**APPENDIX J – ETHICAL WALLS AGREEMENT**

**East West Railway company limited**

and

**Provider Name**

|  |  |  |
| --- | --- | --- |
|  | ethical walls agreement |  |
|  | CTXXXX |  |

This Agreement is dated [ ] 20

Between

1. E**AST WEST RAILWAY COMPANY LIMITED**, a company registered in England and Wales (Company Registration Number 11072935) whose registered office is at East West Railway Company Limited, The Quadrant: MK, Elder Gate, MK9 1EN (the **Authority**); and
2. **PROVIDER NAME** whose registered office is at XXXXXXXXXXXXXXXXXXXXXXX and whose company number is XXXXXXXXXX (the **“Counterparty”**).

BACKGROUND

1. The Authority is obliged to ensure transparency, fairness, non-discrimination and equal treatment in relation to its procurement process pursuant to the Procurement Act 2023
2. The Authority is conducting a procurement exercise for the NAME OF THE PROCUREMENT / REQUIREMENT (the **“Purpose”**).
3. The parties wish to enter into this Agreement to ensure a set of management processes, barriers and disciplines are put in place that ensure 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. The following words and expressions shall have the following meanings in this agreement and its recitals:

“**Affiliate**” means anyperson who is a subcontractor, subsidiary, subsidiary undertaking or holding company of the Counterparty;

“**Agreement**” means this ethical wall agreement duly executed by the Parties;

“**Bid Team**” means any Counterparty, Affiliate, connected to the preparation of an ITT Response;

“**Conflicted Personnel**” means any Counterparty, Affiliate, staff or agents of the Counterparty or an Affiliate who, because of the Counterparty’s relationship with the Authority under any Contract have or have had access to information which creates or may create a conflict of interest.

“**Contract**” means the contract for [XXXXXX] dated [XX/XX/XX] between the Authority and the Counterparty and/or an Affiliate;

“**Government Body**” means a Crown body or any department, agency, office or other emanation of the Crown together with any of its arms length bodies;

“**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 PCR which the Authority has elected to use to select a contractor, together with all relevant information, correspondence and/or documents issued by the Authority as part of that procurement exercise, all information, correspondence and/or documents issued by the bidders in response together with any resulting contract;

**“ITT Response**” means the tender submitted or to be submitted by the Counterparty or an Affiliate [(or, where relevant, by an Other Bidder) ]in response to an ITT;

**[“Other Affiliate”** any person who is a subsidiary, subsidiary undertaking or holding company of any Other Bidder;]

**[“Other Bidder”** means any other bidder or potential bidder that is not the Counterparty or any Affiliate that has or is taking part in the ITT Process;]

**“Parties**” means the Authority and the Counterparty;

“**Professional Advisor**” means a supplier, subcontractor, advisor or consultant engaged by the Counterparty under the auspices of compiling its ITT Response;

“**Purpose**” has the meaning given to it in recital (B) to this Agreement;

[“**Third Party**” means any person who is not a Party and includes Other Affiliates and Other Bidders]

* + 1. Reference to the disclosure of information includes any communication or making available of information and includes both direct and indirect disclosure;
    2. Reference to the disclosure of information, or provision of access, by or to the Authority or the Counterparty includes disclosure, or provision of access, by or to the representatives of the Authority or Representatives of the Counterparty (as the case may be);
    3. Reference to the representatives of any person includes the officers, directors, employees, advisers and agents of that person and, where the context admits, providers or potential providers of finance to the Counterparty or any Affiliate in connection with the ITT Process and the representatives of such providers or potential providers of finance;
    4. Reference to persons includes legal and natural persons;
    5. Reference to any enactment is to that enactment as amended, supplemented, re-enacted or replaced from time to time;
    6. Reference to clauses and recitals is to clauses of and recitals to this Agreement;
    7. Reference to any gender includes any other;
    8. Reference to writing includes email;
    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;
    10. The words “include” and “including” are to be construed without limitation;
    11. The singular includes the plural and vice versa; and
    12. The headings contained in this Agreement shall not affect its construction or interpretation.
  1. ETHICAL WALLS
     1. In consideration of the sum of £1 payable by the Authority to the Counterparty, receipt of which is hereby acknowledged, the Counterparty:
        1. shall take all appropriate steps to ensure that neither the Counterparty nor its Affiliates and/or 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 or its Affiliates or Representatives and the duties owed to the Authority under the Contract or pursuant to an open and transparent ITT Process;
        2. acknowledges and agrees that a conflict of interest may arise in situations where the Counterparty or an Affiliate intends to take part in the ITT Process and, because of the Counterparty’s relationship with the Authority under any Contract, the Counterparty, its Affiliates and/or Representatives have or have had access to information which could provide the Counterparty and/or its Affiliates with an advantage and render unfair an otherwise genuine and open competitive ITT Process; and
        3. where there is or is likely to be a conflict of interest or the perception of a conflict of interest of any kind in relation to the ITT Process, shall comply with Clause 2.2.
     2. The Counterparty shall:
        1. Not assign any of the Conflicted Personnel to the Bid Team at any time;
        2. Provide to the Authority a complete and up to date list of the Conflicted Personnel and the Bid Team and reissue such list upon any change to it;
        3. Ensure that by no act or omission by itself, its staff, agents and/or Affiliates results in information of any kind or in any format and however so stored:
           1. about the Contract, its performance, operation and all matters connected or ancillary to it becoming available to the Bid Team; and/or
           2. which would or could in the opinion of the Authority confer an unfair advantage on the Counterparty in relation its participation in the ITT Process becoming available to the Bid Team.
        4. Ensure that by no act or omission by itself, its staff, agents and/or Affiliates and in particular the Bid Team results in information of any kind or 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;
        5. Ensure that confidentiality agreements which flow down the Counterparty’s obligations in this Agreement are entered into as necessary between the Authority and the Counterparty, its Affiliates, its staff, agents, any Conflicted Personnel, and between any other parties necessary in a form to be prescribed by the Authority;
        6. physically separate the Conflicted Personnel and the Bid Team, either in separate buildings or in areas with restricted access;
        7. provide regular training to its staff, agents and its Affiliates to ensure it is complying with this Agreement;
        8. monitor Conflicted Personnel movements within restricted areas (both physical and electronic online areas) to ensure it is complying with this Agreement ensure adherence to the ethical wall arrangements;
        9. ensure that the Conflicted Personnel and the Bid Team are line managed and report independently of each other; and
        10. comply with any other action as the Authority, acting reasonably, may direct.
     3. In addition to the obligations set out in Clause 2.1.1 and 2.1.3, the Counterparty shall:
        1. notify the Authority immediately of all potential and/or actual conflicts of interest that arise; and
        2. submit in writing to the Authority full details of the nature of the conflict including (without limitation) full details of the risk assessments undertaken, the impact or potential impact of the conflict, the measures and arrangements that have been established and/or are due to be established to eliminate the conflict and the Counterparty’s plans to prevent future conflicts of interests from arising; and
        3. seek the Authority’s approval thereto,

