

Dated _____ **20[]**

NETWORK RAIL INFRASTRUCTURE LIMITED

and

[NAME OF CUSTOMER]

IMPLEMENTATION AGREEMENT

with respect to

[name of project]

FIXED PRICE BASIS

Network Rail reserves the right to request a surety following internal credit review

If Depot Change or closure applies or for stations when Network Rail is not the station owner; specific wording is available for inclusion in these circumstances

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THIS 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, NW12DN ("**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 has requested Network Rail to procure the implementation of certain works to Network Rail's railway network on behalf of the Customer.
- (B) The Customer has confirmed it will fund such work on the terms and conditions contained in this Agreement.
- (C) An [outline][detailed] design of such works has been undertaken by [Network Rail][the Customer].
- (D) Network Rail has agreed to carry out such works 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;

"**Additional Expense**" has the meaning given in Clause 5.1;

"**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);

"**Area of Work**" means any area under the control of the Contractor for the purpose of carrying out the Works;

"**Base Price**" means the total price for implementing the Works as set out in Part A of Schedule 2 as may be adjusted by the cost of any Variation for which the Customer is obliged to pay pursuant to Clause 6 and for which a fixed price is agreed;

"**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;

"**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, after the Commencement Date, or GRIP 3 if later, 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;

“Competent Authority” means any local, national or supra-national agency, authority, department, inspectorate, minister, ministry, official, court, tribunal or public or statutory person (whether autonomous or not), whether of the United Kingdom or of the European Union, which has, in respect of this Agreement, jurisdiction over either of the Parties or the subject matter of this Agreement;

“Completion” means the completion of the Works in accordance with Clause 9;

“Completion Certificate” means a certificate issued by Network Rail in accordance with Clause 9.4;

“Completion Criteria” means those criteria specified in Paragraph 8 of Schedule 3;

“Completion Date” means the date for completion of the Works as set out in Paragraph 9 of Schedule 3 as amended or varied from time to time in accordance with this Agreement;

“Confidential Information” has the meaning given in Clause 16;

“Contract” means the contract between Network Rail and its Contractor;

“Contractor” means any person providing Services or carrying out Works on behalf of Network Rail;

“Customer Cap” means an amount equal to 10% of the Base Price as at the Commencement Date;¹

“Design Liability Cap” means an amount equal to [♦];²

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

“Direction” means any direction, requirement, instruction or rule legally binding on either of the Parties, and includes any modification, extension or replacement of any such direction, requirement, instruction or rule for the time being in force, but shall not include:

- (a) the exercise of a discretion under any contract or other obligation binding on the Party in question or the enforcement of any such contract or obligation; or
- (b) any direction issued by the ORR pursuant to section 16A of the Act;

“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 17;

“Enhanced Assets” means any assets operated and/or maintained by / or on behalf of Network Rail which have been created or enhanced by the carrying out of any works and/or services forming part of the Project;

“Escalation Procedure” means the procedure for the escalation of disputes set out in Schedule 4;

“Existing Asset Obligation” means any statutory or contractual obligation as at the Commencement Date for Network Rail to carry out works in relation to any land or asset owned by Network Rail;

“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 the Areas of Work;

¹ The cap should be a percentage of the cost of the Works which impacts on the infrastructure save where this is inappropriate.

² The cap will be agreed by the Parties acting reasonably and taking into account the particulars of the Project including the design.

- (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;

“**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 www.rgsonline.co.uk;

“**Implementation Programme**” means the programme for the Project as set out in Paragraph 7 of Schedule 3 as updated from time to time in accordance with this Agreement;

“**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) of the Insolvency Act 1986 shall have the 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 (5) 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 Works as are listed in Paragraph 11 of Schedule 3;

“**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 any other project in relation to the Network which interfaces with the Project;

“**Land and Noise Claim**” means a claim against Network Rail made for common law nuisance or pursuant to the Land Compensation Act 1973 or any regulation made pursuant to that Act (including the Noise Insulation (Railways and Other Guided Transport Systems) Regulations 1996) and which is attributable to the design, carrying out or completion of the Works or the subsequent correct and proper operation of the completed Works as part of the Railway;

“**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
- (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;

“**Liquidated Damages Payment Date**”³ means the date stated in Paragraph 10 of Schedule 3 as amended from time to time in accordance with this Agreement;

“**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;

“**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 Operation Issue**” means the following events or circumstances, in so far as not reasonably foreseeable at the Commencement Date, that requires Network Rail to act immediately or with urgency:

- (a) any Safety Critical Event;
- (b) any Operational Emergency;
- (c) any Change in Law;
- (d) any Direction of a Competent Authority;
- (e) any change in the Network Licence;

³ The Liquidated Damages Payment Date recognises that the date on which LD's become payable may not be the same date as the Completion Date. The date should be the date the Customer would start incurring financial losses.

