

## ICT SERVICES AGREEMENT SCHEDULES

### SCHEDULE 9.1

#### STAFF TRANSFER

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## **Section A**

### **Product Description**

#### **1. PRODUCT TITLE**

ICT Services Agreement - Schedule 9.1 (Staff Transfer).

#### **2. PURPOSE OF PRODUCT**

The purpose of the schedule is to set out the parties obligations relating to any employees whose employment transfers (as a result of the signature or operation of the Agreement or as a result of termination of the Agreement) pursuant to the Employment Regulations ("**Transferring Employees**") and to support the Authority's need to comply with the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector.

#### **3. COMPOSITION**

The schedule should set out the Authority's and the Contractor's obligations in relation to the Transferring Employees to ensure compliance with the Employment Regulations and with the Statement. The schedule should also provide for relevant warranty and indemnity protection to clarify the parties respective liabilities for pre and post transfer matters.

#### **4. DERIVATION**

Authority to draft.

#### **5. RELATED CLAUSES & SCHEDULES**

Clauses: 29 - (Employment Indemnity) Guidance paragraph

30 - (Staff Transfer) Guidance paragraph

33 - (Non-Solicitation)

Schedules: 9.2 (Terms and Conditions of Services Employees)

Guidance: Guidance Note 1 (Key Commercial Principles), section 1 - 15 (Termination for Convenience by the Authority)

**6. ALLOCATION**

Drafting to be circulated as part of the dialogue stage.

**7. QUALITY / REVIEW**

- The Authority will need to carefully review any amendments by bidders to the standard wording.
- Authority expertise: Commercial, procurement and legal.

## **Section B**

### **Guidance**

#### **1. INTRODUCTION**

- 1.1 The schedule should be used in all contracting out exercises whenever there will be a transfer of employees from the Authority to the Contractor pursuant to the Employment Regulations. It should also be used in contracting out exercises where the Employment Regulations do not strictly apply. This is a complex legal area and specialist advice should be always be taken in determining whether or not to include the schedule in the Agreement. The basic principle contained within the CO Statement is that contracting out exercises with the private sector will be conducted on the basis that staff will transfer and that the Employment Regulations should apply unless there are genuinely exceptional reasons not to do so. This will include all second and subsequent round contracts resulting in a new Contractor being appointed (ie "second generation TUPE") and where a function is brought back into a public sector organisation.
- 1.2 The CO Statement applies to all Central Government departments and agencies and to the NHS. The Government also expects other public sector organisations to follow the CO Statement. Where local authorities and best value authorities are involved in contracting out exercises the Statement has been given statutory effect and additional considerations apply (see schedule 9.2 (Terms and Conditions of Services Employees)).
- 1.3 In circumstances when the CO Statement does not apply, for example where a new service is being established, the Authority should consider including a limited set of provisions dealing with the possible application of the Employment Regulations on expiry or early termination of the Agreement.

#### **2. TRANSFERRING EMPLOYEES**

- 2.1 The schedule should always include a statement to the effect that it is intended that the Employment Regulations apply to the Agreement and that, as a consequence, the Transferring Employees will transfer from the employment of the Authority to the Contractor with effect from the relevant transfer date on their existing terms and conditions. The Authority will need to be clear about the correct date to use. Where

more than one service is being contracted out there may be different relevant transfer dates and the Agreement will need to be clear about this. The schedule should also provide that, in the event that the Employment Regulations do not strictly apply to the Agreement the Contractor is under an obligation to offer employment to all individuals who would be Transferring Employees on the terms and conditions which they enjoy with the Authority as at the relevant transfer date, subject also to the separate provisions relating to pensions (see below).

2.2 If there are any employees of existing private contractors whose employment will transfer to the Contractor then the schedule will need to be clear as to the parties' liabilities for such individuals. Bidders may request that any indemnity protection (see below) is extended to cover such individuals. The Authority should not provide any protection over and above the protection it currently enjoys from any existing private contractor.

