

FACILITIES MANAGEMENT OF COMPUTER OPERATIONS

INDEX

Clause No	Title
1	Definitions
2	The Service
3	Employees
4	The Premises
5	Right to Audit
6	The Customer Computer Equipment
7	Software
8	Third Party Contracts
9	Consumables
10	The Service Charge
11	Variations
12	Customer Responsibilities
13	Formal Performance Reviews
14	Nominated Representatives
15	Confidentiality and Data Protection
16	Intellectual Property Rights
17	Termination
18	Liquidated Damages
19	Liability and Indemnity
20	Statutory Regulations
21	Publicity
22	Force Majeure
23	Subcontracting and Assignment
24	Waiver
25	Notices
26	No Third Party Rights
27	Expert Determination
28	Dispute Resolution
29	Law

1. DEFINITIONS

- 1.1 'Commencement Date' shall mean the date stated in the Contract for the commencement of the Service or such earlier date as may be agreed by the parties.
- 1.2 'Contract' shall mean the agreement between the Customer and the Contractor for the execution of the Service including all documents expressly incorporated therein.
- 1.3 'Contractor' shall mean the person, firm or company named as such in the Contract and responsible for providing the Service and shall include its legal personal representatives, successors and permitted assigns.
- 1.4 'Customer' shall mean the person, firm or company named as such in the Contract for whom the Service is to be provided and shall include its legal personal representatives, successors and permitted assigns.
- 1.5 'Customer Computer Equipment' shall mean the computer hardware in the possession and/or control of the Customer which is listed in the Contract.

- 1.6 'Employees' shall mean the employees of the Customer who are named in the Contract.
- 1.7 'Expert Determination' shall have the meaning given in Clause 27.
- 1.8 'Force Majeure' shall have the meaning given in Clause 22.
- 1.9 'Premises' shall mean the Customer's premises from where the Service is to be provided as described in the Contract.
- 1.10 'Service' shall mean the facilities management service described in the Contract.
- 1.11 'Service Charge' shall mean the charge(s) payable by the Customer in consideration of the provision of the Service.
- 1.12 'Software' shall mean the software and associated documentation listed in the Contract.
- 1.13 'Standard Consumables' shall mean those consumables listed in the Contract which are to be provided by the Contractor.
- 1.14 'Third-Party Contracts' shall mean those contracts listed in the Contract which exist between the Customer and third parties to be managed by or assigned to the Contractor hereunder, except for those relating to software licences and the provision of customer computer equipment.

2 THE SERVICE

- 2.1 In consideration of the payment of the Service Charge by the Customer, the Contractor shall provide the Service to the Customer from the Commencement Date for the period specified in the Contract.
- 2.2 The Service shall conform to the details specified in the Contract. Save as otherwise agreed in writing by the parties, all other specifications, descriptive material, written or oral representations and all warranties and conditions whether express or implied by law shall, to the extent permitted by law, be excluded.
- 2.3 Notwithstanding the foregoing, any additional terms and conditions relating to the provision of the Service which are detailed in the Contract shall apply.

3 THE EMPLOYEES

- 3.1 The parties believe that the Transfer of Undertakings (Protection of Employment) Regulations 1981 ('the Transfer Regulations') do apply to the transaction the subject of the Contract.
- 3.2 The Customer hereby warrants to the Contractor that the Employees are suitably qualified and experienced to provide the Service and that the Employees have prior to the Commencement Date been fully involved in the provision of a service (substantially equivalent to the Service) to the Customer.
- 3.3 The Contractor shall indemnify and hold harmless the Customer against all costs, claims, liabilities and expenses arising out of or in connection with the employment of the Employees by the Contractor on and after the Commencement Date, including but not limited to breach of statutory duty, any claim for damages for breach of contract and/or for compensation for unfair or wrongful dismissal or redundancy or failure to provide comparable pension rights.
- 3.4 The Customer shall indemnify and hold harmless the Contractor against all costs, claims, liabilities and expenses arising out of or in connection with the employment of the Employees by the Customer prior to the Commencement Date, including but not limited to breach of statutory duty and any claim for damages for breach of contract.
- 3.5 In the event of early termination of the Contract, other than as a result of a substantial or material breach of the Contract by the Contractor, the Customer shall indemnify and hold harmless the Contractor against all costs, claims, liabilities and expenses arising out of or in connection with the termination of the contracts of employment of the Employees by the Contractor.
- 3.6 The Contractor shall be entitled to use the work of the Employees for the purpose of providing the Service to the Customer and for any other purposes whatsoever, provided that any use of such work otherwise than for the purpose of providing the Service shall not adversely affect the Service.
- 3.7 Any other terms and conditions applicable to the Employees detailed in the Contract shall additionally apply to the release by the Customer and the employment by the Contractor of the Employees.
- 3.8 If it is subsequently determined by a Court or other Tribunal of competent jurisdiction that the Transfer Regulations do not apply to the transaction the subject of the Contract, the Customer shall use all its reasonable endeavours to ensure that the Contractor is able to use the Employees in the provision of the Service, subject to the parties agreeing on an equitable basis for the reimbursement by the Contractor of the Customer's costs in so doing.

4 **THE PREMISES**

- 4.1 With effect from the Commencement Date or such earlier date as may be agreed by the parties, the Customer shall allow the Contractor and its employees free and full access to the Premises by prior arrangement and upon the terms and conditions specified in the Contract.
- 4.2 The Customer shall, free of charge to the Contractor, provide or ensure provision of, such services as are listed in the Contract.
- 4.3 The Contractor shall be entitled to use the office equipment and furniture within the Premises.
- 4.4 The Contractor shall allow the Customer and its representatives (excluding representatives who are business competitors of the Contractor) all reasonable access to the Premises, and all other locations relevant to the Service, upon reasonable notice.
- 4.5 The Contractor shall be responsible for any damage to the Premises and/or the above mentioned office equipment and furniture which is caused by the negligence or wilful misconduct of its employees or invitees, save that reasonable wear and tear of the same shall not be the Contractor's responsibility.

5 **RIGHT TO AUDIT**

- 5.1 The Customer and its nominated representatives (excluding representatives who are business competitors of the Contractor) shall have the right to audit the Contractor's performance of the Service under the Contract.
- 5.2 Subject to Clause 5.3, the Contractor shall arrange for the Customer and its representative(s) (excluding representatives who are business competitors of the Contractor) to have access to the Premises and to all locations and documentation relevant to the Service. The Contractor shall make available appropriate employees to assist the Customer in the performance of its audit.
- 5.3 When exercising its rights, under Clause 5, the Customer shall give reasonable prior notice to the Contractor, and shall make reasonable endeavours to avoid hindering the provision of the Service by the Contractor, and such other use by the Contractor of the Customer Computer Equipment and Software as may be agreed in accordance with Clauses 6.2 and 7.2

6 **THE CUSTOMER COMPUTER EQUIPMENT**

- 6.1 With effect from the Commencement Date or such earlier date as may be agreed by the parties, the Customer shall afford the Contractor and its employees access to and use of the Customer Computer Equipment upon the terms and conditions specified in the Contract.
- 6.2 Subject to the Contractor obtaining the necessary consents from any third-parties who have a legal interest in the Customer Computer Equipment, the Contractor shall be entitled to use the Customer Computer Equipment for other purposes and/or to relocate the Customer Computer Equipment provided that the use for other purposes and the relocation does not adversely affect the Service. The Contractor shall agree with the Customer the timing and plans for the said relocation of the Customer Computer Equipment and the costs of relocation and all additional services shall be for the Contractor's account.
- 6.3 The charges (if any) payable by the Contractor in respect of access to and use of the Customer Computer Equipment shall be as detailed in the Contract. The arrangements between the parties in respect of payments and other obligations due to third-parties who have a legal interest in the Customer Computer Equipment shall likewise be as detailed in the Contract.

