

## **CONDITION 16. PROCUREMENT OF RELEVANT SERVICE CAPABILITY**

### **Introduction**

- 16.1 This condition sets out requirements (Part A below) and principles (Part B below) that are to apply to the Licensee's procurement of Relevant Service Capability.
- 16.2 Relevant Service Capability is capability that is used (or is to be used) for the purposes of securing the provision of Mandatory Business Services under or pursuant to the Smart Energy Code or Retail Energy Code (and includes Fundamental Service Capability and Fundamental Registration Service Capability).
- 16.3 This condition also requires the Licensee:
- (a) to take account of any guidance issued by the Secretary of State under Part C below in the form of a Public Interest Statement;
  - (b) to have in place a Procurement Strategy for Relevant Service Capability, in a form designated by the Secretary of State, that takes account of the principles established by this condition and of any guidance issued pursuant to it; and
  - (c) to comply with the provisions of Appendix 1 to this condition with respect to any Energy Supplier Contracts adopted by the Licensee.

### **Part A: Requirements that are imposed on procurement activities**

- 16.4 The Licensee must (subject to paragraph 16.6) procure Relevant Service Capability from External Service Providers on a competitive basis and under arrangements to be known as External Service Provider Contracts that are compliant with the principles established by Part B below ("the Part B Principles").
- 16.5 The duty imposed by paragraph 16.4 applies without exception to the procurement by the Licensee of such Relevant Service Capability as is specified as:
- (a) Fundamental Service Capability in Schedule 1 (which has effect as part of this condition) to this Licence; or
  - (b) Fundamental Registration Service Capability.
- 16.6 Relevant Service Capability that is not so specified may be provided by the Licensee from its own resources, or be procured from an Affiliate or Related Undertaking, or from elsewhere, if the Licensee, having had regard to the Part B Principles (excluding Principle 2), is satisfied that the procurement of such capability by that means:
- (a) would be the most economical and efficient option; or
  - (b) would be immaterial in terms of its value or use of resources within the overall context of the Mandatory Business of the Licensee.
- 16.6A Subject to paragraph 16.6C, the Licensee must not:

- (a) enter into arrangements with an External Service Provider for the provision of any new or additional Relevant Service Capability; or
- (b) require or agree to any change to existing Relevant Service Capability provided by an External Service Provider,

unless and until the requirements of paragraph 16.6B have first been satisfied in respect of:

- (c) the Relevant Service Capability referred to in paragraph 16.6A(a); or
- (d) the change to the Relevant Service Capability referred to in paragraph 16.6A(b) (each of which, in this Part, is the '**proposed Relevant Service Capability**').

16.6B The requirements of this paragraph 16.6B are that the Licensee has:

- (a) submitted to the Secretary of State [\(or from such date as may be specified in a direction issued by the Secretary of State under paragraph 16.6D, to the Authority\)](#) a description of the nature and scope of, and reasons and need for, the proposed Relevant Service Capability;
- (b) provided such additional details or information relating to the proposed Relevant Service Capability as may be requested by the Secretary of State [\(or from such date as may be specified in a direction issued by the Secretary of State under paragraph 16.6D, by the Authority\)](#) having received the Licensee's description of the proposed Relevant Service Capability; and
- (c) obtained confirmation in Writing that the Secretary of State [\(or from such date as may be specified in a direction issued by the Secretary of State under paragraph 16.6D, the Authority\)](#) does not object to the proposed Relevant Service Capability.

16.6C Paragraph 16.6A does not apply:

- (a) in respect of any proposed Relevant Service Capability which is of a type described or specified in a direction issued by the Secretary of State [\(or from such date as may be specified in a direction issued by the Secretary of State under paragraph 16.6D, by the Authority\)](#) to the Licensee under this paragraph 16.6C(a); or
- (b) if the Secretary of State [\(or from such date as may be specified in a direction issued by the Secretary of State under paragraph 16.6D, the Authority\)](#) has issued a direction to the Licensee under this paragraph 16.6C(b), from such date as is specified in the direction as the date on which the requirements of paragraph 16.6A shall cease to have effect.

