

[FOR REFERENCE ONLY]

MANAGING CONFLICTS AGREEMENT

NATIONAL HIGHWAYS

and

[THE COUNTERPARTY]

**MANAGING CONFLICTS
AGREEMENT**

In respect of the Change
Transformation Consultancy
Procurement

This Agreement is dated [] 20[] (the "Effective Date").

Between:

NATIONAL HIGHWAYS (the "Authority") whose office is at [x]; and

[NAME OF COUNTERPARTY] a [company]/[limited liability partnership] registered in England and Wales under registered number [insert registered number] whose registered office is at [insert Counterparty's registered address] (the "Counterparty"),

together the "Parties" and each a "Party".

BACKGROUND

- A. The Authority is obliged to ensure transparency, fairness, non-discrimination and equal treatment in relation to its procurement process pursuant to the Procurement Regulations (defined below). The purpose of this document ("Agreement") is to define the protocols to be followed to prevent, identify and remedy any conflict of interest (whether actual, potential or perceived) in the context of the Purpose (defined below).
- B. The Authority is conducting a procurement exercise for the provision of consultancy services for its Change Transformation programme (the "Purpose").
- C. The Authority has an obligation to deal with conflicts of interest as set out in Regulation 24(1) of the Public Contracts Regulations 2015 (as amended) (the "PCR"). The concept of conflict of interest is wide. In the PCR it is described as covering "*at least any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure*" (Regulation 24(2)). "Staff members" refers to staff members of the Authority or of a procurement service provider acting on behalf of the Authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure. "Procurement service provider" refers to a public or private body which offers ancillary purchasing activities on the market.
- D. Pursuant to Regulation 41 of the PCR, the Authority is also under an obligation to ensure that competition is not distorted by the participation of any bidder where it has advised the Authority (whether in pre-market engagement or otherwise) or participated in the preparation of the procurement. Distortion of competition could also arise if any personnel of an incumbent service provider may have obtained information regarding the procurement or the Authority's requirements which other bidders would not have access to. The Authority is under a duty to remove any such advantage where reasonably practical.
- E. The Parties wish to enter into this Agreement to ensure that a set of management processes, barriers and disciplines are put in place to ensure that conflicts of interest do not arise, and that the Counterparty does not obtain an unfair competitive advantage over Other Bidders.

IT IS AGREED:

1 DEFINITIONS AND INTERPRETATION

1.1 The following capitalised words and expressions shall have the following meanings in this Agreement and its recitals:

“Affiliate” means in relation to a body corporate, any other entity which directly or indirectly Controls, is Controlled by, or is under direct or indirect common Control of that body corporate from time to time;

“Agreement” means this managing conflicts agreement duly executed by the Parties;

“Bid Team” means any Representatives of the Counterparty, any of its Affiliates and/or any Subcontractors, connected to the preparation of an ITT Response;

“Central Government Body” means a body listed in one of the following sub-categories of the Central Government classification of the Public Sector Classification Guide, as published and amended from time to time by the Office for National Statistics including:

- a) Government Departments;
- b) Non-Departmental Public Bodies or Assembly Sponsored Public Bodies (advisory, executive, or tribunal);
- c) Non-Ministerial Departments; or
- d) Executive Agencies;

“Conflicted Personnel” means any Representatives of:

- a) the Counterparty;
- b) any of the Counterparty’s Affiliates; and/or
- c) any Subcontractors,

who, because of the Counterparty’s, any of its Affiliates’ and/or any Subcontractors’ relationship with the Authority under any Contract or due to advising the Authority on the procurement preparations or due to any other relationship with members of the Authority staff, have or have had access to information which creates or *may* create a conflict of interest or provide the Bid Team with an unfair advantage as regards information Other Bidders would not have;

“Contract” means any pre-existing or previous contract between the Authority and:

- a) the Counterparty;
- b) any of the Counterparty’s Affiliates ;
- c) any Subcontractor; and
- d) any other Third Party,

which may or may be perceived as relating to the same or similar subject matter of the Purpose at the date of the commencement of the ITT Process (including but not limited to any incumbent contract for all or part of the services or any contract to assist in the preparation of the procurement);

