

Dated

2010

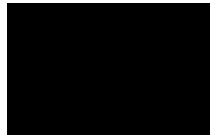
NORTH EAST LINCOLNSHIRE COUNCIL

BALFOUR BEATTY WORKPLACE LIMITED

Compensation on Termination
Schedule 23

PART 1

NOTE: The Parties have based their understanding on the compensation items from the following extract from the Financial Model which is correct as at the Commencement Date and represents compensation payable by the Council to the Partner for all the Core Services at the Commencement Date. The parties acknowledge that the Financial Model may be amended during the Term and that the numbers in the following extract may change as a result of additional Services being added or the removal of any Service. For Strategic Projects, if compensation is applicable, the parties shall agree as part of the Business Case the profile of compensation payable. The numbers in the Financial Model as at the Termination Date shall apply on the payment of any compensation by the Council:



For the avoidance of doubt, the maximum potential amount payable by the Council to the Partner or the Partner to the Council in respect of the Term is set out in clauses 48.5 to 48.8 (Liability of the Parties) of the Agreement and any compensation under this Schedule is subject to those limitations and exclusions of liability.

PART 2

1. DEFINITIONS

The following definitions shall have the meaning given below for the purposes of this Schedule 23 (Compensation on Termination):

"Breakage Costs" means (demonstrated on an Open Book basis) any costs (including costs payable for early termination of contracts entered into by the Partner) incurred by the Partner as a result of the termination of this Agreement, but only to the extent that such costs:

1. would not have been incurred had this Agreement continued until its natural expiry;
2. relate to the provision of the Services;
3. are unavoidable, proven, reasonable, and not capable of recovery; and
4. are incurred under arrangements or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms in the context of the Partner's delivery of the Services;

"Compensation" means a payment of compensation detailed in this Schedule 23;

"Discount Rate" means the base rate of the Bank of England as at the Termination Date;

"Partner Handover Costs" means (demonstrated on an Open Book basis):

1. all costs, claims and demands reasonably incurred by the Partner, in addition to the Partner's normal costs, incurred in providing the Services, in seeking to ensure that this Agreement terminates in circumstances that minimise disruption to the Council; and
2. all costs, claims, demands and expenses reasonably incurred by the Partner in transferring its rights and/or obligations (or some of them) whether by way of assignment, licence, sub-contracting, novation or otherwise to the Council or (at the Council's request) a Third Party;

"Partner Investment Costs" means (with reference to the Financial Model (as updated from time to time)) any financial investment undertaken, capital or revenue, by the Partner in connection with the Partnership, which shall include:

1. the Partner's bid and mobilisation costs as stated in the Financial Model (as at the Commencement Date, contained in the Output - 19 Sys incl. bid cost tab, Line 147 thereof¹);
2. investments made by the Partner in the expectation that it would improve the delivery of Services either by reducing the ongoing cost of delivering those Services or by improving the standard of Service delivered; and
3. any redundancy payments made by the Partner to staff who have transferred to the Partner from the Council pursuant to the terms of this Agreement. For the avoidance of doubt, the redundancy payments in this definition are different to the "Redundancy Liability" defined below;

"Redundancy Liability"

all sums due and payable by the Partner to any Personnel who become redundant in the 12 month period following the Termination Date within the meaning of Section 139 of the Employment Rights Act 1996, such costs to be calculated in accordance with Section 162 Employment Rights Act 1996 or any statutory re-enactments or modification thereof from time to time in force in addition to any other sums or benefits due to such Personnel in accordance with their contract of employment;

"Relevant Authority"

any court with the relevant jurisdiction and any local, national or supra-national agency, local authority, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom or of the European Union; and

"Tax"

any kind of tax, levy, duty, impost, charge or withholding of any nature whatsoever, whether or not similar to any in force at the date of this Agreement and whether imposed by local, governmental or other authority in the United Kingdom or elsewhere, together with any penalty, charge or amount of interest relating to any of them or to any failure to file any return required for the purposes of any of them.