[16.6D The Secretary of State may, in a direction issued to the Licensee under this paragraph 16.6D, specify that the provisions of paragraphs 16.6B and 16.6C that refer to the Secretary of State shall, from such date as is specified in the direction, refer to the Authority.](#)

16.6E Where the Secretary of State issues a direction under paragraph 16.6D, any direction issued by the Secretary of State pursuant to paragraph 16.6C(a) or 16.6C(b) prior to the date specified in the direction issued under paragraph 16.6D shall not cease to have effect (other than in accordance with the terms of that direction) unless and until it is amended, replaced or revoked by a direction issued by the Authority pursuant to paragraph 16.6C(a) or 16.6C(b) (as the case may be).

**Part B: Principles that are applicable to procurement activities**

16.7 This Part B establishes principles:

- (a) that are to apply to the Licensee’s procurement of Relevant Service Capability; and
- (b) taking account, except in respect of the Fundamental Registration Service Capability, of any guidance contained in a Public Interest Statement issued under Part D below.

16.8 Principle 1 is that Relevant Service Capability must be procured with due regard for the Licensee’s ability (and the ability of any Successor Licensee) at all times to fully exercise the functions it has under or by virtue of the Principal Energy Legislation, this Licence, the Retail Energy Code and the Smart Energy Code (“the Relevant Functions”).

16.9 Principle 2 is that Relevant Service Capability must be procured competitively wherever practicable and proportionate, and with due regard for (i) the principles of equality and non-discrimination between economic operators and (ii) the employment of transparent and objective procurement processes.

16.10 Principle 3 is that Relevant Service Capability must be procured from suitable and appropriate organisations, having due regard to:

- (a) the good standing, conduct, and financial capacity of such organisations; and
- (b) the capability and capacity of such organisations to deliver the Relevant Service Capability.

16.11 Principle 4 is that Relevant Service Capability must be procured in a manner that:

- (a) secures value for money in terms of the combination of quality and cost over the lifetime of the contract;
- (b) delivers the required goods, services, or works to the appropriate standards according to the needs of service users;
- (c) takes account of the potential need to replace from time to time the persons engaged in providing the capability; and
- (d) incorporates (at a cost that is not disproportionate to any expected benefit) sufficient flexibility to adapt to changing service user requirements over the duration of the contract.

- 16.12 Principle 5 is that Relevant Service Capability must be procured under contractual arrangements that make provision for the full and enduring protection of business continuity, including:
- (a) appropriate provision to secure the Licensee's ability to exercise all of the Relevant Functions in the event of any material financial default of an External Service Provider;
  - (b) appropriate provision to secure the Licensee's ability to exercise all of the Relevant Functions in the event of any operational failure of an External Service Provider; and
  - (c) appropriate provision to secure the transfer or novation of the contract in the circumstances of a handover of the business of the Licensee to a Successor Licensee following the expiry or any revocation of this Licence or where applicable, pursuant to direction by the Authority under Condition 15.6 (as to which, see paragraph 14 of Condition 43 (Arrangements for the handover of business) for further relevant provision).
- 16.12A Principle 6 is that the procurement of Relevant Service Capability must not also include or incorporate the procurement of additional, contingent, excess or surplus capability or capacity for the purposes of, or with the intention of, the utilisation of such capability or capacity by the Licensee for the provision of Permitted Business Services.

**Part C: Public Interest Statement relating to procurement activities**

- 16.13 In applying the provisions of Parts A and B above to its procurement activities with respect to Fundamental Service Capability, the Licensee must take account of any guidance contained within a Public Interest Statement issued by the Secretary of State in accordance with this Part C.
- 16.14 Before issuing a Public Interest Statement, the Secretary of State must consult the Authority and the Licensee about the contents of the statement.
- 16.15 The purpose of a Public Interest Statement under this Part C is to provide guidance to the Licensee with respect to the public interest considerations that may need to be reflected in the scope and functionality of Fundamental Service Capability procured by the Licensee pursuant to the provisions of Parts A and B above.
- 16.16 Such guidance may, in particular, indicate how and to what extent the procurement of Fundamental Service Capability might be expected to contribute towards the achievement of any one or more of such energy policy outcomes as are set out in any strategy and policy statement designated by the Secretary of State for the purposes of Part 5 of the Energy Act 2013.
- 16.17 A Public Interest Statement issued in accordance with this Part C may be revised at any time by the Secretary of State following consultation with the Authority and the Licensee.
- 16.18 The Licensee must publish and maintain a Public Interest Statement (including any

amended statement following a revision under paragraph 16.17) on its Website.

