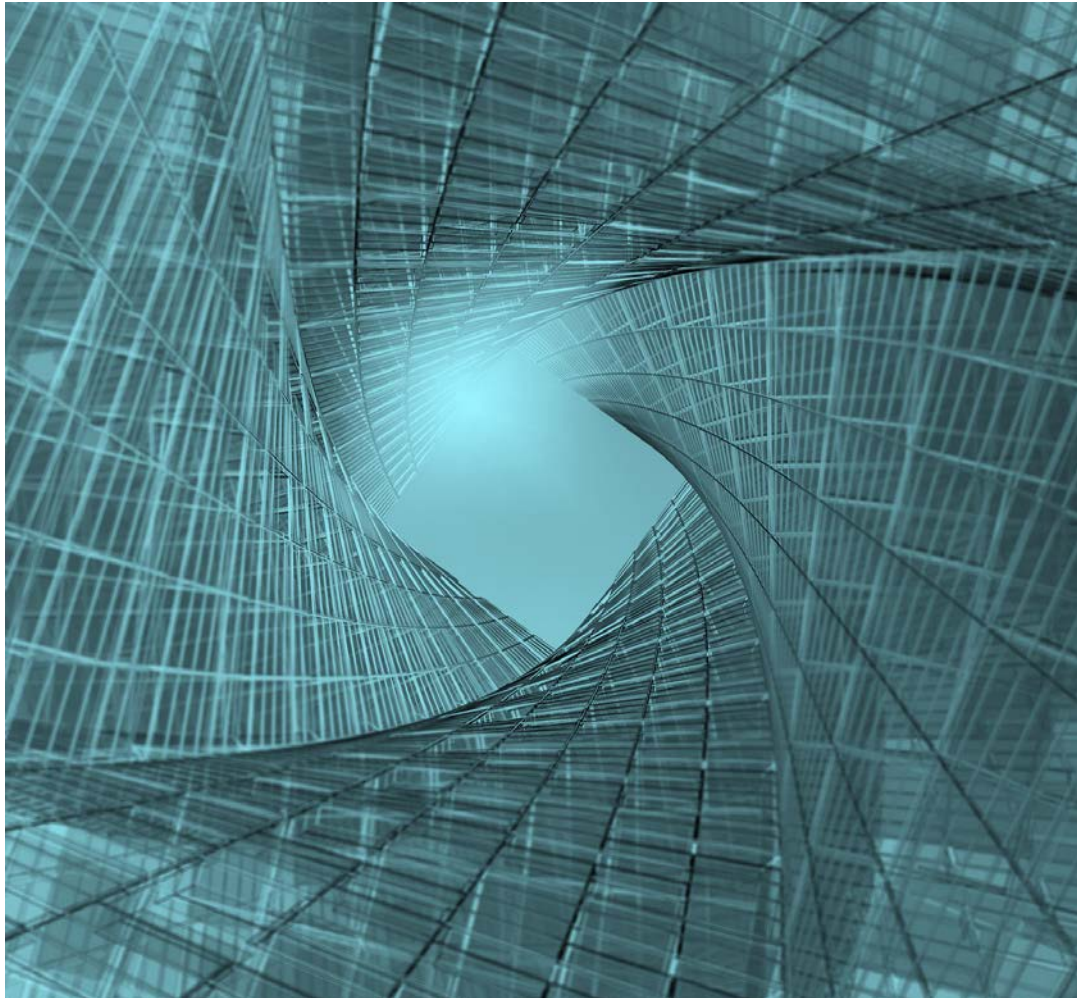


Infrastructure Conditions of Contract



NR8 With Quantities Version ***NetworkRail***

for

[Insert Contract Title]



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Infrastructure Conditions of Contract

NR8 With Quantities Version

*Based on the ICC With
Quantities Version November
2014 with Network Rail
amendments embedded*

Association for Consultancy and Engineering (ACE)
Civil Engineering Contractors Association (CECA)

ICC BASELINE FORM OF CONTRACT

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**NETWORK RAIL INFRASTRUCTURE LIMITED
INFRASTRUCTURE CONDITIONS OF CONTRACT, WITH QUANTITIES
VERSION**

CONTRACT AGREEMENT

This AGREEMENT is made the [Insert] day of [Insert]

BETWEEN:

- (1) **NETWORK RAIL INFRASTRUCTURE LIMITED** registered in England and Wales as company number 2904587 and having its registered office at 1 Eversholt Street, London, NW1 2DN (“the Employer”); and
- (1) [Insert] [registered in as company number] and having its [registered office at] (“the Contractor”).

each a “Party”

WHEREAS the Employer is desirous that certain Works should be constructed, namely the Permanent Works and Temporary Works in connection with [Insert] and has reached agreement with the Contractor on the terms of a contract for the construction and completion of such Works.

NOW THIS AGREEMENT WITNESSETH as follows:

In this Agreement words and expressions shall have the same meanings as are respectively assigned to them in the Conditions hereinafter referred to.

- 1.** The following documents are annexed hereto and shall form and be read and construed as part of this Agreement, and in the case of any ambiguity or discrepancy shall have the following order of priority:
- (a) This Contract Agreement;
 - (b) Schedule of Post Tender Amendments;
 - (c) The Appendix;
 - (d) Contract Specific Conditions and annexed form of parent company guarantee, form of deed of collateral warranty and form of Trust Deed and PBA Sub Contractor Joining Deed (if applicable);
 - (e) The Infrastructure Conditions of Contract, With Quantities Version and with Network Rail Amendments embedded;
 - (f) Technical Workscope;
 - (g) Contract Requirements HSEA;
 - (h) Preliminaries;
 - (i) Bill of Quantities; and
 - (j) Contractor’s Proposals.
- 2.** In consideration of the payments to be made by the Employer to the Contractor in accordance with the Contract, the Contractor covenants with the Employer to construct and complete the Works in conformity in all respects with the provisions of the Contract.
- 3.** The Employer and the Contractor hereby agree that the Contract Price shall be [Insert] (£[Insert]) or such other sum as shall become payable in accordance with the Contract.

- 4. The Employer covenants to pay to the Contractor in consideration of the construction and completion of the Works, the Contract Price at the times and in the manner prescribed by the Contract.

IN WITNESS whereof the Employer and the Contractor have caused this Agreement to be executed in duplicate on the date first stated above, as follows:

Where the Agreement is executed using DocuSign electronic signature process, the digital certification for the signatures of both Parties can be found on the Electronic Execution Page at the end of the contract documentation.

THE COMMON SEAL of)
NETWORK RAIL INFRASTRUCTURE LIMITED)
was affixed to this DEED in the presence of:)

Authorised signatory

OR

SIGNED for and on behalf of)
NETWORK RAIL INFRASTRUCTURE LIMITED)
by:)

Authorised signatory

Printed Name:

THE COMMON SEAL of)
)
.....)
was affixed to this DEED in the presence of:)

Director

Printed Name:

Director/Company Secretary

Printed Name:

OR

SIGNED as a DEED for and on behalf of)
)
.....)
by)

Director

Printed Name:

Director/Company Secretary

Printed Name:

OR

SIGNED for and on behalf of)
)
.....)
by)

Director

Printed Name:

SCHEDULE OF POST TENDER AMENDMENTS:

None

APPENDIX

1	Name of the Employer's Representative (1.1(n) and 5.1):	Name [Insert] Position [Insert] Address [Insert]
2	Defects Correction Period (1.2(e) and 10.5):	[Fifty-two weeks]
3	Contract Language (1.2(c)):	English
4	Governing Law (1.2(j)):	The laws of England and Wales
5	Notices which must be delivered by hand or by pre-paid first-class post or other next working day delivery service (2.3):	(a) Any notice of termination, suspension or notice purporting to terminate this Contract; (b) Any notice relating to any dispute under Clause 18 or 19; or (c) Insert any other type of notice required to be sent by hard copy / Not applicable
	Notices to be delivered by hand or by pre-paid first class post as identified above shall be sent to the following address:	The Employer's registered address marked for the attention of the Company Secretary with a copy to the Employer's Representative and to notices@networkrail.co.uk
6	Courts/Jurisdiction (2.4):	High Court of England and Wales for resolution as business of the Technology and Construction Court
7	Third Party Rights (3.2) (list relevant laws or statutes):	Contracts (Rights of Third Parties) Act 1999 for the purposes of clause 25.1(g) only
8	Name of Contractor's designer(s) (if any) (3.4):	[Insert]
9	Parts or Sections of the Works or their design which shall not be sub-contracted without the Employer's Representative's prior written approval (3.5):	[Insert]
10	The Key Sub-contractors are (3.5A):	The following sub-contractors: [Insert full company names] The sub-contractors appointed to undertake the following disciplines: [Insert]
11	Number and type of copies of drawings to be provided (4.3):	[Insert]

- 12** Contract Documents to be provided (4.3) (list): [Insert]
- 13** Other restrictions on the Employer’s Representative’s authority (5.2) [Insert details and clause numbers / Not Applicable]
- 14** CDM:
- (a) Name of the Principal Contractor (6.9(b)): [The Contractor]
- (b) Name of the Principal Designer (6.9(c)): [Network Rail Infrastructure Limited]
- 15** Nominated Sub-Contractors (7.1): There are no Nominated Sub-Contractors.
- 16** Commencement Date (10.1): [Insert]
- 17** Time for completion (10.3):
- EITHER for the whole of the Works: [Insert] weeks
- OR for Sections of the Works (1.1(s)):
- Section A: [Insert] [Insert] weeks
- Section B: [Insert] [Insert] weeks
- Section C: [Insert] [Insert] weeks
- Section D: [Insert] [Insert] weeks
- the remainder of the Works: [Insert] weeks
- 18** Liquidated damages for delay (10.6 and 10.7):
- EITHER for the whole of the Works: £[Insert] per day
- OR
- Section A: [Insert] £[Insert] per day
- Section B: [Insert] £[Insert] per day
- Section C: [Insert] £[Insert] per day
- Section D: [Insert] £[Insert] per day
- the remainder of the Works (as above): £[Insert] per day

	The total amount of liquidated damages in respect of the whole of the Works or any Section (10.8):	Shall not exceed the Contract Price
19	Method of measurement adopted in the preparation of the Bill of Quantities (11.1):	[Rail Method of Measurement]
20	Percentage of the value of goods and materials to be including in interim certificates (11.5(b)):	90%
21	Rate of retention (11.7):	0%
22	Bank whose Base Lending Rate is to be used (10.10 and 11.9):	Bank of England
23	Contemporary Records (13.1) (required format):	[Insert]
24	Vesting of materials not on Site (11.4(d)) and 16.3) (if required by Employer):	
	1[Insert]	4[Insert]
	2[Insert]	5[Insert]
	3[Insert]	6[Insert]
25	Insurance of the Works (17.1):	As stated in the Project Insurance Manual in the Preliminaries
26	Minimum amount of Employer's third party insurance (17.7):	£155,000,000 (one hundred and fifty five million pounds) each and every occurrence
27	Third party property damage (including damage to the Employer's property) (17.7):	As stated in the Project Insurance Manual in the Preliminaries
28	Professional indemnity insurance for design (17.10):	[Not required / Required]
	Minimum amount of professional indemnity insurance (17.10):	[Not applicable / £10,000,000 (ten million pounds) for any one claim or series of claims arising out of any one event and which may be subject to an annual aggregate limit]
29	Insurance policy excesses (17.12):	[Insert]
30	Security for performance of the contract (18.1(a)):	Not required
31	Parent company guarantee (18.1(b)):	[Required / Not Required / Provided via Framework PCG]
32	Security to be provided in respect of advance payment (18.3):	[No advance payments will be payable under this Contract]

- 33 Dispute Avoidance Panel (19.2B): [Applies / Does not apply]
- 34 Adjudication Procedure to be used (19.4):

The Adjudication Nominating Body shall be (19.4):

The Scheme for Construction Contracts made in accordance with the provisions of section 114 of the Housing Grants, Construction and Regeneration Act 1996 (as amended)

The President or Vice-President for the time being of the Technology and Construction Bar Association
- 35 BIM Protocol (if BIM is adopted) (20): [Not Applicable / CIC/BIM Protocol first edition 2013]
- 36 Information Protocols (if BIM is adopted) (5.2 and 20): [Not Applicable / As detailed in the Technical Workscope]
- 37 Milestones (21): [Applies / Does not apply]
- 38 Details of the suppliers and consultants whose contracts are to be novated to the Contractor (26.2):

[Insert]

Address: [Insert]

[Insert]

Address: [Insert]
- 39 Information Security (34): [Not applicable / Applicable (Contractor is connecting to the Employer's network or has access to the Employer's information classified as Internal or above)]
- 40 Intermediaries Legislation (38): [Applies]/[Does not apply]
- 41 The Aggregate Liability Cap (39.1) is:

The greater of:

(a) An amount equal to the Contract Price plus 10%; and

(b) £10,000,000.00 (ten million pounds)
- 42 Liability for Railway Costs (39.3) Shall not exceed the Contract Price
- 43 MTBF Liquidated damages (39.5) [Applies / Does not apply]

£[Insert] per event in excess of the agreed number of MTBF failures

Agreed number of MTBF failures during Defects Correction Period – [Insert]

The Contractor's liability under sub-clause 39.5 shall not exceed the Contract Price

44	Project Bank Account (40)	[Applies from the date of this Contract / Does not apply]
	The Project Bank is	[Insert / Not applicable]
	The PBA Sub-Contractors are:	[Insert / Not applicable]
45	Consolidated Programme (41)	[Applies / Does not apply]
	Where stated to apply, the Key Direct Contractors are (41.1)	[Insert] [Insert] [Insert]
	The Contractor's liability (41.2)	together with any other Direct Contractor notified by the Employer to the Contractor from time to time / Not applicable] Shall not exceed the Contract Price
46	Additional responsibility for care of the Works (42)	[Applies / Does not apply]
	The items defined under Clause 42 are:	[Insert]
47	M&E and Signalling (43)	[Applies / Does not apply]
	"Plant" shall include the following items:	[Applies if and to the extent that the Works include the provision of plant and machinery for which there are testing requirements in the Technical Workslope or the Contractor's Proposals] [Insert]
	The "Tests on Completion" shall be the following and/or are referred to in the following sections of the Technical Workslope:	[Insert]
	The "Performance Tests" shall be the following and/or are referred to in the following sections of the Technical Workslope:	[Insert]
48	Works performed under previous contracts (43)	[Applies] / Does not apply]
	The purchase orders to which Clause 43 applies are:	[Insert / Not applicable]

49 Employer's Options (45)

[Applies] / Does not apply]

The Employer's Options are:

The Option shall be exercised no later than:

The Time for Completion is

The liquidated damages for delay are

[Insert]

[Insert]

[Insert]

[Insert]

[Insert]

[Insert]

[Insert]

[Insert]

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**INFRASTRUCTURE CONDITIONS OF CONTRACT – WITH QUANTITIES
VERSION WITH DESIGN
AND WITH NETWORK RAIL AMENDMENTS EMBEDDED**

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In the Contract the following words and expressions shall have the meanings hereby assigned unless the context otherwise requires:

- (a) “**Appendix**” means the Appendix to the Contract;
- (b) “**Bill of Quantities**” means the priced and completed Bill of Quantities;
- (c) “**Contract**” means the Contract Agreement and the other documents listed in the Contract Agreement to which these Conditions of Contract are annexed;
- (d) “**Contract Price**” means the sum to be ascertained and paid in accordance with the provisions of the Contract for the construction and completion of the Works;
- (e) “**Contractor**” means the Party named as such in the Contract and includes the Contractor’s personal representatives, successors and permitted assignees;
- (f) “**Contractor Designed Works**” means the part or parts of the Permanent Works to be designed, constructed and completed by or on behalf of the Contractor and all Temporary Works;
- (g) “**Contractor’s Equipment**” means all appliances or things of whatsoever nature required in or about the construction and completion of the Works but does not include materials or other things intended to form or forming part of the Permanent Works;
- (h) “**Contractor’s Proposals**” means the Contractor’s proposals for the design and carrying out of the Works referred to in the Contract Agreement;
- (i) “**Cost**” means all expenditure reasonably and properly incurred or to be incurred in providing the Works whether on or off the Site including overhead finance and other charges properly allocated thereto but does not include any allowance for profit;
- (j) “**Direct Contractor**” means a contractor, other than the Contractor, who is employed by the Employer to carry out work ancillary to but not forming part of the Works including statutory undertakers or authorities engaged by or employed by the Employer;
- (k) “**Employer**” means the Party named as such in the Contract Agreement to which these Conditions of Contract are annexed and includes the Employer’s personal representatives, successors and permitted assignees;
- (l) “**Employer Designed Works**” means the Permanent Works in respect of which the Employer is responsible for design in accordance with the Contract as identified in the Technical Workslope;
- (m) Not used;
- (n) “**Employer’s Representative**” means such person or persons as may be nominated by the Employer to act as such for the purposes of the Contract;
- (o) Not used;
- (p) “**Fixed Quantity**” means a quantity set out in the Bill of Quantities which is not subject to re-measurement;
- (q) “**Permanent Works**” means the permanent works to be designed, constructed and completed in accordance with the Contract;

- (r) **“Re-measurement”** means the ascertainment of the actual quantities of the work carried out for any item of work described in the Bill of Quantities as subject to re-measurement;
- (s) **“Section”** means a part of the Works separately identified in the Appendix; a part of the Works is a part which is not separately identified;
- (t) **“Site”** means the lands and other places on under in or through which the Works are to be constructed and any other lands or places provided by the Employer for the purposes of the Contract together with such other places as may be designated in the Contract or subsequently agreed by the Employer’s Representative as forming part of the Site;
- (u) **“Site Information”** means the document so described containing information relating to the Site;
- (v) **“Temporary Works”** means all temporary works of every kind required in or about the construction and completion of the Works;
- (w) **“Tender Total”** means the total of the Contractor’s tender for the design construction and completion of the Works as stated in the Contract Agreement;
- (x) **“Works”** means the Permanent Works and the Temporary Works and includes the Contractor’s design work;
- (y) Not used;
- (z) Not used;
- (aa) **“Agreed Rail Industry Period”** means each 28 day consecutive accounting period commencing on 1 April in each calendar year;
- (ab) **“Certificate of Substantial Completion”** means a certificate issued by the Employer’s Representative to the Contactor pursuant to sub-clause 10.4 (Substantial Completion), confirming that Substantial Completion has occurred;
- (ac) **“Conditions of Contract”** means The Infrastructure Conditions of Contract With Quantities Version, dated June 2018, with Network Rail’s NR8 embedded amendments;
- (ad) **“Confidential Information”** means any information which has been designated as confidential by either Party in writing or that ought reasonably to be considered as confidential, however it is conveyed, including information that relates to the business, affairs, developments, trade secrets, know-how, personnel, affiliates and suppliers (including sub-contractors) of either Party, including Intellectual Property, together with all information derived from the above, and any other information clearly designated as being confidential (whether or not it is marked as “confidential”) or which ought reasonably to be considered to be confidential;
- (ae) **“Contract Agreement”** means the contract agreement executed by the Employer and the Contractor to which these Conditions of Contract are annexed;
- (af) **“Contract Requirements HSEA”** means the document referred to as such in the Contract Agreement to which these Conditions of Contract are annexed, and as the same may be updated from time to time;
- (ag) **“Contracting Authority”** means any contracting authority as defined in Regulation 4 of The Utilities Contracts Regulations 2016;
- (ah) **“Crown”** means the government of the United Kingdom (including the Northern Ireland Executive Committee and Northern Ireland Departments, the Scottish Government and the National Assembly for Wales), including, but not limited to, government ministers, government departments, government and particular bodies and government agencies;
- (ai) **“Data Protection Legislation”** means (i) the European General Data Protection Regulation (Regulation (EU) 2016/679) **“GDPR”** and any applicable national implementing laws as amended from time to time (ii) the Data Protection Act 2018 to the extent that it relates to processing of personal data and privacy; (iii) all applicable laws about the processing of personal data and privacy;

- (aj) “**Greater London Area**” means the area administered by the Greater London Authority or any relevant person or body which replaces the Greater London Authority;
- (ak) “**Guarantor**” means an entity which provides a parent company guarantee in favour of the Employer in accordance with sub-clause 18.1 (Performance Security);
- (al) “**Insolvent**” means the relevant entity:
 - (i) suspending or threatening to suspend payment of its debts or being unable to pay its debts as they fall due or admitting inability to pay its debts or being deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;
 - (ii) being the subject of a petition presented (which is not dismissed within fourteen (14) days of its service), a notice given, or a resolution passed for or in connection with winding up other than for the sole purpose of a scheme for a solvent amalgamation with one or more other companies or solvent reconstruction;
 - (iii) being the subject of an application to court for the appointment of an administrator or a notice of intention to appoint an administrator filed at court;
 - (iv) going into liquidation;
 - (v) having a receiving or administration order made against him;
 - (vi) compounding with creditors;
 - (vii) carrying on business under a receiver, trustee or manager for the benefit of creditors,or any order, act or event which under applicable laws has effect substantially similar to these orders, acts or events.
- (am) “**Intellectual Property**” means all copyright and all neighbouring and database rights and moral rights, registered designs, registered and unregistered design rights, or any rights or property similar to the foregoing in any part of the world whether registered or unregistered together with the right to apply for the registration of such rights in any part of the world and the rights to current applications for registration of any such intellectual property;
- (an) “**Intermediaries Legislation**” means Income Tax (Earnings and Pensions) Act 2003 (ITEPA), Social Security Contributions and Benefits Act 1992 (SSCBA) and all other related statutes and regulations including the Finance Act 2017;
- (ao) “**Joint Names Policy**” means a policy of insurance which includes the Employer and the Contractor as the insured and under which insurers have no right of recourse against any person named as an insured;
- (ap) “**Key Sub-contractor**” are those sub-contractors of the Contractor to which the requirements of sub-clause 3.5A (Approval of sub-contract documents) as stated in the Appendix;
- (aq) “**London Living Wage**” means the basic hourly rate which is set as the London Living Wage by the Mayor of London and/or the Greater London Authority and/or another relevant person, body or agency (before tax, other deductions and any increase for overtime), as may be revised from time to time by the Mayor of London, the Greater London Authority or another relevant person, body or agency;
- (ar) “**PCR**” means the Public Contracts Regulations 2015 SI 2015/102 as amended from time to time;
- (as) “**Preliminaries**” means the document referred to as such in the Contract Agreement to which these Conditions of Contract are annexed;
- (at) “**Sub-Contractor**” means any sub-contractors to the Contractor including sub-contractors of any such sub-contractors;
- (au) “**Technical Workslope**” means the means the document referred to as such in the Contract Agreement to which these Conditions of Contract are annexed; and

- (av) “UCR” means the Utilities Contracts Regulations 2016 SI 2016/274 as amended from time to time.

