

Note: Text highlighted in yellow to be updated for contract award

Dated

[ ] 20[ ]

**Agreement for the Supply of Goods and Services**

between

**[PURCHASER]**

and

**[CONTRACTOR]**

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**THIS AGREEMENT** is made

**BETWEEN: -**

- (1) [INSTITUTION NAME], [INSTITUTION DETAILS], whose registered address is [ADDRESS] (the "**Purchaser**"); and
- (2) [COMPANY NAME], (Company Number: [COMPANY NUMBER]), whose registered address is at [ADDRESS] (the "**Contractor**").

(each a "**Party**" and together the "**Parties**")

**BACKGROUND:**

- (A) The Purchaser wishes to purchase good and/or services.
- (B) The Contractor supplies these good and/or services.
- (C) The Purchaser selected the Contractor to supply it with the goods and/or services.
- (D) The Parties each agree to be bound by the terms of this agreement (the "Agreement") in respect of the Contractor's supply of the goods and/or services to the Purchaser.

## **1. INTERPRETATION**

1.1 In the Agreement, unless the context otherwise requires:

- 1.1.1 capitalised terms shall have the meanings given to them in Schedule 1;
- 1.1.2 the singular includes the plural and vice versa;
- 1.1.3 a reference to one gender includes references to all other genders;
- 1.1.4 a reference to a clause is a reference to the whole of that clause unless stated otherwise;
- 1.1.5 any reference to any statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted by any subsequent statute, enactment, order, regulation or instrument;
- 1.1.6 a reference to a person includes natural persons, companies, partnerships, bodies corporate and other legal entities;
- 1.1.7 any reference to a document shall include any variation, amendment, or supplement to such document;
- 1.1.8 an obligation to do something includes an obligation to procure it to be done;
- 1.1.9 an obligation not to do something includes an obligation not to wilfully allow it to be done;

- 1.1.10 the words "include", "includes" and "including" are to be construed as if they were immediately followed by the words "without limitation";
- 1.1.11 headings are included in this agreement for ease of reference only and do not affect the interpretation or construction of this Agreement; and
- 1.1.12 If more than one person is detailed in the Agreement as the Contractor, references to the "Contractors" shall be interpreted and construed as each such person on a joint and several basis.

## **2. SUPPLY OF GOODS**

### 2.1 The Goods shall:

- 2.1.1 be to the reasonable satisfaction of the Purchaser;
- 2.1.2 conform in all respects with the requirements of the Agreement;
- 2.1.3 be of sound materials, workmanship and design;
- 2.1.4 conform in all respects with all relevant Laws;
- 2.1.5 be fit for the purpose for which such goods are ordinarily used;
- 2.1.6 be fit for any particular purpose made known to the Contractor;
- 2.1.7 conform with and be of the exact kind, model, type or variety as the samples or demonstration equipment if samples have been submitted or equipment has been demonstrated (whether before or after the entering into of this Agreement);
- 2.1.8 be free from defects in design, material and workmanship and remain so for the Warranty Period; and
- 2.1.9 to the extent the Goods comprise websites and apps, comply with Web Content accessibility Guidelines 2.1 AA standard.

### 2.2 The Contractor shall:

- 2.2.1 use the minimum adequate amount of packaging material to prevent contamination of or damage to the Goods;
- 2.2.2 ensure packaging material used is designed and produced in such a way as to facilitate its re-use or recycling;
- 2.2.3 avoid or minimise the use of any hazardous substance in the packaging material;
- 2.2.4 manufacture, pack and supply the Goods in accordance with all generally accepted industry standard practices that are applicable; and
- 2.2.5 comply with all relevant Laws in relation to the packaging of the Goods.

- 2.3 The rights of the Purchaser under this Agreement in relation to Goods shall apply to Goods as originally delivered, and to Goods repaired or replaced pursuant in connection with this Agreement.
- 2.4 Goods repaired or replaced pursuant to this Agreement shall be deemed to be delivered and put into service on the date of repair or replacement, and accordingly shall be guaranteed for a further Warranty Period.
- 2.5 Unless expressly provided to the contrary in this Agreement, all pallets, containers, cases and other transit or packaging materials which are not removed by the Contractor immediately after delivery of the Goods will be considered non-returnable to the Contractor.
- 2.6 Without prejudice to Clause 2.5, within 5 days of a demand by the Purchaser, the Contractor will uplift all pallets, containers, cases and other transit or packaging materials used in relation to the Goods. If the Contractor fails to so uplift such materials then, without prejudice to the Purchaser's other rights and remedies, the Purchaser may destroy, re-cycle, dispose of or re-use them.
- 2.7 All containers of hazardous goods shall bear internationally recognised danger symbols and in addition, in English:
  - 2.7.1 prominent and adequate warnings;
  - 2.7.2 a full description of the Goods;
  - 2.7.3 a full description of the hazardous nature of the Goods; and
  - 2.7.4 procedures to be followed in the event of an emergency.

### **3. DELIVERY OF GOODS**

- 3.1 Unless otherwise agreed in writing between the Purchaser and the Contractor, delivery of goods shall be made at such times and locations as the Agreement specifies.
- 3.2 Delivery of Goods will be complete when such Goods are unloaded at the delivery location specified in the Agreement.
- 3.3 The time and date of delivery is of the essence.
- 3.4 Unless the Agreement provides expressly to the contrary, delivery shall be free of charge to the Purchaser.
- 3.5 Property and risk in the Goods shall pass to the Purchaser when the Goods have been delivered to the Purchaser in accordance with Clause 3.2.
- 3.6 The transfer of property to and risk in the Goods shall be without prejudice to any rights of the Purchaser in relation to the Goods, including its right to reject Goods pursuant to the Agreement.
- 3.7 With each delivery of Goods, the Contractor will provide a delivery note providing particulars of the quantities, weights (on a package by package basis), batch codes

and descriptions of the Goods delivered, and such other information reasonably specified by the Purchaser in advance of delivery.

- 3.8 All Goods of a kind that customarily or in accordance with Good Industry Practice bear any mark, tab, brand, label or other device indicating place of origin, inspection by any government or other body or standard of quality must be delivered with all the said marks, tabs, brands, labels, or other device intact.
- 3.9 The batch codes disclosed on delivery notes must tally with information recorded by the Contractor about its manufacturing, purchasing or Sub-Contracting processes to allow rapid checks to be made by the Purchaser on its stocks of Goods in the event of a series of complaints about the Goods or a product recall.

#### **4. ACCEPTANCE TESTING, INSPECTION AND REJECTION OF GOODS**

- 4.1 The Contractor shall carry out the first Acceptance Tests on the date and at the time set out in the Agreement. If no dates and times are set out in the Agreement the Contractor shall carry out the first Acceptance Tests as soon as possible after delivery of the relevant Goods, on a date and at a time agreed between the Purchaser and the Contractor, each acting reasonably.
- 4.2 Unless otherwise specified in the Agreement, it shall be for the Contractor to provide at its cost the equipment, labour and other requirements necessary to carry out all Acceptance Tests. The Purchaser shall be entitled to be present at all Acceptance Tests.
- 4.3 Where the Contractor fails to carry out any Acceptance Tests on the agreed date and at the agreed time, the Purchaser shall be entitled, at its option:
  - 4.3.1 to itself carry out those Acceptance Tests, and the Contractor shall reimburse the Purchaser for the reasonable costs associated with such Acceptance Tests; or
  - 4.3.2 to reject the Goods by notice in writing to the Seller and obtain from the Contractor, without delay, a full refund in respect of the Goods concerned.
- 4.4 If, pursuant to Clause 4.1, the Goods pass the Acceptance Tests, the Contractor shall issue a notice in writing to the Purchaser to that effect. If, pursuant to Clause 4.3.1, the Goods pass the Acceptance Tests, the Purchaser shall issue a notice in writing to the Contractor to that effect.
- 4.5 If the Goods or any part of them fail to pass the first Acceptance Tests:
  - 4.5.1 the Contractor shall within 7 days of the failure or election take such steps at its own cost as are required to ensure that the Goods will pass the Acceptance Tests (including repair, adjustment and/or replacement as the case may be); and
  - 4.5.2 by not later than the end of the 7 day period shall Re-Test on a date and at a time agreed between the Purchaser and the Contractor, each acting reasonably.

- 4.6 If on any Re-Test the Goods or any part of them fail to pass the Acceptance Tests, the Purchaser shall be entitled, at its option:
- 4.6.1 to elect that there should be a further Re-Test in which case the Contractor shall comply with Clause 4.5; or
  - 4.6.2 to reject the Goods by notice in writing to the Contractor and obtain from the Contractor, without delay, a full refund in respect of the Goods concerned.
- 4.7 The rights of the Purchaser in this Section shall apply:
- 4.7.1 without prejudice to its other rights and remedies; and
  - 4.7.2 to Goods as originally delivered, and to Goods repaired, adjusted or replaced pursuant to this Section.
- 4.8 The signature or acceptance of a delivery note by the Purchaser will not constitute evidence of acceptance of the Goods.
- 4.9 The Purchaser may, by written notice to the Contractor at any time within 30 days of delivery, reject all or any of the Goods which fail to meet the requirements of the Agreement, or Goods in a consignment which is deficient in weight, quantity or measure.

## **5. SUPPLY OF SERVICES**

- 5.1 Where the Agreement provides for the Services to:
- 5.1.1 commence on a certain date;
  - 5.1.2 be completed by a certain date; or
  - 5.1.3 be provided for a certain period,
- the Contractor will comply with such requirements.
- 5.2 The Contractor shall:
- 5.2.1 perform the Services and provide any Deliverables to meet or exceed the Service Levels set out in the Agreement;
  - 5.2.2 ensure that the Services and Deliverables will conform in all respects with the Service Levels set out in the Agreement;
  - 5.2.3 to the extent the Services comprise digital services, websites and apps, comply with Web Content accessibility Guidelines 2.1 AA standard.
  - 5.2.4 ensure that the Services and Deliverables will be fit for any purpose expressly or implicitly made known to the Contractor by the Purchaser;
  - 5.2.5 perform the Services with the highest level of care, skill and diligence in accordance with best practice in the Contractor's industry, profession or trade;



- 5.2.6 ensure that all Deliverables, and all goods, materials, standards and techniques used in providing the Services are of the best quality and are free from defects in workmanship, installation and design;
  - 5.2.7 co-operate with the Purchaser in all matters relating to the Services, and comply with the Purchaser's reasonable instructions;
  - 5.2.8 before the date on which the Services are to start, obtain and at all times, maintain during the Period, all necessary licences and consents and comply with all applicable Laws in relation to the Services;
  - 5.2.9 observe all health and safety rules and regulations and any other reasonable security requirements that apply at any of the Purchaser's premises from time to time and that have been communicated to it;
  - 5.2.10 hold all Purchaser Materials in safe custody at its own risk and maintain the Purchaser Materials in good condition until returned to the Purchaser; and
  - 5.2.11 not dispose of or use the Purchaser Materials other than in accordance with the Purchaser's written instructions or authorisations.
- 5.3 If Services are to be provided in distinct elements, the Contractor will comply with any reasonable request of the Purchaser as to the order in which the Services will be provided.
- 5.4 The Contractor will provide, at the reasonable request of and in such form as the Purchaser may require, reports showing the progress of the provision of the Services, the costs to the Purchaser of the Services provided during the period covered by the report, and a review of any factors likely to affect the satisfactory completion of the Services in accordance with the Agreement.
- 5.5 The Contractor agrees to immediately notify the Purchaser if it believes that it may be unable to achieve any particular Milestone. If the Contractor fails to achieve any Milestone on or by the relevant date other than due to a delay caused by the Purchaser that has been notified in writing by the Contractor to the Purchaser as soon as reasonably practicable, a Force Majeure event or where an extension of time is agreed by the Parties, then the Purchaser will have the right (without prejudice to all other rights and remedies available to it under these conditions or otherwise), at its discretion, to deduct by way of liquidated damages (and as a genuine pre-estimate and not by way of penalty) from any amounts payable to the Contractor, the amount set out in the particular Order Form (which shall be calculated in accordance with the anticipated cost to the Purchaser of such failure) for each week or part of a week that the achievement of the Milestone is overdue.
- 5.6 To the extent any Professional Services are to be supplied in accordance with the Agreement:
- 5.6.1 the Purchaser shall be entitled to rely upon the Deliverables;
  - 5.6.2 the Contractor may issue Deliverables in draft form, but if requested to do so the Contractor may not unreasonably refuse to issue a draft Deliverable in final form, nor unreasonably delay that issue;

5.6.3 the Contractor acknowledges that it shall have no right to be identified as the author of any Deliverable, and hereby waives any such rights conferred by law; and

5.6.4 to the extent the Contractor's compliance with the provisions of the Agreement would be inconsistent with the Contractor's obligations under Law or owed to any regulatory body exercising jurisdiction over the supply of the relevant Professional Services ("**Regulatory Requirements**"), and the affected provisions of the Agreement are identified in an Order Form as being not applicable or subject to variation to no greater degree than necessary to meet the Regulatory Requirements, such provisions shall be of no effect.

5.7 The Contractor shall have an ongoing obligation throughout the Agreement Period to identify new or potential improvements to the Services and promptly notify the Purchaser of such improvements.

## **6. REMEDIES**

6.1 In connection with Defective Goods and Defective Services, the Purchaser may choose to, without prejudice to the Purchaser's other rights and remedies:

6.1.1 have Defective Goods repaired by the Contractor at the Contractor's expense, without delay (and in any event within 7 days of the Rejection Notice), so as to meet in all respects the requirements of the Agreement;

6.1.2 have any Defective Goods replaced by the Contractor at the Contractor's expense, without delay and in any event within 7 days of the Rejection Notice, with Goods which comply in all respects with the requirements of the Agreement;

6.1.3 require, without undue delay, re-performance or completion of the Defective Services at no additional charge to the Purchaser;

6.1.4 terminate the Agreement in whole or only as regards the Defective Goods or Defective Services, and be released from all payment obligations in relation to Defective Goods or Defective Services, obtaining from the Contractor, without delay, a full refund of the sums already paid in respect of the Defective Goods or Defective Services; and

6.1.5 claim damages from the Contractor for any costs, expenses or losses resulting from the Contractor's failure to properly manufacture and deliver the Goods or perform the Services in accordance with the Agreement (including, without limitation, the reasonable costs incurred in obtaining substitute goods or services from a different supplier).

6.2 The Purchaser's rights and remedies as regards Defective Goods shall be unaffected if the loss or damage occurred in the transit of the Goods.

6.3 Except as otherwise expressly provided in the Agreement:

6.3.1 all remedies available to a Party under the Agreement are cumulative and may be exercised concurrently or separately; and

6.3.2 the exercise of any one remedy shall not exclude the exercise of any other remedy.

## **7. PAYMENT**

7.1 The Purchaser shall pay to the Contractor the Charges in consideration of the performance of the Contractor's obligations under the Agreement.

7.2 The Contractor shall issue invoices to the Purchaser in accordance with the Pricing Matrix. The Purchaser shall pay the Contractor within 30 days of the date of receipt of a valid invoice from the Contractor.

7.3 All Charges are exclusive of Value Added Tax. If any Value Added Tax is payable, the Contractor will show this separately on its invoice.

7.4 All Charges are stated in pounds sterling, and all invoices must be presented and demanded in pounds Sterling.

7.5 The Charges represent the entire amount payable by the Purchaser to the Contractor in respect of the performance of the Contractor's obligations under the Agreement, and except as otherwise expressly stated to the contrary in the Agreement, the Purchaser shall not be liable to the Contractor for any of its costs, expenses or liabilities.

7.6 The Contractor will comply with all reasonable requests of the Purchaser in respect of invoicing, including the formatting of invoices and the consolidation or splitting of invoices to reflect different parts of the performance of the obligations of the Agreement (including delivery to different locations and/or performance for the ultimate benefit of different persons).

7.7 The Contractor shall ensure that its Sub-Contracts all contain a clause:

7.7.1 notifying the Sub-Contractor that the Sub-Contract forms part of a larger contract for the benefit of the Purchaser and, if the Sub-Contractor has any difficulty in securing timely payment of an invoice, that matter may be referred to the Purchaser by the Sub-Contractor;

7.7.2 requiring the Contractor to pay the relevant Sub-Contractor without deduction and not more than 30 days after the receipt of a valid and payable invoice unless the Contractor is exercising a right of retention or set-off in respect of a breach of the Sub-contract by the relevant Sub-Contractor; and

7.7.3 in the same terms as that set out in this clause 7.7 (including, for the avoidance of doubt, this clause 7.7.3) subject only to modification to refer to the correct designation of the equivalent party as the Contractor and Sub-Contractor as the case may be

7.8 The Parties will pay interest on any amount payable under the Agreement not paid on the due date, for the period from that date to the date of payment at a rate equal to 3% above the base rate set from time to time by the Bank of England.

- 7.9 The Contractor is requested to address complaints regarding the late payment of invoices to, in the first instance, the addressee of the invoice and, in the second instance to [INSERT CONTACT DETAILS].
- 7.10 The Contractor shall, at least once quarterly and more frequently on request, provide the Purchaser with all such information as the Purchaser may reasonably require to ensure the Contractor and any Sub-Contractors have complied with the requirements of clause 7.7

## **8. WARRANTIES AND REPRESENTATIONS**

- 8.1 The Contractor warrants and represents to the Purchaser that:
- 8.1.1 the Contractor has full capacity and all necessary consents (including but not limited to, where its procedures so require, the consent of its Parent Company) to enter into and to perform the Agreement;
  - 8.1.2 to the best of its knowledge there is no inhibition, restriction or prohibition which in any way affects the capacity of the Contractor to enter into and perform the Agreement;
  - 8.1.3 the Contractor shall discharge its obligations under the Agreement in accordance with Good Industry Practice;
  - 8.1.4 as at the Commencement Date, all information, statements and representations contained in the Tender are true, accurate and not misleading and it will promptly advise the Purchaser and Purchaser of any fact, matter or circumstance of which it may become aware during the Agreement that would render any such information, statement or representation to be false or misleading;
  - 8.1.5 no claim is being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of its knowledge and belief, pending or threatened against it or any of its assets that will or might affect its ability to perform its obligations under the Agreement;
  - 8.1.6 no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, are threatened) for the winding up of the Contractor or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, manager, administrator or similar officer in relation to any of the Contractor's assets or revenue; and
  - 8.1.7 the Contractor shall comply with Schedule 2, Schedule 3[ and OR ,] Schedule 5[, Schedule 6, Schedule 7, Schedule 8 and Schedule 9] .
- 8.2 The Contractor shall comply with all Laws which are relevant to the Agreement and the performance thereof.

## **9. CONFLICT OF INTEREST**

- 9.1 Where the Agreement is one for the provision of Professional Services, the Contractor shall ensure that it has no conflict of interest such as may be likely to prejudice its independence and objectivity in performing the Agreement, and:

- 9.1.1 where the Contractor becomes aware of any conflict of interest during the performance of the Agreement (whether the conflict existed before the award of the Agreement or arises during its performance) it shall immediately notify the Purchaser in writing of the same, giving particulars of its nature and the circumstances in which it exists or arises and shall furnish such further information as the Purchaser may reasonably require;
- 9.1.2 where the Purchaser is of the opinion that the conflict of interest notified to it under Clause 9.1.1 is not capable of being avoided or removed the Purchaser may terminate the Agreement forthwith by notice in writing to the Contractor.
- 9.1.3 where the Purchaser is of the opinion that the conflict of interest notified to it under Clause 9.1.1 is capable of being avoided or removed the Purchaser may require the Contractor to take such steps as will, in its opinion, avoid, or as the case may be, remove the conflict and:
  - (a) if the Contractor fails to comply the Purchaser's requirements in this respect, or
  - (b) if, in the opinion of the Purchaser, compliance does not avoid or remove the conflict,the Purchaser may terminate the Agreement forthwith by notice in writing to the Contractor; and
- 9.1.4 if the Agreement is terminated pursuant to Clause 9.1.2 and, in the Purchaser's reasonable opinion, the relevant conflict of interest existed at the time of the award of the Agreement and could have been discovered with the application by the Contractor of due diligence and ought to have been disclosed in the Tender, then notwithstanding Clause 38 (Consequences of Termination), no payment shall be due for any Services provided by the Contractor.

## **10. CONFIDENTIALITY**

10.1 The Confidential Information shall not:

- 10.1.1 be used by the Contractor other than for the purposes of this Agreement;  
or
- 10.1.2 be disclosed by the Contractor, other than to those Contract Workers who need to have access to that information for the purposes of the Agreement and who are bound by written obligations of confidentiality no less onerous than those set out in this Clause 10.

without the prior written consent of the Purchaser.

10.2 Clause 10.1 shall not apply to any Confidential Information which:

- 10.2.1 was generally available to the public at the time of the Purchaser's disclosure to the Contractor;

- 10.2.2 becomes generally available to the public other than as a result of a breach by the Contractor of Clause 10.1;
  - 10.2.3 was known to the Contractor prior to its disclosure to the Contractor by the Purchaser;
  - 10.2.4 comes into the Contractor's possession from a third party not under any duty of confidence to the Purchaser in respect of that information;
  - 10.2.5 the Contractor is obliged by law to disclose provided that, in the case of a request for disclosure under the Information Legislation, the Contractor will not disclose any Confidential Information without first using reasonable endeavours to consult the Purchaser on the disclosure; or
  - 10.2.6 the Contractor requires to provide to its insurers or professional advisers to allow the Contractor to properly conduct its business.
- 10.3 The Contractor will take all technical and organisational measures and other precautions necessary to ensure that the Confidential Information is not used or disclosed other than as permitted by Clauses 10.1 and 10.2.
- 10.4 Upon the expiry or termination of the Period, the Contractor will promptly, and in any event within 14 days of such expiry or termination, return to the Purchaser or destroy (at the absolute discretion of the Purchaser) any Confidential Information in its possession, and provide the Purchaser with a certificate, signed by a duly authorised officer, certifying that the Contractor has complied with its obligations under this Clause 10.4. The obligation to destroy any Confidential Information pursuant to this Clause 10.4 includes an obligation to permanently delete Confidential Information from any information technology systems owned and/or used by the Contractor, any copies of that Confidential Information held in electronic form. Notwithstanding the foregoing provisions of this Clause 10.3, the Contractor shall be entitled to retain Confidential Information to the extent it is required to do so for regulatory reasons or for compliance with Law.
- 10.5 Nothing in this Clause 10 will prevent the Contractor from using in the normal course of its business any techniques, ideas or know-how gained during the performance of the Agreement to the extent that such use does not result in any unauthorised disclosure of any Confidential Information or an infringement of the Purchaser's (or anyone else's) Intellectual Property Rights.
- 10.6 The Contractor must immediately notify the Purchaser of any breach of security concerning the Confidential Information.
- 10.7 The Contractor acknowledges that the Purchaser may publish and make available a copy of the Agreement when required to do so by applicable law or in accordance with its own internal procedures.
- 10.8 Notwithstanding expiry of termination of the Agreement, the obligations contained in this Clause 10 shall continue in full force in perpetuity following the Period.

## **11. FREEDOM OF INFORMATION**

- 11.1 The Contractor acknowledges that the Purchaser is subject to the requirements of the Information Legislation. The Contractor will provide such assistance and co-operation as the Purchaser may reasonably require to enable it to comply with its obligations under the Information Legislation including by providing the Purchaser with a copy of any information which it is holding on behalf of the Purchaser in the form that the Purchaser specifies within 7 days of a request from the Purchaser to that effect.
- 11.2 The Purchaser will be entitled to determine at its absolute discretion whether to disclose upon request or otherwise publish any information under the Information Legislation, including any information provided to it by the Contractor or which relates in any way to the Contractor or the Agreement. In particular, the Purchaser will be entitled to determine at its absolute discretion whether, even if it is not required to disclose or otherwise publish information under the Information Legislation, it would nevertheless be in the public interest to do so.

## **12. DATA PROTECTION**

- 12.1 The Purchaser and the Contractor shall each comply with their respective obligations under the Data Protection Laws.
- 12.2 Both Parties agree to negotiate in good faith any such amendments to the Agreement as may be required to ensure that both Parties are compliant with their obligations under the Data Protection Laws.
- 12.3 The Contractor will provide the Purchaser with contact details for its data protection officer or equivalent individual with responsibility for data protection and privacy, to act as a point of contact regarding data protection and privacy obligations.
- 12.4 The Personal Data to be Processed and the details of the Processing to be undertaken under the Agreement is detailed in the Order Form.

### **[OPTION 1: CONTROLLER TO PROCESSOR**

- 12.5 Without prejudice to the meaning afforded to each party under the Data Protection Laws, the intention of the parties is that in respect of any Personal Data Processed by the Contractor under this Contract, the Purchaser shall be the Data Controller and the Contractor shall be a Data Processor.
- 12.6 The Contractor shall (and shall ensure that its Contract Workers shall):
- 12.6.1 implement and maintain appropriate technical and organisational measures and safeguards for protection of Personal Data, to ensure the rights of Data Subjects are protected and to ensure that processing will meet the requirements of Data Protection Laws;
- 12.6.2 ensure that all employees and Sub-Contractors authorised to Process Personal Data are subject to binding confidentiality obligations in respect of that Personal Data;

- 12.6.3 assist the Purchaser, using appropriate technical and organisational measures, to respond to requests from Data Subjects including requests for information, requests for deletion and amendments of information and requests for the transfer of data;
- 12.6.4 assist the Purchaser in ensuring compliance with its security, data breach notification, impact assessment and consultation obligations under Data Protection Laws, taking into account the nature of Processing and information available to the Contractor;
- 12.6.5 at the Purchaser's election, delete or return all Personal Data and existing copies to the Purchaser (unless Data Protection Laws require the Contractor to store that Personal Data);
- 12.6.6 make available to the Purchaser all information necessary, and allow for and contribute to audits and inspections conducted by the Purchaser or the Purchaser's mandated auditor, to demonstrate the Contractor's compliance with its obligations under this Contract;
- 12.6.7 without delay inform the Purchaser if, in the Contractor's opinion, any instruction given by the Purchaser to the Contractor infringes Data Protection Laws;
- 12.6.8 maintain a written record of all Processing activities under its responsibility and of all categories of Processing activities carried out on behalf of the Purchaser, that satisfies the requirements of the Data Protection Laws;
- 12.6.9 cooperate on request with any relevant UK, European Union or member state supervisory authority;
- 12.6.10 notify the Purchaser without undue delay after becoming aware of a breach of Personal Data and notify the Purchaser immediately if it is asked to do something infringing the Data Protection Laws or other data protection law of the EU or a member state;
- 12.6.11 take any further action and execute any further documents and amendments to this Contract as may, in the Purchaser's reasonable opinion, be required to comply with Data Protection Laws;
- 12.6.12 only process Personal Data in accordance with the Purchaser's documented written instructions consistent with and in the scope of this Contract (unless required to do so by applicable law, in which case the Contractor shall inform the Purchaser of that legal requirement unless prohibited by Law);
- 12.6.13 only engage another Data Processor to carry out specific processing activities with prior specific or general written authorisation of the Purchaser, and only where that other Data Processor is subject to a written contract imposing on that other Data Processor the same data protection obligations as are imposed on the Contractor in this Contract;



- 12.6.14 not Process or transfer Personal Data outside the United Kingdom and the European Economic Area except with the express prior written consent of the Purchaser; and
- 12.6.15 nothing within this Contract relieves the Contractor of its own direct responsibilities and liabilities under the Data Protection Laws.
- 12.7 The Contractor agrees that the technical and organisational measures referred to in Clause 12.6.1 above shall ensure a level of security appropriate to the risk, taking into account:
  - 12.7.1 the state of the art, the costs of implementation;
  - 12.7.2 the nature, scope, context and purposes of Processing and risks of varying likelihood; and
  - 12.7.3 severity for the rights and freedoms of individuals.
- 12.8 The Contractor agrees that the technical and organisational measures to be implemented by them and as referred to in Clause 12.6.1 above shall include, as appropriate: -
  - 12.8.1 pseudonymisation and encryption of Personal Data;
  - 12.8.2 the ability to ensure the ongoing confidentiality, integrity, availability and resilience of Processing systems and services;
  - 12.8.3 the ability to restore the availability and access to Personal Data in a timely manner in the event of a physical or technical incident; and
  - 12.8.4 a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the Processing.]

**OR**

**[OPTION TWO: CONTROLLER TO CONTROLLER**

- 12.5 Without prejudice to the meaning afforded to each Party under the Data Protection Laws, the intention of the Parties is that in respect of any Personal Data Processed by the Contractor under this Agreement, the Purchaser shall be the Data Controller and the Contractor shall be a Data Processor.
- 12.6 Notwithstanding clause 12.5, if the Contractor is to Process any Personal Data other than as a Data Controller, the Contractor shall immediately notify the Purchaser of such fact and the Contractor and Purchaser shall enter into a legally compliant written agreement in respect of such Processing (the "DSA"). The Contractor warrants and undertakes that it shall not commence such Processing until the DSA has been signed off by both Parties.
- 12.7 The Personal Data to be Processed and the details of the Processing to be undertaken under this Contract are detailed in the Order Form.
- 12.8 The Contractor shall:

12.8.1 if, for the purpose of performing its obligations hereunder, it is required to transfer the Personal Data to the other party or to any third party, ensure that it has all necessary notices and consents and lawful bases in place to lawfully enable such transfer;

12.8.2 give full information (as required by Data Protection Laws) to any Data Subject whose Personal Data may be Processed under this Contract of the nature of such Processing;

12.8.3 Process the Personal Data only for the purpose(s) set out in the Order Form;

12.8.4 not disclose or allow access to the Personal Data other than as expressly set out in the Order Form;

12.8.5 ensure that all Permitted Recipients (as set out in the Order Form) are subject to written contractual obligations concerning the Personal Data (including obligations of confidentiality) which are no less onerous than those imposed by this Contract;

12.8.6 ensure that it has in place appropriate technical and organisational measures to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data;

12.8.7 not transfer any Personal Data received from the Purchaser outside the UK unless such transfer is expressly provided for in the Order Form and it ensures that: (i) the transfer is to a country approved under the applicable Data Protection Laws as providing adequate protection; or (ii) there are appropriate safeguards or binding corporate rules in place pursuant to the applicable Data Protection Laws; or (iii) the Contractor otherwise complies with its obligations under the Data Protection Laws by providing an adequate level of protection to any Personal Data that is transferred; or (iv) one of the derogations for specific situations in the applicable Data Protection Laws applies to the transfer.

