

Consultation BAPA Final – table of material amendments against the template (previously revised 2010)

August 2019

Clause	Material drafting amendment	Commentary
General		The majority of the changes to the precedent form of Third Party Basic Asset Protection Agreement have been made by Network Rail (NR) in response to the recommendations in the Hansford Review ¹ (Hansford Review) and these amendments have been agreed with ORR as part of the APA review process. In addition, a number of amendments have been made for consistency with the new and amended definitions, correcting punctuation, capitalised words cross referencing etc.
General		There have been changes across the agreement to ensure consistency when referring to Standards.
General		Interpretation section moved to schedule 1.
Definitions	Addition of new definitions: BAPA Construction Certificate, Construction Completion Criteria, Construction Completion Date and Construction Completion Certificate.	<p>NR typically uses the asset management plan (AMP) process contained within Standard NR/L2/MTC/089 to confirm when certain stages during the construction of the Works have been completed. However, the AMP process does not contain certain requirements, such as compliance with planning consents.</p> <p>To overcome this, the new BAPA Construction Certificate can only be issued by the Customer and countersigned by NR once the AMP requirements for Construction Completion and any project specific criteria (which will be set out in schedule 1) have been satisfied.</p> <p>The Construction Completion Certificate is issued in accordance with the NR AMP process. This new definition has been inserted into the BAPA to clarify to the Customer that there are two</p>

¹ <https://thehansfordreview.co.uk>

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		<p>certificates. One issued under the AMP process which is one of the criteria that need to be satisfied together with the bespoke criteria set out in the BAPA. When both are satisfied a BAPA Construction Certificate is issued under the BAPA.</p> <p>In order to for the Works to be considered complete in accordance with the BAPA, there are four separate stages that each need to be satisfied. These stages are contained within clause 7:</p> <ul style="list-style-type: none"> (a) the issue of the BAPA Construction Certificate and counter signature by Network Rail; (b) the issue of the Taking Over Certificate and counter signature by Network Rail; (c) the issue of the Defects Identification and Completion Certificate and counter signature by Network Rail; and (d) the issue of the BAPA Final Certificate and counter signature by Network Rail. <p>The guidance notes to the BAPA will be updated to include greater detail in relation to the AMP process.</p> <p>The agreement contains consequential amendments to capture this change.</p>
Definitions	Addition of new definitions: BAPA Final Certificate, Final Completion Criteria and Final Certificate.	<p>Once the BAPA Final Certificate has been issued by the Customer and countersigned by NR, it is evidence that the Customer has satisfied all requirements under the BAPA. However, the Final Certificate under the AMP process may not capture everything that NR requires to be satisfied the works have been completed in any regards.</p> <p>Therefore the criteria that need to be satisfied for the BAPA Final Certificate are the AMP requirements for the Final Certificate and any project specific criteria which will be set out in schedule 1.</p> <p>The Final Certificate is issued in accordance with the NR AMP process. This new definition has been inserted into the BAPA to</p>

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		clarify to the Customer that there are two certificates. One issued under the AMP process which is one of the criteria that need to be satisfied together with the bespoke criteria set out in the BAPA. When both are satisfied a BAPA Final Certificate is issued under the BAPA.
Daily Liquidated Damages Sum – Definition	New definition of Daily Liquidated Damages Sum included.	Amendment to the BAPA so information that has to be completed is included within the schedules rather than the front end of the document.
Definitions	Additions of new definitions: Defects Identification and Completion, Defects Identification and Completion Certificate and Defects Identification and Completion Date.	New definitions included to explain to the Customer that the certificates relating to Defects Identification and Completion will be issued in accordance with the AMP process.
Definitions	Addition of new definition of Disputes and Escalation Procedure.	The Escalation Procedure from the APA has been included in the BAPA.
Payment Period – Definition	Amendment to definition.	Amendment requested as part of the phase 1 consultation included.
Definitions	Addition of new definition: Service Level Obligations.	As required by the Hansford Review, the BAPA contains levels of service for NR to comply with and be measured against.
Definitions	Additions of new definitions: Taking Over and Taking Over Certificate.	New definitions included to explain to the Customer that the requirements for Taking Over (when NR will be responsible for the maintenance of the Works) are set out as part of the AMP process.
Clause 2.2(f) (Obligations of the Customer)	Inclusion of clause to allow the Works to be carried out in accordance with an equivalent to the GRIP process.	This clause is to allow the Customer to carry out the Works in accordance with an equivalent to the GRIP process. The standard BAPA referred only to the GRIP process and then only indirectly.