1.2 Definitions in Conditions

The following words and expressions are defined elsewhere in the Contract:

- (a) Commencement Date has the meaning stated in sub-clause 10.1;
- (b) Contract Documents are the documents as referred to in sub-clause 1.1(b);
- (c) Contract Language is as stated in the Appendix;
- (d) Contractor Default has the meaning stated in sub-clause 15.1;
- (e) Defects Correction Period and Defects Correction Certificate have the meanings stated in sub-clauses 10.5 and 13.4;
- (f) Employer Default has the meaning stated in sub-clause 15.7;
- (g) Employer’s Risks are the risks referred to in sub-clause 8.5;
- (h) Excepted Risks are the risks referred to in sub-clause 8.3;
- (i) Force Majeure has the meaning stated in sub-clause 14.1;
- (j) Governing Law is as stated in the Appendix;
- (k) Information Protocol means the document so identified in Clause 20;
- (l) Milestone Sum has the meaning stated in Clause 21;
- (m) Nominated Sub-Contractor has the meaning stated in sub-clause 7.1;
- (n) Shared Risks are the risks referred to in sub-clause 8.7;
- (o) Substantial Completion has the meaning stated in sub-clause 10.4;
- (p) Aggregate Liability Cap has the meaning stated in Clause 39; and
- (q) Employer Furnished Materials has the meaning stated in Clause 23.

1.3 Singular and Plural

Words importing the singular also include the plural and vice-versa, as the context requires. Words importing the male gender include the female.

1.4 Meaning of Days

References to days means calendar days unless otherwise stated.

1.5 Headings and Marginal Notes

Headings and marginal notes in these Conditions of Contract shall not be deemed to be part of or be taken into consideration in the interpretation or construction of the Contract.

2. GOVERNING LAW, COMMUNICATIONS AND JURISDICTION

2.1 Governing Law

The Contract shall be governed by and interpreted in accordance with the laws of the country or jurisdiction stated in the Appendix.

2.2 Language

The Contract Language shall be that stated in the Appendix. If any part of the Contract is written in any other languages, those parts written in the Contract Language shall prevail.

2.3 Communications

Communications, except where stated in the Appendix, may be in any form, including electronic form, provided that a permanent record exists. Unless otherwise agreed by the Parties, communications shall be in the Contract Language.

Where the Appendix states that any communication must be delivered by hand or by pre-paid first class post or other next working day delivery service any such notice shall be deemed to have been received:

- (a) if delivered by hand, on signature of a delivery receipt; or
- (b) if sent by pre-paid first-class post or other next working day delivery service, at 9.00 am on the second working day after posting or at the time recorded by the delivery service.

2.4 Jurisdiction

The courts of the country stated in the Appendix shall, subject to Clause 19 (Resolution of Disputes) hereof, have jurisdiction over the Contract and over the enforcement of any decision of the Employer's Representative or of an adjudicator appointed thereunder.

3. ASSIGNMENT AND SUBCONTRACTING

3.1 Assignment

The Employer shall not assign, charge or transfer this Contract or any of its rights under it without the prior written consent of the Contractor (such consent not to be unreasonably withheld or delayed), provided that the Contractor's consent shall not be required where it is between the Employer and its direct or indirect holding companies and its direct or indirect subsidiaries (within the meaning of s1159 Companies Act 2006). The Contractor shall not assign, charge or transfer this Contract or any of its rights under it without the prior written consent of the Employer (such consent not to be unreasonably withheld or delayed).

3.2 Third Party Rights

Save as provided in sub-clause 25.1(g) (Employment protection and TUPE), nothing in this Contract shall confer on any third party any benefit or right to enforce any term of the Contract pursuant to any applicable law or statute to the extent such law or statute may be derogated from.

Any such law or statute that may otherwise be applicable shall be identified in the Appendix.

3.3 Sub-contracting of Works

The Contractor shall not without the prior written agreement of the Employer sub-contract the whole of the Works. Any purported sub-contract in breach hereof shall be of no effect.

3.4 Contractor's designer

The Contractor shall not appoint any new designers, nor change any Contractor's Designers named in the Appendix without the Employer's Representative's prior written consent which shall not be unreasonably withheld.

3.5 Sub-contracting of Parts

Except as provided in the Appendix the Contractor may sub-contract any part of the Works or their design subject to the Employer's Representative's consent which shall not be unreasonably withheld. Prior details of any work or design proposed to be sub-contracted and particulars of the sub-contractor or designer together with the proposed sub contract documents in accordance with sub clause 3.5 (Approval of sub contract documents) shall be notified to the Employer's Representative at least 14 days before the

proposed appointment. The Employer's Representative shall respond either with his consent or his refusal with reasons within 7 days.

3.5A **Approval of sub-contract documents**

The Contractor shall submit the sub-contract documents to the Employer's Representative for approval, unless the Employer's Representative has agreed that no submission is required. Without prejudice to sub-clause 3.5 (Sub-contracting of Parts), the Employer's Representative may withhold its approval:

- (a) if the Contractor cannot provide reasonable evidence to the Employer's Representative that the proposed sub-contractor possesses the level of experience and knowledge necessary to perform the relevant sub-contracted element of the Works; or
- (b) except where the Employer's Representative agrees otherwise (acting reasonably), if the sub-contract does not contain a provision:
 - (i) complying with sub-clause 3.5B (Supply Chain Protection);
 - (ii) enabling the Contractor to assign any of its rights and/or obligations under the sub-contract to the Employer without restriction (including any need to obtain any consent or approval) or payment by the Employer in accordance with sub-clause 15.4(b) (Employer rights after Termination);
 - (iii) where the sub-contract is for a Key Sub-contractor:
 - (a) requiring the sub-contractor to notify the Employer's Representative promptly in writing of any material non-payment or late payment of any sums properly due to the sub-contractor from the Contractor under the sub-contract, under a specified valid invoice and not subject to a genuine dispute;
 - (b) requiring the sub-contractor to notify the Employer's Representative if it intends to terminate the sub-contract due to a default by the Contractor and giving the Employer the right to step-in to the sub-contract in place of the Contractor;
 - (c) giving the Employer the right to step-in to the sub-contract in place of the Contractor in the event the Employer is entitled to terminate this Contract due to a breach by the Contractor;
 - (d) confirming that the rights of step-in granted to the Employer take priority over those rights of any other third party granted rights under such sub-contract; and
 - (e) expressly identifying the Employer as a third party entitled to enforce all rights and remedies equivalent to those available to the Contractor in accordance with the provisions of the Contracts (Rights of Third Parties) Act 1999.

Following the appointment of a sub-contractor in accordance with this sub-clause 3.5A, the Contractor shall provide a copy of the signed and dated sub-contract to the Employer's Representative within 14 days of the date of the appointment.

3.5B **Supply Chain Protection**

- (a) The Contractor shall procure that all sub-contracts entered into with Sub-Contractors contain provisions:
 - (i) requiring the Contractor to pay the Sub-Contractor within a specified period not exceeding 28 days from receipt of a valid and undisputed invoice;
 - (ii) giving the Employer a right to publish the Contractor's compliance with its obligation to pay undisputed invoices within the specified payment period;
 - (iii) which do not allow the Contractor to withhold retention or alternatively have a retention rate of 0%;

- (iv) containing insurance provisions that properly flow-down from Clause 17 (Insurances) and thereby do not provide for duplication of insurance cover; and
 - (v) requiring the Sub-Contractor to include a clause to the same effect as this sub-clause 3.5B in any contracts it enters into wholly or substantially for the purpose of performing or contributing to the performance of the whole or any part of the sub-contract.
- (b) Notwithstanding any provisions of Clause 27 (Confidentiality and Comptroller and Auditor General), if the Contractor notifies the Employer's Representative that the Contractor has failed to pay a sub-contractor's undisputed invoice within 28 days of receipt, or the Employer discovers the same, the Employer shall be entitled to publish the details of the late or non-payment (including on government websites and in the press).

3.6 **Labour Only Sub-Contractors**

The employment of a labour-only sub-contractor does not require the Employer's Representative's consent under sub-clause 3.5.

3.7 **Liability for Sub-Contractors**

The Contractor shall be liable under the Contract for all work sub-contracted by him and for all acts omissions defaults or neglects of any sub-contractor his agents servants or workers.

3.8 **Removal of Sub-Contractor**

The Contractor shall remove from the Works or their design any sub-contractor who mis-conducts himself or fails to conform with mandatory requirements for health and safety or whose conduct is prejudicial to health or safety.

4. **THE CONTRACT AND PROVISION OF INFORMATION**

4.1 **Contract Documents**

- (a) The documents forming the Contract are listed in the Contract Agreement. Any ambiguities or discrepancies shall be explained and adjusted by the Employer's Representative who shall issue an instruction accordingly applying the order of priority of documents stated in the Contract Agreement.
- (b) If the Contractor shall find any inaccuracy, discrepancy or ambiguity contained in or between any of the Contract Documents, he shall immediately notify the Employer, who shall, on receipt of such notice, issue an instruction as to how such inaccuracy, discrepancy or ambiguity shall be resolved applying the order of priority of documents stated in the Contract Agreement. The Contractor shall not be entitled to an extension of time or to any additional payment in respect of compliance with such instruction to the extent that such inaccuracy, discrepancy, ambiguity could reasonably have been found or foreseen at the date of this Contract by a contractor exercising the skill, care and diligence reasonably to be expected of a contractor experienced in projects of a similar nature to the Works.
- (c) The Contractor accepts entire responsibility for the Contractor's Proposals and for any ambiguities or discrepancies therein whether or not the whole or any part of the Contractor's Proposals has been prepared by or on behalf of the Employer.

4.2 **Whole Agreement**

The Contractor and the Employer agree that the Contract sets out fully the rights, obligations and liabilities of each of them to the other arising under or in connection with the Contract or the Works. No statement by either Party shall have effect unless made in writing and incorporated into the Contract.

4.3 **Provision of Documents**

Upon award of the Contract the Contractor shall be provided with hard copies of the Contract Documents as specified in the Appendix.

4.4 **Not used**

4.5 **Inspecting of Site**

The Contractor shall be deemed to have inspected the Site and its surroundings and to have obtained such information in connection therewith as is reasonably available prior to the date of the Contract; and to have satisfied himself, so far as is practicable, as to the form and nature of the Site including the sub-soil and hydrological conditions, the means of communication with and access to the Site and the accommodation he may require, and to have obtained for himself all necessary information as to risks, contingencies and other circumstances which may affect the Contract Price and his liabilities under the Contract.

4.6 **Employer's Design and further instructions**

Without prejudice to sub-clause 4.8 (Contractor Designed Works), any Employer's design shall be contained in the Technical Workslope and in such further instructions, including drawings and specifications, as the Employer's Representative shall supply to the Contractor, being necessary for the design and construction of the Works. The Contractor shall be bound by all such instructions. If they include any variation, it shall be dealt with in accordance with Clause 12 (Changes to the Works and Valuation).

4.7 **Design Criteria**

The Employer's Representative shall provide to the Contractor such design criteria relevant to the Employer Designed Works or to any Temporary Works design supplied by the Employer's Representative as may be necessary to enable the Contractor to comply with the Contract.

4.8 **Contractor Designed Works**

The Contract may require that parts of the Permanent Works shall be designed by the Contractor. In such case:

- (a) The Contractor's design shall comply with the Technical Workslope and with any Contractor's Proposals;
- (b) The Contractor shall submit to the Employer's Representative for his acceptance four reproducible copies (including by electronic format) trust-to-scale of such drawings specifications calculations and other design information as are necessary to satisfy the Employer's Representative that the Contractor's design complies with the requirements of the Contract and the Contractor shall not commence construction in accordance with such design documentation until the Employer's Representative has accepted them;
- (c) The Employer's Representative may require the Contractor to supply such further documents as may be necessary for the proper and adequate construction of the Works and, when accepted by the Employer's Representative, the Contractor shall be bound by the same. Such further documents shall be provided at such times as not to delay or disrupt the progress of the Works and in accordance with the programme referred to in sub-clause 9.1 (Programme for the Works) and/or any relevant dates set out in the Technical Workslope;
- (d) The Contractor shall supply to the Employer, as provided by the Technical Workslope and within the times as so stated, such operational and maintenance manuals and as-built drawings as are sufficient to enable the Employer to operate and maintain the Permanent Works;
- (e) Acceptance by the Employer's Representative of the Contractor's design shall not relieve the Contractor of any of his responsibilities under the Contract; and
- (f) The Employer's Representative shall be responsible for the integration and co-ordination of the Contractor's design with the design of the whole of the Works.

4.9 **Design Particulars**

- (a) Upon acceptance by the Employer's Representative of the Contractor's design, the Contractor shall supply to the Employer's Representative all design documentation as specified in the Technical Workslope.

- (b) One copy of the Technical Workscope, the Contractor's Proposals and of all design documentation shall at all reasonable times be available on the Site for inspection and use by the Employer's Representative and any other person authorised by the Employer's Representative.

4.10 **Assessment of Risks**

The Contractor shall be responsible for the interpretation of all information obtained relevant to the Site or to risks, contingencies and other circumstances which may affect his performance of the Contract, whether such information is obtained by the Contractor or supplied by the Employer.

4.11 **Copyright**

Neither the Employer nor the Contractor shall acquire copyright or other Intellectual Property rights in the data supplied in accordance with this Clause 4, but the Contractor and its sub-contractors, the Employer and any Direct Contractors and the Employer's Representative shall be entitled to copy and use the same for the purpose only of the Contract and of providing and using the Works (including in the case of the Employer maintaining and adjusting the Works).

4.12 **Patent Rights**

The Contractor shall indemnify and keep indemnified the Employer from and against all claims and proceedings for or on account of infringement of any patent right design trademark or name or other protected Intellectual Property right in respect of:

- (a) Contractor's Equipment used for or in connection with the Works;
- (b) materials plant and equipment for incorporation in the Works;
- (c) the design, construction and completion of the Works or any part of the Works,

and from and against all claims demands proceedings damages costs charges and expenses whatsoever in respect thereof or in relation thereto except where such infringement results from compliance with design for which the Employer is responsible in accordance with this Contract.

4.13 **Site Photographs**

- (a) Except as required to record activities on the Site, the Contractor shall not at any time take any photograph of the Site or the Works or any part of them, and shall ensure that no such photographs shall at any time be taken or published or otherwise circulated by any person employed by him, unless the Contractor has obtained the prior written consent of the Employer's Representative.
- (b) All Intellectual Property in any photographs or moving images of the Site or the Works or any part of them, taken by or on behalf of the Contractor (the "**Photographs**") shall vest in the Employer. The Employer grants the Contractor a licence to copy, use, adapt and re-produce the Photographs for any purpose whatsoever, subject to obtaining the Employer's consent in accordance with sub-clause 4.13(e) on each occasion.
- (c) The Employer shall own the full image rights to all Photographs. It is the Contractor's responsibility, when appointing a photographer, to ensure that all Intellectual Property in the Photographs shall vest in the Employer and to ensure that unlimited usage rights are obtained. The Employer may use the Photographs for any purpose whatsoever and shall not be required to credit the images.
- (d) The Contractor shall indemnify the Employer against any loss, damage, cost or expense for which the Employer is or becomes liable as a result of any infringement or alleged infringement by the Contractor of any third party's Intellectual Property in relation to any Photographs.
- (e) The Contractor shall not publish, release or circulate any Photographs or make any reference to the Work or the Site, including publishing or releasing any Photographs, press releases or press articles, without first obtaining the Employer's written consent.

- (f) At its own expense, the Contractor shall, and shall use all reasonable endeavours to procure that any necessary third party shall, promptly execute and deliver such documents and perform such acts as may be required for the purpose of giving full effect to sub-clauses 4.13(a) to (e) above.

5. THE EMPLOYER'S REPRESENTATIVE

5.1 The Employer's Representative

The Employer shall appoint an individual, firm or company to act as the Employer's Representative under the Contract and so notify the Contractor in writing. If the Employer's Representative is identified in the Appendix he shall be so appointed; provided that the Employer may at any time replace the Employer's Representative upon notifying the Contractor in writing.

5.2 Employer's Representative Duties

The Employer's Representative shall carry out the duties required by the Contract and shall comply with any Information Protocols listed in the Appendix. Any other restrictions on the Employer's Representative's authority shall be identified in the Appendix.

5.3 Employer's Representative Authority

The Employer's Representative shall have no authority to amend the terms of the Contract and no consent or approval or failure to disapprove by or on behalf of the Employer's Representative shall relieve the Contractor of any of his obligations under the Contract. Provided that the Employer's Representative when acting pursuant to sub-clause 6.1(b) (Responsibility of Parties) shall have the power to bind the Employer if expressly authorised to do so in writing.

5.4 Employer's Representative to be Impartial

The Employer's Representative shall act impartially where the Contract requires him to decide any matter as between the Parties to the Contract.

5.5 Employer's Representative Assistants

The Employer's Representative may appoint assistants to superintend the Works and/or to exercise delegated authority on his behalf. Such delegation shall be in writing and exclude duties under Clauses 15 (Termination for Default) and 19 (Resolution of Disputes). Any such delegation shall continue in force until such time as the Employer's Representative notifies the Contractor in writing that such delegation has been revoked.

The Employer's Representative and any person exercising delegated authority on his behalf shall be afforded sufficient access to the Works, the Site and the Contractor's premises, including those of any sub-contractor, to carry out any inspection, examination, testing or measurement that the Employer's Representative or his representative may consider necessary.

5.6 Instructions in Writing

Instructions of the Employer's Representative or of any person exercising delegated authority shall be in writing. An oral instruction shall be of no effect unless confirmed by the person issuing the instruction within two working days such that a permanent record of the instruction exists. Provided that the Employer's Representative or any person exercising delegated authority shall upon the written request of the Contractor specify in writing under which powers any instruction is given.

