

## Appendix B

### TERMS AND CONDITIONS FOR NORTHERN GAS NETWORKS DIVERSION WORKS

#### Background

- A. The Customer would like NGN (Northern Gas Networks Limited of 1100 Century Way, Thorpe Park Business Park, Colton, Leeds, LS15 8TU hereafter referred to as **NGN**) to divert its gas pipelines to enable the Customer to carry out its proposed development.
- B. NGN is willing to facilitate that request, provided that its costs of carrying out the Works are paid by the Customer and NGN is held harmless against any losses, damages or expenses that may arise in the conduct of the Works in accordance with these terms.

#### Definitions

**Charges** means all of the charges incurred by NGN in carrying out the Works including the costs of equipment, materials and manpower, (including the total charges of any sub-contractors engaged by NGN) and any other costs reasonably incurred by NGN pursuant to the carrying out of the Works, plus the relevant Uplift but less any Statutory Reductions.

**Contract** means these terms and conditions, the Letter of Quotation and the Diversion Works Acceptance Form

**Customer** means the company, partnership, organisation or individual executing the Diversion Works Acceptance Form

**Diversion Works Acceptance Form** means the letter or form received from a company, partnership, organisation or individual accepting these terms and conditions and NGN's estimate of the cost of the Works

**Environmental Information Regulations (EIRs)** means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant government department in relation to such regulations

**Extension/Variation Grounds** means any circumstances beyond NGN's control which trigger an extension to the indicative programme of Works provided by NGN to the Customer and/or a chargeable variation under the Contract including but not limited to any of the following reasons:

- (i) there are ground conditions at the Site that are different from those previously surveyed or different to those that NGN may reasonably expect;
- (ii) the Site has any archaeological finds, antiquities, habitats or species that would necessitate a delay to the Works;
- (iii) the Customer has requested that NGN suspend work or otherwise change or amend its programme of Works (**Customer Requested Change**);
- (iv) on the grounds of Force Majeure;  
and/or
- (v) any third party has damaged or stolen any equipment of NGN or its subcontractors or has otherwise materially interrupted or interfered with the Works.

**Force Majeure** means any event or circumstance or combination of events or circumstances which is beyond the reasonable control of a Party

**Letter of Quotation** means NGN's letter providing a budget quotation for Works and to which these terms and conditions apply.

**Loss** means all:

- (i) direct losses including any losses, damages or liabilities reasonably foreseeable by the parties at the time of entering in to the Contract;
- (ii) indirect or special loss (whether or not reasonably foreseeable at the time of entering in to the Contract) including but not limited to all costs, expenses, charges, loss of profit, loss of revenue, loss of contract, loss of opportunity, loss of anticipated savings, loss of production and any increased

cost of working, cost of delay and any business interruption howsoever caused arising out of or in connection with the Contract irrespective of whether or not it was caused by the negligence of NGN, by any delay in NGN completing the Works or by any tortious act or omission or breach of this Contract by NGN

**Normal Working Hours** means 8:00 a.m. to 5:00 p.m. on every day except Saturdays, Sundays and a bank holiday in England

**Party** means NGN and the Customer and “Parties” shall be construed accordingly

**Request for Information** means a request for information or an apparent request under the EIRs

**Site** means the location(s) where the Works are to be carried out

**Statutory Reductions** means any reduction or discount to NGN’s costs that NGN is obliged to make by way of statute or statutory instrument in force at the time of NGN carrying out the Works (and the amount of any reduction or discount shall be as prescribed in that statute or statutory instrument)

**Uplift** means the uplift that NGN shall apply to different types of costs incurred by NGN in carrying out the Works

**Works** means (in all cases subject to any Extension/Variation Grounds):

- (i) the tendering for and appointment of any sub-contractors
- (ii) the procurement of any easements, rights of way or other property or access rights
- (iii) the design, build and commissioning of a replacement gas pipeline
- (iv) the procurement of all materials for a replacement gas pipeline (including any pipes, valves or other similar equipment)
- (v) the excavation and reinstatement of land
- (vi) decommissioning the existing gas pipeline including the purging out of any remaining natural gas and the sealing off of any live gas pipeline but excluding the removal of the same  
but excludes
- (vii) the reinstatement of land to any condition different to that when NGN commenced its excavation works;
- (viii) the reinstatement of land where it includes any landscaping, walls, fences or any special surface finishes
- (ix) any or all of (ii) to (vi) above where NGN has been unable to procure the necessary easements or other property rights for the replacement gas pipeline.

