



Smart Meters Programme Schedule 9.1

(TUPE) (CSP Central version)

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

**SCHEDULE 9.1
TUPE**

1. PURPOSE OF THIS SCHEDULE

This Schedule 9.1 sets out the parties' respective rights and obligations in relation to the application of the Employment Regulations to this Agreement.

2. APPLICATION OF THE EMPLOYMENT REGULATIONS ON THE COMMENCEMENT OF THIS AGREEMENT

2.1 The DCC and the Contractor agree that it is the intention of the parties that at the Effective Date and at all times during the Service Period, the Employment Regulations shall not apply in such a way so as to transfer the employment (or any associated or related liabilities) of any employees or former employees of the DCC, any DCC Service Provider, any DCC Service User or any DCC Service User Provider to the Contractor or any Contractor Person in connection with the commencement or provision of any DCC Service.

2.2 If any person who is or claims to be an employee or former employee of the DCC, any DCC Service Provider, any DCC Service User or any DCC Service User Provider claims or it is determined that his/her contract of employment and/or any liabilities in connection with, associated with or arising from his/her employment or its termination or cessation howsoever arising has been transferred from the DCC, any DCC Service Provider, any DCC Service User or any DCC Service User Provider (as applicable) to the Contractor or a Contractor Person pursuant to the Employment Regulations in connection with the commencement or provision of any DCC Service, or claims that his/her employment would have so transferred had he/she not resigned, then:

- (a) the Contractor will, within fourteen (14) Working Days of the earlier of the date on which:
 - (i) it becomes aware of that fact; or
 - (ii) a Contractor Person notifies the Contractor of that fact,give notice in writing to the DCC;
- (b) the DCC may (or may request that the DCC Service Provider, DCC Service User or DCC Service User Provider (as applicable) may) offer employment to such person within twenty-one (21) Working Days of the notification by the Contractor;
- (c) if such offer of employment is accepted, the Contractor or the relevant Contractor Person shall immediately release the person from his/her employment; and
- (d) if after that period has elapsed, no such offer of employment has been made or such offer has been made but not accepted, the Contractor or the relevant Contractor Person may within fourteen (14) Working Days give notice to terminate the employment of such person.

- 2.3 Subject to the Contractor and each relevant Contractor Person acting in the way set out in paragraph 2.2 or in such other way as may be agreed between the Contractor and the DCC and subject always to paragraph 2.4, the DCC will indemnify the Contractor and each Contractor Person against:
- (a) all Employee Liabilities arising out of such termination or otherwise arising out of the employment of such person by the Contractor or the relevant Contractor Person; and/or
 - (b) any direct employment costs (if any) associated with the employment of such person by the Contractor or the relevant Contractor Person up to the date of termination of such person's employment.
- 2.4 The indemnity in paragraph 2.3 above will not apply:
- (a) to any claim by any person in respect of whom the notification given to the DCC under paragraph 2.2(a) is received by the DCC more than six (6) months after the earlier of:
 - (i) the date on which such person claims or it is determined that his/her employment (or any associated liabilities) transferred to the Contractor or the Contractor Person (as applicable); or
 - (ii) the date on which the Contractor or the Contractor Person (as applicable) ought reasonably to have been aware of such claim or transfer; and/or
 - (b) if such person is neither re-employed by the DCC, DCC Service Provider, DCC Service User, or DCC Service User Provider (as applicable) nor dismissed given notice of termination by the Contractor or the relevant Contractor Person within the timescales set out in paragraph 2.2,
- in which case such person will be treated as having transferred to the Contractor or the relevant Contractor Person who shall be responsible for all liabilities arising in respect of any such person.
- 2.5 Further, and without prejudice to paragraph 2.4 above, the indemnity in paragraph 2.3 above will not apply to any claim for discrimination on the basis of any protected characteristic (as defined by the Equality Act 2010) in relation to any act or omission of the Contractor and/or any Contractor Person.
- 2.6 Following the Effective Date, the DCC and the Contractor may agree that a Foundation Contract or responsibility for any services provided thereunder is transferred, novated or otherwise assigned (whether in whole or in part) to the Contractor and/or subsequently subsumed in or replaced by the Services (each a "**Foundation Transfer**").
- 2.7 In the event that any person claims or it is held that his/her employment (or any associated or related liabilities in relation to his/her employment) has transferred to the Contractor as a result of a Foundation Transfer whether pursuant to the Employment Regulations or otherwise then the indemnities in this paragraph 2 shall not apply with respect to any such person.

