

DATED

2014

(1) SECRETARY OF STATE FOR HEALTH

and

(2) IBM UNITED KINGDOM LIMITED

AGREEMENT

relating to

THE PROVISION AND MAINTENANCE OF
AN ELECTRONIC STAFF RECORD
SYSTEM

Bundle 1 of 3

CONTENTS

SECTION A - PRELIMINARIES.....	4
1 DEFINITIONS AND INTERPRETATION	4
2 DUE DILIGENCE	5
3 WARRANTIES	6
SECTION B - THE SERVICES.....	9
4 TERM	9
5 SERVICES	10
6 TRANSITION AND OTHER PROJECTS	14
7 PERFORMANCE INDICATORS	15
8 SERVICES IMPROVEMENT	17
9 EQUIPMENT AND MAINTENANCE	18
SECTION C - PAYMENT, TAXATION AND VALUE FOR MONEY PROVISIONS	19
10 FINANCIAL AND TAXATION MATTERS	19
SECTION D - CONTRACT GOVERNANCE.....	21
11 GOVERNANCE.....	21
12 RECORDS, REPORTS, AUDITS & OPEN BOOK DATA	21
13 CHANGE	21
SECTION E - SUPPLIER PERSONNEL AND SUPPLY CHAIN	23
14 SUPPLIER PERSONNEL	23
15 SUPPLY CHAIN RIGHTS AND PROTECTIONS	26
SECTION F - INTELLECTUAL PROPERTY, DATA AND CONFIDENTIALITY	31
16 INTELLECTUAL PROPERTY RIGHTS	31
17 LICENCES GRANTED BY THE SUPPLIER	32
18 LICENCES GRANTED BY THE AUTHORITY.....	34
19 IPRs INDEMNITY	35
20 AUTHORITY DATA AND SECURITY REQUIREMENTS.....	36
21 CONFIDENTIALITY	37
22 FREEDOM OF INFORMATION	40
23 PROTECTION OF PERSONAL DATA	41
24 PUBLICITY AND BRANDING	43
SECTION G - LIABILITY, INDEMNITIES AND INSURANCE	45
25 LIMITATIONS ON LIABILITY	45
26 INSURANCE.....	48
SECTION H - REMEDIES AND RELIEF	49
27 RECTIFICATION PLAN PROCESS	49
28 DELAY PAYMENTS	50
29 REMEDIAL ADVISER.....	51
30 STEP-IN RIGHTS	53
31 AUTHORITY CAUSE.....	55
32 FORCE MAJEURE	57
SECTION J - TERMINATION AND EXIT MANAGEMENT	59
33 TERMINATION RIGHTS	59
34 CONSEQUENCES OF EXPIRY OR TERMINATION.....	60
SECTION I - MISCELLANEOUS AND GOVERNING LAW	63
35 COMPLIANCE	63
36 ASSIGNMENT AND NOVATION	64
37 WAIVER AND CUMULATIVE REMEDIES	64
38 RELATIONSHIP OF THE PARTIES	64
39 PREVENTION OF FRAUD AND BRIBERY	65
40 SEVERANCE.....	66
41 FURTHER ASSURANCES	66
42 ENTIRE AGREEMENT	66
43 THIRD PARTY RIGHTS	67
44 NOTICES	67
45 DISPUTES	69
46 GOVERNING LAW AND JURISDICTION	69

SCHEDULES

1. **Definitions**
2. **Service Requirements**
 - 2.1 Services Description
 - 2.2 Performance Levels
 - 2.3 Standards
 - 2.4 Security Management Plan
 - 2.5 Insurance Requirements
 - 2.6 Legacy Assets
3. **Authority Responsibilities**
4. **Supplier Matters**
 - 4.1 Solution
 - 4.2 Commercially Sensitive Information
 - 4.3 Notified Key Sub-contractors
 - 4.4 Authorised Sub-Contracts
5. **Software**
 - 5.1 IPRs provided by Supplier
 - 5.2 IPRs provided by Authority
 - 5.3 IPRs procured by Supplier
6. **Transition, Projects and Testing**
 - 6.1 Transition and Project Plans
 - 6.2 Testing Procedures
7. **Financial Matters**
 - 7.1 Charges and Invoicing
 - 7.2 Payments on Termination
 - 7.3 Benchmarking
 - 7.4 Financial Distress
 - 7.5 Financial Reports
 - 7.6 Anticipated Savings
8. **Governance**
 - 8.1 Governance
 - 8.2 Change Control Procedure
 - 8.3 Dispute Resolution Procedure
 - 8.4 Records Provisions and Audit Rights
 - 8.5 Exit Management
 - 8.6 Business Continuity and Disaster Recovery
 - 8.7 Conduct of Claims
9. **Employment**
 - 9.1 Staff Transfer
 - 9.2 Key Personnel

THIS AGREEMENT is made on

2014

BETWEEN:

- (1) **THE SECRETARY OF STATE FOR HEALTH** of Richmond House, 72 Whitehall, London SW1A 2NS (the "Authority") which term shall include its successors and permitted assigns; and
- (2) **IBM United Kingdom Limited** a company registered in England and Wales under company number 741598 whose registered office is at PO Box 41, North Harbour, Portsmouth, Hampshire, PO6 3AU (the "Supplier")

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

INTRODUCTION

- (A) *In December 2001, McKesson was appointed by the Authority to build ESR, a single workforce management tool for the NHS: offering a true "end to end" workforce management solution. ESR's functionality can be grouped into three main areas: HR & payroll, learning and talent management and workforce information provision.*
- (B) *The Authority now wishes to re-procure ESR on behalf of User Organisations in England and Wales. The Authority sees this re-procurement as an opportunity to improve on these aspects of ESR and push for innovation in respect of User Organisations in England and Wales and their successors.*
- (C) *On 13 December 2013 the Authority advertised in the Official Journal of the European Union (reference 2013/S 243-422933), inviting prospective suppliers to submit proposals for the re-procurement of ESR.*
- (D) *The Supplier is a leading provider of business and technology services and has experience in delivering major Oracle e-Business Suite implementations and associated transformational programmes.*
- (E) *On the basis of the Supplier's response to the advertisement and a subsequent tender process, the Authority selected the Supplier as its preferred supplier.*
- (F) *Following negotiations, the Parties have agreed to contract with each other in accordance with the terms and conditions set out below.*

IT IS AGREED as follows:

SECTION A - PRELIMINARIES**1 DEFINITIONS AND INTERPRETATION**

- 1.1 In this Agreement, unless the context otherwise requires, capitalised expressions shall have the meanings set out in Schedule 1 (*Definitions*) or the relevant Schedule in which that capitalised expression appears.
- 1.2 In this Agreement, unless the context otherwise requires:
 - (a) the singular includes the plural and vice versa. Reference to a gender includes the other gender and the neuter;
 - (b) references to a person include an individual, company, body corporate, corporation, unincorporated association, firm, partnership or other legal entity or Central Government Body;

- (c) a reference to any Law includes a reference to that Law as amended, extended, consolidated or re-enacted from time to time;
 - (d) the words “including”, “other”, “in particular”, “for example” and similar words shall not limit the generality of the preceding words and shall be construed as if they were immediately followed by the words “without limitation”;
 - (e) references to “writing” include typing, printing, lithography, photography, display on a screen, electronic and facsimile transmission and other modes of representing or reproducing words in a visible form, and expressions referring to writing shall be construed accordingly;
 - (f) the headings are for ease of reference only and shall not affect the interpretation or construction of this Agreement; and
 - (g) references to Clauses and Schedules are, unless otherwise provided, references to the clauses and schedules of this Agreement and references in any Schedule to Paragraphs, Parts and Annexes are, unless otherwise provided, references to the paragraphs, parts and annexes of the Schedule or the Part of the Schedule in which the references appear.
- 1.3 If there is any conflict between the Clauses and the Schedules and/or any Annexes to the Schedules, the conflict shall be resolved in accordance with the following order of precedence:
- (a) the Clauses and Schedule 1 (*Definitions*);
 - (b) Schedules 2.1 (*Services Description*) and 2.2 (*Performance Levels*) and their Annexes;
 - (c) any other Schedules and their Annexes (other than Schedule 4.1 (*Solution*) and its Annexes); and
 - (d) Schedule 4.1 (*Solution*) and its Annexes (if any).
- 1.4 The Schedules and their Annexes form part of this Agreement.

2 DUE DILIGENCE

- 2.1 The Supplier acknowledges that, subject to the Allowable Assumptions:
- (a) the Authority has delivered or made available to the Supplier all of the information and documents that the Supplier considers necessary or relevant for the performance of its obligations under this Agreement;
 - (b) it has made its own enquiries to satisfy itself as to the accuracy and adequacy of the Due Diligence Information;
 - (c) it has satisfied itself (whether by inspection or having raised all relevant due diligence questions with the Authority before the Effective Date) of all relevant details relating to:
 - (i) the Authority Requirements;

- (ii) the suitability of the existing and (to the extent that it is defined or reasonably foreseeable at the Effective Date) future Sites, Authority System and Legacy Assets;
- (iii) the operating processes and procedures and the working methods of the Authority;
- (iv) the ownership, functionality, capacity, condition and suitability for use in the Services of the Legacy Assets; and
- (v) the existing contracts (including any licences, support, maintenance and other agreements relating to the Sites, Authority System and Legacy Assets) referred to in the Due Diligence Information which may be novated to, assigned to or managed by the Supplier under this Agreement and/or which the Supplier will require the benefit of for the provision of the Services.

2.2 The Supplier shall not be excused from the performance of any of its obligations under this Agreement on the grounds of, nor, subject to Clause 2.3, shall the Supplier be entitled to recover any additional costs or charges, arising as a result of:

- (a) any unsuitable aspects of the Sites, Authority System and Legacy Assets;
- (b) any misinterpretation of the Authority Requirements; and/or
- (c) any failure by the Supplier to satisfy itself as to the accuracy and/or adequacy of the Due Diligence Information.

2.3 The Parties shall comply with the provisions of Paragraph 7 of Part C of Schedule 7.1 (*Charges and Invoicing*) in relation to the verification of any Allowable Assumptions.

3 WARRANTIES

3.1 Each Party represents and warrants that:

- (a) it has full capacity and authority to enter into and to perform this Agreement;
- (b) this Agreement is executed by its duly authorised representative;
- (c) there are no actions, suits or proceedings or regulatory investigations before any court or administrative body or arbitration tribunal pending or, to its knowledge, threatened against it (or, in the case of the Supplier, any of its Affiliates) that might affect its ability to perform its obligations under this Agreement; and
- (d) its obligations under this Agreement constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar Laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or law).

3.2 The Supplier represents and warrants that:

- (a) it is validly incorporated, organised and subsisting in accordance with the Laws of its place of incorporation;
- (b) it has all necessary consents and regulatory approvals to enter into this Agreement;
- (c) its execution, delivery and performance of its obligations under this Agreement will not constitute a breach of any Law or obligation applicable to it and will not cause or result in a default under any agreement by which it is bound;
- (d) as at the Effective Date, all written statements and representations in any written submissions made by the Supplier as part of the procurement process, including without limitation its response to the PQQ, PTIN and ITN (if applicable), its tender and any other documents submitted remain true and accurate except to the extent that such statements and representations have been superseded or varied by this Agreement or to the extent that the Supplier has otherwise disclosed to the Authority in writing prior to the date of this Agreement;
- (e) as at the Effective Date, it has notified the Authority in writing of any Occasions of Tax Non-Compliance and any litigation in which it is involved that is in connection with any Occasion of Tax Non-Compliance;
- (f) it has and shall continue to have all necessary rights in and to the Specially Written Software, Project Specific IPRs, Supplier Software, Third Party Software, Third Party IPRs, Supplier Background IPRs and any other materials assigned to the Authority or otherwise made available by the Supplier (and/or any Sub-contractor) to the Authority which are necessary for the performance of the Supplier's obligations under this Agreement and/or the receipt of the Services by the Authority;
- (g) the Financial Model is a true and accurate reflection of the forecast Costs and forecast Supplier Profit Margin and the Supplier does not have any other internal financial model in relation to the Services inconsistent with the Financial Model;
- (h) it is not subject to any contractual obligation, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under this Agreement; and
- (i) 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 Supplier 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 Supplier's assets or revenue.

3.3 Each of the representations and warranties set out in Clauses 3.1 and 3.2 shall be construed as a separate representation and warranty and shall not be limited or restricted by reference to, or inference from, the terms of any other representation, warranty or any other undertaking in this Agreement.

- 3.4 The representations and warranties set out in Clauses 3.1 and 3.2 (other than those in Clauses 3.2(d) and 3.2(e)) shall be deemed to be repeated on the Service Commencement Date by reference to the facts then existing. Any reference made to the Effective Date (whether express or implied) in relation to any representation or warranty (other than those in Clauses 3.2(d) and 3.2(e)) shall be construed, in connection with the repetition of the warranties, as a reference to the Service Commencement Date. If at any time a Party becomes aware that a representation or warranty given by it under Clauses 3.1 and 3.2 has been breached, is untrue or is misleading, it shall immediately notify the other Party of the relevant occurrence in sufficient detail to enable the other Party to make an accurate assessment of the situation.
- 3.5 For the avoidance of doubt, the fact that any provision within this Agreement is expressed as a warranty shall not preclude any right of termination which the Authority may have in respect of breach of that provision by the Supplier.

SECTION B - THE SERVICES**4 TERM****4.1 This Agreement shall:**

- (a) come into force on the Effective Date, save for Clauses 1 (Definitions and Interpretation), 4 (Term), 21 (Confidentiality), 22 (Freedom of Information), 24 (Publicity and Branding), 25 (Limitations on Liability), 37 (Waiver and Cumulative Remedies), 38 (Relationship of the Parties), 40 (Severance), 42 (Entire Agreement), 43 (Third Party Rights), 44 (Notices), 45 (Disputes) and 46 (Governing Law and Jurisdiction), which shall be binding and enforceable as between the Parties from the date of signature; and
- (b) unless terminated at an earlier date by operation of Law or in accordance with Clause 33 (Termination Rights), shall terminate:
 - (i) at the end of the Initial Term; or
 - (ii) if the Authority elects to extend the Initial Term by giving the Supplier at least 6 months' notice before the end of the Initial Term, at the end of the Extension Period.

Condition Precedent

- 4.2 Save for Clauses 1 (*Definitions and Interpretation*), 4 (*Term*), 21 (*Confidentiality*), 22 (*Freedom of Information*), 24 (*Publicity and Branding*), 25 (*Limitations on Liability*), 37 (*Waiver and Cumulative Remedies*), 38 (*Relationship of the Parties*), 40 (*Severance*), 42 (*Entire Agreement*), 43 (*Third Party Rights*), 44 (*Notices*), 45 (*Disputes*) and 46 (*Governing Law and Jurisdiction*), this Agreement is conditional upon the valid execution and delivery to the Authority of the Guarantee (the “**Condition Precedent**”). The Authority may in its sole discretion at any time agree to waive compliance with the Condition Precedent by giving the Supplier notice in writing provided always that such waiver shall not prevent the Authority from requesting a Guarantee later during the Term.
- 4.3 The Supplier shall satisfy, or procure the satisfaction of, the Condition Precedent as soon as possible. In the event that the Condition Precedent is not satisfied within 20 Working Days after the date of this Agreement then, unless the Condition Precedent is waived by the Authority in accordance with Clause 4.2:
 - (a) this Agreement shall automatically cease and shall not come into effect; and
 - (b) neither Party shall have any obligation to pay any compensation to the other Party as a result of such cessation.
- 4.4 The Supplier shall consult with the Authority in relation to the steps it takes to satisfy the condition set out in Clause 4.2 and shall keep the Authority fully informed of its progress in satisfying the condition and of any circumstances which are likely to result in the condition not being satisfied by the date set out in Clause 4.3.

5 SERVICES

5.1 The Supplier shall provide:

- (a) the Transition Services from (and including) the Service Commencement Date;
- (b) the Operational Services from (and including) the relevant Operational Service Commencement Date;
- (c) the Projects from the relevant Project Commencement Date; and
- (d) the Disengagement Services as required from each and any Exit Commencement Date(s).

5.2 The Supplier shall ensure that:

- (a) the Services:
 - (i) comply in all respects with the Services Description; and
 - (ii) are supplied in accordance with the Solution and the provisions of this Agreement; and
- (b) where:
 - (i) the Operational Services to be provided from the Service Commencement Date are similar to services that the Authority was receiving immediately prior to the Service Commencement Date (“**preceding services**”); and
 - (ii) the standard and level of service received by the Authority in respect of any of the preceding services in the 12 month period immediately prior to the Service Commencement Date have been disclosed to the Supplier in the Due Diligence Information (all such preceding services being “**Relevant Preceding Services**”),

the Operational Services as set out in Schedule 2.1 (*Services Description*) to be provided from the Service Commencement Date that are similar to the Relevant Preceding Services are provided to a standard and level of service which is at least as good as the standard and level of service received by the Authority in respect of the Relevant Preceding Services in the 12 month period immediately prior to the Service Commencement Date.

5.3 The Supplier shall perform its obligations under this Agreement in accordance with:

- (a) all applicable Law;
- (b) Good Industry Practice;
- (c) the ESR Services Objectives;
- (d) the Standards;
- (e) the Security Policy;

- (f) the Quality Plans;
- (g) the Authority IT Strategy; and
- (h) the principles and processes set out in Schedule 8.1 (Governance)
- (i) the Supplier's own established procedures and practices to the extent the same do not conflict with the requirements of Clauses 5.3(a) to (h).

5.4 The Supplier shall deliver the Services using efficient business processes and ways of working having regard to the Authority's obligation to ensure value for money.

5.5 The Supplier shall:

- (a) at all times allocate sufficient resources with the appropriate technical expertise to supply the Deliverables and to provide the Services in accordance with this Agreement;
- (b) save to the extent that obtaining and maintaining the same are Authority Responsibilities and subject to Clause 13 (*Change Control*), obtain, and maintain throughout the duration of this Agreement, all the consents, approvals, licences and permissions (statutory, regulatory contractual or otherwise) it may require and which are necessary for the provision of the Services;
- (c) ensure that:
 - (i) the release of any new Software or upgrade to any Software complies with the process for release agreed between the Parties during Transition in accordance with the Services Description as set out in Schedule 2.1, as updated, and the requirements of Schedule 2.4 (*Security Management Plan*).
 - (ii) all Software including Upgrades, Updates and New Releases used by or on behalf of the Supplier are currently supported versions of that Software and perform in all material respects in accordance with the relevant specification;
 - (iii) any products or services recommended or otherwise specified by the Supplier for use by the Authority in conjunction with the Deliverables and/or the Services shall enable the Deliverables and/or Services to meet the Authority Requirements; and
 - (iv) the Supplier System and Assets used in the performance of the Services will be free of all encumbrances (except as agreed in writing with the Authority).
- (d) minimise any disruption to the Services, the ESR System and/or the Authority's operations when providing the Services;
- (e) ensure that any Documentation and training provided by the Supplier to the Authority are comprehensive, accurate and prepared in accordance with Good Industry Practice;
- (f) co-operate with the Other Suppliers and provide reasonable information

(including any Documentation), advice and assistance in connection with the Services to any Other Supplier to enable such Other Supplier to create and maintain technical or organisational interfaces with the Services and, on the expiry or termination of this Agreement for any reason, to enable the timely transition of the Services (or any of them) to the Authority and/or to any Replacement Supplier;

- (g) assign to the Authority, or if it is unable to do so, shall (to the extent it is legally able to do so) hold on trust for the sole benefit of the Authority, all warranties and indemnities provided by third parties or any Sub-contractor in respect of any Deliverables and/or the Services. Where any such warranties are held on trust, the Supplier shall enforce such warranties in accordance with any reasonable directions that the Authority may notify from time to time to the Supplier;
 - (h) provide the Authority with such assistance as the Authority may reasonably require during the Term in respect of the supply of the Services;
 - (i) notify the Authority in writing as soon as reasonably practicable prior to a Change of Control taking place (or, if prevented to do so by Law, no later than 5 days after a Change of Control taking place), and, without prejudice to the foregoing, such Change of Control shall be deemed to be a Supplier Termination Event unless:
 - (i) the Authority has given its prior written consent to the particular Change of Control, which subsequently takes place as proposed; or
 - (ii) the Authority has not served its notice of objection (providing reasonable justification for the same) within 2 months of the later of the date the Change of Control took place or the date on which the Authority was given notice of the Change of Control;
 - (j) ensure that neither it, nor any of its Affiliates, embarrasses the Authority or otherwise brings the Authority into disrepute by engaging in any act or omission which is reasonably likely to diminish the trust that the public places in the Authority, regardless of whether or not such act or omission is related to the Supplier's obligations under this Agreement; and
 - (k) gather, collate and provide such information and co-operation as the Authority may reasonably request for the purposes of ascertaining the Supplier's compliance with its obligations under this Agreement.
- 5.6 An obligation on the Supplier to do, or to refrain from doing, any act or thing shall include an obligation upon the Supplier to procure that all Sub-contractors and Supplier Personnel also do, or refrain from doing, such act or thing.
- 5.7 Without prejudice to Clauses 19.2 and 19.3(*IPRs Indemnity*) and any other rights and remedies of the Authority howsoever arising, the Supplier shall, where practicable:
- (a) remedy any breach of its obligations in Clauses 5.4(b) to 5.4(d) inclusive within 3 Working Days of becoming aware of the breach or being notified of the breach by the Authority where practicable or within such other time

period as may be agreed with the Authority (taking into account the nature of the breach that has occurred); and

- (b) any breach of its obligations in Clause 5.4(a) and Clauses 5.4(e) to 5.4(k) inclusive within 20 Working Days of becoming aware of the breach or being notified of the breach by the Authority; and
- (c) meet all the costs of, and incidental to, the performance of such remedial work,
and any failure of the Supplier to comply with its obligations under Clause 5.7(a) or Clause 5.7(b) within the specified or agreed timeframe shall constitute a Notifiable Default.

