MEMBER'S BRIEFING

supporting voluntary organisations that work with offenders and their families

RUSSELL-COOKE | SOLICITORS

Briefing: The 'Final ISPA'

A summary of changes

Introduction

This briefing summarises the key changes between the "Draft ISPA" and the "Final ISPA". The aim of this briefing is to support and inform voluntary sector organisations about the Industry Standard Partnering Agreement (ISPA), which is a template subcontract produced by the Ministry of Justice (MoJ) to be used in subcontracts under their commissioned programmes. This version of the ISPA, which is specific to the Transforming Rehabilitation competition, was released on June 6th (titled "Final ISPA"), following an initial draft released in January 2014 and a consultation that lasted until February 20th. Clinks' response to this consultation, in which it recommended a number of changes to the ISPA, is available on the Clinks website.

We are aware that changes are expected to be made to this version of the ISPA and Clinks will, through our website, keep the voluntary sector informed as to how those changes could impact on the advice given in this document.

It should be noted that the ISPA is a template for subcontracts that needs to be completed between contracting partners. Many of the schedules are blank for this reason, and much of the content will require negotiation. While it is the final template, it is only the basis for a specific agreement with your organisation.

The ISPA should be read alongside the Explanatory Guide. The Guide does not form part of the contract, but does provide background about how and when the ISPA should be used.

The Final ISPA has been electronically sent to all the organisations registered as tier 1, 2, or 3 providers with the Ministry of Justice's Transforming Rehabilitation programme. If you are not registered please contact MAS@justice.gsi.gov.uk**, or view more information on the** Ministry of Justice website**.** Any publically available documents relating to the ISPA are available on the Clinks website.

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Contents: The key changes and issues in the ISPA are as follows:

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1. The ISPA has been made specific to offender management

This guidance refers to the Final ISPA that has been created by the Ministry of Justice to be used specifically for the Transforming Rehabilitation Programme, and includes aims specific to offender management and references to the Offender Management Act 2007 (particularly Part 1 - Section 7(1), Section 3(6), Section 8, Section 9 (1), Section 10 www.legislation.gov.uk/ukpga/2007/21/contents). A 'generic' ISPA was released by the Ministry of Justice prior to this version, for the purpose of consultation.

The Final ISPA includes references to procedures, software and training relating to offender management. These include for example, Mandatory Prison Service Instructions, and Prison Service Orders, particularly PSO 9010 – IT Security and PSO 9015 – Information Assurance. The contract refers to elements of these documents. It would be advisable to ensure that you are familiar with how your organisation will be expected to implement them. This is likely to be part of management discussions with a Tier 1 provider. It would be advisable to ask the Tier 1 to provide copies of relevant and up to date Instructions and Orders, and to clarify your role in complying with them.

2. The ISPA is now required for all registered Tier 2 and 3 providers

Clause 1.3 of the Explanatory Guide states that the ISPA must be used for all Tier 2 and Tier 3 registered providers, including those that are subcontracted by a Subcontractor. This is a slight change from previous guidance which indicated that the ISPA would be deemed to be "good practice" in relation to Tier 3s.

If the ISPA is used, some clauses are mandatory, but many will be non-mandatory. This means a simpler version of the ISPA could be used for smaller providers.

3. Provision for grant agreements

There is now specific provision allowed for grants (see Explanatory Guide section 5). However, grant funding is only applicable for *"smaller organisations or a charitable trust that assists with the provision of services or requires funding to support an innovative project."*

In further correspondence with Clinks, the MoJ have indicated that it is the Authority's view that grant funding is only appropriate where the organisation is not delivering the services directly and is assisting or supporting the delivery of the services. They have indicated that this is the key issue, rather than the size or legal position of the organisation.

4. Mandatory and non-mandatory clauses have been identified

Some clauses in the ISPA are mandatory. In correspondence with Clinks, the MoJ have clarified that that these clauses cannot be amended, and that where the Authority has permitted some flexibility on an otherwise mandatory clause, this has been made clear in the ISPA and Explanatory Guide.