2.8 For the avoidance of doubt, upon the expiry or termination (in whole or in part) of any Services provided by the Contractor pursuant to a Foundation Transfer, the Contractor's indemnity in paragraph 4 shall apply with respect to any person whose employment (or any associated or related liabilities) transferred to the Contractor pursuant to a Foundation Transfer.

3. **APPLICATION OF THE EMPLOYMENT REGULATIONS ON TERMINATION OR EXPIRY OF THIS AGREEMENT OR ANY SERVICES**

3.1 The Contractor agrees, subject to compliance with the Data Protection Legislation, that within twenty (20) Working Days of the earliest of:

- (a) receipt of the giving of notice of early termination of this Agreement or any part thereof; or
- (b) the date which is twelve (12) months before the end of the Termination Assistance Period; or
- (c) receipt of a written request of the DCC at any time (provided always that the DCC may not make more than one such request in any 12 month period outside the Termination Assistance Period),

it will (and it will ensure that its sub-contractors will) provide the Contractor's Staff List and the Staffing Information to the DCC or, at the direction of the DCC, to a Replacement Contractor and it will provide an updated Contractor's Staff List and Staffing Information to take account of any material changes to the same at such intervals as are reasonably requested by the DCC.

3.2 Subject to compliance with the Data Protection Legislation, the DCC shall be permitted to use and disclose the Contractor's Staff List and the Staffing Information for informing any tenderer or other prospective Replacement Contractor for any services which are substantially the same type of services (or any part thereof) as the Services, provided that the DCC imposes on such third party obligations of confidence that are no less onerous than the DCC has to the Contractor in relation to that information.

3.3 The Contractor warrants that, as at the date on which they are provided, the Contractor's Staff List and the Staffing Information will be true and accurate in all material respects.

4. **THE CONTRACTOR'S INDEMNITY**

4.1 The DCC and the Contractor agree that it is the intention of the parties that, upon the termination or expiry of:

- (a) this Agreement (whether in whole or in part);
- (b) any Service Period (whether in whole or in part); and/or
- (c) any Services (whether in whole or in part),

the Employment Regulations shall not apply in such a way so as to transfer the employment (or any associated or related liabilities) of any employees or

former employees of the Contractor or any Contractor Person to the DCC or any Replacement Contractor.

4.2 If any person who is or claims to be an employee or former employee of the Contractor or any Contractor Person claims or it is determined that his/her contract of employment and/or any liabilities in connection with, associated with or arising from his/her employment or its termination or cessation howsoever arising has been transferred from the Contractor or any Contractor Person (as applicable) to the DCC or the Replacement Contractor pursuant to the Employment Regulations or otherwise, or claims that his/her employment would have so transferred had he/she not resigned, then:

- (a) the DCC or the Replacement Contractor (as applicable) will, within seven (7) Working Days of becoming aware of that fact, give notice in writing to the Contractor;
- (b) the Contractor may (or may request that a Contractor Person) offer employment to such person within twenty-one (21) Working Days of the notification by the DCC or the Replacement Contractor (as applicable);
- (c) if such offer of employment is accepted, the DCC or the Replacement Contractor (as applicable) shall immediately release the person from his/her employment; and
- (d) if after that period has elapsed, no such offer of employment has been made or such offer has been made but not accepted, the DCC or the Replacement Contractor (as applicable) may within seven (7) Working Days give notice to terminate the employment of such person.

4.3 Subject to the DCC or the Replacement Contractor (as applicable) acting in the way set out in paragraph 4.2 or in such other way as may be agreed between the Contractor and the DCC and subject always to paragraph 4.4, the Contractor will indemnify the DCC and each Replacement Contractor against:

- (a) all Employee Liabilities arising out of such termination or otherwise arising out of the employment of such person by the DCC or the Replacement Contractor (as applicable); and/or
- (b) any direct employment costs (if any) associated with the employment of such person by the DCC or the Replacement Contractor (as applicable) up to the date of termination of such person's employment.

4.4 The indemnity in paragraph 4.3 above will not apply:

- (a) to any claim by any person in respect of whom the notification given to the Contractor under paragraph 4.2(a) is received by the Contractor more than six (6) months after the date of the termination or expiry of this Agreement (whether in whole or in part); and/or
- (b) if such person is neither re-employed by the Contractor or a Contractor Person (as applicable) nor dismissed by the DCC or the Replacement Contractor (as applicable) within the timescales set out in paragraph 4.2,

in which case such person will be treated as having transferred to the DCC or the Replacement Contractor (as applicable) who shall be responsible for all liabilities arising in respect of any such person.

- 4.5 Further, and without prejudice to paragraph 4.4 above, the indemnity in paragraph 4.3 above will not apply to any claim for discrimination on the basis of any protected characteristic (as defined by the Equality Act 2010) in relation to any act or omission of the DCC and/or a Replacement Contractor.

5. CONDUCT OF CLAIMS

- 5.1 This paragraph 5 shall apply to the conduct, by a party from whom an indemnity is sought under this Schedule 9.1, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is referred to as the "**TUPE Beneficiary**" and the party giving the indemnity is referred to as the "**TUPE Indemnifier**".

- 5.2 If the TUPE Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the TUPE Beneficiary is, or may become entitled to, indemnification under this Schedule 9.1 ("**TUPE Claim**"), the TUPE Beneficiary shall give notice to the TUPE Indemnifier as soon as reasonably practicable and in any event within ten (10) Working Days of receipt of the same.

- 5.3 Subject to paragraphs 5.4 and 5.5, on the giving of a notice by the TUPE Beneficiary pursuant to paragraph 5.2 above, where it appears that the TUPE Beneficiary is or may be entitled to indemnification from the TUPE Indemnifier in respect of all (but not part only) of the liability arising out of the TUPE Claim, the TUPE Indemnifier shall (subject to providing the TUPE Beneficiary with a secured indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the TUPE Claim in the name of the TUPE Beneficiary at the TUPE Indemnifier's own expense and take conduct of any defence, dispute, compromise or appeal of the TUPE Claim and of any incidental negotiations relating to the TUPE Claim. If the TUPE Indemnifier does elect to conduct the TUPE Claim, the TUPE Beneficiary shall give the TUPE Indemnifier all reasonable co-operation, access and assistance for the purposes of such TUPE Claim and, subject to paragraph 5.5 below, the TUPE Beneficiary shall not make any admission which could be prejudicial to the defence or settlement of the TUPE Claim without the prior written consent of the TUPE Indemnifier.

- 5.4 With respect to any TUPE Claim conducted by the TUPE Indemnifier pursuant to paragraph 5.3 above:

- (a) the TUPE Indemnifier shall keep the TUPE Beneficiary fully informed and consult with it about material elements of the conduct of the TUPE Claim;
- (b) the TUPE Indemnifier shall not bring the name of the TUPE Beneficiary into disrepute;

- (c) the TUPE Indemnifier shall not pay or settle such TUPE Claim without the prior written consent of the TUPE Beneficiary, such consent not to be unreasonably withheld or delayed; and
 - (d) the TUPE Indemnifier shall conduct the TUPE Claim with all due diligence.
- 5.5 The TUPE Beneficiary shall be entitled to have conduct of the TUPE Claim and shall be free to pay or settle any TUPE Claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:
- (a) the TUPE Indemnifier is not entitled to take conduct of the TUPE Claim in accordance with paragraph 5.3 above;
 - (b) the TUPE Indemnifier fails to notify the TUPE Beneficiary of its intention to take conduct of the relevant TUPE Claim within ten (10) Working Days of the notice from the TUPE Beneficiary under paragraph 5.2 above or if the TUPE Indemnifier notifies the TUPE Beneficiary that it does not intend to take conduct of the TUPE Claim; or
 - (c) the TUPE Indemnifier fails to comply in any material respect with the provisions of paragraph 5.4 above.

