

**DATED** \_\_\_\_\_ **2015**

**LONDON UNDERGROUND LIMITED**  
and  
**KIROW ARDELTA GMBH**

---

**MANUFACTURE AND SUPPLY**  
**AGREEMENT**  
**for a modular points and crossings delivery**  
**and installation system**

---

## TABLE OF CONTENTS

Clause	Headings	Page
1.	DEFINITIONS AND INTERPRETATION .....	1
2.	EXERCISE OF RIGHTS AND PERFORMANCE OF OBLIGATIONS BY A THIRD PARTY .....	11
3.	PURCHASE.....	11
4.	MANUFACTURER'S GENERAL OBLIGATIONS .....	12
5.	CHANGE IN LAW .....	13
6.	TECHNICAL REQUIREMENTS AND DEVELOPMENT OF DESIGN.....	13
7.	CONFLICTS AND DISCREPANCIES.....	14
8.	CONTRACT PROGRAMME.....	15
9.	KEY PERSONNEL, MEETINGS AND REPORTS .....	16
10.	MANUFACTURING FACILITIES AND RIGHTS OF AUDIT AND INSPECTION .....	17
10A	DESIGN/BUILD VERIFICATION.....	19
11.	YEAR ONE CONSUMABLES, CRITICAL SPARES AND CONTINUING SUPPORT .....	20
12.	TESTING, ACCEPTANCE AND DELIVERY PROCEDURE.....	20
13.	LIQUIDATED DAMAGES.....	24
14.	NOT USED .....	25
15.	EXTENSIONS OF TIME .....	25
16.	TRANSFER OF TITLE AND RISK.....	27
17.	DEFECT RECTIFICATION.....	28
18.	SUSPENSION.....	29
19.	HEALTH AND SAFETY .....	30
20.	PAYMENT .....	30
21.	VAT.....	33
22.	SECURITY .....	34
23.	VARIATION PROCEDURE.....	35
24.	INTELLECTUAL PROPERTY RIGHTS .....	36
25.	TERMINATION .....	36
26.	SURVIVAL OF CLAUSES.....	41
27.	FORCE MAJEURE.....	41
28.	INSURANCE.....	42
29.	INDEMNITIES AND LIMITATIONS ON LIABILITY .....	43
30.	CONFIDENTIALITY .....	44
31.	FREEDOM OF INFORMATION.....	46
32.	DISPUTE RESOLUTION .....	46
33.	PROHIBITED ACTS.....	46

34.	ASSIGNMENT, TRANSFER AND SUB-CONTRACTING BY THE MANUFACTURER.....	47
35.	ASSIGNMENT AND NOVATION OR GRANTING OF SECURITY BY THE PURCHASER.....	47
36.	NOTICES .....	48
37.	ENTIRE AGREEMENT .....	49
38.	RIGHTS CUMULATIVE WITH THOSE AT LAW .....	49
39.	FURTHER ASSURANCE.....	49
40.	SET-OFF .....	49
41.	CONTRACTUAL AMENDMENTS AND WAIVER .....	50
42.	SEVERANCE .....	50
43.	COSTS .....	50
44.	LANGUAGE.....	50
45.	CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999.....	50
46.	COUNTERPARTS.....	50
47.	GOVERNING LAW AND JURISDICTION .....	50
48.	RESPONSIBLE PROCUREMENT.....	51
49.	CRIME AND DISORDER.....	51
50.	LONDON LIVING WAGE .....	51
51.	DATA TRANSPARENCY.....	52
52.	DATA PROTECTION.....	52
53.	CONFLICT OF INTEREST .....	52
54.	CRIMINAL RECORDS DECLARATION .....	52
55.	BEST VALUE .....	53
56.	WORK RELATED ROAD RISK .....	53
57.	ACCESS.....	57
	<b>SCHEDULE 1A: TECHNICAL REQUIREMENTS .....</b>	<b>59</b>
	<b>SCHEDULE 1B: MANAGEMENT OF DELIVERY.....</b>	<b>60</b>
	<b>SCHEDULE 2: CONTRACT PROGRAMME.....</b>	<b>65</b>
	<b>SCHEDULE 3: YEAR ONE CONSUMABLES, CRITICAL SPARES AND SPECIAL TOOLS.....</b>	<b>66</b>
	<b>SCHEDULE 3A: CONTINUING SUPPORT .....</b>	<b>68</b>
	<b>SCHEDULE 4: CONTRACT PRICE.....</b>	<b>69</b>
	<b>SCHEDULE 5: KEY PERSONNEL .....</b>	<b>76</b>
	<b>SCHEDULE 6: NOT USED.....</b>	<b>77</b>
	<b>SCHEDULE 7: NOT USED.....</b>	<b>78</b>
	<b>SCHEDULE 8: NOT USED.....</b>	<b>79</b>
	<b>SCHEDULE 9: INSURANCE .....</b>	<b>80</b>
	<b>SCHEDULE 11: FORM OF PERFORMANCE BOND .....</b>	<b>88</b>

<b>SCHEDULE 12: FORM OF ADVANCE PAYMENT BOND</b> .....	94
<b>SCHEDULE 13: FORM OF ESCROW AGREEMENT</b> .....	100
<b>SCHEDULE 14: QUENSH</b> .....	119
<b>SCHEDULE 15: NOT USED</b> .....	120
<b>SCHEDULE 16: CONTRACT PARTICULARS</b> .....	121

**BETWEEN:**

- (1) **LONDON UNDERGROUND LIMITED**, (Registered No: 1900907) a company incorporated under the laws of England and Wales whose registered office is at Windsor House, 42-50 Victoria Street, London SW1H 0TL (the **“Purchaser”**); and
- (2) **KIROW ARDELT GMBH**, (Registered No: HRB 26343) a company incorporated under the laws of Germany whose registered office is at Spinnereistr 13, 04179 Leipzig Germany (the **“Manufacturer”**).

**WHEREAS:**

- (A) The Purchaser wishes to procure the Goods for use on the London Underground.
- (B) The Purchaser and the Manufacturer have agreed to enter into an agreement for (among other things) the manufacture and supply of the Goods on the terms and conditions set out hereinafter.

**IT IS AGREED:**

1. **DEFINITIONS AND INTERPRETATION**

1.1 **Definitions**

In this Agreement the following words and expressions shall have the following meanings save where the context requires otherwise:

**“Acceptance for Service”** means:

- (a) in respect of the Plant and Machinery, that it satisfies the Acceptance for Service Criteria and has been accepted by the Purchaser Representative in accordance with Clause 12.4.2 or 12.4.3(ii); and
- (b) in respect of any other item of Goods, that it has been delivered to the Purchaser in accordance with the provisions of this Agreement;

and **“Accept for Service”** and **“Accepted for Service”** shall be construed accordingly;

**“Acceptance for Service Certificate”** means the certificate to be signed by the Parties to evidence Acceptance for Service;

**“Acceptance for Service Criteria”** has the meaning given in Clause 12.4.1;

**“Agreed Qualification”** means a written statement in or attached to an Acceptance for Service Certificate specifying any of the Acceptance for Service Criteria which have not been met;

**“Agreement”** means this Agreement including the Schedules;

**“Applicable Laws”** means, as the context may require, all or any laws, statutes, by-laws, codes of practice which have force of law, 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 this Agreement, any agreement or document referred to herein, any item of Goods, the Training Services and/or the Manufacturer's obligations (including their performance) under this Agreement;

**“Approved Design”** means a design which has achieved Design Approval;

**“Change in Law”** means the coming into effect after the date of this Agreement of any Applicable Law, other than any Applicable Law which was at the date of this Agreement

reasonably foreseeable by an experienced contractor performing works and services similar to those under this Agreement and exercising the foresight that such a contractor ought or ought reasonably to have anticipated at the date of this Agreement;

**"Commencement Date"** means the date specified as such in the Contract Particulars, or if no date is specified, the date specified in a written notice by the Purchaser to the Manufacturer instructing it to commence the provision of works and services under this Agreement;

**"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;

**"Concept Design"** means the concept design more particularly described in Schedule 1A and includes the identification and resolution of Technical Issues;

**"Concept Design Date"** means the date scheduled for achieving Design Approval for the Concept Design as set out in Schedule 16;

**"Condition"** means a condition stated in Schedule 16 as may be further described in Schedule 1A;

**"Confidential Information"** has the meaning ascribed to it in Clause 30.1;

**"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 Manufacturer which shall consist of the Manufacturer's name, the expenditure account code, the expenditure account code description, the SAP document number, the clearing date and the invoice amount;

**"Contract Particulars"** means the contract particulars set out in Schedule 16;

**"Contract Price"** means the amount payable by the Purchaser to the Manufacturer under this Agreement as specified in the Contract Particulars and as further detailed in Schedule 4, as such amount may be amended from time to time pursuant to the this Agreement;

**"Contract Programme"** means the programme set out in Schedule 2 or, where no programme is so included or the included programme has subsequently been revised (and such revisions have been accepted by the Purchaser Representative), the latest programme accepted by the Purchaser Representative pursuant to Clause 8. The latest programme accepted by the Purchaser Representative supersedes previous Contract Programmes;

**"Contractual Acceptance Date"** means, in relation to the Plant and Machinery and each other item of Goods, the date specified in the Contract Particulars for Acceptance for Service and/or Final Acceptance (as applicable) of such Plant and Machinery or other item of Goods as such date may be amended in accordance with this Agreement;

**"Contractual Approval Dates"** means the dates specified in the Contract Particulars for achieving Design Approval;

**"Corrective Action"** has the meaning ascribed to it in Clause 10.6.1;

**"Critical Spares"** means those Spares listed in Schedule 3 Part B;

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

**"Defect"** has the meaning ascribed to it in Clause 17.1;

**"Defect Rectification Period"** has the meaning ascribed to it in Clause 17.1;

**"Delivery"** means the passing of possession of the Plant and Machinery or other item of Goods from the Manufacturer to the Purchaser or (as the case may be) the Owner and **"Deliver"** and **"Delivered"** shall be construed accordingly;

**"Delivery Date"** means the date identified in the Contract Particulars for delivery of the Plant and Machinery to the Delivery Location as such date may be amended in accordance with this Agreement;

**"Delivery Location"** means the Purchaser's depot at Ruislip;

**"Design"** means all design documentation (whether in written or electronic form) produced by or on behalf of the Manufacturer for the Plant and Machinery;

**"Design Approval"** means approval of the Design pursuant to Clause 6.3.2(b);

**"Detailed Design"** has the meaning ascribed to it in Schedule 1A;

**"Engineering Overrun"** means **REDACTED**;

**"Environmental Damage"** means any material injury or damage to persons, living organisms or property (including offence to man's senses) or any pollution or impairment of the environment resulting from the discharge, emission, escape or migration of any substance or energy, noise or vibration save to the extent any of the foregoing are within the requirements of Schedule 1A (Technical Requirements);

**"Escrow Agent"** means NCC Escrow International Limited (Company Number 03081952) or any successor or replacement to all or any of its functions;

**"Escrow Agreement"** means an agreement in the form or substantially in the form set out in Schedule 13;

**"Excepted Liabilities"** means:

- (a) the Manufacturer's liability for death or personal injury; and
- (b) **REDACTED**;

**"Factory Tests"** means the factory tests identified in the Test Plan;

**"Fault Free Running Period"** means the period commencing on the date that the Plant and Machinery has been Accepted for Service by the Purchaser and ending on the date **twelve (12)** months thereafter;

**"Final Acceptance"** means that the Plant and Machinery satisfies the Final Acceptance Criteria and has been accepted by the Purchaser Representative in accordance with Clause 12.5.2 and **"Finally Accept"** and **"Finally Accepted"** shall be construed accordingly;

**“Final Acceptance Certificate”** means the certificate to be signed by the Parties to evidence Final Acceptance;

**“Final Acceptance Criteria”** has the meaning given in Clause 12.5.2(ii);

**"Financial Services Framework"** means the TfL Financial Services Framework Agreement REDACTED or any replacement framework agreement entered into by TfL;

**"Fit for Purpose"** means, in relation to any asset or service to be provided under this Agreement:

- (a) that it complies with all requirements and provisions of this Agreement including the Technical Requirements;
- (b) that it complies with all Applicable Laws, Relevant Consents and applicable Standards and, to the extent that there is non-compliance with an applicable Standard, that there is a valid derogation from that Standard; and
- (c) where it is a Part and/or Spare, that if such Part or Spare is incorporated into the Plant and Machinery, such incorporation does not prevent the Plant and Machinery from complying with (a) or (b) above;

**"FM Affected Party"** has the meaning ascribed to it in Clause 27.1.1;

**"FM Notice"** has the meaning ascribed to it in Clause 27.4;

**"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 Manufacturer's and/or their Subcontractors' employees or those of any of its Subcontractors.

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

**“German VAT”** means VAT imposed by a Competent Authority in Germany;

**“GLA Act”** means the Greater London Authority Act 1999;

**"Goods"** means the Plant and Machinery, Year One Consumables, Critical Spares, Special Tools, Manuals and other item to be provided by the Manufacturer in accordance with this Agreement;

**“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 Greater London Authority Act 1999 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;

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

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

**"Indemnified Parties"** has the meaning ascribed to it in Clause 29.2;

**"Independent Auditor"** has the meaning ascribed to it in Clause 25.10.3;

**"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 Purchaser (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, patent application, trade mark, trade mark application, registered design, registered design application, utility model, trade name, discovery, invention, process, formula, specification, copyright, unregistered design right, technical information or drawing (including rights in software, database rights and topography rights);

**"Key Date"** means a date, as stated in Schedule 16 unless later changed in accordance with this Agreement, by which the Manufacturer is required to meet a Condition.

**"Key Personnel"** means the persons listed in Schedule 5 (or any replacements appointed in accordance with Clause 9.1);

**"Late Acceptance for Service"** has the meaning given in Clause 13.1;

**"Late Manufacturing Approval"** has the meaning given in Clause 13.1;

**"Latent Defect"** means REDACTED;

**"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 Purchaser;

**"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 Purchaser, its employees or agents, the Owner or any other person;

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

**"Manuals"** means documents which fully describe how the Plant and Machinery should be operated, serviced, maintained, dismantled, reassembled, repaired and overhauled;

**"Manufacturer Event of Default"** means any of the events or circumstances listed in Clause 25.1;

**"Manufacturer Group"** means the Manufacturer and any member of its Group from time to time;

**"Manufacturer IPR"** has the meaning ascribed to it in Clause 24.1;

**"Manufacturer Termination Notice"** has the meaning ascribed to it in Clause 25.9;

**"Manufacturer's Records"** has the meaning ascribed to it in Clause 10.3.1 (A);

**"Manufacturer's Works"** means the premises specified as such in the Contract Particulars;

**"Manufacturing Approval"** has the meaning ascribed to it in Schedule 1A;

**"Manufacturing Approval Date"** means the date(s) specified in the Contract Particulars for Manufacturing Approval;

**"Material"** means all plans, drawings, specifications, schedules, reports, Manuals, record calculations, correspondence and other documents (including any computer software developed by the Manufacturer to generate them and any design contained in them) prepared or provided by the Manufacturer in connection with this Agreement;

**"Mayor of London"** means the person elected to hold the office as Mayor of London with the powers and function set out in the Greater London Authority Act 1999;

**"Owner"** means the Purchaser or such other person nominated by the Purchaser to take title to, have supplied to it, and own, the Goods, and any designated representative of the same;

**"Part"** means any component, furnishing or equipment forming part of the Plant and Machinery or Spare;

**"Party"** means each of the Purchaser and the Manufacturer and **"Parties"** shall be construed accordingly; **"Permitted Delay Event"** has the meaning given to it in Clause 15.1;

**"Persistent Breach"** has the meaning ascribed to it in Clause 25.4.2;

**"Plant and Machinery"** means the plant and machinery to be provided by the Manufacturer in accordance with this Agreement;

**"Prohibited Act"** means:

- (a) offering or agreeing to give to any servant, employee, officer or agent of the Purchaser 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 Purchaser; or
  - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Purchaser;
- (b) entering into this Agreement or any other contract with the Purchaser in connection with which commission has been paid or has been agreed to be paid by the Manufacturer 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 Purchaser;
- (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 Purchaser; or
- (d) defrauding or attempting to defraud the Purchaser;

**"Purchaser Event of Default"** means any of the events or circumstances listed in Clause 25.8;

**"Purchaser Representative"** means the person specified as such in the Contract Particulars;

**"Purchaser Termination Notice"** has the meaning ascribed to it in Clause 25.4.2;

**"Relevant Consents"** has the meaning ascribed to it in Clause 4.3;

**"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 Manufacturer or any Subcontractor carrying out, or intended to carry out, any aspects of this Agreement on the LUL Network or any other property owned by the Purchaser;

**"Remedial Plan"** has the meaning ascribed to it in Clause 25.3.1(B);

**"Remedy Notice"** has the meaning ascribed to it in Clause 25.3.1;

**"Required Insurance"** means the insurances specified in Schedule 9;

**"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 Purchaser on request;

**"Retention"** means any amounts retained by the Purchaser in accordance with Clause 13.2.2 and the percentage of each payment of the Contract Price specified in the Contract Particulars;

**“Retention Balance”** means, for the time being, the aggregate of the amounts retained by the Purchaser under Clause 13.2.2 and Clause 20.2.1 less any deductions made by the Purchaser under Clause 13.4.2(ii);

**“Retention Period”** has the meaning ascribed to it in Clause 10.3.1(B);

**"Security"** means:

- (a) any right of ownership, lien, mortgage, charge, pledge, hypothecation, attachment, security interest, assignment by way of security, right of possession, right of detention or other encumbrance; or
- (b) any other preferential arrangement resulting in a secured transaction or having the same economic or legal effect as any of the foregoing; or
- (c) any agreement to give any of the foregoing; or
- (d) any arrangement to prefer one creditor over another creditor; or
- (e) the interest of the vendor or lessor under any conditional sale agreement, lease, hire purchase agreement or other title retention arrangement; or
- (f) any interest described in (a) to (e) above over any interest described in (a) to (e) above;

**“Site Tests”** means the site tests identified in the Test Plan;

**"Software"** means, as may be developed, enhanced, modified, adapted, altered or updated from time to time, the lists of instructions, stored in permanent or semi-permanent form, used:

- (a) to define the functions of microprocessors and similar devices installed on any Goods or any part thereof or in equipment to be used in conjunction with, or for the operation, testing, commissioning, modification and/or refurbishment of, any Goods or any part thereof; and/or
- (b) to run programmes, spreadsheets and/or databases in connection with the operation, testing, commissioning, modification and/or refurbishment of the Goods, in each case except for such as are standard commercial products, usable as made, and which have not been modified in order to perform any of the tasks set out in sub-clause (a) above,

which:

- (i) forms part of the Goods; and
- (ii) is not Third Party Software;

**"Source Code"** means the source code version of any Manufacturer-owned Software which is licensed to the Purchaser pursuant to this Agreement in a form capable of being read and interpreted by humans, together with related interpretative documentation and material;

**"Spares"** means all spare parts of any description including fluids, parts and assemblies required in connection with the Plant and Machinery supplied or to be supplied by the Manufacturer or any Subcontractor under this Agreement;

**"Special Tools"** means those special tools listed in Schedule 3 Part B;

**"Standards"** means the various standards documents and associated codes of practice identified in the Technical Requirements as applicable to work under this Agreement;

**"Subcontract"** means any contract (a subcontract) other than a supply contract awarded by, or to be awarded by, the Manufacturer (and any contract awarded by any person or organisation who is a party to a subcontract with the Manufacturer or awarded by any party to a subcontract with a Subcontractor, and so on) in relation to, or in connection with:

- (a) constructing or installing any part of the Goods;
- (b) providing a service in connection with this Agreement; or
- (c) supplying any part of the Goods which has been wholly or partly designed specifically for or in connection with this Agreement;

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

**"Taxes"** means all present and future taxes, charges, imposts, duties or levies of any kind whatsoever, payable at the instance of or imposed by any Competent Authority, together with any penalties, additions, fines, surcharges or interest relating thereto and **"Tax"** and **"Taxation"** shall be construed accordingly;

**"Technical Issues"** means any conflicts or discrepancies in or between the requirements and provisions of this Agreement (including the Technical Requirements), Applicable Laws, Relevant Consents and applicable Standards (including, without limitation, contradictions in relation to the regulations, standards and requirements of Network Rail, the Purchaser and other applicable authorities (including the European Union)) that need to be resolved to ensure the Goods will be Fit for Purpose and meet the Acceptance for Service Criteria and the Final Acceptance Criteria;

**"Technical Requirements"** means the technical requirements specification set out in Schedule 1A, as such requirements may be amended in accordance with this Agreement;

**"Test Plan"** means the test plan to be developed and provided by the Manufacturer and agreed with the Purchaser in accordance with Clause 12.2 setting out the regime of tests required for Acceptance for Service of the Plant and Machinery;

**"Tests"** means the tests identified in the Test Plan approved under Clause 12.2.2;

**"TfL"** or **"Transport for London"** means the body established pursuant to section 154 of the Greater London Authority Act 1999 and any successor body;

**"TfL Group"** means Transport for London and any member of its Group;

**"Third Party Software"** means software owned by third parties prior to the Commencement Date which has not been produced in connection with or for the purpose of the Goods;

**"Training Services"** means the training services stated in the Technical Requirements to be provided by the Manufacturer;

**"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;

**"UK VAT"** means VAT imposed by a Competent Authority in the United Kingdom;

**"VAB"** means the vehicle acceptance body appointed by the Manufacturer pursuant to the VAB Appointment as specified in the Contract Particulars;

**"VAB Appointment"** means the appointment to be entered into between the Manufacturer and the VAB;

**"Variation"** means any addition, omission or other change whatsoever to or in respect of the Technical Requirements and/or the Goods or any other technical requirement contained in this Agreement;

**"Variation Procedure"** means the variation procedure set out in Clause 23;

**"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;

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

**"Year One Consumables"** means those items listed in Schedule 3 Part A.

## 1.2 Interpretation

In this Agreement, except where the context otherwise requires:

- 1.2.1 any reference to this Agreement includes the Schedules to it, each of which forms part of this Agreement for all purposes;
- 1.2.2 a reference to an enactment, statutory provision or Standard shall unless otherwise expressly specified in this Agreement include a reference to any subordinate legislation made under the relevant enactment, statutory provision or Standard and unless otherwise expressly specified in this Agreement is a reference to that enactment, statutory provision, Standard or subordinate legislation as from time to time amended, consolidated, modified, reenacted or replaced;
- 1.2.3 words in the singular shall include the plural and vice versa;
- 1.2.4 references to one gender include other genders;
- 1.2.5 a reference to a person shall include a reference to a firm, a body corporate, an unincorporated association, a partnership, limited partnership, limited liability partnership or to an individual's executors or administrators;
- 1.2.6 a reference to a Clause or Schedule (other than to a schedule to a statutory provision) shall be a reference to a clause or schedule (as the case may be) of or to this Agreement and a reference in a Schedule to a paragraph shall mean a reference to a paragraph of that Schedule;
- 1.2.7 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;
- 1.2.8 references to any English legal term for any action, remedy, method of judicial proceeding, legal document, legal status, court, official or any legal concept or thing shall in respect of any jurisdiction other than England be deemed to include what most nearly approximates the English legal term in that jurisdiction and references to any English statute or enactment shall be deemed to include any equivalent or analogous laws or rules in any other jurisdiction;
- 1.2.9 references to writing shall include any modes of reproducing words in any legible form and shall exclude email except where expressly stated otherwise;

- 1.2.10 a reference to "includes" or "including" shall mean "includes without limitation" or "including without limitation";
- 1.2.11 the contents page and headings in this Agreement are for convenience only and shall not affect its interpretation;
- 1.2.12 references to this Agreement include this Agreement as amended, varied or supplemented in accordance with its terms;
- 1.2.13 a reference to the "Purchaser" or the "Manufacturer" includes its respective (and any subsequent) successors in title, and its respective permitted transferees or assignees;
- 1.2.14 references in the Agreement to costs, expenses and losses which are to be indemnified to, or recovered by, the person incurring the same shall be construed as references to an amount equal to the amount of such costs, expenses and losses together with any amount that represents VAT or other similar tax properly chargeable therein in any jurisdiction;
- 1.2.15 reference to a "third party" is a reference to any person who is not a Party;
- 1.2.16 references in this Agreement to any other agreement or other instrument (other than an enactment or statutory provision) shall be deemed to be references to that agreement or instrument as from time to time amended, varied, supplemented, substituted, novated or assigned; and
- 1.2.17 references to time of day are to that time in London.

## **2. EXERCISE OF RIGHTS AND PERFORMANCE OF OBLIGATIONS BY A THIRD PARTY**

- 2.1 The Manufacturer acknowledges and agrees that the Purchaser may, after notifying the Manufacturer in writing, delegate at any time some or all of its actions in connection with this Agreement to the Purchaser Representative and may cancel any delegation.
- 2.2 The Purchaser Representative may, after notifying the Manufacturer in writing, delegate at any time some or all of its actions in connection with this Agreement and may cancel any delegation. Any reference to an action of the Purchaser Representative in this Agreement includes an action by his delegate.
- 2.3 The Manufacturer will perform its obligations under this Agreement in accordance with the relevant provisions of this Agreement as if the Purchaser Representative was, to the extent notified, the Purchaser, and, to that extent, accept the instructions, requests, notifications, claims and demands of the Purchaser Representative in substitution for the Purchaser accordingly.
- 2.4 The Manufacturer shall be entitled to rely and act upon the exercise by a Purchaser Representative of any right permitted in accordance with Clauses 2.1 and 2.2 and any performance by a Purchaser Representative of any obligation on the part of the Purchaser shall constitute good and valid discharge of the Purchaser's obligation in question.
- 2.5 Except as provided under this Clause 2, no person or entity is authorised to act or give any instruction to the Manufacturer in connection with this Agreement on behalf of the Purchaser.

## **3. PURCHASE**

### **3.1 Purchase**

The Manufacturer shall supply each item of Goods to the Purchaser by the relevant

Contractual Acceptance Date for that item in consideration for the Purchaser procuring payment to the Manufacturer of the Contract Price in respect of each such item in each case in accordance with the terms of this Agreement.

#### 4. **MANUFACTURER'S GENERAL OBLIGATIONS**

##### 4.1 **General Undertaking and Warranties**

The Manufacturer undertakes and warrants to the Purchaser, for the benefit of the Purchaser and the Owner (where it is not the Purchaser), that it shall design, manufacture, supply, assemble, test, commission, and Deliver the Plant and Machinery and other items of Goods:

- 4.1.1 so that it is Fit for Purpose;
- 4.1.2 so that the Plant and Machinery satisfies the Acceptance for Service Criteria and the Final Acceptance Criteria;
- 4.1.3 so that the Plant and Machinery is manufactured in accordance with the design agreed in accordance with this Agreement;
- 4.1.4 in accordance with, and so that the Plant and Machinery shall function in accordance with, sound modern design and engineering principles and practices in the rail industry except where these would conflict with Clauses 4.1.1 and 4.1.2;
- 4.1.5 in accordance with the Technical Requirements and the Contract Programme so as to achieve Acceptance for Service and/or Final Acceptance (as applicable) of the Plant and Machinery and other items of Goods on their respective Contractual Acceptance Dates;
- 4.1.6 in compliance with all Applicable Laws and all applicable Standards;
- 4.1.7 in accordance with good industry practice and with all due skill, care and diligence to be expected of appropriately qualified and experienced professional designers and engineers with experience in carrying out work of a similar scope, type, nature and complexity to that required under this Agreement;
- 4.1.8 using materials and goods that comply with the Technical Requirements and the Standards and so that the Goods will be of new manufacture and comply with the Technical Requirements;
- 4.1.9 in accordance with the requirements of any instructed Variation and in all other respects in accordance with this Agreement; and
- 4.1.10 in respect of the Year One Consumables and Critical Spares, so that each of those is sufficient and adequate to enable maintenance to be carried out on the Plant and Machinery.

##### 4.2 **Compliance**

In performing its obligations under this Agreement, the Manufacturer shall, and shall procure that its Subcontractors shall:

- (A) comply with the version of the Contract Programme in place from time to time; and
- (B) comply with all Applicable Laws, all applicable Standards and all directions of the Purchaser and any other Competent Authority.

