

**Guidance Note – Rail Passenger Contracts
Umbrella Direct Agreement 4.0
Please read this Guidance Note alongside the
Umbrella Direct Agreement
(Template 4.0 – 8 JULY 2024)**

Introduction and Disclaimer

1. This guidance document is intended as an explanatory aid for Operators and their suppliers to the latest Umbrella Direct Agreement template.
2. It is not intended to be contractually binding on the Secretary of State for Transport (the **"Secretary of State"**) nor is any of its contents to be considered as a representation or warranty made by the Secretary of State.
3. This guidance document does not purport to contain all of the information that a supplier may require in order to enter into the Umbrella Direct Agreement. Accordingly, neither the Secretary of State nor any employees, agents or advisers of the Department for Transport make any representation or warranty as to the accuracy or completeness of the information contained in this guidance document.
4. Prospective suppliers should where necessary seek their own professional advice in connection with this guidance document and the Umbrella Direct Agreement.
5. Where the contents of this guidance note contradicts any of the terms contained in the Umbrella Direct Agreement, the Umbrella Direct Agreement shall prevail.

Purpose of the Umbrella Direct Agreement

6. Section 30 of the Railways Act 1993 (the **"Act"**) places the Secretary of State under a statutory duty to secure the continued provision of railway passenger services where a franchise agreement (as defined under the Act) (herein referred to as a **"Rail Agreement"**) ends without a successor operator having been appointed.
7. A Key Contract is a contract between a supplier (the **"Supplier"**) and any franchisee company (as defined in section 85(8) of the Act), franchisee or franchise operator (as defined respectively in section 23(3) of the Act) or nominee of the Secretary of State pursuant to section 30 of the Act operating rail passenger services (the **"Operator"**) which is designated as a Key Contract under the relevant Rail Agreement. Contracts designated as Key Contracts are those which are considered essential for the continued provision of railway passenger services and those it would be necessary for the Secretary of State to step in to in the unlikely event that an Operator was to run into difficulties and a Rail Agreement was terminated early.
8. The Umbrella Direct Agreement provides the Secretary of State with the contractual entitlement to step in to the Key Contract in place of the Operator to allow for a seamless transition in the event that the Secretary of State had to exercise the Secretary of State's section 30 duty.

9. The Umbrella Direct Agreement has advantages for both the Secretary of State and the Supplier. The Secretary of State ensures that the contracts that the Secretary of State needs to operate passenger services on the railways remain in place and the Supplier is able to continue to sell/provide goods and services in circumstances where its contract with the Operator might otherwise have terminated.
10. The Umbrella Direct Agreement is designed to cover *any* contract that the Supplier has with any Operator which is designated as a Key Contract under a relevant Rail Agreement in order to minimise the administrative burden of negotiating individual direct agreements for each Key Contract to which the Supplier might be a party.

Effect of the Umbrella Direct Agreement

Termination of Key Contracts

11. When the Supplier negotiates the terms of a Key Contract with a connected company (such as one that is in the same group of companies as the Supplier) it will negotiate those terms on bona-fide arms'-length commercial terms and will provide a draft of any Key Contract to the Secretary of State so that the Secretary of State may approve its terms.
12. Should the Supplier consider terminating a Key Contract for reason of breach or an event of default by the Operator under that contract, the Supplier must notify the Secretary of State before terminating the contract.
13. Unless the Secretary of State consents, the Supplier must not terminate the Key Contract for three months after delivering notice of its intention to terminate the Key Contract. If the breach or event of default can be remedied within the three month period the Supplier may not terminate the contract unless directed to do so by the Secretary of State.
14. If the Secretary of State does not consent to the termination of the Key Contract within 7 business days of being served with notice of the Supplier's intention to terminate, the Secretary of State will indemnify the Supplier, subject to certain exclusions.
15. If the default or breach cannot be remedied and the Supplier proceeds to terminate the Key Contract, the Secretary of State has the option to enter into a new contract with the Supplier on the same terms as the Key Contract (unless otherwise agreed between the Supplier and the Secretary of State).
16. The Supplier may not terminate a Key Contract where the Operator under that Key Contract is the subject of a railway administration order while the railway administration order remains in force (subject to certain exceptions).
17. A railway administration order ensures that in the event the Operator is in financial difficulty, the affairs, business and property of the company shall be managed, by a person appointed by the court, protecting the Operator from formal insolvency or winding-up proceedings in a similar way to administration under the Insolvency Act 1986 (see ss. 59-64 of the Act for further details).
18. The Secretary of State has an option to enter into a new contract with a supplier if either the Supplier or the Operator wishes to terminate a Key Contract pursuant to a voluntary right to terminate.

