

ADVICE TO NORTHUMBERLAND COUNTY COUNCIL ABOUT THE POTENTIAL DISSOLUTION OF NORTHUMBRIA INTEGRATED CONSULTANCY LIMITED

1. Background

- 1.1. Northumbria Integrated Consultancy Limited ("NIC") is a company limited by shares, incorporated on 29 March 2021. We are advised that the entire issued share capital is held by Northumberland Enterprise Holdings Limited, which in turn is wholly-owned by Northumberland County Council (the "Council").
- 1.2. On 19 June 2020 the Council entered into a framework agreement (the "Framework Agreement") with Fujian Jilin Medical technology Co. Ltd ("Jilin"). Under that Framework Agreement the Council agreed that, subject to entering into call-off contracts, it would deliver specified services to Jilin relating to the development of the Fujian Lin Wenjing Memorial Hospital (the "Project").
- 1.3. Jilin and the Council also entered into a call-off contract on 19 June 2020 for what was described as stage two of the Project (the "Stage 2 Call-Off"). We understand that this stage has been completed.
- 1.4. On 15 September 2021 the Framework Agreement, together with the Stage 2 Call-Off contract, was novated to NIC.
- 1.5. On that same date NIC and Jilin entered into a further call-off contract (the "Stage 3 Call-Off").
- 1.6. Also on 15 September 2021 NIC entered into sub-contracts with Archus Limited, the Christie NHS Foundation Trust and University Hospital Southampton NHS Foundation Trust (the Sub-Contracts"). These Sub-Contracts were subsequently terminated by mutual agreement, although we are not aware of the termination dates.
- 1.7. On 31 March 2022 the Stage 3 Call-Off was terminated by mutual agreement and the Framework Agreement was amended.
- 1.8. There have been no further call-offs, so at the moment we understand that no services are being delivered by NIC to Jilin and Jilin have not requested any further services.
- 1.9. We therefore understand that NIC is not currently trading and the Council are considering whether NIC should be dissolved.

2. Status of NIC and options for dissolution

- 2.1. As described above, it appears at the moment that NIC is not trading. We understand that it holds no assets, no employees and has not entered into any contracts, other than those it has entered into with Jilin, together with the Sub-Contracts.
- 2.2. Broadly speaking, the options for closing a company down depend on whether or not it can pay its debts. If it cannot, then the only routes open to closing down a company are administration or creditors' voluntary winding up.
- 2.3. However, since we understand that NIC has no creditors and is not trading, then an application to strike the company off the Register of Companies is the most simple and effective option. This can only be done if:
 - 2.3.1. NIC has not traded in the last 3 months;
 - 2.3.2. It has not changed its name in the last 3 months;

- 2.3.3. No-one is threatening to wind-up the company; and
- 2.3.4. It has no arrangements with creditors.
- 2.4. We are not aware if there is any amount owing to HMRC, but if there is, provision should be made to ensure that this is paid. HMRC should be told of the decision to dissolve and they should be sent final statutory accounts and a tax return
- 2.5. The procedure for dissolution is very simple. An application is made on-line by a majority of the directors and a small fee is paid. The Registrar then publishes a notice in the London Gazette and, if no-one raises an objection, the Company is struck off 2 months later.

3. **Liabilities**

- 3.1. The principal issue to consider is whether there are any ongoing liabilities or obligations on NIC which might mean that a third party (such as Jilin) might object to the dissolution.
- 3.2. Given that we are told the only contracts are those that relate to the Project and the Framework Agreement, we therefore need to consider if there are any ongoing liabilities pursuant to those.
- 3.3. First of all, in relation to any call-offs under the Framework:
 - 3.3.1. For the Stage 2 Call-Off we have not seen any termination documents, so we assume that the services delivered under that call-off were completed;
 - 3.3.2. The template call-off agreement (attached to the Framework Agreement) does not contain any provisions for termination, but instead assumes that each call-off would be entered into for a fixed term. We believe the Stage 2 Call-Off was for a period of one year. If the term of that call-off has expired then there will be no ongoing obligations or liabilities on NIC, although there may still be an ability for Jilin to raise a claim for breach of the call-off (eg failure to provide the services in accordance with the terms of the Stage 2 Call-Off and the Framework Agreement). The call-offs are governed by English law, so the limitation period for any claim is 6 years (assuming that they were not executed as deeds). Therefore, there is a theoretical possibility that there may be further liabilities in NIC, but if the directors of NIC are not aware of any claim then this will not stop them proceeding with a dissolution;
 - 3.3.3. In relation to the Stage 3 Call-Off, the 31 March 2022 Deed of Termination includes a release by Jilin of NIC from all claims or demands under or in connection with that call-off whether arising before or after 31st March 2022. Therefore, it is clear that there can be no ongoing liability on NIC.
- 3.4. Secondly, in relation to the Sub-contracts, while we have not seen evidence that the termination letters were signed, the draft letters did contain full releases of NIC from all liabilities whether arising before or after termination, so provided that these letters were signed by the counterparties in the same or substantially similar form to the drafts that we provided, there is no ongoing liability on NIC under those Sub-Contracts.
- 3.5. We have also considered the position of the Council, since it was the original party to the Framework Agreement. The novation on 15 September 2021 expressly released the Council from any claims or demands under or in connection with the Framework and it's the Stage 2 Call-Off, whether arising before or after 15 September 2015. Therefore, there is no ongoing liability on the Council, including any liability that may arise as a result of NIC's dissolution.