#### 4.3 **Licences and Consents**

The Manufacturer shall obtain and maintain all consents, approvals, authorisations, acceptances, certificates, licences (including export 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 Manufacturer's duties and obligations under this Agreement ("**Relevant Consents**").

#### 4.4 **Tax Allowances**

The Manufacturer undertakes and confirms to the Purchaser that neither it nor any other person which is a member of the Manufacturer Group, a Subcontractor, a supplier or a provider of finance to the Manufacturer or any of those persons has claimed and that it will not claim and shall procure that no such other person shall claim any capital allowances or analogous Tax allowances in respect of the Plant and Machinery or any other item of Goods.

#### 4.5 **Key Dates**

The Manufacturer shall perform its duties and obligations under this Agreement so that the Condition stated for each Key Date is met by the relevant Key Date.

### 5. **CHANGE IN LAW**

5.1 On becoming aware of the occurrence of any relevant Change in Law, the Purchaser Representative shall issue an instruction in order to address such Change in Law.

5.2 In relation to any adjustment to the Contract Price pursuant to this Clause 5, the net increase or (as relevant) decrease in the cost to the Manufacturer of performing its obligations under this Agreement shall be calculated on the basis that the Manufacturer shall be placed in no better or worse position than it would have been in had the Change in Law not occurred, taking into account:

- (A) any decrease in its costs resulting from any Change in Law; and
- (B) any amount which the Manufacturer will recover under any Required Insurance as a result of such Change in Law (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement).

### 6. **TECHNICAL REQUIREMENTS AND DEVELOPMENT OF DESIGN**

#### 6.1 **Trust and co-operation**

The Parties shall act as stated in this Agreement and in a spirit of mutual trust and co-operation.

#### 6.2 **Design Procedures**

The Manufacturer shall undertake the design of the Plant and Machinery in accordance with the requirements of this Agreement.

#### 6.3 **Design Approval Process**

6.3.1 The Manufacturer shall submit to the Purchaser Representative in accordance with the Contract Programme and the Technical Requirements the Design for the Plant and Machinery in the format set out in Schedule 1A. Where the Technical Requirements require the Manufacturer to achieve Design Approval for different stages of the Design, the Manufacturer shall follow the process set out in this Clause 6.3 to achieve Design Approval with respect to each such stage.

6.3.2 Following submission of the proposed Design under Clause 6.3.1, the Purchaser Representative shall notify the Manufacturer within the period stated in Schedule 1A:

- (a) of any reason why the proposed Design submitted under Clause 6.3.1 does not comply with this Agreement, following which the Manufacturer shall promptly address any such deficiency and re-submit the proposed Design. This Clause 6.3.2 shall apply to the re-submitted proposed Design; or
- (b) **REDACTED.**

6.3.3 **REDACTED.**

6.3.4 Should the Manufacturer subsequently wish to make any material modification to the Design, it shall notify the Purchaser Representative and Clauses 6.3.1, 6.3.2 and 6.3.3 shall apply mutatis mutandis (and, in the case of Clause 6.3.3, reference to manufacture of the Plant and Machinery shall mean any manufacturing activity resulting from the implementation of such modification).

#### 6.4 **Design Liability**

All design liability in relation to the Plant and Machinery and/or any other item of Goods shall be borne solely by the Manufacturer regardless of any assurance that may be given by the Purchaser.

#### 6.5 **Liability for Performance**

Notwithstanding any other provision of this Agreement, no examination or lack of examination and/or assurance given by the Purchaser in respect of any document submitted by the Manufacturer shall in any way relieve or absolve the Manufacturer from any obligation or liability under or in connection with this Agreement whether in relation to accuracy, safety, suitability, adequacy, performance, time or otherwise.

#### 6.6 **Not used**

#### 6.7 **RAM Criteria**

The Manufacturer shall provide such support in relation to the Purchaser's Reliability, Availability and Maintainability (RAM) process as required under this Agreement. For the avoidance of doubt, the Manufacturer shall not be liable with respect to any RAM criteria that may be established by the Purchaser pursuant to such process.

### 7. **CONFLICTS AND DISCREPANCIES**

#### 7.1 **Priority of provisions in the Agreement**

Unless expressly stated otherwise, where there is a conflict or other discrepancy between a Clause of this Agreement and the provisions of a Schedule, the provisions of the Clause of this Agreement shall prevail.

#### 7.2 **Manufacturer's acknowledgements regarding discrepancies and errors**

**REDACTED.**

#### 7.3 **Notification of errors and inconsistencies**

**REDACTED.**

7.4 **Resolving discrepancies and errors**

**REDACTED.**

7.5 **Late notification by Manufacturer**

**REDACTED.**

8. **CONTRACT PROGRAMME**

8.1 **Contract Programme**

8.1.1 If a programme is not included in Schedule 2, the Manufacturer shall within the period stated in the Contract Particulars submit a programme to the Purchaser Representative for his acceptance showing:

- (A) the Commencement Date, Key Dates, Delivery Date(s), Contractual Approval Dates, Contractual Acceptance Date(s) and payment dates;
- (B) the sequence and timing of activities by which the Manufacturer proposes to carry out the Agreement (including design, manufacture, testing, commissioning and Delivery);
- (C) the respective dates for submission by the Manufacturer of the Design and Manuals for approval thereof by the Purchaser Representative;
- (D) the dates by which, in order to carry out the Agreement, the Manufacturer will need (to the extent provided for under this Agreement):
  - (A) access to the Purchaser's premises;
  - (B) acceptances or approvals from the Purchaser and/or Purchaser Representative;
  - (C) any plant, materials, drawings, information or other things to be provided by the Purchaser;
- (E) the dates when the Manufacturer plans to conduct factory acceptance tests or inspections; and
- (F) any other information which the Technical Requirements require the Manufacturer to show on the programme.

8.1.2 The Manufacturer undertakes to carry out the design, manufacture, supply, assembly, testing and commissioning and Delivery of the Plant and Machinery and all other items of Goods in a regular and diligent manner and in accordance with the Contract Programme.

8.1.3 The matters set out in the Contract Programme shall be wholly without prejudice to the Manufacturer's obligation to achieve Acceptance for Service and (as appropriate) Final Acceptance for the Plant and Machinery and each other item of Goods on their respective Contractual Acceptance Dates.

8.2 **Form of programme**

8.2.1 The programme shall be in such form as may be specified in the Contract Particulars or, if not so specified, as may reasonably be required by the Purchaser Representative.

8.3 **Acceptance of programme**

8.3.1 The Purchaser Representative shall either accept a programme (or any revised programme submitted pursuant to Clauses 8.5 or 8.6) or notify the Manufacturer

of his reasons for not accepting it. Reasons for not accepting the programme may include:

- (A) the Manufacturer's plans shown on it are not practicable;
- (B) it does not show the information which this Agreement requires;
- (C) it does not represent the Manufacturer's plans realistically; or
- (D) it does not comply with the Contract Particulars or Technical Requirements.

8.3.2 Acceptance by the Purchaser Representative of the programme shall not relieve the Manufacturer of any of his obligations under this Agreement.

#### **8.4 Alterations to programme**

8.4.1 The Manufacturer shall not without the Purchaser Representative's consent make any alteration to the Contract Programme.

#### **8.5 Revision of programme**

8.5.1 The Manufacturer shall submit a revised programme to the Purchaser Representative for acceptance:

- (A) every four weeks from the Commencement Date pursuant to Schedule 1B; and
- (B) if instructed to do so pursuant to Clause 8.6.

#### **8.6 Rate of progress**

8.6.1 The Purchaser Representative may notify the Manufacturer if it assesses that the rate of progress is too slow to achieve Acceptance for Service and (as appropriate) Final Acceptance for the Plant and Machinery and each other item of Goods on their respective Contractual Acceptance Dates and that this is not due to a circumstance for which the Manufacturer is entitled to an extension of time pursuant to Clause 15.

8.6.2 Following receipt of such notice the Manufacturer shall take such steps as may be necessary and as the Purchaser Representative may approve to remedy or mitigate the likely delay, including submitting a revised programme to the Purchaser Representative for acceptance. The Manufacturer will not be entitled to additional payment or an extension of time for taking such steps.

#### **8.7 Termination**

**REDACTED.**

### **9. KEY PERSONNEL, MEETINGS AND REPORTS**

#### **9.1 Key Personnel**

The Manufacturer shall not replace any Key Personnel without:

- 9.1.1 giving not less than sixty (60) days' notice; and
- 9.1.2 proposing a replacement Key Personnel to the Purchaser who the Purchaser has approved (such approval not to be unreasonably withheld or delayed).

#### **9.2 Management of Delivery**

The Parties shall comply with Schedule 1B in relation to design management, project management and programme management.

## 10. MANUFACTURING FACILITIES AND RIGHTS OF AUDIT AND INSPECTION

### 10.1 Manufacturing facilities

The Manufacturer shall ensure that the assembly and testing of the Plant and Machinery shall be carried out by the Manufacturer at the Manufacturer's Works and the Manufacturer shall not use any other manufacturing facility for such assembly and testing without the prior agreement of the Purchaser.

### 10.2 Access to Facilities for Purpose of Audits

For the purposes of exercising any of their rights under Clause 10, the Manufacturer shall (a) grant the Purchaser and the Owner access on reasonable prior notice to any of the Manufacturer's premises involved in the design, manufacture, supply, assembly, testing, certification, commissioning and Delivery of the Plant and Machinery and any other item of Goods including the Manufacturer's Works and (b) use its reasonable endeavours to procure such access to those premises of its agents and Subcontractors.

### 10.3 Right of Audit and Inspection

10.3.1 The Manufacturer shall, and shall (unless the Purchaser Representative otherwise agrees in writing) procure that its Subcontractors shall:

- (A) maintain a complete and correct set of records pertaining to all activities relating to the performance of the Manufacturer's obligations under this Agreement and all transactions and Subcontracts entered into by the Manufacturer for the purposes of performing its obligations under this Agreement (in respect of the Manufacturer) and the performance by the Subcontractor of its obligations under its Subcontract (in respect of the Subcontractor) (the "**Manufacturer's Records**"); and
- (B) retain all the Manufacturer's Records until the date six (6) years (or such longer period as may be required by law or specified in the Contract Particulars) following termination of this Agreement for whatever reason (the "**Retention Period**").

10.3.2 Notwithstanding any other right of audit that the Purchaser is entitled to under this Agreement, in order to verify the Manufacturer's performance of and compliance with the Agreement the Purchaser and the Owner shall be entitled on reasonable notice (whether in writing or verbally), either itself or using such agents or representatives as it may authorise to:

- (A) audit, inspect or witness any aspects of the manufacturing, testing or commissioning of the Plant and Machinery or any other item of Goods or any of their Parts and to audit the design and certification thereof including being present at, and participating in, amongst other things:
  - (A) any inspection and conformance control of subsystems supplied by Subcontractors;
  - (B) any inspection and conformance control of the Plant and Machinery construction at stages to be agreed between the Purchaser and the Manufacturer;
  - (C) any system tests (at stages to be agreed) during construction;
  - (D) any dynamic run testing of the completed Plant and Machinery; and

- (E) any inspection and certification of the Plant and Machinery's compliance with the Technical Requirements after completion of assembly and dynamic testing;
- (B) inspect the sub-assembly of the Plant and Machinery;
- (C) inspect any and all of the Manufacturer's Records during the Retention Period as are reasonably necessary to investigate the Manufacturer's (and any Subcontractor's) performance of its obligations under this Agreement;
- (D) audit the management systems of the Manufacturer and those of any Subcontractor; and
- (E) inspect and/or audit compliance by the Manufacturer and its Subcontractors with the Manufacturer's obligations under this Agreement.

#### 10.4 **Co-operation with Audit Procedure**

To the extent necessary for the purpose of exercising any of the rights granted under Clause 10.3.2 the Manufacturer shall provide, and shall procure that its Subcontractors shall provide, all reasonable co-operation to the Purchaser and the Owner including

- 10.4.1 upon request from the Purchaser, acting reasonably, providing electronic or paper copies of any Manufacturer's Records required for the purposes of Clause 10.3.2(C) free of charge and within a reasonable time of any request and
- 10.4.2 making the Manufacturer's employees available for discussion with the Purchaser.

#### 10.5 **No Claim for Relief**

No audit, inspection and/or testing by the Authority pursuant to Clause 10.3.2 shall relieve the Manufacturer (nor any of its Subcontractors) from any of its obligations under this Agreement or prejudice any right, power and/or remedy of the Purchaser against the Manufacturer.

#### 10.6 **Corrective Actions Arising**

- 10.6.1 Any actions found to be reasonably necessary having regard to the Manufacturer's obligations under this Agreement as a consequence of the Purchaser undertaking any inspections or audits (a "**Corrective Action**") shall be carried out by the Manufacturer. The Manufacturer shall acknowledge formally within two (2) Working Days receipt of any request for a Corrective Action raised by the Purchaser, together with the Manufacturer's confirmation of the timescale allocated by the Purchaser for the Manufacturer to close out the Corrective Action. The Manufacturer shall advise the Purchaser upon its close-out of the Corrective Action, together with details of the Corrective Action applied. The Purchaser shall be entitled to undertake a further audit of any Corrective Actions on the same basis as set out in Clauses 10.2 to 10.5.
- 10.6.2 If the Manufacturer (acting reasonably) disputes any Corrective Action, it shall notify the Purchaser whereupon the Manufacturer and the Purchaser shall consult with each other and seek to resolve such dispute and in default of such resolution either the Purchaser or the Manufacturer may refer the dispute for determination in accordance with Clause 32.

#### 10.7 **Plans for Remedial Action**

If, at any time in the course of any participation or inspection by the Purchaser in accordance with Clauses 10.3 and 10.6, the Purchaser reasonably determines that any item of Goods does not, or is unlikely in the future to comply with any of the Technical

Requirements or the requirements of Clause 4.1, the Purchaser shall notify the Manufacturer of such determination. The Purchaser and the Manufacturer shall thereafter use all reasonable endeavours to agree a plan for necessary remedial action to be implemented by the Manufacturer, at the Manufacturer's cost, to ensure that that the item of Goods does or will conform to the Technical Requirements and the requirements of Clause 4.1.

#### **10A DESIGN/BUILD VERIFICATION**

10A.1 Once manufacturing has commenced, the Manufacturer shall procure that the VAB carries out audits in accordance with the VAB Appointment to ensure that the Manufacturer is manufacturing the Plant and Machinery and any other item of Goods in compliance with the Approved Design.

10A.2 In order (without limitation) to verify that the Manufacturer is manufacturing the Plant and Machinery and any other item of Goods in compliance with the Approved Design the Purchaser shall be entitled on reasonable notice (whether in writing or verbally), either itself or using such agents or representatives as it may authorise, to:

10A.2.1 audit, inspect or witness any aspects of the manufacturing of the Plant and Machinery or any other item of Goods and to audit the design and certification thereof including being present at, and participating in, amongst other things:

- (a) any inspection and conformance control of subsystems supplied by Subcontractors;
- (b) any inspection and conformance control of the Plant and Machinery construction at stages to be agreed between the Purchaser and the Manufacturer;
- (c) factory acceptance tests and any other system tests during construction;
- (d) any dynamic run testing of the completed Plant and Machinery; and
- (e) any inspection and certification of the Plant and Machinery's compliance with the Technical Requirements after completion of assembly and dynamic testing;

10A.2.2 inspect the sub assembly of the Plant and Machinery;

10A.2.3 inspect any and all of the Manufacturer's Records as are reasonably necessary to investigate the Manufacturer's (and any Subcontractor's) compliance with the Approved Design; and

10A.2.4 inspect and/or audit compliance by the Manufacturer and its Subcontractors with the Approved Design.

The rights of the Purchaser under this Clause 10A.2 are without prejudice to Clause 10A.1 and notwithstanding any other right of audit to which the Purchaser is entitled under this Agreement.

10A.3 Clauses 10.4, 10.5, 10.6 and 10.7 shall apply mutatis mutandis to audits carried out under Clauses 10A.1 and 10A.2.

10A.4 Unless otherwise agreed by the parties, the Manufacturer shall not be entitled to deliver the Plant and Machinery to the Delivery Location under Clause 12.3 until the VAB has certified that the Plant and Machinery and any other relevant item of Goods have been manufactured in accordance with the Approved Design.

10A.5 The Parties shall comply with Schedule 1B in relation to certification and assurance activities.

## 11. **YEAR ONE CONSUMABLES, CRITICAL SPARES AND CONTINUING SUPPORT**

### 11.1 **Quality and Identifiability**

The Manufacturer shall ensure that:

- (A) each of the Spares is a brand new part manufactured from materials of sound and satisfactory quality and is Fit for Purpose;
- (B) to the extent of good industry practice, each Spare has a serial number which is clearly identifiable; and
- (C) each Spare is clearly labelled or otherwise identifiable as being the property of the Purchaser.

### 11.2 **Time for Delivery**

Without prejudice to Clause 4.1, the Manufacturer shall Deliver the Year One Consumables, Critical Spares and Special Tools to the Purchaser by no later than the Contractual Acceptance Dates for such items.

### 11.3 **Continuing Support**

The Parties shall comply with Schedule 3A in relation to continuing support.

## 12. **TESTING, ACCEPTANCE AND DELIVERY PROCEDURE**

### 12.1 **Compliance with the Programmes and Procedures**

The Manufacturer shall ensure that:

12.1.1 the Plant and Machinery and other items of Goods are delivered, tested and made ready for Acceptance for Service and (as applicable) Final Acceptance by the Purchaser Representative in accordance with the Technical Requirements, the Contract Programme, and the other provisions of this Agreement; and

12.1.2 no Plant and Machinery or other item of Goods is Delivered to the Purchaser prior to its Contractual Acceptance Date unless otherwise agreed by the Purchaser Representative.

### 12.2 **Type Test Approvals and Factory Testing**

12.2.1 The Manufacturer shall develop and submit to the Purchaser Representative a draft Test Plan by the Concept Design Date.

12.2.2 Within 10 (ten) Working Days of submission of the draft Test Plan, the Purchaser Representative shall notify the Manufacturer as to whether the draft Test Plan is approved or rejected. The Purchaser Representative shall be entitled to reject the draft Test Plan (and shall provide reasons for such rejection) if:

- (i) it does not comply with the testing requirements set out in the Standards;

- (ii) acting reasonably, it assesses that the draft Test Plan will not be sufficient to establish that the Plant and Machinery meets the requirements of this Agreement, including in particular the Technical Requirements.

Following any rejection of the draft Test Plan, the Manufacturer shall promptly address the issues notified to it by the Purchaser Representative and re-submit the draft Test Plan. This Clause 12.2.2 shall apply to any re-submitted draft Test Plan until it has been approved.

- 12.2.3 Following approval of the Test Plan in accordance with Clause 12.2.2, the Manufacturer shall conduct the Factory Tests at its own expense in accordance with the Test Plan.
- 12.2.4 The Purchaser Representative shall be entitled to attend any Factory Tests together with such other representatives of the Purchaser as the Purchaser Representative may nominate. The Manufacturer shall be responsible for procuring such access. The Manufacturer shall provide the Purchaser Representative with not less than 15 (fifteen) Working Days' notice of the time, location and subject matter of any such Factory Tests.
- 12.2.5 The Manufacturer shall be responsible for all costs and expenses associated with the Factory Tests.
- 12.2.6 Any repetition or prolongation of the Factory Tests which is necessary by reason of a failure of the Plant and Machinery to meet the requirements of the Factory Tests shall be at the Manufacturer's cost. The Manufacturer shall not be entitled to any additional costs, any extension of time or any other relief in connection with such failure.

### 12.3 **Post production/delivery (Site Tests)**

- 12.3.1 Following completion of all Factory Tests pursuant to Clause 12.2, and provided the Manufacturer has obtained the required certification from the VAB pursuant to Clause 10A.3, the Manufacturer shall (at its own expense) Deliver the Plant and Machinery, together with such evidence as the Purchaser Representative may reasonably require that the Plant and Machinery has passed all of the Factory Tests, to the Delivery Location on the Delivery Date.
- 12.3.2 Following Delivery of the Plant and Machinery under Clause 12.3.1, the Site Tests shall be conducted by the Manufacturer at its own expense in accordance with the Test Plan. In conducting the Site Tests:
  - (i) the Manufacturer shall comply with its obligations under Clause 57 ; and
  - (ii) the Purchaser Representative shall be given reasonable notice (being not less than 20 (twenty) Working Days) by the Manufacturer of all on-track testing or commissioning to be carried out by or on behalf of the Manufacturer so that the Purchaser Representative can make the arrangements referred to in Clause 12.3.3(i) to 12.3.3(v) (inclusive). The Manufacturer acknowledges that, if it does not provide the notice required by this Clause 12.3.2(ii), the Purchaser Representative may not be able to secure the required time slots and the Manufacturer shall not be entitled to any additional costs, any extension of time or any other relief in connection with any resulting delay.
- 12.3.3 The Manufacturer shall be responsible for all costs and expenses associated with the Site Tests save for the following, which shall be provided by the Purchaser:

- (i) track access;
- (ii) diesel fuel;
- (iii) pilotmen (to allow access over the LUL Network);
- (iv) safety related staff to create safe testing locations; and
- (v) geometry information and ALC files.

12.3.4 In the event that the Plant and Machinery does not pass any Site Test, the Manufacturer shall be responsible at its own expense for:

- (i) carrying out the works required to ensure that the failed Site Test(s) can be passed (the “**Rectification Works**”);
- (ii) (if required by the Purchaser Representative) removing the relevant Plant and Machinery from the Delivery Location;
- (iii) re-delivering the relevant Plant and Machinery to the Delivery Location once the Rectification Works are complete on a date to be arranged with the Purchaser Representative; and
- (iv) the repetition and/or prolongation of the Site Test(s) necessary by reason of the failure of the Plant and Machinery to meet the requirements of the Site Test(s);

and, for the avoidance of doubt, the Manufacturer shall not be entitled to any additional costs, any extension of time or any other relief in connection with such failure.

## 12.4 **Acceptance for Service**

12.4.1 Where, in relation to the Plant and Machinery:

- (i) the Manufacturer has provided evidence acceptable to the Purchaser Representative, including all relevant supporting documentation, that the Plant and Machinery has passed all Tests required by the Test Plan to be performed prior to Acceptance for Service;
- (ii) the Plant and Machinery meets in all material respects the Technical Requirements;
- (iii) the Plant and Machinery has no Defects, or items missing from it, except those covered by Agreed Qualifications;
- (iv) the Manufacturer has provided to the Purchaser Representative the Manuals and any other documentation reasonably necessary to enable operation and maintenance of the Plant and Machinery;
- (v) the Manufacturer has complied with its obligations under this Agreement with respect to the provision of Training Services; and
- (vi) the Manufacturer has supplied all Year One Consumables and Special Tools in relation to the Plant and Machinery in accordance with the provisions of this Agreement,

(together the “**Acceptance for Service Criteria**”) the Manufacturer shall be entitled to request Acceptance for Service in accordance with Clause 12.4.2.

12.4.2 Where the Acceptance for Service Criteria are satisfied in respect of the Plant and Machinery, the Manufacturer shall be entitled to submit to the Purchaser Representative an Acceptance for Service Certificate for the Plant and Machinery

signed by a duly authorised representative of the Manufacturer certifying that the Acceptance for Service Criteria have been satisfied. Following receipt of an Acceptance for Service Certificate from the Manufacturer in accordance with this Clause 12.4.2, the Purchaser Representative shall within the period stated in the Contract Particulars counter-sign and date that Acceptance for Service Certificate, or refuse to do so under Clause 12.4.3.

12.4.3 The Purchaser Representative may:

(i) refuse to sign an Acceptance for Service Certificate for the Plant and Machinery if it does not satisfy any of the Acceptance for Service Criteria in which case it shall, within five (5) Working Days of such refusal, notify the Manufacturer in writing of the reasons for refusing to sign the Acceptance for Service Certificate; or

(ii) **REDACTED**

Where the Purchaser Representative accepts Plant and Machinery which does not meet any or all of the Acceptance for Service Criteria, the Purchaser Representative shall, when counter-signing and dating the Acceptance for Service Certificate, endorse the Acceptance for Service Certificate accordingly and submit details of any failure(s) to meet the Acceptance for Service criteria (including any necessary remedial work) on an attachment to the Acceptance for Service Certificate. Such details shall constitute Agreed Qualifications.

12.4.4 Where the Purchaser Representative has submitted to the Manufacturer details of an Agreed Qualification under Clause 12.4.3(ii), the Purchaser Representative may (in its absolute discretion):

(i) provide written confirmation that the Manufacturer does not need to rectify the matter the subject of the Agreed Qualification, in which case the Manufacturer shall (without prejudice to any other right of the Purchaser under this Agreement) be under no obligation to rectify such matter; or

(ii) state the period within which the Manufacturer is required to rectify the matter the subject of the Agreed Qualification, in which case the Manufacturer shall at its own cost rectify such matter within such period.

Where, in relation to any matter the subject of an Agreed Qualification, the Purchaser Representative has not issued an instruction under Clause 12.4.4(i) or (ii), the Manufacturer shall at its own cost rectify such matter within a reasonable period having regard to the circumstances.

12.4.5 Rectification of all matters the subject of Agreed Qualifications shall (unless the Purchaser Representative has provided confirmation under Clause 12.4.4(i) in relation to such matter) be a condition precedent to Final Acceptance of the relevant Unit(s) under Clause 12.5.2.

12.4.6 Where the Plant and Machinery has not been Accepted for Service by the Contractual Acceptance Date, Clause 13.1 shall apply.

## 12.5 **Final Acceptance and Fault Free Running**

12.5.1 Clause 13.3 shall apply in relation to any Engineering Overrun during the Fault Free Running Period.

12.5.2 Where:

- (i) the Fault Free Running Period in respect of the Plant and Machinery has expired; and
- (ii) the following conditions have been satisfied in relation to the Plant and Machinery:
  - (A) the Plant and Machinery has been Accepted into Service
  - (B) any liquidated damages payable as a result of any Engineering Overrun suffered by the Plant and Machinery during the Fault Free Running Period have been paid to the Purchaser; and
  - (C) any matters the subject of any Agreed Qualifications which are required to be rectified under Clause 12.4.4 have been rectified in accordance with Clause 12.4.4,

(together the **“Final Acceptance Criteria”**) the Manufacturer shall be entitled to submit a Final Acceptance Certificate for the Plant and Machinery signed by a duly authorised representative of the Manufacturer to the Purchaser Representative, and the Purchaser Representative shall counter-sign and date that Final Acceptance Certificate, or refuse to do so under Clause 12.5.3, as soon as practicable (and in any event within five (5) Working Days of submission of that certificate in accordance with this Clause 12.5.2).

12.5.3 The Purchaser Representative may refuse to sign a Final Acceptance Certificate for any Unit if the Plant and Machinery does not satisfy any of the Final Acceptance Criteria, in which case it shall, within five (5) Working Days of such refusal, notify the Manufacturer in writing of the reasons for refusing to sign the Final Acceptance Certificate. If the reason for such refusal is that the conditions in Clause 12.5.2(B) or Clause 12.5.2(C) have not been met, the Manufacturer shall be entitled to re-submit the Final Acceptance Certificate once the relevant condition(s) have been satisfied and Clause 12.5.2 and this Clause 12.5.3 shall apply to each such resubmitted Final Acceptance Certificate.

12.5.4 Not used

12.5.5 Following Final Acceptance, Clause 20.2.3 shall apply in relation to repayment of the Retention Balance.

### 13. **LIQUIDATED DAMAGES**

#### 13.1 **Delay Liquidated Damages**

**REDACTED**

#### 13.2 **Calculation of Delay Liquidated Damages**

13.2.1 Any liquidated damages payable under Clause 13.1 shall accrue at the rate specified in the Contract Particulars up to the maximum amount specified in the Contract Particulars.

13.2.2 **REDACTED.**

13.2.3 Where liquidated damages become Retention pursuant to Clause 13.2.2, they shall no longer be regarded as liquidated damages for the purpose of this Agreement and shall not count towards any calculation of the Manufacturer’s maximum aggregate liability for liquidated damages payable under Clause 13.1.