- (f) any contractual commitment of Network Rail existing on or prior to the Commencement Date under any Access Agreement,

provided that in each case such issue affects or is affected by the Works;

"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 Base Price as at the Commencement Date;

"Network Rail Consents" means those consents to be granted by Network Rail in relation to the Project as set out in Paragraph 5 of Schedule 3;

"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 Works and Services under this Agreement, as published on the website "www.uk.ih.com";

"Operational Emergency" means any situation or circumstance which Network Rail reasonably considers requires immediate or urgent action in order to maintain or restore the effective operation of the Network or any part of it;

"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 five (5) Working Days on reasonable prior notice from Network Rail to the Customer);⁴

"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 the project as set out in Paragraph 1 of Schedule 3;

"QRA" means the quantified assessment of risks and assumptions associated with the Project (as referred in Paragraph 6 of Schedule 3) and which is incorporated into this Agreement;

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

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

"Relief Event" means an event where:

- (a) any Booked Possession 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 the Works in accordance with the Implementation Programme; or
 (c) a Variation is being implemented in accordance with Clause 6.7(a) to (c);

"Representative" means the person appointed by each Party to manage the delivery of services and works under this Agreement;

"Safety Critical Event" means risk to the health and safety of any individual or risk of damage or destruction to any property, or any incident which may reduce the safety integrity levels of any item of infrastructure;

"Services" means the services to be performed by or on behalf of Network Rail pursuant to this Agreement as set out in Schedule 3;

"Specific Change in Law" means any Change in Law which applies expressly to:

⁴ Depending on the Commencement Date the first Payment Period may be less than 28 days so as to synchronise the remaining Payment Periods with NR's financial cycle.

- (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 Works or Services, works or services of a similar type, but not to works or 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;

"Variation" means any change or variation to the Works, the Services, the Completion Date and/or the Liquidated Damages Payment Date in accordance with Clause 6 and, for the avoidance of doubt, includes a Mandatory Variation;

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

"Works" means the whole of the design and construction works as described in the Works Requirements;

"Works Commencement Date" means the date on which the physical works commence; and

"Works Requirements" means the specification which sets out a description of works in Paragraph 2 of Schedule 3 including the technical description of the Enhanced Assets and Network Rail's requirements in respect of those works, as amended from time to time in accordance with this Agreement.

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;
- (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, 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 CUSTOMER⁵**
- 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 information as reasonably requested from time to time by Network Rail. If any delay is caused to the Implementation Programme as a result of failure by the Customer to comply with this Clause 2.2, then the Completion Date and the Liquidated Damages Payment Date shall be extended by such period as is reasonable in the circumstances.
- 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 carry out the Works and/or 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 Works Requirements and the terms of this Agreement.
- 3.3 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 or works 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

⁵ When NR requires access to the Customer’s property, express additional wording must be inserted here and in clause 12.7 to ensure the costs arising from failure to grant access would not be included in the Customer Cap.

- (b) appoint Contractors who in the reasonable opinion of Network Rail have the necessary competence and experience.
- 3.4 Network Rail will procure that the Works are completed by the Completion Date. The Completion Date and the Liquidated Damages Payment Date may be amended under Clauses 2.2, 4.2, 6, 7, 13, 14.1 and 14.2 provided that Network Rail will not be entitled to change the Completion Date or the Liquidated Damages Payment Date to the extent any delay is caused by the breach or negligence of Network Rail.
- 3.5 Subject to Clause 6 as the Project progresses, Network Rail shall revise and update the Implementation Programme set out in Schedule 3. Network Rail shall deliver a copy of the revised and updated Implementation Programme to the Customer promptly following its production.
- 3.6 As the Project progresses, Network Rail shall identify and manage arrangements between the Works and any Interfacing Projects in the interests of economic and efficient Network management and operation and in accordance with the Network Licence.
- 3.7 Network Rail will prepare project status reports at agreed intervals (but no more frequently than every four weeks) for submission to the Customer. The reports shall:
- (a) include information relating to progress of the Works, the Services, Implementation Programme, risks and QRA updates and any Interfacing Project, together with a change control log recording changes in the status of the Project; and
 - (b) in the event that the total costs incurred by Network Rail in relation to the Works exceed 125% of the sum of the Base Price, provide key financial information for the Project, including the agreed budget, original forecast for the reporting period, cost of work done to date and estimated final total costs; and
 - (c) any other reasonable information reasonably requested by the Customer.
- 3.8 Network Rail hereby elects (and the Customer acknowledges such election) that it shall be the only client in accordance with the CDM Regulations.
- 3.9 Network Rail shall effect and maintain (or procure the taking out and the maintenance of) the insurances which are set out in Paragraph 11 of Schedule 3.
- 3.10 Network Rail shall, at the request of the Customer allow the Customer to observe any progress meetings it has with any Contractor in respect of the Works. In addition the Customer shall:
- (a) on reasonable notice be entitled at all reasonable times to have access to any Area of Work to observe the carrying out of the Works by the Contractor, subject to complying with such reasonable restrictions as are stipulated by Network Rail; and
 - (b) be given sufficient notice by Network Rail to allow it to attend and observe any inspection of the Works pertaining to the issue of any completion certificate (whether substantial, practical, sectional or final completion as defined under the Contract), subject to complying with such reasonable restrictions as are stipulated by Network Rail.
- 4. NECESSARY CONSENTS**
- 4.1 Network Rail shall make applications for, and use reasonable endeavours to obtain, those Necessary Consents specified in Paragraph 5.2 of Schedule 3 as revised in accordance with Clause 6.
- 4.2 Network Rail shall have no liability to the Customer under this Agreement and shall have the right to extend the Completion Date and the Liquidated Damages Payment Date by such period as is reasonable in the circumstances 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.
- 4.3 In the case of agreement of the Regulated Change before the Commencement Date the Regulated Change shall be as listed in Paragraph 5 of Schedule 3. Where a Regulated