"Control" means the beneficial ownership of more than 50% of the issued share capital of a company or the legal power to direct or cause the direction of the management of the company and **"Controls"** and **"Controlled"** shall be interpreted accordingly;

"Effective Date" means the date of this Agreement as set out above;

"Invitation to Tender" or **"ITT"** means an invitation to submit tenders issued by the Authority as part of an ITT Process;

"ITT Process" means, with regard to the Purpose, the relevant procedure provided for in the Procurement Regulations (as amended) which the Authority has elected to use to select a contractor or contractors, together with all relevant information, data, correspondence and/or documents issued and/or made available by or on behalf of the Authority as part of that procurement exercise and all information, correspondence and/or documents issued and/or made available by or on behalf of the bidders in response together with any resulting contracts;

"ITT Response" means the tender(s) submitted or to be submitted by the Counterparty, any of its Affiliates and/or any Subcontractors in response to any invitation(s) to submit bids under the ITT Process;

"Other Bidder" means any other bidder or potential bidder that is not the Counterparty or any of its Affiliates that has taken or is taking part in the ITT Process;

"Procurement Regulations" means the Public Contracts Regulations 2015, the Defence and Security Public Contracts Regulations 2011, the Utilities Contracts Regulations 2016, and the Concession Contracts Regulations 2016, each as amended from time to time;

"Professional Advisor" means a supplier, subcontractor, advisor or consultant engaged by the Counterparty and/or any of its Affiliates under the auspices of compiling its ITT Response;

"Subcontractor" means an existing or proposed subcontractor of:

- a) the Counterparty; and/or
- b) any of the Counterparty's Affiliates,

who is connected to the preparation of an ITT Response (including key subcontractors named in the ITT Response);

"Purpose" has the meaning given to it in recital B to this Agreement;

"Representative" refers to a person's officers, directors, employees, advisers (including the officers, directors, employees, advisers and agents of any Professional Advisors), agents and, where the context admits, providers or potential providers of finance (including their representatives) to the Counterparty, any of its Affiliates and/or any Subcontractors, engaged in connection with the ITT Process;

"Third Party" means any person who is not a Party, including Other Bidders, their Affiliates and/or their Representatives; and

"Working Day" means any day of the week other than a weekend, when Banks in England and Wales are open for business.

- 1.2 Reference to the disclosure of information includes any communication or making available information and includes both direct and indirect disclosure.
- 1.3 Reference to the disclosure of information, or provision of access, by or to the Authority, the Counterparty, any of the Counterparty's Affiliates and/or any Subcontractors includes disclosure, or provision of access, by or to the Representatives of the Authority, the Counterparty any of its Affiliates and/or any Subcontractors (as the case may be).
- 1.4 Reference to persons includes legal and natural persons.
- 1.5 Reference to any enactment is to that enactment as amended, supplemented, re-enacted or replaced from time to time.
- 1.6 Reference to clauses and recitals is to clauses of and recitals to this Agreement.
- 1.7 Reference to any gender includes any other.
- 1.8 Reference to writing includes email.
- 1.9 The terms "associate", "holding company", "subsidiary", "subsidiary undertaking" and "wholly owned subsidiary" have the meanings attributed to them in the Companies Act 2006, except that for the purposes of section 1159(1)(a) of that Act, the words 'holds a majority of the voting rights' shall be changed to 'holds 30% or more of the voting rights', and other expressions shall be construed accordingly.
- 1.10 The words "include" and "including" are to be construed without limitation.
- 1.11 The singular includes the plural and vice versa.
- 1.12 The headings contained in this Agreement shall not affect its construction or interpretation.

2 ETHICAL WALL

- 2.1 In consideration of the sum of £1 payable by the Authority to the Counterparty, receipt of which is hereby acknowledged, the Parties agree to be bound by the terms of this Agreement.