### **Acceptance**

1. Upon execution of the Diversion Works Acceptance Form by the Customer and its receipt by NGN, the Customer agrees to be bound by these terms and conditions and NGN agrees to perform the Works on the basis of these terms and conditions subject to receipt by NGN of payment of any sums specified as being payable in the Diversion Works Acceptance Form.
2. If there is any conflict between these terms and conditions and the Diversion Works Acceptance Form, these terms and conditions shall prevail.

### **NGN Obligations**

3. NGN agrees to carry out such of the Works that are necessary to divert its gas pipeline and any other assets pursuant to a request by the Customer to divert the same.
4. The Works shall be carried out in accordance with NGN’s standard procedures and policies as may apply from time to time, and both parties recognise that NGN shall be constructing any replacement gas pipeline for itself as a licensed gas transporter.
5. Any programme or plan in respect of the Works provided by NGN to the Customer shall be indicative only. NGN may extend any proposed programme for the Works at its discretion, including on the basis of the Extension/Variation Grounds as further detailed in the relevant clause below.
6. Time shall not be of the essence in carrying out the Works.

7. NGN shall only undertake the Works during Normal Working Hours NGN unless NGN has agreed in writing to the contrary in which case additional costs may be levied.
8. NGN shall take reasonable steps to comply with any consents or permissions obtained by the Customer and where the Customer has informed NGN of the same.
9. All assets, equipment and materials used by NGN in the performance of the Works shall at all times remain the property of NGN.
10. NGN shall inform the Customer when NGN's existing gas pipeline has been decommissioned by it.

### **Land Rights**

10A. This clause applies where NGN (at its absolute discretion) NGN requires a land right in connection with the Works (whether or not at the same time disposing of an existing land right).

10B. In this clause "land right" means:

- (a) in respect of pipes and associated apparatus, a permanent legal easement; and/or
- (b) in respect of above ground apparatus where NGN requires sole possession of any portion of land, a legal grant of land in fee simple (or, at our discretion, a legal lease for a period of not less than 125 years (or less at NGN's absolute discretion) from the date of completion of the Works, or in the case of above ground apparatus already the subject of an existing lease, a period ending not later than the date of the existing lease).

10C. Where NGN requires a land right in land *not* owned by the Customer:

- (a) NGN will (at the Customer's cost) negotiate directly the acquisition of the land right with the relevant owner of the land concerned, unless this is expressed as being the responsibility of the Customer pursuant to an existing deed of grant of easement that is in force between the Customer and NGN;
- (b) NGN will not be obliged to (but may) exercise its rights of compulsory acquisition of the land right (at the Customer's cost);
- (c) NGN will at the Customer's request keep the Customer informed of the progress of any such negotiations and will have regard to its representations but shall not be obliged to engage the Customer in, nor shall the Customer attempt to engage (save with NGN's consent), in direct negotiations with the land owner concerned;
- (d) the terms on which NGN agrees the new land right shall be at NGN's sole discretion but NGN will inform the Customer of the proposed cost of the new land right including, so far as known, NGN's and the landowner's proposed legal and surveyors costs in obtaining the land right) before completing it; and
- (e) NGN will take reasonable steps to obtain (and keep the Customer updated) the estimate of the proposed costs of acquiring any new land right (including solicitors and surveyors costs).