For example, the Explanatory Guide (Paragraph 11) refers to ISPA Clause 7: Liability. It implies that the Subcontractor should consider whether it can manage uncapped liabilities as set out in the ISPA and that the Contractor should not seek to inappropriately flow down liabilities.

Other clauses are non-mandatory and can be negotiated or removed in completed versions. How much these clauses can be negotiated is likely to depend on the nature of the service you are providing, the proportion of risk your organisation is able to take on, and the requirements of the Tier 1 provider.

Mandatory	Mandatory in part or in some cases	Non Mandatory
1.1 Principal Obligations 2.5 Remedial Plan Process 2.6 Service Agreement Meetings 3. Equalities and Human Rights 4. Changes in Services 5. Information Assurance 6.1 Warranty 6.2 Exercise of Rights 6.3 ISPA Questionnaire 6.4 Risk Assessment 6.7 Tax 7.1 Limitations of Liability 7.2 Indirect and Consequential Loss 7.4 Miscellaneous 8.1 Relief Events 8.2 Force Majeure 9. Subcontractor Personnel 11. Insurance 14. Audit 15.1 Contract Period 15.2 Voluntary Termination 18. Transparency and Information (including record keeping, data protection, Freedom of Information Act requirements) 19. Intellectual Property 20. Project Data 21. Assignment 22. Subcontracting	6.5 Subcontractor Undertakings 6.6 Reputational Damage 12. Access Rights 15.3 Termination on Insolvency 15.4 Termination on Material Breach 16. Exit and Exit Plan 23. Dispute Resolution 24. Miscellaneous	1.2 Service Levels 1.3 Service Credits 2.1 Annual Service Plan 2.2 Service Report 2.3 Continuous Improvement Plan 2.4 Contract Reviews 7.3 Recoverable Losses 8.3 Business Continuity 10. Governance 13. Price and Payment 17. VAT

5. Tightening up of timescales

Some timescales have been tightened in favour of the Contractor. This means that there has been a reduction in most timescales relating to requirements of the Subcontractor to inform the Contractor of certain occurrences and reporting.

It would be advisable for organisations to pay close attention to the proposed timescales and to re-negotiate them where they are considered to be unmanageable. For example, in clause 2.4(b), the Service Report for the first 9 months of the year must now be provided only 2-3 weeks after the 9 month period ends, in order to meet the deadline set out in 2.4(b). Depending on the detail and complexity of the Service Report, this may be an unrealistic time-frame for some organisations. It would be advisable to seek clarity on this during contract management discussions.

6. Subcontractor undertakings included

A new clause 6.5 sets out the Subcontractor's undertakings. This clause is only mandatory for "materially significant" contracts (see below). The Guide states that these undertakings *"are necessary for the Authority to retain control over the provision of key services".*

Some of the undertakings are standard, however, others are less common and should be given closer attention by sub-contractors who are less familiar with government contracts. For example, organisations considering changing their name, undergoing any restructuring of staff or selling assets that may affect the Services, should have regard to these clauses as they may require the prior consent of the MoJ and / or the Contractor.

7. "Materially significant" contracts need to be identified

Paragraph 5 of the Explanatory Guide states that a "materially significant" contract will be *"an agreement where the subcontractor will be providing a material part of the services contracted under the Services Agreement"* (i.e. the contract between the MoJ and the Tier 1 Contractor).

The MoJ have provided some clarification of this – *"The definition of a "materially significant" contract will vary, due to the nature of the services being delivered, according to the operating model of the provider, and reflecting the strategic importance of the services to be delivered by the subcontractor. In addition the volume of work being delivered will have an impact. This also allows flexibility to agree what constitutes a materially significant contract."*

This is important as materially significant contracts are subject to additional requirements, and the Contractor cannot terminate such contracts without permission from the MoJ. It also affects which clauses are mandatory or not. It is advisable to identify whether a subcontract is to be treated as "materially significant" early in your negotiations and to record this.