Specially Written Software warranty

5.8 Without prejudice to Clauses 5.5 and 5.7 (*Services*) and any other rights and remedies of the Authority howsoever arising, the Supplier warrants to the Authority that all components of the Specially Written Software shall:

- (a) be free from material design and programming errors;
- (b) perform in all material respects in accordance with the relevant specifications contained in the Solution and Documentation; and
- (c) not infringe any Intellectual Property Rights.

Continuing obligation to provide the Services

5.9 The Supplier shall continue to perform all of its obligations under this Agreement and shall not suspend the supply of the Services, notwithstanding:

- (a) any withholding of the Service Charges by the Authority pursuant to Clause 7.2(d)(ii) (*Performance Failures*);
- (b) the existence of an unresolved Dispute; and/or
- (c) any failure by the Authority to pay any Charges,

unless the Supplier is entitled to terminate this Agreement under Clause 33.3(a) (*Termination by the Supplier*) for failure to pay undisputed Charges.

- (d)

Authority Responsibilities

5.10 The Authority shall comply with its responsibilities set out in Schedule 3 (*Authority Responsibilities*).

User Organisations

5.11 This Agreement has been entered into by the Authority on behalf of and for the benefit of all User Organisations. Any reference to the rights of the Authority in this Agreement shall mean all such User Organisations and for the purpose of Clause 43, the loss of a User Organisation shall be deemed the loss of the Authority. Where any User Organisations fulfils any obligation of the Authority

under this Agreement, such obligation shall be discharged as if the Authority had fulfilled the obligation itself.

- 5.12 For the purpose of this Agreement, any loss, damage, cost or liability being suffered or incurred by any ESR User and or User Organisation shall be deemed to have been suffered or incurred by the Authority and shall be recoverable only by the Authority from the Supplier as if it was a loss, damage, cost or liability suffered or incurred directly and solely by the Authority. None of the User Organisations will be entitled to enforce the terms of this Agreement directly against the Supplier, its employees, agents, successors, assigns and affiliates.
- 5.13 For the avoidance of doubt, the Parties shall not be required to obtain the prior agreement or consent of any of the User Organisations in order to agree any Change to this Agreement.

6 TRANSITION AND OTHER PROJECTS

Quality Plans

- 6.1 The Supplier shall develop, within 90 Working Days of the Effective Date, quality plans that ensure that all aspects of the Services are the subject of quality management systems and are consistent with BS EN ISO 9001 or any equivalent standard which is generally recognised as having replaced it (“Quality Plans”).
- 6.2 The Supplier shall obtain the Authority Representative’s written approval of the Quality Plans before implementing them, which approval shall not be unreasonably withheld or delayed. The Supplier acknowledges and accepts that the Authority’s approval shall not act as an endorsement of the Quality Plans and shall not relieve the Supplier of its responsibility for ensuring that the Services are provided to the standard required by this Agreement.
- 6.3 Following the approval by the Authority of the Quality Plans:
- (a) the Supplier shall design and deliver all Deliverables in accordance with the Quality Plans; and
 - (b) any Changes to the Quality Plans shall be agreed in accordance with the Change Control Procedure.

Plans and Delays

- 6.4 The Parties shall comply with the provisions of Schedule 6.1 (*Transition and Project Plans*) in relation to the agreement and maintenance of the Plans.
- 6.5 The Supplier shall perform each of the tasks identified in the Plans by the applicable date assigned to that particular task in the Plan so as to ensure that each Milestone is Achieved on or before its Milestone Date.
- 6.6 If the Supplier becomes aware that there is, or there is reasonably likely to be, a Delay:
- (a) it shall:
 - (i) notify the Authority in accordance with Clause 27.1 (*Rectification Plan Process*); and

- (ii) comply with the Rectification Plan Process in order to address the impact of the Delay or anticipated Delay; and
 - (iii) use all reasonable endeavours to eliminate or mitigate the consequences of any Delay or anticipated Delay; and
- (b) if the Delay or anticipated Delay relates to a Key Milestone, the provisions of Clause 28 (*Delay Payments*), if applicable, shall apply.

Testing and Achievement of Milestones

6.7 The Parties shall comply with the provisions of Schedule 6.2 (*Testing Procedures*) in relation to the procedures to determine whether a Milestone or Test has been Achieved.

7 PERFORMANCE INDICATORS

7.1 The Supplier shall:

- (a) subject to the provisions of Clause 31 (*Authority Cause*), provide the Operational Services in such a manner so as to meet or exceed the Target Performance Level for each Performance Indicator from the relevant Operational Service Commencement Date; and
- (b) comply with the provisions of Schedule 2.2 (*Performance Levels*) in relation to the monitoring and reporting on its performance against the Performance Indicators.

Performance Failures

7.2 If in any Service Period:

- (a) a KPI Failure occurs, Service Credits shall be deducted from the Service Charges in accordance with Paragraph 5 of Part C of Schedule 7.1 (*Charges and Invoicing*);
- (b) a Material KPI Failure occurs, the Supplier shall comply with the Rectification Plan Process (in addition to Service Credits accruing in accordance with Clause 7.2(a));
- (c) an SPI Failure occurs, the Supplier shall notify the Authority of the action (if any) it will take to rectify the SPI Failure and/or to prevent the SPI Failure from recurring; and/or
- (d) a Material SPI Failure occurs:
 - (i) the Supplier shall comply with the Rectification Plan Process; and
 - (ii) the Authority may withhold a proportionate amount of the Service Charges in accordance with the process set out in Clause 10.7 (*Set Off and Withholding*) until the relevant Material SPI Failure is rectified to the reasonable satisfaction of the Authority, at which point the Authority shall pay the amount withheld.

- 7.3 Service Credits shall be the Authority's exclusive financial remedy for a KPI Failure except where:
- (a) the Supplier has over the previous 12 month period accrued Service Credits in excess of the Service Credit Cap;
 - (b) the Authority incurs cost in relation to any fine (including but not limited to HMRC or Information Commissioner fines) and/or bank charges incurred by one or more ESR User(s) as a result of any non-payment or late payment of any monies due to them caused by the KPI Failure;
 - (c) any operational and/or administrative costs and expenses incurred by the Authority, including costs relating to time spent by or on behalf of the Authority in dealing with the consequences of a breach of the security requirements set out in Schedule 2.1 (Services Description), Schedule 2.4 (Security Management) and/or the Security Policy caused by the KPI Failure;
 - (d) the KPI Failure:
 - (i) does not meet the relevant KPI Service Threshold;
 - (ii) has arisen due to the fraud or wilful default by the Supplier or any Supplier Personnel; and
 - (iii) results in:
 - (A) the corruption or loss of any Authority Data (in which case the remedies under Clause 20.7 (*Authority Data and Security Requirements*) shall also be available); and/or
 - (B) the Authority being required to make a compensation payment to one or more third parties; and/or
 - (e) the Authority is otherwise entitled to or does terminate the relevant Services or this Agreement pursuant to Clause 33.1(b) (*Termination by the Authority*);

in which case payment of Service Credits shall be without prejudice to the Authority's other rights and remedies.

Changes to Performance Indicators and Service Credits

- 7.4 Not more than once in each Contract Year after consulting with and taking note of the Supplier's views, the Authority may, on giving the Supplier at least 3 months' notice:
- (a) change the weighting that applies in respect of one or more specific Key Performance Indicators; and/or
 - (b) convert one or more:
 - (i) Key Performance Indicators into a Subsidiary Performance Indicator; and/or
 - (ii) Subsidiary Performance Indicators into a Key Performance Indicator

(in which event the Authority shall also set out in the notice details of what will constitute a KPI Failure for the new Key Performance Indicator);

and the Supplier shall not be entitled to object to, or increase the Service Charges as a result of such changes, provided that:

- (a) the proposed changes are reasonable having regards to the impact on the Services and the Service Charges;
- (b) the principal purpose of the change is to reflect changes in the Authority's business requirements and/or priorities or to reflect changing industry standards; and
- (c) there is no change to the Service Credit Cap.

7.5 The Supplier shall not be entitled to object to any changes made by the Authority under Clause 7.4.

8 SERVICES IMPROVEMENT

8.1 Notwithstanding the specific obligations in the Service Requirements on the Supplier to deliver identified enhancements and additions to the Services, the Supplier shall have an ongoing obligation throughout the Term to identify new or potential improvements to the Services in accordance with this Clause 8. As part of this obligation the Supplier shall identify and report to the Project Board once every 12 months on:

- (a) the emergence of new and evolving relevant technologies which could improve the ESR System and/or the Services, and those technological advances potentially available to the Supplier and the Authority which the Parties may wish to adopt;
- (b) new or potential improvements to the Services including the quality, responsiveness, procedures, benchmarking methods, likely performance mechanisms and customer support services in relation to the Services;
- (c) new or potential improvements to the interfaces or integration of the Services with other services provided by third parties or the Authority which might result in efficiency or productivity gains or in reduction of operational risk;
- (d) changes in business processes and ways of working that would enable the Services to be delivered at lower costs and/or at greater benefits to the Authority; and/or
- (e) changes to the ESR System, business processes and ways of working that would enable reductions in the total energy consumed annually in the delivery of Services.

8.2 The Supplier shall ensure that the information that it provides to the Authority shall be sufficient for the Authority to decide whether any improvement should be implemented. The Supplier shall provide any further information that the Authority requests.

- 8.3 If the Authority wishes to incorporate any material improvement identified by the Supplier, the Authority shall send the Supplier a Change Request in accordance with the Change Control Procedure.

9 EQUIPMENT AND MAINTENANCE

Supplier Equipment

- 9.1 The Supplier shall be solely responsible for the cost of carriage of Supplier Equipment to the Sites and to the Authority Premises, including its off-loading, removal of all packaging and all other associated costs. Likewise on termination or expiry of this Agreement the Supplier shall be responsible for the removal and safe disposal of all relevant Supplier Equipment from the Sites and the Authority Premises, including the cost of packing, carriage and making good the Sites and/or the Authority Premises following removal, and taking account of any sustainability requirements, including safe removal of data and recycling requirements.
- 9.2 All the Supplier's property, including Supplier Equipment, shall remain at the sole risk and responsibility of the Supplier, except that the Authority shall be liable for loss of or damage to any of the Supplier's property located on Authority Premises which is due to the negligent act or omission of the Authority.
- 9.3 Subject to any express provision of the BCDR Plan to the contrary, the loss or destruction for any reason of any Supplier Equipment shall not relieve the Supplier of its obligation to supply the Services in accordance with this Agreement, including the Target Performance Levels.

Maintenance

- 9.4 The Supplier shall create and maintain a rolling schedule of planned maintenance to the ESR System (the "**Maintenance Schedule**"), which shall be communicated to, and agreed by, the Authority.
- 9.5 The Supplier shall only undertake the planned maintenance (which shall be known as "**Permitted Maintenance**") in accordance with the Maintenance Schedule.
- 9.6 The Supplier shall give as much notice as is reasonably practicable to the Authority Representative prior to carrying out any Emergency Maintenance.
- 9.7 Without prejudice to the Service Requirements, the Supplier shall carry out any necessary maintenance (whether Permitted Maintenance or Emergency Maintenance) where it reasonably suspects that the ESR System or the Services or any part thereof has or may have developed a fault. Any such maintenance shall be carried out in such a manner and at such times so as to avoid (or where this is not possible so as to minimise) disruption to the ESR System and the Services.

SECTION C - PAYMENT, TAXATION AND VALUE FOR MONEY PROVISIONS**10 FINANCIAL AND TAXATION MATTERS****Charges and Invoicing**

- 10.1 In consideration of the Supplier carrying out its obligations under this Agreement, including the provision of the Services, the Authority shall pay the Charges to the Supplier in accordance with the pricing and payment profile and the invoicing procedure specified in Schedule 7.1 (*Charges and Invoicing*).
- 10.2 Except as otherwise provided, each Party shall each bear its own costs and expenses incurred in respect of compliance with its obligations under Clauses 6.7 (*Testing and Achievement of Milestones*), 12 (*Records, Reports, Audits and Open Book Data*), 22 (*Freedom of Information*), 23 (*Protection of Personal Data*) and, to the extent specified therein, Clause 29 (*Remedial Adviser*) and Clause 30 (*Step-In Rights*).
- 10.3 If the Authority fails to pay any undisputed Charges properly invoiced under this Agreement, the Supplier shall have the right to charge interest on the overdue amount at the applicable rate under the Late Payment of Commercial Debts (Interest) Act 1998, accruing on a daily basis from the due date up to the date of actual payment, whether before or after judgment.

VAT

- 10.4 The Charges are stated exclusive of VAT, which shall be added at the prevailing rate as applicable and paid by the Authority following delivery of a valid VAT invoice.
- 10.5 The Supplier shall indemnify the Authority on a continuing basis against any liability, including any interest, penalties or costs incurred, which is levied, demanded or assessed on the Authority or any User Organisation at any time in respect of the Supplier's failure to account for or to pay any VAT relating to payments made to the Supplier under this Agreement. Any amounts due under this Clause 10.5 shall be paid in cleared funds by the Supplier to the Authority not less than five Working Days before the date upon which the tax or other liability is payable by the Authority.

Set Off and Withholding

- 10.6 The Authority may retain or set off any amount owed to it by the Supplier against any amount due to the Supplier under this Agreement or under any other agreement between the Supplier and the Authority.
- 10.7 If the Authority wishes to:
- (a) set off any amount owed to it by the Supplier against any amount due to it by the Supplier pursuant to Clause 10.6; or
 - (b) exercise its right pursuant to Clause 7.2(d)ii) (*Performance Failures*) to withhold payment of a proportion of the Service Charges

it shall give notice to the Supplier within 30 days of receipt of the relevant invoice, setting out the Authority's reasons for withholding or retaining the relevant Charges.

Benchmarking

10.8 The Parties shall comply with the provisions of Schedule 7.3 (*Benchmarking*) in relation to the benchmarking of any or all of the Services.

Financial Distress

10.9 The Parties shall comply with the provisions of Schedule 7.4 (*Financial Distress*) in relation to the assessment of the financial standing of the Supplier and the consequences of a change to that financial standing.

Promoting Tax Compliance

10.10 If, at any point during the Term, an Occasion of Tax Non-Compliance occurs, the Supplier shall:

- (a) notify the Authority in writing of such fact within 5 Working Days of its occurrence; and
- (b) promptly provide to the Authority:
 - (i) details of the steps that the Supplier is taking to address the Occasion of Tax Non-Compliance and prevent the same from recurring, together with any mitigating factors that it considers relevant; and
 - (ii) such other information in relation to the Occasion of Tax Non-Compliance as the Authority may reasonably require.

SECTION D - CONTRACT GOVERNANCE

11 GOVERNANCE

11.1 The Parties shall comply with the provisions of Schedule 8.1 (*Governance*) in relation to the management and governance of this Agreement.

Representatives

11.2 Each Party shall have a representative for the duration of this Agreement who shall have the authority to act on behalf of their respective Party on the matters set out in, or in connection with, this Agreement.

11.3 The initial Supplier Representative shall be the person named as such in Schedule 9.2 (*Key Personnel*). Any change to the Supplier Representative shall be agreed in accordance with Clause 14 (*Supplier Personnel*).

11.4 The Authority shall notify the Supplier of the identity of the initial Authority Representative within 5 Working Days of the Effective Date. The Authority may, by written notice to the Supplier, revoke or amend the authority of the Authority Representative or appoint a new Authority Representative.

12 RECORDS, REPORTS, AUDITS & OPEN BOOK DATA

12.1 The Supplier shall comply with the provisions of:

- (a) Schedule 8.4 (*Records Provisions*) in relation to the maintenance and retention of records; and
- (b) Part A of Schedule 7.5 (*Financial Reports*) in relation to the maintenance of Open Book Data.

12.2 The Parties shall comply with the provisions of:

- (a) Part B of Schedule 7.5 (*Financial Reports*) in relation to the provision of the Financial Reports; and
- (b) Part B of Schedule 8.4 (*Records Provisions and Audit Rights*) in relation to the exercise of the Audit Rights by the Authority or any Audit Agents.

13 CHANGE

Change Control Procedure

13.1 Any requirement for a Change shall be subject to the Change Control Procedure.

Change in Law

13.2 The Supplier shall neither be relieved of its obligations to supply the Services in accordance with the terms and conditions of this Agreement nor be entitled to an increase in the Charges as the result of:

- (a) a General Change in Law; or
- (b) a Specific Change in Law where the effect of that Specific Change in Law on

the Services is reasonably foreseeable at the Effective Date.

- 13.3 If a Specific Change in Law occurs or will occur during the Term (other than as referred to in Clause 13.2(b)), the Supplier shall:
- (a) notify the Authority as soon as reasonably practicable of the likely effects of that change, including:
 - (i) whether any Change is required to the Services, the Charges or this Agreement; and
 - (ii) whether any relief from compliance with the Supplier's obligations is required, including any obligation to Achieve a Milestone and/or to meet the Target Performance Levels; and
 - (b) provide the Authority with evidence:
 - (i) that the Supplier has minimised any increase in costs or maximised any reduction in costs, including in respect of the costs of its Sub-contractors;
 - (ii) as to how the Specific Change in Law has affected the cost of providing the Services; and
 - (iii) demonstrating that any expenditure that has been avoided, for example which would have been required under the provisions of Clause 8 (*Services Improvement*), has been taken into account in amending the Charges.
- 13.4 Any variation in the Charges or relief from the Supplier's obligations resulting from a Specific Change in Law (other than as referred to in Clause 13.2(b)) shall be implemented in accordance with the Change Control Procedure.

SECTION E - SUPPLIER PERSONNEL AND SUPPLY CHAIN**14 SUPPLIER PERSONNEL****14.1** The Supplier shall:

- (a) with as much advance notice as reasonably practicable, provide a list of the names of all Supplier Personnel requiring admission to Authority Premises or to User Organisation premises, specifying the capacity in which they require admission and giving such other particulars as the Authority or any User Organisation may reasonably require;
- (b) ensure that all Supplier Personnel:
 - (i) are appropriately qualified, trained and experienced to provide the Services with all reasonable skill, care and diligence in accordance with the ESR Services Objectives;
 - (ii) are vetted in accordance with Good Industry Practice and, where applicable, the Security Policy and the Standards; and
 - (iii) comply with all reasonable requirements of the Authority concerning conduct at the Authority Premises, including the security requirements as set out in Schedule 2.4 (*Security Management*);
- (c) subject to Schedule 9.1 (*Staff Transfer*), retain overall control of the Supplier Personnel at all times so that the Supplier Personnel shall not be deemed to be employees, agents or contractors of the Authority;
- (d) be liable at all times for all acts or omissions of Supplier Personnel, so that any act or omission of a member of any Supplier Personnel which results in a Default under this Agreement shall be a Default by the Supplier;
- (e) use all reasonable endeavours to minimise the number of changes in Supplier Personnel;
- (f) unless otherwise agreed with the Authority and/or for short-term sickness or holidays of 2 weeks or less, replace (temporarily or permanently, as appropriate) any Supplier Personnel as soon as practicable if any Supplier Personnel have been removed or are unavailable for any reason whatsoever;
- (g) bear the programme familiarisation and other costs associated with any replacement of any Supplier Personnel; and
- (h) procure that the Supplier Personnel shall vacate the Authority Premises immediately upon the termination or expiry of this Agreement.

14.2 If the Authority reasonably believes that any of the Supplier Personnel are unsuitable to undertake work in respect of this Agreement, it may:

- (a) refuse admission to the relevant person(s) to the Authority Premises; and/or
- (b) direct the Supplier to end the involvement in the provision of the Services of

the relevant person(s).

Key Personnel

- 14.3 The Supplier shall ensure that the Key Personnel fulfil the Key Roles at all times during the Term. Schedule 9.2 (*Key Personnel*) lists the Key Roles and names of the persons who the Supplier shall appoint to fill those Key Roles at the Effective Date.
- 14.4 The Authority may identify any further roles as being Key Roles and, following agreement to the same by the Supplier, the relevant person selected to fill those Key Roles shall be included on the list of Key Personnel.
- 14.5 The Supplier shall not remove or replace any Key Personnel (including when carrying out Exit Management) unless:
- (a) requested to do so by the Authority;
 - (b) the person concerned resigns, retires or dies or is on maternity or long-term sick leave;
 - (c) the person's employment or contractual arrangement with the Supplier or a Sub-contractor is terminated for material breach of contract by the employee; or
 - (d) the Supplier obtains the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).
- 14.6 The Supplier shall:
- (a) notify the Authority promptly of the absence of any Key Personnel (other than for short-term sickness or holidays of 2 weeks or less, in which case the Supplier shall ensure appropriate temporary cover for that Key Role);
 - (b) ensure that any Key Role is not vacant for any longer than 10 Working Days;
 - (c) give as much notice as is reasonably practicable of its intention to remove or replace any member of Key Personnel and, except in the cases of death, unexpected ill health or a material breach of the Key Personnel's employment contract, this will mean at least 60 Working Days' notice;
 - (d) ensure that all arrangements for planned changes in Key Personnel provide adequate periods during which incoming and outgoing personnel work together to transfer responsibilities and ensure that such change does not have an adverse impact on the performance of the Services; and
 - (e) ensure that any replacement for a Key Role:
 - (i) has a level of qualifications and experience appropriate to the relevant Key Role; and
 - (ii) is fully competent to carry out the tasks assigned to the Key Personnel whom he or she has replaced.