12.9 The Contractor and the Purchaser shall each assist the other in complying with all applicable requirements of the Data Protection Laws. In particular, each of the Contractor and the Purchaser shall:

12.9.1 consult with the other party about any notices given to Data Subjects in relation to Personal Data Processed in connection with this Contract;

12.9.2 promptly inform the other party about the receipt of any Data Subject rights request in connection with any Personal Data Processed in connection with this Contract;

12.9.3 provide the other party with reasonable assistance in complying with any Data Subject rights request;

12.9.4 not disclose, release, amend, delete or block any Personal Data Processed in connection with this Contract in response to a Data Subject rights request without first consulting the other party wherever possible;

12.9.5 assist the other party, at the cost and request of the other party, in responding to any request from a Data Subject and in ensuring compliance with its obligations under the Data Protection Laws with respect to security, personal data breach notifications, data protection impact assessments and consultations with the Information Commissioner or other regulators;

12.9.6 notify the other party without undue delay on becoming aware of any breach of the Data Protection Laws in connection with Personal Data Processed in connection with this Contract; and

12.9.7 use compatible technology for the processing of Personal Data to ensure that there is no lack of accuracy resulting from Personal Data transfers;

12.9.8 maintain complete and accurate records and information to demonstrate its compliance with this clause 12; and

12.9.9 provide the other party with contact details of at least one employee as point of contact and responsible manager for all issues arising out of the Data Protection Laws, including the joint training of relevant staff, the procedures to be followed in the event of a data security breach, and the regular review of the parties' compliance with the Data Protection Laws.

12.10 The Contractor agrees that the technical and organisational measures to be implemented by them and as referred to in Clause 12.8.6 above shall include, as appropriate: (i) pseudonymisation and encryption of Personal Data; (ii) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of Processing systems and services; (iii) the ability to restore the availability and access to Personal Data in a timely manner in the event of a physical or technical incident; and (iv) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the Processing.

12.11 The Contractor shall, at the written direction of the Purchaser, delete or return all Personal Data disclosed by or on behalf of the Purchaser and copies thereof to the Purchaser on termination of this Contract unless required by law to store the Personal Data.]

12.10 and

### **13. INTELLECTUAL PROPERTY**

13.1 The Contractor must not infringe any Intellectual Property Rights of any third party in the performance of the Agreement.

#### **[OPTION ONE: INTELLECTUAL PROPERTY IS OWNED BY THE PURCHASER**

13.2 All rights (including ownership and Intellectual Property Rights) title and interest in or to any reports, documents, specifications, instructions, plans, drawings, patents, models or designs whether in writing, or on magnetic or other media or distributed electronically:

- 13.2.1 forming Issued Property or otherwise made available to the Contractor by the Purchaser shall remain vested in the Purchaser; and
  - 13.2.2 prepared by or for the Contractor for use, or intended use, in relation to the performance of the Agreement (including Deliverables) are hereby assigned to and shall vest in the Purchaser.
- 13.3 The assignment contained at Clause 13.2.2 shall take effect on the earliest of: (i) the Agreement's Commencement Date; and (ii) the coming into existence of the relevant rights in the relevant reports, documents, specifications, instructions, plans, drawings, patents, models or designs.
- 13.4 The Contractor shall, promptly at the Purchaser's request, do (or procure to be done) all such further acts and things and the execution of all such other documents as the Purchaser may from time to time require for the purpose of securing for the Purchaser all right, title and interest in and to the Intellectual Property Rights assigned to the Purchaser in accordance with Clause 13.2.2.]

**OR**

**[OPTION TWO: INTELLECTUAL PROPERTY IS OWNED BY THE CONTRACTOR AND PURCHASER IS GRANTED A NON-EXCLUSIVE LICENCE TO USE THEM**

- 13.2 All rights (including ownership and Intellectual Property Rights) title and interest in or to any reports, documents, specifications, instructions, plans, drawings, patents, models or designs whether in writing, or on magnetic or other media or distributed electronically:
- 13.2.1 forming Issued Property or otherwise made available to the Contractor by the Purchaser shall remain vested in the Purchaser; and
  - 13.2.2 prepared by or on behalf of the Contractor for use, or intended use, in relation to the performance of the Agreement (including Deliverables) (the "Contractor Results") shall vest in the Contractor.
- 13.3 The Contractor grants the Purchaser a perpetual, irrevocable, non-exclusive, sub-licensable royalty-free licence, to store, use, maintain, reproduce and modify the Contractor Results.
- 13.4 If the Purchaser requires the use of intellectual property of the Contractor that was created or generated prior to or outside the scope of the Agreement in order to exercise its rights in the Contractor Results then the Contractor will promptly grant a royalty-free licence to the Purchaser so that the Purchaser may use such intellectual property for the purpose of exercising its rights in the Contractor Results.]

**14. ACCESS TO PREMISES**

- 14.1 If the Agreement requires the Contractor to take access to or occupation of any Premises in connection with the Agreement, such access or occupation shall be made available to the Contractor free of charge.

- 14.2 The Contractor will not deliver any Goods, materials, plant or equipment, and will not commence any work at the Premises, until it has obtained the Purchaser's prior consent to the date and time of access, and, where appropriate, as to the proposed method of working or delivery (to the extent that such access details are not included within the Agreement).
- 14.3 The Premises shall be used by the Contractor solely for the purpose of performing the Agreement.
- 14.4 The Contractor shall have access to or occupation of the Premises as non-exclusive licensee only and shall vacate the Premises on the earlier of: (i) the Premises no longer being required for the purpose of performing the Agreement; or (ii) termination or expiry of the Agreement.
- 14.5 All tools, equipment and materials of the Contractor required in the performance of the Contractor's obligations under the Agreement shall be and remain at the sole risk of the Contractor, whether or not they are situated at any Premises.
- 14.6 If requested the Contractor shall provide a list of the names and addresses of all Contract Workers who may require admission to the Premises in connection with the performance of the Agreement, containing such other particulars as the Purchaser may reasonably require.
- 14.7 The Purchaser may refuse to admit to the Premises any Contract Worker whose admission would be, in the opinion of the Purchaser, undesirable.
- 14.8 The Contractor shall comply with (and procure that all Contract Workers comply with) all reasonable instructions given by the Purchaser in relation to the access to and use of the Premises including security and health and safety requirements and occupation and cooperation with other users of the Premises.
- 14.9 If the Purchaser so directs, the Contractor will submit a basic Disclosure Certificate obtained from Disclosure Scotland in respect of any Contract Workers who requires access to any Premises, prior to such access being taken.

## **15. ISSUED PROPERTY**

- 15.1 All Issued Property shall remain the property of the Purchaser and shall be used by the Contractor only for the purposes of the Agreement.
- 15.2 The Contractor shall notify the Purchaser without delay if any Issued Property is not in good condition when received by or on behalf of the Contractor.
- 15.3 The Contractor undertakes to keep safe custody of Issued Property and to return all Issued Property to the Contractor, with the exception of any Issued Property consumed or incorporated for the purposes of the Agreement.
- 15.4 The Contractor will return all Issued Property on demand, at any time, and within 7 days of the termination or expiry of the Agreement. To the extent that Issued Property includes working papers or other written materials, at the same time as the Contractor returns such Issued Property it shall also return copies it has made of such Issued Property and any other materials of whatsoever nature prepared by the Contractor using the information in such Issued Property.

- 15.5 Neither the Contractor nor any other party shall have a lien on any Issued Property and the Contractor shall take all reasonable steps to ensure that the title of the Purchaser to and the exclusion of any such lien in respect of Issued Property are brought to the notice of all persons dealing with any Issued Property.

## **16. AUDIT ACCESS**

- 16.1 The Contractor shall grant to the Purchaser, any auditors of the Purchaser (including internal auditors and Audit Scotland and any other organisation or body which may from time to time have cause to audit the accounts of the Purchaser) and any other person authorised by the Purchaser (together the "Auditors") access to all of the Records and shall provide reasonable assistance at all times to the Purchaser or the Auditors (including the provision of such oral and written explanations as the Purchaser or the Auditors may require in relation to the Records, all for the purposes of enabling the Purchaser or the Auditors:

16.1.1 to carry out an audit of the Contractor's compliance with the Agreement;

16.1.2 to carry out an audit of all activities carried out and security precautions taken in connection with the performance of the Agreement;

16.1.3 to prepare, audit, examine and certify the accounts of the Purchaser; or

16.1.4 to conduct any audit or investigation by Audit Scotland or any other auditor.

- 16.2 The Contractor shall be repaid any reasonable expenses properly and necessarily incurred in giving such reasonable assistance.

- 16.3 Without prejudice to Clause 16.1 in the event of an investigation into suspected fraudulent activity or other impropriety by any Contractor Party or Contract Worker:

16.3.1 the Purchaser and/or the Auditors may enter any premises of any Contractor Party and take access to the Records, which shall be made available to them (whether they are held at such premises or otherwise) by the Contractor or Contractor Party provided that save in cases of emergency, actual or reasonably suspected material Default on the part of the Contractor or instruction of any regulatory body, the Purchaser and/or the Auditors shall provide reasonable advance notice (of not less than 5 Working Days) that it wishes to exercise the foregoing right;

16.3.2 the Contractor shall render all necessary assistance to the conduct of such investigation (including the provision of office accommodation and the provision of such oral and written explanations as the Purchaser or the Auditors may require in relation to the Records or any other subject of investigation or enquiry by the Purchaser or the Auditors); and

16.3.3 the Contractor shall be paid any reasonable expenses properly and necessarily incurred in giving such necessary assistance in the event that the result of such investigation is that no fraudulent activity or other impropriety by a Contractor Party or a Contract Worker is found (but not otherwise).

- 16.4 The Purchaser shall ensure that any representative of the Purchaser given access to any premises or Records by the Contractor in accordance with Clause 16.1 causes the minimum amount of disruption to the business of the Contractor.

## **17. CONTRACT WORKERS**

- 17.1 The Contractor shall engage, employ, and train suitably experienced and qualified Contract Workers to perform Contractor's duties and obligations under the Agreement.
- 17.2 On request, the Contractor will provide the Purchaser with the names of all proposed Contract Workers together with a description of the part each Contract Worker will play in performing the Agreement, and details of their qualifications, experience and previous employment.
- 17.3 On request, the Contractor will provide the Purchaser with documentary or other evidence to establish that the Contract Workers are suitably qualified and experienced to perform their respective duties under the Agreement.
- 17.4 If the Purchaser gives the Contractor notice that any Contract Worker proposed Contract Worker is not to become or remain involved in the performance of the Agreement, the Contractor will take all reasonable steps to comply with such notice without delay, at the Contractor's cost.
- 17.5 Nothing in the Agreement shall have the effect of making any Contract Worker an employee of the Purchaser.

## **18. KEY PERSONNEL**

- 18.1 The Contractor shall appoint an Account Manager to be the representative of the Contractor for all purposes connected with the delivery of the Agreement, and who shall be authorised by the Contractor to fulfil that role.
- 18.2 The Purchaser may at any time by notice to the Contractor designate any Contract Worker as "Key Personnel". Any person referred to in the Agreement or the Contractor's response to the Invitation to Tender as to be concerned with the delivery of the Agreement and the Account Manager referred to in Clause 18.1 will be deemed so designated.
- 18.3 The Contractor will ensure that the Key Personnel are made available in performance of the Agreement, unless the Purchaser agrees otherwise. The Purchaser will act reasonably in considering requests for replacements to the Key Personnel where the need for the replacement has arisen due to circumstances beyond the control of the Contractor. If the Contractor proposes a replacement for any person designated as Key Personnel, the Purchaser reserves the right to interview any such person before considering agreeing to the replacement.
- 18.4 If the Purchaser refuses its consent for any replacement Key Personnel the Contractor will propose an alternative, without undue delay.

## **19. NON-SOLICITATION OF EMPLOYEES**

19.1 Without in any way restricting the right of any person freely to accept employment and change employment, neither the Purchaser nor the Contractor shall, during the Period and for the period of 6 months thereafter, without the other Party's written consent:

19.1.1 subject to Clause 19.2, employ any of the employees of the other Party who have at any time been engaged in the performance of the Agreement to perform similar duties to those involved in the performance of the Agreements; or

19.1.2 solicit to employment any such employees of the other Party.

19.2 A Party shall not be in breach of Clause 19.1 if a person (without having been previously approached directly or indirectly) responds to a general recruitment advertisement placed by or on behalf of the prospective new employer.

## **20. STAFF TRANSFER AT COMMENCEMENT**

20.1 The Contractor and the Purchaser agree that the commencement of the provision of the Services by the Contractor may constitute a Relevant Transfer in respect of the Incoming Employees.

20.2 The Contractor, and any Affiliate of the Contractor or a Sub-Contractor, shall use reasonable endeavours to organise its workforce so that there is not an organised grouping of employees whose principal purpose is to carry out the services on behalf of the Purchaser.

20.3 The Contractor is responsible for all emoluments and outgoings in respect of the Incoming Employees (including, without limitation, all wages, bonuses, commission, premiums, subscriptions, pay as you earn and national insurance contributions, accrued by untaken holiday pay and pension contributions) which are attributable in whole or in part to the period from the date of the Incoming Relevant Transfer, including bonuses or commission which are payable on or before the date of the Incoming Relevant Transfer but attributable in whole or in part to the period from the date of the Incoming Relevant Transfer.

## **21. INFORMATION ABOUT EMPLOYEES**

21.1 The Purchaser may at any time by Notice require the Contractor to disclose such information as the Purchaser may require to the Purchaser or, at the direction of the Purchaser, to any prospective Replacement Contractor relating to the manner in which the Services are organised or information about any employee who is wholly or mainly assigned to carrying out activities in provision of the Services whether employed by the Contractor or Affiliate of the Contractor or a Sub- Contractor ("**Assigned Employee**"). The information required by the Purchaser about Assigned Employees may include Employee Liability Information and/or Staffing Information.

21.2 The Contractor must disclose by Notice all such information as is required by the Purchaser under Clause 21.1, within such reasonable period specified by the



Purchaser. The Contractor acknowledges that the Data Protection Laws do not prevent the disclosure of anonymised data that is not Personal Data.

- 21.3 The Contractor warrants for the benefit of the Purchaser and any Replacement Contractor that all information provided pursuant to this Clause 21 shall be true and accurate in all material respects at the time of providing the information. The Purchaser may at any time require the Contractor to confirm whether information provided under this Clause 21 remains true and accurate in all material respects or ask it to provide updated information.
- 21.4 The Purchaser shall be permitted to use and disclose the information provided by the Contractor under this Clause 21 for the purpose of informing any prospective Replacement Contractor.

## **22. TRANSITION AND ACCEPTANCE**

- 22.1 During the Transition Period the Contractor will:
- 22.1.1 ensure that all Contract Workers have received the training necessary to allow the Contractor to perform the Agreement from the Commencement Date;
  - 22.1.2 prepare draft procedural instructions to be issued to all Contract Workers in connection with the Agreement, and submit the draft to the Purchaser for approval (which will not be unreasonably withheld);
  - 22.1.3 issue procedural instructions as approved by the Purchaser to all Contract Workers in advance of the Commencement Date; and
  - 22.1.4 comply with its obligations pursuant to the Transition Plan.
- 22.2 During the Transition Period the Purchaser will use its reasonable endeavours to comply with its obligations pursuant to the Transition Plan.
- 22.3 The Conditions will apply to the Transition Period from the commencement of that period, notwithstanding that this is prior to the Commencement Date.

## **23. SYSTEM TRIALS DURING LEAD-IN PERIOD**

- 23.1 During the Transition Period, the Contractor shall, at its own expense, conduct system trials and testing in relation to the Goods and/or Services required for the performance of its obligations pursuant to the Agreement in accordance with any reasonable instructions which the Purchaser may give including as to the time and location of the trials and tests. The Purchaser may attend and monitor the system trials and testing.
- 23.2 Within 7 days of each event of system trials and testing, the Contractor shall report to the Purchaser as to the results, in such form and containing such information as the Purchaser may reasonably require.
- 23.3 If the system trials and testing are not completed to the reasonable satisfaction of the Purchaser:

- 23.3.1 before the Commencement Date, the Contractor may carry out the system trials and testing on any number of occasions prior to the Commencement Date in accordance with the provisions of this Clause 23.3; and
- 23.3.2 by the Commencement Date, the Purchaser may (without prejudice to any other right or remedy which it may have):
  - 23.3.2.1 notify the Contractor of a revised Commencement Date to allow the Contractor additional time to complete the system trials and testing to the reasonable satisfaction of the Purchaser; or
  - 23.3.2.2 terminate the Agreement with immediate effect by giving written notice of termination to the Contractor in which case the Purchaser shall have no liability in respect of any costs or expenses incurred by the Contractor arising out of or in connection with the Agreement including the performance of the system trials or testing (and the termination will be deemed to have been effected pursuant to Clause 37 of the Agreement.
- 23.4 The Purchaser will notify the Contractor when the completion of the system trials and testing has been carried out to the reasonable satisfaction of the Purchaser, but such completion will not constitute evidence that any Goods have been accepted by the Purchaser nor that they are fit for purpose or otherwise in accordance with the requirements of the Agreement.
- 23.5 After the completion of the system trials and testing to the reasonable satisfaction of the Purchaser, the Contractor may not use alternative Goods in the delivery of the Services (or provide alternative Goods) in performance of the Agreement without the prior written consent of the Purchaser. In considering a request for consent, the Purchaser may ask for all reasonable information concerning the reason for the request and as regards the proposed alternatives, and may require system trials and testing to be carried out in respect of the proposed alternatives, prior to making its decision as to whether to grant or withhold its consent.

## **24. STAFF TRANSFER ON EXPIRY OR TERMINATION**

- 24.1 The Contractor and the Purchaser agree that the ceasing of the provision of the Services by the Contractor may constitute a Relevant Transfer in respect of the Outgoing Employees.
- 24.2 The Contractor shall comply and shall procure that each Affiliate of the Contractor and each Sub-Contractor shall comply with all of its obligations under TUPE and shall perform and discharge and procure that each Affiliate of the Contractor and each Sub-Contractor shall perform and discharge all its obligations in respect of all the Outgoing Employees arising in respect of the period up to (and including) the date of the Outgoing Relevant Transfer.
- 24.3 The Contractor is responsible for all emoluments and outgoings in respect of the Outgoing Employees (including, without limitation, all wages, bonuses, commission, premiums, subscriptions, pay as you earn and national insurance contributions, accrued but untaken holiday pay and pension contributions) which are attributable

in whole or in part to the period up to and including the date of the Outgoing Relevant Transfer (including bonuses or commission which are payable after the date of the Outgoing Relevant Transfer but attributable in whole or in part to the period on or before the date of the Relevant Transfer).

- 24.4 The Contractor shall and shall procure that each Affiliate of the Contractor and each Sub-Contractor shall promptly provide to the Purchaser and any Replacement Contractor in writing such information (including, but not limited to, Staffing Information and Employee Liability Information) as is necessary to enable the Purchaser and/or the Replacement Contractor as the case may be to carry out their respective duties under regulation 13 of TUPE.
- 24.5 The Contractor shall provide and shall procure that each Affiliate of the Contractor and each Sub-Contractor shall provide all reasonable co-operation and assistance to the Purchaser and any Replacement Contractor to ensure the smooth transfer of the Outgoing Employees including without prejudice to the foregoing generality providing sufficient information in advance of the date of the Outgoing Relevant Transfer to ensure that all necessary payroll arrangements can be made to enable the Outgoing Employees to be paid as appropriate.
- 24.6 The Contractor warrants to the Purchaser that during the period of 6 months immediately prior to the expiry of the Period it will not (and will ensure that any Affiliate of the Contractor and any Sub-Contractor will not) without the prior consent of the Purchaser:
- 24.6.1 increase the total employment costs of the Assigned Employees in any material way;
  - 24.6.2 amend or vary (or purport or promise to amend or vary) the terms and conditions of employment or engagement (including for the avoidance of doubt pay) of any Assigned Employee other than where such amendment or variation has previously been agreed in the normal course of business and where any such amendment or variation is not in any way related to the transfer of the Services;
  - 24.6.3 terminate or give notice to terminate the employment or engagement of any Assigned Employee other than in circumstances in which the termination is for reasons of misconduct or lack of capability;
  - 24.6.4 transfer away, remove, reduce or vary the involvement of any of the Assigned Employees from or in the provision of the Services other than where such transfer or removal:
    - 24.6.4.1 was planned as part of the individual's career development;
    - 24.6.4.2 takes place in the normal course of business; and
    - 24.6.4.3 will not have any adverse impact upon the delivery of the Services by the Contractor provided that any such transfer, removal, reduction or variation is not in any way related to the transfer of the Services; or

24.6.5 recruit or bring in any new or additional individuals to provide the Services who were not already involved in providing the Services.

## **25. ANTI-CORRUPTION AND ANTI-BRIBERY**

25.1 The Contractor shall not (and shall procure that no Contract Worker nor any other person acting on its behalf shall) offer or give or agree to offer or give any person any gift or consideration of any kind as an inducement or reward for:

25.1.1 showing or forbearing to show favour or disfavour to any person in relation to the Agreement; or

25.1.2 doing or forbearing to do (or having done or forborne to do) any act in relation to the obtaining or performance of the Agreement or any other agreement.

25.2 The Contractor shall:

25.2.1 comply with the Relevant Requirements;

25.2.2 not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;

25.2.3 have and shall maintain in place throughout the Period its own policies and procedures, including but not limited to adequate procedures under the Bribery Act 2010, to ensure compliance with the Relevant Requirements and will enforce them;

25.2.4 immediately notify the Purchaser if a foreign public official becomes an officer or employee of the Contractor or acquires a direct or indirect interest in the Contractor (and the Contractor warrants that it has no foreign public officials as officers, employees or direct or indirect owners at the date of this agreement);

25.2.5 ensure that all persons associated with the Contractor or other persons who are performing services in connection with the Agreement comply with this Clause 25; and

25.2.6 within 2 months of the date of the Agreement, and annually thereafter, certify to the Purchaser in writing signed by an officer of the Contractor, compliance with this Clause 25 by the Contractor, its Affiliates, Contractor Parties, Sub-Contractors and Contract Workers. The Contractor shall provide such supporting evidence of compliance as the Purchaser may reasonably request.

25.3 For the purpose of this Clause 25, the meaning of adequate procedures and foreign public official and whether a person is associated with another person shall be determined in accordance with section 7(2) of the Bribery Act 2010 (and any guidance issued under section 9 of that Act), sections 6(5) and 6(6) of that Act and section 8 of that Act respectively. For the purposes of this Clause 25 a person associated with the Contractor includes but is not limited to any subcontractor of the Contractor.

- 25.4 In the event of any breach of this Clause 25 by the Contractor or by anyone employed by it or acting on its behalf (whether with or without the knowledge of the Contractor):
- 25.4.1 the Contractor shall immediately give the Purchaser full details of any such breach and shall co-operate fully with the Purchaser in disclosing information and documents which the Purchaser may request; and
  - 25.4.2 The Purchaser shall (without prejudice to any of its rights or remedies under the Agreement or otherwise) be entitled by notice in writing to terminate the Agreement immediately.
- 25.5 In exercising its rights or remedies under this Clause 25, the Purchaser shall:
- 25.5.1 act in a reasonable and proportionate manner having regard to such matters as the gravity of, and the identity of the person performing, the prohibited act;
  - 25.5.2 give due consideration, where appropriate, to action other than termination of the Agreement, including:
    - 25.5.2.1 requiring the Contractor to procure the termination of a Sub-Contract where the prohibited act is that of a Sub-Contractor; or
    - 25.5.2.2 requiring the Contractor to procure the dismissal of an employee of any Contractor Party where the prohibited act is that of such employee.

## **26. ANTI-SLAVERY AND HUMAN TRAFFICKING**

- 26.1 In performing its obligations under the Agreement, the Contractor shall:
- 26.1.1 comply with all applicable anti-slavery and human trafficking laws, statutes, regulations and codes of the Purchaser from time to time in force including the Modern Slavery Act 2015;
  - 26.1.2 not engage in any activity, practice or conduct that would constitute an offence under sections 1, 2 or 4, of the Modern Slavery Act 2015 if such activity, practice or conduct were carried out in the UK; and
  - 26.1.3 include in its contracts with its Sub-Contractors and suppliers' anti-slavery and human trafficking provisions that are at least as onerous as those set out in this Clause 26.
- 26.2 The Contractor represents and warrants that at the date of the Agreement:
- 26.2.1 neither the Contractor nor any of its officers, employees or other persons associated with it:
  - 26.2.2 has been convicted of any offence involving slavery and human trafficking; and

- 26.2.3 having made reasonable enquiries, so far as it is aware has been or is the subject of any investigation, inquiry or enforcement proceedings by an governmental, administrative or regulatory body regarding any offence or alleged offence of or in connection with slavery and human trafficking.
- 26.3 The Contractor shall implement due diligence procedures for its subcontractors, and suppliers and other participants in its supply chains, to ensure that there is no slavery or human trafficking in its supply chains.
- 26.4 The Contractor shall notify the Purchaser and the Purchaser as soon as it becomes aware of actual or suspected slavery or human trafficking in a supply chain which has a connection with the Agreement.
- 26.5 The Contractor shall:
  - 26.5.1 maintain a complete set of records to trace the supply chain of all Goods and Services provided to the Purchaser in connection with the Agreement; and
  - 26.5.2 permit the Purchaser and its third party representatives, on reasonable notice during normal business hours, but without notice in case of any reasonably suspected breach of this clause, to have access to and take copies of the Contractor's records and any other information and to meet with the Contractor's personnel to audit the Contractor's compliance with its obligations under this Clause 26.
  - 26.5.3 The Contractor represents, warrants and undertakes that it conducts its business in a manner that is consistent with the anti-slavery laws.
  - 26.5.4 The Purchaser may terminate the Agreement with immediate effect by giving written notice to the Contractor if the Contractor commits a breach of the provisions of this Clause 26.

## **27. ANTI-FACILITATION OF TAX EVASION**

- 27.1 The Contractor shall:
  - 27.1.1 not engage in any activity, practice or conduct which would constitute either a UK tax evasion facilitation offence under section 45(1) of the Criminal Finances Act 2017; or (ii) a foreign tax evasion facilitation offence under section 46(1) of the Criminal Finances Act 2017; and
  - 27.1.2 have and maintain in place throughout the term of the Agreement such policies and procedures as are both reasonable to prevent the facilitation of tax evasion by another person (including without limitation employees of the Contractor) and to ensure compliance with Clause 21.1; and
  - 27.1.3 promptly report to the Purchaser any request or demand from a third party to facilitate the evasion of tax within the meaning of Part 3 of the Criminal Finances Act 2017, in connection with the performance of the Agreement.

27.2 The Contractor shall ensure that any person associated with the Contractor who is performing Services and/ or providing Goods in connection with the Agreement does so only on the basis of a written contract which imposes on and secures from such person terms equivalent to those imposed on the Contractor in this Clause 27.

27.3 Breach of this Clause 27 shall be deemed a material breach of the Agreement and shall allow the Purchaser to terminate by written notice with immediate effect.

## **28. HEALTH & SAFETY**

28.1 The Contractor shall be responsible for the observance by itself and all Contract Workers of all safety precautions necessary for the protection of all Contract Workers including all precautions relating to manual handling and all precautions required to be taken by or under Laws relating to health and safety.

28.2 The Contractor shall promptly notify the Purchaser of any health and safety hazards which may arise in connection with the performance of the Agreement.

28.3 Where the Purchaser notified the Contractor of any health and safety hazards which may exist or arise at the Premises and which may affect the Contractor or any Contract Worker, the Contractor shall draw these hazards to the attention of all Contract Workers and shall instruct such persons in connection with any necessary associated safety measures.

## **29. NON-DISCRIMINATION**

29.1 The Contractor shall comply with the Discrimination Legislation and shall not unlawfully discriminate within the meaning and scope of the Discrimination Legislation.

29.2 The Contractor shall notify the Purchaser and the Purchaser immediately of any investigation of or proceedings against the Contractor under the Discrimination Legislation and shall cooperate fully and promptly with any requests of the person or body conducting such investigation or proceedings, including allowing access to any documents or data required, attending any meetings and providing any information requested.

29.3 The Contractor must at all times comply with any relevant codes of practice relating to the subject matter of the Discrimination Legislation.

## **30. ENVIRONMENTAL CONSIDERATIONS**

30.1 The Contractor will ensure that:

30.1.1 no Goods or Services are supplied which will endanger the health and safety of the end users of the Goods or Services (in each case assuming that such persons act reasonably); and

30.1.2 no Goods are supplied which will cause significant damage to the environment during manufacture, use, or disposal, which consume a disproportionate amount of energy during manufacture, use, or disposal, which cause unnecessary waste because of over-packaging or because of

an unusually short shelf life, or which contain materials derived from threatened species or threatened environments.

- 30.2 The Contractor will comply in all material respects with applicable Laws relating to environmental matters which are relevant to the Agreement. Where the provisions of any such Laws are implemented by the use of voluntary agreements or codes of practice, the Contractor shall comply with such voluntary agreements or codes of practice.

### **31. FORCE MAJEURE**

- 31.1 Provided that the affected Party complies with this Clause 31, a Party affected by Force Majeure shall not be liable to the other for any loss of any kind which is directly or indirectly caused by reason of any failure or delay in the performance of its obligations under the Agreement which is due to Force Majeure.

31.1.1 If either Party becomes aware of circumstances of Force Majeure which are likely to give rise to a failure or delay on its part, it shall forthwith notify the other as to the circumstances and the period for which it is estimated that such failure or delay is likely to continue.

31.1.2 If a Party becomes aware of circumstances of Force Majeure which are likely to give rise to a failure or delay on its part, it shall use its best endeavours to continue to perform, or resume performance of, its obligations under the Agreement as soon as possible.

31.1.3 In the event that the Contractor or the Purchaser is affected by a Public Health Event that is likely to affect its ability to perform its obligations under the Agreement or the commercial viability of the continuance of the Agreement, the Contractor and the Purchaser shall promptly discuss such Public Health Event. the reasonable instructions of the Purchaser regarding the Contractor's supply of Goods and Services and the Agreement.

31.1.4 If either Party is prevented from performance of its obligations under the Agreement for a continuous period in excess of 3 months by reason of Force Majeure, the other Party may terminate the Agreement immediately on service of written notice upon the Party so prevented.

31.1.5 The only events which shall afford relief from liabilities under the Agreement for failure or delay shall be any event constituting Force Majeure.

### **32. INDEMNITIES**

- 32.1 Any Goods rejected pursuant to Clause 4.3.2 or 4.6.2 shall be removed by (and at the expense of) the Contractor within 7 days of the Rejection Notice. If the Contractor fails to remove rejected Goods within such period, the Purchaser may return the rejected Goods or any of them at the Contractor's risk, and the Contractor will indemnify the Purchaser in respect of the cost of carriage and any other costs incurred in relation to such return.

