

**Consultation APA Final - table of material amendments against the Template (previously revised 2010)**

**August 2019**

<b>Clause</b>	<b>Material drafting amendment</b>	<b>Commentary</b>
General		The majority of the changes to the precedent form of Third Party Asset Protection Agreement have been made by Network Rail (NR) in response to the recommendations in the Hansford Review <sup>1</sup> ( <b>Hansford Review</b> ). In addition, a number of amendments have been made for consistency with the new and amended definitions, correcting punctuation, capitalised words cross referencing etc.
General		There have been changes across the agreement to ensure consistency when referring to Standards.
General	Inclusion of drafting relating to Depots.	Optional wording where the works relate to Depots rather than Stations has been included. This drafting relates to Network Rail's regulated light maintenance depots. Where works are being undertaken at any other type of depot that Network Rail owns and is not leased under a long lease to any party, additional drafting will need to be incorporated into the APA.
General	Change from "approval" to "acceptance" throughout the APA.	The APA has been updated to reflect that in most cases NR "accepts" the information provided to it, rather than "approving" such information, which could inadvertently impose CDM obligations upon NR.
Definitions	Addition of new definitions: APA Construction Certificate, Construction Completion Criteria, Construction Completion Date and Construction Completion Certificate.	NR typically uses the asset management plan (AMP) process contained within Standard NR/L2/MTC/089 to confirm when certain stages during the construction of the Works have been completed. However, the AMP process does not contain certain requirements, such as compliance with planning consents.  To overcome this, the new APA Construction Certificate can only be issued by the Customer and countersigned by NR once the AMP requirements for

<sup>1</sup> <https://thehansfordreview.co.uk>

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		<p>Construction Completion <b>and</b> any project specific criteria (which will be set out in schedule 3) have been satisfied.</p> <p>The Construction Completion Certificate is issued in accordance with the NR AMP process. This new definition has been inserted into the APA to clarify to the Customer that there are two certificates. One issued under the AMP process which is one of the criteria that need to be satisfied together with the bespoke criteria set out in the APA. When both are satisfied an APA Construction Certificate is issued under the APA.</p> <p>In order to for the Works to be considered complete in accordance with the APA, there are four separate stages that each need to be satisfied. These stages are contained within clause 10:</p> <ul style="list-style-type: none"> <li>(a) the issue of the APA Construction Certificate and counter signature by Network Rail;</li> <li>(b) the issue of the Taking Over Certificate and counter signature by Network Rail;</li> <li>(c) the issue of the Defects Identification and Completion Certificate and counter signature by Network Rail; and</li> <li>(d) the issue of the APA Final Certificate and counter signature by Network Rail.</li> </ul> <p>The guidance notes to the APA will be updated to include greater detail in relation to the AMP process.</p> <p>The agreement contains consequential amendments to capture this change.</p>
Definitions	Addition of new definitions: APA Final Certificate, Final Completion Criteria, Final Completion Date and Final Certificate.	<p>Once the APA Final Certificate has been issued by the Customer and countersigned by NR, it is evidence that the Customer has satisfied all requirements under the APA. However, the Final Certificate under the AMP process may not capture everything that NR requires to be satisfied the works have been completed in any regards.</p> <p>Therefore the criteria that need to be satisfied for the APA Final Certificate are the AMP requirements for the Final Certificate <b>and</b> any project specific criteria which will be set out in schedule 3.</p>

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		The Final Certificate is issued in accordance with the NR AMP process. This new definition has been inserted into the APA to clarify to the Customer that there are two certificates. One issued under the AMP process which is one of the criteria that need to be satisfied together with the bespoke criteria set out in the APA. When both are satisfied an APA Final Certificate is issued under the APA.
Definitions	Addition of new definition: Commission.	Update to clarify the Standards that NR follows to commission the Works.
Definitions	New definition of Daily Liquidated Damages Sum included.	Amendment to the APA so information that has to be completed is included within the schedules rather than the front end of the document.
Definitions	Additions of new definitions: Defects Identification and Completion, Defects Identification and Completion Certificate and Defects Identification and Completion Date.	New definitions included to explain to the Customer that the certificates relating to Defects Identification and Completion will be issued in accordance with the AMP process.
Definitions	Amendment to limb (b) of definition of Insolvent.	Amendment to limb (b) to narrow the definition of Insolvent.
Definitions	Amendment to definition of Payment Period.	Update to definition to make easier to understand.
Definitions	Addition of new definition: Service Level Obligations.	As required by the Hansford review, the APA contains levels of service for NR to comply with and be measured against.
Definitions	Deletion of definition: Taking into Use and consequential changes to clauses 10.1, 10.5 and 10.10.	The term "Taking into Use" is no longer used within the APA.
Definitions	Additions of new definitions: Taking Over, Taking Over Date and Taking Over Certificate.	New definitions included to explain to the Customer that the requirements for Taking Over (when NR will be responsible for the maintenance of the Works) are set out as part of the AMP process.
Definitions	Work Package Plans.	A new definition has been included to clarify the plans that NR will review as part of the Services.
Clause 2.3 (Obligations of the Customer)	Clause has been updated to clarify the duty of care requirements.	This clause has been updated to avoid requiring a fitness for purpose obligation which the Customer is unable to pass down to Contractors and is not insurable.