Employment Indemnity

14.7 The Supplier shall both during and after the Term indemnify the Authority against all Employee Liabilities that may arise as a result of a breach of Clauses 14.1 to 14.6 (inclusive) where such claim arises from any act or omission of the Supplier or any Supplier Personnel.

Income Tax and National Insurance Contributions

14.8 Where the Supplier or any Supplier Personnel are liable to be taxed in the UK or to pay national insurance contributions in respect of consideration received under this Agreement, the Supplier shall:

- (a) at all times comply with the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax, and the Social Security Contributions and Benefits Act 1992 and all other statutes and regulations relating to national insurance contributions, in respect of that consideration; and
- (b) indemnify the Authority against any income tax, national insurance and social security contributions and any other liability, deduction, contribution, assessment or claim made against the Authority or the User Organisation (s) arising from or made in connection with the provision of the Services by the Supplier or any Supplier Personnel.

Staff Transfer

14.9 The Parties agree that:

- (a) where the commencement of the provision of the Services or any part of the Services results in one or more Relevant Transfers, Schedule 9.1 (*Staff Transfer*) shall apply as follows:
 - (i) where the Relevant Transfer involves the transfer of Transferring Authority Employees, Part A of Schedule 9.1 (*Staff Transfer*) shall apply;
 - (ii) where the Relevant Transfer involves the transfer of Transferring Former Supplier Employees, Part B of Schedule 9.1 (*Staff Transfer*) shall apply;
 - (iii) where the Relevant Transfer involves the transfer of Transferring Authority Employees and Transferring Former Supplier Employees, Parts A and B of Schedule 9.1 (*Staff Transfer*) shall apply; and
 - (iv) Part C of Schedule 9.1 (*Staff Transfer*) shall not apply;
- (b) where commencement of the provision of the Services or a part of the Services does not result in a Relevant Transfer, Part C of Schedule 9.1 (*Staff Transfer*) shall apply and Parts A and B of Schedule 9.1 (*Staff Transfer*) shall not apply; and
- (c) Part D of Schedule 9.1 (*Staff Transfer*) shall apply on the expiry or termination of the Services or any part of the Services.

15 SUPPLY CHAIN RIGHTS AND PROTECTIONS

Appointment of Sub-contractors

- 15.1 The Supplier shall exercise due skill and care in the selection and appointment of any Sub-contractors to ensure that the Supplier is able to:
- (a) manage any Sub-contractors in accordance with Good Industry Practice;
 - (b) comply with its obligations under this Agreement in the delivery of the Services; and
 - (c) assign, novate or otherwise transfer to the Authority or any Replacement Supplier any of its rights and/or obligations under each Sub-contract that relates exclusively to this Agreement.
- 15.2 Prior to sub-contracting any of its obligations under this Agreement, the Supplier shall notify the Authority in writing of:
- (a) the proposed Sub-contractor's name, registered office and company registration number;
 - (b) the scope of any Services to be provided by the proposed Sub-contractor; and
 - (c) where the proposed Sub-contractor is an Affiliate of the Supplier, evidence that demonstrates to the reasonable satisfaction of the Authority that the proposed Sub-contract has been agreed on "arm's-length" terms.
- 15.3 If requested by the Authority within 10 Working Days of receipt of the Supplier's notice issued pursuant to Clause 15.2, the Supplier shall also provide:
- (a) a copy of the proposed Sub-contract, or, where not solely related to the Services, the parts thereof in so far as it applies that apply to the Services; and/or
 - (b) any further information reasonably requested by the Authority.
- 15.4 Subject to Clause 15.6, following any notification to the Authority pursuant to Clause 15.2, the Supplier may proceed with the proposed appointment and the relevant Sub-contract shall constitute a Sub-Contract for the purposes of Schedule 4.4 (Authorised Sub-Contracts).
- 15.5 Notwithstanding Clause 15.4, unless the Authority notifies the Supplier that it objects to the proposed Sub-contractor's appointment (based on reasonable grounds related to the ability of the Sub-contractor to perform the Supplier's obligations under this Agreement) by the later of 10 Days of receipt of:
- (i) the Supplier's notice issued pursuant to Clause 15.1; and
 - (ii) any further information requested by the Authority pursuant to Clause 15.3;

in which case the Supplier shall terminate the relevant Sub-contract with immediate effect. For the avoidance of doubt, the Authority may not object to the appointment of Sub-contractors under the Authorised Sub-Contracts.

Appointment of Key Sub-contractors

- 15.6 Where the Supplier wishes to enter into a Key Sub-contract or replace a Key Sub-contractor, it must obtain the prior written consent of the Authority, such consent not to be unreasonably withheld or delayed. The Authority may reasonably withhold its consent to the appointment of a Key Sub-contractor if it considers that:
- (a) the appointment of a proposed Key Sub-contractor may prejudice the provision of the Services or may be contrary to the interests of the Authority;
 - (b) the proposed Key Sub-contractor is unreliable and/or has not provided reasonable services to its other customers ; and/or
 - (c) the proposed Key Sub-contractor employs unfit persons.
- 15.7 The Authority consents to the appointment of the Key Sub-contractors listed in Schedule 4.3 (*Notified Key Sub-contractors*).
- 15.8 Except where the Authority has given its prior written consent, the Supplier shall ensure that each Key Sub-contract shall include:
- (a) provisions which will enable the Supplier to discharge its obligations under this Agreement;
 - (b) a right under CRTPA for the Authority to enforce any provisions under the Key Sub-contract;
 - (c) a provision enabling the Supplier to assign, novate or otherwise transfer any of its rights and/or obligations under the Key Sub-contract to the Authority or any Replacement Supplier;
 - (d) obligations no less onerous on the Key Sub-contractor than those imposed on the Supplier under this Agreement in respect of:
 - (i) data protection requirements set out in Clauses 20 (Authority Data) and Security Requirements) and 23 (Protection of Personal Data) where Authority Data is processed.
 - (ii) FOIA requirements set out in Clause 22 (*Freedom of Information*);
 - (iii) the obligation not to embarrass the Authority or otherwise bring the Authority into disrepute set out in Clause 5.4(j) (*Services*);
 - (iv) the keeping of records in respect of the services being provided under the Key Sub-contract, including the maintenance of Open Book Data; and
 - (v) the conduct of Audits set out in Part B of Schedule 8.4 (Records Provisions *and Audit Rights*);

- (e) provisions enabling the Supplier to terminate the Key Sub-contract on notice on terms no more onerous on the Supplier than those imposed on the Authority under Clauses 33.1(a) (*Termination by the Authority*) and 34.4 (*Payments by the Authority*) and Schedule 7.2 (*Payments on Termination*) of this Agreement;
- (f) a provision restricting the ability of the Key Sub-contractor to Sub-contract all or any part of the services provided to the Supplier under the Key Sub-contract without first seeking the written consent of the Authority;
- (g) a provision enabling the Supplier or the Authority to appoint a Remedial Adviser on substantially the same terms as are set out in Clause 29 (*Remedial Adviser*);
- (h) a provision enabling the Supplier, the Authority or any other person on behalf of the Authority to step-in on substantially the same terms as are set out in Clause 30 (*Step-in Rights*);
- (i) a provision requiring the Key Sub-contractor to participate in, and if required by the Authority in the relevant Multi-Party Procedure Initiation Notice to procure the participation of all or any of its Sub-contractors in, the Multi-Party Dispute Resolution Procedure; and
- (j) a provision requiring the Key Sub-contractor to:
 - (i) promptly notify the Supplier and the Authority in writing of any of the following of which it is, or ought to be, aware:
 - (A) the occurrence of a Financial Distress Event in relation to the Key Sub-contractor; or
 - (B) any fact, circumstance or matter of which it is aware which could cause the occurrence of a Financial Distress Event in relation to the Key Sub-contractor,

and in any event, provide such notification within 10 Working Days of the date on which the Key Sub-contractor first becomes aware of such); and
 - (ii) co-operate with the Supplier and the Authority in order to give full effect to the provisions of Schedule 7.4 (*Financial Distress*), including meeting with the Supplier and the Authority to discuss and review the effect of the Financial Distress Event on the continued performance and delivery of the Services, and contributing to and complying with the Financial Distress Service Continuity Plan.

15.9 The Supplier shall not terminate or materially amend the terms of any Key Sub-contract without the Authority's prior written consent, which shall not be unreasonably withheld or delayed.

Supply Chain Protection

15.10 The Supplier shall ensure that all Sub-contracts contain a provision:

- (a) requiring the Supplier to pay any undisputed sums which are due from it to the

Sub-contractor within a specified period not exceeding 30 days from the receipt of a valid invoice; and

- (b) a right for the Authority to publish the Supplier's compliance with its obligation to pay undisputed invoices within the specified payment period.

15.11 The Supplier shall:

- (a) pay any undisputed sums which are due from it to a Sub-contractor within 30 days from the receipt of a valid invoice;
- (b) include within the Balanced Scorecard Report produced by it pursuant to Schedule 2.2 (*Performance Levels*) a summary of its compliance with Clause 15.11, such data to be certified each Quarter by a director of the Supplier, or a delegate of the Supplier as agreed with the Authority, as being accurate and not misleading.

15.12 Notwithstanding any provision of Clauses 21 (*Confidentiality*) and 24 (*Publicity and Branding*), if the Supplier notifies the Authority (whether in a Balanced Scorecard Report or otherwise) that the Supplier has failed to pay an undisputed Sub-contractor's invoice within 30 days of receipt, or the Authority otherwise discovers the same, the Authority shall be entitled to publish the details of the late or non-payment (including on government websites and in the press).

Termination of Sub-contracts

15.13 The Authority may require the Supplier to terminate:

- (a) a Sub-contract where:
 - (i) the acts or omissions of the relevant Sub-contractor have caused or materially contributed to the Authority's right of termination pursuant to Clause 33.1(b)(*Termination by the Authority*); and/or
 - (ii) the relevant Sub-contractor or its Affiliates embarrassed the Authority or otherwise brought the Authority into disrepute by engaging in any act or omission which is reasonably likely to diminish the trust that the public places in the Authority, regardless of whether or not such act or omission is related to the Sub-contractor's obligations in relation to the Services or otherwise; and
- (b) a Key Sub-contract where there is a Change of Control of the relevant Key Sub-contractor, unless:
 - (i) the Authority has given its prior written consent to the particular Change of Control, which subsequently takes place as proposed; or
 - (ii) the Authority has not served its notice of objection within 6 months of the later of the date the Change of Control took place or the date on which the Authority was given notice of the Change of Control.

Competitive Terms

15.14 If the Authority is able to obtain from any Sub-contractor or any other third party (on a like-for-like basis) more favourable commercial terms with respect to the

supply of any goods, software or services used by the Supplier or the Supplier Personnel in the supply of the Services, then the Authority may:

- (a) require the Supplier to replace its existing commercial terms with that person with the more favourable commercial terms obtained by the Authority in respect of the relevant item; or
- (b) subject to Clause 15.13, enter into a direct agreement with that Sub-contractor or third party in respect of the relevant item.

15.15 If the Authority exercises either of its options pursuant to Clause 15.14, then the Charges shall be reduced by an amount that is agreed in accordance with the Change Control Procedure.

15.16 The Authority's right to enter into a direct agreement for the supply of the relevant items is subject to:

- (a) the Authority making the relevant item available to the Supplier where this is necessary for the Supplier to provide the Services; and
- (b) any reduction in the Charges taking into account any unavoidable costs payable by the Supplier in respect of the substituted item, including in respect of any licence fees or early termination charges.

Retention of Legal Obligations

15.17 Notwithstanding the Supplier's right to sub-contract pursuant to this Clause 15, the Supplier shall remain responsible for all acts and omissions of its Sub-contractors and the acts and omissions of those employed or engaged by the Sub-contractors as if they were its own.

SECTION F - INTELLECTUAL PROPERTY, DATA AND CONFIDENTIALITY**16 INTELLECTUAL PROPERTY RIGHTS**

16.1 Except as expressly set out in this Agreement:

- (a) the Authority shall not acquire any right, title or interest in or to the Intellectual Property Rights of the Supplier or its licensors, including:
 - (i) the Supplier Software;
 - (ii) the Third Party Software;
 - (iii) the Third Party IPRs; and
 - (iv) the Supplier Background IPRs;
- (b) the Supplier shall not acquire any right, title or interest in or to the Intellectual Property Rights of the Authority or its licensors, including:
 - (i) the Authority Software;
 - (ii) the Project Specific IPRs;
 - (iii) the Specially Written Software; and
 - (iv) the Authority Background IPRs.

16.2 Where either Party acquires, by operation of law, title to Intellectual Property Rights that is inconsistent with the allocation of title set out in Clause 16.1 (*Intellectual Property Rights*), it shall assign in writing such Intellectual Property Rights as it has acquired to the other Party on the request of the other Party (whenever made).

16.3 Neither Party shall have any right to use any of the other Party's names, logos or trade marks on any of its products or services without the other Party's prior written consent.

Specially Written Software and Project Specific IPRs

16.4 Pursuant to Clause 16.1 and 16.2, the Supplier hereby assigns with full title guarantee (including by way of prospective assignment) to the Authority, or shall procure the assignment to the Authority of any and all Specially Written Software and Project Specific IPRs, including without limitation:

- (a) the Documentation, Source Code and the Object Code of the Specially Written Software;
- (b) all build instructions, test instructions, test scripts, test data, operating instructions and other documents and tools necessary for maintaining and supporting the Specially Written Software and Project Specific IPRs (together the “**Supporting Materials**”).

16.5 The Supplier:

- (a) shall:
 - (i) inform the Authority of all Specially Written Software and Project Specific IPRs that constitute a modification or enhancement to Supplier Software or Third Party Software; and
 - (ii) deliver to the Authority the Specially Written Software in both Source Code and Object Code forms together with relevant Documentation and all related Supporting Materials within seven days of the issue of a Milestone Achievement Certificate in respect of the relevant Deliverable and shall provide updates of the Source Code and of the Supporting Materials promptly following each new release of the Specially Written Software, in each case on media that is reasonably acceptable to the Authority; and
- (b) acknowledges and agrees that the ownership of the media referred to in Clause 16.5 (a)(ii) shall vest in the Authority upon their receipt by the Authority.

17 LICENCES GRANTED BY THE SUPPLIER

Supplier Software and Supplier Background IPRs

17.1 Unless otherwise stated in Schedule 5.1 (*IPRs granted by Supplier*), the Supplier hereby grants to the Authority a perpetual, royalty-free and non-exclusive licence to use:

- (a) the Supplier Software for any purpose relating to the Services (or substantially equivalent services) or for any purpose relating to the exercise of the Authority's (or any User Organisations whose main place of establishment is in the UK) business or function including but not limited to the right to load, execute, store, transmit, display and copy (for the purposes of archiving, backing-up, loading, execution, storage, transmission or display); and
- (b) the Supplier Background IPRs for any purpose relating to the Services (or substantially equivalent services) or for any purpose relating to the exercise of the Authority's (or any User Organisations whose main place of establishment is in the UK) business or function.

Authority's right to sub-license

17.2 The Authority may sub-license:

- (a) the rights granted under Clause 17.1 (*Supplier Software and Supplier Background IPRs*) to a third party (including for the avoidance of doubt, any Replacement Supplier) provided that:
 - (i) the sub-license is on terms no broader than those granted to the Authority; and
 - (ii) the sub-license only authorises the third party to use the rights licensed in Clause 17.1 (*Supplier Software and Supplier Background*

IPRs) for purposes relating to the Services (or substantially equivalent services) or for any purpose relating to the exercise of the Authority's (or any other Central Government Body's) business or function; and

- (b) the rights granted under Clause 17.1 (*Supplier Software and Supplier Background IPRs*) to any Approved Sub-Licensee to the extent necessary to use and/or obtain the benefit of the Specifically Written Software and/or the Project Specific IPRs provided that the sub-licence is on terms no broader than those granted to the Authority.

Authority's right to assign/novate licences

- 17.3 The Authority may assign, novate or otherwise transfer its rights and obligations under the licence granted pursuant to Clause 17.1 (*Supplier Software and Supplier Background IPRs*) to anybody (including any private sector body) which performs or carries on any of the functions and/or activities that previously had been performed and/or carried on by the Authority.
- 17.4 Any change in the legal status of the Authority which means that it ceases to be a Central Government Body shall not affect the validity of any licence granted in Clause 17.1 (*Supplier Software and Supplier Background IPRs*). If the Authority ceases to be a Central Government Body, the successor body to the Authority shall still be entitled to the benefit of the licences granted in Clause 17.1 (*Supplier Software and Supplier Background IPRs*).
- 17.5 If a licence granted in Clause 17.1 (*Supplier Software and Supplier Background IPRs*) is novated under Clause 17.3 (*Authority's right to assign/novate licences*) or there is a change of the Authority's status pursuant to Clause 17.4 (both such bodies being referred to as the "Transferee"), the rights acquired by the Transferee shall not extend beyond those previously enjoyed by the Authority.

Third Party IPRs and Third Party Software

- 17.6 Unless otherwise stated in Schedule 5.3 (*IPRs Procured by Supplier*), the Supplier shall procure that the owners or the authorised licensors of any Third Party IPRs and any Third Party Software which is not commercial off-the-shelf software grant a direct licence to the Authority on terms at least equivalent to those set out in Clause 17.1 and 17.2 (*Supplier Software and Supplier Background IPRs*) and Clause 17.3 (*Authority's right to assign/novate licences*). If, in respect of any Third Party Software not identified in Schedule 5.3 (*IPRs Procured by Supplier*) the Supplier cannot obtain for the Authority a licence materially in accordance with the licence terms set out in Clause 17.1 and 17.2 (*Supplier Software and Supplier Background IPRs*) and Clause 17.3 in respect of any such Third Party IPRs and/or Third Party Software, the Supplier shall:
 - (a) notify the Authority in writing giving details of what licence terms can be obtained from the relevant third party and whether there are alternative providers which the Supplier could seek to use; and
 - (b) only use such Third Party IPRs and/or Third Party Software if the Authority approves in writing the terms of the licence from the relevant third party.

- 17.7 The Supplier shall procure that the owners or the authorised licensors of any Third Party Software which is commercial off-the-shelf software grants a direct licence on a royalty free basis to the Authority:
- (a) that are aligned in so far as practicable with the licensing terms set out in Clause 17.1 and 17.2 (Supplier Software and Supplier Background IPRs) for the Authority and the User Organisations to use the Services in full;
 - (b) as further set out in Schedule 5.3 (*IPRs Procured by Supplier*); and
 - (c) in any event on terms no less favourable that such software is usually made available.

Termination

- 17.8 All licences granted pursuant to this Clause 17 shall survive the termination or expiry of this Agreement unless otherwise stated in Schedule 5.3 (*IPRs Procured by Supplier*) where it is not commercially practicable or desirable to do so in relation to Third Party Software.
- 17.9 The Supplier shall, if requested by the Authority in accordance with Schedule 8.5 (*Exit Management*), grant (or procure the grant) to the Replacement Supplier of a licence to use any Supplier Software, Supplier Background IPRs, Third Party IPRs and/or Third Party Software on terms equivalent to those set out in Clause 17.1 (*Supplier Software and Supplier Background IPRs*), Schedule 5.1 (*IPRs granted by Supplier*) or Schedule 5.3 (*IPRs Procured by Supplier*), subject to the Replacement Supplier entering into reasonable confidentiality undertakings with the Supplier.

18 LICENCES GRANTED BY THE AUTHORITY

- 18.1 The Authority hereby grants to the Supplier a royalty-free, non-exclusive, non-transferable licence during the Term to use the Authority Software solely to the extent necessary for performing the Services in accordance with this Agreement, including (but not limited to) the right to grant sub-licences to Sub-contractors provided that:
- (a) any relevant Sub-contractor has entered into a confidentiality undertaking with the Supplier on the same terms as set out in Clause 21 (*Confidentiality*); and
 - (b) the Supplier shall not without the Authority's prior written consent use the licensed materials for any other purpose or for the benefit of any person other than the Authority.
- 18.2 In the event of the termination or expiry of this Agreement, the licence granted pursuant to Clause 18.1 and any sub-licence granted by the Supplier in accordance with Clause 18.1 shall terminate automatically on the expiry of the Term and the Supplier shall:
- (a) immediately cease all use of the Authority Software (as the case may be);
 - (b) at the discretion of the Authority, return or destroy documents and other tangible materials that contain any of the Authority Software, provided that

if the Authority has not made an election within 6 months of the termination of the licence, the Supplier may destroy the documents and other tangible materials that contain any of the Authority Software (as the case may be); and

- (c) ensure, so far as reasonably practicable, that any Authority Software that are held in electronic, digital or other machine-readable form ceases to be readily accessible from any Supplier computer, word processor, voicemail system or any other Supplier device containing such Authority Software.