- 32.2 Unless the Purchaser elects for Defective Goods to be repaired, and agrees to that repair taking place at the Premises, any rejected Goods shall be removed by (and



at the expense of) the Contractor within 7 days of the Rejection Notice. If the Contractor fails to remove rejected Goods within such period, the Purchaser may return the rejected Goods or any of them at the Contractor's risk, and the Contractor will indemnify the Purchaser in respect of the cost of carriage and any other costs incurred in relation to such return.

- 32.3 The Contractor will indemnify and keep indemnified the Purchaser on demand from and against any costs, claims, liabilities and expenses (including legal expenses on an indemnity basis) suffered or incurred by the Purchaser as a result of (i) any failure by the Contractor to comply with its obligations under the Data Protection Laws; or (ii) any breach by the Contractor of Clause 12.
- 32.4 The Contractor will indemnify and keep indemnified the Purchaser against all actions, claims, demands, costs and expenses incurred by or made against the Purchaser which arise in connection with any breach (whether actual or alleged) by the Contractor of Clause 13.1.
- 32.5 The Contractor shall indemnify the Purchaser in respect of all losses of or damage to Issued Property (including waste of Issued Property) arising from bad workmanship or negligence of the Contractor) save for any losses or damage resulting from the normal and proper use of Issued Property for the purposes of the Agreement.
- 32.6 If the Contractor breaches Clause 19.1 it shall indemnify the Purchaser in respect of that Party's costs and expenses in replacing the employee employed by the Purchaser including advertising and other recruitment costs and initial training (but not the cost of ongoing emoluments).
- 32.7 The Contractor indemnifies the Purchaser, the Replacement Contractor and the Incoming Employees' former employer against all Employee Liabilities which the Purchaser, any Replacement Contractor and/or the Incoming Employees' former employer may incur in respect of any breach by the Contractor of Clause 20.3.
- 32.8 The Contractor indemnifies the Purchaser against and all Employee Liabilities which the Purchaser may suffer as a result of or in connection with:
- 32.7.1 any failure by the Contractor to comply with its obligations pursuant to TUPE in respect of the Incoming Employees; and
- 32.7.2 anything done or omitted to be done by the Contractor in respect of any of the Incoming Employees whether before or after the date of the Incoming Relevant Transfer.
- 32.9 The Contractor indemnifies the Purchaser and any Replacement Contractor against any and all Employee Liabilities which the Purchaser or any Replacement Contractor may suffer as a result of or in connection with:
- 32.9.1 any failure by the Contractor or any Affiliate of the Contractor or any Sub-Contractor to comply with its obligations under Clause 17 and/or Clause 21 in relation to the provision of information, including but not limited to, such information being inaccurate and/or incomplete and/or not providing in a timely manner;

- 32.9.2 any claim or demand by any Outgoing Employee (whether in contract, delict, under statute or otherwise) and whether made before, on or after the date of the Outgoing Relevant Transfer arising directly or indirectly from any act, fault or omission of the Contractor or any Affiliate of the Contractor or any Sub-Contractor in respect of any Outgoing Employee on or before the date of the Outgoing Relevant Transfer;
- 32.9.3 any failure by the Contractor or any Affiliate of the Contractor or any Sub-Contractor to comply with its obligations under regulations 13 or 14 of TUPE or any award of compensation under regulation 15 of TUPE save where such failure arises from the failure of the Purchaser or any Replacement Contractor to comply with its obligations under regulation 13 of TUPE;
- 32.9.4 any failure by the Contractor or any Affiliate of the Contractor or any Sub-Contractor to comply with its obligations under regulation 11 of TUPE or any award of compensation under regulation 12 of TUPE save where such failure arises from the failure of the Purchaser or any Replacement Contractor to comply with its obligations under regulation 11 of TUPE;
- 32.9.5 any claim arising out of the provision of, or proposal by the Contractor or any Affiliate of the Contractor or any Sub-Contractor to offer any change to any benefit, term or condition or working condition of any Outgoing Employee arising on or before the date of the Outgoing Relevant Transfer;
- 32.9.6 any statement communicated to or action done by the Contractor or any Affiliate of the Contractor or any Sub-Contractor or in respect of any Outgoing Employee on or before the date of the Outgoing Relevant Transfer regarding the Outgoing Relevant Transfer which has not been agreed in advance with the Purchaser in writing;
- 32.9.7 any claim (including any individual employee entitlement under or consequent on such a claim) by any trade union or other body or person representing any Outgoing Employees arising from or connected with any failure by the Contractor or any Affiliate of the Contractor or any Sub-Contractor to comply with any legal obligation to such trade union, body or person;
- 32.9.8 any act or omission of the Contractor or any Affiliate of the Contractor or any Sub-Contractor whether occurring before, on or after the date of the Outgoing Relevant Transfer or any other matter, event or circumstance occurring or having its origin on or before the date of the Outgoing Relevant Transfer;
- 32.9.9 the breach or non-observance by the Contractor or any Affiliate of the Contractor or any Sub-Contractor occurring on or before the date of the Outgoing Relevant Transfer of any collective agreement applicable to the Outgoing Employees or any custom or practice in respect of any Outgoing Employees that the Purchaser or a Replacement Contractor is contractually obliged to honour; and
- 32.9.10 any claim made by or in respect of any person employed or engaged or formerly employed or engaged by the Contractor or any Affiliate of the

Contractor or any Sub-Contractor other than an Outgoing Employee for whom it is alleged the Purchaser or a Replacement Contractor may be liable by virtue of the Agreement or TUPE.

- 32.10 The Contractor indemnifies the Purchaser and any Replacement Contractor against any and all Employee Liabilities which the Purchaser or Replacement Contractor may incur arising from any act or omission of the Contractor or any Affiliate of the Contractor or any Sub-Contractor or any other event or occurrence in relation to any member of Staff, who is not an Outgoing Employee, during any period whether before, on or after the date of the Outgoing Relevant Transfer.
- 32.11 The Contractor indemnifies the Purchaser and any Replacement Contractor against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and any other liabilities which the Purchaser or Replacement Contractor may incur in respect of the emoluments and outgoings referred to in Clause 24.3.
- 32.12 In the event of termination pursuant to Clause 25.4.2, the Contractor shall be liable for and shall indemnify and keep the Purchaser indemnified in respect of any and all loss resulting from such termination.
- 32.13 The Contractor shall indemnify the Purchaser against any losses, liabilities, damages, costs (including but not limited to legal fees) and expenses incurred by or awarded against, the Purchaser as a result of any breach by the Contractor of anti-slavery laws.

### **33. LIMITATION OF LIABILITY**

- 33.1 References to liability in this Clause 33 apply to every liability arising under or in connection with the Agreement including liability in delict (including negligence), misrepresentation, restitution or otherwise.
- 33.2 Subject to Clauses 33.4 and 33.5, neither Party shall have liability to the other Party under the Agreement for any:
- 33.2.1 loss of profits, business, revenue or goodwill; or
- 33.2.2 indirect or consequential loss or damage.
- 33.3 Subject to Clauses 33.4 and 33.5, the liability of each Party to the other Party under or in relation to the Agreement is subject to the following cumulative financial limits, each to the extent permitted by law:
- 33.3.1 the aggregate liability of a Party in respect of loss or damage caused to any land, buildings or tangible property of the other Party shall not exceed [Ten Million Pounds (£10,000,000)]; and
- 33.3.2 the aggregate liability of a Party in respect of any claim made by the other Party under the Agreement flowing from any one event or a series of connected events (other than in respect of claims for loss or damage caused by the Party's negligence to any tangible property of the other Party) shall not exceed the greater of: (i) [One Million Pounds (£1,000,000)]; and (ii) 150% of the total amount paid to the Contractor

under the Agreement in the twelve (12) months preceding the claim giving rise to the liability.

33.4 Nothing in the Agreement shall limit or exclude the Contractor's liability arising:

33.4.1 under Clause 32[; or

33.4.2 under Schedule 8].

33.5 Nothing in the Agreement shall limit or exclude any either Party's liability for:

33.5.1 death or personal injury caused by its negligence;

33.5.2 misrepresentation;

33.5.3 any breach of any obligations implied by section 12 of the Sale of Goods Act 1979 or sections 2 or 11B of the Supply of Goods and Services Act 1982; or

33.5.4 any other sort of liability which, by law, cannot be limited or excluded.

#### **34. INSURANCE**

34.1 The Contractor shall effect and maintain with reputable insurers employer's liability insurance and public liability insurance to the extent and subject to the limits on indemnity specified in the Invitation to Tender. Such insurance shall be unlimited as to numbers of claims.

34.2 The Contractor shall effect and maintain with reputable insurers adequate insurances covering all the Contractor's other liabilities in terms of the Agreement.

34.3 On the request of the Purchaser, the Contractor shall exhibit satisfactory evidence of the insurance policies referred to in this Clause 34, together with satisfactory evidence of payment of the premium.

34.4 Such insurance must be maintained for the Period and for a minimum of 5 years following the expiry or termination of the Agreement.

#### **35. DISPUTE RESOLUTION**

35.1 The Parties must attempt in good faith to resolve any Dispute or difference between them arising out of or in connection with the Agreement, including any question regarding its existence, validity or termination, in accordance with this Clause 35.

35.2 There shall be two levels of escalation, and at each level each Party will make available for the purposes of resolving Disputes and differences an appropriate representative most closely matching the description given below.

<b><u>Level</u></b>	<b><u>Representative</u></b>
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First Level	person with day to day responsibility for this Agreement.
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Second Level	person with managerial responsibility for this Agreement.
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- 35.3 An individual representing a Party at one level may not be made available by a Party to represent it at a higher level.
- 35.4 If a Dispute or difference is resolved at any level, the resolution shall be reduced to writing, without delay, and signed by both Parties. Once signed by both Parties, the resolution shall be binding on the Parties.
- 35.5 Unless the resolution of a Dispute or difference is reduced to writing signed by both Parties, all discussions and negotiations connected with the Dispute or difference shall be conducted without prejudice to the rights of the Parties in any future legal or other proceedings, and no such discussions and negotiations may be produced or relied upon in evidence in any such proceedings.
- 35.6 A meeting of the representatives at the first level shall take place as soon as possible after any Dispute or difference arises.
- 35.7 If a Dispute or difference has not been resolved, reduced to writing and signed by both Parties within seven days of the first meeting at the first level, the Dispute or difference shall be referred to the next level, and the representatives at that next level shall meet within 3 days of the reference to that level.
- 35.8 Any Dispute or difference arising out of or in connection with the Agreement, including any question regarding its existence, validity or termination, which cannot be resolved in accordance with the foregoing sub-clauses of this Clause 35, may be referred by either Party to a court of competent jurisdiction for a final, binding and enforceable resolution.
- 35.9 Nothing contained in this Clause 35 shall prevent either Party from applying to a court of competent jurisdiction for interim relief to prevent the occurrence of irreparable harm.

## **36. DEFAULT**

- 36.1 If the Contractor is in Default then without prejudice to any of its other rights and remedies the Purchaser may require the Contractor within 14 days (or such other period as the Purchaser may specify, acting reasonably) to produce a draft remedial plan to remedy the Default for the approval of the Purchaser, such approval not to be unreasonably withheld or delayed.
- 36.2 The Contractor will implement the remedial plan approved by the Purchaser pursuant to Clause 36.1.
- 36.3 At any time while the Contractor is in Default the Purchaser may without prejudice to any of its other rights and remedies seek to remedy the effects of the Default by carrying out the activities necessary to perform the Services, obtain goods similar to the Goods or otherwise meet the objectives of the Agreement, or contract with a third party to do any of the same, and:
  - 36.3.1 the Contractor will use all reasonable endeavours to co-operate with the Purchaser and any third party to mitigate the effects of the Default; and

- 36.3.2 the Contractor will indemnify the Purchaser in respect of the reasonable costs and expenses incurred by the Purchaser in remedying or seeking to remedy the effects of the Default.
- 36.4 If the Contractor is in Default the Purchaser may withhold a proportion of any sum which is payable by the Purchaser to the Contractor until the Default has been remedied, such proportion to be reasonable and commensurate with regard to:
  - 36.4.1 the extent to which the Default has caused or will cause a diminution in the extent or quality, including delay, of the Contractor's performance of the Agreement; and
  - 36.4.2 the amount of any loss or any additional costs which the Purchaser has incurred or may incur in consequence of the Default.
- 36.5 If any sum of money shall be due from the Contractor to the Purchaser, the same may be deducted from any sum then due or which at any time thereafter may become due to the Contractor under the Agreement or any other contract with the Purchaser.

## **37. TERMINATION**

- 37.1 The Purchaser may terminate the Agreement at any time by giving 30 days' written notice to the Contractor. In the event of any such termination, the Contractor shall be entitled to payment in respect of all Goods and Services supplied up to the effective date of termination.
- 37.2 The Purchaser may terminate the Agreement by serving written notice on the Contractor with effect from the date specified in such Notice where the Contractor commits a material Default or repeated Defaults and (i) such Default(s) is/are incapable of remedy; or (ii) the Contractor has not remedied the material Default or repeated Defaults to the satisfaction of the Purchaser within 20 Working Days after issue of a written notice specifying the material Default and requesting it to be remedied.
  - 37.2.1 The Purchaser may terminate the Agreement immediately on written notice to the Contractor in the event of a breach of any warranties set in Clause 8.
  - 37.2.2 The Purchaser may terminate the Agreement immediately in the event of a Bidding Misrepresentation.
  - 37.2.3 The Purchaser may terminate the Agreement immediately on providing written notice in the event of a Change of Control in respect of the Contractor.
  - 37.2.4 The Purchaser may terminate the Agreement with immediate effect by notice where in respect of the Contractor:
    - 37.2.4.1 a proposal is made for a voluntary arrangement within Part 1 of the Insolvency Act 1986 or of any other composition scheme or arrangement with, or assignment for the benefit of, its creditors;

- 37.2.4.2 a shareholders' meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding up is passed (other than as part of, and exclusively for the purpose of, a bona fide reconstruction or amalgamation);
- 37.2.4.3 a petition is presented for its winding up (which is not dismissed within 14 days of its services) or an application is made for the appointment of a provisional liquidator or a creditors' meeting is convened pursuant to Section 98 of the Insolvency Act 1986;
- 37.2.4.4 a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets;
- 37.2.4.5 an application order is made either for the appointment of an administrator or for an administration order, an administrator is appointed, or notice of intention to appoint an administrator is given;
- 37.2.4.6 it is or becomes insolvent within the meaning of section 123 of the Insolvency Act 1986;
- 37.2.4.7 being a "small company" within the meaning of section 382 of the Companies Act 2006, a moratorium comes into force pursuant to schedule A1 of the Insolvency Act 1986;
- 37.2.4.8 a debt relief order is entered into; or
- 37.2.4.9 any event similar to those listed above occurs under the law of any other jurisdiction.

### **38. CONSEQUENCES OF TERMINATION**

- 38.1 The termination or expiry of the Agreement shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to either Party.
- 38.2 Termination of the Agreement will not affect the continued operation of those Clauses which are stated to apply after its termination or any other of the provisions of the Agreement which, having regard to their terms, are intended to apply on or to survive termination or expiry.
- 38.3 If on the termination or expiry of the Agreement any Intellectual Property Rights in connection with the Agreement owned by a Contractor Party are required by the Purchaser for the efficient conduct of its business or the orderly and efficient transition, with minimum disruption to the Purchaser, of the performance of the Contractor's obligations under the Agreement to the Purchaser or a third party, the Purchaser may acquire from the Contractor at the then fair market rate a non-exclusive licence to use any such Intellectual Property Rights which licence shall:
  - 38.3.1 be subject to a single, one-off payment;
  - 38.3.2 be perpetual and irrevocable;

- 38.3.3 afford the Purchaser the right to make such modifications, adaptations and enhancements as it sees fit to products in relation to which the Intellectual Property Rights arise;
  - 38.3.4 permit the Purchaser to engage a third party to use, modify, adapt or enhance any such products, provided that such third party shall have entered into a confidentiality agreement with the Purchaser in a form to the reasonable satisfaction of the Contractor; and
  - 38.3.5 carry the right to grant sub-licences,
- and the Contractor will procure that such a licence is granted by any Contractor Party.
- 38.4 If fair market value cannot be agreed pursuant to Clause 31 the matter will be referred to the Dispute Resolution Procedure.
  - 38.5 On the termination of the Agreement pursuant to Clause 37.1, Clause 37.2, Clause 4 (rejection of Goods), Clause 9 (conflict of interest) or Clause 21 (corruption), the Contractor will indemnify the Purchaser in respect of:-
    - 38.5.1 any additional operational and administrative costs and expenses suffered or incurred by the Purchaser as a result of such termination;
    - 38.5.2 the costs and expenses suffered or incurred by the Purchaser in providing (or procuring that another party provides) goods or services similar to the Goods or Services on a temporary basis until the completion of a tendering or reappointment process carried out by the Purchaser to find a successor to the Contractor, but only to the extent that such costs and expenses exceed the Charges that would have been payable (or a reasonable estimate of such charges, to the extent uncertain) had the Agreement not been terminated; and
    - 38.5.3 the costs and expenses suffered or incurred by the Purchaser in carrying out the tendering or reappointment process referred to in Clause 38.5.2.
  - 38.6 The costs and expenses of the Purchaser referred to in Clause 38.5.2 shall include reasonable charges to reflect the application of the Purchaser's internal resources, evidenced by records of time spent and other resources applied.
  - 38.7 Upon the expiry or termination of the Agreement, for any reason whatsoever, the Contractor shall cooperate with the Purchaser to such extent as the Purchaser may require for the period required by the Purchaser (of up to a maximum of 6 months after the date of such expiry or termination) to ensure an orderly and efficient transition, with minimum disruption to the Purchaser, of the performance of the Contractor's obligations under the Agreement to the Purchaser or a third party.
  - 38.8 The Purchaser shall reimburse to the Contractor all reasonable costs and expenses incurred by the Contractor in satisfying the provisions of Clause 38.7.
  - 38.9 The cooperation referred to in Clause 38.7 may include, if the Purchaser requires:



- 38.9.1 the making available of any Issued Property, the making available of relevant instruction and operating manuals and the provision of instruction in the use of any equipment or machinery forming part of the Issued Property; and/or
- 38.9.2 the continued provision of the Services, or part of them, or the continued performance of the Contractor's obligations under the Agreement.

### **39. EXIT ASSISTANCE**

- 39.1 The Parties shall use all reasonable endeavours to agree a draft exit plan for the activities necessary to facilitate the orderly transfer of the Services to the Purchaser or a New Contractor. Unless and until the Parties agree a final version, the remaining provisions of this Clause 39 will serve as the exit plan. On the serving of any notice of termination of the Agreement or, if earlier, on its termination, the Contractor shall comply with the exit plan for the period of up to 12 months as nominated by the Purchaser.
- 39.2 The objectives of the exit services to be provided by the Contractor are:
  - [39.2.1](#) to maintain continuity of supply and minimise any disruption to the Purchaser's operations; and
  - 39.2.2 to enable a smooth transfer of responsibility for the ongoing provision of the Services from the Contractor to the Purchaser or to a Replacement Contractor.
- 39.3 The Contractor must perform all exit services in a manner that is consistent with and calculated to achieve these objectives.
- 39.4 The Contractor must provide the Purchaser and the Replacement Contractor with all information reasonably required to assume responsibility for the ongoing provision of the Services, including:
  - 39.4.1 details of all tools, equipment, software and other materials used by the Contractor to provide the Services;
  - 39.4.2 up-to-date and complete records of all Services provided by the Contractor;
  - 39.4.3 full details of all outstanding, incomplete or ongoing Services; and
  - 39.4.4 a copy of all Purchaser Data in the Contractor's possession or control.
- 39.5 All information to be provided by the Contractor as part of the exit services will be supplied in a format and at a time specified by the Purchaser. If the Purchaser does not specify a format, the information must be supplied in a common non-proprietary format.
- 39.6 The Contractor will make available appropriate personnel to:
  - 39.6.1 attend handover meetings with the Purchaser and/or the New Contractor (as applicable);

- 39.6.2 answer all reasonable questions from the Purchaser and/or the New Contractor about the provision of the Services; and
- 39.6.3 explain any documentation and other materials provided by the Contractor in connection with the exit process.
- 39.7 Notwithstanding the foregoing, the Contractor shall not be required, as part of any exit plan, to provide any of its confidential information or make available any of its Intellectual Property Rights to any Replacement Contractor which is a direct competitor of the Contractor.
- 39.8 The Contractor will provide all reasonable assistance requested by the Purchaser for the purposes of migrating the Purchaser Data from the Contractor's systems onto the systems of the Purchaser or the New Contractor (as applicable). Any migration may be carried out in stages in accordance with a project plan and timetable specified by the Purchaser.

#### **40. ASSIGNATION AND SUB-CONTRACTING**

- 40.1 The Contractor shall not assign, novate, sub-contract or otherwise transfer or dispose of its interest in the Agreement or any part thereof without the prior written consent of the Purchaser.
- 40.2 The Contractor shall remain fully liable for the actions and defaults of all of its Sub-Contractors. Sub-Contracting will not relieve the Contractor of the obligations or duties attributable to the Contractor under the Agreement.
- 40.3 The Contractor will procure that its Sub-Contractors comply with all the relevant obligations of the Agreement in the same way as the Contractor is bound to comply.
- 40.4 The Purchaser shall be entitled to assign, novate, sub-contract or otherwise transfer or dispose of its interest in the Agreement or any part thereof:
  - 40.4.1 to any person (including but not limited to any body in the private sector) which substantially performs any of the functions that previously had been performed by the Purchaser; or
  - 40.4.2 with the previous consent in writing of the Contractor (which will not be unreasonably withheld or delayed).

#### **41. RELATIONSHIP**

- 41.1 The Contractor is an independent contractor during the Period and nothing in the Agreement establishes a relationship of employment, agency or partnership, or a joint venture between the Parties. Neither Party is authorised to act in the name of, or on behalf of, or otherwise bind the other Party other than as expressly permitted by the terms of the Agreement.

#### **42. WAIVER AND CUMULATIVE REMEDIES**

- 42.1 The failure of either Party to insist upon the performance or the strict performance of any provision of the Agreement, or the failure of either Party to exercise any right or remedy to which it is entitled hereunder, shall not constitute a waiver of that

provision, right or remedy and shall not cause a diminution of the obligations established by the Agreement.

- 42.2 No waiver of any of the provisions of the Agreement shall be effective unless it is expressly stated to be a waiver and notified in writing to the other Party.
- 42.3 The rights and remedies provided by the Agreement are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.

### **43. SEVERABILITY**

- 43.1 If any provision of the Agreement is held invalid, illegal or unenforceable (an "Unenforceable Provision") for any reason by any court of competent jurisdiction, such provision is severed and the remainder of the provisions of the Agreement shall continue in full force and effect as if the Agreement had been executed with the invalid, illegal or unenforceable provision eliminated.
- 43.2 If an Unenforceable Provision is so fundamental that its severance prevents the accomplishment of the purpose of the Agreement, the Parties shall immediately commence good faith negotiations to remedy such invalidity, but if the Parties have not implemented that remedy within 2 weeks of the declaration of the provision as an Unenforceable Provision, either Party may terminate the Agreement forthwith by notice in writing to the other.

### **44. AMENDMENTS**

- 44.1 The Agreement shall not be varied or amended unless such variation or amendment is agreed in writing by a duly authorised representative of each of the Contractor and the Purchaser, each having completed the change control procedure set out in this Clause 44.
- 44.2 Should either Party wish to propose a Variation, it shall submit to the other 2 copies of a change control notice (CCN) completed in so far as that Party is able.
- 44.3 Each CCN shall contain: (i) the title of the Variation; (ii) the originator of the proposal for the Variation and the date of the proposal; (iii) the reason for the Variation; (iv) full details of the Variation including any specifications; (v) the price, if any, of the Variation; (vi) a timetable for implementation of the Variation; and (vii) details of the likely impact, if any, of the Variation on other aspects of the Agreement.
- 44.4 The CCN will be reviewed by the other Party and both Parties will seek to complete and agree the content of the CCN.
- 44.5 In the case of a Variation proposed by the Purchaser, the Parties will act reasonably in agreeing the content of the CCN and will execute a variation or amendment to the Agreement to implement the agreed CCN, without delay.
- 44.6 In the case of a Variation proposed by the Contractor, the Purchaser will act reasonably in considering the content of the CCN but the agreement or otherwise to the content of a CCN shall be at Purchaser's sole discretion.

## **45. NOTICES**

45.1 Notices shall be:

45.1.1 served in writing;

45.1.2 served in English;

45.1.3 sent to the Party receiving it by letter by prepaid recorded or special delivery post to the address of the relevant Party as detailed in this Agreement (or, where that Party is a company, that Party's registered address); and

45.1.4 if sent in accordance with this Clause 45, deemed to be effectively given on the day when in the ordinary course of the means of sending it would first be received by the addressee in normal business hours.

## **46. PUBLICITY**

46.1 The Contractor shall not make any public statement identifying the Purchaser as a client or customer of the Contractor or using the Purchaser's name and/or brand in any promotion or marketing without the prior written consent of the Purchaser.

## **47. COMPLIANCE WITH THE LAW**

47.1 The Contractor shall, in complying with all obligations incumbent upon it in terms of the Agreement, comply in all respects with, and shall ensure that the Contractor's agents, employees and representatives whomsoever comply with the Law.

47.2 The Contractor shall take all reasonable steps to ensure the observance of the provisions of clause 47.1 above by all of their servants, employees, agents, consultants and sub-contractors.

## **48. THIRD PARTY RIGHTS**

48.1 Unless it expressly states otherwise, the Agreement does not confer any rights to any third party under the Contract (Third Party Rights) (Scotland) Act 2017 which would enable a third party to enforce any of the terms of the Agreement.

48.2 Notwithstanding clause 48.1, a Replacement Contractor shall be able to enforce the following clauses of the Agreement against the Contractor: clause 21.3, clause 24.5, clause 32.7, clause 32.9, clause 32.10, and clause 32.11.

## **49. PARENT COMPANY GUARANTEE**

49.1 At the request of the Purchaser, the Contractor shall promptly deliver to the Purchaser:

49.1.1 a validly executed parent company guarantee in favour of the Purchaser and/or Purchaser in the form set out in Schedule 4; and

49.1.2 a certified copy extract of the board minutes of the parent company approving the execution of the guarantee

**50. GOVERNING LAW AND JURISDICTION**

50.1 The Agreement is governed by and shall be construed and interpreted in accordance with Scots law and, subject to Clause 35 (Dispute Resolution), the Parties submit to the exclusive jurisdiction of the Scottish courts.

50.2 Notwithstanding Clause 50.1, where (i) the Purchaser is located in England or Northern Ireland; (ii) the Invitation to Tender specified that the Purchaser was willing to contract under the laws of England and Wales or Northern Ireland; and (iii) this has been agreed between the Parties, the Agreement shall be construed and interpreted in accordance with the laws of England and Wales or Northern Ireland (as the case may be) and, subject to Clause 35, the Parties submit to the exclusive jurisdiction of the courts of England and Wales or Northern Ireland (as the case may be). In such case, all references to Scottish legal terms or Scottish legal proceedings contained in the Agreement shall be deemed as having been replaced with the nearest English or Northern Irish equivalent.

**IN WITNESS WHEREOF** these presents typewritten on this and the [XXX] preceding pages are executed as follows:

**SIGNED** for and on behalf of [XXX]

**SIGNED** for and on behalf of [XXX]

At .....

At .....

On .....

On .....

Signature .....

Signature .....

Full name .....

Full name .....

Position .....

Position .....

Address .....

Address .....

**In the presence of**

**In the presence of**

Signature .....

Signature .....

Full name .....

Full name .....

Address .....

Address .....

## **SCHEDULE 1**

### **DEFINITIONS**

<b>Acceptance Tests</b>	means (i) the procedures for acceptance testing the Goods as set out in the Agreement; (ii) where no specific procedures for acceptance testing are set out in the Agreement, those procedures published by the manufacturer of the relevant Goods; or (iii) where no specific procedures for acceptance testing are set out in the Agreement or published by the manufacturer of the relevant Goods, the procedures established by Good Industry Practice as required for the Purchaser to satisfy itself that the Goods have been delivered and/or installed such that they are in accordance with the requirements of the Agreement, and includes Acceptance Tests carried out at any Re-Test.
<b>Affiliate</b>	means in relation to a body corporate, any other entity which directly or indirectly controls, is controlled by, or is under direct or indirect control with, that corporate body from time to time.
<b>Agreement</b>	means this legally binding agreement for the provision of Goods and/or Services made between the Purchaser and the Contractor comprising the preceding terms and conditions, the appendices and Schedules appended thereto, the Order Form and any specific quantities or other requirements stipulated by the Purchaser related to such Goods and Services.
<b>Assigned Employee</b>	shall have the meaning set out in Clause 21 of the Agreement.
<b>Bidding Misrepresentation</b>	means any discovery by the Purchaser that the non-collusive tendering certificate submitted by the Contractor (if any) to Purchaser or any other communication, document or other information in whatever form provided by the Contractor to Purchaser or the Purchaser is erroneous, false, misleading or untrue in any material respect.
<b>Charges</b>	means the charges as laid out in the relevant Order Form and/or Pricing Matrix.
<b>Change of Control</b>	means a change of control within the meaning of Section 1124 of the Corporation Tax Act 2010.
<b>Commencement Date</b>	means the commencement date stated in the Agreement.
<b>Confidential Information</b>	shall mean all information of a confidential nature obtained by the Contractor under or in connection with the Agreement.

