

ICT SERVICES AGREEMENT SCHEDULES

SCHEDULE 4.3

NOTIFIED SUB-CONTRACTORS

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Section A

Product Description

1. PRODUCT TITLE

ICT Services Agreement - Schedule 4.3 (Notified Sub-contractors)

2. PURPOSE OF PRODUCT

The schedule sets out a list, reviewed by the Authority without formal objection to its content, of Sub-contractors to the Contractor and the scope of the sub-contracting in respect of each of the Sub-contractors. The list may only be amended in accordance with the Change Control Procedure.

3. COMPOSITION

- Sub-contractor name and address
- Registered address and company number
- Description of product/service to be supplied/provided

4. DERIVATION

Bidder's proposal.

5. RELATED CLAUSES & SCHEDULES

Clauses: 23 (Supply Chain Rights)

Schedules: 7.1 (Charges)

7.4 (Financial Distress)

8.3 (Dispute Resolution Procedure)

Guidance: Guidance Note 1 (Key Commercial Principles), section 1 - 11 (Financial Distress), 15 (Termination for Convenience by the Authority), 20 (Change in Control) and 28 (Supply Chain Rights)

6. ALLOCATION

The Authority should issue the pro-forma schedule to bidders for completion during contract development stage of the procurement (see Section C).

7. QUALITY / REVIEW

- Authority to review.
- Authority expertise: project management, commercial/procurement.

Section B

Guidance

1. INTRODUCTION

- 1.1 In large scale ICT projects it is invariably the case that the prime contractor (i.e. the Contractor who enters into the Agreement with the Authority) will need to sub-contract certain of its obligations under the Agreement. Sub-contracting may be necessary where the Contractor cannot perform the relevant obligations itself (e.g. provision of third party proprietary software) or may be preferable where a sub-contractor can perform those obligations more efficiently or cost effectively than the prime contractor.
- 1.2 Unless the Agreement expressly states otherwise, the prime contractor will be responsible for ensuring that any obligations performed (i.e. products/services provided) by a sub-contractor on the Contractor's behalf are sufficient to fulfil its (the prime contractor's) obligations under the Agreement. Sub-contracting of obligations does not relieve the Contractor from primary liability in respect of any of its obligations under the Agreement. It is very unusual for this position to be altered by a provision in the Agreement to the contrary; if the Authority is to accept third party performance risk there should be compelling reasons for it to do so (e.g. significant costs savings) and the Authority should carefully consider the extent of the performance risk before agreeing to this approach.
- 1.3 It is in the Authority's interest to take an active role in ensuring that the parties proposed to carry out the work or provide the services meet certain standards. Accordingly, the Authority will often require that the identity of each sub-contractor is notified to it before the sub-contractor starts any work (quite possibly before contract signature), to ensure that those standards have been met. If they are not met, the Authority will usually retain the right to veto the selection of any such third party supplier. The Authority may sometimes pre-approve lists of sub-contractors in respect of certain parts of the scope, and when the time comes for the sub-contractor to be engaged, the Contractor will be free to select an appropriate sub-contractor from the list (subject to notifying the Authority of the appointment and providing the Authority with the information relating to the sub-contractor and proposed sub-contract required by the Agreement).

2. OVERVIEW

The purpose of clause 23 (Supply Chain Rights) of the Agreement and the notified Sub-contractors list schedule is to allow the Authority to apply controls to the appointments of any sub-contractor in the context of the role it is intended to perform. The Contractor may sub-contract to the companies listed in the notified Sub-contractors list (in respect of which the Authority has already given its consent) provided that the Contractor provides to the Authority the information relating to the sub-contractor and proposed sub-contract required by the Agreement (see clause 23.3 of the Agreement). The Contractor cannot enter into a sub-contract with any company not listed in the notified Sub-contractors list without the prior written consent of the Authority (see Clause 23.1).

3. IDENTITY

3.1 In agreeing the notified Sub-contractors list, the Contractor should be required to set out the name and local address; registered office address (if different) and registered company number of each Sub-contractor.

3.2 The Sub-contractors identified in the schedule should be only those Sub-contractors directly contributing to the Contractor's ability to meet its obligations under the Agreement. There is no need to specify those sub-contractors providing general services to the Contractor (such as window cleaners, lawyers etc).

3.3 The Authority may wish to consider whether the Sub-contractors should be allowed to further sub-contract (with or without the Authority's consent). If the Authority wishes to constrain the ability of Sub-contractors to further sub-contract, it is advisable to provide that the Contractor must flow down a restriction on sub-contracting into its contract with the Sub-contractor.

