

EFAC Contract – Variation 52

Appendix 2

Clause Amendments

A. Force Majeure

A new **Clause A11** will be inserted as follows:

A11 Force Majeure

- A11.1 Subject to the remaining provisions of this Clause A11 (and, in relation to the Contractor, subject to compliance with its obligations set out in Paragraph A32 (Business Continuity) of Schedule A and it implementing the Disaster Recovery Plan in the event of a disaster or business continuity event occurring), a Party may claim relief under this Clause A11 from liability for failure to meet its obligations under this Contract for as long as and only to the extent that the performance of those obligations is directly affected by a Force Majeure Event. Any failure or delay by the Contractor in performing its obligations under this Contract which results from a failure or delay by an agent, sub-contractor or supplier shall be regarded as due to a Force Majeure Event only if that agent, sub-contractor or supplier is itself impeded by a Force Majeure Event from complying with an obligation to the Contractor.
- A11.2 The Affected Party shall as soon as reasonably practicable on becoming aware that a Force Majeure Event has occurred or is likely to occur, issue a Force Majeure Notice to the other Party which shall include:
- (a) details of the Force Majeure Event;
 - (b) the date from which:
 - (i) the Force Majeure Event has prevented or hindered; or
 - (ii) its best estimate of the date from which the Force Majeure Event will prevent or hinder,the Affected Party in the performance of its Contract obligations;
 - (c) the Contract obligations affected by the Force Majeure Event;
 - (d) any action the Affected Party proposes to take to mitigate the effect of the Force Majeure Event; and
 - (e) the Affected Party's best estimate of the date upon which it shall be able to resume performance of the affected Contract obligations.
- A11.3 The Affected Party shall provide at reasonable intervals updates to the other Party on the status of the Force Majeure Event and the steps which the Affected Party has taken and is taking to resume performance of its Contract obligations affected by the Force Majeure Event.
- A11.4 If the Contractor is the Affected Party, it shall:
- (a) use its reasonable endeavours to prevent and mitigate the effects of the Force Majeure Event;

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- (b) take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event; and
- (c) use its reasonable endeavours to resume performance of its Contract obligations affected by the Force Majeure Event as soon as reasonably practicable.

A11.5 If the Authority is the Affected Party, it shall:

- (a) use its reasonable endeavours to prevent and mitigate the effects of the Force Majeure Event; and
- (b) use its reasonable endeavours to resume performance of its Contract obligations affected by the Force Majeure Event as soon as reasonably practicable.

A11.6 Where, as a result of a Force Majeure Event:

- (a) an Affected Party fails to perform its obligations in accordance with this Contract, then during the continuance of the Force Majeure Event:
 - (i) the other Party shall not be entitled to exercise any rights to terminate this Contract in whole or in part as a result of such failure other than pursuant to Clauses G1, G1A or G3; and
 - (ii) neither Party shall be liable for any Default arising as a result of such failure;
- (b) the Contractor fails to perform its obligations in accordance with this Contract:
 - (i) the Authority shall not be entitled during the continuance of the Force Majeure Event to exercise its rights under Clause I3 as a result of such failure;
 - (ii) the Contractor shall not accrue Service Points nor receive Service Credits to the extent that a Performance Failure has been caused by the Force Majeure Event; and
 - (iii) the Contractor shall be entitled to receive the Commission Payment (or a proportional payment of them) only to the extent that the Services (or part of the Services) continue to be performed in accordance with the terms of this Contract during the occurrence of the Force Majeure Event.

A11.7 The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under the Contract.

A11.8 Relief from liability for the Affected Party under this Clause A11 shall end as soon as the Force Majeure Event no longer causes the Affected Party to be unable to comply with its obligations under the Contract and the ending of relief shall not be dependent on the serving of notice under Clause A11.7.

B. Audit and the National Audit Office

Clause D9.1 will be amended as follows:

- D9.1 The Contractor shall keep and maintain until 6 years after the end of the Contract Period, or as long a period as may be agreed between the Parties, full and accurate records of the Contract including the Goods and Services supplied under it, the Open Book Data, all expenditure reimbursed by the Authority, and all payments made by the Authority. Subject to each Party's obligations of confidentiality (to each other and to third parties), the Contractor shall on request afford the Authority or the Audit Agents all reasonable co-operation and assistance, including:
- (a) all information requested by the Authority which the Authority is permitted to access pursuant to this Contract or Law;
 - (b) reasonable access to any premises and to any equipment used (whether exclusively or non-exclusively) in the performance of the Services;
 - (c) reasonable access to the Contractor System; and
 - (d) access to the Contractor Personnel.

