

- 37.10.3.5 is entitled or subject to any additional terms and conditions of employment other than those disclosed to the Authority or Successor Operator (as appropriate);
- 37.10.3.6 is or has been within the previous two years the subject of formal disciplinary proceedings;
- 37.10.3.7 has received a written warning (other than a warning that has lapsed);
- 37.10.3.8 has taken or been the subject of a grievance procedure within the previous two years; or
- 37.10.3.9 has objected, or has indicated an intention to object, in accordance with TUPE to his or her employment transferring to the Authority or Successor Operator (as appropriate) under TUPE.
- 37.10.4 The Service Provider undertakes to each of the Authority and any Successor Operator that it will (and will procure that its Sub-Contractors will):
- 37.10.4.1 continue to perform and observe all of its obligations under or in connection with the contracts of employment of the Re-Transferring Personnel and any collective agreements relating to the Re-Transferring Personnel up to the Further Transfer Date;
- 37.10.4.2 pay to the Re-Transferring Personnel all Employment Costs to which they are entitled from the Service Provider or any Sub-Contractor which fall due in the period up to the Further Transfer Date;
- 37.10.4.3 to pay to the Authority or the Successor Operator (as appropriate) within 7 days of the Further Transfer Date an apportioned sum in respect of Employment Costs as set out in Clause 37.10.5; and
- 37.10.4.4 to comply in all respects with its information and consultation obligations under TUPE and to provide to the Authority or Successor Operator (as appropriate) such information as the Authority or Successor Operator may request in order to verify such compliance.
- 37.10.5 The Parties agree that all Employment Costs in respect of the Re-Transferring Personnel will be allocated as follows:
- 37.10.5.1 the Service Provider will be responsible for any Employment Costs relating to the period up to and including the Further Transfer Date;
- 37.10.5.2 the Authority or (where appointed) any Successor Operator will be responsible for the Employment Costs relating to the period after the Further Transfer Date
- and will if necessary be apportioned on a time basis (regardless of when such sums fall to be paid) except that there will be no apportionment in respect of the Re-Transferring Personnel's holiday entitlements.
- 37.10.6 The Service Provider will indemnify and keep indemnified each of the Authority and any Successor Operator from and against all Employment Liabilities which the Authority and/or the Successor Operator incurs or suffers arising directly or indirectly out of or in connection with:
- 37.10.6.1 any failure by the Service Provider to comply with its obligations under this Clause 37.10;

- 37.10.6.2 any act or omission by or on behalf of the Service Provider (or its Sub-Contractors) in respect of the Re-Transferring Personnel whether occurring before on or after the Further Transfer Date;
- 37.10.6.3 any failure by the Service Provider (or its Sub-Contractors) to comply with Regulation 13 of TUPE (except to the extent that such failure arises from a failure by the Authority or the Successor Operator to comply with Regulation 13 of TUPE);
- 37.10.6.4 any claim or demand by HMRC or any other statutory authority in respect of any financial obligation including but not limited to PAYE and national insurance contributions in relation to any Re-Transferring Personnel to the extent that such claim or demand relates to the period from the Contract Commencement Date to the Further Transfer Date;
- 37.10.6.5 any claim or demand or other action taken against the Authority or any Successor Operator by any person employed or engaged by the Service Provider (or its Sub-Contractors) (other than Re-Transferring Personnel included on the Final Staff List) who claims (whether correctly or not) that the Authority or Successor Operator has inherited any liability from the Service Provider (or its Sub-Contractors) in respect of them by virtue of TUPE.
- 37.11 If TUPE does not apply on the expiry or termination of the Contract, the Service Provider will remain responsible for the Service Provider Personnel and will indemnify and keep indemnified the Authority against all Employment Liabilities which the Authority incurs or suffers arising directly or indirectly out of or in connection with the employment or termination of employment of any of the Service Provider Personnel or former Service Provider Personnel.
- 37.12 The Service Provider will procure that whenever the Authority so requires on reasonable notice at any time during the continuance in force of this Contract and for 2 years following the date of expiry or earlier termination of the Contract the Authority will be given reasonable access to and be allowed to consult with any person, consultant or employee who, at that time:
- 37.12.1 is still an employee or Sub-Contractor of the Service Provider or any of the Service Provider's associated companies; and
- 37.12.2 was at any time employed or engaged by the Service Provider in order to provide the Services to the Authority under this Contract,
- and such access and consultation will be provided on the first occasion free of charge and thereafter be charged at reasonable rates for the time spent by the Service Provider and/or its employees or Sub-Contractors on such consultation. The Service Provider will use all reasonable endeavours to procure that such persons co-operate with the Authority's requests.
- 37.13 Clause 40.1 shall be amended so that benefits conferred on the Successor Operator under this Clause 37 shall be enforceable by them.