5.7 Employer's Representative Powers

The Employer's Representative shall monitor the Works on behalf of the Employer and shall carry out and exercise the duties and powers of the Employer's Representative under the Contract which shall include without limitation the following powers:

- (a) Order the suspension of the Works or any Section or part if provided for in the Contract or necessary by reason of weather conditions or necessary for the proper construction of the Works or necessary by some breach of Contract or negligence on the part of the Contractor or necessary for the safety of the Works or for such time or times and in such manner as the Employer's Representative may consider necessary;

- (b) Order the testing of any work or materials, the cost of which shall be borne by the Contractor if so provided in the Contract or where the test shows the work or materials not to be in accordance with the Contract;
- (c) Order at the expense of the Contractor the uncovering of any part of the work for which the Employer's Representative or his representative has not been afforded the opportunity to make such inspection or examination as is reasonably necessary; and
- (d) Order at the expense of the Contractor the removal and proper replacement of any work or materials, including any design for which the Contractor is responsible, where such work, materials or design are not in accordance with the Contract.

In default of compliance by the Contractor with any such order within such time as the Employer's Representative may reasonably direct, the Employer may employ and pay others to carry out the necessary work and may recover the costs of doing so from the Contractor.

5.8 **Instructions for Urgent Repair**

- (a) If in the opinion of the Employer's Representative any remedial or other work or repair is urgently necessary at any time up to the end of the Defects Correction Period, the Employer's Representative may instruct the Contractor to carry out such work or repair. If the Contractor fails to carry out the work or repair within such time as the Employer's Representative shall reasonably require, the Employer may use his own staff and/or may employ and pay others to carry out the work or repair and may recover the costs of doing so from the Contractor.
- (b) Notwithstanding sub-clause 5.8(a), if in the opinion of the Employer's Representative, any urgent measures shall become reasonably necessary in order to obviate any risk of accident or failure or if, by reason of the happening of any accident or failure or other event, any remedial or other work or repair shall become urgently necessary, and the Contractor shall be unable or unwilling at once to carry out such measures, the Employer may by his own staff and/or by using other contractors carry out such measures as the Employer may consider necessary. The Employer shall be entitled to recover from the Contractor all reasonable additional costs and expenses incurred by the Employer in carrying out such measures.

6. **RESPONSIBILITY OF PARTIES**

6.1 **Collaboration and early warning**

The Contractor, the Employer and the Employer's Representative on his behalf shall each, in the performance of the Contract, collaborate in a spirit of trust and mutual support in the interests of the timely, economic and successful completion of the Works. In particular, the Contractor and the Employer's Representative shall each give notice to the other as soon as they become aware of any matter which is likely to affect the design or construction of the Works or to cause delay or additional Cost, irrespective of whether the matter is contended to give rise to any relief under the Contract. Upon the giving of such notice:

- (a) The Employer's Representative shall as soon as reasonably practicable arrange a meeting of appropriately authorised persons to consider actions or measures in response to the matter so notified and for avoiding or mitigating any such delay or additional Cost;
- (b) Any actions or measures so agreed shall be put into writing and, when signed by the Contractor and (subject to express authorisation having been given in accordance with sub-clause 5.3 (Employer's Representative's Authority)), the Employer's Representative on behalf of the Employer, shall be binding on the Parties;
- (c) An agreement under sub-clause 6.1(b) may include matters of payment and/or extension of time, provided that any such agreement shall be deemed to be in full satisfaction of any claim by either Party arising out of the actions and measures included in the agreement;
- (d) Where agreement is reached under sub-clause 6.1(b) but does not include matters of payment and/or extension of time, the rights of the Parties in respect of the matters agreed shall continue to be governed by the terms of the Contract; and

- (e) Where no agreement is reached under sub-clause 6.1(b) the Employer's Representative shall issue such instructions as are appropriate including instructions under sub-clauses 12.3 or 12.4 (Changes to the Works and Valuation).

6.2 Carrying out the Works

Save insofar as it is legally or physically impossible the Contractor shall design construct and complete the Works in accordance with the Contract to the satisfaction of the Employer's Representative. The Contractor shall comply with the Preliminaries and provide all labour, materials, equipment and everything whether of a temporary or permanent nature required for such design construction and completion and shall comply with the instructions of the Employer's Representative or of any representative appointed in accordance with sub-clause 5.5 (Employer's Representative Assistants). Where the Contractor has provided designs or carried out any other works (including preliminary works or site set-up) in relation to the Works under any other contract with the Employer, the Contractor shall not be able to disclaim responsibility for such design or work and shall be responsible for any error in such design or other works.

6.3 Design of the Works

The Contractor shall be responsible for the design of the Contractor Designed Works and for the design of all Temporary Works except to the extent that any design is the responsibility of the Employer's Representative or the Employer in accordance with this Contract.

6.4 Contractor's Design

The Contractor shall exercise the skill care and diligence appropriate to an experienced professional consultant in the design of the Contractor's Designed Works.

6.5 Superintendence of Works

- (a) The Contractor shall provide all necessary superintendence during the construction of the Works and for as long thereafter as the Employer's Representative may consider necessary. The Contractor shall employ on the Works only such persons as are competent and have adequate knowledge of the work, including the hazards likely to be encountered. The Contractor shall have the duty to take all necessary and appropriate steps to maintain the safety of all persons entitled to be on the Site and to avoid any danger to the public. Subject at all times to the Contractor's obligations under sub-clauses 6.6 and 6.9, the Employer shall have the same duty in relation to any work which he carries out himself or through a Direct Contractor. The Contractor shall keep the Site, so far as it is under his control, and the Works, until substantial completion or occupation by the Employer, in a safe and orderly state.
- (b) The Employer's Representative may object to and require the Contractor to remove or cause to be removed from the Works any person who in the opinion of the Employer's Representative misconducts himself or is incompetent or negligent in the performance of his duties or fails to conform with any provisions with regard to safety set out in this Contract or persists in any conduct which is prejudicial to safety or health and such persons shall not be again employed upon the Works without the permission of the Employer's Representative.

6.6 Safety of Work and Persons

- (a) The Contractor shall take full responsibility for the adequacy, safety and stability of all site operations and methods of construction.
- (b) The Contractor shall submit at such times and in such detail as the Employer's Representative may reasonably require such information relating to the methods of construction (including Temporary Works and the use of Contractor's Equipment) which the Contractor proposes to adopt or use and, if requested by the Employer's Representative such calculations of stresses strains and deflections that will arise in the Permanent Works and any parts of them during construction from the use of such methods as are sufficient to demonstrate to the Employer's Representative that if these methods are adhered to, the Works can be executed in accordance with this Contract and without detriment to the safe working of the railway or the property of the Employer and others or to the Permanent Works when completed.
- (c) If the particulars or calculations provided show, in the Employer's Representative's opinion, any failure to meet the requirements of the Contract or detriment to the Permanent Works the

Employer's Representative may instruct the Contractor, at the Contractor's cost, to change the proposed methods so as to meet the requirements of the Contract or to avoid any detriment to the Permanent Works.

6.7 **Interference with Traffic and Adjoining Properties**

- (a) All operations necessary for the construction and completion of the Works shall so far as compliance with the requirements of this Contract permits be carried out so as not to:
 - (i) cause an unplanned interruption in the use of track or station areas or other railway infrastructure (it being acknowledged that the Employer may incur penalties and liabilities for this under its contractual and regulatory arrangements with third parties including passenger train and freight operators in accordance with Clause 28 (Track Possessions and Isolations));
 - (ii) interfere unnecessarily or improperly with:
 - (a) the convenience of the public; or
 - (b) the access to public or private roads footpaths or properties whether in the possession of the Employer or of any other person and with the use or occupation of them.
- (b) All work shall be carried out without unreasonable noise disturbance or other pollution.
- (c) To the extent that events caused by sub-clauses 6.7(a)(ii) and 6.7(b) are not the unavoidable consequence of carrying out the Works, the Contractor shall indemnify the Employer in respect of all claims, demands, proceedings, damages, costs and charges and expenses whatsoever arising out of or in relation to such matters.
- (d) The Contractor will advise the Employer as soon as possible of any potential liability for damages on account of noise disturbances or other pollution which would be the unavoidable consequences of carrying out the Permanent and/or Temporary Works and on measures to avoid such liability. The Contractor will comply with any necessary changes to the Permanent and/or Temporary Works to the satisfaction of the Employer's Representative. The cost of such compliance shall be borne by the Contractor unless, in the opinion of the Employer's Representative, the compliance is a variation for the purposes of Clause 12 (Changes to the Works and Valuation) in which case, subject to Clause 13 (Additional Payment and Final Account) the Contract Price shall be adjusted by the amount of such cost as may be reasonable except to the extent that such cost results from the Contractor's breach of Contract or negligence.

6.8 **Site Security**

- (a) The Contractor shall take all reasonable steps and all steps required by this Contract to prevent unauthorised persons being admitted to the Site. If the Employer's Representative gives the Contractor notice that any person is not to be admitted to the Site, the Contractor shall take all practicable steps to prevent that person being admitted.
- (b) Where access to the Site is required by way of the Employer's land the route of such access shall be approved by the Employer's Representative. The Contractor shall be responsible for ensuring that no person employed on his behalf trespasses beyond the agreed limits of the working area or access route and shall, if required so to do, provide and maintain to the satisfaction of the Employer's Representative temporary fencing of an approved type to prevent trespass on the railway or neighbouring land.
- (c) Passes are required for admission to the Site and the Employer shall either issue them to the Contractor or arrange for their issue by the Contractor. The Contractor shall submit to the Employer's Representative a list of the names of the relevant employees and other persons issued or to be issued with passes and any other information which the Employer's Representative reasonably requires in this connection. The passes shall be returned at any time on the demand of the Employer's Representative and in any case on the completion of the Works.
- (d) The Contractor shall maintain a record of all visitors to the Site and shall, if and when instructed by the Employer's Representative, give to the Employer's Representative a list of names and addresses of all persons who are or may be at any time concerned with the Works or any part of

them, specifying the capacities in which they are so concerned, and giving such other particulars as the Employer's Representative may reasonably require.

6.9 **CDM Regulations**

- (a) The Contractor shall strictly comply with the Employer's health and safety requirements as set out in the Contract Requirements HSEA. The Contractor shall ensure that all the Contractor's employees, any Sub-Contractors and other persons engaged by it in relation to this Contract receive safety and skills training in accordance with the requirements of the Contract Requirements HSEA and the Employer may instruct the immediate replacement, at the Contractor's cost, of any person on the Site who is not so trained.
- (b) The "**Principal Contractor**" (for the purposes of and as defined in the Construction (Design and Management) Regulations 2015 ("**CDM 2015**")) for the Project is as stated in the Appendix.
- (c) If the Contractor is appointed Principal Contractor it warrants that it is competent to accept this appointment and that it will properly perform all the duties required of a principal contractor under CDM 2015.
- (d) If the Contractor is not the Principal Contractor for the whole or any part of the Works it shall support the Principal Contractor to enable it to perform the duties required of the principal contractor under CDM2015.
- (e) The "**Principal Designer**" (for the purposes of and as defined in CDM 2015) for the Project is as stated in the Appendix.

7. **NOMINATED SUB-CONTRACTORS AND DIRECT CONTRACTORS**

7.1 **Nominated Sub-Contractor**

Nominated Sub-Contractor means a sub-contractor who is identified as such in the Contract or whom the Employer's Representative instructs the Contractor to employ as a Nominated Sub-Contractor.

7.2 **Objection to Nomination**

The Contractor shall not be bound to employ a Nominated Sub-Contractor against whom the Contractor raises reasonable objection by written notice given to the Employer's Representative as soon as practicable. An objection shall be deemed reasonable if based on any of the following grounds:

- (a) The Contractor reasonably believes the Nominated Sub-Contractor not to have adequate competence, resources or financial standing;
- (b) The Nominated Sub-Contractor does not agree to undertake to the Contractor such obligations and liabilities as will enable the Contractor to discharge his obligations and liabilities under the Contract; and
- (c) The Nominated Sub-Contractor does not undertake to indemnify the Contractor against all such liabilities arising under or in connection with the Contract from the consequences of any failure by the Nominated Sub-Contractor to perform such obligations under the sub-contract.

Provided that ground 7.2(c) shall not apply if the Employer agrees to indemnify the Contractor accordingly.

7.3 **Payments to Nominated Sub-Contractors**

The Contractor shall pay the Nominated Sub-Contractor the amounts which the Employer's Representative certifies as due in accordance with the nominated sub-contract. The Contractor shall be entitled to be paid the amounts so certified together with such overhead charges and profit as specified in the Appendix subject to sub-clause 7.4.

7.4 **Direct Payment**

Before issuing any Payment Certificate which includes an amount payable to a Nominated Sub-Contractor the Employer's Representative may request the Contractor to provide proof that the sum

previously certified in respect of the Nominated Sub-Contractor has been paid less any applicable deduction for retention or otherwise. If the Contractor fails to provide such proof or otherwise fails to satisfy the Employer's Representative that he is reasonably entitled to withhold or refuse payment of such amount to the Nominated Sub-Contractor, then the Employer may, at his discretion, make payment direct to the Nominated Sub-Contractor in respect of amounts previously certified as due to the Nominated Sub-Contractor but unpaid and may then deduct such amounts from any sums otherwise becoming payable to the Contractor.

7.5 Direct Contractor

The Contractor acknowledges that the Employer is permitted to appoint Direct Contractors to execute work not forming part of this Contract including to undertake work on the Site. In such a case:

- (a) The Contractor shall, in accordance with the Employer's Representative's instructions, provide reasonable facilities on the Site for any Direct Contractor;
- (b) The Contractor shall owe a duty to the Employer to co-operate in co-ordinating the work of the Direct Contractor with the work of the Contractor;
- (c) Subject to sub-clause 7.5(b), the Employer shall be responsible to the Contractor for the performance of the Direct Contractor;
- (d) The Employer's Representative shall issue such instructions to the Contractor and to the Direct Contractor as shall be necessary to ensure the proper and timely carrying out and completion of the Works; and
- (e) The work to be carried out by the Direct Contractor shall not be deemed to be part of the Works.

8. RISK

8.1 Contractor's Risk

The Contractor shall assume all risks in carrying out the Works save for the Excepted Risks, the Employer's Risks and the Shared Risks to the extent set out in the Contract.

8.2 Care of the Works

The Contractor shall:

- (a) subject to sub-clause 8.3 take responsibility for the Works and materials plant and equipment for incorporation therein from the Commencement Date until the date on which Substantial Completion for the whole of the Works or any Section or part of the Works is certified when, save as provided in paragraph (b) hereof, the responsibility for their care shall pass to the Employer; and
- (b) take responsibility for the care of any work which he undertakes during the Defects Correction Period including any materials plant and equipment therefor until such work has been completed.

8.3 Excepted Risks

The Contractor is not liable for loss or damage to the Works to the extent it is due to any of the Excepted Risks which are the following:

- (a) the use or occupation by the Employer his agents servants or other contractors (not being employed by the Contractor or for which the Contractor is not otherwise responsible in accordance with this Contract) of any part of the Permanent Works;
- (b) any fault defect error or omission in the design of the Works for which the Employer is responsible under this Contract;
- (c) riot war invasion act of foreign enemies or hostilities (whether war be declared or not);
- (d) civil war rebellion revolution insurrection or military or usurped power;

- (e) ionizing radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component; and
- (f) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

8.4 Rectification of Loss

- (a) In the event of any loss or damage to the Works or any Section or part of them or to any materials plant or equipment for incorporation therein while the Contractor is responsible for their care (except as provided in sub-clause 8.3), the Contractor shall at his own cost rectify such loss or damage so that the Permanent Works conform in every respect with the provisions of the Contract and the Employer's Representative's instructions. The Contractor shall also be liable for any loss or damage to the Works occasioned by him in the course of any operations carried out by him for the purpose of completing any outstanding work or correcting any defect.
- (b) Should any such loss or damage arise from any of the Excepted Risks defined in sub-clause 8.3 the Contractor shall if and to the extent required by the Employer's Representative rectify the loss or damage at the expense of the Employer.
- (c) In the event of loss or damage arising from an Excepted Risk and from a risk for which the Contractor is responsible under sub-clause 8.2 then the cost of rectification shall be apportioned on a fair and reasonable basis.

8.5 Employer's Risks

The Employer's Risks (subject to the other provisions of this Contract) are:

- (a) physical conditions (other than weather conditions or conditions due to weather conditions or contamination and/or pollution) or artificial obstructions which conditions or obstructions could not reasonably have been foreseen by an experienced contractor;
- (b) failure by the Employer's Representative to deliver necessary instructions or details or any necessary approval, acceptance or consent within such times as they are reasonably necessary in accordance with this Contract;
- (c) failure by the Employer to give access to the Site or part of it in accordance with this Contract;
- (d) unless resulting from the Contractor's breach of Contract or negligence, the issue by the Employer's Representative of an instruction (including a variation) which causes delay and/or disruption to the Works;
- (e) the Technical Workslope provided by the Employer and for which it is responsible under this Contract or any instructions of the Employer's Representative being found not to be in conformity with any applicable law, regulation or bye-law;
- (f) any error in the setting out of the Works or their construction which is due to incorrect information for which the Employer is responsible in accordance with this Contract supplied in writing by the Employer's Representative or other person exercising delegated authority;
- (g) suspension of the Works or any Section for a reason not falling within sub-clause 8.7(b);
- (h) delay or additional cost caused by a Direct Contractor;
- (i) delay or additional cost arising from a default or failure by the Employer in relation to Employer Furnished Materials;
- (j) delay or additional cost resulting from encountering remains or articles of geological or archaeological importance on the Site; and
- (k) cancellation or alteration of the dates and times of agreed speed restrictions, track possessions or isolations under sub-clause 28.2 (where applicable)

8.6 Contractor's Entitlement

Where any Employer's Risk occurs the Contractor shall be entitled to payment, subject to Clauses 11 (Measurement and Payment) and 13.3 (Delay or Disruption), of additional Cost incurred directly and unavoidably as a result of the occurrence of such risks and to allowance of additional time for completion of the Works or any Section subject to Clause 9 (Programme and Time for Completion).

8.7 Shared Risks

The Shared Risks are:

- (a) exceptionally adverse weather conditions or conditions due to exceptionally adverse weather conditions;
- (b) suspension of the Works or any Section if provided for in the Contract or necessary by reason of weather conditions or necessary for the proper construction of the Works and not arising from any error on the part of the Employer's Representative or the Employer or breach of Contract or negligence on the part of the Contractor;
- (c) an event of Force Majeure;
- (d) an Excepted Risk;
- (e) the exercise after the date of tender by the United Kingdom Government of any statutory power that directly affects the execution of Works;
- (f) the use or threat of terrorism as defined by the Terrorism Act 2000 and/or the activities of the relevant authorities in dealing with such threat;
- (g) the valid exercise by the Contractor of its rights under Section 112 of the Housing Grants, Construction and Regeneration Act 1996 (as amended); and
- (h) pollution or contamination encountered by the Contractor at the Site.

8.8 Allowance of Time

Where any Shared Risk occurs, the Contractor shall be entitled to allowance of additional time for completion of the Works or any Section subject to Clause 9 (Programme and Time for Completion) but not to financial compensation unless otherwise provided in the Contract.

8.9 Ordering a Variation

The Employer's Representative may, where any of the risks in sub-clauses 8.5 or 8.7 occur, order a variation, in which case the Contractor's entitlement shall be as provided in Clause 12 (Changes to the Works and Valuation).

9. PROGRAMME AND TIME FOR COMPLETION

9.1 Programme For Works

Within 21 days after the award of the Contract the Contractor shall submit to the Employer's Representative a programme for the Works with a critical path network and accompanied by a general description of the arrangements and methods of construction which the Contractor proposes to adopt. The Employer's Representative shall within a further 21 days either accept the programme or require amendments necessary to meet the requirements of the Contract, in which case the Contractor shall submit an amended programme within such time as the Employer's Representative may direct. In default of response within 21 days the Employer's Representative shall be deemed to have accepted the programme.

9.2 Performance Information

The Contractor shall provide to the Employer's Representative, during the carrying out of the Works, such information as to performance as may be required by the Technical Workslope and Preliminaries.

9.3 Revised Programme

Should it appear at any time that the progress of the work does not conform with the accepted programme, the Employer's Representative may require the Contractor to submit a further programme showing such modifications as required to achieve completion in accordance with the Contract or to reduce delay and the Contractor shall submit the further programme within such time as the Employer's Representative may direct.

9.4 Extension of Time

The Contractor shall be entitled, subject to Clause 13 (Additional Payment and Final Account), to an extension of time for the completion of the Works or any Section of the Works where delay is caused by any of the grounds set out in sub-clause 8.4(b) (Rectification of Loss), sub-clause 8.5 (Employer's Risks) or sub-clause 8.7 (Shared Risks).