2.3 The schedule should provide clarity as to the responsibility for payment of salaries and provision of other benefits before and after the relevant transfer date. The Authority should be responsible for the payment of all salaries and benefits which have accrued up to the relevant transfer date and the Contractor should be responsible for payment of salaries and provision of all benefits which accrue from the relevant transfer date. The position in relation to holiday entitlement is somewhat more complex. It is not unusual for bidders to ask for specific provision to be made relating to the accrual of holiday entitlement up to the date of termination. For example where the Transferring Employees have not taken their full accrued holiday entitlement at the relevant transfer date there may be a payment adjustment in favour of the Contractor and vice versa. This is not a clause which is usually included as standard but may be subject to discussion with the bidders.

### **3. INFORMATION AND CONSULTATION**

The Authority needs to bear in mind its obligations to inform and consult with the appropriate representatives of all employees who may be affected by the transfer. This obligation is set out in Regulation 10 of the Employment Regulations. The schedule will need to contain express provisions requiring compliance by both the Authority and the Contractor with their respective consultation obligations. In particular the Authority will need to ensure that the Contractor is obliged to provide details to the Authority of any measures it proposes to take in

respect of the Transferring Employees. Such information must be provided in good time to enable formal consultation to take place.

#### **4. PROVISION OF EMPLOYMENT INFORMATION**

Bidders will inevitably require the Authority to provide full employment information relating to the Transferring Employees to enable them to comply with their own consultation obligations under the Agreement and under the Employment Regulations. The extent of the information to be provided will be a matter for discussion between the Authority and the bidders. In general terms the Authority will usually agree to set out in a schedule a list of the prospective Transferring Employees together with full details of all terms and conditions of employment including but not limited to salary, hours of work, bonus and commission entitlement, all other contractual benefits, sick pay and holiday entitlement. Bidders may require the Authority to go further and provide information on employees who are on long term sickness absence or on maternity, paternity or adoption leave. The Authority must be mindful of its obligations under the Data Protection Act 1998 with regard to the disclosure of personal information. Bidders may require the Authority to warrant that this information is correct. Bidders may also seek a mechanism for an adjustment to payments under the Agreement where the employment information turns out to be incorrect or misleading. This is usually a greater issue for bidders where a significant number of employees are expected to transfer.

#### **5. INDEMNITIES**

5.1 The schedule will need to contain appropriate indemnity protection for both the Authority and the Contractor in relation to the Transferring Employees. The exact scope and nature of such indemnities will be one of the key areas for discussion. In general terms, the indemnities will cover the following issues:

5.1.1 An indemnity in favour of the Contractor for acts and omissions of the Authority pre-transfer and a similar indemnity in favour of the Authority for acts and omissions of the Contractor post transfer.

5.1.2 Cross indemnities in relation to a failure by either party to comply with the requirement to inform and consult with employee representatives under regulation 10 of the Employment Regulations.

5.1.3 Cross indemnities relating to a failure by either party to discharge their obligations to pay the Transferring Employees and provide all contractual benefits pre and post transfer.

5.1.4 The Contractor may seek an indemnity in relation to any individual who is not listed as a Transferring Employee but who nevertheless claims that his employment has or should have transferred to the Contractor. In such circumstances the Authority will need to consider whether it should make any such indemnity conditional upon the Contractor notifying the Authority of any such claim and giving the Authority a reasonable period of time to offer re-employment to such individual.

## 6. PENSIONS

The annex to the CO Statement specifically requires the Authority to protect the pensions of Transferring Employees. The schedule will need to deal with the issue of pension provision and should oblige the Contractor to either seek admitted body status or to establish a "broadly comparable" occupational pension scheme. Specialist pension advice should always be taken in this area.

## 7. EXPIRY AND TERMINATION

7.1 The schedule will need to deal with the position of the Contractor's employees on expiry or termination of the Agreement. The same principles will usually apply, namely that the parties anticipate that the expiry or termination of the Agreement will constitute a relevant transfer for the purposes of the Employment Regulations. Consequently, all employees who are primarily engaged in the provision of the services at the date of expiry or termination ("**Returning Employees**") will transfer either back to the Authority or to any new service provider at the date of expiry / termination ("**Return Date**").

7.2 The Authority will need to consider whether the Services are likely to continue following the expiry or termination of the Agreement. The clauses in the schedule dealing with expiry or termination will normally say that although the parties intend that the Employment Regulations will apply on expiry or termination this is without prejudice to the ultimate position which must be determined at the time.

