



**Ministry
of Justice**

INDUSTRY STANDARD PARTNERING AGREEMENT

EXPLANATORY GUIDE

RESTRICTED – COMMERCIAL DISCUSSION DRAFT - VERSION 2 10.01.2013

PART 1

INTRODUCTION

1. General Principles behind the ISPA

- 1.1 The Ministry of Justice (**Contracting Authority**) has developed the Industry Standard Partnering Agreement (**ISPA**) to be widely used in a range of competitions to facilitate good practice between lead organisations and their supply chains. The ISPA is the standard contract document that will be used for all subcontracting arrangements.
- 1.2 The ISPA represents a new approach to subcontracting arrangements and sets a standard that will promote fair practices and assist in the development of diversity and transparency within supply chains.
- 1.3 The guidance here applies generally but for individual projects a more specific set of explanatory guides may be issued. These will provide focus on some of the project related issues that might dictate particular approaches depending on the nature of the services and the potential supply chain partners.
- 1.4 The Contracting Authority has also developed a set of Market Stewardship Principles that is published as part of its Principles of Competition as each new major procurement exercise is entered into. These Principles must underpin the Contractor's provision of the relevant services and its engagement with all entities to which it subcontracts the provision of the services. The Market Stewardship Principles are set out in Schedule 3 of the IPSA.
- 1.5 This Explanatory Guide should be read in full before an ISPA is entered into.

2. Approach to the Industry Standard Partnering Agreement

- 2.1 It is important for the Contracting Authority to understand the relationship a Contractor has with its own Subcontractors to ensure certainty in the supply of the services, to ensure the flow down of key contractual provisions and to obtain assurance that the subcontract provides incentives and provisions that are consistent with the agreement that the Contracting Authority has with the Contractor (**Services Agreement**).
- 2.2 The ISPA is intended as a starting point to assist the Contractor and the Subcontractor. It is not intended to be a complete contract and must in all cases be adapted to the particular services and circumstances (which may involve removing some parts of the ISPA which are not relevant to the services or not appropriate given the nature or volumes of the services). Some of the concepts in the ISPA are complex and a number of provisions are interdependent.
- 2.3 Certain clauses may be deemed to be mandatory by the Contracting Authority. In other words, they must be included in each ISPA which a Contractor enters into, otherwise the Contractor will be in breach of its agreement with the Contracting Authority. These will be clearly identified by the Contracting Authority and are clearly marked in the ISPA.
- 2.4 It will be necessary to obtain legal or other professional advice before entering into the ISPA. Specialist legal advice on employment and pension issues will also be essential if employees are transferred under the IPSA. Tax advice should also be obtained, where appropriate. Neither the

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Contracting Authority nor any of its advisers are responsible in any way for the use of this agreement.

- 2.5 The ISPA has a drafting date of January 2014. It will be necessary to ensure that the ISPA is reviewed in detail and updated by each party's legal advisors when it is used.
- 2.6 The ISPA contains, in some cases, provisions which are only for use if the ISPA is entered into with a Subcontractor which provides a material part of the services, referred to in this Explanatory Guide as a Material Subcontract.
- 2.7 The ISPA contains a number of clauses which have square brackets. These indicate that provisions will need to be considered and potentially amended to suit the particular services and circumstances.

3. Mystery Shopper

The Subcontractor is entitled to use the Cabinet Office's free Mystery Shopper service to raise concerns about procurement practice or supply chain issues if it feels that it has been the subject of poor practice from the Contractor. In addition to responding to Subcontractor requests, the Mystery Shopper will also conduct spot-checks of supply chain management.

The Subcontractor can find out more about the scope and remit of the mystery Shopper Service here:

<https://www.gov.uk/government/publications/mystery-shopper-scope-and-remit>

4. Location and updates to this Explanatory Guide and the Industry Standard Partnering Agreement

- 4.1 Each of the Explanatory Guide and the ISPA can be found on [www. \[\]](#). *[Explanatory Note: MOJ to confirm]* They may be updated from time to time. Please ensure that the most up-to-date versions are used.

