

Dated

NETWORK RAIL INFRASTRUCTURE LIMITED

- and -

CHESHIRE EAST BOROUGH COUNCIL

TWO PARTY UNDERBRIDGE AGREEMENT
relating to
a new structure under the railway on KCS1 at 7m990yds

CONTENTS

1.	DEFINITIONS AND INTERPRETATION	1
2.	DUTIES AND OBLIGATIONS OF THE COUNCIL	5
3.	DUTIES AND RIGHTS OF NETWORK RAIL	17
4.	SUSPENSION.....	20
5.	INDEMNITY AND LIMIT OF LIABILITY	21
6.	MISCELLANEOUS.....	22
	Schedule 1 - Particulars	27
	Schedule 2 - Payment.....	28
	Schedule 3 - Network Rail's Services	32
	Schedule 4 - Notice Details.....	33
	Schedule 5 - Plan of Land in the Ownership of Network Rail.....	35
	Schedule 6 – Escalation Procedure.....	36

THIS AGREEMENT is made the day of 2013

BETWEEN

(1) **NETWORK RAIL INFRASTRUCTURE LIMITED** ("Network Rail") registered in England and Wales as Company No. 2904587 and having its registered office at Kings Place, 40 Melton Street, London NW1 2EE

and

(2) **CHESHIRE EAST BOROUGH COUNCIL** ("the Council") of Council Offices Westfields Middlewich Road Sandbach Cheshire CW11 1HZ]

WHEREAS

- (1) The Council wishes to design and construct a new Road which crosses under the Railway Infrastructure on KCS1 at 7m990yds.
- (2) The Council wishes to design and construct the New Structure to be known as 21C to carry the Road under the Railway Infrastructure. It is intended that the Council will adopt the Road.
- (3) Network Rail is prepared to permit the Council to design and construct the New Structure and Network Rail is prepared to own and maintain the New Structure at the cost of the Council, subject to the terms and conditions of this Agreement, which reflects the statutory obligations and framework within which Network Rail is obliged to operate the Railway.
- (4) Network Rail is prepared to dedicate its land which carries the Road to the Council for the purpose of a public highway for or in connection with the New Structure upon terms to be subject to a separate legal agreement and payment of compensation.

NOW IT IS AGREED by and between the parties hereto as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement, unless the context otherwise requires:

- 1.1.1 "Accepted Design" means the design for the Works accepted by Network Rail in accordance with Clause 2.2.2.13
- 1.1.2 "Approved Drawings" means any drawing approved by Network Rail in connection with the Works (in particular drawings submitted under clauses 2.2.2.6 and 2.2.2.13;
- 1.1.3 "Certificates for Design and Checking of Structures" means certificates in such format as Network Rail shall require in respect of those parts of the Rail Related Works;
- 1.1.4 "Certificates for Design and Checking of Temporary Works" means certificates in such format as Network Rail shall require in respect of Temporary Works;
- 1.1.5 "CDM Regulations" means the Construction (Design and Management) Regulations 2007;

- 1.1.6 "Competent Authority" means any local, national or supra-national agency, authority, department, inspectorate, minister, ministry, official, court, tribunal or public or statutory person (whether autonomous or not) of the United Kingdom or of the European Union, which has, in respect of this Agreement, jurisdiction over or the power to bind any of the parties to, or the subject matter of, this Agreement,
- 1.1.7 "Construction Works Commencement Date" means the latest of:
- (i) the date of this Agreement;
 - (ii) completion of the agreement for payment of any compensation referred to in Recital (4) above unless the parties agree otherwise in writing;
 - (iii) the date that Network Rail confirms to the Council that it is satisfied that the requirements of Clause 2.2.2.2 and 2.2.3.2 have been met, such confirmation to not be unreasonably delayed or withheld;
 - (iv) the date of Network Rail's approvals pursuant to Clause 2.2.3.3. which are necessary to commence construction of the Works;
 - (v) the provision on site of site safety personnel by the Council pursuant to Clause 2.2.1.2;
 - (vi) receipt of evidence confirming that the Council has taken out the insurances required by Clause 2.3; or
 - (vii) the date on which all Necessary Consents have been obtained which are necessary to commence construction of the Works.
 - (viii) the date of Network Rail's approval to the Safety Management System pursuant to Clause 2.2.1.7;
- 1.1.8 "Contract Documents" means the documents which form a contract between the Council and a third party in respect of the carrying out of the whole (or any part) of the design and construction of the Works;
- 1.1.9 "Contractor" means any person or company to whom a contract for the whole (or any part) of the Works is let and for whom the Council is the employer;
- 1.1.10 "Supplier Licence" has the meaning given in the Network Rail Company Standards inter alia Network Rail Standard NR/L2/INI/CP0070
- 1.1.11 "Costs" means all fees, costs, charges, expenses and disbursements properly incurred by Network Rail and/or payable to Network Rail in carrying out its duties, rights and obligations under this Agreement;
- 1.1.12 "Direction" means any direction, requirement, instruction or rule legally binding on Network Rail, and includes any modifications, extension or replacement of any such direction, requirement, instruction or rule for the time being in force but shall not include the exercise of a discretion under any contract or other obligation binding on Network Rail or the enforcement of any such contract or obligation;
- 1.1.13 "Escalation Procedure" means the procedure for the resolution of any disagreement between the parties as set out in Schedule 6

- 1.1.14 “Health and Safety Executive” means the executive arm of the Health and Safety Commission which enforces health and safety law under the Health and Safety at Work etc. Act 1974 or any successor body;
- 1.1.15 “Necessary Consents” means all approvals, permissions, consents, licences, registrations and authorisations (whether statutory or otherwise) which are required from time to time for the purposes of carrying out the Works whether required in order to comply with any legal requirement or as a result of any rights of any third party in relation to the Works;
- 1.1.16 “Network Licence” means the licence granted to Network Rail pursuant to Section 8 of the Railways Act 1993 (as amended by the Transport Act 2000);
- 1.1.17 “Network Operator Issues” means:
- (i) a Safety Critical Event;
 - (ii) an Operational Emergency;
 - (iii) a regulatory requirement or requirement of Network Rail’s Network Licence;
 - (iv) a requirement of English law and/or European Community law; or
 - (v) a Direction of a Competent Authority;
- 1.1.18 “Network Rail Approval in Principle Submission” means the submissions necessary to obtain the approval in principle for the Rail Related Works in accordance with such procedures and format as is acceptable to Network Rail.
- 1.1.19 “Network Rail Company Standards” means a standards document issued by Network Rail for its own use in relation to the Railway as a whole and which applies to the performance of the Works under this Agreement;
- 1.1.20 “Network Rail’s Estimated Costs” means a non-binding estimate of the Costs up to and including final completion of the Works;
- 1.1.21 “New Structure” means the permanent works and the underbridge to be constructed/installed in accordance with this Agreement at the site referred to in Recital (1) and for the avoidance of doubt does not include the Railway Infrastructure;
- 1.1.22 “Operational Emergency” means any material disruption to the Railway arising (directly or indirectly) as a result of any unforeseen circumstances or event affecting the Railway or any part thereof;
- 1.1.23 “Possession” means planned safety arrangements, which control or prevent the normal movement of rail traffic on the Railway Infrastructure between defined locations and for a pre-determined period;
- 1.1.24 “Programme” means the programme for the carrying out and completion of the Works to be approved by Network Rail in accordance with this Agreement as may be amended by agreement between the parties;

- 1.1.25 "Rail Related Works" means the New Structure and any permanent changes made to the Railway Infrastructure in consequence of the construction of the New Structure;
- 1.1.26 "Railway" means the Railway Infrastructure, Network Rail's activities in carrying out the operation, maintenance and replacement of the Railway Infrastructure, and traffic on the Railway Infrastructure;
- 1.1.27 "Railway Group Standards" means technical standards to which railway assets or equipment must conform and operating procedures with which the operators of railway assets must comply;
- 1.1.28 "Railway Infrastructure" means Network Rail's infrastructure and operational track;
- 1.1.29 "Regulator" means the Office of Rail Regulation as established by the Railways and Transport Safety Act 2003;
- 1.1.30 "Road" means that section of the new road and footway to cross under the Railway Infrastructure by means of the New Structure the construction or operation of which could impact on the safe operation of railway infrastructure.
- 1.1.31 "Safety Critical Event" means an imminent risk:
- (i) to the health and safety of any person(s);
 - (ii) of damage or destruction to any property on or adjacent to the Railway Infrastructure which may have an adverse affect on the safe operation of the Railway; or
 - (iii) of an Operational Emergency;
- 1.1.32 "Safe Management System" means the management structure and controls within the Council and Contractors organisations through which the Council and its Contractors demonstrate they are capable of understanding Railway related risks and providing or procuring the provision of a safe system of working on or about the Railway;
- 1.1.33 "Special Requirements" means a document entitled "Special Requirements in relation to Network Rail" dated April 2004 with references to CDM amended 2008 or the requirements from time to time substituted therefore;
- 1.1.34 "Standards" means Railway Group Standards, Network Rail Company Standards, British and European standards and normal building practice;
- 1.1.35 "Temporary Works" means all works of a temporary nature of every kind required for the completion of the Works;
- 1.1.36 "Tender Documents" means the documents issued to tenderers by the Council in respect of the Works;
- 1.1.37 "Track Access Agreement" shall have the same meaning as given to access contract under Section 17(6) of the Railways Act 1993 (as amended by the Transport Act 2000);

- 1.1.38 "Variation" means any alteration or modification of the design, quality or quantity of the Works including:
- (i) the addition, omission or substitution of any work; or
 - (ii) the alteration of the kind or standard of any of the materials or goods to be used in the Works;
- 1.1.39 "Works" means the Rail Related Works and the Road including all tasks incidental thereto as more fully described in Schedule 1.