#### 13.3 **Performance Liquidated Damages**

**REDACTED.**

13.4 **Calculation and Payment of Performance Liquidated Damages**

13.4.1 Any liquidated damages payable under Clause 13.3 shall accrue at the rate specified in the Contract Particulars per Engineering Overrun up to the maximum amount specified in the Contract Particulars.

13.4.2 Where Clause 13.3 applies, the Purchaser shall be entitled (without prejudice to Clause 40) to:

- (i) demand payment of the relevant sum from the Manufacturer; or
- (ii) deduct the relevant sum from the monies it has withheld pursuant to Clause 20.3.1.

13.5 **Genuine Pre-Estimate of Loss**

The Manufacturer acknowledges and agrees that the liquidated damages specified in Clause 13.2 represent a genuine pre-estimate of the Purchaser's losses arising from late delivery and/or Acceptance for Service of any Plant and Machinery.

14. **NOT USED**

15. **EXTENSIONS OF TIME**

15.1 **Permitted Delays**

For the purposes of this Agreement, the occurrence of one or more of the following shall constitute a "**Permitted Delay Event**":

- 15.1.1 a Force Majeure Event which prevents the Manufacturer from performing its obligations under this Agreement;
- 15.1.2 any breach by the Purchaser or Purchaser Representative of an express obligation under this Agreement;
- 15.1.3 the suspension of this Agreement in accordance with Clause 18 (other than where the suspension results from the circumstance in Clause 18.3.1 or 18.3.2);
- 15.1.4 any Variation instructed pursuant to the Variation Procedure (including any Variation instructed to resolve a Change in Law or an error or discrepancy within the Agreement or any other Technical Issue); and
- 15.1.5 the Manufacturer is denied access to the LUL Network in the circumstances described in Clause 57.8 ,

but in each case only insofar as any of the events described in Clauses 15.1.1 to 15.1.5:

- (A) has a direct and material adverse effect on the Manufacturer's ability to achieve a Condition by the applicable Key Date or Acceptance, Acceptance for Service or (as applicable) Final Acceptance of the Plant and Machinery and/or (as applicable) any other item of Goods by the Contractual Acceptance Date in relation to such Plant and Machinery and/or item of Goods; and
- (B) has not been caused or contributed to by the act, omission or default of the Manufacturer.

15.2 **Qualification to Permitted Delays**

Where any delay in achieving the applicable Key Date or a Contractual Acceptance Date for the Plant and Machinery or any other item of Goods arises, the Manufacturer shall be entitled to an extension to the applicable Key Date or a Contractual Acceptance Date for the Plant and Machinery and/or any other item of Goods (as the case may be) but only to

the extent that such delay is directly caused by a Permitted Delay Event and provided that the Manufacturer:

- 15.2.1 has fully complied with the requirements of Clause 15.3 and subsequently provided such further information as the Purchaser may reasonably require regarding the nature and likely duration of such event;
- 15.2.2 has provided the Purchaser with reasonable access to the Manufacturer's Works and/or the facilities of its Subcontractors for investigating the validity of the potential Permitted Delay Event;
- 15.2.3 has used its reasonable endeavours to mitigate the delay to the applicable Key Date or the Contractual Acceptance Date for the Plant and Machinery and/or other item of Goods (as the case may be); and
- 15.2.4 shall not be entitled to an extension of time to the extent that the Permitted Delay Event was caused by or resulted from any act, neglect or default of the Manufacturer, its Subcontractors or suppliers or the directors, agents, representatives or employees of any of them and/or any breach of this Agreement by the Manufacturer, its Subcontractors or suppliers or the directors, agents, representatives or employees of any of them

### 15.3 **Notification of Permitted Delay Event**

15.3.1 The Manufacturer shall give notice to the Purchaser of the occurrence of a Permitted Delay Event. **REDACTED**.

15.3.2 Within 20 Working Days (or such other period as the parties may agree) of:

- in the case of a Permitted Delay Events under Clauses 15.1.1, 15.1.2 and 15.1.5, the Manufacturer serving notice on the Purchaser of such event; and
- in the case of a Permitted Delay Event under Clauses 15.1.3 or 15.1.4, the Purchaser instructing a Variation or a suspension of this Agreement (as the case may be),

the Manufacturer shall provide the Purchaser with the following details:

- (A) full and detailed particulars of the cause and extent of the delay and the effect of the Permitted Delay Event on the Manufacturer's ability to comply with its obligations under this Agreement;
- (B) details of the documents and records which the Manufacturer will rely upon to support its claim for an extension of time; and
- (C) details of the measures which the Manufacturer has adopted and/or proposes to adopt to mitigate the consequences of the Permitted Delay Event.

### 15.4 **Grant of Extension of Time**

Subject to the Manufacturer complying with the requirements of this Clause 15 and the Purchaser, acting reasonably, being satisfied that a Permitted Delay Event has occurred, the Purchaser shall, as soon as reasonably practicable, agree with the Manufacturer a reasonable extension of time to the relevant Key Date and/or Contractual Acceptance Date and any such extension shall amend the Contract Programme and each relevant Key Date and/or Contractual Acceptance Date.

15.5 **Extensions of Time – General**

15.5.1 Any extension of time agreed by the Purchaser and the Manufacturer under this Clause 15 to a Key Date and/or a Contractual Acceptance Date shall not of itself entitle the Manufacturer to any extension to any other Key Date and/or Contractual Acceptance Date.

15.5.2 Except as expressly provided elsewhere in this Agreement, any extension of time agreed between the Purchaser and the Manufacturer pursuant to this Clause 15.5 shall be in full compensation and satisfaction for any loss sustained or sustainable by the Manufacturer in respect of any Permitted Delay Event in connection with which that extension is granted.

16. **TRANSFER OF TITLE AND RISK**

16.1 **Title to Items of Goods**

16.1.1 **REDACTED**, full legal and beneficial title to all items of Goods which are manufactured from time to time shall pass to the Purchaser or (as applicable) the Owner.

16.1.2 Until Delivery of any item of Goods to the Purchaser, the Manufacturer shall ensure all items of Goods are readily identifiable as the Purchaser's property, including by marking them as the Purchaser's property. The Manufacturer shall provide access to any premises at which such items are stored so that the Purchaser can verify compliance with this Clause 16.1.2.

16.2 **Risk of loss etc**

Risk of loss, theft, damage or destruction of an item of Goods shall pass to the Purchaser or (as applicable) the Owner on Acceptance for Service of the relevant item. The Manufacturer shall be responsible for the safe custody and transit of any item of Goods until it has been Accepted for Service.

16.3 **Warranty in respect of Title**

The Manufacturer warrants to the Purchaser that the title to the Plant and Machinery and each other item of Goods transferred to it under this Agreement shall be with full title guarantee and free and clear of all Security.

16.4 **Prohibition on Creating Security**

The Manufacturer undertakes that it shall not at any time create or purport to create any Security over the Plant and Machinery or any other item of Goods (including any Manual or other documentation) to be Delivered in accordance with this Agreement and which has been, or is to be, supplied to the Purchaser under and in accordance with the terms of this Agreement.

16.5 **Ownership of Goods**

Any reference in this Agreement to items of Goods or other assets being supplied to, delivered (whether by Delivery or otherwise) to and/or owned by the Purchaser shall, in the event that a person other than the Purchaser is the Owner, be construed as a reference to items of Goods or other assets being supplied to, delivered to or owned by such person.

## 17. **DEFECT RECTIFICATION**

### 17.1 **Definitions**

For the purpose of this Agreement:

**"Defect"** means that the Goods or any part of them are defective, damaged, of unsatisfactory quality or not Fit for Purpose whether in consequence of:

- a. defective materials, workmanship or design;
- b. transit of the Goods from the Manufacturer to the Purchaser; or
- c. any act or omission of the Manufacturer during the Defect Rectification Period,

and is not principally caused by:

- i. any failure by the Purchaser or any third party appointed by the Purchaser to use, operate or maintain the Goods in accordance with the Manuals and/or any Applicable Laws and applicable Standards;
- ii. fair wear and tear; or
- iii. vandalism, collision or accidental damage caused by any person other than the Manufacturer, its Subcontractors or suppliers or the directors, agents, representatives or employees of any of them

**"Defect Rectification Period"** means (without prejudice to the further provisions of this Clause 17), in relation to the Plant and Machinery (and those Parts forming part of the Plant and Machinery), the period commencing on the date that the Plant and Machinery has been Accepted for Service and ending on the date twelve (12) months thereafter, as may be extended in accordance with Clause 17.3.

### 17.2 **Rectification of Defects**

17.2.1 The Manufacturer shall, at its own cost, rectify (which, for the purposes of this Clause 17, means repair, replace, modify or (as appropriate) amend) each Defect which arises, occurs or becomes apparent in relation to any item of Goods during the Defect Rectification Period for that item and where necessary shall execute or procure the execution by another of all rectification works.

17.2.2 Where the Purchaser identifies a Defect in an item of Goods, the Purchaser shall notify the Manufacturer of such Defect within a reasonable time of its discovery. The Manufacturer shall, after consultation with the Purchaser, determine how the Defect is to be rectified.

17.2.3 The Manufacturer shall commence the rectification of any Defect as set out in Clauses 17.2.1 and 17.2.2 without delay and complete the rectification within a reasonable period having regard to the circumstances.

### 17.3 **Extended Defect Rectification Period**

Where an item of Goods and/or any Part of the same is rectified or replaced due to a Defect, the Defect Rectification Period for the that item shall be twelve (12) months from the date of repair or (as the case may be) replacement certified in writing by the Purchaser.

### 17.4 **Rectification by the Purchaser**

17.4.1 Where the Manufacturer is obliged to rectify a Defect in accordance with this Clause 17 but has not, for any reason, responded and commenced either fault finding or any rectification work in relation to that Defect within ten (10) Working Days of being notified of such Defect by the Purchaser, the Purchaser may rectify that Defect using its own or third party personnel or resources.

17.4.2 All costs and expenses properly and reasonably incurred by the Purchaser in undertaking any work pursuant to Clause 17.4.1, together with VAT chargeable thereon shall be recoverable by the Purchaser within ten (10) Working Days of demand from the Purchaser as a debt due and owing from the Manufacturer.

#### 17.5 **Latent Defects**

Where, **REDACTED**, a Latent Defect arises, occurs or becomes apparent during the eight year period (or such other period stated in the Contract Particulars) following the date of Final Acceptance of the Plant and Machinery, the Manufacturer shall:

17.5.1 if required by the Purchaser, conduct a detailed investigation to ascertain the cause of the Latent Defect;

17.5.2 develop and agree with the Purchaser a plan to rectify the Latent Defect and comply with such plan; and

17.5.3 rectify, at its own cost and in accordance with the plan agreed pursuant to Clause 17.5.2, the Latent Defect and undertake all necessary rectification works to the Plant and Machinery (whether or not such Latent Defect has become apparent in the Plant and Machinery),

provided that the Manufacturer shall not be liable for any damage caused by the failure to operate and/or maintain the Plant and Machinery in accordance with the Manuals.

#### 17.6 **Application to Repaired Plant and Machinery**

Where the Manufacturer rectifies a Latent Defect pursuant to Clause 17.5, the Manufacturer shall be liable for any Latent Defect arising, occurring or becoming apparent in the rectified Part during the period from the date of such rectification until the later of:

17.6.1 expiry of the period referred to in Clause 17.5; and

17.6.2 the period ending twelve (12) months from the date of such rectification.

### 18. **SUSPENSION**

#### 18.1 **Right to Suspend Work**

The Purchaser may at any time instruct the Manufacturer to suspend the design, manufacture, supply, assembly, testing, commissioning or Delivery of the Plant and Machinery and/or any other item of Goods.

#### 18.2 **Protection of Work in Progress**

The Manufacturer shall during any such suspension take reasonable steps to protect and secure the Plant and Machinery and/or any other items of Goods affected at the Manufacturer's premises (or other location agreed with the Purchaser).

#### 18.3 **Entitlement to Costs for Suspension**

If a suspension occurs, the additional reasonable and documented costs incurred by the Manufacturer in complying with an instruction under Clause 18.1 (including those costs incurred in protecting, securing and insuring the items described in Clause 18.2) shall be reimbursed by the Purchaser save that the Manufacturer shall not be entitled to be paid any additional costs

18.3.1 where the suspension arises by reason of material default on the part of the Manufacturer or any of its Subcontractors or suppliers or the directors, agents, representatives or employees of any of them; or

18.3.2 arising from remedying any deterioration, defect or loss caused by the Manufacturer's faulty workmanship or materials or by the Manufacturer's failure to comply with Clause 18.2.

**18.4 Prolonged Suspension**

Unless otherwise agreed, if any suspension lasts for three hundred and sixty (360) or more days the Purchaser shall, if requested to do so by the Manufacturer, terminate this Agreement in accordance with Clause 25.7 (Voluntary Termination).

**18.5 Resumption**

Subject to Clause 18.4, the Purchaser may at any time instruct the Manufacturer to resume any activities suspended pursuant to Clause 18.1.

**18.6 Making Good Deterioration**

Upon receipt by the Manufacturer of an instruction from the Purchaser to proceed with any suspended activities, the Manufacturer shall examine the Plant and Machinery and other Goods affected by the suspension. The Manufacturer shall make good any deterioration or defect in or loss of such Plant and Machinery and other Goods that may have occurred during suspension.

**18.7 Entitlement to Costs for Resumption**

The additional reasonable and documented costs incurred by the Manufacturer in complying with an instruction under Clause 18.5 and its obligations under Clause 18.6 shall be added to the Contract Price, provided that the Manufacturer shall not be entitled to be paid any cost **REDACTED**.

**19. HEALTH AND SAFETY**

Where the Manufacturer or any of its Subcontractors carries out any work, including testing and commissioning work on the Plant and Machinery on the LUL Network or any other site under the control or supervision of the TfL Group, the Manufacturer shall and shall procure that its Subcontractors shall:

19.1.1 comply with all applicable Standards and Applicable Laws and carry out such work in a manner which would be adopted by a diligent and skilled contractor;

19.1.2 comply with any direction or instruction (whether written or oral) given by the Purchaser or their respective employees, contractors or agents, including any direction to cease working; and

19.1.3 comply with Schedule 14 (QUENSH).

**20. PAYMENT**

**20.1 Not used**

**20.2 Payment**

Payment

20.2.1 In consideration for performance of the Manufacturer's obligations under this Agreement but subject to Clause 20.3, the Purchaser shall pay the Manufacturer the amount of the Contract Price due at each payment date. The first payment shall be the first milestone payment (Advance Payment) in accordance with Schedule 4 Part 4 (Payment Milestones) . Subsequent payment dates shall occur at the intervals specified in the Contract Particulars.

20.2.2 Any payment due to the Manufacturer shall be retained until he has:

- (A) if no programme is included in Schedule 2, submitted an initial programme to the Purchaser Representative showing the information required under Clause 8.1.1 and which is capable of acceptance in accordance with Clause 8.3.1; and
- (B) supplied any advance payment bond or performance bond to the Purchaser required pursuant to Clause 22.2 and Schedule 4.

#### Payment applications

- 20.2.3 The amount due at each payment date shall be calculated as:
- (A) the value of payment due (less any payments already made) pursuant to Part 4 (Payment Milestones) of Schedule 4 where the conditions of a payment milestone have been met provided that the Manufacturer's payment application sets out the details and value of the milestone payment being sought; and
  - (B) the value of payment due (less any payments already made) pursuant to Clause 23.2 in respect of any properly completed Variation (or, where the Parties have agreed that a Variation shall be paid on a sectional basis, in respect of any properly completed section of the Variation) provided that the Manufacturer's payment application sets out the details and value of any Variation payment being sought.
- 20.2.4 The Purchaser Representative shall consider the Manufacturer's payment application and assess the amount due. The Purchaser Representative shall certify payment within 14 days of the later of receipt of the application and the relevant payment date and shall give the Manufacturer details of how the amount due has been assessed.

#### VAT invoice

- 20.2.5 Following receipt of such payment certificate the Manufacturer shall issue a corresponding VAT invoice for certified amount, accompanied by a copy of such payment certificate, to the Purchaser Representative in accordance with any instructions received from him. The Manufacturer shall ensure that such invoice:
- (A) is dated and issued no earlier than the date when any payment milestone and/or Variation to which it relates was met;
  - (B) shall clearly state the purchase order number; and
  - (C) **REDACTED.**

#### Payment due date

- 20.2.6 Payment of such VAT invoice shall become due 30 days following the date on which the Purchaser Representative receives the Manufacturer's VAT invoice. If the Manufacturer's invoice does not comply with the contractual requirements then the Purchaser shall be under no obligation to pay the same.

#### Payments owed by Manufacturer

- 20.2.7 Where a payment application shows a net amount owed by the Manufacturer to the Purchaser the Manufacturer shall pay the amount to the Purchaser within 30 days of such application being provided to the Purchaser Representative or, at the option of the Purchaser Representative, carry forward that amount to the next

milestone payment application in reduction of amounts which would otherwise have been owed by the Purchaser to the Manufacturer.

#### Payment recovery

20.2.8 Any payment made by the Purchaser under this Agreement does not prevent the Purchaser 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 Manufacturer by mistake of law or fact.

#### Late payment

20.2.9 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 the 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 Manufacturer is not entitled to suspend works under the Agreement or Delivery of the Goods as a result of any sums being outstanding.

### **20.3 Retention**

20.3.1 The Purchaser shall be entitled to withhold and (subject to Clauses 20.3.2 and 20.3.3) retain the Retention from each payment of the Contract Price under this Agreement.

20.3.2 The Retention monies shall be retained by the Purchaser without obligation to invest and without creating any fiduciary obligation or duty on the part of the Purchaser to the Manufacturer or any other person with whom the Manufacturer has contracted.

20.3.3 Within 28 (twenty eight) days after the Plant and Machinery has been Accepted for Service, the Purchaser shall pay to the Manufacturer the Retention Balance.

### **20.4 Provisional sums**

20.4.1 Where the Contract Price contains a provisional sum the Manufacturer shall only expend such sum to the extent that he is instructed in writing by the Purchaser Representative to do so. The value of the activity and/or item to which the provisional sum relates shall be assessed in accordance with Clause 20.4.2 and the Contract Price shall be adjusted accordingly. In so far as any provisional sum is not expended (in whole or in part) it shall be deducted from the Contract Price.

20.4.2 The cost of any activity and/or item in respect of which a provisional sum has been applied shall be assessed by the Purchaser Representative on the basis of the rates and prices contained in Schedule 4 and, in relation to any activity and/or item for which there are no applicable rates or prices, on a fair and reasonable basis in all the circumstances reflecting, so far as possible, the then current market rates.

### **20.5 Prime cost items**

20.5.1 Where the Contract Price contains a sum in respect of a prime cost item the Manufacturer shall only expend such sum to the extent that he is instructed in

writing by the Purchaser Representative to do so. Subject to the foregoing, the Manufacturer shall be entitled to recover the net amount that it has paid in respect of the prime cost item plus a percentage fee, which shall be calculated by applying the percentage stated in the Contract Particulars to such net amount. In so far as any prime cost sum is not expended (in whole or in part) it shall be deducted from the Contract Price.

## 21. VAT

### 21.1 Payment of VAT

The Contract Price is, unless otherwise stated, exclusive of VAT. To the extent that VAT is chargeable in respect of the Contract Price and the Manufacturer is liable to account for such VAT to any Competent Authority, such VAT shall be charged by the Manufacturer to the Purchaser at the rate in force on the date of the relevant payment application and must be shown as a separate amount on such payment application and shall accordingly be paid by the Purchaser to the Manufacturer. To the extent that VAT is chargeable in respect of the Contract Price and the Purchaser is liable to account for such VAT to any Competent Authority, the Contract Price shall not be affected by such VAT and no additional payments in respect of such VAT shall be made by the Purchaser to the Manufacturer pursuant to this Agreement but the Purchaser shall instead account for such VAT to the relevant Competent Authority.

### 21.2 Reimbursement of VAT

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).

### 21.3 VAT representations and undertakings

21.3.1 The Manufacturer represents and warrants that it is and will be registered for German VAT with the German VAT registration number stated in the Contract Particulars and shall manufacture and supply the Goods pursuant to this Agreement in the course or furtherance of a business.

21.3.2 The Purchaser represents and warrants that is and will be registered for UK VAT with UK VAT registration number stated in the Contract Particulars and shall acquire the Goods pursuant to this Agreement in the course or furtherance of a business.

21.3.3 The Manufacturer represents and warrants that, as at the date of this Agreement, no German VAT is chargeable in respect of the manufacture and supply of the Goods pursuant to this Agreement and the Manufacturer and the Purchaser undertake to complete any necessary forms (e.g. the Entry Certificate – *Gelangensbestätigung*) and comply with any necessary procedures to ensure German VAT is not chargeable in respect of the manufacture and supply of the Goods pursuant to this Agreement.

### 21.4 Confirmation of Parties' understanding of UK VAT position

The Parties confirm their understanding that, as at the date of this Agreement, UK VAT will be chargeable on the acquisition of the Goods by the Purchaser and/or on any services provided (or deemed for VAT purposes to be provided) by the Manufacturer to the

Purchaser under this Agreement and that such UK VAT will fall to be accounted for by the Purchaser pursuant to section 10 and/or section 8 of the United Kingdom Value Added Tax Act 1994 and not by the Manufacturer. Accordingly, the Parties confirm their understanding that the Purchaser shall account for such VAT to HM Revenue and Customs and no additional payments shall be made by the Purchaser to the Manufacturer in respect of UK VAT.

**21.5 VAT credit note to be issued on repayment**

Where under this Agreement any rebate or repayment of any amount is payable by the Manufacturer to the Purchaser, the Manufacturer shall issue a valid VAT credit note to the Purchaser.

**22. SECURITY**

**22.1 Not used**

**22.2 Security**

**22.2.1 REDACTED**

22.2.2 On or prior to the date of Delivery Certification, the Manufacturer shall supply the Purchaser with a performance bond in the amount stated in the Contract Particulars substantially in the form set out in Schedule 11, to expire upon Final Acceptance.

22.2.3 The bonds pursuant to Clauses 22.2.1 and 22.2.2 shall be from an issuer who has been approved in writing in advance by the Purchaser, such approval not to be unreasonably withheld or delayed so long as the issuer has a credit rating of not less than A+ or equivalent from at least one of the three main rating agencies (Standard & Poor's, Moody's and Fitch).

22.2.4 If at any time an existing bond ceases to meet the requirements of this Clause 22 then the Manufacturer shall replace such bond with a bond that meets the requirements within 10 (ten) Working Days.

**22.3 Failure of Security**

If the Manufacturer fails to provide security as provided for in Clause 22, a Manufacturer Event or Default shall arise pursuant to Clause 25.1.

**22.4 Renewal of Security**

22.4.1 In the event that the requirements of Clause 22.2.1 (A) and (B) have not been satisfied by the Manufacturer on or prior to the date of expiry of any advance payment bond provided pursuant to Clause 22.2.1 (the "**Original Bonds**"), then the Manufacturer shall supply the Purchaser with replacement advance payment bonds (the "**Replacement Bonds**") on substantially the same terms as the Original Bonds save that the expiry date of the Replacement Bonds shall be the date falling 12 (twelve) months after expiry of the Original Bonds. The remainder of this Clause 22 shall apply mutatis mutandis to the Replacement Bonds.

22.4.2 In the event that:

- (A) the Manufacturer is obliged to supply any Replacement Bonds under Clause 22.4.1; and

- (B) the Manufacturer has not supplied the Purchaser with such Replacement Bonds in accordance with this Clause 22 by the date falling two (2) weeks prior to expiry of the applicable Original Bonds,

the Purchaser shall be entitled to draw down the Maximum Amount (as defined in the applicable Original Bonds) under the applicable Original Bonds.

**22.5 Return of Bonds**

Subject to the Manufacturer's continuing compliance with its obligations under this Clause 22, the Purchaser shall, if requested to do so by the Manufacturer, return any expired bonds to the Manufacturer as soon as reasonably practicable following such request.

**23. VARIATION PROCEDURE**

**23.1 Right to vary**

23.1.1 The Purchaser Representative may at any time until the date of the Final Acceptance Certificate instruct the Manufacturer in writing to proceed with any Variation.

23.1.2 Upon issue of such instruction, the Manufacturer shall carry out such Variation and be bound by the terms of this Agreement in so doing, as though the Variation was stated in the Technical Requirements.

23.1.3 Nothing in this Clause 23.1.1 shall prevent the Manufacturer from making proposals to the Purchaser Representative for Variations but no Variation so proposed shall be carried out by the Manufacturer except as directed in writing by the Purchaser Representative.

**23.2 Valuation of variations**

23.2.1 As soon as possible after having received an instruction under Clause 23.1.1, the Manufacturer shall notify the Purchaser Representative if, in the Manufacturer's opinion, the Variation will involve an addition to or deduction from the Contract Price.

23.2.2 Subject to Clause 23.2.4, the amount to be added to or deducted from the Contract Price shall, if not the subject of a quotation from the Manufacturer which has been accepted by the Purchaser Representative prior to the Variation having been instructed, be determined by the Purchaser Representative in accordance with the rates and prices set out in Schedule 4 or, to the extent that such rates are not applicable, 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 the Agreement which is rendered useless by any such Variation.

23.2.3 Not used

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

**23.3 Manufacturer's records of costs**

23.3.1 In any case where the Manufacturer is instructed to proceed with a Variation prior to the determination of the value thereof under Clause 23.2.2, the Manufacturer shall keep contemporary records of the cost of carrying out the Variation and of time expended thereon. Such records shall be open to inspection by the Purchaser Representative in accordance with Clause 10.3.

**23.4 Notice of variations**

23.4.1 When instructing any Variation, the Purchaser Representative shall, to the extent possible, give the Manufacturer such reasonable notice as will enable him to make his arrangements accordingly.

**23.5 Progress with variations**

23.5.1 The Manufacturer shall, on receipt of an instruction from the Purchaser Representative under Clause 23.1, immediately proceed to carry out such instruction. The carrying out of such instruction shall not, without the consent of the Purchaser Representative, be delayed pending agreement on the value of the Variation.

**24. INTELLECTUAL PROPERTY RIGHTS**

**REDACTED**

**25. TERMINATION**

**25.1 Manufacturer Events of Default**

The occurrence of one or more of the following shall constitute a Manufacturer Event of Default:

- 25.1.1 the Manufacturer commits a material breach under this Agreement;
- 25.1.2 not used;
- 25.1.3 the Manufacturer commits a breach of Clause 10.1 (Manufacturing Facilities);
- 25.1.4 the maximum amount of any liquidated damages payable by the Manufacturer pursuant to Clause 13.1 and/or Clause 13.3 shall have accrued;
- 25.1.5 an Insolvency Event occurs in relation to the Manufacturer;
- 25.1.6 the Manufacturer fails to make payment of any sum not in dispute when due and payable to the Purchaser in accordance with this Agreement within thirty (30) days of a written demand for payment;
- 25.1.7 the Manufacturer fails to take out and/or maintain any of the Required Insurances in accordance with Schedule 9;
- 25.1.8 not used
- 25.1.9 not used; or
- 25.1.10 the Manufacturer fails to provide any bond required pursuant to Clause 22.2 or, subject to clause 22.2.4, any such bond ceases to be valid and enforceable by the Purchaser as provided for in Clause 22.2 or to otherwise meet the requirements of Clause 22.2.

**25.2 Procedures in relation to Termination for a Manufacturer Event of Default**

25.2.1 The Manufacturer shall notify the Purchaser forthwith on the Manufacturer becoming aware of the occurrence of a Manufacturer Event of Default.

25.2.2 Following the occurrence of a Manufacturer Event of Default (and notwithstanding that the Manufacturer may not have notified it pursuant to Clause 30.2.1), the Purchaser may by notice in writing to the Manufacturer ("**Purchaser Termination Notice**") specifying the Manufacturer Event of Default in question terminate this Agreement either in respect of all of the Goods which have not been Accepted for Service or (as specified in the notice) in relation to specific items of Goods which have not been Accepted for Service, such termination to take effect from the date specified in the Purchaser Termination Notice (being not less than seven (7) days after the date of the Purchaser Termination Notice or, in the case of Insolvency, forthwith) provided that, in respect of a Manufacturer Event of Default under Clauses 25.1.1, 25.1.3 or 25.1.6 which is capable of remedy, the provisions of Clause 25.3 shall apply.

