Schedule 1 there is specified any person to whom copies of notices shall also be sent, the Party serving a notice in the manner required by this clause 25 shall send a copy of the notice in question to such person at the address for serving copies as specified in Schedule 1. Such copy notice shall be sent at the same time as the original notice.

25.3 Either Party shall be entitled to amend in any respect the communication particulars which relate to it and which are set out in Schedule 1. Any such amendment shall be made only by notice given to the other Party in accordance with this clause 25.

## 26 Surety Obligations[28]

On the Commencement Date the Customer shall deliver to Network Rail a Deed substantially in the form set out in Schedule 5 duly executed by the Surety.[29]

[28] Network Rail reserves the right to request a surety.

[29] This clause should be replaced with 'Not used' if surety is not required.

## 27 Anti-bribery and Slavery

27.1 The Customer shall perform its obligations under this Agreement in accordance with all applicable anti-bribery, anti-corruption and anti-slavery legislation including the Bribery Act 2010 and Modern Slavery Act 2015.

27.2 The Customer shall not, (and the Customer shall procure that its Contractor shall not), purchase any raw materials, resources or products from any country that have been sourced from any producer or manufacturer using forced labour in its operations or practice.

## 28 Equality and Diversity

28.1 The Customer shall perform its obligations under this Agreement in accordance with:

(a) all applicable equality law (whether in relation to age, disability, gender reassignment, marriage or civil partnership status, pregnancy or maternity, race, religion or belief, sex or sexual orientation (each a **Relevant Protected Characteristic**); and

(b) any other requirements and instructions which Network Rail reasonably imposes in connection with any equality obligations imposed on Network Rail at any time under any applicable equality law.

28.2 The Customer shall take all reasonable steps to secure the observance of clause 28.1 above by its employees, agents, representatives, contractors and consultants.

28.3 The Customer acknowledges that Network Rail is under a duty under section 149 of the Equality Act 2010 to have due regard to the need to eliminate unlawful discrimination (on the grounds of a Relevant Protected Characteristic); to advance equality of opportunity, and to foster good relations, between persons who share a Relevant Protected Characteristic and persons who do not share it. In performing its obligations under this Agreement, the Customer shall assist and co-operate with Network Rail where possible in satisfying this duty.

## 29 Confidential Data and Protection of Personal Data and Confidential Information

29.1 Unless the context otherwise requires, for the purpose of this clause 29:

(a) **GDPR** means all applicable laws and regulations, in each case pertaining to the security, confidentiality, protection or privacy of Personal Data, as amended or re-enacted from time to time, including (without limitation and to the extent applicable) the Data Protection Act 2018 and the European General Data Protection Regulation (Regulation (EU) 2016/679) to the extent that it applies in the United Kingdom by virtue of the European Union (Withdrawal) Act 2018;

(b) **Permitted Purpose** means, with respect to a Party, the purposes of: (i) carrying out its obligations under this Agreement; (ii) exercising its rights under this Agreement; and (iii) complying with its obligations under applicable laws (including UK GDPR);

(c) **Personal Data** means the personal data that is processed by a Party pursuant to or in connection with this Agreement;

(d) **Security Incident** means: (a) the unlawful or unauthorised processing of Personal Data; or (b) any security incident affecting the Personal Data (including (without limitation) a personal data breach as defined in the UK GDPR); and

(e) the terms **controller**, **processor**, **processing/process**, **personal data** and **data subject** shall be interpreted and construed by reference to UK GDPR.

29.2 The Parties agree that (to the extent it processes Personal Data) for the purposes of UK GDPR each Party processes Personal Data as an independent data controller in its own right. Nothing in this Agreement is intended to construe either Party as the data processor of the other Party or as joint data controllers with one another with respect to Personal Data.

29.3 Each Party shall:

(a) comply with its obligations under UK GDPR;

(b) be responsible for dealing with and responding to data subject requests, enquiries or complaints it receives (including any request by a data subject to exercise their rights under UK GDPR); and

(c) be responsible for managing all Security Incidents in accordance with their obligations under the UK GDPR, including reporting any such Security Incident to the Information Commissioner's Office (where necessary).

29.4 Without prejudice to clause 29.3(a), each Party (the Disclosing Party) agrees that if it provides Personal Data to the other Party (the Receiving Party), it shall ensure that it has provided all necessary information to, and obtained all necessary consents from, the data subjects of the Personal Data, in each case to enable the Disclosing Party to disclose the Personal Data to the Receiving Party and for the Receiving Party to use that Personal Data for the Permitted Purposes, in each case in accordance with UK GDPR.

29.5 In relation to the Personal Data it receives from the Disclosing Party, each Party shall:

(a) at all times process the Personal Data in a manner that ensures appropriate security of the Personal Data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical and organisational measures; and

(b) ensure that, at a minimum, the measures required under clause 29.3(a) meet the standard required by UK GDPR.

## 30 Freedom of Information

30.1 The Parties acknowledge that:

(a) pursuant to the provisions of section 1(1) of the Freedom of Information Act 2000, all regulations made under it, and the Environmental Information Regulations 2004, and any amendment or re-enactment of any of them, including any guidance issued by the Information Commissioner, the Department of Constitutional Affairs, and the Department for Environment, Food and Rural Affairs in relation to such legislation (**Information Acts**), any person has a right to request information in any form from either Party who is or becomes a public authority under the Information Acts (for the purpose of this clause 30.1 a **Public Authority**);

(b) a Public Authority has a duty (to the extent required by and subject to any exemptions in the Information Acts) to disclose the information requested and subsequently to communicate it to the person making the request; and

(c) the publication scheme which a Public Authority is required to adopt and maintain under the Information Acts may refer to information relating to the Works and/or Services or disclosed in tendering for, the negotiation of, or pursuant to this Agreement (**Project Information**).

30.2 In the event that a Public Authority receives a request under the Information Acts relating to Project Information, it shall comply with such a request in accordance with the Information Acts and any applicable code of practice made thereunder provided that:

(a) the Public Authority shall comply with any such request only if none of the exemptions from disclosure in the Information Acts applies and the relevant Party shall provide reasonable assistance and co-operation to the Public Authority to enable the Public Authority to comply with such request;

(b) in the event that a Public Authority is in doubt whether any such exemption applies, it shall inform the relevant Party of the request as soon as possible and shall consult with the relevant Party as to the potential application of any exemption;

(c) the Public Authority shall inform the relevant Party of any Project Information it has disclosed as soon as possible after such disclosure; and

(d) if the request relates to Confidential Information the Public Authority shall, where practicable, consult with the relevant Party in advance of making any disclosure under the Information Acts and shall, acting reasonably, take due account of all reasonable representations by the other Party that such Confidential Information is exempt information.

## 31 Miscellaneous

31.1 Neither Party may assign or charge all or any part of the benefit of, or rights or benefits under, this Agreement without the prior written consent of the other Party (not to be unreasonably withheld or delayed) provided that such consent shall not be required in respect of any assignment by either Party to a statutory successor of the rights, obligations and interests of such Party.

31.2 If any provision of this Agreement shall be held to be illegal, invalid, void or unenforceable under the laws of any jurisdiction, the legality, validity and enforceability of the remainder of this Agreement in that jurisdiction shall not be affected, and the legality, validity and enforceability of the whole of this Agreement shall not be affected in any other jurisdiction.

31.3 In the event of any conflict:

(a) between the Network Code and/or Station Access Conditions and this Agreement (where the Works relate to a station) the provisions of the Network Code and/or Station Access Conditions (as appropriate) will apply; and

(b) between the Network Code and/or Depot Access Conditions and this Agreement (where the Works relate to a Depot) the provisions of the Network Code and/or Depot Access Conditions (as appropriate) will apply.

31.4 Nothing in this Agreement shall create a partnership, association or joint venture or establish a relationship of principal and agent. Neither Party shall have any authority (unless expressly conferred in writing by virtue of this Agreement or otherwise and not revoked) to bind the other Party as its agent or otherwise.

31.5 No waiver by either Party of any default or defaults by the other in the performance of any of the provisions of this Agreement shall operate or be construed as a waiver of any other or further default or defaults whether of a like or different character.

31.6 No failure or delay by either Party in exercising any right, power or privilege under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise by that Party of any right, power or privilege preclude any further exercise thereof or the exercise of any other right, power or privilege.

31.7 This Agreement may be executed in two counterparts which, taken together, shall constitute one and the same document.

31.8 No amendment to or variation of this Agreement shall be effective unless in writing and signed by a duly authorised representative on behalf of each Party.