10D. Where NGN requires a land right in land owned by the Customer:

- (a) the Customer will grant to NGN a new land right at no cost to NGN in the form approved by NGN and in the location notified by NGN within 14 days of NGN's written request to the Customer;
- (b) the Customer and NGN agree that the location of the new land right shown on the plan is approximate only, but NGN will take reasonable steps to ensure that the Works are positioned as closely as possible, having regard to all the circumstances, to that shown on the plan (the Customer and NGN having previously agreed the route of the new land right at a joint site meeting). The Customer and NGN will complete within 14 days of NGN's written request the new land right or any amendment/rectification to it in the location actually positioned in accordance with this subclause;

- (c) at the Customer's request and cost NGN will surrender any existing land right to the extent that it is superseded by the land right granted under subclause (a) above with effect from the date of the grant of the new land right; and
- (d) the Customer and NGN agree that any existing pipes or other apparatus no longer required by NGN may remain in the ground, to be removed by the Customer at the Customer's cost if the Customer so wishes, unless NGN agrees to remove them at the Customer's cost following the carrying out of the Works.

### **Customer's Obligations**

- 11. Not used.
- 12. The Customer shall provide to NGN (without cost to NGN) such information, drawings and specifications within the possession or reasonable control of the Customer as NGN may reasonably request and shall ensure that the same are accurate in all material respects.
- 13. Subject to clauses 10A to 10D above the Customer shall obtain at its sole cost all necessary planning permissions, consents and licences as NGN may require the Customer to obtain in order that NGN can carry out the Works.
- 14. The Customer shall provide all such assistance and support as NGN may reasonably require (at the Customer's cost) in order that NGN can procure such easements, rights of way or property access as are necessary to complete the Works.
- 15. The Customer shall provide such land (and access to the same) as NGN may require for the storage of assets and equipment in connection with the Works.
- 16. The Customer shall not carry out (and shall ensure that its agents, contractors and employees shall not carry out) any works in the vicinity of NGN's existing gas pipeline unless NGN has given its prior written consent to such works or NGN has informed the Customer that the existing gas pipeline has been decommissioned and that it is safe to operate and carry out near, in or under that existing gas pipeline.
- 17. The Customer shall ensure that no damage is caused by it or any of its agents, contractors or employees to any gas pipeline or any ancillary equipment owned by NGN.
- 18. The Customer shall provide such utilities (power and water) as NGN may reasonably require to carry out the Works.
- 19. The Customer shall not interfere with or otherwise hinder the performance by NGN of the Works and shall afford NGN uninterrupted access to the Site for the purpose of the Works to the extent that it is in the Customer's control.

### **Warranties**

- 20. NGN shall be carrying out the construction of a replacement gas pipeline for itself as a licensed gas transporter and accordingly NGN makes no warranties to the Customer regarding the skill or care with which the Works are carried out nor regarding the time for completion of the Works.
- 21. To the fullest extent permissible by law, NGN excludes all representations and warranties regarding the Works.

### **Title and Property in Assets**

- 22. All risk and title to the replacement gas pipeline shall at all times remain with NGN.
- 23. Any and all obligations to replace, repair and maintain the replacement gas pipelines shall remain with NGN.
- 24. After NGN has informed the Customer that its existing gas pipeline has been decommissioned, the Customer may remove, dispose of, sell or leave in situ the decommissioned gas pipeline.
- 25. Title to the existing gas pipelines removed, disposed of, sold or otherwise used by the Customer

shall pass to the Customer immediately at the time works are undertaken to effect the removal of the pipeline or immediately before it is sold to any third party or otherwise used by the Customer.

26. Where the Customer uses, sells, removes or disposes of part of the existing gas pipeline, the Customer shall make good the remainder of the gas pipelines that it leaves in situ so that it poses no danger or risk to any person or thing and so as to ensure that structural integrity of the land in which the gas pipelines lie.
27. The Customer shall provide NGN with a plan showing that part of the existing gas pipeline that remains in place.
28. The Customer shall be liable for all costs, damages, expenses, charges and liabilities (both historic and future) in respect of any part of the existing gas pipeline that it uses, removes, disposes of, sells or otherwise utilises.
29. The Customer shall fully and effectively indemnify NGN in respect of any costs, charges, expenses, damages and liabilities claimed by a third party in respect of the existing gas pipeline that is used, removed, disposed of, sold or otherwise utilised by the Customer.