7 **THE SOFTWARE**

- 7.1 With effect from the Commencement Date, or such earlier date as may be agreed by the parties, the Customer shall grant or procure the grant of licences to the Contractor in respect of use of the Software for the purpose of providing the Service. At the same time the Customer shall allow the Contractor and its employees access to and use of the Software and all supporting documentation.
- 7.2 Subject to the Contractor obtaining (or having obtained for it under Clause 7.1) the necessary consents and licences from any third-parties who have a legal interest in the Software, the Contractor shall be entitled to use the same for purposes other than for the purpose of providing the Service, provided always that such additional use does not adversely affect the Service.
- 7.3 The terms and conditions, including charges (if any) payable by the Contractor, in respect of use of the Software, including, if the Software is owned by the Customer, use of the same for purposes other than the provision of the Service, shall be as detailed in the Contract.
- 7.4 If the use of the Software or part thereof is licensed to the Contractor by the Customer, as opposed to

- by a third party, the Customer shall indemnify and hold harmless the Contractor against any expense, loss or damage incurred by the Contractor as a result of a claim or allegation that the Contractor's use of the Software or part thereof infringes the intellectual property rights of a third party.
- 7.5 If the use of the Software or part thereof is licensed to the Contractor by a third party, the Contractor shall be responsible for ensuring that the Contractor's use thereof will not be in breach of the intellectual property rights of a third party.

8 **THIRD-PARTY CONTRACTS**

- 8.1 The parties acknowledge that the Third Party Contracts listed in the Contract are necessary in order for the Contractor to provide the Service.
- 8.2 Unless otherwise stated in the Contract, the Contractor shall:
- (i) endeavour, in conjunction with the Customer, to procure the assignment or novation of the Third Party Contracts in favour of the Contractor upon the same terms as currently apply to the Customer; and/or
 - (ii) during the interim period and subsequently, in the case of Third Party Contracts which cannot be so assigned or novated, act as the Customer's sub-contractor in respect of the Third Party Contracts which the Customer shall hold in trust for the benefit of the Contractor.

- Any payments required to be made by the Customer under the Third-Party Contracts in respect of any period after the Commencement Date shall be repaid by the Contractor or shall be deducted by the Customer from payments due or becoming due to the Contractor under the Contract.
- 8.3 The Contractor shall give the Customer all reasonable assistance in connection with and undertake all necessary actions required of the Contractor for the assignment or novation of the Third Party Contracts.
- 8.4 The Customer shall not be required to novate or assign and the Contractor shall not be required to accept the assignment or novation of Third Party Contracts if the third party thereto seeks as a condition of its consent (if required) a payment or other consideration for such novation or assignment.
- 8.5 Upon termination of any Third Party Contract which continues to be necessary for the provision of the Service and which has not been assigned or novated in favour of the Contractor, the Contractor shall endeavour to negotiate an equivalent contract in its name, but if this is not possible the Customer shall be responsible for re-negotiating or extending the Third Party Contract.
- 8.6 The Contractor has no liability to the Customer for deficiencies in the Service caused wholly or partly by the non-performance by a third-party of its obligations under a Third Party Contract which has not been assigned or novated in favour of the Contractor.
- 8.7 The Customer shall indemnify and hold harmless the Contractor from and against any and all losses, costs, liabilities, outgoings and expenses arising out of or in connection with Third Party contracts prior to the assignment or novation of the Third Party contract to the Contractor.

9 **THE CONSUMABLES**

- 9.1 The Contractor shall provide the Standard Consumables listed and in the quantities detailed in the Contract.
- 9.2 The Customer shall be responsible for providing all consumables other than the Standard Consumables, save that the Contractor shall not unreasonably refuse to provide the same, subject to agreement in respect of the terms and conditions of, and the costs associated with such provision.

10 **THE SERVICE CHARGE**

- 10.1 In consideration of the provision of the Service by the Contractor, the Customer shall pay the Contractor the Service Charge quarterly in advance.
- 10.2 The Service Charge shall be in the amount detailed in the Contract, but the Contractor reserves the right to revise the Service Charge annually, with effect from the first anniversary of the Commencement Date, using the formula set out in the Contract to take into account changes in the factors and indices listed in the Contract.
- 10.3 Payment of the Service Charge and any other charges due in terms of the Contract, including agreed charges for additional services provided by the Contractor upon request by the Customer, shall be made within thirty (30) days of receipt of the Contractor's invoice therefor.

- 10.4 All charges and prices referred to in the Contract are exclusive of value added tax which shall be added in accordance with prevailing legislation.
- 10.5 Notwithstanding Sub-Clause 10.3 above the Customer reserves the right to withhold payment against the whole or any part of any invoice which is not in accordance with the Contract and shall notify the reasons to the Contractor in writing forthwith.

11 VARIATIONS

- 11.1 At any time during the term of the Contract the Customer may request or the Contractor may recommend variations to the Service and/or variations to any other matters covered by the Contract.
- 11.2 The Contractor shall investigate the likely impact of any such requested or recommended variations upon the Service, the Service Charge and other aspects of the Contract and shall report promptly to the Customer.
- 11.3 Neither party shall be obliged to agree to any requested or recommended variation.
- 11.4 Until such time as any variations to the Contract resulting therefrom have been mutually agreed in writing, the parties shall continue to perform their respective obligations without taking account of the requested or recommended variation.

12 CUSTOMER RESPONSIBILITIES

- 12.1 The Customer warrants that as at the Commencement Date the Customer Computer Equipment and the Software will be:
- (i) in reasonable working order and condition (fair wear and tear excepted in the case of the Customer Computer Equipment); and
 - (ii) suitable for the purpose of performing those elements of the Service provided by the Customer prior to the Commencement Date.
- The Customer's liability in respect of breaches of this warranty is limited to claims notified by the Contractor within twelve (12) months of the Commencement Date.
- 12.2 To enable the Contractor to provide the Service, the Customer shall at its own expense:
- (i) provide the Contractor with access to all information and documentation within the Customer's possession or control which is reasonably required by the Contractor for the performance of the Service;
 - (ii) make available to the Contractor for consultation and guidance staff who are familiar with the Customer's organisation, operations and business practices; and
 - (iii) undertake those responsibilities (if any) detailed in the Contract within the timescales specified therein or, in the absence of specified timescales, without delay.