9.5 Employer's Representative's Assessment of Delay

Upon receipt of any claim for extension in accordance with sub-clause 13.1 (Notice of Claims), the Employer's Representative shall consider all the circumstances known to him at that time and make an assessment of the delay (if any) that has occurred as a result of the alleged cause(s). In the absence of a claim by the Contractor the Employer's Representative may make an assessment of the delay that he considers has occurred.

9.6 Interim Extension of Time

The Employer's Representative shall, in the light of his assessments under sub-clause 9.5, grant to the Contractor any extension of time he considers fairly due for the substantial completion of the Works or any Section on an interim basis, and notify the Contractor and the Employer of the extension and of the reasons.

9.7 Extension at Completion

The Employer's Representative shall not later than 14 days after the due date or extended date for Substantial Completion of the Works or any Section, whether or not the Contractor has made any claim for an extension of time, consider all the circumstances known to him at that time and grant to the Contractor any extension of time he considers fairly due on an interim basis, and notify the Contractor and the Employer of the extension and of the reasons.

9.8 Final Extension

The Employer's Representative shall within 28 days or such longer period as he may reasonably require after the issue of the Certificate of Substantial Completion for the Works or for any Section review all the circumstances known to him and finally determine the extension of time (if any) to which he considers the Contractor fairly entitled in respect of the Works or the relevant Section and notify the Contractor and the Employer of the final extension and of the reasons. No such final review shall result in a decrease in any extension of time already granted by the Employer's Representative pursuant to sub-clauses 9.6 or 9.7.

10. PERFORMANCE AND COMPLETION

10.1 Contractor to Proceed

The Contractor shall commence the Works on or as soon as practicable after the Commencement Date, which shall be the date for commencement of the Works stated in the Appendix or otherwise as agreed between the Parties in writing. The Contractor shall then proceed with the Works with due expedition and without delay in accordance with the Contract.

10.2 Site Access

Subject to sub-clause 6.7(a) (Interference with traffic and adjoining properties), Clause 28 (Track Possessions and Isolations) and any restrictions included in this Contract, the Employer shall give the Contractor a non-exclusive licence to occupy the Site and such access to it as is necessary for the construction of the Works.

10.2A Access and Facilities

The Contract Price shall not be adjusted for the cost of any access or facilities outside the Site required by the Contractor for the purposes of the Works that are additional to those provided by the Employer.

10.3 Time for Completion

The whole of the Works and any Section required to be completed within a particular time as stated in the Appendix shall be completed within the times so stated, subject to sub-clause 10.4 and subject to any extensions granted under Clause 9 (Programme and Time for Completion). Provided that a part of the Works shall not be deemed completed unless the Employer agrees in writing to accept completion of it.

10.4 Substantial Completion

For the purposes of this Contract completion means substantial completion such that all the work required by the Contract has been carried out (including any Tests on Completion under Clause 43.3 (Tests on Completion) (if applicable) but excluding Performance Tests under Clause 43.4 (Performance Tests)) save for any omission or defect which does not prevent use of the Works for their intended purpose. The Contractor shall give written notice to the Employer's Representative of the date upon which the Works or any Section are substantially complete. The Employer's Representative shall within 21 days of such notice, or if in the absence of such notice the Employer's Representative considers at any time that a Certificate of Substantial Completion is or may be due, either issue to the Contractor a Certificate of Substantial Completion or notify the Contractor of work which is required to be completed before the issue of such certificate. Upon such completion the Employer's Representative shall issue a Certificate of Substantial Completion. Subject to sub-clause 10.3, the Works or any Section or part of the Works shall be deemed complete where:

- (a) the Employer's Representative agrees in writing to defer any outstanding items of work until after completion; or
- (b) the Employer and the Contractor agree in writing to a non-exclusive licence to occupy the Site for outstanding items of work;
- (c) and in either such case the Contractor agrees in writing to complete the outstanding work within such time as shall be agreed or, in default of agreement, within the Defects Correction Period. The Employer's Representative shall certify when such deemed completion occurs.

In the event that the Employer's Representative issues a Certificate of Substantial Completion under this Clause 10.4 without any notice having been given by the Contractor under this Clause 10.4, upon the issue of such certificate the Contractor shall be deemed to have given an undertaking to finish any outstanding work in relation to the Works or the relevant Section in accordance with the provisions of Clause 10.5.

10.5 Defects Correction

The Contractor shall, during the Defects Correction Period stated in the Appendix rectify any defects and complete any outstanding works within the time agreed in accordance with sub-clause 10.4(c) or if no time is agreed as soon as practicable during the Defects Correction Period. The Contractor shall be given access to the Works to rectify any notified defects and to complete any outstanding works. Such access shall only be allowed in line with the Employer's requirements for the Site (including operation of the railway) and is at the Contractor's own risk and cost. Rights of access may only be available during planned speed restrictions, track possession or isolation at the discretion of the Employer. Subject to any other agreement of the Parties, the Defects Correction Period runs from the date on which the Works or any Section or part are or are deemed substantially completed.

10.6 Liquidated Damages

If the Contractor fails to achieve completion of the whole of the Works as required by sub-clause 10.3 he shall pay to the Employer Liquidated Damages, as stated in the Appendix, for every day during which the Works remain uncompleted. If any part of the Works achieves or is deemed to achieve completion before the completion of the whole, the Liquidated Damages shall be reduced in proportion to the value of the part so completed.

10.7 **Liquidated Damages for Sections**

Where any Section of the Works is required to be completed before completion of the whole, Liquidated Damages payable in respect of that Section shall be stated in the Appendix and sub-clause 10.6 shall apply as though the Section were the Works.

10.8 **Limit of Damages**

The Appendix shall state any limit applicable to the amount of Liquidated Damages that may be deducted.

10.9 **Payment of Damages**

Subject to sub-clause 11.12 (Omission from Certificate), Liquidated Damages payable by the Contractor may be deducted from any sum becoming due under the Contract. Otherwise the Employer may require the Contractor to pay such amount to the Employer forthwith.

10.10 **Repayment of Damages**

If upon a subsequent or final review under Clause 9 (Programme and Time for Completion), or as a result of any matter occurring after the date the Employer became entitled to Liquidated Damages, the Contractor is entitled to any or any further extension of time, any Liquidated Damages deducted or recovered by the Employer in excess of the amount to which he is entitled shall be repayable to the Contractor forthwith together with interest compounded monthly at the rate of 4% per annum above the base lending rate of the bank specified in the Appendix.

10.11 **Rate of Progress**

If for any reason which does not entitle the Contractor to an extension of time the rate of progress of the Works or any Section is in the opinion of the Employer's Representative too slow to ensure completion by the time or extended time for completion, the Contractor shall if so required by the Employer's Representative specify and take steps necessary to achieve timely completion. In such a case:

- (a) The Contractor shall be entitled to change any accepted programme and to adopt any new or changed method of working;
- (b) The Employer's Representative shall be entitled to require the Contractor to give priority to any Section or part of the Works; and
- (c) The Contractor shall not be entitled to any additional payment or extension of time in respect of any such measures.

10.12 **Acceleration**

The Contractor may agree to accelerate the Works or any Section upon such terms as may be agreed with the Employer's Representative on behalf of the Employer.

11. MEASUREMENT, VALUATION AND PAYMENT

11.1 **Bill of Quantities**

The Employer warrants that the Bill of Quantities has been prepared in accordance with the Standard Method of Measurement stated in the Appendix or, in default of such provision, in accordance with the Civil Engineering Standard Method of Measurement Fourth Edition prepared by the Institution of Civil Engineers or any amended edition stated in the Appendix.

11.2 **Quantities**

Quantities set out in the Bill of Quantities are deemed to be Fixed Quantities unless expressly identified therein as subject to re-measurement. For the quantities subject to re-measurement, the Contractor shall be paid for the actual quantities of work at the rates contained in the Bill of Quantities for those items. For the Fixed Quantity items the Contractor shall be paid for the fixed quantity at the rates contained in the Bill of Quantities. Where any item in the Bill of Quantities is

not in accordance with the Method of Measurement referred to in sub-clause 11.1, the item shall be corrected and the Contractor shall be paid the corrected amount.

11.3 **Re-measurement**

Where work is subject to re-measurement the Employer's Representative shall ascertain the quantities executed and submit these to the Contractor for his agreement. If the Contractor disputes the Employer's Representative quantities he shall provide the Employer's Representative with fully substantiated details of the quantities with which he disagrees.

11.4 **Interim Statements**

The Contractor shall submit to the Employer's Representative following the end of the first Agreed Rail Industry Period in which the Commencement Date falls and thereafter at 28 day intervals an interim statement specifying the sum which the Contractor considers to be due at the following payment due date and the basis on which the sum is calculated. The payment due date is 14 days after the date of the Contractor's interim statement. The interim statement shall include the following amounts:

- (a) the assessed value of Fixed Quantity items of work carried out by him to the end of the immediately preceding Agreed Rail Industry Period;
- (b) the estimated value of items of work subject to re-measurement carried out by him to the end of the immediately preceding Agreed Rail Industry Period;
- (c) a list of any goods or materials delivered to the Site but not yet incorporated in the Permanent Works and their value;
- (d) a list of any of those goods or materials identified in the Appendix which have not yet been delivered to the Site but of which the property has vested in the Employer pursuant to sub-clause 16.3 and their value; and
- (e) the estimated amounts to which the Contractor considers himself entitled in connection with all other matters for which provision is made under the Contract (including under Clause 13);

11.5 **Interim Payments**

Within 14 days after the Contractor's interim statement the Employer's Representative shall certify the sum that the Employer's Representative considers to be due at the payment due date and specify the basis on which that sum is calculated including:

- (a) the amount which the Employer's Representative considers is due to the Contractor on account of sub-clauses 11.4 (a), (b) and (e) less a retention as provided in sub-clause 11.7;
- (b) such amounts (if any) which the Employer's Representative considers is due (but not exceeding the percentage of the value stated in the Appendix) in respect of sub-clauses 11.4(c) and (d); and
- (c) any deductions of sums due from the Contractor under the Contract including under Clause 29 (Set-Off) or for any other reason (including for losses arising from the Contractor's breach of contract).

The final date for payment is 21 days after the date of delivery of the Contractor's interim statement.

Amounts certified in respect of nominated sub-contracts shall be shown separately in the certificate.

If the Contractor fails to submit the interim statement as required by sub-clause 11.4, the Employer's Representative shall certify the sum that the Employer's Representative considers to be due at the payment due date and specify the basis on which that sum is calculated. The certificate issued by the Employer's Representative in accordance with this sub-clause 11.5 shall be a payment notice for the purposes of the Housing Grants, Construction and Regeneration Act 1996 (as amended) and the Employer's Representative shall issue the payment notice even if the amount that he considers to be due is zero.

11.6 Paying Less

Where for any payment under this Clause 11 or sub-clause 13.8 (Final Date for Payment), the Employer intends to pay less than the sum certified or otherwise due under the Contract the Employer shall notify the Contractor in writing not less than five days before the final date for payment specifying the sum that the Employer considers to be due on the date the notice is served and the basis on which that sum is calculated.

11.7 Retention

The Employer shall be entitled to deduct retention as stated in the Appendix on amounts due to the Contractor under sub-clauses 11.4(a), (b) and (e). For any Milestone Sum becoming due in accordance with sub-clause 21.1 the Employer shall be entitled to deduct the retention stated in the Appendix or such other amount stated in the Contract. Half the amount so deducted shall be released to the Contractor on the issue of a Certificate of Substantial Completion in respect of the Works or any Section or part of the Works, calculated pro rata to the value of the completed Works. The remaining amount of any retention shall be released after the end of the Defects Correction Period for the Works or the Section or part including work in any Milestone Sum. Any such amounts shall be certified as due by the Employer's Representative in the following monthly Employer's Representative's certificate.

11.8 Withholding Retention

The Employer shall be entitled to withhold retention otherwise payable in accordance with sub-clause 11.7 if in the Employer's Representative's opinion there remains any outstanding work to be carried out or any fault or defect which the Contractor is required to rectify or investigate. The Employer's Representative may then withhold certification of so much of the retention as in the Employer's Representative's opinion represents the cost of the work remaining until completion of the outstanding work or until the fault or defect is rectified.

11.9 Interest on Overdue Payments

In the event of failure by the Employer's Representative to certify or the Employer to make payment in accordance with this Clause 11 the Employer shall pay to the Contractor interest compounded monthly for each day on which any payment is overdue or which should have been certified and paid at a rate equivalent to 4% per annum above the base lending rate of the bank specified in the Appendix.

11.10 Interest in Adjudication

If in an adjudication pursuant to the Contract the adjudicator holds that any sum or additional sum should have been certified by a particular date this shall be regarded as a failure to certify such sum or additional sum, which shall be deemed to be due for payment 28 days after the date by which the adjudicator holds that the Employer's Representative should have certified the sum and interest as provided in sub-clause 11.9 shall accrue on that sum.

11.11 Omission from Certificate

The Employer's Representative shall have power to omit from any certificate the value of any work done goods or materials supplied or services rendered with which he may for the time being be dissatisfied and for that purpose may by any certificate delete correct or modify any sum previously certified.

11.12 Construction Industry Scheme

- (a) For the purposes of this sub-clause 11.12, the "Scheme" shall mean the Construction Industry Scheme, as provided for in Chapter 3 of the Finance Act 2004 and the Income Tax (Construction Industry Scheme) Regulations 2005;
- (b) Not later than 21 days before the first payment under this Contract is due to the Contractor, the Contractor shall provide to the Employer the information specified in regulation 6(2)(b)(iii) of the Income Tax (Construction Industry Scheme) Regulations 2005;
- (c) The Contractor shall ensure that at all times it is registered for gross payment under the Scheme; and

- (d) If the Contractor fails to comply with the provisions of sub-clauses 11.12(b) or 11.12(c), the Employer shall not be obliged to make any further payment to the Contractor until such time as the failure is remedied.

11.13 Value Added Tax

- (a) The Contractor shall be deemed not to have allowed in the Contract Price for the tax payable by him as a taxable person to HM Revenue and Customs being tax chargeable on any taxable supplies to the Employer which are to be made under this Contract.
- (b) All certificates issued by the Employer's Representative under sub-clause 11.5 shall be net of Value Added Tax and the Contractor shall not issue any claim, statement of sums due or account to the Employer or the Employer's Representative inclusive of Value Added Tax. When requesting or claiming payment the Contractor shall state how the work or supply in question is rated for the purposes of Value Added Tax, and show separately any relevant rates of Value Added Tax relating to the work or supplies.
- (c) In addition to the payments due under this Contract the Employer shall separately identify and pay to the Contractor any Value Added Tax properly chargeable by HM Revenue and Customs on the supply to the Employer of any goods and/or services by the Contractor under this Contract.
- (d) If any dispute difference or question arises between either the Employer or the Contractor and HM Revenue and Customs in relation to any tax chargeable or alleged to be chargeable in connection with this Contract or the Works each shall render to the other such support and assistance as may be necessary to resolve the dispute difference or question.
- (e) Clause 19 (Resolution of Disputes) shall not apply to any dispute difference or question arising under this Clause 11.
- (f) If the Contractor fails to carry out his obligations under this Contract and the Employer employs some other contractor to fulfil them, and a payment in respect of Value Added Tax is made or falls to be made to that other contractor, then the Employer shall be entitled to recover from the Contractor any Value Added Tax (which he is not otherwise able to recover) additional to what he would have paid had the Contractor carried out his obligations under this Contract.
- (g) The Contractor shall issue to the Employer, upon receipt of any amount paid by the Employer under this Contract and any Value Added Tax properly paid under sub-clause 11.13(b), an authenticated receipt of the kind referred to in Regulation 13(4) of The Value Added Tax Regulations 1995 (or any amendment or re-enactment) containing the particulars required under Regulation 14(1) of the same Regulations to be contained in a VAT invoice.

12. CHANGES TO THE WORKS AND VALUATION

12.1 Variation to Works

The Employer's Representative may order any variation to any part of the Works that he considers necessary for the satisfactory completion of the Works or that for any other reason shall in his opinion be desirable for the completion and/or improved functioning of the Works. Variations may include additions or omissions and changes to any specified sequence, method or timing of construction. Variations may be ordered at any time up to the end of the Defects Correction Period.

12.2 Order in Writing

Variations shall be ordered in writing but subject to sub-clause 5.6 (Instructions in Writing). The Employer's Representative may instruct work to be carried out on daywork basis, where there is no other appropriate means of valuing the work. Daywork will only be used as a basis for valuing works where expressly instructed by the Employer's Representative.

12.3 Contractor's Offer

If the Contractor submits to the Employer's Representative an offer to vary the Works the following shall apply:

- (a) the Employer's Representative may require the Contractor to submit with his offer:

- (i) the estimated cost for the varied work and for any other effects of the offered variation;
and
 - (ii) any consequential delay and the financial consequences insofar as not included in (i).
- (b) If the Employer's Representative accepts the Contractor's offer (whether as submitted or with agreed modifications) he shall issue a variation order, and the Contractor shall thereafter be entitled to be paid and to be granted an extension of time in accordance with the Contractor's offer, as submitted or modified, and shall have no further entitlement in regard to such variation.

12.4 Contractor to Quote

The Employer's Representative may similarly require the Contractor to submit his quotation for the amount to be paid and for any consequential delay and the financial consequences as in sub-clause 12.3 in regard to any variation ordered or proposed to be ordered and the Employer's Representative may similarly accept the Contractor's quotation (whether as submitted or with agreed modifications). Where accepted, the Contractor shall thereafter be entitled to be paid and to be granted an extension of time in accordance with the Contractor's quotation, as submitted or modified, and shall have no further entitlement in regard to such variation.

12.5 Contractor's Default

The value of all variations shall be taken into account in ascertaining the amount of the Contract Price except to the extent that any increase in cost relating to such variation is necessary by reason of the Contractor's breach of the Contract or negligence.

12.6 Valuation of Variations

Subject to sub-clauses 12.3 or 12.4, variations ordered by the Employer's Representative in accordance with sub-clause 12.1 shall be valued by the Employer's Representative in accordance with the following principles:

- (a) Where work is of similar character and carried out under similar conditions to work priced in the Bill of Quantities it shall be valued at such rates and prices contained therein as may be applicable;
- (b) Where work is not of a similar character or is not carried out under similar conditions or is ordered during the Defects Correction Period the rates and prices in the Bill of Quantities shall be used as the basis for valuation so far as may be reasonable failing which a fair valuation shall be made;
- (c) Where work is executed on a daywork basis it shall be valued at daywork rates and charges as set out in the Bill of Quantities.

13. ADDITIONAL PAYMENT AND FINAL ACCOUNT

13.1 Notice of Claims

If the Contractor intends to claim any additional payment or any allowance of additional time for completion of the Works or any Section under these Conditions, he must give notice to the Employer's Representative using the claim submission format and an accompanying Claim Sign Off Sheet as detailed in the Preliminaries as soon as reasonably practicable, and in any event within 28 days of becoming aware of the facts giving rise to the claim. Thereafter the Contractor must keep contemporary records, including data in such electronic and/or computerised format, as may be required by the Appendix or agreed with the Employer's Representative, and submit full and detailed particulars of the claim within such further period as the Employer's Representative may direct.

13.2 Failure to Give Notice

- (a) If the Contractor fails to give notice in accordance with sub-clause 13.1 which an experienced contractor could have given the Employer's Representative shall determine any entitlement to additional payment or any allowance of additional time for completion of the Works or any Section as if the Contractor had given that notice.

- (b) Without prejudice to sub-clause (a), if the Contractor has not given notice of a claim within twelve weeks after it became aware or an experienced contractor would have become aware of the event giving rise to the claim, the Contractor shall have no entitlement to additional payment or any allowance of additional time for completion of the Works or any Section unless the event arises from the Employer's Representative giving any instruction, issuing a certificate or changing any earlier instruction.

13.3 Delay or Disruption

Subject to sub-clause 13.1, if pursuant to Clause 5 (The Employer's Representative) or otherwise the Employer's Representative shall issue an instruction which causes delay or disruption to the Works, provided that the instruction was not issued as a result of the Contractor's breach of the Contract or negligence, the Employer's Representative shall after consultation with the Contractor determine the amount of any additional Cost incurred by the Contractor, together with a reasonable amount in respect of any loss of profit where incurred, and shall take such delay into account in determining any extension of time to which the Contractor is entitled under Clause 9 (Programme and Time for Completion).