<b>Contractor Party</b>	means the Contractor or any Sub-Contractor.
<b>Contractor Software</b>	means Software which is proprietary to the Contractor (or an Affiliate of the Contractor) and which is or will be used by the Contractor for the purposes of providing the Services.
<b>Contract Worker</b>	means an officer, servant, employee or agent of a Contractor Party, and any person on or at the premises of the Purchaser in connection with the Agreement at the express or implied invitation of the Contractor or any other Contract Worker.
<b>Control</b>	has the meaning given in section 450 of the Corporation Tax Act 2010.
<b>Data Controller</b>	has the meaning given to it in the Data Protection Laws.
<b>Data Processor</b>	has the meaning given to it in the Data Protection Laws.
<b>Data Protection Laws</b>	means any law, statute, subordinate legislation, regulation, order, mandatory guidance or code of practice, judgment of a relevant court of law, or directive or requirement of any regulatory body which relates to the protection of individuals with regard to privacy or the Processing of Personal Data to which a Party is subject as may be amended, updated or replaced from time to time (including, where applicable) the Data Protection Act 2018, the GDPR, the UK GDPR, and the guidance and codes of practice issued by the Information Commissioner).
<b>Data Subject(s)</b>	shall have the meaning ascribed to it under Data Protection Laws.
<b>Data Subject Access Request(s)</b>	shall have the meaning given to it under Data Protection Laws.
<b>Default</b>	means non-compliance with or default against any obligation under the Agreement by the Contractor.
<b>Defective Goods</b>	means Goods not properly manufactured or delivered in accordance with the Agreement, or Goods in a consignment which is deficient in weight, quantity or measure.
<b>Defective Services</b>	means Services not properly performed in accordance with the Agreement and/or applicable Service Levels.
<b>Deliverable</b>	means any output of the Services and any other document, product or material provided to the Purchaser by or on behalf of the Contractor in relation to the Services.
<b>Discrimination Legislation</b>	means the Equality Act 2010 and all applicable Law in relation to discrimination.

<b>Direct Award</b>	means (if applicable) the direct award procedure used by the Purchaser to place the Agreement with the Contractor and detailed in <b>paragraph XX of Section 2</b> of the Invitation to Tender.
<b>Dispute</b>	means any dispute or difference of opinion between the Purchaser and the Contractor in connection with the Agreement.
<b>Employee Liabilities</b>	<p>means all claims (whether in delict, contract, under statute or otherwise), demands, actions, orders, complaints, proceedings and any award, compensation, damages, tribunal awards, fine, loss, order, penalty, disbursement, payment by way of settlement and costs and expenses and legal costs reasonably incurred in connection with any claim or investigation (including any investigation by the Equality and Human Rights Commission or other enforcement, regulatory, or supervisory body and of implementing any requirements which may arise from such investigation) including but not limited to:</p> <ul style="list-style-type: none"><li>(a) claims for redundancy payments, unlawful deduction of wages, claims for equal pay, unfair, wrongful or constructive dismissal compensation; and</li><li>(b) compensation for discrimination on grounds of sex, sexual orientation, race, disability, religion or belief, gender reassignment, marriage or civil partnership, pregnancy and maternity and age or less favourable treatment of part-time workers or fixed term employees.</li></ul>
<b>Employee Liability Information</b>	has the meaning given in regulation 11 of TUPE.
<b>Force Majeure</b>	means any event or occurrence which is outside the reasonable control of the Party concerned and which is not attributable to any act or failure to take preventative action by that Party, including Public Health Events, industrial action, fire, flood, violent storm, pestilence, explosion, malicious damage, armed conflict, acts of terrorism, nuclear, biological or chemical warfare, or any other disaster, natural or man-made.
<b>GDPR</b>	means the General Data Protection Regulation (EU 2016/679) (GDPR).
<b>Good Industry Practice</b>	means in relation to any undertaking and any circumstances, the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in the same type of undertaking under the same or similar circumstances.



<b>Goods</b>	means the goods to be supplied by the Contractor as detailed in the Specification.
<b>Incoming Employees</b>	means individuals whose employment/engagement transfers to the Contractor by operation of TUPE on the commencement of the provision of the Services.
<b>Incoming Relevant Transfer</b>	means a transfer within the meaning given in regulation 2(1) of TUPE which has the effect of transferring the employment of Incoming Employees to the Contractor on the commencement of the provision of the Services.
<b>Information Commissioner</b>	means the Commissioner as set out in Part 5 of the Data Protection Act 2018.
<b>Information Legislation</b>	means the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004.
<b>Intellectual Property Rights</b>	means patents, inventions, trade marks, service marks, logos, design rights (whether registerable or otherwise), plant variety rights, applications for any of the foregoing, copyright, database rights, domain names, trade or business names, moral rights and other similar rights or obligations whether registerable or not in any country (including but not limited to the United Kingdom) and the right to sue for passing off.
<b>Invitation to Tender</b>	means, if applicable, the invitation issued by the Purchaser with, or pursuant to, the <b>OJEU/FIND MY TENDER</b> Notice.
<b>Issued Property</b>	means anything issued or otherwise made available to the Contractor for any purpose by or on behalf of the Purchaser including working papers and other written materials.
<b>Law</b>	means all applicable laws, consents and approvals, including legislative provisions, sub-ordinate legislation, legally binding codes of practice and the common law.
<b>Malicious Software</b>	means any software programme or code intended to destroy, interfere with, corrupt, or cause undesired effects on program files, data or other information, executable code or application software macros, whether or not its operation is immediate or delayed, and whether the malicious software is introduced wilfully, negligently or without knowledge of its existence.
<b>Milestone</b>	means the completion of any event or task of a material nature by a particular date, such as the delivery of a Deliverable or completion of certain Services, identified as a milestone in the applicable Specification and/ or Order Form.
<b>Mini-Competition</b>	means (if applicable) the mini-competition procedure used by the Institution to place the Agreement with the Contractor

	and detailed in paragraph XX of Section 2 of the Invitation to Tender.
<b>Notice</b>	means a letter or other document sent by one Party to the other which has a specific effect with reference to the Agreement. Examples include notices which are given when there are changes to the Agreement, or breaches of the Agreement.
<b>Open Source Software</b>	means computer software that has its source code made available subject to an open-source licence under which the owner of the copyright and other Intellectual Property Rights in such software provides the rights to use, study, change and distribute the software to any and all persons and for any and all purposes free of charge.
<b>Order</b>	means an order placed for Goods and/or Services under the Agreement.
<b>Order Form</b>	means a document or online ordering system that sets out the details of an Order in the form set out in Schedule 5 or such similar or analogous form agreed between the Parties.
<b>Outgoing Employees</b>	means individuals whose employment/engagement transfers by operation of TUPE from the Contractor on the ceasing of the provision of the Services by the Contractor.
<b>Outgoing Relevant Transfer</b>	means a transfer within the meaning given in regulation 2(1) of TUPE which has the effect of transferring the employment of the Outgoing Employees to the Purchaser or any Replacement Contractor on expiry of the Agreement or on the earlier cessation of the Services or part thereof.
<b>Parent Company</b>	means if the Contractor is a "company", any "company" which is a "holding company" of the Contractor, as such terms are defined in section 1159 of the Companies Act 2006.
<b>Period</b>	means the duration of the Agreement, as set out in the Order Form.
<b>Personal Data</b>	has the meaning given in the Data Protection Laws.
<b>Premises</b>	means any premises of the Purchaser being a location where Goods are to be delivered or Services are to be provided.
<b>Pricing Matrix</b>	means the pricing matrix set out in Schedule 2.
<b>Processing</b>	has the meaning given in the Data Protection Laws and cognate expressions shall be construed accordingly.
<b>Professional Services</b>	means consultancy services and any services relating to the provision of legal, financial or other specialist advice which

are subject to Laws or regulatory requirements affecting the nature of such services, the conduct of business by suppliers of such services and/ or the terms upon which such services can be supplied.

**Public Health Event** means a Force Majeure resulting from a public health event that has been declared a pandemic by the World Health Organisation.

**Purchaser Requirements** means the operational requirements, functions and characteristics of the supply of Goods and/or Services set out in Schedule 3 (Specification).

**Purchaser Data** means all information, text, drawings, diagrams, images or sounds that are embodied in any electronic or tangible medium, and which: (i) are supplied by the Purchaser to the Contractor under or in contemplation of the Agreement; (ii) are held by the Purchaser but are accessed by the Contractor under the Agreement; (iii) the Contractor is obliged to generate or process under the Agreement; or (iv) is otherwise stored in, generated, processed or created by any part of the Managed Service or the Services.

**Purchaser Materials** means all documents, information, items and materials in any form (whether owned by the Customer or a third party), which are provided by the Purchaser to the Contractor in connection with the Services.

**Records** means any files, documents or other records which relate to delivery of the Agreement or the management, administration, organisation or planning of them whether in writing or on magnetic or other media.

**Rejection Notice** means a notice from the Purchaser to the Contractor rejecting Goods in accordance with Clause 6.1 or 6.2 of the Agreement.

**Relevant Requirements** means all applicable laws, regulations, codes and sanctions relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010.

**Relevant Transfer** has the meaning given in regulation 2(1) of TUPE.

**Replacement Contractor** means any third party contractor appointed by the Purchaser or by any other Purchaser, company or body corporate, to supply the Services (or similar services) or part thereof in succession to the Contractor on expiry of the Agreement or the earlier cessation of the Services or part thereof.

<b>Re-Test</b>	means the carrying out of Acceptance Tests on the second and any subsequent occasion.
<b>Schedule</b>	means a schedule annexed to the preceding term and conditions.
<b>Services</b>	means the services as are to be supplied by the Contractor to Purchaser as set out in the Specification (including any Professional Services and including any part of the Services that is provided using Software hosted by or on behalf of the Supplier so specified).
<b>Service Levels</b>	means the standards and particular levels of service that the Contractor has undertaken to meet, as contained in the Agreement and the Specification.
<b>Software</b>	means Specifically Written Software, Contractor Software and Third Party Software.
<b>Specifically Written Software</b>	means any Software (including database Software, linking instructions, test scripts, compilation instructions and test instructions) created by the Contractor (or by a Sub-Contractor or other third party on behalf of the Contractor) specifically for the purposes of the Agreement.
<b>Specification</b>	means the specification of the Services that the Contractor has undertaken to provide set out in Schedule 3.
<b>Staff</b>	means all employees, workers, agents, consultants and individual contractors of the Contractor, Affiliates of the Contractor and/or of any Sub-Contractor.
<b>Staffing Information</b>	means such information as the Purchaser may request in an anonymised format or otherwise including: <ul style="list-style-type: none"><li>(a) ages;</li><li>(b) dates of commencement of employment or engagement;</li><li>(c) job or role descriptions and objectives of role;</li><li>(d) details of whether they are employed, self-employed contractors or consultants, agency workers or otherwise;</li><li>(e) the identity of the employer or relevant contracting party;</li><li>(f) their relevant contractual notice periods and any other terms relating to termination of employment including redundancy procedures and redundancy payments;</li></ul>

- (g) their wages, salaries and profit sharing arrangements as applicable;
- (h) details of other employment-related benefits including (without limitation) medical insurance, life assurance, pension or other retirement benefit schemes, share option schemes and company car schedules applicable to them;
- (i) any outstanding or potential contractual, statutory or other liabilities in respect of such individuals (including in respect of personal injury claims);
- (j) details of any such individuals on long call sickness absence, parental leave, maternity leave or other authorised long term absence;
- (k) copies of all relevant documents and materials relating to such information, including copies of relevant contracts of employment (or relevant standard contracts if applied generally in respect of such employees); and
- (l) any other Employee Liability Information.

**Sub-Contract**

means any contract or proposed contract between the Contractor and any third party in respect of the performance of the Agreement (or any part thereof). The terms "Sub-Contractor" and "Sub-Contracting" shall be similarly construed.

**Tender**

means the tender submitted by the Contractor to the Purchaser in response to the Invitation to Tender dated [XXX].

**Third Party Software**

means Software which is proprietary to any third party (other than an Affiliate of the Contractor) or any Open Source Software which in any case is, will be or is proposed to be used by the Service Provider for the purposes of providing the Services.

**Transition Period**

means any period between the award of the Agreement and the Commencement Date as set out in the Agreement.

**Transition Plan**

means the Contractor's plan for the Lead-in Period forming part of the Agreement.

**TUPE**

means the Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended.

**Unenforceable Provision**

has the meaning given to it in Clause 43.1 of the Agreement.

**UK GDPR**

means the GDPR as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3

of the European Union (Withdrawal) Act 2018 and as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019.

**Warranty Period**

means the shorter of (i) 12 months after the delivery of the relevant Goods to the Purchaser; and (ii) 18 months from the date the Goods pass the Acceptance Tests.

**Working Day**

means a day other than a Saturday, Sunday or bank holiday in Scotland, within the meaning of the Banking and Financial Dealings Act 1971.

**Working Hour**

means an hour during a Working Day between the hours of 9am and 5pm.

**SCHEDULE 2**  
**PRICING MATRIX**

[All relevant pricing details to be entered here inc. set prices, mechanisms for setting prices, consequences of failing to agree price (e.g. dispute resolution procedure or termination), discounts, rebates, payment dates, instalment amounts etc.]

**SCHEDULE 3  
SPECIFICATION**

[Information, including applicable service levels and the operational requirements, functions and characteristics of the supply of the Goods and/or Services, to be provided here.]



## SCHEDULE 4

### Pro Forma Parent Company Guarantee

We [here insert the full name of the parent company], a company incorporated under the Companies Acts (Company number [ ]) and having our Registered Office at [ ] refer to the Agreement concluded between [XXX] (the "Purchaser") and [here insert the full name of the Contractor], a company incorporated under the Companies Acts (Company number [ ]) and having its Registered Office at [ ] ("the Company") of which we are the ultimate holding company ("the Agreement") and in security of the Company's obligations thereunder guarantee the same in the following manner:-

1. We guarantee that the Company shall perform all its obligations contained in the Agreement.
2. If the Company shall in any respect fail to perform its obligations under the Agreement or shall commit any breach thereof, we undertake, on demand by the Purchaser, to perform or to take whatever steps may be necessary to achieve performance of said obligations under the Agreement and shall indemnify and keep indemnified the Purchaser against any loss, damages, claims, costs and expenses which may be incurred by them by reason of any such failure or breach on the part of the Company.
3. Our guarantee and undertakings hereunder shall be unconditional and irrevocable, and without prejudice to the foregoing generality we shall not be released or discharged from our liability hereunder by:
  - 3.1 any waiver or forbearance by the Purchaser of or in respect of any of the Company's obligations under the Agreement whether as to payment, time, performance or otherwise howsoever, or by any failure by the Purchaser to enforce the Agreement or this instrument, or
  - 3.2 any alteration to, addition to or deletion from the Agreement or the scope of the obligations to be performed under the Agreement, or
  - 3.3 any change in the relationship between ourselves and the Company; or
  - 3.4 the bankruptcy, insolvency, liquidation, amalgamation, reconstruction, reorganisation, administrative or other receivership or dissolution of the Company, and any equivalent or analogous proceeding by whatever name known and in whatever jurisdiction,and our guarantee and undertakings shall continue in force until all the Company's obligations under the Agreement and all our obligations hereunder have been duly performed.
4. This Guarantee shall be construed and take effect in accordance with Scots law.
5. Our obligations under this Guarantee may be enforced by the Purchaser at their discretion without first having taken any steps or proceedings against the Company or any other person.

6. We shall, on demand by the Purchaser, execute such documents or take such action as the Purchaser may require, for protecting the Purchaser rights under this Guarantee.
7. If at any time any provision of this Guarantee is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, the legality, validity or enforceability of the other provisions of this Guarantee shall not be affected or impaired.
8. No single or partial exercise by the Purchaser of any right, power or remedy provided by law or under this Guarantee shall preclude any other or further exercise thereof or the exercise of any other right, power or remedy.
9. The rights, powers and remedies provided in this Guarantee are cumulative with, and not exclusive of, any rights, powers and remedies provided by law.
10. Notices in connection with the Agreement or Guarantee shall be:
  - 10.1 served in writing;
  - 10.2 served in English;
  - 10.3 sent to the Party receiving it for the attention of the contact and at the address specified at Clause 11 (or to such other address as that receiving Party may notify from time to time);
  - 10.4 shall be sent by a method listed in Clause 12; and
  - 10.5 shall, if sent in accordance with this Clause 12 be deemed received as set out in Clause 13.
11. The address and contacts for the service of notices in connection with the Agreement or Guarantee are:

**Purchaser**

Address: XXX

For the attention of: XXX

Tel: XXX

E-mail: XXX

**Parent Company**

Address: XXX

For the attention of: XXX

Tel: XXX

E-mail: XXX

- 12. All notices and other communications required or permitted to be given in terms of this Agreement or Guarantee, or any proceedings relating to it, shall be serve by hand, by fax, by prepaid recorded or special delivery post, or by email.
- 13. Any such notice or communication shall be deemed to have been served,
  - 13.1 if delivered by hand, on the date of delivery;
  - 13.2 if sent by fax, 4 working hours after the time at which the fax was sent;
  - 13.3 if sent by pre-paid recorded or special delivery post, on the date of delivery; or
  - 13.3.1 if sent by electronic mail, 4 working hours after the time at which the email was sent,

provided that, if in accordance with the above provisions, any such notice or communication is delivered or received outside working hours on any working day, such notice or communications shall be deemed to have been served at the start of the working hour on the next working day thereafter.

**IN WITNESS WHEREOF** these presents typewritten on this and the 2 preceding pages are executed as follows:

**SIGNED** for and on behalf of [Parent Company Name]

At .....

on .....

.....  
Signatures

.....

Full name.....

Position.....

Address.....

.....

.....

**In the presence of**

.....

.....  
Signature

Full name .....

Address.....

.....

.....

## **SCHEDULE 5 ORDER FORM**

This Order is made by [INSERT DETAILS OF PURCHASER] pursuant to the terms of the Agreement reference [INSERT]

It is agreed as follows:

**1. GOODS TO BE SUPPLIED**

1.1 [Set out a brief summary of the Goods or cross-refer to Specification if easier].

**2. SCOPE OF SERVICES**

2.1 [Set out a brief summary of the Services, inc. any Purchaser Responsibilities or cross-refer to Specification if easier].

**2.2 Out of Scope Goods/Services**

[Explicitly state what exactly is out of scope where applicable.]

**2.3 Key Personnel**

The following are the Key Personnel engaged:

[List names]

**2.4 Deliverables, Milestones and Acceptance Criteria**

[List or cross-refer to project plan/ timetable if easier.]

**2.5 Service Levels & Service Credits**

[Specify any applicable Service Levels required for the on-going delivery of the Services (and not already specified in the Agreement or Specification. This should include any specific KPIs or SLAs that are not covered in the Agreement and which are specific to this engagement.)]

**2.6 Documentation**

[Specify any particular documentation (in addition to the actual Deliverables) which the Contractor will be expected to produce during the course of providing the Services]

**2.7 Dependencies**

[List, if any.]

**2.8 Assumptions**

[If assumptions are to be listed, it is preferable to expressly specify what the consequences of the assumptions NOT being met will be, and how any adverse impacts will be mitigated]

## 2.9 Approved Sub-Contractors

[List, if any.]

## 3. CHARGES

[Specify costs or cross-refer to Pricing Matrix if easier]

The table below sets out the Milestones against which the Contractor shall be entitled to raise an invoice once the relevant Milestone has been achieved.

Milestone	Milestone Start Date	Milestone Due Date	Payment	% of Total

## 4. LIQUIDATED DAMAGES

[Specify any applicable liquidated damages usually by reference to weekly or part-weekly amount]

## 5. PERIOD

The Agreement shall commence on [day / month / year] (the "Commencement Date") and be completed/expire on [day / month / year] which may be extended by the Purchaser at its discretion unless terminated earlier as permitted by the Agreement.

[Include any specific break provisions/options to extend, if relevant, and any particular rights of termination specific to the Goods or Services]

## 6. DATA PROCESSING DETAILS

<b>Scope of processing</b>	Performance of the Contractor's obligations under the Contract
<b>Nature of processing</b>	[INSERT DETAILS OF THE NATURE OF PROCESSING (this is what the Contractor will be doing with the personal data)]
<b>Purpose of processing</b>	The Contractor's provision of Services and Goods to the Purchaser in accordance with the Contract
<b>Duration of processing</b>	The period set out in clause 5 of this Order Form.

<b>Categories of data subject</b>	[INSERT DETAILS OF DATA SUBJECTS (whose data will the Contractor be processing )]
<b>Types of personal data</b>	[INSERT DETAILS OF WHAT DATA IS BEING PROCESSED (this is any information that could identify the data subject e.g. name, title, marital status, date of birth, age, address, email address, phone number, health data, criminal convictions, bank account details, political or religious beliefs, ethnicity, image data, audio recordings etc.)]

## [SCHEDULE 6]

### ICT SPECIFIC PROVISIONS

#### 1. Application

This Section only applies when the Agreement is wholly or mainly for the provision of information and communication technology goods and services.

#### 2. Additional Definitions

References to Clauses in this Schedule are to clauses of this Schedule unless identified as comprised within the Agreement. Words that are capitalised in this Schedule 6 shall have the meaning set out in Schedule 1 of the Agreement or, if no such meaning is set out, as set out below:

**Acceptance Date** means in relation to the System (or a component of the System) the date it is deemed to be accepted in terms of Clause 7.1 (Acceptance Testing).

**Additional Services** the provision of Person Days and/or Person Hours by the Contractor to the Purchaser under the provisions of Clause 14 (Additional Options).

**Additional Services Request** a written request from Purchaser for the provision of Additional Services under Clause 14 (Additional Options) setting out (i) the task(s) to be achieved by the Contractor; (ii) the number of Person Days or Person Hours to be devoted to such task(s); and (iii) the relevant Daily Rates.

**Adjusted Specification** means the technical specification as specified in the Agreement.

**Available** means that the System (and each part of the System) and the functions to be provided by the System are in Good Working Order, free of Faults, and performing in accordance with the terms of the Agreement.

**Business Day** means each of Monday to Friday in any week, excluding any day that is a public holiday in Scotland.

**Candidate for Acceptance** means either an iteration of the Foreground Design Documentation, or an iteration of a Testing Protocol, the System, and (if specified in the Implementation Plan or the Testing Protocols agreed under Clause 7.1) a specific component of the System.

**Contractor's Software** (i) the software listed or identified in the Agreement; and (ii) any other software that is supplied to the Purchaser by the Contractor under or in connection with the Agreement or installed by the Contractor as part of the Hosting Services

(as applicable) and where the IPRs comprised in or protecting such software are owned by the Contractor.

<b>Daily Rate(s)</b>	means the sums set out in, or calculated in accordance with, the Agreement.
<b>Date Compliant</b>	means that in the use and/or operation of an item (i) no value for a date will cause any interruption of the item; (ii) all manipulations of time related data by that item will produce the desired results for all valid date values within the application domain; (iii) date elements in interfaces and data storage will permit specifying the century using four digits to eliminate date ambiguity; and (iv) where any date element is represented without a century, the correct century shall be unambiguous for all manipulations involving that element.
<b>Design Documentation</b>	means all design documentation (whether in paper form or data file form or any other form) created by the Contractor in preparing its Tender and/or performing its obligations under the Agreement, including any scripts, configurations or protocols created by the Contractor, from time to time, for commissioning, profiling or configuring the System, any item of Hardware, Software or other media used in connection with the System.
<b>Documentation</b>	(i) the documentation expressly specified in the Agreement; and (ii) any other documentation supplied to the Purchaser by or on behalf of the Contractor under or in connection with the Agreement or that the Contractor makes available for download by the Purchaser (including the documentation referred to in Clause 6.9, to the extent that it does not form part of the Foreground Design Documentation).
<b>Embedded Code</b>	means code internal to, and stored on solid state devices within, the Hardware and which is supplied to the Purchaser hereunder as an integral part of the Hardware.
<b>Fault</b>	means any occurrence in respect of the System or any component of the System which (i) results in all or part of the System being rendered unusable or inoperative; or (ii) causes all or part of the System not to perform in accordance with its published specification; or (iii) causes all or part of the System not to perform in accordance with the Adjusted Specification.
<b>Fault Free for Thirty Days Date</b>	the date on which the System has been free of any Fault for thirty (30) consecutive days.
<b>Fault Free Running Period</b>	means the period between the final Acceptance Date and the Fault Free for Thirty Days Date.



<b>Firmware</b>	means machine readable software which is capable of being archived and which is supplied to the Purchaser hereunder as an integral part of an item of Hardware.
<b>Foreground Design Documentation</b>	means any Design Document but excluding any pre-existing design documentation.
<b>Good Working Order</b>	means that the relevant equipment or component operates fully in accordance with its published specification.
<b>Hardware</b>	means the equipment listed in the Agreement.
<b>Hosted Service</b>	means any part of the Services that is provided using Software hosted by or on behalf of the Supplier, as described in the Agreement.
<b>Hosted Software</b>	means the Software hosted by the or on behalf of the Supplier to provide any Hosted Service, as identified in the Agreement.
<b>Hourly Rate(s)</b>	means the sums set out in, or calculated in accordance with, the Agreement.
<b>Implementation Charges</b>	means the charges set out in, or calculated in accordance with, the Agreement.
<b>Implementation Plan</b>	means the plan set out in the Agreement as amended from time to time in accordance with the terms of the Agreement.
<b>Implementation Services</b>	the services set out in the Agreement.
<b>Interim Payment</b>	means any payment of the Implementation Charges made by the Purchaser to the Contractor other than the final payment scheduled under the Agreement.
<b>New Contractor</b>	means a contractor (who is not the Contractor) appointed by the Purchaser, or by any other Purchaser, company or body corporate, to supply the Services (or similar services) or part thereof in succession to the Contractor on expiry of the Agreement or the earlier cessation of the Services or part thereof.
<b>Person Day</b>	means the provision of Services by an individual Contract Worker for a minimum of 7.5 hours (excluding travelling time to/from the relevant place of performance) between 08.30 and 18.30 on any day.
<b>Person Hour</b>	means the provision of Services by an individual Contract Worker for one hour (excluding travelling time to/from the relevant place of performance) between 08.30 and 18.30 on any day.

<b>Planned Acceptance Date</b>	means in relation to the System (or part of the System), the relevant date set out in the Implementation Plan (as amended in accordance with Clause 4.3 (Variation to Implementation Plan)).
<b>Purchaser</b>	means the Institution submitting the Order Form to the Contractor;
<b>Purchaser Data</b>	means all information, text, drawings, diagrams, images or sounds that are embodied in any electronic or tangible medium, and which (i) are supplied by the Purchaser to the Contractor under or in contemplation of the Agreement; (ii) are held by the Purchaser but are accessed by the Contractor under the Agreement; (iii) the Contractor is obliged to generate or process under the Agreement; or (iv) is otherwise stored in, generated, processed or created by any part of the System or the Services;
<b>Purchaser Owned Development</b>	means any Specially Written Software, the IPRs in which are to be owned Purchaser, as specified in the Agreement.
<b>Purchaser Property</b>	means anything issued or otherwise furnished to the Contractor under or in connection with the Agreement by or on behalf of the Purchaser, other than any heritable property.
<b>Purchaser Purposes</b>	means (i) Purchaser's statutory functions; (ii) any function identified in the Tender Documents; or (iii) any function carried out by the Purchaser or an entity that is owned by, controlled by, funded by, and/or administered by the Purchaser (in each case whether in whole or in part).
<b>Purchaser Responsibilities</b>	means the responsibilities of the Purchaser as expressly set out and identified as "Purchaser Responsibilities" in the Agreement.
<b>Service Reporting Period</b>	means a consecutive four (4) week period.
<b>Service Credits</b>	means the amounts payable to the Purchaser if the Service Levels are not met as calculated in accordance with the provisions of the Agreement.
<b>Service Levels</b>	means the service levels set out in the Agreement.
<b>Software</b>	means the Contractor's Software, the Third Party Software, the Specially Written Software, any Embedded Code, any Firmware, and any Hosted Software.
<b>Source Code</b>	means software in eye-readable form (as opposed to binary or assembly code form or byte code form) and in such form that it can be compiled or interpreted into equivalent object code, together with all technical information and

	documentation necessary for the use, reproduction, maintenance, modification and enhancement of such software.
<b>Specially Written Software</b>	i) the software identified as Specially Written Software in the Agreement; and ii) any software specifically written by or on behalf of the Contractor in order to comply with its obligations under the Agreement.
<b>Supported Software</b>	has the meaning set out in Clause 10.3.
<b>System</b>	means the system specified in the Agreement, which system may comprise the provision of Hardware and/or Software and/or access to any Hosted Service.
<b>Target Environment</b>	means the environment described in the Agreement.
<b>Testing Protocol</b>	means the acceptance testing protocols for the User Acceptance Tests, including any acceptance criteria notified by the Purchaser to the Contractor.
<b>Third Party</b>	means any party other than the Purchaser or the Contractor.
<b>Third Party Software</b>	i) the software expressly specified as such in the Agreement; and ii) any software provided to the Purchaser by the Contractor under or in relation to the Agreement where the IPRs comprised in or protecting such software are owned by a Third Party.
<b>Training Services</b>	the Services identified as such in the Agreement.
<b>Use</b>	means load, execute, store, transmit, display, copy or otherwise to use in each case for purposes of conducting Purchaser's business and/or Purchaser Purposes.
<b>User Acceptance Tests</b>	means, in respect of the System or a component of the System, the tests to be performed to test whether it is Fault free and/or whether it is performing in accordance with the Adjusted Specification and the Design Documentation.

### **3. The System and the Services**

3.1 In consideration of the payment of the Charges, the Contractor shall:

- 3.1.1 supply and deliver (and/or, where applicable, host and allow Purchaser to use the Hosted Software) the System;

- 3.1.2 supply and deliver the Hardware;
  - 3.1.3 supply the Services; and
  - 3.1.4 at all times comply with the reasonable directions of the Purchaser.
- 3.2 During the Period, the Contractor shall cooperate with, and provide reasonable assistance to, the Purchaser, and any contractor or supplier engaged by or on behalf of the Purchaser, in connection with the construction, commissioning, testing and operation of the System.

#### **4. Implementation Plan**

- 4.1 The Contractor shall perform its obligations under the Agreement on or before the relevant dates set out in the Implementation Plan, and otherwise in compliance with the Implementation Plan.
- 4.2 If the Contractor fails to fulfil an obligation incumbent upon it under the Agreement by the relevant date specified in the then current Implementation Plan, then the Contractor shall arrange all such additional resources as are necessary to fulfil the said obligation as soon as practicable thereafter at no additional charge to the Purchaser.
- 4.3 The Implementation Plan may be varied in accordance with the provisions of Clauses 4.3.1, 4.3.2 and 4.3.3 below:
- 4.3.1 The Implementation Plan may be varied by the written agreement of the Parties if:
    - 4.3.1.1 the Contractor is prevented or delayed from carrying out its obligations under the Agreement in accordance with the Implementation Plan as a direct consequence of a failure by the Purchaser (or a third party supplier to the Purchaser) to perform a Purchaser Responsibility on or before the relevant date set out in the Implementation Plan (other than to the extent caused by a preceding breach of the Agreement by the Contractor) (in this Clause 4.3 each a "Purchaser Delay Event"); and
    - 4.3.1.2 the Contractor has promptly served a written notice on Purchaser setting out details of that Purchaser Delay Event and referring to this Clause 4.3, then:
      - 4.3.1.2.1 the Parties shall use all reasonable endeavours to mitigate the impact of such delay and to recover any resultant delay; and
      - 4.3.1.2.2 the Parties shall agree (such agreement not to be unreasonably withheld or delayed by either Party) a reasonable extension of any subsequent dates set out in the Implementation Plan that are directly impacted by the Purchaser Delay Event, such extension having regard to the delay caused

by the Purchaser Delay Event, the related dependencies set out in the Implementation Plan, and the consequences of any delay upon Purchaser.

