

Supply Chain

Clarification of Contractual Flowdowns

November 2013



Clarification of Contractual Flowdowns for the supply chain – November 2013

The NDA requires certain contract terms to be flowed down from the Site Licence Companies (SLCs) head contract with the NDA – the ‘flowdown’ terms. Over time these have been simplified and amended to reflect the NDA’s requirements either to meet its statutory obligations or its management obligations.

The wording reflects the fact that within the head contracts we have with the SLCs, they are referred to as the ‘Contractor’. Part A flowdowns apply to all contracts with an SLC (Contractor) at the Tier 2 level only (all subcontracts), while only Part B should be flowed down through the supply chain via Tier 2 to Tier 3 and below (all sub-sub contracts)

Provisions such as Intellectual Property (IP) are no longer a mandatory NDA flowdown requirement. There is a revised IP policy that SLCs are expected to work to and include IP clauses relevant to the requirement. There may be some contract provisions that the SLCs still deem necessary for their own commercial reasons, but they are not an NDA flowdown requirement.

Equally we expect that requirements such as insurance (particularly Professional Indemnity), warranties and guarantee requirements are proportionate to the work being undertaken.

Below is an extra from Schedule 5 Terms.

Extract of Schedule 5 Terms

16. FLOWDOWN OF CONTRACTUAL PROVISIONS

16.1 Subject only to paragraph 17 (*Exception to Flowdown of Contractual Provisions*) below, the Contractor shall ensure that:

- (a) all Subcontracts shall include the contractual provisions set out in Part A of the Appendix to this Part 1 (*Work Activity Management – Subcontracts and Procurement*); and
- (b) all Subcontracts and Sub-Subcontracts include the contractual provisions set out in Part B of the Appendix to this Part 1 (*Work Activity Management – Subcontracts and Procurement*).

16.2 For the purposes of this paragraph 16 (*Flowdown of Contractual Provisions*) the Contractor shall ensure, and shall procure that all its Subcontractors ensure, that the provisions referred to in paragraph 16.1 above are incorporated into all

new Subcontracts and Sub-Subcontracts (other than contracts with utility companies) which have a value per annum in excess of one hundred and fifty thousand pounds Sterling (£150,000). For Subcontracts and Sub-Subcontracts which have a value per annum of less than one hundred and fifty thousand pounds Sterling (£150,000) the Contractor shall be required to use its professional judgement as to which of these provisions should be incorporated into the Subcontract or Sub-Subcontract with the exception of provision 11 Payment Terms which must be included in all Sub-Contracts and Sub-Subcontracts regardless of value.

17 EXCEPTION TO FLOWDOWN OF CONTRACTUAL PROVISIONS

17.1 Where the Contractor enters into Subcontracts in connection with an Asset Purchase which:

- (a) the Contractor reasonably considers does not contain significant risk in terms of value, duration or nature; or
- (b) contracts with a value of less than one hundred and fifty thousand pounds Sterling (£150,000);

it shall not be required to flowdown the contractual provisions referred to in paragraph 16.1 (*Flowdown of Contractual Provisions*) above, with the exception of provision 11 Payment Terms which must be included in all Sub-Contracts and Sub-Subcontracts, but shall be required to use its professional judgement as to which of these provisions should be incorporated into the Subcontract.

17.2 Subject to paragraph 17.1 above, the Contractor shall not without the Authority's prior written approval (not to be unreasonably withheld or delayed) conclude any Subcontract which omits any of the contractual provisions referred to in paragraph 16.1 (*Flowdown of Contractual Provisions*) above.

17.3 When seeking the Authority's approval in accordance with paragraph 17.2, the Contractor must specify:

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- (a) with reference to the Procurement Plan then current, which Subcontract is the subject of the request;
- (b) which contractual provision(s) specified in paragraph 16.1 (*Flowdown of Contractual Provisions*) the Contractor wishes to be excluded (in part if applicable) in respect of the proposed Subcontract; and
- (c) an explanation of the risks and benefits flowing from the proposed omission(s), particularly but not only how the relevant contractual provision(s) (or part of the contractual provision(s) if applicable) will affect the pricing mechanism of the Subcontract if not omitted.

