

Single Source: Profit and Loss Sharing on Firm / Fixed Price Contracts

DEFCON 811
Edition 12/14

1. In this Condition the following words and expressions shall have the meanings given to them, except where the context requires a different meaning:
 - a. "Contract" means, for the purpose of this Condition only and notwithstanding DEFCON 501:
 - (1) where the agreement between the parties uses only one or more Firm Prices or Fixed Prices, as defined in DEFCON 501; or
 - (2) where the agreement between the parties uses one or more Firm Prices or Fixed Prices together with one or more elements which are not priced on a Firm Price or Fixed Price basis, only those elements of the agreement which are priced on a Firm Price or Fixed Price basis.
 - b. "Contract Price" means as defined in DEFCON 501 except that the meaning of Contract defined in this Condition shall be used.
 - c. "Contract Profit Rate" means the profit, in percentage terms, which the parties have agreed to add to the estimated Contract costs to arrive at the Contract Price.
 - d. "Excess Level 1" means the contract profit which the Contractor would have achieved under the Contract (before any payment under this Condition) if a rate of profit five (5) percentage points greater than the Contract Profit Rate was applied to the Outturn Costs.
 - e. "Excess Level 2" means the contract profit which the Contractor would have achieved under the Contract (before any payment under this Condition) if a rate of profit ten (10) percentage points greater than the Contract Profit Rate was applied to the Outturn Costs.
 - f. "Excess Level 3" means the contract profit which the Contractor would have achieved under the Contract (before any payment under this Condition) if a rate of profit fifteen (15) percentage points greater than the Contract Profit Rate was applied to the Outturn Costs.
 - g. "Group Undertaking" has the meaning given by Section 1161 of the Companies Act 2006.
 - h. "Loss Level" means the loss which the Contractor would have made under the Contract (before any payment under this Condition) had the Outturn Costs been five (5) percentage points greater than the Contract Price.
 - i. "Material Single Source Sub-contract (Non-Qualifying)" means a sub-contract entered into by the Contractor where:
 - (1) the sub-contract is entered into at the same time as, or after, this Contract was entered into;

- (2) the sub-contract is entered into for the purposes of the Contract;
 - (3) the award of the sub-contract is not the result of a "competitive process" as defined in Regulation 59, or Regulation 60, as appropriate, of the Single Source Contract Regulations 2014 (SSCR) for Qualifying Sub-contracts (QSCs);
 - (4) the sub-contract uses one or more Firm Prices or Fixed Prices, the total value of which is equal to or greater than £50,000,000; and
 - (5) at least 50% of the sub-contract (by value) is required either to enable the performance of the Contract, or to enable the combined performance of the Contract and any other contract, or prospective contract, to which the Contractor or any group undertaking of the Contractor is a party, or might become a party.
- j. "Outturn Costs" means the amount of the Contractor's actual Allowable Costs under the Contract.
- k. "Outturn Profit" means the difference between the Contract Price and the Outturn Costs, where the former exceeds the latter.
- l. "Outturn Profit Rate" means the Outturn Profit, expressed as a percentage of the Outturn Costs.
2. This Condition shall only apply where the Contract Price is equal to or greater than £5,000,000.
3. Subject to clause 9, where the Outturn Profit Rate exceeds the Contract Profit Rate by five (5) percentage points or more but less than ten (10) percentage points, the Contractor shall pay to the Authority an amount equal to twenty five (25) per cent of the Outturn Profit made which exceeds Excess Level 1.
4. Subject to clause 9, where the Outturn Profit Rate exceeds the Contract Profit Rate by ten (10) percentage points or more but less than fifteen (15) percentage points, the Contractor shall pay to the Authority an amount equal to:
- a. fifty (50) per cent of the Outturn Profit made which exceeds Excess Level 2, plus
 - b. twenty five (25) per cent of the Outturn Profit made which exceeds Excess Level 1 (excluding any Outturn Profit made which exceeds Excess Level 2).
5. Subject to clause 9, where the Outturn Profit Rate exceeds the Contract Profit Rate by fifteen (15) percentage points or more, the Contractor shall pay to the Authority an amount equal to:
- a. seventy five (75) per cent of the Outturn Profit made which exceeds Excess Level 3, plus
 - b. fifty (50) per cent of the Outturn Profit made which exceeds Excess Level 2 (excluding any Outturn Profit made which exceeds Excess Level 3), plus
 - c. twenty five (25) per cent of the Outturn Profit made which exceeds Excess Level 1 (but excluding any Outturn Profit made which exceeds Excess Level 2).