13.4 Defects Correction Certificate

At the end of the Defects Correction Period or if more than one the last of such periods, and when all outstanding work and all work of repair and making good of defects or other faults has been completed, the Employer's Representative shall issue a Defects Correction Certificate stating the date on which the Contractor shall have completed his obligations under the Contract to the Employer's Representative's satisfaction. The issue of the Defects Correction Certificate shall not be taken as relieving either the Contractor or the Employer from any liability towards the other arising out of or in any way connected with the performance of their obligations under the Contract.

13.5 Statement of Final Account

Not later than 3 months after the date of the Certificate of Substantial Completion (or, where there is more than one, after the date of the last in time to be issued) the Contractor shall submit to the Employer's Representative a statement of final account and supporting documentation showing in detail the value, in accordance with this Contract of the Works carried out together with all further sums, which the Contractor considers to be due to him under this Contract up to and including the date of the Certificate of Substantial Completion (or, where there is more than one, after the date of the last in time to be issued).

13.6 Not used

13.7 Final Certificate

- (a) Within 3 months after receipt of the statement of final account and of all information reasonably required for its verification the Employer's Representative shall issue a final certificate stating the amount which in his opinion is finally due under this Contract from the Employer to the Contractor or from the Contractor to the Employer as the case may be up to and including the date of the Certificate of Substantial Completion (or, where there is more than one, after the date of the last in time to be issued) and after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled under this Contract.
- (b) The amount finally due under this Contract shall be evaluated on the basis of the total of payments due to the Contractor by the Employer under the terms of this Contract less any previous payments on account and any sums deductible from the Contractor or payable from the Contractor to the Employer either under Clause 29 (Set-Off) or for any other reason (including for losses arising from the Contractor's breach of contract).
- (c) Any certificate issued by the Employer's Representative under this sub-clause 13.7 shall be a payment notice for the purposes of the Housing Grants, Construction and Regeneration Act 1996 (as amended) and the Employer's Representative shall issue the payment notice even if the amount that he considers to be due is zero.

13.8 Final Date for Payment

Not later than 5 days after the issue of the final certificate the Employer shall give the Contractor a written notice specifying the amount of the payment to be made by the Employer or Contractor (as the case may be), to what the payment relates and the basis on which the amount was calculated. The final date for payment is 21 days after the date of issue of the final certificate.

13.9 Failure to submit final statement

- (a) In the event that the Contractor fails to submit to the Employer's Representative his statement of final account and supporting documentation in accordance with sub-clause 13.5, then not later than 6 months after the date of the Certificate of Substantial Completion (or, where there is more than one, after the date of the last in time to be issued) the Employer's Representative may issue a certificate stating the amount which in his opinion is finally due under the Contract in accordance with sub-clause 13.7.
- (b) The payment becomes due 9 months after the date of the Certificate of Substantial Completion (or, where there is more than one, after the date of the last in time to be issued). The final date for payment is 21 days later.

13.10 Works after Substantial Completion

- (a) If the Contractor executes further Works after the date of the Certificate of Substantial Completion (or, where there is more than one, after the date of the last in time to be issued) for which he is entitled to payment under this Contract, then, not later than 3 months after the date of the substantial completion of such further Works, the Contractor shall submit to the Employer's Representative a further statement of account and supporting documentation, showing in detail the value in accordance with this Contract of such further Works executed, together with all further sums which the Contractor considers to be due to him under this Contract up to and including the date of the Certificate of Substantial Completion.
- (b) Within 3 months after receipt of the further statement of account and of all information reasonably required for its verification, the Employer's Representative shall issue a certificate stating the amount which in his opinion is finally due under this Contract from the Employer to the Contractor or from the Contractor to the Employer, as the case may be, up to and including the date of the Certificate of Substantial Completion and after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled under this Contract and any sums deductible from the Contractor or payable from the Contractor to the Employer either under Clause 29 (Set-Off) or for any other reason (including for losses arising from the Contractor's breach of contract).
- (c) Such amount shall be paid to or by the Contractor, as the case may require. The payment becomes due 3 months after the Employer's receipt of the further statement of account and the information reasonably required for its verification. The final date for payment is 21 days later.

14. FORCE MAJEURE

14.1 Force Majeure

Force Majeure means any circumstance outside the control of either Party and not attributable to the breach of Contract or negligence of either Party which arises during the currency of the Contract which renders it impossible or illegal for either Party to fulfil his contractual obligations.

14.2 Termination of Employment

Should further performance of the Contract be prevented by Force Majeure for a continuous period of not less than 42 days, either Party may, after giving the other a further 28 days' notice of its intention to do so, terminate the Contractor's employment under the Contract.

14.3 Entitlement on Termination

Upon termination of the Contractor's employment pursuant to sub-clause 14.2 the Parties shall continue to be bound by the Contract and the Contractor shall be entitled to be paid the following amounts:

- (a) the Contract value of all work carried out prior to the date of abandonment, after deducting the value of any defects in or omissions from such works, in so far as such amounts have not already been paid on account;
- (b) preliminary items so far as the work or service they relate to have been carried out or performed and a proper proportion of any such items which have been partially carried out or performed;

- (c) the cost of materials or goods reasonably ordered for the Works which have been delivered to the Contractor or of which the Contractor is legally liable to accept delivery (such materials or goods becoming the property of the Employer upon such payment being made to the Contractor);
- (d) any expenditure reasonably incurred by the Contractor in the expectation of completing the whole of the Works insofar as not recovered by any other payments;
- (e) the reasonable cost incurred in removal from the Site; and
- (f) any retention sums which may otherwise be withheld under the Contract.

14.4 Removal of Contractor's Equipment

Upon termination of his employment pursuant to sub-clause 14.2 the Contractor shall with all reasonable dispatch remove from the Site all Contractor's Equipment. If the Contractor fails to comply with this obligation the Employer may dispose of the Contractor's Equipment and shall account to the Contractor only for the net proceeds of disposal.

15. TERMINATION FOR DEFAULT

15.1 Contractor Default

The following events shall be regarded as a Contractor Default:

- (a) the Contractor or the Guarantor or, where the Contractor is made up of more than one entity or a joint venture, one of the relevant companies (if unincorporated) or one of the joint venture shareholders (if incorporated) becoming Insolvent;
- (b) the Employer's Representative certifying in writing to the Employer with a copy to the Contractor that in his opinion the Contractor:
 - (i) has suspended the progress of the Works without due cause for 14 days after receiving from the Employer's Representative written notice to proceed; or
 - (ii) has failed to remove goods or materials from the Site or to remove and replace work for 14 days after receiving from the Employer's Representative written notice that the said goods materials or work has been rejected by the Employer's Representative; or
 - (iii) despite previous warnings by the Employer's Representative in writing is failing to proceed with the Works with due diligence or is otherwise persistently or fundamentally in breach of his obligations under the Contract; or
 - (iv) has abandoned this Contract without due cause;
- (c) the Contractor is in breach of sub-clause 3.3 (Sub-contracting of Works);
- (d) the Contractor assigns or attempts to assign this Contract or any part thereof or any benefit or interest under it without the prior written consent of the Employer;
- (e) the Contractor is liable to compensate the Employer in respect of sums referred to in sub-clause 10.8 (Limit of damages), sub-clause 39.1 (Aggregate Liability Cap) or sub-clause 39.3 (Railway Costs) equal to or exceeding the aggregate limit of the liability of the Contractor as stated in the relevant provision or the Appendix (as applicable); or
- (f) the Employer considers any of the circumstances set out in
 - (i) regulation 89(1)(b) of the UCR; or
 - (ii) regulation 73(1)(b) of the PCR,(as applicable) have arisen.

The Contractor shall notify the Employer in writing immediately upon becoming aware of the circumstances referred to in sub-clause 15.1(f) applying.

15.1A Termination at Will and Breach of the Regulations by the Employer

- (a) The Employer may, in addition to any other power he may have, with 30 days' notice to the Contractor forthwith terminate the employment of the Contractor under this Contract.
- (b) The Employer may terminate this Contract in the event that it considers any of the circumstances set out in regulations 89(1)(a) or (c) of the UCR or regulations 73(1)(a) or (c) of the PCR as applicable have arisen.

15.2 Termination of Employment

Upon the occurrence of a Contractor Default the Employer, after giving 7 days' notice in writing to the Contractor specifying the event relied on (and regardless of any Contractor's attempted remedy of the event), may terminate the Contractor's employment under the Contract. The Employer may then enter upon the Works and any other parts of the Site provided by the Employer and expel the Contractor. Such termination or entry shall not avoid the Contract or release the Contractor from any of his obligations or liabilities under the Contract.

15.3 Notice of Termination

Where a notice of termination is given pursuant to a certificate issued by the Employer's Representative it shall be given as soon as is reasonably possible after receipt of the certificate. Provided that the Employer may extend the period of notice to give the Contractor an opportunity to remedy the default relied on.

15.4 Employer's Rights After Termination

Where the Employer has terminated the Contractor's employment pursuant to sub-clause 15.2:

- (a) the Employer may thereafter complete the Works himself or employ another contractor to do so, and in either case may use for such completion any of the Contractor's Equipment Temporary Works goods and materials on any part of the Site. The Employer may at any time sell any such Contractor's Equipment Temporary Works and unused goods and materials and shall account to the Contractor only for the net proceeds of sale;
- (b) the Contractor shall if so instructed by the Employer's Representative in writing within 7 days of such termination assign to the Employer the benefit of any agreement which the Contractor may have entered into for the supply of any goods or materials and/or for the carrying out of any work or design for the purposes of the Contract.

15.5 Work to be Valued

As soon as practicable after termination of the Contractor's employment by the Employer under sub-clause 15.2, the Employer's Representative shall fix and determine as at the time of such termination:

- (a) the amount (if any) which has been reasonably earned by or would reasonably accrue to the Contractor in respect of work actually done by under the Contract; and
- (b) the value of any unused or partially used goods and materials which are under the control of the Employer or the net proceeds of sale where the Employer elects to sell the same; and shall certify accordingly after such investigation or enquiry as the Employer's Representative may think fit to make or institute.

15.6 Payment After Termination

- (a) Where the Employer has terminated the Contractor's employment pursuant to sub-clause 15.2, he shall not be liable to pay the Contractor any money under the Contract (whether in respect of amounts certified by the Employer's Representative or otherwise) unless or until the Employer's Representative certifies that an amount is due to the Contractor under sub-clause 15.6(b). If the Contractor was or becomes insolvent within the meaning of Section 113(2) of the Housing Grants, Construction & Regeneration Act 1996 then the final date for payment shall be suspended in respect of any amount already due where the Contractor's insolvency occurred after the last date for the Employer to issue a pay less notice in respect of that amount.
- (b) The Employer's Representative shall certify the difference between:

- (i) such sum as would have been due to the Contractor if he had completed the Works together with any proceeds of sale under sub-clause 15.4; and
 - (ii) the costs of completing the Works (whether or not the Works are completed under a separate contract) damages for delay (if any) and all other expenses properly incurred by the Employer.
- (c) If the Employer's Representative is satisfied at any time prior to the completion of the Works that such sum as calculated under sub-clause 15.6(b)(ii) exceeds such sum as calculated under sub-clause 15(b)(i) he may issue an interim certificate to that effect and such interim certificate shall be a debt due from the Contractor to the Employer.

15.6A Payment on Termination at Will or breach of the Regulations by the Employer

If the Employer terminates this Contract under sub-clause 15.1A, the Employer shall pay the Contractor (insofar as such amounts or items have not already been covered by payments on account made to the Contractor) the Contract value of all work carried out prior to the date of termination and in addition:

- (a) the amounts payable in respect of preliminary items insofar as the work or service comprised therein has been carried out or performed and a proper proportion of any such items which have been partially carried out or performed;
- (b) the cost of materials or goods reasonably ordered for the Works which have been delivered to the Contractor or for which the Contractor is legally liable to accept delivery (such materials or goods becoming the property of the Employer upon such payment being made to the Contractor);
- (c) a sum being the amount of any expenditure reasonably incurred by the Contractor in the expectation of completing the whole of the Works insofar as such expenditure has not been recovered by any other payments referred to above; and
- (d) the reasonable costs of removal of all the Contractor's plant, tools, equipment, goods and materials from the Site.

The Contractor shall not be entitled to payment of any other loss (including loss of profit) and/or damage arising from such termination or otherwise.

15.7 Employer Default

The following events shall be regarded as an Employer Default, namely the Employer becoming Insolvent.

15.8 Termination of Employment

Upon the occurrence of an Employer Default the Contractor may after giving 7 days' notice in writing to the Employer specifying the event relied on terminate his employment under the Contract without thereby avoiding the Contract or releasing the Employer from any of his obligations or liabilities under the Contract.

15.9 Payment After Termination

Upon the Contractor terminating his employment under sub-clause 15.8:

- (a) the Contractor shall have the right and shall with all reasonable despatch remove from the Site all Contractor's Equipment; and
- (b) the Employer shall be under the same obligations with regard to payment as if the Contractor's employment had been terminated under the provisions of Clause 14 (Force Majeure), provided that in addition to payments there specified the Employer shall pay to the Contractor the amount of any loss or damage to the Contractor arising from or as a consequence of such termination.

16. CONTRACTOR'S EQUIPMENT AND MATERIALS

16.1 Non-removal of Materials and Equipment

Contractor's Equipment Temporary Works or goods or materials owned by the Contractor and brought to the Site for the purposes of the Contract shall not be removed without the written consent of the Employer's Representative which shall not be unreasonably withheld or delayed. The Employer shall not assume any liability for loss or damage to them save for that caused by the Excepted Risks.

16.2 Removal of Surplus Materials

The Contractor shall on completion of the Works or any Section remove all surplus Goods and goods or materials from the Site when so instructed by the Employer's Representative. In default of compliance, the Employer shall be entitled to effect removal and shall account to the Contractor only for any net proceeds of sale.

16.3 Listed Goods and Materials

With a view to securing payment under Clause 11 (Measurement and Payment), the Contractor may (and shall if the Employer's Representative so directs) transfer to the Employer the property in goods and materials listed in the Appendix or as subsequently agreed between the Contractor and the Employer before they are delivered to the Site provided that the goods and materials:

- (a) have been manufactured or prepared and are substantially ready for incorporation in the Works; and
- (b) are the property of the Contractor or the contract for the supply of the same expressly provides that the property therein shall pass unconditionally to the Contractor upon the Contractor taking the action referred to in sub-clause 16.5; and
- (c) have been marked and set aside in accordance with sub-clause 16.5.

16.4 Transfer of Property

The intention of the Contractor to transfer the property in any goods or materials to the Employer in accordance with this Clause 16 shall be evidenced by the Contractor providing to the Employer's Representative documentary evidence that the property in those goods or materials has vested in the Contractor and by taking or causing the supplier of those goods or materials to take one or more of the following actions:

- (a) suitably mark or otherwise plainly identify the goods and materials so as to show that their destination is the Site that they are the property of the Employer and (where they are not stored at the premises of the Contractor) to whose order they are held;
- (b) set aside and store the goods and materials so marked and identified to the satisfaction of the Employer's Representative; and
- (c) send to the Employer's Representative a schedule listing and giving the value of every item of the goods and materials so set aside and stored and inviting him to inspect them.

16.5 Vesting of Property

If the Employer's Representative approves in writing the transfer of property in any goods and materials for the purposes of this Clause 16 they shall vest in and become the absolute property of the Employer and thereafter shall be in the possession of the Contractor for the sole purpose of delivering them to the Employer and incorporating them in the Works and shall not be within the ownership control or disposition of the Contractor. Provided always that:

- (a) the Contractor shall be responsible for any loss or damage to such goods or materials and for the cost of storing handling and transporting them and shall effect such additional insurance as may be necessary to cover the risk of such loss or damage from any cause; and
- (b) approval by the Employer's Representative for the purposes of this Clause 16 or any payment certified by him in respect of goods and materials pursuant to Clause 11 (Measurement and

Payment) shall be without prejudice to the exercise of any power of the Employer's Representative contained in this Contract to reject any goods or materials which are not in accordance with the provisions of the Contract and upon any such rejection the property in the rejected goods or materials shall immediately re-vest in the Contractor.

16.6 No lien on goods or materials

Neither the Contractor nor a sub-contractor nor any person shall have a lien on any goods or materials which have vested in the Employer under sub-clause 16.5 for any sum due to the Contractor sub-contractor or other person and the Contractor shall take all steps reasonably necessary to ensure that the title of the Employer and the exclusion of any such lien are brought to the notice of sub-contractors and other persons dealing with such goods or materials.

16.7 Delivery of goods or materials

Upon termination of the employment of the Contractor under this Contract before the completion of the Works whether as a result of the operation of Clauses 14 (Force Majeure) or 15 (Termination for Default) or otherwise the Contractor shall deliver to the Employer any goods or materials the property in which has vested in the Employer by virtue of sub-clause 16.5 and if he fails to do so the Employer may enter any premises of the Contractor or of any sub-contractor and remove such goods and materials and recover the cost of doing so from the Contractor.

16.8 Sub-contracts

The Contractor shall incorporate provisions equivalent to those provided in this Clause 16 in every sub-contract in which provision is to be made for the payment in respect of goods or materials before the same have been delivered to the Site.

17. INSURANCES

17.1 Insurance of Works

The Employer shall without limiting his or the Contractor's obligations under this Contract insure under a Joint Names Policy the carrying out of the Works together with materials (including Employer Furnished Materials) and plant and equipment for incorporation therein, such insurance to include a reasonable amount to cover additional costs that may arise incidental to the rectification of any loss or damage in respect of professional fees, cost of demolition and removal of debris, having regard to the nature of this Contract.

17.2 Extent of Cover

The insurance required under sub-clause 17.1 shall cover any person recognised as an insured under the Joint Names Policy against all loss or damage from whatsoever cause arising (including Terrorism) other than the Excepted Risks as defined in sub-clause 8.3 from the Commencement Date until the date of issue of the relevant Certificate of Substantial Completion and any loss occasioned by the Contractor in the course of any operation carried out by him for the purpose of complying with his obligations under sub-clauses 10.4 (Substantial Completion) and 10.5 (Defects Correction).

17.2A Payments made to the Employer

All claims made under the insurance referred to in sub-clause 17.1 shall be paid to the Employer. The Employer will pay all such monies due to the Contractor by instalments under certificates of the Employer's Representative issued at the time of issue of interim certificates in accordance with the terms of this Contract. Any amounts not insured or not recovered from insurers whether as excesses under the policy or otherwise shall be borne by the Contractor or the Employer in accordance with their respective responsibilities under Clause 8 (Risk) and (where applicable) Clause 42 (Additional Responsibility for Care of the Works).

17.3 Damage to Persons or Property

The Contractor shall except if and so far as the Contract provides otherwise and subject to the exceptions set out in sub-clause 17.4 indemnify and keep indemnified the Employer against all losses and claims in respect of death of or injury to any person or loss of or damage to any property (other than the Works) which may arise out of or in consequence of the construction of the Works and the remedying of any

defects in the Works and against all claims demands proceedings damages costs charges and expenses whatsoever in respect of or in relation to the Works.

17.4 Exceptions

The exceptions referred to in sub-clause 17.3 which are the responsibility of the Employer are:

- (a) damage to crops being on the Site (save in so far as possession has not been given to the Contractor);
- (b) the use or occupation of land provided by the Employer for the purposes of the Contract (including consequent losses of crops) or interference whether temporary or permanent with any right of way light air or water or other easement or quasi-easement which are the unavoidable result of the construction of the Works in accordance with the Contract;
- (c) the right of the Employer to construct the Works or any part of the Works on over under in or through any land;
- (d) damage which is the unavoidable result of the construction of the Works in accordance with the Contract including any design for which the Contractor is not responsible under the Contract; and
- (e) death of or injury to persons or loss of or damage to property resulting from any act neglect or breach of statutory duty done or committed by the Employer his agents servants or other contractor (not being employed by the Contractor) or for or in respect of any claims demands proceedings damages costs charges and expenses in respect thereof or in relation thereto.

17.5 Indemnity by Employer

The Employer shall subject to sub-clause 17.6 indemnify the Contractor against all claims demands proceedings damages costs charges and expenses in respect of the matters referred to in the exceptions set out in sub-clause 17.4.

17.6 Shared Responsibility

- (a) The Contractor's liability to indemnify the Employer under sub-clause 17.3 shall be reduced in proportion to the extent that the act or neglect of the Employer his agents servants or other contractors (not being employed by the Contractor) contributed to the said death injury loss or damage.
- (b) The Employer's liability to indemnify the Contractor in respect of a matter falling within sub-clause 17.4(e) shall be reduced in proportion to the extent that the act or neglect of the Contractor or his sub-contractors servants or agents contributed to the death injury loss or damage.