### 25.3 Remedial Plan

25.3.1 Where a Manufacturer Event of Default that is capable of remedy arises under Clauses 25.1.1, 25.1.3 or 25.1.6, the Purchaser shall by notice in writing to the Manufacturer signed on behalf of the Purchaser (a "**Remedy Notice**") require the Manufacturer either

- (A) to remedy such breach(es) referred to in the Remedy Notice within thirty (30) Working Days of that notice or
- (B) within ten (10) Working Days of the Remedy Notice, to put forward a plan (a "**Remedial Plan**") to remedy the breach(es) referred to in the Remedy Notice. Such plan shall be in writing and shall specify the proposed remedy in reasonable detail and the latest date by which it is proposed that that remedy will be completed.

25.3.2 Where the Manufacturer puts forward a Remedial Plan in accordance with Clause 25.3.1, the Purchaser shall have twenty (20) Working Days after receipt of it in which to notify the Manufacturer in writing that it does not accept it (such acceptance not to be unreasonably withheld), failing which the Purchaser shall be deemed to have accepted that Remedial Plan.

25.3.3 If the Purchaser notifies the Manufacturer that it does not accept that Remedial Plan, the Purchaser and the Manufacturer shall endeavour in the following ten (10) Working Days to agree any necessary amendments to that plan in order for it to be acceptable to the Purchaser. In the absence of agreement in that period of ten (10) Working Days, the Purchaser may treat the Manufacturer Event of Default as not being capable of remedy and terminate this Agreement in accordance with Clause 25.2.2 (notwithstanding the proviso thereto). Where the Purchaser and the Manufacturer agree the form of the Remedial Plan, the Manufacturer shall implement such plan and comply with its terms.

25.3.4 If any breach specified in a Remedy Notice served under Clause 25.3.1 is not remedied

- (A) before the expiry of the period referred to in Clause 25.3.1(A) (if applicable) or
- (B) in accordance with a Remedial Plan that has been accepted or deemed accepted by the Purchaser, or the Manufacturer otherwise fails to comply with the terms of that Remedial Plan,

then the Purchaser may exercise its rights under Clause 25.2.2 as if the Manufacturer Event of Default is not capable of remedy.

25.4 **Not used**

25.5 **Consequences of Termination for Manufacturer Fault**

Where the Purchaser has served (a) a Purchaser Termination Notice in accordance with Clause 25.2.2 (and, where relevant, the Manufacturer Event of Default has not been remedied pursuant to Clause 25.3), or (b) a notice of termination under Clause 33.6 (Termination for Prohibited Act), the Purchaser shall be entitled (in its absolute discretion) to:

25.5.1 procure the completion of the Plant and Machinery and other items of Goods so that they satisfy the conditions necessary for the passing of title to the Purchaser and, upon completion, pay to the Manufacturer that part of the Contract Price for the Plant and Machinery and any other item of Goods not yet paid as at the date of termination less the cost of completion including procurement of the same. Where this gives rise to a negative figure, the corresponding positive amount will be payable by the Manufacturer to the Purchaser together with Default Interest (calculated from the date of termination of this Agreement to the date of payment by the Manufacturer); or

25.5.2 be reimbursed for all payments made to the Manufacturer in relation to the supply of the Plant and Machinery and other items of Goods (other than those in respect of which title has transferred to the Purchaser pursuant to Clause 16). The amount to be reimbursed shall attract Default Interest (calculated from the date of termination of this Agreement to the date of payment by the Manufacturer).

25.6 **Additional Remedies**

Without prejudice to Clause 38, where this Agreement has been terminated pursuant to Clause 25.2, 33.3, 33.4, 53.2, 54.5 or 56.9, the Purchaser shall be entitled to require the Manufacturer:

25.6.1 to assign the benefit of any warranties which have been given by any third parties, Subcontractors or suppliers to the Manufacturer in respect of the Goods; or

25.6.2 to provide all drawings of all Parts and all design, technical and maintenance records relating to the Goods including all Manuals relating to the Goods save to the extent the same have already been provided in accordance with this Agreement and such information shall be treated as Manufacturer IPR for the purposes of this Agreement.

25.7 **Voluntary Termination**

The Purchaser may terminate this Agreement without cause at any time by giving notice to the Manufacturer of such termination and the date when such termination shall become effective and the termination shall take effect upon such date.

25.7A **Technical Issues Termination**

Prior to the Manufacturer achieving Design Approval, either party may by written notice to the other party terminate this Agreement if any Technical Issues are identified which the parties, working together in good faith, have been unable to resolve. Such termination shall take effect from the date specified in the notice (such date being not less than seven (7) days after the date of the notice).

25.8 **Purchaser Event of Default**

A Purchaser Event of Default shall occur when:

25.8.1 the Purchaser fails to make payment of any sum which is due and payable to the Manufacturer in accordance with this Agreement and not in dispute and such amount has not been paid within thirty (30) days following a subsequent written demand by the Manufacturer for payment; or

25.8.2 an Insolvency Event occurs in relation to the Purchaser.

**25.9 Procedures in relation to Termination for a Purchaser Event of Default**

On the occurrence of a Purchaser Event of Default, the Manufacturer may by notice to the Purchaser (a "**Manufacturer Termination Notice**") terminate this Agreement and such termination shall take effect from the date specified in the Manufacturer Termination Notice.

**25.10 Consequences of Voluntary Termination or Termination for a Purchaser Event of Default or Concept Design Termination**

25.10.1 The Manufacturer and the Purchaser each agrees to notify each other of the occurrence of any Purchaser Event of Default as soon as it becomes aware of such occurrence.

25.10.2 Where this Agreement is terminated by the Purchaser in accordance with Clause 25.7 (Voluntary Termination) or by the Manufacturer in accordance with Clause 25.9 (Procedure in relation to Termination for Purchaser Event of Default) or by either party in accordance with Clause 25.7A (Technical Issues Termination), the Purchaser shall pay to the Manufacturer:

- (a) an amount equivalent to the amount that would be payable by the Purchaser to the Manufacturer in respect of a termination as a result of a Force Majeure Event in accordance with Clause 25.11; and
- (b) provided that the Manufacturer shall use all reasonable endeavours to mitigate such costs, expenses and/or other liabilities:
  - (i) the cost of materials or goods reasonably ordered for the Goods which have been delivered to the Manufacturer or of which the Manufacturer is legally liable to accept delivery (such materials or goods becoming the property of the Purchaser upon such payment being made to the Manufacturer); and
  - (ii) a sum being the amount of any expenditure reasonably and properly incurred by the Manufacturer in the expectation of completing its obligations under this Agreement insofar as such expenditure has not been recovered by any other payments referred to above,

provided that, where the amount would be a negative figure, the corresponding positive amount shall be payable by the Manufacturer to the Purchaser on the same basis as set out in Clause 25.5.1)

The Manufacturer shall not be entitled to payment of any other loss and/or damage arising from such termination.

25.10.3 Unless the parties otherwise agree, the Purchaser shall appoint a suitably qualified and appropriately skilled independent person from the Financial Services Framework ("**Independent Auditor**") to audit any or all of the costs, expenses and/or other liabilities incurred by the Manufacturer in performing his obligations under this Agreement until the date of its termination and any valuations made in connection with the termination and determine whether the

amount of such costs, expenses and/or liabilities were properly and reasonably incurred by the Manufacturer in accordance with this Agreement and whether such valuations have been properly and reasonably determined. The Purchaser shall use its reasonable endeavours to consult with the Manufacturer with respect to such appointment, subject always to the Purchaser's obligations to comply with the requirements of the Financial Services Framework and any applicable law.

- 25.10.4 Where the Purchaser appoints an Independent Auditor pursuant to Clause 25.10.3, it shall give written notice to the Manufacturer identifying the Independent Auditor appointed by the Purchaser, the terms of the Independent Auditor's appointment and the proposed timeframes for undertaking the audit. The Manufacturer shall cooperate with the Independent Auditor and grant the Independent Auditor the same rights of audit as the Purchaser enjoys under this Agreement.
- 25.10.5 The Purchaser shall procure that the Independent Auditor provides a copy of its decision in writing (together with reasons for its decisions) to the Manufacturer. Where the Independent Auditor determines that some or all of a specific cost, expense and/or liability was not properly and reasonably incurred by the Manufacturer, the Purchaser shall not be obliged to pay such amount to the Manufacturer.
- 25.10.6 The costs incurred by the Independent Auditor in undertaking the audit shall be borne by the Purchaser save where the Independent Auditor determines that some or all of a specific cost, expense and/or liability was not properly and reasonably incurred by the Manufacturer, in which case the Independent Auditor shall determine, taking into account what is reasonable in the circumstances, the proportion of its costs that shall be borne by the Manufacturer .
- 25.10.7 In the event the Manufacturer disputes any findings of the Independent Auditor, such Dispute shall be referred for resolution in accordance with Clause 32.

#### **25.11 Consequences of Termination for Force Majeure**

- 25.11.1 Where this Agreement is terminated in whole or in part by the Purchaser as a result of a Force Majeure Event in accordance with Clause 27, the Purchaser will acquire any:
- (A) Design that has been produced in connection with this Agreement prior to the date of service upon the Manufacturer of the FM Notice; and
  - (B) partially completed Plant and Machinery or other item of Goods that is the subject of the FM Notice.
- 25.11.2 The value of the Purchaser's acquisition will be assessed, where appropriate, in accordance with Schedule 4 (and in particular the Contract Price Breakdown contained in Part 3 of Schedule 4) or, to the extent that this is not appropriate due to the level of Design development, the costs and expenses reasonably and properly incurred by the Manufacturer in carrying out its obligations under this Agreement less the amount of progress or advance payments made to the Manufacturer. Where this gives rise to a negative figure, the corresponding positive amount shall be payable by the Manufacturer to the Purchaser on the same basis as set out in Clause 25.5.1.

**25.12 Consequences of Termination for other reasons**

Where this Agreement is terminated by the Purchaser under Clause 33.3, 33.4, 53.2, 54.5 or 56.9, the provisions of Clause 25.5 and 25.6 shall apply.

**25.13 Rejection**

This Clause 25 shall not apply to any rejection of the Plant and Machinery pursuant to Clause 14.

**26. SURVIVAL OF CLAUSES**

**26.1 Consequence of Termination or Expiry**

Upon termination or expiry of this Agreement, whether in respect of any one item of Goods or all Goods, the obligations of the Parties under this Agreement in respect of the terminated Goods shall cease except for:

26.1.1 any rights and obligations arising as a result of any antecedent breach of this Agreement or any rights and obligations which shall have accrued or become due prior to the date of termination; and

26.1.2 the provisions of Clauses 1, 7, 10.2 to 10.7 inclusive, 17, 20, 21, 22, 24, 25.5, 25.6, 25.10, 25.11, 25.12, 26, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 47 and 51 and the related Schedules referred to in or required to give effect to those Clauses which shall survive the termination or expiry of this Agreement and continue in full force and effect.

**27. FORCE MAJEURE**

**27.1 Consequence of a Force Majeure Event and Notification Requirements**

No Party shall be in breach of an obligation under this Agreement to the extent that it is unable to perform that obligation in whole or in part by reason of the occurrence of a Force Majeure Event provided that:

27.1.1 if any Party seeks to rely on this Clause 27 (the "**FM Affected Party**"), as soon as reasonably practicable and in any event no more than five (5) Working Days after the start of the claimed Force Majeure Event, the FM Affected Party shall notify the other Parties in writing of the act, event or circumstance relied on as a Force Majeure Event; and

27.1.2 within a further five (5) Working Days, the FM Affected Party shall notify the other Parties in writing of the date on which such act, event or circumstance commenced, including an estimate of the period of time required to overcome it and its effects, details of any failure by the FM Affected Party to perform its obligations under this Agreement, the effect on the FM Affected Party's ability to perform its obligations under this Agreement and the action being taken to mitigate its consequences in accordance with Clause 27.2 below.

**27.2 Mitigation**

27.2.1 An FM Affected Party shall:

- (i) make all reasonable efforts to mitigate the effects of the claimed Force Majeure Event (including, in the case of the Manufacturer, complying with the requests of the Purchaser Representative and, in relation to the Manufacturer's Works, using all reasonable endeavours to find alternative facilities at which to carry out its obligations), to continue to

perform its obligations under this Agreement and to resume performance as soon as possible;

- (ii) shall furnish written reports every seven (7) days to the other Party on its progress in doing so and any proposals to mitigate the effect of the claimed Force Majeure Event, including any reasonable alternative means for performance of the affected obligations; and
- (iii) shall provide any information relating to the claimed Force Majeure Event and its effects that other Party may reasonably request.

27.2.2 The FM Affected Party shall not be relieved from liability under this Agreement to the extent that it is not able to perform its obligations under this Agreement due to its failure to comply with its obligations under Clause 27.2.1 above.

### 27.3 **Extensions of Time for Force Majeure**

Subject to Clauses 27.2 and 27.4 the occurrence of a Force Majeure Event which directly causes delay to the supply of the Plant and Machinery and/or any other item of Goods will entitle the Manufacturer to an extension of time as provided for in Clause 15.

### 27.4 **Termination for Force Majeure**

Notwithstanding the provision of Clause 27.3 entitling the Manufacturer to an extension of time, the Purchaser shall be entitled to terminate this Agreement by notice in writing (a "**FM Notice**") to the Manufacturer if the Acceptance for Service of the Plant and Machinery or other item of Goods has been or would be delayed as the result of a Force Majeure Event for more than an aggregate total of ninety (90) days following the Contractual Acceptance Date for such Plant and Machinery or other item. The provisions of Clause 25.11 shall apply in respect of such termination.

### 27.5 **Effect on payments**

If a Force Majeure Event results in the Manufacturer being unable to carry out its obligations, the Purchaser shall cease to be liable to make any payment which would otherwise have been due on fulfilment of that obligation until and to the extent that the Manufacturer has performed that obligation.

### 27.6 **Cessation of Force Majeure**

Immediately after the end of the Force Majeure Event, the FM Affected Party shall notify the other Party in writing that the Force Majeure Event has ended and shall resume performance of its obligations under this Agreement insofar as the Agreement has not been terminated or varied in accordance with Clause 27.4.

### 27.7 **Continuing Obligations**

The Parties shall not be released from any of their obligations under this Agreement as a result of a Force Majeure Event, and this Agreement shall, subject to Clause 27.4, remain in effect for the duration of a Force Majeure Event.

## 28. **INSURANCE**

The Manufacturer and the Purchaser shall comply with the requirements of the insurance regime set out in Schedule 9.

29. **INDEMNITIES AND LIMITATIONS ON LIABILITY**

29.1 **Application**

The provisions of this Clause 29 shall apply notwithstanding any other provision of this Agreement.

29.2 **General Indemnity**

The Manufacturer shall be liable for and shall indemnify the Purchaser, TfL and the Owner, including any of their respective employees, servants, agents, subcontractors, suppliers, directors and officers (together the "**Indemnified Parties**"), against all expenses, liabilities, losses, damages, claims, costs, demands, proceedings and Taxes whatsoever suffered or incurred by the Purchaser, TfL, LUL or the Owner in respect of:

29.2.1 death or personal injury to any person or damage to any property or assets (including the LUL Network, the Plant and Machinery or any other item of Goods) arising from or in connection with:

- (A) the Manufacturer's testing and commissioning of the Plant and Machinery (and/or any subsystem or Part forming part of the Plant and Machinery) and/or any other items of Goods; and/or
- (B) the performance or non-performance (including any negligent performance) of the obligations of the Manufacturer, its Subcontractors or suppliers or the directors, agents, representatives or employees of any of them under this Agreement including in respect of the design of any Goods or of any Defect or Latent Defect arising from the same;

29.2.2 the negligence of, or any breach of this Agreement by, or any breach of statutory duty or wilful misconduct in each case by, any of the Manufacturer, its Subcontractors or suppliers or the directors, agents, representatives or employees of any of them;

29.2.3 any Environmental Damage arising from the acts or omissions of the Manufacturer, its Subcontractors or suppliers or their respective directors, agents, servants, officers, representatives or employees, or occurring during the design, manufacture, supply, testing, commissioning, Delivery and/or use of the Plant and Machinery and/or any other item of Goods; and

29.2.4 pursuant to Clause 24.3, any claim for infringement of any Intellectual Property Rights that are supplied by or on behalf of the Manufacturer pursuant to this Agreement including any costs and expenses incurred in defending a claim for infringement and in obtaining such rights, replacement rights or modifications to the existing rights so as to eliminate or avoid the infringement.

29.3 **Qualifications**

The Manufacturer shall not be liable to indemnify any Indemnified Party under the indemnity in Clause 29.2 in the case of any loss referred to in Clauses 29.2.1 and 29.2.2 to the extent that it results from negligence or breach of duty on the part of any Indemnified Party.

29.4 **Limitation on Manufacturer's Liability**

29.4.1 Subject to Clause 29.4.2, the Manufacturer's liability to the Indemnified Parties under this Agreement (whether arising in contract, tort (including negligence, breach of statutory duty or otherwise) or liquidated damages) shall not in aggregate exceed the amount stated in the Contract Particulars.

29.4.2 The Manufacturer's liability to the Indemnified Parties under this Agreement in respect of:

- (A) the Excepted Liabilities; and
- (B) The Manufacturer's express obligations in relation to warranty claims and for Defect rectification pursuant to each of its obligations under Clause 17,

shall not be subject to the limits referred to in Clause 29.4.1.

## 29.5 **Consequential Breach and Loss**

29.5.1 Neither the Manufacturer or the Purchaser shall be treated as being in breach of this Agreement if such breach arises as a direct, necessary and inevitable consequence of the occurrence of a breach thereof on the part of the other Party.

29.5.2 Other than in respect of Excepted Liabilities, neither Party shall be liable for any matter howsoever arising out of or in connection with this Agreement (including Clause 29.2) in respect of any Consequential Loss. Each Party respectively undertakes not to sue the other Party, the Owner, TfL or any member of the TfL Group in respect of Consequential Loss.

## 30. **CONFIDENTIALITY**

### 30.1 **Obligations of Confidentiality**

Subject to Clause 30.2 the contents of this Agreement, any documents referred to in this Agreement and any information whether written or oral, provided by the Purchaser to the Manufacturer or by the Manufacturer to the Purchaser in connection with this Agreement shall be treated by the recipient as confidential ("**Confidential Information**"). The Purchaser and the Manufacturer shall not (and shall procure that their respective officers, employees, advisers and agents and the officers, employees, advisers and agents of its subcontractors and suppliers do not) without the prior written consent of the other Parties or by failure to exercise due care or otherwise by any act or omission:

- 30.1.1 disclose Confidential Information to any person whomsoever;
- 30.1.2 use or exploit Confidential Information commercially for its or their own purposes other than in connection with the performance of this Agreement; or
- 30.1.3 use Confidential Information otherwise than for the purpose for which it was provided.

### 30.2 **Permitted Disclosure**

This Clause 30 shall not preclude the Purchaser from disclosing Confidential Information:

- 30.2.1 in accordance with any requirement under any Applicable Law (including pursuant to Clause 31) or Standard to do so;
- 30.2.2 to their respective professional advisers and auditors who are bound to such Party by a duty of confidentiality which applies to any information disclosed;
- 30.2.3 to any banks and financial institutions providing finance, or advising on or envisaging the provision of finance for any purpose in connection with this Agreement;
- 30.2.4 to or any Competent Authority;
- 30.2.5 to the Mayor of London and/or the Greater London Authority;
- 30.2.6 to any member of the TfL Group;

- 30.2.7 to the extent that the relevant Confidential Information is in the public domain otherwise than by breach of this Agreement by the Purchaser;
- 30.2.8 which was made available to the disclosing Party on a non-confidential basis;
- 30.2.9 which is required in connection with a disposition or other transfer of rights permitted in accordance with this Agreement;
- 30.2.10 which is required by law or by order of a Court of a competent jurisdiction (but only to the extent required by such law or order) to be disclosed in connection with any Dispute, litigation or other dispute resolution procedure; or
- 30.2.11 to any member of the Manufacturer Group for the purposes of the performance by the Manufacturer of its obligations under this Agreement,

nor shall it preclude the Manufacturer, subject to Clause 30.3, from disclosing Confidential Information for the purposes set out in and in accordance with Clauses 30.2.1, 30.2.2, 30.2.3, 30.2.4, 30.2.5, 30.2.6, 30.2.7, 30.2.8, 30.2.9, 30.2.10, and 30.2.11.

### 30.3 **Confidentiality Undertaking**

Where disclosure is permitted under Clause 30.2, other than Clauses 30.2.1, 30.2.2, 30.2.7 or 30.2.8, the Party disclosing the Confidential Information shall procure that the recipient of the Confidential Information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

### 30.4 **Prior Notice of Disclosure**

If a Party becomes required in circumstances contemplated by Clauses 30.2.1 to 30.2.11 to disclose any Confidential Information, such Party shall give to the other Party as much notice as is practical in the circumstances of such disclosure and shall co-operate with the other Parties, having due regard to the other Parties' views, and take such steps as the other Parties may reasonably require in order to enable it to mitigate the effect of, or avoid the requirements for, any such disclosure. Where the disclosing Party giving notice is the Purchaser, it shall only be obliged to give notice to, co-operate with, have due regard to the views of, and take steps as reasonably required by the Manufacturer.

### 30.5 **Standard of Care**

In fulfilling its obligations under this Clause 30, each Party shall be required to use the same degree of care to prevent unauthorised disclosure of such Confidential Information as it would use to prevent the disclosure of its own commercial and financial information of the same or similar nature and which it considers proprietary or confidential.

### 30.6 **Announcements**

The Manufacturer shall not (and shall procure that each Subcontractor and supplier does not) without the consent of the Purchaser (such consent not to be unreasonably withheld or delayed) advertise or otherwise give any publicity in any form to any matter relating to this Agreement or announce their involvement in the design, manufacture, supply, assembly, testing, commissioning, Delivery or support of any Goods.

### 30.7 **Reputation**

The Manufacturer shall not knowingly do or omit to do anything in relation to this Agreement which may bring the standing or reputation of any other Party into disrepute or otherwise attract adverse publicity in relation to the other Parties.

31. **FREEDOM OF INFORMATION**

- 31.1 The Manufacturer acknowledges that the Purchaser:
- 31.1.1 is subject to the FOI Legislation and agrees to assist and co-operate with the Purchaser to enable the Purchaser to comply with its obligations under the FOI Legislation, and
  - 31.1.2 may be obliged under the FOI Legislation to disclose Information without consulting and/or obtaining consent from the Manufacturer.
- 31.2 Without prejudice to the generality of Clause 31.1, the Manufacturer agrees and shall procure that its Subcontractors and suppliers (if any) will agree to:
- 31.2.1 transfer to the Purchaser or such other persons as may be notified by the Purchaser to the Manufacturer each Information Request relevant to this Agreement or any member of the TfL Group that the Manufacturer or its Subcontractors (if any) (as the case may be) receive as soon as practicable and in any event within 3 days of receiving such Information Request; and
  - 31.2.2 in relation to Information held by the Manufacturer on behalf of the Purchaser, provide the Purchaser with details about and/or copies of all such Information that the Purchaser requests and provide such details and/or copies within 6 days of a request from the Purchaser (or such other period as the Purchaser may reasonably specify), and in such forms as the Purchaser may reasonably specify.
- 31.3 The Purchaser (as may be directed by TfL) shall be responsible for determining whether Information is exempt or excepted information under the FOI Legislation and for determining what Information (if any) will be disclosed in response to an Information Request in accordance with the FOI Legislation. The Manufacturer shall not himself respond to any person making an Information Request, save to acknowledge receipt, unless expressly authorised to do so in writing by the Purchaser.
- 31.4 The Manufacturer acknowledges that the Purchaser (as may be directed by TfL) may be obliged under the FOI Legislation to disclose Information without consulting or obtaining consent from the Manufacturer.

32. **DISPUTE RESOLUTION**

If any Dispute should arise under this Agreement, either Party may refer it for resolution pursuant to Schedule 10.

33. **PROHIBITED ACTS**

- 33.1 The Manufacturer shall not and shall use its reasonable endeavours to procure that its Subcontractors (if any) shall not commit any Prohibited Act.
- 33.2 The Purchaser may audit and check any and all such records of the Manufacturer as are necessary in order to monitor compliance with this Clause 33 at any time during performance of this Agreement and during the three (3) years after the date on which the Final Acceptance Certificate has been given in respect of the Plant and Machinery.
- 33.3 If the Manufacturer, any of its shareholders, Subcontractors, or anyone employed by or acting on behalf of the Manufacturer or any of its agents commits any Prohibited Act, this constitutes a material breach of this Agreement and shall entitle the Purchaser to serve written notice terminating this Agreement in whole or in part with immediate effect. In the event that this Agreement is terminated in accordance with this Clause 33.3, Clauses 25.5 and 25.6 shall apply.

33.4 If a Prohibited Act is committed by any Subcontractor or any employee or agent of such Subcontractor or the Manufacturer then the Purchaser may serve a warning notice upon the Manufacturer instead of exercising its rights to terminate with immediate effect and unless, within thirty (30) days of receipt of such warning notice, the Manufacturer removes or procures the removal of the relevant Subcontractor, employee or agent (as the case may be) from further involvement with any aspect of the performance of this Agreement and (if necessary) procures the provision of the affected works and/or services by another Subcontractor, employee or agent (as the case may be) this constitutes a material breach of this Agreement and entitles the Purchaser to serve written notice terminating this Agreement in whole or in part with immediate effect. In the event that this Agreement is terminated in accordance with this Clause 33.4, Clauses 25.5 and 25.6 shall apply.

#### **34. ASSIGNMENT, TRANSFER AND SUB-CONTRACTING BY THE MANUFACTURER**

##### **34.1 Subcontracting**

34.1.1 The Manufacturer may sub-contract its obligations under this Agreement either in whole or in part to any Subcontractor provided that the written consent of the Purchaser Representative is obtained by the Manufacturer prior to the Manufacturer entering into any Subcontract.

34.1.2 Not used

34.1.3 The Manufacturer shall be fully responsible for any act, neglect, default or breach of this Agreement by any Subcontractor or supplier or the directors, agents, representatives or employees of the Manufacturer or of any of its Subcontractors or suppliers as if such act, neglect, default or breach had been carried out by the Manufacturer.

##### **34.2 Assignment**

Without prejudice to Clause 34.1, the Manufacturer shall not assign (whether absolutely or by way of security and whether in whole or in part), transfer, mortgage, charge, declare itself a trustee for a third party of, or otherwise dispose of (in any manner whatsoever) its rights and/or obligations under this Agreement, and any purported dealing in contravention of this Clause 34 shall be ineffective.

#### **35. ASSIGNMENT AND NOVATION OR GRANTING OF SECURITY BY THE PURCHASER**

##### **35.1 Permitted Transfers**

The Purchaser shall be entitled without the consent of the Manufacturer to assign (whether absolutely or by way of security and whether in whole or in part) transfer, novate, mortgage, charge or otherwise dispose of its rights and/or obligations under this Agreement to any person including for the purposes of financing its obligations under this Agreement.

##### **35.2 Implementation of Transfers**

If the Purchaser wishes to deal with its rights and/or obligations in this Agreement (either in whole or in part) pursuant to Clauses 39.1, the Manufacturer shall execute such documents and do such other things as the Purchaser may reasonably request in order to facilitate and perfect such dealing.

36. **NOTICES**

36.1 **Form of Communications**

Any notice, approval, consent or other communication referred to in this Agreement:

36.1.1 must be in writing; and

36.1.2 must be left at the address of the addressee or sent by pre-paid first class post (airmail if posted to or from a place outside the United Kingdom) to the address of the addressee or sent by facsimile to the facsimile number of the addressee in each case which is specified in this Clause 36.1 in relation to the Party to whom the notice is addressed, and marked for the attention of the person so specified, or to such other address or facsimile number in England or Wales, and/or marked for the attention of such other person as the relevant Party may from time to time specify by notice given in accordance with this Clause 36.1.