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PART 2

GUIDE TO KEY CLAUSES AND SCHEDULES

1. Completion of questionnaire and allocation of risk (Recital D and Schedule 2)

- 1.1 Before an ISPA is entered into, the Contractor and the Subcontractor must complete a questionnaire together. The form of the questionnaire is set out in Appendix 1 to this Explanatory Guide and a completed version of it must be incorporated into the ISPA before it is entered into.
- 1.2 It is very important to identify, as far as possible, all risks to be assumed by the Subcontractor, to quantify those risks and to be able to describe the impact on the business of the Subcontractor of those risks.
- 1.3 The Contractor will be required to describe those risks to the Contracting Authority in reasonable detail and confirm in writing that those risks have been addressed reasonably.
- 1.4 The parties must critically review the level of risk to be allocated to the Subcontractor to ensure that it is proportionate to the types of services to be provided, the fees payable for those services and the extent to which performance or results are linked to payment.
- 1.5 The ISPA aims to ensure that a Subcontractor is rewarded and recognised for good performance.

2. Principal obligation to provide services (Clause 1 and Schedule 4)

- 2.1 The Subcontractor will be required to provide the services which it has agreed to provide. These services must be clearly set out in Schedule 4 to the ISPA. This is a critical part of the agreement as failure to provide any of the services described could put the Subcontractor in breach of the ISPA and in turn put the Contractor in breach of the Services Agreement. The Subcontractor must ensure that the services description accurately reflects its capabilities to provide the services. Both parties must work together to agree the scope of services to avoid contractual disputes as far as possible.
- 2.2 In addition to the terms of the ISPA, the Subcontractor must also provide the Services in accordance with Good Industry Practice (see definition in Schedule 1 to the ISPA) and all applicable laws and legislation. If there are any other mandatory provisions that the Contractor has to comply with under the Services Agreement that must also apply to its subcontractors, these will be listed in Clause 1.1(b).
- 2.3 The Subcontractor must also comply with, and meet all the requirements of, additional directions, policies and instructions listed in Clause 1.1(b) of the ISPA and will need to ensure that it has access to and can familiarise itself with the contents of all relevant documentation relating to these before entering into the ISPA.

3. Material Subcontracts (Clause 1.1(g))

- 3.1 If there are any overarching purposes of the services that the Subcontractor will need to meet, these will be set out here. Overriding purposes may include, for example, the reduction of reoffending rates. If the subcontract is a Material Subcontract (i.e. if the subcontractor will be providing a material part of the services contracted under the Services Agreement), the Contracting Authority may impose additional conditions on a case by case basis, and these will be set out in Clause 1.1(g).

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3.2 The Contractor may not enter into a Material Subcontract without the prior written consent of the Authority.

4. Obligations to provide information and support (Clause 1.1(f) and Schedule 11)

4.1 The Contractor must provide the Subcontractor with the necessary information, data and access to systems that the Subcontractor requires to provide the services. The Subcontractor may request additional information if the Contractor does not provide adequate information.

4.2 The parties must ensure that all relevant support that the Subcontractor requires, and which the Contractor agrees to provide, is set out in in Schedule 11 to the ISPA.

5. Service Levels and Service Credits (Clause 1.2 and Schedule 5)

5.1 The parties will need to consider whether the services to be provided should meet certain standards. If there are standards which apply to the equivalent services in the Services Agreement, the Contractor will want to pass those standards on to the Subcontractor. The Subcontractor, however, will need to consider whether it can meet those standards and whether it is a reasonable allocation of the risks associated with the provision of those services.

5.2 If service levels are agreed, the Subcontractor should review the Contractor's rights and remedies and consider the financial and operational consequences of a failure. If the Contractor wants to impose service credits to be paid if standards are not reached, they should be structured as a reduction on the charges, so the Contractor does not pay full price for services which have not been delivered in accordance with agreed standards. Schedule 5 will contain details of the amount the Contractor can deduct from the charges the Subcontractor would otherwise receive under the Agreement if the Subcontractor fails to provide the services in accordance with the service levels. The Subcontractor should carefully review its exposure to service credits and satisfy itself that they are proportionate to the severity of the underperformance or failure to perform.