- 7.3 The schedule will contain similar clauses to those dealing with the commencement of the Agreement setting out the parties respective liabilities to the Returning Employees. In particular, the schedule should contain similar indemnities relating to responsibility for acts and omissions of the Contractor and the Authority or new service provider before and after the Return Date. The schedule will also contain similar provisions relating to the responsibility for payment of salary and provision of all other contractual benefits before and after the return date. The schedule should also set out the parties respective responsibilities to inform and consult with appropriate representatives under regulation 10 of the Employment Regulations.
- 7.4 One additional consideration that needs to be taken into account by the Authority is the extent to which the Contractor is able to alter the number of employees working on the Agreement in the period leading up to the Return Date and the ability to vary terms and conditions of the Returning Employees. There is always the possibility that the Contractor may seek to assign additional unwanted employees from other areas to the Agreement in the expectation that such employees would all then transfer out on the Return Date. The Contractor may also seek to vary terms and conditions of employment to increase the costs of the Authority or any future service providers. The Authority therefore needs to consider including appropriate drafting in the schedule to prevent the Contractor from varying the terms and conditions of the Returning Employees either once notice of termination has been given or within a defined period prior to the anticipated expiry of the Agreement without consent. Such clauses should also prevent the Contractor from increasing or decreasing the number of employees assigned to the Agreement in the same period without consent. The schedule should also require the Contractor to provide information in relation to the Returning Employees to the Authority and/or any prospective new service provider. Bidders will usually seek to make any such requirements subject to the requirements of the Data Protection Act 1998.



## Section C

### Pro-Forma/Example Schedule

*[Guidance: subject to the agreement of this schedule, the following definitions will need to be added to schedule 1.]*

<b>"Acquired Rights Direct"</b>	the European Council Directive 77/187/EEC on the approximation of laws of European member states relating to safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, as amended;
<b>"Contractor Final Staff List"</b>	the relevant list of all Contractor Personnel engaged in or wholly or mainly assigned to, the provision of the Services or any party of the services at the date of the Service Transfer;
<b>"Contractor Party"</b>	the Contractor's agents and contractors, including each Sub-contractor;
<b>"Contractor Personnel"</b>	all employees, agents, consultants and contractors of the Contractor and/or any Sub-contractor;
<b>"Contractor's Provisional Staff List"</b>	a list prepared and updated by the Contractor of all Contractor Personnel who are engaged in or wholly or mainly assigned to, the provision of the Services or any part of the Services as at the date of such list;
<b>"Losses"</b>	(without limitation) any damages, liabilities, claims, demands, proceedings, actions, costs, charges, losses and/or expenses;]
<b>"Staffing Information"</b>	in relation to all person's named on the Contractor's Provisional Staff List, such information as the Authority may reasonably request (subject to Data Protection Legislation), but including in an anonymised format:  (a) their ages, dates of commencement of employment or engagement and gender;  (b) details of whether they be employed, self employed contractors or consultants, agency workers or otherwise;  (c) the identity of the employer or relevant contracting party;

- (d) their relevant contractual notice periods and any other terms relating to termination of employment, including redundancy procedures, and redundancy payments;
- (e) the wages, salaries, profit sharing;
- (f) details of other employment related benefits, including (without limitation) medical insurance, life assurance, pension or other retirement benefit schemes, share option schemes and company car schedules applicable to them;
- (g) any outstanding or potential contractual, statutory or other liabilities in respect of such individuals (including in respect of personal injury claims);
- (h) details of any such individuals on long term sickness absence, parental leave, maternity leave or other authorised long term absence; and

copies of all relevant documents and materials relating to such information, including copies of relevant contracts of employment (or relevant standard contracts if applied generally in respect of such employees); and

- (j) any other "employee liability information" as such term is defined in Regulation 11 of the Employment Regulations;

**"Service Transfer"** has the meaning given in paragraph 3 of schedule 9.1 (Staff Transfer);

**"Service Transfer Date"** the date of a Service Transfer;

## 8. PURPOSE OF THIS SCHEDULE

This schedule sets out the parties respective right and obligations in relation to the application of the Employment Regulations to this Agreement.

