

Design Services Agreement Templates - Customer Explanatory Notes

Section 1 - Explanatory Notes on Design Services Agreement

Clause Heading	Explanation
Background	<p>The Development Services covers activities or services that Network Rail provides during the development stage of the project. The design and development activities may be carried out by Network Rail directly, or by Consultants and Contractors employed by Network Rail. The Services provided may include physical (intrusive) surveys if information is required to achieve the design. The DSA is based on Network Rail undertaking and managing the Services. Where the Customer also intends to undertake design and employ consultants unless such design is very minor, the Asset Protection Agreement should be used.</p> <p>The Agreement provides for reasonable and proper costs (including costs of risks not contracted out, insured or covered through the Industry Risk Fund) to be passed through to the Customer on an emerging cost basis.</p> <p>If funding constraints or other concerns mean that the Customer requires greater certainty over costs, it may be possible to offer fixed price Services or cap the cost of the Services.</p> <p>If the Services are relatively uncomplicated, straight forward to manage, and the procurement of a consultant is not required it may be more appropriate to use the Basic Services Agreement.</p> <p>The DSA is not intended to cover implementation.</p>
Roles and Responsibilities	<p>In carrying out Services on behalf of the Customer and producing Deliverables, Network Rail will have a range of obligations towards the 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. Network Rail will also be liable to the Customer for the acts and omissions of the Consultants and Contractors. It is therefore important that these costs and liabilities are appropriately identified and addressed in the Agreement.</p> <p>In addition to Network Rail's obligations towards its Customer and its Contractors and Consultants, it also has obligations as operator of the Network relating to safety, operational continuity, land rights and other legal/regulatory requirements.</p>

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Clause 1 - Definitions and Interpretation	<p>Capitalised terms used in these guidance notes are defined in the Agreement.</p> <p>This clause includes general provisions as to consents including the acknowledgement that Network Rail retains sole discretion in relation to safety issues.</p>
Clause 2 - Obligations of the Customer	<p>This clause places general obligations on the Customer to comply with the Agreement and to act in such a way as to allow Network Rail to perform its obligations under the Agreement.</p>
Clause 3 - Obligations of Network Rail	<p>Network Rail undertakes to carry out the Services in accordance with Good Industry Practice, legislation, Necessary Consents, Standards, the Remit and the terms of the Agreement. What forms the Remit is set out in Schedule 4 and what the Standards are is set out in the definitions.</p> <p>The clause sets out the roles of the parties under the CDM Regulations, for which Network Rail assumes the role as Designer or CDM Co-ordinator and the Customer is the client.</p> <p>Network Rail may sub-contract its obligations but remains liable for the sub-contractor's performance. If Network Rail intends to sub-contract a material part of the works or services Network Rail is to take account of the Customer's comments on the proposed appointment.</p> <p>Network Rail is responsible for procuring the insurances specified in paragraph 1.5 of Schedule 4 and for managing any necessary arrangements with Interfacing Projects.</p>
Clause 4 – Brief, Remit, Programme and Cost	<p>The Remit is developed between Network Rail and the Customer with a view to achieving the objectives of the Brief.</p> <p>Network Rail and the Customer are to work together to plan the Development Programme and to determine the Estimated Cost. As the Project is developed, it may be necessary to amend the Remit or Development Programme. If Network Rail considers that an amendment is necessary it shall notify the Customer.</p> <p>If Network Rail and the Customer cannot agree an amendment, the Dispute can be referred to the Dispute Resolution Procedure.</p>
Clause 4 – Progress of Services	<p>Network Rail is responsible for progressing the Services having due regards to the Completion Date (which is the date for delivery of the Deliverables and is set out in the Remit) and any key dates set out in the Development Programme.</p>

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Clause 6 – Necessary Consents	<p>Network Rail must apply for those Necessary Consents listed in Schedule 4. It is acknowledged that 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 has no liability in respect of the Necessary Consents unless the failure is caused by its negligence or breach of the Agreement.</p> <p>The Customer is responsible for the Necessary Consents listed as its responsibility in Schedule 4.</p>
Clause 7 – Project Development Meetings and Reporting	<p>Network Rail is responsible for arranging monthly progress meetings, for which it will give the Customer appropriate notice. Timing, location and the agenda will be agreed between the Parties. In addition, Network Rail will provide updates to the Customer – the content, format and timing of which will also be agreed between the Parties.</p> <p>A representative is to be appointed by both the Customer and Network Rail, with full authority to act on its behalf.</p>
Clause 8 – Variation of Services and Completion Date	<p>If a change to the Project is required by the Customer or Network Rail, the party making the request is required to issue a Variation Request. The parties are required to consult with each other and Network Rail will then produce a revised Estimated Cost, proposals to change the Development Programme (if any) and, if relevant, any amendments to the scope of the Services.</p> <p>Where Network Rail reasonably considers that a Variation is necessary for a number of listed reasons then Network Rail is entitled to vary the Brief or the Completion Date. The Customer is not liable to pay any Rail Costs in connection with a Variation required as a consequence of a Relief Event or a Mandatory Variation.</p> <p>In respect of such Variations, the Customer may not object to the carrying out of the required Variation but may challenge the information provided and request that Network Rail amends the Works Requirements to accommodate its reasonable objections. If the parties do not agree the information provided, the Dispute may be referred to the Escalation Procedure.</p>
Clause 9 – Compensation and Relief	<p>This clause sets out the entitlement of the Customer to recover Direct Costs from Network Rail and be relieved from its obligation to pay Network Rail Costs as a result of a Relief Event. The parties are to notify each other of the occurrence of a Relief Event.</p> <p>Relief Events are industry-related events and encompass cancellation/alteration of possessions, interference from Interfacing Projects and the carrying out of Mandatory Variations.</p> <p>The Customer may only make a claim where the Direct Costs incurred and Network Rail Costs that are not payable exceed £10,000 (the threshold is to avoid a "claims culture"). No claim can be made where the Relief Event was caused by the Customer or a contractor appointed by the Customer (other than Network Rail).</p>