The relevant details of each Party at the date of this Agreement are:

**Purchaser:** as specified in the Contract Particulars

**Manufacturer:** as specified in the Contract Particulars

36.2 Each such communication shall, unless otherwise shown, be deemed to have been received:

36.2.1 if personally delivered, at the time of delivery;

36.2.2 if sent by first class post, on the third Working Day following the date on which it was posted or, if posted to or from a place outside the United Kingdom, the seventh Working Day after posting;

36.2.3 in the case of a facsimile, on production of a transmission report from the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient; and

36.2.4 in the case of electronic mail, five (5) working hours (where “working hours” are 09:00 to 17:00 in a Working Day) following the time when the sender’s electronic mail system dispatches the electronic mail provided that the correct email addresses as detailed in Clause 36.1 are used. The place of delivery of email will be deemed to be the postal address nominated by the recipient in Clause 36.1.

36.3 Not used

36.4 **Receipt on a Non-Working Day**

A notice received or deemed to be received in accordance with Clause 36.1 above on a day which is not a Working Day or after 5.00 p.m. on a Working Day according to local time in the place of receipt, shall be deemed to be received on the next following Working Day.

36.5 **Change of Address**

Each Party undertakes to notify immediately the other Parties by notice served in accordance with this Clause 36 if the address specified herein is no longer an appropriate address for the service of notice.

36.6 **Service of Proceedings**

This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

37. **ENTIRE AGREEMENT**

37.1 **Whole Agreement**

Each Party confirms that this Agreement and any other documents referred to in this Agreement represents the entire understanding, and constitutes the whole agreement, in relation to its subject matter and supersedes any previous agreement between the Parties with respect thereto.

37.2 **Non Reliance**

Each Party acknowledges and agrees that:

37.2.1 in entering into this Agreement it has not relied on any representation, warranty, assurance, covenant, indemnity, undertaking or commitment which is not expressly set out or referred to in this Agreement or any other documents referred to in this Agreement; and

37.2.2 no Party has any other right or remedy in respect of the matters set out in Clause 37.2.1 (whether by way of a claim for contribution or otherwise) in tort (including negligence) or for misrepresentation (whether negligent or otherwise, and whether made prior to, and/or in, this Agreement) save for any liability for fraudulent misrepresentation or fraudulent misstatement.

38. **RIGHTS CUMULATIVE WITH THOSE AT LAW**

38.1 **Rights Cumulative**

Except where expressly stated to the contrary the powers, rights and remedies conferred on the Parties herein shall be in addition and without prejudice to all other powers, rights and remedies available to the Parties by law.

38.2 **Equitable Remedies**

Without prejudice to any other rights or remedies that the Parties may have, the Parties acknowledge and agree that the remedies of injunction and specific performance as well as any other equitable relief for any threatened or actual breach of the provisions of this Agreement by any Party shall be available to the Parties and that no proof of special damages shall be necessary for the enforcement of the provisions of this Agreement.

39. **FURTHER ASSURANCE**

Each Party to this Agreement shall (at its own cost) do and execute, or arrange for the performance and execution of, each necessary act or document to implement its obligations under this Agreement.

40. **SET-OFF**

The Purchaser shall be entitled to withhold from any sum or sums expressed in this Agreement to be payable by it to the Manufacturer, any amounts due or expressed to be due by the Manufacturer to the Purchaser. Any payment payable by the Manufacturer under this Agreement shall be made in full without any set-off or counterclaim howsoever arising and shall be free and clear of, and without deduction of, or withholding for or on account of, any amount which is due and payable to the Manufacturer under this Agreement.

41. **CONTRACTUAL AMENDMENTS AND WAIVER**

41.1 **Contractual Amendments**

No change to this Agreement, unless provided for in the terms thereof, shall have effect unless it has been agreed, confirmed in writing and signed by the Parties.

41.2 **Waiver**

The rights and remedies of the Parties shall not be affected by any failure to exercise or delay in exercising any right or remedy or by the giving of any indulgence by the other Party or by anything whatsoever except a specific waiver or release in writing and any such waiver or release shall not prejudice or affect any other rights or remedies of the Parties. No single or partial exercise of any right or remedy shall prevent any further or other exercise thereof or the exercise of any other right or remedy.

42. **SEVERANCE**

If any provision or part of this Agreement is void or unenforceable due to the operation of any Applicable Law, it shall be deemed to be deleted and the remaining provisions of this Agreement shall continue in full force and effect.

43. **COSTS**

Each Party shall be responsible for their own costs (including legal costs) in relation to the negotiation and execution of this Agreement.

44. **LANGUAGE**

This Agreement is executed in English and all communications under this Agreement shall be made in English.

45. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

With the exception of the right of

45.1 any member of the TfL Group

45.2 the Owner (where it is not the Purchaser) and

45.3 any person expressly stated to be indemnified by a Party

to enforce any term of this Agreement which either expressly or by implication confers any benefit upon such person, no term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a signatory to this Agreement.

46. **COUNTERPARTS**

This Agreement may be executed in any number of counterparts and by the Parties to it on separate counterparts, each of which when so executed and delivered shall be an original, but all the counterparts shall together constitute one and the same instrument.

47. **GOVERNING LAW AND JURISDICTION**

47.1 **Governing Law**

This Agreement shall be governed by, and construed in accordance with, English law.

47.2 **Exclusive Jurisdiction**

Subject to the terms of Clause 32, the English Courts have exclusive jurisdiction in relation to any claim, dispute or difference ("**Proceedings**") concerning this Agreement and any

matter arising from it. For these purposes, each Party irrevocably submits to the jurisdiction of the English Courts.

**47.3 Forum**

Each Party irrevocably waives any right that it may have to object to any Proceedings being brought in the English Courts, to claim that the Proceedings have been brought in an inconvenient forum, or to claim that the English Courts do not have jurisdiction.

**48. RESPONSIBLE PROCUREMENT**

48.1 The Manufacturer shall have regard to the Responsible Procurement Principles and shall comply at all times with the Responsible Procurement Principles insofar as they are relevant to this Agreement, the Manufacturer and/or any Subcontractor.

**49. CRIME AND DISORDER**

49.1 The Manufacturer acknowledges that the Purchaser is under a duty in accordance with Section 17 of the Crime and Disorder Act 1998 to:

- 49.1.1 have due regard to the impact of crime, disorder and community safety in the exercise of the Purchaser's duties;
- 49.1.2 where appropriate, identify actions to reduce levels of crime and disorder; and
- 49.1.3 without prejudice to any other obligation imposed on the Purchaser, exercise his functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent crime and disorder in its area,

and in the performance of this Agreement the Manufacturer shall assist and co-operate, and use its reasonable endeavours to procure that its Subcontractors assist and co-operate, with the Purchaser where possible to enable the Purchaser to satisfy its duty.

**50. LONDON LIVING WAGE**

50.1 The Manufacturer acknowledges and agrees that the Mayor of London, pursuant to section 155 of the GLA Act, has directed the TfL Group (including the Purchaser) to ensure that the London Living Wage is paid to anyone engaged by the TfL Group who is required to perform contractual obligations in Greater London or on the LUL Network.

50.2 Without prejudice to the generality of Clause 50.1, the Manufacturer shall and shall procure that its Subcontractors (if any) shall:

- 50.2.1 ensure that none of its employees engaged in the performance of this Agreement in Greater London or on the LUL Network (but not otherwise) is paid an hourly wage (or equivalent of an hourly wage) less than the London Living Wage;
- 50.2.2 ensure that none of his employees engaged in the performance of this Agreement is paid less than the amount to which they are entitled in their respective contracts of employment; and
- 50.2.3 co-operate and provide all reasonable assistance to the Purchaser and any member of the TfL Group in monitoring the effect of the London Living Wage.

51. **DATA TRANSPARENCY**

51.1 The Manufacturer acknowledges that the Purchaser is subject to the Transparency Commitment. Accordingly, notwithstanding any provisions of this Agreement relating to the FOI Legislation or confidentiality, the Manufacturer hereby gives its consent for the Purchaser to publish the Contract Information to the general public.

51.2 The Purchaser may in its absolute discretion redact all or part of the Contract Information prior to its publication. In so doing and in its absolute discretion the Purchaser may take account of the exemptions/exceptions that would be available in relation to information requested under the FOI Legislation. The Purchaser may in its absolute discretion consult with the Manufacturer regarding any redactions to the Contract Information to be published pursuant to Clause 51.1. The Purchaser shall make the final decision regarding publication and/or redaction of the Contract Information.

52. **DATA PROTECTION**

52.1 The Manufacturer shall at all times comply with the Data Protection Act 1998 (including any subordinate legislation made under that Act from time to time) and any policies issued by the Purchaser from time to time in relation to the processing of data and shall not by any act or fault cause the Purchaser to be in breach of these requirements.

52.2 The Manufacturer shall:

52.2.1 take appropriate technical and organisational security measures satisfactory to the Purchaser against unauthorised or unlawful Processing of Purchaser Personal Data (as those terms are defined in the Data Protection Act) and against accidental loss, destruction of, or damage to such Personal Data;

52.2.2 provide the Purchaser with such information as it may reasonably require to satisfy itself of compliance by the Manufacturer with the requirements of this Clause 52; and

52.2.3 cooperate with the Purchaser in complying with requests or enquiries made pursuant to the Data Protection Act.

53. **CONFLICT OF INTEREST**

53.1 The Manufacturer acknowledges and agrees that it does not have any interest in any matter where there is or is reasonably likely to be a conflict of interest with performing this Agreement or any member of the TfL Group, save to the extent fully disclosed to and approved in writing by the Purchaser.

53.2 The Manufacturer shall undertake ongoing and regular conflict of interest checks throughout the duration of this Agreement and in any event not less than once in every six months and shall notify the Purchaser in writing immediately on becoming aware of any actual or potential conflict of interest with performing this Agreement or any member of the TfL Group and work with the Purchaser to do whatever is necessary (including the separation of staff working on and/or data relating to this Agreement from the matter in question) to manage such conflict to the Purchaser's satisfaction and provided that, where the Purchaser is not so satisfied (in its absolute discretion), the Purchaser shall be entitled to serve written notice terminating this Agreement in whole or in part with immediate effect. In the event that this Agreement is terminated in accordance with this Clause 53, Clauses 25.5 and 25.6 shall apply.

54. **CRIMINAL RECORDS DECLARATION**

54.1 The Manufacturer shall procure from each Relevant Individual (as the case may be) a

declaration that he has no Relevant Convictions (“Declaration”) or disclosure of any Relevant Convictions he has committed. The Manufacturer shall confirm to the Purchaser in writing on an annual basis upon request that each Relevant Individual has provided a Declaration. The Manufacturer shall procure that a Relevant Individual notifies the Manufacturer immediately if he commits a Relevant Conviction throughout the duration of this Agreement and the Manufacturer shall notify the Purchaser in writing immediately on becoming aware that a Relevant Individual has committed a Relevant Conviction.

- 54.2 The Manufacturer shall not engage or allow to act on behalf of the Manufacturer or any Subcontractor in the performance of any aspect of this Agreement any Relevant Individual who has disclosed a Relevant Conviction.
- 54.3 The Purchaser may audit and check any and all such records of the Manufacturer as are necessary in order to monitor compliance with this Clause 54 at any time during performance of this Agreement.
- 54.4 If the Manufacturer fails to comply with the requirements under Clause 54.1 and/or 54.2, the Purchaser may, without prejudice to its rights under Clause 54.5, serve notice on the Manufacturer requiring the Manufacturer to immediately take such steps as are necessary to ensure that such Relevant Individual has no further involvement with the performance of any aspect of this Agreement unless (in the case of non-compliance with Clause 54.1) within 7 days of receipt of the notice the Manufacturer confirms to the Purchaser that it has procured all of the Declarations required under Clause 54.1.
- 54.5 A persistent breach of Clause 54.1 and/or 54.2 by the Manufacturer shall constitute a material breach of this Agreement and shall entitle the Purchaser to serve written notice terminating this Agreement in whole or in part with immediate effect. In the event that this Agreement is terminated in accordance with this Clause 54, Clauses 25.5 and 25.6 shall apply.
- 54.6 If either Party becomes aware that a Relevant Individual has committed a Relevant Conviction, the Manufacturer shall take such steps as are necessary to ensure that such Relevant Individual has no further involvement with the performance of any aspect of this Agreement.
- 54.7 Nothing in this Clause 54 in any way waives, limits or amends any obligation of the Manufacturer to the Purchaser arising under this Agreement and the Manufacturer’s obligation to perform this Agreement remains in full force and effect and the Manufacturer cannot claim any extra costs or time as a result of any actions under this Clause 54.
- 54.8 The Manufacturer confirms that, for the duration of this Agreement, its corporate security and personnel processes are sufficient to ensure that no personnel with a Relevant Conviction will carry out any aspect of this Agreement.

## 55. **BEST VALUE**

- 55.1 The Manufacturer acknowledges that TfL is a best value authority for the purposes of the Local Government Act 1999 and as such TfL and the Purchaser are required to make arrangements to secure continuous improvement in the way they exercise their functions, having regard to a combination of economy, efficiency and effectiveness. The Manufacturer shall assist the Purchaser (and, where appropriate, TfL) to discharge this duty and agrees to negotiate in good faith any changes to this Agreement in order for the Purchaser (and, where appropriate, TfL) to achieve best value.

## 56. **WORK RELATED ROAD RISK**

### **Definitions**

56.1 For the purposes of Clauses 56.2 to 56.9 (inclusive) of this Agreement, the following expressions shall have the following meanings:

**“Bronze Accreditation”** the minimum level of accreditation within the FORS Standard, the requirements of which are more particularly described at:

[www.fors-online.org.uk](http://www.fors-online.org.uk)

**“Car-derived Vans”** a vehicle based on a car, but with an interior that has been altered for the purpose of carrying larger amounts of goods and/or equipment;

**“Collision Report”** a report detailing all collisions during the previous 12 months involving injuries to persons or fatalities;

**“Delivery and Servicing Vehicle”** a Lorry, a Van or a Car-derived Van;

**“Driver”** any employee of the Manufacturer (including an agency driver), who operates Delivery and Servicing Vehicles on behalf of the Manufacturer while delivering the Goods;

**“DVLA”** Driver and Vehicle Licensing Agency;

**“FORS”** the Fleet Operator Recognition Scheme, which is an accreditation scheme for businesses operating van and lorry fleets. It offers impartial, independent advice and guidance to motivate companies to improve their compliance with relevant laws and their environmental, social and economic performance;

**“FORS Standard”** the standard setting out the accreditation requirements for the Fleet Operator Recognition Scheme, a copy of which can be found at:

[www.fors-online.org.uk](http://www.fors-online.org.uk)

**“Gold Accreditation”** the highest level of accreditation within the FORS Standard, the requirements of which are more particularly described at:

[www.fors-online.org.uk](http://www.fors-online.org.uk)

**“Lorry”** a vehicle with an MAM exceeding 3,500 kilograms;

<b>“MAM”</b>	the maximum authorised mass of a vehicle or trailer including the maximum load that can be carried safely while used on the road;
<b>“Side Guards”</b>	guards that are fitted between the front and rear axles of a Lorry and that comply with EC Directive 89/297/EEC and the Road Vehicles (Construction and Use) Regulations 1986;
<b>“Silver Accreditation”</b>	the intermediate level of accreditation within the FORS Standard, the requirements of which are more particularly described at:  <a href="http://www.fors-online.org.uk">www.fors-online.org.uk</a>
<b>“to provide the Goods”</b>	to provide the Goods in the United Kingdom
<b>“Van”</b>	a vehicle with a MAM not exceeding 3,500 kilograms.

#### **Fleet Operator Recognition Scheme Accreditation**

- 56.2 Where the Manufacturer operates Delivery and Servicing Vehicles to provide the Goods, it shall within 90 days of the Agreement Commencement Date:
- 56.2.1 (unless already registered) register for FORS or a scheme, which in the reasonable opinion of Purchaser, is an acceptable substitute to FORS (the **“Alternative Scheme”**); and
  - 56.2.2 (unless already accredited) have attained the standard of Bronze Accreditation (or higher) or the equivalent within the Alternative Scheme and shall maintain the standard of Bronze Accreditation (or equivalent standard within the Alternative Scheme) by way of an annual independent assessment in accordance with the FORS Standard or take such steps as may be required to maintain the equivalent standard within the Alternative Scheme. Alternatively, where the Manufacturer has attained Silver or Gold Accreditation, the maintenance requirements shall be undertaken in accordance with the periods set out in the FORS Standard.

#### **Safety Equipment on Vehicles**

- 56.3 The Manufacturer shall ensure that every Lorry, which it uses to provide the Goods, shall:
- 56.3.1 have Side Guards, unless the Manufacturer can demonstrate to the reasonable satisfaction of Purchaser that the Lorry will not perform the function for which it was built if Side Guards are fitted;
  - 56.3.2 have front, side and rear blind spots completely eliminated or minimised as far as practical and possible, through the use of fully operational direct and indirect vision aids and driver audible alerts;
  - 56.3.3 have equipment fitted with an audible means of warning other road users of the Lorry’s left manoeuvre; and
  - 56.3.4 have prominent signage on the Lorry to warn cyclists and other road users of the dangers of passing the Lorry on the inside and of getting too close to the Lorry.

### **Driver Licence Checks**

- 56.4 Where the Manufacturer operates Delivery and Servicing Vehicles to provide the Goods the Manufacturer shall ensure that:
- 56.4.1 it has a system in place to ensure all its Drivers hold a valid driving licence for the category of vehicle that they are tasked to drive, along with recording any endorsements, or restrictions on the Drivers licence; and
  - 56.4.2 each of its Drivers engaged in the provision of the Goods has a driving licence check with the DVLA or such equivalent before that Driver commences delivery of the Goods and that the driving licence check with the DVLA or equivalent authority is repeated in accordance with either the following risk scale (in the case of the DVLA issued licences only), or the Manufacturer's risk scale, provided that the Manufacturer's risk scale has been approved in writing by Purchaser within the last 12 months:
    - 56.4.2.1 0-3 points on the driving licence – annual checks;
    - 56.4.2.2 4-8 points on the driving licence – six monthly checks;
    - 56.4.2.3 9-11 points on the driving licence – quarterly checks; or
    - 56.4.2.4 12 or more points on the driving licence – monthly checks.

### **Driver Training**

- 56.5 Where the Manufacturer operates Delivery and Servicing Vehicles to provide the Goods the Manufacturer shall ensure that each of its Drivers undergo approved progressive training (to include a mix of theoretical, e-learning, practical and on the job training) and continued professional development to include training covering the safety of vulnerable road users and on-cycle hazard awareness, throughout the term of the Agreement.

### **Collision Reporting**

- 56.6 Where the Manufacturer operates Delivery and Servicing Vehicles to provide the Goods, the Manufacturer shall:
- 56.6.1 ensure that it has a system in place to capture, investigate and analyse road traffic collisions that results in fatalities, injury or damage to vehicles, persons or property and for generating Collision Reports; and
  - 56.6.2 no later than 30 Working Days prior to the first use of Delivery and Servicing Vehicles to provide the Goods, provide to Purchaser a Collision Report. The Manufacturer shall provide to Purchaser an updated Collision Report within five working days of a written request from Purchaser.

### **Self Certification of Compliance**

- 56.7 Where the Manufacturer operates Delivery and Servicing Vehicles to provide the Goods, within 90 days of the Commencement Date, the Manufacturer shall make a written report to Purchaser detailing its compliance with Clauses 56.3, 56.4 and 56.5 of this Agreement (the "**WRRR Self-certification Report**"). The Manufacturer shall provide updates of the WRRR Self-certification Report to Purchaser on each three month anniversary of its submission of the initial WRRR Self-certification Report.

### **Obligations of the Manufacturer Regarding Subcontractors**

- 56.8 The Manufacturer shall ensure that those of its Subcontractors or suppliers who operate Delivery and Servicing Vehicles to provide the Goods shall:
- 56.8.1 comply with Clause 56.2; and

- 56.8.2 where its Subcontractors or suppliers operate the following vehicles to provide the Goods shall comply with the corresponding provisions of this Agreement:
  - 56.8.2.1 For Lorries – Clauses 56.3, 56.4, 56.5 and 56.6; and
  - 56.8.2.2 For Vans – Clauses 56.4, 56.5 and 56.6.

### **Failure to Comply with Freight-related Obligations**

- 56.9 Without limiting the effect of any other clause of this Agreement relating to termination, if the Manufacturer fails to comply with Clauses 56.2, 56.3, 56.4, 56.5, 56.6, 56.7 and 56.8:
  - 56.9.1 the Manufacturer has committed a material breach of this Agreement; and
  - 56.9.2 the Purchaser may refuse the Manufacturer, its employees, agents and Delivery and Servicing Vehicles entry onto any property that is owned, occupied or managed by Purchaser for any purpose (including but not limited to deliveries).

### **57. ACCESS**

- 57.1 The Purchaser shall give the Manufacturer access to the parts of the LUL Network required for the performance of this Agreement in accordance with the provisions of this Clause 57.
- 57.2 Subject to the provisions of this Clause 57, the Purchaser shall use reasonable endeavours to give access to such parts of the LUL Network to the Manufacturer on the dates and times on which it has stated that it requires such access.
- 57.3 The Manufacturer acknowledges that the Purchaser 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 the Agreement.
- 57.4 Where the Manufacturer requires access to the LUL Network to carry out its obligations under this Agreement, it shall
  - 57.4.1 apply for access at the earliest available opportunity; and
  - 57.4.2 provide the Purchaser Representative without delay with such additional information as the Purchaser Representative may reasonably require in respect of the Manufacturer's access requests.
- 57.5 The Purchaser shall confirm access bookings in accordance with this Clause.
- 57.6 The Purchaser does not warrant or guarantee to the Manufacturer that such access will be granted. If any request for access is rejected, the Purchaser shall advise the Manufacturer and agree with the Manufacturer alternative dates for resubmission.
- 57.7 Prior to returning any part of the LUL Network to the Purchaser at the end of any period of booked access, the Manufacturer 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 Purchaser Representative.
- 57.8 Where:
  - 57.8.1 the Manufacturer is denied booked access to any part of the LUL Network through no fault of the Manufacturer; or
  - 57.8.2 having fully complied with the requirements of Clause 57.4, the Manufacturer has a request for access rejected by the Purchaser,this shall constitute a Permitted Delay Event.

**IN WITNESS** whereof this Agreement has been executed and unconditionally delivered as a deed the day and year first above written.

**THE COMMON SEAL** of  
**LONDON UNDERGROUND LIMITED**  
was affixed to **THIS DEED**  
in the presence of:

Signature of Authorised Signatory .....

Print name of Authorised Signatory .....

**EXECUTED AND DELIVERED AS A DEED**  
by **KIROW ARDEL T GMBH**  
acting by:

Signature of Director .....

Print name of Director .....

Signature of Director/Secretary .....

Print name of Director/Secretary .....

**SCHEDULE 1A: TECHNICAL REQUIREMENTS**

**REDACTED**

## **SCHEDULE 1B: MANAGEMENT OF DELIVERY**

### 1. Project Management and Programme Management

#### 1.1 **Project Start Meeting**

Within 10 Working Days of the Commencement Date, the Purchaser will convene a Project Start meeting with the Manufacturer and VAB. The purpose of this meeting is to establish and define or communicate as appropriate, how the contract will be delivered. It will include topics such as:

- Named contractual contacts and organisation structure.
- Means of conducting communication.
- Project Meetings structure / attendees.
- Planning and programme management.
- Project Deliverables.

#### 1.2 **Project Progress Review & Reporting**

Both parties shall review progress on a 4 weekly basis. This will be held in a manner, method and location which is agreed by both parties and form the formal periodic review of progress. These meetings will be recorded with meeting minutes agreed, circulated to appropriate stakeholders and archived for project reference.

Where required the Manufacturer may be requested to take part in a weekly review meeting with the Purchaser during the project. This may range from a brief review phone call, a video conference, or a face to face meeting. Unless otherwise agreed by the Purchaser and where possible, this meeting will be recorded with meeting minutes agreed, circulated to appropriate stakeholders and archived for project reference.

Five days in advance of progress review meetings, every four weeks from the Commencement Date, the Manufacturer shall provide the Purchaser with a progress report containing details of the Design, manufacture, supply, assembly, testing, commissioning and Delivery of the Goods, including:–

- 1.2.1 An up to date programme with the data-date shown on the programme as of the date of submission.
- 1.2.2 Programme variances against previous programme submission.
- 1.2.3 An updated, numbered summary table of early warning notices issued to the Purchaser regarding any issues that may affect Safety, Programme, Quality or Cost.
- 1.2.4 An updated, numbered summary table of any current and unresolved Quality or Technical related Issues between the both Parties.
- 1.2.5 An updated, numbered summary table containing details of any Disputes between the Manufacturer and any third parties in connection with the contract.

- 1.2.6 An updated, numbered summary table of any Risks that have emerged to the Manufacturer. This will form the Manufacturers' Risk Register. The risk register should contain details of any details of any Safety, Technical or Commercial issues related to this delivery.
- 1.2.7 Progressed details and update on purchased and Delivered items (e.g. Critical Spares / Year One Consumables)
- 1.2.8 Supply a brief narrative describing progress since the previous report including photos if required.

### 1.3 **Document Communication & Management**

In order to enable efficient and traceable project management communication the Purchaser will provide the Manufacturer templates for project communication between both parties and also a template for communicating early warnings regarding making the other party aware of potential issues that may affect the delivery of all aspects of the project. Both types should be given a unique project communication reference number whenever they are issued. These project communications and early warnings are to be treated as everyday project correspondence will be the required between parties and will ensure that formal document management, and can be used to manage the change control process set out in Schedule 23 (Variation Procedure) and should be sent via email.

Throughout the project lifecycle the Manufacturer and the Purchaser will need to exchange other design & manufacturing related documents between each other. The Purchaser will provide the Manufacturer with access to our preferred method of sharing this information which will be online via an internet based method which is currently SharePoint.

## 2. **LONDON UNDERGROUND APPROVALS SUMMARY** – Certification and Assurance activities: New Plant and Machinery – VAB

In order to run and operate on the London Underground Network, the Manufacturer shall obtain suitable approvals/acceptance and provide certification that the Plant and Machinery have been verified as conforming against the relevant standards. An accredited and recognised VAB shall be engaged by the Manufacturer for this purpose.

The design of the Plant and Machinery and associated documentation shall be such that limitations on certification are kept to an absolute minimum (scope and duration).

The Manufacturer's chosen Verification Validation Body [Lloyd's Register] referred to in the Conditions of contract as VAB, shall scrutinise and provide verification of the following:

- Compliance with the requirements set out in Standards.
- Demonstration of acceptable safety risks for the Plant and Machinery in their intended use.

The Manufacturer shall procure that the VAB scrutinises the submitted evidence of compliance to standards in order that the approval of the Plant and Machinery as a rail vehicle by the Purchaser and the associated issue of a Certificate of Technical Conformance can take place.

The main elements for activities by a VAB are:

2.1.1 Design Assurance.

2.1.2 Engineering Acceptance / Technical Conformance for Standards.

2.1.3 Operations and Maintenance Assurance for use on London Underground & Network Rail.

2.1.4 London Underground Design Conformance

The VAB will provide verification of design conformance to the Manufacturer on behalf of the Manufacturer in order for the Purchaser to provide Design Approval.

## 2.2 **Management of Non-conformities to the Purchaser Technical Requirements Specification**

The Manufacturer shall procure that they identify any non-conformities to the technical requirements in accordance with activities laid out in the V&V and progresses any concession applications that may be desired where achievement of compliance is agreed to be impracticable, undesirable or unaffordable. Concessions can only be granted by the Purchaser.

## 2.3 **Management of Non-conformities to Standards for London Underground**

The Manufacturer shall procure that the VAB identifies any non-conformities . The Manufacturer is responsible to progress any concessions that may be desired where achievement of compliance is impracticable, undesirable or unaffordable. Concessions can only be granted by the Purchaser. The Manufacturer shall propose and agree an action plan to handle non-conformities in conjunction with the VAB.

## 2.4 **Standards Conformity Checklists**

A conformity check list shall be produced by the Manufacturer with VAB input to record details of the assessment undertaken and the results obtained. This will be done by utilising as a minimum the Conformity check lists in S-1172, Appendix 2 of Schedule 1A and any relevant Standard.