4. ROLE

4.1 The Authority may approve the appointment of a Sub-contractor in principle but it also needs to be able to monitor which Sub-contractor will provide which software/system/services. Ideally the notified Sub-contractors schedule should specify the role of each Sub-contractor by setting out (if applicable) the purpose or nature of the software or hardware it provides (for example, security software applications and security smart cards) or the type of work it will carry out (for example, development, consultancy, maintenance and/or support). This enables the

Authority to ensure that any Sub-contractor provides the software/system/services for which it has industry wide recognition.

5. FLOW DOWN

5.1 The Authority will usually specify a range of core provisions from the main Agreement that it will require to be flowed down to each Sub-contract entered into by the Contractor. Provisions commonly flowed down to Sub-contracts include:

- 5.1.1 a right for the Authority to enforce the terms of the Sub-contract as if it were the Contractor;
- 5.1.2 the ability to assign or novate the Contractor's rights and/or obligations under the Sub-contract to the Authority;
- 5.1.3 Authority step-in rights;
- 5.1.4 confidentiality provisions and/or a requirement that the Sub-Contractor enters into a direct confidentiality undertaking with the Authority (see clause 43 (Confidentiality) of the Agreement);
- 5.1.5 compliance with Data Protection (see clauses 41.25 and 41.2.10 (Protection Personal Data) of the Agreement) and corrupt gifts/payments provisions (see clause 64.2 (Prevention of Corruption) of the Agreement);
- 5.1.6 an obligation on the Contractor to pay any undisputed sums to the Sub-contractor within a specified period that does not exceed 30 days from the date the Contractor receives the Sub-contractor's invoice (see clause 16.2 (Charges and Invoicing) of the Agreement);
- 5.1.7 an obligation on the Sub-contractor to provide at the request of the Authority or the Contractor any assistance required in order to resolve any Dispute where the Sub-contractor is involved in the Services which are the subject of the Dispute, including the provision of any information, data or documentation and the attendance at any meetings or hearings;

- 5.1.8 a requirement that the Sub-contractor complies with audits, enquiries or other monitoring undertaken by the Authority (see clauses 13.5 (Quality Monitoring) and 13.8 (Performance Monitoring) of the Agreement);
- 5.1.9 an obligation on the Sub-contractor to carry out the appropriate checks on staff employed in delivery of the Services, for example Criminal Records Bureau checks, (see clause 28.4 (Relevant Convictions));
- 5.1.10 an obligation on the Sub-contractor to obtain the Authority's consent to the removal of any Key Personnel from the project (see clause 28.5 (Key Personnel) of the Agreement);
- 5.1.11 an obligation on the Sub-contractor to comply with the requisite terms and conditions of service contracts relating to the employment of Services Employees (see clause 28.11 (Terms and Conditions of Service Employees) of the Agreement);
- 5.1.12 provisions to prevent the solicitation of employees used in the delivery of the Services by the Sub-contractor (see clause 33 (Non-solicitation) of the Agreement);
- 5.1.13 an obligation on the Sub-contractor not to use licensed materials for any other purpose than to benefit the Authority (see clause 36.2.2 (Licences granted by the Authority) of the Agreement); and
- 5.1.14 an obligation on the Sub-contractor to pass on and comply with any requests made pursuant to the Freedom of Information Act (see clause 42.2 (Freedom of Information) of the Agreement).

6. MATERIAL SUB-CONTRACTORS

- 6.1 In major ICT projects the Contractor will often use a large number of Sub-contractors, in which case it may be too onerous and not financially or commercially viable for the Contractor to be required to flow down obligations to all of its Sub-contractors. The Contractor may therefore negotiate that those obligations imposed on it that are required under the Agreement to flow down to a Sub-contractor only flow down to 'material' Sub-contractors. A 'Material Sub-contractors' schedule would then replace the 'Notified Sub-contractors' schedule.

6.2 A material Sub-contractor may be described as being party to a Sub-contract where either:

6.2.1 the price of such Sub-contract is expressed as a significant percentage of the Charges payable under the Agreement.

6.2.2 it performs a role which, in the opinion of the Authority is critical to the provision of the Services.

7. RELATED CLAUSES

For information purposes the clauses in the Agreement that impose controls on the use of Sub-contractors include:

24.1.1 (Audits)

45 (Warranties)

47.3.1 (Change in Law)

55.1.5.12 (Termination Rights)

59.3.2 (Exit Management)

60.3.2 and 60.3.3 (Step-in Rights)

Section C

Pro-forma/Example Schedule

This schedule details the Sub-contractors that the Contractor intends to engage in connection with the provision of the Services as at the Effective Date.

Sub-contractor Name and Address (if not the same as the registered office)	Registered Office and Company Number	Product/Service Description	<i>[see note below]</i>

[Guidance: in the event that the schedule relates only to material Sub-contractors (see section B paragraph 5.2), further columns may be added entitled:

"Sub-contract Price expressed as a percentage of total projected Charges over lifetime of the Agreement" or

"Key role in delivery of the Services"].