13 FORMAL PERFORMANCE REVIEWS

- 13.1 In addition to the daily operational contact between the Customer and the Contractor the parties shall meet at the frequencies specified in the Contract to discuss their respective levels of satisfaction in respect of the Contract and to agree any changes necessary to address areas of dissatisfaction.
- 13.2 The time, date and venue of such meeting(s) shall be agreed by the parties and the Customer shall produce an agenda, incorporating items requested by the Contractor, in advance of the review.
- 13.3 The parties shall ensure that they have at their disposal at the review all information and personnel necessary for a meaningful discussion of the items on the agenda and that they are represented at such meeting(s) by personnel who have the authority to make decisions on their behalf.
- 13.4 The proceedings of such meeting(s) shall be minuted by the Customer and such minutes forwarded to the Contractor for acceptance as soon thereafter as possible. Once the minutes, including any agreed changes thereto, have been agreed and signed by the parties, such minutes shall be deemed to be an authoritative record of the matters discussed and agreed.

14 NOMINATED REPRESENTATIVES

- 14.1 Where not agreed prior to the Commencement date, within fourteen (14) days of the Commencement Date the parties shall notify each other of their respective representatives who are authorised to make decisions on their behalf for the purposes of the performance of the Contract. Where one party objects to the other's proposed representative the other party shall reconsider such appointment and produce an alternative representative for approval. The parties may change their authorised representatives from time to time by notice thereof in writing to the other party.
- 14.2 All communications concerning the Contract shall be conveyed between the parties' representatives.

15 **CONFIDENTIALITY AND DATA PROTECTION**

- 15.1 Each party shall treat the Contract and any information it may have obtained or received in relation thereto or arising out of or in connection with the performance of the Contract or its negotiation or relating to the business or affairs of the other as private and confidential and neither party shall publish or disclose the same or any particulars thereof without the prior written consent of the other or as may be permitted under the later provision of this Clause.
- 15.2 The obligations expressed in sub-Clause 1 above shall not apply to any information which:
- (a) is or subsequently comes into the public domain otherwise than by breach of this Clause;
 - (b) is already in the possession of the receiving party without an accompanying obligation of confidentiality;
 - (c) is obtained from a third party who is free to divulge the same;
 - (d) is independently and lawfully developed by the recipient or its sub-Contractor outside the scope of the Contract.
- 15.3 So far as it may be necessary for the performance of the Contract or for the operation and maintenance of the subject matter of the Contract each party may divulge any information to be kept confidential under sub-Clause 1 of this Clause to their employees, agents and approved sub-Contractors, if any, on a 'need to know' basis but undertake that they will ensure compliance by such employees, agents, and sub-Contractors with the obligations as to confidentiality expressed in this Clause and will be responsible to the other party for any failure by any employee, agent or sub-Contractor to comply with such obligations whether such employee, agent or sub-Contractor was aware of them or not.
- 15.4 Both parties shall ensure that they, their employees, agents and sub-Contractors shall observe the requirements of the Data Protection Act 1998 and any amendments or revisions thereto in the provision and use of the subject matter of the Contract and shall comply with any request made or direction given to the other which is directly due to the requirements of such Act.
- 15.5 The provisions of this Clause shall continue in perpetuity.

16 **INTELLECTUAL PROPERTY RIGHTS**

- 16.1 Nothing in this Agreement shall transfer between the parties any intellectual property rights, including copyright, database rights, patents, design rights and registered designs, domain names and trade marks ('Intellectual Property Rights'), in any material or items existing as at the Commencement Date, except where expressly stated herein.
- 16.2 Unless otherwise agreed by the parties in writing, all Intellectual Property Rights in material or items produced by the Contractor for the purposes of providing the Service shall vest in and be assigned to the Customer. The Contractor shall execute all documents necessary to effect such vesting.
- 16.3 On termination hereof the Contractor shall ensure any necessary software for performance of the Software in its ownership shall be licensed to any new or replacement contractor or to the Customer of the Customer at market rates.

17 **TERMINATION**

- 17.1 The Contract shall remain in force for the period stated therein and thereafter unless determined
- (i) by at least 12 months written notice by either party expiring on the end date of the period stated in the contract, or any anniversary of that date
 - (ii) in accordance with the provisions of Clauses 17.2 and 17.3
- 17.2 Either party shall have the right to terminate the Contract if the other party commits a substantial, material or persistent breach of the Contract and, if such breach is capable of remedy, fails to remedy the same within thirty (30) days of written notice requiring remedy, by giving notice within three (3) months of the breach in question, such notice to specify a date for termination no more than six (6) months from the date of notice.
- 17.3 Either party shall have the right to terminate the Contract forthwith by giving written notice if the other party becomes insolvent or goes or is put into liquidation (other than solely for solvent amalgamation or reconstruction) or if a receiver is appointed over all or any part of its business or assets or if any administration order is made in respect of it.
- 17.4 Upon or prior to termination of the Contract for any reason whatsoever, the Contractor shall give all assistance and undertake all actions as are reasonably necessary to allow the Customer to maintain an unbroken computer service. The Customer shall pay reasonable charges in respect of such assistance.
- 17.5 Upon termination for whatsoever reason, each party undertakes to return to the other party any

equipment, documentation, information or other materials belonging to the other party or which it has no legal right to retain.

The Contractor further undertakes to vacate the Premises and to remove all equipment and materials which are not legally held by the Customer within ninety (90) days, or such longer period as the parties may agree, of termination.

17.6 Clauses 3, 15, 17.4, 17.5, 19 shall survive termination of the Contract.

18 **LIQUIDATED DAMAGES**

18.1 Should the Contractor fail to provide those components of the Service identified in the Contract as being subject to liquidated damages to the performance level stated therefor, the Contractor shall pay to the Customer as and by way of liquidated damages, being a genuine pre-estimate of the Customer's loss occasioned by such failure, the amounts specified in the Contract in respect of such failure, provided that:

- (i) these provisions shall not apply to the extent that the failure in question is caused otherwise than by reason of the Contractor's act, default or negligence; and
- (ii) the Contractor's liability to pay liquidated damages shall be limited in aggregate to no more than the percentage stated in the Appendix of the Service charge appropriate to the period during which the failure resulting in liability to pay liquidated damages arose.

18.2 The Contractor shall pay to the Customer any liquidated damages within thirty (30) days of receipt of an invoice therefor from the Customer.

19 **LIABILITY AND INDEMNITY**

19.1 The Contractor shall indemnify and keep indemnified the Customer against all damages, losses, compensation or expenses arising from the death or injury of any person and against all loss of or damage to any physical property caused by any act, default or negligence of the Contractor, its sub-contractors and/or agents and against all actions, claims, demands or proceedings in respect thereof or in relation thereto, provided that this indemnification shall not apply to the extent that the death or injury to any person or the loss of or damage to any physical property is wholly or partly attributable to any act, default or negligence of the Customer or a third-party (other than the Contractor's sub-contractors and/or agents).

19.2 The Customer shall indemnify and keep indemnified the Contractor against all damages, losses, compensation or expenses arising from the death or injury of any person and against all loss of or damage to any physical property caused by any act, default or negligence of the Customer its agents or contractors (other than the Contractor) and against all actions, claims, demands and proceedings in respect thereof or in relation thereto, provided that this indemnification shall not apply to the extent that the death or injury to any person or the loss of or damage to any physical property is wholly or partly attributable to any act, default, or negligence of the Contractor or a third-party other than the Customer's agents or contractors (other than the Contractor).

