

SCHEDULE 18 (FINANCIAL DISTRESS)

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SCHEDULE 18

FINANCIAL DISTRESS

Schedule 18 (*Financial Distress*)

1 DEFINITIONS

1.1 In this Schedule, the following definitions shall apply:

“Accounting Reference Date”	shall be deemed in this Schedule 18 to be the date the Supplier files its annual audited financial statement at Companies House (normally being the end of September);
“Board Confirmation”	means written confirmation from the Board of Directors in accordance with Paragraph 7 of this Schedule;
“Credit Rating Level”	a credit rating level as specified in Annex 1 of this Schedule;
“Credit Rating Threshold”	the minimum Credit Rating Level for each entity in the FDE Group as set out in Annex 2 of this Schedule;
“FDE Group”	means the Supplier;
“Rating Agency”	the rating agency listed in Annex 1 of this Schedule.

2 WARRANTIES AND DUTY TO NOTIFY

- 2.1 The Supplier warrants and represents to the Authority for the benefit of the Authority that as at the Effective Date the long term credit ratings issued for each entity in the FDE Group by each of the Rating Agencies are as set out in Annex 2 of this Schedule.
- 2.2 The Supplier shall promptly notify (or shall procure that its auditors promptly notify) the Authority in writing if there is any downgrade in the credit rating issued by the Rating Agency for any entity in the FDE Group (and in any event within five (5) Working Days of the occurrence of the downgrade).
- 2.3 The Supplier shall:
- (a) regularly monitor the credit ratings of each entity in the FDE Group with the Rating Agencies;
 - (b) promptly notify (or shall procure that its auditors promptly notify) the Authority in writing following the occurrence of a Financial Distress Event or any fact, circumstance or matter which could cause a Financial Distress Event (and in any event, ensure that such

SCHEDULE 18 (FINANCIAL DISTRESS)

Crown copyright 2022

notification is made within ten (10) Working Days of the date on which the Supplier first becomes aware of the Financial Distress Event or the fact, circumstance or matter which could cause a Financial Distress Event).

- 2.4 For the purposes of determining whether a Financial Distress Event has occurred pursuant to the provisions of Paragraphs 3.1(a), and for the purposes of determining relief under Paragraph 6.1, the credit rating of an FDE Group entity shall be deemed to have dropped below the applicable Credit Rating Threshold if:
- (a) the Rating Agency has given a Credit Rating Level for that entity which is below the applicable Credit Rating Threshold; or
 - (b) a Rating Agency that is specified as holding a credit rating for an entity as set out at Annex 2 of this Schedule ceases to hold a credit rating for that entity.

3 FINANCIAL DISTRESS EVENTS

3.1 The following shall be Financial Distress Events:

- (a) the credit rating of an FDE Group entity dropping below the applicable Credit Rating Threshold;
- (b) an FDE Group entity issuing a profits warning to a stock exchange or making any other public announcement, in each case about a material deterioration in its financial position or prospects;
- (c) there being a public investigation into improper financial accounting and reporting, suspected fraud or any other impropriety of an FDE Group entity;
- (d) an FDE Group entity committing a material breach of covenant to its lenders;
- (e) a Key Sub-contractor notifying the Authority that the Supplier has not satisfied any material sums properly due under a specified invoice and not subject to a genuine dispute;
- (f) any FDE Group entity extends the filing period for filing its accounts with the Registrar of Companies so that the filing period ends more than 9 months after its accounting reference date without an explanation to the Authority which the Authority (acting reasonably) considers to be adequate;
- (g) any FDE Group entity is late to file its annual accounts without a public notification or an explanation to the Authority which the Authority, acting reasonably, considers to be adequate;
- (h) the directors and/or external auditors of any FDE Group entity conclude that a material uncertainty exists in relation to that FDE Group entity's going concern in the annual report including in a

SCHEDULE 18 (FINANCIAL DISTRESS)

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reasonable but plausible downside scenario. This includes, but is not limited to, commentary about liquidity and trading prospects in the reports from directors or external auditors; and

- (i) any of the following:
 - (i) any FDE Group entity makes a public announcement which contains adverse commentary with regards to that FDE Group entity's liquidity and trading and trading prospects, such as but not limited to, a profit warning or ability to trade as a going concern;
 - (ii) commencement of any litigation against an FDE Group entity with respect to financial indebtedness greater than £5m or obligations under a service contract with a total contract value greater than £5m;
 - (iii) non-payment by an FDE Group entity of any financial indebtedness;
 - (iv) any financial indebtedness of an FDE Group entity becoming due as a result of an event of default;
 - (v) the cancellation or suspension of any financial indebtedness in respect of an FDE Group entity; or
 - (vi) the external auditor of an FDE Group entity expressing a qualified opinion on, or including an emphasis of matter in, its opinion on the statutory accounts of that FDE entity,

in each case which the Authority reasonably believes (or would be likely to reasonably believe) could directly impact on the continued performance and delivery of the Services in accordance with this Contract.