17.7 Third Party Insurance

- (a) Other than as specifically stated herein, without prejudice to the Contractor's obligations to indemnify the Employer under sub-clause 17.3, the Employer shall take out and maintain:
 - (i) a Joint Names Policy against liabilities for death of or injury to any person (other than any person in the employment of the Employer or the Contractor where and to the extent that any such liabilities should reasonably be covered by any insurance maintained by the Contractor in compliance with the Employer's Liability Compulsory Insurance Act 1969 and any statutory orders made thereunder or any amendment or re-enactment) or loss of or damage to any property (other than the Works and materials and plant and equipment for incorporation therein or other property of the Employer or the Contractor) arising out of the performance of this Contract, for a sum not less than that stated in the Appendix for any one occurrence or series of occurrences arising out of one event; and
 - (ii) a policy or policies of insurance (or self-insurance arrangements) in respect of loss or damage to property of the Employer (other than the Works and materials and plant and equipment for incorporation therein but including work executed after practical completion thereof) arising out of or in connection with the Works and business interruption costs consequent upon such loss or damage, with a waiver of subrogation in favour of the Contractor and Sub-Contractors. The Contractor's liability under sub-clause 17.3 shall exclude loss or damage to such property of the Employer and business

interruption costs consequent thereon, to the extent of the insurance (or self-insurance) provided for in this sub-clause 17.7(a)(ii) except for the first £10,000 of each and every occurrence of such loss or damage.

- (b) The Employer shall not be responsible for any amounts in excess of the limits of indemnity and sums insured or any retained liability as specified in the Appendix or Conditions of Contract or risks not insured or excluded by the terms, exceptions or conditions of such insurance policies.

17.8 **Not used**

17.9 **Accident or Injury to Operatives etc**

The Employer shall not be liable for or in respect of any damages or compensation payable at law in respect of or in consequence of any accident or injury to any operative or other person in the employment of the Contractor or any sub-contractor save and except to the extent that such accident or injury results from or is contributed to by any act, omission or default of the Employer his agents or servants and the Contractor shall indemnify and keep indemnified the Employer against all such damages and compensation (save and except as aforesaid) and against all claims demands proceedings costs charges and expenses whatsoever in respect or in relation thereto.

17.10 **Professional Indemnity Insurance for design**

The Contractor shall take out and maintain professional indemnity insurance if required by and in accordance with the Appendix as follows:

- (a) The insurance will cover (amongst other things), all his liability under this Contract in respect of defects or insufficiency in design, upon customary and usual terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom in an amount not less than that stated in the Appendix for a period beginning with the date of this Contract and ending twelve years after the issue of the Certificate of Substantial Completion for the whole of the Works, provided always that such insurance is available at commercially reasonable rates.
- (b) Any increased or additional premium required by insurers by reason of the Contractor's claims, records or other matters particular to the Contractor shall be considered to be within commercially reasonable rates.
- (c) The Contractor shall immediately inform the Employer if such insurance ceases to be available at commercially reasonable rates in order that the Employer and the Contractor can discuss the means of best protecting the respective positions of the Employer and the Contractor in the absence of such insurance.
- (d) The said terms and conditions shall not include any term or condition to the effect that the Contractor must discharge any liability before being entitled to recover from the insurers, or any other term or condition which might adversely affect the rights of any person to recover from the insurers pursuant to the Third Parties (Rights Against Insurers) Act 2010.
- (e) The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of the Contract for any reason whatsoever, including (without limitation) breach by the Employer.

17.11 **Evidence of Insurance**

The Contractor shall provide satisfactory evidence to the Employer prior to the Commencement Date and thereafter when reasonably requested that the insurances required under the Contract or by law have been effected and are in force. The terms of all such insurances shall be subject to the approval of the Employer (which approval shall not be unreasonably withheld). The Contractor shall upon request produce to the Employer receipts for the payment of current insurance premiums. A summary of the insurance policies taken out and maintained by the Employer under sub-clause 17.1 and sub-clause 17.7 is included in Section 2 of the Project Insurance Manual in the Preliminaries and further details of the Employer's insurance policies may be provided to the Contractor on request.

17.12 Deductibles

Any excesses on the policies of insurance effected under sub-clauses 17.1 and 17.7 shall be no greater than those stated in the Appendix.

17.13 Contractor's Failure to Insure

If the Contractor shall fail upon request to produce to the Employer satisfactory evidence that there is in force any of the insurances required under the Contract then the Employer may effect and keep in force any such insurance and pay such premium or premiums as may be necessary for that purpose and from time to time deduct the amount so paid from any monies due or which may become due to the Contractor or recover the same as a debt due from the Contractor.

17.14 Compliance With Policy

Both the Employer and the Contractor shall comply with all conditions laid down in the insurance policies effected pursuant to the Contract. Should the Contractor or the Employer fail to comply with any condition imposed by such insurance policies the Party in default shall indemnify the other against all losses and claims arising from such failure.

17.15 Notification of claims

The Contractor shall immediately notify any occurrence that may result in a claim under the Employer's insurance policies in accordance and in compliance with the provisions of the procedures detailed in Section 3 of the Project Insurance Manual in the Preliminaries.

18. BONDS AND SECURITIES

18.1 Performance Security

- (a) The Contractor shall within 28 days of the award of the Contract provide such security for the proper performance of the Contract as shall be specified in the Appendix, which shall not exceed 10% of the Tender Total. The security shall be provided by a body approved by the Employer (which approval shall not to be unreasonably withheld or delayed) and be in the Form of Bond annexed to these Conditions or in such other form as may be agreed. The Contractor shall pay the cost of the security unless the Contract provides otherwise;
- (b) If stated to be required in the Appendix the Contractor shall obtain and provide to the Employer, forthwith upon entry into this Contract, a parent company guarantee in the form appended to the Contract Specific Conditions from the Contractor's ultimate holding company. For these purposes "ultimate holding company" shall mean the parent company of the group of companies of which the Contractor is a member (as each of those terms is defined in section 170 Taxation of Chargeable Gains Act 1992); and
- (c) Where the Contractor is made up of more than one entity or a joint venture, a parent company guarantee is required from the ultimate holding company of each of the relevant companies (if unincorporated) or each of the joint venture shareholders (if incorporated).

18.2 Failure to provide Security

The Contractor's compliance with the provisions of sub-clause 18.1 shall be a condition precedent to any obligation on the part of the Employer to make any payment that might otherwise be due under this Contract, and the Contractor acknowledges that he has no entitlement either to receive payment or to exercise any rights in respect of non-payment arising under this Contract unless and until the Contractor has provided the security if so required under sub-clause 18.1.

18.3 Advance Payment Security

The Contractor shall likewise provide such other security as shall be specified in the Appendix or otherwise agreed in respect of any advance payment or advanced release of retention.

18.4 Dispute Resolution

For the purposes of the dispute resolution provisions in any such security:

- (a) the Employer shall be deemed to be a party to the security for the purpose of doing everything necessary to give effect to such provisions; and
- (b) any agreement decision award or other determination touching or concerning the relevant date for the discharge of the security shall be without prejudice to the resolution or determination of any dispute between the Employer and the Contractor under Clause 19 (Resolution of Disputes).

19. RESOLUTION OF DISPUTES

19.1 Employer's Representative's Decision

The Employer's Representative shall decide any dispute between the Contractor and the Employer arising out of or connected with the Contract that shall be referred to him by either of them and shall give his decision thereon in writing within 14 days of the reference. Provided that no such reference shall be made unless the Employer's Representative has previously given a determination of the matter which either Party by its reference seeks to challenge; and no reference shall be effective unless it is stated to be made under sub-clause 19.1.

19.2 Employer's Representative's Decision Binding

The Employer's Representative's decision shall be binding on both Parties unless either of them gives written notice to the other within 28 days of the decision stating that the decision is disputed. Where such notice is given, the Parties shall remain bound by and shall comply with the Employer's Representative's decision unless and until it is revised by a settlement agreement pursuant to sub-clause 19.3 or otherwise, the decision of an adjudicator pursuant to sub-clause 19.4 or by the Courts pursuant to sub-clause 19.6. While it remains binding on the Parties the Employer's Representative's decision may be enforced as provided by sub-clause 2.4 (Jurisdiction).

19.2A Dispute Avoidance

- (a) As soon as the Employer or Contractor becomes aware of any matter which if not resolved might become a dispute they shall so advise the other party in writing with a copy to the Employer's Representative.
- (b) The Employer and the Contractor shall meet at the earliest opportunity and no later than 7 days after such notification to try to resolve the matter. Either party may invite the Employer's Representative and any other relevant person to participate.
- (c) If the matter is not resolved within a reasonable period of time the parties shall define in writing those parts of the matter that remain unresolved.
- (d) Without prejudice to the other provisions of this Clause 19, any claim submission issued by the Contractor shall be in the form and contain the information specified for claim submissions in the Preliminaries.

19.2B Dispute Avoidance Panel

- (a) Where stated to apply in the Appendix, the Parties shall within 14 days of the Commencement Date appoint an independent dispute avoidance panel ("**DAP**") consisting of not less than two and no more than four members selected from Network Rail's DAP Membership Pool from time to time or as otherwise agreed by the parties acting reasonably.
- (b) Such appointments will be on Network Rail's standard terms for the appointment of DAP members. The costs of the DAP will be shared equally by the Employer and the Contractor. The Contractor's share of such costs is deemed to be included within the Contract Price.
- (c) The terms of reference of the DAP shall be agreed by the Parties and shall include the following:
 - (i) The purpose of the DAP is to gather and review information in order to provide observations via a "**DAP Review Report**" in a form agreed by the Parties on possible sources and warning signs of potential disputes to enable early intervention and resolution. The DAP Review Report is confidential.

- (ii) The DAP's role is limited to providing such observations in the DAP Review Report and the DAP and its members are not authorised and do not have jurisdiction to provide advice, mediate or decide upon an issue or dispute. The DAP Review Report and associated observations are not binding on the Parties.
- (iii) Neither Party shall solicit advice or consultation from the DAP or individual DAP members on matters relating to the Works beyond such role.
- (iv) The Parties and the DAP shall agree a review timetable. The Parties shall coordinate with the DAP the need for site visits and the availability of key project personnel that it may wish to consult during its review.
- (v) Not less than 3 days before an agreed review date the Parties will provide to the DAP a copy of relevant project related documents including a copy of this Contract, progress reports, programmes, applications for payment, variation orders and other relevant documents reasonably necessary to enable the DAP to undertake its role.
- (vi) All communications between the Parties and the DAP are to be either in writing (copied to the other Party) or made in person the designated lead DAP member agreed by the Parties. Unless agreed otherwise the DAP will be empowered to meet the Parties privately or together.
- (vii) The DAP will provide its DAP Review Report to each Party within 5 days of the relevant agreed review date.

19.3 **Optional Conciliation or Mediation**

The Employer or the Contractor may at any time by notice in writing seek the agreement of the other Party for any dispute between them to be referred to conciliation or mediation. Any settlement resulting from conciliation or mediation shall be binding when incorporated in a written agreement signed by both Parties.

19.4 **Adjudication**

The Employer or the Contractor may at any time by notice in writing require any dispute between them to be referred to adjudication whether or not the dispute has been referred to the Employer's Representative. The Adjudicator shall be appointed as provided in the Appendix and the adjudication shall be carried out in accordance with the Adjudication Procedure stated in the Appendix.

19.5 **Adjudicator's Decision Binding**

The Adjudicator's decision shall be binding on both Parties and may be enforced as provided by sub-clause 2.4 (Jurisdiction). The decision shall cease to be binding if and when revised by a decision of the Courts or by agreement.

19.6 **Litigation**

Subject to sub-clauses 19.1 to 19.4, any dispute or difference that arises between the Parties shall be referred to the High Court of England and Wales for resolution as business of the Technology and Construction Court.

20. BUILDING INFORMATION MODELLING (BIM)

20.1 **BIM Building Information Modelling**

The Contractor and the Employer shall comply with their respective obligations set out in any BIM Protocol referred to in the Appendix. Any additional procedures or requirements which the Contractor is to adopt in support of or as part of the BIM Protocol and/or associated IT systems shall be set out in an Information Protocol. The Parties shall have the benefit of any rights granted to them in the BIM Protocol and of any limitations or exclusions of liability contained within it.

SUPPLEMENTARY CLAUSES

21. MILESTONES

21.1 Milestone Sum

Milestone Sum means a sum identified as such in the Bill of Quantities and which is not subject to measurement.

21.2 Entitlement to Payment

In respect of each Milestone Sum the Contractor shall be entitled to payment only upon achievement of the criteria set out in the Works Data.

21.3 Payment of Milestone

In the monthly Employer's Representative certificate given under sub-clause 11.5 that follows the achievement of the Milestone the Employer's Representative shall certify as follows:

- (a) the amount of the Milestone Sum less a retention as provided in sub-clause 11.7; and
- (b) such amounts (if any) as the Employer's Representative may consider proper in respect of any other matter relating to the work within the Milestone Sum for which provision is made elsewhere in the Contract, less any amount previously certified in respect thereof.

22. NOT USED

23. EMPLOYER FURNISHED MATERIALS

23.1 Employer Furnished Materials

The Employer shall make available at the Site to the Contractor all materials identified in the Appendix or in the Preliminaries as Employer Furnished Materials (EFM) and the Contractor shall be responsible for incorporation of the EFM into the Works

23.2 Conditions Applicable to EFM

The following conditions shall apply in the absence of other specific provision in the Preliminaries or other agreement in writing:

- (a) The Employer shall make the EFM available to the Contractor at the Site on or before the dates or the expiry of the periods for the provision of the same stated in the Preliminaries;
- (b) Upon completion of delivery such EFM shall stand at the risk of the Contractor;
- (c) Immediately upon the same being made available to him, the Contractor shall carry out a detailed inspection of such EFM and shall use his reasonable endeavours to advise the Employer's Representative within 24 hours and no later than 7 days or before being taken into operational use (whichever is the sooner) if any of such EFM are damaged or defective;
- (d) The Employer shall immediately then secure the repair, replacement and/or reissue of any such EFM;
- (e) If the Contractor does not so notify, the Contractor shall not be entitled subsequently to claim that any such EFM are damaged or defective to the extent that the same could have been identified by detailed inspection within such period; and
- (f) The Contractor shall dispose of any packaging and/or waste arising.

24. COMPLIANCE WITH LAW

24.1 Giving of notices and associated fees

Except where otherwise provided in this Contract the Contractor shall give all notices and pay all fees required to be given or paid by any applicable law, regulation or bye-law of any local or other statutory authority in relation to the design, construction and completion of the Works and by the rules and regulations of all public bodies and companies whose property or rights are or may be affected in any way by the Works.

24.2 Payment of fees

The Employer shall repay or allow to the Contractor all such sums as certified by the Employer's Representative to have been properly payable and paid by the Contractor in respect of such fees and also all rates and taxes paid by the Contractor in respect of the Site or any part of it or anything constructed or erected on it or on any part of it or any temporary structures situated elsewhere but used exclusively for the purposes of the Works or any structures used temporarily and exclusively for the purposes of the Works.

24.3 Contractor to conform with Statutes etc

The Contractor shall ascertain and conform in all respects with the provisions of applicable law, regulations and bye-laws of any local or other statutory authority which may be applicable to the Works and with such rules and regulations of public bodies and companies as aforesaid and shall keep the Employer indemnified against all penalties and liability of every kind for breach of any applicable law, regulation or bye-law. Provided always that:

- (a) the Contractor shall not be required to indemnify the Employer against the consequences of any such breach which is the unavoidable result of complying with the Technical Workslope or instructions of the Employer's Representative;
- (b) the Contractor shall not be responsible for obtaining any planning permission which may be necessary in respect of the Permanent Works in their final position or of any Temporary Works designed by the Employer's Representative in their designated position on Site. The Employer warrants that all such permissions have been or will in due time be obtained.

24.4 Changes in law

If there is a change in applicable law, regulation or bye-law applicable to the Works after the date of this Contract which necessitates a variation to the Works, such variation shall be deemed to have been carried out under an instruction for the purposes of sub-clause 8.5(e) (Employer's Risks).

25. EMPLOYMENT PROTECTION AND TUPE

25.1 Employment protection and TUPE

Notwithstanding anything to the contrary elsewhere in this Contract:

- (a) the Contractor shall be responsible for and shall indemnify and keep indemnified the Employer from and against all and any costs, claims, expenses, damages, demands, actions, losses and liabilities arising out of or in connection with any claim in respect of any person which arises or is alleged to arise by reason of the operation of and/or for failure to inform and consult under the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended or re-enacted from time to time ("TUPE");
- (b) in the last 12 months prior to completion of the Works, within 28 days of the Employer's request, the Contractor shall (where TUPE is likely to apply) provide the Employer with a list of names, ages, addresses and national insurance numbers of all persons who are, who have been, or who may be at any time concerned with the Works or any part of them, specifying their job title, job description, basic salary, bonus and all other emoluments and benefits, period of continuous employment, the percentage of the time that they have worked on this Contract, details of any agreements entered into with employee representative bodies in relation to such persons, details of all training and competency courses attended and certificates or qualifications obtained and such other requirements as the Employer may reasonably require (altogether the "Employee Data"). The Employer will, subject to compliance with any Data Protection Legislation, be permitted to disclose any information provided to it under this sub-clause in summary and/or anonymised form to any person who has been invited to tender for the provision of the Works (or similar works) and to any replacement contractor and replacement contractor's sub-contractors;
- (c) in the last 12 months prior to completion of the Works, the Contractor shall (and shall procure that any Sub-Contractor shall) provide to the people engaged in the performance of this Contract, written contracts of employment or statements of terms of employment, in either case complying with the requirements of Section 1 of the Employment Rights Act 1996, and retain copies of such documents together with such

other documentation and PAYE records as may reasonably be required by the Employer (“Personnel Records”) and shall (where TUPE is likely to apply) within 28 days of the Employer’s request, whether during the performance of this Contract or following the end of this Contract (whether lawfully or otherwise) deliver up to the Employer or to such person as the Employer may nominate, the Employee Data, such copies of the Personnel Records as may be required by the Employer and, to the extent not otherwise provided, any employee liability information pursuant to and in accordance with Regulation 11 of TUPE. The Employer may communicate such information to persons intending to tender to execute works of the nature of the Works;

- (d) the Contractor shall not (and shall procure that any Sub-Contractor shall not) (where TUPE is likely to apply) in the last six months prior to completion of the Works, without the prior written permission of the Employer, vary or purport or promise to vary (in the employee’s favour), the terms of the contract of employment of any person engaged wholly or principally in the execution of the Works;
- (e) the Contractor shall not (and shall procure that any Sub-Contractor shall not) (where TUPE is likely to apply), without the prior written consent of the Employer create or grant, or promise to create or grant, terms or conditions of employment for any new employee engaged wholly or principally in the execution of the Works if and to the extent that such terms or conditions are materially different to the terms or conditions of employment of equivalent or nearest equivalent existing employees (which themselves comply with sub-clause 25.1(d)) at the date of commencement of employment of such new employee;
- (f) the Contractor shall (and shall procure that any Sub-Contractor shall) (where TUPE is likely to apply) at all times comply with its information and consultation obligations under Regulation 13 of TUPE; and
- (g) the Contractor shall indemnify and keep indemnified the Employer and any successor contractor against all costs, claims, expenses, damages, demands, actions, losses and liabilities arising out of or in connection with any claim or demand arising out of or in connection with any act or omission of the Contractor of any Sub-Contractor and which the Employer or a successor contractor incurs:
 - (i) in relation to any one or more employees whose employment has transferred or is alleged to have transferred to the Employer and/or a successor contractor pursuant to TUPE and/or this Contract; and/or
 - (ii) as a result of the Contractor’s breach of sub-clauses 25.1(d), 25.1(e) and/or 25.1(f);

and, despite anything else in this Contract, such a successor contractor can directly enforce the indemnity in its favour provided for by this sub-clause 25.1(g).

26. COLLATERAL WARRANTIES

26.1 Collateral Warranties

The Contractor shall, within 7 working days of the Employer’s request so to do, execute in favour of any person or persons nominated by the Employer who have entered into or intend to enter into an agreement for the provision of finance in connection with the Works and/or for the purchase of an interest, whether leasehold or freehold, in the land upon which the Works or any part of them are situated a deed in the form appended to the Contract Specific Conditions.

27. CONFIDENTIALITY AND COMPROLLER AND AUDITOR GENERAL

27.1 Confidentiality and Comptroller and Auditor General

All information obtained by the Parties in the course or conduct of the Contract shall be held confidential and shall not be divulged by the Parties to any third party save to the extent necessary to effect the execution of this Contract and then only on the basis that the recipient of such information shall be bound by similar confidentiality obligations to those undertaken by the Parties.