19.3 Notwithstanding the foregoing and anything to the contrary in the Contract, the liability of both parties to each other under or in connection with the Contract, whether arising from contract, negligence or howsoever, shall be limited as follows:

- (i) in the case of liability arising from death or injury to persons, there shall be no limit;
- (ii) in the case of liability for loss of or damage to physical property, including all actions, claims, demands, costs and expenses in respect thereof or in relation thereto the limit for any one event or series of connected events shall be as stated in the Appendix;
- (iii) in respect of any failure to meet the performance levels for those components of the Service identified in the Contract as being subject to liquidated damages, liability shall be limited to the amount of such liquidated damages;
- (iv) in respect of any other liability, liability shall be limited to the amount stated in the Appendix for any one event or series of connected events.

19.4 Save as expressly stated elsewhere in the Contract, neither party shall be liable to the other for any special, consequential or indirect damages, loss of profit, revenue, opportunity or goodwill arising out of or in connection with the Contract.

19.5 Without thereby limiting their responsibilities under the Contract each party shall insure with a reputable insurance company against all loss of and damage to property and injury to persons (including death) arising out of or in consequence of its obligations under the Contract and against all

actions, claims, demands, costs and expenses in respect thereof, or in relation thereto. Documentary proof of such insurance cover shall be made available on demand by either party.

20 **STATUTORY REGULATIONS**

- 20.1 Both parties shall in all matters arising in the performance of the Contract conform with all Acts of Parliament and with all orders, regulations and bye-laws made with statutory authority by Government Departments or by local or other authorities that shall be applicable to the Contract. The Contractor shall not in the performance of the Contract in any manner endanger the safety or unlawfully interfere with the convenience of the public. The cost to each party in meeting the requirements of this sub-clause shall be borne by that party.
- 20.2 If the cost to the Contractor of the performance of the Contract shall be increased or decreased by reason of the making after the date of the contract of any law or any order, regulation or bye-law having the force of law that shall be applicable to the Contract (other than any tax on profits), the amount of such increase or reduction shall be paid to or repaid by the Contractor as appropriate.
- 20.3 In the event that either party necessarily incurs costs to which it would not otherwise be liable due to the other party's failure to comply with any law or any order, regulation or bye-law having the force of law, the amount of such costs shall be reimbursed by the other party.
- 20.4 The Contractor undertakes that he and his employees, agents and sub-Contractors will at all times comply with all health and safety requirements relating to the carrying out of the work under the Contract. Such requirements include in addition to statutory laws and regulations any codes of practice and British Standards or their equivalent relating to Health or Safety which may be applicable to the performance of the Contract. In the performance of the Contract the Contractor shall conform to all relevant environmental standards, guidelines and Codes of Practice and shall take all practical steps in the design of the work to be performed under the Contract to minimise any risk to the environment.

21 **PUBLICITY**

Neither party shall without the written consent of the other (the giving of which consent shall be at the sole discretion of that party) advertise, publicly announce or provide to any other person information relating to the existence or details of the Contract or use the other party's name in any format for any promotion, publicity, marketing or advertising purpose.

22 **FORCE MAJEURE**

- 22.1 For the purpose of the Contract the term Force Majeure shall mean:
- (a) war and other hostilities including terrorist activities, (whether war be declared or not) invasion, act of foreign enemies, mobilisation, requisition or embargo
 - (b) rebellion, revolution, insurrection, military or usurped power or civil war
 - (c) riot, commotion or disorder except where solely restricted to employees of the Contractor or its sub-Contractors or sub-suppliers
 - (d) earthquake, flood, fire or other natural physical disasters except to the extent that any such disaster is caused by, or its effects contributed to by, the party claiming force majeure.
- Force majeure shall not include a general industrial dispute or failure by approved sub-contractors.
- 22.2 If either party considers that any circumstance of Force Majeure has occurred which may affect materially the performance of its obligations then he shall forthwith notify the other in writing to that effect giving full details of the circumstances giving rise to the Force Majeure event.
- 22.3 Neither party shall be considered to be in default of its obligations under the Contract to the extent that it can establish that the performance of such obligations is prevented by any circumstance of Force Majeure which arises after the date of the Contract and which was not foreseeable at the date of the Contract.
- 22.4 If the performance of the obligations of either party under the Contract is so prevented by circumstances of Force Majeure and shall continue to be so prevented for a period less than 30 days then during that period the Contract shall be considered as suspended. Upon the ending of the Force Majeure event the Contractual obligations of the parties shall be reinstated with such reasonable modifications to take account of the consequences of the Force Majeure event as may be agreed between the parties or, in default of such agreement, as may be determined by an Expert appointed under this Agreement. Notwithstanding such suspension the Contractor shall use his reasonable endeavours to assist the Customer in the performance of the Contract.

- 22.5 If performance of the obligations of either party under the Contract is so prevented by circumstances of Force Majeure and shall continue to be so prevented for a period in excess of 30 days then the Contract shall be terminated by mutual consent and, subject to sub-Clause 22.6 below neither party shall be liable to the other as a result of such termination.
- 22.6 If the Contract is so terminated then subject to the transfer to the Customer of the benefit referred to in sub-Clause 22.7 below the Customer shall pay to the Contractor such reasonable sum as may be agreed between the parties or in default of agreement as may be determined by Expert Determination in accordance with this Agreement in respect of costs incurred and commitments already entered into by the Contractor at the date of the Force Majeure notice, less the amount of any payments already made to the Contractor at the date of the Force Majeure notice. If the amount of such advance payments made to the Contractor exceeds the sum due to the Contractor under this sub-Clause then the Contractor shall repay the balance to the Customer.
- 22.7 The Contractor shall transfer to the Customer the benefit of all work done by him or his approved sub-Contractors if any and sub-suppliers in the performance of the Contract up to the date of the Force Majeure notice, and if applicable it shall include the rights in any licensed and developed software and licensed firmware so far as the rights in the same have accrued to the Contractor prior to the Force Majeure notice or will do so on the payment under sub-Clause 22.6 above.

23 **SUB-CONTRACTING AND ASSIGNMENT**

- 23.1 Neither party shall assign the Contract or any of its rights or obligations thereunder without first having received the written approval of the other party (provided that the Customer may assign the benefit of the Contract to any of his associated or subsidiary companies or to any leasing or financing company of his choice).
- 23.2 The Contractor shall not sub-Contract the Contract or any part thereof without having first obtained the written permission of the Customer provided that this restriction shall not apply to sub-Contracts for materials or minor details or any part of the work to be performed or materials or equipment to be supplied for which the sub-Contractor is named in the Contract.
- 23.3 The Contractor shall be responsible for the acts, defaults and omissions of its sub-Contractors, whether approval has been given to their appointment under this Clause or not, as if they were his own and any consent given under this Clause shall not relieve the Contractor of any of his obligations under the Contract.