8. The Market Stewardship Principles are more clearly defined as part of the Services Agreement

The Explanatory Guide has been updated to confirm that breach of the Market Stewardship Principles would constitute a breach of the Contractor's Services Agreement with the MoJ (Part 1, Paragraph 2.2 – Explanatory Guide). This follows Clinks' recommendation in its consultation response that there should be "*specific and ongoing obligations on the Tier 1s to behave in line with the Market Stewardship Principles*". This is somewhat comforting as there is a clear intention from the MoJ to ensure that the Market Stewardship Principles are maintained.

The Market Stewardship Principles are set out in Appendix 3 of the ISPA and are also mentioned in the Questionnaire that both parties must sign before entering into the ISPA (Appendix 1). There is a specific obligation placed on the Subcontractor to uphold the Market Stewardship Principles (clause 22.2(d)). Failure to do so may therefore result in a breach of the ISPA. There is no corresponding obligation placed on the Contractor to uphold the Principles and so Subcontractors will need to rely on these obligations being enforced under the Services Agreement, rather than having a direct claim or remedy for breach of the Market Stewardship Principles by the Contractor.

9. Some additional protection of the supply chain named in the bid

A positive inclusion is a note at Clause 15.2(a) that written permission from the MoJ will be required for *voluntary* termination of both materially significant contracts *and* contracts with named suppliers in the bid. The intention of this is to help the MoJ protect the diversity of the supply chain.

Permission is also required from the MoJ for termination for a default, but for materially significant contracts only, and not for other non-materially significant contracts named in the bid. Note that this does not mean that the MoJ will withhold permission to terminate, nor that if your organisation is listed on the Supply Chain that it will necessarily get a contract in the first place, but it does at least signal the MoJ's intentions to provide some protection to the named supply chain in the bids.

10. An option for minimum volume guarantees

The option for setting minimum volume guarantees has been allowed if negotiated individually and set out in Schedule 4 of the ISPA. This is a positive development for Tier 2 and 3 organisations, if they can in fact negotiate this with the Contractor. This goes some way to meeting the Clinks recommendation that minimum volumes should be required.

11. The three year minimum term confirmed

The ISPA still provides an initial contract term of three years (Schedule 3, clause 1(f)), unless otherwise negotiated and approved by the MoJ in writing. The three year term is the period from when Services start rather than the date of the ISPA. This is set out in the definition of Contract Period in Schedule 1. The minimum term offers the Subcontractor some security, but care should be taken by organisations when entering into fixed three year contracts. The ISPA stipulates a 6 month notice period, so if the initial term is 3 years, the Subcontractor's earliest opportunity to voluntarily terminate the contract is 2 and a half years into the initial term.

It should be noted that if a Subcontractor seeks to terminate the contract before the end of the three year term it may be in default and could face significant liabilities. These liabilities are now more clearly set out in the Final ISPA (clause 7.3). Organisations should have careful regard to the implications of these liabilities.

12. Detail of recoverable losses for the Contractor

Clause 7.3 is a new clause, setting out the losses that the Contractor may recover if the Subcontractor defaults on a contract. Some organisations may not be familiar with contracts which allow for this level of recoverable loss. They should carefully consider this clause and its possible consequences.

The recoverable losses include, for example, the payment of additional costs to the Contractor for maintaining the Services until the Termination Date following a default by the Subcontractor, and advertising costs to limit any reputational damage incurred.

This clause is non-mandatory and Subcontractors should try to omit it or limit it, to reflect a reasonable level of risk.

13. Breakage Costs to be paid by the Contractor

Clause 15.1(c) is a new clause referring to Breakage Costs. Breakage Costs are the costs that are incurred by the Subcontractor if the contract is terminated early, due to no fault of the Subcontractor.

Breakage Costs can now be reclaimed from the Contractor (Clause 15.1(c)). This is a positive step and offers some protection for the Subcontractor.