## **Appendix 1 to Clause 37**

### **Information to be provided in respect of those on the Staff List**

- Amount of time spent on the Services (or any part of the Services specified by the Authority)
- Date of birth
- Role title/designation and role profile
- Annual salary £
- Bonus and commission amount and frequency
- Pay frequency and date
- Overtime - contractual or non-contractual and rates
- Contractual working hours
- Contract type - permanent/temporary
- Geographical area of work / location
- Commencement of employment date
- Continuous service date
- Car allowance
- Pension contributions
  - Employer
  - Employee
  - Including additional info on:
    - who were originally employees of the Authority,
    - who were members of (or eligible to become members of) the TfL Pension Fund / The Local Government Pension Scheme for England and Wales/The Principal Civil Service Pension Scheme,
    - whose employment transferred from the Authority to the Service Provider under TUPE; and
    - who were entitled to broadly comparable benefits under the Existing Service Provider's Scheme
- Details of any contracting out certificate
- Details of the relevant employee representative body or bodies and relevant collective agreements
- Date of annual pay award
- Annual leave entitlement
- Contractual notice period
- Public holiday /concessionary days entitlement
- Sickness entitlement (in 12 month rolling period)
- Salary/wage increases pending
- Eligibility for enhanced redundancy pay and any other contractual or non-contractual termination of severance arrangements (including methods of calculation)
- Details of any other benefits provided, whether contractual or non-contractual
- Copy of employment contract or applicable standard terms and employee handbook
- Any loans or educational grants
- For those employees who are foreign nationals the country of citizenship, immigrant status and all documentation required by law to demonstrate a right to work in the United Kingdom

- Information on any disciplinary or grievance procedure taken against or by an employee in the two years immediately preceding the information being provided
- Information about any tribunal claims in the immediately preceding two years or whether there are reasonable grounds to believe a claim may be brought
- Department and place on organisation chart
- Average absence due to sickness
- Training and competency records

### **38 DECLARATION OF INEFFECTIVENESS AND PUBLIC PROCUREMENT TERMINATION EVENT**

38.1 In the event that a court makes a Declaration of Ineffectiveness, the Authority shall promptly notify the Service Provider. The Parties agree that the provisions of Clause 35 and Clauses 38.1, 38.2, 38.4 to 38.6 and clause 38.12 shall apply as from the time when the Declaration of Ineffectiveness is made.

38.2 The Declaration of Ineffectiveness shall not prejudice or affect any right, liability or remedy which has accrued or shall accrue to either Party prior to or after such Declaration of Ineffectiveness in respect of the period prior to the Declaration of Ineffectiveness.

