

Basic Implementation Agreement Templates – Customer Explanatory Notes

Explanatory Notes on Basic Implementation Agreement (Emerging Cost)

Paragraph Number / Heading	Comment
(BIA/EC)	
Background	<p>A Basic Implementation Agreement is required when a Customer requests a Network Rail to undertake works, directly or indirectly via sub-contracts, on the Network Rail network or its other property. It does not give the Customer access to the network.</p> <p>The Basic Implementation Agreement (Emerging Cost) provides for reasonable and proper costs (including costs of risks <u>not</u> contracted out, insured or covered through the Industry Risk Fund, etc) to be passed through to the Customer as they arise as Network Rail carries out the works on the Customer's behalf. This form of agreement is appropriate where the Customer is content with carrying remaining project risk himself and having visibility and appropriate control of contingency funding directly to cover unforeseen eventualities rather than requiring Network Rail to carry the risk and add a contingency to reflect this risk in a fixed price.</p> <p>The Customer needs to consider the risk profile of the scheme, funding constraints and the interface with any other stakeholders.</p> <p>If the works are complicated or have the potential to cause significant disruption to the network, the Implementation Agreement (Emerging Cost) should be considered.</p>
Roles and Responsibilities	<p>In carrying out works on behalf of the Customer, Network Rail will have a range of obligations towards its Customer. Network Rail will be contracting directly with consultants and contractors and will have direct liability to these parties for payment and other contracted obligations. It is therefore important that costs and liabilities are appropriately identified and addressed in the agreement. However, Network Rail will be liable to the Customer for the acts and omissions of the consultants and contracts.</p>
1	<p>The parties agree that Network Rail will carry out the Works and that the Customer will fund the Works.</p>

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2 Definitions and Interpretation	This paragraph includes general provisions as to consents including the acknowledgement that Network Rail retains sole discretion in relation to safety.
3, 4 and 5 – (Obligations of the Customer)	<p>Paragraph 3 obliges the Customer to act in good faith, use reasonable endeavours to avoid disputes and not to interfere with Network Rail's rights and obligations.</p> <p>Paragraph 4 places general obligations on the Customer to comply with the Agreement and confirms that a failure to do so may result in the date agreed by the parties for the completion of the Works (the Completion Date) and from which liquidated damages are payable for delay to completion (the Liquidated Damages Payment Date) being extended. These dates will be established in line with the Completion Criteria set out in Schedule 2.</p> <p>Paragraph 5 places obligations upon the Customer in respect of information it provides to Network Rail.</p>
6 to 15 (Obligations of Network Rail)	<p>Paragraph 6 obliges Network Rail to act in good faith, use reasonable endeavours to avoid disputes and not interfere with the Customer.</p> <p>At paragraph 7 Network Rail undertakes to carry out the Works in accordance with Good Industry Practice, Legal Requirements, Standards, Necessary Consents, Works Requirements and the terms of the Agreement. What forms the Works Requirements is set out in Schedule 2 and what the Standards are is set out in the definitions.</p> <p>At paragraph 8 Network Rail may sub-contract its obligations but remains liable for the sub-contractor's performance.</p> <p>At paragraph 9 Network Rail is to procure that the Works will satisfy the Completion Criteria by the Completion Date. This and the Liquidated Damages Payment Date are fixed dates which may be amended in accordance with the Agreement. Network Rail is also to use reasonable endeavours to carry out the Works in accordance with the Implementation Programme.</p> <p>At paragraph 10 Network Rail is obliged to report to the Customer on progress of the Works and key financial information.</p> <p>At paragraph 11 Network Rail elects to be the client for the purposes of the CDM Regulations.</p>

