

Schedule 16

Market Testing Procedure

A. Introduction

In each part of this Schedule 16 the following expressions (in addition to those specified in Schedule 1 (*Definitions and Interpretation*)) shall, save where the context or the express provisions of this Agreement otherwise requires or admits, have the following meanings:

Associated Entity means:

- (a) an Associate of any of the Service Provider, the FM Contractor, the Services Contractor, the Construction Contractor or the Shareholders;
- (b) any partner in any partnership or any person who participates in any profit sharing or joint purse arrangement, in each case to which any of the Service Provider, the FM Contractor, the Services Contractor, the Construction Contractor, the Shareholders or any person mentioned in paragraph (a) is also a party;
- (c) any shareholder, director, officer or employee of any of the persons referred to in paragraphs (a) and (b) or any of those persons' spouses, children, step-children or partners; or
- (d) any body corporate of which any person referred to in (c) above is a shareholder, director, officer or employee

Compliant Tender means a tender received from a Tenderer which complies with the Tender Requirements

Draft Proposal has the meaning given to it in paragraph 4.1 (*Market Testing Proposal*) of this Schedule 16

Excluded Person means the Service Provider, any Associated Entity, any sub-contractor of an Associated Entity or any Associate of their respective sub-contractors

Market Testing means the process described in this Schedule 16 and the term **Market Tested** shall be construed accordingly

Market Testing Meeting means a meeting convened in accordance with paragraph 2.1 (*Market Testing Programme*) of this Schedule 16

Market Testing Proposal means the final version of the Draft Proposal, as agreed by the parties or as determined, in either case, in accordance with this Schedule 16

Preferred Tenderer(s) means, following the Market Testing of any Market Tested Service, any group of Market Tested Services or any part of any Market Tested Service (as the case may be), the Tenderer(s) selected to provide such services in accordance with the provisions of paragraph 7 (*Preferred Tenderers*) of this Schedule 16

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Prospective Tenderers means those persons who express an interest in being requested to prepare and submit tenders for each Market Tested Service, group of Market Tested Services or any part of any Market Tested Service (as the case may be)

Relevant Employees means all of the employees of the Services Contractor who are engaged wholly or mainly in the provision of the Market Tested Services for which the Tenderers are tendering¹

Tenderers means those of the Prospective Tenderers selected to submit tenders in accordance with paragraph 5 (*Selection of Tenderers*) of this Schedule 16

Tender Requirements means the form and requirements of the tender documents to be sent to Tenderers as agreed or determined in accordance with the provisions of this Schedule 16

Tender Validity Period means the period within which tenders from Tenderers must be received if they are to be valid

TUPE Information means information relating to the terms and conditions, job title, age, length of service and benefits of the employees of the Services Contractor who are engaged wholly or mainly in the provision of the Market Tested Services

1 Market Testing Dates

- 1.1 The Market Testing of each Market Tested Service shall, notwithstanding any other provision of this Schedule 16 (including, without limitation, the participation of the Authority described in paragraph 2 (*Market Testing Programme*)), be the responsibility of the Service Provider and shall be carried out in accordance with this Schedule 16 so that the Preferred Tenderers shall commence provision of the relevant Market Tested Services on the relevant Market Testing Date.
- 1.2 To avoid doubt the Contract Management Service and the Estates Maintenance Service [*Authority to specify*] shall not be subject to Market Testing pursuant to this Schedule 16.

2 Market Testing Programme

At least [forty (40)] weeks² before each Market Testing Date, the parties shall meet together as often as may be necessary in respect of all Market Tested Services to be Market Tested on that date:

- (a) to review the Services Specification and the Service Delivery Plan for each Market Tested Service and, if required by the Authority, amend the relevant part of the Services Specification and/or the relevant Service Delivery Plan as appropriate. The Service Provider may only object to any change in the requirements of the Authority on the grounds referred to in paragraph 3.2(a) (*Authority Change*)

¹ DN - Authority to check defined term is compatible with clause 31 (*TUPE and Employment Matters*) and clause 32 (*Employment Obligations on Expiry/Termination*) used in employment clauses.

² This may need to change on a project specific basis.