19. The Secretary of State must agree to any amendments of the provisions of a Key Contract.

Termination of Rail Agreements

20. Any Key Contract must include: a) a right for the relevant Operator to terminate the Key Contract following the termination of a Rail Agreement (otherwise than by effluxion of time); and b) a right for the Counterparty to terminate the Key Contract following the termination of a Relevant Rail Agreement (otherwise than by effluxion of time) only exercisable if the Counterparty is directed to terminate the Key Contract by the Secretary of State.
21. If, as set out at paragraph 20 above: a) the Operator exercises its right to terminate the Key Contract; or b) the Secretary of State directs the Counterparty to terminate the Key Contract, the Secretary of State (or the Secretary of State's nominee) will enter into a new contract with the Counterparty.

Terms of a new contract

22. Unless otherwise agreed between the Secretary of State and the Supplier and subject to Clause 6, any new contract will be on the same terms as the Key Contract and entry into a new contract with the Secretary of State will not be an opportunity for Suppliers to re-negotiate or seek more favourable terms than they had with the Operator.

Rail Contract expiry

23. Where (i) a Rail Agreement expires by effluxion of time, or (ii) a Rail Agreement is terminated early and the Secretary of State has exercised the Secretary of State's option to enter into a new contract with the Supplier, the Secretary of State has a further option, exercisable not more than 6 months but not less than 1 month before the Rail Agreement expires or would have expired but for the early termination, to enter into a new contract with the Supplier for a period of 3 years from the date of expiry of the Rail Agreement.

Provision of information to the Secretary of State for retendering

24. The Secretary of State may request, and the Supplier will provide, information that is required by the Secretary of State for any retendering process, as if the Secretary of State were the Operator.

Miscellaneous

25. The Supplier is restricted from sub-contracting or assigning its rights under a Contract with an Operator without the Secretary of State's consent or the assignee agreeing to be bound by the terms of the Umbrella Direct Agreement.
26. In the event of disputes arising under the Umbrella Direct Agreement, the parties will be bound by the dispute resolution procedure set out in the Railway Industry Dispute Resolution Rules which can be found in the following web address:

<http://accessdisputesrail.org/RIDR/RIDR%20Rules.pdf>

Broadly speaking these rules provide for mediation in the first instance followed by arbitration under the rules prescribed by the Arbitration Act 1996. However, recognising that time is of the essence in the performance of the Umbrella Direct Agreement and noting that damages may not always be an adequate remedy for a breach thereof, the Umbrella Direct Agreement also provides for disputes to be

settled through litigation, with the courts of England and Wales having exclusive jurisdiction.

27. As the Secretary of State is acting as a public authority the Secretary of State is bound by the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 (the "**FOI legislation**"), and is under a duty to disclose certain information which is either in respect of the Supplier or otherwise the subject of the Umbrella Direct Agreement (including information about the goods and services) in the event that prescribed exemptions under the FOI legislation do not apply, including where the public interest test against disclosure is not met.
28. The Umbrella Direct Agreement sets out the rules of engagement with the Supplier where the FOI legislation is engaged, and provides for consultation between the parties and a restriction on the Secretary of State from disclosing information unless the Secretary of State is legally obliged to do so and provided further that no relevant exemption under the FOI legislation applies.