5.3 If the amount of service credits that the Contractor can deduct are sufficient to reimburse the Contractor for its losses, then the parties may agree that service credits are the sole financial remedy available to the Contractor (although the Contractor might also have the right to terminate for material breach if the failure is severe enough). The Subcontractor should ensure that it understands whether there are any circumstances in which the Contractor also has the right to also seek damages in addition to applying service credits.

5.4 The Contractor can require changes to service levels and service credits and/or introduce new service levels and service credits, but these changes require three months' prior written notice and must be to reflect changing industry standards and the business requirements and priorities of the Contractor or Authority.

6. Contract management and governance (Clause 2 and Schedule 9)

6.1 The parties should consider and agree how the ISPA should be managed. This could include structuring a governance arrangement which includes specified committees to manage certain elements of the services and to meet, report on and make decisions within their particular remit, produce information and reports and deal with the escalation of issues.

6.2 The ISPA places requirements on the Subcontractor to produce regular reports to the Contractor that set out the Subcontractor's performance during a designated period and highlight areas for improvement.

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- 6.3 The ISPA contains continuous improvement provisions that enable the Contractor to ensure that the Subcontractor considers new and improved ways of delivering the services. If the Contractor wishes to include the continuous improvement requirement, the Subcontractor should understand what changes and improvements the Contractor can reasonably expect from the Subcontractor without paying an increase in charges or implementing through the change control process. Continuous improvement may not be relevant for some services.
- 6.4 The Subcontractor may be required to produce a remedial plan if the Contractor has serious concerns about the provision of certain services or broader concerns relating, for example, to public protection or information security. These concerns should be considered on a case by case basis and the parties should ensure that the potential concerns are relevant to the subcontracted services.
- 6.5 The ISPA also contains provisions which provide the Subcontractor with the opportunity to demonstrate areas of success, innovation and good performance. The Contracting Authority will review the Subcontractor's performance as part of its review of the Contractor's performance under the Services Agreement.
- 6.6 The ISPA entitles the Subcontractor to make representations to attend the Contractor's meetings with the Contracting Authority, and the Contractor must make reasonable efforts to enable the Subcontractor to attend those meetings if it is appropriate for the Subcontractor to do so.

7. Change in Services (Clause 4 and Schedule 7)

Changes to the terms of the ISPA will be dealt with under a separate schedule. The Contractor should ensure that changes which might impact its pricing or risk allocation are dealt with separately to simple changes that have a less significant impact.

8. Information Assurance (Clause 5)

[Note: to be completed by the MOJ once the IA requirements are finalised]

9. Representations, Warranties and Undertakings (Clause 6)

- 9.1 Each party must give representations and warranties regarding (i) its capacity and authority, (ii) the binding nature of obligations and (iii) authorisation and consents. These are standard provisions.
- 9.2 The Subcontractor must give additional representations, warranties and undertakings in relation to tax. Broadly, these relate to (i) schemes entered for the sole purpose of avoiding, deferring or reducing tax liabilities, (ii) criminal convictions for tax related offences, and (iii) incorrect tax returns. It is very important that each party obtains tax advice before agreeing to these provisions.
- 9.3 In the case of a Material Subcontract, the Subcontractor will be required to give certain undertakings, for example not to change the scope of its activities in a detrimental way or not to sell any part of its business which would materially affect its performance. These undertakings are necessary for the Contracting Authority to retain control over the provision of key services that have been subcontracted.

10. Liability (Clause 7)

- 10.1 Each party and, in particular, the Subcontractor will want to limit its liability in the ISPA. The limit in Clause 7 is a standard way of quantifying a party's maximum exposure under an agreement. The limit does not apply to certain losses that cannot be limited or excluded under English law, but the

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Subcontractor should review each additional provision that is excluded from the liability limit and consider whether it is appropriate for its liability to be uncapped.

- 10.2 There needs to be an appropriate allocation of risk between the parties which reflects the risk profile of the agreement. The Subcontractor should consider the extent to which the agreement to provide the service will become uneconomic if it cannot limit its liability at an appropriate level.