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Clause 2.6 (Obligations of the Customer)	Addition of new clause.	Amendment to ensure that the Customer takes out appropriate insurance and that NR is provided with information in relation to the same.
Clause 3.3 (Obligations of Network Rail)	New clause requiring NR to use reasonable endeavours to meet the Service Level Obligations.	Requirement of the Hansford Review to include service level obligations (SLOs). The SLO's are set out in schedule 5.
Clause 3.7 (Obligations of Network Rail)	New clause requiring NR to provide the Customer with examples of similar derogations to NR Standards that have been adopted.	This was a specific requirement of the Hansford Review and allows the Customer to consider whether any particular derogations previously adopted by NR would be applicable to the relevant Project.
Clause 4.4 (Necessary Consents)	Update to clause.	Amendment to ensure that the Customer cannot double recover.
Clause 7 (Taking Over and Completion)	<p>The key clauses from the APA have been included in the BAPA. In particular:</p> <ul style="list-style-type: none"> • Title to the works is to vest in NR • NR is entitled to inspect the works • The Customer is required to make good damage to the Network • The Customer is to carry out remediation works where the Works fail to comply with the agreement • The Customer is to carry out snagging • The Customer is to maintain the Works until they are taken over by NR • How the BAPA Construction Certificate is issued by the Customer and countersigned by NR • How the Taking Over Certificate is issued by the Customer and countersigned by NR • How the Defects Identification and Completion Certificate is issued by the Customer and countersigned by NR • How the BAPA Final Certificate is issued by the Customer and countersigned by NR 	

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	<ul style="list-style-type: none"> • Confirmation the Customer remains liable for the Works • Confirmation that the Customer is responsible for remedying any defects. 	
Clause 10.2 (Compensation and Relief)	Insertion of new clause.	New clause to clarify that direct costs relating to industry risks will be outside Network Rail's cap.
Clause 13.2 (Limitation of Liability)	Liquidated damages included within the cap.	Clarifying amendment that liquidated damages are also included within the cap, but that insurance proceeds will be outside the cap. All sums recovered under contract will also be paid to the Customer provided that the cap has not been reached prior to the sums being recovered under contract. This mirrors the position in the clause 13.6 relating to the Customer's maximum liability.
Clause 13.5 (Limitation of Liability)	Clause updated to reflect the new defined terms.	The clause has been updated to clarify that Liquidated Damages will become payable if the [Construction Completion Date] has not occurred by the Liquidated Damages Payment Date.
Clause 13.6 (Limitation of Liability)	Clause updated to reflect that insurance proceeds will sit outside the Customer Cap.	The clause has been updated to mirror the updated position in clause 13.2 relating to NR's maximum liability.
Clause 17 (Escalation and Dispute Resolution)	Insertion of new clause and new schedule 4.	The APA Escalation and Dispute Resolution Procedure has been incorporated into the BAPA.
Clause 18 (Anti-bribery and slavery)	Insertion of new clause.	Update in legislation.
Clause 19 (Equality and Diversity)	Insertion of new clause.	Update in legislation.
Clause 20 (Confidential)	Insertion of new clause.	Update in legislation.

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Information and Data Protection)		
Schedule 3 (Network Rail Costs)	Definition of Agency Costs has been updated.	Definition updated to tie in with NR statement to ORR regarding costs.
Schedule 3 (Network Rail Costs)	Definition of Agency Personnel deleted.	Definition deleted as no longer required in definition of Agency Costs.
Schedule 3 (Network Rail Costs)	Definition of Contractors' Costs has been updated.	Definition updated to tie in with NR statement to the ORR regarding costs.
Schedule 3 (Network Rail Costs)	Definition of Expenses and Disbursements has been updated.	Definition updated to clarify the expenses and disbursements that NR is entitled to be paid for.
Schedule 5 (Service Level Obligations)	New schedule containing service level obligations.	The various NR obligations have been incorporated into service level obligations that NR is to comply with. NR has the ability to agree longer SLOs where the size and/or complexity of the project warrant them.