31.9 For the purposes of the Contracts (Rights of Third Parties) Act 1999, nothing in this Agreement confers or purports to confer on a third party who is not a Party to this Agreement any benefits or rights to enforce a term of this Agreement.

31.10 This Agreement constitutes the entire agreement between the Parties relating to the subject matter of this Agreement and supersedes and extinguishes any prior drafts, undertakings, representations, warranties and arrangements of any nature, whether in writing or oral, relating to such subject matter. Each Party acknowledges that it has not been induced to enter into this Agreement by any representation, warranty or undertaking not expressly incorporated into it.

31.11 No general terms and conditions contained in any purchase order or other document customarily required by either Party in connection with the request for works or services shall be binding on the Parties.

31.12 This Agreement shall be governed by and construed in accordance with the laws of England and Wales. Save as expressly provided otherwise, the Parties irrevocably agree that the courts of England and Wales are to have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this Agreement.

Signed by )
duly authorised for and on behalf of )
**[Insert registered name of the Customer]** ) .....

**Subject to contract**

| | | |
|---|---|---|
| Signed by | ) | |
| duly authorised for and on behalf of | ) | |
| **Network Rail Infrastructure Limited** | ) | ..... |

**Subject to contract**

## Schedule 1

## Contact Particulars and Representatives

**Network Rail**'s address for the service of notices is:

Network Rail Infrastructure Limited

Waterloo General Offices

London, SE1 8SW

Email: notices@networkrail.co.uk

All written notices to be marked:

"URGENT: ATTENTION THE GROUP COMPANY SECRETARY"

and copied to:

The Route Director

Network Rail [route / HQ]

[local office address 1

Address 2

City, postcode]

Network Rail's Representative is: [insert name of sponsor]

[local office address 1

Address 2

City, postcode]

Tel.: [insert number]

Email: [insert email address]

The **Customer**'s address for the service of notices is:

[Registered name of the Customer]

[office address 1

Address 2

City, postcode]

Tel.: [insert number]

Email: [insert email address]

All written notices to be marked:

"URGENT: ATTENTION [insert name or title]"

and copied to:

[Insert name and title]

[office address 1

Address 2

City, postcode]

Tel.: [insert number]

Email: [insert email address]

The Customer's Representative is: [insert name of representative]

**Subject to contract**

[office address 1

Address 2

City, postcode]

Tel.: [insert number]

Email: [insert email address]

Subject to contract

## Schedule 2

## Network Rail Costs

### 1 Definitions

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

**Additional Payment** means the costs in respect of Regulated Change, Additional Expense and Land and Noise Claims;

**Agency Costs** means the cost, multiplied by 1.15, to Network Rail, of any consultants and contractors who are not Network Rail employees but who are engaged by Network Rail in connection with the performance of Network Rail's obligations under this Agreement and for whom Network Rail incurs business unit overheads (for example, business unit overheads includes utility costs, accommodation, conferences/meetings, IT costs, stationary/printing, office costs and posting/archiving), plus the properly incurred expenses and disbursements charged to Network Rail by those consultants and contractors;

**Contractors' Costs** means the cost to Network Rail of any consultants and contractors not working within Network Rail offices and engaged by Network Rail in connection with the performance of Network Rail's obligations under this Agreement, plus the properly incurred expenses and disbursements of those consultants and contractors;

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

(a) all technical, commercial and professional fees (excluding Contractors' Costs and Agency Costs);

(b) 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 Works (including this Agreement);

(c) insurance costs; and

(d) any sums payable by Network Rail pursuant to Conditions G and H of the Network Code where the same arise in connection with the carrying out or completion of the Works or the subsequent operation of the completed Works;

**Fee** means an amount equal to the Network Rail Fee plus the Industry Risk Fee;

**Hourly Rate** means in respect of each member of Network Rail's Personnel the rate set out in paragraph 2 of this Schedule 2 for their particular banding as the same may be adjusted from time to time in accordance with paragraph 3 of this Schedule 2, which rate will be payable in respect of all worked hours spent by Network Rail's Personnel in connection with the Project;

**Industry Risk Fee** means an amount equal to 0.5% of the aggregate of Estimated Works Cost as at the Commencement Date as revised in accordance with clause 12 (other than a Variation of the type described in clause 12.7(a) to 12.7(c));

**Necessary Consents Costs** means the costs incurred by Network Rail in connection with any Necessary Consent for the Project, including those related to:

(a) the costs of third parties associated with applying for, undertaking, changes to or as a consequence of any Necessary Consents;

(b) any sums payable by Network Rail pursuant to Conditions G and H of the Network Code where the same arise in connection with the carrying out of the Works; or

(c) Possessions-Related Costs;

**Network Rail Costs** means Additional Payment, Agency Costs, Contractors' Costs, Expenses and Disbursements, Fee, Necessary Consents Costs, Personnel Costs, Possessions-Related Costs and Third Party Costs to the extent they arise from, or are a consequence of, the performance of Network Rail's obligations under this Agreement;

**Network Rail Fee** means an amount equal to 7.5% of the aggregate of the Agency Costs, Contractors' Costs, and Personnel Costs as set out in the Estimated Cost as at the Commencement Date as revised in accordance with clause 12 (other than a Variation of the type described in clause 12.7(a) to 12.7(c));

**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, except that should a delay arise in the Implementation Programme that is caused by the breach or negligence of Network Rail the Customer will not be liable for such amounts incurred after the Final Completion Date which are in excess of those amounts which would have been allowed had the delay not occurred;

**Possessions-Related Costs** means sums Network Rail will be obliged to pay to any train operator pursuant to Schedule 4 and/or Schedule 8 or equivalent provision of the relevant Access Agreement including sums payable as a result of any acts or omissions of a Contractor or the Customer in relation to the Works, and sums attributable to the Customer in relation to disruptive Possessions linked to one or more Interfacing Projects; and

**Third Party Costs** means any amount which Network Rail is obliged to pay to third parties in connection to the Project.

## 2 Hourly Rates

| Banding | Hourly Rate |
|---|---|
| 1 | £256.62 |
| 2 | £179.63 |
| 3 | £135.44 |
| 4 | £116.90 |
| 5 | £95.51 |
| 6 | £94.09 |
| 7 | £86.96 |
| 8 | £78.41 |

*Rates apply from 1 April 2026*

## 3 Adjustment of Hourly Rates

3.1 Network Rail shall adjust the Hourly Rates to reflect any rate review agreed between Network Rail and the ORR, or in the absence of such rate review, annually on 1 April by the increase in the retail price index for the year ending the preceding November.

3.2 Where Network Rail identifies opportunities for delivering the Services for a lower cost by using Network Rail's Personnel for whom lower hourly rates apply, Network Rail will use reasonable endeavours to deliver the Services through such Network Rail's Personnel. In such cases, the hourly rate applicable to such Network Rail's Personnel shall apply.

## 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 Limits on Additional Payment[30]

The Customer shall be liable to pay Network Rail all amounts due under this Agreement, subject to the following limits:

(a) The Customer's liability under this Agreement in respect of Regulated Change under clause 4.10 where Network Rail is undertaking Regulated Change on behalf of the Customer shall be limited to [insert figure or follow instructions in footnote];[31]

(b) The Customer's liability under this Agreement in respect of Additional Expense under clause 11 shall be limited to [insert figure or follow instructions in footnote];[32] and

(c) The Customer's liability under this Agreement in respect of Land and Noise Claims under clause 17.8 shall be limited to [insert figure or follow instructions in footnote].[33]

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[30] The Parties shall, where reasonably possible, agree and insert these liability caps prior to the Commencement Date. However, if it is not reasonably possible to estimate these liability caps prior to entering into the Agreement, they will be agreed and inserted when sufficient information is available as set out below. Alternatively, if the Parties agree not to apply one or more liability caps, replace the appropriate wording in (a), (b) or (c) with "not used".

[31] If it is not possible to insert this figure prior to the Commencement Date, it should be inserted upon agreement of the Regulated Change, unless the Parties agree upon a later date. Where Network Rail is not undertaking Regulated Change on behalf of the Customer, the Customer will be liable for all costs in undertaking it and this paragraph 5(a) will not apply. "Not used" should be inserted.

[32] If it is not possible to insert this figure prior to the Commencement Date, it should be inserted upon agreement of the Regulated Change, unless the Parties agree upon a later date.

[33] Where the Parties cannot agree a limit prior to the Commencement Date, the Parties shall agree and set out the limit within 20 Working Days of the completion of PACE Phase 2 or by agreement a later date prior to the Works Commencement Date.