### **Charges**

30. In consideration of NGN's performance of the Works, the Customer agrees to pay NGN the Charges on a cost reimbursable basis. The Customer acknowledges that the Works have been priced on an estimated basis and therefore may be subject to revisions upwards (including but not limited due to the occurrence of any of the Extension/Variation Grounds) or downwards, to reflect the actual costs incurred. If following the completion of the Works, the Charges are lower than the estimate, NGN will promptly refund the balance to the Customer.
31. NGN may invoice the Customer for all or any part of its Charges at such times as NGN may in its absolute discretion decide. NGN may also invoice the Customer in advance for all or any part of the Charges that NGN expects to incur during the course of undertaking the Works.
32. NGN shall take reasonable endeavours to inform the Customer of the amount that will become due and owing to NGN and when those payments will be required to be made by the Customer. Where the Customer may benefit from statutory discounts under the New Roads and Street Works Act 1991 or any other applicable legislation in respect of the Works then the Customer's estimate of the Charges will take account of the same.
33. The Customer shall pay NGN within thirty (30) days of the date of any invoice sent by NGN to the Customer, save for the final invoice which shall be paid within thirty five (35) days of the final account being issued.
34. The Customer shall pay to NGN all value added tax (at the rate prescribed by law) as may be due and owing in respect of any invoice issued by NGN.
35. The Customer shall not be entitled to set-off against or withhold any amounts from any Charges due and owing to NGN.
36. In the event of any dispute regarding the Charges, the Customer shall provide NGN with full details of the amount disputed and the grounds of the dispute within 35 days of the date of any invoice. The Customer shall have no right to withhold payment of the disputed amount. At the determination or agreed resolution of such dispute, NGN shall pay to the Customer any amount that it is determined or agreed to be due to the Customer.

### **Liability**

37. NGN shall not be liable to the Customer for any Loss.
38. In the event that NGN should be held by a Court of law to be liable to the Customer for any costs, damages, liabilities, losses or expenses (if any) incurred by the Customer as a result of a breach of the Contract by NGN, any breach of statutory duty or negligence (howsoever arising), it is agreed that NGN's liability in the aggregate shall not at any time exceed 1) £1,000,000 (one million pounds) in relation to property damage and 2) for all other liabilities, the Charges paid by the Customer to NGN under the Contract.

39. Nothing in the Contract shall operate so as to relieve NGN or the Customer of any liability for death or personal injury caused by the negligence of NGN or the Customer or for any fraudulent misrepresentation.
40. The Customer shall fully and effectively indemnify NGN and keep NGN fully and effectively indemnified on demand from and against all and any costs, charges, expenses (including legal expenses), losses, damages, claims, liabilities, demands and proceedings howsoever arising incurred by NGN as a result of any breach by the Customer of its obligations in the Contract, any negligence by the Customer and/or any such losses incurred by NGN in relying on any information or plans provided by the Customer.
41. The Customer shall indemnify NGN and keep it fully and effectively indemnified on demand from and against all and any costs, charges, expenses (including legal expenses), damages or liabilities, losses, claims or demands incurred by NGN as a consequence of the Customer or any of its contractors, agents or employees damaging any gas pipelines or ancillary equipment in the ownership of NGN (including any compensation payments that NGN has to make to gas consumers in accordance with any legal requirements).
- 41A. The Customer shall fully and effectively indemnify NGN and keep NGN fully and effectively indemnified on demand from and against all and any costs, charges, expenses (including legal expenses), losses, damages, claims, liabilities, demands and proceedings howsoever arising incurred by NGN (including but not limited to abortive site visits and rectification costs) as a result of any works carried out by the Customer subsequent to NGN's laying of the replacement pipeline and/or gas services pursuant to the Works which result in the depth(s) of the replacement pipeline and/or gas services contravening the minimum and recommended depth(s) as set out in NGN's MSL1 specification (as may be amended or replaced) and the National Joint Utilities' Group's Guidelines on the Recommending Positioning of Utilities' Mains and Plant for New Works (as may be amended or replaced).