11. Force Majeure and Relief Events (Clause 8)

- 11.1 Neither party will be liable for acts or omissions beyond its reasonable control such as fire, flood or terrorist attacks.

- 11.2 The Subcontractor will not be in breach of the ISPA if the Contractor fails to carry out any act or thing that has an effect on the Subcontractor's ability to provide the services or to meet the required service levels. These 'Dependencies' should be identified in the ISPA and a Relief Event is the failure of the Contractor to carry out a Dependency. The Subcontractor must therefore identify each act or thing on which it depends to provide the services so that will not be in breach of the ISPA as a result of a failure by the Contractor.

12. Subcontractor Personnel (Clause 9)

- 12.1 The Subcontractor's employees, volunteers, agents and consultants may be required to adhere to additional rules, regulations and security measures from time to time and the Subcontractor should ensure that it receives copies of all relevant written rules, regulations and procedures with which the Subcontractor is expected to comply, and admission passes for any relevant premises.

- 12.2 Specific clauses about vetting of the Subcontractor's personnel may be required.

13. Insurance (Clause 11)

- 13.1 The Subcontractor should consider carefully the appropriate insurance measures which should be taken out to meet its potential liability under the ISPA. It should take advice from an insurance specialist as necessary.

- 13.2 Depending on the services to be provided by the Subcontractor, it may be necessary or appropriate with respect to some services for the Contractor to impose specified insurance requirements on a subcontractor and these should be listed in Clause 11.

14. Step-In Rights (Clause 12)

The Contracting Authority has the right to take certain action under the Services Agreement in certain circumstances, for example if it is likely that the Contractor will breach its obligations under the Services Agreement or if it wishes to inspect the services and monitor the Contractor's compliance with its obligations under the Services Agreement. A Subcontractor should note that the Contracting Authority may also have this right against a Contractor's Subcontractors under a Material Contract.

15. Price and Payment (Clause 13 and Schedule 6)

The parties must specify in detail the charges for the services or the manner in which the charges must be calculated. The basis of recovery of all other costs and expenses should also be clearly set out. If charges are to depend on a 'payment by results' mechanism, the parties need to ensure that this is specified in detail including the way in which the results are linked to payment.

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16. Audit (Clause 14)

It is very important for the Contracting Authority to gain access to information held by its contractors and to make checks on how services are being provided. The Secretary of State will have certain statutory functions which he needs to carry out and the audit provisions are designed to assist in the carrying out of those functions. The Contracting Authority must also be entitled to carry out an audit of a Contractor's Subcontractor. The audit provisions set out in Schedule 10 to the ISPA, therefore, must mirror the corresponding obligations on the Contractor under the Services Agreement.

17. Employee transfers

17.1 In some cases, the entering into of an agreement for the provision of services may result in the transfer of the Contractor's employees to the Subcontractor so that those employees become employed by the Subcontractor. This may take place where there is an organised grouping of employees whose principal purpose prior to the subcontracting is to provide those services being subcontracted.

17.2 If the Subcontract includes the transfer of employees, the terms of the employee transfer both on entry (i.e. transfer to the Subcontractor) and on exit (i.e. on termination of the ISPA or the Services Agreement) will be dealt with in the ISPA. Any provisions relating to employee transfer on subcontracting that are included in the Services Agreement and which are to be binding on the Subcontractor should be reflected as appropriate in the ISPA.

17.3 The following suggested draft wording envisages that an employee transfer will take place on entry and on exit as a result of the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the **Employment Regulations**):

EITHER:

“The parties envisage that the Employment Regulations will apply on commencement of this Agreement (**Entry**) and on termination of this Agreement or the Services Agreement (**Exit**). To the extent that the Employment Regulations apply on Entry and/or Exit, each party agrees to comply with its obligations under the Employment Regulations and will indemnify the other party in respect of any failure to do so. If the Employment Regulations do not apply, the existing employer of the employees providing the Services at the time of Entry or Exit (as the case may be) will continue to be responsible for those employees and will indemnify the other party for any liability arising from a failure to discharge that responsibility.”