It does not apply where the Subcontractor is at fault, nor where the contract is properly terminated through voluntary termination.

14. Extension of “uncapped” liability

It is not possible to limit certain liabilities under law, such as death, personal injury and fraud. This has been extended to include a party's agents, employees and subcontractors. This is usual, and is likely to apply whether set out in the contract or not.

The ISPA makes it clear that a Subcontractor is liable for the acts and omissions of its own subcontractors in any event (clause 22.1(d)). This will mean greater care is needed when entering into subcontracts and in checking the insurance of a subcontractor and the extent of your own cover, as this generally won't cover claiming for errors made by your subcontractors.

The removal of a cap for liability for breach of Clause 18 (Data Protection, Confidentiality and Freedom of Information) and Clause 19.7 (IP Indemnity) should be carefully considered as part of any risk analysis of the ISPA as any breach of these clauses could result in significant financial liabilities for the Subcontractor. The reference to Clause 19.7 has been added to this version of the ISPA.

Paragraph 11 of the Explanatory Guide states that the Subcontractor should consider each additional provision and assess whether it is appropriate for its liability to be uncapped. This suggests that even though this is a "mandatory" clause, there is some scope for amending or limiting it. Organisations should carefully consider whether having uncapped liability in these areas constitutes a "reasonable" level of risk.

15. Removal of compensation payable by the Contractor for Relief Events

Clause 8.1(e) (i) of the draft ISPA has been removed. This required the Contractor to cover the costs of the Subcontractor if the Contractor failed to complete a Dependency (i.e. act of the Contractor), and the Subcontractor incurred costs as a result of this. There appears now to be no compensation for the Subcontractor in these circumstances.

Subcontractors may wish to negotiate that this is added back into the contract, on the grounds that this is a reasonable expectation if risks are to be shared appropriately. A reasonable and appropriate sharing of risk must be agreed under the Market Stewardship Principles.

16. Changes to clauses on Intellectual Property Rights (IPR)

Clause 19.2: Licence of IPRs: Clinks raised the issue of IPR in its consultation response to the draft ISPA, on the basis of the questions and concerns it had noted from members about these provisions. Although the licensing provisions have largely remained the same, there is some reassurance in that it has been made explicitly clear that the Subcontractor is the sole and exclusive owner of its IPRs (clause 19.2(a)). The Contractor is only granting a licence to the Subcontractor to use the Authority's IPRs, so as the Guide explains, it may be necessary to negotiate additional licences if the Subcontractor needs to use Contractor IPRs to be able to perform the services.

However, the Subcontractor licence is granted to both the Authority and the Contractor (clause 19.2(d), previously clause 19.5) "*to use and reproduce Subcontractor IPRs to the extent necessary to receive and use the Services".* Note that this licence also transfers the right to use the Subcontractor's IP to "Authority Related Parties", which includes a wide range of bodies such as the police and other government departments or agencies (see definition of "*Authority Related Party*" on p42 of the ISPA).

Clause 19.3: Branding: A new clause has been added to further protect the Authority's brand. This is fairly standard, but places further obligations on the Subcontractor to ensure that it does not damage the Authority brand in any way.

Clause 19.6: Ownership of Bespoke Materials: "Bespoke Materials" is a new definition that relates to any concepts, manuals or other items that have been produced by the Subcontractor in connection with the ISPA. This clause makes it clear that unless otherwise agreed, the Bespoke Materials will belong to the Authority. The Authority grants the Subcontractor a licence to use these materials to the extent necessary to perform the services.

Interestingly, clause 19.6 (e) allows a Subcontractor to apply to the Authority to use these materials for purposes other than under the ISPA. This presumably covers instances where say a Subcontractor has developed a particular operating manual and wants to use it for a future unrelated project. It does however mention "arrangements for the sharing of revenue", so there may be a cost to the Subcontractor.

17. Significant changes in indemnity requirements for IPR

There have been quite significant changes to the IPR indemnity given by the Subcontractor (Clause 19.7). The Subcontractor must now indemnify the Authority as well as the Contractor against any IPR claims from a third party. This is a fairly common provision, but could be quite costly, especially as it is not included in the cap on liability discussed in paragraph 14 above.

