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Outside In Contract Processes Workshop

18 August 2020

Objectives

This is an extension of the Market Engagement One to One sessions and is an opportunity to discuss how the following contract and operational processes will work:

- ❖ Full Stage 1 and expedited Stage 1
- ❖ Invoicing and payment
- ❖ Rectification Plan Procedure
- ❖ Extreme Engineering Difficulties
- ❖ Relief Events
- ❖ Force Majeure
- ❖ Change control
- ❖ Dispute management procedure
- ❖ Termination

We will record any feedback we receive from you in the course of the discussion so that we can review where necessary.

Stage 1 (Network Detailed Design and Due Diligence):

- **Expedited**
- **Full**

Stage One (Network Detailed Design and Due Diligence)

Purpose: The detailed network design, up front surveying and due diligence prior to stage 2 build commencing. An ability to amend scope or funding for the agreement where agreed, reducing the need for in-life contract change.

- Supplier specifies if they will undertake Stage 1 Expedited or Full network detailed design and due diligence in Grant Award Form para 6 of their bid.
- If the Supplier opts for Expedited Stage 1 - supplier immediately progresses to Stage 2 Build
- Stage 2 Full - Supplier wins bid, performs planning, physical surveys, detailed network design, project planning for Stage 2 build - DPS Sch 1 (Specification) para 2.2, 2.3 specifies the requirements for Stage 1
- What happens upon Completion of Stage One is set out in Clause 10 - Supplier either provides:
 - Stage One Output and monthly status reports (on 5th wd of the month) - in accordance with DPS Sch 1 (Specification) and Clause 19.19, or
 - Written confirmation of due diligence completed as per DPS Sch 1 para 2.5
 - Authority reviews and accepts, the Supplier submits claim for payment of qualifying costs (lower of costs of Stage One Works or Maximum Stage One Grant Payment (in accordance with Clause 11 Grant Payments)
 - If Authority believes there's material change to Stage 2 which changes the Value For Money, Authority in its sole discretion, may:
 - a) choose to increase funding allocation, rescope premises, supplier solution or timeframe for build, or
 - b) advise the Supplier it will invoke the break clause as in clause 10.1 (e) and terminate the Agreement in accordance with Clause 24.1 - Termination at the end of Stage 1
- Any change to the contract will be handled through change control (Clause 46)

Invoicing and Payment:

Invoicing and Payment

Purpose: Invoicing and payment process facilitates supplier's submission of valid claims and supporting evidence documentation as defined in the contract and ability for the Authority to review claims and required evidence and make payments of valid and undisputed claims in a timely manner, with the ability to resolve any disputes through Dispute Resolution Procedure. If Supplier has selected Expedited Stage 1 - no due diligence and no payment at Stage 1

- **Stage 1 Full - One-off payment -**
 - Supplier Achieves the Stage One Milestone,
 - submits Stage One Output and claim (as per clause 11.6(a)) for the lower of:
 - costs incurred for Stage 1 Works, or
 - Maximum Stage 1 Grant Payment as per clause 11.6(a)
 - supporting evidence of delivery to demonstrate Achievement of Milestone. Stage One Output are listed in Clause 19.19 Grant Agreement Reports Table and Annex 2 Grant Agreement Sch 13 Project Plan and Testing
 - Authority reviews claim, can request Supplier for more information/clarification
 - If Authority approves claim, it pays valid and undisputed claim within 20 wd in accordance with clause 12.3
 - If Authority does not approve claim (even after a few requests for clarification then issues Dispute Notice which gets resolved through the Dispute Resolution Procedure

Invoicing and Payment

- **Stage 2 (Build) Regular Payments -**
 - On the last wd of the month the Supplier can submit a claim for Stage Two (Build) regular monthly payment (as per Clause 11.9) including evidence (as set out in the table in Clause 19.19) - based on Stage 2 Progress Reports. These are paid as long as the required reports are submitted as per the contract.
 - There are Build Milestones in Stage 2 - (in Grant Agreement Sch13 Project Plan and Testing), a minimum of 4 Build Milestones, each Build Milestone has an agreed number of premises under it. If a Build Milestone is missed then the supplier will not get paid moving forward and we might request a Rectification Plan to get build back on track. Once build is back on track then monthly payments resumes and are backdated. Authority reviews claim, can request Supplier for more information/clarification
 - If Authority approves claim, it pays valid and undisputed claim within 20 wd in accordance with clause 12.3
 - If Authority does not approve claim (even after a few requests for clarification then it issues Dispute Notice which gets resolved through the Dispute Resolution Procedure
- Supplier may only submit a claim for payment if it has Achieved a Build Milestone which has a Milestone Date earlier than the date of the relevant claim (Clause 11.8)