**9. APPLICATION OF THE EMPLOYMENT REGULATIONS ON THE COMMENCEMENT OF THE AGREEMENT**

9.1 The Authority and the Contractor agree that, at the Effective Date, neither the Acquired Rights Directive nor the Employment Regulations shall apply in such a way so as to transfer the employment of any employees of the Authority to the Contractor or any Contractor Party at the Effective Date.

9.2 If any person who is an employee of the Authority claims or it is determined that his/her contract of employment has been transferred from the Authority to the Contractor or a Contractor Party pursuant to the Employment Regulations and/or the Acquired Rights Directive, or claims that his employment would have so transferred had he not resigned, then:

9.2.1 the Contractor will, within [seven] Working Days of becoming aware of that fact, give notice in writing to the Authority;

9.2.2 the Authority may offer employment to such person within [21] Working Days of the notification by the Contractor;

9.2.3 if such offer of employment is accepted, the Contractor or the relevant Contractor Party shall immediately release the person from his/her employment;

9.2.4 if after that period has elapsed, no such offer of employment has been made or such offer has been made but not accepted, the Contractor or the relevant Contractor Party may within [seven] Working Days given notice to terminate the employment of such person.

9.3 Subject to the Contractor and each relevant Contractor Party acting in the way set out in paragraph 9.2 or in such other way as may be agreed between the Contractor and the Authority, the Authority will indemnify the Contractor and each Contractor Party against:

9.3.1 all Employment Liabilities arising out of such termination or otherwise arising out of the employment of such person by the Contractor or the relevant Contractor Party; and/or

9.3.2 any direct employment costs (if any) associated with the employment of such person by the Contractor or the relevant Contractor Party up to the date of termination of such person's employment.

9.4 The indemnity in paragraph 0 will not apply:

9.4.1 to any claim by any person in respect of whom the notification given to the Authority under paragraph 9.2.1 is received by the Authority more than six calendar months after the Effective Date; and

9.4.2 if such person is neither re-employed by the Authority nor dismissed by the Contractor or the relevant Contractor Party within the time scales set out in paragraph 9.2, in which case such person will be treated as having transferred to the Contractor or the relevant Contractor Party who shall be responsible for all liabilities arising in respect of any such person.

## **10. APPLICATION OF THE EMPLOYMENT REGULATIONS ON TERMINATION OR AT THE END OF THE TERM**

The Agreement envisages that, subsequent to the commencement of the provision of the Services, the identity of the provider of the Services (or any part of the Services) may change (whether as a result of termination of this Agreement, or part, or otherwise) resulting in the Services or related services being undertaken by the Authority or a Replacement Contractor. Such change in the identity of the supplier of such services shall be a "**Service Transfer**". The parties acknowledge that a Service Transfer will be a Relevant Transfer and in such event, the Authority, or a Replacement Contractor, would inherit liabilities in respect of the Transferring Employees. Accordingly, the Employment Regulations and/or the Acquired Rights Directive will apply.

## **11. PRE-SERVICE TRANSFER OBLIGATIONS**

11.1 The Contractor agrees, subject to compliance with the Data Protection Legislation that within 20 Working Days of the earliest of:

11.1.1 receipt of a notification from the Authority of a Service Transfer or intended Service Transfer; or

11.1.2 receipt of the giving of notice of early termination of this Agreement or any part thereof; or

- 11.1.3 the date which is 12 months before the end of the Term; or
- 11.1.4 receipt of a written request of the Authority at any time (provided that the Authority shall only be entitled to make one such request in any six month period),

it will provide the Contractor's Provisional Staff List and the Staffing Information to the Authority or, at the direction of the Authority, to a Replacement Contractor and it will provide an updated Contractor's Provisional Staff List at such intervals as are reasonably requested by the Authority.