**Subject to contract**

## 6 Terms of Payment

The terms of payment are as set out in clause 15.1 and clause 15.2 of this Agreement except that the Network Rail Fee and Industry Risk Fee set out in paragraph 5 of Schedule 3 will be added to the first invoice.

**Subject to contract**

# Schedule 3

# The Project

## 1 The Project

[Describe the Project and background.]

## 2 Works Requirements

The Works comprise [insert a description of the Works and include references to appropriate detailed design drawings, specifications, Detailed Route Requirements Document, Documents, scope, desired outputs etc.]

Document reference: [ ]

## 3 Services[34]

The Services to be provided by Network Rail are as follows:

(a) provision of a Network Rail sponsor to provide support and guidance to the Customer;

(b) provision of a Network Rail project manager to provide support and guidance to the Customer;

(c) preparatory work in respect of future project phases (including drafting of other agreements), as appropriate and by agreement between the Parties;

(d) provision of guidance documents for Works to take place on Network Rail land;

(e) provision of guidance on applicable Network Rail [procedures]/[Requirements] and Standards;

(f) project engineers for relevant engineering disciplines to undertake duties under the Standard NR/L2/RSE/02009 as required;

(g) provision of Network Rail record drawings and services information where available;

(h) attendance at meetings;

(i) review of method statements / risk assessments / Asset Management Plans / environment plans / safety management plans [insert details of any other reviews];

(j) review of [information provided by the Customer] [Design Data] demonstrating that the design of the Works takes into account the site constraints and all applicable Standards;

(k) procurement and management of Possessions and Isolations;

(l) provision of asset protection services;

[34] The template list provided should be amended to reflect project specifics. Where the Works relate to a station or depot, the Services shall include liaison and consultation on Commissioning procedures with the Station Facility Owner or Depot Facility Owner, as appropriate. The Services will include the services as Infrastructure Manager, in accordance with the ROGS.

(m) appointment of project engineers for applicable engineering disciplines to undertake design review and acceptance or no objection where necessary;

(n) issue of access permits or track visitor permits;

(o) facilitating surveys;

(p) provision of site safety staff to effect a safe system of work on Network Rail property;

(q) administration of the Taking Over procedures, including arranging the Taking Over meeting within four (4) weeks of the Construction Completion Date;

(r) facilitating the monitoring of the effects of electromagnetic interference on railway infrastructure;

(s) monitoring of track levels;

(t) review of Work Package Plans submitted by the Customer;

(u) review and acceptance of compliant project health and safety file;

(v) supporting the Asset Management Plan process;

(w) monitoring and reporting on Network Rail's performance against the Service Level Obligations;

(x) applying for Network Change;

(y) applying for the Necessary Consents where Network Rail is responsible for obtaining such consents;

(z) administration and management of internal Network Rail procedures to consider the applications for the Necessary Consents;

(aa) publication of operations notices;

(bb) amending documentation needed to operate the Network e.g. sectional appendix/ hazard directory asset registers;

(cc) Network Rail maintenance staff to provide disconnect/reconnect services;

(dd) obtaining the written consent of third parties for access to any land in which Network Rail has an interest, which has been leased or licensed to a third party; and

(ee) [insert details of any other services and/or remove services that are not required.]

## 4 Network Rail Requirements

[Insert specific requirements in relation to this Project.]

## 5 Estimated Cost

[Insert the costs table from the Ready Reckoner output here.]

The Estimated Network Rail Cost is subject to the following assumptions and exclusions:

(a) [Insert any assumptions on which the Network Rail Estimated Cost is calculated.]

(b) [Insert any exclusions from the Network Rail Estimated Cost.]

**6 Estimated Works Cost**

[Insert the seconds costs table from the Ready Reckoner output here.]

**7 Implementation Programme**

[Insert the Implementation Programme.]

**8 Completion Criteria**[35]

The detailed Completion Criteria for the APA Construction Certificate, Taking Over Certificate, Defects Identification and Completion Certificate and APA Final Certificate relating to the Works shall be agreed as part of agreeing the Asset Management Plan, but shall as a minimum comprise:

(a) for the APA Construction Certificate – achievement and delivery against all Necessary Consents, completion of the Works in accordance with the requirements of the Agreement (with only minor defects and snagging items remaining), testing, Commissioning and handover of sufficient documentation to allow the Works to be put into operational use;

(b) for the Taking Over Certificate – satisfaction of the requirements set out in Standard NR/L2/MTC/089 and recorded in form NR/L2/MTC/089/AMP015;

(c) for the Defects Identification and Completion Certificate – satisfaction of the requirements set out in Standard NR/L2/MTC/089 and recorded in form NR/L2/MTC/089/AMP016; and

(d) for the APA Final Certificate – all of the foregoing, plus provision of an acceptable health and safety file.

**9 Liquidated Damages Payment Date**

[Insert date]

**10 Daily Liquidated Damages Sum**[36]

[Insert amount]

**11 Interfacing Projects**

[Insert as appropriate]

[35] The criteria for deciding whether the Works are completed will be extracted from AMP017.

[36] This will be based on that agreed with the Customer representing a pre-estimate of the Customer's loss which will be negotiated by the Parties acting reasonably. If the Parties cannot agree a figure clause 17.5 should be redrafted to include a cap on damages.

**Subject to contract**

**12 Works that will be asset protected but will not transfer to Network Rail**[37]

[Insert as appropriate]

**13 Safety Management Systems**[38]

(a) Network Rail Safety Management System;

(b) SFO Safety Management System; and/or

(c) DFO Safety Management System.

**14 [Direct Costs]**[39]

[Insert if appropriate]

**15 Defects Liability Period**[40]

[Insert as appropriate]

[37] Prior to signature of the APA, Network Rail to check the ownership arrangements for the Works post Commissioning.

[38] Parties to set out in relation to the specific project when the Safety Management System of any of Network Rail, the SFO or DFO would apply in relation to the Works. For example, the Network Rail Safety Management System may only apply in respect of Possessions, or the SFO Safety Management System may only apply in respect of certain Works at a Station.

[39] Parties to set out any project specific costs that will be incurred by the Customer that should be treated as direct costs, for example, costs incurred under a co-operation agreement. Delete this heading if square-bracketed wording in the definition of Direct Costs is removed.

[40] Minimum 12 months required.

**Subject to contract**

## Schedule 4

## Escalation Procedure

### 1 Definitions

1.1 In this Schedule, except where the context otherwise requires, the following words shall have the following meanings:

**Executive Level Director** means a person from time to time appointed as the holder of such office within each Party, which for Network Rail shall include Route Managing Directors;

**Initial Notice** means the notice served under paragraph 2.1 of this Schedule 4;

**Project Manager** means the person appointed by each Party to manage the delivery of Services or Works under this Agreement;

**Response Notice** means the notices served under paragraph 2.3 of this Schedule 4; and

**Senior Manager** means the person in each Party's organisation responsible for the management and oversight of this Agreement.

### 2 Stage 1 – Project Managers

2.1 In order to invoke the Escalation Procedure, either Project Manager may notify the other Project Manager by serving a written notice (**Initial Notice**).

2.2 The Initial Notice shall:

(a) state the clause under which the Escalation Procedure is being invoked or alternatively any other matter to be resolved by means of the Escalation Procedure;

(b) advise all correspondence and documentation relevant to the matter raised in paragraph 2.2(a); and

(c) propose a date within five (5) Working Days for a meeting between the Project Managers to seek resolution of the matter referred to in paragraph 2.2(a).

2.3 Following receipt of the Initial Notice, the receiving Project Manager shall respond by written notice within three (3) Working Days (**Response Notice**).

2.4 The Response Notice shall:

(a) (i) state the actions and programme to resolve the matter raised in the Initial Notice; or

(ii) confirm attendance at the meeting referred to in the Initial Notice;

and

(b) advise any further correspondence and documentation relevant to matter raised in the Initial Notice.

2.5 If the Project Managers agree that the Response Notice or the meeting pursuant to the Initial Notice resolves the matter raised in the Initial Notice, the Project Manager who issued the Initial Notice will notify the other Project Manager by written notice. Such notification shall be made within three (3) Working Days following the receipt of the Response Notice or within three (3) Working Days following the meeting.

2.6 If the Project Managers do not agree that the Response Notice or the meeting pursuant to the Initial Notice resolves the matter raised in the Initial Notice, both Project Managers will notify their respective Senior Managers accordingly. Such notification shall be made within three (3) Working Days following the receipt of the Response Notice or within three (3) Working Days following the meeting.