17.4 When responding to any Contractor request submitted pursuant to this paragraph 17 (*Exception to Automatic Flowdown of Contractual Provisions*), the Authority shall:

- (i) not unreasonably withhold consent to the exclusion of the relevant contractual provision(s) (or part thereof if applicable) identified by the Contractor in its request;
- (ii) provide its decision in writing within fifteen (15) Working Days; and
- (iii) provide reasons for any refusal of consent to the Contractor's request.

APPENDIX

Part A – Provisions to be incorporated into all Subcontracts

Pursuant to paragraph 16.1(a) of Part 1 (*Work Activity Management – Subcontracts and Procurement*) of Schedule 5 (*Subcontracting/Procurement*) the Contractor shall include the following provisions in each and every Subcontract.

1 Change of Control

In the event of any change in ownership, management or control of the Contractor, the Subcontractor shall not be entitled to terminate the Subcontract or make any amendment to this Subcontract.

2 Novation and Assignment

The Contractor shall be entitled to assign, novate or transfer its interest in the Subcontract to a party nominated by the Authority:

- 2.1 without the consent of the Subcontractor;
- 2.2 without requiring the consent of any third party; and
- 2.3 without incurring any payment obligation or other additional liability.

3 Termination for Convenience

- 3.1 The Contractor shall be entitled to terminate this Subcontract at any time upon giving reasonable notice, to the Subcontractor. For the purposes of this Clause 3.1 'reasonable notice' shall not be less than 30 days' notice.
- 3.2 Where the Contractor terminates the Subcontract pursuant to Clause 3.1 above, the Subcontractor shall be entitled to recover from the Contractor costs reasonably and actually incurred and arising directly from termination of the relevant Subcontract. For the avoidance of doubt, the Subcontractor shall not be entitled to recover any payment in respect of loss of anticipated profits, loss of opportunity or consequential losses.

4 Rights of Third Parties

The Authority shall, pursuant to the Contracts (Rights of Third Parties) Act 1999, be entitled to enforce any of the Contractor's rights under the Subcontract and any term

in this Subcontract which directly or indirectly prevents or attempts to prevent the Authority from exercising those rights shall have no legal effect.

5 Agreement under section 12(3A) of the Nuclear Installations Act 1965 to provide protection for contractor equipment on the licensed site in the event of nuclear damage

5.1 Pursuant to section 12(3A) of the Nuclear Installations Act 1965 ("**the Act**"), the Contractor and the Subcontractor agree as follows:

- (a) In the event of an occurrence involving nuclear matter as defined within section 7 of the Act, the Contractor shall be liable to the Subcontractor for damage to the property of the Subcontractor and / or the property of the Subcontractor's subcontractors or suppliers which is located on the [*insert details of the nuclear licensed site*] for the purposes of the Subcontract.
- (b) The liability in (a) shall be limited to liability for property damage as would otherwise exist if section 7(3) of the Act did not apply and claims under this agreement for property damage shall be governed by the Act as if section 7(3) of the Act did not apply.
- (c) The Contractor shall not be liable under (a) unless and to the extent that the Subcontractor has notified the Contractor and the Authority of:
 - (i) the estimated value of the Subcontractor's plant, equipment and assets [and any such plant, equipment and assets of its subcontractors or suppliers brought onto [*insert details of the nuclear licensed site*]] on an annual basis for the purposes of the Subcontract in accordance with the Authority's insurance renewal requirements; and
 - (ii) where the value of such property has changed by (20%) or more during any one (1) year.
- (d) The liability in (a) shall be limited to the market value of the property notified in writing pursuant to paragraph [5].1(c) above.
- (e) The Contractor shall not be liable under (a) to the extent that the occurrence involving nuclear matter was attributable to any act or omission of the Subcontractor or any employee, servant or agent of the Subcontractor [, or

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the Subcontractor's subcontractor or any employee, servant or agent of the Subcontractor's subcontractor] done with the intent to cause injury or damage or done with reckless disregard for the consequences of the act or omission.

5.2 For the avoidance of doubt, nothing in this Subcontract is or shall be deemed to be an agreement for the Subcontractor to incur liability under Section 12(3A) of the Act.

Part B - Provisions to be incorporated into all Subcontracts and Sub- Subcontracts

Pursuant to paragraph 16.1(b) of Part 1 (*Work Activity Management – Subcontracts and Procurement*) of Schedule 5 (*Subcontracting/Procurement*) the Contractor shall include the following provisions in each and every Subcontract and shall procure that such provisions are included within each and every Sub-Subcontract.