6. Subject to clause 9, where the Outturn Costs exceed the Contract Price by an amount up to the Loss Level, the Authority shall pay to the Contractor an amount equal to twenty five (25) per cent of that excess.
7. Subject to clause 9, where the Outturn Costs exceed the Contract Price by an amount equal to or greater than the Loss Level, the Authority shall pay to the Contractor:
 - a. an amount equal to twenty five (25) per cent of the excess which is less than the Loss Level; plus
 - b. an amount equal to fifty (50) per cent of the excess which is equal to or greater than the Loss Level.
8. The calculation of any Outturn Profit or Loss Level shall not include:
 - a. any effect on the Outturn Costs arising from any incentive arrangement under the Contract that involves a payment or deduction of costs; and
 - b. any interest on overdue payments payable under the terms of the Contract.
9. Payments shall only be due under this Condition where those payments are equal to or greater than £250,000.
10. The Authority's entitlement to payment under this Condition shall be conditional on it providing a notification to the Contractor of its intention to seek payment within:
 - a. three (3) months of receiving a Contract Costs Statement from the Contractor in accordance with DEFCON 813; or
 - b. where the Contractor is not obliged to provide a Contract Costs Statement under DEFCON 813, three (3) months of receiving a report or other notification from the Contractor confirming the Outturn Costs, or the Authority otherwise verifying the Outturn Costs through alternative means within 15 months of the completion of the Contract.
11. The Contractor's entitlement to payment under this Condition shall be conditional on it:
 - a. providing to the Authority:
 - (1) a Contract Costs Statement in line with DEFCON 813 where it is obliged to do so; or
 - (2) where the Contractor is not obliged to provide a Contract Costs Statement under DEFCON 813, an alternative report or notification confirming the Outturn Costs; and
 - b. notifying the Authority of its intention to seek payment under this Condition within three (3) months of providing the relevant report or notification required.
12. Except where the Authority expressly agrees otherwise in writing, the Contractor shall use reasonable endeavours to include in any Material Single Source Sub-contract (Non-Qualifying) the terms specified in Appendix I to this Condition (inserting relevant party names where appropriate).

13. Where the terms specified in Appendix I to this Condition are included in a Material Single Source Sub-contract (Non-Qualifying), the Contractor shall take reasonable steps to secure the performance by the Sub-contractor of the obligations contained in those terms.

14. Before entering into a Material Single Source Sub-contract (Non-Qualifying) the Contractor shall promptly notify the Authority where it is unable to include in the Contract the terms specified in Appendix I to this Condition, or where it believes that the inclusion of those terms will prevent the achievement of a fair and reasonable price for the Material Single Source Sub-contract (Non-Qualifying).

15. Except where it is necessary for proper compliance with the requirements of any person acting in the capacity of an arbitrator under any provision of the Contract, the Authority shall not disclose to any person outside any Government Central Body any information obtained by it in consequence of the application of any of the provisions of this Condition.

Appendix I to DEFCON 811

Provisions To Be Included In Material Single Source Sub-contracts

1. In this Condition the following words and expressions shall have the following meanings given to them, except where the context requires a different meaning:

- a. "Excess Level 1" means the contract profit which the Sub-contractor would have achieved under the Sub-contract (before any payment under this Condition) if a rate of profit five (5) percentage points greater than the Sub-contract Profit Rate was applied to the Outturn Costs.
- b. "Excess Level 2" means the contract profit which the Sub-contractor would have achieved under the Sub-contract (before any payment under this Condition) if a rate of profit ten (10) percentage points greater than the Sub-contract Profit Rate was applied to the Outturn Costs.
- c. "Excess Level 3" means the contract profit which the Sub-contractor would have achieved under the Sub-contract (before payment under this Condition) if a rate of profit fifteen (15) percentage points greater than the Sub-contract Profit Rate was applied to the Outturn Costs.
- d. "Loss Level" means the loss which the Sub-contractor would have made under the Sub-contract (before any payment under this Condition) had the Outturn Costs been five (5) percentage points greater than the Sub-contract Price.
- e. "Group undertaking" has the meaning given by Section 1161 of the Companies Act 2006.
- f. "Material Single Source Sub-contract (Non-Qualifying)" means a sub-contract entered into by the Sub-contractor where:
 - (1) the sub-contract is entered into at the same time as, or after, this Sub-contract was entered into;
 - (2) the sub-contract is entered into in connection with or for the purposes of the Sub-contract;
 - (3) the award of the sub-contract is not the result of a "competitive process" as that is defined in Regulation 59, or Regulation 60, as appropriate, of the Single Source Contract Regulations (SSCR) for Qualifying Sub-contracts (QSCs);
 - (4) the sub-contract uses one or more Firm Prices or Fixed Prices, the total value of which is equal to or greater than £50,000,000; and
 - (5) at least 50% of the sub-contract (by value) is required either to enable the performance of the Sub-contract, or to enable the combined performance of the Sub-contract and any other contract, or prospective contract, to which the Sub-contractor or any group undertaking of the Sub-contractor is a party, or might become a party.