PART 3

BASIS OF COMPENSATION

2. Council Default / Voluntary Termination Compensation

Where this Agreement terminates pursuant to clauses 53.5 or 55 then the Compensation due from the Council to the Partner shall be the aggregate of:

- 2.1 all sums owed by the Council to the Partner under the terms of the Agreement;
- 2.2 the Partner's Corporate Overhead (██████████) for a period of twelve (12) months commencing upon the Termination Date (with reference to line 1 of the Financial Model extract at Part 1 (as updated from time to time));
- 2.3 the Partner's lost profit, based upon ██████ of unrecovered PBIT (profit before interest and tax) for each of the first five years of the Term and then, in the following five years, ██████ of unrecovered PBIT for each of the following five years (with reference to line 2 of the Financial Model extract at Part 1 (as updated from time to time));
- 2.4 unrecovered Partner Investment Costs (with reference to line 3 of the Financial Model extract at Part 1 (as updated)) written down in accordance with Clause 40;
- 2.5 all Breakage Costs (on an Open Book basis);
- 2.6 all Redundancy Liability; and
- 2.7 all Partner Handover Costs (on an Open Book Basis).

3. Partner Default

Where this Agreement is terminated by the Council pursuant to clauses 53 (Termination for Breach) and 54 (Insolvency) then:

- 3.1 Subject to paragraph 3.3 below, the Compensation due from the Partner to the Council shall, subject to clause 48, be the aggregate of:
 - (a) the Council's costs of procuring an agreement to replace this Agreement provided that such costs are reasonably and properly incurred and properly evidenced by the Council; and
 - (b) any Direct Losses (or Indirect Losses (where such Indirect Losses are expressly permitted to be recovered by the terms of this Agreement))

incurred by the Council (provided that such Losses are reasonably and properly incurred and properly evidenced by the Council) arising from the termination of this Agreement; and

3.2 the Compensation due from the Council to the Partner shall be all sums owed by the Council to the Partner under the terms of the Agreement and the Partner Investment Costs limb 2 (of the definition) (save where paragraph 6 applies) and limb 3 (of the definition) (save to the extent that redundancies arose in the Service Areas which have poorly performed and are the subject of the termination by the Council), that, as of the Termination Date, have not been recovered by the Partner. For the avoidance of doubt, limb 1 of the definition of Partner Investment Costs shall not be payable.

3.3 The Compensation due from the Partner to the Council pursuant to paragraph 3.1 above shall be reduced on an equitable and pro-rated basis where the Council procures a replacement agreement for the Agreement which:

3.3.2 has a term which is greater than the unexpired Term as at the Termination Date; and/or

3.3.3 provides for a higher standard of services and/or greater range of services than under the Agreement.

3.4 For the avoidance of doubt, (save as set out in this paragraph 3) no Compensation shall be payable by the Council to the Partner for Services removed as a result of Partner breach.

4. Force Majeure Compensation

4.1 Where this Agreement terminates pursuant to clause 68, the Compensation due from the Council to the Partner shall be the aggregate of:

4.1.1 all sums owed by the Council to the Partner under the terms of the Agreement; and

4.1.2 the Partner Investment Costs that, as at the Termination Date, have not been recovered by the Partner.

4.2 Save where set out above in paragraphs 4.1 and 4.2 above, the Council and the Partner shall bear their own costs where this Agreement terminates pursuant to clause 68.