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	Where the Relief Event arises from the cancellation or alteration of a Booked Possession occurring as a result of Network Rail's negligence or breach, the Direct Costs paid by Network Rail will count towards the Network Rail Cap.
Clause 10 - Intellectual Property	<p>Network Rail grants to the Customer an intellectual property licence to use and sub-licence for 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>The clause limits the use of such a licence. Network Rail has no liability to a sub-licensee and the Customer indemnifies Network Rail in respect of losses arising from the use of such property by a sub-licensee. Each party indemnifies the other in respect of the use by it of intellectual property other than for the purposes of the Project.</p>
Clause 11 - Completion	Network Rail will notify the Customer when, in its reasonable opinion, it has completed all (or an identifiable part) of the Remit.
Clause 12 - Network Rail Costs	<p>This clause sets out the procedure for invoicing the Customer for reimbursement of costs as set out in Schedule 2, for payment by the Customer of invoices and the rights and procedures for the Customer to object to such invoices. Network Rail is entitled to be paid all Network Rail Costs (as defined in Schedule 2) reasonably and properly incurred.</p> <p>The clause also sets out a mechanism whereby the Customer can agree a fixed or capped cost.</p> <p>If Network Rail has provided a Feasibility Capped Cost Estimate (which is set out in the Agreement), Network Rail will develop the initial Remit and provide a Capped Costs Estimate for completing the Services. Network Rail cannot charge more than the Feasibility Capped Cost Estimate for this initial work.</p> <p>The parties will endeavour to agree the Capped Cost Estimate and if agreed the Customer will only be obliged to pay Network Rail the Network Rail Costs up to the Capped Cost Estimate. The Capped Cost Estimate can be adjusted for a Variation (except for a Variation of the type described in clause 8.3(a) and (b)).</p> <p>If a Capped Cost Estimate is not agreed then the Customer may terminate the Agreement on not less than ten Working Days</p>

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	<p>written notice. If the Customer does not terminate the Agreement then Network Rail is entitled to claim all reasonably and properly incurred Network Rail Costs for carrying out the Services unlimited by the Capped Cost Estimate.</p> <p>In certain circumstances, Network Rail may agree to a fixed cost rather than a capped cost in which case the drafting will need amendment.</p>
Clause 13 - Value Added Tax	This clause sets out the way VAT shall be applied.
Clause 14 - Limitation of Liability	<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 Services 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 under the insurance policies listed in Schedule 4 in respect of loss suffered by the Customer are payable by Network Rail in addition to the Network Rail Cap and contribute 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>If relevant, the Customer acknowledges that external factors may affect the Services, where they involve the preparation or evaluation of a proposed development train timetable.</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 by the Customer) 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.</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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<p>Clause 15 – Force Majeure Events</p>	<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 clause 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> <p>If the Force Majeure Event prevails and no such agreement can be reached within three months of the occurrence of the event, then either party has the right to terminate the Agreement with immediate effect, in which case the provisions of Consequences of Termination (Clause 17) will apply.</p>
<p>Clause 16 - Suspension and Termination</p>	<p>The criteria and procedures governing termination are set out in this clause. As well as the mutual rights to terminate for persistent or material breach and insolvency, the Customer may terminate for any reason by giving two months written notice to Network Rail.</p> <p>The clause also contains the criteria and procedure governing the right of Network Rail to suspend performance of the Services for non-payment.</p> <p>Upon issue or receipt of any termination notice Network Rail will reduce as quickly as possible its expenditure, and bring the Services to a close in an orderly manner.</p>
<p>Clause 17 – Consequences of Termination or Completion</p>	<p>This clause 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.</p> <p>Certain obligations, such as intellectual property rights and confidentiality, survive termination of the Agreement.</p> <p>The Customer is not entitled to compensation or other remedies in connection with the suspension or termination of the Agreement.</p>

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Clause 18 - Confidential Information	This clause 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.
Clause 19 – Escalation Dispute Resolution	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 in Schedule 5. 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.
Clause 20 - Notices	This clause sets out the procedure that needs to be adhered to in order to constitute a validly delivered notice to each party. Non adherence to this procedure may mean rights could be compromised if formal notice is required in order to exercise such rights.
Clause 21 – Freedom of Information	This clause 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 clause is to be deleted if the Customer is not a public authority under the Information Acts.
Clause 22- Miscellaneous	<p>This clause covers 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) provided it may do so without consent if assignment is to its statutory successor; • the Agreement does not constitute a partnership between the parties and that, unless expressly conferred in writing otherwise, neither party has the right to act as an agent for the other; • 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	Details for delivery of notices and representatives.

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Schedule 2	The components of Network Rail Costs are set out.
Schedule 3	This schedule contains details of the Brief, as provided by the Customer.
Schedule 4	This sets out the details of the Remit, including the Services, Deliverables, underlying assumptions, Necessary Consents, details of Insurance Policies and information to be provided by the Customer.
Schedule 5	The Escalation Procedure referred to in Clause 19 is set out here.

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