

Dated

20th July

2012

Merseyside Passenger Transport Executive

- and -

Bircham Dyson Bell LLP

**Consultancy Services Agreement
for the Procurement of new Rolling Stock for the
Merseyrail Network**

Louise Outram
Secretary
Merseyside Passenger Transport Executive
PO Box
Liverpool L69 3HN

Ref: LCS/DJ/RSN5427(2)

THIS AGREEMENT is made the 20th day of July 2012

BETWEEN:

(1) **MERSEYSIDE PASSENGER TRANSPORT EXECUTIVE** of Number 1 Mann Island
PO Box 1976 Liverpool L69 3HN ("the Executive") **AND**

(2) **BIRCHAM DYSON BELL** of 50 Broadway London SW1H 0BL ("the Consultant")

WHEREAS the Executive has requested the Consultant to perform the Service and the Consultant have agreed to perform the Service (hereinafter defined) in accordance with the Contract Documents (hereinafter defined) and on the terms herein contained

It is hereby agreed as follows:-

1. **Definition of Interpretation**

In this Agreement except where the context otherwise requires the following expressions should have the following meanings:-

- 1.1 'Authorised Personnel' means the personnel detailed in Schedule 1 attached hereto or such other persons as the Executive may in consultation with the Consultant designate for that purpose
- 1.2 'Brief' means the provision of legal advice in the procurement of the rolling stock, including drafting the PIN, OJEU Notice, ITT and preparation of the contracts. It will also include the management of communications and stakeholder workstreams and the provision of project governance, as well as liaising with the Rail Services Committee and the Integrated Transport Authority
- 1.3 'Commencement Date' means 7 November 2011 or such other date as may be agreed between the parties
- 1.4 'Consultant's Representative' means any person notified by the Consultant to the Instructing Officer as being responsible for providing the Service
- 1.5 'Contract' means this Agreement including Schedule 1
- 1.6 'Contract Documents' means the documents comprising the Contract

- 1.7 'Contract Period' means the period commencing on the Commencement Date and continuing until the Executive no longer requires the Services from the Consultant and serves notice under Clause 16 hereof
- 1.8 The 'Contract Standard' means the standard which complies with the relevant provisions of the Contract or where and to the extent that no criteria are stated in the Contract then with the reasonable requirements of the Instructing Officer
- 1.9 'Instructing Officer' shall mean the Head of the Chief Executive's Office or such other nominated representative of the Executive who has been notified by the Executive to the Consultant
- 1.10 'Management Information' shall mean files, records, time recording and charging information and such other management information as the Consultant is obliged to retain for the information of the Executive in the Contract
- 1.11 'Project' means the procurement of new Rolling Stock for the Merseyrail Network
- 1.12 'Schedule of Rates' means the schedule of rates fee proposal and prices set out in Schedule 1 hereto
- 1.13 'Service' means the services relating to the Project as detailed within the Brief and includes any modification thereto made under the Contract
- 1.14 Reference to any employees of the Consultant shall be deemed to include the Consultants agents and sub-contractors unless the context otherwise requires
- 1.15 A reference to any Act of Parliament or to any Order Regulations Statutory Instrument or the like shall be deemed to include a reference to any amendment or re-enactment of the same

2. **Authorised Personnel**

- 2.1 The Consultant shall provide the Authorised Personnel to provide the Service *during the contract period* in accordance with the Contract Documents The Consultant and the Authorised Personnel shall exercise reasonable skill care and diligence in the

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provision of the Service and they shall devote such of their time attention and abilities to the Service as shall be deemed necessary by the Executive

2.2 The Consultant shall ensure that the Authorised Personnel who provide the Service are at all times properly and sufficiently qualified, competent, skilled, honest, experienced, instructed and supervised as necessary with regard to the Service

2.3 The Executive shall be entitled to request the Consultant to withdraw any of the Authorised Personnel from providing the Service if the Instructing Officer thinks in his opinion that such Authorised Personnel are not exercising such reasonable skill care and diligence in the provision of the Service or are not devoting such of their time attention and abilities to the Service as shall be deemed necessary by the Executive