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	<p>At paragraph 12 Network Rail is to maintain or procure insurance appropriate for the Works.</p> <p>Paragraph 13 provides for Network Rail to allow the Customer access to documents and to attend progress meetings with contractors.</p> <p>At paragraph 14 Network Rail is to use reasonable endeavours to carry out the Works for the cost it has estimated but the Customer is obliged to pay the Network Rail Costs (set out in Schedule 3) reasonably and properly incurred by Network Rail.</p> <p>At paragraph 15 Network Rail is to notify the Customer of a matter which prevents or impedes the carrying out of the Works.</p>
16 to 21 – (Necessary Consents)	<p>At paragraph 16 Network Rail is to apply for those Necessary Consents listed in Schedule 2. The grant of such consents is not within Network Rail's power, and therefore Network Rail cannot guarantee when they will be granted (if at all) or the terms on which they will be granted. Network Rail is to provide relevant correspondence to the Customer.</p> <p>At paragraph 17 the Customer is to pay the costs incurred in applying for or as a consequence of the grant of a Necessary Consent (unless due to Network Rail's negligence or breach).</p> <p>Paragraph 18 sets out the procedure to apply in respect of a Regulated Change that has not been agreed before the Commencement Date. Network Rail must give the estimated costs related to a Regulated Change and these costs are to be inserted at Schedule 2. There is a limit on what Network Rail can claim for Regulated Change and this is set out in section C of Schedule 2. If the scope and pricing of the Regulated Change is not known at the Commencement Date, the parties will need to agree an appropriate limit or adjustment to the limit. The limit will be based on Network Rail's experience of the likely level of settlements required by rail industry parties.</p> <p>At paragraph 19 Network Rail's obligations to obtain Necessary Consents are conditional on it receiving any relevant documentation and assistance from the Customer.</p> <p>At paragraph 20 Network Rail has no liability in respect of the Necessary Consents (and may extend the Completion Date and Liquidated Damages Payment Date) unless the failure is caused by its negligence or breach of the Agreement.</p>

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	At paragraph 21 the Customer may attend meetings in respect of a Regulated Change and Network Rail is to provide it with relevant correspondence and have due regard to its comments.
22 – (Additional Expenses)	Network Rail owns the Works on their competition. The Customer is to pay the Additional Expense each year where the sum is greater than £50,000 per annum after deductions of sums paid to Network Rail by a third party.
23 to 25 – (Variations)	<p>Paragraph 23 provides that Variations are to be paid for by the Customer unless the Variation is required as a result of a Network Operation issue, any existing Asset Obligation and a Mandatory Variation apply. A Variation is only effective if agreed in writing.</p> <p>At paragraph 24, where Network Rail reasonably considers that a Variation is necessary for a number of listed reasons then Network Rail is entitled to a Variation that is reasonable in the circumstances.</p> <p>At paragraph 25, where Network Rail considers a Variation is necessary under paragraph 24 it shall provide information to the Customer and take account of its comments. In respect of such Variations the Customer may not object to the carrying out of the required Variation but may refer matters concerning its scope, cost and effect to the Escalation Procedure at paragraph 47.</p>
26 – (Compensation and Relief)	<p>This paragraph provides that Network Rail is responsible for the reasonable direct costs of the Customer above £10,000 (to avoid a claims culture) as a result of:</p> <ul style="list-style-type: none"> (a) a delay due to a Network Operation Issue; (b) interference with Works by a contractor from an interfacing project; or (c) a booked possession being cancelled or altered, <p>except where caused by the Customer's breach or negligence.</p>
27 and 28 – (Intellectual Property)	<p>At paragraph 27 Network Rail grants to the Customer an intellectual property licence to use the intellectual property owned by Network Rail. Where Network Rail does not own the rights it will use reasonable endeavours to procure such rights from the owner of the intellectual property for the Customer.</p> <p>At paragraph 28 each party indemnifies the other in respect of the use by it of intellectual property other than for the</p>

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	purposes of the Works.
29 – (Completion)	Once Network Rail has completed the Works in accordance with the Completion Criteria, it will issue a Completion Certificate to the Customer.
30 and 31 - (Payment)	<p>Paragraph 30 provides that the Customer is to pay all reasonably and properly incurred Network Rail Costs.</p> <p>Paragraph 31 sets out the procedure for invoicing the Customer for reimbursement of costs as set out in Schedule 3, for payment by the Customer of invoices and the rights and procedures for the Customer to object to such invoices.</p>
32 to 39 – (Limitation)	<p>Subject to qualifications set out in the Agreement, neither party is liable for any Losses incurred by the other party until the aggregate amount has exceeded £10,000 (to avoid a “claims culture”). Claims can also be made on completion of the Works or termination.</p> <p>Network Rail’s liability to the Customer for any reason relating to the Agreement is limited to the Network Rail Cap. Any sums actually recovered by Network Rail under an insurance policy in respect of the loss suffered by the Customer are payable by Network Rail in addition to the Network Rail Cap if the cap has not already been reached. This limitation does not apply to losses as a result of a liability for death or personal injury from Network Rail’s negligence or breach of statutory duty or in respect of fraud by Network Rail or a Contractor.</p> <p>Compensation to the Customer in the event that Network Rail fails to achieve the Completion Criteria by the Liquidated Damages Payment Date, unless due to the fault of the Customer, is limited to liquidated damages calculated on a daily basis. Any liquidated damages paid count towards the Network Rail Cap. If the parties are unable to agree a figure for the liquidated damages, the clause is to be amended to provide for a cap on damages for delay.</p> <p>The Customer’s liability to Network Rail for any reason relating to the Agreement is limited to the Customer Cap plus any monies recovered from insurers or any contracts. This limitation does not apply to various payment obligations (including the obligation to pay Network Rail Costs), where losses are a result of the Customer’s negligence (except where negligence relates to the carrying out of design) or fraud or to claims for death or personal injury.</p> <p>There is a separate Design Liability Cap which is in addition to the Customer Cap which covers losses incurred by Network Rail as a result of the negligent design by the Customer or any contractor of the Customer.</p> <p>Neither party is liable for any loss of profits or other indirect or consequential loss suffered by the other party.</p>