**3 Stage 2 – Senior Managers Meeting**

3.1 Following receipt of a notification pursuant to paragraph 2.6, the Senior Managers of each Party shall arrange a meeting within five (5) Working Days to seek resolution of the matter referred to in the Initial Notice. The Senior Managers may, at their discretion, invite the Project Managers to attend such a meeting.

3.2 If the Senior Managers agree that their meeting resolves the matter raised in the Initial Notice, they will notify their Project Managers accordingly. The Project Manager who issued the Initial Notice will notify the other Project Manager by written notice. Such notification shall be made within three (3) Working Days following the meeting of Senior Managers.

3.3 If the Senior Managers do not agree that their meeting resolves the matter raised in the Initial Notice, they will notify their respective Project Managers accordingly within three (3) Working Days following the meeting of Senior Managers.

3.4 At the same time as they make the notification in paragraph 3.3, each Senior Manager shall notify their respective Executive Level Directors of the matter raised in the Initial Notice and the steps taken at the meetings between Project Managers and Senior Managers to resolve the matter.

**4 Stage 3 – Executive Level Directors' Meeting**

4.1 Following receipt of a notification pursuant to paragraph 3.4, the Executive Level Directors of each Party shall arrange a meeting within five (5) Working Days to seek resolution of the matter referred to in the Initial Notice. The Executive Level Directors may, at their discretion, invite the Senior Managers and/or the Project Managers to attend such a meeting.

4.2 If the Executive Level Directors agree that their meeting resolves the matter raised in the Initial Notice, they will notify their Senior Managers and Project Managers accordingly. The Project Manager who issued the Initial Notice will notify the other Project Manager by written notice. Such notification shall be made within three (3) Working Days following the meeting of Executive Level Directors.

4.3 If the Executive Level Directors do not agree that their meeting resolves the matter raised in the Initial Notice, either Party may refer the matter to Dispute Resolution in accordance with clause 24.

**Subject to contract**

# Schedule 5

## Surety Provisions[41]

[41] If surety required. Otherwise replace 'Surety Provisions' with 'Not Used'.

**Subject to contract**

## Schedule 6

## Collateral Warranty[42]

### Part 1 – Contractor Collateral Warranty

### FORM OF COLLATERAL WARRANTY

**THIS DEED is made the day of 20[ ]**

**BETWEEN**:

(1) [**INSERT THE REGISTERED NAME OF THE CONTRACTOR**] registered in [insert jurisdiction] under company number [insert company number] and whose registered office is at [insert registered address] (the **Contractor**); and

(2) **NETWORK RAIL INFRASTRUCTURE LIMITED** registered in England and Wales under company number 02904587 and having its registered office at Waterloo General Offices, London, SE1 8SW (the **Beneficiary**).

**WHEREAS**:

(A) The Contractor has entered into the Contract with the Employer to carry out the Works.

(B) The Beneficiary has an interest in the Works because the Works have an impact upon the Network (as defined below).

(C) The Beneficiary has entered into the Agreement with the Employer in connection with the Works.

In consideration of the payment of £1 by the Beneficiary to the Contractor, receipt of which the Contractor acknowledges, the Contractor has agreed to enter into this Deed with the Beneficiary and **IT IS AGREED AS FOLLOWS**:

#### 1. Definitions and interpretation

1.1. In this Deed (including the recitals), except where the context otherwise requires, the following words and expressions shall have the following meanings:

**Agreement** means the agreement entered into between the Beneficiary and the Employer in connection with the Works dated [insert the date of the asset protection agreement];

**Contract** means the agreement dated [insert the date of the agreement through which the Contractor has been appointed] between (a) the Employer and (b) the Contractor in connection with the Works;

**Employer** means [insert the registered name and address of the counterparty to the asset protection agreement];

**Intellectual Property** means all current and future legal and equitable interests in registered or unregistered trade marks, service marks, patents, registered designs, inventions, technical information, know-how or other intellectual property rights of any nature created by the Contractor or on the Contractor's behalf in connection with the Works;

**Network** means any facility property or infrastructure owned or managed by the Beneficiary including, for the avoidance of doubt, the railway network of which the Beneficiary is the facility owner (as defined in section 17(6) of the Railways Act 1993 (as amended));

**Network Licence** means the licence relating to the Network granted to Network Rail pursuant to section 8 of the Railways Act 1993 (as amended);

[42] If warranty over contractor works is required.

**Standards** has the meaning ascribed to it in the Agreement; and

**Works** means [insert description of relevant Works].

1.2. In this Deed unless the context otherwise requires:

(a) words importing any gender include every gender;

(b) words importing the singular number only include the plural number and vice versa;

(c) words importing persons include firms, companies and corporations, and vice versa;

(d) any reference to any statute (whether or not specifically named) shall include any statutory modification or re-enactment of it for the time being in force and any order, instrument, plan, regulation, permission and direction made or issued under it or under any statute replaced by it or deriving validity from it;

(e) references to Clauses are references to the relevant clause in this Deed;

(f) the words **include** and **including** are to be construed without limitation;

(g) where any obligation is undertaken by two or more persons jointly, those persons shall be jointly and severally liable in respect of that obligation; and

(h) the headings to the Clauses are for convenience only and shall not affect the interpretation of this Deed.

## 2. Contractor's obligations

The Contractor represents, warrants and undertakes to the Beneficiary that:

(a) the Works shall be carried out and completed diligently, in a good and workmanlike manner, in compliance with all applicable Standards and in accordance with the terms of the Contract;

(b) in carrying out any design in connection with the Works (including, for the avoidance of doubt, any temporary works relating to the Works), it has exercised and will continue to exercise all the skill, care and diligence to be reasonably expected of an appropriately qualified and competent designer experienced in carrying out design services in connection with projects of a similar scope, nature, complexity and size to the Works;

(c) it has complied with and will comply with each and all of the obligations, duties and undertakings of the Contractor under and pursuant to the Contract;

(d) on completion, the Works will satisfy all performance specifications and requirements contained or referred to in the Contract;

(e) the Beneficiary shall be deemed to have relied upon the Contractor's skill and judgement in respect of those matters relating to the Works as lie within the scope of the Contract and that the Contractor owes a duty of care in respect thereof to the Beneficiary (but not more onerous than that owed to the Employer under the Contract);

(f) all materials and goods used in the Works shall be new (unless otherwise agreed by the Beneficiary and the Employer), of sound and satisfactory quality, suitable for their purpose, in compliance with all applicable Standards and not:

(i) generally known (at the time of their specification or use) in the railway or construction industries to be deleterious in the particular circumstances in which they are used in connection with the Works; and

(ii) identified as being deleterious or of unsuitable quality in accordance with the provisions of the guide entitled Good Practice in the Selection of Construction Materials (2011) published by the British Council for Offices.

## 3. Liability

3.1. This Deed shall not negate or diminish any duty or liability otherwise owed by the Contractor to the Beneficiary or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by the Beneficiary or by any firm, company or party on behalf of the Beneficiary, nor any action or omission of any such firm, company or party whether or not such action or omission might give rise to an independent liability of such firm, company or party to the Beneficiary.

3.2. In respect of its performance of the Contract, the Contractor owes to the Beneficiary the same (but no greater) obligations as it would have owed to the Beneficiary had the Beneficiary been named as joint employer under the Contract. The Contractor shall be entitled in any action or proceedings brought by the Beneficiary to rely on any term in the Contract and to raise the equivalent rights in defence of liability (other than in relation to set-off, abatement and counterclaim) as it would have been entitled to raise under the Contract (other than where the Employer has suffered a different loss to the Beneficiary or no loss).

3.3. The Contractor undertakes not to contend in defence of proceedings under this Deed or otherwise that its liability to the Beneficiary is affected or diminished where the Employer under the Contract has suffered no loss or a loss different from the Beneficiary by reason of any breach of the Contractor.

3.4. No action or proceedings for any breach of this Deed shall be commenced against the Contractor after the expiry of 12 years from the date of practical completion of the Works.

## 4. Intellectual Property

4.1. The Contractor as beneficial owner irrevocably grants to the Beneficiary with effect from the date of this Deed (and notwithstanding that the Contract may be completed or terminated) a royalty-free, non-exclusive licence to use all rights, titles and interest in the Intellectual Property for any purpose relating to the Works or the Beneficiary's interests therein, including (without limitation):

(a) in connection with the maintenance, repair, reinstatement, renewal or extension of the Works or the Network adjacent to the Works; or

(b) in order for the Beneficiary to comply with the obligations on its part under the Network Licence or to comply with any standard or requirement affecting the Beneficiary.