24 **WAIVER**

Except in respect of Clauses 17.2 and 17.3, Any failure by the Customer to insist at any time upon the performance of any of the terms, provisions or undertakings of the Contractor contained in the Contract or to exercise any rights thereunder shall not constitute or be construed as a waiver thereof or a relinquishment of the Customer's rights to require the future performance of any such term, provision or undertaking but the obligation of the Contractor with regard to the same shall continue in full force and effect

25 **NOTICES**

- 25.1 Any notice or other communication which either party is required by the Contract to serve on the other party shall be sufficiently served if sent to the other party at its address as specified in the Contract either
- (a) by hand; (b) by registered or first class post or recorded delivery or (c) by facsimile or electronic mail transmission confirmed by registered, first class post or recorded delivery within 24 hours of transmission.
- 25.2 Notices are deemed to have been served as follows: delivered by hand; on the day when they are actually received, sent by post or recorded delivery; two working days after posting, sent by facsimile or electronic mail; on the day of transmission if transmitted before 16.00 hours on the working day, but otherwise 09.00 hours on the following working day, provided in each case that the required confirmation is sent.

26 **NO THIRD PARTY RIGHTS**

Nothing in this Contract shall confer, nor is it intended to confer, any enforceable right on any third party under the Contracts (Rights of Third Parties) Act 1999 except as otherwise expressly so stated.

27 **EXPERT DETERMINATION**

Where under the Contract any issue is to be determined by an Expert then:

- (a) either party may give 7 days' notice in writing to the other requiring expert determination by an Expert to be agreed between the parties or nominated as referred to below
- (b) within 14 days of the receipt of such notice the parties shall have agreed on the choice of an Expert or in default of agreement the Expert shall be nominated by the President for the time being of the British Computer Society on the application of either party
- (c) the Expert shall act in accordance with such procedure as the Expert may in his sole discretion decide provided that he shall act impartially as between the parties
- (d) the Expert shall reach a decision within 56 days of his appointment, which decision shall except in the case of fraud be final and binding on the parties
- (e) the Expert shall sit as an expert and not as an arbitrator.

The Expert shall not be liable for anything done or omitted to be done in the discharge or purported discharge of his duties as an Expert unless the act or omission was done in bad faith.

28 **DISPUTE RESOLUTION**

28.1 If any dispute or difference whatsoever shall arise between the parties in connection with or arising out of the Contract, except any matter which under the Contract is to be referred to Expert Determination, either party may give the other 7 days notice to resolve the dispute or difference through Alternative Dispute Resolution (ADR) in accordance with the mediation procedure of the Centre for Dispute Resolution. If the parties fail to agree terms of settlement of their dispute or difference within 56 days of the receipt of such notice or the party to whom the notice was given refuses to participate in the ADR procedure then the matter shall be litigated, without prejudice to either party's right at any time to obtain immediate interim court relief.

28.2 The parties submit to the exclusive jurisdiction of the English courts in connection with any dispute hereunder.

29 **LAW**

Unless otherwise agreed in writing between the parties, the Contract shall be subject to and construed and interpreted in accordance with English Law.

APPENDIX

CLAUSE 19 LIABILITY AND INDEMNITY

Sub-Clause 19.3 (ii)

The liability of either party to the other under sub-clause 19.3 (ii) in respect of any one event or series of connected events shall not exceed

Sub-Clause 19.3 (iv)

The liability of either party to the other under sub-clause 19.3 (iv) in respect of any one event or series of connected events shall not exceed

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Since we are unable to know the circumstances in which these conditions are used, CIPS will not accept any liability for their usage. It is the responsibility of you, the user to decide whether they are suitable for your purpose and what modifications, if any, are required to make them suitable and for which purpose you might need to take professional advice.

*CIPS Model CS 1993
Revised November 2002*

NOTES FOR GUIDANCE

1. **INTRODUCTION**

The objective of the publication of Model Conditions of Contract for Facilities Management Contracts by the Chartered Institute of Purchasing and Supply is to provide a contractual basis upon which the Customer can contract out its computer operations.

(NB Facilities Management means the full range of available services, referred to by some contractors as 'Outsourcing').

As with any set of conditions, it is necessary both to understand the intention of the conditions and to apply them in their proper context.

For this reason, these Notes for Guidance are issued as an aid when using the Model Conditions but it must be understood that they do not form part of, or legally interpret the conditions in any way.

It is stressed that these are Model Conditions and can be added to or amended to suit the requirements of particular contracts by agreement between the parties concerned. However, in order to secure the advantages of uniformity, it is recommended that such alterations be kept to a minimum.

The Model Conditions aim to achieve a middle ground between buyer and seller being biased in favour of neither. Some buyers or sellers will prefer to have their own conditions drafted which are in their favour to a much greater extent.

Model Conditions have been published for the following. This list includes this set:-

Supply and Installation (Purchase) of Computer Equipment - CIPS Model P

Servicing (Maintenance) of Computer Equipment - CIPS Model M

Licence Agreement for the Use of Computer Software Products - CIPS Model L

Software Development - CIPS Model SD

Support and Maintenance of Bespoke Software - CIPS Model S(M)

Hire of Computer Staff - CIPS Model CS

Facilities Management of Computer Operations - CIPS Model FM

Procurement of IT Systems - CIPS Model IT

2. **INVITATIONS TO TENDER**

Specific reference to the Conditions or a copy of the Conditions should be included in all invitations to tender. If amendments or additions to the Conditions are required, these should be listed on a separate schedule.

Because the Service will be critical to the Customer's business, it is recommended that the Customer undertakes, or has undertaken on his behalf, a detailed appraisal of the management, financial and technical viability of potential contractors prior to inviting them to tender. It is also recommended that, to assist in this exercise, Customers study the Chartered Institute of Purchasing and Supply Briefing Pamphlet on 'Supplier Appraisal'.

3. **COMMENTS ON CLAUSES**

The buyer's attention is drawn to the following clauses to which, it is felt, particular notice should be given.

Clause 1.2

Contracts are usually:

- (a) by a formal Agreement incorporating the applicable conditions, specification, schedules, etc or:*

- (b) *without a formal Agreement, the tender and its acceptance, together with other relevant correspondence, about, for example, the method of charging, frequency of invoices etc, being relied upon as constituting the Contract between the parties.*

In the event that a contract of the format in (b) above is to be used, the Customer must ensure that his contract acceptance letter refers to all relevant documents and correspondence, ie the Invitation to Tender and other documents to be detailed, the conditions of contract, the Contractor's tender and any relevant additions to, deletions from or amendments to these documents. Whichever method is used, it is essential that reference to any other conditions, other than those agreed to be applicable to the Contract, is withdrawn in writing.

Once the contract is made, changes can only be incorporated by means of the formal Variations procedure - see Clause 11.

The specification is a particularly critical part of any Facilities Management contract and particular note should be taken of the comments under Clause 2.

Clause 1.7

It should be noted that for the purpose of these Model Conditions it is assumed that the Service will be provided on the Customer's site. However, Clause 6 covers the situation where it becomes preferable or necessary to undertake the Service at a Contractor or third party location.

Clause 2

A Facilities Management contract can be extremely complex and its success will be dependent on a clear definition of the Service to be provided including the response times, system-up-time, time of batch delivery etc required which must be realistic in relation to the needs of the Customer and the capability of the hardware and software. It is recommended therefore that, if the Customer does not have an experienced IT Manager to undertake this task, it seeks expert advice in defining the Service. It will usually be appropriate to instruct solicitors to draft or customise a facilities management contract as few will be as simple as this Model Form and their provisions differ widely from agreement to agreement. Notwithstanding this it was thought helpful to provide a short model example from which users can work with their lawyers.