Change that Network Rail is undertaking, has not been agreed before the Commencement Date, then following agreement of that Regulated Change and prior to the Works Commencement Date the Parties shall meet and agree an estimate of costs up to the Completion Date for the Regulated Change. The estimated Regulated Change costs shall be listed in Paragraph 5.4 of Schedule 3. If they are not included at the Commencement Date, as soon as the estimate has been agreed, the Parties shall set it out in Paragraph 5.4 of Schedule 3.

- 4.4 In conducting any discussions or negotiations with train operators in relation to Regulated Change Network Rail, subject to any reasonable confidentiality requirements, will:
- (a) allow the Customer and its representatives to attend relevant meetings with any train operator;
 - (b) provide the Customer with copies of all relevant correspondence; and
 - (c) have due regard to the Customer's comments (if any) in relation to Regulated Change.⁶
- 4.5 The Customer has agreed to be responsible for applying for, and using reasonable endeavours to obtain the Necessary Consents listed in Paragraph 5.3 of Schedule 3, in a format agreed between the Parties and in line with the requirements of the Implementation Programme.
- 4.6 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.

5. ADDITIONAL EXPENSE

- 5.1 If in consequence of the Works and/or any Regulated Change, Network Rail incurs additional cost and expense in connection with the repair, maintenance, improvement, operation or alteration of the Railway which would not have been incurred but for the Works and/or the Regulated Change ("**Additional Expense**") then the provisions of this Clause 5 shall apply.
- 5.2 Network Rail shall gain approval for the Regulated Change unless the Parties agree that the Customer will be responsible for obtaining the Regulated Change.⁷ In gaining approval for the Regulated Change, the relevant Party shall also agree the calculation of the Additional Expense (obtaining approvals where necessary) and shall, where applicable, recover any contribution to the Additional Expense from a third party.
- 5.3 The Customer shall pay the Additional Expense, as an annual sum, for the life of the relevant Enhanced Assets where the Additional Expense is greater than £50,000 per annum after deduction of any sums paid to Network Rail by a third party.
- 5.4 The Additional Expense shall be calculated as follows:
- (a) where the Additional Expense has not been calculated prior to the Works Commencement Date:
 - (i) Network Rail shall estimate a fixed sum payable each year and if such fixed sum is accepted by the Customer, this shall be the agreed Additional Expense and Network Rail shall not be entitled to claim any other sums pursuant to this Clause 5; or
 - (ii) where the parties can not agree a fixed sum pursuant to Clause 5.4(a)(i) then the Additional Expense shall be the sum calculated pursuant to the Regulated Change procedure if applicable or, where there is no Regulated Change, the sum calculated by Network Rail acting reasonably;
 - (b) where the Regulated Change has been obtained and the Additional Expense has been calculated prior to the Works Commencement Date, the Customer shall pay the calculated Additional Expense which is set out in Paragraph 5.1 of Schedule 2;
- and such Additional Expense shall be paid by the Customer to Network Rail within twenty (20) Working Days of receipt of an invoice from Network Rail setting out the amounts due.

⁶ This Clause 4.4 should be deleted when the Customer is a train operating company.

⁷ The Customer may be responsible for obtaining the Regulated Change where the Customer is a train operating company.

6. VARIATIONS

6.1 Prior to the issue of a Completion Certificate either Party may request from the other Party a Variation (“**Variation Request**”). The Variation Request shall include a description of the proposed Variation and state which Party is intended to be responsible for funding the proposed Variation. Any such Variation Request may be withdrawn by the requesting Party at any time prior to the written agreement of the Variation under Clause 6.6 below. If the requesting Party withdraws a Variation Request, it shall reimburse the other Party for all Direct Costs reasonably and properly incurred by the other Party in relation to the proposed Variation prior to its withdrawal.

