

**PRIVATE AND CONFIDENTIAL**

**London Underground Limited**

**and**

**Schweerbau GmbH & Co. KG**

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**Rail Re-Profiling Services**

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# CONTENTS

	Page
1	DEFINITIONS AND INTERPRETATION ..... 1
2	CONFLICTS AND DISCREPANCIES ..... 16
3	AGREEMENT DURATION ..... 17
4	REPRESENTATIONS AND WARRANTIES ..... 18
5	THE SERVICES ..... 20
6	VARIATIONS ..... 23
7	ACCESS TO LUL Network ..... 25
8	PERFORMANCE REGIME ..... 27
9	PAYMENTS ..... 27
10	ACCESS AND AUDIT ..... 32
11	SECURITY ..... 34
12	COMPANY'S OBLIGATIONS ..... 35
13	EVENTS OF DEFAULT ..... 35
14	PROHIBITED ACTS ..... 41
15	INTELLECTUAL PROPERTY RIGHTS ..... 41
16	LIABILITY, INDEMNITIES ..... 44
17	INSURANCE ..... 49
18	FORCE MAJEURE EVENTS ..... 49
19	CONFIDENTIALITY ..... 51
20	CONTRACT MANAGEMENT ..... 53
21	WAIVER AND VARIATION ..... 56
22	SURVIVAL ..... 56
23	LANGUAGE ..... 56
24	ENTIRE AGREEMENT ..... 56
25	SEVERABILITY AND ILLEGALITY ..... 57
26	FREEDOM OF INFORMATION ..... 58
27	RESPONSIBLE PROCUREMENT ..... 58

28	CRIME AND DISORDER .....	59
29	LONDON LIVING WAGE .....	59
30	DATA TRANSPARENCY .....	59
31	DATA PROTECTION .....	60
32	CONFLICT OF INTEREST .....	61
33	CRIMINAL RECORDS DECLARATION .....	61
34	BEST VALUE.....	62
35	EQUALITY, DIVERSITY AND MODERN SLAVERY .....	62
36	WORK RELATED ROAD RISK.....	63
37	COSTS .....	69
38	ASSIGNMENT .....	69
39	NOTICES.....	71
40	SET OFF .....	72
41	ACCRUED RIGHTS .....	72
42	CONTRACT (RIGHTS OF THIRD PARTIES) ACT 1999.....	72
43	COUNTERPARTS.....	72
44	DISPUTES AND GOVERNING LAW .....	72
Schedule 1	Machine Specification and Works Information.....	75
	Part A – Machine Specification .....	76
	Part B - Works Information .....	77
Schedule 2	Performance Management Regime.....	79
Schedule 3	Service Payments.....	89
	Part A – Pricing Preambles.....	90
	Part B - Payment .....	93
	Part C - Pricing Schedule.....	94
	Part D - Indexation Adjustment .....	96
Schedule 4	Insurance .....	97
Schedule 5	QUENSH Contract .....	99
Schedule 6	Dispute Resolution Procedure.....	101
Schedule 7	Not used .....	108
Schedule 8	Form of Deed of Warranty .....	109
Schedule 9	Form of Performance Bond.....	120

Schedule 10 Not used .....126  
Schedule 11 Key Personnel..... 127

## SERVICES SUPPLY AGREEMENT

DATED 17TH MAY

2019

### BETWEEN:

- (1) London Underground Limited a company registered in England and Wales under number 01900907, whose registered office is at 55 Broadway, London, SW1H 0BD (the "**Company**" and "LUL");
- (2) Schweerbau GmbH & Co. KG (Registered Number HRA 1140), a limited partnership incorporated in Germany, whose registered office is at Industriestrasse 12, 31655 Stadthagen, Germany (the "**Supplier**").

### BACKGROUND

- (A) The Supplier carries on the business of rail re-profiling and providing the Services.
- (B) The Company wishes to buy and the Supplier wishes to supply the Services on the terms and conditions set out in this Agreement.
- (C) This Agreement may be utilised by the Company or any other member of the TfL Group. The Greater London Authority, any of the London boroughs, the Metropolitan Police Service, or any functional body (as defined in the GLA Act) may, if the Supplier so agrees, contract with the Supplier on the terms set out in this Agreement.

### IT IS AGREED:

#### I DEFINITIONS AND INTERPRETATION

##### 1.1 Definitions

In this Agreement, (including the recitals) unless the context otherwise requires, the following words and expressions have the following meanings respectively:

"Additional Services" means the transportation, crange and site survey and inspection services to be performed by the Supplier upon request from the Company as described in the Appendix to Part C of Schedule 3 (Service Payments);

"Additional Services Payments" shall have the meaning given to it in Part C of Schedule 3 (Service Payments);

"Affected Party" shall have the meaning given to it in Clause 25.2;

"Agreement" means this agreement which has been signed and delivered by the Parties as a Deed and includes the Schedules;

"Agreement Duration" means the period commencing upon the date hereof and continuing until the Expiry Date subject to:

- (a) earlier termination pursuant to Clause 13, and/or Clause 17, and/or Clause 21.4; and
- (b) the Company extending this Agreement pursuant to Clause 3.2;

"Applicable Laws" means all or any laws, statutes, proclamations, by-laws, directives, regulations, statutory instruments, rules, orders, rules of court, delegated or subordinate legislation, rules of common law or any European Union legislation at any time or from time to time in force in the United Kingdom or the European Union and which are or may become applicable to the Rail Re-Profiling Machines or to this Agreement or any obligations performed under it, or to any agreement or document referred to in this Agreement, including, without limitation, Industry Standards (but excluding the TfL Standards), the Railways (Interoperability) Regulations 2006 and ROGS;

"Available" means, in relation to a Rail Re-Profiling Machine that is intended to perform a Shift, that:

- (a) the Rail Re-Profiling Machine arrives at the Starting Point for the Shift on or prior to the scheduled commencement time for the Shift, each as set out in the applicable Works Scope Document;
- (b) all Relevant Consents in respect of the Rail Re-Profiling Machine have been obtained and are in full force and effect;
- (c) the Rail Re-Profiling Machine is in a condition which:
  - (i) satisfies all relevant safety standards and all Applicable Laws and TfL Standards; and
  - (ii) is suitable to enable the Supplier to perform the Services planned for that Shift in accordance with: (A) the instructions set out in the Programme of Works and the applicable Works Scope Document; and (B) the requirements of the Machine Specification and the Works Information; and
- (d) the Rail Re-Profiling Machine is being operated by Supplier personnel who fulfil the requirements of clauses 5.4 and 5.5;

"Bond Provider" means a bond provider having a credit rating of at least the Required Rating and having been approved in writing by the Company (in its absolute discretion);

"Commencement Date" means the date notified by the Company to the Supplier pursuant to clause 3 of this Agreement;

"Company's Representative" means any person appointed as such by the Company in accordance with Clause 20.2;

"Competent Authority" means any legislative, judicial, regulatory or administrative body or agency (or any subdivision of them) of the United

Kingdom or the European Union or any supranational body which has rule-making power or whose directions, instructions, rulings, laws or regulations are directly enforceable against a Party in connection with the performance of this Agreement;

"Completed Shift" means that a Rail Re-Profiling Machine that is Available for a Shift:

- (a) leaves the Starting Point on time;
- (a) completes rail re-profiling as and where required in accordance with the instructions set out in the Works Scope Document and the requirements of the Works Information;
- (b) the Rail Head Profiling Measurements collected at the end of the Shift and recorded in the Shift Report are satisfactory to the Company;
- (c) follows the correct route as set out in the Works Scope Document; and
- (d) arrives at the Finishing Point at the scheduled finishing time for a Shift as set out in the Works Scope Document;