18.3 The Authority hereby grants to the Supplier and its Affiliates a perpetual, worldwide, transferable, royalty-free licence to the Specially Written Software and Project Specific IPRs to use the same with other customers, and to enable the creation of works for other customers of the Supplier that are adapted or derived from the Specially Written Software and Project Specific IPRs, provided always that Supplier shall not charge any UK government health bodies involved in the provision of healthcare in the UK as listed as a User Organisation or under Paragraph 4.1.1 of Schedule 4.1 to the Agreement for use of such Specially Written Software, Project Specific IPRs, or works or adaptations.

19 IPRs INDEMNITY

19.1 The Supplier shall at during and after the Term, indemnify the Authority against all Losses incurred by, awarded against or agreed to be paid by the Authority or one or more User Organisation(s) arising from an IPRs Claim.

19.2 If an IPRs Claim is made, or the Supplier anticipates that an IPRs Claim might be made, the Supplier may, at its own expense and sole option, either:

- (a) procure for the Authority the right to continue using the relevant item which is subject to the IPRs Claim; or
- (b) replace or modify the relevant item with non-infringing substitutes provided that:
 - (i) the performance and functionality of the replaced or modified item is at least equivalent to the performance and functionality of the original item;
 - (ii) the replaced or modified item does not have an adverse effect on any other Services or the ESR System;
 - (iii) there is no additional cost to the Authority; and
 - (iv) the terms and conditions of this Agreement shall apply to the replaced or modified Services.

19.3 If the Supplier elects to modify or replace an item pursuant to Clause 19.2(b) or to procure a licence in accordance with Clause 19.2(a), but this has not avoided or resolved the IPRs Claim, then:

- (a) the Authority may terminate this Agreement by written notice with immediate effect; and

without prejudice to the indemnity set out in Clause 19.1, the Supplier shall be liable for all reasonable and unavoidable costs of the substitute items and/or services including the additional costs of procuring, implementing and maintaining the substitute items.

20 AUTHORITY DATA AND SECURITY REQUIREMENTS

- 20.1 The Supplier shall not delete or remove any proprietary notices contained within or relating to the Authority Data.
- 20.2 The Supplier shall not store, copy, disclose, or use the Authority Data except as necessary for the performance by the Supplier of its obligations under this Agreement or as otherwise expressly authorised in writing by the Authority.
- 20.3 To the extent that Authority Data is held and/or processed by the Supplier, the Supplier shall supply that Authority Data to the Authority as requested by the Authority in the format specified in Schedule 2.1 (*Services Description*).
- 20.4 The Supplier shall preserve the integrity of Authority Data and prevent the corruption or loss of Authority Data at all times that the relevant Authority Data is under its control or the control of any Sub-contractor.
- 20.5 The Supplier shall perform secure back-ups as further described in section 4 of Schedule 2.1 (*Services Description*) of all Authority Data and shall ensure that up-to-date back-ups are stored off-site in accordance with the BCDR Plan. The Supplier shall ensure that such back-ups are available to the Authority (or to such other person as the Authority may direct) at all times upon request and are delivered to the Authority at no less intervals than 6 months or otherwise as may be agreed between the Parties.
- 20.6 The Supplier shall ensure that any system on which the Supplier holds any Authority Data, including back-up data, is a secure system that complies with the Security Policy.
- 20.7 If the Authority Data is corrupted, lost or sufficiently degraded as a result of the Supplier's Default so as to be unusable, the Authority may:
- (a) require the Supplier (at the Supplier's expense) to restore or procure the restoration of Authority Data to the extent and in accordance with the requirements specified in Schedule 8.6 (*Business Continuity and Disaster Recovery*) and the Supplier shall do so as soon as practicable but not later than 5 Working Days from the date of receipt of the Authority's notice]; and/or
 - (b) itself restore or procure the restoration of Authority Data, and shall be repaid by the Supplier any reasonable expenses incurred in doing so to the extent and in accordance with the requirements specified in Schedule 8.6 (*Business Continuity and Disaster Recovery*).
- 20.8 If at any time the Supplier suspects or has reason to believe that Authority Data has or may become corrupted, lost or sufficiently degraded in any way for any reason, then the Supplier shall notify the Authority immediately and inform the Authority of the remedial action the Supplier proposes to take.

- 20.9 The Supplier shall comply with the requirements of Schedule 2.4 (*Security Management*).
- 20.10 Subject to Clauses 20.11 and 20.12, the Supplier shall comply with any changes or proposed changes to the Security Policy as notified to the Supplier.
- 20.11 If the Supplier believes that a change or proposed change to the Security Policy will have a material and unavoidable cost implication to the Services it may submit a Change Request. In doing so, the Supplier must support its request by providing evidence of the cause of any increased costs and the steps that it has taken to mitigate those costs. Any change to the Charges shall then be agreed in accordance with the Change Control Procedure.
- 20.12 Until and/or unless a change to the Charges is agreed by the Authority pursuant to Clause 20.11 the Supplier shall continue to perform the Services in accordance with its existing obligations.

Malicious Software

- 20.13 The Supplier shall, as an enduring obligation throughout the Term, use the latest versions of anti-virus definitions and software available from an industry accepted anti-virus software vendor (unless otherwise agreed in writing between the Parties) to check for, contain the spread of, and minimise the impact of Malicious Software in the ESR System (or as otherwise agreed by the Parties).
- 20.14 Notwithstanding Clause 20.13, if Malicious Software is found, the Parties shall cooperate to reduce the effect of the Malicious Software and, particularly if Malicious Software causes loss of operational efficiency or loss or corruption of Authority Data, assist each other to mitigate any Losses and to restore the Services to their desired operating efficiency.
- 20.15 Any cost arising out of the actions of the Parties taken in compliance with the provisions of Clause 20.14 shall be borne by the Parties as follows:
- (a) by the Supplier where the Malicious Software originates from the Supplier Software, the Third Party Software supplied by the Supplier (except where the Authority has waived the obligation set out in Clause 20.13) or the Authority Data (whilst the Authority Data was under the control of the Supplier) unless the Supplier can demonstrate that such Malicious Software was present and not quarantined or otherwise identified by the Authority when provided to the Supplier; and
 - (b) otherwise by the Authority.

21 CONFIDENTIALITY

- 21.1 For the purposes of this Clause 21, the term “**Disclosing Party**” shall mean the Party which discloses or makes available to the other Party directly or indirectly its Confidential Information and “**Recipient**” shall mean the Party which receives or obtains directly or indirectly Confidential Information.
- 21.2 Except to the extent set out in this Clause 21 or where disclosure is expressly permitted elsewhere in this Agreement, the Recipient shall:
- (a) treat the Disclosing Party’s Confidential Information as confidential and

keep it in secure custody (which is appropriate depending upon the form in which such materials are stored and the nature of the Confidential Information contained in those materials);

- (b) not disclose the Disclosing Party's Confidential Information to any other person except as expressly set out in this Agreement or without obtaining the Disclosing Party's prior written consent;
- (c) not use or exploit the Disclosing Party's Confidential Information in any way except for the purposes anticipated under this Agreement; and
- (d) immediately notify the Disclosing Party if it suspects or becomes aware of any unauthorised access, copying, use or disclosure in any form of any of the Disclosing Party's Confidential Information.

21.3 The Recipient shall be entitled to disclose the Confidential Information of the Disclosing Party where:

- (a) the Recipient is required to disclose the Confidential Information by Law, provided that Clause 22 (*Freedom of Information*) shall apply to disclosures required under the FOIA or the EIRs;
- (b) the need for such disclosure arises out of or in connection with:
 - (i) any legal challenge or potential legal challenge against the Authority arising out of or in connection with this Agreement;
 - (ii) the purpose of the examination and certification of the Authority's accounts (provided that the disclosure is made on a confidential basis) or for any examination pursuant to section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority is making use of any Services provided under this Agreement; or
 - (iii) the conduct of a Central Government Body review in respect of this Agreement; or
- (c) the Recipient has reasonable grounds to believe that the Disclosing Party is involved in activity that may constitute a criminal offence under the Bribery Act 2010 and the disclosure is being made to the Serious Fraud Office.

21.4 If the Recipient is required by Law to make a disclosure of Confidential Information, the Recipient shall as soon as reasonably practicable and to the extent permitted by Law notify the Disclosing Party of the full circumstances of the required disclosure including the relevant Law and/or regulatory body requiring such disclosure and the Confidential Information to which such disclosure would apply.

21.5 The Supplier may only disclose the Confidential Information of the Authority on a confidential basis only to:

- (a) Supplier Personnel who are directly involved in the provision of the Services and need to know the Confidential Information to enable performance of the Supplier's obligations under this Agreement;

- (b) its auditors; and
- (c) its professional advisers for the purposes of obtaining advice in relation to this Agreement.

Where the Supplier discloses Confidential Information of the Authority pursuant to this Clause 21.5, it shall remain responsible at all times for compliance with the confidentiality obligations set out in this Agreement by the persons to whom disclosure has been made.

21.6 The Authority may disclose the Confidential Information of the Supplier:

- (a) on a confidential basis to the User Organisations;
- (b) to any Central Government Body on the basis that the information may only be further disclosed to Central Government Bodies;
- (c) to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
- (d) to the extent that the Authority (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;
- (e) on a confidential basis to a professional adviser, consultant, supplier or other person engaged by any of the entities described in Clauses 21.6(a) to (c) (including any benchmarking organisation) for any purpose relating to or connected with this Agreement;
- (f) on a confidential basis for the purpose of the exercise of its rights under this Agreement, including the Audit Rights, its step-in rights pursuant to Clause 30 (*Step-In Rights*), its rights to appoint a Remedial Adviser pursuant to Clause 29 (*Remedial Adviser*) and Exit Management rights; or
- (g) on a confidential basis to a proposed Successor Body in connection with any assignment, novation or disposal of any of its rights, obligations or liabilities under this Agreement;

and for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on the Authority under this Clause 21.

21.7 Nothing in this Clause 21 shall prevent a Recipient from using any techniques, ideas or know-how gained during the performance of this Agreement in the course of its normal business to the extent that this use does not result in a disclosure of the Disclosing Party's Confidential Information or an infringement of Intellectual Property Rights.

Transparency

21.8 The Parties acknowledge that, except for any information which is exempt from disclosure in accordance with the provisions of the FOIA (taking into account but not bound by the information disclosed in Schedule 4.2), the content of this Agreement is not Confidential Information. The Authority shall determine whether any of the content of this Agreement is exempt from disclosure in accordance with

the provisions of the FOIA. The Authority may consult with the Supplier to inform its decision regarding any redactions but shall have the final decision in its absolute discretion.

- 21.9 Notwithstanding any other provision of this Agreement, the Supplier hereby gives its consent for the Authority to publish to the general public this Agreement in its entirety (but with any information which is exempt from disclosure in accordance with the provisions of the FOIA redacted), including any changes to this Agreement agreed from time to time.
- 21.10 The Supplier shall assist and co-operate with the Authority to enable the Authority to publish this Agreement.
- 21.11 The Supplier shall co-operate with the Authority in good faith and in a transparent way and shall promptly provide the Authority with all information together with such explanation that the Authority in its discretion requires for the Authority to have full use and enjoyment of the Solution and manage effectively the delivery of the Services.

22 FREEDOM OF INFORMATION

- 22.1 The Supplier acknowledges that the Authority is subject to the requirements of the FOIA and the EIRs. The Supplier shall:
- (a) provide all necessary assistance and cooperation as reasonably requested by the Authority to enable the Authority to comply with its obligations under the FOIA and EIRs;
 - (b) transfer to the Authority all Requests for Information relating to this Agreement that it receives as soon as practicable and in any event within 2 Working Days of receipt;
 - (c) provide the Authority with a copy of all Information belonging to the Authority and/or relating to the Services requested in the Request for Information which is in its possession or control in the form that the Authority requires within 5 Working Days (or such other period as the Authority may reasonably specify) of the Authority's request for such Information; and
 - (d) not respond directly to a Request for Information unless authorised in writing to do so by the Authority.
- 22.2 The Supplier acknowledges that the Authority may be required under the FOIA and EIRs to disclose Information (including Commercially Sensitive Information) without consulting or obtaining consent from the Supplier. The Authority shall take reasonable steps to notify the Supplier of a Request for Information (in accordance with the Secretary of State's section 45 Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the FOIA) to the extent that it is permissible and reasonably practical for it to do so but (notwithstanding any other provision in this Agreement) the Authority shall be responsible for determining in its absolute discretion whether any Commercially Sensitive Information and/or any other information is exempt from disclosure in accordance with the FOIA and/or the EIRs.

23 PROTECTION OF PERSONAL DATA

23.1 With respect to the Parties' rights and obligations under this Agreement, the Parties acknowledge that the Authority is a Data Controller and that the Supplier is a Data Processor.

23.2 The Supplier shall:

- (a) Process the Personal Data only in accordance with instructions from the Authority to perform its obligations under this Agreement;
- (b) ensure that at all times it has in place appropriate technical and organisational measures to guard against unauthorised or unlawful processing of the Personal Data and/or accidental loss, destruction or damage to the Personal Data, including the measures as are set out in Clause 20 (*Authority Data and Security Requirements*);
- (c) not disclose or transfer the Personal Data to any third party or Supplier Personnel unless necessary for the provision of the Services and, for any disclosure or transfer of Personal Data to any third party, obtain the prior written consent of the Authority (save where such disclosure or transfer is specifically authorised under this Agreement);
- (d) take all reasonable steps to ensure the reliability and integrity of any Supplier Personnel who have access to the Personal Data and ensure that the Supplier Personnel:
 - (i) are aware of and comply with the Supplier's duties under this Clause 23 and Clauses 20 (*Authority Data and Security Requirements*) and 21 (*Confidentiality*);
 - (ii) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by the Authority or as otherwise permitted by this Agreement; and
 - (iii) have undergone adequate training in the use, care, protection and handling of personal data (as defined in the Data Protection Act 1998);
- (e) notify the Authority within 5 Working Days if it receives:
 - (i) from a Data Subject (or third party on their behalf):
 - (A) a Data Subject Access Request (or purported Data Subject Access Request);
 - (B) a request to rectify, block or erase any Personal Data; or
 - (C) any other request, complaint or communication relating to the Authority's obligations under the DPA;
 - (ii) any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data; or

- (iii) a request from any third party for disclosure of Personal Data where compliance with such request is required or purported to be required by Law;
 - (f) provide the Authority with full cooperation and assistance (within the timescales reasonably required by the Authority) in relation to any complaint, communication or request made (as referred to at Clause 23.2 (c)), including by promptly providing:
 - (i) the Authority with full details and copies of the complaint, communication or request;
 - (ii) where applicable, such assistance as is reasonably requested by the Authority to enable the Authority to comply with the Data Subject Access Request within the relevant timescales set out in the DPA; and
 - (iii) the Authority, on request by the Authority, with any Personal Data it holds in relation to a Data Subject; and
 - (g) if requested by the Authority, provide a written description of the measures that has taken and technical and organisational security measures in place, for the purpose of compliance with its obligations pursuant to this Clause 23 and provide to the Authority copies of all documentation relevant to such compliance including, protocols, procedures, guidance, training and manuals.
- 23.3 The Supplier shall not Process or otherwise transfer any Personal Data in or to any country outside the European Economic Area or any country deemed adequate by the European Commission pursuant to Article 25(6) of Directive 95/46/EC (together “**Restricted Countries**”). If, after the Effective Date, the Supplier or any Sub-contractor wishes to Process and/or transfer any Personal Data in or to any Restricted Countries, the following provisions shall apply:
- (a) the Supplier shall submit a Change Request to the Authority which, if the Authority agrees to such Change Request, shall be dealt with in accordance with the Change Control Procedure and Clauses 23 (b) to (d);
 - (b) the Supplier shall set out in its Change Request and/or Impact Assessment details of the following:
 - (i) the Personal Data which will be transferred to and/or Processed in or to any Restricted Countries;
 - (ii) the Restricted Countries to which the Personal Data will be transferred and/or Processed; and
 - (iii) any Sub-contractors or other third parties who will be Processing and/or receiving Personal Data in Restricted Countries;
 - (iv) how the Supplier will ensure an adequate level of protection and adequate safeguards in respect of the Personal Data that will be Processed in and/or transferred to Restricted Countries so as to ensure the Authority’s compliance with the DPA;

- (c) in providing and evaluating the Change Request and Impact Assessment, the Parties shall ensure that they have regard to and comply with then-current Authority, Central Government Bodies and Information Commissioner Office policies, procedures, guidance and codes of practice on, and any approvals processes in connection with, the Processing in and/or transfers of Personal Data to any Restricted Countries; and
- (d) the Supplier shall comply with such other instructions and shall carry out such other actions as the Authority may notify in writing, including:
 - (i) incorporating standard and/or model clauses (which are approved by the European Commission as offering adequate safeguards under the DPA) into this Agreement or a separate data processing agreement between the Parties; and
 - (ii) procuring that any Sub-contractor or other third party who will be Processing and/or receiving or accessing the Personal Data in any Restricted Countries either enters into:
 - (A) a direct data processing agreement with the Authority on such terms as may be required by the Authority; or
 - (B) a data processing agreement with the Supplier on terms which are equivalent to those agreed between the Authority and the Sub-contractor relating to the relevant Personal Data transfer,

and in each case which the Supplier acknowledges may include the incorporation of model contract provisions (which are approved by the European Commission as offering adequate safeguards under the DPA) and technical and organisation measures which the Authority deems necessary for the purpose of protecting Personal Data.

23.4 The Supplier shall use its reasonable endeavours to assist the Authority to comply with any obligations under the DPA and shall not perform its obligations under this Agreement in such a way as to cause the Authority to breach any of the Authority's obligations under the DPA to the extent the Supplier is aware, or ought reasonably to have been aware, that the same would be a breach of such obligations.

24 **PUBLICITY AND BRANDING**

24.1 The Supplier shall not:

- (a) make any press announcements or publicise this Agreement or its contents in any way; or
- (b) use the Authority's name or brand in any promotion or marketing or announcement of orders;

without the prior written consent of the Authority, which shall not be unreasonably withheld or delayed.

24.2 Each Party acknowledges to the other that nothing in this Agreement either

expressly or by implication constitutes an endorsement of any products or services of the other Party (including the Services, the ESR System and the Authority System) and each Party agrees not to conduct itself in such a way as to imply or express any such approval or endorsement.

SECTION G - LIABILITY, INDEMNITIES AND INSURANCE

25 LIMITATIONS ON LIABILITY

Unlimited Liability

25.1 Neither Party limits its liability for:

- (a) death or personal injury caused by its negligence, or that of its employees, agents or Sub-contractors (as applicable);
- (b) fraud or fraudulent misrepresentation by it or its employees;
- (c) breach of any obligation as to title implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982;
- (d) any liability to the extent it cannot be limited or excluded by Law.

Financial Limits

25.2 Subject to Clause 25.1 (*Unlimited Liability*), the Supplier's total aggregate liability:

- (a) in respect of any breach of Clauses 20 (*Data Security*), Clause 21 (*Confidentiality*), Clause 23 (*Personal Data*) and Clause 39 (*Prevention of fraud and bribery*) or the indemnities in Clause 10.5 (*VAT*), Clause 14.7 (*Employment Indemnity*), Clause 14.8 (*Income Tax and National Insurance Contributions*), Clause 19 (*IPRs Indemnity*),; Schedule 9.1 (*Staff Transfer*) and the Annexes to Schedule 9.1 (*Staff Transfer*) shall be unlimited;
- (b) in respect of all Service Credits incurred in any rolling period of 12 months shall be subject in aggregate to the Service Credit Cap;
- (c) in respect of all Delay Payments incurred in any rolling period of 12 months shall be subject in aggregate to the Delay Payment Cap;
- (d) in respect of all other Losses incurred by the Authority under or in connection with this Agreement as a result of Defaults by the Supplier shall in no event exceed:
 - (i) in relation to Defaults occurring in the first Contract Year, the higher of ***Information redacted under Section 43 of FOIA*** of the Estimated Year 1 Charges; and
 - (ii) in relation to Defaults occurring during any subsequent Contract Year, the higher of ***Information redacted under Section 43 of FOIA*** of the Charges paid and/or due to be paid to the Supplier under this Agreement in the Contract Year immediately preceding the Default occurring; and
- (e) in relation to Defaults occurring after the end of the Term, the higher of ***Information redacted under Section 43 of FOIA*** of the Charges paid and/or due to be paid to the Supplier in the 12 month period immediately prior to the last day of the Term;

provided that where any Losses referred to in Clause 25.2(d) have been incurred by the Authority as a result of the Supplier's abandonment of this Agreement or the Supplier's wilful default, wilful breach of a fundamental term of this Agreement or wilful repudiatory breach of this Agreement, the references in such Clause to ***Information redacted under Section 43 of FOIA.***

25.3 Subject to Clause 25.1 (*Unlimited Liability*), and without prejudice to its obligation to pay the Charges as and when they fall due for payment, the Authority's total aggregate liability in respect of all Losses incurred by the Supplier under or in connection with this Agreement:

(a) for early termination of this Agreement by the Authority pursuant to Clause 33.1(a) (*Termination by the Authority*) or by the Supplier pursuant to Clause 33.3(a) (*Termination by the Supplier*) shall in no event exceed the following amounts:

- (i) in relation to the Unrecovered Payment, the amount set out in Paragraph 4 of Schedule 7.2 (*Payments on Termination*);
- (ii) in relation to the Breakage Costs Payment, the amount set out in Paragraph 3.2 of Schedule 7.2 (*Payments on Termination*); and
- (iii) in relation to the Compensation Payment, the amount set out in Paragraph 6 of Schedule 7.2 (*Payments on Termination*); and

(b) as a result of Defaults of the Authority shall in no event exceed:

- (i) in relation to Defaults occurring in the first Contract Year, an amount equal to the Estimated Year 1 Charges;
- (ii) in relation to Defaults occurring during any subsequent Contract Year, an amount equal to the total Charges paid and/or due to be paid under this Agreement in the Contract Year immediately preceding the occurrence of the Default; and
- (iii) in relation to Defaults occurring after the end of the Term, an amount equal to the total Charges paid and/or due to be paid to the Supplier in the 12 month period immediately prior to the last day of the Term.

