



Smart Meters Programme Schedule 5.3

(Escrow) (CSP South version)

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Amendment History		
Version	Date	Status
v.1	Signature Date	Execution copy

SCHEDULE 5.3
ESCROW

1. SOURCE CODE MATERIALS FOR SPECIALLY WRITTEN SOFTWARE

1.1 By no later than the relevant date(s) specified in the applicable Implementation Plan (the "**Original Source Code Delivery Date**"), or at such other times as the DCC may from time to time require, the Contractor shall deliver to the DCC a copy of the Source Code Materials relating to the Specially Written Software.

1.2 The Contractor shall deliver to the DCC an up-to-date copy of the Source Code Materials relating to the Specially Written Software:

- (a) by no later than each anniversary of the Original Source Code Delivery Date;
- (b) within thirty (30) days after the implementation of any material Modification relating to any of the Specially Written Software;
- (c) within thirty (30) days after the implementation of any material Change which involves a change to any of the Specially Written Software;
- (d) within ten (10) Working Days after the date of any notice of termination given by either party under this Agreement;
- (e) within thirty (30) days after the commencement of operational use of any Catalogue Service; and
- (f) on the date which is ninety (90) days prior to the expiry of the Term.

2. DEPOSITED SOFTWARE

2.1 By no later than the relevant date(s) specified in the applicable Implementation Plan (the "**Original Deposit Date**"), the Contractor shall deposit a copy of the Source Code Materials for the Deposited Software in escrow in the United Kingdom with NCC (or an alternative escrow agent approved by the DCC) (the "**Escrow Agent**") under one or more escrow agreements in a form to be agreed by the parties within thirty (30) days of the Effective Date (such agreement not to be unreasonably withheld or delayed) or such other form as may be agreed by the parties from time to time (the "**Escrow Agreements**"). Each Escrow Agreement shall reflect the principles set out in Appendix 1 of this Schedule 5.3.

2.2 The Contractor hereby grants to the DCC (or, in relation to any Source Code Materials relating to Third Party Software, shall procure that the owners or the authorised licensors of such Third Party Software grant to the DCC) a perpetual, royalty-free, irrevocable and non-exclusive licence to exercise all Intellectual Property Rights relating to the Source Code Materials accessed from escrow in accordance with the relevant Escrow Agreement (including the right to modify any source code comprised in the Source Code Materials) which are necessary for the DCC, or any of the entities referred to in paragraph 2.3, to Use the Deposited Software for the purposes of:

- (a) performing or receiving the benefit of the Services (or, if applicable, the Replacement Services);
 - (b) performing or receiving services which are similar or equivalent to the Services;
 - (c) integrating the Services (or, if applicable, the Replacement Services or any services which are similar or equivalent to the Services) with any other services provided pursuant to (or otherwise related to) the Smart Metering Programme;
 - (d) correcting defects and faults in the Deposited Software; and
 - (e) any other purposes envisaged by this Agreement.
- 2.3 The DCC may sub-licence its rights under paragraph 2.2 to:
- (a) any DCC Service Provider (including any replacements for such persons from time to time);
 - (b) any Replacement Contractor; and
 - (c) any other third party to the extent necessary for such person to provide any goods or services to the DCC, provided that the DCC has complied with its obligations under Clause 50 (Confidentiality).
- 2.4 The Contractor shall ensure that at all times the Source Code Materials placed in escrow under paragraph 2.1 are kept fully up-to-date and accurately reflect the version of the Deposited Software then in use (including any Modifications).
- 2.5 Without limiting the Contractor's obligations under paragraph 2.4, the Contractor shall update or replace the Source Code Materials placed in escrow under paragraph 2.1 so that it accurately reflects the version of the Deposited Software then in use (including any Modifications):
- (a) by no later than each anniversary of the Original Deposit Date;
 - (b) within thirty (30) days after the implementation of any material Modification relating to any of the Specially Written Software; and
 - (c) within thirty (30) days after the implementation of any material Change which involves a change to any aspect of the Deposited Software.
- 2.6 If any Escrow Agreement expires or is terminated for any reason, the Contractor shall procure that, within ten (10) Working Days after the date of expiry or termination of the Escrow Agreement, the Source Code Materials referred to in paragraph 2.1 are placed in escrow under an alternative escrow agreement acceptable to the DCC (acting reasonably) which complies with the requirements of paragraph 2.1.
- 2.7 The Contractor must pay all amounts payable under or in relation to the Escrow Agreements (or an alternative escrow agreement entered into pursuant to paragraph 2.6).

- 2.8 Where the Contractor is unable to procure compliance with the provisions of this paragraph 2 in respect of any Third Party Software, it shall:
- (a) provide the DCC with written evidence of its inability to comply with such provisions; and
 - (b) propose a suitable alternative to escrow that affords the DCC the nearest equivalent protection in relation to access to the relevant Source Code Materials.

The Contractor shall only be excused from its obligations under any of paragraphs 2.1 to 2.7 to the extent that the DCC accepts (in its sole discretion) any alternative proposal in accordance with this paragraph 2.8.

3. VERIFICATION OF DEPOSITED SOFTWARE

3.1 At any time after the Original Deposit Date, the DCC may engage an appropriately qualified and independent third party (the "**Third Party Tester**"), which may (or may not) be the Escrow Agent to conduct such verification, analysis and testing of the Source Code Materials for the Deposited Software as the DCC requires from time to time, including to verify that:

- (a) the Source Code Materials are complete and comply with the requirements of this Agreement regarding the scope and content of such Source Code Materials;
- (b) the Source Code Materials contain all of the Software and other information and materials that would be necessary for the DCC, or any of the entities referred to in paragraph 2.3, to Use the Deposited Software for the purposes referred to in paragraph 2.2, including that:
 - (i) any compressed files included within the Source Code Materials can be decompressed;
 - (ii) any encrypted files included within the Source Code Materials can be read; and
 - (iii) any password-protected files within the Source Code Materials can be accessed;
- (c) the Source Code Materials are capable of being used for the purposes referred to in paragraph 2.2;
- (d) the Source Code Materials do not contain any Malicious Software; and
- (e) the Source Code Materials otherwise comply with the requirements of this Agreement (including this Schedule 5.3),

(the "**Verification Exercise**").

