

ICT SERVICES AGREEMENT SCHEDULES

SCHEDULE 8.5

EXIT MANAGEMENT

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Section A
Product Description

1. PRODUCT TITLE

ICT Services Agreement - Schedule 8.5 (Exit Management)

2. PURPOSE OF PRODUCT

The schedule sets out how exit from the Agreement (whether on expiry of the Term, termination or otherwise) is to be managed. The guiding principle is that the exit management should cause minimum disruption to the Authority and where service provision is transferred, that transfer should be seamless.

3. COMPOSITION

- Clause 59 (Exit Management) of the Agreement sets out the general principles relating to the exit management process.
- The schedule sets out the detail of how the exit management process will operate and the requirements in relation to the Exit Plan.

4. DERIVATION

Authority's requirements.

5. RELATED CLAUSES & SCHEDULES

Clauses: 28.5 (Key Personnel)

 35.5 (Licences Granted by the Contractor)

 40.3 (Authority Data)

 57 (Consequences of Termination)

 58.1 (Payments Made on Termination)

 59 (Exit Management)

6. ALLOCATION

The requirements of the Authority in relation to exit management should be issued to the bidders with the ITT. The detailed Exit Plan is likely to be agreed between the parties after execution of the Agreement and the schedule will need to set out the process and procedures for agreeing that Exit Plan.

7. QUALITY/REVIEW

Authority expertise: technical, commercial/procurement, legal.

Section B

Guidance

1. INTRODUCTION

The Agreement may come to an end for a number of reasons. Whatever the reason, a key concern of the Authority will be to ensure that the provision of all or part of the Services migrates from the incumbent Contractor either back to the Authority and/or to a Replacement Contractor with the minimum disruption possible.

1.1 This section B is designed to:

1.1.1 consider the different scenarios under which all or part of the Agreement could terminate;

1.1.2 summarise the various considerations that relate to termination of the Agreement;

1.1.3 provide guidance on how to formulate exit strategies, covering key issues such as how the termination is handled, in what time frame and who bears the costs; and

1.1.4 provide guidance as to how an exit strategy may operate in practice.

2. THE SIGNIFICANCE OF EXIT MANAGEMENT

2.1 The exit strategy is unlikely to be near the top of the list of the parties' priorities when ITTs and responses are being prepared. It is also complicated by factors such as the problems of predicting what may happen between the time of contracts being signed and termination and the potential of having an unwilling Contractor on exit.

2.2 Despite the difficulties described in paragraph 2.1, it is essential that the Authority focuses on its requirements for exit at an appropriate stage in the development of the cost and that the Agreement and schedule set out a clear exit strategy which deals in a bespoke and structured manner with the specifics of the relevant transaction.

3. THE EXIT STRATEGY

How exit is managed will vary widely depending on the nature of the Services. Depending on the project, the exit strategy should seek to address the following high level issues:

- 3.1 **Managing assets** - how will assets (whether people, contracts, physical assets or intangibles such as IP rights) be managed at the end of the Agreement?
- 3.2 **Identifying assets** - how will the parties determine what assets are to be transferred on exit?
- 3.3 **Valuation** - how will the parties determine the price (if any) to be paid for any assets on exit and the price to be paid for any transitional services or assistance provided by the Contractor?
- 3.4 **Allocation of risk** - what exposure should each party accept on the transfer of assets e.g. through warranties about the condition of assets transferred?
- 3.5 **Transfer** - how will the assets be transferred or otherwise made available to the Authority and/or a Replacement Contractor on exit?
- 3.6 **Support** - what extra transitional arrangements does the Authority require to ensure a smooth hand-over?

Each of these issues is dealt with in more detail below.

4. CIRCUMSTANCES OF EXIT

- 4.1 The potential ways in which the Agreement may terminate in accordance with its terms include:
 - 4.1.1 the expiry of the Initial Term or any Extension Period;
 - 4.1.2 termination by the Authority for convenience in accordance with clause 55.2 (Termination for Convenience by the Authority);
 - 4.1.3 termination for cause by the Authority in accordance with clause 55.1 (Termination for Cause by the Authority);

- 4.1.4 termination by the Authority as a result of a Change of Control of the Contractor to which the Authority objects in accordance with clause 55.3 (Termination for Change of Control);
 - 4.1.5 termination by the Contractor for the Authority's material breach in accordance with clause 55.5 (Termination by the Contractor); and
 - 4.1.6 termination as a result of a prolonged Force Majeure Event in accordance with clause 55.6 (Termination for a Continuing Force Majeure Event.
- 4.2 Theoretically, the Authority's practical requirements for the exit strategy will be the same in each of the above circumstances. However, in practice, the circumstances in which exit could occur need to be borne in mind as they are likely to significantly affect: (i) the willingness of both parties to co-operate on exit; (ii) the timing of the required activities; and (iii) the attitude of the parties to the cost of exit.
- 4.3 The example schedule set out in section C deals with this point by differentiating between "Emergency Exit" and "Ordinary Exit" scenarios and requires separate mechanisms dealing with each scenario to be included in the Exit Plan (see paragraph 13.2 of section C).

5. ASSETS

5.1 Overview

- 5.1.1 In any ICT services agreement there are likely to be a variety of assets that may need to be transferred to, or accessed by, the Authority and/or Replacement Contractor on exit. When formulating an exit strategy, the types of assets which the Authority should consider include: hardware, software, intellectual property rights, third party supply contracts and licences, other physical items of equipment, Government or similar licences or authorisations and (perhaps most crucially) data.
- 5.1.2 In many cases it will prove difficult or impossible to identify in detail, at the time when the Agreement is being developed, which assets the Authority and/or Replacement Contractor will require on exit. Thus the key is to establish the process for **identifying** the assets at the relevant time, anticipating how they will need to be **transferred** (and any likely constraints on doing so) and determining how they are to be **valued**.

5.2 Physical assets

- 5.2.1 The starting point for assessing what should happen to any physical assets on exit is to identify which assets are used exclusively in providing the Services and which are shared across a number of customers. It is common to find that some of the assets are leveraged across a number of customers to obtain economies of scale. In such cases, attempting to retain access to such assets post exit may be difficult. The exit strategy will therefore generally give the Authority an option to buy assets used exclusively in relation to the Authority's service. Clause 59.2 (Exit Management) of the Agreement deals with this by specifying that the Contractor Equipment cannot be encumbered by the Contractor in any way which prevents the Authority from exercising any of its rights under the Exit Management schedule.
- 5.2.2 Clause 59.2 should give the Authority certainty that it will be able to acquire key assets on exit. Using this approach should be balanced against the potential cost savings that could be realised through the economies of scale offered by leveraging the Contractor Equipment. Paragraph 16.4 of the model schedule in section C covers the transfer of any assets which are used on a non-exclusive basis.
- 5.2.3 To ensure that the process of identifying and transferring exclusive assets works smoothly in practice, it is prudent to require the Contractor to maintain a register of assets and to physically label exclusive assets as such. This is covered in paragraphs 11.1 and 11.2 of the example schedule in section C.
- 5.2.4 Another key issue that needs to be addressed in the exit strategy is the valuation of any assets that are eventually bought by the Authority on exit. This might be assessed on the basis of open market value, net book value or another mechanism. The exact accounting treatment to be applied (e.g. straight line depreciation over a fixed period) should be specified to avoid any dispute.
- 5.2.5 The exit strategy may also need to build in a process for identifying any restrictions that might apply to transfers of assets or which might require

assets to be licensed or sub-let (for example, major items of equipment may have been leased or financed by the Contractor, which may require special buy-out procedures or lease assignments).