## **Termination**

42. Either Party may terminate the Contract:
  - 42.1 forthwith on written notice if the other Party takes any step or action in connection with its entering (or goes into) administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing to carry on business, or if the other party suspends or threatens to suspend, or ceases or threatens to cease to carry on all or a substantial part of its business;
  - 42.2 by giving 28 days' notice in writing of a material breach of the Contract (where remediable), provided that the Party in default fails to take substantial steps to remedy the breach within that 28 day period;
  - 42.3 forthwith on written notice if the other party materially breaches the Contract and where such breach is not remediable;
  - 42.4 forthwith on written notice if an event of Force Majeure continues for more than three calendar months.
43. In the event that the Customer is in breach of any of its obligations under the Contract (including but limited to payment), NGN shall be entitled to suspend all or any part of the Works until the Customer has rectified such breach or NGN may terminate the Contract on 28 days' prior written notice.
44. NGN may suspend the provision of the Works and/or terminate the Contract with immediate effect without liability should the Customer refuse to agree to a written variation as requested by NGN under clauses 61 or 63.
45. In the event that NGN or the Customer terminate the Contract, the Customer shall pay NGN for all work in progress (including time and materials) and for any committed expenditure that NGN is required to make to ensure the Works are safe and NGN is able to continue transporting gas.

## **Force Majeure**

46. If either Party is rendered unable wholly or in part by Force Majeure to carry out its obligations under the Contract (other than the obligation to make payment hereunder) it shall as soon as reasonably practicable after becoming aware of the occurrence of the event or circumstance of Force Majeure give written notice to the other Party giving full particulars of the event or circumstances constituting Force Majeure and of the obligations which cannot as a result be performed. The Party giving notice shall thereafter be excused from liability for non-performance of such obligations to the extent and for so long as the inability to perform the obligations as a result of the event or circumstance of Force Majeure may continue.

## **Notices**

47. Any notice to be given by one Party to the other under the Contract shall be delivered by first class mail or recorded delivery post (to the registered office of the other Party or in the case of the Customer to the address of that Customer as specified in the Diversion Works Acceptance Form.)

48. All notices sent shall be deemed as received at the recipient's address if received during Normal Working Hours or if outside of Normal Working Hours shall be deemed as received on the next following day during Normal Working Hours.

## **Confidentiality**

49. Both Parties shall keep confidential and shall not disclose to any third party any information provided by the other Party in connection with the negotiation or performance of the Contract, provided that this restriction shall not apply to any information which at the time of the disclosure is in the public domain or thereafter becomes part of the public domain otherwise than as a consequence of a breach by the disclosing Party of its obligations hereunder. Provided further than nothing in the Contract shall prevent the disclosure of information to any government department or any government or regulatory agency having jurisdiction over a Party or as required by law (including but not limited to clauses 50 and 51 below) or any lawful subpoena or recognised stock exchange or other process in connection with any judicial arbitration or administration proceeding or where reasonably necessary to give effect to the purpose of the Contract.

## **Environmental Information Regulations**

50. The Customer acknowledges that NGN is subject to the requirements of the EIRs. The Customer shall:

- (a) provide all necessary assistance and cooperation as reasonably requested by NGN to enable NGN to comply with its obligations under the EIRs;
- (b) transfer to NGN all Requests for Information relating to this Contract that it receives as soon as practicable and in any event within 2 Business Days of receipt;
- (c) provide NGN with a copy of all information belonging to the Customer requested in the Request For Information which is in its possession or control in the form that NGN requires within 5 Business Days (or such other period as NGN may reasonably specify) of NGN's request for such information; and
- (d) not respond directly to a Request For Information unless authorised in writing to do so by NGN.

51. The Customer acknowledges that NGN may be required under the EIRs to disclose information (including Confidential Information) without consulting or obtaining consent from the Customer. NGN shall take reasonable steps to notify the Customer of a Request For Information as directly applies to this Contract to the extent that it is permissible and reasonably practical for it to do so but (notwithstanding any other provision in this Contract) NGN shall be responsible for determining in its absolute discretion whether any Confidential Information and/or any other information is exempt from disclosure in accordance with the EIRs.