6.2 Where the Customer issues a Variation Request, Network Rail shall notify the Customer within ten (10) Working Days of receipt of the Variation Request whether it objects to the implementation of the proposed Variation on one or more of the following grounds:

- (a) that it would infringe or be contrary to any Legal Requirement or Direction of a Competent Authority or existing contractual obligation; or
- (b) that it would cause any existing Necessary Consent (which is not capable of modification) to be revoked; or
- (c) that it would require a new Necessary Consent, which Network Rail (using reasonable endeavours) believes that it cannot obtain; or
- (d) the responsibility for funding the Variation is not agreed; or
- (e) the responsibility for funding the Additional Expense is not agreed; or
- (f) that it would materially hinder an Interfacing Project; or
- (g) that it would materially affect the ability of Network Rail to perform its role as Infrastructure Manager or as owner and operator of the Network in accordance with the Network Licence; or
- (h) that the proposed Variation, if implemented, would result in a change to the essential nature of the Works or would place material additional risk on the Project (including an increased design risk) that cannot be adequately compensated for by the payment of additional money;

and the Parties will meet to discuss Network Rail's concerns and the Customer will either revise and reissue the Variation Request or withdraw the Variation Request. If Network Rail requires further information in order to make a decision under this Clause 6.2, the Customer shall provide such information on request and the time period of ten (10) Working Days referred to above shall commence on receipt of such additional information.

6.3 Following any Variation Request and subject to Clause 6.2, Network Rail shall consult with the Customer and, where the Party responsible for funding the Variation is agreed, shall provide to the Customer within a reasonable time and to a reasonable level of detail (to the extent applicable):

- (a) the estimated cost of the Variation;
- (b) any requirement for any Additional Expense;
- (c) any amendment to the Works Requirements in order to give effect to the Variation;
- (d) reasoned proposals to change the Implementation Programme and the Completion Date and the Liquidated Damages Payment Date (if any) provided that the Completion Date and the Liquidated Damages Payment Date shall not be changed if the Variation is required as a result of an event described in Clause 6.7 which was reasonably foreseeable;
- (e) in the case of a proposed alteration of the Works or Services details of any Necessary Consent that must be obtained or amended for the proposed Variation to be implemented and Network Rail's reasonable assessment of the latest date by which any such Necessary Consent must be obtained or modified for the matters set out in this Clause 6.3 to remain valid;
- (f) in the case of a proposed Variation under Clause 6.7, an explanation of why the Variation is necessary and reasonable in the circumstances

provided that where the information contained in any Variation Request made by the Customer is inadequate to enable Network Rail to respond, the Customer shall provide the necessary information on request. Where the Parties do not agree which Party will be responsible for funding the Variation, the matter shall be referred to the Escalation Procedure.

- 6.4 Within fifteen (15) Working Days of the receipt of the information set out in Clause 6.3 (or such longer period as may be agreed by the Parties acting reasonably), the Customer shall notify Network Rail:
- (a) where the Variation was requested by Network Rail:
 - (i) that it has no objection to the proposed Variation and/or agrees the information provided under Clause 6.3; or
 - (ii) acting reasonably, that it objects to the Variation and/or does not agree the information provided under Clause 6.3 together with its reasons for doing so; or
 - (b) where the Variation was requested by the Customer:
 - (i) that it agrees the information provided under Clause 6.3; or
 - (ii) acting reasonably, that it does not agree with the information provided under Clause 6.3 together with its reasons for doing so.
- 6.5 Following the issue of a notice by a Customer pursuant to Clause 6.4(a)(ii) or 6.4(b)(ii), Network Rail shall meet with the Customer within a further fifteen (15) Working Days (or such longer period as may be agreed by the Parties acting reasonably) to agree the Variation Request (as may be amended) or the matters referred to in Clause 6.3 and shall supply to the Customer any further information or revisions to the information already provided under Clause 6.3 as may be reasonable.
- 6.6 Upon the agreement or determination of the Variation Request and the matters referred to in Clause 6.3, the Parties shall confirm in writing that they agree to the implementation of the Variation (subject to obtaining or amending any Necessary Consents) which Party shall fund the Variation and whether the Customer will pay a fixed price (in which case the Base Price will be adjusted) or the Customer will pay for such Variation on an emerging cost basis (in which case Network Rail Costs will be paid).. Subject to Clause 6.8, no Variation shall be effective unless agreed in writing by the Parties.
- 6.7 Notwithstanding any provision in this Agreement, where Network Rail reasonably considers that a Variation is necessary:
- (a) to avoid, address or alleviate a Network Operation Issue; or
 - (b) to carry out any works necessary due to any Existing Asset Obligation; or
 - (c) to address, alleviate or comply with (as appropriate) a Mandatory Variation; or
 - (d) to address, alleviate or comply with (as appropriate) any Legal Requirement or a Direction of a Competent Authority or any requirement of the Network Licence to the extent it is not a Mandatory Variation; or
 - (e) as a consequence of the crystallisation of a risk which is identified in the QRA; or
 - (f) to meet the Works Requirements and the need for the Variation was not reasonably foreseeable as at the Commencement Date

Network Rail shall be entitled to vary the Works or Services or Completion Date or the Liquidated Damages Payment Date to the extent that is reasonable in the circumstances, and the Customer shall not be liable for the Network Rail Costs in connection with a Variation in respect of this Clause 6.7.

