GUIDE TO TEMPLATE AGREEMENTS FOR UNDERTAKING RAILWAY PROJECTS

Introduction

This guide is intended to assist all parties interested in taking forward projects which will enhance the railway network, consistent with the Office of Rail and Road's (ORR) Policy Framework for Investments. The ORR is the rail industry regulator and as such determines Network Rail's funding framework and the rules governing such funding.

We, Network Rail have established a suite of Template Agreements, approved by the ORR, for the delivery of enhancements funded by third parties.

The purpose of this guide is to:

1. Summarise project governance principles;
2. Summarise risk allocation principles built into the Template Agreements;
3. Describe the individual Template Agreements in general terms, and help explain how to choose which form of Template Agreement to use for the appropriate contractual framework;
4. Set out how railway environment specific risks are managed;
5. Describe service level obligations so that customers know what to expect from us;

Note that parties who enter into contracts with us are referred to in the Template Agreements and in this document as "Customers".

1. Project Governance

Project governance is central to any agreement. To avoid ambiguity or conflict, and to facilitate efficient delivery, the Template Agreements set out:

a. Roles and Responsibilities

The roles, responsibilities and obligations of the parties should be agreed. This enables the risks inherent in the agreement to be allocated to the party best qualified to manage them.

b. Project Requirements (Scope / Cost / Time)

Our joint requirements for the project need to be clearly articulated and understood by both parties. Any specific emphasis placed on these project requirements is suitably defined and recorded in the agreement. The parties' combined requirements will dictate what services we will provide, and the level of resources required to meet the project timescales.

c. Monitoring

The Template Agreements allow monitoring mechanisms to be put in place to check that the parties fulfil their obligations. Understanding how the project is progressing against the project requirements, and any issues arising affecting your business case or other objectives (such as risks to cost, programme or scope), are critical and are managed through the meeting and reporting requirements.

d. Controls

The Template Agreements allow control mechanisms to be put in place to check that the parties fulfil their obligations. Whilst we are the infrastructure manager and asset owner, the business case for the project rests with you. Therefore, decisions which could have a material impact on the business case and/or the project's outputs, or outcomes need to be agreed by us both. Procedures are set out to manage changes and variations effectively and fairly.

e. Risk Allocation

We should both have a clear and common understanding of the risks inherent in the project. The Template Agreements provide the framework for allocating risks to the parties, and the incentive framework for managing and funding such risk allocation. They provide means for redress, where appropriate, if a party fails to fulfil its obligations. Further information on risk is contained in Section 2 (Risk Allocation Principles) and Section 4 (Managing Railway Environment Risks) below. The Template Agreements provide for caps on both parties' level of liabilities.

2. Risk Allocation Principles

The following high-level principles have been used to underpin and determine the financial allocation of risk within the Template Agreements:

- We are not funded to assume liabilities arising from risks related to enhancement projects. The ORR therefore approved the establishment of Risk Funds to enable us to assume liability for our breach or negligence (within Network Rail's liability cap) and "industry risks", i.e. those specific to the railway[1]. You pay fees, approved by the ORR, proportionate to the project cost to us which contribute to the Risk Funds, namely the Network Rail Fee Fund and Industry Risk Fund. This enables us to fund your liabilities under the Template Agreements (see Section 4 and Appendix A below for further details);

- You fund the direct incremental costs of the scheme, including non-Rail Industry Risk, generally on an emerging cost basis, but a fixed price (subject to any agreed assumptions) arrangement may be considered when concluding an Implementation Agreement;

[1] Industry Risks are typically low likelihood/high impact and outside the control of the Customer and as such would be unreasonable for the Customer to bear.

- Where you are responsible for delivery, an Asset Protection Agreement is used and you should transfer design construction risks to your Contractors, or manage those risks yourself where you cannot transfer them;

- Where we are delivering under a Development Services Agreement or an Implementation Agreement, we will assume any risks in the contracts with our own Contractors;

- Your liability for breach and negligence is capped at an appropriate level;

- Our liability for contractual breach and negligence is capped at the level of the value of the Works and/or Services being provided

- Liability for death, personal injury and fraud is uncapped for us both, in accordance with the law;

- We are entitled to charge:

    - Costs reasonably and properly incurred by us (or a fixed amount if an Implementation Agreement (Fixed Price) is used subject to any agreed assumptions);

    - A Network Rail Fee to contribute towards funding normal contractual liabilities;

    - An Industry Risk Fee to contribute towards funding generic rail industry risks; and