27.2 Obligation does not apply

Provided however that this obligation shall not apply to information which:

- (a) is or shall become part of the public domain otherwise than in consequence of a breach by the Parties of their obligations under this Clause 27;

- (b) was in the Parties possession prior to award of this Contract and was not notified to the other Party as being confidential or which would not reasonably be regarded as confidential by its very nature;
- (c) was received from third parties having to the best of the relevant Party's knowledge the right to disclose such information; and
- (d) is required to be disclosed pursuant to a court order or statutory requirement provided that the Contractor shall to the extent permitted by the relevant legal or statutory requirement: (i) provide prompt written notice of any such requirement before such disclosure is made and (ii) take all reasonable action to avoid and limit such disclosure as may be requested by the other Party.

27.3 Sub-contractors

The Contractor shall ensure that the provisions of this Clause 27 are incorporated in any sub-contracts or supply orders and that the employees, agents or representatives of all or any of the Sub-Contractors or suppliers comply with the same.

27.4 Announcements

The Contractor shall not make any announcement in relation to this contract or its subject matter without the prior written approval of the Employer except as required by law or by any legal or regulatory authority.

27.5 Permitted disclosures by Employer

Nothing in this Contract shall prevent the Employer disclosing the Contractor's Confidential Information:

- (a) to the Crown, any other Contracting Authority or any government department. All government departments receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other government departments on the basis that the information is confidential and is not disclosed to a third party which is not part of the Crown, any Contracting Authority or any government department;
- (b) for the purpose of the examination and certification of the Employer's accounts; or
- (c) for any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Employer has used its resources.

27.6 Access

The Contractor shall and shall procure that its sub-contractors shall provide such access to its or their books and records as may be required from time to time by the Comptroller and Auditor General of the National Audit Office for the purpose of their audit and examination of the accounts of Network Rail and its group companies, the Department for Transport and the consolidated set of financial statements for the UK public sector.

27.7 Survival

This Clause 27 shall remain binding on the Parties notwithstanding the completion or termination of this Contract for any reason.

28. TRACK POSSESSIONS AND ISOLATIONS

28.1 Track possessions and Isolations

After the programme has been accepted by the Employer's Representative and consent has been given by him to proceed with carrying out the Works, the Contractor shall in all cases submit written notice to the Employer's Representative confirming any speed restrictions, track possession or isolation requirements in accordance with the Employer's current planning procedures (or as otherwise laid down in this Contract) in advance of the proposed commencement of work on or near the railway lines.

28.2 Cancellation and alteration on short notice

The Employer reserves the right to cancel or alter the dates and times of the agreed speed restrictions, track possessions or isolations at short notice if this proves necessary because of any emergency affecting the safe or uninterrupted running of rail traffic, but in such an event alternative arrangements will be made as soon as the

Employer's programme permits. Subject to sub-clause 8.6 (Contractor's Entitlement) such cancellation or alteration shall be an Employer's Risk for the purposes of sub-clause 8.5 (Employer's Risks).

28.3 Adequate arrangements

Where any part of the Works has to be carried out during an agreed period of a speed restriction, track possession or isolation, the Contractor shall make adequate arrangements to ensure that such part can commence as programmed, and can be completed as early as possible, and in any case within that period. The arrangements shall include the provision of sufficient and suitable Contractor's Equipment (including, where practicable, standby equipment) and sufficient labour.

28.4 Cancellation and alteration due to failure to make adequate arrangements

Prior to the commencement of any speed restriction, track possession or isolation, if the Employer's Representative is of the opinion that the Contractor has failed to comply with the requirements of sub-clause 28.3, he may at his discretion cancel the speed restriction, track possession or isolation, or reduce the extent of the work that the Contractor may carry out during such speed restriction, track possession or isolation, and shall notify the Contractor accordingly.

28.5 Contractor unable to complete

If, during a speed restriction, track possession or isolation, the Employer's Representative is of the opinion that the Contractor will be unable to complete the planned work (or any revision of them proposed by the Contractor) to his satisfaction so as to permit the termination of the speed restriction, track possession or isolation at the time agreed, then the Employer's Representative may instruct the Contractor to reduce the extent of or vary the dates and times of the work to be carried out during such speed restriction, track possession or isolation. Such reduction or variation shall not entitle the Contractor to any additional payment or extension of time for completion if and to the extent that the Contractor's inability to complete the planned work was due to a breach by the Contractor of the requirements of this Contract.

28.6 Acknowledgement

The Contractor acknowledges that the Employer may incur additional costs as a result of the requirement to use and/or obtain additional speed restrictions, track possessions or isolations in accordance with sub-clauses 28.4 and 28.5, and that subject to sub-clause 39.3 (Railway Costs), the Employer shall be entitled to contra-charge the Contractor in respect of such costs to the extent they are due to a breach by the Contractor of the requirements of this Contract.

29. SET-OFF

29.1 Set-off

Without prejudice to the Employer's other rights and remedies, the Employer may deduct from any sums due to the Contractor under this Contract an amount equivalent to any sum due from the Contractor to the Employer (whether such sums are due to the Employer under this Contract or under any other agreement between the Contractor and the Employer) and may also deduct any sum of money that is recoverable from or payable by the Contractor under this Contract from any sum then due or which at any time thereafter may become due under any other agreement between the Contractor and the Employer which provides for disputes to be resolved by adjudication.

30. CLAIMS HANDLING PROVISIONS

30.1 Definitions

In these provisions, "**Claims Allocation and Handling Agreement**" means the agreement so entitled dated 1 November 2015 and made between the parties whose names are contained in Schedule 6 of that agreement (the "**Industry Parties**") and Railway Claims Limited (the "**Agency**") (as amended from time to time in accordance with its terms) and terms and expressions defined in the Claims Allocation and Handling Agreement shall have the same meaning in this Contract, and the Employer shall supply the Contractor with a copy of each amendment to it, as and when it is made.

30.2 Claims handling provisions

- (a) These provisions shall apply:

- (i) if this Contract is in connection with the maintenance or operation of the Employer's Railway Assets; and
- (ii) in respect of the period (if any) while the Contractor is an Independent Contractor; and
- (iii) where a claim, which arises out of or is connected with this Contract, is made by a third party who does not have a contract with the Contractor:
 - (a) against the Employer or the Agency, which may result in a claim being made against the Contractor; or
 - (b) against the Contractor, which may result in a claim being made against the Employer or the Agency (whether by the Contractor or otherwise).
- (b) In relation to clause 17 of the Claims Allocation and Handling Agreement this Contract does permit the recovery by the Employer of loss or revenue or other consequential losses that are direct and foreseeable.
- (c) The Contractor irrevocably appoints the Employer as its agent to authorise the Agency (in consultation, where necessary, with Industry Parties and their Insurers) to defend such claim on behalf of the Contractor and Industry Parties, in accordance with the Claims Allocation and Handling Agreement. In relation to such a claim, the Contractor shall be bound by the terms of that Agreement as if the Contractor were a party to it.
- (d) Where such a claim results in a payment to the third party, the Contractor agrees that liability for such payment and the costs of handling and defending the claim, shall be allocated in accordance with the Claims Allocation and Handling Agreement. The Contractor agrees to participate in the procedure for allocating liability set out in the Dispute Resolution Rules; and to be bound by the result as if the Contractor were party to those Rules; and such matters shall not be referable to adjudication or the Courts in accordance with this Contract.
- (e) Provided that sub-clauses 30.2(c) and 30.2(d) shall not apply to any claim in respect of which the Contractor admits that he is liable, and that no Industry Party is liable. In such a case, the Contractor himself may defend the claim.
- (f) Without prejudice, and in addition, to any rights and remedies of the Employer, the Contractor shall indemnify the Employer against all losses, claims, liability, costs and expenses which are borne by the Employer under the Claims Allocation and Handling Agreement and which arise out of either a breach of contract by the Contractor or a breach of duty of care owed to a third party which is the subject of a claim under the Claims Allocation and Handling Agreement.

31. COMPLIANCE

31.1 General

- (a) The Contractor shall comply with all applicable anti-bribery, anti-corruption and anti-slavery legislation including the Bribery Act 2010 and Modern Slavery Act 2015.
- (b) The Contractor shall comply with Network Rail's Code of Business Ethics and Code of Conduct, corporate hospitality, conflicts of interests and speak out (whistleblowing) policies and any updates to them.

31.2 Bribery

- (a) The Contractor shall maintain and enforce its own policies and procedures, including adequate procedures under the Bribery Act 2010, to ensure compliance with all applicable anti-bribery and anti-corruption legislation. Adequate procedures shall be determined in accordance with section 7(2) of the Bribery Act 2010 (and any guidance issued under section 9 of the Act).
- (b) The Contractor shall use reasonable endeavours to ensure that all persons associated with the Contractor (as defined by section 8 of the Bribery Act 2010) including any Sub-Contractors and suppliers comply with this Clause 31.

31.3 Modern Slavery Act

- (a) The Contractor shall implement due diligence procedures for its own suppliers, Sub-Contractors and other participants in its supply chains, to ensure that there is no slavery or human trafficking in its supply chains.
- (b) The Contractor shall use reasonable endeavours not to purchase any raw materials, resources or products from any country that has been sourced from producers or manufacturers using forced labour in its operations or practice.

31.4 Remedies

Any breach of this Clause 31 shall be deemed a fundamental breach under this Contract.

32. CORPORATE TAX

32.1 Corporate Tax

- (a) The Contractor shall keep (and shall procure that its Sub-Contractors keep) records of all expenditure, costs and other outgoings incurred in the performance of its obligations under this Contract, to enable, validate and support claims and compliance requirements made by the Employer under UK tax legislation with particular reference, but not limited to, reliefs provided under the Capital Allowances Act 2001 (“CAA2001”). The Contractor shall provide (and shall procure that any Sub-Contractors provide) a breakdown of costs at a sufficiently granular level to enable identification of costs attributable to assets qualifying for tax relief under CAA2001.
- (b) The Contractor shall provide (and shall procure that its Sub-Contractors provide) such records in the form that the Employer may request and such other documentation as they may have in their possession for the purposes set out in sub-clause 32.1(a) above.

33. FREEDOM OF INFORMATION

33.1 Freedom of Information

- (a) The Contractor acknowledges that the Employer may be required, under the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 (collectively, the “**Information Acts**”) to respond to requests for information relating to the subject matter of this Contract.
- (b) The Contractor shall (and shall procure that its Sub-Contractors shall):
 - (i) provide all necessary assistance and cooperation as reasonably requested by the Employer to enable it to comply with its obligations under the Information Acts;
 - (ii) transfer to the Employer all requests for information relating to this Contract that it receives as soon as practicable and in any event within two (2) Working Days of receipt;
 - (iii) provide the Employer with a copy of all information belonging to the Employer requested in the request for information which is in its possession or control in the form that the Employer requires within five (5) Working Days (or such other period as the Employer may reasonably specify) of the Employer requesting such information; and
 - (iv) not respond directly to a request for information unless authorised in writing to do so by the Employer.
- (c) The Contractor acknowledges that the Employer may be required under the Information Acts to disclose information (including Confidential Information) without consulting or obtaining consent from the Contractor.
- (d) The Employer shall take reasonable steps to notify the Contractor of a request for Confidential Information (in accordance with the Secretary of State’s section 45 Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000) to the extent that it is permissible and reasonably practical for it to do so and shall consider any reasonable and timely representations made by the Contractor regarding the application of exemptions to the requested information.

- (e) Notwithstanding any other provision in this Contract, the Employer shall be responsible for determining in its absolute discretion whether any Confidential Information and/or any other information is exempt from disclosure in accordance with the Information Acts.

34. INFORMATION SECURITY

34.1 Information Security

The Contractor shall comply with the Employer's Security Principles for Supplier Selection and Management Standard when stated as being applicable in the Appendix.

35. EQUALITY AND DIVERSITY

35.1 Equality and Diversity

- (a) The Contractor shall perform its obligations under this Contract in accordance with:
 - (i) all applicable equality law (whether in relation to age, disability, gender reassignment, marriage or civil partnership status, pregnancy or maternity, race, religion or belief, sex or sexual orientation (each a "**Relevant Protected Characteristic**") or otherwise);
 - (ii) the Employer's equality, diversity and inclusion policy as published by the Employer from time to time; and
 - (iii) any other requirements and instructions which the Employer reasonably imposes in connection with any equality obligations imposed on the Employer at any time under applicable equality law.
- (b) The Contractor shall take all reasonable steps to secure the observance of sub-clause 35.1(a) above by its employees, agents, representatives and Sub-Contractors.
- (c) The Contractor acknowledges that the Employer is under a duty under section 149 of the Equality Act 2010 to have due regard to the need to eliminate unlawful discrimination (on the grounds of a Relevant Protected Characteristic); to advance equality of opportunity, and to foster good relations, between persons who share a Relevant Protected Characteristic and persons who do not share it. In performing its obligations under this Contract, the Contractor shall assist and co-operate with the Employer where possible in satisfying this duty.

36. LONDON LIVING WAGE

36.1 London Living Wage

- (a) The Contractor shall and shall also procure that its relevant Sub-Contractors (if any) shall:
 - (i) ensure that none of its workers or its Sub-Contractor's workers engaged in the performance of this Contract in the Greater London Area (but not otherwise) and who would also satisfy the eligibility criteria set by the Living Wage Foundation (or any replacement) is paid an hourly wage (or equivalent of an hourly wage) less than the London Living Wage; and
 - (ii) co-operate and provide all reasonable assistance to the Employer in monitoring the effect of the London Living Wage.
- (b) If the London Living Wage increases during the term of this Contract, the Contractor shall not be entitled to adjust the Contract Price and the Parties agree and acknowledge that any increases in the London Living Wage anticipated during the term of this Contract have been factored into the Contract Price.
- (c) Any failure by the Contractor to comply with the provisions of sub-clause 36.1(a) shall be treated as a fundamental breach under this Contract.

37. PROTECTION OF PERSONAL DATA

37.1 Definitions

Unless the context otherwise requires, for the purpose of this Clause:

- (a) **Permitted Purpose** means, with respect to a Party, the purposes of: (i) carrying out its obligations under this Contract; (ii) exercising its rights under this Contract; and (iii) complying with its obligations under applicable law (including Data Protection Legislation);
- (b) **Personal Data** means the personal data that is processed by a Party pursuant to or in connection with this Contract;
- (c) **Security Incident** means: (a) the unlawful or unauthorised processing of Personal Data; or (b) any security incident affecting the Personal Data (including (without limitation) a personal data breach as defined in the GDPR); and
- (d) the terms **controller, processor, processing/process, personal data** and **data subject** shall be interpreted and construed by reference to Data Protection Legislation.

37.2 **Independent Data Controllers**

- (a) The Parties agree that, for the purposes of Data Protection Legislation, each Party (to the extent it processes Personal Data) processes Personal Data as an independent data controller in its own right. Nothing in this Contract is intended to construe either Party as the data processor of the other Party or as joint data controllers with one another with respect to Personal Data.
- (b) Each Party shall:
 - (i) comply with its obligations under Data Protection Legislation;
 - (ii) be responsible for dealing with and responding to data subject requests, enquiries or complaints (including any request by a data subject to exercise their rights under Data Protection Legislation) it receives, unless otherwise agreed between the Parties; and
 - (iii) promptly notify the other Party in writing of each Security Incident of which it becomes aware relating to the Personal Data to the extent the Security Incident is likely to affect the other Party.
- (c) Each Party warrants that it is not subject to any restriction which would prevent or restrict it from disclosing or transferring Personal Data to the other Party in accordance with the terms of this Contract.
- (d) Without prejudice to sub-clause (i), each Party (**the Disclosing Party**) agrees that if it provides Personal Data to the other Party (**the Receiving Party**), it shall ensure that it has provided all necessary information to, and obtained all necessary consents from, the data subjects of the Personal Data, in each case to enable the Disclosing Party to disclose the Personal Data to the Receiving Party and for the Receiving Party to use that Personal Data for the Permitted Purposes, in each case in accordance with Data Protection Legislation.
- (e) In relation to the Personal Data it receives from the Disclosing Party, each Party shall:
 - (i) at all times process the Personal Data in a manner that ensures appropriate security of the Personal Data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical and organisational measures; and
 - (ii) ensure that, at a minimum, the measures required under sub-clause 37.2(e)(i) meet the standard required by Data Protection Legislation, including Article 32 of the GDPR.

38. **INTERMEDIARIES LEGISLATION**

38.1 **Engagement of Off-Payroll service providers through the Contractor**

If stated in the Appendix that the works provided through this Contract are assessed by the Employer to fall under the Intermediaries Legislation then:

- (a) The Contractor shall comply with the Intermediaries Legislation and all reasonable instructions and requests for information from the Employer in respect thereof.

- (b) The Contractor shall supply all the information required, and to any specified time, for the Employer to report to the Department for Transport and HM Treasury as to compliance with the Intermediaries Legislation including the number of workers affected.
- (c) The Contractor shall be liable for and shall indemnify the Employer against all and any loss, damage, cost, expense, liability, claims and proceedings whatsoever in respect of a failure of the Contractor to comply with this Clause 38.
- (d) The Employer shall provide all reasonably requested information within a reasonable timescale to support the Contractor in its compliance with the Intermediaries Legislation.
- (e) Failure by the Contractor to comply with this Clause 38 shall be deemed to be a fundamental breach of this Contract.

39. LIMITS OF LIABILITY

39.1 Aggregate Liability Cap

- (a) Subject to the provisions of sub-clauses 39.2 and 39.4, the aggregate limit of liability of the Contractor under this Contract (whether arising in contract, tort (including negligence) or otherwise at law) shall be the amount stated in the Appendix (the “**Aggregate Liability Cap**”).
- (b) Without prejudice to sub-clause 39.2, where in this Contract the liability of the Contractor for a particular category of loss or other amount is stated to be “subject to the Aggregate Liability Cap” such liability is subject to the single Aggregate Liability Cap referred to in sub-clause 39.1(a) and not a separate cap on liability per category.

39.2 Exclusions from Aggregate Liability Cap

No limit of liability in this Contract shall apply to:

- (a) any liability in respect of death or personal injury resulting from a negligent act or omission or breach of statutory duty by the Contractor or any person for whom the Contractor is responsible;
- (b) any losses directly caused by the fraud of the Contractor;
- (c) any liability of the Contractor under:
 - (i) sub-clause 4.11 (Copyright);
 - (ii) Clause 25 (Employment protection and TUPE);
 - (iii) Clause 27 (Confidentiality and Comptroller and Auditor General);
 - (iv) Clause 31 (Compliance);
 - (v) Clause 37 (Data Protection); and
- (d) any liability in respect of which the Contractor is entitled to recovery (or would be entitled to recovery but for its own default) under the terms of insurances required to be maintained in accordance with this Contract which shall be subject to the limit of liability in sub-clause 39.4.

39.3 Railway Costs

- (a) For the purposes of this sub-clause 39.3:
 - (i) “**Track Access Agreement**” means any agreement (excluding Freight Access Agreements) entered into between the Employer and any other party and incorporating the Network Code.
 - (ii) “**Freight Access Agreement**” means any agreement (excluding Track Access Agreements) entered into between the Employer and any other party for non-passenger services and incorporating the Network Code.

- (iii) “**Network Code**” means the document entitled “Network Code” dated 12 July 2017, as amended and modified from time to time.
- (b) The liability of the Contractor under this Contract to compensate the Employer in respect of any sums payable by the Employer pursuant to Schedules 4 and 8 of any Track Access Agreement or the equivalent provisions of any Freight Access Agreement (“**Railway Costs**”) whether in contract, tort, delict or otherwise shall not exceed in aggregate the sum stated in the Appendix.

39.4 **Insured Losses**

The aggregate limit of liability of the Contractor under this Contract (whether arising in contract, tort (including negligence) or otherwise at law) in respect of which the Contractor is entitled to recovery (or would be entitled to recovery but for its own default) under the terms of insurances required to be maintained in accordance with this Contract shall be limited to the minimum amount of the relevant insurance required to be maintained in accordance with the terms of this Contract.

