

Dated _____ **20[]**

NETWORK RAIL INFRASTRUCTURE LIMITED

and

[NAME OF CUSTOMER]

DEVELOPMENT SERVICES AGREEMENT

with respect to

[name of project]

Notes:

1. This version of the DSA is not suitable for use where the Customer is carrying out surveys which require access to the Railway, when an asset protection agreement must be used.
2. If it is intended for use for depot development then specific wording is available for insertion.
3. Network Rail reserves the right to request adequate surety following internal credit review.

Contents

| Clause | | Page |
|--------|--|------|
| 1. | DEFINITIONS AND INTERPRETATION | 1 |
| 2. | OBLIGATIONS OF THE CUSTOMER..... | 6 |
| 3. | OBLIGATIONS OF NETWORK RAIL | 6 |
| 4. | BRIEF, REMIT, PROGRAMME AND COST..... | 7 |
| 5. | PROGRESS OF SERVICES | 8 |
| 6. | NECESSARY CONSENTS..... | 8 |
| 7. | PROJECT DEVELOPMENT MEETINGS AND REPORTING | 8 |
| 8. | VARIATION OF SERVICES AND COMPLETION DATE | 9 |
| 9. | COMPENSATION AND RELIEF | 9 |
| 10. | INTELLECTUAL PROPERTY | 10 |
| 11. | COMPLETION | 11 |
| 12. | NETWORK RAIL COSTS | 11 |
| 13. | VALUE ADDED TAX..... | 12 |
| 14. | LIMITATION OF LIABILITY | 12 |
| 15. | FORCE MAJEURE EVENTS..... | 13 |
| 16. | SUSPENSION AND TERMINATION | 14 |
| 17. | CONSEQUENCES OF TERMINATION, OR COMPLETION | 15 |
| 18. | CONFIDENTIAL INFORMATION | 15 |
| 19. | ESCALATION AND DISPUTE RESOLUTION..... | 17 |
| 20. | NOTICES | 17 |
| 21. | FREEDOM OF INFORMATION..... | 17 |
| 22. | MISCELLANEOUS..... | 18 |

THIS DEVELOPMENT SERVICES AGREEMENT is made on

20

BETWEEN:

- (1) **Network Rail Infrastructure Limited** registered in England and Wales under company number 2904587 whose registered office is at 1 Eversholt Street, London NW1 2DN ("**Network Rail**"); and
 - (2) [**Name of customer**] a company registered in [] under company number [] whose registered office is at [] (the "**Customer**")
- (together the "**Parties**", references to "**Party**" shall be construed accordingly).

WHEREAS:

- (A) The Customer's proposals for developing the Project involve the requirement for certain services from [feasibility], [through option selection]¹, development and design to be carried out in relation thereto; and
- (B) Network Rail has agreed to carry out the Services for the Customer on the terms set out below.

NOW IT IS AGREED AS FOLLOWS:

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;

"**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;

"**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;

"**Brief**" means the outline details of the Project and the objectives of the Services as set out in Schedule 3;

"**Capped Cost Estimate**" means the capped estimate of Network Rail Costs as determined in accordance with Clauses 12.5 to 12.7 and set out in Paragraph 2.4 of Schedule 4;²

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

"**Change in Law**" means the application to any Party of any Legal Requirement which did not so previously apply or 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 of a Group Standard or of any amendment thereto, or of a Network Rail Standard or of any amendment thereto, with which Network Rail is obliged to comply;

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

¹ Delete as appropriate

² Capped Cost Estimates are intended to reduce exposure to cost overruns for particular stages of Project development when Customer funding may be similarly capped. This Definition is to be used in conjunction with clauses 8.1, 8.4, 12.1 and 12.5 to 12.10, Schedule 2 definitions ("Industry Risk Fee" and "Network Rail Fee") and Schedule 4 paragraph 1.11

SUBJECT TO CONTRACT

“Completion Date” means the date for delivery of the Deliverables as set out in the Remit;

“Confidential Information” has the meaning given in Clause 18;

“Contract” means any contract entered into by Network Rail with a Contractor for the carrying out of any part of the Services;

“Contractor” means any person providing services to, or carrying out Survey Works on behalf of, Network Rail for the delivery of the Services;

“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 Cost as at the Commencement Date;

“Deliverables” means the documents and/or other items which Network Rail is required to deliver to the Customer as part of the Services, as set out in Schedule 4;

“Design Liability Cap” means an amount equal to ♦³;

“Development Programme” means the programme developed in accordance with Clause 4;

“Direct Costs” means direct costs reasonably incurred in relation to the Project, including, in the case of the Customer, any costs paid by the Customer to contractors appointed by the Customer but excludes any Indirect Loss;

“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;

“Dispute Resolution Procedure” means the procedure referred to in Clause 19

“Escalation Procedure” means the procedure referred to in Schedule 5;