    - Additional Expense to be incurred in connection with incremental maintenance and operational costs, etc. arising from the project in excess of £50,000 per annum;

- Liquidated Damages, we will seek to agree an acceptable and deliverable programme with you and have resources and processes in place to manage this programme. However, slippage may still occur, with potential "knock-on" losses to you. Where you can demonstrate at the time the agreement is being negotiated that a genuine loss would result from a delay caused by us. We may agree to include liquidated damages in the agreement. These would reflect a pre-estimate of your loss, agreed by the us both acting reasonably and stated in the Agreement. In the event of a delay to the programme caused by us, then we would pay the agreed amount of liquidated damages to you. Then we would also agree the date from which liquidated damages would be payable and this would normally reflect the date at which you start to incur the loss.

- Relief Events – These are events where you are entitled to relief from costs and liabilities as the risks involved are outside your control. These are risks specific to the rail industry and include operational emergencies and safety critical events as well as changes in law specific to the Railway, directions of competent authorities such as the ORR, cancelled possessions and changes in our Network Licence requirements which affect your project. (See Section 4 for more information).

3. Template Agreements & Explanatory Notes

A brief summary of the purpose of each of the Template Agreements is given below. These Template Agreements set out the obligations of us both in respect of the services provided, and/or works to be delivered, and reflect the principles in the "Investment Framework Consolidated Policy and Guidelines" published by the ORR in October 2010. The ORR has approved these templates and expects us both to use them when engaging in enhancement schemes. These templates are designed for projects generally with a total cost of circa £50 million or less.

We have provided detailed explanatory notes for each agreement along with the Template Agreements, these can be found under Downloads for Third Parties on our website. The rationale for this is to explain the purpose of and link the project governance principles to each clause so that their intent can be more clearly understood by you.

These explanatory notes are designed for you to use at the beginning of the process, when we may not have yet appointed a representative (usually a "Sponsor") to your project. It is not possible to cater for every question or possible situation. However, once appointed, the Sponsor will be able to assist you with any questions relating to your project.

There are 8 templates covering the main types of enhancement projects. These are summarised in the notes below, and a simplified diagram to help you understand the Template Agreement structure and identify the appropriate agreement for the type and phase[2] of a project are shown in Appendix B.

Network Rail delivering services:

i. Basic Services Agreement (BSA) usually less than £5m

This is a simple agreement aimed at quickly putting in place a contractual relationship following an initial approach from you, to cover pre-feasibility works to scope the scheme and develop the business case. Typically, up to the value of £5 million, the tasks it covers can include the provision of asset information to you, attendance at meetings and workshops, and where appropriate for small schemes, review of any initial scoping work undertaken by you. The agreement also permits, within constraints, you or your representative to undertake visual inspection of the network. It will generally be used during PACE Phases A to 1.

ii. Development Services Agreement (DSA)

This agreement covers development and design work undertaken by us on your behalf, potentially including detailed design. The agreement also permits you, or your representative, to undertake surveys and investigations of the network where there is a mix of Network Rail and Contractors providing services for more complex schemes. Such actions would be subject to our usual access requirements and processes. The DSA covers PACE Phases A - 2, recognising that it can be put in place after PACE Phase 1 where a BSA has already been used for the early development Phase.

Network Rail implementing works for low risk projects:

[2] Project Acceleration in a Controlled Environment (PACEPhase).

iii. Basic Implementation Agreement (BIA), Emerging Cost (EC)

A simple emerging cost agreement for minor, straightforward, low risk works up to a typical value of £5 million, where we act as the Construction Manager, on or about the controlled railway infrastructure. The agreement usually covers PACE Phase 3 - 4 inclusive.

iv. Basic Implementation Agreement (BIA), Fixed Price (FP)

This is a simple agreement for minor straightforward low risk works up to a typical value of £5 million, where we act as the Construction Manager, on or about the controlled railway infrastructure. It envisages that our Works Contractor will have provided a tendered fixed price based on the scope and timescales agreed between us both. You pay a fixed price subject to any reasonable assumptions and exclusions. Usually covering PACE Phase 3 - 4 ..