New **Clauses D9.2 to D9.4** will be inserted as follows:

- D9.2 The Authority shall ensure that the conduct of each audit pursuant to this Clause D9 does not unreasonably disrupt the Contractor or cause the Contractor to be in breach of its obligations under the Contract.
- D9.3 The Parties agree that they shall bear their own respective costs and expenses incurred in respect of compliance with this Clause D9.
- D9.4 The Authority acknowledges that Clause D9.1 shall not permit its personnel to have routine operational access to the Contractor System. If at any time the Authority requires such access, the Parties shall agree the associated costs and document the additional charges payable by the Authority in a Variation to the Contract.

C. Declaration of Ineffectiveness

A new **Clause E9** will be inserted as follows:

E9. Declaration of Ineffectiveness

- E9.1 If a court of competent jurisdiction makes a Declaration of Ineffectiveness in respect of any variation to this Contract (including Variation 52), the Parties agree that:
- (a) 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;
 - (b) the Contract shall continue in full force and effect, save that: (i) the amendments made by such variation shall be deemed severed from the Contract on the date on which the Declaration of Ineffectiveness was made; and (ii) either Party may give notice to the other Party requiring the Parties to commence good faith negotiations to amend this Contract.
- E9.2 If either Party serves notice on the other Party in accordance with Clause E9.1 (b) and the Parties are unable to agree on the revisions to the Contract within 20 Working Days of the date of the notice, either Party may terminate the Contract on 3 months' written notice to the other Party.
- E9.3 If either Party terminates the Contract pursuant to Clause E9.3, each Party shall bear its own costs of termination. For clarification, such termination shall be without prejudice to each Party's accrued rights and obligations under the Contract.

D. Liabilities

Clause F1.4 will be amended as follows:

- F1.4 Subject always to Clause F1.1, the liability of either Party for Defaults shall be subject to the following financial limits:
- (a) the aggregate liability of either Party for all Defaults resulting in direct loss of or damage to the Property of the other under or in connection with the Contract shall in no event exceed {1} million pounds;
 - (aa) the aggregate liability of the Contractor to the Authority in respect of Service Credits shall in no event exceed Redacted FOIA 2000 S43 (2) during the Contract Period; and
 - (b) the annual aggregate liability under the Contract of either Party for all Defaults (other than a Default governed by Clauses D8.4 (Intellectual Property Rights), F1.4 (a) or F1.4 (aa) shall in no event exceed the greater of or (10%) of the Contract Price paid or payable by the Authority to the Contractor in the year in which the liability arises;
 - (c) The aggregate liability of the Contractor under Clause D8.4 (Intellectual Property Rights) where applicable shall in no event exceed 1 million pounds.
 - (d) Where the Authority is satisfied that the Contractor has failed to apply the Authority's process, guidance or learning in accordance with Specification and this failure has resulted in an incorrect decision being made, the Authority will undertake remedial action and impose liquidated damages on the Contractor to cover the cost thereof at a rate of £240 per case. Such liquidated damages shall be deemed to be a genuine pre-estimate of the foreseeable damages incurred by the Authority.

E. Default, Disruption and Termination

A new **Clause G1A** will be inserted as follows:

G1A Termination for Force Majeure

- G1A.1 Either Party may terminate the Contract (and the Authority shall revoke delegation), or terminate a provision of any part of the Contract by written notice to the other with immediate effect, if a Force Majeure Event endures for a continuous period of more than 90 days.

A new **Clause G2.1A** will be inserted as follows:

- G2.1A The Authority may terminate the Contract and revoke delegation, or terminate a provision of any part of the Contract on Redacted FOIA 2000 S43 (2) Working Days written notice to the Contractor, if
- (a) the Contractor accrues more than Redacted FOIA 2000 S43 (2) Service Points in total across any Redacted FOIA 2000 S43 (2) consecutive Measurement Periods; or
 - (b) a Correction Plan Failure occurs.

A new **Clause G3A** will be inserted as follows:

G3A No Fault Termination

- G3A.1 Redacted FOIA 2000 S43 (2).
- G3A.2 If the Authority terminates the Contract pursuant to Clause 3A.1, each Party shall bear its own costs of termination. For clarification, such termination shall be without prejudice to each Party's accrued rights and obligations under the Contract.
- G3A.3 The termination right set out in Clause 3A.1 above is without prejudice to the Parties' rights and obligations set out in Schedule F of the Contract.

Clause G4.1 will be amended as follows:

- G4.1 Where the Authority terminates the Contract and revokes delegation under Clause G2 (Termination on Default) or Clause G2.1A and then makes other arrangements for the supply of the Services, the Authority may recover from the Contractor the cost reasonably incurred of making those other arrangements and any additional expenditure incurred by the Authority throughout the remainder of the Contract Period. The Authority shall take all reasonable steps to mitigate such additional expenditure. Where the Contract is terminated under Clause G2 (Termination on Default) or Clause G2.1A, no further payments shall be payable by the Authority to the Contractor (for Services supplied by the Contractor prior to termination and in accordance with the Contract but where the payment has yet to be made by the Authority), until the Authority has established the final cost of making the other arrangements envisaged under this Clause.