“Estimated Cost” means the estimate of the Network Rail Costs as set out in the Remit, updated from time to time in accordance with this Agreement;

“Feasibility Capped Cost Estimate” means the capped estimate of Network Rail Costs incurred in developing the Remit and providing to the Customer a Capped Costs Estimate for completing the Services as set out in Paragraph 2.3 of Schedule 4;]

“Force Majeure Event” means any of the following events (and any circumstance arising as a direct consequence of any of the following events):

- (a) an act of the public enemy or terrorists or war (declared or undeclared), threat of war, revolution, riot, insurrection, civil commotion, demonstration or sabotage;
- (b) acts of vandalism or accidental damage or destruction of machinery, equipment, track or other infrastructure in areas other than areas of Survey Works;
- (c) natural disasters or phenomena, including extreme weather or environmental conditions (such as lightning, earthquake, hurricane, storm, fire, flood, drought or accumulation of snow or ice);
- (d) nuclear, chemical or biological contamination;
- (e) pressure waves caused by devices travelling at supersonic speeds;
- (f) discovery of fossils, antiquities or unexploded bombs; and/or
- (g) strike or other industrial action other than involving the Customer or Network Rail;

“GRIP” means the Network Rail document entitled Governance for Railway Investment Projects as amended from time to time;

³ In the event that Network Rail will be relying on any designs developed by the Customer, the cap will be agreed by the Parties acting reasonably and taking into account the particulars of the Project – including the design. If Network Rail will not be relying on any designs developed by the Customer, this definition should be deleted and changes made to Clause 14.7 as instructed.

SUBJECT TO CONTRACT

“GRIP 3” means the option selection stage reached following the GRIP process;

“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;

“Group Standards” means Railway Group 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 <http://www.rgsonline.co.uk/>;

“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 to contractors appointed by the Customer in relation to the Project) or any indirect or consequential loss arising out of or in connection with this Agreement;

“Infrastructure Manager” has the meaning set out 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 effect as if for “£750” there were substituted “£10,000”;
- (b) any step being taken by any person with a view to the winding up of such Party or any person presenting a winding-up petition which is not dismissed within five Working Days;
- (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;

“Insurance Policies” means those insurances maintained by Network Rail or the Contractor in relation to the Services as are listed in Paragraph 1.5 of Schedule 4;

“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 3 month LIBOR plus 2% per annum;

“Interfacing Project” means a project in relation to the Network which has an interface with the Project;

“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

SUBJECT TO CONTRACT

- (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 Paragraphs (a) or (b) above to have effect in a way which is different to that in which it previously had effect;

"Losses" means any costs, claims, damages, demands, losses, expenses or liabilities incurred by the relevant person but excluding any Indirect Loss;

"Mandatory Variation" means any Variation necessitated by:

- (a) any Specific Change in Law; and/or
(b) any Change in Standards for safety reasons;

in each case after the date on which the Services achieve GRIP 3 (and which is not reasonably foreseeable as at such date);

"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 Project;

"Network" means the railway facilities of which Network Rail or another party is the facility owner (as defined in section 17(6) of the Act);

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

"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 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) included in the Estimated Cost as at the Commencement Date;

"Network Rail Consents" means those consents to be granted by Network Rail in relation to the Project, including those consents set out in the Remit;

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

"Network Rail Standard" means a standards document (or the equivalent of such document) issued by Network Rail from time to time in relation to the Network as a whole which applies to the performance of the Services under this Agreement as published on the website <http://www.uk.ihc.com/>;

"ORR" means the Office of Rail and Road;

"Payment Period" means the period of up to 28 days (to be notified by Network Rail) commencing on the Commencement Date and each period of 28 days thereafter (provided that the length of the first and last such period in any Network Rail financial year may be varied by up to 7 days on reasonable prior notice from Network Rail to the Customer);

"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);

"Project" means [include brief description];

"QRA" means the quantified assessment of risks and assumptions associated with the Project produced by Network Rail;

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

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

SUBJECT TO CONTRACT

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

“Representative” means the person appointed by each Party to manage the delivery of services under this Agreement;

“Relief Event” means an event where:

- (a) any booked possession for Survey Works is cancelled or altered (including as a result of any default by any train operator but excluding as a result of any default by the Customer); or
- (b) any contractor from an Interfacing Project interferes with, hinders or obstructs a Contractor from carrying out Survey Works in accordance with the Development Programme; or
- (c) a Mandatory Variation is being implemented;

“Remit” means the scope of the Services to be provided by Network Rail and includes details of the Deliverables, Necessary Consents and Interfacing Projects as initially set out in Schedule 4 and as developed, updated and amended in accordance with the provisions of this Agreement;

“Services” means the services to be performed and Deliverables to be produced and Survey Works to be carried out by Network Rail as set out as part of the Remit;

“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 Services or services of a similar type but not to services in general;