"Confidential Information" shall have the meaning given to it in Clause 19.1;

"Consequential Loss" means in relation to a breach of this Agreement or other circumstances in which an Indemnified Party is entitled to recover any costs, expenses or liabilities suffered or incurred, any loss of production, loss of profit, loss of revenue, loss of contract, loss of goodwill, liability under other agreements or liability to third parties and/or indirect or consequential or other financial loss resulting from such breach and whether or not the Party committing the breach knew, or ought to have known, that such indirect or consequential loss would be likely to be suffered as a result of such breach;

"Contract Information" means (i) this Agreement in its entirety (including from time to time agreed changes to this Agreement) and (ii) data extracted from the invoices submitted by the Supplier which shall consist of the Supplier's name, the expenditure account code, the expenditure account code description, the SAP document number, the clearing date and the invoice amount;

"Contract Management Meeting" shall have the meaning given to it in Clause 20.4.1;

"Contract Year" means each 12-month period commencing on 1 April and ending on the next 31 March, or (where applicable) such shorter period that (i) commences on the date hereof and ends on the next 31 March, or (ii) commences on the applicable 1 April and ends on the Expiry Date or earlier date of termination of this Agreement;

"Corrective Action" shall have the meaning given to it in Clause 10.7;

"Data Protection Legislation" means:

- (a) any legislation from time to time in the United Kingdom which implements the European Community's Directive 95/46/EC and Directive 2002/58/EC, including but not limited to the Data Protection Act 1998 and the Privacy and Electronic Communications (EC Directive) Regulations 2003;
- (b) from 25 May 2018 only, the Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "General Data Protection Regulation");
- (c) any other legislation in force from time to time in the United Kingdom relating to privacy and/or the Processing of Personal Data (as such terms are defined in section 1(l) of the Data Protection Act 1998); and
- (d) any statutory codes of practice issued by the Information Commissioner's Office of the United Kingdom in relation to such legislation;

"Declaration" shall have the meaning given to it in Clause 33.1;

"Declaration of Ineffectiveness" means a declaration of ineffectiveness in relation to this Agreement made by a court of competent jurisdiction in accordance with Chapter 6 of Part 3 of the Public Contracts Regulations 2015 (as amended) or Chapter 2 of Part 5 of the Utilities Contracts Regulations 2016 (as amended);

"Default Interest" means interest on late payment at the rate of two per cent (2%) per annum above the base rate of the Bank of England from time to time;

"Designated Depot" means any depot as nominated by the Company in the supplied Programme of Works;

"Dispute" has the meaning given to it in Schedule 6 (Dispute Resolution Procedure);

"Environmental Claim" means receipt by the Company in connection with any pollution or contamination of the environment of:

- (a) any written claim, demand, suit or notice from a third party, including a Regulatory Authority ("Regulatory Authority" means any government entity or other public or quasi-public authority or privatised utility having responsibility for any matters concerning the environment, or Environmental Law) or any order of the court of competent jurisdiction in connection with an alleged breach of Environmental Law; or

- (b) any charge or condition imposed by any Regulatory Authority or any notice served by any Regulatory Authority requiring remediation (including any written indication from any Regulatory Authority that a requirement to carry out remediation will be imposed on the Company unless the Company agrees to carry out remediation voluntarily);

"Environmental Damage" means any injury or damage to persons (including material offence to man's senses), living organisms or property or any material pollution or impairment of the environment resulting from the discharge, emission, escape or migration of any substance, energy, noise or vibration;

"Environmental Law" means all and any laws, including common law, legislation, codes of practice, notices, judgments, decrees, regulations, applicable clean-up standards, circulars, guidance notes (statutory or otherwise), as may be enacted, adopted, amended or supplemented.

"European Railway Agency" means the European Railway Agency established pursuant to Regulation (EC) No 1335/2008 of the European Parliament and of the Council of 16 December 2008 amending Regulation (EC) No 881/2004 establishing a European Railway Agency (Agency Regulation) and includes any successor to all or any of its functions;

"Excepted Liabilities" means the liability of the Supplier for:

- (a) any abatements for performance levied in accordance with this Agreement;
- (b) Losses against which the Supplier is entitled to an indemnity under any policy of insurance (or would have been entitled but for any breach or failure to maintain such insurance);
- (c) Losses caused by fraudulent acts or acts of a criminal nature; and
- (d) Losses caused by the Supplier committing a Prohibited Act or Safety Breach;

"Expiry Date" means the date falling five (5) years after the Commencement Date;

"Extension Limit" means two (2) years;

"Failed Shift" means a Shift that does not meet the criteria for being a Completed Shift;

"Finishing Point" means the station or other location where a Shift is scheduled to finish, as set out in the Works Scope Document;

"FM Affected Party" shall have the meaning given to it in Clause 18.1.1;

"FM Notice" shall have the meaning given to it in Clause 18.3;

"FOI Legislation" means the Freedom of Information Act 2000, all regulations made under it and the Environmental Information Regulations 2004 and any amendment or re-enactment of any of them; and any guidance issued by the Information Commissioner, the Department of Constitutional Affairs, or the Department for Environment Food and Rural Affairs (including in each case its successors or assigns) in relation to such legislation;

"Force Majeure Event" means any:

- (a) fire, earthquake or flood;
- (b) act of terrorism;
- (c) war, invasion, acts of foreign enemies, hostilities, civil war, revolutions, insurrection, riots or civil unrest; and/or
- (d) strikes, lock outs or other industrial action not solely affecting the Supplier's and/or their Subcontractors' employees or those of any of its Subcontractors,

save to the extent that such event is caused by the Supplier, any Subcontractor, or their respective agents, officers and/or employees;

"GLA Act" means the Greater London Authority Act 1999;

"Government Authority" means any national, supra-national (including the European Union), state or local government, any political subdivision thereof or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or other similar entity and includes the ORR and the Secretary of State;

"Greater London" means that term as it is used in the GLA Act;

"Greater London Authority" means the authority established by section 1 of the GLA Act and its successors;

"Group" means, in relation to any company (which for the purposes of this Agreement shall include TfL), that company and any company which is a holding company or subsidiary of that company and any subsidiary of any such holding company; for which purposes "subsidiary" and "holding company" have the meanings respectively given to them by section 1159 of the Companies Act 2006;

"Indemnified Parties" shall have the meaning given to it in Clause 16.1;

"Indemnified Party" shall have the meaning given to it in Clause 16.1;

"Independent Auditor" shall have the meaning given to it in Clause 13.6.3;

"Indexation Adjustment" shall have the meaning given to it in paragraph 1.1 of Part D of Schedule 3 (Service Payments);

"Industry Standards" means all the laws, rules, regulations, recommendations and instructions, including (without limitation) guidance, codes of practice and conduct which have the force of law or with which it is generally accepted within the United Kingdom rail industry that it is good practice to comply, relating to the performance of this Agreement and/or applicable to the Rail Re-Profiling Machines which are or have been issued by the Secretary of State, Network Rail, ORR, RSSB, or any other Relevant Consents Authority or other person from time to time legally authorised to set standards in respect of the rail industry including the European Railway Agency and shall include, without limitation, Railway Group Standards, the Rule Book, Notified National Technical Rules and Technical Specifications for Interoperability;

"Information" means information recorded in any form held by or on behalf of the Company;

"Information Request" means a request for any Information under the FOI Legislation;

"Insolvency Event" in relation to any person means:

- (a) such person stopping or suspending or threatening to stop or suspend payment of all or a material part of its debts, or becoming unable to pay its debts, or being deemed unable to pay its debts under section 123(1) or (2) of the Insolvency Act 1986;
- (b) any step being taken by any person with a view to the winding up of such person or any person presenting a winding-up petition in respect of such person which is not dismissed within seven (7) days;
- (c) any step being taken to enforce security over or a distress execution or other similar process being levied or served out against the whole or a substantial part of the assets or undertaking of such person;
- (d) a receiver, administrative receiver, administrator, compulsory manager or other similar officer being appointed in respect of such person;
- (e) such person ceasing or threatening to cease to carry on all or a material part of its business, except for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation on terms approved by the Company (in its absolute discretion) before that step is taken;
- (f) the making by such person of a general assignment or an arrangement or composition with or for the benefit of creditors; or
- (g) any event occurring which, under the laws of any relevant jurisdiction other than England and Wales, has an analogous or equivalent effect to any of the events listed above;

"Intellectual Property Rights" or "IPRs" means all intellectual property rights in any part of the world, including any patent, rights to inventions, patent application, trade mark and service mark (including any trade, brand or business names), trade mark application, domain names, rights in get-up, rights in goodwill or to sue for passing off, unfair competition rights, design rights, registered design, registered design application, utility model, trade name, discovery, invention, process, formula, specification, copyright and related rights, unregistered design right, technical information or drawing (including rights in software, database rights and topography rights), rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications (or rights to apply) for, and renewals or extensions of, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world;

"Key Personnel" means the persons listed in Schedule II (Key Personnel) (or any replacements appointed in accordance with Clause 5.5);

"Level 4 Non-Conformance" has the meaning given to it in paragraph 2.5 of the Performance Regime;

"Liquidated Damages" means the payments to be made by the Supplier to the Company under the Performance Regime;

"London Living Wage" means the basic hourly wage current at the date of this Agreement (before tax, other deductions and any increase for overtime) as may be revised from time to time by the Mayor of London or any other body or agency whose directives, decisions, instructions, rulings, laws, or regulations are directly enforceable against the Company;

"Losses" means, in the context of the definition of Excepted Liabilities, any expense, liability, loss, claims, fines, damages, costs (including reasonable legal and other professional fees and disbursements), penalties, settlements and judgments incurred by the Company, its employees or agents or any other person;

"LUL Network" means the stations and depots (wherever situate), assets, systems, track and other buildings which are used in the maintenance and provision of the underground service known as "London Underground";

"LUL Plant Approval" means the department within the Company that approves plant and machines for use on the track environment;

"Machine Specification" means the specification for the Rail Re-Profiling Machines set out in Part A of Schedule I;

"Management Quality Plan" has the meaning given to it in Clause 5.3.1;

"Network Rail" means Network Rail Infrastructure Limited (Registered No: 02904587) a company incorporated under the laws of England and Wales whose registered office is at 1 Eversholt Street, London, NW1 2DN;

"Notified Body" means any person approved as a notified body pursuant to the Notified Standards for the purposes of the acceptance of the Rail Re-Profiling Machines;

"Notified National Technical Rules" means those rules or standards notified by the Secretary of State to the European Commission in accordance with Directive 2008/57/EC on the interoperability of the rail system within the community;

"Notified Standards" shall have the meaning given to it in the Railways (Interoperability) Regulations 2006;

"ORR" means the Office of Rail and Road established pursuant to the Railways and Transport Safety Act 2003 and includes any successor to all or any of its functions;

"Party" means either the Company or the Supplier;

"Parties" means both the Company and the Supplier;

"Payment Application" shall have the meaning given to it in Clause 9.2.1;

"Payment Certification" shall have the meaning given to it in Clause 9.3.1;

"Payment Period" means each consecutive 28 day period, the first of which starts on 1 April in each year and, in respect of the first or last such period in any year, as may be varied by the Company;

"Performance Bond" means a performance bond issued by a Bond Provider in favour of the Company in substantially the form set out in Schedule 9 (Form of Performance Bond); "Performance Regime" means the performance regime set out in Schedule 2 (Performance Management Regime);

"Performance Report" means a report in respect of the Supplier's performance of the Services in a form agreed between the Parties;

"Periodic Service Charge" means the amount payable per Payment Period for each Rail Re-Profiling Machine as set out in the first row of the table in the Service Payments Schedule;

"Personal Data" has the meaning given to it in the Data Protection Legislation;

"Prescribed Period" has the meaning given to it in Clause 9.6;

"Proceedings" shall have the meaning given to it in Clause 44.3;

"Programme of Works" means the programme of works for the Rail Re-Profiling Works to be issued and updated by the Company as applicable in accordance with paragraph 1.3 of the Works Information;

"Prohibited Act" means:

- (a) offering or agreeing to give to any servant, employee, officer or agent of the Company or the TfL Group any grant, gift or consideration of any kind as an inducement or reward:
  - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Company; or
  - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Company;
- (b) entering into this Agreement or any other contract with the Company in connection with which commission has been paid or has been agreed to be paid by the Supplier or on its behalf or to his knowledge unless, before the relevant contract or document is entered into, particulars of any such commission and the terms and conditions of any such contract or document for the payment thereof have been disclosed in writing to the Company;
- (c) committing any offence:
  - (i) under the Prevention of Corruption Acts 1889-1916 and/or the Bribery Act 2010;
  - (ii) under any law or legislation creating offences in respect of fraudulent acts; or
  - (iii) at common law in respect of fraudulent acts,in relation to this Agreement or any other contract with the Company; or
- (d) defrauding or attempting to defraud the Company;

"Protected Characteristics" has the meaning given to it in Clause 35.2.1;

"Public Procurement Termination Event" means:

- (a) this Agreement has been subject to any substantial modification that would require a new procurement procedure in accordance with Regulation 72 of the Public Contracts Regulations 2015; or
- (b) the Company determines that this Agreement should not have been awarded to the Supplier in view of a serious infringement of the obligations contained under the EU Treaties and Directives 2014/24/EU of the European Parliament Council dated 26 February 2014;

"QUENSH Contract" means the QUENSH Contract included at Schedule 5 and as amended from time to time;

"Rail Head Profiling Measurements" has the meaning given to it in paragraph 4.20 of the Works Information;

"Rail Re-Profiling Machine(s)" means the machines to be used by the Supplier to undertake the Rail Re-Profiling Works more particularly described in the Machine Specification;

"Rail Re-Profiling Works" has the meaning given to it in the Works Information;

"Railway Group Standards" means, to the extent applicable to the Rail Re-Profiling Machines and their operation, those standards to which railway assets or equipment used on or as part of railway assets must conform, and operating procedures with which the purchaser of railway assets must comply, in each case as prepared and updated by RSSB;

"Relevant Consents" has the meaning given to it in Clause 5.4.1;

"Relevant Consents Authority" means any or all of the Government Authority, the Notified Body, or any other entity which has the appropriate authority for the granting of a Relevant Consent;

"Relevant Conviction" means any unspent criminal conviction relating to actual or potential acts of terrorism or acts which threaten national security;

"Relevant Individual" means any servant, employee, officer, consultant or agent of the Supplier or any Subcontractor carrying out, or intended to carry out, any aspects of this Agreement on the LUL Network and/or the TfL Premises;

"Remedy Notice" shall have the meaning given to it in Clause 13.3.1;

"Remedial Plan" shall have the meaning given to it in Clause 13.3.1;

"Representative" means a representative appointed by the Supplier, or the Company, as the case may be, in accordance with Clause 20.2;

"Required Approvals" means all relevant approvals and certifications required by LUL Plant Approval in order for a Rail Re-Profiling Machine to operate on the LUL Network (including any approvals and certifications specified in the Machine Specification);