1.2 In this Agreement;

- 1.2.1 the Clause headings shall not affect their interpretation;
- 1.2.2 references to "Clauses" and "Schedules" are references to a clause or a schedule in this Agreement as appropriate;
- 1.2.3 references to statutory provisions shall be construed as references to those provisions as amended or re-enacted, or as their application is modified by other provisions, from time to time;
- 1.2.4 references to Standards shall be construed as references to the edition or version of those documents, or their replacements, current at the start of the performance of the action to which they refer;
- 1.2.5 use of the present tense means the relevant time or as the case may be from time to time during the relevant period;
- 1.2.6 the singular implies the plural and vice versa and the masculine includes the feminine; and,
- 1.2.7 reference to "Network Rail" and "the Council" shall where applicable include their respective successors.

2. DUTIES AND OBLIGATIONS OF THE COUNCIL

2.1 Costs and Payment

- 2.1.1 The Council shall pay the Costs.
- 2.1.2 Save where Clause 2.1.7 applies, in which case invoices shall be on the basis set out therein, payment of Costs (calculated to the extent applicable in accordance with Schedule 2) to Network Rail shall be made in accordance with the following arrangements:
- 2.1.2.1 Network Rail shall be entitled to request payment every 28 days in arrears by issuing an invoice to the Council. The form of invoice and extent to which supporting documents are required shall be as previously approved by the Council (where not already given prior to the date of this Agreement, such approval not to be unreasonably withheld or delayed). The invoice shall detail the Costs calculated to the extent applicable in accordance with Schedule 2 during the relevant period;

- 2.1.2.2 such invoices shall be payable within 14 days of the date of the invoice (the "Due Date for Payment") and the final date for payment shall be 14 days from the Due Date for Payment (the "Final Date for Payment"); and
 - 2.1.2.3 the Council may give notice to Network Rail on or before the Due Date for Payment, specifying the amount of the payment made or to be made and the basis upon which it was calculated. Where no such notice is given, the amount to be paid shall be that stated in the invoice.
 - 2.1.3 If the Council disputes the payment of any part of an invoice it shall serve a notice of intention to withhold payment (the "Withholding Notice") no later than 10 days before the Final Date for Payment. The Withholding Notice shall specify the amount proposed to be withheld and the grounds for withholding payment or if there is more than one ground, each ground and the amount attributable to it.
 - 2.1.4 Should a Withholding Notice be served, Network Rail shall:
 - 2.1.4.1 issue a new invoice (the "Undisputed Amount Invoice") for the undisputed amount; and
 - 2.1.4.2 issue a further new invoice (the "Disputed Amount Invoice") for the amount disputed in the Withholding Notice, which will become the final date for payment for the disputed amount.
- and the Undisputed Amount Invoice shall be paid by the Final Date for Payment of the original invoice whereas the Disputed Amount Invoice (or such amount as is adjudged or resolved to be payable) shall be paid within seven (7) days after the dispute is resolved or determined under Clause 6.9.
- 2.1.5 Should any payment not be made by the Final Date for Payment then:
 - 2.1.5.1 Network Rail reserves the right to suspend performance of its obligations under this Agreement; and
 - 2.1.5.2 the payment due shall bear interest thereon at the rate of two (2) percent above the base lending rate of the HSBC Bank plc (or such other bank in the UK nominated by Network Rail) such rate to be determined upon such Final Date for Payment and be payable from such Final Date for Payment to the date of actual payment. Interest shall be payable at the rate stated above upon any sum paid under a Disputed Amount Invoice for the period from the Final Date for Payment of the original invoice to which the Disputed Amount Invoice relates until the actual date of payment.
 - 2.1.6 Payments shall be exclusive of Value Added Tax and shall be subject to the addition of Value Added Tax if and where applicable on production of a Value Added Tax invoice.
 - 2.1.7 In respect of Costs following final completion of the Works, Network Rail may invoice the Council at any time and such invoices shall be for the actual Costs.

2.2 The Works

2.2.1 General:

The Council shall be responsible for designing, carrying out and completing the Works and shall:

2.2.1.1 design and construct the Works in accordance with:

- (i) the Special Requirements and Standards (or such derogations therefrom as Network Rail may approve or consent to in writing with express reference to it being aware that its approval or consent to the matter in question constitutes a derogation from the relevant Standard);
- (ii) any requirement of the Health and Safety Executive or any subordinate body; and
- (iii) such other conditions as Network Rail may in its reasonable opinion consider necessary to prevent, address, alleviate or comply with (as applicable) a Network Operator Issue;

2.2.1.2 design and construct the Works to the satisfaction of Network Rail in respect of the protection, safety and efficient operation of the Railway and the safety of persons on or near the Railway Infrastructure Provided That the Council shall provide all site safety personnel save where Network Rail is obliged to provide some site safety personnel as a requirement of its Network Licence;

2.2.1.3 supervise the construction of the Works and cause the design and construction of the Works to be completed with all reasonable dispatch;

2.2.1.4 demonstrate that the Special Requirements are included as a schedule to the Contract Documents entered into with a Contractor and that such Contractor shall be obliged to comply in all respects with the Special Requirements in respect of the carrying out of any construction element of the Works;

2.2.1.5 demonstrate that each Contractor, or sub-contractor of any Contractor (as the case may be) which is involved in carrying out and completion of the Rail Related Works meets the requirements of the Supplier Licence for all relevant classes of work to be carried out by that particular Contractor or sub-contractor (as the case may be);

2.2.1.6 liaise and meet as necessary with Network Rail during the design and construction of the Works.

2.2.1.7 obtain the written approval of Network Rail to the Safe Management System prior to Construction Works Commencement Date.

2.2.2 Design of the Works:

The Council shall be responsible for the design element of the Works at their own risk and cost and shall:

- 2.2.2.1 not appoint or continue to employ a CDM Co-ordinator (as defined in the CDM Regulations) for the Rail Related Works without obtaining and considering Network Rail's comments thereon;
- 2.2.2.2 provide sufficient information to Network Rail as to the competency and experience in delivery of similar projects in the rail environment of any Contractor providing design services, to enable Network Rail to satisfy itself that its ability to operate a safe and efficient rail infrastructure will not be compromised;
- 2.2.2.3 consult with Network Rail to ensure that the design of the Works conforms with Network Rail's requirements including, without limitation;
 - (i) those in Clause 2.2.1;
 - (ii) Network Rail's signalling arrangements and the prevention of any adverse effects which may be caused by lighting on the Road and/or lights on vehicles using the Road;
 - (iii) those necessary to ensure that routine maintenance and examination of the Rail Related Works and the neighbouring part of the Railway Infrastructure can be carried out without the need for restrictions to the Railway so far as reasonably practicable;
 - (iv) such other conditions as Network Rail may impose for the protection and safety of the Railway and the safety of persons on or near the Railway Infrastructure;
- 2.2.2.4 consult with Network Rail to ensure that the design of the Works is such as to enable construction of the Works in a manner which minimises disruption to the Railway;
- 2.2.2.5 plan and execute the design of the Works so that the Works may be carried out in accordance with the requirements of any, Necessary Consents;
- 2.2.2.6 prepare and submit a Network Rail Approval in Principle Submission, to include without limitation all relevant drawings, to Network Rail for comment and subsequently amend the design criteria for the Works to take account of any such comments made by Network Rail on the Network Rail Approval in Principle Submission and submit further Network Rail Approval in Principle Submissions to Network Rail as may be required by Network Rail;
- 2.2.2.7 not authorise the commencement of the detailed design of the Rail Related Works until comment on the Network Rail Approval in Principle Submission has been given by Network Rail and the Works have been allocated a checking category in accordance with the Standards;

- 2.2.2.8 obtain the prior approval of Network Rail before appointing a checker appropriate to the checking category allocated to the Rail Related Works;
 - 2.2.2.9 prepare in accordance with any requirements which Network Rail may have and at the appropriate times within the design and construction processes all the documentation required to enable Network Rail to make submissions for approval of the Rail Related Works or any part thereof in accordance with the requirements of The Railway and Other Guided Transport Systems (Safety Regulations) 2006, and the “Guide to the approval of railway works, plant and equipment” issued by the Health and Safety Executive and when necessary modify the design or construction processes to ensure that approval is obtained and provide Network Rail with such number of copies as Network Rail shall reasonably require of all such relevant documents so prepared;
 - 2.2.2.10 provide Network Rail with all documentation and assistance which Network Rail may require within a reasonable time in order to enable Network Rail to fulfil its obligations pursuant to Clause 3;
 - 2.2.2.11 supply, to Network Rail for comment and approval in writing, such extracts of the draft Tender Documents as necessary to demonstrate that Network Rail’s requirements for the Works shall be reflected within the Tender Documents, (which shall include the Special Requirements);
 - 2.2.2.12 save in respect of tenders relating exclusively to the design element of the Works, not invite tenders for the Works or any part thereof until Network Rail has confirmed its acceptance of the Tender Documents provided through 2.2.2.11; and
 - 2.2.2.13 prepare in accordance with Standards the detailed designs for the Works, to include without limitation all relevant drawings, and the proposed Certificates for Design and Checking of Structures and Certificates for Design and Checking of Temporary Works and submit to Network Rail for acceptance.
 - 2.2.2.14 supply to Network Rail copies of the Approved Drawings together with supporting Certificates for Design and Checking of Structures, Certificates for Design and Checking of Temporary Works and Contract Documents for Network Rail’s use during the carrying out of the Works.
- 2.2.3 Construction of the Works:

The Council shall not commence construction of the Works prior to the Construction Works Commencement Date and shall be responsible for construction of the Works which shall be at their own risk and cost and shall:

- 2.2.3.1 obtain all Necessary Consents required for the construction of the Works and forward copies to Network Rail of the Necessary Consents and obtain a written acknowledgement of receipt of the same from Network Rail;

- 2.2.3.2 provide sufficient information to Network Rail as to the competency and experience in delivery of similar projects in the rail environment of any Contractor engaged in construction of the Works, to enable Network Rail to satisfy itself that its ability to operate a safe and efficient rail infrastructure will not be compromised;
- 2.2.3.3 obtain Network Rail's prior written approval to the Programme and all method statements for the construction of the Works and the movement of materials, plant and equipment on or near the Railway Infrastructure (not to be unreasonably withheld or delayed save that Network Rail's decision shall be final where its approval is withheld in order to prevent, address, alleviate or comply with (as applicable) a Network Operator Issue);
- 2.2.3.4 establish and maintain a robust procedure to enforce safe access for all personnel to the Railway Infrastructure in connection with the construction of the Works;
- 2.2.3.5 take all reasonable steps to ensure that the Works are constructed in such manner as to minimise disruption to the Railway and any third party using or with an interest in or a right over any part of the Railway Infrastructure or any other land and buildings affected by the Works;
- 2.2.3.6 save in respect of Network Rail's obligations pursuant to Clauses 3.2, 3.3 and 3.5, be responsible for the management and procurement of all resources and associated costs and payments for any Possessions required to complete the Works (such arrangements to be approved by Network Rail) and consult with Network Rail with regard to the costs implications of Possessions in respect of compensation and other payments arising from the Works which are payable by Network Rail under any relevant Track Access Agreement;
- 2.2.3.7 immediately, or, if so advised by Network Rail, within such other timescale as Network Rail may at its absolute discretion request, take all action required by Network Rail if Network Rail notifies the Council that in its reasonable opinion it considers that any act or omission of the Council or their Contractor has or could cause, exacerbate or be inconsistent with (as applicable) a Network Operator Issue;
- 2.2.3.8 allow Network Rail reasonable access to the site of the Works for audit and inspection purposes;
- 2.2.3.9 procure that all materials and goods used in the construction of the Works shall be new (or of serviceable standard, if appropriate), of good quality, in compliance with all applicable Standards and not generally known in the railway industry to be deleterious at the time of incorporation;
- 2.2.3.10 construct the Works in accordance with the Contract Documents, Approved Drawings , Necessary Consents, Accepted Designs and any agreed amendment thereto and in accordance with the Safe Management System approved by Network Rail pursuant to Clause 2.2.1.8;

- 2.2.3.11 submit details of any Temporary Works to Network Rail and where in the opinion of Network Rail such Temporary Works may affect the safety or operation of the Railway, subject such details to engineering design and checking procedures for Rail Related Works and submit Certificates for Design and Checking of Temporary Works to Network Rail for comments and acceptance;
- 2.2.3.12 arrange with the appropriate third party for any necessary temporary or permanent diversion of any sewers, pipes, cables or other media and/or protection, or relocation to a suitable environment, of any flora and fauna that is subject to conservation which may be affected by the construction of the Works;
- 2.2.3.13 to the satisfaction of Network Rail erect temporary fencing to protect the site of the Rail Related Works and the Railway Infrastructure from trespass and vandalism during construction of the Works;
- 2.2.3.14 provide for such barriers, watching and lighting of the site of the Works as may be necessary during the construction of the Works;
- 2.2.3.15 comply with the requirements of Network Rail with regard to Network Rail's signalling arrangements and the prevention of any adverse effects which may be caused by the lighting of the Works;
- 2.2.3.16 notify Network Rail of any Variation, and take such further steps in relation to any Variation as may be required by Network Rail pursuant to Clause 3.7;
- 2.2.3.17 during construction of the Works and/or on completion of each Possession and/or final completion of construction of the Works remove all surplus material brought onto the site in the carrying out of the Works and either (at the election of Network Rail):
 - (i) make good any property of Network Rail which may have been damaged or interfered with; or
 - (ii) reimburse Network Rail the Costs of making good any property of Network Rail which may have been damaged or interfered with;
- 2.2.3.18 notify in writing to Network Rail when the Council considers that the Works have been substantially completed in accordance with the Contract Documents, Approved Drawings, Necessary Consents, Accepted Designs and any agreed amendments and give Network Rail reasonable notice in writing of any inspections, demonstrations or testing of the Rail Related Works by the Council or the Contractor and allow Network Rail to attend such inspections, demonstrations or testing;
- 2.2.3.19 take such action as Network Rail may reasonably require to remedy any deficiencies and defects in the Rail Related Works identified by Network Rail;

- 2.2.3.20 on final completion of the Works including remedying deficiencies and defects in accordance with Clause 2.2.3.19 certify to Network Rail that the Works have been completed fully in accordance with Contract Documents, Approved Drawings, , Necessary Consents, Accepted Designs and any agreed amendments thereto;
- 2.2.3.21 provide Network Rail with such information about the Rail Related Works at such times and in such format as Network Rail reasonably requires for record purposes; and
- 2.2.3.22 not interfere with existing points of emergency access to the Railway Infrastructure without the prior written agreement of Network Rail.

2.2.4 The CDM Regulations:

- 2.2.4.1 For the purposes of the Works under the CDM Regulations the Council is the sole client
- 2.2.4.2 The Council shall prepare and provide to Network Rail the Pre-Construction Information as defined in the CDM Regulations for the Works and submit it to Network Rail. Network Rail may provide comments to the Council on the elements of such Health and Safety Plan relating to works in the railway environment. The Council shall also provide of a copy of the construction Health and Safety Plan to Network Rail.
- 2.2.4.3 The Council shall prepare a relevant data manual (including “As-Built” drawings and such other information as Network Rail may stipulate) for the Works which shall in due course form part of the “Health and Safety File” as defined in the CDM Regulations.

2.3 Insurance

The Council shall: -

- 2.3.1 take out and maintain or procure that a Contractor takes out and maintains in the joint names of Network Rail, the Council and that Contractor a policy of insurance for all risks insurance in respect of the Works for the full reinstatement value of the Works and fees and shall maintain such policy up to and including final completion of the Works;
- 2.3.2 procure that each Contractor takes out and maintains:
 - 2.3.2.1 up to final completion of the Works, public liability insurance naming Network Rail as a joint insured of not less than £25,000,000 (or such other figure as may be agreed in writing between the parties) to cover any loss, cost, expense, liability, action, demand, claim or proceeding whatsoever arising under any statute or at common law in respect of personal injury or damage to any Network Rail property except to the extent that the same is due to any act or neglect of Network Rail or its servants, agents or employees; and

- 2.3.2.2 in respect of design services, professional indemnity insurance with a limit of indemnity of not less than £5,000,000 to cover any claim against the Contractor and any sub-contractor with a design responsibility for any negligent act, error or omission in the design or in the carrying out of the Works for a period of 12 years from final completion of the Works Provided That such insurance continues to be generally available in the insurance market on commercially reasonable terms;
- 2.3.3 whenever reasonably requested by Network Rail provide evidence within 14 days of a written request and to the reasonable satisfaction of Network Rail that the insurances referred to in this Clause 2.3 are being maintained in accordance with the provisions of this Clause. In the event that the Council fails to provide evidence of such insurances within 14 days of a written request, Network Rail may take out and maintain such insurances and recover the cost of so doing from the Council as a debt.
- 2.3.4 Network Rail shall in conjunction with Clause 2.3.2.1 take out and maintain third party customer excess public liability insurance (naming the Council and the Contractor as co-insured parties) from £25,000,000 to a sum not less than £155,000,000 in respect of liability for (a) death or personal injury to any person using the Railway, and (b) loss or damage to any railway asset (save for any loss or damage to the Works or any part of the Railway Infrastructure) caused by an activity in connection with this Agreement. Network Rail shall maintain such insurance cover subject to the terms, conditions and memoranda of, and the exceptions to the relevant policy, up to and including the earlier of:
- (a) the date of termination of this Agreement; and
 - (b) the date of final completion of the Rail Related Works.

For the avoidance of doubt the cost of maintaining such insurance cover shall be an Expense and disbursement for the purposes of paragraph 5 to Schedule 2.