One way of limiting the liabilities here would be to remove reference to clause 19.7 from the list of unlimited liabilities in clause 7.1, although there is no guarantee that a Contractor would agree to this. Under clause 19.7(b), the Subcontractor must now also try (at its own cost) to obtain a right for the Contractor to continue using the services in the event of a third party claim, or change the infringing part of the services so that it is compliant with the contract.

The corresponding indemnity that was given by the Contractor to the Subcontractor in the first ISPA has been removed. This is despite that fact that paragraph 24.3 of the Guide states that "*the Subcontractor and Contractor each indemnify each other*". This means that a subcontractor has no way of recouping the costs of a third party claim made against it as a result of the Contractor infringing a third party's IPR. This should be the subject of negotiation, as the Guide and the Market Stewardship Principles indicate that risk should be reasonably shared. The MoJ have indicated that they are reviewing this section.

18. Widening of the reputational damage clause

Clause 6.6: Reputational Damage has been widened to potentially include protection of the Contractor's reputation as well as the Ministry of Justice. While the clause relating to the MoJ is mandatory, the addition of the Contractor is not and should be negotiated.

It is usual for a contractor to seek to limit reputational damage, but there is a concern that this clause may effectively prevent organisations from highlighting failure or poor practice by the Contractor as the Authority and Contractor may argue that it has damaged their reputation or harmed the confidence of the public in the respective entities.

Without a public interest defence or a whistleblowing clause, subcontracting organisations may be concerned that they will be unable to raise issues of public concern.

It has been made clear in correspondence with the MoJ that there is no intention to preclude the reporting of concerns to the Authority, and that they are committed to an open and transparent process. However, if the protection of the contractor's reputation is included in the contract, then voluntary sector organisations should consider the impact this could have on raising issues of concern in the future.

The Cabinet Office have established the Mystery Shopper Service, which has been established to identify poor procurement practice. This scheme can be contacted through MysteryShopper@cabinet-office.gsi.gov.uk or by telephoning our Service Desk on 01603 704999.

19. Data Protection – legal advice required

Previously, the ISPA referred to the Subcontractor as the "data processor" (clause 18: Data Protection), whilst the Contractor was the "data controller".

In Paragraph 22.2 of the Explanatory Guide, the MoJ has indicated that it now advises that Subcontractors seek legal advice about whether they are a data controller or a data processor under the Data Protection Act 1998 (DPA). This would affect their responsibilities under the Act.

This has been a contentious issue in public sector contracting. Under the DPA, the data controller is the party that decides how the data is to be processed and the purposes for which it is used. The data processor is the organisation that handles information on behalf of a data controller, but has no say in how the information is collected or used. It is quite tricky to assess whether you are a data controller or data processor and it will ultimately depend on the facts of each case and how and why data is being collected. The Information Commissioner's Office advises that consideration should be given to the degree of independence or discretion that each party has in determining how and in what manner the data should be processed. A subcontractor may also be deciding how the same data is used in connection with other projects or services where they are the data controller.

It is the data controller, rather than the processor that is responsible for ensuring that the provisions of the DPA are adhered to, and that will be liable for any mistakes. It is not possible to "contract out" being a data controller and so even if the contract states that the Subcontractor is only a processor, in reality it could also be a controller, and be subject to the terms of the DPA.

Subcontractors should take legal advice if they are uncertain of what category they fall under, and it appears that the Ministry of Justice has revised their Explanatory Guidance to reflect this.

If you are a data controller then the alternative wording set out in the Explanatory Guide should be used in place of clause 18.2(b). Although on the surface it seems like a more onerous provision, it is important to be clear on what status a Subcontractor actually has to ensure that it does not fall foul of the DPA. Where two parties are acting as joint data controllers care needs to be taken in clearly identifying their responsibilities for complying with the data protection principles, otherwise there is a danger of confusion and non-compliance.