"Required Rating" means a long term, stable credit rating of at least "A+" or better from Standard & Poor's or the equivalent rating from Moody's or Fitch;

"Responsible Procurement Principles" means the seven principles of responsible procurement more particularly described in the GLA Group Responsible Procurement Policy dated March 2006, as updated in January 2008 and as may be further updated from time to time and which is available from the Company on request;

"Retention Period" shall have the meaning given to it in Clause 10.2.2;

"ROGS" means Railways and Other Guided Transport Systems (Safety) Regulations 2006;

"RPIX" means the measure of inflation in the United Kingdom, equivalent to the all items Retail Price Index excluding mortgage interest payments which is, at the date of this Agreement, published on a monthly basis by the Office of National Statistics;

"RSSB" means the Rail Safety and Standards Board;

"Rule Book" means the document with references GE/RT 8000 (including all applicable Modules as defined in GE/RT 8051) issued by RSSB;

"Safety Breach" means a material breach of any obligation under this Agreement caused by the gross incompetence of or wilful default by the Supplier (or anyone employed by or acting on behalf of the Supplier) or any of its agents which has materially affected the safe operation of the LUL Network or the safety of the Company's customers, staff or any other person;

"Safety Plan" means the safety plan specific to this Agreement produced by the Supplier and approved by the Company in accordance with Clause 5.3.2;

"Secretary of State" means the Secretary of State for Transport, or any successor to all or part of his functions in relation to the operation of the railways;

"Security Interest" means any mortgage, charge, assignment, pledge, lien, hypothecation, security interest, title retention or other encumbrance;

"Service Payments" means the payments to be made by the Company to the Supplier in respect of the provision of the Services as set out in Schedule 3 (Service Payments);

"Service Payments Schedule" means Part C of Schedule 3 (Service Payments);

"Services" means the services, works and activities to be performed by the Supplier as stated in this Agreement, the Works Information, the Machine Specification and each Works Scope Document and any Additional Services requested by the Company in accordance with this Agreement;

"Services Period" means the period running from the Commencement Date and ending at the time at which the Services cease in accordance with the terms of this Agreement;

"Shift" means a defined period of time during which the Supplier will be required to provide Services, as confirmed to the Supplier by the Company in a Works Scope Document in accordance with the process set out in the Works Information;

"Shift Completion Certificate" means a certificate in a form as notified by the Company to the Supplier from time to time that certifies that a Shift is a Completed Shift;

"Shift Report" means the form to be completed after each Shift by the Supplier's Representative and to be given to the Company's Representative in accordance with this Agreement;

"Specified Area" means as defined by the PWT-EH and or Protection Master;

"Starting Point" means the station or other location where a Shift is scheduled to start, as set out in the Works Scope Document;

"Sterling" means the lawful currency from time to time of the United Kingdom;

"Subcontract" means any contract awarded by, or to be awarded by, the Supplier for any work to be performed as part of, or in connection with, the performance of the Supplier's obligations under this Agreement, and, unless the context herein requires, includes a subcontractor or supplier of any such person;

"Subcontractor" means any party to a Subcontract other than the Supplier;

"Supplier Event of Default" means any of the events set out in Clause 13.1;

"Supplier Public Procurement Termination Event" means the Supplier has, as at the Commencement Date, been in one of the situations referred to in Regulation 57(l) of the Public Contracts Regulations 2015 and should therefore have been excluded from the procurement procedure in accordance with those regulations;

"Supplier's Representative" means any person appointed as such by the Supplier in accordance with Clause 20.2;

"Supplier's Group" means the Supplier and any member of its Group from time to time;

"Supplier's Records" shall have the meaning given to it in Clause 10.2.1;

"Survey Reporting System" means Schweerbau's Work and Quality Reporting System or such other substitute system as the Company and the Supplier may agree from time to time;

"Taxes", "Tax" and "Taxation" means all present and future taxes, charges, imposts, duties or levies of any kind whatsoever, payable at the instance of or imposed by any Government Authority, together with any penalties, additions, fines, surcharges or interest thereon;

"Technical Specifications for Interoperability" means the Technical Specifications for Interoperability adopted pursuant to EU Directive 2001/16/EC;

"TfL" or "Transport for London" means the body established pursuant to section 154 of the GLA Act and any successor body;

"TfL Group" means Transport for London, a statutory body set up by the GLA Act and any of its subsidiaries and their subsidiaries;

"TfL Premises" means any property, including railway infrastructure, owned by or under the control or supervision of the Company and/or any member of the TfL Group;

"TfL Standards" means the various standards documents and associated codes of practice produced by the Company or the TfL Group that shall, upon reasonable notice to the Supplier, apply to the Services from time to time, and includes without limitation any standards documents and associated codes of practice referred to in the Machine Specification or the Works Information;

"Transparency Commitment" means the transparency commitment stipulated by the UK government in May 2010 (including any subsequent legislation) in accordance with which the TfL Group is committed to publishing its contracts, tender documents and data from invoices received;

"TUPE" means The Transfer of Undertakings (Protection of Employment) Regulations 2006;

"Works Information" means the works information for the Supply and Operation of Rail Re-Profiling Services (TfL Reference Number: TfL01087) set out in Part B of Schedule I;

"Works Scope Document" means the works scope document to be provided that is filled in by the Company prior to a Shift with instructions for the Rail Re-Profiling Works to be undertaken during that Shift;

"Variation" means any addition, omission or other change whatsoever to or in respect of this Agreement including (without limitation) the Services, or the requirements of the Performance Regime;

"Variation Procedure" means the procedure for amending this Agreement, as detailed in Clause 6;

"Variation Quote" has the meaning given to it in Clause 6.2;

"Variation Valuation" has the meaning given to it in Clause 6.4;

"VAT" means

(a) any tax imposed in compliance with the Council Directive of 28 November 2006 on the common system of value added tax (EC Directive 2006/112); and

(b) any other tax of a similar nature, whether imposed in a member state of the European Union in substitution for, or levied in

addition to, such tax referred to in paragraph (a), or imposed elsewhere; and

"Working Day" means a weekday (other than Saturday and Sunday) on which banks are open for domestic business in the City of London.

## 1.2 Construction

Save where the contrary is indicated:

- 1.2.1 the contents page and headings in this Agreement are for convenience only and shall not affect its interpretation;
- 1.2.2 where appropriate, the singular includes the plural and vice versa;
- 1.2.3 a reference to a Clause or to a schedule shall be to a Clause of or, as the case may be, a schedule, to this Agreement and references to this Agreement include its recitals and schedules;
- 1.2.4 references to (or to any specified provision of) this Agreement or any other document shall be construed as references to this Agreement, that provision or that document as in force for the time being and as from time to time amended, supplemented, novated or varied in accordance with the terms hereof or, as the case may be, with the consent of the relevant parties (and where such consent is, by the terms of this Agreement or the relevant document, required to be obtained as a condition to such amendment being permitted, such prior written consent);
- 1.2.5 if a period of time is specified as "from" or "within" a given day, or "from" or "within" the day of an act or event, it shall be calculated exclusive of that day;
- 1.2.6 a reference to "includes" or "including" shall mean "includes without limitation" or "including without limitation";
- 1.2.7 references to a Party or person shall include their successors, transferees, legal, personal representatives and permitted assignees;
- 1.2.8 reference to Applicable Laws or also includes a reference to such Applicable Laws or Industry Standards as from time to time amended, extended or re-enacted;
- 1.2.9 references to a "regulation" include any present or future regulation, rule, directive, requirement, request or guideline (whether or not having the force of law) of any Government Authority or Relevant Consents Authority;
- 1.2.10 references to a statute shall include any subordinate legislation made from time to time under it and shall be construed so as to refer to such statute as it is amended or modified from time to time;

- 1.2.11 a reference to one gender includes other genders;
- 1.2.12 references to assets include business, undertakings, securities, properties, revenues or rights of every description and whether present or future, actual or contingent; and
- 1.2.13 references to this Agreement shall include reference to the Schedules, the Annexures and any document or information contained in electronic format on any CD-ROM dated the date of this Agreement and initialled by each Party to identify that CD-ROM and the documents or information contained in it as forming part of a Schedule or Annexure.