Customer designing and/or delivering the Works:

v. Basic Asset Protection Agreement (BAPA)

A simple agreement for straightforward, low risk Customer-led work on the controlled railway infrastructure, where we facilitate your project through asset protection. The works should present low risks to the network, and so may, for example, take place on secondary routes, with few or no possessions required. Our services will include attendance at meetings, oversight of interfaces on the network and, where they are necessary, booking possessions. The agreement can cover up to PACE Phase 4 but may require variations as the project progresses and the scope is developed through the various PACE Phases. This agreement includes service level obligations so that you can hold us to account. By having service levels in place, when undertaking projects on the railway you know what to expect from us and when to expect it by. More details can be found in Appendix B

vi. Asset Protection Agreement (APA)

An agreement for Customer-led works on the controlled railway infrastructure, where we facilitate your enhancement scheme through asset protection and managing interfaces with our operating, maintenance and renewal obligations. You pay the costs of our services that include engineering safety management approvals, provision of asset information, booking of possessions, applying for consents, as well as attendance at meetings and oversight of interfaces on the network or with other projects. The agreement typically covers up to PACE Phase 4 but may require variations as the project progresses and the scope is developed through the various PACE Phases. This agreement also includes service level obligations, as detailed in the previous paragraph.

Network Rail implementing works:

vii. Implementation Agreement (IA), Emerging Cost

This is an emerging cost agreement with us acting as a Construction Manager. It is designed for use on larger projects, typically with a value in excess of £5 million, or where the project is especially complex. It establishes the commercial terms for enhancement work on or about the controlled railway infrastructure. It allows for detailed design and implementation of the Customer-funded scheme, with the contracting strategy agreed by the parties. The agreement covers PACE Phase 3-4.

viii. Implementation Agreement (IA), Fixed Price (FP) below £10m

This agreement is intended to cover implementation of works up to a value of £10 million. It envisages that our Works Contractor will have provided a tendered fixed price based on the scope and timescales agreed by us both. It establishes the commercial terms for enhancement work on or about the controlled railway infrastructure. You pay a fixed price subject to any reasonable assumptions and exclusions. It can provide for detailed design and implementation of the Customer-funded scheme, usually covering PACE Phase 2 - 4.

4. Managing Railway Environment Risks

We want to actively encourage third-party investment in Britain's railways and to remove barriers to you in doing so.

We are not funded by government to take on liabilities in relation to third-party funded enhancement projects, but to ask funders to accept uncapped liabilities in relation to third-party enhancements would be a significant barrier to investment.

The Template Agreements described above frame the balance of risk and responsibility between us both with our liabilities funded by the Risk Funds described above.

The key benefit of the Risk Funds is to provide a dedicated pooled funding source for certain events within liability caps approved by the ORR. In return you make a proportionate contribution towards the Risk Funds in the form of fees as part of each enhancement project. These are paid as part of the first invoice and are non-refundable.

For each investment proposal we will provide you with a breakdown which sets out the level of the fees and liability caps and how they are calculated.

The ORR expects us to regularly monitor the operation of the Risk Fund mechanism. Incoming funds (your contributions) are tracked against the outgoing funds (substantiated claims) and reported to the ORR at least once a year. We also regularly review with the ORR the risk profile and contribution levels to make sure they remain in balance and offer value for money for you.

i. Network Rail Fee (NRF)

The NRF funds our potential contractual liabilities to you in respect of qualifying events under

our direct control.

All NRFs are pooled to meet substantiated claims for contractual breach and negligence by us.

ii. Industry Risk Fee (IRF)

The IRF funds our potential contractual liabilities to you in respect of qualifying events outside our direct control. Typically, these are the low-probability, high-impact risks specific to rail industry conditions that would not normally occur in a high street environment.

All IRFs are pooled to meet substantiated claims for industry risk events.

The IRF covers two broad categories of risk for you:

1. Risks which are typically regarded as 'employer' or 'government' risks (for example, mandatory changes resulting from a change in the law peculiar to the rail industry, or changes to railway safety standards); and

2. Risks relating to events arising elsewhere on the network which have an impact on the project which results in disruption to the works (for example, a disruption caused by a safety critical event.

We would be liable for costs and losses arising from such risks, where the amounts are more than £10,000[3], and would be funded from the Industry Risk Fund.

iii. Relief Events

The Contractor, whether they are appointed by us or by you, will be reimbursed for the increased costs (excluding indirect costs) reasonably and properly incurred as a result of a Relief Event which causes delay or disruption to a project.

The categories of Relief Event are:

- Network operation issues;
- Cancellation and alteration of possessions due to events outside the control of us or you; and
- The impact of interfacing projects.

All parties, including the Contractor, have the usual duty to mitigate such costs or losses, but Network Rail will be liable for them and will recover any amounts incurred from the Industry Risk Fund.