OR:

“The parties shall comply with their respective obligations set out in Schedule 10 (Employee Transfers).”

17.4 The Contractor and Subcontractor should note, however, that an employee transfer will not happen automatically and, where a transfer does take place, it may not necessarily be as a result of the operation of the Employment Regulations. The transfer may be the result, for example, of a Statutory Transfer Scheme. Advice should be obtained from specialist employment lawyers to determine whether there will be an employee transfer in a given case. If there is an employee transfer, the parties may wish to include more detailed provisions on, for example, the conditions of transfer, apportionment of liability etc, and the details should be set out in the schedule to the ISPA. Again, specialist employment law advice should be obtained on the details of these provisions.

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18. Pensions

18.1 If the Subcontract includes the transfer of employees, the parties to the ISPA will need to consider what pension arrangements are in place for the employees transferring and whether those arrangements need to continue or be replicated, especially if the employees participate in a public service pension scheme (or had participated in one whilst working in the public sector). Legal advice may be needed on the following issues and suitable provisions will need to be included in the ISPA as appropriate:

- (a) Whether any of the transferring employees are covered by the Fair Deal policy: “*Fair Deal for staff pensions: staff transfer from central government*” published by HM Treasury in October 2013 (and/or the original Fair Deal policy on staff pensions announced in 1999 which may be relevant in some situations). In summary, the Fair Deal policy requires that staff who have been compulsorily transferred from the public sector to independent providers providing public services are provided with continued access to the relevant public service pension scheme, while they continue to be employed on the contracted-out service or function, including on any subsequent compulsory transfer to a sub-contractor. See paragraph 1.12 of the Fair Deal policy.
- (b) Whether the terms of the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector 2000 (**COSOP**), as amended in December 2013, need to be considered and applied. COSOP is a policy framework that is to be followed in relation to staff that are transferred to the private sector from the civil service (or transferred within the civil service). It seeks to protect the rights of the employees involved in such transfers. The policy uses the Employment Regulations as a foundation and requires that there should be appropriate arrangements to protect occupational pensions, redundancy and severance terms of staff on various types of transfer, including on second and subsequent generation contracting. It incorporates the requirements of the Fair Deal policy referred to above.
- (c) Where there is a transfer of staff under the Employment Regulations, the requirement to provide a minimum level of pension provision. (See sections 257 and 258 of the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005).
- (d) The requirements to auto-enrol certain workers in a qualifying pension arrangement (under the Pensions Act 2008).

18.2 If the transfer of employees includes employees who were originally employed in the function when it was carried out in the public sector, then it is likely that provisions which mirror those in the main contract will be required.

19. Contract Period and Termination (Clause 15)

19.1 The ISPA can be terminated for convenience by either party at any time by giving not less than six months’ written notice to the other party, but only after the Initial Term of three years. It can also be terminated if the Contracting Authority requires it to be terminated in certain circumstances. It will also terminate automatically if the Services Agreement is terminated.

19.2 The Subcontractor should note that the Contractor may have made commitments to the Contracting Authority about certain aspects of its supply chain, including a commitment to maintain certain arrangements in place for a specified period of time or to refer certain volumes of services or case

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referrals to a particular subcontractor. If this is the case, these obligations should be specified in the ISPA so the Subcontractor receives the full benefit of these commitments.

19.3 In the case of a Material Subcontract, the Contractor must not terminate the ISPA without the Contracting Authority's prior written consent. This is addressed in clause 15.2(a) of the ISPA.

19.4 The Contractor must provide the Subcontractor with written details of its retendering process if it terminates the ISPA where the Subcontractor is not at fault and intends to retender the same services. The Contractor must consider the Subcontractor's proposal for the provision of those services if the Subcontractor submits an offer.