- 6.8 Where Network Rail considers a Variation is necessary under Clause 6.7, it shall submit a Variation Request to the Customer pursuant to Clause 6.1 and provide the information listed in Clause 6.3. Clause 6.4 shall apply except that the Customer may not object to the proposed Variation itself, but may challenge the information provided under Clause 6.3 and any issues arising from such information. For the avoidance of doubt, the Customer may request that Network Rail amends the Works Requirements to accommodate any reasonable objections raised by the Customer. Where Network Rail has to act immediately in the case of Clauses 6.7(a) and 6.7(b) to protect the safety and operation of the Railway, Network Rail shall not be obliged to serve a Variation Request prior to commencing the Variation but shall as soon as

practicable, provide to the Customer the information set out in Clause 6.3. If the Parties do not agree the information provided under Clause 6.3 (whether provided before or after commencement of the Variation), the Dispute shall be referred to the Escalation Procedure. Upon agreement or determination, Clause 6.6 shall apply.

6.9 If agreement on any matter under this Clause 6 is not reached within a reasonable period of time, or as otherwise specified, either Party may refer such matter for resolution in accordance with the Escalation Procedure.

7. COMPENSATION AND RELIEF

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

7.2 Network Rail shall notify the Customer of any Relief Event as soon as reasonably practicable and shall provide a revised Implementation Programme (if appropriate). The Customer shall notify Network Rail of any Relief Event within a reasonable period of time of becoming aware of the same and provide reasonable details of the relief required under this Clause 7. 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 7.4, together with any revisions to the Implementation Programme (including any changes to the Completion Date and the Liquidated Damages Payment Date), taking into account the likely effect of delay in the progress of the Works and Services.

7.3 Promptly following the agreement (or determination in accordance with Clause 17) 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 Implementation 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 17), 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.

7.4 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 12.2 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 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 consequential effects of the Relief Event on the Project.

7.5 Save as set out in this Clause 7, neither Party shall have any other right or remedy whether under or in connection with this Agreement against the other for any Relief Event.

8. INTELLECTUAL PROPERTY

8.1 Network Rail hereby grants to the Customer, to use for the purposes of the modification, operation or maintenance 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.

- 8.2 The licence referred to in Clause 8.1 shall include the right for the Customer to grant sub-licences for any of the purposes set out in Clause 8.1, provided that:
- (a) the sub-licensee shall be prohibited from entering into any assignment or sub-sub-licence; and
 - (b) any such sub-licence shall impose confidentiality obligations upon the sublicensee which are no less onerous than the confidentiality obligations upon the Customer under this Agreement.
- 8.3 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.
- 8.4 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.
- 8.5 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 indemnify Network Rail from and against any and all Losses arising from the use by any sub-licensee of any Intellectual Property.
- 8.6 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.

9. COMPLETION

- 9.1 Where the Works have been completed in accordance with the Completion Criteria, prior to issuing a completion certificate Network Rail shall issue a certificate to such effect (a "Provisional Completion Certificate") to the Customer which shall include supporting information that the Works have been completed.
- 9.2 If the Customer objects to the issue of a Provisional Completion Certificate, it shall give notice to Network Rail (an "Objection Notice") setting out in detail its reasons for such objection (which may include a failure by Network Rail to provide the information described in Clause 9.1) within twenty (20) Working Days after receipt of the Provisional Completion Certificate. If the Customer does not issue an Objection Notice within such period, it shall be deemed to have accepted that Provisional Completion Certificate.
- 9.3 If Network Rail receives an Objection Notice within the time specified in Clause 9.2, Network Rail shall take due account of the matters raised therein (and provide reasons where it does not accept the Customer's objection) and be entitled to issue a Completion Certificate.
- 9.4 Network Rail shall issue a Completion Certificate when the Works satisfy the Completion Criteria. If the Customer is not satisfied that the Works have been properly completed, it shall refer such matter to the Escalation Procedure. If the Customer does not make such a referral within twenty (20) Working Days after receipt of the Completion Certificate, it shall be deemed to have accepted that Completion Certificate.
- 9.5 The legal and beneficial title in the Works and the Enhanced Assets shall vest in Network Rail.

10. PAYMENT

- 10.1 The Customer shall pay to Network Rail:
- (a) the Base Price in accordance with Part A of Schedule 2;
 - (b) all reasonably and properly incurred Network Rail Costs; and
 - (c) any other sums payable under this Agreement.
- 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.
- 10.2 Within ten (10) Working Days after the end of each Payment Period throughout the carrying out of the Works and Services, Network Rail shall submit an invoice to the Customer showing:

- (a) the amount due in respect of the Base Price applicable to such Payment Period in accordance with Part A of Schedule 2; plus
- (b) any Network Rail Costs and any other sums payable under this Agreement (with an attached breakdown and including any supporting information reasonably requested by the Customer) applicable to such Payment Period or any preceding Payment Periods, if not previously invoiced.

Subject to Clause 10.3, 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**”).

