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Should you have any queries, please contact Commercial@SmartDCC.co.uk

SCHEDULE 11

ESCROW

1. SOURCE CODE MATERIALS FOR SPECIALLY WRITTEN SOFTWARE

- 1.1 By no later than the issuance of the Milestone Achievement Certificate for Milestone 3 as specified in the applicable Project Plan (the "**Original Source Code Delivery Date**") the Contractor shall deliver to the DCC an up-to-date copy of the Source Code Materials relating to the Specially Written Software which has been used to Achieve Milestone 3.
- 1.2 By no later than the issuance of the Milestone Achievement Certificate for Milestone 5 as specified in the applicable Project Plan, the Contractor shall deliver to the DCC an up-to-date copy of the Source Code Materials relating to the Specially Written Software which has been used to Achieve Milestone 5.
- 1.3 Notwithstanding Paragraphs 1.2 and 1.3 above, the Contractor shall deliver to the DCC an up-to-date copy of the Source Code Materials relating to the Specially Written Software:-
- 1.3.1 by no later than each anniversary of the Original Source Code Delivery Date;
 - 1.3.2 within thirty (30) days after the implementation of any material modification relating to any of the Specially Written Software;
 - 1.3.3 within thirty (30) days after the implementation of any material Variation which involves a change to any of the Specially Written Software;
 - 1.3.4 within ten (10) Business Days after the expiry of the Term or after the date of any notice of termination given by either Party under this Agreement;
 - 1.3.5 if the DCC and the Contractor have entered into an agreement for an Enduring Service, on the date which is ninety (90) days prior to the expiry of the term of any agreement for the Enduring Service.

2. DEPOSITED SOFTWARE

Provided that the DCC has entered into an agreement with the Contractor for Enduring Services or for the provision of a maintenance and support agreement in respect of the Contractor Software, Contractor Software Improvements and/or Third Party Software:-

- 2.1 DCC and Contractor shall not later than thirty (30) Business Days after issuance of the Milestone Achievement Certificate for Milestone 5 as specified in the Project Plan (or such other date as the Parties shall agree) enter into one or more escrow agreements in a form to be agreed by the Parties for deposit of the Source Code Materials for the Deposited Software ("**Escrow Agreements**"). Each Escrow Agreement shall reflect the principles set out in Appendix 1 of this Schedule 11.

- 2.2 Pursuant to such Escrow Agreements, 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**") no later than the last to occur of (i) ten (10) Business Days after signature of the Escrow Agreement, and (ii) sixty (60) days the issuance of the Milestone Achievement Certificate for Milestone 5 as specified in the Project Plan (the "**Original Deposit Date**").
- 2.3 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 licensor of such Third Party Software grant to the DCC) a royalty-free, irrevocable and non-exclusive licence to exercise all Intellectual Property Rights relating to the Source Code Materials released 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 2.5 of this Schedule 11, to use the Deposited Software for the purposes of:-
- 2.3.1 performing or receiving the benefit of the Services and/or the Enduring Service;
 - 2.3.2 performing or receiving services which are similar or equivalent to the Services and/or the Enduring Service;
 - 2.3.3 integrating the Services and/or Enduring Service (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; or
 - 2.3.4 correcting defects and faults in the Deposited Software.
- 2.4 For the avoidance of doubt, neither the licence described in Paragraph 2.3 of this Schedule 11 nor the release of the Deposited Software shall result in any assignment or transfer of any copyright, trade secret, patent or other Intellectual Property Rights of the Contractor or any third party in the Deposited Software to DCC, a Successor Licensee or any other person. The Source Code Materials for the Deposited Software are Commercially Sensitive Information and DCC shall, if such are released, maintain the Source Code Materials in a safe, secure location.
- 2.5 The DCC may sub-licence its rights under Paragraph 2.3 to:-
- 2.5.1 any DCC Service Provider (including any replacements for such persons from time to time);
 - 2.5.2 any DCC Eco-System Entity (including any replacements for such persons from time to time);
 - 2.5.3 any Replacement Contractor;

- 2.5.4 any Regulatory Body (or any third-party representative acting on behalf of any Regulatory Body from time to time) to the extent necessary for such persons to:-
- (a) exercise any of the rights of such Regulatory Body under the terms of any applicable Mandatory Requirements, including the DCC Licence and/or the SEC;
 - (b) otherwise fulfil any of the statutory duties of such Regulatory Body under the terms of any applicable Mandatory Requirements regarding the Smart Metering Programme; or
- 2.5.5 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 37 (*Confidentiality*).
- 2.6 The Contractor undertakes that it shall during the Term and the term of any agreement for Enduring Service:-
- 2.6.1 update or replace the Source Code Materials placed in escrow under Paragraph 2.2 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 Variation which involves a change to any aspect of the Deposited Software; and
- 2.6.2 procure that, within ten (10) Business Days after the date of expiry or termination of the Escrow Agreement, the Source Code Materials referred to in Paragraph 2.2 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 as set-up and annual fees to the Escrow Agent under or in relation to the Escrow Agreements (or an alternative escrow agreement entered into pursuant to Paragraph 2.8.2).
- 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:
- 2.8.1 provide the DCC with written evidence of its inability to comply with such provisions; and
 - 2.8.2 propose a suitable alternative to escrow that affords the DCC the nearest equivalent protection in relation to access to the relevant Source Code Material.
- 2.9 The Contractor shall only be excused from its obligations under any of Paragraphs 2.1 to 2.6 to the extent that the DCC accepts (in its sole discretion) any alternative proposal in accordance with Paragraph 2.8.

3. VERIFICATION OF DEPOSITED SOFTWARE

In the event that an Escrow Agreement is entered into pursuant to Paragraph 2 of this Schedule 11, the provisions of this Paragraph 3 shall also apply.

3.1 At any time after the Original Deposit Date, and during the Term and/or the term of any agreement for an Enduring Service, 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:-

3.1.1 the Source Code Materials are complete and comply with the requirements of this Agreement regarding the scope and content of such Source Code Materials;

3.1.2 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 2.5, to use the Deposited Software for the purposes referred to in Paragraph 2.3, including that:

(a) any compressed files included within the Source Code Materials can be decompressed;

(b) any encrypted files included within the Source Code Materials can be read;

(c) any password-protected files within the Source Code Materials can be accessed.

3.1.3 the Source Code Materials are capable of being used for the purposes referred to in Paragraph 2.3;

3.1.4 the Source Code Materials do not contain any malicious software; and

3.1.5 the Source Code Materials otherwise comply with the requirements of this Agreement (including this Schedule 11), (the "**Verification Exercise**").

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

3.3 The Contractor:-

3.3.1 shall, where the Third-Party Tester is not the Escrow Agent, have the right to object (acting reasonably) to the appointment on the grounds that the Third-Party Tester is not independent, in which case DCC shall select an alternative Third Party Tester;

3.3.2 shall 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 ten (10) Business Days after receipt of the DCC's notice under Paragraph 3.2;

- 3.3.3 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 37 (Confidentiality) including acknowledging that the Source Code Materials are Commercially Sensitive Information); and
- 3.3.4 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) Business 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 and at its own cost:-
 - 3.5.1 replace or update such Source Code Materials so that it does comply with the requirements of Paragraph 3.1; and
 - 3.5.2 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 its 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:
 - 3.7.1 any Verification Exercise (with the exception of the first Verification Exercise undertaken by DCC) which demonstrates that the Source Code Materials for the Deposited Software do not comply with the requirements of Paragraph 3.1; or
 - 3.7.2 any repeated Verification Exercise under Paragraph 3.6.
- 3.8 The Verification Fees in relation to any Verification Exercise referred to in Paragraph 3.7.1 and/or 3.7.2 shall be paid by the Contractor.

3 CONTRACTOR WARRANTIES

The Contractor represents and warrants that it has, and will continue to have for the Term and/or the term of any agreement for an Enduring Service, all rights that are necessary to comply with its obligations under this Schedule 11.

APPENDIX 1

Principles for the form of Escrow Agreement

1. The Escrow Agreements shall, unless otherwise agreed by the Parties, remain in force for the Term and for the term of any agreement for an Enduring Service and shall be consistent with the provisions of this Schedule 11 including with regards to responsibility for charges, delivery of updates to the Deposited Software and Verification Exercises.
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 Successor Licensees, as appropriate) upon the occurrence of any of the following events :
 - a. where the DCC terminates this Agreement (either in whole or in part) in accordance with Clause 46.2 (*Termination Rights*), provided that, where there is a partial termination, only the Source Code Materials for the Deposited Software relating to the terminated Services shall be released; or
 - b. if the DCC and the Contractor have entered into an agreement for an Enduring Service, the DCC terminates such agreement under and in accordance with provisions equivalent to Clause 46.2 (*Termination Rights*) in such agreement, provided that, where there is a partial termination, only the Source Code Materials for the Deposited Software relating to the terminated Services shall be released; or
 - c. where the Contractor terminates a Sub-contract and/or removes any Sub-contractor, provided that in these circumstances, only the Source Code Materials for the Deposited Software of the terminated Sub-contractor shall be released.
4. The Escrow Agreements shall not entitle the Contractor to terminate the Escrow Agreement without the DCC's agreement in writing unless permitted by the terms of an agreement for Enduring Services or other applicable written agreement between the parties.
5. 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 Successor Licensees as appropriate).