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Home Office

AUTHORITY: The Secretary of State for the Home Department

## **Schedule 9.1 – Personnel Transfer**

Secure English Language Testing Services

Trinity College London

## DOCUMENT LIST

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## 1. EMPLOYMENT AND PENSIONS

### Part A: No Transfer of Employees

- 1.1 The Authority and the Concessionaire have considered the facts and circumstances of the provision of the Services under the Concession Agreement and believe that the commencement of the provision of Services (or any part of them) by the Concessionaire under the Concession Agreement does not constitute a relevant transfer for the purposes of TUPE and that, as a result, there shall be no transfer of the employment of any employees of the Authority or any third party to the Concessionaire.

### Part B: Re-Tendering

## 2. RE-TENDERING

- 2.1 Where, in the reasonable opinion of the Authority, TUPE is likely to apply on the full or partial termination or expiration of the Concession Agreement, the Authority may:
- 2.1.1 notify the Concessionaire that the Authority intends either to re-tender the Services, or any part of the Services; or transfer the Services (or part of them) to a Replacement Concessionaire; and
  - 2.1.2 by means of a written request, require the Concessionaire to provide (subject to its obligations under the Data Protection Legislation) to the Authority or, at the Authority's request, to a Replacement Concessionaire materially accurate and complete Personnel Information, as defined in paragraph 2.4 below.
- 2.2 The Concessionaire shall comply with any written request under Paragraph 2.1 within thirty (30) Working Days of such written request.
- 2.3 Where the provision of Personnel Information by the Concessionaire to the Authority or Replacement Concessionaire may be restricted by the Data Protection Legislation or any other relevant obligations or restrictions imposed by law, the Concessionaire shall use its reasonable endeavours to ensure that the Personnel Information can be provided to the Authority or Replacement Concessionaire.
- 2.4 "**Personnel Information**" shall mean full details in writing of each of the Dedicated Concessionaire Personnel providing those Service(s) which may be re-tendered or transferred, covering:
- 2.4.1 grade, job function, experience and the percentage of their working time in the three (3) months prior to the request that they have spent working in the provision of such Services;
  - 2.4.2 ages and dates of commencement of employment;
  - 2.4.3 place of work;
  - 2.4.4 details of salary and benefit entitlements (including any enhanced

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redundancy terms);

- 2.4.5 details of any pension scheme membership;
- 2.4.6 the particulars of employment which the Concessionaire is obliged to give under the ERA 1996;
- 2.4.7 contractual periods of notice;
- 2.4.8 information relating to any collective agreements which apply to any of those Dedicated Concessionaire Personnel;
- 2.4.9 details of any disciplinary action taken against any of those Dedicated Concessionaire Personnel within the preceding two years;
- 2.4.10 details of any grievances raised by any of those Dedicated Concessionaire Personnel within the preceding two (2) years;
- 2.4.11 details of any court or tribunal case, claim or action brought by any of those Dedicated Concessionaire Personnel against the Concessionaire in the preceding two years;
- 2.4.12 details of any potential court or tribunal case or Claim which may be brought by any of those Concessionaire Personnel against the Concessionaire, where the Concessionaire has reasonable grounds to believe such case or Claim might occur; and
- 2.4.13 details of any Dedicated Concessionaire Personnel who have been away from work for one (1) month or more for any reason including sickness leave, career break, sabbatical and maternity leave; and
- 2.4.14 resignation letters.

- 2.5 No later than thirty (30) Working Days prior to the Termination Transfer Date or, if earlier, within thirty (30) Working Days of a written request by the Authority during the Exit Management Period (provided the identity of the Replacement Concessionaire has been determined), the Concessionaire shall compile a draft list for approval by the Replacement Concessionaire of the Dedicated Concessionaire Personnel whom it considers will transfer to the Replacement Concessionaire as a result of TUPE. The draft list shall be finalised by the Concessionaire and the Replacement Concessionaire five (5) Working Days prior to the Termination Transfer Date and shall at a minimum include a list of all Dedicated Concessionaire Personnel providing the Service to be transferred or replaced together with their job title, employment status, remuneration and benefit details, percentages of working time spent in delivering the Services, date of commencement of employment and notice period. If the Concessionaire and Replacement Concessionaire cannot agree the final list, the matter must be referred to the Authority whose decision will be final.