39.5 **MTBF Liquidated Damages**

This sub-clause 39.5 shall apply where stated in the Appendix. The Contractor shall pay liquidated damages at the rate detailed in the Appendix for any failure to achieve the reliability target set out in the Technical Workslope (referred to as the Mean Time Between Failures (“**MTBF**”)) during the Defects Correction Period. Such liquidated damages (if any) shall be assessed at the end of the Defect Correction Period and the relevant rate applied depending upon the number of failures arising in the period in excess of the number of failures predicted by the MTBF which are caused by defects in the Works attributable to the Contractor. The liability of the Contractor under this sub-clause 39.5 shall not exceed the sum stated in the Appendix.

40. **PROJECT BANK ACCOUNT**

Subject to sub-clause 40.8, this Clause 40 shall apply where stated in the Appendix.

40.1 **Project Bank Account – definitions**

For the purposes of this Clause 40, the following words and expressions shall have the following meanings assigned to them:

- (a) “**Bank Instruction**” means a document instructing the Project Bank to make payments to the Contractor and PBA Sub-Contractors.
- (b) “**PBA Sub-Contractors**” means the Sub-Contractors stated in the Appendix and other Sub-Contractors who have signed the PBA Sub-Contractor Joining Deed.
- (c) “**PBA Sub-Contractor Joining Deed**” means an agreement in the form appended to the Contract Specific Conditions under which a Sub-Contractor joins the Trust Deed.
- (d) “**Project Bank**” means the bank identified in the Appendix.
- (e) “**Project Bank Account**” means the account used to receive payments from the Employer and the Contractor and to make payments to the Contractor and PBA Sub-Contractors.
- (f) “**Trust Deed**” means an agreement in the form appended to the Contract Specific Conditions which contains provision for administering the Project Bank Account.

40.2 **Project Bank Account**

- (a) Subject to sub-clause 40.8, the Contractor shall establish the Project Bank Account with the Project Bank within three weeks of the date of this Contract.
- (b) The Contractor shall pay any charges made and shall be paid any interest paid by the Project Bank in respect of the Project Bank Account. Subject to sub-clause 40.8, the charges and interest by the Project Bank are deemed to be in the Contract Price.
- (c) The Contractor shall submit to the Employer’s Representative for acceptance details of the banking arrangements for the Project Bank Account. The Employer’s Representative may reject the banking arrangements where they do not provide for payments to be made in accordance with this Contract. The

Contractor shall provide to the Employer's Representative copies of communications with the Project Bank in connection with the Project Bank Account.

40.3 PBA Sub-Contractors

- (a) The Contractor shall include in its contracts with PBA Sub-Contractors the arrangements in this Contract for the operation of the Project Bank Account and Trust Deed. The Contractor shall inform the PBA Sub-Contractors of the details of the Project Bank Account and the arrangements for payment of amounts due under their contracts.
- (b) The Contractor shall submit proposals for adding a Sub-Contractor to the PBA Sub-Contractors to the Employer's Representative for acceptance. The Employer's Representative may reject the addition of the Sub-Contractor where such addition does not comply with the Scope. The Employer, the Contractor and the Sub-Contractor shall sign the PBA Sub-Contractor Joining Deed after acceptance.

40.4 Payments

- (a) The Contractor shall show in the application for payment the amounts due to PBA Sub-Contractors in accordance with their contracts.
- (b) Within the time set out in the banking arrangements to allow the Project Bank to make payment to the Contractor the PBA Sub-Contractors in accordance with this Contract:
 - (i) the Employer shall make payment to the Project Bank Account of the amount which is due to be paid under this Contract; and
 - (ii) the Contractor shall make payment to the Project Bank Account of any amount which the Employer has informed the Contractor it intends to withhold from the certified amount and which is required to make payment of PBA Sub-Contractors.
- (c) The Contractor shall prepare the Bank Instruction, setting out the sums due to PBA Sub-Contractors as assessed by the Contractor and to the Contractor for the balance of the payment due under this Contract. After signing the Bank Instruction, the Contractor shall submit to the Employer's Representative no later than four days before the final date for payment. The Employer shall sign the Bank Instruction and submit it to the Project Bank no later than one day before the final date for payment.
- (d) The Contractor and PBA Sub-Contractors shall receive payment from the Project Bank Account of the sums set out in the Bank Instruction as soon as practicable after the Project Bank Account receives payment.
- (e) Any payment which is due from the Contractor to the Employer shall not be made through the Project Bank Account.

40.5 Effect of payment

Payments made from the Project Bank Account are treated as payments from the Employer to the Contractor in accordance with this Contract or from the Contractor or his sub-contractor to PBA Sub-Contractors in accordance with their contracts as applicable. A delay in payment due to a failure of the Contractor to comply with the requirements of this Clause 40 is not treated as late payment under this Contract.

40.6 Trust Deed

Subject to sub-clause 40.8, the Employer, the Contractor and PBA Sub-Contractors shall sign the Trust Deed before the first assessment date.

40.7 Termination

If the Employer's Representative issues a notice of termination in accordance with this Contract no further payment shall be made into the Project Bank Account.

40.8 Subsequent Implementation

If this Clause 40 is stated not to apply in the Appendix as at the date of this Contract, the Employer may nonetheless subsequently instruct the implementation of a Project Bank Account arrangement in accordance with

this Clause 40 by giving notice in writing to the Contractor. Such an instruction shall be treated as a variation for the purposes of sub-clause 12.1 (Variation to the Works).

41. CONSOLIDATED PROGRAMME

This Clause 41 shall apply where stated in the Appendix.

41.1 Consolidated Programme

- (a) Without prejudice to sub-clause 7.5 (Direct Contractor), the Contractor acknowledges that the Works together with the work to be undertaken by the Direct Contractors stated in the Appendix (together the “**Key Direct Contractors**”) shall combine to deliver the overall project as defined in the Technical Workscope (the “**Overall Project**”).
- (b) Each of the programmes submitted by the Key Direct Contractors together with the Contractor’s programme submitted in accordance with sub-clause 9.1 (Programme for Works) will form part of the Employer’s consolidated programme for the Overall Project and shall so far as is reasonably practicable be coordinated, updated and amended as necessary so that an efficient coordinated programme incorporating each of the Key Direct Contractors’ programmes can be established that meets the Employer’s desired dates for completion of the Overall Project as from time to time notified by the Employer (“**Consolidated Programme**”).
- (c) Without prejudice to sub-clause 7.5 (Direct Contractor), the Contractor shall coordinate, liaise with and make due allowance for working alongside the Key Direct Contractors as necessary to assist the Employer to deliver the Overall Project in accordance with the Consolidated Programme.

41.2 Liability

Notwithstanding the other rights and remedies available to the Employer under this Contract, if the Contractor fails to comply with any of its obligations under this Contract and, as a result, the Employer incurs additional cost either:

- (a) in carrying out work; or
- (b) by paying an additional amount to the Key Direct Contractors in carrying out work,

the Contractor shall pay or allow an amount equal to such additional cost to the Employer. Any such amount when taken together with any liquidated damages for delay for which the Contractor is liable under sub-clause 10.6 (Liquidated Damages) shall not exceed in aggregate the sum set out in the Appendix.

42. ADDITIONAL RESPONSIBILITY FOR CARE OF THE WORKS

This Clause 42 shall apply where stated in the Appendix.

42.1 Hand-over Certificate

- (a) The Employer’s Representative may issue a draft hand-over certificate (the “**Hand-over Certificate**”) when any part of the Works or a Direct Contractor’s works (the “**Hand-over Works**”) are completed to a standard which is sufficient for it to be capable of being handed over to a Direct Contractor or the Contractor or the Employer.
- (b) The Hand-over Certificate shall detail the relevant Hand-over Works and shall be valid and effective once it is signed by the Contractor, the Employer’s Representative and the relevant Direct Contractor.

42.2 Care of Hand-over Works

- (a) Where the Contractor is handing over works it shall be relieved of its obligations to take responsibility for the care of the Hand-over Works under sub-clause 8.2(a) (Care of the Works) from the date of the Hand-over Certificate and responsibility for the care of the Hand-over Works shall pass to the relevant Direct Contractor or the Employer. The Contractor’s responsibility for the remaining Works shall not be affected by this Clause 42.
- (b) Where the Contractor is receiving works it shall take responsibility for the Hand-over Works in accordance with sub-clause 8.2(a) (Care of the Works).

- (c) The passing of responsibility for the care of the Hand-over Works shall not constitute substantial completion of the Works for the purposes of Clause 10.4 (Substantial Completion).

43. M&E AND SIGNALLING CONDITIONS

43.1 Definitions

For the purposes of this Clause 43, the following words and expressions shall have the following meanings assigned to them:

- (a) **“Plant”** means those items of machinery, computer hardware and software, apparatus, equipment and materials (if any), other than the Contractor’s Equipment, identified as such in the Appendix and/or in respect of which the Appendix provides that Tests on Completion or Performance Tests shall apply.
- (b) **“Tests on Completion”** means the tests (if any) referred to in the Appendix (or otherwise agreed by the Employer and the Contractor) which are to be made by the Contractor upon completion of erection and/or installation before the issue of a Certificate of Substantial Completion in respect of the Works or a Section thereof.
- (c) **“Performance Test”** means the tests (if any) referred to in the Appendix (or otherwise agreed between the Employer and the Contractor) to be made after substantial completion of the Works to demonstrate the performance of the Works.

43.2 Inspection and testing of plant before delivery

- (a) The Employer’s Representative shall be entitled at all reasonable times during manufacture to inspect, examine and test on the Contractor’s premises or elsewhere the materials, workmanship and performance of all Plant. If any part of the Plant is being manufactured on premises other than the Contractor’s own, the Contractor shall obtain permission for the Employer’s Representative to inspect, examine and test such Plant as if it were being manufactured on the Contractor’s premises. Such inspection, examination or testing shall not release the Contractor from any obligation under the Contract.
- (b) If not specified in the Contract, the Contractor shall agree with the Employer’s Representative the date on and the place at which any Plant will be ready for inspection, examination or testing. The Employer’s Representative shall give the Contractor 24 hours’ notice of his intention to attend the test or inspection. If the Employer’s Representative shall not attend on the date and at the place agreed, the Contractor may proceed with the inspection, examination or test which shall be deemed to have been made in the Employer’s Representative’s presence. The Contractor shall forthwith forward to the Employer’s Representative duly certified copies of the results of the inspection, examination or test.
- (c) The Contractor shall provide such assistance, labour, materials, electricity, fuel stores, apparatus and instruments as may be necessary or as may be reasonably requested by the Employer’s Representative for the purposes of carrying out any such inspection, examination or test.
- (d) When the Employer’s Representative is satisfied that any Plant has passed the inspection, examination or test referred to in this Clause 43 he shall forthwith issue to the Contractor a certificate to that effect.
- (e) If after inspecting, examining or testing any Plant the Employer’s Representative shall decide that such Plant or any part thereof is defective or not in accordance with the Contract, he may reject the said Plant or part thereof by giving to the Contractor notice of such rejection, stating therein the grounds upon which his decision is based. Following any such rejection the Contractor shall make good or otherwise repair or replace the rejected Plant and resubmit the same for inspection, examination or testing in accordance with this Clause 43. All expenses reasonably incurred by the Employer in consequence of such re-inspection, re-examination or re-testing and the Employer’s Representative’s attendance shall be deducted from any amounts due to the Contractor under this Contract.
- (f) No Plant may be delivered to the Site unless it has been certified by the Employer’s Representative in accordance with sub-clause 43.2(d).

43.3 Tests on Completion

- (a) The Contractor shall give to the Employer’s Representative 21 days’ notice of the date after which he will be ready to make any Tests on Completion. Unless otherwise agreed the Tests on Completion shall take

place within 10 days after the said date on such day or days as the Employer's Representative shall notify to the Contractor.

- (b) Provided that where the conduct of the Tests on Completion requires signalling disconnections and/or restricts the operating railway in any way, the Contractor shall submit to the Employer's Representative for his acceptance pursuant to sub-clause 9.1 a programme showing those dates and times at which the Contractor requests access to the operating railway to complete the Works, and any such request for access that is disruptive to the railway shall be made in accordance with Clause 28 (Track Possessions and Isolations).
- (c) If the Employer's Representative fails to appoint a time after having been asked to do so or to attend at any time or place duly appointed for making the Tests on Completion, the Contractor shall be entitled to proceed in his absence and the Tests on Completion shall be deemed to have been made in the presence of the Employer's Representative. The Contractor shall forthwith forward to the Employer's Representative duly certified copies of the results of the Tests on Completion.
- (d) Before commencing Tests on Completion in respect of signalling and signalling related works that require signalling disconnections and/or restrict the operating railway in any way, the Contractor shall have arranged any possessions or signalling disconnections required to carry out the tests in accordance with Clause 28 (Track Possessions and Isolations) and shall submit all pre-test documentation (including the Testing Strategy and Test Plan(s)) to the Employer's Representative in accordance with applicable Railway Group Standards, Network Rail Standards and/or any equivalent standards including, but not limited to the Signalling Testing Handbook.
- (e) No signalling testing activity of any sort shall take place unless the Testing Strategy and Test Plan(s) have been approved in writing by the Employer. If the Contractor fails to submit any pre-test documentation within the time limits specified in the Signalling Testing Handbook or the submitted documentation is not approved for any reason, the proposed Tests on Completion shall not take place and the Contractor shall submit alternative arrangements to the Employer for his acceptance. Such arrangements shall be at no additional cost to the Employer and all costs which the Employer may incur in the re-arrangement of the Tests on Completion shall be deducted from any amounts due to the Contractor under this Contract.
- (f) If any Plant fails to pass the Tests on Completion it shall be repeated within a reasonable time upon the same terms and conditions. All expenses reasonably incurred by the Employer in consequence of such repetition of the Tests on Completion and the Employer's Representative's attendance shall be deducted from any amounts due to the Contractor under this Contract.
- (g) If any Plant fails to pass the Tests on Completion (including any repetition thereof) the Contractor shall (subject to the provisions of Clause 28 (Track Possessions and Isolations) in the case of work or the conduct of the tests requiring signalling disconnections and/or restricting the operating railway in any way) take whatever steps may be necessary to enable the Plant to pass the Tests on Completion and shall thereafter repeat them, unless any time limit specified in the Contract for the passing thereof shall have expired, in which case it shall be deemed to be a fundamental breach of this Contract and the Employer's Representative shall be entitled to reject such Plant and the Employer shall be entitled to proceed in accordance with Clause 15.2 (Contractor Default).

43.4 Performance Tests

- (a) Where Performance Tests are included in the Contract they shall be carried out in accordance with any agreed programme or if none then as soon as is reasonably practicable and within a reasonable time after that part of the Works into which the relevant Plant is incorporated has been substantially completed.
- (b) Performance Tests shall be carried out by the Employer or the Employer's Representative on his behalf under the supervision of the Contractor and in accordance with the procedures and under the operating conditions specified in the Contract and in accordance with such other instructions as the Contractor may give in the course of carrying out such tests.
- (c) The Employer, or the Employer's Representative on his behalf, or the Contractor shall be entitled to order the cessation of any Performance Test if damage to the Plant or personal injury is likely to result from continuation.

- (d) If any Plant fails to pass any Performance Test (or repetition thereof) or if any Performance Test is stopped before its completion, such test shall, subject to sub-clause 43.4(e), be repeated as soon as practicable thereafter. Any additional cost incurred by the Employer by reason of the repetition of any Performance Test shall be deducted from any amounts due to the Contractor under this Contract. The Employer shall permit the Contractor to make adjustments and modifications to any part of the Plant before the repetition of any Performance Test and shall, if required by the Contractor, shut down any part of the Plant for such purpose and re-start it after the adjustments and modifications have been made. All such adjustments and modifications shall be made by the Contractor with all reasonable speed and at his own expense. The Contractor shall, if so required by the Employer's Representative, submit to the Employer's Representative for his approval details of the adjustments and modifications which he proposes to make.
- (e) If any Plant fails to pass any Performance Test (of repetition thereof) and the Contractor in consequence proposes to make any adjustments or modifications thereto, the Employer's Representative may notify the Contractor that the Employer requires the carrying out of such adjustments or modifications to be postponed. In such event the Contractor shall remain liable to carry out the adjustments or modifications and a successful Performance Test within a reasonable time of being notified to do so by the Employer's Representative. If however the Employer's Representative fails to give any such notice within one year of the date of substantial completion of that part of the Works in which such Plant is incorporated, the Contractor shall be relieved of any such obligation and any Plant shall be deemed to have passed such Performance Test.
- (f) The results of Performance Tests shall be compiled and evaluated jointly by the Employer, or the Employer's Representative on his behalf, and the Contractor in the manner detailed in the Contract.

43.5 **Defective plant and further testing**

If any repairs or replacements are to be carried out pursuant to the Contractor's obligations under sub-clause 10.5 (Correction of Defects) that are of such character as may affect the operation of any Plant, the Employer or the Employer's Representative may within one month after such repair or replacement give to the Contractor notice requiring that further Tests on Completion or Performance Tests be made in which case such tests shall be carried out as provided in sub-clause 43.3 or sub-clause 43.4 as the case may be.

43.6 **Intellectual Property**

Notwithstanding sub-clause 4.11 (Intellectual Property), no licences shall be granted to the Employer under this Contract to reproduce or have reproduced any Plant in part or whole; and neither shall any license be granted to the Employer to make or have made components or spare parts for the Works which are protected by Intellectual Property rights vested in the Contractor or any of its sub-contractors or suppliers for any purposes other than the maintenance, running or repair of the Works.

44. **WORKS PERFORMED UNDER PREVIOUS CONTRACTS**

This Clause 44 shall apply where stated in the Appendix.

44.1 **Previous Works**

The Contractor hereby acknowledges that he has carried out preliminary Works for this Contract under the purchase orders listed in the Appendix and that as a consequence of this Contract:

- (a) all and any obligations on the part of the Employer to make payment under such purchase orders shall determine;
- (b) any payments made under such purchase orders shall be treated as payments on account of this Contract; and
- (c) everything done by the Contractor or on behalf of the Contractor under such purchase orders shall be deemed to have been done pursuant to this Contract and any outstanding payments, variations or claims under such purchase orders shall be valued and managed in accordance with the terms and conditions of this Contract.

45. **EMPLOYER'S OPTIONS**

This Clause 45 shall apply where stated in the Appendix.

45.1 **Definitions**

For the purposes of this Clause 45, references to an “**Option**” have the meaning given to them in the Appendix.

45.2 **Phases**

As at the date of this Contract the Employer is not in a position to proceed with the Option(s). The Contractor shall not be obliged or permitted to and shall not commence an Option unless and until the Contractor receives a written instruction from the Employer’s Representative to proceed with that Option.

45.3 **Adjustment to Contract Price**

If the Employer’s Representative issues a written instruction to proceed with an Option in accordance with sub-clause 45.2, provided the scope for that Option described in that instruction does not materially differ from the Option scope described in the Technical Workslope at the date of this Contract and it is instructed no later than the dates specified in the Appendix:

- (a) the Contract Price shall reflect the price for that Option itemised in the Bill of Quantities (and shall not be adjusted further including for the addition of any additional preliminary costs); and
- (b) the time or times for completion of the Works shall not be extended.

45.4 **Valuation of changes to Option**

If the relevant Option as instructed by the Employer’s Representative in accordance with sub-clause 45.2 is materially different from the relevant Option scope of work included in the Technical Workslope at the date of this Contract such changes to the scope of work shall be priced in accordance with Clause 12 (Changes to the Works and Valuation) and the relevant Contract Price described in sub-clause 45.3 shall be adjusted either up or down accordingly.

45.5 **Option not instructed**

If the Employer’s Representative does not issue a written instruction to proceed with any Option by the relevant date stated in the Appendix, or the Employer otherwise determines that it does not intend to instruct an Option under this Contract, unless agreed otherwise by the Parties in writing:

- (a) such Works relating to that Option shall be deemed not to be and never to have been included as part of the Works for the purposes of the Contract;
- (b) the Employer shall not be liable to the Contractor for any costs, losses or expenses, direct or indirect (including loss of profit) arising as a consequence of the Option not being instructed; and
- (c) the Employer shall be entitled to award the scope described in the relevant Option to a third party contractor without any liability to the Contractor whatsoever.

CONTRACT SPECIFIC CONDITIONS

NONE

TECHNICAL WORKSCOPE

[Insert]

CONTRACT REQUIREMENTS HSEA

[Insert]

PRELIMINARIES

[Insert]

BILL OF QUANTITIES

[Insert]

CONTRACTOR’S PROPOSALS

All relevant sections of the Contractor’s Proposals where the Contractor is required to design part of the Permanent Works are included in the Technical Workslope and no other section of the Contractor’s Proposals forms part of the Contract.

[Insert]

ELECTRONIC EXECUTION PAGE

[Insert]