“Standards” means Group Standards and Network Rail Standards;

“Station Access Conditions” means the National Station Access Conditions 1996 (England and Wales) together with the station specific annexes applicable to the relevant stations the subject of the Project;

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

“Survey Works” means any survey (intrusive or non-intrusive), inspection, examination or testing of the Network in respect of this Agreement;

“Variation” means any material change to the Brief or the Completion Date which is not the result of the normal process of developing the scope and detail of the Project; and

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

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;

SUBJECT TO CONTRACT

- (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 an 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 or agreement shall be construed such that such consent, approval or agreements shall not be unreasonably delayed or withheld. The Parties acknowledge that:
- (a) the withholding or delaying of the giving of consent, approval or agreement by the Customer under this Agreement which would place Network Rail in breach of the law, the Network Licence or any Standard or any contract would be unreasonable;
 - (b) nothing in this Agreement shall require Network Rail to give or procure the giving of any consent or approval 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 comply with its obligations under this Agreement including carrying out actions or providing the Brief and information identified as necessary in the Development Programme to enable Network Rail progress the Services, together with any additional information reasonably requested from time to time by Network Rail.
- 2.3 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.

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

- (c) Necessary Consents; and
 - (d) the Remit and the terms of this Agreement.
- 3.3 For the purposes of the CDM Regulations:
- (a) the [Customer/Network Rail]⁴ will act as the “**only client**”; and
 - (b) if in providing the Services, Network Rail assumes any role as “**designer**” or “**Principal Designer**”, Network Rail shall comply with its duties as “**designer**” or “**Principal Designer**” respectively.
- 3.4 For the purposes of the CSM-REA Regulations, Network Rail will act as the Proposer as defined and in accordance with the CSM-REA Regulations.⁵
- 3.5 For the purposes of the Railway Interoperability Regulations, Network Rail will act the Project Entity as defined in and in accordance with the Railway Interoperability Regulations.⁶
- 3.6 Network Rail may subcontract all or part of its obligations under this Agreement. Notwithstanding the appointment of any Contractor Network Rail shall remain liable for the performance of its obligations. Network Rail shall notify the Customer of any proposal to appoint a Contractor to carry out any material design services and where practicable shall give the Customer a reasonable opportunity to comment on the proposal and shall have due regard to the Customer’s comments. Where Network Rail appoints a Contractor Network Rail shall:
- (a) comply with the Utilities Contracts Regulations 2016; and
 - (b) appoint Contractors who in the reasonable opinion of Network Rail have the necessary competence and experience.
- 3.7 Network Rail shall procure that the insurances set out in Paragraph 1.5 of Schedule 4 are taken out and maintained.
- 3.8 As the Project progresses Network Rail shall identify and manage arrangements between the Services and any Interfacing Projects in the interests of economic and efficient Network management and operation, and in accordance with the Network Licence.
- 4. BRIEF, REMIT, PROGRAMME AND COST**
- 4.1 Network Rail shall develop the Remit in consultation with the Customer with a view to achieving the objectives set out in the Brief, including identifying the scope of the Services, the Deliverables, the underlying assumptions, any Necessary Consents required and any Interfacing Projects.
- 4.2 The Parties shall co-operate in the planning of a Development Programme and determining the Estimated Cost. The Development Programme shall set out, in such detail as is reasonably practicable the estimated programme for:
- (a) carrying out the Services;
 - (b) GRIP stage gate reviews for feasibility, design optioneering and single option design development;
 - (c) obtaining the Necessary Consents; and
 - (d) any actions or information required from the Customer.

⁴ Delete as appropriate. In most circumstances the Customer will be the only client, however where Network Rail is undertaking the majority of design activities it may be appropriate for Network Rail to assume some or all of the Client duties.

⁵ If the CSM-REA Regulations are not applicable, replace the text with “Not used”. In the minority of cases where the Customer is the Proposer, delete “Network Rail” and replace with “the Customer” in this sentence.

⁶ If the Railway Interoperability Regulations are not applicable, replace the text with “Not used”. In the minority of cases where the Customer is the Project Entity, delete “Network Rail” and replace with “the Customer” in this sentence.

SUBJECT TO CONTRACT

4.3 The Parties acknowledge that the need for change to the Remit or the Development Programme may become apparent in the course of developing the Project through the GRIP stages and, as a result, Network Rail shall, from time to time, review the Remit, the Development Programme and the Estimated Cost and Network Rail shall notify the Customer of any changes which Network Rail considers may be needed to fulfil the objectives set out in the Brief.

4.4 If at any time the Parties are unable to agree a change to the Remit, the Development Programme or the Estimated Cost, either Party may refer the Dispute to the Dispute Resolution Procedure.