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Notice) of Part 1 of the Change Procedure. Any such objection must be made by notice in writing to the Authority within ten (10) Business Days of the relevant Market Testing Meeting;

- (b) to discuss and seek to agree (subject to the provisions of paragraph 3 (*Grouping of Services*)) any grouping or groupings of Market Tested Services or any division of any Market Tested Service into separate parts which will optimise the opportunity for the Authority to obtain best value for money;
- (c) to discuss and seek to agree the appropriate media for advertising the Market Tested Services and identifying the Prospective Tenderers;³
- (d) to discuss and seek to agree the basis on which the Tenderers shall be selected by the Service Provider from among the Prospective Tenderers;
- (e) to discuss and seek to agree the Tender Requirements which shall be in sufficient detail to allow the Service Provider to determine the Preferred Tenderer and shall include, without limitation:
 - (i) a statement of the Tender Validity Period;
 - (ii) requirements in respect of the possible grouping or groupings of Market Tested Services and any division of any Market Tested Service into separate parts;
 - (iii) details of the tender evaluation criteria;
 - (iv) the terms and conditions under which the Market Tested Services will be contracted;
 - (v) in relation to the first Market Test, a statement that Tenderers shall (where the Transfer Regulations do not otherwise apply) be required to offer employment to all Relevant Employees on terms and conditions as favourable as those they enjoy with that Service Provider as if the Transfer Regulations do apply;
 - (vi) the Authority's requirements in relation to the following, which shall be decided (in the Authority's discretion) on the basis of its consideration of what represents best value for money for the Authority:
 - (A) the basis on which Tenderers are to be required to bid at the subsequent Market Test if the Transfer Regulations were not to apply at that time;
 - (B) whether (and on what terms) the then incumbent Service Provider would be given any protection by the Authority in the event that it was not awarded a contract following any

³ Authorities should promote the pan-European advertisement of the Market Tested Services both as good procurement practice and to promote genuine competition for the Market Testing exercise. Where relevant or appropriate, this may include advertisement in the Official Journal of the European Union.

subsequent Market Test for the relevant Service in relation to any liabilities reasonably incurred by such unsuccessful incumbent Service Provider in terminating the employment of any Relevant Employee that would not transfer to a successful Preferred Tenderer because the Transfer Regulations did not apply at that time;

- (vii) the TUPE Information which shall be provided by the Service Provider;
 - (viii) the information that Tenderers are required to provide;
 - (ix) an explanation of the requirement for Tenderers to comply with the provisions of clause 31 (*TUPE and Employment Matters*), clause 32 (*Employment Obligations on Expiry/Termination*) and clause 33 (*Pension Matters*) of this Agreement;
 - (x) how many tenders are required for the Market Testing to be valid; and
 - (xi) whether or not an independent tender manager needs to be appointed by the Service Provider to manage the tender process.
- 2.2 The time, place and agenda for the first Market Testing Meeting shall be advised by the Service Provider to the Authority at least one (1) month in advance of the meeting. Thereafter, each subsequent meeting shall be convened on not less than ten (10) Business Days' notice (identifying the agenda items to be discussed at the meeting) provided that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances.
- 2.3 To avoid doubt, any tender evaluation criteria agreed between the Service Provider and the Authority and made available to the Tenderers as part of the Tender Requirements must be objective and impartial.

3 Grouping of Services

- 3.1 Unless the Service Provider can demonstrate to the Authority that it will optimise its ability to obtain best value for money for the Authority if the Market Tested Services are tendered separately or in particular groupings, or if any Market Tested Service is divided into separate parts, the grouping of any Market Tested Services shall be left to the discretion of Tenderers on the basis that the Tender Requirements shall specify that:
- (a) Tenderers may submit tenders for all or any of the Market Tested Services; and
 - (b) where a Tenderer submits a tender for a group or groups of Market Tested Services, it may be required to provide all or any of the Services in such group or groups and shall, in any event, provide separate pricing for each Service in such group or groups.

4 Market Testing Proposal

- 4.1 Notwithstanding any failure of the parties to agree any matter referred to in paragraph 2.1, the Service Provider shall prepare and deliver to the Authority no later than ten (10)

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months before the relevant Market Testing Date a draft proposal for the Market Testing (the **Draft Proposal**) describing in detail the Service Provider's proposals for the Market Testing of each Market Tested Service. The Market Testing Proposal shall describe all of the matters referred to in, and agreed pursuant to, paragraph 2.1 (Market Testing Programme) and, if appropriate, the form of contract which the Preferred Tenderer will be required to accept.