This assumes in each case that neither of us, you or the Contractor is at fault.

iv. Mandatory Variations

After approval of the works at PACE Phase 2, if the works need to be varied as a result of any change in law or legal requirement expressly applying to the railway industry or the railway works, or as a result of changes to railway safety standards, such costs would fall to us to

[3] The Template Agreements do not permit any claims by either party that are less than £10,000 in aggregate. The ORR required this to avoid a "claims culture".

recover any costs or losses from the Industry Risk Fund.

v. Network, Station or Depot Change

You will need to pay for industry compensation costs associated with any network, station or depot change, or any closure processes. This cost can be uncertain, and an estimate of the value may be made, and a cap agreed. If so, your liability for costs above this limit would be treated as an industry risk.

vi. Land and Noise Claims

These are claims made against us under common law or pursuant to the Land Compensation Act 1973 or any other relevant regulations which relate to the operation or existence of any works which become a Network Rail asset.

These claims are in respect of nuisance and the diminution of property values due to the implementation of the scheme. Whilst this is a Customer risk, where an estimate of the value has been made and a cap agreed, liability for costs above this limit would be treated as an industry risk.

However, it should be noted that land and noise claims made during delivery of the works would not be covered under these provisions as these would have been addressed during any planning consent process and/or the licence to deliver the works.

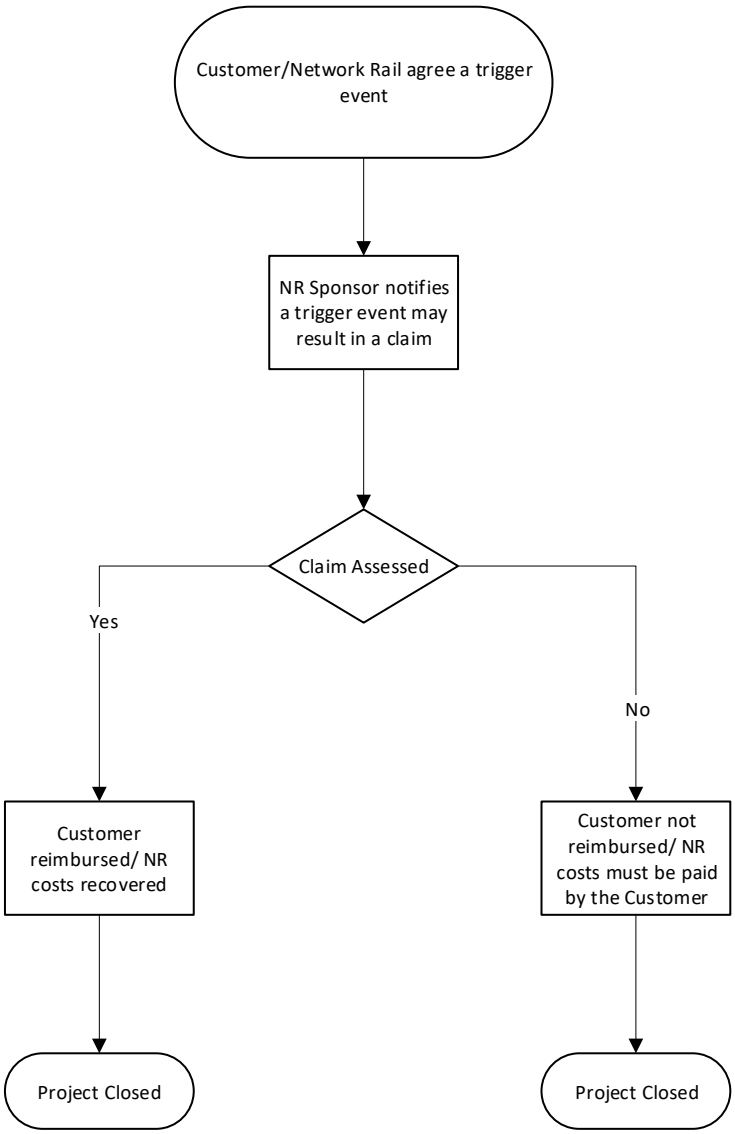
vii. Bankruptcy/Insolvency of the Customer

Irrespective of the diligence applied to assess your creditworthiness and steps taken to obtain surety in the form of guarantees or bonds, there is always a possibility of insolvency or bankruptcy. In this event, particularly where the scheme is under way, the cost of termination or completion may require some additional funding. Given that the you would be unable to pay such costs in full, and that such funding was not part of the original cost forecast, the funding shortfall would be funded through the Industry Risk Fund.

viii. How the Funds are Accessed

The Risk Funds were established to cover the costs of any variations or events for which Network Rail is liable. Should you have a claim, you should lodge it against us and not against the Risk Funds themselves. If a claim is substantiated as valid, and you have incurred costs or losses, it will be reimbursed by us, we will then seek compensation internally from the Risk Funds. If your claim is substantiated as valid, but it relates to an amount invoiced by us and therefore not paid, we will seek compensation internally for the non-payment from the Risk Funds.