20. Exit and Exit Plan (Clause 16)

20.1 It is always prudent to have an exit plan that manages each party's exit from a contractual agreement. It is unlikely that the parties will be able to develop an exit plan prior to entering into the ISPA, so the parties must therefore agree an exit plan that will be implemented in the [six month] exit period immediately prior to the termination of the ISPA as soon as possible after entering into the ISPA. The Subcontractor will be responsible for creating this plan and updating it annually. Suggested contents of the Exit Plan are set out in Schedule 13.

20.2 During the exit period, the Subcontractor must continue to provide the services to the Contractor and must also provide assistance to allow the services to continue and/or be transferred back to the Contractor or to a new subcontractor without interruption.

21. Transparency and Information (Clause 18)

21.1 The Contractor will be required to maintain detailed records for the Contracting Authority under the Services Agreement, including with respect to its Subcontractors. The Subcontractor will therefore have to provide similar information to the Contractor. This information will include records of the Subcontractor's costs of performing the services, its performance levels (with reference to the applicable service levels and any payment of service credits), and any health, safety or security issues and staff matters.

22. Data Protection and Information Assurance (Clause 18.2)

22.1 Restrictions on the processing of personal data under the ISPA are set out in Clause 18.2 as well as requirements to maintain appropriate technical and organisational measures to prevent damage to, loss of or unauthorised processing of personal data. The Subcontractor must ensure that it has adequate technical and organisational methods in place to ensure compliance with the ISPA and UK data protection laws.

22.2 The Subcontractor must ensure that all assets and systems that it uses to transmit information under the ISPA are compliant with the Contracting Authority's information assurance policies and requirements. The Contractor must satisfy itself that the Subcontractor can meet the level of security required under the ISPA.

23. Public Relations and Publicity (Clause 18.3)

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The Subcontractor will be permitted under Clause 18.3 to communicate with representatives of the press, television, radio or other communications media and promote and publicise its business and service capabilities, but must consult with the Contractor prior to doing so and no permission to photograph or film in or on any property used for the provision of the Services shall be given by the Contractor without the Contracting Authority's approval.

24. Intellectual Property and Project Data (Clause 19)

24.1 The Subcontractor must grant to the Contractor a licence to use its intellectual property rights to the extent necessary for the Contractor or the Contracting Authority to receive and use the services.

24.2 There are restrictions on the Subcontractor's use of project data and strict requirements about how that data is stored, processed, backed-up and segregated from other data that the Subcontractor holds. If the Subcontractor is working with offenders, it must keep up-to-date records for each person on the Authority's 'nDelius' system, or any other reporting system or template that the Contractor requests.

25. Assignment and Novation (Clause 21)

25.1 Neither party can transfer its rights under the ISPA to another person without the prior written consent of the other party.

25.2 The Contracting Authority may wish to preserve an ISPA even though the relevant Services Agreement has been terminated. The Subcontractor, therefore, must agree to transfer the ISPA to a replacement provider to the Contracting Authority. The rights and obligations of the Subcontractor will remain the same except the services will need to be provided to that replacement provider.

26. Subcontracting (Clause 22)

26.1 In the case of a Material Subcontract, the ISPA prevents the Subcontractor from subcontracting the provision of any part of the services without the Contractor's prior written consent, which may only be given subject to certain conditions.

26.2 The Subcontractor will be responsible for all acts and omissions of a subcontractor and will be the Contractor's sole point of contact for the performance of a subcontractor's obligations.

26.3 The terms of any subcontract must not contradict the ISPA and must include many of the ISPA's contractual provisions to ensure that that each subcontract is compliant with the Market Stewardship Principles and is performed in accordance with good industry practice (namely, using a degree of skill, care, prudence, foresight and operating practice that would reasonably be expected of a subcontractor under the same or similar circumstances), and that each subcontractor is protected against disproportionate exposure to risk.

27. Dispute Resolution (Clause 23)

The ISPA's dispute resolution procedure provides for an escalation of measures, including commercial negotiations through a number of executive levels, [optional] mediation and then litigation.

28. Third Party Rights (Clause 24.4)

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The Contracting Authority may enforce any Clause in the ISPA against the Subcontractor even though it is not a party to the ISPA.

29. Amendments (Clause 24.8)

No amendments can be made to the ISPA without agreement by both parties.