5. PROGRESS OF SERVICES

5.1 Network Rail shall progress the Services with due diligence having due regard to the Completion Date and any other key dates for performance of the Services set out in the Development Programme (as amended from time to time with the consent of the Customer or in accordance with this Agreement).

6. NECESSARY CONSENTS

6.1 Network Rail shall make applications for, and use reasonable endeavours to obtain, those Necessary Consents specified in Paragraph 1.4 (a) of Schedule 4 as revised in accordance with Clause 8.

6.2 Network Rail shall have no liability to the Customer under this Agreement as a result of:

- (a) any Necessary Consent not being granted; or
- (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 breach of this Agreement by Network Rail and in which case Network Rail will be liable for the Direct Costs incurred by the Customer.

6.3 Network Rail shall be obliged to appeal against any decision in respect of Regulated Change if reasonably requested to do so by the Customer and at the cost of the Customer.

6.4 The Customer is responsible for applying for, and using reasonable endeavours to obtain, the Necessary Consents listed in the Remit (which shall, for the avoidance of doubt, exclude the Necessary Consents referred to in Clause 6.1) in a format agreed between the Parties and in line with the requirements of the Development Programme.

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

7. PROJECT DEVELOPMENT MEETINGS AND REPORTING

7.1 Network Rail shall arrange project development meetings at monthly intervals (or more often if required), at which appropriate personnel of Network Rail and the Customer shall be present, to discuss the progress of the Services. Network Rail shall give appropriate notice of and agree the timing, location and agenda with the Customer for all such meetings.

7.2 Each Party shall appoint a Representative with full authority to act on its behalf in connection with this Agreement (the initial Representatives being identified in Schedule 1). Any restriction placed by either Party on its Representative's authority must be notified to the other Party in writing in order to be effective. The Representatives may delegate their authority by notice in writing specifying the identity of the delegate and specifying the authority so delegated.

7.3 Network Rail shall, in a format and at intervals to be agreed with the Customer:

- (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;
- (c) report on any changes to the Remit, Development Programme and Estimated Cost, which it considers may be needed to fulfil the objectives set out in the Brief;
- (d) update the list of Interfacing Projects; and

SUBJECT TO CONTRACT

- (e) use reasonable endeavours to provide other information reasonably requested by the Customer.
- 7.4 Network Rail shall have due regard to any comments or representations made by the Customer in connection with any reports or at any meetings, and shall provide reasons to the Customer where it does not take into account any such comments or representations.

8. VARIATION OF SERVICES AND COMPLETION DATE

- 8.1 Either Party may request from the other Party a Variation (a "**Variation Request**"). Following any such request, Network Rail shall consult with the Customer and shall provide to the Customer within a reasonable time and to a reasonable level of detail (to the extent applicable):

- (a) a revised Estimated Cost [and a revised Capped Cost Estimate];
- (b) reasoned proposals to change the Development Programme and the Completion Date (if any); and
- (c) in the case of a Variation of the Services, the scope of the Services as so varied and any appropriate revision to the terms of this Agreement, including details of any addition, omission or amendment to the Deliverables which will be produced by Network Rail.

- 8.2 Subject to Clause 8.3, the Customer shall be responsible for the costs of all Variations. No Variation shall be effective unless agreed in writing by the Parties.

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

- (a) as a consequence of a Relief Event; or
- (b) to address, alleviate or comply with (as appropriate) a Mandatory Variation; or
- (c) to address the results of Survey Works; or
- (d) to address, alleviate or comply with (as appropriate) any Change in Law or Change in Standards (excluding Mandatory Variations); or
- (e) to address changes to the underlying assumptions set out in the Remit; or
- (f) as a consequence of the crystallisation of a risk which is identified in the QRA;

Network Rail shall be entitled to implement a Variation to the extent that is reasonable in the circumstances and subject to Clause 9, the Customer shall not be liable for any Network Rail Costs in connection with a Variation of the type described in Clause 8.3(a) and (b).

- 8.4 Where Network Rail considers a Variation is necessary under Clause 8.3, it shall submit a Variation Request to the Customer and provide the information pursuant to Clause 8.1. The Customer may not object to the proposed Variation itself, but may challenge the information provided under Clause 8.1 and any issues arising from such information. For the avoidance of doubt the Customer may request that Network Rail amend the Variation or the Services to accommodate any objections raised by the Customer and/or to stay within the previous [Capped Cost Estimate or] Estimated Cost. If the Parties do not agree the information provided under Clause 8.1, the Dispute shall be referred for resolution in accordance with Clause 19.

9. COMPENSATION AND RELIEF

- 9.1 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 Development Programme; and
- (b) relieved from its obligation to pay additional Network Rail Costs incurred to the extent caused by a Relief Event.