## 2.5 **Systems Safety Risk Management**

The Manufacturer shall procure that the VAB verifies that there is sufficient evidence that the safety risks associated with the Plant and Machinery's deployment and use have been fully explored and are tolerable and ALARP. This must include evidence of acceptable safety when the Plant and Machinery is running outside of Protection.

## 2.6 **Operational and Maintenance Acceptance.**

The Manufacturer shall procure that the VAB supports the approval of the Plant and Machinery by the Purchaser and the issue of an Infrastructure Manager's Letter of Acceptance.

The Manufacturer shall procure that the VAB verifies that the Manufacturer has specified and/or provided sufficient supporting documentation to define or facilitate the provision of suitable competence levels of staff, required tools, required workshop facilities etc to enable the safe and effective operation and maintenance of the Plant and Machinery in accordance with Standard S1171.

The output from this activity will allow the Purchaser to demonstrate that there is sufficient operational and maintenance readiness to operate the Plant and Machinery for running on Network Rail infrastructure.

### 3. **CERTIFICATION AND ASSURANCE ACTIVITIES: NEW PLANT AND MACHINERY – Network Rail Controlled Infrastructure Verification/ Certification**

The Manufacturer shall engage an accredited VAB to provide assurance and certification that the Plant and Machinery can be operated on Network Rail Controlled Infrastructure for transit operations (hauled in train formation only).

The Manufacturer shall procure that the VAB provides assurance that the Plant and Machinery is compliant with Railway Group Standards / Technical Standards for Interoperability (TSI's), as applicable under ROGS and facilitate or provide the following certification:

3.1.1 NRAP Certification.

3.1.2 Engineering Acceptance Certification.

3.1.3 Maintenance Conformance Certification.

3.1.4 Any other certification or conformance verification activities that may be required (such as Entity in Charge of Maintenance etc) as applicable, with the goal of allowing the machines to operate as specified on Network Rail Controlled Infrastructure.

The Manufacturer shall register the Plant and Machinery in order that it can be operated on Network Rail Infrastructure, e.g. registering with the Rolling Stock Library under the appropriate categories.

### 4. **DESIGN MANAGEMENT**

The Purchaser and the Manufacturer will hold regular meetings on Design matters throughout the contract design period. Design matters, issues and revisions are to be managed live, and in suitable elemental sections. Design outcomes are to be managed and discussed at the regular meetings. Formal designs, for review and approval by the Purchaser, shall be the output of a successful design management process, with the design solutions and issues all “expected” by the Purchaser. The intention, by holding all discussions live and thus minimising design reviews, wherever possible, is to avoid abortive work during the build programme.

An initial design meeting will be held following the Project Start Meeting. The purpose of this meeting will be to understand the Manufacturers’ design strategy and control plan that they are intending to employ for the design of the Cranes, tilting wagons & associated

support equipment with respect to the Design brief as discussed in the Technical requirements specification.

The Purchaser can then determine and clarify the design reviews that will be required to satisfy the Purchaser's process taking into account any independent assurances as provided to the Purchaser via the Manufacturer. The Purchaser process for concept and detailed design formal approvals will be discussed along with agreed communication channels for key project management, Project Engineering and design review personnel. Where appropriate the Manufacturer will be requested to embed these details including expected dates within their Contract Programme to assist with the communication of equipment design progress throughout the project life cycle.

Throughout the project lifecycle the Manufacturer and the Purchaser will need to exchange documents between each other. The Purchaser will provide the Manufacturer with access to our preferred method of sharing this information which will be online via SharePoint. This will be the required transfer method of documents between parties and will ensure that formal document management, and can be used to manage the change control process set out in Schedule 23 (Variation Procedure).

At the initial design meeting, an agreement will be made on how design meetings will be held for the contract period. It is envisaged that there are times when this will need to be face to face, but at other times, the use of video conferencing facilities or alternative means are utilised to reduce time and cost requirements. Further, it is also envisaged that the timing, frequency and required attendance at these meetings will change over the life cycle of the design phase of the project relative to the issues being addressed.

## **SCHEDULE 2: CONTRACT PROGRAMME**

Within the period stated in the Contract Particulars the Manufacturer shall, in accordance with Clause 8.1, submit a programme to the Purchaser Representative for his acceptance.

**SCHEDULE 3: YEAR ONE CONSUMABLES, CRITICAL SPARES AND SPECIAL TOOLS**

**PART A: YEAR ONE CONSUMABLES**

<b><u>One year consumables for two railway cranes</u></b>		
Engine Oil Filter	2	pc
Engine Filter Element for Main Fuel Filter	2	pc
Engine Complete pre fuel filter	2	pc
Engine Fuel filter element for pre filter	2	pc
Engine Main air filter element	2	pc
Engine Secondary air filter element	2	pc
Engine Poly V-belt	2	pc
Maintenance kit for auxiliary engine	2	pc
Hydraulic system Return filter element	2	pc
Hydraulic system Pressure filter element	2	pc
Hydraulic system Vent filter element	2	pc
Hydraulic system By pass filter element	2	pc
Hydraulic system Filter element	2	pc
Hydraulic system Drying agent cartridge	2	pc
<b><u>One year consumables for eight tilting wagons</u></b>		
Engine oil Filter	8	pc
Engine air Filter	8	pc
Engine fuel Filter	8	pc
Hydraulic oil breather filter	8	pc
Hydraulic oil filter	8	pc

## **PART B: CRITICAL SPARES**

The Critical Spares are to be agreed by the Parties and instructed in accordance with Clause 20.4 and the Variation Procedure.

## **PART C: SPECIAL TOOLS**

There are no Special Tools

**SCHEDULE 3A: CONTINUING SUPPORT**

**REDACTED**

## **SCHEDULE 4: CONTRACT PRICE**

### **PART 1 – PRICING PREAMBLES**

#### **1. PRICING INTRODUCTION**

1.1 This Part 1 provides further details with respect to the Contract Price.

#### **2. PRICING CONCEPT**

2.1 The Contract Price is a fixed sum, for the duration of the Agreement, adjusted in accordance with the contractual Variation procedure. The VAT treatment of supplies pursuant to this Agreement shall be as set out in Clause 21 of this Agreement.

2.2 The Manufacturer will be provided facilities by the Purchaser for Site Tests, rectification of Defects during the Defect Rectification Period and for compliance with Schedule 3A (Continuing Support). Examples of facilities provided are:

2.2.1 Temporary accommodation

2.2.2 Health, welfare and safety equipment

**REDACTED.**

2.3 The Contract Price shall be inclusive of all costs and charges whatsoever and shall be deemed to include all costs, overheads, profit, risk allowances and the like required for the Manufacturer's performance of this Agreement.

#### **3. PRICING APPROACH**

3.1 The Contract Price shall be in Euro and shall include all applicable taxes including any import/export taxes and all other statutory costs and the like but excluding VAT (which shall be dealt with pursuant to Clause 21 of this Agreement).

3.2 Notwithstanding paragraph 2.2 above, the rates and prices for all items and activities required for the Manufacturer's performance of this Agreement are deemed to be fully inclusive, and shall include (without limitation) the following:

##### **3.2.1 Preliminaries**

- i) Head Office, Branch Office and Manufacturer's Works Support - All Head Office, Branch Office and Manufacturer's Works costs directly related to this Agreement including, supervisory, liaison, engineering, planning, quality assurance and administrative staff including all associated overheads, communications and data costs, stationery, printing, postage, etc. not included in the percentage addition for overheads and profit.
- ii) All costs of temporary accommodation and sanitary facilities necessary for site staff including all associated costs including heating, lighting, furniture, first aid, associated consumables and all other safety, health and welfare facilities.
- iii) Site Communications - All costs in connection with the provision of telephones and portable telephones including installation costs, rental and calls, costs of usage

of public telephones and other communication equipment and consumables in connection with performing the Agreement.

- iv) Training Requirements - Course and examination fees and all costs of staff attending medical examinations and training courses in connection with performing the Agreement. All costs of Manufacturer run courses and licensing of staff.
- v) Insurance - All costs of complying with the insurance requirements as set out in the Agreement

### 3.2.2 Mobilisation

The mobilisation costs shall include (without limitation) staff costs, costs of training, recruitment, establishment of facilities, purchase of equipment, establishment of process and procedures etc and all other items necessary for the successful commencement of the performance of the Agreement. All costs in connection with mobilisation, set-up and the like and management thereof are deemed to be included.

### 3.2.3 Overheads and Profit - For the avoidance of doubt, overheads shall be deemed to include (without limitation):-

Corporate overhead contribution, profit recovery, headquarters staff costs, Manufacturer offices, yards, depots and other buildings and associated plant, Manufacturer's equipment and vehicles. rents, rates, insurances, running, maintenance and replacement costs for the above, general and administrative head and branch office staff salaries and wages, emoluments, expenses and allowances and all other costs of employment, including costs of and allowance for motor cars, subsistence, hotels, accommodation and the like, travel and associated expenses for directors and general and administrative head and branch office staff, legal and accountancy fees and costs, any financing costs and depreciation associated with all of the above, other non-job related costs and other indirect costs associated with the Agreement.

### 3.2.4 Attendance and Reporting

The Contract Price is deemed to be fully inclusive of the costs of the Manufacturer's recording and provision of information in accordance with this Agreement including as requested by the Purchaser Representative. The Contract Price is also deemed to include the costs of the Manufacturer's personnel attending any meetings.

## **PART 2 – PAYMENT**

### **1. FIXED PRICE ELEMENT OF CONTRACT PRICE**

- 1.1 The Manufacturer will be entitled to apply for payment in respect of the relevant payment milestone upon completion of all of the stated criteria, as set out in Part 4 (Payment Milestones) for that milestone.

### **2. PROVISIONAL SUMS**

**REDACTED**

### **3. PRIME COST SUMS**

- 3.1 Prime Cost Items will only be paid as instructed by a Variation. The Manufacturer will be entitled to apply for payment at intervals of not less than a month. Prime cost sums instructed under different Variations shall be applied for separately; the Manufacturer may apply for payment of more than one prime cost sum at the same time and may also apply for payment of one or more other Variations at that time.
- 3.2 The Manufacturer shall provide reference the Variation when applying for payment in respect of prime cost sums and include evidence that the Manufacturer has incurred the cost applied for.

### **4. VARIATIONS**

- 4.1 Where a Variation varies the Fixed Price Element of the Contract Price, the Variation will be paid by varying the payment due at the payment milestone to which the Variation relates. Where the Variation relates to two or more payment milestones, the value of the Variation will be divided between those milestones, based on allocating the value of the Variation between the payment milestones in proportion to the value of the Variation related to each payment milestone.
- 4.2 Where a Variation varies the Fixed Price Element of the Contract Price and the payment milestone to which the Variation relates has been paid, payment will be made by varying the amount due at the next payment milestone.
- 4.3 Otherwise Variations will be paid once the instructed Variation has been fully completed, unless it is set out in the Variation that payment may be applied for on an interim basis.
- 4.4 Where a Variation does not relate to a payment milestone, the Manufacturer will be entitled to apply for payment in respect of Variations at intervals of not less than a month. The Manufacturer may apply for payment of one or more Variations at the same time.

### **5. CONTINUING SUPPORT**

- 5.1 The Manufacturer will be entitled to payment for Continuing Support (Schedule 3A) at Final Acceptance.

**PART 3 – CONTRACT PRICE BREAKDOWN**

**The Contract Price Breakdown is attached**

**Design and Provision of Modular P&C Delivery & Installation System**

**Purchased Equipment**

		Quant	Unit	Rate	€
	The tenderer is to price inclusive of delivery to Delivery Location on the Delivery Date, with items delivered in accordance with the Approved Design.				
	<b>Fixed Price</b>				
A	Design activities and test related to Engineering Acceptance	1	Sum	REDACTED	REDACTED
B	Railway Crane MULTI TSKER KRC250LUL with fixed counterweight, including preparation of crane for retrofitting rotor head, all manuals and training	2	pc	REDACTED	REDACTED
C	Twin tension system for tandem operation of the two cranes forming an KRC500S	1	pc	REDACTED	REDACTED
D	Container platforms on FEA wagons from LUL and transport from Ruislip_Lpz_Ruislip	3	pc	REDACTED	REDACTED
E	Tow bars 1,5 m long	2	pc	REDACTED	REDACTED
F	Tilting wagons SWITCH TILTER LUL including load fixing and handling system	8	pc	REDACTED	REDACTED
G	SINGLE/TANDEM LIFTING BEAM – LONG 18+2x2m for tandem and single hook operation for E and bigger points	1	pc	REDACTED	REDACTED
H	TANDEM LIFTING BEAM – SHORT 15m for tandem operation for points up to D size	1	pc	REDACTED	REDACTED
J	GENERAL PURPOSE LIFTING BEAM 15+2x3m	2	pc	REDACTED	REDACTED
K	Panel grab (hydraulic plain line panel beam with rail grabs for lifting panels)	2	pc	REDACTED	REDACTED
L	Development of data logger for tilting wagons	1	pc	REDACTED	REDACTED
M	Proximity warning system for CW and boom height	2	pc	REDACTED	REDACTED
N	Year One Consumables (from Page 2)				REDACTED
				Sub-Total	REDACTED
	<b>Provisional Sums</b>				
	<b>Critical Spares</b> - all Parts with a lead time of one month of longer, and to be provided as part of the Plant, required to keep the Plant working in accordance with both the regime set out in the Conditions of Contract, Schedule 1 (Technical Specification) and the Manuals.				
P	Set of spare parts (for 2 cranes) subject to wear and tear as for example sliding plates, wire ropes, brake parts, engine parts, electric, hydraulic and pneumatic parts	1	set	REDACTED	REDACTED
Q	Set of spare parts (for 2 cranes) for emergency replacement or repair as for example engine parts, electric, hydraulic and pneumatic parts, a control system with a set of sensors and a set of wheelsets	1	set	REDACTED	REDACTED
R	Set of spare parts (for 8 tilting wagons) subject to wear and tear as for example brake parts, engine parts, electric, hydraulic and pneumatic parts	1	set	REDACTED	REDACTED
S	Set of spare parts (for 8 tilting wagons) for emergency replacement or repair as for example engine parts, electric, hydraulic and pneumatic parts, a control system with a set of sensors and a set of wheelsets	1	set	REDACTED	REDACTED
	<b>Prime Cost Items</b>				
T	VAB service of UK consultant (from Page 2)	DACT	€	REDACTED	REDACTED
U	Percentage addition on above	DACT	%	REDACTED	REDACTED
V	Travel expenses (+20%)	DACT	%	REDACTED	REDACTED
	<b>Continuing Support (Schedule 3A)</b>				
X	Kirow service technician to accompany tests and shifts in the first year - total of 125 days	1	Sum	REDACTED	REDACTED

**Contract Price 20,101,021.63 €**

## Design and Provision of Modular P&C Delivery & Installation System

### Purchased Equipment

	Quant	Unit	Rate	€
<b><u>Year One Consumables</u></b>				
<p>The tenderer shall list below all consumables required in Year 1 and to be provided as part of the Plant, required to keep the Plant working in accordance with both the regime set out in the Conditions of Contract, Schedule 1 (Specification) and the Manual. The tenderer is to price and quantify each item individually.</p> <p>The tenderer is to price inclusive of delivery to Delivery Location. Including any protective packaging necessary to ensure safe arrival.</p>				
<b><u>One year consumables for two railway cranes</u></b>				
Engine Oil Filter	2	pc	REDACTED	REDACTED
Engine Filter Element for Main Fuel Filter	2	pc	REDACTED	REDACTED
Engine Complete pre fuel filter	2	pc	REDACTED	REDACTED
Engine Fuel filter element for pre filter	2	pc	REDACTED	REDACTED
Engine Main air filter element	2	pc	REDACTED	REDACTED
Engine Secondary air filter element	2	pc	REDACTED	REDACTED
Engine Poly V-belt	2	pc	REDACTED	REDACTED
Maintenance kit for auxiliary engine	2	pc	REDACTED	REDACTED
Hydraulic system Return filter element	2	pc	REDACTED	REDACTED
Hydraulic system Pressure filter element	2	pc	REDACTED	REDACTED
Hydraulic system Vent filter element	2	pc	REDACTED	REDACTED
Hydraulic system By pass filter element	2	pc	REDACTED	REDACTED
Hydraulic system Filter element	2	pc	REDACTED	REDACTED
Hydraulic system Drying agent cartridge	2	pc	REDACTED	REDACTED
<b><u>One year consumables for eight tilting wagons</u></b>				
Engine oil Filter	8	pc	REDACTED	REDACTED
Engine air Filter	8	pc	REDACTED	REDACTED
Engine fuel Filter	8	pc	REDACTED	REDACTED
Hydraulic oil breather filter	8	pc	REDACTED	REDACTED
Hydraulic oil filter	8	pc	REDACTED	REDACTED

**Design and Provision of Modular P&C Delivery & Installation System**

**Purchased Equipment**

	Quant	Unit	Rate	£ p
<b><u>Estimate of Prime Cost Items</u></b>				
Below is an estimated build up of the Prime Cost Sum related to the VAB service of UK consultant				
<b>Assistance with Technical Issues</b>				
A	1	sum	REDACTED	REDACTED
<b><u>Estimated to be over a six month's period</u></b>				
<b>Estimations on the maximum amounts - Eight tilting transportation wagons</b>				
<u>It is understood the eight tilting transportation wagons will be required for 'movement' and 'operate' on both LUL infrastructure and mainline Network Rail network</u>				
B	1	sum	REDACTED	REDACTED
<u>'Authorisation for Placing Service' [APIS] and compliance to R(I)R 2011 will apply on the mainline railway</u>				
C	1	sum	REDACTED	REDACTED
Compliance to LUL standards				
<b>Estimations on the maximum amounts – KRC 250 cranes</b>				
<u>It is understood the KRC 250 cranes will be required for 'movement' on both LUL infrastructure and mainline Network Rail network with 'operation' ONLY on LUL infrastructure</u>				
D	1	sum	REDACTED	REDACTED
<u>'Authorisation for Placing Service' [APIS] and compliance to R(I)R 2011 will apply on the mainline railway</u>				
E	1	sum	REDACTED	REDACTED
Compliance to LUL standards				
<b>Estimations on the maximum amounts – Site Test</b>				
F	1	sum	REDACTED	REDACTED
Dynamic brake test, dynamic ride test, dQ, bogie rotational, logistics for the tests				

**PART 4 - PAYMENT MILESTONES**

*The Payment Milestones for the Fixed Price Element of the Contract Price are:*

**REDACTED**

## **PART 5 – VALUATION OF VARIATIONS**

### **1. SCHEDULE OF RATES AND PRICES**

- 1.1 The rates and prices that shall be used to determine the value of Variations in accordance with Clause 23.2.2 are set out in Part 6.
- 1.2 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 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 Purchaser Representative may request that the Manufacturer provide three dated quotations and for the value of the Variation to be based on the one that provided best value.

### **2. CONVERSION OF SUMS INTO EUROS**

- 2.1 The Manufacturer may request the Purchaser to make payment to the Manufacturer, in respect of payments legitimately made under this Agreement to the VAB (including the other items, e.g. testing costs, referred to in Pound Sterling in the Schedule of Rates / Part 6 below), in sterling. This request shall be made in writing to the Purchaser Representative before the payment application, to which the request relates, is issued by the Manufacturer.
- 2.2 Notwithstanding paragraph 2.1 above, where a sum forming part or all of the value of a Variation is not in Euros, the following will apply:
  - 2.2.1 A dated invoice / quotation from the third party will form the basis of the valuation.
  - 2.2.2 A currency conversion will be applied based on the Central European Bank's Euro foreign exchange reference rates as published at:

<http://www.ecb.europa.eu/stats/exchange/eurofxref/html/index.en.html>

or such other address as may be used by the Central European Bank or other body which takes over its function, as at the same date as that on the invoice / quotation.

**PART 6 – SCHEDULE OF RATES AND PRICES**

**REDACTED**

## **SCHEDULE 5: KEY PERSONNEL**

The following are the Key Personnel:

**REDACTED**

**SCHEDULE 6: NOT USED**

**SCHEDULE 7: NOT USED**

**NOT USED**

**SCHEDULE 8: NOT USED**

**NOT USED**

## **SCHEDULE 9: INSURANCE**

The Manufacturer shall procure and maintain the insurances of the types and with the insurance amounts as listed below, being understood that the actual insurance coverage will in each case be subject to the specific terms, conditions, limitations and requirements of the respective insurance contract and that the insurance coverage will not cover all sums for which the Manufacturer shall be legally liable under this Agreement. Such insurances shall be in effect for the duration of the contract unless otherwise specified. Evidence that such insurance is in effect shall be provided in the form of a broker's letter or similar, within 14 days of the contract commencement and at the time of each renewal of such policies.

If at any time any of the policies cease to meet the requirements of this Schedule 9, the Manufacturer shall replace such policy with a policy that meets the requirements within 10 (ten) Working Days.

- 1.1 Insurance to cover liability for death of or bodily injury or illness sustained by employees of the Manufacturer arising out or in the course of their employment. Such insurance shall be of an amount and on terms that comply with the appropriate statutory obligations in each country in which the Manufacturer operates.
- 1.2 Public Liability insurance of not less than £10,000,000 per incident or series of incidents arising out of one event and in the aggregate per annum; such insurance to cover such sums (other than those excluded by the policy terms and conditions) for which the Manufacturer shall be legally liable to pay as damages in respect of death or injury or illness or disease to third parties and/or loss of or damage to third party property.
- 1.3 Product Liability insurance of not less than £10,000,000 per incident or series of incidents arising out of one event and in the aggregate per annum; such insurance to cover such sums (other than those excluded by the policy terms and conditions) for which the Manufacturer shall be legally liable to pay as damages in respect of death or injury or illness or disease to third parties and/or loss of or damage to third party property arising as a result of a defect, fault or flaw in the goods supplied.
- 1.4 Erection All Risk Insurance to cover risks of physical loss or damage to the Goods until Acceptance for Service; such insurance shall extend to cover any damage to the Goods by the Purchaser after Delivery and prior to Acceptance for Service.
- 1.5 Insurance to cover all risk of loss or damage (including theft) to the Goods whilst in transit from one place to another or being stored during a journey, whether by land, rail, sea or air.
- 1.6 In the event that the Site Tests require the Goods to be tested and operated on Network Rail infrastructure, the Purchaser shall use reasonable endeavours to ensure that sufficient public liability insurance is maintained in order to comply with the requirements of the Office of the Rail Regulator and Network Rail. The Manufacturer shall co-operate with any requests for information to enable such insurance to be effected or with respect to compliance with the terms of the Purchasers' insurances.



## **SCHEDULE 10: DISPUTE RESOLUTION PROCEDURE**

For the purposes of this Dispute Resolution Procedure the following terms have the meanings set out below:

**“Adjudicator”** means an independent person appointed to act as an adjudicator in accordance with paragraph 8 of this Schedule 10.

**“Dispute”** means any dispute, controversy or claim arising out of or in connection with this Agreement.

**“Nominating Authority”** means the President or Vice President or other duly authorised officer of the London Court of International Arbitration;

**“Notice of Adjudication”** means any notice given by a Party to the other party or parties to the Dispute requiring reference of a Dispute to the Adjudicator in accordance with paragraph 7. The Notice of Adjudication shall include:

- (i) the nature and a brief description of the Dispute;
- (ii) details of where and when the Dispute arose; and
- (iii) the nature of the redress which is sought.

**“Referral Notice”** means a notice referring a Dispute to the Adjudicator in accordance with paragraph 11;

**“Senior Representative”** means a representative of a Party at senior executive level.

- 1 The Purchaser and the Manufacturer shall follow the procedure set out in this Schedule 10 for the management and resolution of Disputes.
- 2 Subject to paragraph 7, any Dispute may in the first instance be referred in writing from the referring Party to the Senior Representatives by notice in writing to the other Party. The written notice from the referring Party shall give brief written particulars of the Dispute, the relief sought and the basis for claiming the relief sought (including the provisions of this Agreement that are relevant to the Dispute). The written notice shall also identify the referring Party's Senior Representative.
- 3 Within 14 days of receipt of the notice pursuant to paragraph 2, the responding Party provides the referring Party with a brief written response. The response includes identification of the responding Party's Senior Representative.
- 4 The Senior Representatives shall meet and try to reach agreement to resolve the Dispute referred to them pursuant to paragraph 3.
- 5 If the Senior Representatives are unable to, or fail to, reach agreement to resolve the

Dispute within 14 days after the date of the response under paragraph 3, court proceedings shall not be commenced unless and until the Dispute has first been referred to adjudication (and an Adjudicator's decision has been obtained) in accordance with the procedure in paragraphs 7–28 and notice has been given in accordance with paragraph 29.

6 Each Party bears its own costs and expenses in relation to any reference of a Dispute to the Senior Representatives. Discussions amongst the Senior Representatives and any documents prepared or exchanged in relation to the reference of the Dispute to the Senior Representatives (including, for the avoidance of doubt, the notice under paragraph 2 and any response under paragraph 3) are without prejudice and the Parties shall not make use of or rely upon any without prejudice statements in any proceedings.

7 Notwithstanding the provisions of paragraphs 1, 2, 3, 4, 5 and 6, either Party may give notice at any time of its intention to refer a Dispute to adjudication under the procedure set out in paragraphs 7–29 by giving a Notice of Adjudication to the other parties to the Dispute.

8 Should either Party give a Notice of Adjudication then immediately thereafter the parties to the Dispute shall endeavour to agree upon a person whom they would consider suitable to act as the Adjudicator.

In the event of the parties to the Dispute failing to agree upon a suitable person who is able to act as the Adjudicator, the referring Party shall request the Nominating Authority to select a person to act as the Adjudicator.

The Nominating Authority communicates the selection of the Adjudicator to the Parties within 4 days of receiving a request to do so.

9 Any person requested or selected to act as the Adjudicator in accordance with paragraph 8:

9.1 shall be a natural person acting in his personal capacity; and

9.2 shall not be an employee of any of the parties to the Dispute, and shall declare any interest, financial or otherwise, in any matter relating to the Dispute

10 The terms of remuneration of the Adjudicator shall be agreed by the parties to the Dispute and the Adjudicator with the object of securing the appointment of the Adjudicator within 7 days of the Notice of Adjudication. If any party to the Dispute (but not all parties to the Dispute) rejects the terms of the remuneration of the Adjudicator the same shall be settled (and binding upon the parties to the Dispute) by agreement between the Nominating Authority and the Adjudicator (provided that the level of the Adjudicator's remuneration does not exceed the level originally proposed to the parties to the Dispute by the Adjudicator). If all the parties to the Dispute reject the terms of remuneration proposed by an Adjudicator another person shall be selected as an Adjudicator in accordance with paragraph 8.

11 Where the Adjudicator has been selected in accordance with paragraph 8 the referring Party shall refer the Dispute in writing to the Adjudicator by the Referral Notice in accordance with paragraph 12 within 7 days of the date of the Notice of Adjudication or within 2 days of the date of appointment of the Adjudicator, whichever is later. Upon

receipt of the Referral Notice, the Adjudicator must inform every Party to the dispute of the date that it was received.

12 The Referral Notice shall:

- 12.1 include the facts relied upon by the referring Party in support of its claim(s);
- 12.2 include a statement of the contractual and/or other basis relied upon by the referring Party in support of its claim(s);
- 12.3 include a calculation of the specific monetary amount (if any) that the referring Party is seeking to recover in relation to each and every claim that is the subject matter of the Dispute;
- 12.4 be accompanied by copies of, or relevant extracts from, this Agreement and such other documents on which the referring Party relies; and
- 12.5 include the addresses of all Parties to the Dispute.

The referring Party shall send copies of the Referral Notice and the documents referred to in this paragraph 12 to the other Party at the same time as he sends them to the Adjudicator.

13 If a matter disputed by the Manufacturer under or in connection with a Subcontract is also a matter disputed under or in connection with this Agreement, the Manufacturer may, with the consent of the Purchaser, refer the Subcontract dispute to the Adjudicator at the same time as the main Agreement referral. The Adjudicator shall then decide the disputes together and references to the parties for the purposes of the Dispute are interpreted as including the Subcontractor. The parties to the Dispute agree to consider and endeavour to agree in good faith any reasonable request by the Adjudicator for additional time to decide the main Agreement and Subcontract disputes.