## **Intellectual Property**

52. All patents, copyright and other intellectual property rights (including but not limited to trademarks, NGN Diversion Terms and Conditions 2 November 2020

registered designs, designs, know how, inventions, and to the extent that intellectual property is embodied therein, documents (including but not limited to drawings, notes, reports and plans) where created or supplied by NGN in connection with the Contract shall be owned by NGN and where created or supplied by the Customer shall be owned by the Customer.

53. Each Party grants to the other Party a royalty-free, non-exclusive licence to its Intellectual Property for the sole purpose of performing its obligations pursuant to this Agreement.

### **Disputes**

54. Each party agrees that it will seek to resolve any dispute arising pursuant to the Contract by referring it to senior managers of each Party for discussion and settlement.
55. If the parties are unable to settle the dispute between them they shall refer the matter to mediation with a mediator to be agreed by the parties hereto or, failing that, a mediator appointed by the Centre for Effective Dispute Resolution.
56. If the parties are still unable to reach an agreement, the parties shall refer the dispute to any method established by way of any statute that deals with the proposed diversion or to Court proceedings.

### **Third Party Rights**

57. A person who is not a party to the Contract shall have no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Contract but this does not affect any right or remedy of a third party which exists or is available apart from or under that Act.

### **Sub-contracting and Assignment**

58. The Customer shall have no right to sub-contract or assign the Contract without having first obtained the prior written consent of NGN.
59. NGN may sub-contract its obligations to any party and may assign its rights to any party without the consent of the Customer but will still remain responsible to the Customer for carrying out the Works.

### **Waiver**

60. No failure to exercise and no delay in exercising on the part of either Party of any right, power or privilege under the Contract shall operate as a waiver of it. Nor shall any single or partial exercise of any right, power or privilege preclude the enforcement of any other right, power or privilege. Nor shall the waiver of any breach of a provision be taken or be held to be a waiver of the provision itself. For a waiver to be effective it must be made in writing.

### **Variations/Extensions**

61. Save for any variations triggered by any Extension/Variation Grounds, no variations or amendment to these terms and conditions shall be valid and binding unless in writing and signed by a duly authorised representative of each Party and neither Party shall be obliged to act upon its contents unless and until signed by both Parties. In the event of any Extension/Variation Grounds being triggered, NGN will promptly inform the Customer of the nature of the extension/variation, the reasons for it, and the expected effect on the Charges and/or the completion of the Works.
62. The Customer must notify NGN as quickly as possible in writing of any Customer Requested Change together with sufficient detail to enable NGN to assess the effect of the same on costs and timescales. Whilst NGN is under no obligation to agree to a Customer Requested Change, NGN will take reasonable steps to advise the Customer as soon as reasonably practicable of any revised costs or timescales for carrying out the Works as a result of the same.
63. Without detracting from clause 60, NGN reserves the right not to carry out any Customer Requested Change or any other variation unless the Customer agrees in writing in advance to NGN's notified variation of costs' estimate and/or revised timescales.

### **Survival of terms**

64. Any termination of all or part of the Contract shall not affect the coming into force of any provision of the Contract which is expressly or by implication intended to come into force or continue in force on or after such termination.

#### **Severance**

65. In the event any of the terms, conditions or provisions of the Contract are determined by any competent authority to be invalid, unlawful or unenforceable to any extent then such term, condition or provision will to that extent be severed from the remaining terms, conditions and provisions which will continue to be valid to the fullest extent permitted by law.

#### **Entire Agreement**

66. The Contract constitutes the entire understanding between the Parties with respect to the subject matter of the Contract and supersedes all prior agreements, negotiations and discussions between the Parties relating to it.

#### **Governing Law**

67. To the extent permissible by law, the Contract shall prevail over any policy, procedure, guidance, rule, regulation or requirement established by way of statute or statutory instrument in respect of the same matters as addressed in the Contract.

68. The Parties agree that the Contract and its provisions will be governed by and construed in accordance with English law and the parties hereby submit to the exclusive jurisdiction of the English Courts.