- 10.3 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 10.2. 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 10.2.
- 10.4 Should any invoice not be paid by the due date for payment in accordance with Clause 10.2 (except in respect of any amount determined not to be payable pursuant to Clause 17), 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.
- 10.5 The Customer will not be liable for Network Rail Costs for any part of the Works and Services which have already been included in Network Rail's business plan for the year in which such Network Rail Costs are incurred and approved for the Project by Network Rail's Board prior to the Commencement Date, or, in respect of the Network Rail Costs of any Variation, the date of agreement of such Variation.⁸

11. VALUE ADDED TAX

- 11.1 Unless stated otherwise, all amounts referred to in this Agreement shall be deemed to be exclusive of VAT.
- 11.2 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.
- 11.3 Where under this Agreement one Party has agreed to reimburse or indemnify the other 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 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.
- 11.4 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.

12. LIMITATION OF LIABILITY

- 12.1 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

⁸ Following Network Rail's reclassification in 2014 as an arm's length body of government, it is no longer permitted to finance the acceleration of renewals and other works from one financial year to an earlier one. Therefore, any such works included in Network Rail's business plan will only be funded by Network Rail if they are delivered in the same financial year as provided for in the business plan. The cost of any such works delivered in an earlier year would be for the account of the Customer.

claim shall be made until the earlier of any further Losses suffered being in excess of £10,000 and Completion and termination of this Agreement); or

- (b) the Losses are incurred as a result of, or sums are unpaid under, Clauses 10, 11 or 15.2.
- 12.2 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 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 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). For the avoidance of doubt, regardless of the extent that Network Rail makes any such recovery, it shall remain liable to deliver the Works and Services for the Base Price.
- 12.3 Clause 12.2 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.
- 12.4 Any Losses suffered by either Party shall, for the purposes of Clause 12.1, 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.
- 12.5 Subject to the limit on liability in Clause 12.2, if the relevant Completion Criteria have not been achieved by the Liquidated Damages Payment Date, unless due to the fault of the Customer or any contractor employed by the Customer, then Network Rail shall pay to the Customer the sum of £[] for each day from the Liquidated Damages Payment Date⁹ until the date the Completion Certificate is issued by Network Rail in accordance with Clause 9 or the date that it is determined under the Escalation Procedure and/or the Dispute Resolution Procedure that Completion has occurred. The Customer is not entitled to claim any other Losses in relation to delay of the Completion Date except pursuant to this Clause 12.5.
- 12.6 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.
- 12.7 Clause 12.6 shall not apply to:
- (a) the Customer's payment obligations under Clauses 4.3, 5, 10, 11, 12.8, 15.2 or Schedule 2;
- (b) any Losses incurred by Network Rail due to the negligence (except to the extent such negligence relates to the carrying out of any design by the Customer or any contractor appointed by the Customer), fraud or fraudulent misrepresentation of the Customer or of any contractor appointed by the Customer (other than Network Rail);

⁹ This will be based on that agreed with the Customer representing a pre-estimate of the Customer's loss which will be negotiated by the Parties acting reasonably. If the Parties cannot agree a figure the clause should be redrafted to include a cap on damages.

- (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 not instead exceed an amount equal to the Design Liability Cap; and
 - (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.
- 12.8 The Customer shall reimburse Network Rail in respect of all Losses and/or Direct Costs arising in respect of Land and Noise Claims up to the limit set out in Paragraph 6.1(c) of Schedule 2.
- 12.9 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).
- 13. FORCE MAJEURE EVENTS**
- 13.1 Subject to Clauses 13.2 to 13.6, each Party shall be relieved from liability for non-performance of its obligations under this Agreement (other than any obligation to make payment) to the extent that it is not able to perform such obligations by reason of a Force Majeure Event. Network Rail shall be entitled to a change to the Completion Date and the Liquidated Damages Payment Date to reflect an extension of time properly awarded under the Contracts in respect of a Force Majeure Event.
- 13.2 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 have not in fact performed, its obligations under this Agreement due to any failure to comply with its obligations under Clause 13.2(a).
- 13.3 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 13.2(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.
- 13.4 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).
- 13.5 As soon as practicable following the notification described in Clause 13.3, the Parties shall use reasonable endeavours to agree appropriate terms or modifications to the Implementation Programme to mitigate the effects of the Force Majeure Event and to facilitate the continued performance of this Agreement.
- 13.6 If no such terms or modifications are agreed on or before the date falling three 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 15 shall apply.
- 14. SUSPENSION AND TERMINATION**
- 14.1 Without prejudice to the other provisions of this Clause 14, Network Rail may suspend all or part of the Works (acting reasonably) with immediate effect to the extent required in order to prevent, address, alleviate or comply with (as applicable) a Network Operation Issue. Network

Rail shall notify the Customer of any such suspension as soon as reasonably practicable. Such notification shall contain such relevant information relating to the suspension as is available, including an estimate of the period of suspension and the effect on the Completion Date, the Liquidated Damages Payment Date and the Project. Network Rail shall promptly provide the Customer with any further information it receives or becomes aware of which relates to the suspension and provide an update on the estimate of its duration. The Parties shall meet within five (5) Working Days to discuss how to address the circumstances which have given rise to such suspension. Network Rail shall notify the Customer as soon as practicable (and in any event within two (2) Working Days) once it is established that the performance of its affected obligations can be resumed and shall resume such performance to the extent that it can do so (performance to continue on the terms existing immediately prior to the suspension). Upon resumption of the Works, the Completion Date and the Liquidated Damages Payment Date will be adjusted to reflect the period of suspension.