- 2.6 The Concessionaire warrants that as at the date five (5) Working Days prior to the Termination Transfer Date:
- 2.6.1 the final approved list and the Personnel Information relating to the Termination Transferring Employees shall, subject to Paragraph 2.7, be complete and accurate in all material respects;
  - 2.6.2 all the Termination Transferring Employees shall be employed by the Concessionaire or a Sub-contractor and no person employed by the Concessionaire or a Sub-contractor (other than the Termination Transferring Employees) shall be wholly or mainly assigned to work in the provision of the Services being transferred (or, on a partial cessation of the Services, the Services ceasing to be performed by the Concessionaire); and
  - 2.6.3 it has disclosed to the Authority to the extent it can lawfully do so all material terms and conditions of employment relating to the Termination Transferring Employees.
- 2.7 If there are any changes to the information provided in Paragraph 2.6 between the date upon which the Concessionaire's final list of Termination Transferring Employees is produced and the Termination Transfer Date, the Concessionaire shall immediately notify the Authority and warrant the revised information to the same extent as provided in Paragraph 2.6 as at the time of such notification.
- 2.8 If a third party is appointed as the Replacement Concessionaire, the Concessionaire shall as reasonably requested, co-operate fully and in good faith with the Authority and any Replacement Concessionaire in order to effect a smooth transfer of the Termination Transferring Employees. In particular, the Concessionaire shall allow the Replacement Concessionaire all reasonable access to:
- 2.8.1 Concessionaire Personnel;
  - 2.8.2 Key Personnel; and
  - 2.8.3 such information as the Authority or any Replacement Concessionaire may deem reasonably necessary in order to ensure the seamless transfer of the Termination Transferring Employees (including all payroll information).
- 2.9 During the Exit Management Period, the Concessionaire shall not (without the prior written consent of the Authority's Representative), except in the normal course of business:
- 2.9.1 vary or purport to vary or promise to vary the terms and conditions of employment or engagement of those Concessionaire Personnel providing the Service which are to be re-tendered and/or transferred;
  - 2.9.2 introduce any new contractual or customary practice (including for the avoidance of doubt any payments on termination of employment) applicable to those Concessionaire Personnel providing the Service which are to be re-tendered and/or transferred;

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- 2.9.3 employ or engage any person who would become a Termination Transferring Employee;
- 2.9.4 change the role or responsibilities of any person so that he becomes involved in the provision of the Services to a sufficient degree that he would become a Termination Transferring Employee;
- 2.9.5 terminate or give notice to terminate the employment or engagement of any Concessionaire Personnel providing the Services which are to be re-tendered and/or transferred other than a fair dismissal on grounds of capability, conduct or redundancy; or
- 2.9.6 reduce or vary the involvement of any Concessionaire Personnel in the provision of the Services to a sufficient degree that he would cease to be a Termination Transferring Employee.

### 3. SUB-CONTRACTORS

- 3.1 References in this Part B to the Concessionaire shall include any Sub-contractor which is engaged by the Concessionaire to carry out any part of the Services.
- 3.2 Where a provision in this Part B imposes an obligation on the Concessionaire and/or where the Concessionaire provides an indemnity, undertaking or warranty in this Part B, the Concessionaire shall procure that any Sub-contractor, which is engaged by the Concessionaire to carry out any part of the Services, shall comply with such obligation and/or provide such indemnity, undertaking or warranty.

#### Part C: Exit Provisions

### 4. APPLICATION OF TUPE

- 4.1 In the event of the termination or expiry of the Concession Agreement or the termination of any part of the Services provided by the Concessionaire under the Concession Agreement, the Parties acknowledge that the provisions of the TUPE may apply to transfer an employee or employees of the Concessionaire or its Sub-contractors to a Replacement Concessionaire or Replacement Concessionaires.

### 5. ADMINISTERING THE TRANSFER OF EMPLOYMENT

- 5.1 If (in the reasonable opinion of the Authority TUPE shall have effect on the termination or cessation of the Services (or any part of them), the provisions in Paragraphs 5.2 to 10 shall apply.
- 5.2 The Authority shall notify the Concessionaire as soon as reasonably practicable before the date of termination or cessation of the Services (or any part of them) who shall be the Replacement Concessionaire(s) (which for the purposes of this Part C may be the Authority itself). The Authority shall procure that any Replacement Concessionaire shall comply with its duties pursuant to regulations 13 and 14 of TUPE and shall provide to the Concessionaire such information as it shall reasonably

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require in order to meet its obligations as employer pursuant to regulation 13 of TUPE.