4.2. Insofar as the beneficial ownership of any Intellectual Property provided by the Contractor in connection with the Works is vested in a person other than the Contractor, the Contractor shall use all reasonable endeavours to procure that the beneficial owner grants to the Beneficiary a licence in such material or similar terms and for such purposes as are referred to in Clause 4.1.

4.3. The licence referred to in Clauses 4.1 and 4.2 shall carry the right to grant sub-licences in the same terms and shall be transferable to third parties.

4.4. All royalties or other sums payable in respect of the supply and use of any Intellectual Property required in connection with the Contract shall be paid by the Contractor and the Contractor shall indemnify the Beneficiary from and against all claims, proceedings, damages, costs and expenses suffered or incurred by the Beneficiary by reason of the Contractor infringing or being held to infringe any intellectual property rights in the course of or in connection with the Contract or the licence granted in Clause 4.1 or 4.2 above.

4.5. The Contractor shall not be liable for any use by the Beneficiary of the Intellectual Property for any other purpose than that for which it was prepared.

4.6. The Contractor waives any moral right which it may have as the author of the Intellectual Property. Where the Contractor is not the author, the Contractor shall use its reasonable endeavours to obtain for the Beneficiary a corresponding waiver from the author.

## 5. Insurance

The Contractor has effected and will maintain professional indemnity insurance in an amount of [£[insert amount] million for each and every claim or series of claims arising out of the same event

or circumstances][43] for a period of 12 years from the date of the issue of the certificate of practical completion of the Works, provided that such professional indemnity insurance continues to be generally available in the insurance market on commercially reasonable terms. In the event that such professional indemnity insurance is not so available in the insurance market, the Contractor shall effect the nearest equivalent professional indemnity insurance cover that is available in the insurance market on commercially reasonable terms. As and when reasonably requested to do so by the Beneficiary, the Contractor shall produce for inspection documentary evidence that such insurance is being maintained and that payment has been made in respect of all premiums due under it.

## 6. Notices

Any notices to be given under this Deed shall be either delivered personally or sent by first class recorded delivery post. The address for service of the Beneficiary and of the Contractor shall be as stated in this Deed or such other address for service as the party to be served may have previously notified in writing to the other party. A notice shall be deemed to have been served as follows:

(a) if personally delivered, at the time of delivery; or

(b) if posted, at the expiration of 48 hours after the envelope containing the same was delivered into the custody of the postal authorities.

In proving such service, it shall be sufficient to prove that personal delivery was made or that the envelope containing such notice was properly addressed and delivered into the custody of the postal authorities as a pre-paid first class recorded delivery letter.

## 7. General

7.1. The Contractor shall have no claim whatsoever against the Beneficiary in respect of any damage, loss or expense howsoever arising out of or in connection with the Contract or any amounts due to the Contractor thereunder.

7.2. The Beneficiary may assign the benefit of this Deed on a maximum of two occasions without the consent of the Contractor. The benefit of this Deed may also be assigned by way of security or charged without the consent of the Contractor to any mortgagee of the Beneficiary or its assignees on any number of occasions.

7.3. The parties to this Deed do not intend that any term of this Deed should be enforceable, by virtue of the Contracts (Rights of Third Parties) Act 1999, by any person who is not a party to this Deed.

7.4. If for any reason any Clause in this Deed shall be found to be ineffective, inoperable or unenforceable, it shall be severed and deemed to be deleted from this Deed and in such event the remaining provisions of this Deed shall continue to have full force and effect.

7.5. This Deed shall be governed by and construed in accordance with the law of England and any dispute or difference concerned with its terms shall be referred to the non-exclusive jurisdiction of the Courts of England.

7.6. This Agreement may be executed in two counterparts which, taken together, shall constitute one and the same document.

**IN WITNESS** whereof the parties have caused this Deed to be executed as a deed on the date first before written.

EXECUTED AS A DEED by )

**[CONTRACTOR's registered name]** )

[43] Clause to be completed in accordance with the level and basis of Professional Indemnity Insurance that Network Rail has agreed is to be maintained by the grantor.

**Subject to contract**

acting by

Director

Director/Secretary

| | | |
|---|---|---|
| **EXECUTED AS A DEED** by **NETWORK RAIL INFRASTRUCTURE LIMITED** acting by its attorney: | ) | |
| …… | ) | ……..… |
| | ) | [Signature] |
| In exercise of a power of attorney dated | ) | |
| | ) | Acting as attorney for **NETWORK RAIL** |
| ……..…..…… | ) | **INFRASTRUCTURE LIMITED** |

in the presence of:

Signature of Witness: ……..……...

Name: ……

Address: ……

I confirm that I was physically present when ……..…….... signed this Deed

…….. [Signature of Witness]

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| | | |
|---|---|---|
| **EXECUTED AS A DEED** by affixing the common seal of **NETWORK RAIL INFRASTRUCTURE LIMITED** in the presence of: | ) | |
| | ) | |
| | ) | |
| | ) | |
| | | ……..… |
| | | [Signature] |
| | | Authorised Signatory for **NETWORK RAIL INFRASTRUCTURE LIMITED** |
| | | ……. |
| | | [Print Name] |

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[44] Use this signing block where warranty is to be signed via DocuSign and where document is not to be sealed.

[45] Use this signing block where warranty is executed in hard copy by the application of NRIL Company Seal.

**Subject to contract**

**Subject to contract**

## Part 2 – Consultant Collateral Wararnty

## FORM OF COLLATERAL WARRANTY

**THIS DEED** is made the day of 20[ ]

**BETWEEN**:

(1) [**INSERT THE REGISTERED NAME OF THE CONSULTANT**] registered in [insert jurisdiction] under company number [insert company number] and whose registered office is at [insert registered address] (the **Consultant**); and

(2) **NETWORK RAIL INFRASTRUCTURE LIMITED** registered in England and Wales under company number 02904587 and having its registered office at Waterloo General Offices, London, SE1 8SW (the **Beneficiary**).

**WHEREAS**:

(A) The Employer wishes to carry out, or procure the carrying out, of the Works.

(B) The Employer has appointed the Consultant under the Contract for the provision of the Design in connection with the Works.

(C) The Beneficiary has an interest in the Works (and therefore the Design) as they have or may have an impact upon the Network (as defined below).

(D) The Beneficiary has entered into the Agreement with the Employer in connection with the Works.

In consideration of the payment of £1 by the Beneficiary to the Consultant, receipt of which the Consultant acknowledges, the Consultant has agreed to enter into this Deed with the Beneficiary and **IT IS AGREED AS FOLLOWS**:

### 1. Definitions and interpretation

1.1. In this Deed (including the recitals), except where the context otherwise requires, the following words and expressions shall have the following meanings:

**Agreement** means the agreement entered into between the Beneficiary and the Employer in connection with the Works dated [insert the date of the asset protection agreement]];

**Contract** means the agreement dated [insert the date of the agreement through which the Contractor has been appointed] between (a) the Employer and (b) the Consultant;

**Design** means the carrying out of [insert brief description of the design services to be performed by the Consultant];

**Employer** means [insert the registered name and address of the counterparty to the asset protection agreement];

**Intellectual Property** means all current and future legal and equitable interests in registered or unregistered trade marks, service marks, patents, registered designs, inventions, technical information, know-how or other intellectual property rights of any nature created by the Consultant in connection with the Works (including any Design);

**Network** means any facility property or infrastructure owned or managed by the Beneficiary including, for the avoidance of doubt, the railway network of which the Beneficiary is the facility owner (as defined in section 17(6) of the Railways Act 1993 (as amended));

**Network Licence** means the licence relating to the Network granted to Network Rail pursuant to section 8 of the Railways Act 1993 (as amended);

**Standards** has the meaning ascribed to it in the Agreement; and

**Works** means [insert description of relevant Works].

1.2. In this Deed unless the context otherwise requires:

(a) words importing any gender include every gender;

(b) words importing the singular number only include the plural number and vice versa;

(c) words importing persons include firms, companies and corporations, and vice versa;

(d) any reference to any statute (whether or not specifically named) shall include any statutory modification or re-enactment of it for the time being in force and any order, instrument, plan, regulation, permission and direction made or issued under it or under any statute replaced by it or deriving validity from it;

(e) references to Clauses are references to the relevant clause in this Deed;

(f) the words **include** and **including** are to be construed without limitation;

(g) where any obligation is undertaken by two or more persons jointly, those persons shall be jointly and severally liable in respect of that obligation; and

(h) the headings to the Clauses are for convenience only and shall not affect the interpretation of this Deed.