3.6. For the avoidance of doubt, the shareholder of NIC and its ultimate parent (the Council) have no liability in relation to the actions of NIC's directors in dissolving the company, because of the principle of limited liability and the veil of incorporation. Had Jilin wanted the shareholders to accept liabilities it would have had to seek a guarantee.

4. **Any requirements under the Framework Agreement?**

4.1. Under clause 3 of the Framework Agreement Jilin may request NIC to provide services, but NIC has the ability to state that it is unwilling to provide those services, so NIC is not obliged to enter into a call-off contract.

4.2. The issue to consider is whether, by taking a positive step to dissolve, NIC is somehow in breach of the Framework Agreement, since it will not exist to accept requests from Jilin. The Agreement itself is for a fixed term (we have not seen a copy of the signed framework agreement, so we are not certain what the term is), and there is no provision for either party to give notice earlier for a voluntary termination. Therefore, there is no ability for NIC to unilaterally serve notice to terminate.

4.3. This means that by ceasing to exist as a company, NIC will effectively be making it impossible to perform the Framework Agreement and therefore, in theory undertaking the procedure for dissolution could be treated as an anticipatory repudiatory breach by NIC, giving Jilin grounds to terminate and claim damages for that breach. In our view this would be an academic argument only because:

4.3.1. Even if NIC was in breach, it would no longer exist to enable Jilin to bring a claim; and

4.3.2. If NIC did still exist, it would be impossible for Jilin to demonstrate a loss, since under the terms of the Framework, NIC could always say that it was not willing to provide the services.

4.4. Therefore, the dissolution of NIC might be a theoretical repudiatory breach of the Framework Agreement, but we cannot see how Jilin could bring a claim in relation to that breach. In addition, because the Council was released by the Deed of Novation on 15 September 2021 it has no liability in relation to the dissolution.

4.5. We have also been asked if NIC should notify Jilin of its intention to dissolve. There is no express obligation to do so under the Framework Agreement, but it is a matter of courtesy as to whether or not to tell Jilin. Also, see our comments in paragraph 4.5.2 below. It is possible that they would be aware of the notice in the London gazette and that they might object to the dissolution, although, as already described above, that would have little bearing on the operation of the Framework Agreement, since even if it were to remain in existence, NIC could simply refuse to accept any request for its services. Jilin may have a better argument to retain NIC if there were ongoing obligations under the Framework Agreement, but since the amendment to its terms in March this year, there have in effect been no substantive ongoing obligations. The only obligations that remain are:

4.5.1. Those set out in clause 4. The obligations in 4.1 and 4.3 relate directly to the carrying out of services, so they are only effective where there is a relevant call-off in existence. In 4.2.1 NIC is obliged to inform Jilin if anything has happened to delay or impede the delivery of the services, but we construe that as only being relevant if, again, there is a call-off in existence with specific services.

4.5.2. Clause 7 sets out various warranties given by NIC to Jilin and these appear to be ongoing warranties, due to the requirement on NIC in clause 7.2 to notify Jilin if it becomes aware that any of the warranties may be breached. It seems

likely that there may be breaches of one or two of these warranties by virtue of steps being taken to dissolve NIC (eg 7.1.10), but as described in paragraph 4.3 above, we cannot see what loss Jilin would suffer. However, technically it seems that there is an obligation to notify Jilin if steps are being taken which might be a breach of warranty.

- 4.5.3. Clause 14 sets out the consequences of termination of the Framework Agreement. Clearly, NIC will not be in a position to comply if it has dissolved, but we would suggest that the Council should take steps to ensure that all the practical steps outlined in clause 14 are followed, such as following any agreed exit plan and handing over any relevant data.

5. **Conclusions**

- 5.1. The Council asked 3 specific questions. Based on the analysis above, we can answer as follows:

- 5.1.1. Would there be any legal implications that the Council will need to consider beforehand?

As indicate above, there are no implications on the Council, which was released from all liabilities under the Framework Agreement and the Stage 3 Call-Off on 15 September 2021. It was also released from any liabilities relating to the Stage 2 Call-Off

- 5.1.2. Would any decision to dissolve the company be a legal risk for the Council?

There is no contractual risk for the Council, since it is no longer a party to the framework and has been released in any event. As an ultimate parent company it is protected by NIC's limited liability. NIC's immediate parent company is also protected by NIC's limited liability.

- 5.1.3. Would the Council/NIC need to advise and/or inform Rong Qiao prior to taking the decision to dissolve?

While there is no express requirement to notify them, there is a technical argument that it should be notified as a potential breach of warranty under clause 7 of the Framework Agreement, although a failure to notify would of itself be a breach of warranty and does not appear to cause Jilin any loss, hence preventing the from bringing a substantive claim for breach of contract.