



## Network Rail publishes revised templates for Asset Protection and Investment Projects (GRIP)

### Introduction

The original template agreements introduced by Network Rail in 2006 for use in relation to Asset Protection and rail investment projects (GRIP) have been revised. Following approval by ORR on 5 February 2010 the revised templates are available for use and can be downloaded from Network Rail's website at: <http://www.networkrail.co.uk/asp/1606.aspx>. This briefing is intended to provide a quick refresher on the types of templates available and looks at some of the reasons behind the changes.

### The old templates

The old Templates and subsequent revised drafts have now been withdrawn from Network Rail's website. However, ORR has stated that it will not withdraw approval of them, to avoid causing disruption to existing projects. It seems likely that ORR will withdraw approval at some point in the future.

### The revised templates

The complete set of templates comprises:

- Basic Services Agreement
- Basic Asset Protection Agreement
- Basic Implementation Agreement (Fixed Price)
- Basic Implementation Agreement (Emerging Cost)
- Development Services Agreement
- Framework Agreement
- Asset Protection Agreement
- Implementation Agreement (Emerging Cost)
- Implementation Agreement (Fixed Price Basis)

### Key changes

The revised templates have come as a surprise in some quarters as there has been no significant formal engagement with consultees by either Network Rail or ORR since the March 2009 consultation closed.

Unfortunately, Network Rail has still to publish any

commentary or mark ups so it is difficult to comment on the changes in detail. ORR has said that the changes reflect concerns raised during the ORR's May 2008 and March 2009 conclusions.

The three areas of change highlighted by ORR in its announcement of the revised templates are:

#### ■ *Liquidated damages and delay*

The templates used to include a default level of liquidated damages arising from delay. This was unsatisfactory as the level of liquidated damages could exceed any loss, and therefore be potentially unenforceable. The expectation now is that Network Rail will agree a realistic level of liquidated damages at the outset of any project so as to allow a genuine estimate of expected losses to be agreed.

#### ■ *Design risk*

Under the old templates, Network Rail did not assume risk for any design unless it also implemented it. Under the revised templates Network Rail should take design risk for all design work it carries out or procures. The customer remains responsible for design risk for its own design works which it carried out or provides to Network Rail.

#### ■ *Liability caps*

Liability for losses by customers and Network Rail are capped under the templates. The cap on Network Rail's liability has now been increased to include the full value of the agreement between Network Rail and its customer and incorporates agency, consultants' contractors' and personnel costs, or £100,000 if this amount is greater. The capping arrangements are not reciprocal, and the level of the customer's cap on liability remains unchanged; in particular the customer's liability in negligence remains uncapped.

### Use of the templates

According to ORR, the revised Templates offer a fair balance of risk between Network Rail and investors and have been drafted from the perspective that investors in some cases must contract with Network Rail (having no alternative) and

therefore Network Rail is obliged to perform key services if an investor requires it.

However (importantly), it remains the case that they only represent a default position and ORR continues to expect parties to negotiate alternative provisions to fit with particular project circumstances.

Ultimately, if an investor is unhappy with Network Rail's approach to negotiations the matter can be referred to the ORR which will consider whether Network Rail is complying with the terms of its stakeholder relationships licence condition and code of practice. Whether ORR scrutiny provides an effective control remains to be seen.

Those involved in the previous consultations on the templates have had no input into this final drafting exercise. As mentioned above, neither ORR nor Network Rail have published any mark ups or commentary on the changes. Consultees must satisfy themselves that the revised templates pick up all key changes

which it had been agreed would be addressed through the review process.

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