- 9.2 Network Rail shall notify the Customer of any Relief Event as soon as reasonably practicable and shall provide a revised Development Programme under Clause 4 (if appropriate). The Customer shall notify Network Rail of any Relief Event within a reasonable period of time of

SUBJECT TO CONTRACT

becoming aware of the same and provide reasonable details of the relief required under this Clause 9. In respect of each Relief Event the Parties shall seek to agree the Direct Costs and the additional Network Rail Costs which will not be payable in accordance with Clause 9.4 together with any revisions to the Development Programme (including any changes to the Completion Date), taking into account the likely effect of delay in the progress of the Services.

- 9.3 Promptly following the agreement (or determination in accordance with Clause 19) 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 Development 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 19), 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.
- 9.4 In calculating the additional Direct Costs payable or the 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 Completion 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 14.2 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 payment of 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 the cost of the consequential effects of the Relief Event on the Project.
- 9.5 Save as set out in this Clause 9, neither Party shall have any other right or remedy whether under or in connection with this Agreement against the other for any Relief Event.

10. INTELLECTUAL PROPERTY

- 10.1 Network Rail hereby grants to the Customer, to use for the purposes of the Project, an irrevocable, royalty-free and non-exclusive licence to use, reproduce, modify and/or enhance any such Intellectual Property owned by Network Rail.
- 10.2 The licence referred to in Clause 10.1 shall include the right for the Customer to grant sub-licences for any of the purposes set out in Clause 10.1, provided that:
- (a) the sub-licensee shall be prohibited from entering into any assignment or further sub-licence; and
 - (b) any such sub-licence shall impose confidentiality obligations upon the sub-licensee which are no less onerous than the confidentiality obligations upon the Customer under this Agreement.
- 10.3 Where Network Rail does not own rights in any relevant Intellectual Property, it shall use reasonable endeavours to procure such rights in the Intellectual Property for the Customer.
- 10.4 The Customer shall not use the documentation and information provided to it by Network Rail under the Agreement other than for the purpose for which it was provided. If the Customer provides any document produced by Network Rail or any Contractor to a third party, Network Rail shall have no liability to such third party in respect of the use of such document for any purpose other than that for which it was produced and the Customer shall obtain prior written acknowledgement from the third party to this effect.
- 10.5 Network Rail shall have no liability whatsoever in respect of the use by the sub-licensee of any Intellectual Property provided by Network Rail to the Customer, and the Customer shall

SUBJECT TO CONTRACT

indemnify Network Rail from and against any and all Losses arising from the use by any sub-licensee of any Intellectual Property.

- 10.6 The Customer shall indemnify Network Rail from and against any and all Losses arising from the use by the Customer of any Intellectual Property other than for the purposes of the Project. Network Rail shall indemnify the Customer from and against any and all Losses arising from the use by Network Rail of any Intellectual Property other than for the purposes of the Project.

11. COMPLETION

- 11.1 When in its reasonable opinion Network Rail has completed such Services or Deliverables as constitute all or an identifiable part of the Remit, it shall notify the Customer.

12. NETWORK RAIL COSTS

- 12.1 [Subject to Clause 12.7,]⁷ 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 12 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.
- 12.2 Within ten (10) Working Days after the end of each Payment Period throughout the carrying out of the 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 12.3, 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 (the “**due date for payment**”).
- 12.3 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 12.2. 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 12.2.
- 12.4 Should any invoice not be paid by the due date for payment in accordance with Clause 12.2 (except in respect of any amount determined not to be payable pursuant to Clause 19), 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.
- 12.5 [Where Network Rail has provided a Feasibility Capped Costs Estimate, the Customer shall pay Network Rail the Network Rail Costs incurred in developing the initial Remit and providing to the Customer a Capped Cost Estimate for completing the Services, up to the Feasibility Capped Cost Estimate.
- 12.6 The Customer shall advise Network Rail in writing within twenty (20) Working Days of receipt whether it agrees the Capped Cost Estimate. If the Customer does not agree the Capped Cost Estimate then Network Rail shall produce a revised Capped Cost Estimate and the Parties shall endeavour to agree the revised Capped Cost Estimate (which may for the avoidance of doubt include amending the Remit).
- 12.7 If the Capped Costs Estimate is agreed in accordance with Clause 12.6, Network Rail will provide the Services and the Customer will pay the Network Rail Costs as incurred by Network Rail up to the Capped Costs Estimate.
- 12.8 Network Rail shall be entitled to adjust the Capped Costs Estimate as a consequence of a Variation except for a Variation of the type described in Clause 8.3(a) and (b).
- 12.9 If the revised Capped Cost Estimate is not agreed in accordance with Clause 12.6 then the Customer may, by not less than ten (10) Working Days written notice to Network Rail, terminate this Agreement provided such written notice of termination is given within twenty

⁷ Applies where Clauses 12.5-12.11 are included.

SUBJECT TO CONTRACT

(20) Working Days of issue by Network Rail of the revised Capped Cost Estimate pursuant to clause 12.6.