2.4 Use of Network Rail Land

- 2.4.1 Subject to Clause 2.4.2, the Council shall not use, and shall procure that a Contractor shall not use, any land in the ownership of Network Rail for or in connection with the carrying out of the Works or the Temporary Works prior to the Construction Works Commencement Date.
- 2.4.2 Subject to Clause 3.6, Network Rail shall provide the Council and any Contractor with access to land in the ownership of Network Rail before the Construction Works Commencement Date (at times to be agreed in advance with Network Rail) solely for the purpose of carrying out site surveys, Provided That:
- 2.4.2.1 prior arrangements have been made with Network Rail (approval of such arrangements not to be unreasonably withheld or delayed); and
 - 2.4.2.2 such access is in accordance with any conditions imposed by Network Rail which it considers necessary to prevent, address, alleviate or comply with (as applicable) a Network Operator Issue.

- 2.4.3 Subject to Clause 3.6, Network Rail shall from the Construction Works Commencement Date until final completion of the Works or termination of this Agreement pursuant to Clause 4 (whichever is the earlier) provide the Council and any Contractor with access to land in the ownership of Network Rail for the purpose of carrying out the Works, Provided That:
- 2.4.3.1 prior arrangements have been made with Network Rail (approval of such arrangements not to be unreasonably withheld or delayed); and
 - 2.4.3.2 such access is in accordance with any conditions imposed by Network Rail which it considers necessary to prevent, address, alleviate or comply with (as applicable) a Network Operator Issue.
- 2.4.4 If, in using any land in the ownership of Network Rail (whether temporarily or permanently) in connection with the Works, the Council interfere with an existing point of authorised access to the Railway Infrastructure, the Council shall provide such alternative facilities as may be reasonably stipulated by Network Rail.

2.5 **Bridge Identification Plates and Permanent Fencing**

- 2.5.1 The Council shall (on or before substantial completion of the Works) at their own cost:
- 2.5.1.1 provide and fix to the New Structure so as to be readily visible from both the Railway Infrastructure and the Road numerical identification plates in accordance with details and specifications submitted to the Council by Network Rail; and
 - 2.5.1.2 erect permanent fencing of a type stipulated by Network Rail in positions to be decided by Network Rail acting reasonably. Such fencing to become the property and responsibility of Network Rail

2.6 **New Roads and Street Works Act Procedures**

- 2.6.1 The Council shall advise Network Rail on substantial completion of the Works and from time to time afterwards:
- 2.6.1.1 of any sewers, pipes, cables and other media which are to be laid under statutory powers over, under or beside the New Structure or in or under the Road;
 - 2.6.1.2 of what protective provisions (if any) under the New Roads and Street Works Act 1991 are to be applied to the Road.
- 2.6.2 Any sewers, pipes, cables and other media for which there are no statutory powers may only be laid in the Road following notification to Network Rail of the Council's intention to do so and subject to whatever reasonable conditions Network Rail may require for the protection and safety of the railway where it crosses the New Structure..

2.7 Provision of "As Built" Drawings & Information

- 2.7.1 Within three months of substantial completion of the Works the Council shall provide, for record purposes and free of cost to Network Rail:
- 2.7.1.1 the Health and Safety File;
 - 2.7.1.2 3 sets of "As Built" drawings (so endorsed) of the Works in such form as Network Rail may reasonably require; and
 - 2.7.1.3 such other information including, without limitation, design calculations, specifications, documents and computer input and output data, as Network Rail may reasonably require and specify.
- 2.7.2 The Council shall ensure that the Contract Documents provide for a sum of not less than two percent of the contract value by way of a retention to be retained until provision of the Health and Safety File and "As Built" drawings in accordance with Clause 2.7.1 above.

2.8 Lighting of the Road

- 2.8.1 The Council, in lighting the Road and its environs and in providing illuminated signs, shall comply with such reasonable requirements of Network Rail as may be dictated by the signalling arrangements of Network Rail and shall use their reasonable endeavours to ensure that any lighting or signs erected by other parties entitled so to do complies with such requirements.

2.9 Restrictions on works on the Road

- 2.9.1 Except under such conditions as Network Rail may reasonably require, the Council shall not, in maintaining the Road, execute works or permit works to be executed which may affect the New Structure or the stability of the approaches or reduce the clear headway, or give rise to a Safety Critical Event or an Operational Emergency or materially affect the safety and/or efficient operation of the Railway.

2.10 Collisions with or Damage to the New Structure by vehicles using the Road

- 2.10.1 The Council shall reimburse Network Rail for Costs consequent on or in connection with the closure, inspection, repair or replacement of the New Structure and/or Railway Infrastructure and/or suspension of train services and/or any sums which are payable by Network Rail under any relevant Track Access Agreement arising from damage caused to the New Structure by road vehicles under the control of or belonging to any third party in contract with the Council ("Direct Damage") Provided That except in the case of emergency (of which Network Rail shall be the sole arbiter) Network Rail shall obtain the Council's prior approval to the works (not to be unreasonably withheld or delayed) to repair the Direct Damage and their dates of commencement and conclusion.

- 2.10.2 If the Council has built the New Structure to clearance standards lower than Network Rail's then current clearance requirements (as shall be notified by Network Rail to the Council from time to time) or where by agreement the Council has designed the New Structure to resist collision impact at a lower clearance, the Council shall reimburse Network Rail for Costs consequent on or in connection with the closure, inspection, repair or replacement of the New Structure and/or the Railway Infrastructure and/or the suspension of train services and/or any sums which are payable by Network Rail under any relevant Track Access Agreement arising from damage caused to the New Structure by road vehicles ("Vehicular Damage") Provided That
- 2.10.2.1 except in the case of emergency (of which Network Rail shall be the sole arbiter) Network Rail shall obtain the Council's prior approval to the works (not to be unreasonably withheld or delayed) to repair the Vehicular Damage and their dates of commencement and conclusion; and
- 2.10.2.2 Network Rail shall use reasonable endeavours to secure payment of such Costs from the owner driver or insurers of the road vehicle responsible for the Vehicular Damage and shall repay to the Council any payment obtained from the owner driver or insurer that is in respect of a payment already made to Network Rail by the Council, less the cost to Network Rail of securing such payment.

2.11 **Trespass and Vandalism**

- 2.11.1 In the event of acts of trespass or vandalism occurring on or from the approaches to the New Structure or the Road, the Council shall at their own cost and within such timescales as shall be agreed between the parties to be reasonably practicable (such agreement not to be unreasonably withheld) having regard to the incidence and nature of the acts of trespass or vandalism and the cost of such measures, take such preventative or defensive measures as Network Rail may reasonably require Provided That if in the opinion of Network Rail such acts of trespass or vandalism endanger safety on the Railway Infrastructure or the safety of persons on or near the Railway Infrastructure, Network Rail may at the cost of the Council (except to the extent any costs arise due to the failure of Network Rail to maintain any fence for which it is responsible) take such urgent measures as it considers necessary.

2.12 **Future Railway Alterations**

- 2.12.1 If, solely in consequence of the carrying out of the Works and/or the existence of the New Structure, Network Rail incurs additional costs and expenses in connection with the widening or alteration of the Railway Infrastructure on land in the ownership of Network Rail at the date of this Agreement (as shown on the plan annexed at Schedule 5), the Council shall pay such additional costs and expenses.

2.13 **Mining Subsidence**

- 2.13.1 If, in the opinion of Network Rail, it shall be necessary (at any time) to purchase, or to pay compensation for leaving unworked, any mines or minerals to ensure continued support to the New Structure and, if necessary, the adjacent Railway Infrastructure, Network Rail may take such action as Network Rail considers necessary to preserve support for the Railway Infrastructure over and/or adjacent to the New Structure and necessitated by the construction of the New

Structure.

- 2.13.2 If Network Rail or the Council reasonably apprehends that the working of any mines or minerals is likely to cause the New Structure or the adjacent Railway Infrastructure to sink or otherwise suffer damage by reason of subsidence or if such working causes the New Structure or the adjacent Railway Infrastructure to sink or otherwise suffer damage then Network Rail and the Council before taking any steps to prevent guard against or make good such damage shall notify and consult with the other party with a view to agreeing the measures necessary to be taken.
- 2.13.3 Notwithstanding Clause 2.13.2 above, if Network Rail considers that as a result of the working of any mines or minerals the condition of the New Structure is such as to make it a danger to the Railway or to the adjacent Railway Infrastructure to such a degree that immediate measures must be taken Network Rail may take such measures as Network Rail considers necessary.
- 2.13.4 At any time after the expiry of twenty one days (or one calendar month if the minerals are vested in the Coal Authority) of the Council having been first notified by Network Rail under Clause 2.13.2, Network Rail may (unless otherwise agreed) take such steps as Network Rail considers necessary for the protection and safety of the Railway.
- 2.13.5 If in carrying out any measures agreed between Network Rail and the Council or considered necessary by Network Rail in accordance with the preceding provisions of this Clause Network Rail incurs Costs which it would not have incurred had the Works not been constructed, those Costs shall be repaid by the Council to Network Rail less so much thereof as may be recovered by Network Rail from some other party and in any case where Network Rail shall with the approval of the Council have taken legal proceedings against such other party the costs and expenses of such proceedings (insofar as they shall fall upon Network Rail) shall be added to the amount recoverable from the Council.