2.4 The Consultant will make every reasonable effort to maintain continuity of personnel throughout the provision of the Service but in the event of a change in the Authorised Personnel the Consultant shall bear all costs related thereto In the event of the Consultant requiring the engagement of personnel in the provision of the Service other than the Authorised Personnel then the prior written consent of the Executive is required

2.5 If the Consultant requires the services of an employee of the Executive to assist in the provision of the Service then the Consultant will negotiate with the Executive for such services as are desired

2.6 The Consultant shall undertake to refrain from approaching or otherwise inducing the Executive staff to leave their current employment during the Contract Period or for a period of one year thereafter

3. **Modification**

3.1 Subject to the giving of reasonable notice the Instructing Officer shall be entitled to issue to the Consultant instructions in writing to modify the Service as follows:-

3.1.1 To omit any part of the Service

3.1.2 To provide services additional to the Service provided that these shall be the same as or similar to the Service

3.2 The Instructing Officer shall ascertain the value of modifications made under this condition as follows:-

3.2.1 Where a part of the Service is being omitted by reference to the rates and prices contained in the Schedule of Rates

3.2.2 Where the additional service required is of a similar character to and is executed under similar conditions as the Service then the rates and prices shall be as contained in the Schedule of Rates

3.2.3 Where the modifications are not of a similar character to or are not executed under similar conditions to the Service the valuation shall be made at fair rates and prices having due regard where applicable to the Schedule of Rates

3.2.4 Any dispute arising as to the value of any modification under this Clause may be referred to a mediator under Clause 17 hereof for determination but pending this determination the Consultant shall comply with the instructions given under this Clause

4. **Consultant's Obligations to Provide the Service**

4.1 The Consultant shall provide the Service to enable the Executive to achieve the Project and shall discharge the Service to the Contract Standard

4.2 The Consultant shall perform the Service in a conscientious and timely manner in accordance with the requirements of the Instructing Officer and shall acknowledge all instructions received from the Instructing Officer

4.3 The Consultant shall notify the Instructing Officer immediately of any circumstances relating to the Consultant and/or the Executive concerning the Service of which the Consultant is aware or anticipates which may justify the Executive taking action to protect its interests (including its reputation and standing)

4.4 The Consultant in the performance of the Service shall comply with the internal requirements and procedures of the Executive. In particular the Consultant shall comply with the Standing Orders and Financial Regulations of the Executive (a copy of which will be provided upon request)

5. **Attendance at Meetings**

The Consultant shall provide a representative approved by the Executive to attend at any meetings as may be required by the Executive during the Contract Period

6. **Record Keeping**

The Consultant shall maintain records of all work undertaken in the provision of the Service and shall upon request produce such records to the Instructing Officer

7. **Consultation**

The Consultant and the Authorised Personnel shall make such investigations and enquiries as may be necessary to provide the Service and shall consult the Instructing Officer and keep him/her informed in all matters connected with the Service and produce regular reports in such manner and at such times as the Instructing Officer may require

8. **Default in Performance of the Service**

8.1 The Consultant shall respond promptly to all complaints oversights and omissions and shall immediately make good any default at its own expense

8.2 If the Consultant fails to provide the Service or any part thereof with due diligence or in a proper skilful manner or to the Contract Standard the Executive may itself provide or may employ and pay other persons to provide the Service or any part thereof and all costs incurred thereby including

additional administration and supervisions costs and the loss of income as a results of the default may be deducted from any sums due or to become due to the Consultant under the Contract or shall be recoverable from the Consultant by the Executive as a debt

8.3 The rights of the Executive under Clause 8.1 and 8.2 shall be without prejudice to its rights under all other Clauses

9. **Executive's Obligations to the Consultant**

The Executive shall cooperate with the Consultant and provide all information known by or available to the Executive which may aid the Consultant in providing the Service

10. **Performance Review**

10.1 The Consultant shall ensure that the Consultants Representative is available to meet the Instructing Officer for a sufficient amount of time as is reasonably necessary to deliver the Service to the Contract Standard at no additional cost to enable the Executive to monitor and review the Consultant's performance under the Contract