- 4.2 The Service Provider shall procure that, in respect of any Market Testing, the existing Services Contractor conducts its business and provides information for inclusion in the Tender Requirements to allow:
- (a) the consequences of the Transfer Regulations or compliance with the requirements relating to employees referred to in paragraph 2.1(e) (*Market Testing Proposal*) above on any change of Service Provider to be assessed; and
 - (b) so far as practicable, the cost of such change to the Authority to be minimised.
- 4.3 If the Service Provider and the Authority are unable to agree on any matter relating to the Draft Proposal within ♦ Business Days of the Authority's receipt of the Draft Proposal, either party may refer the matter for resolution in accordance with the Dispute Resolution Procedure.
- 4.4 It shall be a principle of the Market Testing Proposal that, unless otherwise agreed by the parties, the allocation of risk to the Preferred Tenderer, if appointed to act as a Services Contractor, shall not be materially greater than such allocation to the Services Contractor whom the Preferred Tenderer is to replace.
- 4.5 The Services Specification, Tender Requirements and form of contracts set out in the Market Testing Proposal shall be used for the Market Testing.⁴

5 Selection of Tenderers

- 5.1 The Service Provider shall be responsible for compiling the list of Prospective Tenderers.
- 5.2 The Service Provider shall be responsible for selecting the Tenderers from the list of Prospective Tenderers on the basis of the following criteria:
- (a) the financial standing of the Prospective Tenderers; and
 - (b) the technical, managerial and other relevant experience and ability of the Prospective Tenderers (taking into account any relevant customer references).
- 5.3 The Authority shall have a right to object to the selection of any person as a Prospective Tenderer if such person does not (or could not reasonably be considered to) comply with any of the criteria referred to in paragraph 5.2.

⁴ Authority to amend as appropriate to include reference to any other relevant items (such as performance standards etc) on a project specific basis.

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- 5.4 To avoid doubt, an Excluded Person shall not be disqualified from selection as a Tenderer merely by virtue of the existence of the contractual relationship reflected in the Project Documents, subject to:
- (a) compliance with all Legislation; and
 - (b) the establishment of, and compliance with, arrangements reasonably satisfactory to the Authority to avoid any conflict of interest or unfair advantage. Failure by the Service Provider to comply with any such arrangements shall automatically lead to the disqualification of the Excluded Person and the provisions of paragraph 11 (*Indemnities*) shall apply.
- 5.5 The Authority shall, in its absolute discretion, have the right to veto the selection of any person as a Tenderer on the grounds that the Prospective Tenderer has committed a Prohibited Act.
- 5.6 The Service Provider shall (after consultation with the Authority) provide any Prospective Tenderer which is unsuccessful in being selected as a Tenderer with an appropriate explanation of the reasons behind its non-selection, if so requested by the person in question.
- 5.7 Where, in respect of any Market Tested Service or group of Market Tested Services or any part of any Market Tested Service, there is only one Prospective Tenderer (or the Service Provider intends to select only one of the Prospective Tenderers as Tenderer), the Service Provider shall not be entitled to proceed with the Market Testing of the same without the prior written consent of the Authority.

6 Tendering Process

- 6.1 The Service Provider shall be responsible for managing and co-ordinating the Market Testing in an efficient and fair manner in accordance with the Market Testing Proposal (and in particular, but without limitation, the Tender Requirements) and shall procure that only Tenderers selected in accordance with this Schedule 16 are invited to submit tenders. The Service Provider shall ensure that the principle of equality of information to, and treatment of, Tenderers shall apply at all times.
- 6.2 The Service Provider shall send all necessary documents and information to Tenderers (including, without limitation, the Tender Requirements) in a timely manner.
- 6.3 Tenders must be assessed for compliance with the Tender Requirements.
- 6.4 The Service Provider shall bear all costs, fees and expenses associated with Market Testing.

7 Preferred Tenderers

- 7.1 Following expiry of the Tender Validity Period, the Service Provider shall (subject to the provisions of this paragraph 7) determine which Compliant Tender represents the best value for money for the Authority. Without affecting the generality of the foregoing the Service Provider shall, when evaluating the submissions of Tenderers, ensure that

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the existing Services Contractor is not given an unfair competitive advantage because it does not have to make provision for Bulk Transfers.⁵

- 7.2 Immediately upon selecting the Preferred Tenderer(s) pursuant to in paragraph 7.1, the Service Provider shall supply to the Authority a copy of its tender evaluation, together with sufficient supporting information concerning the tender evaluation to enable the Authority to analyse and understand the basis for the Service Provider's determination.
- 7.3 If the Authority does not agree with the Service Provider's determination of the Preferred Tenderer(s), the Authority may, within fifteen (15) Business Days of being provided with the tender evaluation pursuant to paragraph 7.2, dispute such determination and, if the parties do not resolve such dispute within a further fifteen (15) Business Days, the dispute shall be referred for resolution in accordance with the Dispute Resolution Procedure.