14 The parties to the Dispute may jointly terminate the Adjudicator's appointment at any time. In such a case, or:

- 14.1 if the Adjudicator fails to give notice of his decision within the period referred to in paragraph 17 and the parties to the Dispute do not jointly extend time for his decision to be made in accordance with paragraph 17, or
- 14.2 if the period referred to in paragraph 17 is extended in accordance with paragraph 18 or by agreement by the parties to the Dispute and the Adjudicator fails to give notice of his decision within such extended period, and the parties to the Dispute do not jointly extend time for his decision to be made in accordance with paragraph 17, or
- 14.3 if at any time the Adjudicator declines to act or is unable to act as a result of his death, disability, resignation or otherwise,

a person shall be appointed to replace the Adjudicator in accordance with the provisions of paragraph 8. In the event of the parties to the Dispute failing to jointly appoint a

person willing and suitable to act as replacement Adjudicator within 3 days, any party to the Dispute may apply to the Nominating Authority to appoint a replacement Adjudicator. In any case where the Adjudicator is appointed as a replacement pursuant to this paragraph 14, the parties to the Dispute shall each send to the Adjudicator, as soon as reasonably practicable, copies of all documents supplied by them to the Adjudicator he replaces.

- 15 The Nominating Authority and its employees and agents shall not be liable to any Party for any act or omission unless the act or omission is in bad faith. The Parties also agree that any employee or agent of the Nominating Authority shall be similarly protected from liability.
- 16 The Party not making the referral may send to the Adjudicator within 14 days of the date of the referral, with a copy to the other Party, a written statement of the contentions on which it relies and any materials it wishes the Adjudicator to consider.
- 17 The Adjudicator shall reach his decision and give notice of the decision to the parties to the Dispute within 28 days of the date of receipt of the Referral Notice mentioned in paragraph 11, or such longer period as is agreed by the parties to the Dispute after the Dispute has been referred to him. Notice of the Adjudicator's decision (stating that it is given under this Schedule 10) shall be in writing and shall include a summary of the Adjudicator's findings and a statement of the reasons for his decision.
- 18 The Adjudicator may extend the period of 28 days referred to in paragraph 17 by up to 14 days, with the consent of the Party by whom the Dispute was referred.
- 19 The Adjudicator's decision shall be binding upon the parties to the Dispute and the Adjudicator unless and until the Dispute is finally determined by legal proceedings, by arbitration (if the parties otherwise agree to arbitration) or by agreement. The Adjudicator may on his own initiative or on the application of a Party correct his decision so as to remove a clerical or typographical error arising by accident or omission. Any correction of a decision must be made within five days of the delivery of the decision to the parties to the dispute. As soon as possible after correcting a decision in accordance with this paragraph, the Adjudicator must deliver a copy of the corrected decision to each of the Parties to this Agreement. Any correction of a decision shall form part of the decision. The Adjudicator may in his decision allocate his remuneration and expenses between the Parties in accordance with paragraph 26. If the Adjudicator's decision changes any payment which is due under this Agreement, payment of the sum decided by the Adjudicator shall be due not later than seven days from the date of the decision or the date on which such payment is due in accordance with the provisions of this Agreement, whichever is the later.
- 20 The Adjudicator:
  - 20.1 shall act impartially and as an expert (not as an arbitrator) in the conduct of the reference and in reaching his decision;
  - 20.2 shall consider any relevant information submitted to him by any of the parties to the Dispute and make available to them any information to be taken into account in reaching his decision provided in accordance with the procedure (if any) which

- the Adjudicator may decide;
- 20.3 shall reach his decision in accordance with the law applicable to this Agreement;
- 20.4 may take the initiative in ascertaining the facts and the law in relation to the Dispute;
- 20.5 may with the consent of the parties to the Dispute seek legal or technical advice from consultants whose appointment by the Adjudicator (including terms of remuneration) is subject to the approval of the parties to the Dispute;
- 20.6 shall, where a translation of any document is required, decide by whom it should be provided in the event that the parties to the Dispute do not agree.
- 21 The Adjudicator shall decide in his discretion on the procedure to be followed in the adjudication. In particular he may, but is not obliged to:
- 21.1 convene meetings upon reasonable notice to the parties to the Dispute at which such parties and their representatives are entitled to be present;
- 21.2 submit lists of questions to the parties to the Dispute to be answered in such meetings or in writing within such reasonable time as he requires;
- 21.3 require the parties to the Dispute to provide him with such information and other facilities as he reasonably requires for the determination of the Dispute;
- 21.4 otherwise take such action and adopt such procedures as do not conflict with any of the provisions of this Agreement and are reasonable and proper for the just, expeditious and economical determination of the Dispute;
- 21.5 inspect any part of the LUL Network, the Manufacturer's Works or the facilities of any relevant Subcontractor.
- 22 The Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as an adjudicator unless the act or omission is in bad faith. The Parties also agree that any employee or agent of the Adjudicator shall be similarly protected from liability.
- 23 All meetings are private and save as required by law the Adjudicator and the Parties shall keep confidential the Dispute, all information of whatever nature provided to him by or on behalf of any Party and his decision.
- 24 The Parties to a contract to which the Dispute relates shall continue to observe and perform all the obligations contained in such contract, notwithstanding any reference to the Adjudicator, and insofar as the same is consistent with any safety review procedures to which the parties to the Dispute are bound, give effect forthwith to the Adjudicator's decision in every respect unless and until as hereinafter provided the Dispute is finally determined by a court in any legal proceedings, by arbitration (if the parties otherwise agree to arbitration) or by agreement. Any party to the Dispute may apply to any

appropriate court for enforcement of the Adjudicator's decision. Neither any form of enforcement of the Adjudicator's decision nor any form of challenge to the enforcement of the Adjudicator's decision nor any dispute arising out of or in connection with such enforcement or challenge are regarded and treated as a Dispute for the purposes of this Schedule 10.

- 25 After the giving of a Notice of Adjudication, the Parties may seek to agree how the Adjudicator allocates the costs and fees excluding his remuneration and expenses which are dealt with in paragraph 26 below of the adjudication as between the Parties. If such an agreement is reached between the Parties, they shall notify the Adjudicator, who shall allocate costs and fees in accordance with such agreement. The Parties agree to be bound by the Adjudicator's allocation of costs and fees and to pay such costs and fees in accordance with the Adjudicator's direction unless and until the direction of the Adjudicator is set aside or revised by a court pursuant to any legal proceedings.
- 26 Subject to any agreement of the Parties, the Adjudicator shall allocate payment of his remuneration and expenses as between the Parties. Unless the Parties otherwise agree, the Adjudicator awards the payment of his remuneration and expenses on the general principle that costs should follow the event, except where it appears to the Adjudicator that in the circumstances this is not appropriate in relation to the whole or part of his remuneration or expenses. The Parties agree to be bound by the Adjudicator's allocation of payment of his remuneration and expenses and pay such remuneration and expenses in accordance with the Adjudicator's direction unless and until the direction of the Adjudicator is set aside or revised by a court pursuant to any legal proceedings.
- 27 All notices, written submissions and any other written communications between the parties to the Dispute and the Adjudicator shall either be delivered by hand, sent by facsimile or sent by first class pre-paid post or recorded delivery (airmail if posted to or from a place outside the United Kingdom) and, in each case, copied simultaneously (delivered or sent as aforesaid) to the other Parties. Copies by way of confirmation of all communications by facsimile between the parties to the Dispute and the Adjudicator shall also be sent by first class post (airmail if posted to or from a place outside the United Kingdom) not later than the next following Working Day the date of the original facsimile transmission.
- 28 All information of whatever nature provided to the Adjudicator by any party to the Dispute shall be copied to the other parties simultaneously.
- 29 If any party to a Dispute is dissatisfied with the Adjudicator's decision on that Dispute, that party may commence court proceedings for the final determination of the Dispute.

## **SCHEDULE 11: FORM OF PERFORMANCE BOND**

(Letterhead of Guarantor)

To: London Underground Limited (its successors in title and assigns)

**Contract Bond No. [ • ]**

1. Whereas our clients [ • ] (the “**Supplier**”) have entered into a contract with you dated [ • ] (the “**Contract**”) in respect of [ • ], we [ • ] (the “**Guarantor**”, which term shall include our successors in title and assigns) hereby irrevocably undertake as a primary obligation upon first demand in writing made by you upon us from time to time or at any time to pay to you on each occasion the sum demanded by you within five (5) banking days upon service of your demand.

**PROVIDED THAT:**

2. This Bond shall come into force on the date hereof.
3. Any demand hereunder shall be substantially in the form of either Annex 1A or Annex 2 to this Bond, and as between you and us the facts set out in that demand shall be: (a) deemed to be true and (b) accepted by us as conclusive evidence for the purposes of this Bond that the amount claimed in the demand is due and payable to you hereunder, it being our intention that the event upon which payment must be made hereunder is the service of your demand without any rights on our part to raise any objections, irrespective of the validity or the effectiveness of the Contract and the obligations arising thereunder and irrespective of the underlying facts or their significance under the Contract.
4. Any demand in the form of Annex 1A to this Bond shall be accompanied by a copy of a letter from you sent to the Supplier by first class recorded delivery fourteen (14) or more days before the date of the demand, substantially in the form of Annex 1B to this Bond.
5. All sums payable under this Bond shall be paid in pounds sterling to such bank account as may be specified in your demand in immediately available funds, free of any restriction or condition and free and clear of and without any deduction or withholding whether for or on account of tax, by way of set-off, or otherwise, except to the extent required by law.
6. For the purpose of this paragraph 6, the expression “Expiry Date” means [ • ]. Our liability hereunder shall be limited as follows:

- (a) we shall have no liability in respect of any demand received after the Expiry Date; and
  - (b) in respect of a demand or demands received on or before the Expiry Date, our liability shall not exceed the aggregate sum of £[ • ].
7. Our obligations hereunder shall remain in full force and effect and shall not in any way be affected, reduced or discharged by:
- (a) any alteration to the terms of the Contract made by agreement between you and the Supplier; and/or
  - (b) any defence, counterclaim, set-off or other deduction available to the Supplier under the Contract; and/or
  - (c) any alteration in the extent or nature or sequence or method or timing of the works/services to be carried out under the Contract; and/or
  - (d) any time being given to the Supplier or any other indulgence or concession to the Supplier or any forbearance, forgiveness or any other thing done, omitted or neglected to be done under the Contract; and/or
  - (e) any other bond, security or guarantee now or hereafter held by you for all or any part of the obligations of the Supplier under the Contract; and/or
  - (f) the release or waiver of any such other bond, security or guarantee; and/or
  - (g) any amalgamation or reconstruction or dissolution including liquidation or change in control or constitution of the Supplier; and/or
  - (h) the termination of the Contract; and/or
  - (i) any other event which might operate to discharge a guarantor at law or in equity.
8. Terms defined in the Contract and not otherwise defined herein shall have the same meaning in this Bond unless inconsistent with the context.
9. This Bond shall be governed by, and interpreted according to, the laws of England and the Courts of England shall have exclusive jurisdiction in relation to any claim, dispute or difference concerning this Bond and any matter arising from it save that you shall have the right to bring proceedings in the Courts of any other jurisdiction in which any of our assets may be situated.
10. This Bond may be assigned or transferred without our prior consent to any member of the Transport for London Group. Any other assignment or transfer of this Bond by

either party shall require the consent of the other party, such consent not to be unreasonably withheld or delayed.

11. This bond may not be amended, varied or supplemented in any manner whatsoever without your prior written consent, other than in accordance with its express terms.
12. Each of the provisions of this bond is severable and distinct from the others, and if at any time any such provision is or becomes ineffective, inoperable, invalid or unenforceable it shall be severed and deemed to be deleted from this bond, and in such event the remaining provisions of this bond shall continue to have full force and effect.
13. All bank charges and other fees payable in relation to or in connection with this bond are for the account of the Manufacturer and you shall have no liability or responsibility therefor.
14. Except to the extent it is inconsistent with the express terms of this bond, this bond is subject to the ICC Uniform Rules for Demand Guarantees, 2010 revision, ICC Publication No. 758.

Executed as a deed by the parties and delivered on the date of this Bond.

Executed as a Deed by [GUARANTOR] )

acting by ) .....

) Authorised Signatory

and

) .....

) Authorised Signatory

Executed as a deed by affixing the Common Seal of )

LONDON UNDERGROUND LIMITED )

in the presence of:- )

.....

*[Authorised Signatory]*

**ANNEX 1A**

**Form of Demand from the Company to the Guarantor**

**To be sent by first class recorded delivery post**

Dear Sirs

**[Contract Title]**

**Contract No: [ ● ]**

We refer to the Bond given by you to us dated [ ● ]. We enclose a copy of a letter from us to [ ● ] (“the **Supplier**”) which was sent to the Supplier by first class recorded post on [ ● ] which is more than fourteen (14) days before the date of this demand.

The Supplier has not taken steps to remedy the breach/breaches of the Contract.

The breach/breaches of the Contract is/are as follows:

[ ● ]We hereby demand payment from you of the sum of £[ ● ] under your Bond. Please make payment by CHAPS in sterling payable to [London Underground Limited / bank account details].

Yours faithfully

.....

London Underground Limited

Windsor House

42-50 Victoria Street

London

SW1H 0TL

**ANNEX 1B**

**Form of letter from the Company to the Supplier**

**To be sent by first class recorded delivery post**

Dear Sirs

**[Contract Title]**

**Contract No: [ • ] (the “Contract”)**

As explained in [previous letters to you/ our letter dated [ • ]], you are in breach of your obligations under the Contract and you have not proposed or implemented sufficient steps to remedy those breaches.

This letter therefore notifies you that, unless within the next fourteen (14) days you take steps to remedy the breach/breaches, we will be entitled without further notice to you to call for payment under the Bond given on your behalf by [ • Guarantor].

Yours faithfully

.....

on behalf of

London Underground Limited

Windsor House

42-50 Victoria Street

London

SW1H 0TL

**ANNEX 2**

**Alternative form of demand from the Company to the Guarantor**

Dear Sirs

**[Contract Title]**

**Contract No: [ • ] (the “Contract”)**

We refer to the Bond given by you to us dated [ • ].

An event has occurred of the type described in Clause [ • ] of the Contract.

The breach/breaches of the Contract is/are as follows:

[ • ]

We hereby demand payment from you of the sum of £[ • ] under the Bond. Please make payment by CHAPS made payable to [\[London Underground Limited / bank account details\]](#).

Yours faithfully

.....

London Underground Limited

Windsor House

42-50 Victoria Street

London

SW1H 0TL

## SCHEDULE 12: FORM OF ADVANCE PAYMENT BOND

London Underground Limited  
Windsor House  
42-50 Victoria Street  
London  
SW1H 0TL

For the attention of:

Dear Sirs,

### **On Demand advance payment bond No: [NUMBER] dated [DATE]**

1. This on demand advance payment bond is issued at the request of [NAME OF MANUFACTURER] (the “**Manufacturer**”) in favour of London Underground Limited (“**you**”, or the “**Beneficiary**”) in connection with a Manufacture and Supply Agreement for a modular points and crossings delivery and installation system *dated* [DATE OF MSA] between the Beneficiary and the Manufacturer (the “**Contract**”).
2. This on demand advance payment bond is issued for the Maximum Amount.
3. We [NAME AND ADDRESS OF BANK] irrevocably promise to pay, as primary obligor, to you on your first written demand (in the form of statement as set out in Appendix 2) (a “**Demand**”) and waiving all rights of objection and defence and without reference to the Manufacturer an amount or amounts not exceeding in aggregate £[ ] ([ ] million pounds sterling) (the “**Maximum Amount**”) provided that your Demand:
  - 3.1. complies with the provisions of this bond; and
  - 3.2. shall not exceed the Maximum Amount less any amount previously paid by us to you under this bond; and,
  - 3.3. confirms that the Manufacturer has failed to perform or is otherwise in breach of its obligations under the Contract in accordance with the terms and conditions thereof.
4. In this bond, “**Expiry**” means the earliest of:
  - 4.1. close of normal banking hours at this office on [DATE OF EXPIRY];
  - 4.2. the repayment of the Maximum Amount by the Manufacturer or by us to you as certified to us, by you, in writing;
  - 4.3. [the Maximum Amount reducing to zero in accordance with the Contract as certified to us, by you, in writing,] [*Mechanism to be confirmed once structure of payments settled*]

On Expiry, this bond shall expire and become null and void, whether returned to us for cancellation or not, and any Demand received after Expiry shall be ineffective.

5. Your Demand under this bond must be received at this office before Expiry and must be in the form of a statement (as set out in Appendix 2) that:
  - 5.1. specifies the amount paid by us as referred to in paragraph 3.2, even if that amount is zero; and
  - 5.2. specifies the amount claimed.

We shall accept such Demand as evidence, for the purposes of this bond alone, that the amount claimed is due to you under this bond.

6. This bond is personal to you and is not transferable or assignable. For the avoidance of doubt, nothing in this bond shall confer on any third party any benefit or the right to enforce any term of this bond.
7. Except to the extent it is inconsistent with the express terms of this bond, this bond is subject to the ICC Uniform Rules for Demand Guarantees, 2010 revision, ICC Publication No. 758.
8. Each Demand, notice or other communication to be made hereunder shall be made in writing by letter. Any communication or document to be made or delivered by one person to another under this bond shall (unless that person has, by five (5) Working Days' (as defined in the Contract) written notice to the other, specified another address) be made or delivered to that other person by hand or by facsimile transmission at their address or facsimile number identified in Appendix 1 hereto and shall be deemed to have been made or delivered and received when left or received at that address or facsimile number during business hours on a Working Day (as defined in the Contract).
9. Any Demand made by you in accordance with Clause 3 shall be conclusive evidence that the sum stated in such Demand is properly due and payable to you under this advance payment bond. Save as required by applicable law, we shall have no right and shall not be under any duty or responsibility to enquire into the reason or circumstances of any Demand made by you, the respective rights and/or obligations and/or liabilities of the Beneficiary and the Manufacturer under the Contract, the authenticity of any written Demand made by or the authority of the persons signing any written Demand by you.
10. All payments to be made hereunder to you shall be made without set-off, counterclaim, withholding or deduction for or on account of tax or otherwise (save as expressly otherwise provided herein) unless we are required to make such payment subject to deduction or withholding of tax, in which case the sum payable by us shall be increased to the extent necessary to ensure that after the making of such deduction or withholding you receive and retain a net sum equal to the sum you would have received had no such deduction or withholding been made.
11. This bond may not be amended, varied or supplemented in any manner whatsoever without your prior written consent, other than in accordance with its express terms.
12. Our obligations hereunder shall be direct, primary, irrevocable obligations and shall not be discharged, prejudiced or adversely affected by any of the following:

- 12.1. any time, waiver, release, indulgence or forbearance which you or your agents or representatives may grant to the Manufacturer or that the Manufacturer may grant to you;
  - 12.2. amendment or modification to the Contract;
  - 12.3. any invalidity, illegality or unenforceability in or of the terms of any agreement or other commitment to which the Manufacturer is or may become a party, including (without limitation) any invalidity in the Contract, or the avoidance, termination or other revocation of or loss of rights under the Contract;
  - 12.4. any disability, incapacity, change in ownership or change in status of the Manufacturer;
  - 12.5. an insolvency or similar event in relation to, or a change in the constitution of, the Manufacturer;
  - 12.6. any breach of the Contract by any party thereto; or
  - 12.7. by any other matter or thing which in the absence of this provision would or might have that effect.
13. No failure or delay by you in exercising any right or remedy shall operate as a waiver, nor shall any single or partial exercise or waiver of any right or remedy preclude its further exercise or the exercise of any other right or remedy.
  14. Each of the provisions of this bond is severable and distinct from the others, and if at any time any such provision is or becomes ineffective, inoperable, invalid or unenforceable it shall be severed and deemed to be deleted from this bond, and in such event the remaining provisions of this bond shall continue to have full force and effect.
  15. All bank charges and other fees payable in relation to, or in connection with, this bond are for the account of the Manufacturer and you shall have no liability or responsibility therefor.
  16. This bond is governed by and construed in accordance with the laws of England and is subject to the jurisdiction of the English courts.

**Appendix 1**  
**Notice Addresses**

**[Issuer name and address]**

*[Issuer's address to be in London]*

Attention:

Fax Number:

**London Underground Limited**

Windsor House

42-50 Victoria Street

London

SW1H 0TL

Attention: Director of Legal (Andrea Clarke at the date of this bond)

Fax Number: 0207 918 4597

**Appendix 2**  
**Form of Demand**  
**[On the headed paper of Beneficiary]**

To: [insert details of the Issuer]

Copy: [MANUFACTURER]

[Date]

Dear Sirs

**Advance Payment Bond Dated [•]**

We refer to the above-mentioned advance payment bond dated [•] (the “**Bond**”) a copy of which is attached for your reference.

The amount previously paid by you to us under the Bond is [ ].

We confirm that the Manufacturer has failed to perform or is otherwise in breach of its obligations under the Contract in accordance with the terms and conditions thereunder.

We hereby demand payment of the sum of [•] under the Bond. We require payment of [•] to be made by telegraphic transfer to:

[•] Bank plc

Address:

Sort Code:

Account Name:

Account Number:

Yours faithfully

\_\_\_\_\_

For and on behalf of

London Underground Limited

EXECUTED as a Deed the day and year first above written above.

*[insert execution clause for Issuer]*

## SCHEDULE 13: FORM OF ESCROW AGREEMENT

**THIS AGREEMENT** is made on [ ]

### **BETWEEN:**

- (1) **KIROW ARDEL T GMBH**, (Registered No: HRB 26343) a company incorporated under the laws of Germany whose registered office is at Spinnereistr 13, 04179 Leipzig Germany (the “**Manufacturer**”);
- (2) **NCC ESCROW INTERNATIONAL LIMITED**, (Registered No: 03081952) a company incorporated under the laws of England and Wales whose registered office is at Manchester Technology Centre, Oxford Road, Manchester M1 7EF (the “**Escrow Agent**”); and
- (3) **LONDON UNDERGROUND LIMITED** (Registered No: 1900907) a company incorporated under the laws of England and Wales whose registered office is at Windsor House, 42-50 Victoria Street, London SW1H 0TL (the “**Purchaser**”).

### **WHEREAS:**

- (A) The Purchaser and the Manufacturer have agreed that the Manufacturer will manufacture and supply the “**Goods**” (as defined in the Manufacture and Supply Agreement) and provide related services to the Purchaser on and subject to the terms set out in the Manufacture and Supply Agreement.
- (B) The Escrow Materials are the confidential property of the Manufacturer and are required for the manufacture, operation, maintenance and modification of the Goods.
- (C) The Manufacturer acknowledges that in certain circumstances the Purchaser may require possession of the Escrow Materials up-to-date and in good order.

**THE PARTIES AGREE** as follows:

### **1. Interpretation**

#### *Definitions*

- 1.1 In this Agreement, words and expressions which are given a meaning in Appendices 1 and 2 shall have that meaning when used in this Agreement.

#### *Interpretation*

- 1.2 In this Agreement unless the context otherwise requires:
  - 1.2.1 a reference to the “Purchaser”, “Escrow Agent” or “Manufacturer” or any other person includes its (and any subsequent) successor in title and its permitted transferees and permitted assignees;
  - 1.2.2 references to persons shall include individuals, bodies corporate, corporations sole, unincorporated associations and partnerships and any other person having legal capacity;

- 1.2.3 a reference to any “Party” shall mean either the Purchaser, the Manufacturer, or the Escrow Agent as the context requires, and “Parties” shall mean two or three of them as the context requires;
- 1.2.4 the singular includes the plural and vice versa;
- 1.2.5 the feminine includes the masculine and vice versa, and the neuter includes the feminine or the masculine and vice versa;
- 1.2.6 the headings and table of contents are inserted for convenience only and shall not affect the construction of this Agreement;
- 1.2.7 any reference to any Relevant Law is a reference to it as from time to time amended, consolidated or re-enacted and includes all instruments, orders or regulations made under, or deriving validity from, such Relevant Law;
- 1.2.8 any references to a Clause, Schedule or Appendix is a reference to that clause or schedule of, or appendix to, this Agreement and references in a Schedule or Appendix to a paragraph is a reference to that paragraph of that Schedule or Appendix;
- 1.2.9 references to this Agreement or any other document or agreement is a reference to this Agreement or that document or agreement as the same may be amended, varied, modified, supplemented, suspended, replaced or novated in accordance with its terms from time to time;
- 1.2.10 any reference to a document in the agreed form is to the form of the relevant document agreed between the Parties and for the purpose of identification initialled by each of them or on their behalf (in each case with such amendments as may be agreed by or on behalf of the Parties);
- 1.2.11 references to includes or including shall mean without limitation;
- 1.2.12 references to agreements includes concessions, contracts, deeds, franchises, licences, treaties and undertakings (in each case whether written or oral);
- 1.2.13 references in this Agreement to costs and expenses which are to be reimbursed to or recovered by the person incurring the same shall be construed as references to an amount equal to the amount of such costs and expenses together with any VAT (other than VAT in respect of which that person or any member of a group for VAT purposes of which such person is a member (in any such case a “VAT Group Member”) is able to recover by way of credit or repayment PROVIDED ALWAYS THAT in determining the extent to which such person or any other VAT Group Member is entitled to recover any amount of VAT by way of credit or repayment it shall be assumed that such person has not entered into any transaction other than those contemplated by this Agreement and that such person or any other VAT Group Member has made accurate and timely VAT returns;
- 1.2.14 “month” is a reference to a calendar month, save that, where any month ends on a day which is not a Working Day, it shall be deemed to end on the next following Working Day (and references to “months” and “monthly” shall be construed accordingly);

1.2.15 the Parties have had the opportunity to take legal advice in relation to this Agreement and no term shall, therefore, be construed “contra proferentem”.

## **2. Warranty**

Each Party warrants that it has the right and authority to enter into this Agreement.

## **3. Deposit of Escrow Materials**

3.1 Subject to the remainder of this Clause 3, the Manufacturer shall deliver two copies of the Escrow Materials to the Escrow Agent at Design Approval of the Concept Design, Design Approval of the Detailed Design and otherwise when the Escrow Materials or updated or upgraded and in any event as soon as reasonably practicable after creation of such Escrow Materials and in any event within 28 days of the commencement of the Site Tests, in such format as may be specified in the Manufacture and Supply Agreement or reasonably required by the Purchaser.

3.2 Not used

3.3 For those Escrow Materials not in existence as at the date of this Agreement, the Manufacturer shall deliver to the Escrow Agent any such Escrow Materials in respect of which it owns the Intellectual Property Rights in the format referred to in Clause 3.1 no later than the last day of the month following the month in which the relevant item is created.

3.4 Not used

3.5 In addition, the Manufacturer shall, immediately upon termination of the Manufacture and Supply Agreement (howsoever arising) so deliver any Escrow Materials not already delivered to the Escrow Agent under this Clause.

3.6 The Manufacturer shall ensure that the Escrow Materials delivered to the Escrow Agent are copies of and correspond to the most recent versions of the Manufacturer-owned Software and Source Code. The Manufacturer shall accordingly deliver two copies of all amended or updated Escrow Materials to the Escrow Agent as and when necessary within the deadlines set out in this Clause 3.

3.7 The Escrow Materials shall be delivered to the Escrow Agent by the Manufacturer in such manner as the Escrow Agent may reasonably direct. The Escrow Materials shall be supplied with details of the following (where relevant):

3.7.1 details of the deposit; full name and version details, number of media items, media type and density, file or archive format, list or retrieval commands, archive hardware and operating system details;

3.7.2 name and functionality of each module/application of the Escrow Materials;

3.7.3 names and versions of development tools etc.;

3.7.4 documentation describing the procedures for building/compiling/executing/using the Software (technical notes, user guides);

3.7.5 hardcopy directory listings of the contents of the media; and

- 3.7.6 name and contact details of employee(s) with knowledge of how to maintain and support the Escrow Materials.

The Manufacturer shall provide the above information to the Purchaser at the same time as supplying it to the Escrow Agent.