Diagram: Risk Funds Claim Process



5. Service Level Obligations

Our service level obligations summarised below apply where you are promoting and funding a project and we are carrying out asset protection activities. The service level obligations reflect what you can expect from us when entering into either a Basic Asset Protection Agreement or an Asset Protection Agreement.

We monitor our performance against these service levels by regularly asking you to complete an online survey and publishing the results on the Network Rail website.

The service level obligations are a contractual commitment that require a strong and ongoing dialogue with you from the inception of a project to handover and completion.

Service level	**Measure of success**	**Our commitment**
Response to initial contact	Within five working days of initial contact	Respond to initial contact in writing within five working days with a relevant contact to support the work
Secondary contact date	Within 15 working days of initial contact	Secondary contact within 15 working days of initial contact. We will engage with you to commence exploration of your requirements at an appropriate level of expertise
Design submission date ASPRO response	Within 25 working days of receipt	Return any design data identified as being on the critical path within 25 working days of receipt
ASPRO final response to programme received	Within 10 working days of receipt of implementation programme or information	Review implementation programme and provide comments to you
Date ASPRO informed customer of possession(s)	Within 20 working days of completion of consultation on proposed possession plan	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

Appendix A

Network Rail Fee and Industry Risk Fee

Type of agreement	Network Rail Fee	Industry Risk Fee
Basic Services Agreement (BSA)	Fee is equal to 0.2% of the aggregate of the agency costs, consultants' and contractors' costs and personnel costs, as estimated at the scheme commencement date.	Not Applicable
Development services agreement	Fee is equal to 0.1% of the aggregate of the agency costs, consultants' and contractors' costs and personnel costs, as estimated at the scheme commencement date.	Fee is equal to 0.2% of the project cost, which is the estimated total cost of the project up to the completion of the current stage of development contracted for.
Basic implementation agreement (emerging cost)	Fee is equal to 0.3% of the aggregate of the agency costs, consultants' and contractors' costs and personnel costs, as estimated at the scheme commencement date.	Fee is equal to 0.4% of the aggregate of the agency costs, consultant's and contractors' costs and personnel costs.
Implementation agreement (emerging cost)	Fee is equal to 5% of the aggregate of the agency costs, consultants' and contractors' costs and personnel costs, as estimated at the scheme commencement date.	Fee is equal to 1.5% of the aggregate of the agency costs, consultant's and contractors' costs and personnel costs.
Basic implementation agreement (fixed price)	Fee is equal to 13% of the aggregate of the agency costs, consultants' and contractors' costs, personnel costs and QRA (risk assessment for any variation undertaken at a P50 probability in respect of the risks owned by Network Rail or capped to the customer), as estimated at the scheme commencement date.	Fee is equal to 2% of the aggregate of the agency costs, consultants' and contractors' costs, personnel costs and QRA (risk assessment for any variation undertaken at a P50 probability in respect of the risks owned by Network Rail or capped to the customer).
Implementation agreement (fixed price)	Fee is equal to 13% of the aggregate of the agency costs, consultants' and contractors' costs, personnel costs and QRA (risk assessment for any variation undertaken at a P50 probability in respect of the risks owned by Network Rail or capped to the customer), as estimated at the scheme commencement date.	Fee is equal to 2% of the aggregate of the agency costs, consultants' and contractors' costs, personnel costs and QRA (risk assessment for any variation undertaken at a P50 probability in respect of the risks owned by Network Rail or capped to the customer).
Basic Asset Protection Agreement	Fee is equal to 2.4% of the aggregate agency costs, contractors' costs and personnel costs, as estimated at the scheme commencement date.	Fee is 0.1% of the total estimated costs of the project up to its completion, including construction costs, contractors' costs, regulated change costs and Network Rail costs.
Asset protection agreement (including basic)	Fee is equal to 7.5% of the aggregate agency costs, contractors' costs and personnel costs, as estimated at the scheme commencement date.	Fee is 0.5% of the total estimated costs of the project up to its completion, including construction costs, contractors' costs, regulated change costs and Network Rail costs.

Appendix B

Choose the Right Template