25.4 Subject to Clause 25.1 (*Unlimited Liability*) and Clause 25.5, neither Party shall be liable to the other Party for:

- (a) any indirect, special or consequential Loss; or
- (b) any loss of profits, turnover, business opportunities or damage to goodwill (in each case whether direct or indirect).

25.5 Subject to Clause 25.2 nothing in Clause 25.4 shall limit the right of the Authority to claim from the Supplier the following Losses incurred by the Authority to the extent that they arise as a result of a Default by the Supplier:

- (a) any additional operational and/or administrative costs and expenses incurred by the Authority, including costs relating to time spent by or on behalf of the Authority in dealing with the consequences of the Default;

- (b) any wasted expenditure or charges;
- (c) any bank charges incurred by one or more ESR User as a result of any non-payment or late payment of any monies due to them;
- (d) the additional cost of procuring Replacement Services for the remainder of the Term and/or replacement Deliverables, which shall include any incremental costs associated with such Replacement Services and/or replacement Deliverables above those which would have been payable under this Agreement;
- (e) any compensation or interest paid to a third party by the Authority;
- (f) any fine, penalty or costs incurred by the Authority pursuant to Law; and
- (g) any anticipated savings identified in Schedule 7.6 (*Anticipated Savings*);
- (h) costs, expenses and charges resulting from the loss or corruption of the data or software owned by or under the control of the Authority provided that the Supplier's liability shall be limited to costs, expenses and charges associated with re-constituting such data or software and returning it to a fully operational state insofar as it is inherently capable of being re-constituted;
- (i) all additional operational and administrative costs and expenses incurred (including but not limited to any tax liabilities, interest and penalties payable to the Inland Revenue, national insurance, costs incurred in any Inland Revenue investigation, any grossed up tax liabilities arising as a result of payments made by the Authority or arising out of the overpayment by the Authority of tax and national insurance liabilities on behalf of its employees) by the Authority as a result of the claims received by Authority from its payees and third parties arising as a result of any Contractor Default, or incurred as a result of carrying out activities to ensure prompt and accurate payment, remedial accurate payment or the recovery of any overpayment to such payees or third parties, including but not limited to interest payments, and it is expressly accepted that save where it is reasonable so to do the Authority shall not be required to seek recovery of any tax, national insurance, interest or penalties paid by the Authority on behalf of its employees, from its employees.

25.6 Deductions shall not be taken into consideration when calculating the Supplier's liability under Clauses 25.2(b) or 25.2(e).

25.7 Each Party shall use all reasonable endeavours to mitigate any loss or damage suffered arising out of or in connection with this Agreement.

25.8 Except as expressly stated in this Agreement, all warranties and conditions whether express or implied by statute, common law or otherwise are hereby excluded to the extent permitted by law.

Conduct of indemnities

25.9 Where under this Agreement one Party indemnifies the other Party, the Parties shall comply with the provisions of Schedule 8.7 (*Conduct of Claims*) in relation to

the conduct of claims made by a third person against the Party having (or claiming to have) the benefit of the indemnity.

26 INSURANCE

The Supplier shall comply with the provisions of Schedule 2.5 (*Insurance Requirements*) in relation to obtaining and maintaining insurance.

SECTION H - REMEDIES AND RELIEF

27 RECTIFICATION PLAN PROCESS

27.1 In the event that:

- (a) there is, or is reasonably likely to be, a Delay;
- (b) a Deliverable fails to satisfy the Test Success Criteria pursuant to Paragraph 12 of Schedule 6.2 (*Testing Procedures*);
- (c) one or more Material Test Issues arise pursuant to Paragraph 13 of Schedule 6.2 (*Testing Procedures*);
- (d) in any Service Period there has been
 - (i) a KPI Failure; and/or
 - (ii) a SPI Failure; and/or
- (e) the Supplier commits a Default that is capable of remedy (and for these purposes a Default may be a single Default or a number of Defaults or repeated Defaults (whether of the same or different obligations and regardless of whether such Defaults are remedied) which taken together constitute a Default),

(each a “**Notifiable Default**”), the Supplier shall, in accordance with Schedule 8.1 (*Governance*), notify the Authority of the Notifiable Default as soon as practicable but in any event within 2 Working Days of becoming aware of the Notifiable Default, detailing the actual or anticipated effect of the Notifiable Default and, unless the Notifiable Default also constitutes limb (d) and/or (f) of the definition of a Rectification Plan Failure, the Authority may not terminate this Agreement in whole or in part on the grounds of the Notifiable Default without first following the Rectification Plan Process.

Notification

27.2 If:

- (a) the Supplier notifies the Authority pursuant to Clause 27.1 that a Notifiable Default has occurred; or
- (b) the Authority notifies the Supplier that it considers that a Notifiable Default has occurred (setting out sufficient detail so that it is reasonably clear what the Supplier has to rectify),

the Supplier shall comply with the Rectification Plan Process.

27.3 The “**Rectification Plan Process**” shall be as set out in Clauses 27.4 (*Submission of the draft Rectification Plan*) to 27.9 (*Agreement of the Rectification Plan*).

Submission of the draft Rectification Plan

27.4 The Supplier shall submit a draft Rectification Plan to the Authority for it to review as soon as possible and in any event within 10 Working Days (or such other period

as may be agreed between the Parties) after the original notification pursuant to Clause 27.2 (*Notification*). The Supplier shall submit a draft Rectification Plan even if the Supplier disputes that it is responsible for the Notifiable Default.

- 27.5 The draft Rectification Plan shall set out:
- (a) full details of the Notifiable Default that has occurred, including a root cause analysis;
 - (b) the actual or anticipated effect of the Notifiable Default; and
 - (c) the steps which the Supplier proposes to take to rectify the Notifiable Default (if applicable) and to prevent such Notifiable Default from recurring, including timescales for such steps and for the rectification of the Notifiable Default (where applicable).
- 27.6 The Supplier shall promptly provide to the Authority any further documentation that the Authority reasonably requires to assess the Supplier's root cause analysis. If the Parties do not agree on the root cause set out in the draft Rectification Plan, either Party may refer the matter to be determined by an expert in accordance with Paragraph 6 of Schedule 8.3 (*Dispute Resolution Procedure*).

Agreement of the Rectification Plan

- 27.7 The Authority may reject the draft Rectification Plan by notice to the Supplier if, acting reasonably, it considers that the draft Rectification Plan is inadequate, for example because the draft Rectification Plan:
- (a) is insufficiently detailed to be capable of proper evaluation;
 - (b) will take too long to complete;
 - (c) will not prevent reoccurrence of the Notifiable Default; and/or
 - (d) will rectify the Notifiable Default but in a manner which is unacceptable to the Authority.
- 27.8 The Authority shall notify the Supplier whether it consents to the draft Rectification Plan as soon as reasonably practicable. If the Authority rejects the draft Rectification Plan, the Authority shall give reasons for its decision and the Supplier shall take the reasons into account in the preparation of a revised Rectification Plan. The Supplier shall submit the revised draft of the Rectification Plan to the Authority for review within 5 Working Days (or such other period as agreed between the Parties) of the Authority's notice rejecting the earlier draft.
- 27.9 If the Authority consents to the Rectification Plan, the Supplier shall immediately start work on the actions set out in the Rectification Plan.

28 DELAY PAYMENTS

- 28.1 If a Key Milestone has not been Achieved by its relevant Milestone Date, the provisions of Paragraph 1 of Part C of Schedule 7.1 (*Charges and Invoicing*) shall apply in relation to the payment of Delay Payments.

28.2 Delay Payments shall be the Authority's exclusive financial remedy for the Supplier's failure to Achieve a Key Milestone by its Milestone Date except where:

- (a) the Authority is entitled to or does terminate this Agreement pursuant to Clause 33.1(b)(*Termination by the Authority*); or
- (b) the Delay exceeds the Delay Deduction Period

in which case payment of Delay Payments shall be without prejudice to the Authority's other rights and remedies.

29 REMEDIAL ADVISER

29.1 If:

- (a) any of the Intervention Trigger Events occur; or
- (b) the Authority reasonably believes that any of the Intervention Trigger Events are likely to occur,

(each an "**Intervention Cause**"), the Authority may give notice to the Supplier (an "**Intervention Notice**") giving reasonable details of the Intervention Cause and requiring:

- (i) a meeting between the Authority Representative and the Supplier Representative to discuss the Intervention Cause; and/or
- (ii) the appointment by the Supplier of a Remedial Adviser, as further described in this Clause 29.

For the avoidance of doubt, if the Intervention Cause is also a Supplier Termination Event, the Authority has no obligation to exercise its rights under this Clause 29.1 prior to or instead of exercising its right to terminate this Agreement.

29.2 If the Authority gives notice that it requires the appointment of a Remedial Adviser:

- (a) the Remedial Adviser shall be:
 - (i) a person selected by the Supplier and approved by the Authority; or
 - (ii) if none of the persons selected by the Supplier have been approved by the Authority, acting reasonably, (or no person has been selected by the Supplier) within 10 Working Days following the date on which the Intervention Notice is given, a person identified by the Authority;
- (b) the terms of engagement and start date agreed with the Remedial Adviser must be approved by the Authority; and
- (c) any right of the Authority to terminate this Agreement pursuant to Clause 33.1(b)(*Termination by the Authority*) for the occurrence of that Intervention Cause shall be suspended for 60 Working Days from (and including) the date of the Intervention Notice (or such other period as may be agreed between the Parties)(the "**Intervention Period**").

29.3 The Remedial Adviser's overall objective shall be to mitigate the effects of, and (to the extent capable of being remedied) to remedy, the Intervention Cause and to avoid the occurrence of similar circumstances in the future. In furtherance of this objective (but without diminishing the Supplier's responsibilities under this Agreement), the Parties agree that the Remedial Adviser may undertake any one or more of the following actions:

- (a) observe the conduct of and work alongside the Supplier Personnel to the extent that the Remedial Adviser considers reasonable and proportionate having regard to the Intervention Cause;
- (b) gather any information the Remedial Adviser considers relevant in the furtherance of its objective;
- (c) write reports and provide information to the Authority in connection with the steps being taken by the Supplier to remedy the Intervention Cause;
- (d) make recommendations to the Authority and/or the Supplier as to how the Intervention Cause might be mitigated or avoided in the future; and/or
- (e) take any other steps that the Authority and/or the Remedial Adviser reasonably considers necessary or expedient in order to mitigate or rectify the Intervention Cause.

29.4 The Supplier shall:

- (a) work alongside, provide information to, co-operate in good faith with and adopt any reasonable methodology in providing the Services recommended by the Remedial Adviser;
- (b) ensure that the Remedial Adviser has all the access it may require in order to carry out its objective, including access to the ESR System;
- (c) submit to such monitoring as the Authority and/or the Remedial Adviser considers reasonable and proportionate in respect of the Intervention Cause;
- (d) implement any reasonable recommendations made by the Remedial Adviser that have been approved by the Authority within the timescales given by the Remedial Adviser; and
- (e) not terminate the appointment of the Remedial Adviser prior to the end of the Intervention Period without the prior consent of the Authority (such consent not to be unreasonably withheld).

29.5 The Supplier shall be responsible for:

- (a) the costs of appointing, and the fees charged by, the Remedial Adviser; and
- (b) its own costs in connection with any action required by the Authority and/or the Remedial Adviser pursuant to this Clause 29.

- 29.6 If:
- (a) the Supplier:
 - (i) fails to perform any of the steps required by the Authority in an Intervention Notice; and/or
 - (ii) is in Default of any of its obligations under Clause 29.4; and/or
 - (b) the relevant Intervention Trigger Event is not rectified by the end of the Intervention Period,

(each a “**Remedial Adviser Failure**”), the Authority shall be entitled to terminate this Agreement pursuant to Clause 33.1(b) (*Termination by the Authority*).

30 STEP-IN RIGHTS

30.1 On the occurrence of a Step-In Trigger Event, the Authority may serve notice on the Supplier (a “**Step-In Notice**”) that it will be taking action under this Clause 30 (*Step-In Rights*), either itself or with the assistance of a third party (provided that the Supplier may require any third parties to comply with a confidentiality undertaking equivalent to Clause 21 (*Confidentiality*)). The Step-In Notice shall set out the following:

- (a) the action the Authority wishes to take and in particular the Services that it wishes to control (the “**Required Action**”);
- (b) the Step-In Trigger Event that has occurred and whether the Authority believes that the Required Action is due to the Supplier’s Default;
- (c) the date on which it wishes to commence the Required Action;
- (d) the time period which it believes will be necessary for the Required Action;
- (e) whether the Authority will require access to the Supplier’s premises and/or the Sites; and
- (f) to the extent practicable, the impact that the Authority anticipates the Required Action will have on the Supplier’s obligations to provide the Services during the period that the Required Action is being taken.

30.2 Following service of a Step-In Notice, the Authority shall:

- (a) take the Required Action set out in the Step-In Notice and any consequential additional action as it reasonably believes is necessary to achieve the Required Action;
- (b) keep records of the Required Action taken and provide information about the Required Action to the Supplier;
- (c) co-operate wherever reasonable with the Supplier in order to enable the Supplier to continue to provide the Services in relation to which the Authority is not assuming control; and

- (d) act reasonably in mitigating the cost that the Supplier will incur as a result of the exercise of the Authority's rights under this Clause 30.
- 30.3 For so long as and to the extent that the Required Action is continuing, then:
- (a) the Supplier shall not be obliged to provide the Services to the extent that they are the subject of the Required Action; and
- (b) subject to Clause 30.4, the Authority shall pay to the Supplier the Charges after subtracting any applicable Deductions and the Authority's costs of taking the Required Action.
- 30.4 If the Required Action results in:
- (a) the degradation of any Services not subject to the Required Action; or
- (b) the non-Achievement of a Milestone,
- beyond that which would have been the case had the Authority not taken the Required Action, then the Supplier shall be entitled to an agreed adjustment of the Charges, provided that the Supplier can demonstrate to the reasonable satisfaction of the Authority that the Required Action has led to such degradation or non-Achievement.
- 30.5 Before ceasing to exercise its step in rights under this Clause 30 the Authority shall deliver a written notice to the Supplier (a "**Step-Out Notice**"), specifying:
- (a) the Required Action it has actually taken; and
- (b) the date on which the Authority plans to end the Required Action (the "**Step-Out Date**") subject to the Authority being satisfied with the Supplier's ability to resume the provision of the Services and the Supplier's plan developed in accordance with Clause 30.6.
- 30.6 The Supplier shall, following receipt of a Step-Out Notice and not less than 20 Working Days prior to the Step-Out Date, develop for the Authority's approval a draft plan (a "**Step-Out Plan**") relating to the resumption by the Supplier of the Services, including any action the Supplier proposes to take to ensure that the affected Services satisfy the requirements of this Agreement.
- 30.7 If the Authority does not approve the draft Step-Out Plan, the Authority shall inform the Supplier of its reasons for not approving it. The Supplier shall then revise the draft Step-Out Plan taking those reasons into account and shall re-submit the revised plan to the Authority for the Authority's approval. The Authority shall not withhold or delay its approval of the draft Step-Out Plan unnecessarily.
- 30.8 The Supplier shall bear its own costs in connection with any step-in by the Authority under this Clause 30, provided that the Authority shall reimburse the Supplier's reasonable additional expenses incurred directly as a result of any step-in action taken by the Authority under:
- (a) limbs (c) or (d) of the definition of a Step-In Trigger Event; or

- (b) limbs (e), (f) and (g) of the definition of a Step-in Trigger Event (insofar as the primary cause of the Authority serving the Step-In Notice is identified as not being the result of the Supplier's Default).

31 **AUTHORITY CAUSE**

31.1 The Supplier shall:

- (a) notify the Authority as soon as reasonably practicable (and in any event within 2 Working Days of the Supplier becoming aware) that an Authority Cause has occurred or is reasonably likely to occur, giving details of:
 - (i) the Authority Cause and its effect, or likely effect, on the Supplier's ability to meet its obligations under this Agreement; and
 - (ii) any steps which the Authority can take to eliminate or mitigate the consequences and impact of such Authority Cause; and
- (b) use all reasonable endeavours to eliminate or mitigate the consequences and impact of an Authority Cause, including any Losses that the Supplier may incur and the duration and consequences of any Delay or anticipated Delay.

31.2 If the Supplier has failed to:

- (a) Achieve a Milestone by its Milestone Date;
 - (b) provide the Operational Services in accordance with the Target Performance Levels; and/or
 - (c) comply with its obligations under this Agreement,
- (each a "Supplier Non-Performance"),

and can demonstrate that the Supplier Non-Performance would not have occurred but for an Authority Cause, then (subject to the Supplier fulfilling its obligations in this Clause 31):

- (i) the Supplier shall not be treated as being in breach of this Agreement to the extent the Supplier can demonstrate that the Supplier Non-Performance was caused by the Authority Cause;
- (ii) the Authority shall not be entitled to exercise any rights that may arise as a result of that Supplier Non-Performance:
 - (A) to terminate this Agreement pursuant to Clause 33.1(b) (*Termination by the Authority*); or
 - (B) to take action pursuant Clauses 29 (*Remedial Adviser*) or 30 (*Step-In*);
- (iii) where the Supplier Non-Performance constitutes the failure to Achieve a Milestone by its Milestone Date:

- (A) the Milestone Date shall be postponed by a period equal to the period of Delay that the Supplier can demonstrate was caused by the Authority Cause;
 - (B) if the Authority, acting reasonably, considers it appropriate, any Plan shall be amended to reflect any consequential revisions required to subsequent Milestone Dates resulting from the Authority Cause;
 - (C) if the Milestone is a Key Milestone, the Supplier shall have no liability to pay any Delay Payments associated with the Key Milestone to the extent that the Supplier can demonstrate that such failure was caused by the Authority Cause; and
 - (D) the Supplier shall be entitled to claim compensation subject to and in accordance with the principles set out in Paragraph 2 of Part C of Schedule 7.1 (*Charges and Invoicing*); and/or
- (iv) where the Supplier Non-Performance constitutes a Performance Failure:
- (A) the Supplier shall not be liable to accrue Service Credits;
 - (B) the Authority shall not be entitled to withhold any of the Service Charges pursuant to Clause 7.2(d)(ii) (*Performance Failures*); and
 - (C) the Supplier shall be entitled to invoice for the Service Charges for the relevant Operational Services affected by the Authority Cause,

in each case, to the extent that the Supplier can demonstrate that the Performance Failure was caused by the Authority Cause.

31.3 In order to claim any of the rights and/or relief referred to in Clause 31.2, the Supplier shall as soon as reasonably practicable (and in any event within 10 Working Days) of becoming aware that an Authority Cause has caused, or is likely to cause, a Supplier Non-Performance, give the Authority notice (a “**Relief Notice**”) setting out details of:

- (a) the Supplier Non-Performance;
- (b) the Authority Cause and its effect on the Supplier’s ability to meet its obligations under this Agreement; and
- (c) the relief and/or compensation claimed by the Supplier.

31.4 Following the receipt of a Relief Notice, the Authority shall as soon as reasonably practicable consider the nature of the Supplier Non-Performance and the alleged Authority Cause and whether it agrees with the Supplier’s assessment set out in the Relief Notice as to the effect of the relevant Authority Cause and its entitlement to relief and/or compensation, consulting with the Supplier where necessary.

- 31.5 Without prejudice to Clause 5.9(*Continuing obligation to provide the Services*), if a Dispute arises as to:
- (a) whether a Supplier Non-Performance would not have occurred but for an Authority Cause; and/or
 - (b) the nature and/or extent of the relief and/or compensation claimed by the Supplier,

either Party may refer the Dispute to the Dispute Resolution Procedure. Pending the resolution of the Dispute, both Parties shall continue to resolve the causes of, and mitigate the effects of, the Supplier Non-Performance.

- 31.6 Any Change that is required to a Plan or to the Charges pursuant to this Clause 31 shall be implemented in accordance with the Change Control Procedure.