5.2.6 Finally, the Authority should also consider whether warranties should be sought from the Contractor regarding its title to the assets and their condition. Depending on the circumstances, it may be appropriate to seek a warranty that all assets have been properly maintained and are in full working order. However the Contractor is likely to resist giving extensive warranties because neither party will know at the outset which assets will still be used to deliver the services on exit. In these circumstances, it may be appropriate for the Contractor not to give any warranties, but instead, to provide that all warranties from third party suppliers in existence as at the date of exit shall be assigned or novated to the Authority.

5.3 Third Party Contracts

5.3.1 The Contractor may have a range of service or supply contracts in place with third parties in relation to the Services. These could include hardware and software maintenance contracts, telecommunications leases and disaster recovery contracts, for example. It is also likely to include software licences and these are dealt with in detail below.

5.3.2 Similar considerations to those raised in relation to physical assets apply to these contracts. The exit strategy needs to include a mechanism for:

- (i) identifying which contracts the Authority may wish to take over on exit;
- (ii) identifying how those contracts should be transferred (e.g. whether they can be assigned, split or novated);
- (iii) reconciling any payments made in advance or arrears; and
- (iv) allocating responsibility for any actions or omissions (which could give rise to claims under the contracts concerned) taking place before or after exit. These points are covered in paragraphs 16 (Assets, Sub-contractors and Software) and 18

(Charges and Apportionments) of the example schedule at section C.

5.3.3 As with physical assets, the third party contracts that are transferred will normally only be those that relate exclusively to the Authority rather than shared contracts. Paragraph 11.3 (Contract Life Obligations) of section C therefore contains an obligation on the Contractor to ensure that its agreements with third parties can be assigned to the Authority and/or a Replacement Contractor without restriction and at no cost. However, the Authority should bear in mind that in some cases the Contractor may be unable to secure these arrangements with its suppliers or the cost of doing so may be prohibitive. Whatever the case, the Authority should ensure that the Contractor consults it on these decisions to ensure that the viability of the exit strategy is maintained.

5.4 Intellectual Property Rights

5.4.1 Intellectual property rights, know how and confidential information will inevitably be either created or obtained under licence during the term of the Agreement. This might take the form of bespoke software, new business processes or perhaps network diagrams.

5.4.2 If the continued provision of the Services after exit is reliant on certain IPRs that are not owned by the Authority, the Authority should ensure that the Agreement:

- (i) sets out a process for identifying those IPRs; and
- (ii) provides that the applicable licence terms in schedule 5.2 (Licence Terms) are wide enough to permit the Authority or its nominated Replacement Contractor to use them post exit (see guidance notes to section G (Intellectual Property, Data and Confidentiality) of the Agreement).

5.4.3 In many cases the Contractor will resist any provision which permits disclosure of the Contractor's IPRs to a Replacement Contractor as the replacement may be a competitor to the Contractor. In these circumstances the Authority could consider narrowing the scope of the

IPRs which will be transferred or licensed on exit, to those that are genuinely essential (as opposed to desirable). It may also consider entering into appropriate confidentiality undertakings in relation to the IPRs to address the Contractor's concerns.

5.4.4 The duration of the licence granted to the Authority after exit may also be an issue for discussion. In some cases, the Authority may be able to secure a perpetual licence without significant cost implications. However, the Contractor will generally require additional licence fees to be paid for the period following termination. To minimise these fees as far as possible, the Authority should consider whether a perpetual licence is required or whether the licence could be limited to a defined transitional period. The Authority should also ensure that the licence fee reflects any bulk discounts against the normal fee that the Authority has been able to negotiate with the Contractor in respect of the Charges which apply during the Term.

5.4.5 The Authority also needs to ensure that the IPRs have been properly captured in a form which will enable the Authority to use them, rather than having them contained in the memory of the Contractor's employees. Where appropriate, the Authority should therefore include provisions in the Agreement which require the Contractor to document any know-how and provide it to the Authority in written form. The Authority may also wish to include provisions requiring the Contractor to provide technical assistance (and the key personnel involved in the provision of the Services) during (and beyond) the period it is obliged to provide Termination Services for, in order to effect the transfer of the IPRs as efficiently as possible.

5.4.6 If the Authority intends to maintain the software itself, then it must ensure that it has the right to do so under the relevant licence and that it has access to the relevant source code (see schedule 5.3 (Escrow Terms)).

5.5 Data

5.5.1 The Authority should consider the extent to which data will have to be transferred from the Contractor on exit and/or whether the Contractor

should be obliged to provide continuing access to the data after exit. The types of data that may be affected include data actually handled, processed or archived for the Authority as part of the Services (e.g. payroll data), data about the way the Services are delivered (such as records of Service Level performance) or data about the personnel involved in Service delivery.

5.5.2 Issues relating to data can be contentious therefore the Agreement clarifies the ownership of Authority Data in clause 40 (Authority Data). Operational data is generally Authority Data, although other types of data may be the subject of discussions. For example, the Contractor may often seek to prevent access to data relating to how it manages its operations. Generally, the Authority is unlikely to be able to gain access on exit to all of the data used or created in the provision of the Services (subject to the Contractor's obligations in relation to audit and it should focus its attention on the data genuinely needed to enable a smooth transition to the Replacement Contractor.

5.5.3 The Authority should also consider how the data will be accessed or transferred. It may be necessary to create mini-exit plans for data handover, specifying the form in which data should be transferred and testing arrangements to ensure a smooth handover, in the case of live, operational data. Where the incumbent Contractor will retain certain data after exit, arrangements will need to be put in place to ensure that relevant records are retained for appropriate periods and that rights are granted to both the Authority and/or the Replacement Contractor to access those records as and when necessary. In general, the incumbent Contractor is likely to want to limit its obligations to provide support in relation to data transfer or access; or at least to charge extra for these services.

5.5.4 The example schedule at section C (paragraph 14.13.3 (Termination Obligations)) provides that all Authority Data is to be delivered to the Authority on exit. Some of the termination services set out in paragraph 14.15 of the schedule also require disclosure of operational and other data by the Contractor to the Authority. In each case, the Authority should consider whether there is any specific data (other than

Authority Data) which it will need to access post exit and deal with this expressly.

5.6 Personnel

5.6.1 In almost every case, the exit strategy should address the issue of personnel, either because the Authority (and/or the Replacement Contractor) may want specific individuals to transfer their employment on exit (or alternatively to definitely not transfer), or as a consequence of the application of the legal requirements relating to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE Regulations**"). See also schedule 9.1 (Staff Transfer).

[Guidance: The TUPE Regulations and other rules, codes and statements on staff transfer is an area which is frequently changing. You should take specialist advice on these types of issues.]

5.6.2 In summary, the TUPE Regulations impose certain rules where there is a transfer of an "undertaking", which can include very small but discreet services. Essentially, where there is a relevant undertaking which transfers, the employees transfer with the business so as to follow their jobs. If the TUPE Regulations apply, then staff assigned to the relevant undertaking will automatically transfer irrespective of the intention of the parties. They will transfer on their existing terms and conditions, with all past liabilities and obligations transferring to the new employer too.