Conflicts of Interest

2.2 The Counterparty:

2.2.1 shall take all appropriate steps to ensure that neither the Counterparty, nor its Affiliates, nor any Subcontractors nor any Representatives are in a position where, in the reasonable opinion of the Authority, there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Counterparty, any of its Affiliates, any Subcontractor and/or any Representatives and the duties owed to the Authority under any Contract or pursuant to an open and transparent ITT Process; and

2.2.2 acknowledges and agrees that a conflict of interest may arise in situations where the Counterparty, any of its Affiliates, any Subcontractors and/or any Representatives intend to take part in the ITT Process and, because of the Counterparty's, any of its Affiliates', any Subcontractors' and/or any Representatives' relationship with the Authority under any Contract, the Counterparty, any of its Affiliates, any Subcontractors and/or any Representatives may have or have had access to information which could provide the Counterparty, any of its Affiliates, any Subcontractors and/or any Representatives' with an advantage and render unfair an otherwise genuine and open competitive ITT Process.

- 2.3 The Counterparty shall take such steps that are necessary to eliminate the conflict of interest to the Authority's satisfaction, including as a minimum the following:

2.3.1 prior to responding to any procurement document, seek declarations from all of its proposed Bid Team to ascertain whether any such personal may be Conflicted Personnel. The Counterparty should refer to the definition of Conflicted Personnel above. For the avoidance of doubt, the Authority accepts that a Counterparty may identify no Conflicted Personnel and merely working on a prior Contract is not automatic evidence that a proposed Bid Team Member is a Conflicted Personnel;

2.3.2 not assign any of the identified Conflicted Personnel to the Bid Team;

2.3.3 provide to the Authority promptly upon request (and/or within the SQ response where required) a complete and up to date list of any Conflicted Personnel and the personnel comprising the Bid Team and reissue such list to the Authority promptly upon any change to it;

- 2.3.4 ensure that no act or omission by itself, its Affiliates, any Subcontractors and/or any Representatives results in information of any kind, however conveyed, or in any format and however so stored:
- (a) about the ITT Process (gleaned from the performance of any Contract or otherwise); and/or
 - (b) which would or could in the opinion of the Authority confer an unfair advantage on the Counterparty in relation to its participation in the ITT Process,
- becoming available to the Bid Team where the Authority has not made generally available that information to Other Bidders;
- 2.3.5 ensuring that by no act or omission by itself, its Affiliates, any Subcontractors and/or any Representatives and in particular the Bid Team results in information of any kind, however conveyed, in any format and however so stored about the ITT Process, its operation and all matters connected or ancillary to it becoming available to the Conflicted Personnel;
- 2.3.6 ensure that agreements that flow down the Counterparty's obligations in this Agreement, are entered into as necessary, between the Counterparty, and its Affiliates and any Subcontractors in a form to be approved by the Authority;
- 2.3.7 physically separate the Conflicted Personnel and the Bid Team, either in separate buildings or in areas with restricted access;
- 2.3.8 providing regular training to its Affiliates, any Subcontractors and/or Representatives to ensure it is complying with this Agreement;
- 2.3.9 monitor Conflicted Personnel movements within restricted areas (both physical and electronic online areas) to ensure it is complying with this Agreement and to ensure adherence to the ethical wall arrangements the Counterparty, its Affiliates, any Subcontractors and/or any Representatives have put in place in order to comply with this Agreement;
- 2.3.10 ensure that the Conflicted Personnel and the Bid Team are line managed and report independently of each other; and
- 2.3.11 comply with any other action as the Authority, acting reasonably, may direct in connection with the ITT Process and/or this Agreement.
- 2.4 Within a reasonable period of receiving the information described in 2.3.3 but prior to the publication of the ITT the Authority shall confirm to the Counterparty whether it accepts the Bid Team or whether it considers that any member of the Bid Team are or may be Conflicted Personnel and must be removed from the Counterparty's Bid Team. Failure of the Authority to identify Conflicted Personnel

does not relieve the Counterparty of its obligations under this Agreement. The Authority's decision as to whether an individual is or may be Conflicted Personnel shall be final.