- 11.2 At least [14] Working Days prior to the Service Transfer Date, the Contractor shall prepare (subject to compliance with Data Protection Legislation) and provide, or as appropriate procure that the Contractor Party shall prepare and provide, to the Authority or, at the direction of the Authority or the Replacement Contractor, the Contractor's Final Staff List, which shall be complete and accurate in all material respects. The Contractor's Final Staff List shall identify which of the Contractor Personnel named are Transferring Employees. The provision of personal data regarding those individuals detailed on the Contractor's Final Staff List is subject to the consent of such individuals (which the Contractor shall use its reasonable endeavours to obtain) and being mindful that the final "Personalised List" can change up to the date of transfer or in the absence of such individual's approval, the Contractor's Final Staff List being suitably anonymised so as to comply with Data Protection Legislation.
- 11.3 Subject to compliance with the Data Protection Legislation, the Authority shall be permitted to use and disclose the Contractor's Provisional Staff List, the Contractor's Final Staff List and the Staffing Information for informing any tenderer or other prospective Replacement Contractor for any services which are substantially the same type of services (or any part thereof) as the Services, provided that the Authority imposes on such third party obligations of confidence that are no less onerous than the Authority has to the Contractor in relation to that information.
- 11.4 Upon reasonable request by the Authority and subject to compliance with the Data Protection Legislation, the Contractor shall provide, and shall procure that each Contractor Party shall provide, the Authority or at the request of the Authority, the Replacement Contractor, with access (on reasonable notice and during normal working

hours) to such employment records as the Authority reasonably requests and will allow the Authority or the Replacement Contractor to have copies of any such documents.

11.5 The Contractor warrants that the Contractor's Provisional Staff List, the Contractor's Final Staff List and the Staffing Information will be true and accurate in all material respects.

11.6 From the date of the earliest event referred to in paragraphs 11.1.1 to 11.1.3 above, the Contractor agrees that it will not, and agrees to procure that each Contractor Party will not, other than in the ordinary course of business, assign any person to the provision of the Services (or the relevant part) which is the subject of a Service Transfer who is not listed in the Contractor's Provisional Staff List and will not, other than in the ordinary course of business, without the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed):

11.6.1 increase the total number of employees listed on the Contractor's Provisional Staff List save for fulfilling assignments and projects previously scheduled and agreed;

11.6.2 make, propose or permit any material changes to the terms and conditions of employment of any employees listed on the Contractor's Provisional Staff List;

11.6.3 increase the proportion of working time spent on the Services (or the relevant part) by any of the Contractor Personnel save for fulfilling assignments and projects previously scheduled and agreed;

11.6.4 introduce any new contractual or customary practice concerning the making of any lump sum payment on the termination of employment of any employees listed on the Contractor's Provisional Staff List;

11.6.5 replace any Contractor Personnel listed on the Contractor's Provisional Staff List or deploy any other person to perform the Services (or the relevant part) or terminate or give notice to terminate the employment or contracts of any persons on the Contractor's Provisional Staff List save for:

11.6.5.1 the execution of assigned operations as detailed in 11.6.1 and 11.6.3; and/or

- 11.6.5.2 replacing voluntary resignations or staff terminated by due disciplinary process to satisfy the fulfilment of previously agreed work streams provided that any replacement is employed on the same terms and conditions of employment as the person he/she replaces; and
- 11.6.6 the Contractor will promptly notify or as appropriate will procure that the Contractor Party will promptly notify the Authority or, at the direction of the Authority, the Replacement Contractor of any notice to terminate employment given by the Contractor or any Contractor Party or received from any persons listed on the Contractor's Provisional Staff List regardless of when such notice takes effect.
- 11.7 Within [seven] Working Days following the Service Transfer Date, the Contractor will provide to the Authority or any Replacement Contractor, in respect of each person on the Contractor's Final Staff List who is a Transferring Employee:
  - 11.7.1 the most recent month's copy pay slip data;
  - 11.7.2 details of cumulative pay for tax and pension purposes;
  - 11.7.3 details of cumulative tax paid;
  - 11.7.4 tax code;
  - 11.7.5 details of any voluntary deductions from pay; and
  - 11.7.6 bank/building society account details for payroll purposes.