4 CONSEQUENCES OF FINANCIAL DISTRESS EVENTS

- 4.1 Immediately upon notification by the Supplier of a Financial Distress Event (or if the Authority becomes aware of a Financial Distress Event without notification and brings the event to the attention of the Supplier), the Supplier shall have the obligations and the Authority shall have the rights and remedies as set out in Paragraphs 4.3 to 4.5.
- 4.2 In the event of a late or non-payment of a Key Sub-contractor pursuant to Paragraph 3.1(e), the Authority shall not exercise any of its rights or remedies under Paragraph 4.3 without first giving the Supplier 10 Working Days to:
 - (a) rectify such late or non-payment; or
 - (b) demonstrate to the Authority's reasonable satisfaction that there is a valid reason for late or non-payment.

SCHEDULE 18 (FINANCIAL DISTRESS)

Crown copyright 2022

- 4.3 The Supplier shall (and shall procure that any relevant Key Sub-contractor shall):
- (a) at the request of the Authority, meet the Authority as soon as reasonably practicable (and in any event within three (3) Working Days of the initial notification (or awareness) of the Financial Distress Event or such other period as the Authority may permit and notify to the Supplier in writing) to review the effect of the Financial Distress Event on the continued performance and delivery of the Services in accordance with this Contract; and
 - (b) where the Authority reasonably believes (taking into account the discussions and any representations made under Paragraph 4.3(a)) that the Financial Distress Event could impact on the continued performance and delivery of the Services in accordance with this Contract:
 - (i) submit to the Authority for its approval, a draft Financial Distress Remediation Plan as soon as reasonably practicable (and in any event, within ten (10) Working Days of the initial notification (or awareness) of the Financial Distress Event or such other period as the Authority may permit and notify to the Supplier in writing); and
 - (ii) to the extent that it is legally permitted to do so and subject to Paragraph 4.7, provide such information relating to the Supplier and/or the Key Sub-contractors as the Authority may reasonably require in order to understand the risk to the Services, which may include forecasts in relation to cash flow, orders and profits and details of financial measures being considered to mitigate the impact of the Financial Distress Event.
- 4.4 The Authority shall not withhold its approval of a draft Financial Distress Remediation Plan unreasonably. If the Authority does not approve the draft Financial Distress Remediation Plan, it shall inform the Supplier of its reasons and the Supplier shall take those reasons into account in the preparation of a further draft Financial Distress Remediation Plan, which shall be resubmitted to the Authority within five (5) Working Days of the rejection of the first draft. This process shall be repeated until the Financial Distress Remediation Plan is either:
- (a) approved by the Authority;
 - (b) referred, by notice sent by either Party to the other Party explaining why it thinks the Financial Distress Remediation Plan has not been approved, to commercial negotiation led by senior representatives who have authority to agree the Financial Distress Remediation Plan to be held within twenty-eight (28) days of the date of the notice; or

SCHEDULE 18 (FINANCIAL DISTRESS)

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- (c) finally rejected by the Authority.
- 4.5 Following approval of the Financial Distress Remediation Plan by the Authority, the Supplier shall:
 - (a) on a regular basis (which shall not be less than fortnightly):
 - (i) review and make any updates to the Financial Distress Remediation Plan as the Supplier may deem reasonably necessary and/or as may be reasonably requested by the Authority, so that the plan remains adequate, up to date and ensures the continued performance and delivery of the Services in accordance with this Contract; and
 - (ii) provide a written report to the Authority setting out its progress against the Financial Distress Remediation Plan, the reasons for any changes made to the Financial Distress Remediation Plan by the Supplier and/or the reasons why the Supplier may have decided not to make any changes;
 - (b) where updates are made to the Financial Distress Remediation Plan in accordance with Paragraph 4.5(a), submit an updated Financial Distress Remediation Plan to the Authority for its approval, and the provisions of Paragraphs 4.4 and 4.5(a) shall apply to the review and approval process for the updated Financial Distress Remediation Plan; and
 - (c) comply with the Financial Distress Remediation Plan (including any updated Financial Distress Remediation Plan) and ensure that it achieves the financial and performance requirements set out in the Financial Distress Remediation Plan.
- 4.6 Where the Supplier reasonably believes that the relevant Financial Distress Event under Paragraph 4.1 (or the circumstance or matter which has caused or otherwise led to it) no longer exists, it shall notify the Authority and the Parties may agree that the Supplier shall be relieved of its obligations under Paragraph 4.5.
- 4.7 The Supplier shall use reasonable endeavours to put in place the necessary measures to ensure that the information specified at Paragraph 4.3(b)(ii) is available when required and on request from the Authority and within reasonable timescales. Such measures may include:
 - (a) obtaining in advance written authority from Key Sub-contractors authorising the disclosure of the information to the Authority and/or entering into confidentiality agreements which permit disclosure;
 - (b) agreeing in advance with the Authority and/or Key Sub-contractors a form of confidentiality agreement to be entered by the relevant parties to enable the disclosure of the information to the Authority;

SCHEDULE 18 (FINANCIAL DISTRESS)

Crown copyright 2022

- (c) putting in place any other reasonable arrangements to enable the information to be lawfully disclosed to the Authority (which may include making price sensitive information available to Authority nominated personnel through confidential arrangements, subject to their consent); and
- (d) disclosing the information to the fullest extent that it is lawfully entitled to do so, including through the use of redaction, anonymisation and any other techniques to permit disclosure of the information without breaching a duty of confidentiality.