3.2 Except as set out in paragraph 3.6, the DCC shall give the Contractor at least twenty (20) Working Days' prior written notice of any Verification Exercise under this paragraph 3.

- 3.3 The Contractor:
- (a) shall, where the Third Party Tester is not the Escrow Agent, provide (or procure that the Escrow Agent provides) the Third Party Tester with a copy of the then current Source Code Materials for the Deposited Software within five (5) Working Days after receipt of the DCC's notice under paragraph 3.2;
 - (b) authorises the Third Party Tester to use such Source Code Materials for the purposes of any Verification Exercise (provided that the DCC has complied with its obligations under Clause 50 (Confidentiality)); and
 - (c) shall provide all reasonable assistance required by the DCC and/or the Third Party Tester in relation to the conduct of any Verification Exercise.
- 3.4 The DCC shall require the Third Party Tester to provide a written report to the DCC and the Contractor detailing the results of any Verification Exercise within twenty (20) Working Days after the completion of the Verification Exercise.
- 3.5 If any Verification Exercise demonstrates that the Source Code Materials for the Deposited Software do not comply with the requirements of paragraph 3.1, the Contractor shall immediately:
- (a) replace or update such Source Code Materials so that it does comply with the requirements of paragraph 3.1; and
 - (b) notify the DCC when such replacement or updated Source Code Materials have been deposited in escrow in accordance with the Escrow Agreement.
- 3.6 Where paragraph 3.5 applies, the DCC may conduct a repeated Verification Exercise on the replacement or updated Source Code Materials (and each party shall comply with their respective obligations under this paragraph 3 in respect of any repeated Verification Exercise). At the election of the DCC, the process in this paragraph 3 may then be repeated until the results of the Verification Exercise indicate that the Source Code Materials for the Deposited Software comply with the requirements of paragraph 3.1. For the avoidance of doubt, paragraph 3.2 shall not apply to any repeated Verification Exercises under this paragraph 3.6.
- 3.7 The fees payable to the Third Party Tester in relation to the conduct of any Verification Exercise ("**Verification Fees**") shall be paid by the DCC except for:
- (a) any Verification Exercise which demonstrates that the Source Code Materials for the Deposited Software do not comply with the requirements of paragraph 3.1; or
 - (b) any repeated Verification Exercise under paragraph 3.6.

The Verification Fees in relation to any Verification Exercise referred to in paragraph 3.7(a) and/or 3.7(b) shall be paid by the Contractor.

4. **CONTRACTOR WARRANTIES**

The Contractor represents and warrants that it has, and will continue to have, all rights that are necessary to grant the licences set out in this Schedule 5.3, and otherwise to comply with its obligations under this Schedule 5.3.

5. **SUCCESSORS**

5.1 The Contractor acknowledges and agrees that if this Agreement is novated, assigned or otherwise transferred to any person (the "**Transferee**") in accordance with Clause 66.3, then:

(a) the licences granted by the Contractor under this Schedule 5.3, and the other rights of the DCC under this Schedule 5.3, shall automatically transfer to the Transferee on a royalty-free, payment-free and non-exclusive basis; and

(b) each Transferee shall be entitled, in perpetuity, to transfer such licences and rights to any person who is subsequently licensed to carry on the Authorised Activity.

5.2 If, for any reason, this Agreement is not novated, assigned or otherwise transferred to any person in accordance with Clause 66.3, the Contractor undertakes to grant equivalent licences and rights to those set out in this Schedule 5.3 to:

(a) each Successor Licensee; and

(b) any other person who is subsequently licensed to carry on the Authorised Activity,

to the extent necessary for each Successor Licensee (or any other person referred to in paragraph 5.2(b)) to exercise its functions under or pursuant to its licence to carry on the Authorised Activity.

Appendix 1 – Principles for the form of Escrow Agreement

1. The Escrow Agreements shall be consistent with the provisions of this Schedule 5.3 including with regards to responsibility for charges, delivery of updates to the Deposited Software and verification by Third Party Testers.
2. The Escrow Agreements shall include trigger events for the release of the Source Code Materials for the relevant Deposited Software to the DCC (or its Transferee or Successor Licensees, as appropriate) upon the occurrence of any event giving rise to:
 - (a) a termination right under this Agreement in accordance with Clause 60.1, 60.8.1 or 60.15; or
 - (b) the right to require the termination of any Sub-contract and/or remove any Sub-contractor in accordance with Clause 36.3.

For the avoidance of doubt, the trigger events under the Escrow Agreements shall apply to both termination of this Agreement in whole or in part.

3. The Escrow Agreements shall not entitle the Contractor to terminate the Escrow Agreement without DCC's agreement in writing unless it can evidence that this Agreement has been terminated in accordance with Clause 60.3, 60.8.3 or 60.12.2.
4. The Escrow Agreements shall not entitle the Escrow Agent to terminate the Escrow Agreement other than for non-payment of charges by the Contractor where the Escrow Agent has notified the DCC that such charges are overdue and afforded the DCC a reasonable opportunity to pay the charges on the Contractor's behalf (and recover such sums as damages from the Contractor under this Agreement). Where an Escrow Agreement is terminated by the Escrow Agent the Source Code Materials for the Deposited Software shall be released to the DCC (or its Transferee or Successor Licensees as appropriate).