## **12. THE CONTRACTOR'S INDEMNITY**

- 12.1 In connection with a Relevant Transfer under paragraph 10 of this schedule, the parties agree that:
  - 12.1.1 the Contractor will, and shall procure that any Contractor Party will, perform and discharge all its obligations in respect of all the Transferring Employees and their representatives for its own account up to and including the Service Transfer Date. The Contractor will indemnify the Authority and any Replacement Contractor against all Employee Liabilities arising from the Contractor's, or any Contractor Party's, failure to

perform and discharge any such obligation and against any Employee Liabilities in respect of the Transferring Employees arising from or as a result of:

- 12.1.1.1 any act or omission by the Contractor or any Contractor Party occurring on or before the Service Transfer Date or any other matter, event or circumstance occurring or having its origin before the Service Transfer Date save simply for accrual of service before that date;
  - 12.1.1.2 all and any Employee Liabilities in respect of all emoluments and outgoings in relation to the Transferring Employees (including without limitation all wages, bonuses, PAYE, national insurance contributions, pension contributions and otherwise) payable in respect of any period on or before the Service Transfer Date;
  - 12.1.1.3 any claim arising out of the provision of, or proposal by the Contractor or any Contractor Party to offer any change to any benefit, term or condition or working condition of any Transferring Employee arising on or before the Service Transfer Date;
  - 12.1.1.4 any claim made by or in respect of any person employed or formerly employed by the Contractor or any Contractor Party other than a Transferring Employee for which it is alleged the Authority or any Replacement Contractor may be liable by virtue of this Service Agreement and/or the Employment Regulations;
- 12.1.2 the Contractor will indemnify the Authority and any Replacement Contractor against all Employee Liabilities arising from:
- 12.1.2.1 any act or omission of the Contractor or any Contractor Party in relation to its obligations under Regulation 13 of the Employment Regulations, or in respect of an award of compensation under Regulation 15 of the Employment Regulations except to the extent that the liability arises from



the Authority or a Replacement Contractor's failure to comply with Regulation 13(4) of the Employment Regulations; and

12.1.2.2 any statement communicated to or action done by the Contractor or any Contractor Party to, or in respect of, any Transferring Employee on or before the Service Transfer Date regarding the Service Transfer which has not been agreed in advance with the Authority in writing subject to the timely availability of the Authority, the Contractor or Contractor Party to verify, amend or negotiate the content of such statements.

12.2 The Contractor will indemnify the Authority and any Replacement Contractor in respect of any Employee Liabilities arising from any act or omission of the Contractor or any Contractor Party in relation to any other Contractor Personnel who is not a Transferring Employee during any period whether before, on or after the Service Transfer Date.

12.3 If any person who is not a Transferring Employee claims or it is determined that his contract of employment has been transferred from the Contractor or any Contractor Party to the Authority, or a Replacement Contractor pursuant to a Relevant Transfer, or claims that his employment would have so transferred had he not resigned, then:

12.3.1 the Authority or the Replacement Contractor will, within [seven] Working Days of becoming aware of that fact, give notice in writing to the Contractor;

12.3.2 the Contractor may offer (or may procure that a Contractor Party may offer) employment to such person within [21] Working Days of the notification by the Authority or the Replacement Contractor;

12.3.3 if such offer of employment is accepted, the Authority or the Replacement Contractor shall immediately release the person from his employment;

12.3.4 if after that period has elapsed, no such offer of employment has been made or such offer has been made but not accepted, the Authority or the Replacement Contractor may within [seven] Working Days give notice to terminate the employment of such person;

- 12.3.5 Subject to the Authority or the Replacement Contractor acting in this way or in such other way as may be agreed between the Contractor and the Authority or the Replacement Contractor, the Contractor will indemnify the Authority and the Replacement Contractor against:
- 12.3.5.1 all Employment Liabilities arising out of such termination or otherwise arising out of the employment of such person by the Authority or a Replacement Contractor; and/or
  - 12.3.5.2 any direct employment costs (if any) associated with the employment of such person by the Authority or the Replacement Contractor up to the date of termination of such persons employment.
- 12.3.6 If such person is neither re-employed by the Contractor or any Contractor Party nor dismissed by the Authority or the Replacement Contractor within the time scales set out in this paragraph 12.3, such person will be treated as a Transferring Employee.