The Model Conditions make a number of references to terms, conditions and other provisions which are detailed or specified 'in the Contract'. It is important that the Customer is aware of these references which must be included in the specification or other tender or contract documents. These references include:

- (i) *Clause 2.1 The Commencement Date and period of contract*
- (ii) *Clause 2.2 Definition of the Service*
- (iii) *Clause 2.3 Any additional terms and conditions relating to the provision of the Service*
- (iv) *Clause 4.1 Terms and conditions applicable to access to site for the Contractor, its employees and other invitees*
- (v) *Clause 4.2 List of services supplied free to the contractor*
- (vi) *Clause 6.1 Terms and conditions applicable to access to and use of the Customer Computer Equipment by the Contractor or its employees*
- (vii) *Clause 6.3 Arrangements between the parties concerning payment and other obligations due to third parties who have a legal interest in the Customer Computer Equipment*
- (viii) *Clause 7.3 Terms and conditions relating to the Contractor's use of the Software for the provision of the Service and other use*
- (ix) *Clause 9.1 List with quantities of Standard Consumables*
- (x) *Clause 10.2 Factors and indices for annual adjustment of Service Charge*
- (xi) *Clause 13.1 Frequency of performance review meetings*
- (xii) *Clause 18.1 List of component parts of the Service which are subject to Liquidated Damages with associated preestimates of loss.*
- (xiii) *Clause 19.3(ii) Limit of Liability to be stated in Appendix*

Clause 3

Where the Contractor is providing a Facilities Management service to the Customer, consideration must be given to the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE). It follows that the decision on whether or not these Regulations apply will be a question of fact, not of choice. The regulations protect employees on the 'transfer of an undertaking' such as sale of a business. They will usually apply to facilities management and outsourcing contracts as well even though all that may be transferred is a contract and perhaps ownership of some equipment.

There is currently uncertainty in the interpretation of the Regulations and it is important that, because of the cost differential to the Contractor, and therefore the price to the Customer, the tender document includes a clear statement of whether the Customer believes that the Regulations do or do not apply. It is recommended that the Customer seeks the advice of an employment lawyer and the Contractor should also be encouraged to do so.

Often the Contractor will be required to take on employees of the Customer. They must be employed on the same terms and conditions of employment as under their contracts with the Customer, even if more favourable than the Contractor's standard conditions because of the effect of TUPE. An alternative clause - Option 2 - is given below from the previous version of this Model Form, to be used where the parties are sure TUPE will not apply. Both should take legal advice to this effect before using any such clause. As the latest case law has held that transfer of one member of a cleaning workforce only invoked TUPE it is probably safer to assume TUPE will apply.

3. THE EMPLOYEES (TUPE DOES NOT APPLY) (OPTION 2)

- 3.1 The parties acknowledge that the Transfer of Undertakings (Protection of Employment) Regulations 1981 ('the Transfer Regulations') do not apply to the transaction the subject of the Contract.
- 3.2 The Customer shall take all action necessary to enable the Employees to take up the Contractor's offers of employment with effect from the Commencement Date, including in respect of those Employees who accept the Contractor's offers of employment, without derogation from the generality of the foregoing, the waiver of notice periods, the release from contracts of employment, the payment of all sums due and, upon request by those Employees, the transfer to the Contractor or its nominee of the actuarially calculated values of the interests of those Employees in the Customer's pension scheme.
- 3.3 The Employees shall be deemed to have the same period of continuous service with the Contractor as they had with the Customer for all statutory purposes except for redundancy where the Employees have received a redundancy payment by reason of the Employees having ceased to be employed by the Customer pursuant to a notice of termination given by the Customer prior to the Commencement Date.
- 3.4 The Contractor shall indemnify and hold harmless the Customer against all costs, claims, liabilities and expenses arising out of or in connection with the employment of the Employees by the Contractor on and after the Commencement Date, including but not limited to breach of statutory duty, any claim for damages for breach of contract and/or for compensation for unfair or wrongful dismissal or redundancy.
- 3.5 The Customer shall indemnify and hold harmless the Contractor against all costs, claims, liabilities and expenses arising out of or in connection with the employment of the Employees by the Customer prior to the Commencement Date, including but not limited to breach of statutory duty, any claim for damages for breach of contract and/or for compensation for unfair or wrongful dismissal or redundancy arising from any of the Employees having ceased for any reason to be employed by the Customer or ceasing to be employed by the Customer pursuant to a notice of termination given by the Customer prior to the Commencement Date.
- 3.6 The Contractor shall be entitled to use the work of the Employees who accept the Contractor's offers of employment for the purpose of providing the Service to the Customer and for any other purposes whatsoever, provided that any use of such work otherwise than for the purpose of providing the Service shall not adversely affect the Service.
- 3.7 Any other terms and conditions applicable to the Employees detailed in the Contract shall additionally apply to the release by the Customer and the employment by the Contractor of the Employees.

- 3.8 If it is subsequently determined by a Court or other Tribunal of competent jurisdiction that the Transfer Regulations do apply to the transaction the subject of the Contract, the Customer shall indemnify and hold harmless the Contractor against any costs, claims, liabilities or expenses incurred by the Contractor in respect of redundancy, unfair dismissal or wrongful dismissal relating to employees, other than the Employees, of the Customer prior to the Commencement Date. The alternative clauses in the Model Conditions therefore include sub-clauses recognising that, notwithstanding pre-contract agreement between the parties, one or both parties could incur significant additional costs.

Clause 4

This clause allows the Contractor, its employees and other invitees access to the Premises by prior agreement and 'upon the terms and conditions specified in the Contract'. It is essential therefore that these terms and conditions are clearly stated in the tendering documentation. If the Contractor's occupation of the premises is to be subject to a Lease or Licence to Occupy, the draft Lease or Licence to Occupy should be included in the tendering documentation. In due course the agreed Lease or Licence can be attached to the Contract as a Schedule. However, care should be taken to ensure that any lease or Licence to Occupy does not create a 'business tenancy'.

The clause also provides for the Customer to have reasonable access to the Premises and all other locations relevant to the Service. This enables the Customer to undertake the Audit covered by Clause 5 and to ensure that the Premises, office equipment, etc are being maintained to an acceptable standard - see Clause 4.5.

Clause 5

This clause gives the Customer the right to audit the Contractor's performance of the Contract.

Clause 6

This clause gives the Contractor the right to:

- (a) use the Customer Computer Equipment for other purposes and,*
- (b) to relocate the Customer Computer Equipment provided that the use for other purposes and the relocation does not adversely affect the Service.*

It is important for the Customer to ensure that the provisions of this Clause do not adversely affect any Customer insurance policies.

Clause 7

Note that it is necessary for the Customer to License to the Contractor, prior to the Commencement Date, any Customer software necessary for the provision of the Service and assist the Contractor to obtain the necessary Licences for third party software currently in use to provide the Service.

It is therefore recommended that, prior to the invitation to tender, the Customer seeks agreement in principle from third party licensors to the transfer of licences to a contractor.

In practice this is a major legal issue. Some third party software suppliers will refuse to license the Contractor to use such Software. Others charge large fees. Some charge nominal fees. Astute Customers will have ensured when they entered into those software licences they included rights to permit a facilities management or outsourcing company to use the Software on their behalf. The notes to clause 7 of the Model Form L (Software Licensing) 2002 version recommends that in the licence Appendix the Customer be given such rights.