Sensitive TUPE Claims

- 5.6 With respect to any TUPE Claim for which the DCC or any Replacement Contractor is the TUPE Beneficiary and the conduct of which the DCC, acting reasonably, considers is likely to have an adverse impact on the general public's perception of the DCC or any Replacement Contractor ("**Sensitive TUPE Claim**"), the TUPE Indemnifier shall only be entitled to take conduct of any defence, dispute, compromise or appeal of the Sensitive TUPE Claim with the DCC's prior written consent. If the DCC withholds such consent and elects that it or the Replacement Contractor shall conduct the defence, dispute, compromise or appeal of the Sensitive TUPE Claim, it shall (or shall procure the Replacement Contractor shall) conduct the Sensitive TUPE Claim with all due diligence and if any failure to do so results in an increase in the amount recoverable by the TUPE Beneficiary in respect of an indemnity under this Agreement, the TUPE Indemnifier shall only be liable to indemnify the TUPE Beneficiary in respect of that amount which would have been recoverable by the TUPE Beneficiary had it conducted the Sensitive TUPE Claim with all due diligence.
- 5.7 The DCC or Replacement Contractor shall be free at any time to give written notice to the TUPE Indemnifier that it is retaining or taking over (as the case may be) the conduct of any TUPE Claim to which paragraph 5.3 above applies notwithstanding that it does not have the right to do so pursuant to paragraph 5.3 if, in the reasonable opinion of the DCC, the TUPE Claim is, or has become, a Sensitive TUPE Claim. In such cases, the provisions of paragraph 5.6 above shall apply.

Recovery of sums

- 5.8 If the TUPE Indemnifier pays to the TUPE Beneficiary an amount in respect of an indemnity and the TUPE Beneficiary subsequently recovers (whether by

payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the TUPE Claim, the TUPE Beneficiary shall forthwith repay to the TUPE Indemnifier whichever is the lesser of:

- (a) an amount equal to the sum recovered (or the value of the discount, credit, saving, relief, other benefit or amount otherwise obtained) less any out-of-pocket costs and expenses properly incurred by the TUPE Beneficiary in recovering or obtaining the same; and
- (b) the amount paid to the TUPE Beneficiary by the TUPE Indemnifier in respect of the TUPE Claim under the relevant indemnity,

provided that there shall be no obligation on the TUPE Beneficiary to pursue such recovery and that the TUPE Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the TUPE Indemnifier exceeds any Loss sustained by the TUPE Beneficiary (including for this purpose any indirect Losses sustained by the TUPE Beneficiary which may be excluded by this Agreement from being recovered from the TUPE Indemnifier).

Insurance

- 5.9 Any person taking any of the steps contemplated by paragraphs 5.2 to 5.7 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

Mitigation

- 5.10 Each of the DCC and the Contractor (on behalf of itself and any Contractor Person) shall at all times take all reasonable steps to minimise and mitigate any Loss for which the relevant party is entitled to bring a claim against the other party pursuant to the indemnities in this Schedule 9.1.

Taxation

- 5.11 If any payment by one party under an indemnity in this Agreement is subject to any tax, deduction or other withholding, including, without limitation, income tax or corporation tax, (or any tax replacing any such tax, deduction or other withholding) in the hands of the recipient (or a withholding made by the paying party in respect of tax), the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax, deduction or other withholding in respect of such additional amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to any such tax, deduction or other withholding.