### **13. THE AUTHORITY'S INDEMNITIES**

- 13.1 The Authority shall indemnify the Contractor and any Contractor Party against all Employee Liabilities arising from the Authority's or the Replacement Contractor's failure to perform and discharge any obligation and against any Employee Liabilities in respect of the Transferring Employee arising from or as a result of:
- 13.1.1 any act or omission by the Authority or the Replacement Contractor relating to a Transferring Employee occurring on or after the Service Transfer Date;
  - 13.1.2 all and any Employee Liabilities in respect of all emoluments and outgoings in relation to the Transferring Employees (including without limitation all wages, bonuses, PAYE, national insurance contributions, pension contribution and otherwise) payable after the Service Transfer Date;
  - 13.1.3 any claim arising out of the provision of, or proposal by the Authority or any Replacement Contractor to offer any change to any benefit, term or condition or working condition of any Transferring Employee arising after the Service Transfer Date;

13.1.4 any failure by the Authority or any Replacement Contractor to comply with the obligations imposed on a transferee by Regulation 10(3) of the Employment Regulations in respect of the transfer of any Transferring Employees on the Service Transfer Date except to the extent such failure is caused by or related to an act or omission of the Contractor or any Contractor Party.

#### **14. MUTUAL OBLIGATIONS**

14.1 The parties shall co-operate to ensure that any requirement to inform and consult with the employees and or employee representatives in relation to a Relevant Transfer will be fulfilled.

14.2 The Authority will assume (or will procure that the Replacement Contractor, as the case may be, will assume) the outstanding obligations of the Contractor and any Contractor Party in relation to the Transferring Employees in respect of accrued holiday entitlements and accrued holiday remuneration to the Service Transfer Date. In consideration, the Contractor will or will procure that any Contractor Party will pay to the Authority (or the Replacement Contractor as the case may be) within [14] days of the Service Transfer Date the full amount necessary to enable the Authority or the Replacement Contractor to meet the cost of providing any such untaken holiday entitlements and remuneration as at the Service Transfer Date. The Authority or the Replacement Contractor, as the case may be, will reimburse the Contractor and any Contractor Party any amount paid by the Contractor or the Contractor Party before the Service Transfer Date in respect of holidays taken in excess of any Transferring Employee's entitlement to paid holiday in respect of the period ending on the Service Transfer Date.

#### **15. THIRD PARTY RIGHTS**

The parties agree that the Contracts (Right of Third Parties) Act 1999 ("CRiTPA") shall apply to paragraphs 12, 13, 14 and 17 of this schedule to the extent necessary that any Replacement Contractor and Contractor Party shall have the right to enforce the obligations owed to, and indemnities given to, the Replacement Contractor by the Contractor or the Authority to the Contractor Party under those paragraphs 12, 13, 14 and 17 in its own right pursuant to clause 1(1) of CRiTPA.

## 16. PROVISIONS WHERE TRANSFER REGULATIONS DO NOT APPLY

16.1 The following provisions shall apply in the event of a Service Transfer to which the Employment Regulations or the Acquired Rights Directive do not apply:

16.1.1 the Authority or the Replacement Contractor can, in its discretion, make to any of the employees listed on the Contractor's Provisional Staff List or any Contractor Personnel assigned to the Services an offer, in writing, to employ that employee under a new contract of employment to take effect on the day after the termination referred to in paragraph 16.1.2 below of this schedule or at the earliest reasonable opportunity;

16.1.2 when the offer has been made by the Authority or Replacement Contractor and accepted by any employee or worker, the Contractor shall, and shall procure that any Contractor Party shall, permit the employee or worker to leave its employment, as soon as practicable depending on the business needs of the Contractor, which could be without the employee or worker having worked his full notice period, if the employee so requests and where operational obligations allow;

16.1.3 if the employee does not accept an offer of employment made by the Authority or Replacement Contractor, the employee shall remain employed by the Contractor (or the Contractor Party, as the case may be) and all Employee Liabilities in relation to the employee shall remain with the Contractor or the relevant Contractor Party;

16.1.4 if the Authority or the Replacement Contractor does not make an offer to any employee on the Contractor's Provisional Staff List or any Contractor Personnel, then that employee and all Employee Liabilities in relation to that employee remains with the Contractor or relevant Contractor Party.

## 17. CONDUCT OF CLAIMS

17.1 This paragraph 17 shall apply to the conduct, by a party from whom an indemnity is sought under this schedule, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is referred to as the "**Beneficiary**" and the party giving the indemnity is referred to as the "**Indemnifier**".