Clause 8

Again note that there is a duty on the Customer to assist the Contractor in obtaining third party contracts. These are Third Party Contracts as defined in Clause 1.12 (ie excluding those for software licences and the provision of Customer Computer Equipment).

A very important initial decision always has to be taken when facilities management contracts are entered into as to whether the Contractor will take an assignment of Third Party Contracts as provided in Clause 8. In many cases the Customer will not wish this to occur and instead to have the Contractor manage contracts on behalf of the Customer whilst those contracts remain in the name of the Customer. The advantages and disadvantages of each approach are set out below:-

<i>Contracts Assigned to Contractor (approach taken in clause 8)</i>	<i>Contracts Remain with Customer</i>
<i>Contractor is legally liable and takes risk of enforcing and complying with the Third Party Contracts for new Contractor</i>	<i>Easier appointment of Contractor and termination/transfer</i>
<i>Suppliers may refuse permission for assignment – clause 8 allows in its wording</i>	<i>Customer remains in control but also remains for the contractually liable</i>
<i>Contractor is given large amount of power</i>	<i>Software licences from the third party software suppliers still necessary and may be fees to pay</i>

Clause 10

This clause sets out the payment requirements and is based on the Service Charge being quarterly in advance. Customers should consider other payment profiles and select the one that best suits their operation.

Note also that the Clause provides for an annual review of the Service Charge. The Contract will set out the details of the factors which are relevant to any increase.

Most large facilities management contracts are drafted by lawyers representing each party. The buyer's lawyers would usually seek to include a detailed provision allowing the buyer access to the books and records of the Contractor to enable the Customer to see what profits the Contractor is making from the arrangement. Such 'open book accounting' is very common in facilities management contracts but is not included in the simple Model Form given here. Most Contractors are loathe to give Customers such access, but accept for big and valuable contracts it a process to which they must accede if they wish to win the tender.

Some Contractors may want a right to suspend the Service if payment is delayed and the Customer fails to rectify the situation. This right if included would be subject to the Contractor giving the Customer 14 days notice in writing of his intention so to do. It is not included in the Model Form as most Customers would regard this as risky given the reliance they may place on the provision of the Services which are outsourced.

No right to charge interest if invoices are paid late is included because few buyers would want such a clause. However the Contractor may be entitled to charge statutory interest and collection charges under the Late Payment of Commercial Debt (Interest) Act 1998 and subsequent legislation.

Clause 11

Note that changes to the Contract can only be made in accordance with the formal Variations procedure.

Clause 12

Note that the Customer must warrant that the Equipment and Software is suitable for performing that part of the Service operated by the Customer prior to the commencement of the contract. In many FM contracts the Contractor will undertake a pre-contract audit of the Customer's existing systems at its sites to ascertain the condition of such Equipment and Software pre-contract as this may have an impact on the prices quotes by the Contractor in its response to the Customer's invitation to tender.

Customers conversely may wish to remove clause 12 or reverse it to put the onus on the Contractor to ascertain the condition of the Equipment and Software, particularly where the Customer has paid for any pre-contract audit by the Contractor of such Equipment and Software.

Clause 13

In addition to the normal daily contact between the parties, this Clause provides for regular formal performance reviews to be attended by senior representatives of the parties who are empowered to make decisions.

Clause 15

If the Customer requires the Contractor to obtain a written confidentiality undertaking from its employees, subcontractors and/or agents engaged in the provision of the Service, the need for such an undertaking should be specified in the tender documents. This is an important Clause especially with any form of IT Contract. If confidential information is to be disclosed during the course of negotiations then a separate agreement covering this should be made and signed prior to the information being released.

The Contractor may as part of the services be handling personal data as defined by the Data Protection Act 1998. It will almost certainly require to have notified the Information Commissioner of its holding of that data. The Contractor may be processing data as a data processor on the Customer's behalf. The Contractor and Customer are required to comply with the Act under this clause 15. The Contractor under the Act should not export such personal data from the European Economic Area otherwise than in accordance with the eighth data protection principle. In some instances data subjects (those whose data is being handled) will need to consent to the passing of that data to the facilities management company. Careful checks on such data protection issues will be part of the due diligence legal process prior to the placing of the facilities management contract.

Clause 16

Note that unless otherwise agreed the intellectual property rights, patents etc in 'material or items produced by the Contractor for the purposes of providing the Service' will vest in the Customer. The Customer has paid for such work and may want a provision to this effect. However many Contractors will wish to reverse this provision. If the Contractor is to develop major software it is recommended that this is handled separately as a software development contract.

The clause also addresses vital software used by the Contractor in providing the Service and states that the Contractor will at market rates license the new contractor or the Customer to use such software. If this is not agreed by the Contractor then the Customer will need to ensure it chooses a new contractor which has adequate software to continue to perform the Service on an uninterrupted basis.

Clause 17

Note that in the event of a substantial, material or persistent breach of contract, notice of termination must be given within 3 months of the breach and must specify an effective date for termination not more than 6 months from the date of the notice.

In the event of insolvency, liquidation, etc of either party, the other party has the right to terminate forthwith by written notice.

It is emphasised that, in the event of termination for any other reason, the parties are required to give at least 6 months notice expiring on the end date of the contract period or any anniversary of that date. Many Customers will want a much longer commitment from the Contractor e.g. 5 years. The agreement proposes a one year minimum term. A termination clause such as clause 17 is likely to be heavily customised by specialist IT lawyers in practice for valuable/important FM agreements and would include considerable detail about termination and handover to a new contractor so ensure a smooth transfer.

Some Contractors will insist that early termination by the Customer should trigger a liquidated damages payment by the Customer to the Contractor of an amount similar to any expenditure the Contractor will have had to incur in taking on the contract. This may include staff and equipment costs. It would not be unusual for it to be several hundred thousand pounds for big FM contracts. No such provision is included in this simple model form as few Customers would want such a provision.

Note also that in the event of termination for whatever reason, the Contractor is required to give to the Customer all assistance that may be reasonably necessary to allow the Customer to maintain an unbroken computer service. The Customer will pay to the Contractor reasonable charges in respect of such assistance. Most details FM contracts contain very detailed provisions relating to this issue which are drafted on a case by case basis.

Clause 18

The parameters necessary for the liquidated damages formula must be set out in the Contract. In setting these parameters it must be remembered that the purpose of such a clause is not to make money but to provide an incentive to the Contractor to provide the agreed level of Service.

Liquidated damages must recognise that:

- (a) the Contractor must be at fault*
- (b) the amount of damages must be realistic in relation to the default and its effect on the level of Service and therefore must be a genuine pre-estimate of loss*
- (c) the parameters which trigger the damages must be clearly defined and understood by both parties.*

It is industry practice to limit the aggregate amount of liquidated damages to a percentage of the revenue/price for the period of the Service during which the liability for liquidated damages arose. Liquidated damages are a convenience mechanism to allow the Customer quick and easy redress, but as a convenience mechanism they have their limitations.

In formulating the list of component parts of the Service to be subject to liquidated damages, it is recommended that damages are confined to those elements that can be clearly monitored, for example, response times, system up-time, time of batch delivery, etc.

