

## Contract Framework Update # 2: Compensation Payable by HUD on Termination for Convenience – 17 December 2018

### 1. Introduction

Following the recent workshops between the Ministry of Housing and Urban Development (**HUD**) and public housing providers (**Providers**) in relation to HUD's new Public Housing Contract Framework, HUD, with the assistance of the sector, has given further consideration to the existing placeholder provisions set out in the Key Terms in the relevant Services Agreement Templates which relate to compensation payable by HUD on termination for convenience.

A high-level summary of the payments which HUD considers are relevant to each Services Agreement (and which should be payable by HUD on termination for convenience are set out below), with the relevant detailed provisions set out in the Appendix to this note.

Any Provider that has already signed a Relationship Agreement will be offered a Variation to gain the benefit of these changes.

### 2. Summary of compensation payable

Services Agreement	Subcontractor Break Costs <sup>1</sup>	Redundancy Costs <sup>2</sup>	Other Direct Costs of Termination <sup>3</sup>	Other Costs
Open Term Services Agreement	X	X	X	X
Capacity Services Agreement (Properties owned or leased)	✓	✓	✓	X
New Supply & Capacity Services Agreement - A (Operating Supplement only scenario)	✓	✓	✓	Net present value of future OS payments (for balance of term)
New Supply & Capacity Services Agreement - B (Up-front Development Cost Funding only scenario)	✓	✓	✓	Provider is entitled to retain any Upfront Development Funding Payments already paid <sup>4</sup>
New Supply & Capacity Services Agreement - C (Operating Supplement and Up-front Development Cost Funding scenario)	✓	✓	✓	Net present value of future OS payments (for balance of term) <b>PLUS</b> Provider is entitled to retain any Upfront Development Funding Payments already paid <sup>5</sup>
New Supply & Capacity Services Agreement - D (Operating Supplement only scenario, but Properties are leased by the Provider)	✓	✓	✓	Capped contribution (lesser of (i) 12 months lease break costs (ii) and net present value of future OS payments (for balance of term) <sup>6</sup>

<sup>1</sup> See paragraph 2 of the Appendix

<sup>2</sup> See paragraph 3 of the Appendix

<sup>3</sup> See paragraph 4 of the Appendix

<sup>4</sup> See paragraph 6 of the Appendix

<sup>5</sup> See paragraph 6 of the Appendix

<sup>6</sup> See paragraph 7 of the Appendix

## Appendix – Relevant Provisions

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### 1. Introductory Provision and No Double Counting Provision

The “compensation payable” Key Term in each relevant Services Agreement will include the following general introductory language:

*If HUD terminates this Agreement for convenience in accordance with the provisions of this Agreement and the Relationship Agreement, HUD will pay the Provider an amount equal to the aggregate of the following:*

...

In addition, each relevant Services Agreement will also include the following no double-counting provision at the end of the “compensation payable” Key Term:

*For the avoidance of doubt, clause 20 of the Relationship Agreement applies to this Agreement.*

### 2. Sub-contractor Break Costs

The provisions relating to Sub-contractor Break Costs are set out below:

(a) *amounts reasonably and properly incurred by the Provider and payable as Sub-contractor Break Costs, as a direct result of the termination of this Agreement, such amounts only to be paid to the extent that:*

- (i) *the Provider is liable to pay such amounts to the Sub-contractor under the express terms of the relevant sub-contract;*
- (ii) *as at the termination date there is no event of default (however described) subsisting under the relevant sub-contract that would entitle the Provider to terminate such sub-contract; and*
- (iii) *they represent an amount no greater than [one year’s] verifiable net profit attributable to the provision of the relevant Services under the relevant sub-contract;*

...

**Sub-contractor Break Costs** *means Losses that have been or will be reasonably and properly incurred by the Provider to a Sub-contractor as a direct result of the termination of this Agreement, but only to the extent that:*

- (a) *the Losses are incurred in connection with the Provider’s performance of its obligations under this Agreement, including in respect of the Services; and*
- (b) *the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms,*

*and for the purposes of this definition Losses may include, but are not limited to, Losses incurred as a result of:*

- i. any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred;*
- ii. any expenditure incurred in anticipation of the provision of Services in the future;*

iii. *the cost of demobilisation including the cost of any relocation of equipment used in connection with the Provider's performance of its obligations under this Agreement; and*

iv. *redundancy payment liability incurred by a Sub-contractor.*

...