- 12.10 If the Customer does not terminate this Agreement pursuant to Clause 12.9 then Network Rail shall be entitled to claim all reasonably and properly incurred Network Rail Costs, for the provision of the Services unlimited by the Capped Costs Estimate. The Customer shall be entitled to request Network Rail at any time to provide a Capped Costs Estimate and, where it is practical to do so, Network Rail shall do so.
- 12.11 If the Project progresses beyond the stage agreed in the Capped Cost Estimate the Customer shall pay any Network Rail Costs reasonably and properly incurred in relation to all Services and Deliverables provided thereafter together with any Network Rail Costs reasonably and properly incurred in excess of the Feasibility Capped Costs Estimate and the Capped Costs Estimate.]⁸

13. VALUE ADDED TAX

- 13.1 Unless stated otherwise, all amounts referred to in this Agreement shall be deemed to be exclusive of VAT.
- 13.2 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.
- 13.3 Where under this Agreement one Party has agreed to reimburse or indemnify the other Party 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 Party 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.
- 13.4 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.

14. LIMITATION OF LIABILITY

- 14.1 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 or completion of the Services or termination of this Agreement); or
 - (b) the Losses are incurred as a result of, or sums are unpaid under, Clauses 12, 13 or 17.2.
- 14.2 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 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 an Insurance Policy, 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 such an Insurance Policy and paid to the Customer shall contribute to the Network Rail Cap insofar as the Network Rail cap has not already been

⁸ Clauses 12.5 to 12.11 to be included where Network Rail has agreed to offer Capped Cost Estimates. In certain circumstances Network Rail may agree to a fixed cost for the provision of Services rather than a Capped Cost.

SUBJECT TO CONTRACT

reached. 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).

- 14.3 Clause 14.2 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) the fraud or fraudulent misrepresentation of Network Rail or the Contractor.
- 14.4 Any Losses suffered by either Party shall for the purposes of Clause 14.1 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.
- 14.5 The Customer agrees and acknowledges that where the Services involve Network Rail preparing or evaluating any proposed development train timetable, the operability of any such development train timetable will be subject to external factors (including evolving development, network capacity and access rights under the Network Code) and can only be modelled against the assumptions made at the relevant stage of development.
- 14.6 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 an insurance policy (including any insurance maintained by a contractor employed by the Customer) or 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 an insurance policy or any contract and paid to Network Rail shall contribute to the Customer Cap insofar as the Customer Cap has not already been reached. 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).
- 14.7 Clause 14.6 shall not apply to:
- (a) the Customer's payment obligations under Clauses 8, 10.6, 12, 13, 17.2 or Schedule 2;
 - (b) any Losses incurred by Network Rail due to the negligence (except to the extent that such negligence relates to the carrying out of any design by the Customer or any contractor appointed by the Customer⁹), fraud or fraudulent misrepresentation of the Customer or of any contractor appointed by the Customer (other than Network Rail); and/or
 - (c) any Losses incurred by Network Rail due to negligence in relation to the carrying out of any design by the Customer or any contractor appointed by the Customer which Losses shall instead not exceed an amount equal to the Design Liability Cap; and/or
 - (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.
- 14.8 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).

15. FORCE MAJEURE EVENTS

- 15.1 Subject to Clauses 15.2 and 15.3, each Party shall be relieved from liability for non-performance of its obligations under this Agreement (other than any obligation to make

⁹ If Network Rail is not relying on any designs developed by the Customer, please delete: (1) the wording in brackets in 14.7(b) only (not the whole clause) and (2) clause 14.7(c) in its entirety.

SUBJECT TO CONTRACT

payment) to the extent that it is not able to perform such obligations by reason of a Force Majeure Event.

- 15.2 Each Party shall at all times following the occurrence of a Force Majeure Event:
- (a) take 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 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 15.2(a).
- 15.3 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 give sufficient details to identify the particular event claimed to be a Force Majeure Event and shall contain such relevant information relating to the failure to perform (or delay in performing) 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 15.2(a) and an estimate of the period of time required to overcome the effects of the Force Majeure Event. 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 and provide an update on the estimate of the period of time required to overcome its effects.
- 15.4 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).
- 15.5 As soon as practicable following the notification described in Clause 15.3, the Parties shall use reasonable endeavours to agree appropriate terms or modifications to the Development Programme to mitigate the effects of the Force Majeure Event and to facilitate the continued performance of this Agreement.
- 15.6 If no such terms or modifications are agreed on or before the date falling three (3) months after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its effects remain, then either Party may terminate this Agreement with immediate effect by written notice to the other Party. Upon termination the provisions of Clause 17 shall apply.