5. Termination in Part

Where this Agreement terminates in part pursuant to (i) clause 55.2 (Termination at Will); (ii) clause 68.3 (Force Majeure); or clause 53.1.1 (Right of Termination) , any Compensation payable to the Partner shall be set out in the Impact Assessment. The Compensation due shall be calculated on the basis set out in this Schedule 23 but shall be relevant and proportionate to the part being terminated and shall be fully evidenced to the Council

6. Un-recovered Partner Investment Costs limb 2 - investment claw back

- 6.1 Nothing in this Schedule shall require the Council to pay any Compensation to the Partner in relation to assets and investment, including non-tangibles, which are (save for minor deviations) not performing or not delivering in accordance with the KPIs or to the extent that assets and/or investments are not subject to KPIs the relevant performance parameters established in the relevant business cases supporting the relevant investment. Where the Council does not pay any Compensation to the Partner in relation to an asset or investment, the Partner shall be entitled to retain ownership of that asset or investment or have ownership of such assets or investment transferred to it by the Council.
- 6.2 Subject to paragraph 6.1, the amount payable for any Termination Assets following a termination of this Agreement shall be the Written Down Value of the asset.

7. No fault termination

- 7.1 Where there is a no fault termination as a result of the Council hitting its cap on liability pursuant to clause 53.6.2, the provisions of clause 53.6.4 shall apply and the Council shall reimburse the Partner:
- 7.1.1 all sums owed by the Council to the Partner under the terms of the Agreement; and
- 7.1.2 the Partner Investment Costs that, as at the Termination Date, have not been recovered by the Partner.
- 7.2 Where there is a no fault termination as a result of either:
- 7.2.1 the Partner hitting its cap on liability pursuant to clause 53.6.3; or
- 7.2.2 a step back pursuant to clause 53.7,

then the Compensation due from the Council to the Partner shall be:

- (a) all sums owed by the Council to the Partner under the terms of the Agreement and
- (b) the Partner Investment Costs limb 2 (of the definition) (save where paragraph 6 applies) and limb 3 (of the definition) (save to the extent that redundancies arose in the Service Areas which have poorly performed and are the subject of the termination by the Council), that, as of the Termination Date, have not been recovered by the Partner. For the avoidance of doubt, limb 1 of the definition of Partner Investment Costs shall not be payable.

PART 4

GENERAL

1. Gross Up of Compensation Payments

If any amount of Compensation is subject to Tax payable to a Relevant Authority, then the party paying Compensation shall pay to the other party such additional amount as will put the other party in the same after Tax position as it would have been in had the payment not been subject to Tax, taking account of any relief, allowances deduction, setting off or credit in respect of Tax (whether available by choice or not) which may be available to the party receiving the Compensation to reduce the Tax to which the payment is subject.

2. Mitigation

Each of the parties agree that where they are entitled to Compensation that:

2.1 they shall take all reasonable steps to mitigate their losses; and

2.2 there shall be no double counting of any elements of Compensation payable,

provided that the Partner shall not be obliged to mitigate Compensation payable pursuant to paragraphs 2.1 to 2.4; paragraph 3.2 or 4.1 of Part 3 (Basis of Compensation) of this Schedule 23 (Compensation on Termination) but in respect of Partner Investment Costs the Partner shall take all reasonable steps to mitigate any investments made from the date of receipt of the notice to terminate.

3. No Double Recovery

The parties agree that they shall not be entitled to recover any Compensation in the event and to the extent that they have already recovered from the other party in respect of such amount(s).

PART 5

METHOD OF PAYMENT

1. In determining any Compensation, the Partner and the Council each agree to act in good faith and with all due speed and diligence to agree the Compensation sums as soon as practicable.
2. All Compensation due from either party to the other shall be paid as a lump sum within 20 Business Days of the later of:
 - 2.1 the date that the Compensation is agreed or otherwise determined in accordance with this Agreement; and
 - 2.2 the relevant Termination Date,
("Due Date").
3. Where there is a dispute as to the calculation of the Compensation at the Due Date then the undisputed amount of Compensation shall be paid on the Due Date and the disputed amount shall be paid within 10 Business Days of the resolution or determination of the dispute together with interest at the Bank of England base rate from the Due Date up to the date of actual payment.
4. The provisions of this Part 5 are subject to Part 6 of this Schedule.

PART 6

DISPUTES

The Council and the Partner agree that any dispute relating to Compensation may be referred by either party for determination under clause 46 (Disputes Procedure).