## **2 CONFLICTS AND DISCREPANCIES**

### **2.1 Contract Precedence**

2.1.1 Unless expressly stated otherwise, where there is any conflict, error, inconsistency or discrepancy between the documents forming part of this Agreement, the following order of precedence shall apply:

- (a) the Clauses of this Agreement;
- (b) the Schedules to this Agreement (equal priority but subject to Clause 2.1.2); and
- (c) any other document referred to in, or incorporated by reference into, this Agreement.

2.1.2 The documents that make up the Schedules shall be taken as being mutually explanatory of one another. In the event of any conflict between any provision of the Clauses of this Agreement and a provision of any other Schedule then the Clauses of this Agreement shall take precedence except where the conflicting part of the other Schedule is explicitly expressed to take precedence over any specific part of the Clauses of this Agreement.

### **2.2 Supplier's acknowledgements regarding discrepancies and errors**

The Supplier confirms to the Company that as at the date of this Agreement it has considered in detail this Agreement and has satisfied itself:

2.2.1 that no conflicts, inconsistencies, discrepancies or errors exist within this Agreement;

2.2.2 that it has:

- (a) obtained all necessary information as to the risks, contingencies and all other circumstances which may influence or affect the level of payment arising under or in connection with this Agreement; and

(b) satisfied itself that the performance of its obligations under and in accordance with this Agreement will be in accordance with all Applicable Laws; and

2.2.3 as to the feasibility of the Works Information with respect to the performance of the Services.

## 2.3 Notification of errors and inconsistencies

2.3.1 Without prejudice to Clause 2.3.3, the Supplier shall notify the Company in writing forthwith upon becoming aware of any conflict, inconsistency, discrepancy or error within this Agreement that cannot be resolved in accordance with Clause 2.1 and the Supplier shall provide with the notice detailed written proposals for resolving such conflict, inconsistency, discrepancy or error. The Company shall decide how such conflict, inconsistency, discrepancy or error should be dealt with and shall notify the Supplier of such decision within fifteen (15) Working Days of the Supplier's notice of such conflict, inconsistency, discrepancy or error. The Supplier shall immediately proceed to comply with such decision. The Company's notification under this Clause 2.3.1 shall constitute a Variation provided that the Supplier shall not be entitled to any increase in the Service Payment or any other payment, compensation, extension of time or relief in respect of such Variation instructed in accordance with this Clause 2.3.1.

2.3.2 Without prejudice to Clause 2.3.1 and subject to Clause 2.3.3, whenever a conflict, inconsistency, discrepancy or error appears within this Agreement, the Parties shall consult with each other over, and seek to agree, the manner in which the conflict, error, inconsistency or discrepancy should be resolved.

2.3.3 Where any conflict, inconsistency, discrepancy or error appears within the TfL Standards, or between a TfL Standard and the equivalent Industry Standard, each Party shall notify the other forthwith in writing upon becoming aware of such conflict, inconsistency, discrepancy or error. The Company shall decide how such conflict, inconsistency, discrepancy or error should be dealt with and shall notify the Supplier within fifteen (15) Working Days of receiving or issuing the notice (as the case may be). The Supplier shall comply with such decision in performing the Services. The Company's notification under this Clause 2.3.3 shall constitute a Variation and the provisions of Clause 6 shall apply.

## 3 AGREEMENT DURATION

### 3.1 Duration

This Agreement shall continue for the Agreement Duration and the Supplier shall provide the Services for the duration of the Services Period in accordance with the provisions of this Agreement.

### 3.2 Commencement Date

- 3.2.1 The Supplier shall obtain the Required Approvals for each Rail Re-Profiling Machine as soon as reasonably practicable.
- 3.2.2 The Company shall notify the Supplier of the Commencement Date for provision of the Services promptly upon the Supplier obtaining the Required Approvals for the first Rail Re-Profiling Machine and the Supplier shall provide the Services from the Commencement Date.
- 3.2.3 The Supplier acknowledges that the Commencement Date shall always be the first day of a Payment Period.
- 3.2.4 The Supplier shall ensure that the relevant Rail Re-Profiling Machine(s) has arrived at the Designated Depot specified by the Company in order to provide the Services from the Commencement Date.
- 3.2.5 Where the Supplier has obtained the Required Approvals in respect of only one Rail Re-Profiling Machine as at the Commencement Date:
  - (a) the Company shall notify the Supplier of the commencement date for provision of the Services for the second Rail Re-Profiling Machine (the "Second Commencement Date") promptly upon the Supplier obtaining the Required Approvals for the second Re-Profiling Machine;
  - (b) the Supplier shall provide the Services using both Re-Profiling Machines from the Second Commencement Date;
  - (c) the Supplier acknowledges that the Second Commencement Date shall always be the first day of a Payment Period; and
  - (d) the Supplier shall ensure that the second Rail Re-Profiling Machine has arrived at the Designated Depot specified by the Company in order to provide the Services from the Second Commencement Date.

### 3.3 Extension

The Company may on no less than two (2) months' prior written notice to the Supplier, extend the term of this Agreement beyond the Expiry Date by a period no longer than the Extension Limit.

## 4 REPRESENTATIONS AND WARRANTIES

### 4.1 Representation and Warranties by the Supplier

- 4.1.1 The Supplier provides the representations and warranties in Clause 4.1.2 to the Company. The Supplier acknowledges and agrees that

the Company is relying on the representations and warranties set out below and is entering into this Agreement on the basis of them.

4.1.2 The Supplier represents and warrants to the Company that as at the date of this Agreement:

- (a) the Supplier is a company properly organised and validly existing under the laws of Germany as a limited partnership. It has the power, capacity and legal right to carry on its business as it is now being conducted and has all licences, consents, approvals, permits, authorisations, exemptions and certifications required for that purpose;
- (b) the Supplier has power, capacity and legal right to enter into and perform its obligations and exercise its rights under this Agreement and any related ancillary documents to which it is a party, and any necessary corporate, shareholder and other action has been taken to authorise the entry into, performance and delivery of this Agreement and any related ancillary documents to which it is a party;
- (c) this Agreement and any related ancillary documents to which it is a party constitute its legal, valid and binding obligations;
- (d) entering into this Agreement and performing its obligations or exercising its rights under this Agreement will not:
  - (i) conflict with the Supplier's Memorandum and Articles of Association;
  - (ii) conflict with or result in a breach of any existing contract to which the Supplier is a party or in the creation of any Security Interest over the Supplier or any of its property;
- (e) as at the date of this Agreement, it has not been in any of the situations referred to in Regulation 57(l) of the Public Contracts Regulations 2015 and should therefore have been excluded from the procurement procedure in accordance with those regulations or Regulation 80(2) of the Utilities Contracts Regulations 2016;
- (f) to the best of the Suppliers' knowledge and except as disclosed on or before this statement of fact is made, no legal proceedings are pending or to the Supplier's knowledge threatened against it which if decided against the Supplier would have a material adverse effect upon the Supplier's financial condition or business or its ability to perform its obligations under this Agreement;

- (g) to the best of the Supplier's knowledge no information is in existence at the time this statement of fact is made which would cause the Company not to enter into this Agreement if the Company were aware of that information;
- (h) no Insolvency Event has occurred or is reasonably likely to occur in relation to the Supplier; and
- (i) none of it, any other member of its Group nor, to the best of the Supplier's knowledge, any Subcontractor of the Supplier has committed any Prohibited Act.