- 5.3** The Authority and the Concessionaire acknowledge and accept that under TUPE, the contracts of employment of each Termination Transferring Employee shall have effect (except in relation to occupational pension scheme benefits excluded under regulation 10 of TUPE) from the Termination Transfer Date as if originally made between the Termination Transferring Employees and the Replacement Concessionaire.
- 5.4** The Concessionaire warrants to the Authority and to the Replacement Concessionaire that as at the Termination Transfer Date no Termination Transferring Employee (save where the Concessionaire shall have notified the Authority and the Replacement Concessionaire to the contrary):
- 5.4.1** shall be under notice of termination;
  - 5.4.2** shall be on sick leave;
  - 5.4.3** shall be on any other form of leave or absence, including maternity leave;
  - 5.4.4** shall be entitled or subject to any additional terms and conditions of employment other than those disclosed to the Authority;
  - 5.4.5** shall be the subject of formal disciplinary proceedings;
  - 5.4.6** shall have received a written warning (other than a warning that shall have lapsed);
  - 5.4.7** shall have taken or shall be the subject of a grievance procedure;
  - 5.4.8** shall have objected in accordance with Regulation 4(7) of TUPE to his employment transferring to the Replacement Concessionaire under TUPE; or
  - 5.4.9** shall have threatened to commence or commenced legal proceedings against the Concessionaire or any Sub-contractor (as the case may be).
- 5.5** The Concessionaire undertakes to the Authority and any Replacement Concessionaire:
- 5.5.1** that it shall continue to perform and observe all of its obligations in connection with the contracts of employment of the Termination Transferring Employees up to the Termination Transfer Date;
  - 5.5.2** to pay to the Termination Transferring Employees all sums to which they are entitled up to the Termination Transfer Date including all wages and salaries, sick pay, maternity pay, any liability to taxation, expenses, accrued bonus, commission and other sums payable in respect of any period up to the Termination Transfer Date and to make all appropriate statutory deductions in respect of payments made to the Termination Transferring Employees; and
  - 5.5.3** to comply in all respects with regulation 13 of (and to provide to the Authority

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and to the Replacement Concessionaire such information that the Authority and the Replacement Concessionaire may reasonably request in writing in order to verify such compliance).

## 6. APPORTIONMENTS

- 6.1 Subject to Paragraphs 6.2 and 6.3, in respect of the Termination Transferring Employees there shall be apportioned as at the Termination Transfer Date pro rata all emoluments and outgoings (including all wages, benefits, bonuses, PAYE, and employers' NICs) between the Concessionaire and the Replacement Concessionaire. The Concessionaire shall be responsible for the period up to the Termination Transfer Date and the Authority shall procure that the Replacement Concessionaire shall be responsible for the Termination Transfer Date and the period after the Termination Transfer Date.
- 6.2 If any Termination Transferring Employee has taken holiday in excess of holiday entitlement which has accrued in respect of that Termination Transferring Employee at the Termination Transfer Date, the Authority shall or shall procure that the Replacement Concessionaire shall pay to the Concessionaire within two (2) months of the Termination Transfer Date a sum equivalent to pay in lieu of such excess holiday, such sum to be agreed in advance by the Concessionaire and the Replacement Concessionaire within one (1) month of the Termination Transfer Date. If any Termination Transferring Employee has not taken all holiday which has accrued to that Termination Transferring Employee at the Termination Transfer Date, the Concessionaire will pay to the Authority or the Replacement Concessionaire (as appropriate) within two (2) months of the Termination Transfer Date a sum equivalent to pay in lieu of such accrued but untaken holiday, such sum to be agreed in advance by the Concessionaire and the Replacement Concessionaire within one (1) month of the Termination Transfer Date.
- 6.3 Within two (2) months of the Termination Transfer Date, the Authority shall or shall procure that the Replacement Concessionaire shall pay to the Concessionaire a sum equal to the outstanding balance on the Termination Transfer Date of any loan, salary, advance or other agreed indebtedness of any Termination Transferring Employee due to the Concessionaire immediately prior to the Transfer Date, such sum to be agreed in advance by the Concessionaire and the Replacement Concessionaire within one (1) month of the Termination Transfer Date.