## 2. Consultant's obligations

The Consultant represents, warrants and undertakes to the Beneficiary that:

(a) in performing the Design, it has exercised and will continue to exercise all the skill, care and diligence to be reasonably expected of an appropriately qualified and competent designer experienced in carrying out design services in connection with projects of a similar scope, nature, complexity and size to the Works;

(b) it has complied with and will comply with each and all of the obligations, duties and undertakings of the Consultant under and pursuant to the Contract and, in so doing, the Consultant has, subject and without prejudice to Clause 2(a), complied with and will comply with all applicable Standards;

(c) subject and without prejudice to Clause 2(a), on completion, the output of the Design will satisfy all performance specifications and requirements contained or referred to in the Contract and shall be compliant with all applicable Standards;

(d) the Beneficiary shall be deemed to have relied upon the Consultant's skill and judgement in respect of those matters relating to the Design as lie within the scope of the Contract and that the Consultant owes a duty of care in respect thereof to the Beneficiary (but not more onerous than that owed to the Employer under the Contract);

(e) subject and without prejudice to Clause 2(a), all materials and goods specified by the Consultant for use in the Works shall be suitable for their purpose, in compliance with all applicable Standards and not:

(i) generally known (at the time of their specification or use) in the railway or construction industries to be deleterious in the particular circumstances in which they are to be used in connection with the Works; and

(ii) identified as being deleterious or of unsuitable quality in accordance with the provisions of the guide entitled Good Practice in the Selection of Construction Materials (2011) published by the British Council for Offices.

## 3. Liability

3.1. This Deed shall not negate or diminish any duty or liability otherwise owed by the Consultant to the Beneficiary or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by the Beneficiary or by any firm, company or party on

behalf of the Beneficiary, nor any action or omission of any such firm, company or party whether or not such action or omission might give rise to an independent liability of such firm, company or party to the Beneficiary.

3.2. In respect of its performance of the Contract, the Consultant owes to the Beneficiary the same (but no greater) obligations as it would have owed to the Beneficiary had the Beneficiary been named as joint employer under the Contract. The Consultant shall be entitled in any action or proceedings brought by the Beneficiary to rely on any term in the Contract and to raise the equivalent rights in defence of liability (other than in relation to set-off, abatement and counterclaim) as it would have been entitled to raise under the Contract (other than where the Employer has suffered a different loss to the Beneficiary or no loss).

3.3. The Consultant undertakes not to contend in defence of proceedings under this Deed or otherwise that its liability to the Beneficiary is affected or diminished where the Employer under the Contract has suffered no loss or a loss different from the Beneficiary by reason of any breach of the Consultant.

3.4. No action or proceedings for any breach of this Deed shall be commenced against the Consultant after the expiry of 12 years from the earlier of practical completion of the Works or the date upon which the Contract is terminated.

## 4. Intellectual Property

4.1. The Consultant as beneficial owner irrevocably grants to the Beneficiary with effect from the date of this Deed (and notwithstanding that the Contract may be completed or terminated) a royalty-free, non-exclusive licence to use all rights, titles and interest in the Intellectual Property for any purpose relating to the Works or the Beneficiary's interests therein, including (without limitation):

(a) in connection with the maintenance, repair, reinstatement, renewal or extension of the Works or the Network adjacent to the Works; or

(b) in order for the Beneficiary to comply with the obligations on its part under the Network Licence or to comply with any standard or requirement affecting the Beneficiary.

4.2. Insofar as the beneficial ownership of any Intellectual Property provided by the Consultant in connection with the Design is vested in a person other than the Consultant, the Consultant shall use all reasonable endeavours to procure that the beneficial owner grants to the Beneficiary a licence in such material or similar terms and for such purposes as are referred to in Clause 4.1.

4.3. The licence referred to in Clauses 4.1 and 4.2 shall carry the right to grant sub-licences in the same terms and shall be transferable to third parties.

4.4. All royalties or other sums payable in respect of the supply and use of any Intellectual Property required in connection with the Contract shall be paid by the Consultant and the Consultant shall indemnify the Beneficiary from and against all claims, proceedings, damages, costs and expenses suffered or incurred by the Beneficiary by reason of the Consultant infringing or being held to infringe any intellectual property rights in the course of or in connection with the Contract or the licence granted in Clause 4.1 or 4.2 above.

4.5. The Consultant shall not be liable for any use by the Beneficiary of the Intellectual Property for any other purpose than that for which it was prepared.

4.6. The Consultant waives any moral right which it may have as the author of the Intellectual Property. Where the Consultant is not the author, the Consultant shall use its reasonable endeavours to obtain for the Beneficiary a corresponding waiver from the author.

## 5. Insurance

The Consultant has effected and will maintain professional indemnity insurance in an amount of [£[insert amount] million for each and every claim or series of claims arising out of the same event or circumstances][46] for a period of 12 years from the date of practical completion of the Works,

[46] Clause to be completed in accordance with the level and basis of Professional Indemnity Insurance that Network Rail has agreed is to be maintained by the grantor.

provided that such insurance continues to be generally available in the insurance market on commercially reasonable terms. In the event that such professional indemnity insurance is not so available in the insurance market, the Consultant shall effect the nearest equivalent professional indemnity insurance cover that is available in the insurance market on commercially reasonable terms. As and when reasonably requested to do so by the Beneficiary, the Consultant shall produce for inspection documentary evidence that such insurance is being maintained and that payment has been made in respect of all premiums due under it.

## 6. Notices

Any notices to be given under this Deed shall be either delivered personally or sent by first class recorded delivery post. The address for service of the Beneficiary and of the Consultant shall be as stated in this Deed or such other address for service as the party to be served may have previously notified in writing to the other party. A notice shall be deemed to have been served as follows:

(a) if personally delivered, at the time of delivery; or

(b) if posted, at the expiration of 48 hours after the envelope containing the same was delivered into the custody of the postal authorities.

In proving such service, it shall be sufficient to prove that personal delivery was made or that the envelope containing such notice was properly addressed and delivered into the custody of the postal authorities as a pre-paid first class recorded delivery letter.

## 7. General

7.1. The Consultant shall have no claim whatsoever against the Beneficiary in respect of any damage, loss or expense howsoever arising out of or in connection with the Contract or any amounts due to the Consultant thereunder.

7.2. The Beneficiary may assign the benefit of this Deed on a maximum of two occasions without the consent of the Consultant. The benefit of this Deed may also be assigned by way of security or charged without the consent of the Consultant to any mortgagee of the Beneficiary or its assignees on any number of occasions.

7.3. The parties to this Deed do not intend that any term of this Deed should be enforceable, by virtue of the Contracts (Rights of Third Parties) Act 1999, by any person who is not a party to this Deed.

7.4. If for any reason any Clause in this Deed shall be found to be ineffective, inoperable or unenforceable, it shall be severed and deemed to be deleted from this Deed and in such event the remaining provisions of this Deed shall continue to have full force and effect.

7.5. This Deed shall be governed by and construed in accordance with the law of England and any dispute or difference concerned with its terms shall be referred to the non-exclusive jurisdiction of the Courts of England.

**IN WITNESS** whereof the parties have caused this Deed to be executed as a deed on the date first before written.

EXECUTED AS A DEED by )

**[CONSULTANT's registered name]** )

acting by

Director

Director/Secretary

**Subject to contract**

**Subject to contract**

| | | |
|---|---|---|
| **EXECUTED AS A DEED** by **NETWORK RAIL INFRASTRUCTURE LIMITED** acting by its attorney: | ) | |
| …… | ) | …….…..… |
| | ) | [Signature] |
| In exercise of a power of attorney dated …….…..…… | ) | Acting as attorney for **NETWORK RAIL INFRASTRUCTURE LIMITED** |
| in the presence of: | | |

Signature of Witness: ……..……...

Name: ……

Address: ……

I confirm that I was physically present when ……..……... signed this Deed

…….. [Signature of Witness]

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| | | |
|---|---|---|
| **EXECUTED AS A DEED** by affixing the common seal of **NETWORK RAIL INFRASTRUCTURE LIMITED** in the presence of: | ) | |
| | ) | …….…..… |
| | ) | [Signature] |
| | ) | Authorised Signatory for **NETWORK RAIL INFRASTRUCTURE LIMITED** |
| | | ……. |
| | | [Print Name] |

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[47] Use this signing block where warranty is to be signed via DocuSign and where document is not to be sealed.

[48] Use this signing block where warranty is executed in hard copy by the application of NRIL Company Seal.