- 14.2 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 10.3, Network Rail may suspend performance of any or all of the affected Works 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. Upon resumption of the Works, the Completion Date and the Liquidated Damages Payment Date will be adjusted to reflect the period of suspension.
- 14.3 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.
- 14.4 If:
- (a) none of the infrastructure outputs specified in the Works Requirements has been delivered by the Completion Date; and
 - (b) the delay has not arisen due to the negligence or breach of the Customer;
- the Customer may give notice to Network Rail of its intention to terminate this Agreement (which notice shall include reference to this Clause 14.4). If arrangements to address the delay are not proposed by Network Rail within twenty (20) Working Days which are satisfactory to the Customer (acting reasonably), the Customer may terminate this Agreement with immediate effect by further notice in writing to Network Rail.
- 14.5 The Customer may in any event terminate this Agreement by giving three months' written notice to Network Rail if the latest estimated duration of the Works results in the likelihood of the Works not being completed by a date [xx] months after the Completion Date revised in accordance with Clause 6 (other than Clause 6.7).
- 14.6 If, in the reasonable opinion of Network Rail, the total costs it will incur in relation to the Works (excluding any Variation for which a fixed price has not been agreed) are likely to exceed 150% of the sum of the Base Price, the Parties shall discuss in good faith whether any changes to this Agreement are required in order to complete the Works in an economic and efficient manner, taking into account the interests of the rail industry as a whole. If the Parties are unable to reach agreement about any such changes, Network Rail may request approval from the ORR to vary the terms upon which this Agreement shall be continued. The ORR may publish criteria specifying the matters to which it would expect to have regard if such a request was made to it.
- 14.7 If, following a request by Network Rail under Clause 14.6, the ORR gives notice to either or both of the Parties that it requires from either or both of them information in relation to the relevant issues:
- (a) the Party of whom the request is made shall provide the requested information to the ORR in accordance with any timescales specified by the ORR in its notice and to the standard required by the ORR; and

- (b) if that Party fails to provide the requested information in accordance with Clause 14.7(a) and has not provided the ORR with an explanation which is satisfactory to the ORR for its failure to do so, including, to the extent applicable, any revised timescales within which that Party shall provide the requested information, the ORR shall be entitled to proceed with its consideration of the matter in question and to reach a decision in relation to it without the information in question and the Party in default shall have no grounds for complaint in that respect.

Subject to Clause 14.8 the Parties shall be bound by the terms of any written decision issued by the ORR in relation to any such request by Network Rail.

- 14.8 The Customer may on or before the expiry of fifteen (15) Working Days after receipt of ORR's decision under Clause 14.7 terminate this Agreement.
- 14.9 Upon issue or receipt of any notice of termination, Network Rail shall:
- (a) reduce the expenditure under this Agreement as rapidly as possible;
 - (b) take immediate steps to bring an end to the performance of the Services and the Works 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.

15. CONSEQUENCES OF TERMINATION, OR COMPLETION

- 15.1 Upon termination of this Agreement or completion of the Works, as applicable, the obligations of the Parties 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 5, 8, 10, 11, 15.2, 16, 17, 20 and Paragraph 5.1(c) of Schedule 2 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.
- 15.2 If this Agreement is terminated for any reason prior to Completion, 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 14.3 or a Force Majeure Event under Clause 13 or is pursuant to Clause 14.4:
 - (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 or the engagement of the Contractor thereunder);
 - (ii) the reasonable and proper costs and expenses incurred by Network Rail in removing all plant, equipment and those materials not incorporated into the Works and in reinstating or procuring the reinstatement of the Works (or such part thereof as may exist as at the date of termination) and the relevant part or parts of the Network affected by the Works to the extent necessary to make the same safe and secure and enable Network Rail to meet its contractual, statutory and Network Licence obligations; and
 - (iii) 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 or the payment of the costs incurred) as it would have been in if the payment had not been a taxable receipt in Network Rail's hands.
- 15.3 Termination of this Agreement is without prejudice to the rights of either Party which accrued before or as a result of such termination.

15.4 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.

16. CONFIDENTIAL INFORMATION

16.1 “**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;

16.2 Subject to Clauses 16.3 and 16.4, the Parties shall:

- (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.

16.3 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 17;
- (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.

16.4 Where disclosure is permitted under Clause 16.3(a), (c) or (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.

16.5 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 16 shall remain in full force and effect in relation to such Confidential Information notwithstanding the termination of this Agreement.

16.6 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.

17. ESCALATION AND DISPUTE RESOLUTION

17.1 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 4 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.

17.2 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.

17.3 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.

17.4 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.

18. NOTICES

18.1 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 18 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; and
 - (c) if sent by email, at the time evidenced by the electronic message delivery receipt.
- 18.2 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 18 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.
- 18.3 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 18.

19. SURETY OBLIGATIONS¹⁰

- 19.1 On the Commencement Date the Customer shall deliver to Network Rail a Deed substantially in the form set out in Schedule 5 duly executed by the Surety.