8 Appointment

- 8.1 The Service Provider shall procure that the Preferred Tenderer(s) (as agreed or determined in accordance with paragraph 7) (*Preferred Tenderers*) are appointed to provide the relevant Market Tested Service or group of Market Tested Services or individual parts of any Market Tested Service (as the case may be) on the basis set out in their Compliant Tender.
- 8.2 Without prejudice to paragraph 5.7 (*Selection of Tenderers*), where the Service Provider believes that only one Compliant Tender is likely to be submitted, or where only one Compliant Tender is in fact submitted, the Service Provider shall not be entitled to proceed further with the Market Testing or (as the case may be) to appoint a Preferred Tenderer without the prior written approval of the Authority.⁶
- 8.3 The Service Provider shall (after consultation with the Authority) provide any Tenderer which is unsuccessful in being selected as a Preferred Tenderer with an appropriate explanation of the reasons behind its non-selection, if so requested by the party in question.

9 Service Payment Adjustments

- 9.1 On the appointment of any Preferred Tenderer, the Service Payment shall be altered in accordance with Part 4 of Schedule 17 (*Change Procedures*).

⁵ The important thing is to ensure that the incumbent provider is not given an unfair advantage. If a rival tenderer includes additional pricing provisions for bulk transfers that are, in the Authority's/the Service Provider's reasonable opinion, excessively cautious, this paragraph does not mean that the whole of the provision has to be disregarded for the purposes of evaluation. Otherwise there is a risk of the incumbent being unfairly disadvantaged.

⁶ If only one Compliant Tender is submitted in respect of some or all of the Market Tested Services, the Authority is at risk of being obliged to pay an uncompetitive price for that part of the Services. Accordingly, the Model Contract provides a right for the Authority to prevent the Service Provider appointing a single bidder and passing those costs onto the Authority through the Services Payment without its approval. The risks of this occurring in practice to be remote and capable of assessment by the Service Provider (unless there are project specific reasons to the contrary) which should enable the Service Provider to accept the inclusion of a provision of this nature. If the parties wish to specify what would happen in those circumstances, the 4P's should be consulted.

- 9.2 Any alteration to the Service Payment shall take effect from the Market Testing Date to which the Market Testing related or (if later) the date on which the Preferred Tenderer begins to perform the relevant Market Tested Services.

10 Information Requirements

Without prejudice to any of the Service Provider's general obligations under this Agreement, including without limitation pursuant to clause 65.4 (*Audit*) of this Agreement, Schedule 19 (*Record Provisions*) and the other provisions of this Schedule 16, the Service Provider shall:

- (a) maintain a full record and audit trail of each Market Testing and make all such records (including details of all tenders received) available for inspection by the Authority and its authorised representatives (including, without limitation, the District Auditor and the Audit Commission on reasonable notice from the Authority;
- (b) provide to the Authority, in a comprehensive and accurate manner, all information necessary to enable the Authority to review and assess all matters relating to the Market Testing;
- (c) certify to the Authority within twenty (20) Business Days of expiry of the Tender Validity Period that:
 - (i) no Excluded Person intends to or will obtain any direct or indirect financial or other benefit from such appointment (other than the benefit of the contract itself);
 - (ii) no Excluded Person has colluded in connection with the Market Testing; and
 - (iii) there has been full compliance with all requirements relating to ensuring equality of information provided to, and treatment of, Tenderers.

11 Indemnities⁷

The Service Provider shall indemnify and keep the Authority fully indemnified at all times for (and against) all claims, demands or notices which may be brought or alleged or threatened against the Authority and from and against all Direct Losses or fines which the Authority may suffer or incur in relation to any such claims, demands or notices which occur as a result of or in connection with:

- 11.1 the implementation of this Schedule 16;
- 11.2 any breach of the provisions of this Schedule 16; and
- 11.3 any claim made by any person (including any Prospective Tenderer, Tenderer or Preferred Tenderer) that is not awarded a contract,

⁷ It should be an assumption of any Market Testing Exercise that the outgoing Services Contractor will provide the new Services Contractor, appointed pursuant to a Market Testing Exercise, with an equivalent indemnity.

save to the extent that any such breach or claim results from any failure of the Authority to comply with the express provisions of this Schedule 16.