**Subject to contract**

## Schedule 7

## Network Rail Approvals, Acceptances and Consents

Network Rail shall only be required to issue the approvals, acceptances and consents referred to in this Schedule 7 subject to all necessary requirements relating to the same being satisfied in full:

### 1 Network Rail Consents to be granted by Network Rail

1.1 Approvals and Acceptances to be provided by Network Rail (subject to all necessary requirements for the approvals and/or acceptances being satisfied in full):

(a) the acceptance of form 1, form 2 and, where applicable, form 3 Design Data and form D Architectural Approval, for the Works;

(b) applicable approvals pursuant to clause 4 of this Agreement;

(c) technical approval of all changes to and interfaces with Network Rail's infrastructure in accordance with the applicable Standards;

(d) approval of designs for track, signalling, telecoms, plant and structures forming part of the Works and any other part of the Works notified to the Customer;

(e) acceptance of Designer, Principal Designer and the Principal Contractor appointed by the Customer;

(f) acceptance of the Contractor's engineering manager and the Contractor's responsible engineers in each relevant discipline;

(g) approval of the Customer's Environment Plan, Asset Management Plan, Quality Plan and Safety Plan;

(h) acceptance of Work Package Plans submitted by the Customer for the Works in accordance with Standard NR/L2/OHS/0044;

(i) amendment of applicable Network Rail records on completion in accordance with Standard NR/L2/MTC/089;

(j) approval of all plans for inspection, testing and Commissioning, Taking Over and Final Certificate;

(k) acceptance of the Construction Phase Plan;

(l) acceptance of the Implementation Programme; and

(m) [other if relevant].

1.2 Network Rail Consents (including Regulated Change) already granted and estimated Regulated Change costs.

[To be inserted]

**Subject to contract**

1.3 Necessary Consents to be obtained by Network Rail (subject to all necessary requirements for the consents being satisfied in full)

(a) Railways (Interoperability) (High Speed) Regulations 2002, Railways (Interoperability) (Conventional) Regulations 2011, any other regulations for interoperability that may be made from time to time;

(b) [others e.g. Regulated Change Consents]; and

(c) estimated Regulated Change costs.

1.4 Necessary Consents to be provided by the Customer

[To be inserted]

1.5 Necessary Consents already granted (excluding Network Rail Consents)

[To be inserted]

**Subject to contract**

## Schedule 8

## Process for Network Rail Consents

### 1 Process

1.1 The Customer shall prepare Design Data in accordance with the Implementation Programme in clause 5.2 and shall notify Network Rail not less than twenty five (25) Working Days prior to a Design Data submission, in line with the Implementation Programme, giving sufficient detail of the content of the submission and the amount of documentation to be included with the submission for Network Rail to determine the resources required to carry out its obligations under this Schedule 8 and clause 4.

1.2 On submitting Design Data the Customer shall provide a list of the Standards, Legal Requirements and other guidance and codes of practice the Customer has complied with in preparing the Design Data together with any details of any derogations from such Network Rail Standards and other guidance and codes of practice as have been agreed with Network Rail or which the Customer wishes Network Rail to agree.

1.3 Network Rail shall use reasonable endeavours to identify to the Customer as soon as practical after submission of the Design Data any further information, data and documents and any errors or omissions in the Design Data and any concerns in relation to the quality of the Design Data. The Customer shall submit any further information, data and documents that Network Rail reasonably requires in order to determine whether Network Rail has a basis for raising comments or making objections to any element of Design Data in accordance with paragraph 1.7 of this Schedule.

1.4 In accordance with clause 4.12(a), Network Rail shall return any Design Data relevant items identified in the Implementation Programme as on the critical path, for Design Data submission within twenty five (25) Working Days from receipt of such Design Data (or within such longer period as may be agreed by the Parties).

1.5 Network Rail will be relieved of obligations to comply with paragraph 1.4 if:

(a) the Customer has not complied with paragraph 1.1 to 1.3 of this Schedule; or

(b) the Design Data was not submitted in accordance with the detailed procedures and requirements notified by Network Rail to the Customer from time to time.

1.6 Notwithstanding paragraph 1.5 of this Schedule, if the Customer does not comply with paragraph 1.1 to 1.3 of this Schedule, the Customer shall keep Network Rail informed of the anticipated date that the Design Data shall be submitted, ensuring that Network Rail is provided with as much notice as reasonably possible of the anticipated submission date and Network Rail shall provide the Customer a reasonable extension to such Design Data submission date, taking into account any resourcing issues Network Rail may have. Following such extension, Network Rail shall return Design Data in accordance with paragraph 1.4 of this Schedule.

1.7 Network Rail may accept any element of Design Data subject to the inclusion of comments. Network Rail may withhold acceptance only if:

(a) the relevant element of Design Data would breach any Legal Requirement;

(b) the relevant element of Design Data does not comply with the Works Requirements and it would not be reasonable for Network Rail (acting in accordance with and subject to clause 1.3) to grant a derogation in relation to a non-compliance with a Network Rail Standard;

(c) the requirements specified in clauses 2.2 and 2.3, the Safety Management System and/or contract-specific addendum related thereto are not being complied with;

(d) the implementation of the relevant element of Design Data will result in non-compliance with the Customer's obligations under clauses 2 and/or 8 or non-compliance with the Implementation Programme;

(e) the implementation of the element of Design Data would limit, qualify or override or purport to limit, qualify or override any obligation, right or entitlement of Network Rail which arises by reason of:

(i) any Network Licence condition;

(ii) the terms and conditions of any Access Agreement; or

(iii) any undertaking given in its Safety Management System;

(f) the Design Data submitted is unlikely to result in the Works carried out in accordance with such designs being Commissioned by Network Rail or if applicable, the Station Facility Owner or the Depot Facility Owner; and/or

(g) insufficient information, data and/or documents have been provided to enable Network Rail to determine whether it has a legitimate basis for commenting or objecting.

1.8 If the Customer does not submit such information, data and documents in accordance with paragraph 1.1 to 1.3 of this Schedule, Network Rail shall be entitled to comment on the Design Data on the basis of the information, data and documents which have been provided (without prejudice to paragraph 1.7(g) of this Schedule).

1.9 If Network Rail raises comments on any element of Design Data on its return or withholds acceptance of any element of Design Data or refuses to grant a derogation to any Network Rail Standard, it shall state the ground(s) upon which such comments or the withholding of acceptance or the refusal to grant a derogation are based and shall provide the supporting evidence or other information where appropriate.

1.10 Any element of Design Data which is returned by Network Rail endorsed "Level 1 - Approved, work may proceed" shall be complied with or implemented (as the case may be) by the Customer. The endorsement "Level 1 - Approved, work may proceed" shall mean that the relevant element of Design Data is technically approved as defined in Railway Industry Standard GC/RT5101 and associated Network Rail Company Standard NR/L2/RSE/02009 Engineering Management for Projects.

1.11 Where Network Rail has endorsed any element of Design Data "Level 2 - Approved with comments, work may proceed subject to inclusion of comments", the Customer may proceed to construct (or proceed to the next level of design of) the part of the Works to which the element of Design Data relates but shall take into account any amendments required by Network Rail in

its comments. The means of achieving compliance with Network Rail's comments shall be documented and filed for later retrieval on request by Network Rail.

The Customer shall comply with or implement (as the case may be) comments in accordance with Network Rail Standard NR/L2/RSE/02009 Engineering Management for Projects.

1.12 Where Network Rail has endorsed any element of Design Data "Level 3 - Not approved with minor comments, resubmit" or "Level 4 - Not approved with major comments, resubmit", the Customer shall not act upon the Design Data but shall amend the element of Design Data in accordance with Network Rail's comments and resubmit the same to Network Rail. Network Rail (acting reasonably, subject to clause 1.3(b) and (c)) shall determine whether the comments on any element of Design Data (taking into account individual comments, or the cumulative number of comments) are major or minor.

1.13 Where Network Rail has endorsed the element of Reviewable Design Data "Level 5 - Technical Approval not required", the Customer shall submit the next element of Design Data in accordance with the Implementation Programme.

1.14 Following the return of Design Data, the Customer shall amend the Design Data for the Works to take account of any comments made by Network Rail in respect of the relevant Works on such submission and submit further Design Data submissions to Network Rail as may be required by Network Rail.

1.15 The Customer shall not authorise the commencement of the detailed design of the Works until the Design Data submission has been accepted by Network Rail and the Works have been allocated a checking category.

**Subject to contract**

## Schedule 9

## Requirements for construction of the Works

1 The Customer shall:

1.1 Obtain Network Rail's prior written acceptance to the Implementation Programme, Construction Phase Plan and Work Package Plans for the carrying out and completion of the Works and the movement of materials, plant and equipment on or near the Railway (not to be unreasonably withheld or delayed, save that Network Rail's decision shall be final where its acceptance is withheld in order to prevent, address, alleviate or comply (as applicable) with a Network Operation Issue).