16. SUSPENSION AND TERMINATION

- 16.1 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 12.3 Network Rail may suspend performance of any or all of the affected 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.
- 16.2 Either Party may by written notice terminate this Agreement with immediate effect if:
- (a) the other Party commits any persistent or material breach of this Agreement (which shall include any failure to pay an amount of at least £10,000 which is due to the other Party) and, in the case of a breach which is capable of remedy, fails to remedy that breach within ten (10) Working Days (or such longer period as the terminating Party may specify) after receipt of a written notice giving full particulars of the breach and requiring it to be remedied; or
 - (b) the other Party becomes Insolvent.
- 16.3 The Customer may in any event terminate this Agreement by giving two (2) months written notice to Network Rail.
- 16.4 Upon issue or receipt of any notice of termination, Network Rail shall:
- (a) reduce the expenditure under this Agreement as rapidly as possible;

SUBJECT TO CONTRACT

- (b) take immediate steps to bring an end to the performance of the Services in an orderly manner; and
- (c) pass to the Customer a complete set of any documents, manuals or other information which the Customer may require in connection with the Project and which at the time of termination are in the possession or under the control of Network Rail.

17. CONSEQUENCES OF TERMINATION, OR COMPLETION

17.1 Upon termination of this Agreement or completion of the Services, as applicable, the obligations of the Parties under this Agreement 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 10, 12, 13, 17.2, 18, 19, and 21 which shall survive the termination or expiry of this Agreement and continue in full force and effect along with any other Clauses of or Schedules to this Agreement which are necessary to give effect to them.

17.2 If this Agreement is terminated for any reason prior to the completion of the Services, the Customer shall pay:

- (a) the Network Rail Costs up to the date of termination; and
- (b) except where termination is due to Network Rail's negligence or Network Rail's breach or Network Rail's insolvency under Clause 16.2(b) or a Force Majeure Event under Clause 15.6;
 - (i) an amount equal to the costs reasonably and properly incurred by Network Rail as a result of or in connection with such termination (including any amounts payable to the Contractor consequent upon termination of the relevant Contracts); 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) as it would have been in if the payment had not been a taxable receipt in Network Rail's hands.

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

17.4 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.

18. CONFIDENTIAL INFORMATION

18.1 "**Confidential Information**" means in relation to any Party (the "**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; or
- (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;

18.2 Subject to Clauses 18.1 and 18.3, the Parties shall:

SUBJECT TO CONTRACT

- (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.
- 18.3 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, agent, officer, sub-contractor (of any tier) 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 19;
 - (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.
- 18.4 Where disclosure is permitted under Clause 18.3(a), 18.3(c) or 18.3(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.
- 18.5 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; or
 - (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 18 shall remain in full force and effect in relation to such Confidential Information notwithstanding the termination of this Agreement.
- 18.6 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.

19. ESCALATION AND DISPUTE RESOLUTION

- 19.1 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 5 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. 649 of 1998 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 TECBAR.
- 19.2 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.
- 19.3 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 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.
- 19.4 In the event that any dispute or difference of any kind whatsoever shall arise between:
- (a) Network Rail and any Contractor; or
 - (b) between the Customer and any contractor appointed by the Customer in relation to the Project

which is substantially the same or connected with issues in any Dispute 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.

20. NOTICES

- 20.1 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 20 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.
- 20.2 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 20 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.
- 20.3 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 20.

21. FREEDOM OF INFORMATION

- 21.1 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 Department for Environment, Food and Rural Affairs in relation to such legislation

SUBJECT TO CONTRACT

(the “**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 21.1(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 Services or disclosed in tendering for, the negotiation of, or pursuant to this Agreement (“**Project Information**”).

21.2 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 other Party shall provide reasonable assistance and co-operation to the Public Authority to enable the Public Authority to comply with such request; and
- (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 relevant Party that such Confidential Information is exempt information.

22. MISCELLANEOUS

- 22.1 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.
- 22.2 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.
- 22.3 In the event of any conflict between the Network Code and/or Station Access Conditions and this Agreement the provisions of the Network Code and/or Station Access Conditions (as appropriate) will apply.
- 22.4 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.
- 22.5 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.
- 22.6 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.
- 22.7 This Agreement may be executed in two counterparts which, taken together, shall constitute one and the same document.

SUBJECT TO CONTRACT

- 22.8 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.
- 22.9 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.
- 22.10 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.
- 22.11 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.
- 22.12 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 on behalf of [])
)

SIGNED by)
 duly authorised on behalf of Network Rail)
 Infrastructure Limited)

Schedule 1

Contact Particulars and Representatives

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

Network Rail Infrastructure Limited
1 Eversholt Street
London
NW1 2DN

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]
[]
Tel: []

Network Rail's Representative is: []

[]
Tel: []
Email: []

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

[Name and address of Customer]
Tel: []
Email: []

All written notices to be marked:

"URGENT: ATTENTION [name]"

and copied to:

[]
[]
Tel: []
Email: []

The Customer's Representative is: []

[]
Tel: []
Email: []