5.6.3 Parties to an agreement which transfers employees cannot contract out of the TUPE Regulations therefore it is important to consider whether or not they apply. Several factors will affect this, such as how similar the new and old service are, the extent to which affected employees are engaged in the "undertaking", whether any physical or other assets are transferred and so on. If the TUPE Regulations are likely to apply then the Authority should set out some parameters for how the personnel transfer process is to be managed and for allocating any financial risks that might arise. If the TUPE Regulations are not likely to apply then it may not be necessary to refer to them in the Agreement or schedules. The problem with this approach is that it is difficult, if not impossible, to achieve

certainty. For that reason the Authority should generally include wording which has effect "in the event that" the TUPE Regulations apply.

5.6.4 There are a number of potential exposures for the parties to an ICT services agreement arising out of the TUPE Regulations' application. Some examples of these are as follows:

5.6.4.1 TUPE Regulations require the incumbent Contractor to conduct collective consultation with staff affected by the transfer. If it does not comply, there is a potential liability by way of a tribunal award of compensation of 13 weeks' pay (uncapped) per person. This liability will pass to the incoming Replacement Contractor and/or to the Authority if the work is going back in-house. A Replacement Contractor which incurred this liability might then seek to recover the costs from the Authority.

5.6.4.2 If the incoming Replacement Contractor refuses to take on staff who would otherwise transfer automatically by operation of the TUPE Regulations, it would automatically constitute an unfair dismissal for those employees with over one year's service unless the Replacement Contractor could show some fair dismissal reason, and such reasons are limited by law.

5.6.4.3 The Replacement Contractor is likely to seek protection from the Authority against any claims that might arise from things the incumbent Contractor did prior to the transfer. The Authority should anticipate this and address this at the outset in the Agreement with the Contractor as part of its agreed exit arrangements with the Contractor and should bear in mind that the price the Authority will pay for any replacement contract is likely to go up if this risk is accepted by the Replacement Contractor.

6. TERMINATION SERVICES

- 6.1 The Authority should consider whether specific measures need to be put in place to ensure a smooth transition process. At the highest level this might involve allowing a limited degree of flexibility over exactly when the main Service ends. For example, if a telecommunications network is being transitioned it may prove difficult to determine the exact date on which all of its component elements can be switched over. In such circumstances the Authority may look for some or all of the services to be continued, perhaps on a rolling month by month basis. The Authority should note that the existence and/or duration of such extension may, depending on exact circumstances, breach procurement rules. Specialist advice should be taken on this issue.
- 6.2 At a lower level there are normally a range of tasks which will need to be undertaken to effect a smooth exit. The details of such tasks will be dependent upon the particular circumstances, but examples of the termination services which the Authority may require include:
- 6.2.1 defining the systems migration objectives and the tasks and processes to achieve this;
 - 6.2.2 segregation of the Contractor's equipment and data from that of the Authority;
 - 6.2.3 defining and implementing a data migration strategy;
 - 6.2.4 defining required documentation and information to be provided and/or created by the Contractor;
 - 6.2.5 defining a plan to deal with third party service providers and customers;
 - 6.2.6 identifying key personnel to manage the exit;
 - 6.2.7 identifying training and knowledge transfer to be provided by the Contractor;
 - 6.2.8 developing communications policies in relation to the Authority's staff and unions; and
 - 6.2.9 providing data for and assisting with test runs of the new system.

- 6.3 Paragraph 14.15 of the example schedule at section C sets out a number of aspects of the Termination Services which may be applicable depending on the circumstances. It is essential that the Authority analyses these on a case by case basis and makes such amendments and additions as are appropriate.
- 6.4 Paragraph 14.12 of the example schedule at section C sets out the circumstances in which the Authority can request the Termination Services. A Contractor may try and limit the period during which the Authority can request these services.

7. MANAGING EXIT DURING THE LIFE OF THE AGREEMENT

7.1 The Exit Plan

- 7.1.1 The Agreement needs to contain a procedure by which the exit strategy agreed between the parties can be documented in an Exit Plan. Clearly, this will not be a static document because the Services and the technology on which they are based will often change over the Term. The Authority should therefore ensure that the Agreement requires periodic review and update of the Exit Plan by the parties e.g. reviews at least annually and during the last six months before expiry of the Agreement.
- 7.1.2 The Authority should also bear in mind that whatever the requirements of the Agreement, the reviews of the Exit Plan may not always take place when planned (if at all) and may not reach agreement. It is therefore important to put in place appropriate contract management procedures to ensure that these reviews do take place. Paragraph 13.4 of the example schedule at Section C addresses the need for regular reviews and paragraph 3.5 requires the appointment of an Exit Manager to oversee the process. It is also useful to include a fallback position, even if this is only a generic set of minimum exit arrangements.

7.2 Management of assets during the life of the agreement

- 7.2.1 The Authority should consider the measures it needs to put in place to protect assets it may want to acquire on exit. Thought should also be given to putting controls in place to govern how the Contractor changes the way it provides the Services throughout the Term. For example, if

the Contractor is given freedom to choose how to finance new equipment (e.g. through leasing arrangements), the result may be that it is unable to sell the assets freely to a Replacement Contractor. Similarly, if the Contractor can choose what computer systems it uses without recourse to the Authority, the Authority and/or the Replacement Contractor could find itself with expensive systems that are proprietary to the original Contractor or difficult to maintain. Clause 59.2 (Exit Management) of the Agreement therefore places restrictions on the Contractor encumbering Contractor Equipment.

7.2.2 To supplement the provisions of clause 59.2 (Exit Management) of the Agreement, paragraph 16.1 of the example schedule at section C limits the Contractor's ability to make material changes to the assets towards the end of the Term. This may be of limited assistance if the Agreement comes to an end abruptly, for example as a result of the Contractor's breach. The Authority must bear in mind that exerting these kinds of controls requires a careful balance, as the Contractor's ability to achieve economies of scale by leveraging its existing systems is an important factor in the Contractor's ability to reduce costs and thereby reduce the Charges. It is also important to avoid muddying the waters of responsibility for Service delivery.

7.3 Management of staff during the life of the Agreement

7.3.1 A key area of the Contractor's operations which the Authority should seek to manage in order to reduce its exposure is how the Contractor deals with its staff during the term of the agreement and particularly near to its expiry. Certain actions by the Contractor may detrimentally affect the provision of the Services and/or affect the extent of any liability arising by virtue of the TUPE Regulations (either for the Authority and/or for its Replacement Contractor). For example, the Authority may wish to prohibit the occurrence of any of the following without its prior written consent:

7.3.1.1 terminating or re-allocating the employment of the key staff engaged on the Services prior to the agreement ending (to

ensure that the Contractor does not retain the most knowledgeable staff);

7.3.1.2 amending the relevant staff's terms and conditions of employment or changing their duties (other than in accordance with planned pay reviews, promotions etc);

7.3.1.3 recruiting any personnel or re-locating or reassigning personnel to/from the provision of the Services (so that staff with expensive benefits or pensions packages are not loaded onto the agreement so as to transfer onwards by virtue of the application of the TUPE Regulations); or

7.3.1.4 solicitation of any employees engaged in the provision or receipt of the Services.

The Authority should also consider imposing positive obligations on the Contractor, such as a warranty to ensure collective consultation takes place and requiring the provision of appropriate staffing information to ensure transparency both for the HR and pricing purposes.