10.2 The Consultants Representative shall bring to this meeting such Management Information as may be reasonably requested by the Instructing Officer

10.3 The Consultant shall comply with any requests made by the Instructing Officer for improvements in methods of Service delivery provided such request is made within the terms of the Contract

11. **Indemnity and Insurance**

11.1 The Consultant shall indemnify and keep indemnified the Executive against all loss damage costs charges and expenses at any time incurred or suffered by the Executive arising from any breach by the Consultant of the Contract or any of its obligations to the Executive or from any negligent act or omission default or breach of duty on the part of the Consultant

11.2 The Consultant shall keep the Executive fully indemnified against any liability in respect of income and other taxes national insurance contributions or levies of

any kind relating to or arising out of the employment of any person employed by the Consultant

11.3 The Consultant shall take out and maintain throughout the Contract Period and for a period of six years thereafter proper professional indemnity insurance (or equivalent as agreed by the Instructing Officer) in respect of the Consultant's business with a minimum cover of [REDACTED] pounds in respect of any event or series of connected events

11.4 The Consultant shall produce to the Executive upon request such evidence of insurance cover as the Executive shall reasonably request

12. **Use of the Executive's Premises and Facilities**

The Consultant shall not in any circumstances use any premises or facilities of the Executive except as agreed with the Executive from time to time

13. **Payments**

13.1 The Consultant shall submit to the Instructing Officer an invoice each month during the Contract Period in respect of the Service provided during that month

13.2 The invoice shall be in accordance with the Schedule of Rates and shall show the following:-

13.2.1 a sum in respect of any fixed fees or unit cost cases which shall be charged on completion;

13.2.2 a sum in respect of any work charged on an hourly (or other time unit) rate basis;

13.2.3 a sum in respect of any work charged on a percentage basis;

13.2.4 the cost and the time spent on each matter in performance of the Service the date of performance and the identity of the Authorised Personnel;

13.2.5 costs disbursements and income must be shown separately;

13.2.6 any other information required by the Executive

- 13.3 Within 14 days of receipt of an invoice the Instructing Officer shall give notice to the Consultant of any disputed amount or amount of set off to be applied under Clause 8.2 or 16.5.3 hereof
- 13.4 Within 30 days of receipt of an invoice the Executive shall pay to the Consultant all monies properly due under the invoice
- 13.5 In addition to the sums specified herein the Executive shall pay to the Consultant such Value Added Tax as may be properly chargeable by the Consultant in connection with the provision of the Service. The Consultant shall issue a Value Added Tax invoice in respect thereof
- 13.6 The rates and prices contained in the Schedule of Rates shall remain fixed for the duration of the Contract Period

15. **Confidentiality/Advertising**

- 15.1 The Consultant shall (except as may be required by law or on the direction of the Executive) keep confidential to the Consultant the affairs of the Executive during the Contract Period and afterwards and shall ensure that all its employees do the same
- 15.2 The provisions of Clause 15.1 shall not apply to:-
- 15.2.1 any information in the public domain otherwise than by breach of this Agreement
- 15.2.2 information obtained from a third party who is free to divulge the same
- 15.3 The Consultant shall divulge confidential information only to those employees who are directly involved in this Agreement and shall ensure that such employees are aware of and comply with these obligations as to confidentiality
- 15.4 The Consultant acknowledge that the Executive is subject to the provisions of the Freedom of Information Act 2000 and that any information provided by the Consultant to the Executive under this Agreement may need to be disclosed to third parties under the provisions of such legislation (and/or any accompanying codes of practice issued under the Freedom of Information Act 2000)

15.5 The Consultant shall not without the prior written consent of the Executive advertise or publicly announce that it is undertaking work for the Executive

16. **Termination**

16.1 The Executive shall be entitled to terminate the Contract and without prejudice to Clause 16.4 to recover from the Consultant the amount of any loss resulting from such termination if in relation to the Contract or any other contract with the Executive the Consultant or any person employed by the Consultant or acting on the Consultant's behalf shall have committed any offence under the Bribery Act 2010 or should have given any fee or reward the receipt of which is an offence under Section 117 of the Local Government Act 1972