#### 4.2 Repetition of Warranties

The Parties agree that the Supplier's representations and warranties set out in paragraphs (f) to (i) (inclusive) of Clause 4.1.2 shall be deemed to be repeated by the Supplier on the Commencement Date and annually thereafter.

### 5 THE SERVICES

#### 5.1 Service Provision

The Supplier shall carry out the Services in accordance with the terms of this Agreement.

#### 5.2 Standards of Performance

5.2.1 The Supplier shall provide the Services and fulfil its obligations under this Agreement:

- (a) in accordance with:
  - (i) all Applicable Laws and applicable TfL Standards;
  - (ii) the requirements of:
    - (A) the Performance Regime;
    - (B) the Works Information, including the Programme of Works as issued by the Company;
    - (C) the Management Quality Plan;
    - (D) the Safety Plan; and
    - (E) the QUENSH Contract;
- (b) with the degree of diligence, care and skill reasonably to be expected of a supplier holding itself out as having the competence, expertise and resources necessary for the proper performance of the Services; and

- (c) in a safe manner and free (to the extent reasonably possible using the best modern design and engineering principles and practices) from any risk to the health and wellbeing of persons using or maintaining the Company's property or railway infrastructure.

### 5.3 Quality and Safety Plans

5.3.1 The Supplier shall provide the Company with a draft management quality plan specific to this Agreement that:

- (a) explains how the Supplier intends to deliver the Services throughout the Agreement Duration;
- (b) sets out any specific arrangements that the Supplier will put in place in order to deliver the Services; and
- (c) explains the processes and arrangements that the Supplier intends to put in place during the initial mobilisation phase of the Services,

by no later than the date falling four (4) weeks after the date of this Agreement. The Company acting reasonably shall notify the Supplier of any amendments required to the draft management quality plan within one (1) month of receiving the draft management quality plan from the Supplier, and the Supplier shall incorporate such amendments. The Supplier shall provide the Company with the final version of the management quality plan (in hard copy and electronic copy form) within fourteen (14) days of the Company notifying the Supplier of any amendments and this shall be deemed to be the "Management Quality Plan" as defined for the purposes of this Agreement.

5.3.2 The Supplier shall provide the Company with a draft safety plan specific to this Agreement that:

- (a) explains how safety will be managed by the Supplier; and
- (b) sets out the measures that the Supplier will put in place to ensure compliance with all Applicable Laws and TfL Standards in relation to safety,

by no later than the date falling four (4) weeks after the date of this Agreement. The Company acting reasonably shall notify the Supplier of any amendments required to the draft safety plan within one (1) month of receiving the draft safety plan from the Supplier and the Supplier shall incorporate such amendments. The Supplier shall provide the Company with the final version of the safety plan (in hard copy and electronic copy form) within fourteen (14) days of the Company notifying the Supplier of any amendments and this shall be deemed to be the "Safety Plan" as defined for the purposes of this Agreement.

5.3.3 The Supplier shall update the Management Quality Plan and the Safety Plan as required to reflect any changes to arrangements and processes during the Agreement Duration.

#### 5.4 Licences, Consents and Training

5.4.1 The Supplier shall obtain and maintain all consents, approvals, authorisations, acceptances, certificates, licences, exemptions, registrations, filings, permits and other matters give all notices and pay all fees, in each case which are required or necessary for the proper performance of the Supplier's duties and obligations under this Agreement ("Relevant Consents"). In particular:

(a) the Supplier shall take all relevant steps in accordance with Clause 7 to ensure that the Supplier is appropriately authorised to access the LUL Network in order to perform the Services; and

(b) the Supplier shall ensure that its drivers hold all appropriate licences and certifications required in order to operate each Rail Re-Profiling Machine on the LUL Network in accordance with the Machine Specification and the Works Information.

5.4.2 The Supplier shall procure that all of its employees or representatives that are involved in the provision of the Services are trained to the appropriate competence in order to carry out the Services.

#### 5.5 Key Personnel

5.5.1 The Supplier shall appoint the Key Personnel set out at Schedule II (Key Personnel).

5.5.2 The Supplier shall ensure that each of the Key Personnel devotes substantially their whole time and effort to the performance of the Services. The Supplier shall take all reasonable steps to ensure it retains the services of the Key Personnel.

5.5.3 The Supplier shall supply the Company's Representative with the licences of the Key Personnel who support the operation of the Rail Re-Profiling Machine(s) supplied.

5.5.4 The Supplier shall inform the Company of the identity and background of any replacements for any of the Key Personnel as soon as a suitable replacement has been identified. Any replacement shall be as, or more, qualified and experienced as the previous incumbent and fully competent to carry out the tasks assigned to the Key Personnel whom he or she has replaced. The Customer shall be entitled to interview any such person and may object to any such proposed appointment within ten (10) Working Days of being informed of or meeting any such replacement if, in

its reasonable opinion, it considers the proposed replacement to be unsuitable for any reason.

5.5.5 The Supplier shall, at its own expense:

(a) ensure that all of the Supplier's personnel possess the appropriate skills, qualifications and experience to perform the tasks assigned to them, and that they shall be available at such times as are necessary to perform the Services in accordance with this Agreement; and

(b) ensure that all of the Supplier's personnel are in possession of valid work permits if they are non-European Community nationals.

5.5.6 Without prejudice to the Supplier's other obligations under this Agreement, where training of any or all of the Supplier's personnel is required for the purposes of performance of this Agreement, the Supplier shall not assign any of the Supplier's personnel to the performance of this Agreement unless and until such Supplier's personnel have satisfactorily completed such training.

5.6 Change in scope of Services

5.6.1 The Company may at any time request a change of the scope of the Services by instructing a Variation and the provisions of Clause 6 shall apply.

5.6.2 If the Company makes a request to reduce the scope of Services pursuant to Clause 5.6.1, the reduced scope of Services becomes effective on the date specified in the Variation and, where applicable, the Service Payment shall be reduced accordingly to reflect such reduction in Services.

5.7 Survey Reporting System

5.7.1 The Supplier shall:

(a) use the Supplier's Survey Reporting System for the Agreement Duration to produce Shift Reports in accordance with the Works Information and the Performance Regime; and

(b) bear all costs associated with the input, processing, transmission, maintenance and support of the Supplier's Survey Reporting System.

## **6 VARIATIONS**

6.1 Any Variation to this Agreement shall be agreed by the Company's Representative and the Supplier in accordance with the Variation Procedure.

6.2 Right to request a quote

- 6.2.1 The Company's Representative may, at any time prior to instructing a Variation, request the Supplier to provide, in writing, a quotation in respect of any Variation envisaged. Such quotation is to detail any adjustment to the Service Payment as a result of implementing the proposed Variation (the "Variation Quote").
- 6.2.2 The Supplier shall:
- (a) provide the Company's Representative with a Variation Quote within five (5) Working Days (or such longer period as the Company's Representative may agree) of a request from the Company's Representative; and
  - (b) hold its Variation Quote open for ninety (90) Working Days and shall endorse the Variation Quote to this effect.
- 6.2.3 The Company's Representative may, in its absolute discretion, accept the Variation Quote and instruct a Variation in accordance with Clause 6.3.1, and the remaining provisions of this Clause 6.2 shall apply in respect of such Variation.
- 6.2.4 The Supplier shall be responsible for all costs and expenses associated with the preparation of any Variation Quote.