- g. "Outturn Costs" means the amount of the Sub-contractor's actual Allowable Costs under the Sub-contract.
- h. "Outturn Profit" means the difference between the Sub-contract Price and the Outturn Costs, where the former exceeds the latter.
- i. "Outturn Profit Rate" means the Outturn Profit, expressed as a percentage of the Outturn Costs.
- j. "Sub-contract" means:
- (1) where the agreement between the Contractor and Sub-contractor uses only one or more Firm Prices or Fixed Prices, that agreement; or
 - (2) where the agreement between the Contractor and Sub-contractor uses one or more Firm Prices or Fixed Prices together with one or more elements which are not priced on a Firm Price or Fixed Price basis, only those elements of the agreement which are priced on a Firm Price or Fixed Price basis.
- k. "Sub-contract Price" means the price exclusive of Value Added Tax, payable to the Sub-contractor by the Contractor under the Sub-contract for the full and proper performance by the Sub-contractor of the Sub-contract as determined under the provisions of the Sub-contract.
- l. "Sub-contract Profit Rate" means the profit, in percentage terms, which the Contractor and Sub-contractor have agreed to add to the estimated Sub-contract costs to arrive at the Sub-contract Price.
2. Subject to clause 8, where the Outturn Profit Rate exceeds the Sub-contract Profit Rate by five (5) percentage points or more but less than ten (10) percentage points, the Sub-contractor shall pay to the Authority an amount equal to twenty five (25) per cent of the Outturn Profit made which exceeds Excess Level 1.
3. Subject to clause 8, where the Outturn Profit Rate exceeds the Sub-contract Profit Rate by ten (10) percentage points or more but less than fifteen (15) percentage points, the Sub-contractor shall pay to the Authority an amount equal to:
- a. fifty (50) per cent of the Outturn Profit made which exceeds Excess Level 2, plus
 - b. twenty five (25) per cent of the Outturn Profit made which exceeds Excess Level 1 (excluding any Outturn Profit made which exceeds Excess Level 2).
4. Subject to clause 8, where the Outturn Profit Rate exceeds the Sub-contract Profit Rate by fifteen (15) percentage points or more, the Sub-contractor shall pay to the Authority an amount equal to:
- a. seventy five (75) per cent of the Outturn Profit made which exceeds Excess Level 3; plus
 - b. fifty (50) per cent of the Outturn Profit made which exceeds Excess Level 2 (excluding any Outturn Profit made which exceeds Excess Level 3); plus

- c. twenty five (25) per cent of the Outturn Profit made which exceeds Excess Level 1 (excluding any Outturn Profit made which exceeds Excess Level 2).
5. Subject to clause 8, where the Outturn Costs exceed the Sub-contract Price by an amount up to the Loss Level, the Authority shall pay to the Sub-contractor an amount equal to twenty five (25) per cent of that excess.
6. Subject to clause 8, where the Outturn Costs exceed the Sub-contract Price by an amount equal to or greater than the Loss Level, the Authority shall pay to the Sub-contractor:
 - a. an amount equal to twenty five (25) per cent of the excess which is less than the Loss Level, plus
 - b. an amount equal to fifty (50) per cent of the excess which is equal to or greater than the Loss Level.
7. The calculation of any Outturn Profit or Loss Level shall not include:
 - a. any effect on the Outturn Costs arising from any incentive arrangement under the Sub-contract that involves a payment or deduction of costs; and
 - b. any interest on overdue payments payable under the terms of the Sub-contract.
8. Payments shall only be due under this Condition where those payments are equal to or greater than £250,000.
9. The Authority's entitlement to payment under this Condition shall be conditional on it providing a notification to the Sub-contractor of its intention to seek payment within:
 - a. three (3) months of receiving a Contract Costs Statement from the Sub-contractor in accordance with terms included in the Sub-contract in line with DEFCON 813; or
 - b. where the Sub-contractor is not obliged to provide such a Contract Costs Statement, three (3) months of receiving a report or other notification from the Sub-contractor confirming the Outturn Costs, or the Authority otherwise verifying the Outturn Costs through alternative means within 15 months of the completion of the Sub-contract.
10. The Sub-contractor's entitlement to payment under this Condition shall be conditional on it:
 - a. providing to the Authority:
 - (1) a Contract Costs Statement in accordance with terms included in the Sub-contract in line with DEFCON 813 where such terms have been included; or
 - (2) where the Sub-contractor is not obliged to provide such a Contract Costs Statement, an alternative report or notification confirming the Outturn Costs; and
 - b. notifying the Authority of its intention to seek payment under this Condition within three (3) months of providing the relevant report or notification required.

11. Except where the Authority notifies the Sub-contractor in writing that it is not required, the Sub-contractor shall use reasonable endeavours to include in any Material Single Source Sub-contract (Non-Qualifying) equivalent terms to those specified in this Condition (inserting relevant party names where appropriate).
12. Where equivalent terms to those specified in this Condition are included in a Material Single Source Sub-contract (Non-Qualifying), the Sub-contractor shall take reasonable steps to secure the performance by its Sub-contractor of those obligations.
13. Before entering into a Material Single Source Sub-contract (Non-Qualifying) the Sub-contractor shall promptly notify the Authority where it is unable to include in the Contract equivalent terms to those specified in this Condition, or where it believes that the inclusion of those terms will prevent the achievement of a fair and reasonable price for the Material Single Source Sub-contract (Non-Qualifying).
14. The Contractor and Sub-contractor agree that terms have been included in this Condition which are for the benefit of the Authority. Notwithstanding any contrary provisions in this Sub-contract, the Contractor and Sub-contractor agree that the Authority shall be able to enforce those terms which confer a benefit on the Authority.