38.3 During any court proceedings seeking a Declaration of Ineffectiveness, the Authority may require the Service Provider to prepare a Cessation Plan in accordance with this clause 38.3 by issuing a notice in writing. As from the date of receipt by the Service Provider of such notification from the Authority, the Parties (acting reasonably and in good faith) shall agree or, in the absence of such agreement, the Authority shall reasonably determine an appropriate Cessation Plan with the object of achieving:

38.3.1 an orderly and efficient cessation of the Services or (at the Authority's request) a transition of the Services to the Authority or such other entity as the Authority may specify; and

38.3.2 minimal disruption or inconvenience to the Authority or to public passenger transport services or facilities,

in accordance with the provisions of Clauses 38.2 to 38.6 and which the parties agree would have effect in the event that a Declaration of Ineffectiveness is made.

38.4 Where there is any conflict or discrepancy between the provisions of clauses 35 and clauses 38.2 to 38.6 or the Cessation Plan, the provisions of these clauses 38.2 to 38.6 and the Cessation Plan will prevail.

38.5 The parties shall comply with their respective obligations under the Cessation Plan (as agreed by the parties or, where agreement cannot be reached, as reasonably determined by the Authority) in the event that a Declaration of Ineffectiveness is made.

38.6 The Authority shall pay the Services Provider's reasonable costs in assisting the Authority in preparing, agreeing and complying with the Cessation Plan. Such costs shall be based on any comparable costs or Charges agreed as part of this Call off Contract or as otherwise reasonably determined by the Authority. Provided that the Authority shall not be liable to the Service Provider for any

loss of profit, revenue, goodwill or loss of opportunity (whether direct, indirect or consequential loss) as a result of the early termination of this Contract pursuant to any Declaration of Ineffectiveness.

- 38.7 Consistent with the Authority's rights of termination implied into this Contract by the Procurement Regulations, in the event of a Public Procurement Termination Event, the Authority shall promptly notify the Service Provider that the provisions of Clause[s] 35 to 37 (inclusive) and these Clauses 38.7 to 38.12 (inclusive) shall apply as from the date of receipt by the Service Provider of the notification of the Public Procurement Termination Event. If there is any conflict or discrepancy between the provisions of Clause[s] 35 to 37 (inclusive) and these Clauses 38.7 to 38.12 (inclusive) or the Cessation Plan, the provisions of these Clauses 38.7 to 38.12 (inclusive) and the Cessation Plan shall prevail.
- 38.8 The Public Procurement Termination Event shall not prejudice or affect any right, liability or remedy which has accrued or shall accrue to either Party prior to or after such Public Procurement Termination Event in respect of the period prior to the Public Procurement Termination Event.
- 38.9 As from the date of receipt by the Service Provider of the notification of the Public Procurement Termination Event, the Parties (acting reasonably and in good faith) shall agree or, in the absence of such agreement, the Authority shall reasonably determine an appropriate Cessation Plan with the object of achieving:
- 38.9.1 an orderly and efficient cessation or (at the Authority's election) a transition to the Authority or such other entity as the Authority may specify of: (i) the Services; or (at Authority's election), (ii) the part of the Services which are affected by the Public Procurement Termination Event; and
- 38.9.2 minimal disruption or inconvenience to the Authority or to public passenger transport services or facilities
- in accordance with the provisions of these Clauses 38.7 to 38.12 (inclusive) and to give effect to the terms of the Public Procurement Termination Event.
- 38.10 Upon agreement, or determination by the Authority, of the Cessation Plan the Parties will comply with their respective obligations under the Cessation Plan.
- 38.11 The Authority shall pay the Service Provider's reasonable costs in assisting the Authority in preparing, agreeing and complying with the Cessation Plan. Such costs shall be based on any comparable costs or Charges agreed as part of this Contract or as otherwise reasonably determined by the Authority, provided that the Authority shall not be liable to the Service Provider for any loss of profit, revenue, goodwill or loss of opportunity (whether direct, indirect or consequential loss) as a result of the early termination of this Contract as a result of a Public Procurement Termination Event.
- 38.12 For the avoidance of doubt, the provisions of this clause 38 (and applicable definitions) shall survive any termination of the Contract following a Declaration of Ineffectiveness or a Public Procurement Termination Event.

## **39 SURVIVAL**