7.4 Management of information collection

7.4.1 The Agreement should stipulate the information relating to exit that is to be collated and provided by the Contractor during the Term and upon termination. It is also good practice to include in schedule 8.4 (Records Provisions) provisions relating to the form and required retention periods of this information and the permitted methods of destruction (see section B to schedule 8.4).

7.4.2 While some information will be of interest to the Authority from the outset of the Agreement or on a regular basis (for example performance metrics such as compliance with Service Levels and details of Service volumes) consideration should be given to, and contractual provisions should also deal with, other information which may only be important on an infrequent basis. Information likely to be important in relation to exit will include:

- 7.4.2.1 in the event that personnel transfer to the Replacement Contractor or back in-house under the TUPE Regulations, employee details such as contracts of employment, benefits, pension details, length of continuous service, disciplinary records etc;
- 7.4.2.2 details of all third party contracts necessary or desirable for the provision of the Services including their subject matter and all commercial information which relate to them (i.e. prices, rates, annual spend, notice periods etc);
- 7.4.2.3 asset registers (particularly those assets to be transferred back to the Authority or its nominated Contractor upon exit); and
- 7.4.2.4 other rights and/or assets, information and knowledge required for the continued provision of the Services.

Provisions relating to the supply of information on exit are set out in the example schedule at section C. As before the Authority should consider this on a case by case basis and make such amendments and additions as are appropriate.

8. OTHER CONSIDERATIONS

8.1 In each project there are likely to be a variety of considerations that are unique to that project. However, there are three other areas that are likely to apply to most exits and these should be borne in mind by the Authority in each case.

8.1.1 Price & Payment

8.1.1.1 To avoid dispute, it is essential to be clear about which party pays the costs of exit. It is also important to differentiate between compensation for termination and the costs of exit (e.g. charges for Termination Services and the costs of assets). The normal position is that payment of a Termination Payment is dealt with in the main agreement (see clause 58 (Payments made on Termination) of the Agreement). The costs of exit are generally dealt with in the Exit Management schedule (see section C - see

paragraphs 16.3, 16.4 and 18). The pricing of assets is also discussed in more detail above.

8.1.1.2 The creation of the Exit Plan and its review and update are usually included in the Charges for the Services but may be separately charged. The cost of this service is likely to be insignificant when compared to the actual cost of exit. Thus the costs of exit, as far as they can be anticipated, need to be built into the original cost model for the transaction as a whole and a method of calculating the relevant Charges needs to be included in the Agreement.

8.1.1.3 The general principle that the Authority will pay for exit arrangements should not be problematic where the Agreement expires naturally, but it tends to present difficulties where, for example, exit occurs by reason of termination due to Contractor Default. In these circumstances the Authority may wish to seek terms requiring the Contractor to pay (as direct costs, rather than through a damages claim) the costs of transition or at least to bear the cost of providing any Termination Services in such circumstances. If the Authority does so, then the Contractor may have to account for this risk when recording the contract in its books. This may impact on the price for the Services and may also act as a powerful disincentive to the Contractor to perform its obligations fully on exit, when the relationship between the parties is likely to be strained. In practice it is likely to prove difficult to get meaningful exit arrangements to be provided at zero cost. A possible alternative would therefore be for the Authority to accept the initial costs of transition, but to reserve the right to recover these costs as damages should the Authority decide to sue.

8.1.1.4 To protect the Authority in circumstances where the Contractor is in breach or insolvent you should consider using mechanisms such as placing payments in escrow until exit or key stages of exit are completed. In more extreme

cases it may also be possible to build in rights for a Replacement Contractor to step in and take over the direct running of the current systems (although the more draconian versions of this might well be disclaimed in the event of the original Contractor's insolvency). Similarly, if the Agreement is terminated due to the Contractor's insolvency, additional measures may need to be put in place to secure assets and the timescales for any transition arrangements may need to be shortened significantly.

8.1.1.5 In some cases the Contractor may seek payment protection if the Agreement runs into trouble because of the Authority's non-payment. Generally this will involve the Contractor requiring at least an element of pre-payment for the provision of any Termination Services.

8.1.2 **Tendering for the new contract**

8.1.2.1 Towards the end of the Agreement, the Authority will be considering whether to do one (or a combination of) the following:

- (a) choose a Replacement Contractor; or
- (b) bring the provision of the services back in-house.

Note that the Authority will need to reserve the ability to obtain from the Contractor, and to give to any potential Replacement Contractor, certain information and know how relating to the current Service. For example, the Authority may want to refer to the current Service description, performance against Service Levels or even pricing in its discussions with prospective bidders. The incumbent Contractor will be reluctant to allow such information to be provided (on the basis that it is commercially sensitive) and will certainly be hostile to any competitors being able to examine its systems and procedures.

8.1.2.2 Provisions relating to assistance with this tender process are set out in paragraph 12 of the example schedule at Section C. Clearly, the level of co-operation given by the Contractor in practice is likely to depend on the reasons for termination of the Agreement.

8.1.3 **Performance standards**

8.1.3.1 Consideration should be given to the extent that the Service Level/Service Credit regime which relates to the Services is to apply during the exit process. Generally the Authority should be able to insist that such regime should continue in place at least while the bulk of the core Services are being provided. However, the Contractor may argue that this is unreasonable as such a regime is intended to apply to the period in which the Services are provided on a steady state basis i.e. not when the parties are actively preparing for exit.

8.1.3.2 Paragraphs 6.4 and 6.5 of the example schedule at section C provide that the Service Levels shall continue to apply during the Termination Assistance Period, except where the Contractor can demonstrate that transition will materially (and unavoidably) affect its ability to provide the Services.

8.1.3.3 In rare cases the Authority may want to consider Service Levels for any additional Termination Services the Contractor is asked to provide on exit. However, Contractors are generally unwilling to take on this additional risk unless there is a significant premium added to the Service Charges, because elements of the Termination Services will depend on the Authority and any Replacement Contractor. Furthermore it is difficult to develop arrangements for a future event where the details of the Service are likely to have changed significantly.

Section C

Pro-forma/Example Schedule

EXIT MANAGEMENT

9. DEFINITIONS

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

"Assets Register"	the register of Assets, Sub-contracts and other relevant agreements to be created and maintained by the Contractor throughout the Term pursuant to paragraph 11.1.1 of this schedule 8.5 (Exit Management);
"Business Process Manual"	a manual setting out a detailed definition of all the business processes that will be supported by the Services;
"Emergency Exit"	any termination of this Agreement which is a (i) termination of the whole or part of this Agreement in accordance with clause 55 (Termination Rights), except where the period of notice given under that clause is greater than or equal to six months; (ii) termination of the provision of the Services for any reason prior to the expiry of any period of notice of termination served pursuant to clause 55; or (iii) wrongful termination or repudiation of this Agreement by either party;

"Exclusive Assets"	those Assets which are used exclusively in the provision of the Services;
"Exit Manager"	the person appointed by each party pursuant to paragraph 11.5 of schedule 8.5 (Exit Management) for managing the parties' respective obligations under schedule 8.5 (Exit Management); <i>[Guidance: The Authority should consider whether it wants to include the Contractor's Exit Manager as a member of the Key Personnel.]</i>
"Exit Plan"	the plan produced and updated by the Contractor during the Term in accordance with paragraph 13 of schedule 8.5 (Exit Management);
"Net Book Value"	the net book value of the relevant Asset(s) calculated in accordance with the depreciation policy set out in the Financial Model;
"Non-Exclusive Assets"	those Assets (if any) which are used by the Contractor in the provision of the Services but which are also used by the Contractor for other purposes;
"Ordinary Exit"	any termination of this Agreement which occurs: (i) pursuant to clause 55 (Termination Rights) where the period of notice given by the party serving notice to terminate pursuant to such clause is greater than or equal to six months; or (ii) as a result of the expiry of the Initial Term or any Renewal Period;
"Registers"	has the meaning set out in paragraph 11.1 of schedule 8.5 (Exit Management);
"Termination Assistance Notice"	has the meaning set out in paragraph 14.10 of

schedule 8.5 (Exit Management);

"Termination Assistance Period" the period specified in the Termination Assistance Notice in which the Contractor shall provide the Termination Services as may be extended pursuant to paragraph 14.11 of schedule 8/5/Exit Management.