### 6.3 Right to vary

- 6.3.1 The Company's Representative may at any time instruct the Supplier in writing to proceed with a Variation of any kind in accordance with the provisions of this Clause 6.3.
- 6.3.2 Upon instruction of a Variation by the Company's Representative, the Supplier shall carry out such Variation and be bound by the terms of this Agreement in so doing, as though the Variation was stated in this Agreement.
- 6.3.3 Nothing in this Clause 6.3 shall prevent the Supplier from making a proposal to the Company's Representative for a Variation but no Variation so proposed shall be carried out by the Supplier except as directed in writing by the Company's Representative.

### 6.4 Valuation of Variations

- 6.4.1 As soon as possible after having received any instruction under Clause 6.3.1, the Supplier shall notify the Company's Representative if, in the Supplier's opinion, the Variation will involve an adjustment to the Service Payment (the "Variation Valuation").
- 6.4.2 Subject to Clauses 6.4.3 and 6.4.4, the Variation Valuation shall, if not the subject of a Variation Quote which has been accepted by the Company's Representative in accordance with Clause 6.2.3, be determined on a fair and reasonable basis in all the circumstances reflecting, so far as possible, the then current market rates. Due

account shall be taken of any partial performance of this Agreement which is rendered useless by any such Variation.

6.4.3 In respect of costs incurred / to be incurred by a third party, the basis of the valuation of this element of the Variation shall be a dated quotation from the third party, to which a ten per cent (10%) addition, to cover all overheads and profit, may be added. Where the Variation relates to goods, works or services which are significant in value and may be provided by a number of different organisations, the Company's Representative may request that the Supplier provides three (3) dated quotations and for the value of the Variation to be based on the one that provided best value.

6.4.4 The Supplier shall not be entitled to any increase in the Service Payment with respect to any Variation to the extent that it was directly or indirectly caused by or resulted from any act, neglect, default or breach of this Agreement by the Supplier its Subcontractors or suppliers or the directors, agents, representatives or employees of any of them or to the extent that the Supplier has failed to take all reasonable steps to mitigate any actual or potential increase in the Service Payment.

## 6.5 Notice of variations

6.5.1 When instructing any Variation, the Company's Representative shall, to the extent possible, give the Supplier such reasonable notice as will enable him to make his arrangements accordingly.

## 6.6 Progress with variations

6.6.1 The Supplier shall, on receipt of an instruction from the Company's Representative to proceed with a Variation, immediately proceed to carry out such Variation in accordance with its terms notwithstanding that the Variation Valuation has not yet been determined. The carrying out of the Variation by the Supplier shall not, without the prior written consent of the Company, be delayed pending determination of the Variation Valuation in accordance with Clause 6.4.2.

6.6.2 The Parties shall enter into such amendments to this Agreement to give effect to any Variation instructed by the Company's Representative pursuant to Clause 6.3.1.

## **7 ACCESS TO LUL Network**

7.1 Subject to the provisions of this Clause 7, the Company shall grant the Supplier such access to the LUL Network as is reasonably required by the Supplier for the performance of the Services.

7.2 The Supplier acknowledges that the Company does not guarantee uninterrupted or exclusive possession to any parts of the LUL Network

and that its access to some parts of the LUL Network may be limited in accordance with this Agreement.

7.3 The Supplier undertakes that while any of its employees or representatives are located at a Designated Depot or any other TfL Premises, such employees or representatives shall:

7.3.1 comply with all rules and/or policies in existence from time to time in relation to the Designated Depot or TfL Premises, including any health and safety rules and security requirements; and

7.3.2 not disrupt the commercial and industrial operation of the Company or its subcontractors,

and the Supplier shall procure that any employees or representatives of any Subcontractors comply with the same.

7.4 Save to the extent reasonably required in the performance of the Services or expressly agreed by the Company and with all reasonable mitigation measures in place, when performing the Services the Supplier shall not interfere with or obstruct any public or private rights or property (including the LUL Network, TfL Premises, any other property belonging to or leased by the Company, the Company's neighbours' property, railway operations and traffic, road traffic and highways).

7.5 The Supplier shall ensure that no person employed on its behalf trespasses beyond the agreed limits of any specified working area(s) or access routes at the Designated Depot or other TfL Premises.

7.6 Where the Supplier requires access to the LUL Network to carry out the Services it shall:

7.6.1 apply for access at the earliest available opportunity; and

7.6.2 provide the Company's Representative without delay with such additional information as the Company's Representative may reasonably require in respect of the Supplier's access requests

7.7 The Supplier shall indemnify and keep indemnified the Company in respect of any claims by third parties relating to the disruption, delay or cancellation of their access due to the actions or omissions of the Supplier.

7.8 Prior to returning any part of the LUL Network to the Company at the end of any period of booked access, the Supplier shall clear away and remove all of its facilities, plant, equipment, rubbish and surplus goods and materials and shall leave that part of the LUL Network in a clean and workmanlike condition to the satisfaction of the Company's Representative.

7.9 If the Designated Depot is unavailable for any reason, the parties shall work together and make all reasonable efforts to mitigate the effects of the unavailability of the Designated Depot in order to minimise the impact on the Supplier's delivery of the Services.

## **8 PERFORMANCE REGIME**

### **8.1 Obligations under the Performance Regime**

The Supplier's performance of the Services under this Agreement shall be measured in accordance with Schedule 2 (Performance Management & Escalation Procedure).

### **8.2 Liquidated Damages**

8.2.1 If any Shift is recorded as a Failed Shift in accordance with either paragraph 1.1(b) or paragraph 1.2(e) of Schedule 2, the Supplier shall pay to the Company Liquidated Damages (as compensation for loss and not as a penalty) at the rate set out in paragraph 1.3 of Schedule 2 and payable in accordance with Clause 9.

8.2.2 The Liquidated Damages shall be subject to the application of the Indexation Adjustment set out in Part D (Indexation Adjustment) of Schedule 3 (Service Payments) for any extension of this Agreement pursuant to Clause 3.3.

8.2.3 The Parties acknowledge and agree that the amount of Liquidated Damages under this Agreement:

(a) serves to protect the Company's legitimate business interests, including the need to have the Services performed on-time and to an appropriate standard in accordance with the requirements of the Performance Regime; and

(b) constitutes a genuine pre-estimate of the loss likely to be suffered by the Company as a result of a Failed Shift.

8.2.4 The Company shall be entitled to set-off any undisputed amount of Liquidated Damages payable to it under this Clause 8.2 against the next Service Payment payable by it to the Supplier.

8.2.5 The Company's entitlement to Liquidated Damages under this Clause 8.2 shall, save as provided in paragraph 2 (Management Escalation Procedure) of Schedule 2 and without prejudice to the Company's rights of termination under Clause 13, be the sole and exclusive remedy of the Company in relation to the occurrence of a Failed Shift.

## **9 PAYMENTS**

### **9.1 Amount of Service Payments**

9.1.1 The Company shall pay Service Payments to the Supplier in accordance with this Clause 9 and Schedule 3 (Service Payments).

9.1.2 No Service Payment shall be made unless and until:

(a) the Performance Bond is in place; and

- (b) the Services Period has commenced.