which the Authority shall have the right to grant, grant conditionally or deny (if the Authority denies its approval the Counterparty shall repeat the process set out in clause 2.3 until such time as the Authority grants approval or the Counterparty withdraws from the ITT Process).

* + 1. Any breach of Clause 2.1, Clause 2.2 or Clause 2.3 shall entitle the Authority to exclude the Counterparty or any Affiliate or Representative from the ITT Process, and the Authority may, in addition to the right to exclude, take such other steps as it deems necessary where, in the reasonable opinion of the Authority there has been a breach of Clause 2.1, Clause 2.2 or Clause 2.3.
    2. The Counterparty will provide, on demand, any and all information in relation to its adherence with its obligations set out under Clauses 2.1 and 2.2 as reasonably requested by the Authority.
    3. The Authority reserves the right to require the Counterparty to demonstrate the measures put in place by the Counterparty under Clauses 2.1.3 and 2.2.
    4. The Counterparty acknowledges that any provision of information or demonstration of measures, in accordance with Clauses 2.5 and 2.6, 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.
    5. The actions of the Authority pursuant to Clause 2.4 shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to the Authority.
    6. In no event shall the Authority be liable for any bid costs incurred by:
       1. the Counterparty or any Affiliate or Representative; or
       2. any Other Bidder, Other Affiliate or Other Representative,

as a result of any breach by the Counterparty, Affiliate or Representative of this Agreement, including, without limitation, where the Counterparty or any Affiliate or Representative, or any Other Bidder, Other Affiliate or Other Representative are excluded from the ITT Process.

* + 1. The Counterparty acknowledges and agrees that:
       1. neither damages nor specific performance are adequate remedies in the event of its breach of the obligations in clause 2; and
       2. in the event of such breach by the Counterparty of any of its obligations in clause 2 which cannot be effectively remedied the Authority shall have the right to terminate this Agreement and the Counterparty’s participation in the ITT Process.
  1. SOLE RESPONSIBILITY
     1. It is the sole responsibility of the Counterparty to comply with the terms of this Agreement. No approval by the Authority of any procedures, agreements or arrangements provided by the Counterparty or any Affiliate or Representative to the Authority shall discharge the Counterparty’s obligations.
  2. WAIVER AND INVALIDITY
     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.
     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.
  3. ASSIGNMENT AND NOVATION
     1. Subject to clause 6.2 the Parties 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.
     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:
        1. any Government Body; or
        2. to a body other than a Government Body (including any private sector body) which performs any of the functions that previously had been performed by the Authority; and
        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 6.
     3. A change in the legal status of the Authority such that it ceases to be a Government Body shall not affect the validity of this Agreement and this Agreement shall be binding on any successor body to the Authority.
  4. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999
     1. Save for any other Government Body whose information is disclosed pursuant to or by virtue of this Agreement, a person who is not party to this Agreement has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce or enjoy the benefit of any term of this Agreement. For the avoidance of doubt, the consent of any person who is not a party to this Agreement is not required to effect a termination or variation of this Agreement.
     2. Any Government Body whose information is disclosed pursuant to or by virtue of this Agreement shall have the right to enforce the terms of this Agreement as though it is the Authority.
  5. TRANSPARENCY
     1. The parties acknowledge and agree that the Authority is under a legal duty pursuant to the PA2023 to run transparent and fair procurement processes. Accordingly, the Authority may disclose the contents of this Agreement to potential bidders in the ITT Process, for the purposes of transparency and in order to evidence that a fair procurement process has been followed.
  6. NOTICES
     1. Any notices sent under this Agreement must be in writing.
     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™ 1st 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 |

* + 1. 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** | Contact Name | Commercial Lead |
| **Address** | Office Address | East West Railway Company Limited,  Quadrant House,  Elder Gate,  Milton Keynes MK9 1EN |
| **Email** | Email Address | Email Address |

* + 1. This Clause 9 does not apply to the service of any proceedings or other documents in any legal action or other method of dispute resolution.
  1. WAIVER AND CUMULATIVE REMEDIES
     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.
     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.
  2. GOVERNING LAW AND JURISDICTION
     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.
     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.

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| --- | --- |
| Signed by the Authority | Name:  Signature:  Position in Authority: |

|  |  |
| --- | --- |
| Signed by the Supplier | Name:  Signature:  Position in Organisation: |