4.3.2 If the Contractor is prevented or delayed from carrying out its obligations under the Agreement in accordance with the Implementation Plan by reason of any event of Force Majeure then provided the Contractor has complied with the provisions of Clause 26 (Force Majeure) of the Agreement:

4.3.2.1 the Parties shall use all reasonable endeavours to mitigate the impact of such delay and to recover any resultant delay; and

4.3.2.2 the Parties shall agree (such agreement not to be unreasonably withheld or delayed by either party) a reasonable extension of any subsequent dates set out in the Implementation Plan that are directly impacted by the event of Force Majeure, such extension having regard to the delay caused by the Force Majeure Event, the related dependencies set out in the Implementation Plan and the consequences of any delay upon Purchaser.

4.3.3 In the event that the Parties cannot agree an amendment to the Implementation Plan pursuant to Clauses 4.3.1 or 4.3.2 then the provisions of Clause 35 of the Agreement shall prevail.

## **5. Implementation Environment**

5.1 Each party shall (as applicable) provide the Target Environment as set out in the Agreement.

5.2 In performing the Services at the Premises or in relation to any Purchaser Property the Contractor shall at all times:

5.2.1 comply with all Law;

5.2.2 leave any Premises and Purchaser Property clean and in a safe and workmanlike condition to the Purchaser's reasonable satisfaction.

5.3 If the Services include the installation or commissioning of all or part of the System at a Premises or upon any Purchaser Property then, following such installation or commissioning, the Contractor shall reinstate the Premises or Purchaser Property to the condition prevailing at the date on which such installation commenced, subject to any changes undertaken by the Contractor and agreed by the Purchaser for the installation or commissioning of the System (including those changes that the Contractor is obliged to implement under the Agreement).

## **6. Software and IPRs**

6.1 The Parties agree that each IPR comprised in or protecting the Foreground Design Documentation, and any Purchaser Owned Developments, and/or Purchaser Data

(in this Clause 6, together "Purchaser IPRs") shall be owned by the Purchaser. To this end:

- 6.1.1 the Contractor hereby assigns (partially by way of a future assignment of IPRs on creation) its entire right title and interest in each Purchaser IPR to the Purchaser; and
  - 6.1.2 the Contractor hereby undertakes, at the request and expense of the Purchaser, to do all acts and to execute all documents, forms and authorisations required to transfer full title to each Purchaser IPR to the Purchaser; and
  - 6.1.3 the Contractor hereby undertakes, at the request and expense of the Purchaser, to deliver to the Purchaser a copy of any manifestation of an Purchaser IPR then in its possession or control.
- 6.2 The Purchaser hereby grants the Contractor a licence during the term of the Agreement to use Purchaser IPRs solely for the purpose of performing the Contractor's obligations under the Agreement.
- 6.3 The Contractor hereby grants to the Purchaser:
- 6.3.1 upon delivery of an item of Contractor's Software and/or Specially Written Software (other than any Purchaser Owned Developments), a perpetual non-exclusive licence to Use that Software; and
  - 6.3.2 a non-exclusive licence to use each item of the Hosted Software;
  - 6.3.3 a perpetual, transferable non-exclusive licence to reproduce any Documentation relating to the Contractor's Software and/or the Specially Written Software for the purposes of the Use of the Contractor's Software and/or the Specially Written Software (in each case) as licensed under Clause 6.3.1.
- 6.4 With the exception of the licence set out in Clause 6.3.2, which licence shall terminate upon the expiry or termination of the Agreement, the licences granted under this Clause 6 shall survive termination or expiry of the Agreement. The licences set out in this Clause are limited to use in relation to the Purchaser Purposes.
- 6.5 The Contractor shall ensure that each relevant Third Party grants to the Purchaser a licence to use the Third Party Software on the terms set out in the Agreement. Notwithstanding the terms of any such licence agreement, the Contractor shall pay all licence fees and/or other costs in connection with the grant of such a licence to the Purchaser.
- 6.6 The Contractor hereby grants to the Purchaser, or shall ensure that prior to delivery of the relevant item of Hardware that each relevant Third Party grants to the Purchaser: (i) a non-exclusive licence to Use the Embedded Code and the Firmware with the relevant Hardware supplied hereunder; and (ii) a non-exclusive licence to reproduce any Documentation relating to the same for the purposes of the Use of the Software licensed hereunder.

- 6.7 Purchaser shall be entitled to engage a Third Party to host and/or Use the Software and/or the Services, subject to and in the accordance with the Agreement on behalf of the Purchaser in relation to the Purchaser Purposes.
- 6.8 Purchaser shall be entitled to copy Software in order to create an archival copy and a back-up copy of the same. When copying Software Purchaser shall include in that copy any original copyright notices.
- 6.9 Within 30 Business Days' of the Purchaser's request to do so following the final Acceptance Date, the Contractor will deliver to the Purchaser an escrow agreement in a suitable form (single licensee, multi-licensee, software escrow, website and software escrow, and/or software as a service (as applicable)) of NCC Escrow International Limited, Manchester, England (or such other escrow agent as the Parties may agree) (the "Escrow Contract") completed as set out in sub-Clauses 6.9.1 to 6.9.4 (inclusive) below and properly executed for and on behalf of the Contractor. In relation to such Escrow Contract:

6.9.1 the "Owner" shall be the Contractor;

6.9.2 the "Licensee" shall be Purchaser;

6.9.3 the "Material" shall as a minimum include the Source Code of the Contractor Software and the Source Code of the Specially Written Software; and

6.9.4 Purchaser shall be responsible for payment of the Annual Fee and the Release Fee (as defined in such Escrow Contract) and the Contractor shall be liable for the Initial Fee and Update Fees and the Storage Fees (as defined in such Escrow Contract) if any

with the Parties agreeing that if the particular Escrow Contract chosen by the Parties does not contain the exact terms described above in Clauses 6.9.1 to 6.9.4 (inclusive), then the terms used shall be those deemed to be most nearly approximate to the terms above.

#### 6.10 **Source Code Licence**

6.10.1 The Contractor hereby grants to the Purchaser a perpetual, non-transferable and non-exclusive licence to Use, reproduce, modify, adapt, enhance, translate (and to licence a Third Party to do all such acts on its behalf) the Source Code and object code versions of the Contractor Software and the Specially Written Software.

6.10.2 The foregoing licence shall only become effective if Purchaser becomes entitled to obtain access to the Source Code version of the Contractor Software and the Specially Written Software pursuant to the source code escrow agreement referred to in Clause 6.9 (Escrow) and the licence shall be subject to any obligations of confidentiality contained herein in respect of the object code version of the Contractor Software.

### 6.11 Provision of documentation

The Contractor shall deliver to the Purchaser a copy of all Foreground Design Documentation promptly upon creation of each item of Foreground Design Documentation (or, where that item of Foreground Design Documentation is subject to acceptance testing in accordance with Clause 7, promptly following the date on which that item is Accepted (as defined in Clause 7) by the Purchaser).

### 6.12 Interfacing

The Contractor shall provide to the Purchaser, promptly upon request and at no additional cost, all reasonable assistance, information and copies of all APIs, configurations, keys, protocols, profiles, scripts and other documentation in each case:

- 6.12.1 in the possession or control of the Contractor; and
- 6.12.2 necessary in order to allow Purchaser (or any third party acting with the permission or Purchaser of the Purchaser) to interface to the System and/or to share data with the System.

### 6.13 Copy of virtual server

6.13.1 Once a week during the term of the Agreement, the Contractor shall deliver to the Purchaser up to date virtualised copies of the servers used by the Contractor to provide any Hosted Services (the "Virtual Server Back-ups"). The Virtual Server Back-ups shall be in an industry-standard format as approved by the Purchaser.

6.13.2 The Contractor hereby grants to the Purchaser a perpetual, non-transferable and non-exclusive licence to Use, reproduce, modify, adapt, enhance, translate (and to licence a Third Party to do all such acts on its behalf) the Virtual Server Back-ups, including the right to install the Virtual Server Back-ups in a suitable host environment under the control of the Purchaser (or a Third Party supplier of hosting to the Purchaser).

6.13.3 The licence set out in Clause 6.13.2 shall only become effective if an Insolvency Event occurs in respect of the Contractor.

6.13.4 For the purpose of Clause 6.13.3 above, where the Contractor is a Company "Insolvency Event" means:

6.13.4.1 the Contractor or any parent company passes a resolution for winding-up or the court makes a winding-up order, other than for the purpose of a genuine and good faith reconstruction or amalgamation which the purchaser has consented to in advance;

6.13.4.2 the Contractor or any parent company passes a resolution for administration;

6.13.4.3 an administrator, administrative receiver, receiver or manager is appointed to the Contractor or any parent



company by a creditor or by the court, or possession is taken of any of the Contractor's or any parent company's property under the terms of a floating charge;

6.13.4.4 the Contractor or any parent company is unable to pay its debts within the meaning of section 123 of the insolvency act 1986 (as if the reference in section 123(1)(a) to £750 was to £10,000); or

6.13.4.5 any similar event occurs under the law of any other jurisdiction.

6.13.5 For the purposes of clause 6.13.3 above, where the Contractor is an individual, "Insolvency Event" means that:

6.13.5.1 A petition is presented for the Contractor's bankruptcy or the sequestration of the Contractor's estate;

6.13.5.2 A criminal bankruptcy order is made against the Contractor;

6.13.5.3 The Contractor makes any composition or arrangement with or for the benefit of the Contractor's creditors, or makes any conveyance or assignment for the benefit of the Contractor's creditors, or an administrator is appointed to the Contractor's affairs;

6.13.5.4 The Contractor becomes apparently insolvent within the meaning of the bankruptcy (Scotland) act 1985; or

6.13.5.5 Any similar event occurs under the law of any other jurisdiction.

6.13.6 For the purposes of clause 6.13.3 above, where the Contractor is a partnership or firm, or a number of persons acting together in any capacity, "Insolvency Event" means that:

6.13.6.1 An event listed in clauses 6.13.5 (a) to 6.13.5 (b) of this section occurs in respect of any partner in the partnership or firm or any of those persons;

6.13.6.2 A petition is presented for the contractor to be wound up as an unregistered company; or

6.13.6.3 Any similar event occurs under the law of any other jurisdiction.

## **7. Acceptance**

### **7.1 Acceptance Testing**

7.2 Each component of the System, each iteration of the Foreground Design Documentation, and the Testing Protocols shall be subject to acceptance testing in accordance with the Implementation Plan and this Clause 7.

## 7.2.1 **Acceptance of Design Documentation and Testing Protocols**

- 7.2.1.1 The Contractor shall submit each iteration of the Foreground Design Documentation and the Testing Protocols to the Purchaser for review and acceptance in accordance with the Implementation Plan and/or any previously agreed accepted Testing Protocol.
- 7.2.1.2 Within twenty (20) Business Days (or such other period as the Parties may agree) of the date of receipt of a submission (or re-submission, as the case may be) of a Foreground Design Document or Testing Protocol Candidate for Acceptance to the Purchaser, the Purchaser shall, subject to Clause 7.3 (Further Information), return to the Contractor one copy of that Candidate for Acceptance endorsed "Level A – no objection", "Level B – proceed subject to comments" or "Level C – resubmit". For the purposes of Clause 7.2 (Non Acceptance Termination Right), a Candidate for Acceptance endorsed with "Level C – resubmit" shall be a "Failure Report".
- 7.2.1.3 If Purchaser makes an objection to any Candidate for Acceptance, the Purchaser shall state the ground upon which such objection is based and the evidence or other information necessary to substantiate that ground.
- 7.2.1.4 If the Candidate for Acceptance is returned by the Purchaser endorsed "Level A – no objection", or if no response is received by the Contractor during the period mentioned in Clause 7.2.1, then the Candidate for Acceptance shall be "Accepted" by the Purchaser and the Contractor shall comply with and implement that Candidate for Acceptance.
- 7.2.1.5 If Purchaser returns the Candidate for Acceptance endorsed other than "Level A – no objection", then the Contractor shall:
  - 7.2.1.5.1 where Purchaser has endorsed the Candidate for Acceptance "Level B – proceed subject to comments", proceed with the performance of the relevant part of the Services, but acknowledge and take into account Purchaser's comments;
  - 7.2.1.5.2 where Purchaser has endorsed the Candidate for Acceptance "Level C – resubmit", not act upon the Candidate for Acceptance, but instead amend the Candidate for Acceptance to respond to the Purchaser's objections and requirements and re-submit the same to the Purchaser in accordance with 7.2.1, unless the Contractor disputes any such objection or proposed requirement is on grounds permitted by the Agreement, in which case the Contractor or Purchaser may refer the matter for determination in accordance with Clause 35 (Dispute Resolution Procedure) of Agreement.
- 7.2.1.6 Where the Candidate for Acceptance has been endorsed "Level C – resubmit", the Contractor shall within ten (10) Business Days of receiving the returned Candidate for Acceptance, resubmit the Candidate for Acceptance as amended to the Contractor and the provisions of this

Clause 7 (Acceptance) shall apply to such re-submission (which shall be deemed to be a Candidate for Acceptance).

7.2.1.7 The return of any Candidate for Acceptance endorsed "Level A – no objection" or otherwise endorsed in accordance with Clause 7.2.1.5.1 ("Level B – proceed subject to comments") shall mean that the Candidate for Acceptance may be used or implemented (subject to any comments made in accordance with Clause 7.2.1.5.1) for the purposes for which it is intended. However, the return of any Candidate for Acceptance howsoever endorsed shall not relieve the Contractor of its obligations under the Agreement.

7.2.1.8 If, having received comments from Purchaser under this 7.2.1, the Contractor considers that compliance with those comments is not in accordance with the scope of the Adjusted Specification and would amount to a change to the Agreement by the Purchaser, then the Contractor shall within five (5) Business Days of those comments being received and in any event before complying with the comments, notify Purchaser of the same and, if it is agreed by the Parties, then Purchaser may proceed with the matter in accordance with Clause 44 (Amendments) of the Agreement.

7.2.2 **Acceptance of the System (and components of the System, including Hardware)**

7.2.2.1 The System (and where identified in the Implementation Plan or the Testing Protocols agreed under Clause 7.2.1 a component of the System) shall be subject to User Acceptance Tests. The User Acceptance Tests shall be carried out in accordance with the relevant Testing Protocols accepted by the Purchaser in accordance with Clause 7.2.1 (Acceptance of Design Documentation and Testing Protocols).

7.2.2.2 The Contractor may submit a Candidate for Acceptance for User Acceptance Tests by serving a written notice on Purchaser (each a "Ready for User Acceptance Tests Notice").

7.2.2.3 Following receipt by the Purchaser of a Ready for User Acceptance Tests Notice, the Parties shall agree the date on which the User Acceptance Tests will be performed (such agreement not to be unreasonably withheld or delayed), upon which date the Contractor shall, in the presence of the Purchaser, conduct the User Acceptance Tests. The Contractor shall comply with the reasonable direction of the Purchaser in relation to the carrying out of the User Acceptance Tests.

7.2.2.4 The Contractor will provide Purchaser with a written report of the User Acceptance Tests within two (2) Business Days of the completion of the User Acceptance Tests. Within ten (10) Business Days of receipt of the report, the Purchaser shall, subject to Clause 7.3, by notice in writing to the Contractor either:

7.2.2.4.1 certify that the relevant Candidate for Acceptance has been "Accepted" by the Purchaser (such acceptance not to be unreasonably withheld or delayed); or

- 7.2.2.4.2 reject the Candidate for Acceptance (a "Failure Report"), in which case the Contractor shall, at its own cost and expense, promptly rectify the Fault and re-submit the Candidate for Acceptance for User Acceptance Tests in accordance with this Clause 7.1.2.
    - 7.2.2.5 If no such notice is received in such period, then the relevant Candidate for Acceptance will be deemed to have been Accepted.
    - 7.2.2.6 In respect of the User Acceptance Tests, the Purchaser shall:
      - 7.2.2.6.1 provide the Contractor with reasonable cooperation and assistance; and
      - 7.2.2.6.2 comply with the relevant Testing Protocol.
- 7.3 If:
  - 7.3.1 Purchaser has issued more than two (2) Failure Reports in relation to the same Candidate for Acceptance under Clause 7.1 (Acceptance Testing); or
  - 7.3.2 a Candidate for Acceptance has not been Accepted in terms of Clause 7.1 (Acceptance Testing) by the date twenty (20) Business Days after the relevant Planned Acceptance Date; or
  - 7.3.3 the Fault Free for Thirty Days Date has not occurred by a date ninety (90) days after the final Acceptance;
- 7.4 the Purchaser shall have the right to terminate the Agreement by way of a written notice served on the Contractor referencing this Clause 7.2 (termination being effective from the date of service of such notice).
- 7.5 The Contractor shall submit any further information or other information, drawings, data and documents (including calculations) that Purchaser reasonably requires, in order to evaluate a Candidate for Acceptance in accordance with this Clause 7 (Acceptance). If the Contractor does not submit any such information, data and documents, the Purchaser shall be entitled to reject the relevant Candidate for Acceptance:
  - 7.5.1 on the basis of the information, data and documents which have been provided; or
  - 7.5.2 on the grounds that insufficient information, data and documents have been provided to enable Purchaser to act in accordance with this Clause 7 (Acceptance).

## **8. Liquidated damages**

- 8.1 If the final Acceptance Date is after the final Planned Acceptance Date then the Contractor shall pay to the Purchaser a sum equal to **[1]%** of the total Implementation Charges for each week (or part thereof) elapsing from the final Planned Acceptance Date until the actual final Acceptance Date, provided that the

amount payable by the Contractor under this Clause 8 shall not exceed a sum equal to **[12]%** of the total Implementation Charges.

- 8.2 All sums payable under this Clause 8 that have not previously been withheld in accordance with the Agreement (in this Clause 8.2 the "**Unrecouped Deductions**") shall be set off against and shown as a deduction of the amount payable (before calculation of Value Added Tax) in the next invoice raised by the Contractor under the Agreement (provided that the amount due under that invoice as a result of the deduction of Unrecouped Deductions shall not be less than zero). After the date of termination or expiry of the Agreement Purchaser may invoice the Contractor for an amount equal to the then current Unrecouped Deductions plus VAT if applicable. The Contractor shall pay such invoice in cleared funds within thirty (30) days after its receipt of the same (such date being the relevant due date for the purpose of Clause 7 (Payment) of The Agreement).

## **9. Title and Risk**

- 9.1 To the extent that this Clause 9 (Title and Risk) conflicts with the Agreement this Clause 9 (Title and Risk) takes precedence.

- 9.2 The Contractor hereby transfers title to:

9.2.1 the Hardware as at the date on which Purchaser accepts, in writing, delivery (or in relation to Hardware and where as part of the Services the Contractor is installing that Hardware the date that installation is complete, and Purchaser has acknowledged, in writing, the completion of installation); and

9.2.2 any other tangible Deliverable on the date that Purchaser accepts delivery.

- 9.3 Nothing in this Clause transfers IPRs, or creates an obligation to transfer IPRs.

- 9.4 The risk of loss of, or damage to, Hardware or any other tangible Deliverable shall transfer to the Purchaser on the date Purchaser accepts, in writing, delivery (or in relation to Hardware and where as part of the Services the Contractor is installing that Hardware the date that installation is complete, and Purchaser has acknowledged, in writing, the completion of installation).

- 9.5 Purchaser shall not unreasonably withhold or delay in issuing any written acceptance or delivery of Hardware or acknowledgement of installation of Hardware referred to in Clauses 9.2 and 9.3.

## **10. Replacement Parts and Supported Software**

- 10.1 If, during the performance of the Services, replacement parts (which shall be new, or if they are repairable, no older than the parts that they are replacing) are fitted to any Hardware supplied by the Contractor to the Purchaser, then:

10.1.1 such replacement parts shall become part of the Hardware and the property of the Purchaser at no additional cost; and

- 10.1.2 the parts removed shall become the property of the Contractor. Each Party hereby transfers its title in the relevant parts accordingly as at the date of such replacement.
- 10.2 If the Contractor sends any part of the Hardware away from the Premises or any Purchaser Property for repair or for any other reason, the Contractor shall be responsible for:
  - 10.2.1 the risk of loss or damage to that part;
  - 10.2.2 the packing, carriage and insurance of such part; and
  - 10.2.3 all costs associated with the dispatch, repair, return and reinstallation of that part.
- 10.3 The software which shall be supported under the Services (the "Supported Software") is:
  - 10.3.1 the Software;
  - 10.3.2 any modification which is acquired by the Purchaser (whether under the Agreement or any other agreement between the Contractor and the Purchaser) during the course of the Agreement and which accordingly becomes part of the software defined as the Software under the Agreement; and
  - 10.3.3 any other software which the Contractor and the Purchaser agree should be Supported Software for the purposes of the Agreement.
- 10.4 **Updates**
  - 10.4.1 If, as part of the Services, the Contractor installs, or issues to the Purchaser, an update of or patch to, an item of Software or Hardware (in this Clause 10.4, each an "Update") then the Contractor shall ensure that the Update is compatible with the rest of the System and in particular with the Specially Written Software. Without prejudice to the foregoing, the Contractor shall ensure that the implementation of an Update by the Purchaser will not cause a loss of functionality, or a material degradation in performance, when compared against the operation of the Software or Hardware prior to implementation of the Update and will not require any alteration to any software or hardware that interfaces to the System.
  - 10.4.2 Any decision by the Purchaser to refuse an Update shall not give rise to any right to terminate the Agreement, nor shall it result in any adverse effect on the System or the performance of the Contractors obligations under the Agreement.
- 10.5 Where during the Period there is a Fault then the Contractor shall provide reasonable assistance, information and advice to the Purchaser in relation to that Fault in accordance with its obligations under the Agreement.

## 11. Service Levels

- 11.1 The Contractor shall ensure that during the Period
- 11.1.1 the Services are provided in accordance with, and
  - 11.1.2 the System operates in accordance with,
- the Service Levels.
- 11.2 In the event of a breach of Clause 11.1, the Contractor shall, at the request of the Purchaser and without prejudice to the Purchaser's other rights and remedies, arrange all such additional resources as are reasonably necessary to correct the said failure as early as practicable thereafter.
- 11.3 Purchaser shall permit the Contractor such access to such parts of the System as are hosted at any Premises as is reasonably required for the Contractor to comply with its obligations under Clause 11.1 (Service Levels) and 11.2 (Failure to meet the Service Levels – additional resource), provided that any access to the System during Purchaser's normal business hours shall be subject to the Purchaser's prior consent.

## 12. Service Credits

- 12.1 If the Contractor has breached Clause 11.1 then the Contractor shall, without prejudice to any other rights and remedies of the Purchaser pay Purchaser the Service Credits accruing in respect of that breach.
- 12.2 No later than ten (10) Business Days after the end of each Service Reporting Period ending during the Period the Contractor shall prepare and deliver to the Purchaser a report (in this Clause 12 each a "**Service Level Report**") setting out:
- 12.2.1 details of compliance with the Service Levels in that Service Reporting Period (including details of the reason for any non-compliance);
  - 12.2.2 a calculation of the Service Credits accruing in that Service Reporting Period;
  - 12.2.3 details of all Faults reported to the Contractor during that Service Reporting Period; and
  - 12.2.4 to be clear such report referred to in Clause 12.2 may be written or may be delivered by email or through a browser portal or similar.
- 12.3 Sums payable under this Clause 12 shall become due thirty (30) days after the issue of the relevant Service Level Report under Clause 12.2 All sums falling due under this Clause 12 that have not previously been set-off against an invoice raised by the Contractor under the Agreement (in this Clause 12.3 the "**Unrecouped Service Credits**") shall be set off against and shown as a deduction of the amount payable (before calculation of Value Added Tax) in the next invoice raised by the Contractor under the Agreement (provided that the amount due under that invoice as a result of the deduction of Unrecouped Service Credits shall not be less than zero). After the date of termination or expiry of the Agreement Purchaser may invoice the Contractor for an amount equal to any the then current Unrecouped Service Credits

plus VAT (if applicable). The Contractor will pay that invoice in cleared funds no later than thirty (30) days after its receipt of The Agreement.

### **13. Minimising Disruption**

13.1 If it appears likely to the Contractor that any planned works or activities to be carried out by the Contractor under the Agreement will necessitate interruption to or restriction of the System and/or require access to any Purchaser Property, then the Contractor shall notify Purchaser not less than fourteen (14) days prior to such planned works or activities.

13.2 In the event of any unplanned works or activities to be carried out by the Contractor as a result of a System Fault or otherwise, then the Contractor shall notify Purchaser as soon as possible of the nature of such works or activities and the likely disruption or restriction of the System.

#### **13.3 The Contractor shall perform the Services:**

13.3.1 so as not to prejudice the health or safety of, or unreasonably interfere with the proper performance of the duties of the Purchaser, employees and third parties, or the availability of any Purchaser Property, or otherwise expose Purchaser to liability under the Health and Safety at Work etc. Act 1974 or the Transport and Works Act 1992 or any other legislation relating to health and safety;

13.3.2 so as to maximise the availability and uptime of the System; and

13.3.3 in a safe manner and so that the System is capable of being operated in a safe and efficient manner free from any unreasonable risk to the health and wellbeing of persons using or maintaining it and free from any reasonably avoidable risk of pollution, nuisance, interference or hazard.

13.4 Where it is not practical to correct a Fault immediately, but a temporary workaround repair is possible, then the Contractor will:

13.4.1 propose that temporary workaround / repair to the Purchaser; and

13.4.2 if Purchaser agrees implement that temporary workaround/repair. To be clear implementing such a temporary workaround/repair does not relieve the Contractor of its obligation to permanently rectify Faults.

### **14. Additional Options**

14.1 The Parties' rights and obligations under this Clause 14 shall survive until the date one (1) year after the last date of the Period.

14.2 At the request of the Purchaser, the Contractor shall provide input into the Purchaser's preparation of Additional Services Requests, including a reasonable estimate of the number of Person Days and/or Person Hours required to complete the task to be set out in the Additional Services Request.

14.3 On receipt of an Additional Services Request unilaterally issued by the Purchaser, and in consideration of payments under Clause 15.2 (Additional Option Charges),



the Contractor will devote the number of Person Days or Person Hours (as appropriate) set out in the Additional Services Request towards the task(s) set out in the Additional Services Request on dates to be agreed (such agreement not to be unreasonably withheld or delayed).

14.4 The Contractor will on request provide Purchaser with reasonable progress reports in relation to the delivery of Person Days under an Additional Services Request. Purchaser may terminate an Additional Services Request by a minimum of five (5) days' written notice. Following such termination the Contractor's obligations under this Clause 14 in relation to the terminated Additional Services shall cease.

14.5 Purchaser has the option to purchase additional items of Hardware at the unit prices set out in the Agreement, subject to any increases envisaged by and/or permitted by the Agreement. In order to exercise that option, the Purchaser must provide the Contractor with written notice setting out the items required (including the quantity) (the "**Additional Hardware**"), the price and the requested delivery date. In that event:

14.5.1 the Contractor shall deliver the Additional Hardware to the Purchaser on that delivery date or as soon as reasonably practicable after that date;

14.5.2 the provision of Clause 15.2 (Additional Option Charges) shall apply in relation to payment for additional Hardware;

14.5.3 title to the Additional Hardware shall transfer on delivery to the Purchaser. The risk of loss of or damage to Additional Hardware shall transfer on Purchaser's written acknowledgement of such delivery to the Purchaser (such acknowledgement not to be unreasonably withheld by the Purchaser); and

14.5.4 the Contractor warrants that as at the date of delivery, each item of Additional Hardware shall operate in accordance with the Adjusted Specification and the Contractor's published technical standards for that item of Additional Hardware, as at the date of the Agreement.

#### 14.6 **Additional Software Option**

Where applicable, the Purchaser has the option to purchase additional units/seats/licences of the items of Contractor Software at the unit prices set out in the Agreement, subject to any increases envisaged by and/or permitted by the Agreement. In order to exercise that option Purchaser must provide the Contractor with written notice setting out the additional units/seats/licences required (the "**Additional Licences**"), and the price. In that event:

14.6.1 as from the date of that notice any licence restriction specified in the Agreement shall be increased by the number of Additional Licences;

14.6.2 the provision of Clause 15.2 (Additional Option Charges) apply in relation to payment for Additional Licences; and

14.6.3 each Additional Licence that is delivered to the Purchaser shall be deemed to be an item of "Software" and part of the "System" for the purposes of Clause 6 (Software and IPRs), Clause 10 (Replacement Parts and

Supported Software), the warranties in Clauses 16.2.8 to 16.2.12 (inclusive) and for the purposes of Clause 18 (IPR Indemnity).

## **15. Charges**

15.1 To the extent that this Clause 15 (Charges) conflicts with the main body of the Agreement, this Clause 15 (Charges) takes precedence.

### **15.2 Additional Option Charges**

15.2.1 In consideration for the supply of Additional Services the Purchaser will pay to the Contractor:

15.2.1.1 the relevant Daily Rate in respect of each Person Day delivered by the Contractor to the Purchaser in response to an Additional Services Request prior to the date of its termination;

15.2.1.2 the relevant Hourly Rate in respect of each Person Hour delivered by the Contractor to the Purchaser in response to an Additional Services Request (other than to the extent that Person Hour was billed as part of a Person Day) prior to the date of its termination; and

15.2.1.3 an amount equivalent to the reasonable travel and subsistence expenses incurred by the Contractor in providing the Additional Services (subject always to prior written approval by the Purchaser).

15.2.2 The Contractor may invoice Purchaser in respect of Additional Services no earlier than monthly in arrears.

## **16. Warranties**

16.1 To the extent that this Clause 16 (Warranties) conflicts with Clause 8 of the main body of the Agreement (Warranties and Representations), this Clause 16 (Warranties) takes precedence.