20. Business continuity provisions extended

Clause 8.3 Business Continuity is a non-mandatory clause and may be excluded or negotiated as appropriate.

The Final ISPA includes some revisions to the draft, including the requirement to provide Business Continuity Management Systems (no longer referred to as a plan) within 40 business days of Service Commencement, and the additional requirement, where applicable, to maintain the Business Continuity Management System to ISO 22301 – a quality standard specific to Business Continuity.

Subcontractors should seek to negotiate this clause and to agree the Business Continuity standards which will be required by the Contractor.

If ISO standards are required these are likely to carry a cost to the organisation. This will depend on how the standards are implemented and the size of the organisation, but one accrediting body indicated that a small organisation could expect to pay between £7,000 to £10,000 in the first year for training, pre-assessment and audit, and a further £1,000-£2,000 per year to maintain the accreditation.

21. Subcontractor personnel – additional training and other significant other requirements

In Clause 9: Subcontractor Personnel, additional training and standards are detailed, which are specific to Offender Management. For example, Clause 9.1(b) (iii) refers to the requirement for *"qualifications, training and experience to the extent required for their role or employment pursuant to the "Core Skills in Probation Practice" and guidelines published from time to time under Section 10 of the OMA".*

Clause 9.1(b) (vi) also requires equality and diversity training for all staff.

It may also be necessary for Subcontractors to review their employees' Terms and Conditions to ensure that they can comply with ISPA requirements 9.1(b) (vii) and 9.1(c).

Clause 9.1(vii) requires Subcontractors to ensure that no staff are knowingly engaged with or members of groups or organisations considered to have racist philosophy, principles, aims or policies. Subcontractors are required to take disciplinary action up to dismissal in these circumstances. It may be advisable to get an agreement on which groups are deemed to be racist. Subcontractors may need to review their recruitment policies and procedures, terms and conditions and disciplinary procedures to ensure they are legally able to comply with this clause.

Clause 9.1(c) is an additional clause giving the MoJ the right to require the removal of personnel from the delivery of Services who may disrupt the Services or damage the reputation of the Authority. This is a key change and should be carefully considered by Tier 2 and 3 organisations. Such provisions are fairly common in public service contracts, but may be difficult to implement in practice.

The contract of employment will be between the Subcontractor and the relevant employee, and so the Subcontractor will also have to comply with the terms of the employment contract and any disciplinary / dismissal policies and procedures, or be at risk of a breach of contract and an employment tribunal claim. Third party (i.e. MoJ) intervention will not necessarily be a fair ground for dismissal as "some other substantial reason" under the Employment Rights Act. A fair procedure must therefore be followed and a Subcontractor must try to alleviate any injustice to the employee by attempting to resolve the issue with the MoJ, or redeploying the employee to an alternative role that is not connected to the Services. All decisions and reasoning in relation to any redeployment or dismissal under this clause must be well documented and recorded in case it is scrutinised by a Tribunal, and in all cases a fair procedure must be followed.

Organisations may seek to amend their policies and terms and conditions to allow for, as far as possible, dismissal to be made should the Authority require it. However, this may be difficult to negotiate with employees or unions. The organisation may find itself in a difficult (and potentially expensive) position caught between its legal duties to its staff and its legal duties to the Ministry of Justice. Though this may be very rare, this is a complex area of law and legal advice should always be sought before altering terms and conditions, or before removing an employee under this clause.

22. Audit rights for the Contractor

Clause 14: Audit has added the right of the Contractor, as well as the MoJ, to audit the Subcontractor.

23. Pensions

Schedule 4 sets out the Fair Deal pension scheme and how this will work with affected employers. This would apply if your organisation is accepting staff that have transferred from the Probation Service or other employers where the Local Government Pension Scheme applies. If this is the case, you should seek legal advice.

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For TR legal support, updates and advice, visit: http://www.clinks.org/criminal-justice/transforming-rehabilitation