**Part D: Procurement Strategy for Relevant Service Capability**

- 16.19 Except where the Secretary of State otherwise consents, the Licensee must within twelve months after the Licence Commencement Date have in place a statement of its Procurement Strategy for Relevant Service Capability.
- 16.20 That statement must have been approved by the Secretary of State for the purposes of this condition following consultation (subject to paragraph 16.23) with the Licensee and with the Authority, SEC Parties, and any other persons who are likely to be materially affected by the strategy.
- 16.21 The statement of the Procurement Strategy for Relevant Service Capability must explain the Licensee's conclusions with respect to the nature and extent of its procurement activities, in such detail and by including such information as may be appropriate for the purpose, with particular reference to:
- (a) the determination of the Relevant Service Capabilities necessary to enable the Licensee to exercise its Relevant Functions;
  - (b) the determination of which of those capabilities are to be procured from External Service Providers by means of a competitive process (having due regard to paragraph 16.6);
  - (c) the determination of how and to what extent the required Relevant Service Capabilities reflect the guidance contained in any Public Interest Statement issued under Part C above;
  - (d) the determination of how the required Relevant Service Capabilities are to be assembled into discrete contracts; and
  - (e) the determination of a forward plan of the procurement activities necessary to secure those contracts.
- 16.22 The Licensee must take all appropriate steps within its power to comply with the provisions of any Procurement Strategy for Relevant Service Capability that is for the time being in force under this condition.
- 16.23 The consultation process that is required by virtue of paragraph 16.20 may be subject to the provisions of Part G below.

**Part E: Procedure for reviewing the procurement strategy**

- 16.24 The Licensee must, for the purposes of ensuring that its Procurement Strategy for Relevant Service Capability at all times continues to be a document that accurately reflects the requirements of this condition:
- (a) review that strategy at least once in each full Regulatory Year following the Secretary of State's designation of it under Part D above; and

- (b) propose to the Authority such revisions (if any) of the strategy as the Licensee thinks are appropriate or necessary for the purpose of better complying with those requirements.
- 16.25 The Authority may at any time, after consulting the Licensee and such other persons as it considers should be consulted in relation to the matter (subject to paragraph 16.26), direct the Licensee to revise its Procurement Strategy for Relevant Service Capability in such manner, with effect from such time, and to such extent as may be specified in the direction.
- 16.26 The consultation process that is required by virtue of paragraph 16.25 may be subject to the provisions of Part G below.

**Part F: Availability of statement of the procurement strategy**

- 16.27 The Licensee must promptly and properly reflect every revision of its Procurement Strategy for Relevant Service Capability in a corresponding revision of the statement of that strategy that is in place by virtue of paragraph 16.19.
- 16.28 The Licensee must give the Authority and, where requested, the Secretary of State a copy of the statement of its Procurement Strategy for Relevant Service Capability and of each revision of that statement.
- 16.29 The Licensee must also (subject to paragraph 16.30) give a copy of the statement of its Procurement Strategy for Relevant Service Capability (or the most recent revision of it) to any SEC Party or REC Party who requests a copy.
- 16.30 In discharging its duties under paragraph 16.29, the Licensee must comply with such restrictions or requirements (if any) with respect to the manner in which it does so as appear to the Authority to be necessary for the purpose of protecting the legitimate commercial interests of any person.

**Part G: Undertakings required in respect of confidentiality**

- 16.31 This Part G applies where the Secretary of State or the Authority (as the case may be) is consulting, or proposing to consult:
  - (a) persons under paragraph 16.20 with respect to the preparation and designation of a statement of the Licensee's Procurement Strategy for Relevant Service Capability; or
  - (b) persons under paragraph 16.25 with respect to any proposed revision of that strategy.
- 16.32 Where this Part G applies, the Secretary of State or the Authority (as the case may be) may require any person (including the Licensee) that is taking part, or that wishes to take part, in the relevant consultation process to enter into such undertakings to maintain the confidentiality (in whole or in part) of the document that is the subject of the consultation as appear to the Secretary of State or the Authority to be necessary for the purpose of protecting the legitimate commercial interests of any person.