16.2 The Contractor hereby warrants, represents and undertakes to the Purchaser that:

16.2.1 at the final Acceptance Date and during the Period the System shall be capable of delivering the functionality set out or described in the Adjusted Specification;

16.2.2 at the final Acceptance Date the System shall comply with the relevant regulations and standards specified in the Agreement;

16.2.3 at the final Acceptance Date, and during the Period, the System shall operate in accordance with its respective published technical specifications;

16.2.4 the Contractor has the full capacity and Purchaser to enter into the Agreement and to grant the licences referred to in Clause 6 (Software and

- IPRs) and that its performance of its obligations under the Agreement will not cause it to breach any other agreement to which it is a party;
- 16.2.5 Use of an item of Software in accordance with the express licence terms to use that item set out in the Agreement will not infringe any IPR;
- 16.2.6 the Services shall be supplied and rendered by, and the Contractor's obligations under the Agreement carried out:
- 16.2.6.1 by appropriately experienced, qualified and trained personnel;
- 16.2.6.2 with all due skill, care and diligence; and in compliance with all Law;
- 16.2.7 the Contractor shall discharge its obligations hereunder in accordance with Good Industry Practice and its own established internal procedures;
- 16.2.8 each item of Hardware supplied will be United Kingdom specification and packaged by its manufacturer for distribution in the United Kingdom;
- 16.2.9 each item of Hardware supplied, and each replacement part fitted to an item of Hardware by or on behalf of the Contractor, will be brand new (or, if repairable, no older than the parts that they are replacing);
- 16.2.10 each item of Hardware will be supported for a minimum period of six (6) years from the date on which title to that item of Hardware passes to the Purchaser in accordance with Clause 9.2 and spare parts will be available for that item from its manufacturer for that six (6) year period;
- 16.2.11 Purchaser shall acquire title to the Hardware, and each replacement part fitted to an item of Hardware by or on behalf of the Contractor, free from all encumbrances;
- 16.2.12 as at the date of delivery to the Purchaser hereunder, each Deliverable will be free from any then documented computer viruses (or other malicious code);
- 16.2.13 all statements made in its Tender Documents, and all statements made by or on behalf of the Contractor to the Purchaser in relation to the subject matter of the Tender Documents between the date of the Tender Documents and the date of execution of the Agreement are (in each case) true and accurate in all material respects; and
- 16.2.14 as at the date of delivery to the Purchaser hereunder, each item of Software and Hardware will be Date Compliant.
- 16.3 The Contractor hereby warrants and undertakes to the Purchaser that:
- 16.3.1 it has not, and will not, transfer or purport to transfer the IPRs comprised in or protecting the Foreground Design Documentation or Purchaser Data to any Third Party; and

16.3.2 title to each IPR comprised in or protecting the Foreground Design Documentation will transfer to the Purchaser on the later of the date of the Agreement or the date of creation of that IPR.

16.4 The Parties hereby exclude from the Agreement all implied warranties, implied conditions, implied licences and implied terms to the fullest extent permitted by law.

## **17. Liability**

17.1 To the extent that this Clause 17 (Liability) conflicts with Clause 33 (Limitation of Liability) of the main body of the Agreement, this Clause 17 (Liability) takes precedence.

### **17.2 Exceptions to Limitations**

17.2.1 Nothing in the Agreement excludes or limits the liability of one party to the other party for:

17.2.1.1 death or personal injury; or

17.2.1.2 any breach of any warranties/conditions of title implied by statute or law; or

17.2.1.3 breach of Clause 10 (Confidentiality) of the Agreement; or

17.2.1.4 breach of Clause 12 (Data Protection) of the Agreement;  
or

17.2.1.5 for infringement of the other party's Intellectual Property Rights; or

17.2.1.6 for loss or damage to land or buildings; or

17.2.1.7 for a fraudulent misrepresentation.

17.2.2 Nothing in this Clause 17 excludes or limits the Contractor's liability:

17.2.2.1 under Clause 18; or

17.2.2.2 under Clause 20.

17.3 Subject always to Clause 17.2 (Exceptions to Limitations), the liability of each party under or in relation to the subject matter of the Agreement shall be subject to the following financial limits:

17.3.1 the aggregate liability of the Purchaser other than liability to pay the Charges or interest thereon under Clause 15 (Charges) shall in no event exceed £[the Charges]; and

17.3.2 the aggregate liability of the Contractor to the Purchaser in relation to the System and/or performance of the Implementation Services shall in no event exceed the greater of:

17.3.2.1 £[insert figure]; or

17.3.2.2 [2 times the Implementation Charge];

17.3.3 the aggregate liability of the Contractor to the Purchaser under the Agreement or in relation to the subject matter of the Agreement shall not exceed the greater of:

17.3.3.1 £[insert figure]; or

17.3.3.2 [1.5 times the sum of the Implementation Charges].

For the avoidance of doubt, payments under Clause 12.3 (Payment of Service Credits) and/or any retention of payments by the Purchaser in terms of the Agreement shall not be deemed to be a payment in respect of liability by the Contractor, and shall not be used in calculating whether the caps on liability above have been reached or exceeded. For the avoidance of doubt, payments under Clause 8 (Liquidated Damages) shall be deemed to be a payment in respect of liability by the Contractor, and shall be used in calculating whether the caps on liability above have been reached or exceeded.

#### 17.4 Consequential Loss Exclusion

Subject always to Clause 17.2 (Exceptions to Limitations), in no event shall either Party be liable to the other for:

17.4.1 consequential loss or damage; and/or

17.4.2 loss of profit, loss of goodwill, or loss of anticipated savings.

17.5 The provisions of Clause 17.4 (Consequential Loss Exclusion) shall not limit or exclude the right of either Party to claim from the other party for additional operational and administrative costs and expenses resulting from the Default of the other Party.

#### 18. IPR Indemnity

18.1 To the extent that this Clause 18 (IPR Indemnity) conflicts with the indemnity granted in Clause 32.4 of the main body of the Agreement, this Clause 18 (IPR Indemnity) takes precedence.

18.2 The Contractor shall ensure that the use and possession of the System in accordance with the terms of the Agreement and/or the receipt of the Services by or on behalf of the Purchaser shall not infringe any IPR of any third party.

18.3 The Contractor shall indemnify Purchaser against all loss, liability, costs and/or expenses (including cost and expenses defending any relevant claim) suffered or incurred by the Purchaser, or any Third Party using the Design Documentation or the System or the Documentation on behalf of the Purchaser in accordance with the terms of the Agreement, in each case to the extent arising from any claim, demand or action that alleges that: i) use or possession of the Design Documentation by the Purchaser (or such Third Party) infringes an IPR; or ii) use or possession of the System or the Documentation by the Purchaser (or such Third Party) infringes an IPR; or iii) delivery or receipt of the Services infringes an IPR, (in each case) except

to the extent that such loss, liability, cost or expense resulted directly from Purchaser's failure to properly observe its obligations under this Clause 18, or to the extent that any such claim or demand or action is in respect of:

- 18.3.1 any use by or on behalf of the Purchaser of the Design Documentation or the System or the Services or the Documentation in combination with any item not supplied by the Contractor where such use directly gives rise to the claim, demand or action; or
  - 18.3.2 any modification carried out by or on behalf of the Purchaser to any item supplied by the Contractor under the Agreement if such modification is not authorised by the Contractor in writing; or
  - 18.3.3 any use by the Purchaser of the System in a manner not reasonably to be inferred from the Tender Documents; or
  - 18.3.4 any use of the Software that is not licensed under the Agreement; or
  - 18.3.5 any breach by the Purchaser of the Agreement or a licence to use Third Party Software procured by the Contractor for Purchaser hereunder.
- 18.4 The Contractor shall promptly notify Purchaser if any claim or demand is made or action brought against the Contractor for infringement or alleged infringement of any Intellectual Property Rights which may affect the use or possession of either the Design Documentation, the System (or any component of the System) or the Documentation and/or the receipt of the Services by or on behalf of the Purchaser.
- 18.5 Purchaser shall promptly notify the Contractor if any claim or demand is made or action brought against Purchaser to which Clause 18.3 (Indemnity Grant) may apply. The Contractor may at its own expense conduct any litigation arising therefrom and all negotiations in connection therewith. To this end, on the written request of the Contractor, the Purchaser shall grant to the Contractor exclusive control of any such litigation and such negotiations.
- 18.6 Purchaser shall, at the request of the Contractor, afford to the Contractor all reasonable assistance for the purpose of contesting any claim or demand made or action brought against Purchaser to which Clause 18.3 (Indemnity Grant) may apply. The Contractor shall reimburse Purchaser for all reasonable costs and reasonable expenses (including but not limited to legal costs and disbursements on a solicitor and client basis) incurred by the Purchaser in so doing.
- 18.7 Other than as required by law, the Purchaser shall not make any admissions which may be prejudicial to the defence or settlement of any claim, demand or action for infringement or alleged infringement of any IPR to which Clause 18.3 (Indemnity Grant) may apply.
- 18.8 If a claim or demand is made or action brought to which Clause 18.3 (Indemnity Grant) may apply, or in the reasonable opinion of the Contractor is likely to be made or brought, the Contractor may at its own expense and within a reasonable time either:
- 18.8.1 modify any or all of the Design Documentation and/or the System and/or the Documentation or the Services without reducing the performance and

functionality of the same, or substitute an alternative software or services of equivalent performance and functionality for any or all of the Software or the Services, so as to avoid the infringement or the alleged infringement, provided that the terms herein shall apply equally to such modified or substituted items or services and such modified or substituted items shall be Acceptable to the Purchaser, such Acceptance not to be unreasonably withheld; or

18.8.2 procure any licence(s) required to avoid such claim demand or action.

18.9 If a claim or demand is made or action brought to which Clause 18.3 (Indemnity Grant) applies and a modification or substitution in accordance with Clause 18.8.1 above is not possible so as to avoid the infringement, or the Contractor has been unable to procure a licence in accordance with Clause 18.8.2, then:

18.9.1 the Purchaser shall be entitled to terminate the Agreement by way of a written notice served on the Contractor referencing this Clause 18.9 (termination being effective from the date of service of such notice); and

18.9.2 the Contractor shall be liable for the value of a replacement for the System and the Services or part thereof together with additional costs incurred in implementing and maintaining such replacements.

## **19. Term and Termination**

19.1 This Clause 19 (Term and Termination) supplements the provisions of Clause 37 (Termination) of the main body of the Agreement and where they conflict, this Clause 19 (Term and Termination) takes precedence.

19.2 The Purchaser may terminate the Agreement as set out in Clause 7.2 (Non Acceptance Termination Right) and/or Clause 7.4 (Purchaser Right to Terminate).

## **20. Consequences of Termination**

20.1 To the extent that this Clause 20 (Consequences of Termination) conflicts with Clause 38 (Consequences of Termination) of the main body of the Agreement, this Clause 20 (Consequences of Termination) takes precedence.

### **20.2 Refund**

20.2.1 In the event of any termination of this Agreement by the Purchaser prior to the Fault Free for Thirty Days Date, then the Purchaser shall be entitled, without prejudice to the Parties' other rights and remedies, to return the System or any part thereof and/or any of the Deliverables, and in that event the Contractor shall give the Purchaser a full refund of all Charges paid by the Purchaser to the Contractor in connection with such returned items.

20.2.2 In the event of termination of this Agreement the Contractor shall within thirty (30) Business Days of such termination reimburse to the Purchaser any Charges previously paid by the Purchaser hereunder and which relate to the period following such termination (calculated pro rata on a daily

basis), plus any Value Added Tax previously paid by the Purchaser in relation thereto.

- 20.3 Following the termination or expiry of the Agreement the provisions of Clauses 2 (Definitions), Clause 5.3 (Making Good), 6 (Software and IPRs), Clause 8 (Liquidated Damages), 9 (Title and Risk), Clause 12 (Service Credits), 14 (Additional Options), 16 (Warranties), 17 (Liability), 18 (IPR Indemnity), 20 (Consequences of Termination), Clause 21 (Documentation shall survive and shall continue to bind the Parties).
- 20.4 The Contractor shall provide Purchaser with such assistance as Purchaser may reasonably require (including the provision of information) necessary to enable Purchaser to transfer the System (or components of the System) to a New Contractor. The Contractor shall be entitled to charge for the reasonable and demonstrable costs of such assistance as an Additional Service Request in accordance with Clause 14.

## **21. Documentation**

- 21.1 The Contractor shall deliver the Documentation in accordance with the Implementation Plan or (where no date for doing so is set out in the Implementation Plan) no later than the final Acceptance Date.
- 21.2 The Contractor shall ensure that the Documentation supplied to the Purchaser under the Agreement in relation to the System (or part of the System) will comprise a complete set of operating manuals for the System (and each component of the System).
- 21.3 The Contractor shall make, and retain during the Period and for a period of two (2) years thereafter, reasonable records in relation to the Implementation Services performed by the Contractor in accordance with Good Industry Practice. The Contractor will maintain reasonable technical records (as opposed to financial records) in relation to its performance of the Services including a detailed record of the rectification of Faults. In each case Purchaser will be allowed to inspect and audit and/or take copies (at no additional cost) of those records following reasonable notice given to the Contractor.
22. The Contractor shall ensure that each Deliverable is clearly marked with a functional title or code, and its version number, so that it can be readily identified.

## **23. Business continuity**

- 23.1 The Contractor will put and maintain in place a business continuity plan and related procedures which are compliant with Good Industry Practice and in any event suitable to allow it to prevent or minimise the adverse effect on its performance of the Agreement of any circumstances beyond its reasonable control and otherwise to maximise the continuity of the Services (the Contractor's "Business Continuity Arrangements").
- 23.2 The Contractor will promptly implement its Business Continuity Arrangements in accordance with their terms, and to this end will ensure that all members of the Contractor's staff are at all times aware of and understand its Business Continuity Arrangements and their role in implementing them.



- 23.3 Upon request by the Purchaser the Contractor will provide Purchaser with a copy of any or all of its then current Business Continuity Arrangements, together with any such additional information as Purchaser requests to assist it in understanding the Supplier's Business Continuity Arrangements and/or assessing their compliance with this Clause.
- 23.4 The Contractor will carry out a full test implementation of its Business Continuity Arrangements at least once every twelve (12) months (each a "Test Implementation"). The Contractor will inform Purchaser in writing of the planned date or dates for each Test Implementation and will provide Purchaser with a written report on each Test Implementation within thirty (30) days of the date on which it was completed.

#### **24. Purchaser right to appoint a managing agent**

- 24.1 In addition to the rights of the Purchaser under Clause 40 (Assignment and Sub-contracting) of the Agreement, the Purchaser shall be entitled, upon notice in writing to the Contractor, to appoint a third party to act as Purchaser's managing agent (the "Managing Agent") in respect of the receipt and management of, and exercise of the Purchaser's rights in connection with, the Services. Where Purchaser appoints a Managing Agent in accordance with this Clause 24, the following provisions shall apply:
- 24.1.1 subject to Clause 24.1.2, the Contractor shall observe, and shall procure that its employees, contractors and representatives observe, all reasonable instructions of the Managing Agent given in accordance with the Agreement; and
- 24.1.2 the Managing Agent shall have no Purchaser to terminate the Agreement, make any claim for payment (under indemnity or otherwise), raise any claim, suit or action against the Contractor, instruct a change to the Agreement under Clause 44 (Amendments) of the Agreement, amend the Agreement, nor to relieve the Contractor or any of its obligations under the Agreement.

## [SCHEDULE 7]

### SOFTWARE AS A SERVICE PROVISIONS

#### 1. Application

- 1.1 This Section applies when the Agreement is wholly or mainly for the provision of "Software-as-a-Service" offerings.

#### 2. Additional Definitions

References to Clauses in this Schedule are to clauses of this Schedule unless identified as comprised within the Agreement. Words that are capitalised in this Schedule 7 shall have the meaning set out in Schedule 1 of the Agreement or, if no such meaning is set out, as set out below:

**Acceptance Date** means in relation to the Managed Service (or a component of the Managed Service) the date it is deemed to be accepted in terms of Clause 9.1 (Acceptance Testing).

**Acceptance Tests** means, in respect of the Managed Service or a component of the Managed Service, the tests to be performed to test whether it is Fault free and/or whether it is performing in accordance with the Adjusted Specification.

**Additional Services** the provision of Person Days and/or Person Hours by the Contractor to the Purchaser pursuant to the provisions of Clause 14 (Additional Options).

**Additional Services Request** a written request from Purchaser for the provision of Additional Services under Clause 14 (Additional Options) setting out (i) the task(s) to be achieved by the Contractor; (ii) the number of Person Days or Person Hours to be devoted to such task(s); and (iii) the relevant Daily Rates.

**Adjusted Specification** means the technical specification as specified in the Order Form.

**Available** means that the Managed Service and the functions to be provided by the Managed Service are in Good Working Order, free of Faults, and performing in accordance with the terms of the Agreement and "Availability" shall be construed accordingly.

**Business Day** means each of Monday to Friday in any week, excluding any day that is a public holiday in Scotland.

**Daily Rate(s)** means the sums set out in, or calculated in accordance with, the Agreement.

**Documentation** (i) the documentation expressly specified in the Agreement; and (ii) any other documentation supplied to the Purchaser by or on behalf of the Contractor under or in connection with

the Agreement or that the Contractor makes available for download by the Purchaser.

<b>Fault</b>	means any occurrence in respect of the Managed Service or any component of the Managed Service which (i) results in all or part of the Managed Service being rendered unusable or inoperative; or (ii) causes all or part of the Managed Service not to perform in accordance with its published specification; or (iii) causes all or part of the Managed Service not to perform in accordance with the Adjusted Specification.
<b>Fault Free for Thirty Days Date</b>	the date on which the Managed Service has been free of any Fault for thirty (30) consecutive days.
<b>Fault Free Running Period</b>	means the period between the final Acceptance Date and the Fault Free for Thirty Days Date.
<b>"Good Working Order"</b>	means that the relevant equipment or component operates fully in accordance with its published specification
<b>Managed Service</b>	means any part of the Services that is provided using software hosted by or on behalf of the Contractor or run on hardware controlled by the Contractor, as described in the Order Form.
<b>Hourly Rate(s)</b>	means the sums set out in, or calculated in accordance with, the Agreement.
<b>Implementation Charges</b>	means the charges set out as being applicable to the Implementation Services, as set out in the Order Form.
<b>Implementation Plan</b>	means the plan set out in the Order Form as amended from time to time in accordance with the terms of the Agreement.
<b>Implementation Services</b>	the services related to the set-up of the Managed Service as set out in the Order Form including any Training Services.
<b>New Contractor</b>	means a contractor (who is not the Contractor) appointed by the Purchaser, or by any other Purchaser, company or body corporate, to supply the Services (or similar services) or part thereof in succession to the Contractor on expiry of the Agreement or the earlier cessation of the Services or part thereof.
<b>Person Day</b>	means the provision of Services by an individual Contract Worker for a minimum of 7.5 hours (excluding travelling time to/from the relevant place of performance) between 08.30 and 18.30 on any day.
<b>Person Hour</b>	means the provision of Services by an individual Contract Worker for one hour (excluding travelling time to/from the

	relevant place of performance) between 08.30 and 18.30 on any day.
<b>Planned Acceptance Date</b>	means in relation to the Managed Service (or part of the Managed Service), the relevant date set out in the Implementation Plan (as the same may be amended in accordance with the provisions of this Schedule).
<b>Purchaser Data</b>	means all information, text, drawings, diagrams, images or sounds that are embodied in any electronic or tangible medium, and which (i) are supplied by the Purchaser to the Contractor under or in contemplation of the Agreement; (ii) are held by the Purchaser but are accessed by the Contractor under the Agreement; (iii) the Contractor is obliged to generate or process under the Agreement; or (iv) is otherwise stored in, generated, processed or created by any part of the Managed Service or the Services;
<b>Purchaser Property</b>	means anything issued or otherwise furnished to the Contractor under or in connection with the Agreement by or on behalf of the Purchaser, other than any heritable property.
<b>Purchaser Purposes</b>	means (i) Purchaser's statutory functions; (ii) any function identified in the Tender Documents; or (iii) any function carried out by the Purchaser or an entity that is owned by, controlled by, funded by, and/or administered by the Purchaser (in each case whether in whole or in part).
<b>Purchaser Responsibilities</b>	means the responsibilities of the Purchaser as expressly set out and identified as "Purchaser Responsibilities" in the Order Form.
<b>Service Reporting Period</b>	means a consecutive four (4) week period.
<b>Service Credits</b>	means the amounts payable to the Purchaser if the Service Levels are not met as calculated in accordance with the provisions of the Agreement.
<b>Testing Protocol</b>	means the acceptance testing protocols for the Acceptance Tests, including any acceptance criteria notified by the Purchaser to the Contractor.
<b>Third Party</b>	means any party other than the Purchaser or the Contractor.
<b>Training Services</b>	the Services identified as such in the Order Form.
<b>Use</b>	means, in relation to any product or service, any use whatsoever of the whole or any part of such product or service in each case for purposes of conducting Purchaser's business and/or Purchaser Purposes.

### **3. The Services**

In consideration of the payment of the Charges, the Contractor shall supply and deliver and/or, where applicable, host and allow Purchaser to use the Managed Service.

3.1.1 In performing its obligations under the Agreement the Contractor shall at all times comply with the reasonable directions of the Purchaser.

3.1.2 During the Period, the Contractor shall cooperate with, and provide reasonable assistance to, the Purchaser, and any contractor or supplier engaged by or on behalf of the Purchaser, in connection with the construction, commissioning, testing and operation of the Managed Service.

### **4. Service Levels**

4.1 The Contractor shall ensure that during the Period:

4.1.1 the Services are provided in accordance with the Service Levels; and

4.1.2 the Managed Service will be Available as determined in accordance with the Order Form.

4.2 In the event of a breach of Clause 4.1, the Contractor shall, at the request of the Purchaser and without prejudice to the Purchaser's other rights and remedies, arrange all such additional resources as are reasonably necessary to correct the said failure as early as practicable thereafter.

4.3 Where applicable, the Purchaser shall permit the Contractor such access to such parts of the Managed Service as are hosted at any Premises as is reasonably required for the Contractor to comply with its obligations under Clauses 4.1 and 4.2, provided that any access to the Managed Service during Purchaser's normal business hours shall be subject to the Purchaser's prior consent.

### **5. Service Credits**

5.1 If the Contractor has breached Clause 4.1 then the Contractor shall, without prejudice to any other rights and remedies of the Purchaser pay Purchaser the Service Credits accruing in respect of that breach.

5.2 No later than ten (10) Business Days after the end of each Service Reporting Period ending during the Period the Contractor shall prepare and deliver to the Purchaser a report (in this Clause 5 each a "Service Level Report") by email or through a browser portal or other means reasonably acceptable to the Purchaser setting out:

5.2.1 details of compliance with the Service Levels in that Service Reporting Period (including details of the reason for any non-compliance);

5.2.2 a calculation of the Service Credits accruing in that Service Reporting Period; and

5.2.3 details of all Faults reported to the Contractor during that Service Reporting Period.

5.3 Sums payable under this Clause 5 shall become due thirty (30) days after the issue of the relevant Service Level Report under Clause 5.2. All sums falling due under this Clause 5 that have not previously been set-off against an invoice raised by the Contractor under the Agreement (in this Clause 5.3 the "Unrecouped Service Credits") shall be set off against and shown as a deduction of the amount payable (before calculation of Value Added Tax) in the next invoice raised by the Contractor under the Agreement (provided that the amount due under that invoice as a result of the deduction of Unrecouped Service Credits shall not be less than zero). After the date of termination or expiry of the Agreement Purchaser may invoice the Contractor for an amount equal to any the then current Unrecouped Service Credits plus VAT (if applicable). The Contractor will pay that invoice in cleared funds no later than thirty (30) days after its receipt of it (such date being the relevant due date for payment for the purpose of Clause 7 (Payment) of the Agreement).

## **6. Implementation Plan**

6.1 The Contractor shall perform its obligations under the Agreement on or before the relevant dates set out in the Implementation Plan, and otherwise in compliance with the Implementation Plan.

6.2 If the Contractor fails to fulfil an obligation incumbent upon it under the Agreement by the relevant date specified in the then current Implementation Plan, then the Contractor shall arrange all such additional resources as are necessary to fulfil the said obligation as soon as practicable thereafter at no additional charge to the Purchaser.

6.3 If in accordance with the Implementation Plan as a direct consequence of a failure by the Purchaser (or a third party supplier to the Purchaser) to perform a Purchaser Responsibility on or before the relevant date set out in the Implementation Plan (other than to the extent caused by a preceding breach of the Agreement by the Contractor) (in this Clause 6.3 each a "Purchaser Delay Event"), and the Contractor has promptly served a written notice on the Purchaser setting out details of that Purchaser Delay Event and referring to this Clause 6.3, then:

6.3.1 the Parties shall use all reasonable endeavours to mitigate the impact of such delay and to recover any resultant delay; and

6.3.2 the Parties shall agree (such agreement not to be unreasonably withheld or delayed by either Party) a reasonable extension of any subsequent dates set out in the Implementation Plan that are directly impacted by the Purchaser Delay Event, such extension having regard to the delay caused by the Purchaser Delay Event, the related dependencies set out in the Implementation Plan, and the consequences of any delay upon Purchaser.

6.4 If the Contractor is prevented or delayed from carrying out its obligations under the Agreement in accordance with the Implementation Plan by reason of any event of Force Majeure then provided the Contractor has complied with the provisions of Clause 27 (Force Majeure) of Agreement:

6.4.1 the parties shall use all reasonable endeavours to mitigate the impact of such delay and to recover any resultant delay; and

6.4.2 the Parties shall agree (such agreement not to be unreasonably withheld or delayed by either party) a reasonable extension of any subsequent dates set out in the Implementation Plan that are directly impacted by the event of Force Majeure, such extension having regard to the delay caused by the Force Majeure Event, the related dependencies set out in the Implementation Plan and the consequences of any delay upon Purchaser.

6.5 In the event that the parties cannot agree an amendment to the Implementation Plan pursuant to Clauses 6.3 or 6.4 then the provisions of Clause 31 (Dispute Resolution Procedure) of The Agreement shall apply.

## **7. Implementation Environment**

7.1 In performing the Services at the Premises or in relation to any Purchaser Property the Contractor shall at all times:

7.1.1 comply with all Law;

7.1.2 leave any Premises and Purchaser Property clean and in a safe and workmanlike condition to the Purchaser's reasonable satisfaction.

7.2 If the Services include the installation or commissioning of all or part of the Managed Service at a Premises or upon any Purchaser Property then, following such installation or commissioning, the Contractor shall reinstate the Premises or Purchaser Property to the condition prevailing at the date on which such installation commenced, subject to any changes undertaken by the Contractor and agreed by the Purchaser for the installation or commissioning of the Managed Service (including those changes that the Contractor is obliged to implement under the Agreement).

## **8. Software and Intellectual Property Rights**

8.1 The Purchaser acknowledges and agrees that, as between the Parties, the Contractor and/or its licensors own all Intellectual Property Rights in all materials connected with the Managed Service and in any material developed or produced in connection with this agreement by the Contractor, its officers, employees, subcontractors or agents.

8.2 The Purchaser shall own and retain all rights, title and interest in and to the Purchaser Data. The Contractor shall have no rights to access, use or modify the Purchaser Data other than strictly in the performance of its obligations and otherwise unless it has the prior written consent of the Purchaser.

8.3 The Purchaser shall own and retain all rights, title and interest in and to all bespoke deliverables and all other reports, documents, materials, techniques, ideas, concepts, trade marks, know-how, algorithms, software, computer code, routines or subroutines, specifications, plans, notes, drawings, designs, pictures, images, text, audio-visual works, inventions, data, information and other items, expressions, works of authorship or work product of any kind that are:

- 8.3.1 authored, produced, created, conceived, collected, developed, discovered or made by the Contractor on a bespoke basis for the Purchaser, including any and all Intellectual Property Rights therein (collectively, "Work Product"); and
  - 8.3.2 provided by any supplier (other than the Contractor), consultant, contractor, advisor or any other third party engaged by the Purchaser in relation to the Services, the Premises Site or its business requirements.
- 8.4 To the extent applicable, the Purchaser shall be deemed to be the "author" of all Work Product. The Contractor hereby waives any and all moral rights (including any rights of attribution) in and to the Work Product. To the extent that any Intellectual Property Rights in the Work Product do not automatically vest in the Purchaser, the Contractor hereby assigns absolutely [with full title guarantee] to the Purchaser all rights, title and interest that the Contractor may have or may hereafter acquire in all Work Product, including all Intellectual Property Rights therein.
- 8.5 At the Purchaser's cost and expense, the Contractor shall execute all documents and take all actions necessary or reasonably requested by the Purchaser to document, obtain, maintain, perfect or assign its rights to the Work Product. The Contractor shall also cause its employees, agents and subcontractors to execute such documents and take such actions as described above. The Contractor will not challenge the validity of Contractor's assignment of rights in the Work Product to Purchaser in accordance with the Agreement. All such Work Product will be deemed to be the confidential, proprietary and trade secret information of the Purchaser under and subject to the provisions of this Clause 8.
- 8.6 The Contractor hereby grants to the Purchaser a perpetual, irrevocable, sub-licensable, non-exclusive, royalty-free, worldwide license to Use all of the Contractor's Intellectual Property Rights as incorporated by the Contractor into the Work Product solely in connection with the Purchaser's use of the Managed Service.
- 8.7 The Purchaser hereby grants to the Contractor a perpetual (during the term of this agreement), revocable, non-transferrable, non-exclusive, royalty-free, limited licence to use, copy, modify, improve, enhance and make derivative works of the Purchaser's Intellectual Property Rights and the Work Product solely to the extent necessary to provide the Services and otherwise comply with its obligations under the Agreement.
- 8.8 The Contractor will not disclose to the Purchaser or use in its work any trade secrets or confidential information of a third party which the Contractor is not lawfully entitled to disclose or use in such manner. The Contractor will not use any equipment, supplies, facilities, computer code, work product, inventions or materials of any other third party (Third-Party Materials) in any Work Product or in the Contractor's performance under this agreement unless:
  - 8.8.1 the Contractor has the full right and Purchaser to do so without violating any rights of any third party;
  - 8.8.2 the Contractor has obtained all necessary rights to enable it to perform its obligations under this agreement and grant the rights granted herein and to permit the Purchaser to utilise the Third-Party Materials as contemplated under this agreement at no additional cost or expense to the Purchaser;



- 8.8.3 the Purchaser's use of such Third-Party Materials will not restrict or impair in any manner its use of the Work Products or subject the Purchaser to any obligation or liability; and
- 8.8.4 such Third-Party Materials are specifically identified to the Purchaser in writing in advance of any use and the Purchaser has agreed in writing to such use.
- 8.9 The Contractor hereby grants to the Purchaser a perpetual, irrevocable, sub-licensable, non-exclusive, royalty-free, worldwide license to use, exploit, sell, copy, reproduce, manufacture, distribute, export, publicly display, publicly perform, sub-license, modify, improve, enhance and make derivative works of such Third-Party Materials as are incorporated in the Work Product solely in connection with the Purchaser's use of the Work Products.
- 8.10 The Purchaser reserves all rights not expressly granted herein.