"Termination Services" the services and activities to be performed by the Contractor pursuant to the Exit Plan, including those activities listed in paragraph 14.15 of schedule 8.5 (Exit Management) and any other services required pursuant to the Termination Assistance Notice;

"Transferring Contracts" shall have the meaning set out in paragraph 16.2.2 of schedule 8.5 (Exit Management);

10. OVERVIEW

The Contractor is required to ensure the orderly transition of the Services from the Contractor to the Authority and/or any Replacement Contractor in the event of termination (including partial termination) or expiry of this Agreement. This schedule sets out the principles of the exit and service transfer arrangements that are intended to achieve such orderly transition and which shall form the basis of the Exit Plan. For the avoidance of doubt, the Contractor shall be responsible for the overall management of the exit and service transfer arrangements.

11. CONTRACT LIFE OBLIGATIONS

11.1 During the Term the Contractor will:

11.1.1 maintain a register of all of the Assets, detailing their ownership and status as either Exclusive Assets or Non-Exclusive Assets and the Net Book Value of such Assets, and detailing all Sub-contracts and other relevant agreements (including relevant software licences, maintenance and support agreements and equipment rental and lease agreements) required for the performance of the Services;

11.1.2 maintain a [configuration management database] [document] detailing the technical infrastructure through which the Contractor provides the Services System. This document should be of sufficient detail to permit the Authority and/or Replacement Contractor to understand how the Contractor provides the Services and to enable the smooth transition of the Services with the minimum of disruption,

(collectively the "**Registers**"). The Contractor shall maintain the Registers in such format as is agreed between the parties and shall update the Registers from time to time and in particular in the event that Assets, Sub-contracts or other relevant agreements are added to or removed from the Services.

- 11.2 The Contractor shall ensure that all Exclusive Assets listed in the Registers are clearly marked to identify that they are exclusively used for the provision of the Services under this Agreement.
- 11.3 The Contractor shall (unless otherwise agreed by the Authority in writing) procure that all Sub-contracts and other agreements with third parties, which are necessary to enable the Authority and/or any Replacement Contractor to perform the Services in accordance with this Agreement or the Replacement Services, shall be assignable and/or capable of novation at the request of the Authority to the Authority (and/or its nominee) and/or any Replacement Contractor upon the Contractor ceasing to provide the Services (or part of them) without restriction (including any need to obtain any consent or approval) or payment by the Authority.
- 11.4 Where the Contractor is unable to procure that any Sub-contract or other agreement referred to in paragraph 11.3 above which the Contractor proposes to enter into after the Effective Date is assignable and/or capable of novation to the Authority (and/or its nominee) and/or any Replacement Contractor without restriction or payment, the Contractor shall promptly notify the Authority of this and the parties shall (acting reasonably and without undue delay) discuss the appropriate action to be taken which, where the Authority so directs, may include the Contractor seeking an alternative Sub-contractor, to be agreed with the Authority.
- 11.5 Each party will appoint an Exit Manager and provide written notification of such appointment to the other party within [three] months of the Effective Date. The Contractor's Exit Manager will be responsible for ensuring that the Contractor and its

employees, agents and Sub-contractors comply with this schedule. The Contractor will ensure that its Exit Manager has the requisite authority to arrange and procure any resources of the Contractor as are reasonably necessary to enable the Contractor to comply with the requirements set out in this schedule. The parties' Exit Managers will liaise with one another in relation to all issues relevant to the termination of this Agreement and all matters connected with this schedule and each party's compliance with it.

12. OBLIGATIONS TO ASSIST ON RE-TENDERING OF SERVICES

12.1 Subject to paragraph 12.2 of this schedule, on reasonable notice, the Contractor shall provide to the Authority and/or (subject to the potential Replacement Contractor entering into reasonable written confidentiality undertakings) to its potential Replacement Contractor, the following material and information in order to facilitate the preparation by the Authority of any invitation to tender and/or to facilitate any potential Replacement Contractor undertaking due diligence:

12.1.1 details of the Service(s);

12.1.2 details of the Assets (including make, model and asset number [*Guidance: specify any additional details required*]) and of the Net Book Value of such Assets and details of their condition and physical location;

12.1.3 details of and information relating to the use of the Assets (including technical specifications);

12.1.4 an inventory of Authority Data in the Contractor's possession or control;

12.1.5 a copy of the Registers, updated by the Contractor up to the date of delivery of such Registers; and

12.1.6 all information relating to Transferring Employees required to be provided by the Contractor under this Agreement.

12.2 The Contractor shall not be required to comply with the provisions of paragraph 12.1 before service of a notice to terminate this Agreement or in the period which is more than six months before the expiry of the Term.

13. EXIT PLAN

13.1 The Contractor will, within [three] months after the Effective Date, deliver to the Authority an Exit Plan which sets out the Contractor's proposed methodology for achieving an orderly transition of Services from the Contractor to the Authority and/or its Replacement Contractor on the expiry or termination of this Agreement and which complies with the requirements set out in paragraphs 13.2 and 13.3 below. Within [30] days after the submission of the Exit Plan, the parties will use their respective reasonable endeavours to agree the contents of the Exit Plan. If the parties are unable to agree the contents of the Exit Plan then such dispute shall be resolved in accordance with the Dispute Resolution Procedure.

13.2 The Exit Plan will contain, as a minimum:

13.2.1 separate mechanisms for dealing with Ordinary Exit and Emergency Exit, the provisions relating to Emergency Exit being prepared on the assumption that the Contractor may be unable to provide the full level of assistance which is required by the provisions relating to Ordinary Exit, and in the case of Emergency Exit, provision for the supply by the Contractor of all such reasonable assistance as the Authority shall require to enable the Authority or its subcontractors to provide the Services;

13.2.2 the management structure to be employed during both transfer and cessation of the Services in an Ordinary Exit and an Emergency Exit; and

13.2.3 a detailed description of both the transfer and cessation processes, including a timetable, applicable in the case of an Ordinary Exit and an Emergency Exit.

13.3 In addition, the Exit Plan shall:

13.3.1 document how the Services will transfer to the Replacement Contractor and/or the Authority, including details of the processes, documentation, data transfer, systems migration, security and the segregation of the Authority's technology components from any technology components operated by the Contractor or its Sub-contractors (where applicable);

13.3.2 specify the scope of the Termination Services that may be required for the benefit of the Authority (including such of the services set out in

paragraph 14.15 below as are applicable) and any charges that would be payable for the provision of such Termination Services (calculated in accordance with the day rates and charging methodology set out in schedule 7.1 (Charging)) and detail how such services would be provided (if required), during the Termination Assistance Period;

- 13.3.3 set out procedures to deal with requests made by the Authority and/or a Replacement Contractor for Staffing Information pursuant to schedule 9.1 (Staff Transfer);
 - 13.3.4 address each of the issues set out in this schedule to facilitate the transition of the Services from the Contractor to the Replacement Contractor and/or the Authority with the aim of ensuring that there is no disruption to or degradation of the Services during the Termination Assistance Period;
 - 13.3.5 provide a timetable and identify critical issues for providing the Termination Services; and
 - 13.3.6 set out the management structure to be put in place and employed during the Termination Assistance Period.
- 13.4 The Contractor will review and (if appropriate) update the Exit Plan in the first month of each Contract Year (commencing with the Second Contract Year) to reflect changes in the Services. Following such update the Contractor will submit the revised Exit Plan to the Authority for review. Within [30] days following submission of the revised Exit Plan, the parties shall meet and use reasonable endeavours to agree the contents of the revised Exit Plan, based on the principles set out in this schedule and the changes that have occurred in the Services since the Exit Plan was last agreed. If the parties are unable to agree the contents of the revised Exit Plan within that [30] day period, such dispute shall be resolved in accordance with the Dispute Resolution Procedure.

14. TERMINATION SERVICES

General

- 14.1 During the Termination Assistance Period or such shorter period as the Authority may require, the Contractor will continue to provide the Services (as applicable) and

will, at the request of the Authority pursuant to paragraph 14.12, provide the Termination Services.

- 14.2 [The costs of providing these Termination Services shall be as stated at []] or [The costs of providing Termination Services shall be as agreed between the parties not less than six months prior to the end of the Term or within one month of the announcement of contract termination].

[Guidance: In most cases it will be difficult for the Contractor to produce a reliable pre-estimate of the cost of providing Termination Services and if required to do so is therefore likely to add a risk premium to cover the uncertainty. In this case, it may be preferable for the costs to be calculated at such time that the Termination Services are required and agreed through the change control process based on rate cards agreed at the outset.]

- 14.3 During the Termination Assistance Period, the Contractor will, in addition to providing the Services and the Termination Services, provide to the Authority any reasonable assistance requested by the Authority to allow the Services to continue without interruption following the termination or expiry of this Agreement and to facilitate the orderly transfer of responsibility for and conduct of the Services to the Authority and/or its Replacement Contractor. The Contractor will use all reasonable endeavours to reallocate resources to provide these services without additional costs. However if this is not possible any additional costs incurred by the Contractor in providing such reasonable assistance which is not already in the scope of the Termination Services or the Exit Plan will be subject to the Change Control Procedure, discussion and agreement (which will not be unreasonably withheld or delayed by either party).
- 14.4 During the Termination Assistance Period, the Services and the Termination Services will be provided at no detriment to the Service Levels, save to the extent that the parties agree otherwise in accordance with paragraph 14.5.
- 14.5 Where the Contractor demonstrates to the Authority's reasonable satisfaction that transition of the Services and provision of the Termination Services during the Termination Assistance Period will have a material, unavoidable adverse effect on the Contractor's ability to meet a particular Service Level(s), the parties shall vary the

relevant Service Level(s) and/or the applicable Service Credits to take account of such adverse effect.

- 14.6 At the Authority's request and on reasonable notice, the Contractor will deliver up-to-date Registers to the Authority.
- 14.7 The parties acknowledge that the migration of the Services from the Contractor to the Authority and/or its Replacement Contractor may be phased, such that certain of the Services are handed over before others.
- 14.8 Within [30 days] after service of notice of termination by either party or [not more than 7 (seven) and no less than] six months prior to the expiry of this Agreement [*Guidance: the Authority needs to consider whether this timetable is appropriate*], the Contractor will submit for the Authority's approval the Exit Plan in a final form that could be implemented immediately.
- 14.9 The parties will meet and use their respective reasonable endeavours to agree the contents of the final form Exit Plan. If the parties are unable to agree the contents of the Exit Plan [within 30 days following its delivery to the Authority] then such dispute shall be resolved in accordance with the Dispute Resolution Procedure. Until the agreement of the final form Exit Plan, the Contractor will provide the Termination Services in accordance with the principles set out in this schedule and the last approved version of the Exit Plan (insofar as this still applies).

Notification of Requirements for Termination Services

[Guidance: Note that it may not always be necessary or appropriate to separately procure or require Termination Services, which for more straightforward projects may be incorporated within Exit Services.]

- 14.10 The Authority shall be entitled to require the provision of Termination Services by notifying the Contractor in writing ("**Termination Assistance Notice**") at least [four months] prior to the date of termination or expiry of this Agreement or as soon as reasonably practicable (but in any event, not later than one month) following the service by either party of any notice to terminate. The Termination Assistance Notice shall specify the:

- 14.10.1 date from which Termination Services are required which shall be no earlier than [12 months] prior to expiry of this Agreement or from the service by either party of any notice to terminate, as the case may be;
- 14.10.2 the nature of the Termination Services required; and
- 14.10.3 the period during which it is anticipated that Termination Services will be required which shall continue no longer than [24] months after the date that the Contractor ceases to provide the Services.

[Guidance: Care should be taken with the duration of Termination Assistance as there may be public procurement law issues around the provision of services beyond the end of the Term, e.g. the original OJEU may have included a limit on the duration of the Agreement. Specialist procurement law advice should be obtained on this issue applying the facts of each project.]

- 14.11 The Authority shall have an option to extend the period of assistance beyond the period specified in the Termination Assistance Notice provided that such extension shall not extend for more than [six months] after the date the Contractor ceases to provide the Services or, if applicable, beyond the end of the Termination Assistance Period and provided that it shall notify the Contractor to such effect no later than [20 Working Days] prior to the date on which the provision of Termination Services is otherwise due to expire. The Authority shall have the right to terminate its requirement for Termination Services by serving not less than [20 Working Days] written notice upon the Contractor to such effect.

Termination Obligations

- 14.12 The Contractor shall comply with all of its obligations contained in the Exit Plan [and shall, upon termination or expiry of this Agreement provide to the Authority an up-to-date Business Process Manual]. *[Guidance: include if there is a Business Process Manual.]*
- 14.13 At the end of the Termination Assistance Period (or earlier if this does not adversely affect the Contractor's performance of the Services and the Termination Services and its compliance with the other provisions of this schedule):

- 14.13.1 the Contractor will erase from any computers, storage devices and storage media that are to be retained by the Contractor after the end of the Termination Assistance Period any software containing the [Specially Written Software] [*Guidance: this needs to be considered in conjunction with the IPR Provisions in the Agreement*] and all Authority Data;
- 14.13.2 the Contractor will return to the Authority such of the following as is in the Contractor's possession or control:
- 14.13.2.1 all copies of the Authority Software and any other software licensed by the Authority to the Contractor under this Agreement;
 - 14.13.2.2 all materials created by the Contractor under this Agreement, the IPRs in which are owned by the Authority;
 - 14.13.2.3 any parts of the ICT Environment and any other equipment which belongs to the Authority; and
 - 14.13.2.4 any items that have been on-charged to the Authority, such as consumables;
- 14.13.3 the Contractor will transfer all Authority Data (in complete, uncorrupted form) in its possession or control to the Authority save to the extent (and for the limited period) that such data is required for the purposes of providing any services to the Authority under this schedule or the Exit Plan;
- 14.13.4 the Contractor shall vacate any Authority Premises; [*Guidance: this needs to be consistent with any separate occupation licence/arrangement.*]
- 14.13.5 each party will return to the other party all Confidential Information of the other party and will certify that it does not retain the other party's Confidential Information save to the extent (and for the limited period) that such information needs to be retained by the party in question for the purposes of providing or receiving any Services or Termination Services.

14.14 Except where this Agreement provides otherwise, all licences, leases and authorisations granted by the Authority to the Contractor in relation to the Services shall be terminated with effect from the end of the Termination Assistance Period.

Scope of the Termination Services

[Guidance: Set out below are some suggested components of the Termination Services. These will need to be reviewed/amended to reflect the nature of the Services and/or the Authority's specific requirements on exit]

14.15 The Termination Services to be provided by the Contractor shall include (without limitation) such of the following services as the Authority may specify:

14.15.1 [ceasing all non-critical Software changes (by agreement with the Authority)];

14.15.2 notifying the Sub-contractors of procedures to be followed during the Termination Assistance Period and providing management to ensure these procedures are followed;

14.15.3 providing assistance and expertise as necessary to examine all operational and business processes (including all supporting documentation) in place and re-writing and implementing processes and procedures such that they are appropriate for use by the Authority and/or Replacement Contractor after the end of the Termination Assistance Period;

14.15.4 delivering to the Authority the existing systems support profiles, monitoring or system logs, problem tracking/resolution documentation and status reports [all relating to the 12 month period immediately prior to the commencement of the Termination Services)];

14.15.5 providing details of work volumes and staffing requirements over the [12 month] period immediately prior to the commencement of the Termination Services;

14.15.6 with respect to work in progress as at the end of the Termination Assistance Period, documenting the current status and stabilising for continuity during transition;

14.15.7 providing the Authority with any problem logs which have not previously been provided to the Authority;

14.15.8 providing assistance and expertise as necessary to examine all governance and reports in place for the provision of the Services and re-writing and implementing these during and for a period of [12 months] after the Termination Assistance Period;

[Guidance: See guidance note below paragraphs 14.10.3 and 14.11 above in relation to the duration of Services after the end of the Term.]

14.15.9 providing assistance and expertise as necessary to examine all relevant roles and responsibilities in place for the provision of the Services and re-writing and implementing these such that they are appropriate for the continuation of the Services after the Termination Assistance Period;

14.15.10 reviewing all Software libraries used in connection with the Services and providing details of these to the Authority and/or its Replacement Contractor; ***[Guidance: You may want to expand on what is required as part of this review.]***

14.15.11 making available to the Authority and/or the Replacement Contractor expertise to analyse training requirements and provide all necessary training for the use of tools by such staff as are nominated by the Authority (acting reasonably) at the time of termination or expiry. A documented plan is to be separately provided for this activity and agreed with the Authority at the time of termination or expiry;

14.15.12 [assisting in establishing naming conventions for the new production site;]

[Guidance: This may not be relevant to all Projects.]

14.15.13 analysing and providing information about capacity and performance requirements, processor requirements and bandwidth requirements, and known planned requirements for capacity growth across these areas;

- 14.15.14 generating a computer listing of the Source Code of [] [**Guidance: specify which Source Code the Authority may require on exit**] in a form and on media reasonably requested by the Authority;
- 14.15.15 agreeing with the Authority a handover plan for all ICT security (logical and physical) matters and a security management control procedures manual. The Contractor will co-operate fully in the execution of the agreed plan, providing skills and expertise of a suitable standard;
- 14.15.16 delivering copies of the production databases (with content listings) to the Authority's and/or the Replacement Contractor's operations staff (on appropriate media) as reasonably requested by the Authority;
- 14.15.17 assisting with the loading, testing and implementation of the production databases;
- 14.15.18 assisting in the execution of a parallel operation until the effective date of expiry or termination of this Agreement;

[Guidance: Consider if the Authority and/or Replacement Contractor will need access to any Contractor Software, Contractor's Background IPRs or Third Party Software. See clause 37.5 (Licences Granted by the Contractor) and its associated guidance. Consider whether any payment is required for such licences and who is meeting the cost of such payments.]

- 14.15.19 in respect of the maintenance and support of the Contractor System, providing historical performance data for the previous [***insert time period***];
- 14.15.20 assisting in the execution of a parallel operation of the maintenance and support of the Contractor System until the end of the Termination Assistance Period or as otherwise specified by the Authority (provided that these Services end on a date no later than the end of the Termination Assistance Period)
- 14.15.21 [the provision of an information pack listing and describing the Services for use by the Authority in the procurement of the Replacement Services;]

- 14.15.22 answering all reasonable questions from the Authority and/or its Replacement Contractor regarding the Services;
- 14.15.23 [agreeing with the Authority and/or the Replacement Contractor a plan for the migration of the Authority Database to the Authority and/or the Replacement Contractor. The Contractor will fully co-operate in the execution of the agreed plan, providing skills and expertise of a reasonably acceptable standard;]
- 14.15.24 the provision of access to the Authority and/or the Replacement Contractor during the Termination Assistance Period and for a period not exceeding [six months] afterwards for the purpose of the smooth transfer of the Services to the Authority and/or the Replacement Contractor:
 - 14.15.24.1 to information and documentation relating to the Transferring Services that is in the possession or control of the Contractor or its Sub-contractors (and the Contractor agrees and shall procure that its Sub-contractors do not destroy or dispose of that information within this period) including the right to take reasonable copies of that material; and
 - 14.15.24.2 following reasonable notice and during the Contractor's normal business hours, to members of the Contractor Personnel who have been involved in the provision or management of the Services and who are still employed or engaged by the Contractor or its Sub-contractors.

Disputes Relating to Termination Services

- 14.16 Where there is any dispute between the parties regarding the manner in which the Termination Services are to be performed, such dispute shall be resolved in accordance with the Dispute Resolution Procedure.

15. KNOWLEDGE TRANSFER

- 15.1 During the Termination Assistance Period, the Contractor will:
 - 15.1.1 transfer all training material and provide appropriate training to those Authority and/or Replacement Contractor staff responsible for internal training in connection with the provision of the Services;
 - 15.1.2 provide for transfer to the Authority and/or the Replacement Contractor of all knowledge reasonably required for the provision of the Services which may, as appropriate, include information, records and documents; and
 - 15.1.3 provide the Contractor and/or Replacement Contractor with access to such members of the Contractor's or its Sub-contractors' personnel as have been involved in the design, development, provision or management of the Services and who are still employed or engaged by the Contractor or its Sub-contractors.
- 15.2 To facilitate the transfer of knowledge from the Contractor to the Authority and/or its Replacement Contractor, the Contractor shall provide a detailed explanation of the procedures and operations used to provide the Services, the change management process and other standards and procedures to the operations personnel of the Authority and/or the Replacement Contractor.
- 15.3 The information which the Contractor shall provide to the Authority and/or its Replacement Contractor pursuant to paragraph 15.1 above will include:
 - 15.3.1 copies of up-to-date procedures and operations manuals;
 - 15.3.2 product information;
 - 15.3.3 agreements with third party suppliers of goods and services which are to be transferred to the Authority;
 - 15.3.4 key support contact details for third party supplier personnel under contracts which are to be assigned or novated to the Authority pursuant to this schedule;

- 15.3.5 information regarding any unresolved faults in progress at the commencement of the Termination Assistance Period as well as those expected to be in progress at the end of the Termination Assistance Period;
 - 15.3.6 details of physical and logical security processes and tools which will be available to the Authority; and
 - 15.3.7 any relevant interface information.
- 15.4 During the Termination Assistance Period the Contractor shall grant any agent or personnel (including employees, consultants and contractors) of the Replacement Contractor and/or the Authority access, during business hours and upon reasonable prior written notice, to any Sites for the purpose of effecting a prompt knowledge transfer provided that:
- 15.4.1 any such agent or personnel (including employees, consultants and contractors) having access to any Sites under this paragraph shall sign a confidentiality undertaking in favour of the Contractor (in such form as the Contractor shall reasonably require); and
 - 15.4.2 the Authority and/or the Replacement Contractor shall pay the reasonable, proven and proper costs of the Contractor incurred in facilitating such access.

16. ASSETS, SUB-CONTRACTS AND SOFTWARE

- 16.1 Following notice of termination of this Agreement and during the Termination Assistance Period, the Contractor will not, without the Authority's prior written consent:
- 16.1.1 terminate[, enter into] or vary any Sub-contract;
 - 16.1.2 (subject to normal maintenance requirements) make material modifications to, or dispose of, any existing Assets or acquire any new Assets; or
 - 16.1.3 [terminate, enter into or vary any licence for software in connection with the Services.]

16.2 Within 30 days of receipt of the up-to-date Registers provided by the Contractor pursuant to paragraph 14.6 above, the Authority will provide written notice to the Contractor setting out:

16.2.1 which Assets the Authority requires to be transferred to the Authority and/or its Replacement Contractor; and

16.2.2 which Sub-contracts and other agreements specified in paragraph 11.3 above the Authority requires to be assigned or novated to the Authority and/or its Replacement Contractor (the "**Transferring Contracts**"),

in order for the Authority and/or its Replacement Contractor to provide the Services at the expiry of the Termination Assistance Period. Where requested by the Authority and/or its Replacement Contractor, the Contractor will provide all reasonable assistance to the Authority and/or its Replacement Contractor to enable it to determine which Assets and Transferring Contracts the Authority and/or its Replacement Contractor requires in order to provide the Services.

16.3 With effect from the expiry of the Termination Assistance Period, the Contractor shall assign to the Authority (and/or its nominated Replacement Contractor), free from all liens, charges, options, encumbrances and third party rights, title to and all rights and interests in those Exclusive Assets identified by the Authority pursuant to paragraph 16.2 above. Such Exclusive Assets will be acquired by the Authority for a consideration equal to their Net Book Value. [except where a Termination Payment is payable by the Authority to the Contractor in which case payment for such Assets shall be included within the Termination Payment.] [*Guidance: only include final sentence if the cost of Assets is included in the Termination Payment*]

16.4 In respect of those Non-Exclusive Assets that the Authority has identified pursuant to paragraph 16.2, the Contractor will either (at the Authority's option, acting reasonably):

16.4.1 sell such Assets to the Authority and/or its Replacement Contractor at an agreed price; or

16.4.2 offer or procure for the Authority and/or its Replacement Contractor the use, rental or licensing of such assets (as appropriate) in each case for

such period of time and on such commercial and other terms as may be agreed between the parties, acting reasonably.

16.5 The Contractor shall assign or procure the novation to the Authority of the Transferring Contracts. The Contractor shall execute such documents and provide such other assistance as the Authority reasonably requires to effect this novation or assignment. *[Guidance: this needs to tie in with paragraph 11.3 above. It may need to be amended if the Contractor is not under an absolute obligation to procure that Sub-Contracts are assignable.]*

16.6 The Authority shall:

16.6.1 accept assignments from the Contractor or join with the Contractor in procuring a novation of each Transferring Contract;

16.6.2 once a Transferring Contract is novated or assigned to the Authority and/or the Replacement Contractor, carry out, perform and discharge all the obligations and liabilities created by or arising under that Transferring Contract and exercise its rights arising under that Transferring Contract, or as applicable, procure that a Replacement Contractor does the same.

16.7 [The Contractor shall hold any Transferring Contracts on trust for the Authority until such time as the transfer of the contract to the Authority and/or the Replacement Contractor has been effected.]

16.8 The Contractor shall indemnify the Authority (and/or the Replacement Contractor, as applicable) against each loss, liability and cost arising out of any claims made by a counterparty to a Sub-contract which is assigned or novated to the Authority (and/or Replacement Contractor) pursuant to paragraph 16.5 above in relation to any matters arising prior to the date of assignment or novation of such Sub-contract.

17. CONTRACTOR PERSONNEL

17.1 The Authority and Contractor agree and acknowledge that in the event of the Contractor ceasing to provide the Services or part of them for any reason, schedule 9.1 (Staff Transfer) will apply.

17.2 The Contractor will not take any step (expressly or implicitly and directly or indirectly by itself or through any other person) to dissuade or discourage any

employees engaged in the provision of the Services from transferring their employment to the Authority and/or its Replacement Contractor.

- 17.3 During the Termination Assistance Period, the Contractor will give the Authority and/or its Replacement Contractor reasonable access to the Contractor's personnel to present the case for transferring their employment to the Authority and/or its Replacement Contractor.
- 17.4 The Contractor will immediately notify the Authority or, at the direction of the Authority, the Replacement Contractor of any period of notice given by the Contractor or received from any person referred to in the Staffing Information, regardless of when such notice takes effect.
- 17.5 The Contractor will not re-employ or re-engage or entice any employees, contractors or Sub-contractors whose employment or engagement is transferred to the Authority and/or its Replacement Contractor for a period of [12] months from the date of transfer. [*Guidance: this may need to be longer for Key Personnel*]

18. CHARGES AND APPORTIONMENTS

- 18.1 During the Termination Assistance Period (or for such shorter period as the Authority may require the Contractor to provide the Termination Services), the Authority shall pay the Charges to the Contractor in respect of the Termination Services, such Charges to be calculated in accordance with schedule 7.1 (Charges).
- 18.2 All outgoings and expenses (including any remuneration due) and all rents, royalties and other periodical payments receivable in respect of the Assets and Sub-contracts transferred to the Authority and/or the Replacement Contractor pursuant to paragraph 16 above shall be apportioned between the Authority and the Contractor and/or the Replacement Contractor and the Contractor, as applicable.
- 18.3 This apportionment will be carried out as follows:
 - 18.3.1 the payments will be annualised and divided by 365 to reach a daily rate;
 - 18.3.2 the Authority shall be responsible for or shall procure that the Replacement Contractor shall be responsible for or entitled to (as the case may be) [that part of the value of the invoice pro rata to the number of complete days following the transfer, multiplied by the daily rate]; and

18.3.3 the Contractor will be responsible for or entitled to (as the case may be) the rest of the invoice.

18.4 Each party shall pay and/or the Authority shall procure that the Replacement Contractor shall pay any monies due under paragraph 18.3 as soon as reasonably practicable.