3. DUTIES AND RIGHTS OF NETWORK RAIL

- 3.1 Network Rail shall (if not previously issued) within seven (7) days of the date of this Agreement issue to the Council Network Rail's Estimated Costs. If it becomes apparent to Network Rail that Network Rail's Estimated Costs have increased by more than 10% a revised estimate shall be provided by Network Rail to the Council.
- 3.2 Network Rail shall use reasonable skill and care to carry out its obligations under this Agreement and to provide the services set out in Schedule 3.
- 3.3 Network Rail shall, at the cost of the Council, supply and make available to the Council, within a reasonable time, data and information which Network Rail can reasonably supply (except for data and information which is confidential or already in the public domain) and which the Council reasonably requires for the purpose of the Works. Such data and information shall be supplied in good faith but without warranty or liability as to its accuracy or soundness and on the basis that it is not to be relied upon.
- 3.4 Network Rail shall use its reasonable endeavours to give its decision or response to all written request from the Council for any approval consent or comment required under the terms of this Agreement within 25 Working Days of receiving a complete package of all relevant material information to allow it to make such a decision, subject to the Council having

- 3.4.1 Provided to Network Rail the Programme, which detail the consents and approvals and comments required.
 - 3.4.2 Given 25 days notice in writing to Network Rail of its intention to submit the written for the approval, consent or comment, giving sufficient detail of the content of the submission and amount of documentation to be included with the submission to determine the resources required to review and consider the request.
 - 3.4.3 Provided sufficient additional information, data and documents that Network Rail reasonably requires in order to enable Network Rail to reach its decision or provide comment. .
- 3.4A** Network Rail shall advise the Council where it is unlikely to be able to give its decision or comment in accordance within the timescales detailed in clause 3.4 and provide reasons why it is unable to do so.
- 3.5 Network Rail shall, in accordance with its obligations under any relevant Track Access Agreement and subject to obtaining in full the necessary documentation from the Council, use reasonable endeavours to:
- 3.5.1 provide the Possessions requested by the Council in line with the Programme save that Network Rail shall have the right (acting reasonably) to refuse to grant any Possession;
 - 3.5.2 permit the Council to work on a Possession arranged for other work subject to:
 - (i) the works proposed by the Council for any such Possession being compatible with the purpose for which the Possession was booked, and;
 - (ii) if necessary the agreement of any third party where that third party has arranged the Possession;
 - 3.5.3 manage such Possessions solely in respect of the safety of the Railway; and
 - 3.5.4 submit documents for the Necessary Consents which are undertaken by Network Rail on behalf of the Council.
- 3.6 If it is agreed by the parties that any land in the ownership of Network Rail is required for temporary use in connection with the Works and is in the possession of a lessee or tenant, Network Rail (at the cost of the Council) shall, so far as it legally can, serve upon its lessee or tenant notices to determine the lease or tenancy and take steps to obtain possession of the land in pursuance of such notice.
- 3.7 In the event that Network Rail considers any Variation notified to it pursuant to Clause 2.2.3.16 materially affects the Railway, Network Rail may request further information from the Council and may require the Council to withdraw such Variation or to amend any such Variation to its satisfaction and to obtain its prior approval to any such amended Variation.
- 3.8 Network Rail shall have the right at any time and at the cost of the Council to inspect any part of the Works during construction, either on site or elsewhere and to satisfy itself that the Works are being carried out in accordance with this Agreement.

- 3.9 Network Rail may at any time and at the cost of the Council take whatever action (including, without limitation, requiring the Council to suspend the Works) Network Rail reasonably considers necessary to safeguard Network Rail's interests resulting from the failure of the Council or the Contractor to complete the Works or any part thereof or because Network Rail considers the safety or operation of the Railway or the safety of persons on or near the Railway Infrastructure to be at risk.
- 3.10 Network Rail shall at the expense of the Council inspect and assess the New Structure from time to time and maintain it in a good and proper state of repair and when necessary in the opinion of Network Rail renew it and in so doing Network Rail shall take whatever action it considers necessary to protect the safety of both road and rail traffic or to prevent, address, alleviate or comply with (as applicable) a Network Operator Issue and may as soon as possible advise the Council of the action taken and/or to be taken. If so agreed by the parties, Network Rail shall (at the cost of the Council) carry out preventative maintenance measures in addition to those Network Rail would usually carry out for structures similar to the New Structure.
- 3.11 When Network Rail intends to carry out maintenance, alteration, repair or renewal works to the New Structure Network Rail shall give the Council a minimum of 12 months notice of such works together with an estimate of Costs and Network Rail will take due cognisance of comments the Council may make (if any and if in a timely manner) regarding the timing of the expenditure provided that if the estimate of Costs is in excess of two hundred and fifty thousand pounds £250,000 then Network Rail shall give the Council a minimum of 24 months notice of such works.
- 3.12 Notwithstanding sub-Clause 3.11:
- 3.12.1 should any works of maintenance, alteration, repair or renewal be estimated to cost less than fifty thousand pounds £40,000 or such sum as may be agreed in writing from time to time between the parties; or
- 3.12.2 should any works of maintenance, alteration, repair or renewal in Network Rail's absolute discretion be unreasonably delayed by any action or inaction of the Council
- then Network Rail shall have the right to arrange for the works to be carried out forthwith and notify the Council of the Costs after completion of the work. Notwithstanding the above Network Rail shall be entitled at any time at the cost of the Council (which cost may be paid by the Council in the next following financial year to the financial year in which the works were carried out) to carry out maintenance, alteration, repair or renewal works to the New Structure where Network Rail considers the safety or operation of the Railway or the safety of persons on or near the Railway Infrastructure to be at risk.
- 3.13 The measures to be taken in the event of the traffic on the Road being prohibited or otherwise regulated in order that any inspection, assessment, maintenance, alteration, repair or renewal of the New Structure may be carried out shall, save in respect of a Safety Critical Event, be fixed following consultation with the Council.
- 3.14 If, in the opinion of Network Rail the Road should be partially or fully closed with immediate effect, as a result of, or in order to prevent the occurrence of, an Operational Emergency or a Safety Critical Event, Network Rail shall notify the Council. The Council shall as soon as possible consider such notification on its merits in accordance with their statutory duties (and without in any way limiting the discretion of the Council) and immediately thereafter take such steps (if any) as they may consider necessary.

- 3.15 If, in the opinion of Network Rail for the maintenance or safety of the Railway an event of any nature on the Road requires the immediate partial or full closure of the Railway Infrastructure, or the temporary imposition of restrictions on traffic using the Railway Infrastructure, Network Rail shall make all necessary arrangements at the cost of the Council.
- 3.16 In the event of acts of trespass or vandalism occurring on or from the New Structure, Network Rail shall at the cost of the Council within such timescales as shall be agreed between the parties to be reasonably practicable (such agreement not to be unreasonably withheld) having regard to the incidence and nature of the acts of trespass or vandalism and the cost of such measures, take such preventative or defensive measures as agreed by the parties Provided That if in the opinion of Network Rail such acts of trespass or vandalism endanger safety on the Railway Infrastructure or the safety of persons on or near the Railway Infrastructure, Network Rail may at the cost of the Council (except to the extent such costs arise in consequence of Network Rail's failure to maintain any fence for which it is responsible) take such urgent measures as it considers necessary.
- 3.17 In the event of Network Rail failing to maintain repair or renew the New Structure in accordance with this Agreement, the Council may (after giving 3 months notice in writing to Network Rail except in the case of emergency) carry out at their own cost such works as the Council consider necessary Provided That the Council complies at all times with the Special Requirements, the Railway Group Standards and such other stipulations in respect of the safety of persons on or near the Railway Infrastructure and/or traffic on the Railway Infrastructure as Network Rail may require. Subject to Clause 5.2.2 Network Rail shall be liable to the Council for the increased costs of carrying out such work which would not have been incurred but for Network Rail's failure to maintain repair or renew the New Structure in accordance with this Agreement.
- 3.18 Following final completion of the Works, Network Rail shall
- 3.18.1 take out and maintain, or procure that any contractor carrying out inspection, maintenance, alteration, repair or renewal of the New Structure takes out and maintains, such public liability insurance as Network Rail considers appropriate to cover any loss, cost, expense, liability, action, demand, claim or proceeding whatsoever arising under any statute or at common law in respect of personal injury or damage to any property of the Council except to the extent that the same is due to any act or neglect of the Council or their servants, agents or employees; and
- 3.18.2 ensure that it has insurance with such excess as Network Rail considers appropriate for damage to the New Structure up to the cost of rebuilding the New Structure.

4. SUSPENSION

- 4.1 Network Rail reserves the right to suspend the Council's rights of access to Network Rail's land under this Agreement in the event that:-
- 4.1.1 in Network Rail's opinion, there is a risk to the safe operation of the Railway
- 4.1.2 the Council has failed to pay an invoice in accordance with the provisions of Clause 2.1
- and Network Rail has informed the Council in writing giving the reasons for the suspension.

5. INDEMNITY AND LIMIT OF LIABILITY

5.1 Indemnity

- 5.1.1 The Council shall indemnify Network Rail and keep Network Rail indemnified against any costs, claims, damages, demands, losses, expenses, liabilities or proceedings of whatever kind and howsoever arising from or in connection with (whether directly or indirectly) the carrying out or the procuring of the carrying out of the Works, breach of this Agreement by the Council or the subsequent existence and/or usage of the New Structure and/or Road (referred to together in this Clause 5.1 as "Losses") Provided That to the extent any such Losses:
- 5.1.1.1 arise from or in connection with negligence or breach on the part of Network Rail then the Council shall not be under an obligation to indemnify Network Rail against such Losses;;
 - 5.1.1.2 arise from the acts or omissions of any third party not being under the control of or in contract with the Council, the Council shall, save in respect of Clause 2.10, only be liable to indemnify Network Rail for such Losses so far as they result from or are increased by negligence or breach on the part of the Council.
 - 5.1.1.3 are recoverable as a Cost payable pursuant to Clause 2.1 of this Agreement then the Council shall not be under an obligation to indemnify Network Rail against such Losses.
- 5.1.2 The liability of the Council to indemnify Network Rail in respect of damage to Network Rail's property shall be limited to £25,000,000 (indexed from the date of this Agreement by reference to the Retail Prices Index) for each incident or event resulting in Losses.