## **9. Acceptance**

- 9.1 The Managed Service shall be subject to acceptance testing in accordance with the Implementation Plan and, to the extent consistent with the Implementation Plan, this Clause 9.
- 9.2 The Contractor shall submit the Managed Service and the Testing Protocols to the Purchaser by serving a written notice on Purchaser (each a "Ready for Acceptance Tests Notice").
- 9.3 Following receipt by the Purchaser of a Ready for Acceptance Tests Notice, the Parties shall agree the date on which the Acceptance Tests will be performed (such agreement not to be unreasonably withheld or delayed), upon which date the Contractor shall, in the presence of the Purchaser, conduct the Acceptance Tests. The Contractor shall comply with the reasonable directions of the Purchaser in relation to the carrying out of the Acceptance Tests.
- 9.4 The Contractor will provide Purchaser with a written report of the Acceptance Tests within two (2) Business Days of the completion of the Acceptance Tests. Within ten (10) Business Days of receipt of the report, the Purchaser shall, subject to Clause 9.3, by notice in writing to the Contractor either:
  - 9.4.1 certify that the Managed Service has been "Accepted" by the Purchaser (such acceptance not to be unreasonably withheld or delayed); or
  - 9.4.2 reject the Managed Service (a "Failure Report"), in which case the Contractor shall, at its own cost and expense, promptly rectify the Fault and re-submit the Managed Service for Acceptance Tests in accordance with this Clause 9.4, and
- 9.5 if no such notice is received in such period then the relevant Candidate for Acceptance will be deemed to have been Accepted.
- 9.6 In respect of the Acceptance Tests, the Purchaser shall provide the Contractor with reasonable cooperation and assistance and comply with the relevant Testing Protocol.

- 9.7 If:
- 9.7.1 Purchaser has issued more than two (2) Failure Reports in relation to the Managed Service under Clause 9.4; or
  - 9.7.2 the Managed Service has not been Accepted by the date twenty (20) Business Days after the relevant Planned Acceptance Date; or
    - (a) the Fault Free for Thirty Days Date has not occurred by a date ninety (90) days after the final Acceptance;
- 9.8 the Purchaser shall have the right to terminate the Agreement with immediate effect by way of a written notice served on the Contractor referencing this Clause 9.6.
- 9.9 The Contractor shall submit any further information or other information, drawings, data and documents (including calculations) that Purchaser reasonably requires, in order to evaluate the Managed Service in accordance with this Clause 9. If the Contractor does not submit any such information, data and documents, the Purchaser shall be entitled to reject the Managed Service.

## **10. Liquidated damages**

- 10.1 If the final Acceptance Date is after the final Planned Acceptance Date then the Contractor shall pay to the Purchaser a sum equal to 1% of the total Implementation Charges for each week (or part thereof) elapsing from the final Planned Acceptance Date until the actual final Acceptance Date, provided that the amount payable by the Contractor under this Clause 10 shall not exceed a sum equal to 12% of the total Implementation Charges.
- 10.2 All sums payable under this Clause 10 that have not previously withheld in accordance with the Agreement (in this Clause 10.2 the "Unrecouped Deductions") shall be set off against and shown as a deduction of the amount payable (before calculation of Value Added Tax) in the next invoice raised by the Contractor under the Agreement (provided that the amount due under that invoice as a result of the deduction of Unrecouped Deductions shall not be less than zero). After the date of termination or expiry of the Agreement, Purchaser may invoice the Contractor for an amount equal to the then current Unrecouped Deductions plus VAT if applicable. The Contractor shall pay such invoice in cleared funds within thirty (30) days after its receipt of the same (such date being the relevant due date for the purpose of Clause 7 (Payment) of the Agreement).

## **11. Updates**

- 11.1 If, as part of the Services, the Contractor installs or deploys an update of or patch to, an item of software or hardware (in this Clause 11.1, each an "Update") used in the delivery of the Managed Service then the Contractor shall ensure that the Update is compatible with the rest of the Managed Service.

- 11.2 Without prejudice to Clause 11.1, the foregoing, the Contractor shall ensure that the implementation of an Update will not cause a loss of functionality, or a material degradation in performance relative to the Service Levels, when compared against the operation of the Managed Service prior to implementation of the Update and will not require any alteration to any software or hardware that interfaces to the Managed Service.
- 11.3 Where during the Period there is a Fault then the Contractor shall provide all required assistance, information and advice to the Purchaser in relation to that Fault in accordance with its obligations under the Agreement and the Service Levels.

## **12. Minimising Disruption**

- 12.1 If it appears likely to the Contractor that any planned works or activities to be carried out by the Contractor under the Agreement will necessitate interruption to or restriction of the Managed Service and/or require access to any Purchaser Property, then the Contractor shall notify Purchaser not less than fourteen (14) days prior to such planned works or activities.
- 12.2 In the event of any unplanned works or activities to be carried out by the Contractor as a result of a Managed Service Fault or otherwise, then the Contractor shall notify Purchaser as soon as possible of the nature of such works or activities and the likely disruption or restriction of the Managed Service.
- 12.3 The Contractor shall perform the Services:
- 12.3.1 so as not to prejudice the health or safety of, or unreasonably interfere with the proper performance of the duties of the Purchaser, employees and third parties, or the availability of any Purchaser Property, or otherwise expose Purchaser to liability under the Health and Safety at Work etc. Act 1974 or the Transport and Works Act 1992 or any other legislation relating to health and safety;
  - 12.3.2 so as to maximise the availability and uptime of the Managed Service; and
  - 12.3.3 in a safe manner and so that the Managed Service is capable of being operated in a safe and efficient manner free from any unreasonable risk to the health and wellbeing of persons using or maintaining it and free from any reasonably avoidable risk of pollution, nuisance, interference or hazard.
- 12.4 Where it is not practical to correct a Fault immediately, but a temporary workaround repair is possible, then the Contractor will, without prejudice to its obligations to permanently rectify Faults:
- 12.4.1 propose that temporary workaround / repair to the Purchaser; and
  - 12.4.2 if the Purchaser agrees, implement that temporary workaround/repair.

## **13. Additional Options**

- 13.1 At the request of the Purchaser, the Contractor shall provide input into the Purchaser's preparation of Additional Services Requests, including a reasonable estimate of the number of Person Days and/or Person Hours required to complete the task to be set out in the Additional Services Request.
- 13.2 On receipt of an Additional Services Request unilaterally issued by the Purchaser, and in consideration of payments under Clause 14.2 (Additional Option Charges), the Contractor will devote the number of Person Days or Person Hours (as appropriate) set out in the Additional Services Request towards the task(s) set out in the Additional Services Request on dates to be agreed (such agreement not to be unreasonably withheld or delayed).
- 13.3 The Contractor will on request provide Purchaser with reasonable progress reports in relation to the delivery of Person Days under an Additional Services Request. Purchaser may terminate an Additional Services Request by a minimum of five (5) days' written notice. Following such termination, the Contractor's obligations under this Clause 13 in relation to the terminated Additional Services shall cease.

#### **14. Charges For Additional Services**

- 14.1 To the extent that this Clause 14 (Charges) conflicts with the main body of the Agreement, this Clause 14 (Charges) takes precedence
- 14.2 In consideration for the supply of Additional Services the Purchaser will pay to the Contractor:
  - 14.2.1 the relevant Daily Rate in respect of each Person Day delivered by the Contractor to the Purchaser in response to an Additional Services Request prior to the date of its termination;
  - 14.2.2 the relevant Hourly Rate in respect of each Person Hour delivered by the Contractor to the Purchaser in response to an Additional Services Request (other than to the extent that Person Hour was billed as part of a Person Day) prior to the date of its termination; and
  - 14.2.3 an amount equivalent to the reasonable travel and subsistence expenses incurred by the Contractor in providing the Additional Services (subject always to prior written approval by the Purchaser).
- 14.3 The Contractor may invoice Purchaser in respect of Additional Services monthly in arrears.

#### **15. Warranties**

- 15.1 To the extent that this Clause 15 conflicts with any terms of the main body of the Agreement, this Clause 15 takes precedence
- 15.2 The Contractor hereby warrants, represents and undertakes to the Purchaser that:
  - 15.2.1 at the final Acceptance Date and during the Period the Managed Service shall operate and function in all respects consistently with the Adjusted Specification, the Contractor's own published specifications and any other requirements set out in the Agreement;

- 15.2.2 the Contractor has the full capacity and Purchaser to enter into the Agreement and to grant the licences referred to in Clause 8 and that its performance of its obligations under the Agreement will not cause it to breach any other agreement to which it is a party;
  - 15.2.3 the Purchaser's Use of the Managed Service in accordance with the Agreement will not infringe any Intellectual Property Rights of any third party;
  - 15.2.4 the Services shall be supplied and rendered by, and the Contractor's obligations under the Agreement carried out:
    - 15.2.4.1 by appropriately experienced, qualified and trained personnel;
    - 15.2.4.2 with all due skill, care and diligence; and
    - 15.2.4.3 in compliance with all Law;
  - 15.2.5 the Training Services shall be provided in accordance with the Implementation Plan and shall be sufficient to enable reasonably skilled and experienced members of the Purchaser's staff to use the Managed Service for the Purchaser Purposes;
  - 15.2.6 the Contractor shall discharge its obligations hereunder in accordance with Good Industry Practice and its own established internal procedures;
  - 15.2.7 as at the date of delivery to the Purchaser hereunder, all outputs of the Managed Service provided to the Purchaser will be free from any then documented computer viruses (or other malicious code);
  - 15.2.8 all statements made in its Tender Documents, and all statements made by or on behalf of the Contractor to the Purchaser in relation to the subject matter of the Tender Documents between the date of the Tender Documents and the date of execution of the Agreement are (in each case) true and accurate in all material respects; and
  - 15.2.9 it has not, and will not, transfer or purport to transfer the Intellectual Property Rights comprised in or protecting the Work Product or Purchaser Data to any Third Party; and
  - 15.2.10 title to each Intellectual Property Right comprised in or protecting the Work Product will transfer to the Purchaser on the later of the date of the Agreement or the date of creation of that Intellectual Property Right.
- 15.3 The Parties hereby exclude from the Agreement all implied warranties, implied conditions, implied licences and implied terms to the fullest extent permitted by law.

## **16. Liability**

- 16.1 To the extent that this Clause 16 conflicts with Clause 29 (Limitation of Liability) of the main body of the Agreement, this Clause 16 takes precedence.

- 16.2 Nothing in the Agreement excludes or limits the liability of one party to the other party for:
- 16.2.1 death or personal injury; or
  - 16.2.2 any breach of any warranties/conditions of title implied by statute or law; or
  - 16.2.3 breach of Clause 10 (Confidentiality) of The Agreement; or
  - 16.2.4 infringement of the other party's IPRs; or
    - 16.2.4.1 loss or damage to land or buildings; or
    - 16.2.4.2 fraudulent misrepresentation.
- 16.3 Nothing in this Clause 16 excludes or limits the Contractor's liability under:
- 16.3.1 Clause 17 (Indemnities); or
  - 16.3.2 Clause 12 (Data Protection) of the Agreement[; or
  - 16.3.3 Clause 20.2 (Refund) of Schedule 6].
- 16.4 Subject always to Clauses 16.2 and 16.3, the liability of each party under or in relation to the subject matter of the Agreement shall be subject to the following financial limits:
- 16.4.1 the aggregate liability of the Purchaser other than liability to pay the Charges or interest thereon under Clause 14 (Charges) shall in no event exceed the amount of Charges; and
  - 16.4.2 the aggregate liability of the Contractor to the Purchaser under the Agreement or in relation to the subject matter of the Agreement shall not exceed the greater of:
    - 16.4.2.1 3 times the annual Charges; or
    - 16.4.2.2 2 times the sum of the Implementation Charges.
- 16.5 For the avoidance of doubt, payments under Clause 5 (Service Credits) and/or any retention of payments by the Purchaser in terms of the Agreement shall not be deemed to be a payment in respect of liability by the Contractor, and shall not be used in calculating whether the caps on liability above have been reached or exceeded. For the avoidance of doubt, payments under Clause 10 (Liquidated Damages) shall be deemed to be a payment in respect of liability by the Contractor, and shall be used in calculating whether the caps on liability above have been reached or exceeded.
- 16.6 Subject always to Clauses 16.2 and 16.3, in no event shall either party be liable to the other for any indirect or consequential losses, including loss of profit, loss of goodwill, or loss of anticipated savings.

16.7 The provisions of Clause 16.6 shall not limit or exclude the right of either party to claim from the other party for additional operational and administrative costs and expenses resulting from the Default of the other Party.

## **17. IPR Indemnity**

17.1 To the extent that this Clause 17 conflicts with the indemnity granted in Clause 32.4 of the main body of the Agreement, this Clause 17 takes precedence.

17.2 The Contractor shall indemnify the Purchaser against all claims, loss, liability, costs and/or expenses (including cost and expenses defending any relevant claim) suffered or incurred by the Purchaser, its agents' employees and contractors ("Indemnified Parties"), in each case arising from any claim, demand or action that alleges that:

17.2.1 use or possession of the Work Product and/ or the Managed Service by an Indemnified Party infringes an IPR; and/ or

17.2.2 delivery or receipt of the Services infringes an IPR.

17.3 The foregoing indemnity shall not apply to the extent that such claim, loss, liability, cost or expense resulted directly from:

17.3.1 Purchaser's failure to properly observe its obligations under the Agreement in relation to its use of the Managed Service; or

17.3.2 any modification carried out by or on behalf of the Purchaser to any item supplied by the Contractor under the Agreement if such modification is not authorised by the Contractor in writing.

17.4 Each party shall promptly notify the other party if any claim or demand is made or action brought against the Contractor for infringement or alleged infringement of any IPRs to which Clause 17.2 may apply.

17.5 Provided that it undertakes the defence of the claim with reasonable diligence and complies with its indemnity obligations under this Clause 17, the Contractor shall be entitled exclusively to conduct any litigation arising therefrom and all negotiations in connection therewith.

17.6 The Purchaser shall:

17.6.1 at the request and expense of the Contractor, afford to the Contractor all reasonable assistance for the purpose of contesting any such claim; and

17.6.2 not make any admissions which may be prejudicial to the defence or settlement of any claim, demand or action for infringement or alleged infringement of any IPR to which Clause 17.2 may apply.

17.7 If a claim or demand is made or action brought to which Clause 17.2 may apply, or in the reasonable opinion of the Contractor is likely to be made or brought, the Contractor may at its own expense and within a reasonable time either:

- 17.7.1 modify the Managed Service and/or the Documentation or the Services without reducing the performance and functionality of the same or causing any adverse effect to the operations of any Indemnified Party, or substitute an alternative software or services of equivalent performance and functionality for any or all of the Managed Service or the Services, so as to avoid the infringement or the alleged infringement; or
  - 17.7.2 procure any licence(s) required to avoid such claim demand or action.
- 17.8 If a claim or demand is made or action brought to which Clause 17.2 applies and the measures set out in Clause 17.7 have not been taken by the Purchaser within twenty (20) Business Days of the relevant, claim, then:
- 17.8.1 the Purchaser shall be entitled to terminate the Agreement with immediate effect by way of a written notice served on the Contractor referencing this Clause 17.8; and
  - 17.8.2 the Contractor shall be liable for the value of a replacement for the Managed Service and the Services or part thereof together with additional costs incurred in implementing and maintaining such replacements.

## **18. Term and Termination**

- 18.1 This Clause 18 supplements the provisions of Clause 37 (Termination) of the main body of the Agreement and where they conflict this Clause 18 (Term and Termination) takes precedence.
- 18.2 The Purchaser may terminate the Agreement as set out in Clause 9.6 (Non Acceptance Termination Right) and/or Clause 17.8 (Purchaser Right to Terminate).

## **19. Consequences of Termination**

- 19.1 To the extent that this Clause conflicts with Clause 38 (Consequences of Termination) of the Agreement, this Clause takes precedence.
- 19.2 In the event of any termination of the Agreement by the Purchaser prior to the Fault Free for Thirty Days Date, then the Purchaser shall be entitled, without prejudice to the Parties' other rights and remedies, to a full refund of all Charges paid by the Purchaser to the Contractor in connection with the Managed Service.
- 19.3 In the event of termination of the Agreement the Contractor shall within thirty (30) Business Days of such termination reimburse to the Purchaser any Charges previously paid by the Purchaser hereunder and which relate to the period following such termination (calculated pro rata on a daily basis), plus any Value Added Tax previously paid by the Purchaser in relation thereto.
- 19.4 Following the termination or expiry of the Agreement the provisions of Clauses 2, 5, 7.2, 8, 10.2 and Clauses 14 to 23 (inclusive) shall survive and shall continue to bind the Parties together with any other provisions which, expressly or by implication, are intended to continue beyond termination of the Agreement.

## **20. Documentation**



- 20.1 The Contractor shall deliver the Documentation in accordance with the Implementation Plan or (where no date for doing so is set out in the Implementation Plan) no later than the final Acceptance Date.
- 20.2 The Contractor shall ensure that the Documentation supplied to the Purchaser under the Agreement in relation to the Managed Service (or part of the Managed Service) will comprise a complete set of operating manuals for the Managed Service (and each component of the Managed Service).
- 20.3 The Contractor shall make, and retain during the Period and for a period of two (2) years thereafter, reasonable records in relation to the Implementation Services performed by the Contractor in accordance with Good Industry Practice. The Contractor will maintain reasonable technical records (as opposed to financial records) in relation to its performance of the Services including a detailed record of the rectification of Faults. In each case Purchaser will be allowed to inspect and audit and/or take copies (at no additional cost) of those records following reasonable notice given to the Contractor.

## **21. Business continuity**

- 21.1 The Contractor will put and maintain in place a business continuity plan and related procedures which are compliant with Good Industry Practice and in any event suitable to allow it to prevent or minimise the adverse effect on its performance of the Agreement of any circumstances beyond its reasonable control and otherwise to maximise the continuity of the Services (the Contractor's "Business Continuity Arrangements").
- 21.2 The Contractor will promptly implement its Business Continuity Arrangements in accordance with their terms, and to this end will ensure that all members of the Contractor's staff are at all times aware of and understand its Business Continuity Arrangements and their role in implementing them.
- 21.3 Upon request by the Purchaser the Contractor will provide Purchaser with a copy of any or all of its then current Business Continuity Arrangements, together with any such additional information as Purchaser requests to assist it in understanding the Contractor's Business Continuity Arrangements and/or assessing their compliance with this Clause.
- 21.4 The Contractor will carry out a full test implementation of its Business Continuity Arrangements at least once every twelve (12) months (each a "Test Implementation"). The Contractor will inform Purchaser in writing of the planned date or dates for each Test Implementation and will provide Purchaser with a written report on each Test Implementation within thirty (30) days of the date on which it was completed.

## **22. Purchaser right to appoint a Vendor Manager**

- 22.1 In addition to the rights of the Purchaser under Clause 35 (Assignment and Sub-contracting) of the Agreement, the Purchaser shall be entitled, upon notice in writing to the Contractor, to appoint a third party to act as Purchaser's Vendor Manager (the "Vendor Manager") in respect of the receipt and management of, and exercise of the Purchaser's rights in connection with, the Services.

- 22.2 Where Purchaser appoints a Vendor Manager, the following provisions shall apply:
- 22.2.1 subject to Clause 23.2(b), the Contractor shall observe, and shall procure that its employees, contractors and representatives observe, all reasonable instructions of the Vendor Manager given in accordance with the Agreement; and
  - 22.2.2 the Vendor Manager shall have no Purchaser to terminate the Agreement, make any claim for payment (under indemnity or otherwise), raise any claim, suit or action against the Contractor, instruct a change to the Agreement under Clause 44 (Amendments) of the Call of Terms and Conditions, amend the Agreement, nor to relieve the Contractor or any of its obligations under the Agreement.

### **23. Exit Assistance**

- 23.1 The Parties shall use all reasonable endeavours to agree a draft exit plan for the activities necessary to facilitate the orderly transfer of the Managed Service to the Purchaser or a New Contractor. Unless and until the Parties agree a final version, the remaining provisions of this Clause 24 will serve as the exit plan. On the serving of any notice of termination of the Agreement or, if earlier, on its termination, the Supplier shall comply with the exit plan for the period of up to 12 months as nominated by the Purchaser.
- 23.2 The objectives of the exit services to be provided by the Contractor are:
- 23.2.1 to maintain continuity of supply and minimise any disruption to the Purchaser's operations; and
  - 23.2.2 to enable a smooth transfer of responsibility for the ongoing provision of the Managed Service from the Contractor to the Purchaser or to a New Contractor.
  - 23.2.3 The Contractor must perform all exit services in a manner that is consistent with and calculated to achieve these objectives.
- 23.3 The Contractor must provide the Purchaser and the New Contractor with all information reasonably required to assume responsibility for the ongoing provision of the Managed Service, including:
- 23.3.1 details of all tools, equipment, software and other materials used by the Contractor to provide the Managed Service;
  - 23.3.2 up-to-date and complete records of all Services provided by the Contractor;
  - 23.3.3 full details of all outstanding, incomplete or ongoing Services; and
  - 23.3.4 a copy of all Purchaser Data in the Contractor's possession or control.

- 23.4 All information to be provided by the Contractor as part of the exit services will be supplied in a format and at a time specified by the Purchaser. If the Purchaser does not specify a format, the information must be supplied in a common non-proprietary format.
- 23.5 The Contractor will make available appropriate personnel to:
- 23.5.1 attend handover meetings with the Purchaser and/or the New Contractor (as applicable);
  - 23.5.2 answer all reasonable questions from the Purchaser and/or the New Contractor about the provision of the Managed Service; and
  - 23.5.3 explain any documentation and other materials provided by the Contractor in connection with the exit process.
- 23.6 Notwithstanding the foregoing, the Contractor shall not be required, as part of any exit plan, to provide any Confidential information or make available any of its Intellectual Property Rights to any New Contractor which is a direct competitor of the Contractor.
- 23.7 The Contractor will provide all reasonable assistance requested by the Purchaser for the purposes of migrating the Purchaser Data from the Contractor's systems onto the systems of the Purchaser or the New Contractor (as applicable). Any migration may be carried out in stages in accordance with a project plan and timetable specified by the Purchaser.
- 23.8 The Contractor shall be entitled to charge for the reasonable and demonstrable costs of any assistance provided pursuant to this Clause 24 which cannot be fulfilled within the resources allocated to the Managed Service as an Additional Service Request in accordance with Clause 14.

## SCHEDULE 8

### [CYBER SECURITY]

#### 1. Application

This Schedule 8 only applies when the Agreement involves the provision of information and communication technology goods and services.

#### 2. Additional Definitions

References to Clauses in this Schedule are to clauses of this Schedule unless identified as comprised within the Agreement. Words that are capitalised in this Schedule 8 shall have the meaning set out in Schedule 1 of the Agreement or, if no such meaning is set out, as set out below:

**“Cyber Implementation Plan”** means the cyber implementation plan set out in Section B (Cyber Implementation Plan) of the Annex to this Schedule 8;

**“Cyber Security Incident”** means any thing, event, act or omission which gives, or may give, rise to:

- (i) unauthorised access to any information system, data or electronic communications network (including breach of an applicable security policy);
- (ii) reduced integrity of an information system, data or electronic communications network;
- (iii) unauthorised use of any information system or electronic communications network for the processing (including storing) of data;
- (iv) disruption or change of the operation (including takeover of control, malicious disruption and/or denial of service) of an information system or electronic communications network;
- (v) unauthorised changes to firmware, software or hardware;
- (vi) unauthorised destruction, damage, deletion or alteration of data residing in an information system or electronic communications network;
- (vii) removal or limiting the availability of, or possibility to use, data residing in an information system or electronic communications network;
- (viii) the appropriation, publication, dissemination or any other use of data by persons unauthorised to do so; or
- (ix) a breach of the Computer Misuse Act 1990, the Network and Information Systems Regulations 2018, the GDPR or the Data Protection Act 2018, the Privacy and Electronic Communications (EC Directive) Regulations 2003, the Communications Act 2003, the Official Secrets Act 1911 to 1989, or any other applicable legal requirements in connection with cybersecurity and/or privacy

in connection with the Goods, Services, and/or the Agreement;

**“Cyber Security Requirements”** means the Purchaser’s requirements in connection with cyber security as set out in Section A of the Annex to this Schedule 8 (Cyber Security Requirements) and Section B (Cyber Implementation Plan) of the Annex to this Schedule 8, and Schedule 3 - the Specification.

### **3. CONTRACTOR'S WARRANTY**

- 3.1 The Contractor warrants and undertakes that it shall meet and comply with the Cyber Security Requirements in connection with the provision of the Goods, Services, and the Agreement (including in respect of any certification or accreditation).

### **4. CONTRACTOR'S OBLIGATIONS**

- 4.1. The Contractor shall implement and maintain all security measures as may be required under applicable laws (including the Network and Information Systems Regulations 2018):

- 4.1.1 to enable it to discharge its obligations under this Schedule 8; and
- 4.1.2 to ensure there are no Cyber Security Incidents

in all cases to the Purchaser's reasonable satisfaction and in accordance with Good Industry Practice.

- 4.2. The Contractor shall notify the Purchaser promptly of any changes in its ability to meet the Cyber Security Requirements, including any changes to certifications and accreditations.
- 4.3. The Contractor shall assist the Purchaser to comply with any applicable cyber security requirements, codes, policies and practices in connection with the Goods, Services and/or the Agreement.
- 4.4. The Contractor shall notify the Purchaser of any breach of this Schedule 8 immediately on becoming aware of it.

### **5. CYBER SECURITY INCIDENTS**

- 5.1. The Contractor shall notify the Purchaser immediately as soon as it knows or believes that a Cyber Security Incident has or may have taken place and shall provide full details of the incident and any mitigation measures already taken and intended to be taken by it and (where applicable) any mitigation measures recommended by it to be taken by the Purchaser. Where such initial notification is not in writing, then the Contractor shall provide the Purchaser with a written notification setting out the details required under this paragraph 5.1 promptly and in any case within twelve (12) hours from the initial notification.
- 5.2. Following a Cyber Security Incident, the Contractor shall:
- (a) use its best endeavours to mitigate the impact of the Cyber Security Incident;

- (b) investigate the Cyber Security Incident completely and promptly, and shall keep the Purchaser fully informed of the progress and findings of its investigation;
  - (c) where required to do so, inform any applicable regulator of the Cyber Security Incident; and
  - (d) take any action deemed necessary by the Purchaser in the circumstances, including complying with any additional security measures deemed appropriate by the Purchaser.
- 5.3. The Contractor shall perform its obligations under this paragraph 5 at no additional charge to the Purchaser, unless it can show that the Cyber Security Incident was caused solely by an act or omission of the Purchaser.

## **6. INFORMATION AND AUDIT**

- 6.1. Promptly upon request, the Contractor shall provide to the Purchaser such information and records in connection with the Contractor's obligations under this Schedule 8 as the Purchaser may request.
- 6.2. The Contractor agrees (and procures that its sub-contractors agree) that the Purchaser, its agents and its representatives may conduct such audits as are considered necessary by the Purchaser acting reasonably, including for the following purposes:
- (a) to ascertain the impact of any Cyber Security Incident;
  - (b) to review and verify the integrity, confidentiality and security of any data relating to the Agreement; or
  - (c) to review the Contractor's and/or any sub-contractor's compliance with its obligations under this Schedule 8.
- 6.3. The Contractor shall (and shall ensure that any sub-contractor shall) provide the Purchaser, its agents and representatives with all reasonable co-operation and assistance in relation to audits, including:
- (a) all data and/or records requested by the Purchaser;
  - (b) access to any relevant premises and to any equipment owned/controlled by the Contractor, any associated or group company and any sub-contractor

and, where such premises and/or equipment are outwith the control of the Contractor, shall secure sufficient rights of access for the Purchaser, its agents and representatives as are necessary to allow audits to take place; and

- (c) access to any relevant individuals.
- 6.4. The Purchaser shall use its reasonable endeavours to:
- (a) provide at least 10 days' notice of its intention to conduct an audit (but is not obliged to do so); and
  - (b) ensure that the conduct of each audit does not unreasonably disrupt the Contractor and/or sub-contractor or delay the performance of the Agreement.
- 6.5. The Parties shall bear their own respective costs and expenses incurred in respect of compliance with their obligations under this paragraph 6 unless an audit identifies a breach of the terms of this Schedule 8 by the Contractor and/or sub-contractor, in which case the Contractor shall reimburse the Purchaser on demand for all the Purchaser's reasonable costs and expenses incurred in conducting the audit.

## **7. BREACH OF CYBER SECURITY REQUIREMENTS**

- 7.1. A breach of this Schedule 8 by the Contractor is a material Default for the purposes of clause 37 of the Agreement.
- 7.2. If the Contractor fails to comply with the provisions of this Schedule 8, the Purchaser may take any action it considers appropriate or necessary (and the Contractor shall comply with the Purchaser's requests in this respect), including:
- (a) suspending the whole or any part of the Contractor's obligations under the Agreement;
  - (b) requiring that specific sub-contractors connected with such breach be removed from their involvement with the Goods, Services and the Agreement and cease to have any access to the Purchaser's Confidential Information and any Personal Data Processed in connection with the Goods and/or Services under the Agreement;
  - (c) requesting the Contractor return and/or arrange the evidenced secure and permanent destruction of the Purchaser's Confidential Information and any Personal Data Processed in connection with the Goods and/or Services under the Agreement; and

- (d) implementing additional or alternative measures, both technical and organisational, to protect and secure the Purchaser's Confidential Information and any Personal Data Processed in connection with the Goods and/or Services under the Agreement.



## **[ANNEX TO SCHEDULE 8] CYBER SECURITY REQUIREMENTS**

The cyber security requirements applicable to the Agreement are set out in this Annex to Schedule 8. Section A (Cyber Security Requirements) includes the Purchaser’s requirements in connection with cyber security and Section B (Cyber Implementation Plan sets out further details on how the Contractor will meet such requirements.

**Guidance notes:** The Purchaser should retain the reference to Section B above if:

- the Scottish Cyber Assessment Service (SCAS) tool has been used in connection with the Agreement; and
- the Contractor and the Purchaser have agreed a Cyber Implementation Plan in conjunction with the SAQ report generated by the SCAS tool.