F. Remedies in the event of inadequate performance

Clauses I3.1 and I3.2 will be amended as follows:

- I3.1 Where the Authority is concerned about the standard of Services or about the manner in which any Services have been supplied or work has been performed or about the materials or procedures used or about any other matter connected with the performance of the Contractor's obligations under the Contract or a complaint is received, then the Authority shall notify the Contractor and where considered appropriate by the Authority investigate the matter. The Authority may at its sole discretion take further action in accordance with the Performance Failure remedies contained in Schedule E and/or Clause G2 (Termination on Default) or Clause G2.1A of the Contract.
- I3.2 In the event that the Authority is of the reasonable opinion that there has been a material breach of the Contract by the Contractor or the right to terminate the Contract pursuant to Clause G2.1A arises, then the Authority may, without prejudice to its rights under Clause G2 (Termination on Default) or Clause G2.1A, do any of the following:
- (a) without terminating the Contract, itself supply or procure the supply of all or part of the Services until such time as the Contractor shall have demonstrated to the reasonable satisfaction of the Authority that the Contractor will once more be able to supply all or such part of the Services in accordance with the Contract;
 - (b) without terminating the whole of the Contract, terminate the Contract in respect of part of the Services only (whereupon a corresponding reduction in the Contract Price shall be made) and thereafter itself supply or procure a third Party to supply such part of the Services; and/or
 - (c) terminate, in accordance with Clause G2 (Termination on Default) or Clause G2.1A, the whole of the Contract.

F. IT Improvement Plan

A new **Clause 17** will be inserted as follows:

- 17.1 Within 5 Working Days after the date of execution of Variation 52, the Contractor shall submit to the Authority for its review and approval a draft IT improvement plan (the "**IT Improvement Plan**").
- 17.2 The IT Improvement Plan shall set out:
- (a) the defects, errors and bugs in the Contractor System which the Contractor proposes to correct;
 - (b) Redacted FOIA 2000 S43 (2);
 - (c) Redacted FOIA 2000 S43 (2);
 - (d) Redacted FOIA 2000 S43 (2);
 - (e) Redacted FOIA 2000 S43 (2),
 - (f) the Contractor's approach for permanently resolving all Defects; and
 - (g) the date by which each Defect is to be permanently resolved.
- 17.3 The Contractor shall promptly provide the Authority with any further documentation that the Authority reasonably requires in order to assess the draft IT Improvement Plan.
- 17.4 The Authority may reject the draft IT Improvement Plan by notice to the Contractor if, acting reasonably, it considers that the draft IT Improvement Plan is inadequate, for example because the draft IT Improvement Plan:
- (a) is insufficiently detailed to be capable of proper evaluation;
 - (b) will take too long to complete; and/or
 - (c) will not permanently resolve one or more Defects.
- 17.5 The Authority shall notify the Contractor whether it consents to the draft IT Improvement Plan as soon as reasonably practicable. If the Authority rejects the draft IT Improvement Plan, the Authority shall give reasons for its decision and the Contractor shall take the reasons into account in the preparation of a revised IT Improvement Plan. The Contractor shall submit the revised draft of the IT Improvement Plan to the Authority for review within 5 Working Days (or such other period as agreed between the Parties) of the Authority's notice rejecting the first draft.
- 17.6 If the Authority consents to the IT Improvement Plan the Contractor shall:
- (a) comply with its obligations set out in the IT Improvement Plan; and
 - (b) provide the Authority with weekly updates of progress against the IT Improvement Plan.
- 17.7 When the Contractor believes that a Defect has been permanently resolved, it shall submit to the Authority all relevant information and provide appropriate access to the Contractor System to enable the Authority to confirm whether or not such Defect has been permanently resolved. The Contractor shall provide the Authority with such further information as the Authority may require in order to make such confirmation. The Parties agree that any Defect shall only be deemed to be

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permanently resolved once confirmation of this fact has been notified by the Authority to the Contractor in writing.

- I7.8 The Contractor acknowledges that any confirmation given by the Authority in accordance with Clause I7.7 shall not release the Contractor from any obligation (including its obligation to provide the Services) under this Contract.
- I7.9 Redacted FOIA 2000 S43 (2).
- I7.10 Any Delay Payments which are payable by the Contractor shall be shown as a deduction from the amount due from the Authority to the Contractor in the next invoice due to be issued under the Contract. If no invoice is due to be issued then the Contractor shall issue the Authority with a credit note against the previous invoice and such Delay Payments shall be payable by the Contractor to the Authority as a debt within 30 Working Days of the date of the credit note.
- I7.11 The Parties agree that the Delay Payments are a genuine pre-estimate of the losses which the Authority will incur as a result of any failure by the Contractor to permanently resolve all Defects by the Final Resolution Date. The Delay Payment rate set out in Clause I7.9(a) is stated exclusive of VAT.