Note that all Contractor failures, other than those subject to liquidated damages, may be the subject of claims for general damages, subject to any exclusions and limitations of liability in Clause 19, to the extent such exclusions are upheld by a court under the Unfair Contract Terms Act 1977..

If the sum for liquidated damages is not a genuine pre-estimate of the Customer's loss arising from the period of delay then the courts under common law can declare the clause void and thus unenforceable as it is a penalty provision which supercedes the court's powers to assess damages.

Clause 19

This is a model clause and may need to be amended to suit the Customer's own insurance policies and requirement. If so, such changes must be incorporated in the tendering documentation. It excludes either party's liability to the other for consequential loss. Many Customers may seek not

to exclude the Contractor's liability in this way, although most Contractors would insist on a provision to this effect. The clause also limits either party's liability to the other to a level to be set out in the Appendix but accepts each party's liability to the other for damage to property and persons. Such liability cannot be excluded under the Unfair Contract Terms Act 1977 in any event. Many contractors will want to exclude terms implied by law such as under the Supply of Goods and Services act 1982 although the model form does not do so. In standard form contracts such exclusions and limitations of liability as there are in clause 19 will only be valid where 'reasonable'.

Clause 21

This is a fairly standard publicity clause but becomes more important if the contract is subject to the EC Procurement Directives, where publicity must be confined to the contract information published in the Official Journal of the European Community and not published prior to the date of despatch of the required information to the Official Journal.

Clause 22

Note the requirement that, if a party fails to perform its obligations as a result of circumstances beyond its control, it must notify the other party in writing as soon as the event has occurred of the circumstances which have resulted, or will or may result in a failure to perform. To obviate as many potential delays as possible, the tendering document should require the Contractor to establish effective disaster recovery procedures. These should be included in the Customer audit covered by Clause 5.

The Clause is longer than the previous CIPS versions. However it is essential to define Force Majeure, to state what is to happen if an event of Force Majeure occurs and how the rights and obligations of the parties are to be affected. Force majeure is defined restrictively and it is for the Contractor to establish that the event prevents him from performing the Contract. If necessary other events could be included but it is strongly suggested that 'beyond the Contractor's control' should never be used it is too broad a term. Some Contractors like to include strikes and industrial disputes as force majeure but most Customers would dispute such categorisation.

There is provided an initial period of suspension; the period could be lengthened if considered appropriate. If the force majeure event is then past the parties' rights are adjusted. It should not be left to agreement of the parties without a third party reference as otherwise the obligation is unenforceable. If the event continues then the Contract is terminated by mutual consent; the supplier is then paid for the work he has done provided that the purchaser is given the benefit of this.

Clause 25

Notices - Notice may be provided by email and indeed fax under this clause as long as it is confirmed on paper as provided in this provision.

Clause 27

Expert Determination - This Clause is a suggestion to overcome the problem that there are Clauses under the CIPS Contract forms where the parties are required to agree on some issue e.g. Force Majeure, Training, Maintenance. Unless there is provision for a third party to decide should the parties not agree, then such a Clause is not enforceable under English law. The name of a suitable nominating body should be included e.g. the British Academy of Experts or the British Computer Society in the case of an IT Contract (as here). The period of 56 days is a maximum and the parties may want to see a shorter period included.

Clause 28

Dispute Resolution - The Agreement provides for preliminary non-binding mediation, failing which disputes go to court. Most UK companies and their advisers agree that court litigation is cheaper than formal arbitration under the Arbitration Act. However arbitration is confidential so a considered judgment must be made in each case. if the contract does not specify

arbitration then disputes go to court and it is best in any event to specify which country's courts have jurisdiction (here English courts are chosen) and in clause 40 which country's laws apply to the contract (whether arbitration or litigation are chosen).

If arbitration is preferred then the following should be substituted:-

DISPUTE RESOLUTION ALTERNATIVE

1. If any dispute or difference whatsoever shall arise between the parties in connection with or arising out of the Contract, except any matter which under the Contract is to be referred to Expert Determination, either party may give the other 7 days notice to resolve the dispute or difference through Alternative Dispute Resolution (ADR) in accordance with the mediation procedure of the Centre for Dispute Resolution. If the parties fail to agree terms of settlement of their dispute or difference within 56 days of the receipt of such notice or the party to whom the notice was given refuses to participate in the ADR procedure then the matter shall be referred to Arbitration in accordance with sub-Clause 2.
2. Subject to sub-Clause 3 below if any dispute or difference which may arise between the parties in connection with or arising out of the Contract is referred to ADR mediation, but is not so settled as specified in sub-Clause 1, then either party shall give notice to the other and such dispute or difference shall be referred to Arbitration. The parties shall agree on the appointment of a single arbitrator within 14 days after the date of such notice or in default of agreement the arbitrator shall be nominated on the application of either party by the President for the time being of the Chartered Institute of Arbitrators. The Arbitration shall be conducted in accordance with the then current Arbitration Rules as published by the Chartered Institute of Arbitrators and in accordance with the Arbitration Act 1986.
3. There are excluded from Arbitration any proceedings brought by one party against the other which arise out of the failure by that other party to comply with the provisions of any binding agreement setting out the terms upon which the dispute or difference was settled as a result of or following from the ADR mediation procedure referred to in sub- Clause 1 above.'

This alternative Clause provides for a two-stage process of dispute resolution. The first stage is ADR mediation under the auspices of the CEDR. If in a defined time this is not successful then the dispute is referred to arbitration under the rules of the Institute of Arbitrators.

The only exception to the initial stage of ADR is if the Contract specifically provides for Expert Determination to resolve a specific issue. This is also the case with the started litigation clause in the Model Form. Sub-paragraph 3 is included to deal with the problem that if the Contract contains an arbitration Clause then all disputes must go to arbitration which would prevent one party from going to court, unless the other party agreed or did not object. Immediate reference to either the courts or arbitration is contrary to modern purchasing practice and indeed the Civil Procedure Rules 1998, so the first step should be to ADR.

One view is that arbitration under the 1996 Act is more flexible and retains the advantage of privacy as opposed to the courts. It is to be preferred generally therefore to the courts.

Clause 29

Law - If other than English law is to apply (eg Scottish), this clause should be amended accordingly.

ENTIRE AGREEMENT:

No Clause has been included because usually an entire agreement Clause is to the benefit only of the Contractor. The purpose of such a Clause is to prevent either party from relying on statements made or documents issued pre-Contract which are not included in the Contract but which in some circumstances would be regarded in law as misrepresentations and to ensure no documents such as pre-contract letters, assurances, tenders, specifications etc are part of the Agreement. It is more likely in practice that such statements will be made or documents issued by the Customer in the course of trying to conclude the sale.

It therefore has the effect of preventing the Customer from relying on these in any action for misrepresentation. If the Customer however wants important documents such as its state-ments of requirements to be part of the contract rather than relying on the absence of the entire agreement the Customer must incorporate such documents by express reference in the contract. In addition pre-contract warranties should ideally also be expressly stated in the Contract.

Last revised by Susan Singleton, Singletons Solicitors, (www.singlelaw.com) who asserts her right to be identified as author pursuant to the Copyright, Designs and Patents Act 1988.

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