5.2 Network Rail Limit of Liability

- 5.2.1 Network Rail shall have no liability to the Council:
- 5.2.1.1 for any costs or delays occasioned by the terms of, or failure to obtain or receive timely Possessions and Necessary Consents, unless such cost or delay is due to the negligence of Network Rail.
 - 5.2.1.2 for the design and construction of the Works, notwithstanding any approval, consent, comment or confirmation which Network Rail may be required to provide in accordance with this Agreement;
 - 5.2.1.3 for any losses, costs, charges or expenses which the Council may incur as a result of closure of the Road in accordance with Clause 3.11 or 3.14.
- 5.2.2 The liability of Network Rail to the Council whether arising in respect of or in consequence of a breach of this Agreement or of a statutory duty or any tortious or negligent act or omission which gives rise to a remedy at common law which arises in respect of or in consequence of this Agreement (except in respect of injury to or death of any persons caused by the negligence of Network Rail) shall not exceed in the aggregate a sum equal to 50% of Network Rail's Estimated Costs save that where such liability is covered by the insurance referred to in Clause 3.18.2, the liability of Network Rail shall not exceed in the aggregate £25 million (indexed from the date of this Agreement by reference to the Retail Prices

Index) in respect of public liability (or such other figure as may be agreed in writing between the parties) and the Council shall be responsible for the amount of any excess or excesses under the terms of such insurance.

6. MISCELLANEOUS

6.1 Ownership

6.1.1 The legal and beneficial title in the Rail Related Works shall vest in Network Rail.

6.2 Intellectual Property

6.2.1 The Council shall grant and procure that the Contractor grants at no cost to Network Rail a full non-exclusive royalty-free and non-terminable licence to Network Rail to use and reproduce any sections, drawings, specifications, soil reports, calculations, method statements, staging proposals and programmes and any other materials provided by the Council and the Contractor respectively in connection with the Works (whether in existence or to be made) and all amendments and additions to them and any works, designs or inventions of the Contractor incorporated or referred to in them ("Proprietary Material") for all purposes relating to the Rail Related Works and the New Structure including without limitation the construction completion reconstruction modification use refurbishment maintenance repair or alteration of the same. The licence in favour of Network Rail shall include the right to grant or assign sub-licences of the right to use and reproduce Proprietary Material. The Council shall have no liability for any use of Proprietary Material other than for the purpose for which it was originally intended.

6.2.2 The Council shall further procure that the Contractor shall on request at any time give Network Rail access to Proprietary Material referred to in Clause 6.2.1 and to provide a reasonable number of copies at no cost to Network Rail.

6.2.3 The Council shall, immediately after appointment of the Contractor, provide written confirmation to Network Rail that the intellectual property in Proprietary Material is vested in the Contractor or is the subject of a non-terminable non-exclusive licence in favour of the Contractor with power to assign or grant sub-licences thereof such that the Contractor has full right and liberty to enter into the obligations contained in Clauses 6.2.1 and 6.2.2.

6.3 Confidentiality

6.3.1 The Council and Network Rail agree that all documents, materials and other information (whether technical or commercial) of a confidential nature acquired pursuant to this Agreement shall be treated as confidential and each shall not without the prior written consent of the other party disclose such information except:

6.3.1.1 to the extent required by law;

6.3.1.2 to any professional advisers or consultants or Contractor(s) of such party and who are acting in that capacity, upon obtaining an undertaking of confidentiality from such professional advisers or consultants; and

6.3.1.3 to the extent that it has become generally available to the public other than as a result of any breach of an obligation of confidence.

6.3.2 If either party is or becomes a public authority under the Freedom of Information Act 2000 and receives a request under such Act for information relating to the Project, it shall comply with any such request only if none of the exemptions from disclosure in such Act applies, and if it is in doubt whether any such exemption applies it shall inform the other party of the request as soon as possible and shall consult with the other party as to the potential application of any exemption. For the purposes of section 43(2) of such Act, the parties acknowledge and agree that the disclosure of any commercially sensitive Information relating to the Project is likely to prejudice the commercial interests of the parties.

6.4 Third Party Rights

6.4.1 This Agreement is not intended to confer any rights on any third party pursuant to the Contracts (Rights of Third Parties) Act 1999.

6.5 Variation or Waiver

6.5.1 No modification, variation or amendment of any provision in this Agreement shall be effective unless it is in writing and signed by a duly authorised representative of each party.

6.5.2 No waiver of any breach or default under this Agreement or any of the terms hereof shall be effective unless such waiver is given in writing and has been signed by the party waiving its entitlement.

6.6 Successors, Assigns and Concessionaires

6.6.1 This Agreement shall be binding upon and take effect to the benefit of the parties and their respective legal successors.

6.6.2 Subject to Clause 6.6.3, this Agreement may not be assigned or charged by way of security by either party unless agreed by both parties in writing.

6.6.3 Save to the extent that Sections 265 – 271 or Schedule 21 of the Highways Act 1980 apply, if the Council cease to be the “Highway Authority” (as defined under the Highways Act 1980) for the Road, the Council and Network Rail shall enter into a novation agreement with such person or body as succeeds the Council as “Highway Authority” for the Road. Upon completion of the novation agreement, the Council shall be released from all liability under this Agreement.

6.6.4 The Council may delegate the performance of its obligations under this Agreement to a Contractor who has been awarded a concession to construct and operate the Road in respect of the Works provided always that the Council shall at all times remain responsible to Network Rail for the performance of the Council’s obligations notwithstanding such delegation.

6.7 Severability

6.7.1 If any term or provision of this Agreement is held to be invalid, illegal or unenforceable in whole or in part under any enactment or rule of law or otherwise such term or provision shall to that extent be deemed not to form part of this Agreement but the validity and enforceability of the remainder of this Agreement shall continue in full force and effect.

6.8 Entire Agreement

6.8.1 This Agreement constitutes the entire agreement between the parties relating to the subject matter of this Agreement and supersedes and extinguishes any prior drafts, undertakings, representations, purchase orders, warranties and arrangements of any nature whatsoever whether in writing or oral relating to such subject matter.

6.9 Resolution of Disputes

6.9.1 In the event of a disagreement relating to this Agreement, either Party may at any time invoke the Escalation Procedure (in accordance with its terms) without prejudice to its other rights and obligations.

6.9.2 Notwithstanding Clause 6.9.1 either party to this Agreement may refer any dispute or difference arising out of or in connection with this Agreement to adjudication at any time in accordance with the Scheme for Construction Contracts pursuant to the Housing Grants, Construction and Regeneration Act 1996 subject to the following:

6.9.2.1 the Adjudicator shall be nominated by the President or Vice-President for the time being of the Institution of Civil Engineers; and

6.9.2.2 unless this Agreement has already been terminated or repudiated, notwithstanding the reference of any dispute or difference for resolution under this Clause 6.9, Network Rail and the Council shall continue to perform, observe and comply with their respective obligations under this Agreement.

6.10 Notices

6.10.1 Any notice, save for a notice detailed in Clause 6.10.2, to be given under this Agreement shall be in writing and shall be deemed duly given if proven to have been delivered by hand, by first class post or by email transmission to the relevant address and fax number set out in Schedule 4 Part 1 or such other recipient, address or email as each party may specify to the other in writing from time to time.

6.10.2 Any notice to be given under Clause 2.1 of this Agreement shall be in writing and shall be deemed duly given if proven to have been delivered by hand, by first class post or by email transmission to the relevant, address or email set out in Schedule 4 Part 2 or such other recipient, address or email as each party may specify to the other in writing from time to time.

6.10.3 Notices sent in accordance with Clauses 6.10.1 or 6.10.2 shall be deemed to have been received three working days after the date of posting or if sent by email, at the time evidenced by the electronic message delivery receipt.

6.11 Law

6.11.1 This Agreement shall be governed by and construed between the parties in accordance with English Law and the parties hereby submit to the exclusive jurisdiction of the English Courts.

IN WITNESS of which Network Rail and the Council have executed this Agreement as first dated above

Signed by a person duly authorised)
by **NETWORK RAIL INFRASTRUCTURE**)
LIMITED in the presence of:)

Signed by a person duly authorised by)
Cheshire East Borough Council)
in the presence of:)

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SCHEDULE 1

PARTICULARS

1. DESCRIPTION OF THE WORKS

Crewe Green Link Road South (CGLRS) is a Cheshire East Council proposal to construct a 1.1km long dual two-lane carriageway with full length central reserve, footway and cycleway either side. The carriageway shall extend south from the existing A5020 Weston Gate roundabout on Weston Road, beneath the Crewe - Stoke railway line and tie in with the northern spur off the existing roundabout on the A500 Hough - Shavington bypass. The carriageway shall incorporate service ducts for highway related infrastructure and utilities and for the adjacent development site. The design speed of the road shall be 50mph (85kph).