- 17.2 If the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification under this schedule ("**Claim**"), the Beneficiary shall give notice to the Indemnifier as soon as reasonably practicable and in any event within 10 Working Days of receipt of the same.
- 17.3 Subject to paragraphs 17.4 and 17.5, on the giving of a notice by the Beneficiary pursuant to paragraph 17.2 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the Claim, the Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the Claim in the name of the Beneficiary at the Indemnified own expense and take conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations relating to the Claim. If the Indemnifier does elect to conduct the Claim, the Beneficiary shall give the Indemnifier all reasonable co-operation, access and assistance for the purposes of such Claim and, subject to paragraph 17.5 below, the Beneficiary shall not make any admission which could be prejudicial to the defence or settlement of the Claim without the prior written consent of the Indemnifier.
- 17.4 With respect to any Claim conducted by the Indemnifier pursuant to paragraph 17.3 above:
- 17.4.1 the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the Claim;
- 17.4.2 the Indemnifier shall not bring the name of the Beneficiary into disrepute;
- 17.4.3 the Indemnifier shall not pay or settle such Claim without the prior written consent of the Beneficiary, such consent not to be unreasonably withheld or delayed; and
- 17.4.4 the Indemnifier shall conduct the Claim with all due diligence.
- 17.5 The Beneficiary shall be entitled to have conduct of the Claim and shall be free to pay or settle any Claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:

- 17.5.1 the Indemnifier is not entitled to take conduct of the Claim in accordance with paragraph 17.3 above;
- 17.5.2 the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant Claim within [10 Working Days] of the notice from the Beneficiary under paragraph 17.2 above or if the Indemnifier notifies the Beneficiary that it does not intend to take conduct of the Claim; or
- 17.5.3 the Indemnifier fails to comply in any material respect with the provisions of paragraph 17.4 above.

### **Sensitive claims**

- 17.6 With respect to any Claim for which the Authority or the Contractor or the Contractor Party are the Beneficiary and the conduct of which the Authority or Contractor acting reasonably, considers is likely to have an adverse impact on the general public's perception of the Authority or the Contractor or the Contractor Party ("**Sensitive Claim**"), the Indemnifier shall only be entitled to take conduct of any defence, dispute, compromise or appeal of the Sensitive Claim with the Beneficiary's prior written consent. If the Beneficiary withholds such consent and elects to conduct the defence, dispute, compromise or appeal of the Sensitive Claim itself, it shall conduct the Sensitive Claim with all due diligence and if any failure to do so results in an increase in the amount recoverable by the Beneficiary in respect of an indemnity under this Agreement, the Indemnifier shall only be liable to indemnify the Beneficiary in respect of that amount which would have been recoverable by the Beneficiary had it conducted the Sensitive Claim with all due diligence.
- 17.7 The Beneficiary shall be free at any time to give written notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any Claim, to which paragraph 17.3 above applies notwithstanding that it does not have the right to do so pursuant to paragraph 17.3 if, in the reasonable opinion of the Beneficiary the Claim is, or has become, a Sensitive Claim. In such cases, the provisions of paragraph 17.6 above shall apply.

### **Recovery of sums**

- 17.8 If the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or

other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the Claim, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:

17.8.1 an amount equal to the sum recovered (or the value of the discount, credit, saving, relief, other benefit or amount otherwise obtained) less any out-of-pocket costs and expenses properly incurred by the Beneficiary in recovering or obtaining the same; and

17.8.2 the amount paid to the Beneficiary by the Indemnifier in respect of the Claim under the relevant indemnity,

provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose any indirect Losses sustained by the Beneficiary which may be excluded by this Agreement from being recovered from the Indemnifier).

### **Insurance**

17.9 Any person taking any of the steps contemplated by paragraphs 17.2 to 17.6 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

### **Mitigation**

17.10 Each of the Authority and the Contractor shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant party is entitled to bring a claim against the other party pursuant to the indemnities in this schedule.

### **Taxation**

17.11 If any payment by one party under an indemnity in this Agreement is subject to income tax or corporation tax (or any tax replacing either or both of them) in the hands of the recipient (or a withholding made by the paying party in respect of tax), the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax payable in respect of such additional amount, the recipient

receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax or withholding.