- 16.33 An undertaking under paragraph 16.32 may be expressed to survive the expiry or any revocation of this Licence.

**Part H: Retention of procurement strategy particulars and records**

- 16.34 The Licensee must maintain, for the full duration of the Licence Term, records and particulars of:
- (a) all Relevant Service Capability offered to it under or pursuant to its Procurement Strategy for Relevant Service Capability; and
  - (b) all contractual arrangements that it has entered into under or pursuant to its Procurement Strategy for Relevant Service Capability.
- 16.35 The Licensee must supply the Authority with any information that it reasonably asks for about the Licensee's procurement and use of Relevant Service Capability.

**Part I: Arrangements for the adoption of Energy Supplier Contracts**

- 16.36 The Licensee must contribute to, implement, and give effect to such provisions of the SEC Adoption Process as are applicable to it.
- 16.37 The SEC Adoption Process comprises those provisions of the SEC that will apply by virtue of Part H of Condition 22 (The Smart Energy Code) to:
- (a) the process of assessing and determining Energy Supplier Contracts for the purpose of providing Relevant Service Capability to the Licensee pursuant to its procurement obligations under this condition; and
  - (b) the adoption by the Licensee of any Energy Supplier Contracts that may be required to be so adopted as a consequence of that process.
- 16.38 Appendix 1 (which has effect as part of this condition) makes further provision with respect to matters arising from the SEC Adoption Process.

**Part J: Interpretation**

- 16.39 References to "capability" in this condition do not include capability required for the purpose of facilitating any incidental administrative, co-ordination, or contract management services associated with or ancillary to the provision of any Services.
- 16.40 For the purposes of this condition:

**Energy Supplier Contract** means a contractual arrangement (in whatever form and however described) that an Energy Supplier has entered into, whether before or after Licence Commencement Date, with any person other than the Licensee for the purpose of procuring and providing communication or data services with respect to Smart Metering Systems.

**Fundamental Service Capability:**

- (a) means Relevant Service Capability that is provided under Legacy Procurement

Contracts (as they are defined and from time to time identified and described in Schedule 1 (Details of Fundamental Service Capability) to this Licence), including the provision of all such capability (including goods and products) as is necessary to enable the Licensee to provide, or arrange for the provision of, the Communications Hub Service pursuant to Part E of Condition 17 (Requirements for the provision of Services); and

- (b) is deemed to have been procured by the Licensee under this Condition 16, and not by any other person acting by or under any other means, despite anything to the contrary in Schedule 1 to this Licence.

**Part B Principles** has the meaning given to that term in paragraph 16.4, and refers to the principles listed in Part B of this condition.

**Public Interest Statement** has the meaning given to that term in paragraph 16.15.

**Relevant Functions** has the meaning that is given to that term in paragraph 16.8.

**SEC Adoption Process** has the meaning given to that term in paragraph 16.37.

#### **Part K: Further relevant provision**

- 16.41 Condition 44 (Treatment of Intellectual Property Rights) sets out and makes further provision relating to the Licensee's management and development of the External Service Provider Contracts to which it is a party pursuant to this Condition 16.
- 16.42 Appendix 1 follows immediately below.

### **APPENDIX 1: ADOPTION OF ENERGY SUPPLIER CONTRACTS**

#### **Introduction**

- A1. In accordance with Part I of this condition, this Appendix 1 applies with respect to matters arising from the SEC Adoption Process to which Part I refers in relation to the adoption by the Licensee of Energy Supplier Contracts.

#### **Part A: Any adopted contracts must be capable of novation**

- A2. The Licensee may not be required by the SEC Adoption Process to adopt an Energy Supplier Contract that is not capable of being transferred or novated:
  - (a) to the Licensee for the purposes of the adoption of the contract; and
  - (b) to a Successor Licensee in the event of a handover of the Licensee's business to such person following the expiry or any revocation of this Licence (as to which, see Condition 43 (Arrangements for the handover of business) for further relevant provision).

#### **Part B: Status of adopted contracts on and after adoption**



- A3. An Energy Supplier Contract adopted by the Licensee by virtue of any decision or determination under the SEC Adoption Process:
- (a) becomes a Legacy Procurement Contract with effect from the date on which the adoption has effect; and
  - (b) is accordingly subject on and after that date to the provisions of Schedule 1 to this Licence (Details of Fundamental Service Capability) so far as they apply to such a contract.