6 Rights of Audit, Inspection and Access

6.1 Subject to compliance with applicable Law and Regulatory Requirements, [*insert name of the relevant contractor*], the Authority and the Authority's Agents shall be entitled at any time, or frequency, to conduct an audit, inspection, review, periodic monitoring and spot check for the purposes of:

- (a) reviewing [*insert name of relevant subcontractor*]'s activities in connection with, and performance in respect of, this [*Subcontract*];
- (b) verifying the accuracy of the [*insert contract term used to refer to the contract price*] and any costs of suppliers (including subcontractors) of the [*Works*][*Services*] which shall include the verification of any supporting documentation in respect of the [*insert contract term used to refer to the contract price*];
- (c) reviewing all information required to be kept by [*insert the name of the relevant subcontractor*] pursuant to this [*Subcontract*];
- (d) verifying the accuracy and completeness of any management information delivered or required by this [*Subcontract*];
- (e) reviewing the integrity, confidentiality and security of the information required to be kept by the [*insert name of relevant subcontractor*] pursuant to this [*Subcontract*];

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- (f) reviewing [*insert name of relevant subcontractor*]'s compliance with the Freedom of Information Act 2000, Environmental Information Regulations 2004 and the Data Protection Act 1998, in accordance with Clause [8], compliance with the Bribery Act 2010 in accordance with Clause [7] and any other Regulatory Requirements or legislation applicable to the [*Works*][*Services*].

6.2 For the purpose of carrying out an audit pursuant to this Clause [6] [*insert the name of the relevant contractor*], the Authority and any Authority Agent shall, subject to compliance with applicable Law and Regulatory Requirements, be entitled to:

- (a) reasonable access to all parts of the [*Site or any other*] site and facilities used by the [*insert the name of the relevant subcontractor*] in the performance of the [*Works*][*Services*];
- (b) interview any employees, secondees or other personnel of the [*insert the name of the relevant subcontractor*];
- (c) carry out any inspections or tests to determine the integrity of information supplied and the quality of the information systems used by [*insert the name of the relevant subcontractor*];
- (d) request and receive all information, books of account, records and data together with appropriate rights of access to any equipment and/or information systems required to obtain such information; and
- (e) copy and collate any information requested pursuant to this Clause [6].

6.3 For the purposes of:

- (a) carrying out the audit and certification of the Authority's accounts;
- (b) carrying out an examination pursuant to section 6(1) of the National Audit Act 1983 or any re-enactment thereof, of the economy, efficiency and effectiveness with which the Authority has used its resources;

the Comptroller and Auditor General may examine such documents relating to expenditure and income as he may reasonably require which are owned, held or otherwise within the control of [*insert the name of the relevant subcontractor*] and may require [*insert the name of the relevant subcontractor*] to produce such oral or

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written explanations as he considers necessary. *[insert the name of the relevant subcontractor]* agrees that they will make such documentation available for use by the Comptroller and/or Auditor General in exercising his statutory duties and functions.

- 6.4 Where appropriate, *[insert the name of the relevant contractor]* shall discuss the outcome of the audit findings with *[insert the name of the relevant subcontractor]*. In such circumstances, *[insert the name of the relevant subcontractor]* shall maintain records of the audit findings together with details of any corrective action taken as a result of such audit findings.
- 6.5 During any inspection or audit of the *[insert the name of the relevant subcontractor]*'s site or facilities *[insert the name of the relevant subcontractor]* shall (on request) make available suitable office accommodation for the purposes of the audit.
- 6.6 *[insert the name of the relevant contractor]*, the Authority and any Authority Agent shall use reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt the *[insert the name of the relevant subcontractor]* or delay the provision of the *[Works][Services]*. *[insert the name of the relevant subcontractor]* shall not be excused from performance of any aspect of its obligations under this *[Subcontract]* for any period of time during which the *[insert the name of the relevant contractor]*, Authority, Authority Agents and/or the Comptroller and Auditor General are exercising their respective rights under this Clause [6].