Due to respective railway and carriageway levels a new rail underbridge will be is required on ELR: KCS1 at 7miles 990 yards. The new bridge number will be: 21c.

Cheshire East Council shall appoint the contractor responsible for undertaking the works and as the bridge will become a Network Rail asset at completion, the design will be subject to Network Rail approval and the construction subject to Network Rail inspection & acceptance.

Underbridge abutment installation and bridge deck placement is scheduled in a series of RoR and ORoR possessions/ isolations. Network Rail assets affected by these work includes, but is not limited to: overhead line electrification, permanent way, track formation, railway embankment & earthworks, signalling & telecoms infrastructure cables and routing, rail drainage, asset records and bonding plans.

The temporary and permanent electrical bonding and inspection of assets shall be required. The works shall be subject to all applicable Network Rail Standards. Network Rail asset records must be created/ updated to reflect the works.

2. LEVEL CROSSING

2.1 The Council and any Contractors shall not be allowed access over the level crossing that connects to the former British Rail depot at Crewe Carriage Sidings for the purpose of constructing the works.

SCHEDULE 2

PAYMENT

NETWORK RAIL'S COSTS

1. COSTS

The costs payable by the Council to Network Rail shall include, without limitation and including at all times Agency Costs, Consultant's Costs, Personnel Costs and Expenses and Disbursements as defined below, the costs:-

- (A) incurred by Network Rail considering the Council's proposals to carry out the Works and entering into this Agreement or any other agreements relating to the New Structure;
- (B) incurred by Network Rail carrying out any review, consideration and commenting on documents submitted in accordance with this Agreement;
- (C) incurred by Network Rail in providing the services in accordance with Clause 3.2;
- (D) of compensation payable to train operating companies and/or freight operating companies pursuant to Track Access Agreements with respect to the booking of Possessions;
- (E) of and occasioned by Network Rail (including without limitation the costs of employing contractors to complete or remove the Works) in circumstances where the Council fails to complete the Works;
- (F) of any Railway alterations required as a result of the Works;
- (G) incurred by Network Rail in respect of any inspection maintenance repair or renewal of the New Structure after substantial completion of the Works;
- (H) arising from damage or interference caused to the Railway or property of third parties which would not have arisen but for the execution of the Works and/or the existence of the New Structure save where such damage or interference results from the negligence of Network Rail or the acts or omissions of any third party not under the control of or in contract with the Council;
- (I) of emergency works and/or emergency safety works and/or emergency closure of the Railway Infrastructure and/or restrictions on traffic using the Railway Infrastructure carried out in accordance with this Agreement save where such works and/or closure and/or restrictions arise from the negligence of Network Rail or the acts or omissions of any third party not under the control of or in contract with the Council; and
- (J) arising as a result of any mineral workings in accordance with Clause 2.13.

2. DEFINITIONS

As from time to time requested by the Council, Network Rail shall provide to the Council reasonable access to and evidence and records of all Personnel Costs and Expenses and Disbursements (as set out in paragraph 5 of this Schedule 2), which may be reviewed and audited by or on behalf of the Council. All other costs and expenses referred to in this Schedule 2 including, without limitation, the mark up of any rates including any elements and amounts stated

in any policy of Network Rail, shall not be subject to review or audit by the Council or any other party and Network Rail shall not be obliged to provide evidence of or records or access to records in respect of such amounts.

The following terms shall have the following meanings when used in this Schedule 2:

- (A) **“Affiliate”** means in relation to any company:
 - (i) a company which is either a holding company or a subsidiary of such company; or
 - (ii) a company which is a subsidiary of a holding company of which such company is also a subsidiary;
- (B) **“Agency Costs”** means the cost (including VAT) to Network Rail of any Agency Personnel engaged in connection with the Works multiplied by 1.5, plus the expenses and disbursements charged to Network Rail by such Agency Personnel;
- (C) **“Agency Personnel”** means those personnel who have entered into a contract for services with Network Rail or any Affiliate of Network Rail to provide services exclusively to Network Rail or any Affiliate thereof;
- (D) **“Consultants’ Costs”** means the actual costs (including VAT) to Network Rail of any consultants or contractors engaged by Network Rail in connection with the Works, plus a mark-up of 10% on the aggregate of those amounts, plus the expenses and disbursements of those consultants or contractors;
- (E) **“Expenses and Disbursements”** means the amounts payable to Network Rail by the Council as set out in paragraph 5 of this Schedule 2;
- (F) **“Hourly Rate”** means in respect of each member of Network Rail’s Personnel in any particular role band the rates set out in paragraph 6 of this Schedule 2 as the same may be adjusted from time to time in accordance with paragraph 3. The resulting Hourly Rate will be payable in respect of all worked hours spent by Network Rail’s Personnel in carrying out or procuring the carrying out of the Works;
- (G) **“Network Rail’s Personnel”** means those personnel referred to in paragraph 4 of this Schedule 2; and
- (H) **“Personnel Costs”** means the sum of the relevant Hourly Rate multiplied by the number of hours spent by Network Rail’s Personnel in connection with the Works.

3. ADJUSTMENT TO HOURLY RATE

3.1 Network Rail shall adjust the Hourly Rates annually on 1st April to reflect the increase in the Retail Price Index for the year ending the preceding November.

4. NETWORK RAIL'S PERSONNEL

If Network Rail uses any of the following persons, in connection with the Works, they shall be deemed to be Network Rail's Personnel:

- (A) any employees and/or officers of Network Rail; and

- (B) any employees and/or officers of any Affiliate of Network Rail.

5. EXPENSES AND DISBURSEMENTS

5.1 The Expenses and Disbursements shall include, without limitation, the following:

- (A) printing, reproduction and purchase of documents, drawings, office consumables, maps and records;
- (B) travelling expenses as follows:
 - (i) for journeys by train by all staff - in accordance with Network Rail's then current personnel policies;
 - (ii) for journeys by the London Underground system - actual costs;
 - (iii) subject to the prior approval of the Council for journeys by air exceeding 8 hours by all staff - business class fares unless otherwise agreed in writing by the Council;
 - (iv) subject to the prior written approval of the Council for journeys by air less than 8 hours by all staff - economy class fares unless otherwise agreed in writing by the Council;
 - (v) car hire for business journeys other than home to office at the Network Rail's office - actual costs;
 - (vi) taxi fares – actual costs;
 - (vii) additional reasonable costs of daily travel costs from Network Rail's offices to the designated project office; and
 - (viii) hotel and restaurant bills and other subsistence expenses associated with such travel including costs on temporary assignments to the Council, in accordance with the Network Rail's then current personnel policies;
- (C) all reasonable costs that are associated with consultants, subcontractors and other outside services and facilities to the extent not included in paragraph (A) or (B) above;
- (D) costs and related expenses incurred by Network Rail in accordance with employment arrangements with Network Rail's Personnel working in connection with the Works including, without limitation, company cars or equivalent car allowances, relocation, accommodation, housing and utilities allowances and children's education allowances and travel and subsistence expenses;
- (E) training courses specifically for the benefit of the Works which have been approved in writing by the Council;
- (F) all reasonable overseas daily incidental expense allowance paid as a term of employment to staff travelling overseas on occasional visits as approved in writing by the Council;

- (G) purchase of software and licences, together with support charges in each case as approved by the Council;
 - (H) approved sub-consultants/sub-contractors costs, as invoiced to Network Rail without Network Rail's mark-up;
 - (I) any VAT chargeable in respect of any items of Expense and Disbursements; and
 - (J) any other disbursements or expenses reasonably and properly incurred by Network Rail in connection with this Agreement which are not expressly set forth herein.
- 5.2 If any single item included within any of the above categories 5.2 (A) to (J) of Expenses and Disbursements is greater than £7,000, it shall only be recoverable from the Council if the Council has approved the item of Expense or Disbursement in question.
- 5.3 For the avoidance of doubt the Council shall not in any circumstances reimburse to Network Rail any Expenses and Disbursements in relation to alcohol.

6. HOURLY RATE BANDS

Banding	Non London	London Region
1	£143.19	£146.89
2	£105.28	£108.99
3	£78.34	£82.04
4	£54.74	£58.46
5	£43.79	£47.50
6	£34.52	£38.25
7	£28.65	£32.35
8	£22.75	£26.45

7. For the avoidance of doubt, all costs that fall within the categories of costs set out in paragraphs 3, 4 and 5 of this Schedule shall be properly and reasonably incurred by Network Rail.

SCHEDULE 3

NETWORK RAIL'S SERVICES

- a) Arrangement of third party asset management for the Works including Possessions in line with the Programme.
- b) Administration & management of internal Network Rail procedures to consider the applications for Necessary Consents.
- c) The appointment of a project manager and appropriate supporting resources.
- d) Alterations to Network Rail records to reflect the changes made to the infrastructure.
- e) Safety inspection for the duration of the period of construction of the Works as notified to Network Rail by the Council to ensure the safety and operation of the Railway.
- f) Provision of asset protection services for the duration of the notified implementation period of the Works.
- g) Review of health and safety plan and the associated method statements with particular reference to protection of the running line and Network Rail's assets.
- h) Services of the Network Rail project manager to manage the interface with Network Rail.
- i) Services of the Network Rail project sponsor and appropriate support staff and resources to support and provide guidance to the Council during the initial stages of the Works including examining and commenting upon designs, drawings and specifications in respect of their impact on the Railway.
- j) Appointment under a call-off arrangement of a Designated Project Engineer and Project Engineers for relevant engineering disciplines to undertake duties in accordance with the Standards as and when reasonably required.
- k) Appointment under a call-off arrangement as required of a Site Safety Staff as and when reasonably required.
- l) Appointment under a call-off arrangement as required of a Fabrication Inspector as and when reasonably required.
- m) Not used.
- n) Not used
- o) Such other services as are necessary in the negotiation and preparation of this Agreement and/or the carrying out of Network Rail's obligations under this Agreement.