12 Irregularity in Award of Contracts

Acceptance by the Service Provider

12.1 Where the Service Provider is required by this Agreement to carry out Market Testing, for the purposes of clause 54 (*Termination for Corrupt Gifts*) of the Agreement it shall be an additional Prohibited Act for the Service Provider or any Associated Entity (or anyone acting on its behalf) to:

- (a) accept or agree to accept any gift or consideration of any kind as an inducement or reward:
 - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of any sub-contracts relating to this Agreement; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to any sub-contract relating to this Agreement; or
- (b) enter into any sub-contract relating to this Agreement in connection with which commission has been paid or has been agreed to be paid unless, before the sub-contract is made, particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Authority and the Authority has consented to the same (in its absolute discretion),

and the provisions of clause 54 (*Termination for Corrupt Gifts*) of this Agreement (changed according to context) shall apply and be construed accordingly.

Offer by Tenderer

12.2 Where the Service Provider is required by this Agreement to carry out Market Testing and any Prospective Tenderer or Tenderer (or anyone acting on its or their behalf or any of its or their directors, officers or employees) offers or agrees to give to the Service Provider or any Associated Entity any gift or consideration of any kind as inducement or reward:

- (a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of any sub-contract relating to this Agreement; or
- (b) for showing or not showing favour or disfavour to any person in relation to any sub-contract relating to this Agreement,

the Authority may (without prejudice to any of its other rights) by notice to the Service Provider require the Service Provider to procure, as soon as practicable, the termination of that person's involvement in the Market Testing or, if discovered after the award of

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the relevant contract, the termination of the relevant sub-contract (and the provisions of clause 54 (*Termination for Corrupt Gifts*) shall apply and be construed accordingly).

- 12.3 The Service Provider shall notify the Authority of the occurrence (and details) of any Prohibited Act promptly on the Service Provider becoming aware of its occurrence.

13 Market Testing of Service Contracts and Sub-Contracts

- 13.1 The Authority in considering exercising its option under clause 51.5 (*Replacement of non performing Services Contractor*) (in circumstances where clause 51.5(b) applies) will require the Service Provider to carry out or procure the carrying out of a Market Testing of the Services Contract in line with this Schedule 16 save that the Service Payment shall not be adjusted following such Market Testing. The Service Provider shall be entitled to reflect the provisions of paragraph 13.2 in any Services Contract it enters into pursuant to this paragraph 13.
- 13.2 If, following the Market Testing carried out pursuant to paragraph 13.1, the Service Provider can demonstrate to the Authority's reasonable satisfaction that the circumstances contemplated in clause 51.5(b) (*Replacement of a non-performing Services Contractor*) of this Agreement are reasonably likely to recur (notwithstanding the exercise of Good Industry Practice and the good financial standing of the new Services Contractor), the parties shall negotiate in good faith such amendments to the Performance Standards (as defined in the Payment Mechanism) in respect of the relevant Service so as to make it fair and reasonable and to the extent that any such amendments reduce the risk profile in respect of that Service the Authority shall be entitled to a corresponding price reduction in respect of that reduced risk profile. In the absence of agreement on amendments to the Performance Standards and any corresponding price reduction the matter may be referred by either party for resolution in accordance with the Dispute Resolution Procedure.
- 13.3 If, following a Market Testing pursuant to paragraph 13.1, the Service Provider exceeds the relevant Service Failure Point threshold in respect of the same Service the Authority shall be entitled:
- (a) in respect of any Market Tested Service, to require the Service Provider to terminate the relevant Services Contract and if the Service Provider fails to do so within sixty (60) Business Days of being requested to do so, to terminate this Agreement; or
 - (b) in respect of any Service that is not a Market Tested Service, to take such steps as it considers to be appropriate (either itself or by engaging others to take such steps) to ensure performance of the relevant Service to the standards required by this Agreement (or as close as possible to those standards as the circumstances permit and, in any event, in accordance with Good Industry Practice) until such time as the Service Provider shall have demonstrated to the reasonable satisfaction of the Authority that it will perform (and is capable of performing) its obligations in respect of the relevant Service to the required standard.

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- 13.4 The Service Provider shall reimburse the Authority for all reasonable costs, losses, expenses or damages incurred by it in relation to taking the steps or engaging others to take the steps referred to in paragraph 13.3(b) and the Authority shall be entitled to deduct any such amount from any amount payable to the Service Provider under the provisions of this Agreement