7 Anti-Bribery and Corruption

- 7.1 *[insert the name of the relevant subcontractor]* shall and shall procure that persons associated with it or other persons who are performing services or providing goods in connection with this *[Subcontract]* shall:
- (a) comply with Relevant Requirements and Relevant Policies;
 - (b) not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;
 - (c) not do, or omit to do, any act that will cause or lead the Authority, *[insert the name of the relevant contractor]* and/or *[insert the name of the relevant*

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subcontractor] to be in breach of any of the Relevant Requirements or Relevant Policies;

- (d) have and shall maintain in place throughout the term of this agreement its own policies, procedures or processes, including but not limited to adequate procedures under the Bribery Act 2010, to ensure compliance with the Relevant Requirements, the Relevant Policies and this Clause [7], and will enforce them where appropriate;
- (e) promptly report to [*insert the name of the relevant contractor*] any request or demand for any undue financial or other advantage of any kind received by [*insert the name of the relevant subcontractor*] or any person working for or engaged by [*insert the name of the relevant subcontractor*] in connection with the performance of this [*Subcontract*];
- (f) if requested, other than in relation to a breach of this Clause [7], provide the Authority and/or [*insert the name of the relevant contractor*] with any reasonable assistance, at the [*insert the name of the relevant contractor*]'s reasonable cost, to enable the Authority and/or [*insert the name of the relevant contractor*] to perform any activity required by any relevant government or agency in any relevant jurisdiction for the purpose of compliance with any of the Relevant Requirements or Relevant Policies;
- (g) within 30 days of the date of this [*Subcontract*], certify to [*insert the name of the relevant contractor*] in writing signed by an officer of the [*insert the name of the relevant subcontractor*] compliance with this Clause [7] by the [*insert the name of the relevant subcontractor*]. [*insert the name of the relevant subcontractor*] shall provide such supporting evidence of compliance as [*insert the name of the relevant contractor*] may reasonably request.

7.2 [*insert the name of the relevant subcontractor*] shall immediately notify the Authority and [*insert the name of the relevant contractor*] if, at any time during the term of this [*Subcontract*], its circumstances, knowledge or awareness changes such that it would not be able to comply with this Clause [7].

7.3 If [*insert the name of the relevant subcontractor*] notifies [*insert the name of the relevant contractor*] that it suspects or knows that there may be a breach of Clause [7.1], [*insert the name of the relevant subcontractor*], the [*insert the name of the relevant subcontractor*] must respond promptly to the [*insert the name of the relevant*

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contractor]'s enquiries, co-operate with any investigation, and allow the *[insert the name of the relevant contractor]* and/or the Authority to audit books, records and any other relevant documentation.

- 7.4 *[insert the name of the relevant contractor]* may terminate this *[Subcontract]* by written notice with immediate effect if the *[insert the name of the relevant subcontractor]* or any persons associated with it or other persons who are performing services or providing goods in connection with this *[Subcontract]* (in all cases whether or not acting with the *[insert the name of the relevant subcontractor]*'s knowledge) breaches Clause [7.1].
- 7.5 Any dispute relating to the interpretation of this Clause [7], or the materiality of any breach of this Clause [7] shall be determined by *[insert the name of the relevant contractor]* and its decision shall be final and conclusive.

8 Compliance with the statutory obligations of the Authority

Freedom of Information Act 2000 (FOIA) and Environmental Information Regulations 2004 (EIR)

- 8.1 *[insert the name of the relevant subcontractor]* acknowledges that the Authority is subject to the requirements of FOIA, and the EIR and the *[insert the name of the relevant subcontractor]* shall assist and co-operate with the Authority and/or *[insert the name of the relevant contractor]* to enable the Authority to comply with these information disclosure requirements.
- 8.2 If the Authority is required to provide information as a result of a request made to it under FOIA and /or EIR and such information is in the possession of any of *[insert the name of the relevant subcontractor]* or its suppliers then *[insert the name of the relevant subcontractor]* shall provide such information to the *[insert the name of the relevant contractor]* as soon as reasonably practicable.
- 8.3 *[insert the name of the relevant subcontractor]* shall provide all necessary assistance as reasonably requested by the Authority and/or *[insert the name of the relevant contractor]* to enable the Authority to respond to a Request for Information (as defined under FOIA) within the time for compliance set out in section 10 of the FOIA or regulation 5 of EIR.