32 **FORCE MAJEURE**

- 32.1 Subject to the remaining provisions of this Clause 32 (and, in relation to the Supplier, subject to its compliance with its obligations in Schedule 8.6 (*Business Continuity and Disaster Recovery*)), a Party may claim relief under this Clause 32 from liability for failure to meet its obligations under this Agreement for as long as and only to the extent that the performance of those obligations is directly affected by a Force Majeure Event. Any failure or delay by the Supplier in performing its obligations under this Agreement which results from a failure or delay by an agent, Sub-contractor or supplier shall be regarded as due to a Force Majeure Event only if that agent, Sub-contractor or supplier is itself impeded by a Force Majeure Event from complying with an obligation to the Supplier.
- 32.2 The Affected Party shall as soon as reasonably practicable issue a Force Majeure Notice, which shall include details of the Force Majeure Event, its effect on the obligations of the Affected Party and any action the Affected Party proposes to take to mitigate its effect.
- 32.3 If the Supplier is the Affected Party, it shall not be entitled to claim relief under this Clause 32 to the extent that consequences of the relevant Force Majeure Event:
- (a) are capable of being mitigated by any of the Services including the BCDR Services, but the Supplier has failed to do so; and/or
 - (b) should have been foreseen and prevented or avoided by a prudent provider of services similar to the Services, operating to the standards required by this Agreement.
- 32.4 Subject to Clause 32.5, as soon as practicable after the Affected Party issues the Force Majeure Notice, and at regular intervals thereafter, the Parties shall consult in good faith and use reasonable endeavours to agree any steps to be taken and an appropriate timetable in which those steps should be taken, to enable continued provision of the Services affected by the Force Majeure Event.
- 32.5 The Parties shall at all times following the occurrence of a Force Majeure Event and during its subsistence use their respective reasonable endeavours to prevent and mitigate the effects of the Force Majeure Event. Where the Supplier is the

Affected Party, it shall take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

32.6 Where, as a result of a Force Majeure Event:

- (a) an Affected Party fails to perform its obligations in accordance with this Agreement, then during the continuance of the Force Majeure Event:
 - (i) the other Party shall not be entitled to exercise any rights to terminate this Agreement in whole or in part as a result of such failure other than pursuant to Clause 33.1(c)(*Termination by the Authority*) or Clause 33.3(b)(*Termination by the Supplier*); and
 - (ii) neither Party shall be liable for any Default arising as a result of such failure;
- (b) the Supplier fails to perform its obligations in accordance with this Agreement:
 - (i) the Authority shall not be entitled:
 - (A) to receive Delay Payments pursuant to Clause 28 (*Delay Payments*) to the extent that the Achievement of any Milestone is affected by the Force Majeure Event; and
 - (B) to receive Service Credits or to withhold any of the Service Charges pursuant to Clause 7.2(d)(ii)(*Performance Failures*) to the extent that a Performance Failure has been caused by the Force Majeure Event; and
 - (ii) the Supplier shall be entitled to receive payment of the Charges (or a proportional payment of them) only to the extent that the Services (or part of the Services) continue to be performed in accordance with the terms of this Agreement during the occurrence of the Force Majeure Event.

32.7 The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement.

32.8 Relief from liability for the Affected Party under this Clause 32 shall end as soon as the Force Majeure Event no longer causes the Affected Party to be unable to comply with its obligations under this Agreement and shall not be dependent on the serving of notice under Clause 32.7.

SECTION J - TERMINATION AND EXIT MANAGEMENT**33 TERMINATION RIGHTS****Termination by the Authority**

- 33.1 The Authority may, by issuing a Termination Notice to the Supplier, terminate:
- (a) this Agreement for convenience at any time upon no less than 12 months' notice;
 - (b) this Agreement if a Supplier Termination Event occurs;
 - (c) this Agreement if a Force Majeure Event endures for a continuous period of more than 90 days;
 - (d) this Agreement following the Mid Term Strategic Review upon no less than 12 months' notice;
 - (e) part only of this Agreement to the extent that it relates to a Project being late where the implementation of the Project is delayed by a period of 3 months or more from the initial estimated go-live date as agreed by the Parties at the start of Project other than due to a Customer Cause;

and this Agreement or part thereof shall terminate on the date specified in the Termination Notice.

33.2 Where the Authority:

- (a) is terminating this Agreement under Clause 33.1(b) due to the occurrence of either limb (c) and/or (h) of the definition of Supplier Termination Event, it may rely on a single material Default or on a number of Defaults or repeated Defaults (whether of the same or different obligations and regardless of whether such Defaults are cured) which taken together constitute a material Default; and/or
- (b) has the right to terminate this Agreement under Clause 33.1(b), Clause 33.1(c) or 33.1(d) it may, prior to or instead of terminating the whole of this Agreement, serve a Termination Notice requiring the partial termination of this Agreement to the extent that it relates to any part of the Services which are materially affected by the relevant circumstances.

Termination by the Supplier

- 33.3 The Supplier may, by issuing a Termination Notice to the Authority, terminate:
- (a) this Agreement if the Authority fails to pay an undisputed sum due to the Supplier under this Agreement which in aggregate exceeds ***Information redacted under Section 43 of FOIA*** and such amount remains outstanding 30 Working Days after the receipt by the Authority of a notice of non-payment from the Supplier;
 - (b) any Services that are materially impacted by a Force Majeure Event that endures for a continuous period of more than 90 days,

and this Agreement or the relevant Services (as the case may be) shall then

terminate on the date specified in the Termination Notice (which shall not be less than 20 Working Days from the date of the issue of the Termination Notice). If the operation of Clause 33.3 (b) would result in a Partial Termination, the provisions of Clause 33.4 (*Partial Termination*) shall apply.

Partial Termination

- 33.4 If the Supplier notifies the Authority pursuant to Clause 33.3(b) (*Termination by the Supplier*) that it intends to terminate this Agreement in part and the Authority, acting reasonably, believes that the effect of such Partial Termination is to render the remaining Services incapable of meeting a significant part of the Authority Requirements, then the Authority shall be entitled to terminate the remaining part of this Agreement by serving a Termination Notice to the Supplier within 1 month of receiving the Supplier's Termination Notice. For the purpose of this Clause 33.4, in assessing the significance of any part of the Authority Requirements, regard shall be had not only to the proportion of that part to the Authority Requirements as a whole, but also to the importance of the relevant part to the Authority.
- 33.5 Following a Partial Termination in accordance with Clause 33.1 (*Termination by the Authority*), Clause 33.3(b) (*Termination by the Supplier*) or Clause 33.4 (*Partial Termination*), the Parties shall agree the effect of any Change necessitated by such Partial Termination in accordance with the Change Control Procedure, including the effect the Partial Termination may have on any other Services and the Charges, provided that:
- (a) the Supplier shall not be entitled to an increase in the Charges in respect of the Services that have not been terminated if the Partial Termination arises due to the occurrence of a Supplier Termination Event;
 - (b) any adjustment to the Charges (if any) shall be calculated in accordance with the Financial Model and must be reasonable;
 - (c) the Supplier shall not be entitled to reject the Change; and
 - (d) the provision of Schedule 7.2 shall apply (Payment on Termination).

34 CONSEQUENCES OF EXPIRY OR TERMINATION

General Provisions on Expiry or Termination

- 34.1 The provisions of Clauses 12 (*Records, Reports, Audits and Open Book Data*), 16 (*Intellectual Property Rights*), 17 (*Licences Granted by the Supplier*), 19.1 (*IPRs Indemnity*), 21 (*Confidentiality*), 22 (*Freedom of Information*), 23 (*Protection of Personal Data*), 25 (*Limitations on Liability*), 34 (*Consequences of Expiry or Termination*), 40 (*Severance*), 42 (*Entire Agreement*), 43 (*Third Party Rights*), 45 (*Disputes*) and 46 (*Governing Law and Jurisdiction*), and the provisions of Schedules 1 (*Definitions*), 5.1 (*IPRs provided by Supplier*), 5.2 (*IPRs provided by Authority*), 5.3 (*IPRs procured by Supplier*), 7.1 (*Charges and Invoicing*), 7.2 (*Payments on Termination*), 7.5 (*Financial Reports and Audit Rights*), 8.3 (*Dispute Resolution Procedure*), 8.4 (*Record Provisions and Audit Rights*), 8.5 (*Exit Management*), 9.1 (*Staff Transfer*), shall survive the termination or expiry of this Agreement.

Exit Management

34.2 The Parties shall comply with the provisions of Schedule 8.5 (*Exit Management*) and any current Disengagement Plan in relation to orderly transition all or any of the Services to the Authority or a Replacement Supplier as required depending on the Services being terminated.

Payments made by the Authority

34.3 If this Agreement is terminated by the Authority pursuant to Clause 33.1(a) or 33.1(d) (*Termination by the Authority*) or by the Supplier pursuant to Clause 33.3(a) (*Termination by the Supplier*), the Authority shall pay the Supplier the following payments (which shall be the Supplier's sole remedy for the termination of this Agreement):

- (a) the Termination Payment; and
- (b) the Compensation Payment, if either of the following periods is less than 365 days:
 - (i) the period from (but excluding) the date that the Termination Notice is given (or, where Paragraph 2.1(d) of Part D of Schedule 7.1 (*Charges and Invoicing*) applies, deemed given) by the Authority pursuant to Clauses 33.1(a) or 33.1(d) (*Termination by the Authority*) to (and including) the Termination Date; or
 - (ii) the period from (and including) the date of the non-payment by the Authority referred to in Clause 33.3(a) (*Termination by the Supplier*) to (and including) the Termination Date.

34.4 If this Agreement is terminated (in part or in whole) by the Authority pursuant to Clauses 33.1(b), 33.1(c), 33.1(e) and/or 33.2 (*Termination by the Authority*), or the Term expires, the only payments that the Authority shall be required to make as a result of such termination (whether by way of compensation or otherwise) are:

- (a) payments in respect of any Assets or apportionments in accordance with Schedule 8.5 (*Exit Management*); and
- (b) payments in respect of unpaid Charges for Services received up until the Termination Date.

34.5 The costs of termination incurred by the Parties shall lie where they fall if either Party terminates or partially terminates this Agreement for a continuing Force Majeure Event pursuant to Clause 33.1(c), 33.2 (*Termination by the Authority*) or 33.3(b) (*Termination by the Supplier*).

Payments made by the Supplier

34.6 In the event of termination or expiry of this Agreement, the Supplier shall repay to the Authority all Charges it has been paid in advance in respect of Services not provided by the Supplier as at the date of expiry or termination.

34.7 If this Agreement is terminated (in whole or in part) by the Authority pursuant to Clause 33.1(b) (*Termination by the Authority*) prior to Achievement of one or more CPP Milestones, the Supplier shall repay to the Authority on demand (if, and to the

extent the Authority requires) the aggregate sum of all Milestone Payments which it has been paid and which relate to the Milestones (or, in the case of Partial Termination, the Milestones for the parts of the Services terminated) relating to each such CPP Milestone.

SECTION I - MISCELLANEOUS AND GOVERNING LAW

35 COMPLIANCE

Health and Safety

- 35.1 The Supplier shall perform its obligations under this Agreement (including those in relation to the Services) in accordance with:
- (a) all applicable Law regarding health and safety; and
 - (b) the Authority's health and safety policy (as provided to the Supplier from time to time) whilst at the Authority Premises.
- 35.2 Each Party shall notify the other as soon as practicable of any health and safety incidents or material health and safety hazards at the Authority Premises of which it becomes aware and which relate to or arise in connection with the performance of this Agreement. The Supplier shall instruct the Supplier Personnel to adopt any necessary associated safety measures in order to manage any such material health and safety hazards.

Equality and Diversity

- 35.3 The Supplier shall:
- (a) perform its obligations under this Agreement (including those in relation to the Services) in accordance with:
 - (i) all applicable equality Law (whether in relation to race, sex, gender reassignment, age, disability, sexual orientation, religion or belief, pregnancy, maternity or otherwise);
 - (ii) the Authority's equality and diversity policy as provided to the Supplier from time to time; and
 - (iii) any other requirements and instructions which the Authority reasonably imposes in connection with any equality obligations imposed on the Authority at any time under applicable equality Law; and
 - (b) take all necessary steps, and inform the Authority of the steps taken, to prevent unlawful discrimination designated as such by any court or tribunal, or the Equality and Human Rights Commission or (any successor organisation).

Official Secrets Act and Finance Act

- 35.4 The Supplier shall comply with the provisions of:
- (a) the Official Secrets Acts 1911 to 1989; and
 - (b) section 182 of the Finance Act 1989.

36 ASSIGNMENT AND NOVATION

36.1 The Supplier shall not assign, novate or otherwise dispose of or create any trust in relation to any or all of its rights, obligations or liabilities under this Agreement without the prior written consent of the Authority.

36.2 The Authority may at its discretion assign, novate or otherwise dispose of any or all of its rights, obligations and liabilities under this Agreement and/or any associated licences to:

- (a) any Central Government Body; or
- (b) to a body other than a Central Government Body (including any private sector body) which performs any of the functions that previously had been performed by the Authority,

and the Supplier shall, at the Authority's request, enter into a novation agreement in such form as the Authority shall reasonably specify in order to enable the Authority to exercise its rights pursuant to this Clause 36.2.

36.3 A change in the legal status of the Authority such that it ceases to be a Central Government Body shall not (subject to Clause 36.4) affect the validity of this Agreement and this Agreement shall be binding on any successor body to the Authority.

36.4 If the Authority assigns, novates or otherwise disposes of any of its rights, obligations or liabilities under this Agreement to a body which is not a Central Government Body or if a body which is not a Central Government Body succeeds the Authority (any such body a "Successor Body"), the Supplier shall have the right to terminate for an Insolvency Event affecting the Successor Body identical to the right of termination of the Authority under limb (i) of the definition of Supplier Termination Event (as if references in that limb (i) to the Supplier and the Guarantor and references to a Party in the definition of Insolvency Event were references to the Successor Body).

37 WAIVER AND CUMULATIVE REMEDIES

37.1 The rights and remedies under this Agreement may be waived only by notice and in a manner that expressly states that a waiver is intended. A failure or delay by a Party in ascertaining or exercising a right or remedy provided under this Agreement or by law shall not constitute a waiver of that right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

37.2 Unless otherwise provided in this Agreement, rights and remedies under this Agreement are cumulative and do not exclude any rights or remedies provided by law, in equity or otherwise.

38 RELATIONSHIP OF THE PARTIES

Except as expressly provided otherwise in this Agreement, nothing in this Agreement, nor any actions taken by the Parties pursuant to this Agreement, shall create a partnership, joint venture or relationship of employer and employee or

principal and agent between the Parties, or authorise either Party to make representations or enter into any commitments for or on behalf of any other Party.

39 PREVENTION OF FRAUD AND BRIBERY

39.1 The Supplier represents and warrants that neither it, nor to the best of its knowledge any Supplier Personnel, have at any time prior to the Effective Date:

- (a) committed a Prohibited Act or been formally notified that it is subject to an investigation or prosecution which relates to an alleged Prohibited Act; and/or
- (b) been listed by any government department or agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in government procurement programmes or contracts on the grounds of a Prohibited Act.

39.2 The Supplier shall not during the term of this Agreement:

- (a) commit a Prohibited Act; and/or
- (b) do or suffer anything to be done which would cause the Authority or any of the Authority's employees, consultants, contractors, sub-contractors or agents to contravene any of the Relevant Requirements or otherwise incur any liability in relation to the Relevant Requirements.

39.3 The Supplier shall during the term of this Agreement:

- (a) establish, maintain and enforce, and require that its Sub-contractors establish, maintain and enforce, policies and procedures which are adequate to ensure compliance with the Relevant Requirements and prevent the occurrence of a Prohibited Act; and
- (b) keep appropriate records of its compliance with its obligations under Clause 39.1 (a) and make such records available to the Authority on request.

39.4 The Supplier shall immediately notify the Authority in writing if it becomes aware of any breach of Clause 39.1 and/or 39.2, or has reason to believe that it has or any of the Supplier Personnel have:

- (a) been subject to an investigation or prosecution which relates to an alleged Prohibited Act;
- (b) been listed by any government department or agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in government procurement programmes or contracts on the grounds of a Prohibited Act; and/or
- (c) received a request or demand for any undue financial or other advantage of any kind in connection with the performance of this Agreement or otherwise suspects that any person or Party directly or indirectly connected with this Agreement has committed or attempted to commit a Prohibited Act.

39.5 If the Supplier makes a notification to the Authority pursuant to Clause 39.4, the Supplier shall respond promptly to the Authority's enquiries, co-operate with any

investigation, and allow the Authority to Audit any books, records and/or any other relevant documentation in accordance with Clause 12 (*Records, Reports, Audits and Open Book Data*).

- 39.6 If the Supplier is in Default under Clauses 39.1 and/or 39.2, the Authority may by notice:
- (a) require the Supplier to remove from performance of this Agreement any Supplier Personnel whose acts or omissions have caused the Default; or
 - (b) immediately terminate this Agreement.
- 39.7 Any notice served by the Authority under Clause 39.6 shall specify the nature of the Prohibited Act, the identity of the Party who the Authority believes has committed the Prohibited Act and the action that the Authority has elected to take (including, where relevant, the date on which this Agreement shall terminate).

40 SEVERANCE

- 40.1 If any provision of this Agreement (or part of any provision) is held to be void or otherwise unenforceable by any court of competent jurisdiction, such provision (or part) shall to the extent necessary to ensure that the remaining provisions of this Agreement are not void or unenforceable be deemed to be deleted and the validity and/or enforceability of the remaining provisions of this Agreement shall not be affected.
- 40.2 In the event that any deemed deletion under Clause 40.1 is so fundamental as to prevent the accomplishment of the purpose of this Agreement or materially alters the balance of risks and rewards in this Agreement, either Party may give notice to the other Party requiring the Parties to commence good faith negotiations to amend this Agreement so that, as amended, it is valid and enforceable, preserves the balance of risks and rewards in this Agreement and, to the extent that is reasonably possible, achieves the Parties' original commercial intention.
- 40.3 If the Parties are unable to agree on the revisions to this Agreement within 5 Working Days of the date of the notice given pursuant to Clause 40.2, the matter shall be dealt with in accordance with Paragraph 3 (*Commercial Negotiations*) of Schedule 8.3 (*Dispute Resolution Procedure*) except that if the representatives are unable to resolve the dispute within 30 Working Days of the matter being referred to them, this Agreement shall automatically terminate with immediate effect. The costs of termination incurred by the Parties shall lie where they fall if this Agreement is terminated pursuant to this Clause 40.3.

41 FURTHER ASSURANCES

Each Party undertakes at the request of the other, and at the cost of the requesting Party to do all acts and execute all documents which may be reasonably necessary to give effect to the meaning of this Agreement.

42 ENTIRE AGREEMENT

- 42.1 This Agreement constitutes the entire agreement between the Parties in respect of its subject matter and supersedes and extinguishes all prior negotiations, arrangements, understanding, course of dealings or agreements made between the

Parties in relation to its subject matter, whether written or oral.

42.2 Neither Party has been given, nor entered into this Agreement in reliance on, any warranty, statement, promise or representation other than those expressly set out in this Agreement.

42.3 Nothing in this Clause 42 shall exclude any liability in respect of misrepresentations made fraudulently.

43 THIRD PARTY RIGHTS

43.1 The provisions of Schedule 9.1 (*Staff Transfer*) and the provisions of Paragraph 6.9 of Schedule 8.5 (*Exit Management*) (together “**Third Party Provisions**”) confer benefits on persons named in such provisions other than the Parties (each such person a “**Third Party Beneficiary**”) and are intended to be enforceable by Third Parties Beneficiaries by virtue of the CRTPA.

43.2 Subject to Clause 43.1 and Clause 5.12, a person who is not a Party to this Agreement has no right under the CRTPA to enforce any term of this Agreement but this does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

43.3 No Third Party Beneficiary may enforce, or take any step to enforce, any Third Party Provision without the prior written consent of the Authority, which may, if given, be given on and subject to such terms as the Authority may determine.

43.4 Any amendments or modifications to this Agreement may be made, and any rights created under Clause 43.1 may be altered or extinguished, by the Parties without the consent of any Third Party Beneficiary.

44 NOTICES

44.1 Any notices sent under this Agreement must be in writing.

44.2 Subject to Clause 44.4, the following table sets out the method by which notices may be served under this Agreement and the respective deemed time and proof of service:

Manner of Delivery	Deemed time of service	Proof of service
Email	9.00am on the first Working Day after sending	Dispatched as a pdf attachment to an e-mail to the correct e-mail address without any error message.
Personal delivery	On delivery, provided delivery is between 9.00am and 5.00pm on a Working Day. Otherwise, delivery will occur at 9.00am on the next Working Day.	Properly addressed and delivered as evidenced by signature of a delivery receipt
Prepaid, Royal Mail	At the time recorded	Properly addressed prepaid

Manner of Delivery	Deemed time of service	Proof of service
Signed For™ 1 st Class or other prepaid, next working day service providing proof of delivery.	by the delivery service, provided that delivery is between 9.00am and 5.00pm on a Working Day. Otherwise, delivery will occur at 9.00am on the same Working Day (if delivery before 9.00am) or on the next Working Day (if after 5.00pm).	and delivered as evidenced by signature of a delivery receipt

44.3 Notices shall be sent to the addresses set out below or at such other address as the relevant Party may give notice to the other Party for the purpose of service of notices under this Agreement:

	Supplier	Authority
Contact	<i>Information redacted under section 40 of FOIA</i>	NHS ESR Programme Director
Address	IBM United Kingdom Limited Meudon House Meudon Avenue Farnborough Hampshire GU14 7NB	NHS Electronic Staff Record Programme 5th Floor Don Valley House Savile Street East Sheffield South Yorkshire S4 7UQ
Email	<i>Information redacted under section 40 of FOIA</i>	

44.4 The following notices may only be served as an attachment to an email if the original notice is then sent to the recipient by personal delivery or recorded delivery in the manner set out in the table in Clause 44.2:

- (a) Step-In Notices;
- (b) Force Majeure Notices;
- (c) notices issued by the Supplier pursuant to Clause 33.3 (*Termination by the Supplier*);
- (d) Termination Notices; and
- (e) Dispute Notices.