**Sub-contractor** means any person engaged by the Provider from time to time as may be permitted by this Agreement and the Relationship Agreement to procure the provision of the Services (or any of them) and includes each Major Sub-contractor;

### 3. Redundancy Costs

The provision relating to Redundancy Costs is set out below:

(b) *redundancy payments for employees of the Provider that have been or will be reasonably incurred by the Provider as a direct result of termination of this Agreement (and where the Provider is unable to reasonably deploy such employees to other parts of the Provider's group), that the Provider is legally liable to pay under the terms of the relevant employment contracts or at law and that would not have been otherwise incurred if this Agreement was not terminated by HUD for convenience;*

### 4. Other Direct Costs of Termination

The provision relating to Other Direct Costs of Termination is set out below:

(c) *costs (other than any costs incurred under paragraphs (a) and (b) above) reasonably and properly incurred by the Provider as a direct result of the termination of this Agreement, but only to the extent that:*

(i) *the costs are incurred in connection with the Provider's performance of its obligations under this Agreement, including in respect of the Services include, but are not limited to, costs incurred as a result of:*

1. *the full or partial termination of any interest rate swaps or other fixed interest arrangements entered into by the Provider in connection with its senior debt financing of the Properties and its obligations under this Agreement to the extent required as a result of the termination of this Agreement;*
2. *any materials or goods ordered in the ordinary course of business that cannot be cancelled without such costs being incurred;*
3. *any expenditure incurred in the ordinary course of business in anticipation of the provision of Services in the future;*
4. *the Provider's services (if any) associated with the termination of Tenancies or the relocation of Tenants prior to the termination date set out in HUD's notice of termination; and*
5. *the cost of demobilisation including the cost of equipment used in connection with the Provider's performance of its obligations under this Agreement; and*

(ii) *the costs are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms; and*

- (iii) *the costs do not include any costs associated with the disposal or leasing of any of the Properties (including valuation, marketing or commission costs).*

**5. Other Costs – Scenario A and C – NPV of Future OS Payments**

The provisions relating to the Net Present Value of future Operating Supplement payment are set out below:

(d)

*the net present value (based on a discount rate equal to the Senior Debt Rate) of the Total OS Payments which would have otherwise been payable by HUD from the date of termination until the Expiry Date had this Agreement not been terminated by HUD;*

....

**Senior Debt Rate** means, at any time, the standard (non-default) interest rate per annum payable by the Provider to its External Financiers in respect of the Provider's senior debt financing at that time, provided that:

- (a) *where the Provider has multiple senior debt facilities or tranches, the weighted average of the interest rates applicable to those facilities or tranches will apply; and*
- (b) *where the Provider has no External Financiers, the Senior Debt Rate (as at any date) will be the 90 day bank bill bid rate recorded at 10.45 am on that date on Reuters Monitor Screen BKBM (or its successor page) plus two per cent.*

**6. Other Costs – Scenario B – Retention of Upfront Development Costs Funding already paid**

The provision relating to the Provider retaining any Upfront Development Cost Funding already paid to it by HUD is set out below:

*If HUD terminates this Agreement for convenience in accordance with the provisions of this Agreement and the Relationship Agreement, the Provider will be entitled to retain any Upfront Development Cost Funding that HUD has paid to it prior to the date of termination.*

## 7. Other Costs – Scenario D – Capped Contribution to Lease Break Costs

The provisions relating to Capped Contributions to Lease Break Costs is set out below:

(d) *The lesser of (i) and (ii) below:*

- i. *costs (other than any costs incurred under paragraphs (a), (b) and (c) above) that have been or will be reasonably and properly incurred by the Provider to a Lessor as a direct result of the termination of this Agreement, but only to the extent that the costs are incurred under a lease that is consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms, and subject in any event to a maximum aggregate amount of 12<sup>7</sup> months rental under that lease; and*
- ii. *the net present value (based on a discount rate equal to the Senior Debt Rate) of the Total OS Payments which would have otherwise been payable by HUD from the date of termination until the Expiry Date had this Agreement not been terminated by HUD.*

...

**Lessor** means the lessor of the Properties identified in the deed of lease entered into by the Provider in relation to the Properties;

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<sup>7</sup> This amount may be able to be increased (for all or a specified period of the term of the arrangements) in exceptional circumstances agreed by HUD.