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- 8.4 The Authority shall be responsible for determining at its absolute discretion whether any information provided to the Authority is exempt from disclosure in accordance with FOIA or EIR or is to be disclosed in response to a request for information.
- 8.5 *[insert the name of the relevant subcontractor]* acknowledges that the Authority may, acting in accordance with the FOIA or EIR disclose information without consulting *[insert the name of the relevant subcontractor]*, or the Authority may, at its discretion, elect to consult *[insert the name of the relevant subcontractor]* and take its views into account.
- 8.6 *[insert the name of the relevant subcontractor]* acknowledges that any lists or schedules provided by it outlining confidential information or commercially sensitive information are of indicative value only and that the Authority may nevertheless be obliged to disclose such information in accordance with this Clause [8].

Data Protection Act 1998 (DPA)

- 8.7 *[insert the name of the relevant subcontractor]* shall comply at all times with the DPA or such other equivalent data protection legislation and shall not perform its obligations under this *[Subcontract]* in such a way as to cause *[insert the name of the relevant contractor]* or the Authority to breach any of its obligations under the DPA or such other equivalent data protection legislation.
- 8.8 Notwithstanding the general obligation in Clause [8.7], where the *[insert the name of the relevant subcontractor]* is processing Personal Data (as defined by the DPA) as a Data Processor (as defined by the DPA) for the *[insert the name of the relevant contractor]*, *[insert the name of the relevant subcontractor]* shall:
- (a) process the Personal Data only in accordance with instructions from the *[insert the name of the relevant contractor]* (which may be specific instructions or instructions of a general nature) as set out in this *[Subcontract]* or as otherwise notified by *[insert the name of the relevant contractor]*;
 - (b) implement appropriate technical and organisational measures to protect the Personal Data against unauthorised or unlawful processing and against accidental loss, destruction, damage, alteration or disclosure. These measures shall be appropriate to the harm which might result from any unauthorised or unlawful processing, accidental loss, destruction or damage

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to the Personal Data and having regard to the nature of the Personal Data which is to be protected;

- (c) ensure that all employees or agents required to access the Personal Data are informed of the confidential nature of the Personal Data and comply with the obligations set out in this Clause [8].

9 Insurance

9.1 *[insert the name of the relevant Contractor]* shall notify *[insert the name of the relevant subcontractor]* of the relevant insurance arrangements put in place by the Authority (the “Authority Insurances”), including any information provided by the Authority from time to time in respect of such Authority Insurances.

9.2 *[insert the name of the relevant subcontractor]* shall:

- (a) not purchase insurance that duplicates the Authority Insurances;
- (b) consent to being a joint named insured under the Authority Insurances; and
- (c) comply with (and shall procure that its subcontractors and suppliers to this *[Subcontract]* agree to comply with) any instructions issued by the Authority from time to time in relation to the Authority Insurances, claims handling and other procedures relevant to this *[Subcontract]*.

9.3 *[insert the name of the relevant subcontractor]* shall arrange appropriate insurance cover to reflect the nature of the *[Works][Services]* to be performed (for example public and product liability, employers’ liability, professional indemnity and motor insurance). For the avoidance of doubt, all such *[insert the name of the relevant subcontractor]*’s insurance policies, with the exception of any professional indemnity insurance, shall contain a provision which obliges the insurers to indemnify the *[insert the name of the relevant contractor]*, *[insert the name of the relevant SLC]*, *[insert the name of the relevant SLCs PBO]* and the Authority in respect of claims made against them arising from the performance of the *[Works][Services]* by the *[insert the name of the relevant subcontractor]*.

10 Agreements with trade unions or other bodies representing employees

The Subcontractor shall comply with the terms of all agreements which the Subcontractor has entered into with trade unions or other bodies representing the employees of the Subcontractor which relate to those employees of the Subcontractor.

11 Payment Terms

[insert the name of the relevant contractor] shall make payment to *[insert the name of the relevant subcontractor]* in a prompt manner on receipt of a correctly rendered invoice and to terms that are *[no longer than Nett Monthly*]*. Payment terms of 'pay when paid' or similar are not allowable.

*Contractors and Subcontractors may agree to shorter payment terms than Nett Monthly. Longer payment terms than Nett Monthly on receipt of a correctly rendered invoice are not allowable.

Definition: Nett Monthly - payment is due on the last day of the month following the month in which a correctly rendered invoice was received