## 9.2 Payment applications

- 9.2.1 At the beginning of each Payment Period (starting from the Payment Period after the Commencement Date) the Supplier shall submit (by no later than the first Friday following the end of subsequent Payment Period) a payment application (a "Payment Application") to the Company's Representative at the address specified in Clause 39.2 which shall show the following amounts separately and in aggregate:
  - (a) the relevant amounts due to the Supplier in respect of the Services provided by the Supplier in the immediately preceding Payment Period (as calculated in accordance with Part A and Part C of Schedule 3); and
  - (b) any amounts due in accordance with the principles set out in paragraph 2 of Part B of Schedule 3, in respect of any properly completed Variation in the immediately preceding Payment Period (or, where the Parties have agreed that the Variation shall be paid on a sectional basis, in respect of any properly completed section of the Variation in the immediately preceding Payment Period) provided that the Supplier's applications sets out details and value of any Variation payment being sought.
- 9.2.2 Each Payment Application shall specify the sum that the Supplier considers will become due on the payment due date and the basis upon which that sum is calculated. The Supplier shall submit any supporting documents that are reasonable necessary to enable the Company's Representative to check and validate the Payment Application.
- 9.2.3 All Payment Applications shall clearly show the Contract Reference Number and any associated Variation. Supporting documentary information shall be submitted to the Company's Representative for all Payment Applications submitted by the Supplier. The Company's Representative shall from time to time agree with the Supplier the detailed information required in relation to all such Payment Applications and the Supplier shall provide such information as is reasonably required.
- 9.2.4 Upon receipt of a Payment Application, the Company's Representative shall consider the Payment Application, and assess and verify the amount due in a timely manner in accordance with Clause 9.3.

## 9.3 Payment Certification

- 9.3.1 The Company's Representative shall notify the Supplier within fourteen (14) days of receipt of the Payment Application of:

(a) the amount (if any) the Company's Representative considers to be due at the payment due date (the "Invoice Amount"); and

(b) the basis on which the Invoice Amount was calculated,

a ("Payment Certification"). It is immaterial for the purposes of this Clause 9.3.1 that the Invoice Amount may be zero.

9.3.2 If the Company fails to issue a Payment Certification to the Supplier within fourteen (14) days of receipt of the Payment Application the Supplier shall provide written notice to the Company notifying the Company of such failure. If the Company then fails to issue a Payment Certification to the Supplier within seven (7) days of receipt of such written notice, the Payment Certification shall be regarded as issued (with the Invoice Amount being deemed to be the sum specified in the Payment Application) for the purposes of Clause 9.3.1 on the day immediately following the expiry of such seven (7) day period.

9.3.3 Any dispute between the Company and the Supplier in relation to the Payment Certification shall be resolved in accordance with Clause 44

#### 9.4 VAT Invoice

Within ten (10) days of receipt of a Payment Certification, the Supplier shall issue a VAT invoice for the Invoice Amount stated in that Payment Certification to the Company's Representative, accompanied by a copy of the Payment Certification.

#### 9.5 Payment due date

9.5.1 The final date for payment ("Final Date for Payment") shall be ten (10) days after the date on which the Company's representative received an appropriate VAT invoice in accordance with Clause 9.4.

9.5.2 Subject to Clause 9.7, the Company shall pay to the Supplier the Invoice Amount on or before the Final Date for Payment.

#### 9.6 Pay Less Notice

9.6.1 If the Company intends to pay less than the Invoice Amount, the Company or the Company's Representative (as the case may be) should notify the Supplier in writing not later than one (1) day prior (the "Prescribed Period") to the Final Date for Payment of:

(a) the amount (if any) that it considers to be due on the date the notice is served and the basis upon which that sum is calculated; or

(b) if there is more than one basis, each basis and the amount attributable to it.

9.6.2 It is immaterial for the purposes of this Clause 9.6.1 that the amounts referred to in Clause 9.6.1(a) may be zero. Where a notice is given under this Clause 9.6, the Company's obligation to pay the Invoice Amount under Clause 9.5 applies only in respect of the sum specified pursuant to this Clause 9.6.

9.6.3 Any dispute between the Company and the Supplier shall be resolved in accordance with Clause 44.

#### 9.7 Payments Owed by the Supplier

Where a Payment Application shows a net amount owed by the Supplier to the Company, the Supplier shall pay the amount to the Company within thirty (30) days of such application being provided to the Company's Representative or, at the option of the Company's Representative, carry forward that amount to the next Payment Application in reduction of amounts which would otherwise have been owed by the Company to the Supplier.

#### 9.8 Payment Recovery

Any payment made by the Company under this Agreement does not prevent the Company from recovering any amount over-paid or wrongfully paid however such payment may have arisen, including but not limited to, those amounts paid to the Supplier by mistake of law or fact.

#### 9.9 Method of Payment

All payments required to be made under this Agreement will be made for value on the due date in cleared funds to such account at a bank in the United Kingdom as the payee shall have notified to the payer by not less than three (3) Working Days' notice, free and clear of any deduction, withholding, set off or counterclaim whatsoever except to the extent deduction is required by any Applicable Laws or is in accordance with the express provisions of this Agreement. If the due date for any payment falls on a day which is not a Working Day, payment shall be made on the next Working Day thereafter unless such day would fall in another Payment Period, in which case payment shall be made on the immediately preceding Working Day.

#### 9.10 Late Payment

Save where otherwise specifically provided, where any payment or sum of money due from one Party to the other Party under any provision of this Agreement is not paid in accordance with the timescales set out in this Agreement, and providing that there has been no Dispute in respect of the sums therein, without prejudice to the Parties' other rights under this Agreement, that sum shall bear simple interest thereon from the due date until payment is made in full at the Default Interest rate current at the date a payment under this Agreement becomes overdue. The Parties agree that this is a substantial remedy for late payment of any sum payable under this Agreement in accordance with section 8(2) of the Late Payment

of Commercial Debts (Interest) Act 1998. The Supplier is not entitled to suspend its provision of the Services under this Agreement as a result of any sums being outstanding.

#### 9.11 Payments Inclusive

Save as expressly provided otherwise in this Agreement, the Service Payments payable by the Company are inclusive of all costs, expenses and disbursements incurred by the Supplier in connection with this Agreement.

#### 9.12 Payments in Sterling

The Service Payments are denominated in, and shall (together with all payments payable by any Party under this Agreement) be made in, Sterling.

#### 9.13 Value Added Tax

9.13.1 All amounts payable by one Party to another Party under this Agreement, unless otherwise stated, shall not include VAT. To the extent that VAT is properly chargeable in respect of any amount payable and the Supplier is liable to account for such VAT to any Competent Authority, such VAT shall be charged at the rate in force on the date of the relevant Payment Application and will be shown as a separate item on all Payment Applications and shall accordingly be paid by the Company to the Supplier. To the extent that VAT is properly chargeable in respect of the Service Payments and the Company is liable to account for such VAT to any Competent Authority, the Service Payments shall not be affected by such VAT and no additional payments in respect of such VAT shall be made by the Company to the Supplier pursuant to this Agreement but the Company shall instead account for such VAT to the relevant Competent Authority.

9.13.2 Where under this Agreement one Party is to reimburse or indemnify another Party in respect of any payment made or cost incurred by the other Party, the first Party shall also reimburse any VAT paid by the other Party in question which forms part of its payment made or cost incurred to the extent such VAT is not available for credit for the other Party in question (or for any person with whom the indemnified party is treated as a member of a group for VAT purposes).

9.13.3 Where under this Agreement any rebate or repayment of any amount is payable by one Party to another Party, and the first Party is entitled as a matter of law or of HM Revenue and Customs practice to issue a valid VAT credit note, such rebate or repayment shall be paid together with an amount representing the VAT paid on that part of the consideration in respect of which the rebate or repayment is made, and the first Party shall issue an appropriate VAT credit note to the other Party in question.