**Part C: Re-procurement of Relevant Service Capability**

- A4. Where the Licensee proposes to re-procure Relevant Service Capability (whether in whole or in part) that is being provided pursuant to a Legacy Procurement Contract adopted in accordance with the SEC Adoption Process, the re-procurement process (and any subsequent such process) must be carried out in compliance with:
- (a) the Part B Principles of this condition (as opposed to any other principles or criteria by reference to which the contract was required to be adopted under the SEC Adoption Process); and
  - (b) such provisions of the Procurement Strategy for Relevant Service Capability in place under this condition as are applicable.

**Part D: Reporting requirements for adopted contracts**

- A5. Except where the Authority otherwise consents, the Licensee must, by not later than three months after the end of each Regulatory Year, give the Authority a report in Writing about its operation during that year of any Legacy Procurement Contract adopted in accordance with the SEC Adoption Process.
- A6. The report must (where applicable) include details of:
- (a) any specific matters of concern arising from such operation that the Licensee considers should be reported to the Authority in respect of each contract to which the report relates; and
  - (b) any plans or proposals of the Licensee with respect to the future management and development of the Relevant Service Capability provided by each such contract.
- A7. Where the Authority so requires, the Licensee must public its report prepared under paragraph A5 in such form and to such extent as may be approved by the Authority, having had regard to the need to preserve commercial confidentiality.

## **CONDITION 23: CHANGE CONTROL FOR THE SMART ENERGY CODE**

### **Introduction**

- 23.1 This condition applies for the purpose of establishing (without limitation) an effective and transparent change control framework for the Smart Energy Code (“the SEC”) that is in force under this Licence by virtue of Condition 22 (The Smart Energy Code).
- 23.2 Any proposal by any person to modify the SEC must have as its purpose the better achievement of the General SEC Objectives set out at Part D of Condition 22 (or such Relevant Policy Objectives as may be applicable to the particular proposal by virtue of Condition 18 (Charging Methodology for Service Charges) of this Licence).

### **Part A: Compliance with the SEC Modification Arrangements**

- 23.3 The Smart Energy Code (“the SEC”) in force under this Licence by virtue of Condition 22 may be modified at any time after the SEC Commencement Date that is referred to in that condition, subject to the constraint imposed by paragraph 23.4.
- 23.4 The SEC may only be modified in accordance with modification arrangements set out in the SEC (“the SEC Modification Arrangements”) that are consistent with and give full and complete effect to the requirements specified at Part B below.

### **Part B: Requirements for modifying the Smart Energy Code**

- 23.5 The SEC Modification Arrangements for which the SEC must make provision must satisfy each of the following requirements.
- 23.6 The first requirement is that the SEC Modification Arrangements must provide for the Licensee and all other SEC Parties to meet periodically for the purpose of discussing the continuing development of the SEC, having regard to the General SEC Objectives.
- 23.7 The second requirement is that the SEC Modification Arrangements must provide for a timely and efficient process by which the SEC Panel can:
- (a) formally receive modification proposals from the Licensee, any SEC Party, the Authority, [the Secretary of State](#), Citizens Advice or Citizens Advice Scotland, or from any other person or body that may be either designated by the Authority for the purpose of making such proposals or specified for such purpose by a provision of the SEC;
  - (b) consult on the merits of those modification proposals with the Licensee, SEC Parties, Citizens Advice and Citizens Advice Scotland, and any other persons whose interests are materially affected by the SEC; and
  - (c) evaluate those proposals in the light of that consultation.
- 23.8 The third requirement is that the SEC Modification Arrangements must provide for the SEC Panel to have a report on any modification proposal (“a Modification Report”) prepared in a timely and efficient manner for submission to the Authority that:

- (a) sets out the terms proposed for the modification;
- (b) fairly summarises the representations received during the consultation process under paragraph 23.7;
- (c) sets out the conclusions reached by the SEC Panel (or by such other body as may be specified for this purpose by the SEC) about the modification proposal in question, including whether in the SEC Panel's opinion (or the opinion of that other body, as the case may be) the modification would, if made, better achieve the General SEC Objectives (or such Relevant Policy Objectives as may be applicable to the proposal by virtue of Condition 18 of this Licence); and
- (d) sets out a timetable for implementing the modification, if it were to be made, and the date with effect from which the modification (if made) would take effect.