16.2 The Executive may without prejudice to any accrued rights or remedies under the Contract terminate the Consultant's employment under the Contract by notice with immediate effect in the following circumstances:-

16.2.1 If the Consultant commits a material breach of any of its obligations under the Contract and (if such breach is capable of remedy) fails to remedy any such breach within 14 days of notice from the Executive requiring remedy of such breach

16.2.2 If there is a change in the composition or staffing of the Consultant for whatever reason which in the reasonable opinion of the Executive seriously affects the ability of the Consultant to discharge its obligations under the Contract to the Contract Standard save that maternity or paternity leave taken by employees under statutory entitlements shall be disregarded for the purposes of this Condition

16.2.3 In the event of the making of an administration order in relation to the Consultant or in the event of the Consultant entering into a voluntary arrangement with its creditors under the Insolvency Act 1986

16.2.4 In the event of the Consultant entering into any composition or arrangement with its creditors

16.3 The Executive shall be entitled to terminate the Contract upon 4 weeks prior written notice to the Consultant or upon expiry of any stage of the Project

16.4 If the Consultant's employment is terminated as provided in Clause 16.1 or 16.2 and is not reinstated the Executive shall:-

16.4.1 cease to be under any obligation to make further payment until costs loss and/or damage resulting from or arising out of the termination of the Consultant's employment shall have been calculated and provided such calculation shows a sum or sums due to the Consultant;

16.4.2 have the right to employ and pay other persons to provide and complete the provision of the Service or any part of it;

16.4.3 have the right to retain any sum due to the Consultant howsoever arising from the Executive to set off against any sum due to the Executive from the Consultant under the terms of the Contract or otherwise. Sums due to the Executive shall include reasonable costs to the Executive of time spent by officers in terminating the Contract and in making alternative arrangements for provision of the Service

16.5 The rights of the Executive under this Clause are in addition to and without prejudice to any other rights the Executive may have to claim the amounts of any loss or damage suffered by the Executive on account of acts or omissions of the Consultant

17. **Dispute Resolution**

17.1 Any dispute between the Executive and the Consultant under the Contract may by agreement of both parties be referred to a single mediator who shall be nominated jointly by the Executive and Consultant or if they do not agree within five working days to such person as may be appointed on application of either the Executive or the Consultant by the Law Society for England & Wales

17.2 The cost of a referral under this Clause shall be paid by the Executive and Consultant in proportions as decided on by the mediator appointed in accordance with Condition 17.1

18. **Copyright**

18.1 The Executive shall be entitled to the copyright of all data documents and other material produced by the Consultant for the purposes of the Contract

18.2 The Consultant shall not use any such data documents or material referred to in Clause 18.1 for any purpose other than the Contract permits without the prior written consent of the Executive

19. **Unlawful Discrimination**

The Consultant shall not unlawfully discriminate within the meaning and scope of the provisions of the Equality Act 2010 in respect of all persons employed by it (whether in provision of the Service or otherwise) in every place situated in the United Kingdom and occupied or used by it

20. **Observance of Statutory Requirements**

The Consultant shall in all matters arising in the performance of the Service conform with all Acts of Parliament and with all orders regulations byelaws and EU Directives that shall be applicable to the Service The Consultant shall also observe any rules applicable to the premises of the Executive

21. **Assignment and Sub-Contracting**

The Consultant shall not assign transfer sub-let or otherwise part with or share their interest in the Contract or any part thereof without the prior written consent of the Executive

22. **Notices**

22.1 Any notice to the Consultant hereunder shall be deemed to have been given if the same is in writing and has been posted to the Consultant at the Consultant's last known address or such other address as the Consultant may from time to time designate in writing for that purpose