1.2 Forward copies of all Necessary Consents approvals to Network Rail and obtain a written acknowledgement of receipt of the same from Network Rail.

1.3 Establish and maintain a robust procedure to ensure safe access for all personnel to the Railway in connection with the Works which recognises the existing points of emergency access to the Railway and not interfere with such access points without prior written approval by Network Rail.

1.4 Obtain Network Rail's prior written approval to the Customer's and Contractor's Safety Management System and ensure compliance with it.

1.5 Immediately take all action required by Network Rail pursuant to clause 9.2.

1.6 Carry out the Works to the satisfaction of Network Rail in respect of the protection, safety and efficient operation of the Railway and the safety of property and of persons on or near the Railway.

1.7 Superintend the Works and cause the Works to be completed with all reasonable dispatch and in any event by the Planned Construction Completion Date.

1.8 Arrange with all relevant third parties for any necessary temporary or permanent diversion or disconnection/reconnection of dedicated technical or support services; for example any sewers, pipes, cables and specialist equipment.

1.9 Arrange for the relocation to a suitable environment of any flora and fauna which is subject to conservation and which may be affected by the Works.

1.10 To the extent that Network Rail (acting reasonably) considers appropriate, during the carrying out of the Works at its own cost, temporarily erect fencing as reasonably necessary to protect Network Rail's property from trespass and vandalism.

1.11 Provide for such barriers, watching and lighting of the Works as may be necessary during the carrying out of the Works.

1.12 Comply with the requirements of Network Rail with regard to Network Rail's signalling arrangements and the prevention of any adverse effects which may be caused by the lighting of the Works.

1.13 Procure that all materials and goods used in the Works shall be of good quality, suitable for their purpose, in compliance with all applicable Standards and not generally known in the railway industry to be deleterious at the time of incorporation.

**Subject to contract**

1.14 The Customer shall, at the request of Network Rail, allow Network Rail to observe any progress meetings it has with the Contractor in respect of the Works. In addition, without prejudice to clause 6.8, Network Rail shall:

(a) on reasonable notice be entitled at all reasonable times to have access to any Area of Work to observe the carrying out of the Works by the Contractor; and

(b) be given sufficient notice by the Customer to allow it to attend and observe any inspection of the Works pertaining to the issue of any completion, Taking Over or Final Certificate whether substantial, practical, sectional or final completion as defined under the Contract and allow Network Rail and the Station Facility Owner (where the Works relate to a station) and the Depot Facility Owner (where the Works relate to a Depot) to attend such inspections, demonstrations or testing.

1.15 The Customer shall prepare a relevant data manual (including as-built drawings and such other information as Network Rail may reasonably stipulate) for the Works which shall in due course form part of the "Health and Safety File" as defined in the CDM Regulations. The manual shall be finalised and passed to Network Rail in such format and with such number of copies as Network Rail may reasonably require prior to the issue by Network Rail of the APA Final Certificate.

1.16 Provide Network Rail with such information at such times and in such format as Network Rail reasonably requires about the Works to enable it to populate its asset register.

**Subject to contract**

## Schedule 10

## Network Rail Service Level Obligations[49]

| | Service | Service Level Obligation to provide service within[50] | Service Level description |
|---|---|---|---|
| 1 | Clause 3.4 – Provision of Network Rail data and information. | A reasonable time. | Provide data and information which is already in Network Rail's possession and which the Customer reasonably requires and has requested to carry out the Works. |
| 2 | Clause 3.8 – Regular reports on Services, Costs and Interfacing Projects. | [To be inserted][51] | Provide report(s) on the progress of the Services, Costs and Interfacing Projects. |
| 3 | Clauses 3.10 and 8.7 – Notify of Interfacing Projects and provide advice on mitigation. | A reasonable time. | Following receipt of information from the Customer, notify the Customer of Interfacing Projects and comment on the Customer's plans to mitigate and control Interfacing Project risk. |
| 4 | Clause 3.11 – Notification of previously granted derogations. | As soon as reasonably practicable, but no later than 25 Working Days. | Provide details of relevant previously granted derogations. |
| 5 | Clause 4.1 and Schedule 7 – Necessary Consents. | [To be inserted][52] | Where Network Rail has agreed to apply for Necessary Consents on behalf of the Customer as specified in Schedule 7, paragraph 1.3. |

[49] The Parties should review the time periods relating to each Service Level Obligation prior to entering into the APA to confirm that the Service Level Obligations are appropriate based on the scope and complexity of the Project.

[50] Where a Service Level Obligation is to be undertaken within "a reasonable time" or "as soon as reasonably practicable", Network Rail and the Customer will agree the relevant time period for each Service Level Obligation post completion of the APA and once there is sufficient detail regarding the scope of the requirement for the Parties to agree the relevant time period.

[51] Time period to be agreed between Network Rail and the Customer prior to completion of the APA.

[52] Time period to be agreed between Network Rail and the Customer prior to completion of the APA.

**Subject to contract**

| | Service | Service Level Obligation to provide service within[50] | Service Level description |
|---|---|---|---|
| 6 | Clause 4.9 and Schedule 7 – Necessary Consents. | As soon as reasonably practicable. | Where Necessary Consents are to be granted by Network Rail (Network Rail Consents). |
| 7 | Clause 5.2 – Confirmation of timescales for booking Possessions. | Within 10 Working Days. | Inform the Customer of the anticipated timescales for booking Possessions. |
| 8 | Clause 5.3 – Review of Implementation Programme. | Within 10 Working Days of receipt of Implementation Programme or information (as applicable) | Review Implementation Programme and provide comments to the Customer. |
| 9 | Clause 5.7 – Keep the Customer informed in respect of alternative Possessions. | A reasonable time. | Keep the Customer fully informed of the progress of obtaining alternative Possessions. |
| 10(a) | Clause 6.16 - Confirm in writing that the relevant Possessions have been obtained or not – together with details. | Within 20 Working Days of completion of consultation on proposed Possession Plan. | Provide confirmation of Possessions obtained and not obtained within 20 Working Days of completion of consultation on proposed Possession Plan. |
| 10(b) | Clause 6.16 - Confirm in writing that the relevant Possessions have been obtained or not – together with details. | Within 20 Working Days of completion of consultation on proposed Possession Plan. | Where possessions not obtained, provide explanation within 20 Working Days of completion of consultation on proposed Possession Plan. |
| 11 | Clause 6 – Network Rail examines and comments on Construction Phase Plan. | A reasonable time. | Provide commentary on Construction Phase Plan. |
| 12 | Clause 10.6 – Construction Completion Criteria. | Within 25 Working Days of the Construction Completion Criteria being satisfied. | Countersign the APA Construction Certificate. |

**Subject to contract**

| | Service | Service Level Obligation to provide service within[50] | Service Level description |
|---|---|---|---|
| 13 | Clause 10.7 – Taking Over Certificate | Within 25 Working Days of the criteria relating to the Taking Over Certificate being satisfied. | Countersign the Taking Over Certificate. |
| 14 | Clause 10.8 – Defects Identification and Completion Certificate | Within 25 Working Days of the criteria relating to the Defects Identification and Completion Certificate being satisfied. | Countersign the Defects Identification and Completion Certificate. |
| 15 | Clause 10.9 – Final Completion Criteria. | Within 25 Working Days of the Final Completion Criteria being satisfied. | Countersign the APA Final Certificate. |
| 16 | Clause 12.2 – Variation Requests. | Within 10 Working Days of receipt of the Variation Request. | Notify the Customer within 10 Working Days if Network Rail objects to the Variation Request. |
| 17 | Clause 12.5 – Variation Requests provision of further information. | 15 Working Days (or such longer time period as agreed between the Parties acting reasonably). | Meet with the Customer following issue of a notice by the Customer pursuant to clauses 12.4(a)(ii) or 12.4(b)(ii). |
| 18 | Paragraph 1.3 of Schedule 8 – Identify any further information required or any errors or omissions in the Design Data. | As soon as reasonably practicable. | Inform the Customer if there is further information required or any errors or omissions in the Design Data |
| 19 | Paragraph 1.4 of Schedule 8 – Return any Design Data identified as critical in the Implementation Programme. | Design Data relevant to items identified as critical in the Implementation Programme, within 25 Working Days of receipt. | Return 'Design Data relevant to items identified as critical in the Implementation Programme within 25 Working Days of receipt. |