23.9 The fourth requirement is that the SEC Modification Arrangements must provide for specified categories of modification (and those categories only) to be capable of:

- (a) being processed and considered more urgently than any other categories of modification; or
- (b) being made by the SEC Panel (or by such other body as may be specified for this purpose by the SEC) without the Authority's approval.

23.10 The fifth requirement is that the SEC Modification Arrangements must provide:

- (a) for every Modification Report to include an assessment of the quantifiable impact (if it is likely to be material) of the relevant modification proposal on Greenhouse Gas emissions; and
- (b) for that assessment to be conducted in accordance with any guidance issued for that purpose by the Authority about the evaluation of such emissions and the appropriate treatment of carbon costs.

23.11 The sixth requirement is that the SEC Modification Arrangements must provide for the Authority, if it considers that a Modification Report does not adequately analyse or fully consider the matter in question:

- (a) to remit that Modification Report to the SEC Panel; and
- (b) to direct the SEC Panel as to the nature of the further analysis or the further consideration, or both, that the Authority believes is required.

23.12 The seventh requirement is that the SEC Modification Arrangements must provide:

- (a) for the Authority [and for the Secretary of State](#) to bring forward a modification proposal of its own motion (or to direct the Licensee to bring forward such a proposal) by reference to particular policy considerations specified in the SEC for that purpose; and
- (b) for any such modification proposal to be initiated, processed, and determined in

accordance with such procedures as are set out in the SEC for the purpose of dealing with such a proposal by reason of its special status.

- 23.13 The eighth requirement is that the SEC Modification Arrangements must provide for the full and timely processing and determination of any modification proposal that is necessary to enable the Licensee, or any SEC Party, or any category of SEC Parties to implement or otherwise comply with any relevant binding decision of the European Commission or the Agency for the Co-operation of Energy Regulators.
- 23.14 The ninth requirement is that the SEC Modification Arrangements must contain provision (which may be the same as that which applies with respect to other parts of the SEC) for modifying the SEC Modification Arrangements.
- 23.15 The tenth requirement is that the SEC Modification Arrangements must provide for the SEC Panel to be required to make a modification of the SEC where the Authority is satisfied:
- (a) that the relevant modification proposal has been processed in accordance with all of the applicable SEC Modification Arrangements;
  - (b) that the modification, if made, would better facilitate the achievement of the General SEC Objectives (or such Relevant Policy Objectives as are applicable to the modification by virtue of Condition 18 of this Licence); and
  - (c) that the making of that modification would be consistent with the Authority's principal objective and general duties under the Principal Energy Legislation.

### **Part C: Interpretation**

23.16 This condition should be read in conjunction with and subject to:

- (a) Parts C and D of Condition 18 (Charging Methodology for Service Charges), which make special provision for the modification of the Charging Methodology for Service Charges as incorporated into the SEC;
- (b) any provision of the SEC arising for transitional purposes by virtue of Part F of Condition 13 (Arrangements relating to the Transition Objective) that has the effect on a transitional basis of varying, adding to, or overriding any of the SEC Modification Arrangements established pursuant to this Condition 23; and
- (c) the provisions of Part G of Condition 22 applying to the incorporation into the SEC of documents designated for such purpose under that condition by the Secretary of State.

**Agency for the Co-operation of Energy Regulators** means the body of that name established under Regulation 2009/713/EC of the European Parliament and of the Council of 13 July 2009.

**Citizens Advice** means (in Condition 22 as well as in this condition) the National Association of Citizens Advice Bureaux.

**Citizens Advice Scotland** (in Condition 22 as well as in this condition) means the Scottish Association of Citizens Advice Bureaux.

**Greenhouse Gas** in relation to emissions has the meaning given to that term in section 92 of the Climate Change Act 2008.

**Modification Report** has the meaning given to that term in paragraph 23.8.

**Relevant Policy Objectives** means the objectives listed in Part C of Condition 18 with respect to the Charging Methodology for Service Charges.

**SEC Modification Arrangements** has the meaning that is given to that term in paragraph 23.4.