Notification of Conflicts of Interest

2.5 The Counterparty shall:

2.5.1 notify the Authority immediately in writing of all perceived, potential and/or actual conflicts of interest that arise or have arisen during the procurement;

2.5.2 submit in writing to the Authority full details of the nature of the perceived, potential and/or actual conflict of interest including full details of the risk assessments undertaken, the impact or potential impact of the perceived, potential and/or actual conflict, the measures and arrangements that have been established and/or are due to be established to eliminate the perceived, potential and/or actual conflict and the Counterparty's plans to prevent potential conflicts of interests from arising ("**Proposed Avoidance Measures**"); and

2.5.3 seek the Authority's approval to the Proposed Avoidance Measures, which the Authority shall have the right to grant, grant conditionally or deny (if the Authority rejects the Proposed Avoidance Measures the Counterparty shall repeat the process set out in this Clause 0 until such time as the Authority grants approval or the Counterparty withdraws from the ITT Process).

2.6 The Counterparty will provide to the Authority, on demand, any and all information in relation to its adherence with its obligations set out under Clauses 2.2 and 2.3 as reasonably requested by the Authority.

2.7 The Authority reserves the right to require the Counterparty to demonstrate the measures put in place by the Counterparty under Clauses 2.2 and 2.3.

2.8 The Counterparty acknowledges that any provision of information or demonstration of measures, in accordance with Clauses 2.6 and 2.7, does not constitute acceptance by the Authority of the adequacy of such measures and does not discharge the Counterparty of its obligations or liability under this Agreement.

Exclusion from the ITT Process

2.9 Where, in the reasonable opinion of the Authority, there has been any breach by the Counterparty of Clauses 2.2, 2.3 or 2.5 or failure to obtain the Authority's approval of the Conflicted Personnel or the Proposed Avoidance Measures, the Authority shall be entitled to exclude the Counterparty, or any of its Affiliates and/or any Representatives, from the ITT Process, and the Authority may, in addition to the right to exclude, take such other steps as it deems necessary.

- 2.10 The actions of the Authority pursuant to Clause 2.9 shall not prejudice or affect any right of action or remedy under this Agreement or at law which shall have accrued or shall thereafter accrue to the Authority.

Bid Costs

- 2.11 In no event shall the Authority be liable for any bid costs incurred by:

2.11.1 the Counterparty, or any of its Affiliates, any Representatives and/or any Subcontractors; or

2.11.2 any Third Party,

as a result of any breach of this Agreement by the Counterparty, any of its Affiliates, any Subcontractors and/or Representatives, including where the Counterparty, any of its Affiliates, any Subcontractors or Representatives, or any Third Party is or are excluded from the ITT Process.

Specific Remedies

- 2.12 The Counterparty acknowledges and agrees that:

2.12.1 neither damages nor specific performance are adequate remedies in the event of a breach of the obligations in Clause 2; and

2.12.2 in the event of a breach of any of the obligations in Clause 2 which cannot be effectively remedied the Authority shall have the right to terminate both this Agreement and the Counterparty's participation in the ITT Process in each case with immediate effect on written notice.

3 SOLE RESPONSIBILITY

- 3.1 It is the sole responsibility of the Counterparty to comply with the terms of this Agreement including ensuring its Affiliates, any Subcontractors, and/or any Representatives comply with the terms of this Agreement. No approval by the Authority of any procedures, agreements or arrangements provided by the Counterparty, any of its Affiliates, any Subcontractors and/or their Representatives to the Authority shall discharge the Counterparty's obligations.

4 WAIVER AND INVALIDITY

- 4.1 No failure or delay by any Party in exercising any right, power or privilege under this Agreement or by law shall constitute a waiver of that or any other right, power or privilege, nor shall it restrict the further exercise of that or any other right, power or privilege. No single or partial exercise of such right, power or privilege shall prevent or restrict the further exercise of that or any other right, power or privilege.
- 4.2 If any provision of this Agreement is prohibited or unenforceable in any jurisdiction in relation to any Party, such prohibition or unenforceability will not invalidate the remaining provisions of this Agreement or affect the validity or

enforceability of the provisions of this Agreement in relation to any other Party or any other jurisdiction.