Invoicing and Payment

- **Stage 2 (Build) Key Milestone Payment -**
 - When the Supplier Achieves the Stage Two (Build) Complete Milestone:
 - the Authority will calculate the Stage Two (Build) true-up Amount and Stage Two (PMO) true-up amount. (Clause 11.10); and
 - Supplier submits a claim for the Stage Two (Build Key Milestone Payment) calculated in accordance with Clause 11.11.
 - Clause 11.12 - if the Supplier Achieves the Stage Two Milestone after its Milestone Date, the claim must not include any costs incurred after the Milestone Date which are of a type within the Stage Two PMO Categories.
 - Authority reviews claim, can request Supplier for more information/clarification
 - If Authority approves claim, it pays valid and undisputed claim within 20 wd in accordance with clause 12.3
 - If Authority does not approve the claim (even after a few requests for clarification then it issues Dispute Notice which gets resolved through the Dispute Resolution Procedure
- All claims for payment must contain the information at clause 12.1

Rectification Plan:

Rectification Plan Process

Purpose: Rectification Plan Process (in Clause 20) sets out the obligations of the Supplier to address any issues with the delivery of the contract to rectify or remedy delays or likely delays, material defaults or breaches

- **Rectification Plan Trigger Event occurs - listed in clause 20.1** - includes such events as delays in achieving a milestone, breaches of the contractual obligations, material defaults, failure to provide Grant Agreement reports etc.
 - Supplier notifies the authority detailing actual or anticipated effect
 - Supplier submits a draft Rectification Plan within 10 wds or such other period as the Parties may agree, (even where the Supplier disputes whether or not is has committed a RP Trigger Event)
 - the Authority can request the Supplier provides a revised draft or escalate any issues to the Dispute Resolution Process. Supplier produces a revised Rectification Plan and provides any further documents
 - Once agreed the Supplier implements Rectification Plan
 - And then if issue is resolved any suspended payments will recommence and backdated
 - If the Authority rejects a draft Rectification Plan in respect of the same RP Trigger Event up to 3 times, the 3rd time will constitute a **Rectification Plan Failure** and then the Authority has the right to terminate however the Authority may at its sole discretion, choose to give the Supplier further opportunity to resume implementation or escalate any issues to the dispute resolution procedure (clause 20.14)

Exceptional Engineering Difficulties:

Exceptional Engineering Difficulties

Purpose: Provides relief for those factor(s) that may occur during Stage 2 build, that are outside the Supplier's control and they could not reasonably have known of this even having done a Stage 1 full physical survey, **for example**, discovery of something of archaeological or historical significance during engineering works that directly impacts build.

- EED occurs (during build Stage 2) - Clause 40.1
- Supplier notifies Authority within 3 wd
- Authority reviews supplier proposals for remediation/mitigation, relief claimed and additional costs
- Authority agrees - as in clause 40.6 (a) to (e) and is satisfied that the Supplier has provided required notice, used all reasonable endeavours to eliminate or mitigate the consequences and impact, without additional costs and has made reasonable efforts to perform their obligations
- Authority grants relief - set out in clause 40.6 (f) to (h) - Milestone Date postponed by likely effect of the delay caused by EED, increased cost absorbed by Works underspent, amend payment timings/frequency, amend Specifications/reduction in number of premises:
 - Authority will cap the amount of the additional relief funds (to 10% of Maximum Stage 2 Grant Payment)
- If the Supplier selects Expedite Stage 1 then they absorb such risks and cannot ask for more funding
- Clause 40.7 - where a relief requires a change to the Agreement, that change will be implemented in accordance with Change Control

Relief Events:

Relief Events

Purpose: If the Supplier is not able to perform their obligations as a direct result of a Relief Event (as set out in Clause 39.1 Table 4) then Supplier may claim relief. Relief Events may be:

- Legal challenges, action or investigation
 - Delays obtaining Local Planning Authority or Local Highways Authority consents or decisions provided Supplier submits applications in a timely manner
 - Delays caused by other factors controlled by the Authority, Local Authority
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- Supplier believes a Relief Event has occurred (as set out in Clause 39 table 4)
 - Supplier submits Relief Notice - after becoming aware that a Relief Events has or will or is likely to cause a Supplier Non-Performance as defined in Clause 39.2
 - Authority reviews Supplier's assessment of relief and entitlement to relief, and may request additional information and evidence of justification
 - Authority agrees and is satisfied that the Supplier has provided required notice, used all reasonable endeavours to eliminate or mitigate the consequences and impact, without additional costs and has made reasonable efforts to perform their obligations
 - Authority grants relief - as in clause 39.2 - Milestone Date postponed by likely effect of the delay caused by RE, Grant Payments may be amended, provided that the Supplier can demonstrate that any additional costs to be incurred are necessary cannot be mitigated or absorbed within the overall forecast Eligible Expenditure; and/or amend Specifications/reduction in number of premise
 - **Clause 39.7** - relief needing amendments to Milestones, Grant Payments and the Specification need to go through Change Control.