20. FREEDOM OF INFORMATION

- 20.1 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 the Department for Environment, Food and Rural Affairs in relation to such legislation (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 20.1 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 Works and/or Services or disclosed in tendering for, the negotiation of, or pursuant to this Agreement (“**Project Information**”).
- 20.2 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 relevant 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.

21. MISCELLANEOUS

- 21.1 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

¹⁰ Network Rail reserves the right for surety.

assignment by either Party to a statutory successor of the rights, obligations and interests of such Party.

- 21.2 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.
- 21.3 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.
- 21.4 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.
- 21.5 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.
- 21.6 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.
- 21.7 This Agreement may be executed in two counterparts which, taken together, shall constitute one and the same document.
- 21.8 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.
- 21.9 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.
- 21.10 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.
- 21.11 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.
- 21.12 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 Managing 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 []

“Industry Risk Fee” means an amount equal to 2% of the aggregate of the Agency Costs, Contractors' Costs and Personnel Costs in relation to the estimated costs of a Variation being carried out on an emerging cost basis as at the date such Variation is agreed in accordance with Clause 6 (other than a Variation of the type described in Clause 6.7);

“Necessary Consents Costs” means the costs incurred by Network Rail in connection with any Necessary Consent for the Project, including those related to:

- (a) the costs of third parties associated with applying for, undertaking, changes to or as a consequence of any Necessary Consents; or
- (b) any sums payable by Network Rail pursuant to Conditions G and H of the Network Code where the same arise in connection with the carrying out of the Variation; or
- (c) Possessions-Related Costs connected with the carrying out of the Variation;

“Network Rail Costs” means Agency Costs, Contractors' Costs, Additional Expense, Expenses and Disbursements, Fee, Necessary Consents Costs, Personnel Costs, Possessions-Related Costs and Third Party Costs to the extent they arise from, or are a consequence of, the performance of the Services and the undertaking of the Works payable in respect of (a) a Variation carried out on an emerging cost basis or (b) the carrying out of Regulated Change under Clause 4;

“Network Rail Fee” means an amount equal to 5% of the aggregate of the Agency Costs, Contractors' Costs and Personnel Costs in relation to the estimated costs of a Variation being carried out on an emerging cost basis as at the date such Variation is agreed in accordance with Clause 6 (other than a Variation of the type described in Clause 6.7);

“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, except that should a delay arise in the Implementation Programme that is caused by the breach or negligence of Network Rail the Customer will not be liable for such amounts incurred after the date of Completion which are in excess of those amounts that would have been allowable had the delay not occurred;

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

“Third Party Costs” means any amount which Network Rail is obliged to pay to third parties in connection with the Project.

2 HOURLY RATES¹¹

Banding	Hourly Rate
1	£180
2	£126
3	£95
4	£82
5	£67
6	£66
7	£61
8	£55

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.

¹¹ Rates apply from 01.04.2019.

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 in relation to any Variation carried out on an emerging cost basis under this Schedule (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 LIMITS ON ADDITIONAL PAYMENTS

- 5.1 The Customer shall be liable to pay Network Rail all amounts due under this Agreement, subject to the following limits:
- (a) The Customer's liability under this Agreement in respect of Regulated Change under Clause 4 shall be limited to [];
 - (b) The Customer's liability under this Agreement in respect of Additional Expense under Clause 5 shall be limited to []; and
 - (c) The Customer's liability under this Agreement in respect of Land and Noise Claims under Clause 12.8 shall be limited to [].

**Schedule 3.
Project Information**

- 1 THE PROJECT**
[]
- 2 WORKS REQUIREMENTS**
 - 2.1 Document reference: []
- 3 SERVICES**
 - 3.1 Services to be provided by Network Rail:
[]
- 4 THE BASE PRICE**
See Part A of Schedule 2.
- 5 NECESSARY CONSENTS (INCLUDING REGULATED CHANGE)**
 - 5.1 Necessary Consents already granted
[]
 - 5.2 Necessary Consents to be provided by Network Rail
[]
 - 5.3 Necessary Consents to be provided by the Customer
[]
 - 5.4 Estimated Costs of Regulated Change
[]
- 6 QRA**
 - 6.1 Document reference:
[]
- 7 IMPLEMENTATION PROGRAMME¹²**
[]
- 8 COMPLETION CRITERIA**
- 9 COMPLETION DATE**
- 10 LIQUIDATED DAMAGES PAYMENT DATE¹³**
- 11 INSURANCE POLICIES**

¹² Note that there are minimum rail industry timescales for the preparation and implementation of certain activities such as booking of possessions and the provision of certain materials, etc. Therefore the Implementation Programme must allow for the timescales or the liabilities in this Agreement should be amended accordingly.

¹³ This is the date from which liquidated damages shall be payable by Network Rail in the event of delay.

**Schedule 4:
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 4;

“**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 4;

“**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.

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 17.

**Schedule 5.:
Surety Provisions¹⁴**

¹⁴ If surety required.