

Schedule 11 - Allocation of Costs on Termination

Payments on Termination

1 DEFINITIONS

1.1 In this Schedule, the following definitions shall apply:

“Anticipated Contract Life Profit Margin” means the anticipated Contractor Profit Margin over Contract Period;

“Compensation Payment” means the payment calculated in accordance with Paragraph 6;

“Contract Breakage Costs” means the amounts payable by the Contractor to its Sub-contractors for terminating all relevant Sub-contracts as a direct result of the early termination of this Contract as at the Termination Date as determined in accordance with Paragraph 3;

“Contractor Profit” means the difference between the total Fees (in nominal cash flow terms but excluding any deductions paid or payable to the Authority under this Contract) and total Costs (in nominal cash flow terms) paid or payable to the Contractor under this Contract;

“Contractor Profit Margin” means in relation to a period, the Contractor Profit for the relevant period divided by the total Fees over the same period and expressed as a percentage;

“Costs” the following costs (without double recovery) to the extent that they are reasonably and properly incurred by the Contractor in providing the Services:

- (i) costs incurred in respect of those Assets which are detailed on the Registers and which would be treated as capital costs according to generally accepted accounting principles within the UK, which shall include the cost to be charged in respect of Assets by the Contractor to the Authority or (to the extent that risk and title in any Asset is not held by the Contractor) any cost actually incurred by the Contractor in respect of those Assets; and
- (ii) operational costs which are not included within (i) above, to the extent that such costs are necessary and properly incurred by the Contractor in the delivery of the Services;

but excluding:

- (i) redundancy costs or any costs related to Staff;
- (ii) Overhead;
- (iii) financing or similar costs;
- (iv) maintenance and support costs to the extent that these relate to maintenance and/or support services provided beyond the Contract Period, whether in relation to Assets or otherwise;
- (v) taxation;

- (vi) fines and penalties; and
- (vii) non-cash items (including depreciation, amortisation, impairments and movements in provisions);

“Overhead” means those amounts which are intended to recover a proportion of the Contractor's indirect corporate costs (including financing, marketing, advertising, research and development and insurance costs and any fines or penalties) but excluding allowable indirect costs apportioned to facilities and administration in the provision of Staff;

“Profit Already Paid” means the Contractor Profit paid or payable to the Contractor under this Contract for the period from the Commencement Date up to (and including) the Termination Date;

“Request for Estimate” means a written request sent by the Authority to the Contractor, requiring that the Contractor provide it with an accurate estimate of the Termination Payment and Compensation Payment that would be payable if the Authority exercised its right under Clause H1 (Termination by the Authority) to terminate this Contract for convenience on a specified Termination Date;

“Shortfall Period” has the meaning given in Paragraph 6.2;

“Termination Estimate” has the meaning given in Paragraph 11.2;

“Total Costs Incurred” means the Costs incurred by the Contractor up to the Termination Date in the performance of this Contract (but excluding any costs relating to Staff, Contract Breakage Costs and any costs the Contractor would not otherwise be able to recover through the Charges) less any Deductions up to (and including) the Termination Date;

“Unrecovered Costs” means the Costs incurred by the Contractor in the performance of this Contract to the extent that the same remain at the Termination Date to be recovered through Charges that but for the termination of this Contract would have been payable by the Authority after the Termination Date in accordance with Schedule 4 (Fees and Payment);

“Unrecovered Payment” means an amount equal to the lower of:

- (a) the sum of the Unrecovered Costs and the Unrecovered Profit; and
- (b) the amount specified in Paragraph 4; and

“Unrecovered Profit” means (Total Costs Incurred x Anticipated Contract Life Profit Margin) - Profit Already Paid remaining unpaid at the Termination Date.

2 TERMINATION PAYMENT

The Termination Payment payable pursuant to Clause H6.1 (Payments by the Authority) shall be an amount equal to the aggregate of the Contract Breakage Costs and the Unrecovered Payment.

3 CONTRACT BREAKAGE COSTS

3.1 The Contractor may recover through the Contract Breakage Costs only those costs incurred by the Contractor directly as a result of the termination of this Contract which:

- (a) would not have been incurred had this Contract continued until the scheduled expiry of the Contract Period;
- (b) are unavoidable, proven, reasonable, and not capable of recovery;
- (c) are incurred under arrangements or agreements that are directly associated with this Contract;
- (d) are not Contract Breakage Costs relating to contracts or Sub-contracts with Affiliates of the Contractor; and
- (e) relate directly to the termination of the Contract.

Limitation on Contract Breakage Costs

3.2 The Contract Breakage Costs shall not exceed the lower of:

- (a) 100% of the Average Annual Contract Value; and
- (b) 120% of the estimate for the Contract Breakage Costs set out in any relevant Termination Estimate.

Contract Breakage Costs

3.3 The Contractor shall be entitled to Contract Breakage Costs only in respect of Sub-contracts which:

- (a) are not assigned or novated to a Replacement Contractor at the request of the Authority in accordance with Schedule 10 (Exit Management); and
- (b) the Contractor can demonstrate:
 - (i) are surplus to the Contractor's requirements after the Termination Date, whether in relation to use internally within its business or in providing services to any of its other customers; and
 - (ii) have been entered into by it in the ordinary course of business.

3.4 The Contractor shall seek to negotiate termination of any Sub-contracts with the relevant Sub-contractor using all reasonable endeavours to minimise the cancellation or termination charges.

- 3.5 Except with the prior written agreement of the Authority, the Authority shall not be liable for any costs (including cancellation or termination charges) that the Contractor is obliged to pay in respect of:
- (a) the termination of any contractual arrangements for occupation of, support of and/or services provided for Contractor premises which may arise as a consequence of the termination of this Contract; and/or
 - (b) Assets not yet installed at the Termination Date.