Schedule 2

Network Rail Costs

1. DEFINITIONS

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

“Agency Costs” means the cost, multiplied by 1.5, 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 costs to Network Rail of any Contractors engaged by Network Rail in connection with the observance and performance of its obligations in relation to the Services, plus the properly incurred expenses and disbursements of those Contractors;

“Expenses and Disbursements” means the costs, expenses and disbursements incurred by Network Rail in relation to the Services, in connection with:

- (a) printing, reproduction and purchase of documents, drawings, office consumables, maps and records;
- (b) travelling expenses in accordance with Network Rail's policies;
- (c) all technical, commercial and professional fees, costs and disbursements excluding Contractors' Costs and Agency Costs;
- (d) 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 Project (including this Agreement);
- (e) insurance costs (including the cost of additional insurance taken out at the request of the Customer in accordance with Clause 3.7);
- (f) any other disbursements or expenses reasonably and properly incurred by Network Rail in connection with the Services (other than for Necessary Consent Costs). The Customer's prior written approval must be obtained for any such disbursements or expenses over £5,000; and
- (g) of any goods, services, materials or other items issued by or on behalf of Network Rail to the Contractor at no cost to the Contractor.

“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 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 1% of the aggregate of the Agency Costs, Contractors' Costs and Personnel Costs as set out in the [Estimated Cost] [Capped Cost Estimate] agreed in the Remit (as revised in accordance with Clause 8, other than a Variation of the type described in Clause 8.3(a) and (b));

“Necessary Consents Costs” means the costs incurred by Network Rail in connection with any Necessary Consent for the Project;

“Network Rail Costs” means Agency Costs, Contractor Costs, Expenses and Disbursements, Fee, Necessary Consents Costs, Personnel Costs and Possessions-Related Costs to the extent they arise from or are a consequence of the performance of the Services and Deliverables as set out in the Remit;

“Network Rail Fee” means an amount equal to 1% of the aggregate of the Agency Costs, Contractors' Costs, and Personnel Costs as set out in the [Estimated Cost] [Capped Cost

SUBJECT TO CONTRACT

Estimate] agreed in the Remit (as revised in accordance with Clause 8, other than a Variation of the type described in Clause 8.3(a) and (b));

“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; and

“Possessions-Related Costs” means sums Network Rail will be obliged to pay to any train operator pursuant to the relevant Access Agreement (Schedules 4 and/or 8 or equivalent provision) of in relation to Survey Works.

2. HOURLY RATES¹⁰

| Banding | Hourly Rate |
|---------|-------------|
| 1 | £185.62 |
| 2 | £129.93 |
| 3 | £97.96 |
| 4 | £84.55 |
| 5 | £69.09 |
| 6 | £68.06 |
| 7 | £62.90 |
| 8 | £56.72 |

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.

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

- 4.1 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. TERMS OF PAYMENT

- 5.1 The terms of payment are as set out in Clause 12.1 and Clause 12.2 of this agreement except that the Network Rail Fee and Industry Risk Fee of amounts set out in paragraph 2.1 of Schedule 4 will be added to the first invoice.

¹⁰ Rates apply from 1 April 2021

Schedule 3

Brief

[Customer to provide]

Schedule 4**Remit****1 NETWORK RAIL REMIT**

To include:

1.1 Services

- (a) design
- (b) role of Infrastructure Manager
- (c) derogation from standards (if appropriate)
- (d) Survey Works
- (e) other services

1.2 Deliverables

- (a) Relevant GRIP stage reports
- (b) Estimated costs of implementation

1.3 Underlying assumptions**1.4 Necessary Consents required:**

- (a) to be obtained by Network Rail
- (b) to be obtained by Customer

1.5 Details of Insurance Policies**1.6 Information to be provided by the Customer****1.7 [QRA if and when available]****2 SCHEDULES TO REMIT****2.1 Estimated Cost¹¹**

| <i>Item</i> | <i>Amount</i> |
|----------------------------|---------------|
| Agency Costs | |
| Contractors' Costs | |
| Expenses and Disbursements | |
| Necessary Consents Costs | |
| Personnel Costs | |
| Possession-Related Costs | |
| QRA | |
| <i>Sub-total (A)</i> | |
| Contingency | |
| <i>Sub-total (B)</i> | |
| Network Rail Fee | |
| Industry Risk Fee | |
| Total | |

2.2 Development Programme**2.3 [Feasibility Capped Costs Estimate]****2.4 [Capped Costs Estimate]**

¹¹ State costs which are not applicable as £0.

Schedule 5

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 5;

“**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 5;

“**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 (the “**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 (the “**Response Notice**”).

- 2.4 The Response Notice shall:

- (a) state the actions and programme to resolve the matter raised in the Initial Notice; or
- (b) confirm attendance at the meeting referred to in the Initial Notice; and
- (c) 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.

SUBJECT TO CONTRACT

- 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 19.