Force Majeure:

Force Majeure

Purpose: Sets out the options available for a Force Majeure events where any event, occurrence, circumstance, matter or cause affecting the performance by either the Authority or the Supplier of its obligations beyond the Party's control - clause 38

- Force Majeure event occurs
- Affected Party issues a Force Majeure Notice
- Has the Party used all reasonable measures to reduce the impact of the event?
- If yes, then that Party is excused from performing its obligations under the Agreement while the inability to perform continues
- Has the carrying out of the Works and/or provision of the Outputs been materially affected by a Force Majeure Event which has lasted for 90 days continuously?
- If yes, either Party may terminate the Agreement in accordance with Clause 26 and Clause 27.1(b) applies whereby each Party bears their own costs

Change control:

Change control

- **Purpose:** Changing the Agreement Procedure (Clause 46) sets out the process for agreeing Changes to the Agreement in a timely manner via the governance arrangements, submission of Change Forms and signature of a Change Authorisation. Both Parties must act in a timely way and without undue delay to comply with clause 46.
- Both Parties discuss a proposed Change in the Quarterly Meeting
- Either Party proposes a Change Request via Change Form
- Do the Parties agree (in writing) an accelerated process - Clause 46.16 as a Fast track Change?
 - If yes, the parties agree accelerated procedure outside the Quarterly Review Meeting in order to effect the Change
- **If Supplier requests the Change:**
 - Supplier provides **Change Impact Assessment** to Authority within 10 wd => Authority reviews (may ask for revised CIA) => after which Change is either agreed and implemented by Supplier **or** rejected by Authority in which case there are 3 options:
 - 1. Agreement continues without Change, or
 - 2. Dispute, or
 - 3. Termination

Change control - cont'd

- **If Authority requests the Change:**
 - Supplier provides cost of preparing Change Impact Assessment ie **Change Impact Assessment Estimate** (capped at £1000) to Authority within 10 wd => Authority reviews (may ask for revised CIA Estimate) => after which Supplier provides **Change Impact Assessment** within period agreed in the Change Request => Authority reviews (may ask for revised CIA) => Change is either agreed and implemented by Supplier **or** rejected by Authority in which case there are 3 options:
 - 1. Agreement continues without Change, or
 - 2. Dispute, or
 - 3. Termination
- Supplier cannot reject a change unless they have reason to believe that the change will infringe any law - **clause 14.15**
- Authority cannot reject when the Change is necessary for the Supplier or the Works and/or the Outputs to comply with any Change in Law - **clause 46.14**
- Either Party may withdraw a Change Request or refer a Dispute to the Dispute Resolution Procedure

Dispute management:

Dispute Resolution Procedure

Purpose: The Dispute Resolution Procedure (**Clause 57**) provides a process for the Parties to resolve Disputes Clause 19.43, only if necessary after the normal avenues of governance and contract management have been exhausted

Note: Either party may refer a Dispute to the Dispute Resolution Procedure at any time. It is not limited to where it is expressly stated in certain clauses.

- Either Party may issue a written Dispute Notice in accordance with clause 57.2.
- The Parties must:
 - continue to perform their obligations regardless of the Dispute
 - keep it strictly confidential unless otherwise agreed in writing
 - use all reasonable endeavours to resolve the Dispute as soon as possible
- If not resolved, within 10wd after sending the Dispute Notice the Parties must meet to attempt to resolve the Dispute initially represented by First Escalation Points of Contact from both Parties authorised to settle the Dispute
- Then if not resolved, within 20wd after sending the Dispute Notice the Parties must escalate to the Second Escalation Points of Contact from both Parties authorised to settle the Dispute

Dispute Resolution Procedure - cont'd

- Then, if still not resolved, within 30wd after sending the Dispute Notice the Dispute must be referred to mediation in accordance with Clause 57.6, written Mediation Notice issued
- Within 5wd after sending the Mediation Notice the Parties must jointly appoint a single mediator; or Either Party may ask the Centre for Effective Dispute Resolution (CEDR) to appoint a mediator
- At any time after sending a Mediation Notice and before issuing court proceedings in accordance with Clause 57.7 the Parties may agree in writing that a Dispute goes to Arbitration
- The mediation will end automatically if either Party issues court proceedings about the Dispute or the Parties agree to resolve the dispute by Arbitration
- For the avoidance of doubt, if either Party issues court proceedings in respect of a Dispute then that Dispute cannot be resolved by arbitration
- Court decision or arbitration outcome may be Termination
- If the Dispute goes to court it will be resolved by the Courts which is legally binding

Termination:

Termination

Purpose: provides mechanisms under which the DPS Agreement and/or the Grant Agreement can be terminated:

- Stage 1 break clause - material differences (covered in Stage 1 slide)
 - Termination for convenience - 30 days notice for DPS (clause 32) and as specified for Grant Agreement (Grant Agreement clause 24.3)
 - Termination for supplier default (e.g. insolvency)
 - Termination for Authority default (non-payment of valid undisputed invoices) - termination of Grant Agreement
 - Public Procurement Termination Event - clause 24.8 (Public Contracts Regs clause 73.1)
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- Authority may exercise its rights to terminate the DPS Agreement (under Clause 24.5) or the Grant Agreement (under Clause 24.6) - as per clause 24.7 Authority can terminate the DPS Agreement and/or potentially all Grant Agreements if the Supplier is in material breach of its obligations under the DPS Agreement
 - **Termination for convenience of:**
 - **DPS Agreement** Clause 24.2 - Authority issues Termination Notice (without reason or liability) providing Supplier with minimum 30 days notice to terminate. Clause 27.1 (a) applies

Termination

- **Termination for convenience of:**
 - **Grant Agreement Clause 24.3** - the Supplier will be entitled to reimbursement of costs incurred to date. The Authority may terminate for convenience due to e.g. a change in government policy:
 - Authority issues Termination Notice (not less than min notice as in Grant Award Form)
 - Upon receiving Termination Notice the Supplier minimises costs and provides itemised list of costs with supporting evidence to support their claim for payment (while ensuring the Network is secure - 24.4); Authority may request more information
 - Authority (at its discretion) agrees to pay reasonable, proven, unavoidable costs of the Supplier which is either: (clause 24.3)
 - a) Stage 1 Eligible Cost Categories (if terminated during Stage 1)
 - b) Stage 2 Eligible Cost Categories (if terminated during Stage 2)
 - Clause 27.1 (a) applies
- **Termination for Supplier Default** - where BUDK may terminate include Insolvency Events, change of control not agreed to by Authority, variations to the Agreement which cannot be agreed under the Change Request process. Authority and the Supplier will normally agree a Rectification Plan to attempt to resolve the issue. Failure by the Supplier to implement the Rectification Plan may then lead to Authority serving a termination notice.

Termination

- **Termination for Authority Default** - Termination of the Grant Agreement, not DPS Agreement
 - Breach by the Authority - non payment of valid, undisputed invoice as per Claims Procedure and as per Invoicing & Payments Process
 - Supplier issues Reminder Notice
 - Authority does not pay the valid, undisputed invoice within 60 days of date of Reminder Notice
 - Supplier issues Termination Notice
 - Clause 27.1 (a) applies
- **For all Terminations - Following issue of Termination Notice:** The whole of Clause 27.1(a) applies where the Agreement terminates for any reason:
 - The Parties consult with the National Competence Centre to ensure funding paid is not rendered unlawful as a result of early termination. Any respective right, obligations are written and executed by duly authorised authority (accumulated rights of the Parties are not affected). Each Party pays to the other outstanding undisputed payments as due prior to termination date.
Supplier:
 - deletes or returns Government data unless required by law to retain copies
 - return any BDUK property
 - shall cease to use BDUK IPR and the Government Data
 - ensure physical Network is secure and performs its health and safety legal obligations

Next steps:

Next Steps...

- Contract management Guidance document for Contract managers and Suppliers
- Contract management training sessions - to be held in autumn

Discussion feedback:

Discussion feedback

Key points of feedback in this discussion are set out below. We will endeavour to review and consider the implications:

Stage 1

- If bundle is up to 8,000 premises, part surveys would help with fluidity of ramping up supply chain.
- Drafting needed for 'Network design' for expedited stage 1.

Stage 2 Progress reports

- Last working day of the month is not feasible to provide reports

Invoicing and payment

- BDUK to share monthly reporting templates and review reporting questions from slido.

Rectification plan

- Rectification plans extend beyond material breaches. Suppliers can't take to dispute resolution. BDUK to review how to clarify the drafting.

Relief events and EEDs

- 3 WD for provision of EED Notice - is this enough? EED Notice template requested
- Cap on additional funds of 10% of Max Grant Payments too low - this is as per OJEU guidelines.
- Cyber attacks a Relief Event?

Force majeure

- Look to include pandemics other than Covid-19 in drafting. How to account for additional waves of Covid that may be of different severity? Particularly where it is the government response to such crises that affects delivery. BDUK to review with legal team.
- Clarify drafting on what is needed after three working days and provide a template for submission.

Discussion feedback

Change control

- Concern around time to review/respond by BDUK - to be specified in guidance. State Aid/VFM teams involved in review?

Termination

- Drafting of termination rights being reviewed.