<b>Clause</b>	<b>Material drafting amendment</b>	<b>Commentary</b>
Clause 2.4(g) (Obligations of the Customer)	Clause has been updated to reference all of the Safety Management Systems that could apply.	This clause is to ensure that the Customer has clarity on the different Safety Management Systems that will apply to different aspects of the Works.
Clause 2.14 (Obligations of the Customer)	Inclusion of clause to allow the Works to be carried out in accordance with an equivalent to the GRIP process.	This clause is to allow the Customer to carry out the Works in accordance with an equivalent to the GRIP process. The standard APA referred only to the GRIP process and then only indirectly.
Clause 3.3 (Obligations of Network Rail)	New clause requiring NR to meet the Service Level Obligations.	Requirement of the Hansford review to include service level obligations (SLOs). The SLO's are set out in schedule 10.
Clause 3.11 (Obligations of Network Rail)	New clause requiring NR to provide the Customer with examples of similar derogations to NR Standards.	This was a specific requirement of the Hansford review and allows the Customer to consider whether any particular derogations previously granted by NR would be applicable to the relevant Project.
Clause 4.15 (Necessary Consents)	New clause clarifying that the APA does not amount to a property consent.	This clause clarifies that property consents are to be obtained in addition to the APA.
Clause 5.2 (Programming of Work)	Clause has been updated to ensure that the Implementation Programme contains all information required by NR.	Update to clause to provide the Customer with clarity on the dates that need to be included in the Implementation Programme.
Clause 5.3 (Programming of Work)	New clause requiring NR to use reasonable endeavours to comment on or approve the Implementation Programme within 10 working days.	The clause has been updated to provide clarity to the process for commenting and approving the Implementation Programme.
Clause 5.6 (Programming of Work)	Clause has been updated to provide for the situation where the Customer unable to meet the Implementation Programme.	Update to clause requiring the Customer to keep NR informed of any delays to the Customer meeting the agreed Implementation Programme, so that NR can minimise the impact of that delay on the delivery of the Services.
Clause 6.1(b) (Access to the Network and	Update to clarify that access is also granted to the Customer to undertake dilapidation surveys.	Clarification amendment.

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obtaining Possessions)		
Clause 6.7 (Access to the Network and obtaining Possessions)	New clause relating to NR inspections.	This new clause is to clarify to the Customer that planned NR inspections are agreed and documented in accordance with the AMP process.
Clause 6.9 and Clause 6.13 (Access to the Network and obtaining Possessions) and definition of Possessions-Related Costs.	Amendments relating to Interfacing Projects.	Amendments to clarify the position in relation to costs where there are Interfacing Projects.
Clause 10.6 (Inspection, Construction Completion, Taking Over and Final Completion)	Amendment to clause setting out the process regarding when the new APA Construction Certificate will be issued and signed.	Amendment to clarify how the APA Construction Certificate will be issued by the Customer and countersigned by NR.
Clause 10.7 (Inspection, Construction Completion, Taking Over and Final Completion)	New clause relating to the Taking Over Certificate.	This clause sets out that the Taking Over Certificate will be issued by the Customer and countersigned by NR in accordance with the AMP process.
Clause 10.8 (Inspection, Construction	New clause relating to the Defects Identification and Completion Certificate.	This clause sets out that the Defects Identification and Completion Certificate will be issued by the Customer and countersigned by NR in accordance with the AMP process.

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Completion, Taking Over and Final Completion)		
Clause 10.9 (Inspection, Construction Completion, Taking Over and Final Completion)	Amendment to clause setting out the process regarding when the new APA Final Certificate will be issued and signed.	Amendment to clarify how the APA Final Certificate will be issued by the Customer and countersigned by NR.
Clause 10.10 (Inspection, Construction Completion, Taking Over and Final Completion)	Amendment to provide for title to those parts of the Works that NR will asset protect to vest in NR at all times.	Clause updated to reflect that Works are constructed on NR land which will vest in NR once constructed as a matter of law. Additionally, the drafting enables the Customer and NR to agree exceptions where elements of the Works should not transfer to NR. The wording also now envisages that if Customer becomes insolvent the property clearly vests in NR.
Clause 11.3 (Additional Expense)	Amendment to clause 11.3.	Amendment to reflect the ORR's position in relation to payment of maintenance costs.
Clause 12.3(f) (Variations)	Inclusion of a new clause 12.3(f).	Amendment to ensure that information provided for Variations includes any changes to the Detailed Route Requirement Document.
Clause 12.4 (Variations)	Amendment to clause 12.4(a)(ii)	Amendment to limit when the Customer can object to a Variation requested by NR including clarity that it would be unreasonable for the Customer to object to a variation to the SLOs if the scope materially changes.
Clause 15 (Network Rail Costs)	Deletion of clauses 15.6 and 15.7.	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.