- 22.2 Any notice to the Executive hereunder should be deemed to have been given if it is in writing and the same has been posted to the Secretary of the Executive at PO Box 1976 L69 3HN or such other address as the Executive may from time to time designate for that purpose
- 22.3 Any notice to be given hereunder shall be sent by prepaid recorded delivery or registered post and shall be deemed to have been received by the addressee within 72 hours of posting

23. **Force Majeure**

- 23.1 Subject to Sub-Clause 23.3 hereof the Consultant shall have no liability for a consequence of any of the following events if that event and consequence was neither preventable nor foreseeable:-
- 23.1.1 a flood storm or other natural event or
- 23.1.2 any war hostilities revolution riot or civil disorder or
- 23.1.3 the introduction of or any amendment to a law or regulation or any change in its interpretation or application by any authority or
- 23.1.4 any action taken by a governmental or public authority or an agency of the European Union including any failure or delay to grant a consent exemption or clearance or
- 23.1.5 any strike lockout or other industrial action or
- 23.2 For this purpose an event or the consequence of an event was neither preventable nor foreseeable if and only if the Consultant could not have prevented it by taking steps which it could reasonably be expected to have taken and the Consultant could not as at the Commencement Date have reasonably been expected to take the risk of it into account by providing for it in this Agreement by insurance or otherwise
- 23.3 Sub-Clause 23.1 does not apply unless the Consultant
- 23.3.1 notifies the Executive of the relevant event and consequence as soon as possible after it occurs

23.3.2 promptly provides the Executive with any further information which the Executive requests about the event (or its causes) or the consequence and

23.3.3 promptly takes any steps (except steps involving significant additional costs) which the Executive reasonably requires in order to reduce the Executive's losses or risk of losses

23.4 It is for the Consultant to show that a matter is a consequence of an event covered by Sub-Clause 23.1 that the event and the consequence were neither preventable nor foreseeable and that it has satisfied the conditions set out in Sub-Clause 23.3

24. **Waiver**

No delay neglect or forbearance on the part of the Executive in enforcing any term or condition of the Contract shall be deemed to be a waiver or in any way prejudice any right of the Executive under the Contract

25. **Headings**

The headings in this Agreement are for convenience of reference only and shall not define or limit any of the terms or provisions hereof

26. **Confidential Reporting Code (Whistle-blowing)**

The Executive is committed to the highest possible standards of openness probity and accountability In line with that commitment the Executive expects its employees contractors consultants and others that it deals with, who have serious concerns about any aspect of the Executive's work to come forward and voice those concerns It is recognised that most cases will have to proceed on a confidential basis For this reason the Executive has a Local Confidential Reporting Code to encourage and enable employees, contractors consultants and others working for or with the Executive to raise serious concerns within the Executive rather than overlooking a problem or "blowing the whistle" outside Details of the code are available on the Executive's web-site (www.merseytravel.gov.uk).

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27. **Entire Agreement**

The terms of this Agreement represent the entire agreement between the parties and this Agreement supersedes any prior agreement between the parties whether written or oral and any such prior agreements are cancelled as at the Commencement Date but without prejudice to any rights which have already accrued to either of the parties

28. **Severability**

If any provision of this Agreement is or becomes illegal void or invalid that shall not affect the legality and validity of the other provisions of this Agreement

29. **Third Party Rights**

For the purposes of Section 1(2) of the Contracts (Rights of Third Parties) Act 1999 the parties state that they do not intend any term of this Contract to be enforced by any third party but any third party right that exists or is available independently of that Act is preserved

30. **Law**

This Agreement shall be subject to and construed and interpreted in accordance with English Law and shall be subject to the jurisdiction of the Courts of England

EXECUTED as a DEED
for and on behalf of
MERSEYSIDE PASSENGER
TRANSPORT EXECUTIVE



..... *L. Outram* Signed



..... *LOUISE OUTRAM* Name

Authorised Signatory -
SECRETARY TO THE EXECUTIVE

..... *20/07/2012* Date

EXECUTED as a DEED
for and on behalf of
BIRCHAM DYSON BELL LLP

.....   Signed

.....   Name

Director Partner

.....   Signed

.....   Name

Director/Secretary/Witness