- 3.8 As soon as reasonably practicable following completion of its Integrity Testing under Clause 8.2, the Escrow Agent will inform the Manufacturer and the Purchaser of the deposit of the Escrow Materials the subject of the Integrity Testing.
- 3.9 The Escrow Materials shall remain the confidential property of the Manufacturer. In the event that the Escrow Agent provides a copy thereof to the Purchaser (in accordance with the terms of this Agreement), the Purchaser shall be permitted to use, copy and modify such copy of the Escrow Materials, and to grant sub-licences to others to do the same, only in accordance with the terms of the Manufacture and Supply Agreement and not further or otherwise. In the event that the Escrow Agent provides a copy of the Escrow Materials to a Competent Authority under Clause 4.5, the requesting Party shall inform the Competent Authority that the Escrow Materials should only be used for the purpose of the Relevant Law Event. Copyright and all other Intellectual Property Rights in the Escrow Materials will not be affected by this Agreement.
- 3.10 Ownership of the media upon which the Escrow Materials are recorded will pass to the Escrow Agent upon delivery to the Escrow Agent. If the Escrow Materials are released to the Purchaser in accordance with Clause 4, ownership of such media shall pass to the Purchaser upon such release. If they are released to a Competent Authority, then ownership of the media shall remain with the Escrow Agent.
- 3.11 In the event of any of the Escrow Materials which have been deposited with the Escrow Agent being destroyed or damaged, the Escrow Agent shall so notify the Manufacturer. The Manufacturer shall then, within 14 days of such notice, deliver a further copy of the relevant Escrow Materials to the Escrow Agent. The Manufacturer shall comply with all other terms of this Agreement in relation to this further copy of the Escrow Materials.

#### **4. Release of Escrow Materials**

- 4.1 The meaning of “**Escrow Release Event**” is set out in Appendix 2.
- 4.2 If an Escrow Release Event occurs the Purchaser may make a request for the release of the Escrow Materials and shall, where such a request is to be made, provide a draft of the written request in the form specified in Clause 4.3 to the Manufacturer in respect of the Escrow Materials. Unless the Manufacturer has disputed the validity of the relevant Escrow Release Event by referring the basis on which the written request has been drawn up to the Dispute Resolution Procedure within 5 Working Days of receipt of the draft written request from the Purchaser such request shall be deemed to have been accepted by the Manufacturer.
- 4.3 The Purchaser may after the written request has been accepted or deemed accepted (or following determination pursuant to the Dispute Resolution Procedure that the draft written request was validly drawn up) serve such written request on the Escrow Agent who will, upon receipt from the Purchaser of the written request in the form described in this Clause 4.3 immediately release a copy of the Escrow Materials, or such part of the Escrow Materials as is identified in the request, to the Purchaser. The written request shall consist of:

- 4.3.1 a statutory declaration sworn by a director of the Purchaser, identifying the Escrow Release Event, stating that:
  - (a) all of the events which together constitute that Escrow Release Event have occurred;
  - (b) the Manufacturer has acted in accordance with Clause 4.2; and
  - (c) the Purchaser is entitled under this Agreement to receive such Escrow Materials and specifying the Escrow Materials to be released; and
- 4.3.2 a signed Confidentiality Undertaking.
- 4.4 A copy of the statutory declaration referred to in Clause 4.3.1 and of the relevant accompanying Confidentiality Undertaking shall be sent contemporaneously by the Purchaser to the Manufacturer.
- 4.5 If a Relevant Law Event occurs, then Clause 4.1, the first sentence of Clause 4.2 and Clause 4.3.1 shall apply as if references in them to an Escrow Release Event were references to a Relevant Law Event and as if the following variations were made to those Clauses:
  - 4.5.1 the statutory declaration referred to in Clause 4.3.1 shall in addition identify the relevant Competent Authority and the Relevant Law Event giving rise to the Escrow Release Event and, instead of stating the Purchaser's entitlement to receive the Escrow Materials, shall state that the Escrow Agent is obliged to release the same to the named Competent Authority;
  - 4.5.2 the Escrow Agent shall release the Escrow Materials in question directly to the relevant Competent Authority (as opposed to releasing them to the Purchaser);
  - 4.5.3 only the Escrow Materials which are the subject of the relevant request by the Competent Authority shall be released;
  - 4.5.4 the Competent Authority shall not be required to enter into a Confidentiality Undertaking; and
  - 4.5.5 the Purchaser shall inform the Competent Authority that the Escrow Materials should only be used for subject matter of the relevant request and that they should be returned to the Escrow Agent as soon as they are no longer required for the purposes of the Relevant Law Event for so long as this Agreement continues in force. If this Agreement is terminated the relevant Competent Authority shall return the Escrow Materials to any successor escrow agent notified to it by the Purchaser or (if no such notification is made) to the Manufacturer.

## **5. Confidentiality**

The Escrow Agent agrees to maintain all information and/or documentation coming into its possession or to its knowledge under this Agreement in strictest confidence and secrecy, not to make use of it other than for the purposes of this Agreement and not to disclose or release it other than in accordance with the terms of this Agreement.

## **6. Fees**

- 6.1 The Manufacturer will pay the Escrow Agent's Fees as set out in Part A of Appendix 4 and the Purchaser will pay the Escrow Agent's Fees as set out in Part B of Appendix 4. For the avoidance of doubt, the Purchaser shall pay the relevant release fee to the Escrow Agent, including where the Escrow Materials are released to a Competent Authority.
- 6.2 All invoices are payable within 30 days from the date of invoice. The Escrow Agent reserves the right to charge interest in respect of the late payment of any sum due under this Agreement (both before and after judgement) at the rate of 2% (two per cent) per annum over the prevailing base rate of HSBC Bank Plc accruing on a daily basis from the due date therefor until full payment.
- 6.3 The Purchaser and the Manufacturer acknowledge that the Escrow Agent shall be entitled to review and vary the Escrow Agent's Fees from time to time in accordance with the Escrow Agent's usual market practice. This shall be without prejudice to the Purchaser's right to terminate this Agreement in accordance with Clause 7.2 if the Purchaser and the Manufacturer should be unable to agree to such variation of the Escrow Agent's Fees.

## **7. Termination**

- 7.1 This Agreement may be terminated by the Escrow Agent giving not less than 90 days' prior written notice (the "**Escrow Agent Notice**") to each of the Manufacturer and the Purchaser. In that event, the Manufacturer and the Purchaser shall appoint a new custodian for the Escrow Materials, by agreement between them, prior to the expiry of the Escrow Agent Notice. If however they fail to reach such an agreement within 21 days of receipt by the Purchaser of the Escrow Agent Notice, the appointment shall instead be made by the Purchaser alone, prior to the expiry of the Escrow Agent Notice, in which event each of the Purchaser and the Manufacturer shall execute a new escrow agreement with the new custodian prior to the expiry of the Escrow Agent Notice on the terms specified in Clause 7.1.2.

7.1.1 Any new custodian appointed under this Clause 7.1 shall not be:

- (a) a member of the Purchaser's Group;
- (b) a competitor of the Manufacturer's Group;
- (c) a member of the Manufacturer's Group; nor
- (d) an operator or maintainer of the Goods.

7.1.2 Any appointment of a new custodian under this Clause 7.1 shall be on terms which are identical to those contained in this Agreement in relation to the definition of the Escrow Release Events, and shall otherwise be on terms as nearly identical to those contained in this Agreement as is possible.

7.1.3 The Purchaser shall notify the Escrow Agent of the identity and address of any new custodian appointed under this Clause 7.1 prior to the expiry of the Escrow Agent Notice and the Escrow Agent shall be obliged forthwith to deliver and release the Escrow Materials directly to the new custodian under the strictest standards of security and confidence.

7.1.4 If no new custodian is appointed and notified to the Escrow Agent under this Clause 7.1 prior to the expiry of the Escrow Agent Notice, the Escrow Agent shall instead deliver and release the Escrow Materials to the Manufacturer upon expiry of the Escrow Agent Notice.

Upon expiry of the Escrow Agent Notice, this Agreement shall terminate.

7.2 The Purchaser may terminate this Agreement by giving notice to the Escrow Agent and the Manufacturer at any time. Such termination shall be without prejudice to the accrued rights of the Parties arising prior to termination.

7.3 The Manufacturer may not terminate this Agreement, unless either

7.3.1 a copy of all of the Escrow Materials has been released to the Purchaser under Clause 4; or

7.3.2 the Purchaser has given its prior written consent to termination of this Agreement.

7.4 Where the Manufacturer terminates this Agreement under Clause 7.3.2, the Escrow Agent shall not thereafter release the Escrow Materials to the Purchaser.

7.5 If the Purchaser terminates this Agreement by giving notice under Clause 7.2 or if this Agreement is terminated under Clause 7.1, then the Escrow Agent shall save as provided to the contrary in Clause 7.1 return the Escrow Materials to the Manufacturer.

7.6 Termination of this Agreement will not relieve the Escrow Agent or its employees from the obligations of confidentiality in Clause 5, which shall survive termination.

7.7 Termination of the Manufacture and Supply Agreement shall not affect the continued existence of this Agreement unless and until this Agreement is terminated under this Clause 7.

7.8 For the avoidance of doubt, where all Escrow Materials have been released from escrow by the Manufacturer (as described in the definition of “**Escrow Release Event**”), this Agreement shall cease to have effect.

## **8. Verification**

8.1 Subject to the provisions of Clauses 8.2 and 8.3, the Escrow Agent shall bear no obligation or responsibility to any person, firm, company or entity whatsoever to determine the existence, relevance, completeness, accuracy, effectiveness or any other aspect of the Escrow Materials.

8.2 Upon the Escrow Materials being lodged with the Escrow Agent, the Escrow Agent shall perform the Integrity Testing and shall provide a copy of the test report to the other Parties to this Agreement.

8.3 The Purchaser shall be entitled to require that the Escrow Agent carries out a Full Verification no more frequently than following each update to the Escrow Materials, plus no more than twice a year in order to verify the media on which the Escrow Materials are held. Any reasonable charges and expenses incurred by the Escrow Agent in carrying out a Full Verification will be paid by the Purchaser save that if, in the opinion of the expert appointed by the managing director of the Escrow Agent, the Escrow Materials are

substantially defective in content, any such reasonable charges and expenses will be paid by the Manufacturer.

- 8.4 The Purchaser shall be entitled to require that the Escrow Agent carries out an audit of the Escrow Materials against the catalogue produced by the Manufacturer of the relevant materials from time to time. The Escrow Agent shall notify the Purchaser and the Manufacturer of any discrepancies between the Escrow Materials and the contents of the catalogue promptly following completion of such audit.

## **9. Notices**

- 9.1 Any notice affecting this Agreement or required to be given under this Agreement and any invoices (together, “**Notices**”) shall be in writing and signed on behalf of the Purchaser, the Manufacturer, or the Escrow Agent (as applicable) and shall be served by leaving such notice at, or sending it by fax, prepaid recorded delivery or special delivery registered post to the address specified below. Proof of posting or despatch of any notice or communication shall be deemed to be proof of receipt:

9.1.1 in the case of delivery by hand, when delivered;

9.1.2 in the case of fax, the Working Day after despatch;

9.1.3 in the case of recorded delivery or special delivery registered post, the date of delivery.

- 9.2 Notices or communications referred to in Clause 9.1 shall in the case of the Manufacturer be addressed to:

[ ]

For the attention of: [ ]

and in the case of the Purchaser be addressed to:

55 Broadway, London, SW1H 0BD

For the attention of: Director of Legal (Andrea Clarke at the date of this Agreement)

and in the case of the Escrow Agent be addressed to:

[ ]

For the attention of: [ ],

or such other person or at such other address as the relevant Party may from time to time notify in writing to the others.

## **10. Governing Law, Disputes and Jurisdiction**

- 10.1 This Agreement shall be governed by and construed in accordance with English Law.

- 10.2 Any Dispute which does not concern or question the Escrow Agent's performance of its obligations under this Agreement in any fashion will be resolved in accordance with the Dispute Resolution Procedure.
- 10.3 The Escrow Agent agrees to abide by the resolution of any dispute or difference contemplated under Clause 10.2, as far as such resolution is communicated to the Escrow Agent by or on behalf of the Parties involved in such dispute or difference. For the avoidance of doubt, the Escrow Agent shall not be required to assure itself that a dispute or difference which is to be dealt with according to Clause 10.2 has been resolved, or has been resolved in a particular manner, or that matters stated in a statutory declaration made under Clause 4 are correct, before releasing any Escrow Materials. Rather, the Escrow Agent shall be deemed to have properly complied with its obligations under Clause 4 provided that it receives a request in the form described in Clause 4.3 or 4.5 (as applicable).
- 10.4 Subject to the terms of this Agreement, each of the Parties agrees that the Courts of England are (subject to Clauses 10.5 and 10.6) to have exclusive jurisdiction to settle any Dispute and the Parties irrevocably submit to the jurisdiction of the Courts of England.
- 10.5 The agreement contained in Clause 10.4 is included for the benefit of the Purchaser. Accordingly, notwithstanding the exclusive agreement in Clause 10.4 in relation to any Dispute which does not concern or question the Escrow Agent's performance of its obligations under this Agreement in any fashion, the Purchaser shall retain the right to bring proceedings against the Manufacturer in any other court which has jurisdiction.
- 10.6 The Purchaser may, in its absolute discretion, take proceedings against the Manufacturer in the courts of any other country which may have jurisdiction and the Manufacturer irrevocably submits to such jurisdiction.
- 10.7 The Manufacturer irrevocably waives any objections to the jurisdiction of any court referred to in this clause.
- 10.8 The Manufacturer irrevocably agrees that a judgment of any court referred to in this Clause 10 in connection with a Dispute is conclusive and binding on the Manufacturer and may be enforced against the Manufacturer in the courts of any other jurisdiction.

## **11. Assignment**

- 11.1 Replacement of the Escrow Agent is dealt with in Clause 7.1.
- 11.2 The Purchaser and the Manufacturer may assign, novate or transfer this Agreement (or any or all of its rights or obligations under this Agreement) to any person to whom it assigns, novates or transfers its rights and/or obligations under the Manufacture and Supply Agreement without the prior written consent of the other Parties provided that no Party's obligations under this Agreement shall thereby be affected. Any other assignment, novation or transfer shall be subject to the prior written consent of the other Parties to this Agreement.

## **12. Variations and Waiver**

- 12.1 A variation to this Agreement is valid only if it is in writing and is signed by or on behalf of each Party.

- 12.2 The failure of any of the Parties at any time to enforce any provision of this Agreement shall in no way affect its right to require complete performance by any other Party, nor shall the waiver of any breach of any provision be taken or held to be a waiver of any subsequent breach of any provision, or be a waiver of the provision itself.
- 12.3 Save as expressed to the contrary in this Agreement each of the Party's rights and remedies under this Agreement are cumulative and shall not apply to exclude or limit any right or remedy at law or any claim for equitable relief.

### **13. Counterparts**

This Agreement may be executed in counterparts, each of which when executed and delivered shall be an original, and together constitute the same document.

### **14. Escrow Agent's Liability**

- 14.1 The Escrow Agent shall not be liable for any loss caused to the Manufacturer, or the Purchaser either jointly or severally except for loss or damage to the Escrow Materials to the extent that such loss or damage is caused by a breach of the Escrow Agent's obligations under this Agreement or by the negligent acts or omissions of the Escrow Agent, its employees, agents or sub-contractors and in such event, the Escrow Agent's total liability in respect of all claims arising under or by virtue of this Agreement shall not (except in the case of claims for fraudulent misrepresentation or for personal injury or death) exceed the sum of £[2,500,000 (two million five hundred thousand pounds)].
- 14.2 The Escrow Agent shall in no circumstances be liable to the Manufacturer or the Purchaser for indirect loss of any nature whatsoever whether for loss of profit, loss of business or otherwise.
- 14.3 The Escrow Agent shall be protected in acting upon any written request, waiver, consent, receipt or other document furnished to it pursuant to this Agreement, not only in assuming its due execution and the validity and effectiveness of its provisions but also as to the truth and acceptability of any information contained in it, which the Escrow Agent in good faith believes to be genuine and what it purports to be.

### **15. Indemnity**

- 15.1 Save for any claim falling within the provisions of Clause 14.1, the Manufacturer and the Purchaser jointly and severally agree to reimburse the Escrow Agent on an indemnity basis all of its legal and related costs incurred directly or indirectly as a result of being brought into or otherwise becoming involved in any form of dispute resolution proceedings or any litigation of any kind between all or any of the other Parties in relation to this Agreement.
- 15.2 In the event that the Escrow Agent requests reimbursement by a Party pursuant to Clause 15.1 (the "**Indemnifying Party**"), the other Parties shall each indemnify the Indemnifying Party to the extent that the legal and related costs incurred by the Escrow Agent are determined to be attributable to such other Party pursuant to any Dispute Resolution Procedures or litigation or if not so determined, to the extent that the legal and related costs incurred by the Escrow Agent are attributable to any Dispute Resolution Procedures or litigation brought by such Party.

## APPENDIX 1

### Definitions

The words and expressions used in this Agreement, unless the context otherwise requires, have the meanings assigned to them in this Appendix 1. Terms defined in the Manufacture and Supply Agreement shall bear the same meaning when used in this Agreement, unless otherwise stated in this Appendix 1. The Escrow Agent acknowledges that it has been provided with a copy of the definitions in the Manufacture and Supply Agreement which are used in this Agreement.

**“Competent Authority”** means any legislative, judicial, regulatory or administrative body or agency (or any subdivision of any of them) of the United Kingdom or of the European Union or any supranational body which has rule-making power or whose directives, decisions, instructions, rulings, laws or regulations are directly enforceable against either the Purchaser or the Manufacturer in connection with the Manufacture and Supply Agreement or any equipment or services provided thereunder;

**“Confidentiality Undertaking”** means the confidentiality undertaking set out in Appendix 3;

**“Dispute Resolution Procedure”** means the procedure set out at Schedule 10 to the Manufacture and Supply Agreement;

**“Escrow Agent Notice”** has the meaning set out in Clause 7.1;

**“Escrow Materials”** means the Software and the Source Code and such other material and documentation (including updates and upgrades thereto and new versions thereof) as are necessary to use the Software and the Source Code (as may be updated or upgraded) or as may otherwise need to be delivered or deposited to comply with Clause 3;

**“Escrow Release Event”** has the meaning set out in Appendix 2;

**“Full Verification”** means those bespoke tests to be agreed between the Purchaser and the Escrow Agent for the verification of the Escrow Materials, insofar as they apply to the Escrow Materials;

**“Integrity Testing”** means those tests and processes detailed in the integrity testing service published by the Escrow Agent from time to time in so far as they apply to the Escrow Materials;

**“Manufacture and Supply Agreement”** means the supply contract between the Purchaser and the Manufacturer dated [ ] pursuant to which the Manufacturer has agreed, inter alia, to manufacture and supply a modular points and crossings delivery and installation system;

**“Relevant Laws”** means any and all of the following each as is in force from time to time:

- (a) laws, by-laws, codes, common law or other laws or legislation made by a Competent Authority and all rules, regulations, ordinances, orders, notices, directives, franchises, guidance notes and circulars promulgated pursuant to the same (to the extent legally effective);
- (b) any binding court decisions of each of the foregoing; and
- (c) principles and guidance codes of practice and conduct relating to the Goods which are issued by a Competent Authority;

**“Relevant Law Event”** means the refusal or failure of the Manufacturer to comply with a request, made by a Competent Authority acting under Relevant Laws, to provide access to any of the Escrow Materials within the time required by the Competent Authority or the Relevant Laws;

## APPENDIX 2

### Escrow Release Events

“**Escrow Release Event**” means each of the following events:

#### **1. Insolvency**

1.1 The occurrence of the following in relation to the Manufacturer shall constitute an Escrow Release Event:

- 1.1.1 the making of a winding-up order against it;
- 1.1.2 the appointment of a provisional liquidator;
- 1.1.3 the passing of a resolution for winding-up (other than in order to amalgamate or reconstruct without insolvency);
- 1.1.4 the making of an administration order against it;
- 1.1.5 the appointment of a receiver, receiver and manager, or administrative receiver over the whole or a substantial part of its undertaking or assets;
- 1.1.6 the making of an arrangement with its creditors;
- 1.1.7 any voluntary arrangement being made for a composition of debts or a scheme of arrangement being approved under the Insolvency Act 1986 or the Companies Act 2006; or
- 1.1.8 any event which, under the law of any relevant jurisdiction, has an analogous or equivalent effect to any of the events set out above.

#### **2. Voluntary Release**

If the Manufacturer notifies the Escrow Agent that specified Escrow Materials are to be voluntarily released from escrow, an Escrow Release Event shall be deemed to have occurred but only the specified Escrow Materials shall be released.

## **Appendix 3**

### **Confidentiality Undertaking**

1. We shall keep confidential and shall not use or disclose (without your prior consent in writing) to any third party any of the Escrow Materials other than as required for purposes of the exercise of the licences to use the Escrow Materials, and the Intellectual Property Rights in them, in accordance with the terms of the Manufacture and Supply Agreement.
2. In addition, where we wish to disclose any of the Escrow Materials to a third party (where this is permitted under paragraph 1 above), we shall first procure that such third party executes an undertaking on terms no less onerous than those of this Undertaking, directly in favour of you and shall provide a copy of such undertaking to you.
3. This Undertaking does not apply to any information that is:
  - 3.1 already in the public domain at the time of its disclosure or shall come into the public domain (for a reason other than a default by a Party under this Agreement or the Manufacture and Supply Agreement);
  - 3.2 disclosed to the relevant Party's employees, directors, contractors, agents, sub-contractors, suppliers, professional advisors, shareholders, representatives, provided that they will be bound by the terms of this Undertaking;
  - 3.3 required to be disclosed, or is appropriate for the Purchaser to disclose, to any Competent Authority;
  - 3.4 required to be disclosed to the extent required by any Relevant Laws, the regulations of any recognised stock exchange or by an order of a court, tribunal or agency of competent jurisdiction.

## **APPENDIX 4**

### **Escrow Agent's Fees**

#### **Part A – paid by Manufacturer**

1. If applicable, a fee of £• plus VAT per deposit for the second and any subsequent scheduled deposits of Escrow Materials (of which the Escrow Agent has been given at least 14 days notice) in any one year of this Agreement, payable on completion of this Agreement and in advance of each anniversary thereafter.
2. If applicable, a fee of £• plus VAT per deposit for the second and any subsequent unscheduled deposits of Escrow Materials (of which the Escrow Agent has been given at least 14 days notice) in any one year of this Agreement.
3. A storage fee shall be payable to the Escrow Agent to cover all reasonable costs for any deposits in excess of one (1) cubic foot (physical deposits) or uploads of more than ten (10) files (electronic deposits).
4. Integrity Testing Fee for deposits consisting of more than five (5) physical media items or ten (10) electronic files.

#### **Part B – paid by Purchaser**

1. An annual fee of £• plus VAT payable on execution of this Agreement and then on each anniversary thereafter during the term of this Agreement.
2. A release fee of £• plus VAT, plus the Escrow Agent's reasonable expenses, payable in the event of an Escrow Release Event.
3. A fee to cover all reasonable costs for the novation or replacement of this Agreement at the request of the other Parties.

**APPENDIX 5**

**Letter of Authority**

Letter of Authority to be given by the Manufacturer or third party

[On letterhead of the Manufacturer or relevant third party]

On behalf of [A] I confirm that [ ] has the authority to deliver the materials described in Schedule 1 (the “**Materials**”) in accordance with the terms of the Escrow Agreement, a copy of which is attached to this letter at Schedule 2 and initialled by [A]. I confirm that [A] is the owner of the Intellectual Property Rights \*in the Materials/in the ----- which forms part of the Materials. I have read the Escrow Agreement and confirm that I am fully aware of its terms and conditions.

Signed on behalf of [A]

.....

Authorised signatory

Name:

Position:

Notes:

\* delete where appropriate

A replace by the name of the owner of the Intellectual Property Rights

The owner of the intellectual property rights should initial the first page of the attached copy of the Escrow Agreement

**Schedule 1 [to the letter]**

**Materials**

**Schedule 2 [to the letter]**  
**Initialed Escrow Agreement**

IN WITNESS whereof this Agreement has been executed and unconditionally delivered as a Deed on the day and year first written above:

Executed as a deed by )

**[MANUFACTURER]** )

acting by: )

.....signature of director

.....name of director

.....signature of director/secretary

.....name of director/secretary

Executed as a deed by )

**[ESCROW AGENT]** )

acting by: )

.....signature of director

.....name of director

.....signature of director/secretary

.....name of director/secretary

**THE COMMON SEAL** of  
**LONDON UNDERGROUND LIMITED**  
was affixed to **THIS DEED**  
in the presence of:

Signature of Authorised Signatory .....

Print name of Authorised Signatory .....

**SCHEDULE 14: QUENSH**

**SCHEDULE 15: NOT USED**

**SCHEDULE 16: CONTRACT PARTICULARS**

**Items of Contract Particulars**

(a) The Key Dates and Conditions are:

**REDACTED**

(b) The Commencement Date is:	27 April 2015
(c) The Concept Design Date is:	<b>REDACTED</b>
(d) The Contractual Acceptance Date(s) is/are:	<b>REDACTED</b>
(e) The limits on the Manufacturer's liability for insurance Losses are:	<b>REDACTED</b>
(f) The Manufacturing Approval Date is:	<b>REDACTED</b>
(g) The Delivery Date(s) is/are:	<b>REDACTED</b>
(h) The Manufacturer's Works are:	KIROW ARDELT GmbH SPINNEREISTR 13 04179 LEIPZIG Germany
(i) The Plant and Machinery is:	Set out in Schedule 1A
(j) The Purchaser Representative is:	Mark Leech
(k) The Retention is:	<b>REDACTED</b>
(l) VAB is:	Lloyd's Register Group Services Limited (Reg. no. 6193893) is a limited company registered in England and Wales. Registered office: 71 Fenchurch Street, London, EC3M 4BS, UK or the VAB's legal successors in title, but not any assignee of the VAB
(m) If a programme is not included in Schedule 2, the Manufacturer shall submit the programme under Clause 8.1.1 within this many days of the	4 weeks from the Commencement Date

	date of this Agreement:	
(n)	Under Clause 8.1.2 the programme should be in the following form:	As may reasonably be required by the Purchaser Representative
(o)	If the Retention Period is not the period stated under Clause 10.3.1(B), it is:	As Clause 10.3.1(B)
(p)	The period for the Purchaser Representative to respond to the Manufacturer under Clause 12.4.2 is the following number of Working Days following receipt by the Purchaser Representative of an Acceptance for Service Certificate from the Manufacturer in accordance with Clause 12.4.2:	2 weeks
(q)	The amount of liquidated damages payable per week under Clause 13.1 is:	<b>REDACTED</b>
(r)	The maximum amount of liquidated damages payable under Clause 13.1 in the aggregate (expressed as a percentage of the Contract Price) is:	<b>REDACTED</b>
(s)	The amount of liquidated damages payable per Engineering Overrun under Clause 13.3 is:	<b>REDACTED</b>
(t)	The maximum amount of liquidated damages payable under Clause 13.3 (expressed as a percentage of the Contract Price) is:	<b>REDACTED</b>
(u)	If the period for Latent Defects is not as stated in Clause 17.5, it is:	As Clause 17.5
(v)	The payment intervals under Clause 20.2.1 are:	28 days
(w)	The prime cost percentage fee under Clause 20.5.1 is:	<b>REDACTED</b>
(x)	The Manufacturer's German VAT registration	<b>REDACTED</b>

number under Clause 21.3.1 is:	
(y) The Purchaser's UK VAT registration number under Clause 21.3.2 is:	<b>REDACTED</b>
(z) The amount of the performance bond under Clause 22.2.2 is:	<b>REDACTED</b>
(aa) The Manufacturer's total aggregate liability to the Indemnified Parties under clause 29.4.1 is:	<b>REDACTED</b>
(bb) The notice details for the Purchaser / Purchaser Representative under Clause 36.1.2 are:	Address: 200 Buckingham Palace Road, London SW1W 9TJ Facsimile: <b>REDACTED</b> Attention: Mark Leech Email <b>REDACTED</b>
(cc) The notice details for the Manufacturer under Clause 36.1.2 are:	Address: KIROW ARDELTA GmbH SPINNEREISTR 13 04179 LEIPZIG Facsimile: <b>REDACTED</b> Attention: Michael Hartmann Email <b>REDACTED</b>