<b>Clause</b>	<b>Material drafting amendment</b>	<b>Commentary</b>
Clause 17.2 (Limitation of Liability)	Liquidated damages included within the cap and sums recovered under insurance to be outside the cap.	Clarifying amendment that liquidated damages are also included within the cap, but that insurance proceeds will be outside the cap. Sums recovered under contract will also be paid to the Customer provided that the cap has not been reached. This mirrors the position in the clause 17.6 relating to the Customer's maximum liability.
Clause 17.5 (Limitation of Liability)	Clause updated to reflect the new defined terms.	The clause has been updated to clarify that Liquidated Damages will become payable if the [Construction Completion Date] has not occurred by the Liquidated Damages Payment Date.
Clause 17.6 (Limitation of Liability)	Clause updated to reflect that insurance proceeds will sit outside the Customer Cap.	The clause has been updated to mirror the updated position in clause 17.2 relating to NR's maximum liability.
Clause 17.7 (Limitation of Liability)	Clause updated to reflect that design liability should be uncapped.	This clause has been updated to reflect that the Customer's liability in relation to design services shall be uncapped. The public purse should not be responsible for costs that NR did not cause.
Clause 20.1 and Clause 20.4 (Insurance)	Clause updated to included NR as a joint insured.	Amendment to ensure that NR is able to approve joint insurances and has appropriate information in relation to the same.
Clause 27 (Anti-bribery and slavery)	Insertion of new clause.	Update in legislation.
Clause 28 (Equality and Diversity)	Insertion of new clause.	Update in legislation.
Clause 29 (Protection of Personal Data and Confidential Information)	Insertion of new clause.	Update in legislation.

<b>Clause</b>	<b>Material drafting amendment</b>	<b>Commentary</b>
Schedule 2 (Network Rail Costs)	Insertion of new definition of Additional Payment.	Amendment requested by NR as Additional Payment previously used, but not defined.
Schedule 2 (Network Rail Costs)	Amendment to definition of Agency Costs.	Definition updated to tie in with NR statement to the ORR regarding costs.
Schedule 2 (Network Rail Costs)	Definition of Agency Personnel deleted.	Definition deleted as no longer required in definition of Agency Costs.
Schedule 2 (Network Rail Costs)	Amendment to definition of Contractors' Costs.	Definition updated to tie in with NR statement to the ORR regarding costs.
Schedule 2 (Network Rail Costs)	Definition of Expenses and Disbursements has been updated.	Definition updated to clarify the expenses and disbursements that NR is entitled to be paid for.
Schedule 2, paragraph 3 (Network Rail Costs)	Updated to reflect NR's new Hourly Rates and that these rates will be subject to review on an annual basis and by the ORR.	NR's Hourly Rates will be updated on review by ORR as well as annually. In addition, NR will use reasonable endeavours to deliver Services via personnel with lower hourly rates.
Schedule 3 (The Project)	This schedule has been populated.	The schedule contains a template for NR and the Customer to complete on a project specific basis. A template list of services have been included which are intended to assist NR and the Customer understand the services that will be provided by NR and the requirements for completion of certain stages. Additionally template wording is provided for completion criteria and other parts of the schedule.
Schedule 6	NR's standard form Works and Design warranties have been included.	The standard form documents included so no need to be located or provided separately.



Clause	Material drafting amendment	Commentary
(Collateral Warranties)		
Schedule 8  (Process for Network Rail Consents)	<p>Updates to the process for obtaining Network Rail Consents to include:</p> <ul style="list-style-type: none"> <li>• Customer to provide details of derogations;</li> <li>• NR confirming whether the submission contains missing information or contains errors;</li> <li>• Customer to keep NR informed of delays to the submission of design data;</li> <li>• Confirmation of when NR can withhold consent.</li> </ul>	<p>Schedule updated to include additional steps that occur when obtaining Network Rail Consents. Additionally, the schedule contains new references to derogations to Network Rail Standards.</p> <p>The Schedule has also been updated to require the Customer to keep NR informed of any delays to the submission of design data, so that NR can provide the Customer with an extension to the date for submission following which NR will review the design data in accordance with the terms of the Schedule.</p>
Schedule 10 (Service Level Obligations)	New schedule containing service level obligations.	The various NR obligations have been incorporated into service level obligations that NR is to comply with. NR has the ability to agree longer SLOs where the size and/or complexity of the project warrant them.