### **Section A: Cyber Security Requirements**

#### **Overview of requirements:**

<b>[Cyber risk profile</b>	<ul style="list-style-type: none"> <li>• [Low]</li> </ul>
<b>[Additional questions for management of specific cyber risks covering:]</b>	<ul style="list-style-type: none"> <li>• [Cloud security]</li> <li>• [Personal data security]</li> <li>• [Governance]</li> <li>• [Etc.]</li> </ul>
<b>[Certification requested for assurance purposes]</b>	<ul style="list-style-type: none"> <li>• [Cyber Essentials or equivalent]</li> <li>• [Cyber Essentials Plus or equivalent]</li> <li>• [IASME Gold or equivalent]</li> <li>• [ISO27001 or equivalent]</li> </ul>
<b>[Supporting evidence required]</b>	<ul style="list-style-type: none"> <li>• [Insert details of any supporting evidence required]</li> </ul>
<b>[Purchaser’s risk management approach]</b>	<ul style="list-style-type: none"> <li>• [Strict pass/fail]</li> <li>• [Cyber Implementation Plans accepted]</li> </ul>

**Guidance notes:** If the SCAS tool is used, insert information in the above table that summarises the Purchaser’s cyber security requirements. Cyber security requirements set out in this Annex should not deviate from the requirements set out in any part of the tender documentation. An example is provided above. The Purchaser should check and amend fields and entries to fit its Agreement.

#### **The Contractor shall meet the following requirements:**

**Guidance notes:** If the SCAS tool is used, the Purchaser’s requirements from SCAS require to be incorporated into the Agreement. Two options to achieve this include the following:

- OPTION 1: Either cut and paste or append the full “SAQ Responses” section of the Contractor’s SAQ Report, which sets out all questions asked of bidding suppliers in the SCAS SAQ (i.e. the Purchaser’s requirements), and the Contractor’s responses. Please also include details of subsequent clarifications with the Contractor, if applicable.
- OPTION 2: provide the following information (as set out in the table below) from the SCAS tool.

The Purchaser should choose the option appropriate to the Agreement, Option 1 being preferable from the point of view of clarity. In case of Option 2, the Purchaser should retain records of its requirements and the Contractor’s responses. [The Purchaser should also retain all metadata / other information (such as e-mail alerts) generated by SCAS relating to completion of SAQs by it and the relevant Contractor.]

<p><b>The cyber security requirements for the Agreement, and the Contractor’s responses, are set out in the Scottish Cyber Assessment Service under the following reference number:</b></p>	<ul style="list-style-type: none"> <li>• [Insert reference number for agreement]</li> </ul>
<p><b>Time that the Contractor submitted its responses to the above cyber security requirements via SCAS:</b></p>	<ul style="list-style-type: none"> <li>• [Insert the time and date at which the Contractor submitted its response to the SAQ via SCAS]</li> </ul>
<p><b>Details of any subsequent clarifications:</b></p>	<ul style="list-style-type: none"> <li>• [Insert details of any subsequent clarifications]</li> </ul>

**Guidance notes:** If SCAS is NOT used, the Purchaser should insert applicable cyber security requirements here. This may include extracting / making reference to relevant parts of the Specification/Statement of Requirements. Cyber security requirements set out in this

Annex should not deviate from the requirements set out in any part of the tender documentation.

### **[Section B: Cyber Implementation Plan**

**Guidance notes:** If SCAS is being used, and a Cyber Implementation Plan has been submitted by the Contractor and agreed by the Purchaser, the Purchaser should include this section B and the text below (if not, this section B may be deleted). Ensure that the date or contract phase is amended to align with the requirements communicated in the Tender's Specification/Statement of Requirements and the SCAS tool.

The Purchaser should insert below the frequency of review of the Cyber Implementation Plan with the Contractor. This should match any frequency indicated in the tender documentation.

The Contractor shall follow the agreed Cyber Implementation Plan to meet the requirements of Section A by no later than the date(s) set out in the Cyber Implementation Plan. The Parties shall review the Contractor's progress on the Cyber Implementation Plan regularly every [4 weeks].] If the Contractor fails to meet the commitments set out in the Cyber Implementation Plan, this shall be considered to be a material Default of the Agreement for the purposes of paragraph 7.1 (Breach of Cyber Security Requirements) of this Schedule 8.

**Guidance notes:** Insert or append the agreed Cyber Implementation Plan below.

## **ANNEX C – CYBER IMPLEMENTATION PLAN – TEMPLATE AND EXAMPLE**

1. A template Cyber Implementation Plan, and an example of a completed Cyber Implementation Plan, are available on the following pages.

CYBER IMPLEMENTATION PLAN – TEMPLATE FORM

CYBER IMPLEMENTATION PLAN	
AGREEMENT DETAILS	
1. Agreement title	
2. Agreement number	
3. Unique SCAS Cyber Risk Assessment Reference number	
4. SCAS Cyber Risk Profile	

5. Name of supplier, and details of authorised officer completing this CIP				
<b>PROPOSED APPROACH TO AREAS WHERE MINIMUM BENCHMARK REQUIREMENTS ARE NOT CURRENTLY MET</b>				
<b>6. Using the feedback from the SCAS SAQ Report, please provide:</b>				
<p><b>(i) details of areas where your organisation does <u>not</u> currently meet the benchmark minimum requirements for the Agreement; and</b></p>				
<p><b>(ii) for each such area identified, details of the actions you intend to take to achieve the minimum benchmark requirements, OR the alternative mitigations or controls you have in place, OR your reasoning as to why compliance with the minimum benchmark requirements is not necessary for the Agreement.</b></p>				
<b>Details of minimum benchmark requirements not currently met</b>	<b>Contractor’s alternative mitigations (effective from contract commencement)</b>	<b>Contractor’s reasoning as to why compliance is unnecessary for the Agreement.</b>	<b>Contractor’s proposed further action (to be implemented during the contract)</b>	<b>By which date(s) do you undertake to have implemented such further action?</b>
<p><i>Please refer to the feedback in your SCAS SAQ Report in order to complete this section.</i></p>				

<i>[Insert details here]</i>				
<i>[Delete this row if not required]</i>				
<i>[Delete this row if not required]</i>				
<i>[Delete this row if not required]</i>				
<b>Purchaser Authorisation</b>				
<b>[For Suthority only]</b>				
<b>In your assessment, does the information provided by the supplier provide sufficient assurance that</b>				

<b>the cyber risks associated with the Agreement will be appropriately mitigated?</b>	
<b>Does the Purchaser accept any cyber risks associated with appointment of the supplier if successful?</b>	
<b>Have you recorded your decision on acceptance of this CIP and any associated risks on SCAS?</b>	
<b>Name, Position and Date</b>	

**[CYBER IMPLEMENTATION PLAN – EXAMPLE OF COMPLETED TEMPLATE]**

**Drafting note:** This is example is for the Purchaser's reference only and should be deleted.

**CYBER IMPLEMENTATION PLAN**



**CONTRACT DETAILS**

<b>1. Agreement title</b>	Cyber Awareness Campaign Materials
<b>2. Agreement number</b>	SG12345
<b>3. Unique SCAS Cyber Risk Assessment Reference number</b>	SCAS RA54321
<b>4. SCAS Cyber Risk Profile</b>	Low
<b>5. Name of supplier, and details of authorised officer completing this CIP</b>	<u>Organisation</u> ACME Cyber Wow Impact Campaigns

**Authorised officer name, position and contact details**

Name: J Smith

Position: Head of Information Technology

Tel: 0131 XXX XXXX

Email: jsmith@acmecyberwowimpactcampaigns547

**PROPOSED APPROACH TO AREAS WHERE MINIMUM BENCHMARK REQUIREMENTS ARE NOT CURRENTLY MET**

**6. Using the feedback from the SCAS SAQ Report, please provide:**

**(i) details of areas where your organisation does not currently meet the benchmark minimum requirements for the Agreement; and**

**(ii) for each such area identified, details of the actions you intend to take to achieve the minimum benchmark requirements, OR the alternative mitigations or controls you have in place, OR your reasoning as to why compliance with the minimum benchmark requirements is not necessary for the Agreement.**

<p><b>Details of minimum benchmark requirements not currently met</b></p> <p><i>Please refer to the feedback in your SCAS SAQ Report in order to complete this section.</i></p>	<p><b>Contractor’s alternative mitigations (effective from contract commencement)</b></p>	<p><b>Contractor’s reasoning as to why compliance is unnecessary for the Agreement.</b></p>	<p><b>Contractor’s proposed further action (to be implemented during the contract)</b></p>	<p><b>By which date(s) do you undertake to have implemented such further action?</b></p>
<p>Cyber Essentials Certification has been requested by the contracting Purchaser but is not currently held.</p>	<p>Acme Cyber Wow Impact Campaigns enforces the controls required under Cyber Essentials through compliance with ISO27001 and the firm’s governance of Cyber Risk Management. Details of our approach are set out here:</p> <p><b>1. Boundary firewalls and internet gateways:</b> The relevant ISO27001 controls are as follows:</p> <ul style="list-style-type: none"> <li>• <b>Network controls:</b> Networks shall be adequately managed and controlled, in order to be protected from threats, and to maintain security for the systems and applications using the network, including information in transit.</li> <li>• <b>Security of network services:</b> Control Security features, service levels, and management requirements of all network services shall be identified and included in any network services agreement, whether these services are provided in-house or outsourced.</li> </ul> <p><b>Comment:</b> The network upon which Scottish Public Services Information will be processed has boundary firewalls and Internet gateways which are managed by a third party. Regular audits check the state of these devices and an annual penetration test informs the vulnerability management process. Our third party supplier is responsible for software and hardware updates and these are routinely</p>	<p>N/a</p>	<p>N/a</p>	<p>While we believe the controls we have set out above mean that we currently effectively meet the requirements of the Cyber Essentials standard, to demonstrate our commitment to meeting the requirements of the Scottish public sector we intend to achieve Cyber Essentials certification by the end of the financial year.</p>

	<p>reviewed at the IT Security Working Group reporting up to the Executive Committee via the Head of IT.</p> <p><b>2. Secure configuration:</b> The relevant ISO27001 controls are as follows:</p> <p><b>Network access control - Objective:</b> To prevent unauthorized access to networked services.</p> <ul style="list-style-type: none"><li>• <b>User authentication for external connections:</b> Appropriate authentication methods shall be used to control access by remote users.</li><li>• <b>Equipment identification in networks:</b> Automatic equipment identification shall be considered as a means to authenticate connections from specific locations and equipment.</li><li>• <b>Remote diagnostic and configuration port protection:</b> Physical and logical access to diagnostic and configuration ports shall be controlled.</li><li>• <b>Segregation in networks:</b> Groups of information services, users, and information systems shall be segregated on networks.</li><li>• <b>Network connection control:</b> For shared networks, especially those extending across the organization’s boundaries, the capability of users to connect to the network shall be restricted, in line with the access control policy and requirements of the business applications.</li><li>• <b>Network routing control:</b> Routing controls shall be implemented for networks to ensure that computer connections and information flows do not breach the access control policy of the business applications.</li><li>• <b>Change control procedures:</b> The implementation of changes shall be controlled by the use of formal change control procedures.</li></ul> <p><b>Comment:</b> The network upon which Scottish Public Services Information will be processed is configured in such a way as to ensure easy management and oversight. The relevant controls from ISO27001 are shown above, and these are included in the Information Security Management System which mandates routine checks of use of the network and boundary configuration. A Network Manager is employed within the IT department to ensure these controls are enforced. Furthermore,</p>			
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	<p>changes to the network are scheduled through the Change Advisory Board which has a security representative as a standing member.</p> <p><b>3. Access control:</b> The relevant ISO27001 controls are as follows:</p> <ul style="list-style-type: none"><li>• <b>Segregation of duties:</b> Duties and areas of responsibility shall be segregated to reduce opportunities for unauthorized or unintentional modification or misuse of the organisation's assets.</li><li>• <b>User access management:</b> To ensure authorised user access and to prevent unauthorised access to information systems.</li><li>• <b>User registration:</b> There shall be a formal user registration and deregistration procedure in place for granting and revoking access to all information systems and services.</li><li>• <b>Privilege management:</b> The allocation and use of privileges shall be restricted and controlled.</li><li>• <b>Review of user access rights:</b> Management shall review users' access rights at regular intervals using a formal process.</li></ul> <p><b>Network access control: Objective:</b> To prevent unauthorized access to networked services.</p> <ul style="list-style-type: none"><li>• <b>Policy on use of network services:</b> Users shall only be provided with access to the services that they have been specifically authorized to use.</li></ul> <p><b>Monitoring: Objective:</b> To detect unauthorised information processing activities.</p> <ul style="list-style-type: none"><li>• <b>Audit logging:</b> Audit logs recording user activities, exceptions, and information security events shall be produced and kept for an agreed period to assist in future investigations and access control monitoring.</li></ul>			
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	<ul style="list-style-type: none"><li>• <b>Monitoring system use:</b> Procedures for monitoring use of information processing facilities shall be established and the results of the monitoring activities reviewed regularly.</li></ul> <p><b>Comment:</b> The network upon which Scottish Public Services Information will be processed is configured in such a way as to ensure appropriate access permissions. The relevant controls from ISO27001 are shown above, and these are included in the Information Security Management System. The HR team also informs IT Admin of new joiners, those who have left and any changes in role which may affect user access.</p> <p><b>4. Malware protection:</b> The relevant ISO27001 controls are as follows:</p> <p><b>Protection against malicious and mobile code – objective:</b> To protect the integrity of software and information.</p> <ul style="list-style-type: none"><li>• <b>Controls against malicious code:</b> Detection, prevention, and recovery controls to protect against malicious code and appropriate user awareness procedures shall be implemented.</li></ul> <p><b>Security of system files – objective:</b> To ensure the security of system files.</p> <ul style="list-style-type: none"><li>• <b>Control of operational software:</b> There shall be procedures in place to control the installation of software on operational systems.</li></ul> <p><b>Comment:</b> The network upon which Scottish Public Services Information will be processed is managed in such a way as to ensure appropriate updates are installed in a reasonable timeframe. The relevant controls from ISO27001 are shown above, and these are included in the Information Security Management System. In</p>			
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	<p>addition, Cyber Wow Impact Campaigns uses a third party, PhishThem, to conduct quarterly Phishing tests, the results of which are reported to the Executive Committee. This is evidence of our commitment to ongoing education and employee awareness of developing threats.</p> <p><b>5. Patch management:</b></p> <p><b>Comment:</b> The network upon which Scottish Public Services Information will be processed is managed in such a way as to ensure appropriate updates are installed in a reasonable timeframe. A software tool is employed by the IT Department to routinely scan the applications in use and to report on outdated and malicious software. An application inventory is held by the IT Department. Patch Management is a standing agenda item on the Change Advisory Board.</p>			
<p><b>Purchaser Authorisation</b></p>				
<p><b>[For Purchaser only]</b></p> <p><b>In your assessment, does the information provided by the supplier provide sufficient assurance that the cyber risks associated with the Agreement will be appropriately mitigated?</b></p>	<p>Yes.</p>			

<b>Does the Purchaser accept any cyber risks associated with appointment of the supplier if successful?</b>	Yes.
<b>Have you recorded your decision on acceptance of this CIP and any associated risks on SCAS?</b>	Yes.
<b>Name, Position and Date</b>	J Bloggs, Senior Information Risk Adviser, Scottish Public Purchaser  23/12/2018



## [SCHEDULE 9]

### E-BOOK LICENCE

#### 1. Application

- 1.1 This Schedule 9 applies only when the Contractor owns or is otherwise entitled to licence to third parties the Intellectual Property Rights in the Works (as defined below), and the Purchaser wishes to obtain a licence to certain of the Works.

#### 2. Additional Definitions

- 2.1 References to Clauses contained herein are to clauses of this Schedule 9 unless otherwise specified. Words that are capitalised in this Schedule 9 shall have the meaning set out in Schedule 1 of the Agreement or, if no such meaning is set out, as set out below:

**Archiving Host** means a third party host contracted by, or on behalf of, the Purchaser to provide access to the Purchased Works in the event that the Agreement has terminated or expired, or the Contractor has withdrawn any Works from the Platform and the Contractor is no longer able or willing to provide such access.

**Authorised User** means an individual who at the time of their use of the Purchased Works is authorised by the Purchaser to access the Secure Network via Secure Authentication whether on-site or off-site and who is affiliated to the Purchaser as a current student (whether undergraduate or postgraduate), member of staff (whether on a permanent or temporary basis), or contractor of the Purchaser. A Walk-In User is also deemed to be an Authorised User but only for the time such Walk-In User is within the premises of the Purchaser.

**Commencement Date** means XXX.

**Commercial Use** means use of the Purchased Works by or on behalf of the Purchaser or an Authorised User primarily for the purpose of monetary reward by means of the sale, resale, loan, transfer, hire or other form of exploitation of the Works other than in the course of an Educational Purpose. For the avoidance of doubt, neither (i) the recovery of the Charges (or other costs) by the Purchaser from Authorised Users; nor (ii) the use by the Purchaser or Authorised Users of the Purchased Works for Educational Purposes where they are funded by a commercial organisation are deemed to constitute Commercial Use.

**Educational Purposes** means education, teaching, tuition, instruction, learning (including distance learning), private study and/or research.

<b>Licence</b>	means the licence to use the Purchased Works contained in Clause 4.1.
<b>Platform</b>	means the web based service operated by the Contractor for the delivery of the Purchased Works via a Secure Network.
<b>Permitted Use</b>	means any use described in Clause 5.
<b>Purchase</b>	means the purchase or rent by the Purchaser of a Licence to use a Work whether on a time-limited (" <b>Lease</b> ") or perpetual (" <b>Perpetual</b> ") basis as set out in the relevant Order Form and/or Specification.
<b>Purchased Works</b>	means Works that are Purchased by the Purchaser.
<b>Secure Authentication</b>	means access to the Purchased Works by OpenAthens authentication or Shibboleth technology based authentication, Internet Protocol (" <b>IP</b> ") ranges or by another means of authentication permitted under the Specification, the Order Form or as otherwise agreed in writing between the Contractor and Purchaser from time to time
<b>Secure Network</b>	means a network which is only accessible by Secure Authentication.
<b>Subscription Period</b>	means (i) for a Lease, the duration of the Lease as specified in [insert location of duration of licence e.g. Order Form/Specification etc.]; and (ii) for a Perpetual Purchase, in perpetuity from the Commencement Date.
<b>Walk-In User</b>	means a person who is not a current student, member of staff or contractor of the Purchaser, but who Purchaser permits to access the Secure Network within the physical premises of the Purchaser.
<b>Works</b>	means those works, as detailed and searchable on the Platform [and as set out in the Order Form and/or Specification], that the Purchaser can Purchase pursuant to the Agreement.

### **3. Agreement**

- 3.1 The Purchaser acknowledges that the Intellectual Property Rights in the Purchased Works are the sole and exclusive property of the Contractor or are duly licensed to the Contractor and that this Schedule 9 does not assign or transfer to the Purchaser any right, title or interest therein except for the rights to access and use the Purchased Works expressly set out in this Schedule 9.
- 3.2 The rights granted to the Purchaser under this Schedule 9 are without prejudice to the rights of the Purchaser and Authorised Users under the Copyright, Designs and Patents Act 1988 and the Copyright (Visually Impaired Persons) Act 2002 (or any similar or related legislation).

- 3.3 The Purchaser will supply Contractor with an initial list of its IP addresses used for the access to the Purchased Works prior to the Commencement Date, and shall notify Contractor of any IP address changes.

#### **4. Licence**

- 4.1 In respect of the Purchased Works, the Contractor hereby grants to the Purchaser:

4.1.1 a non-exclusive, non-transferable world-wide license for the Subscription Period to:

4.1.1.1 access and use the Purchased Works for any Permitted Use; and

4.1.1.2 permit Authorised Users to access and use the Purchased Works for any Permitted Use

via the Platform and Secure Network.

#### **5. Permitted Uses**

- 5.1 Subject to Clause 6, any of the following shall constitute a Permitted Use provided it is carried out in the context of an Educational Purpose:

5.1.1 accessing the Purchased Works via the Secure Network in order to search, retrieve, display, view, download, digitally copy, and/or otherwise use reasonable portions thereof;

5.1.2 electronically saving the Purchased Works;

5.1.3 printing out the Purchased Works;

5.1.4 displaying, downloading and printing parts of the Purchased Works for the purpose of promotion of the Purchased Works, testing of the Purchased Works, or for training Authorised Users;

5.1.5 publicly displaying or publicly performing the Purchased Works as part of a presentation at a seminar, conference, or workshop, or other such similar activity;

5.1.6 making such copies of training material and sharing such training material as may be required for the purpose of using the Purchased Works in accordance with this Schedule [9](#);

5.1.7 using or incorporating the Purchased Works in the preparation of course packs or other educational materials used or created by the Purchaser, including where required, exportation of Purchased Works to a third party software system to enable this;

5.1.8 downloading and storing Works Purchased on a Perpetual basis for access at future times; and

5.1.9 making such local digital copies of the Purchased Works as are necessary to ensure efficient use by Authorised Users by appropriate browser or other software.

- 5.2 To the extent that the Purchased Works are a database, compilation, or collection of information, it shall be a Permitted Use to extract or use information contained in such database for any Educational Purposes, including extraction and manipulation of information for the purpose of illustration, explanation, example, comment, criticism, teaching, research or analysis.

## **6. Restrictions**

- 6.1 The Licence shall not extend to any right to:

- 6.1.1 use any of the Purchased Works for any Commercial Use or for any purpose other than Educational Purposes, unless otherwise agreed in writing by the Contractor;
- 6.1.2 remove, obscure or modify copyright notices, text acknowledgment or other means of identification or disclaimers as they appear on the Purchased Works;
- 6.1.3 alter, adapt or modify the Purchased Works except to the extent that the Purchaser considers it reasonably necessary to allow any Authorised Users with disabilities to access or use the Purchased Works;
- 6.1.4 display or distribute any part of the Purchased Works on any electronic network, including without limitation the Internet and the World Wide Web, and any other distribution medium now in existence or hereinafter created, other than by a Secure Network;
- 6.1.5 systematically make print or electronic copies of multiple extracts of the Purchased Works for any purpose other than Educational Purposes or as explicitly permitted under this Schedule [9](#); or
- 6.1.6 publish, distribute, or make available any of the Purchased Works or works which combine the Purchased Works with any other material, other than for Educational Purposes or as permitted under this Schedule [9](#).

## **7. Contractor's Responsibilities**

- 7.1 With effect from the Commencement Date, the Contractor undertakes to:

- 7.1.1 host, manage and provide the Purchased Works in accordance with the requirements laid down in the Agreement;
- 7.1.2 host, manage and provide the Purchased Works in accordance with the Web Content Accessibility Guidelines (WCAG) 2.1 Standards;
- 7.1.3 ensure that the Purchaser is able to access and use the Purchased Works to in accordance with this Schedule [9](#);
- 7.1.4 make the purchased Works available to the Purchaser and Authorised Users through the Platform at all times (24 hours a day, 365 days a year), save for a maximum down-time of 1% in any one month which shall include routine maintenance time; and
- 7.1.5 make the Purchased Works available to the Purchaser and Authorised Users through the Platform at all times (24 hours a day, 365 days a year), save for

a maximum down-time of 1% of the total number of minutes in any one month which shall exclude routine maintenance time. If the down-time exceeds 1% in any month Purchaser shall, without prejudice to the Purchaser's other rights and remedies, be entitled to a pro-rata credit of any Charges paid in advance in connection with the affected Purchased Works. Contractor will credit Purchaser with an amount calculated as follows:

$$\frac{\text{[Annual License Fee for affected Product]} \times \text{[Number of full days of down-time exceeding the 1\% divided by 365]}}{}$$

If the down-time exceeds 10% in any month, this shall be deemed a material Default of the Agreement.

If the down-time exceeds 10% in any month Purchaser shall, without prejudice to the Purchaser's other rights and remedies, be entitled to a full refund of any Charges paid in advance in connection with the affected Purchased Works.

All of Contractor's obligations and Licensee's rights under this Clause 7.1.4 are subject to (i) Purchaser's full compliance with this Schedule 9 and Contractor's reasonable instructions regarding access to the Purchased Works, (ii) Purchaser promptly notifying the Contractor of a loss of access or interruption, specifying the circumstances in reasonable detail, including affected Purchased Works. Further, Contractor shall have no obligation under this Clause 7.1.4 for any down-time caused in whole or in part by the Purchaser or its Authorized Users acting in breach of this Schedule 9.

- 7.1.6 restore access to the Purchased Works as soon as possible in the event of an interruption or suspension of the service;
- 7.1.7 provide customer support services to the Purchaser and Authorised Users in accordance with the terms of the Agreement;
- 7.1.8 provide access to the Purchased Works by means of Secure Authentication subject to securing any necessary permissions, licenses or consents (including, without limitation, any necessary permissions, licenses or consents in respect of Intellectual Property Rights);
- 7.1.9 provide sufficient server capacity and rate of connectivity for effective access by the Purchaser and Authorised Users;
- 7.1.10 ensure that the Purchased Works and the Platform are free from viruses, worms, trojan horses, cancelbots, and other contaminants and any codes or instructions that may or will be used to access, modify, delete, corrupt, deteriorate, alter or damage any data, files or other computer programs used by the Purchaser or Authorised Users;
- 7.1.11 make available to the Purchaser and Authorised Users COUNTER-compliant usage statistics (<http://www.projectcounter.org>);
- 7.1.12 provide electronic product documentation (i.e. training or promotional materials) free of charge to the Purchaser. The Contractor will allow copies of all documentation to be made and distributed by the Purchaser to

Authorised Users provided it is either duplicated in full, or a proper ownership acknowledgment is included;

- 7.1.13 if, during the Subscription Period the Contractor makes available a new edition of a Work that has been Purchased by the Purchaser, such new edition will be deemed to be a Purchased Work and the Contractor shall immediately make such new edition available to the Purchaser in accordance with clause 4.1, while continuing to also make the previous edition available; and
  - 7.1.14 shall not, and shall not seek to, collect Personal Data in relation to any Authorised User other than is necessary for the performance of this Schedule [9](#).
- 7.2 The Contractor warrants and represents that:
- 7.2.1 the Purchased Works and all Intellectual Property Rights therein are owned by or licensed to the Contractor;
  - 7.2.2 the Contractor has the right to make the Purchased Works available for use in accordance with this Schedule [9](#); and
  - 7.2.3 use of the Purchased Works in accordance with this Agreement will not infringe any copyright or other proprietary or Intellectual Property Rights of any natural or legal person.
- 7.3 The Contractor shall not require Authorised Users to agree to any additional or supplementary terms relating to the use of the Purchased Works before permitting Authorised Users to gain access to the purchased Works (commonly referred to as a "click-through" licence). In the event Authorised Users are required to accept any click through licence prior to accessing the purchased Works, the parties agree that the terms of any such "click-through" licence will have no effect.
- 7.4 Where applicable, the Contractor shall use reasonable efforts to ensure that the Purchased Works are at least equivalent to any off-line or printed versions of the Purchased Works, and represent a complete, faithful and timely replication of the print versions of such Purchased Works. Contractor will cooperate with Purchaser to identify and correct errors or omissions as reasonably required by Purchaser.
- 7.5 Should the Contractor for any reason remove from the Platform a Work(s) Purchased by the Purchaser on a Perpetual basis, the Contractor shall ensure the relevant Purchased Work(s) continues to be available in perpetuity to the Purchaser through the Archiving Host, in accordance with any the terms of the Agreement.

## **8. Purchaser's Responsibilities**

- 8.1 The Purchaser shall:
- 8.1.1 issue passwords (or other information to enable access to the Secure Network) only to Authorised Users and use all reasonable efforts to ensure that Authorised Users do not divulge their passwords or other access information to any third party;

- 8.1.2 provide lists of valid IP addresses, Athens Licensed IDs and other relevant authenticating information to the Contractor and, if Purchaser wishes to change such details, it shall give reasonable advance notice to the Contractor;
  - 8.1.3 notify Authorised Users of the terms that apply to their use of the Purchased Works;
  - 8.1.4 use reasonable efforts to ensure that only Authorised Users are permitted access to the Purchased Works;
  - 8.1.5 use reasonable efforts to monitor compliance with the terms of this Schedule 10 and notify the Contractor immediately and provide full particulars on becoming aware of any of the following: (a) any unauthorised access to or use of the Purchased Works or unauthorised use of any of the Purchaser's password(s) in connection with the Secure Network; or (b) any breach by an Authorised User of the terms of this Agreement. Upon becoming aware of any such breach of the terms of this Agreement, the Purchaser further agrees to: (i) promptly investigate the breach; (ii) use reasonable efforts to ensure that any breaching activity ceases; and (iii) use reasonable efforts to prevent any recurrence.
- 8.2 The Purchaser undertakes that it shall only permit access to the Purchased Works by the Purchaser and Authorised Users by Secure Authentication.

## 9. Warranties and Indemnification

- 9.1 The Contractor confirms that, to the best of its knowledge, there are no inaccuracies or defects in the information contained in the Purchased Works but makes no representation and gives no warranty with regard to such information including regarding its fitness for purpose.
- 9.2 The Contractor warrants to the Purchaser that all Intellectual Property Rights in the Purchased Works are owned by or validly licenced to the Contractor, and that the Purchaser's use of the Purchased Works as envisioned by this Schedule 9 will not infringe the Intellectual Property Rights of any third person.
- 9.3 The Contractor will indemnify and keep indemnified on demand the Purchaser and the Authorised Users (the "**Indemnified Parties**") from and against any costs, claims, liabilities and expenses (including legal expenses on an indemnity basis) suffered or incurred by the Indemnified Parties as a result of or in connection with any claim (actual or alleged) that the Purchased Works or their access or use in accordance with this Agreement has breached or will breach the Intellectual Property Rights of any third party (each a "**Claim**"). This indemnity obligation will survive termination or expiry of the Agreement.
- 9.4 The indemnity contained in Clause 9.3 above shall not apply to the extent that a Claim results from:
- 9.4.1 any use of the Purchased Works by the Indemnified Parties outwith the scope of the Licence; or
  - 9.4.2 any amendment to the Purchased Works by the Indemnified Parties.

## **10. Consequences of termination**

- 10.1 On termination or expiry of the Agreement, the Contractor shall ensure that any Works Purchased by the Purchaser on a Perpetual basis continue to be made available to the Purchaser in perpetuity through the Archiving Host in accordance with the terms and conditions of the Agreement.
- 10.2 On termination or expiry of the Agreement, the IP range of the Purchaser will be excluded and the Purchaser will lose access to the Purchased Works that have not been purchased on a Perpetual basis.
- 10.3 For the avoidance of doubt, any termination of the Agreement by a Purchaser shall not affect any rights and obligations of any other Purchasers contracting under the Agreement, and any Purchaser that has terminated its Contract may enter into another Contract at a later date.