SCHEDULE 4

NOTICE DETAILS

Part 1

- (a) Network Rail's address for the service of notices is:

Network Rail Infrastructure Limited
Kings Place,
90 York Way
London
NW1 9AG

Tel: 020 7557 8000 (check)

Email notices@networkrail.co.uk

All written notices to be marked:

“URGENT : ATTENTION OF THE GROUP COMPANY SECRETARY”

- (b) The address for service of notices for the Council is:

Cheshire East Borough Council
Delamere House
Delamere Street
Crewe
Cheshire
CW1 2LL

Tel: 01270 686353

Email: paul.griffiths@cheshireeast.gov.uk

All written notices to be marked:

“URGENT: ATTENTION OF Paul Griffiths (Principal Traffic Officer)
”

Part 2

(a) Network Rail's address for the service of notices under Clause 2.1 is:

Network Rail Infrastructure Limited
Kings Place,
90 York Way
London
NW1 9AG

Tel: 020 7557 8000 (check)

Email notices@networkrail.co.uk

All written notices to be marked:

"URGENT : ATTENTION OF THE GROUP COMPANY SECRETARY"

(b) The address for service of notices for the Council is:

Cheshire East Borough Council
Delamere House
Delamere Street
Crewe
Cheshire
CW1 2LL

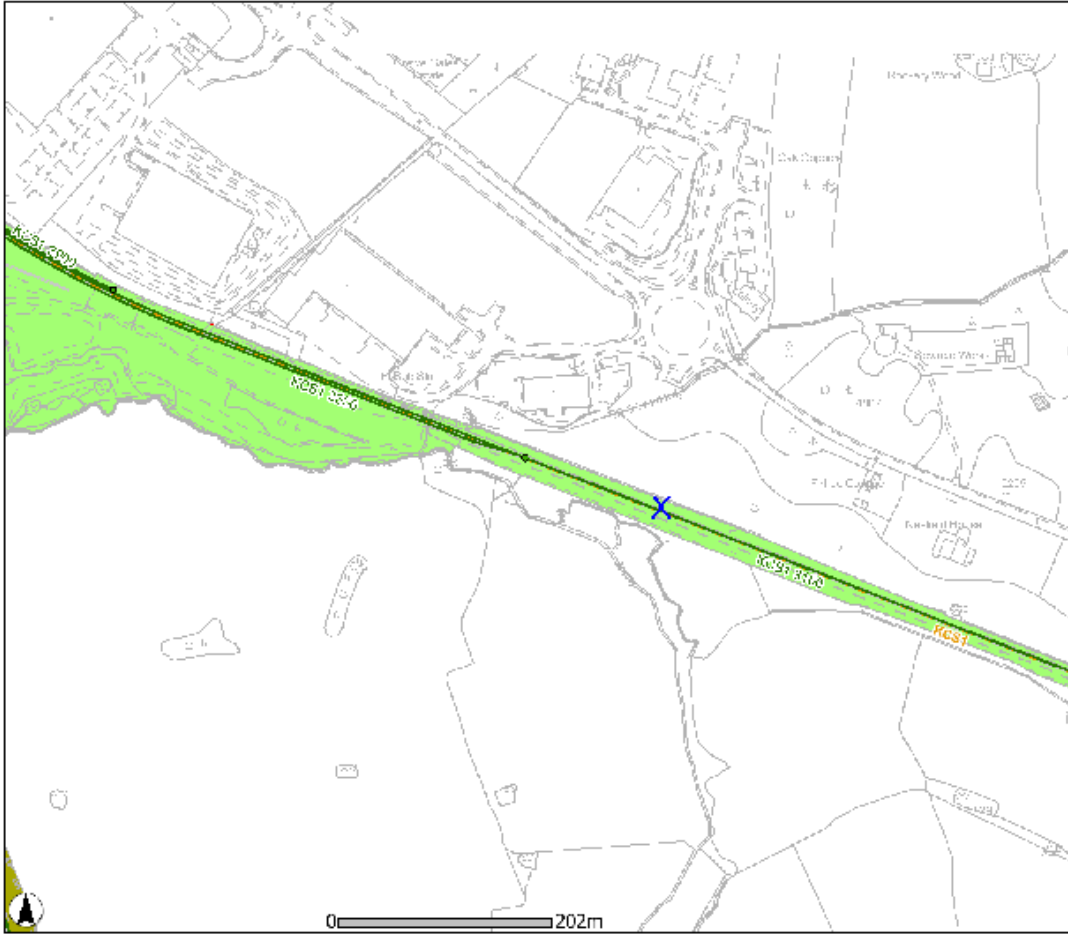
Fax:

All written notices to be marked:


"URGENT: ATTENTION OF Pryce Evans (Programme and Commercial Manager)"

SCHEDULE 5

PLAN OF LAND IN THE OWNERSHIP OF NETWORK



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PROPOSED UNDERBRIDGE Crewe Green	
Plot Scale	1:5000
Plot Date	30/6/2009
	
Output Created from the GI Portal - All Landscapes	

SCHEDULE 6

ESCALATION PROCEDURE

I. DEFINITIONS

- 1.1. In this Schedule, except where the context otherwise requires, the following words shall have the following meanings:

“**Director**” means a person from time to time appointed as the holder of such office within each Party

“**Initial Notice**” means the notice served under paragraph 2.1 of this Schedule6;

“**Project Manager**” means the person appointed by each Party to manage the delivery of services or works under any Works Contract entered into under this Agreement;

“**Response Notice**” means the notices served under paragraph 2.3 of this Schedule6;

“**Senior Manager**” means the person in each Party’s organisation responsible for the management and oversight of this Agreement.

2. STAGE 1 – PROJECT MANAGERS

- 2.1. In order to invoke the Escalation Procedure, either Project Manager may notify the other Project Manager by serving a written notice, the “Initial Notice”.

- 2.2. The Initial Notice shall:

- (a) state the Clause under which the Escalation Procedure is being invoked or alternatively any other matter to be resolved by means of the Escalation Procedure;
- (b) advise all correspondence and documentation relevant to the matter raised in paragraph 2.2(a); and
- (c) propose a date within five Working Days for a meeting between the Project Managers to seek resolution of the matter referred to in paragraph 2.2(a).

- 2.3. Following receipt of the Initial Notice, the receiving Project Manager shall respond by written notice within three Working Days, the “Response Notice”.

- 2.4. The Response Notice shall:

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

- 2.5. If the Project Managers agree that the Response Notice or the meeting pursuant to the Initial Notice resolves the matter raised in the Initial Notice, the Project Manager who issued the Initial Notice will notify the other Project Manager by written notice. Such notification shall be made within three Working Days following the receipt of the Response Notice or within three Working Days following the meeting.
- 2.6. If the Project Managers do not agree that the Response Notice or the meeting pursuant to the Initial Notice resolves the matter raised in the Initial Notice, both Project Managers will notify their respective Senior Managers accordingly. Such notification shall be made within three Working Days following the receipt of the Response Notice or within three Working Days following the meeting.

3. STAGE 2 – SENIOR MANAGERS MEETING

- 3.1. Following receipt of a notification pursuant to paragraph 2.6, the Senior Managers of each Party shall arrange a meeting within five Working Days to seek resolution of the matter referred to in the Initial Notice. The Senior Managers may, at their discretion, invite the Project Managers to attend such a meeting.
- 3.2. If the Senior Managers agree that their meeting resolves the matter raised in the Initial Notice, they will notify their Project Managers accordingly. The Project Manager who issued the Initial Notice will notify the other Project Manager by written notice. Such notification shall be made within three Working Days following the meeting of Senior Managers.
- 3.3. If the Senior Managers do not agree that their meeting resolves the matter raised in the Initial Notice, they will notify their respective Project Managers accordingly within three Working Days following the meeting of Senior Managers.
- 3.4. At the same time as they make the notification in paragraph 3.3, each Senior Manager shall notify their respective Directors of the matter raised in the Initial Notice and the steps taken at the meetings between Project Managers and Senior Managers to resolve the matter.

4. STAGE 3 – DIRECTORS' MEETING

- 4.1. Following receipt of a notification pursuant to paragraph 3.4, the Directors of each Party shall arrange a meeting within five Working Days to seek resolution of the matter referred to in the Initial Notice. The Directors may, at their discretion, invite the Senior Managers and/or the Project Managers to attend such a meeting.
- 4.2. If the Directors agree that their meeting resolves the matter raised in the Initial Notice, they will notify their Senior Managers and Project Managers accordingly. The Project Manager who issued the Initial Notice will notify the other Project Manager by written notice. Such notification shall be made within three Working Days following the meeting of Directors.
- 4.3. If the Directors do not agree that their meeting resolves the matter raised in the Initial Notice, either Party may refer the matter to the Dispute Resolution Procedure in accordance with Clause 6.9.