5 ASSIGNMENT AND NOVATION

- 5.1 The Counterparty shall not assign, novate or otherwise dispose of or create any trust in relation to any or all of its rights, obligations or liabilities under this Agreement without the prior written consent of the Authority.
- 5.2 The Authority may assign, novate or otherwise dispose of any or all of its rights, obligations and liabilities under this Agreement and/or any associated licences to:
- 5.2.1 any Central Government Body; or
 - 5.2.2 to a body other than a Central Government Body (including any private sector body) which performs any of the functions that previously had been performed by the Authority; and
 - 5.2.3 the Counterparty shall, at the Authority's request, enter into a novation agreement in such form as the Authority may reasonably specify in order to enable the Authority to exercise its rights pursuant to this Clause 5.
- 5.3 A change in the legal status of the Authority such that it ceases to be a Central Government Body shall not affect the validity of this Agreement and this Agreement shall be binding on any successor body to the Authority.

6 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

A person who is not a Party to this Agreement has no right under the Contract (Rights of Third Parties) Act 1999 (as amended, updated or replaced from time to time) to enforce any term of this Agreement but this does not affect any right remedy of any person which exists or is available otherwise than pursuant to that Act.

7 TRANSPARENCY

The Parties acknowledge and agree that the Authority is under a legal duty pursuant to the Procurement Regulations to run transparent and fair procurement processes. Accordingly, the Authority may disclose the contents of this Agreement to Other Bidders (and/or potential Other Bidders), for the purposes of transparency and in order to evidence that a fair procurement process is being or has been followed.

8 NOTICES

- 8.1 Any notices sent under this Agreement must be in writing.
- 8.2 The following table sets out the method by which notices may be served under this Agreement and the respective deemed time and proof of service:

Manner of Delivery	Deemed time of service	Proof of service
Email.	9.00am on the first Working Day after sending.	Dispatched as a pdf attachment to an e-mail to the correct e-mail address without any error message.
Personal delivery.	On delivery, provided delivery is between 9.00am and 5.00pm on a Working Day. Otherwise, delivery will occur at 9.00am on the next Working Day.	Properly addressed and delivered as evidenced by signature of a delivery receipt.
Prepaid, Royal Mail Signed For™ 1 st Class or other prepaid, next Working Day service providing proof of delivery.	At the time recorded by the delivery service, provided that delivery is between 9.00am and 5.00pm on a Working Day. Otherwise, delivery will occur at 9.00am on the same Working Day (if delivery before 9.00am) or on the next Working Day (if after 5.00pm).	Properly addressed prepaid and delivered as evidenced by signature of a delivery receipt.

- 8.3 Notices shall be sent to the addresses set out below or at such other address as the relevant Party may give notice to the other Party for the purpose of service of notices under this Agreement:

	Counterparty	Authority
Contact		
Address		
Email		

- 8.4 This Clause 8 does not apply to the service of any proceedings or other documents in any legal action or other method of dispute resolution.

9 WAIVER AND CUMULATIVE REMEDIES

- 9.1 The rights and remedies under this Agreement may be waived only by notice and in a manner that expressly states that a waiver is intended. A failure or delay by a Party in ascertaining or exercising a right or remedy provided under this Agreement or by law shall not constitute a waiver of that right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy.

No single or partial exercise of any right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

- 9.2 Unless otherwise provided in this Agreement, rights and remedies under this Agreement are cumulative and do not exclude any rights or remedies provided by law, in equity or otherwise.

10 TERM

Each Party's obligations under this Agreement shall continue in full force and effect for period of 5 (five) years from the Effective Date.

11 GOVERNING LAW AND JURISDICTION

- 11.1 This Agreement and any issues, disputes or claims (whether contractual or non-contractual) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the laws of England and Wales.

- 11.2 The Parties agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (whether contractual or non-contractual) that arises out of or in connection with this Agreement or its subject matter or formation.

Signed by the Authority

Name:

Signature:

Position in Authority:

Signed by the Counterparty

Name:

Signature:

Position in Counterparty: