OGC
Office of Government Commerce

ICT SERVICES AGREEMENT SCHEDULES

SCHEDULE 5.3

ESCROW TERMS

CONTENTS

Section A

Product Description

1.   PRODUCT TITLE

ICT Services Agreement - schedule 5.3 (Escrow Terms).

2.   PURPOSE OF PRODUCT

The schedule sets out advice and guidance on the Escrow Agreement that the Contractor will enter into with the Authority and a third party Escrow Agent in accordance with the provisions of clause 39 of the Agreement.

3.   COMPOSITION

The Escrow Agreement will be on the standard terms and conditions of the chosen Escrow Agent subject to specific amendments that may need to be made to reflect the particular needs of a project. The schedule sets out the key issues which the Authority should ensure are dealt with in the Escrow Agreement and is drafted in the form of commonly suggested amendments to Escrow Agents' standard form Escrow Agreements. The Authority will need to review the Escrow Agent's standard form agreement to assess whether any amendments are required to reflect the principles set out in section C and any other principles specific to the project.

4.   DERIVATION

Escrow terms and conditions will be standard and agreed with the Escrow Agent and should not be subject to significant discussion with the bidders, save where necessary to ensure that the issues covered in section C of this schedule and other issues specific to the project are adequately dealt with.

5.   RELATED CLAUSES & SCHEDULES

Clauses: Clause 39 - Guidance Paragraphs

                               Clause 39.1

Clause 39.2

Clause 39.3

Schedules: 5.1 (Software), 5.2 (Licence Terms)

See Guidance Note 1 (Key Commercial Principles), section 1 - 8 (Source Code, Deposit and Delivery)

See Guidance Note 3 (Ownership and Licensing of Intellectual Property)

6.   ALLOCATION

Standard Escrow Agreements (and any required variations thereto) to be issued to the bidders with the descriptive document and finalised in the ITT.

7.   QUALITY/REVIEW

Authority expertise: commercial/procurement, legal.

Section B

Guidance

1. INTRODUCTION

Detailed guidance in relation to the operation of Escrow Agreements and their significance in public sector projects is given in:

1.1 Guidance Note 1 (Key Commercial Principles), section 1 - 8 (Source Code, Deposit and Delivery); and

1.2 the guidance notes to clause 39 of the Agreement.

2. WHAT IS AN ESCROW AGREEMENT?

2.1 Ensuring access to the source code and associated materials is essential to ensure the ability to support, modify or upgrade software in the event that the licensor (most commonly the Contractor) is no longer in a position to provide these services. Contractors are, however, understandably extremely reluctant to release source code save where the code relates to software which they have agreed to assign.

2.2 Where it has been agreed that IPR in Specially Written Software is to be assigned to the Authority, the Authority should ensure that the source code to that software is delivered by the Contractor direct to the Authority.

2.3 If IPR in Specially Written Software is to be retained by the Contractor (or a sub-contractor), the Authority should provide for the source code to such software to be placed with an independent third party escrow agent (**"Escrow Agent"**) to be released only on certain trigger events (**"Release Events"**). Some examples of Release Events are the bankruptcy or liquidation of the owner of the material, or the owner's failure to meet contractual obligations to develop or maintain the material.

2.4 Note that Escrow may also apply to Contractor Software and Third Party Software see guidance to clause 39 (Escrow).

2.5   The Escrow Agreement should state how frequently the Contractor should place updated copies of source code with the Escrow Agent (to ensure that an up to date version is available where ongoing development occurs, as is normal).

2.6   The Escrow Agreement should also set out the level of validation services it is agreed that the Escrow Agent shall undertake to verify the quality and integrity of the deposited code, and which party should pay the costs of the Escrow Agent's services.

<center>**Section C**</center>

<center>**Key Issues: Escrow Agreement**</center>

DEFINITIONS

[*Guidance: subject to the agreement of this schedule, the following definition(s) will need to be added to schedule 1*]

"Escrow Agreement"   the agreement entered into between the Authority, the Contractor and the Escrow Agent, pursuant to schedule 5.3 (Escrow Terms);

"Escrow Agent"   the agent appointed by the Authority to hold the Deposited Software, pursuant to schedule 5.3 (Escrow Terms);

"Release Event(s)"   events which will trigger the release of the Deposited Software to a duly authorised officer of the Authority;

[*Guidance: these definitions will need to be reviewed against the definitions in the standard Escrow Agreement*]

3.   VARIATIONS FROM STANDARD COMMERCIAL ESCROW ARRANGEMENTS

Guidance:

1.   *The Authority will most likely need to extend the range of Release Events that will trigger access to the source code. In addition, consideration may need to be given to fees and the timing and regularity of the update deposits into escrow (e.g. deposits may be required at regular intervals and following significant project events such as Milestone Dates).*

2.   *Additional Release Events that the Authority may wish to consider are as follows:*

    2.1   *[the Contractor enters into any company voluntary arrangement or individual voluntary arrangement or (being a company) enters into liquidation whether compulsory or voluntary (other than for the purposes of solvent reconstruction or amalgamation) or has a receiver or administrative receiver appointed over all or any part of its assets or undertaking or an administration order is made or (being*

an individual or partnership) becomes or is adjudicated bankrupt, or an event occurs within the jurisdiction of the country in which the Contractor is situated which has a similar effect to any of the above events in the United Kingdom; or]

2.2   upon transfer of IPRs whether through change of control or by operation of law and the transferee fails to enter into an escrow arrangement with the Authority on the same terms and conditions; or

2.3   termination of the ICT Services Agreement (other than termination by the Authority for convenience); or

2.4   breach of licence terms by the Contractor; or

2.5   exercise by the Authority of step-in rights under the Agreement; and

2.6   failure by the Contractor to comply with its obligations in relation to exit management.

3.   The Authority will need to ensure that the Escrow Agreement reflects any particular agreement as to ownership of the software being placed in escrow e.g. if it has been agreed that Specially Written Software will be assigned to the Authority but nevertheless placed into escrow (in addition to being delivered up to the Authority), the Authority will need to make sure in particular that this software is excluded from any restrictions the Escrow Agreement might impose on the way software is used upon release from escrow.

4.   The Authority will need to ensure that the date upon which the Contractor must deliver a copy of the Software to the Escrow Agent (and any rights to require updated copies to be lodged) ties in with whatever is agreed in clause 39.1 of the Agreement.

5.   The standard Escrow Agreement is likely to contain provisions detailing what the Authority can or can't do with the software once it is released. These may not fit with the detailed licence provisions which have been agreed in the ICT Services Agreement and will need to be replaced with a statement to say that the software will be used in accordance with the licence granted under the ICT Services Agreement.

6.   *If the Escrow Agreement places the responsibility on the Authority to ensure that any relevant third party licences are obtained, this provision should be tempered by a statement along the lines of "unless otherwise agreed by the parties under the terms of the ICT Services Agreement".*

7.   *The Authority will need to ensure that any testing or verification which the escrow agent is due to carry out under the Escrow Agreement is done in accordance with the terms of the ICT Services Agreement.*

8.   *The Authority will need to ensure that a definition of the ICT Services Agreement is inserted and make sure that all references to "Licence" are amended to be references to that agreement.*

9.   *If the Escrow Agreement refers only to the software owner (which will be the Contractor), these references may need to be amended to include Affiliates of the Contractor, Sub-Contractors and third parties (as relevant) in addition, if some of the software placed under escrow may belong to such persons rather than the Contractor itself.*

10.   *The Authority will need to insert a provision ensuring that any defined terms used in the Escrow Agreement which aren't defined in it take the meanings given to them in the ICT Services Agreement and that where any ambiguity or conflict arises, the ICT Services Agreement shall prevail.*