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40 to 42 - (Force Majeure Event)	<p>Force Majeure Events are set out in the definitions. Both parties are relieved of liability for non-performance of their obligations as a result of a Force Majeure Event so long as they have taken all reasonable steps to prevent and mitigate the consequences and have used reasonable endeavours to comply with their obligations.</p> <p>This paragraph sets out the actions each party is required to take if a Force Majeure Event arises, including obligations to inform the other party and take steps to minimise the effect where possible. Both parties have a reasonable endeavours obligation to modify the Implementation Programme and undertake other modifications to their obligations and terms of Agreement in order to mitigate the effects of the Force Majeure Event.</p>
43 and 44 – (Termination)	<p>At paragraph 43, either party may terminate the Agreement if:</p> <ul style="list-style-type: none"> (a) the other party is in persistent and material breach (provided that, in respect of a remediable breach, it allows the other party twenty Working Days to remedy the breach); or (b) the other party becomes insolvent. <p>At paragraph 44 the Customer may terminate the Agreement if the Works are unlikely to be completed by a specified time or if the costs of the Works have increased by more than 25% (adjusted for any Variation).</p>
45 – (Consequences of Termination)	<p>This paragraph sets out the consequences of termination.</p> <p>The Customer must pay Network Rail Costs up to the date of termination, whatever the cause of the termination. Except where termination is due to Network Rail's fault, the Customer must also pay other costs and expenses reasonably incurred by Network Rail as a result of the termination (including the costs of reinstatement).</p> <p>Certain obligations, such as intellectual property rights and confidentiality, survive termination of the Agreement.</p>
46	<p>This paragraph sets out the rules with which each party agrees to comply to maintain the confidentiality of information arising or being passed between the parties and their representatives. Breach of confidentiality can create a liability.</p>
47 and 48 – (Escalation and Dispute Resolution)	<p>Where a dispute arises it is important that the matter is addressed and resolved quickly. As such a management procedure to escalate such matters is set out. Should this not resolve the dispute, an adjudication process is set out. That adjudication process may also be used (without escalating the matter in accordance with the management procedure) where the dispute involves a construction contract under the Housing Grants, Construction and Regeneration Act 1996.</p>

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49 – (Freedom of Information)	This paragraph refers to certain Information Acts, the right of any person to request the disclosure of information from a party who is a public authority and the conduct of that party in complying with such a request. This paragraph is to be deleted if the Customer is not a public authority under the Information Acts.
50 to 55 – (Miscellaneous)	<p>These paragraphs cover a variety of standard boilerplate terms. These include:</p> <ul style="list-style-type: none"> • neither party has the right to assign or charge its rights or benefits in the Agreement without the prior written permission of the other party (not to be unreasonably withheld or delayed); • the Agreement does not create any right under the Contract (Rights of Third Parties) Act 1999 which is enforceable by any person who is not a party to the Agreement.
Schedule 1 – (Definitions)	This Schedule sets out the defined terms used in the Agreement. Capitalised terms used in these guidance notes are defined in this Agreement.
Schedule 2 – (The Works)	This sets out the details of the Works, Requirements, Estimated Project Cost, Necessary Consents, Implementation Programme, Completion Criteria, Completion Date and Liquidated Damages Payment Date. Note that Network Rail cannot take on system output risk as this is not within its control but only infrastructure assets.
Schedule 3 – (Network Rail Costs)	The components of Network Rail Costs are detailed here.

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