## 7. CONCESSIONAIRE INDEMNITY

- 7.1 The Concessionaire shall indemnify the Authority and/or the Replacement Concessionaire from and against all Employee Liabilities awarded against or incurred by the Authority and/or the Replacement Concessionaire as a result of or in connection with:
- 7.1.1 the employment or termination of employment by the Concessionaire of any

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Termination Transferring Employee in the period up to but not including the Termination Transfer Date. This indemnity shall not apply where such claim arises out of the resignation of any such Termination Transferring Employee before the Termination Transfer Date on account of substantial detrimental changes to his contract of employment that are proposed or shall occur as a consequence of the actions of the Replacement Concessionaire in the period on or after the Termination Transfer Date;

- 7.1.2 the employment or termination of employment by the Concessionaire of any existing or former employee of the Concessionaire (who is not a Termination Transferring Employee) in the period up to but not including the Termination Transfer Date in respect of which such employee claims that the Authority or the Replacement Concessionaire has inherited liability from the Concessionaire by virtue of TUPE; or
- 7.1.3 any failure by the Concessionaire to comply with its obligations under regulation 13 of TUPE (other than where any such failure is as a result of a failure by the Replacement Concessionaire to provide sufficient information to the Concessionaire).

## 8. REPLACEMENT CONCESSIONAIRE INDEMNITY

- 8.1 The Authority shall procure that the Replacement Concessionaire shall indemnify the Concessionaire against all Employee Liabilities arising out of or in connection with:
  - 8.1.1 the employment or termination of employment of any Termination Transferring Employee in the period on and after the Termination Transfer Date;
  - 8.1.2 any Claim brought by or on behalf of any Termination Transferring Employee arising out of the resignation of such Termination Transferring Employee before the Termination Transfer Date on account of substantial detrimental changes to his contract of employment that are proposed or shall occur as a consequence of the actions of the Replacement Concessionaire in the period on or after the Termination Transfer Date; or
- 8.2 any failure by the Replacement Concessionaire to provide sufficient information to the Concessionaire to enable the Concessionaire to comply with its obligations under regulation 13 of TUPE.

## 9. ADDITIONAL EMPLOYEES

- 9.1 If any employee of the Concessionaire who was employed immediately prior to the Termination Transfer Date (other than a Termination Transferring Employee) should claim to be employed by the Replacement Concessionaire or the Authority as a result of the provisions of TUPE applying in relation to this Concession Agreement then the Authority shall, upon becoming aware of such claim, notify the Concessionaire in

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writing within fourteen (14) Working Days and allow the Concessionaire the period of twenty eight (28) Working Days from receipt of such notification either to offer employment to that person or to take other steps with a view to obtaining a written withdrawal of the person's claim to be employed by the Replacement Concessionaire.

- 9.2 If the person described in Paragraph 9.1 above is accepted into employment by the Concessionaire, the Replacement Concessionaire shall immediately release that person from its employment or alleged employment.
- 9.3 The Concessionaire shall remain responsible throughout the period between the Termination Transfer Date and either the date of withdrawal of that person's claim or the Replacement Concessionaire's release for the payment of all salary and benefits to that person and shall indemnify the Authority and the Replacement Concessionaire against all Employee Liabilities arising out of or in connection with non-payment of the same.
- 9.4 If the person's claim that they are employed by the Replacement Concessionaire is not withdrawn or resolved within twenty eight (28) Working Days of the Concessionaire being notified, the Replacement Concessionaire may terminate that person's employment within fourteen (14) Working Days of the twenty eight (28) Working Day period expiring. In such circumstances the Concessionaire shall indemnify the Authority and the Replacement Concessionaire against all Employee Liabilities arising out of or in connection with:
- 9.4.1 any Claim brought by such person in respect of any fact or matter concerning or arising from employment with the Concessionaire prior to the Termination Transfer Date;
  - 9.4.2 such person's salary and benefits from the Termination Transfer Date to the date of termination of his employment; and
  - 9.4.3 the termination of the employment of such person by the Replacement Concessionaire but excluding any Employee Liabilities arising out of or in connection with any claim of discrimination in respect of such termination, any failure of the Replacement Concessionaire to follow any statutory minimum dismissal procedures or the payment by the Replacement Concessionaire of any ex gratia sum or settlement which is not approved in writing in advance by the Concessionaire.

## 10. SUB-CONTRACTORS

- 10.1 References in this Part C to the Concessionaire shall include any Sub-contractor which is engaged by the Concessionaire to carry out any part of the Services.
- 10.2 Where a provision in this Part C imposes an obligation on the Concessionaire and/or where the Concessionaire provides an indemnity, undertaking or warranty in this Part C, the Concessionaire shall procure that any Sub-contractor, which is engaged by the Concessionaire to carry out any part of the Services, shall comply with such obligation and/or provide such indemnity, undertaking or warranty.
- 10.3 References in this Part C to the “Replacement Concessionaire” shall include any Sub-contractor engaged by the Replacement Concessionaire to carry out any of the services which are the same as or similar to the Services provided by the Concessionaire.