5 TERMINATION RIGHTS

5.1 The Authority shall be entitled to terminate this Contract under Clause 32.1(b) (*Termination by the Authority*) if:

- (a) the Supplier fails to notify the Authority of a Financial Distress Event in accordance with Paragraph 2.3(b);
- (b) the Supplier fails to comply with any part of Paragraph 4.3;
- (c) the Authority finally rejects a Financial Distress Remediation Plan (or any updated Financial Distress Remediation Plan) in accordance with Paragraphs 4.4 to 4.5(a); and/or
- (d) the Supplier fails to comply with the terms of the Financial Distress Remediation Plan (or any updated Financial Distress Remediation Plan) in accordance with Paragraph 4.5(c).

6 PRIMACY OF CREDIT RATINGS

6.1 Without prejudice to the Supplier's obligations and the Authority's rights and remedies under Paragraph 2, if, following the occurrence of a Financial Distress Event pursuant to any of Paragraphs 3.1(b) to 3.1(i), the Rating Agencies review and report subsequently that the credit ratings for the FDE Group entities do not drop below the relevant Credit Rating Thresholds specified for those entities in Annex 2 of this Schedule, then:

- (a) the Supplier shall be relieved automatically of its obligations under Paragraphs 4.3 to 4.5; and
- (b) the Authority shall not be entitled to require the Supplier to provide financial information in accordance with Paragraph 4.3(b)(ii).

7 BOARD CONFIRMATION

7.1 If this Contract has been specified as a Critical Service Contract under Paragraph 1.1 of Part B to Schedule 26 (*Service Continuity Plan and Corporate Resolution Planning*) then, subject to Paragraph 7.4 of this Schedule, the Supplier shall within one hundred and twenty (120) days after each Accounting Reference Date or within fifteen (15) months of the previous Board Confirmation (whichever is the earlier) provide a Board Confirmation to the Authority in the form set out at Annex 3 of this Schedule, confirming that to

SCHEDULE 18 (FINANCIAL DISTRESS)

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the best of the Board of Director's knowledge and belief, it is not aware of and has no knowledge:

- (a) that a Financial Distress Event has occurred since the later of the Effective Date or the previous Board Confirmation or is subsisting;
or
- (b) of any matters which have occurred or are subsisting that could reasonably be expected to cause a Financial Distress Event.

7.2 The Supplier shall ensure that in its preparation of the Board Confirmation it exercises due care and diligence and has made reasonable enquiry of all relevant Supplier Personnel and other persons as is reasonably necessary to understand and confirm the position.

7.3 In respect of the first Board Confirmation to be provided under this Contract, the Supplier shall provide the Board Confirmation within fifteen (15) months of the Effective Date if earlier than the timescale for submission set out in Paragraph 7.1 of this Schedule.

7.4 Where the Supplier is unable to provide a Board Confirmation in accordance with Paragraphs 7.1 to 7.3 of this Schedule due to the occurrence of a Financial Distress Event or knowledge of subsisting matters which could reasonably be expected to cause a Financial Distress Event, it will be sufficient for the Supplier to submit in place of the Board Confirmation, a statement from the Board of Directors to the Authority (and where the Supplier is a Strategic Supplier, the Supplier shall send a copy of the statement to the Cabinet Office Markets and Suppliers Team) setting out full details of any Financial Distress Events that have occurred and/or the matters which could reasonably be expected to cause a Financial Distress Event.

7.5 The provisions of this paragraph 7 shall apply only to financial information relating to the Supplier and shall not require the Supplier to investigate or obtain board confirmations from any of its Sub-contractors.



SCHEDULE 18 (FINANCIAL DISTRESS)

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ANNEX 1: RATING AGENCIES

- Rating Agency 1 Dun and Bradstreet

SCHEDULE 18 (FINANCIAL DISTRESS)

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ANNEX 2: CREDIT RATINGS AND CREDIT RATING THRESHOLDS

Entity	Credit Rating (long term) (insert credit rating issued for the entity at the Effective Date)	Credit Rating Threshold
<i>Supplier</i>		

SCHEDULE 18 (FINANCIAL DISTRESS)

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ANNEX 3: BOARD CONFIRMATION

Supplier Name:

Contract Reference Number:

The Board of Directors acknowledge the requirements set out at paragraph 7 of Schedule 18 (*Financial Distress*) and confirm that the Supplier has exercised due care and diligence and made reasonable enquiry of all relevant Supplier Personnel and other persons as is reasonably necessary to enable the Board of Directors to prepare this statement.

The Board of Directors confirms, to the best of its knowledge and belief, that as at the date of this Board Confirmation it is not aware of and has no knowledge:

- (a) that a Financial Distress Event has occurred since the later of the previous Board Confirmation and the Effective Date or is subsisting;
or
- (b) of any matters which have occurred or are subsisting that could reasonably be expected to cause a Financial Distress Event.

On behalf of the Board of Directors:

Chair

Signed

Date

Director

Signed

Date