4 UNRECOVERED PAYMENT

The Unrecovered Payment shall not exceed the lowest of:

- (a) 100% of the Average Annual Contract Value;
- (b) 120% of the estimate for the Unrecovered Payment set out in any relevant Termination Estimate; and
- (c) the Charges that but for the termination of this Contract would have been payable by the Authority after the Termination Date in accordance with Schedule 4 (Fees and Payment) as forecast in the Financial Model.

5 MITIGATION OF CONTRACT BREAKAGE COSTS AND UNRECOVERED COSTS

- 5.1 The Contractor agrees to use all reasonable endeavours to minimise and mitigate Contract Breakage Costs and Unrecovered Costs by:

- (a) the appropriation of Assets, employees and resources for other purposes;
- (b) at the Authority's request, assigning any Sub-contracts to the Authority or a third party acting on behalf of the Authority;

and

- (c) in relation to Sub-contracts that are not to be assigned to the Authority or to another third party, terminating those contracts at the earliest possible date without breach or where contractually permitted.

- 5.2 If Assets, employees and resources can be used by the Contractor for other purposes, then there shall be an equitable reduction in the Contract Breakage Costs and Unrecovered Costs payable by the Authority or a third party to the Contractor. In the event of any Dispute arising over whether the Contractor can use any Assets, employees and/or resources for other purposes and/or over the amount of the relevant equitable reduction, the Dispute shall be referred to an Expert for determination in accordance with the procedure detailed in Schedule 16 (Dispute Resolution Procedure).

6 COMPENSATION PAYMENT

- 6.1 The Compensation Payment payable pursuant to Clause H6.1 (Payments by the Authority) shall be an amount equal to the total forecast Fees over the Shortfall Period multiplied by the Anticipated Contract Life Profit Margin.

- 6.2 For the purposes of Paragraph 6.1, the "**Shortfall Period**" means:

- (a) where the Authority terminates this Contract pursuant to Clause H1.1 (Termination by the Authority), a number of days equal to the number of days by which the notice given (or deemed given pursuant to Clause A5.2 (Notices)) falls short of 365 days; or
- (b) where the Contractor terminates this Contract pursuant to Clause H2.1 (Termination by the Contractor), a number of days equal to the number of days by which the period from (and including) the date of the non-payment by the Authority to (and including) the Termination Date falls short of 365 days,

but in each case subject to the limit set out in Paragraph 6.3.

6.3 The Compensation Payment shall be no greater than the lower of:

- (a) 100% of the Average Annual Contract Value; and
- (b) 120% of the estimate for the Compensation Payment set out in the relevant Termination Estimate.

7 FULL AND FINAL SETTLEMENT

Any Termination Payment and/or Compensation Payment paid under this Schedule shall be in full and final settlement of any claim, demand and/or proceedings of the Contractor in relation to any termination by the Authority pursuant to Clause H1.1 (Termination by the Authority) or termination by the Contractor pursuant to Clause H1.2 (Termination by the Contractor) (as applicable), and the Contractor shall be excluded from all other rights and remedies it would otherwise have been entitled to in respect of any such termination.

8 INVOICING FOR THE PAYMENTS ON TERMINATION

All sums due under this Schedule shall be payable by the Authority to the Contractor in accordance with the payment terms set out in Schedule 4 (Fees and Payments).

9 SET OFF

The Authority shall be entitled to set off any outstanding liabilities of the Contractor against any amounts that are payable by it pursuant to this Schedule.

10 NO DOUBLE RECOVERY

- 10.1 If any amount payable under this Schedule (in whole or in part) relates to or arises from any Transferring Assets then, to the extent that the Authority makes any payments pursuant to Schedule 10 (Exit Management) in respect of such Transferring Assets, such payments shall be deducted from the amount payable pursuant to this Schedule.
- 10.2 The value of the Termination Payment and/or the Compensation Payment shall be reduced or extinguished to the extent that the Contractor has already received the Charges or the financial benefit of any other rights or remedy given under this Contract so that there is no double counting in calculating the relevant payment.
- 10.3 Any payments that are due in respect of the Transferring Assets shall be calculated in accordance with the provisions of the Exit Plan.

11 ESTIMATE OF TERMINATION PAYMENT AND COMPENSATION PAYMENT

- 11.1 The Authority may issue a Request for Estimate at any time during the Contract Period provided that no more than two (2) Requests for Estimate may be issued in any six (6) month period.
- 11.2 The Contractor shall within twenty (20) Working Days of receiving the Request for Estimate (or such other timescale agreed between the Parties), provide an accurate written estimate of the Termination Payment and the Compensation Payment that would be payable by the Authority based on a postulated Termination Date specified in the Request for Estimate (such estimate being the “**Termination Estimate**”). The Termination Estimate shall:
- (a) include:
 - (i) details of the mechanism by which the Termination Payment is calculated;
 - (ii) full particulars of the estimated Contract Breakage Costs in respect of each Sub-contract and appropriate supporting documentation; and
 - (iii) such information as the Authority may reasonably require; and
 - (b) state the period for which that Termination Estimate remains valid, which shall be not less than twenty (20) Working Days.
- 11.3 The Contractor acknowledges that issue of a Request for Estimate shall not be construed in any way as to represent an intention by the Authority to terminate this Contract.
- 11.4 If the Authority issues a Termination Notice to the Contractor within the stated period for which a Termination Estimate remains valid, the Contractor shall use the same mechanism to calculate the Termination Payment as was detailed in the Termination Estimate unless otherwise agreed in writing between the Contractor and the Authority.