- 44.5 Failure to send any original notice by personal delivery or recorded delivery in accordance with Clause 44.4 shall invalidate the service of the related e-mail transmission. The deemed time of delivery of such notice shall be the deemed time of delivery of the original notice sent by personal delivery or Royal Mail Signed For™ 1st Class delivery (as set out in the table in Clause 44.2) or, if earlier, the time of response or acknowledgement by the other Party to the email attaching the notice.
- 44.6 This Clause 44 does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution (other than the service of a Dispute Notice under Schedule 8.3 (*Dispute Resolution Procedure*)).

45 DISPUTES

- 45.1 The Parties shall resolve Disputes arising out of or in connection with this Agreement in accordance with the Dispute Resolution Procedure.
- 45.2 The Supplier shall continue to provide the Services in accordance with the terms of this Agreement until a Dispute has been resolved.

46 GOVERNING LAW AND JURISDICTION

- 46.1 This Agreement and any issues, disputes or claims (whether contractual or non-contractual) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the laws of England and Wales.
- 46.2 Subject to Clause 45 (*Disputes*) and Schedule 8.3 (*Dispute Resolution Procedure*) (including the Authority's right to refer the dispute to arbitration), the Parties agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (whether contractual or non-contractual) that arises out of or in connection with this Agreement or its subject matter or formation.

IN WITNESS of which this Agreement has been duly executed by the Parties.

SIGNED for and on behalf of

the Secretary of State for Health

SIGNED for and on behalf of **IBM United Kingdom Ltd**

Signature.....

Signature.....

Name:.....

Name.....

Position:.....

Position.....

Date.....

Date.....

SCHEDULE 1

Definitions

Unless the context otherwise requires the following expressions shall have the meanings set out below.

“12.2 Upgrade”	the eBs Upgrade from the current version of eBs on the ESR System to the Oracle updated version of eBs, i.e v12.2;
“Achieve”	<p>(a) in respect of a Test, to successfully pass a Test without any Test Issues; and</p> <p>(b) in respect of a Milestone, the issue of a Milestone Achievement Certificate in respect of that Milestone in accordance with the provisions of Schedule 6.2 (<i>Testing Procedures</i>),</p> <p>and “Achieved” and “Achievement” shall be construed accordingly;</p>
“Acquired Rights Directive”	the European Council Directive 77/187/EEC on the approximation of laws of European member states relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, as amended or re-enacted from time to time;
“Affected Party”	the Party seeking to claim relief in respect of a Force Majeure Event;
“Affiliate”	in relation to a body corporate, any other entity which directly or indirectly Controls, is Controlled by, or is under direct or indirect common Control with, that body corporate from time to time;
“Allowable Assumptions”	the assumptions set out in Annex 5 of Schedule 7.1 (<i>Charges and Invoicing</i>);
“Annual Contract Report”	has the meaning given in Schedule 7.5 (<i>Financial Reports</i>);
“Anticipated Contract Life Profit Margin”	has the meaning given in Schedule 7.1 (<i>Charges and Invoicing</i>);
“Anticipated Savings Assumptions ”	the Controlled Document WPE-003 set out in Annex 1 to Schedule 7.6 (Anticipated Savings);
“Approved Sub-Licensee”	any of the following:

- (a) a User Organisation;
- (b) a Central Government Body;
- (c) a Welsh Minister;
- (d) any third party providing services to a Central Government Body; and/or
- (e) any body (including any private sector body) which performs or carries on any of the functions and/or activities that previously had been performed and/or carried on by the Authority;

“Asset Register”	the asset register and configuration database referred to in paragraph 4.4.7 of Schedule 2.1 (Services Description);
“Assets”	all assets and rights that may be used by the Supplier to provide the Services in accordance with this Agreement but excluding the Authority System;
“ATP Milestone”	a governance milestone where the Authority shall assess whether the Authority’s requirements for that milestone have been achieved;
“Audit Agents”	<ul style="list-style-type: none">(a) the Authority’s internal and external auditors;(b) the Authority’s statutory or regulatory auditors;(c) the Comptroller and Auditor General, their staff and/or any appointed representatives of the National Audit Office;(d) HM Treasury or the Cabinet Office;(e) any party formally appointed by the Authority to carry out audit or similar review functions; and(f) successors or assigns of any of the above;
“Audit Rights”	the audit and access rights referred to in Schedule 8.4 (<i>Records Provisions and Audit Rights</i>);
“Audit”	any exercise by the Authority of its Audit Rights pursuant to Clause 12 (<i>Records, Reports, Audit and Open Book Data</i>) and Schedule 8.4 (<i>Records Provisions and Audit Rights</i>);

- “Authorised Contact”** a User Organisation representative who will be responsible for, amongst other things, filtering and assessing support requests before raising them with the Supplier;
- “Authority Assets”** means
- (a) the Legacy Assets that remain with the Authority as Authority Assets as stated in Schedule 2.6 (Legacy Assets),
 - (b) Authority Software and the Authority Background IPRs listed in Schedule 5.2 (*IPRs granted by Authority*);
 - (c) the Specifically Written Software and Project Specific IPRs,
 - (d) the licences in the Supplier Software, Third Party Software, Third Party IPRs from the time of the grant; and
 - (e) the Authority's infrastructure, documentation, materials and any other data, software, assets, equipment or other property owned by and/or licensed or leased to the Authority which is or may be used in connection with the provision or receipt of the Services;
- “Authority Background IPRs”**
- (a) the Authority Background IPRs listed in Schedule 5.2 (*IPRs granted by Authority*);
 - (b) IPRs created by the Authority independently of this Agreement; and/or
 - (c) Crown Copyright which is not available to the Supplier otherwise than under this Agreement;
- but excluding IPRs owned by the Authority subsisting in the Authority Software;
- “Authority Cause”** any breach by the Authority of any of the Authority Responsibilities, except to the extent that such breach is:
- (a) the result of any act or omission by the Authority to which the Supplier has given its prior consent; or
 - (b) caused by the Supplier, any Sub-contractor or any Supplier Personnel;

“Authority Central Team” or “ACT”	the Authority's central team managing the Services on behalf of the Authority and the User Organisations;
“Authority Confidential Information”	means the Authority Data and any information however it is conveyed that relates to the business, affairs, developments, trade secrets, personnel and suppliers of the Authority or the User Organisations including all IPRs, together with all information derived from any of the above and other information clearly designated as being confidential (whether or not it is marked “confidential”) or which ought reasonably be considered to be confidential.
“Authority Contract Manager”	has the meaning given in Schedule 8.1 (<i>Governance</i>);
“Authority Data”	<p>(a) the data, text, drawings, diagrams, images or sounds (together with any database made up of any of these) which are embodied in any electronic, magnetic, optical or tangible media, and which are:</p> <ul style="list-style-type: none"> (i) supplied to the Supplier by or on behalf of the Authority or a User Organisation; and/or (ii) which the Supplier is required to generate, process, store or transmit pursuant to this Agreement; or <p>(b) any Personal Data for which the Authority or a User Organisation is the Data Controller;</p>
“Authority IT Strategy”	the Authority's IT policy in force as at the Effective Date (a copy of which has been supplied to the Supplier), as updated from time to time in accordance with the Change Control Procedure;
“Authority Premises”	premises owned, controlled or occupied by the Authority which are made available for use by the Supplier or its Sub-contractors for provision of the Services (or any of them);
“Authority Project Director”	has the meaning given in Schedule 8.1 (<i>Governance</i>);
“Authority Representative”	the representative appointed by the Authority pursuant to Clause 11.4 (<i>Representatives</i>);
“Authority Requirements”	the requirements of the Authority set out in Schedules 2.1 (<i>Services Description</i>), 2.2 (<i>Performance Indicators</i>), 2.3 (<i>Standards</i>), 2.4 (<i>Security Management Plan</i>), 2.5 (<i>Insurance Requirements</i>), 6.1 (<i>Transition and Project Plans</i>), 8.4 (<i>Records Provisions</i>), 8.5 (<i>Exit</i>

	<i>Management</i>) and 8.6 (<i>Business Continuity and Disaster Recovery</i>);
“Authority Responsibilities”	the responsibilities of the Authority specified in Schedule 3 (<i>Authority Responsibilities</i>);
“Authority Software”	software owned by or licensed to the Authority (other than under this Agreement) which is listed in Schedule 5.2 (<i>IPRs granted by Authority</i>) which is or will be used by the Supplier for the purposes of providing the Services;
“Authority System”	the Authority’s computing environment (consisting of hardware, systems telecommunications networks or equipment) which is owned by or licensed to the Authority or a User Organisation by a third party and which interfaces with the ESR System or which is necessary for the Authority to receive the Services but excluding the ESR System;
“Availability”	has the meaning given in Schedule 2.2 (<i>Performance Levels</i>);
“Balanced Scorecard Report”	has the meaning given in Paragraph 1.1(b) of Part B of Schedule 2.2 (<i>Performance Levels</i>);
“BCDR Plan”	the Controlled Document WPC-013 prepared pursuant to Paragraph 2 of Schedule 8.6 (<i>Business Continuity and Disaster Recovery</i>);
“BCDR Services”	the business continuity and disaster recovery services set out in Schedule 8.6 (<i>Business Continuity and Disaster Recovery</i>);
“Breach of Security”	shall have the meaning given in Schedule 2.4 (<i>Security Management</i>). Breach of Security are also referred to as "Security Breach" in Schedule 2.2 (<i>Performance Levels</i>);
“Breakage Costs Payment”	has the meaning given in Schedule 7.2 (<i>Payments on Termination</i>);
“Business Continuity Plan”	has the meaning given in Schedule 8.6 (<i>Business Continuity and Disaster Recovery</i>);
“Capacity Management Statement”	a statement regarding capacity management, including future capacity predictions for all elements of the Services, (HR/Payroll system, Helpdesk, Networks etc.), highlighting load versus capacity and growth projection, busy hour, busy day, response time degradation, the exact form of which shall be agreed

	with the Authority;
“Central Government Body”	a body listed in one of the following sub-categories of the Central Government classification of the Public Sector Classification Guide, as published and amended from time to time by the Office for National Statistics : (a) Government Department; (b) Non-Departmental Public Body or Assembly Sponsored Public Body (advisory, executive, or tribunal); (c) Non-Ministerial Department; or (d) Executive Agency;
“Certificate of Costs”	has the meaning given in Schedule 7.1 (<i>Charges and Invoicing</i>);
“Change Authorisation Note”	a form setting out an agreed Contract Change which shall be substantially in the form of Annex 2 of Schedule 8.2 (<i>Change Control Procedure</i>);
“Change Control Procedure”	the procedure for changing this Agreement set out in Schedule 8.2 (<i>Change Control Procedure</i>);
“Change in Law”	any change in Law which impacts on the performance of the Services which comes into force after the Effective Date;
“Change of Control”	any change in the Control of the Supplier;
“Change Pipeline”	a separate funding stream set aside by the Authority to cater for less complex Change that is within the funding envelope of the Project;
“Change Request”	a written request for a Contract Change substantially in the form of Annex 1 of Schedule 8.2 (<i>Change Control Procedure</i>);
“Change”	any change to this Agreement including a change to the Front End of this Agreement;
“Charges”	the charges for the provision of the Services set out in or otherwise calculated in accordance with Schedule 7.1 (<i>Charges and Invoicing</i>), including any Milestone Payment or Service Charge;
“Commercially Sensitive	the information listed in Schedule 4.2 (<i>Commercial Sensitive Information</i>) comprising the information of a

Information”	commercially sensitive nature relating to the Supplier, its IPRs or its business or which the Supplier has indicated to the Authority that, if disclosed by the Authority, would cause the Supplier significant commercial disadvantage or material financial loss;
“Comparable Supply”	the supply of services to another customer of the Supplier that are the same or similar to any of the Services;
“Compensation Payment”	has the meaning given in Schedule 7.2 (<i>Payments on Termination</i>);
“Condition Precedent”	has the meaning given in Clause 4.2(<i>Condition Precedent</i>);
“Confidential Information”	means the Authority Confidential Information and/or the Supplier Confidential Information;
“Contract Change”	any change to this Agreement other than an Operational Change;
“Contract Inception Report”	the contract inception report in the form agreed by the Supplier and the Authority in writing on or before the Effective Date;
“Contract Year”	<p>(a) the period commencing on the Effective Date and ending on 31 March 2015 ; or</p> <p>(b) thereafter a period of 12 months commencing on 1 April of each year;</p> <p>provided that the final Contract Year shall end on the expiry or termination of the Term;</p>
“Control”	the possession by person, directly or indirectly, of the power to direct or cause the direction of the management and policies of the other person (whether through the ownership of voting shares, by contract or otherwise) and “Controls” and “Controlled” shall be interpreted accordingly;
“Controlled Document”	has the meaning given in Schedule 8.2 (Change Control Procedure);
“Core Hours”	has the meaning given in Schedule 2.2 (Performance Levels);
“Core User”	a user of the ESR System with enhanced access rights, typically in HR, Payroll, Learning or workforce information functions without using the employee or

Manager Self-Service. A Core User are also referred to as a "Professional User";

"Costs"	has the meaning given in Schedule 7.1 (Charges and Invoicing);
"CPP Milestone"	the final governance milestone confirming that all the Authority's requirements for Transition or a Project have been achieved;
"Critical KPI Failure"	(a) the Supplier accruing Service Credits in excess of the Service Credit Cap; or (b) a failure by the Supplier to meet a KPI Service Threshold; or (c) a Material KPI Failure occurring for 3 successive months or more;
"Critical SPI Failure"	a Material SPI Failure occurring for 3 successive months or more;
"CRTPA"	the Contracts (Rights of Third Parties) Act 1999;
"Cutover"	the transition of the Supplier's Solution for ESR System or a Project Deliverable is first available for operational use, Cutover is also referred to as Go-Live in Component 3 - for Enhance;
"Cutover Plan"	a subset of the Transition Plan, developed to provide the detailed planning activity for the detailed Cutover activity and following Cutover rehearsals
"Data Centre"	one of the facility used to house computer systems and associated components, such as telecommunications and storage systems;
"Data Controller"	has the meaning given in the DPA;
"Data Governance Charter "	the Controlled Document WPC-005 described in paragraph 1.2.4.2 of Schedule 4.1 B (Operate)
"Data Processor"	has the meaning given in the DPA;
"Data Retention Policy"	the Controlled Document WPC-003 as described in Paragraph 4.4.8 of Schedule 2.1 (Service Description);

“Data Subject Access Request”	a request made by a Data Subject in accordance with rights granted pursuant to the DPA to access his or her Personal Data;
“Data Subject”	has the meaning given in the DPA;
“Data Warehouse”	the solution designed to meet the National Reporting Requirements and which is used to meet any current and future workforce information reporting requirements identified;
“Deductions”	all Service Credits, Delay Payments or any other deduction which is paid or payable to the Authority under this Agreement;
“Default”	<p>any breach of the obligations of the relevant Party (including abandonment of this Agreement in breach of its terms, repudiatory breach or breach of a fundamental term) or any other default, act, omission, negligence or statement:</p> <ul style="list-style-type: none"> (a) in the case of the Authority, of its employees, servants, agents; or (b) in the case of the Supplier, of its Sub-contractors or any Supplier Personnel, <p>in connection with or in relation to the subject-matter of this Agreement and in respect of which such Party is liable to the other;</p>
“Defect”	<ul style="list-style-type: none"> (a) any error, damage or defect in the manufacturing of a Deliverable; or (b) any error or failure of code within the Software which causes a Deliverable to malfunction or to produce unintelligible or incorrect results; or (c) any failure of any Deliverable to provide the performance, features and functionality specified in the Authority Requirements or the Documentation (including any adverse effect on response times) regardless of whether or not it prevents the relevant Deliverable from meeting its associated Test Success Criteria; or (d) any failure of any Deliverable to operate in conjunction with or interface with any other Deliverable in order to provide the performance, features and functionality specified in the Authority Requirements or the Documentation (including any adverse effect on response times) regardless of whether or not it prevents the

	relevant Deliverable from meeting its associated Test Success Criteria;
“Delay Deduction Period”	the period during which Delay Payments may apply as set out in Schedule 7.1 (<i>Charges and Invoicing</i>) or otherwise in a Change Control Note;
“Delay Payment Cap”	the sum of <i>information redacted under Section 43 of the FOIA</i> ;
“Delay Payments”	in relation to Transition or a Project (as the case may be), the amounts payable by the Supplier to the Authority in respect of a Delay in Achieving a Key Milestone as specified in Schedule 7.1 (<i>Charges and Invoicing</i>);
“Delay”	(a) a delay in the Achievement of a Milestone by its Milestone Date; or (b) a delay in the design, development, testing or implementation of a Deliverable by the relevant date set out in the relevant Plan;
“Deliverable”	an item or feature delivered or to be delivered by the Supplier at or before a Milestone Date or at any other stage during the performance of this Agreement;
“Detailed Project Plan”	any of the plans developed in accordance with Paragraph 3 of Schedule 6.1 (<i>Transition and Project Plans</i>) for the purpose of implementing Component 1 - Transition or any of the Projects;
“Development Lifecycle Process”	the testing lifecycle process outlined in Schedule 6.2 (<i>Testing Procedures</i>);
“Disaster Recovery Plan”	has the meaning given in Schedule 8.6 (Business Continuity and Disaster Recovery);
“Disclosing Party Group”	(a) where the Disclosing Party is the Supplier, the Supplier and any Affiliates of the Supplier; and (b) where the Disclosing Party is the Authority, the Authority, the User Organisations and any Central Government Body with which the Authority or the Supplier interacts in connection with this Agreement;
“Disclosing Party”	has the meaning given in Clause 21.1(<i>Confidentiality</i>);

“Disengagement Plan”	the Controlled Document WPC - 008 described at paragraph 1.2.3.2 of Schedule 4.1B (Operate) and Schedule 8.5 (Exit Management) to be produced as part of Component 1 - Transition and updated by the Supplier during the Term in accordance with Paragraph 4 of Schedule 8.5 (<i>Exit Management</i>);
“Disengagement Services”	the services and activities in connection with termination or expiry of this Agreement (or part of this Agreement) to be performed by the Supplier pursuant to the Disengagement Plan, including those activities listed in Annex 1 of Schedule 8.5 (<i>Exit Management</i>), and any other services required pursuant to the Exit Assistance Notice;
“Dispute Notice”	a written notice served by one Party on the other stating that the Party serving the notice believes that there is a Dispute;
“Dispute Resolution Procedure”	the dispute resolution procedure set out in Schedule 8.3 (<i>Dispute Resolution Procedure</i>);
“Dispute”	any dispute, difference or question of interpretation arising out of or in connection with this Agreement, including any dispute, difference or question of interpretation relating to the Services, failure to agree in accordance with the Change Control Procedure or any matter where this Agreement directs the Parties to resolve an issue by reference to the Dispute Resolution Procedure;
“Documentation”	<p>descriptions of the Services and Performance Indicators, details of the Solution (including (i) vendors and versions for off-the-shelf components and (ii) source code and build information for proprietary components), relevant design and development information, technical specifications of all functionality including those not included in standard manuals (such as those that modify system performance and access levels), configuration details, test scripts, user manuals, operating manuals, web content, process definitions and procedures, and all such other documentation as:</p> <p>(a) is required to be supplied by the Supplier to the Authority under this Agreement;</p> <p>(b) would reasonably be required by a competent third party capable of Good Industry Practice contracted by the Authority to develop, configure, build, deploy, run, maintain, upgrade and test the</p>

individual systems that provide Services;

(c) is required by the Supplier in order to provide the Services; and/or

(d) has been or shall be generated for the purpose of providing the Services;

“DOTAS”

the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HMRC of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to national insurance contributions by the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868) made under section 132A of the Social Security Administration Act 1992;

“DPA”

the Data Protection Act 1998 and any other applicable Laws relating to the processing of personal data and privacy, including where applicable the guidance and codes of practice issued by the Information Commissioner or a relevant Central Government Body in relation to such Laws;

“Due Diligence Information”

any information supplied to the Supplier by or on behalf of the Authority prior to the Effective Date;

“eBusiness Suite (eBS)”

Oracle eBusiness Suite as detailed in Schedule 5.2 (*IPR's provided by Authority*);

“Effective Date”

the later of:

(a) the date on which this Agreement is signed by both Parties; and

(b) the date on which the Condition Precedent has been satisfied or waived in accordance with Clause 4.2 (Condition Precedent);

“EIRs”

the Environmental Information Regulations 2004, together with any guidance and/or codes of practice issues by the Information Commissioner or any Central Government Body in relation to such Regulations;

“Emergency Maintenance”

ad hoc and unplanned maintenance provided by the Supplier where:

- (a) the Authority reasonably suspects that the ESR System or the Services, or any part of the ESR System or the Services, has or may have developed a fault, and notifies the Supplier of the same; or
- (b) the Supplier reasonably suspects that the ESR System or the Services, or any part the ESR System or the Services, has or may have developed a fault; or
- (c) the Supplier needs to carry out any emergency maintenance or repairs to any part of the Supplier Equipment or ESR System to prevent overload of the ESR System, or to preserve the safety, security or integrity of the Services;

“Employee Liabilities”

all claims, actions, proceedings, orders, demands, complaints, investigations (save for any claims for personal injury which are covered by insurance) and any award, compensation, damages, tribunal awards, fine, loss, order, penalty, disbursement, payment made by way of settlement and costs, expenses and legal costs reasonably incurred in connection with a claim or investigation including in relation to the following:

- (a) redundancy payments including contractual or enhanced redundancy costs, termination costs and notice payments;
- (b) unfair, wrongful or constructive dismissal compensation;
- (c) compensation for discrimination on grounds of sex, race, disability, age, religion or belief, gender reassignment, marriage or civil partnership, pregnancy and maternity or sexual orientation or claims for equal pay;
- (d) compensation for less favourable treatment of part-time workers or fixed term employees;
- (e) outstanding debts and unlawful deduction of wages including any PAYE and national insurance contributions;
- (f) claims whether in tort, contract or statute or otherwise;
- (g) 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;

“Employee”	a director, officer, employee, agent or consultant of one, or more, User Organisations who are paid through ESR including salary and expenses;
“Employment Regulations”	the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended or replaced or any other Regulations implementing the Acquired Rights Directive;
“Enhance BAU”	such services and functionalities described in Enhance which once accepted by the Authority pursuant to the relevant Projects, become part of the Operational Services and subject to the Performance Indicators;
“Enhance Project”	such services and functionalities described in Enhance to be delivered as Project(s) by the Supplier;
“Enhance”	the third of the Service Components (e.g. 'the Authority requires the Supplier to carry out step changes in functionality in Enhance) including Enhance Project and Enhance BAU);
“Enhancement”	a deliverable created as a result of the Enhance Project;
“ESR Baseline Requirements (ESR-NHS0118) ”	the Controlled Document described in Schedule 2.1 (<i>Service Description</i>) and set out at Annex 3 therein;
“ESR Interface Inventory (ESR-0173) ”	the Controlled Document described in Schedule 2.1 (<i>Service Description</i>) and set out at information redacted under Section 43 of the FOIA therein;
“Enhance Board”	has the meaning given in Schedule 8.1 (<i>Governance</i>);
“ESR Service Dashboard”	has the meaning given in Paragraph 2.4.2 of Schedule 4.1 Part A (<i>Transition</i>);
“ESR Outputs”	the physical outputs of the Solution including the payslips, P45 and P60;
“ESR Portal”	the Portal for the ESR System to be delivered by the Supplier as part of Component 3 - Enhance as further described in Schedule 2.1 (<i>Service Description</i>) and Work Package 1 and 2;
“ESR Quality Plan for Operate and Enhance ”	the Controlled Document WPC-006 described at paragraph 1.2.3.1 of Part B Schedule 4.1 (<i>Operate</i>);
“ESR Services Objectives”	the objective set out in Paragraph 2.1 of Schedule 2.1 (<i>Services Description</i>);

“ESR Service Volumetrics”	the Controlled Document WPC-011 described at paragraph 1.2.7.8 of Schedule 4.1B (Operate);
“ESR System”	the Supplier System and the Authority Assets (but excluding the Authority System) which is to be maintained and further developed by the Supplier as part of the Services;
“ESR Support Portal”	has the meaning given in Paragraph 2.4.2 of Schedule 4.1 Part A (<i>Transition</i>);
“ESR User”	include a) Employees b) employees, officers or contractors of outsourced payroll providers (i.e Professional Users who may or may not be NHS employees) and c) users of TRS - including ex-employees;
“Estimated Initial Service Charges”	the estimated Service Charges payable by the Authority during the period of 12 months from the first Operational Service Commencement Date, as set out in the Financial Model;
“Estimated Year 1 Charges”	the estimated Charges payable by the Authority during the first Contract Year, as set out in the Financial Model;
“Exclusive Hardware Asset”	those Hardware Assets used by the Supplier or a Sub-contractor exclusively, or predominantly in the provision of the Services or funding for which has been contributed to by the Authority as part of the financial model;
“Exit Assistance Notice”	has the meaning given in Paragraph 5.10 of Schedule 8.5 (<i>Exit Management</i>);
“Exit Assistance Period”	in relation to an Exit Assistance Notice, the period specified in the Exit Assistance Notice for which the Supplier is required to provide the Disengagement Services as may be extended pursuant to Paragraph 5.2 of Schedule 8.5 (<i>Exit Management</i>);
“Exit Commencement Date”	means any of the(s) date when the Disengagement Services are due to commence in accordance with the relevant Exit Assistance Notice;
“Exit Management”	services, activities, processes and procedures to ensure a smooth and orderly transition of all or part of the Services from the Supplier to the Authority and/or a Replacement Supplier, as set out or referred to in Schedule 8.5 (<i>Exit Management</i>);

“Exit Plan”	the plan agreed between the Authority and the Former Supplier to govern the exit of the Former Supplier and transition to the Supplier;
“Expedited Dispute Timetable”	the reduced timetable for the resolution of Disputes set out in Paragraph 2.6 of Schedule 8.3 (<i>Dispute Resolution Procedure</i>);
“Expert Determination”	the process described in Paragraph 5 of Schedule 8.3 (<i>Dispute Resolution Procedure</i>);
“Expert”	has the meaning given in Schedule 8.3 (<i>Dispute Resolution Procedure</i>);
“Extension Period”	a period of two (2) years from the end of the Initial Term;
“Extract Transform and Load (ETL) ”	has the meaning given in Schedule 2.2 (Performance Levels);
“Fast-Track Change”	has the meaning given in Schedule 8.2 (Change Control Procedure);
“Financial Distress Event”	the occurrence of one or more of the events listed in Paragraph 3.1 of Schedule 7.4 (<i>Financial Distress</i>);
“Financial Distress Service Continuity Plan”	a plan setting out how the Supplier will ensure the continued performance and delivery of the Services in accordance with this Agreement in the event that a Financial Distress Event occurs;
“Financial Model”	has the meaning given in Schedule 7.5 (<i>Financial Reports</i>);
“Financial Model Operating Manual”	the Controlled Document provided by the Supplier in support of the Financial Model attached in CD 1 of this Agreement;
“Financial Model Record of Assumptions”	the Controlled Document provided by the Supplier in support the Financial Model attached in CD 1 of this Agreement;
“Financial Reports”	has the meaning given in Schedule 7.5 (<i>Financial Reports</i>);
“Financial Templates”	the Controlled Document set out in Schedule 7.5 (<i>Financial Reports</i>);;
“Financial Transparency Objectives”	has the meaning given in Schedule 7.5 (<i>Financial Reports</i>);

“FOIA”	the Freedom of Information Act 2000 and any subordinate legislation made under that Act from time to time, together with any guidance and/or codes of practice issued by the Information Commissioner or any relevant Central Government Body in relation to such Act;
“Force Majeure Event”	any event outside the reasonable control of either Party affecting its performance of its obligations under this Agreement arising from acts, events, omissions, happenings or non-happenings beyond its reasonable control and which are not attributable to any wilful act, neglect or failure to take reasonable preventative action by that Party, including acts of God, riots, war or armed conflict, acts of terrorism, acts of government, local government or regulatory bodies, fire, flood, storm or earthquake, or disaster but excluding any industrial dispute relating to the Supplier or the Supplier Personnel or the Authority or Authority’s Personnel or any other failure in the Supplier’s or a Sub-contractor’s or the Authority’s supply chain;
“Force Majeure Notice”	a written notice served by the Affected Party on the other Party stating that the Affected Party believes that there is a Force Majeure Event;
“Former Supplier”	McKesson Information Solutions UK Limited (Company no. 02507035) whose registered office is at Globe House, Warwick Technology Park, Warwick, Warwickshire, CV34 6NZ;
“General Anti Abuse Rule”	(a) the legislation in Part 5 of the Finance Act 2013; and (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions;
“General Change in Law”	a Change in Law where the change is of a general legislative nature (including taxation or duties of any sort affecting the Supplier) or which affects or relates to a Comparable Supply;
“Good Industry Practice”	at any time the exercise of that degree of care, skill, diligence, prudence, efficiency, foresight and timeliness which would be reasonably expected at such time from a leading and expert supplier of services similar to the Services to a customer like the Authority, such supplier seeking to comply with its contractual obligations in full

	and complying with applicable Laws;
“Governance Plan”	the Controlled Document WPC-001 which has the meaning given in paragraph 5.2 of Schedule 4.1 (Solution);
“Government IT Strategy”	has the meaning given in Schedule 8.1 (<i>Governance</i>);
“Guarantee”	the deed of guarantee in favour of the Authority that may be required to be entered into by the Guarantor in the form approved by the Authority at any time by the Authority;
“Guarantor”	the guarantor that may be required to provide a Guarantee pursuant to Clause 4.2
“Halifax Abuse Principle”	the principle explained in the CJEU Case C-255/02 Halifax and others;
“Hardware Asset”	an Asset that is hardware;
“Help Desk”	the facilities defined in paragraph 4.4.2 of Schedule 2.1 (<i>Service Description</i>) which enable the Supplier to handle and manage Service Calls. This is also referred to as “ Service Desk ”;
“HMRC”	HM Revenue & Customs;
“Hypercare”	in relation to Component 1 - Transition or a Project, the period of hypercare over and above the Supplier's Operate team to assist with further knowledge transfer and Service Calls to be delivered by the Supplier immediately after Cutover as further set out in Schedule 4.1 (Solution) For Component 3 - Enhance, the Supplier will need to achieve certain acceptance criteria to be defined in the Work Packages in order to exit Hypercare;
“Impact Assessment”	has the meaning given in Schedule 8.2 (<i>Change Control Procedure</i>);
“Information”	all information of whatever nature, however conveyed and in whatever form, including in writing, orally, by demonstration, electronically and in a tangible, visual or machine-readable medium (including CD-ROM, magnetic and digital form);
“Initial Term”	the period commencing on the Effective Date and ending 5 calendar years from the Operational Service

Commencement Date.

“Insolvency Event”

- (a) the other Party suspends, or threatens to suspend, payment of its debts, or is unable to pay its debts as they fall due or admits inability to pay its debts, or:
 - (i) (being a company or a LLP) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986, or
 - (ii) (being a partnership) is deemed unable to pay its debts within the meaning of section 222 of the Insolvency Act 1986;
- (b) the other Party commences negotiations with one or more of its creditors (using a voluntary arrangement, scheme of arrangement or otherwise) with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with one or more of its creditors or takes any step to obtain a moratorium pursuant to Section 1A and Schedule A1 of the Insolvency Act 1986 other than (in the case of a company, a LLP or a partnership) for the sole purpose of a scheme for a solvent amalgamation of that other Party with one or more other companies or the solvent reconstruction of that other Party;
- (c) a person becomes entitled to appoint a receiver over the assets of the other Party or a receiver is appointed over the assets of the other Party;
- (d) a creditor or encumbrancer of the other Party attaches or takes possession of, or a distress, execution or other such process is levied or enforced on or sued against, the whole or any part of the other Party's assets and such attachment or process is not discharged within 14 days;
- (e) the other Party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business;
- (f) where the other Party is a company, a LLP or a partnership:
 - (i) a petition is presented (which is not dismissed within 14 days of its service), a notice is given, a resolution is passed, or an order is made, for or in connection with the

winding up of that other Party other than for the sole purpose of a scheme for a solvent amalgamation of that other Party with one or more other companies or the solvent reconstruction of that other Party;

(ii) an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is filed at Court or given or if an administrator is appointed, over the other Party;

(iii) (being a company or a LLP) the holder of a qualifying floating charge over the assets of that other Party has become entitled to appoint or has appointed an administrative receiver; or

(iv) (being a partnership) the holder of an agricultural floating charge over the assets of that other Party has become entitled to appoint or has appointed an agricultural receiver; or

(g) any event occurs, or proceeding is taken, with respect to the other Party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned above;

“Intellectual Property Rights” or “IPRs”

(a) copyright, rights related to or affording protection similar to copyright, rights in databases, patents and rights in inventions, semi-conductor topography rights, trade marks, rights in Internet domain names and website addresses and other rights in trade names, designs, Know-How, trade secrets and other rights in Confidential Information;

(b) applications for registration, and the right to apply for registration, for any of the rights listed at (a) that are capable of being registered in any country or jurisdiction; and

(c) all other rights having equivalent or similar effect in any country or jurisdiction;

“Intervention Cause”

has the meaning given in Clause 29.1(b) (*Remedial Adviser*);

“Intervention Notice”

has the meaning given in Clause 29.1 (*Remedial Adviser*);

“Intervention Period”	has the meaning given in Clause 29.2(c) (<i>Remedial Adviser</i>);
“Intervention Trigger Event”	<ul style="list-style-type: none"> (a) any event falling within limb (a) to (h) of the definition of a Supplier Termination Event; (b) a Default by the Supplier that is materially preventing or materially delaying the performance of the Services or any material part of the Services; (c) in respect of Transition, a cumulative Delay in Achieving Transition of 6 weeks or more from the Operational Service Commencement Date agreed by the Parties at the start of Transition; (d) a Material KPI Failure; (e) a Material SPI Failure; (f) in respect of a Project, a cumulative Delay in delivering the Project of 2 months or more from the proposed go live date agreed by the Parties at the start of Project;
“Investment Fund”	has the meaning given in Schedule 7.1 (Charges and Invoicing);
“IPRs Claim”	any claim of infringement or alleged infringement (including the defence of such infringement or alleged infringement) of any IPRs, used to provide the Services or as otherwise provided and/or licensed by the Supplier (or to which the Supplier has provided access) to the Authority and/or the Approved Sub-Licensee in the fulfilment of its obligations under this Agreement;
“IT”	information and communications technology;
“Joint Project Board”	the body described in Paragraph 10 of Schedule 8.1 (Governance);
“Key Deliverable”	means a subset of the Deliverables;
“Key Milestone”	the Milestones identified in the relevant Plan as key milestones and in respect of which Delay Payments may be payable in accordance with Paragraph 1 of Part C of Schedule 7.2 (<i>Charges and Invoicing</i>) if the Supplier fails to Achieve the Milestone Date in respect of such Milestone;

“Key Performance Indicator”	the key performance indicators set out in Table 1 of Part A of Annex 1 of Schedule 2.2 (<i>Performance Levels</i>);
“Key Personnel”	those persons appointed by the Supplier to fulfil the Key Roles, being the persons listed in Schedule 9.2 (<i>Key Personnel</i>) against each Key Role as at the Effective Date or as amended from time to time in accordance with Clauses 14.5 and 14.6 (<i>Key Personnel</i>). Schedule 9.2 (<i>Key Personnel</i>) is also a Controlled Document;
“Key Roles”	a role described as a Key Role in Schedule 9.2 (<i>Key Personnel</i>) and any additional roles added from time to time in accordance with Clause 14.4 (<i>Key Personnel</i>);
“Key Sub-contract”	each Sub-contract with a Key Sub-contractor;
“Key Sub-contractor”	any Sub-contractor: <ul style="list-style-type: none"> (a) which, in the opinion of the Authority, performs (or would perform if appointed) a critical role in the provision of all or any part of the Services; and/or (b) with a Sub-contract with a contract value which at the time of appointment exceeds (or would exceed if appointed) 10% of the aggregate Charges forecast to be payable under this Agreement (as set out in the Financial Model);
“Know-How”	all ideas, concepts, schemes, information, knowledge, techniques, methodology, and anything else in the nature of know how relating to the Services but excluding know how already in the other Party’s possession before this Agreement;
“KPI Failure”	a failure to meet the Target Performance Level in respect of a Key Performance Indicator;
“KPI Service Threshold”	shall be as set out against the relevant Key Performance Indicator in Table 1 of Part A of Annex 1 of Schedule 2.2 (<i>Performance Levels</i>);
“Law”	any law, statute, subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of section 2 of the European Communities Act 1972, regulation, order, mandatory guidance or code

of practice, judgment of a relevant court of law, or directives or requirements of any regulatory body with which the Supplier is bound to comply;

“Legacy Assets”

the infrastructure, documentation, materials and any other data, software, assets, equipment which shall either transfer to the Supplier on the Operational Service Commencement Date and become part of the Supplier System or remain with the Authority as Authority Asset as stated in Schedule 2.6 (Legacy Assets);

“Legacy ESR Services”

the services similar to Operate provided by the Former Supplier prior to the Operational Service Commencement Date;

“List of Approved Sub-contractors”

the Controlled Document set out in Schedule 4.4 (*Authorised Sub-contractors*);

“List of Authorised Service Locations”

the Service Locations as referred to in Schedule 4.1 (Solution);

“List of Policies, Standards and Guidelines”

the Controlled Document set out in Schedule 2.3 (*Standards*);

“Losses”

losses, liabilities, damages, costs and expenses (including legal fees on a solicitor/client basis) and disbursements and costs of investigation, litigation, settlement, judgment interest and penalties whether arising in contract, tort (including negligence), breach of statutory duty or otherwise;

“Maintenance Schedule”

shall have the meaning set out in Clause 9.4 (*Maintenance*);

“Malicious Software”

any software program 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;

“Management Information”

the management information specified in Schedule 2.2 (*Performance Levels*), Schedule 7.1 (*Charges and Invoicing*) and Schedule 8.1 (*Governance*) to be provided by the Supplier to the Authority;

“Manager”	the category of ESR Users who have line management responsibilities for other ESR Users and will typically access the manager self service functions as part of their management responsibilities;
“Material KPI Failure”	a KPI Failure at mid-point between the Target Performance Level and the KPI Services Threshold.
“Material SPI Failure”	(a) a failure by the Supplier to meet the SPI Service Threshold in respect of 25% or more of the Subsidiary Performance Indicators that are measured in that Service Period; and/or (b) a failure by the Supplier to meet the Target Performance Level in respect of 50% or more of the Subsidiary Performance Indicators that are measured in that Service Period;
“Material Test Issue”	has the meaning given in Schedule 6.2 (Testing Procedures);
“Measurement Period”	in relation to a Key Performance Indicator or Subsidiary Performance Indicator, the period over which the Supplier’s performance is measured (for example, a Service Period if measured monthly or a 12 month period if measured annually);
“Mid Term Strategic Review”	means the review that will be undertaken by the Authority to determine how the Service will be provided after the Term;
“Milestone Achievement Certificate”	the certificate to be granted by the Authority when the Supplier has Achieved a Milestone, which shall be in substantially the same form as that set out in Annex 3 of Schedule 6.2 (<i>Testing Procedures</i>);
“Milestone Date”	the target date set out against the relevant Milestone in a Plan by which the Milestone must be Achieved;
“Milestone Payment”	a payment identified in Schedule 7.1 (<i>Charges and Invoicing</i>) to be made following the issue of a Milestone Achievement Certificate;
“Milestone Retention”	has the meaning given in Schedule 7.1 (<i>Charges and Invoicing</i>);
“Milestone”	an event or task described in a Plan which, if applicable, shall be completed by the relevant

	Milestone Date;
“Month”	a calendar month and “monthly” shall be interpreted accordingly;
“Multi-Party Dispute Resolution Procedure”	has the meaning given in Paragraph 9.1 of Schedule 8.3 (<i>Dispute Resolution Procedure</i>);
“Multi-Party Procedure Initiation Notice”	has the meaning given in Paragraph 9.2 of Schedule 8.3 (<i>Dispute Resolution Procedure</i>);
“New Releases”	an item produced primarily to extend, alter or improve the Software and/or any Deliverable by providing additional functionality or performance enhancement (whether or not defects in the Software and/or Deliverable are also corrected) while still retaining the original designated purpose of that item;
“NHS Hub”	the interface hub under direct control of the Authority Central Team that acts as gateway between external systems and the Supplier’s interface hub;
“Non-Core Hours”	has the meaning given in Schedule 2.2 (Performance Levels);
“Non-Exclusive Hardware Asset”	has the meaning given in Schedule 8.5 (Exit Management);
“Non-Production Environment”	the development, Test, SIT, UAT, production support, pre-production and training platforms;
“Notifiable Default”	shall have the meaning given in Clause 27.1(<i>Rectification Plan Process</i>);
“Object Code”	software and/or data in machine-readable, compiled object code form;
“Occasion of Tax Non-Compliance”	<p>(a) any tax return of the Supplier submitted to a Relevant Tax Authority on or after 1 October 2012 is found to be incorrect as a result of:</p> <ul style="list-style-type: none"> (i) a Relevant Tax Authority successfully challenging the Supplier under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation in any jurisdiction that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle; (ii) the failure of an avoidance scheme which

the Supplier was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime in any jurisdiction; and/or

- (b) the Supplier's tax affairs give rise on or after 1 April 2013 to a conviction in any jurisdiction for tax related offences which is not spent at the Effective Date or to a penalty for civil fraud or evasion;

“Open Book Data”

has the meaning given in Schedule 7.5 (*Financial Reports*)

“Open Source Software”

computer software that has its source code made available subject to an open-source licence under which the owner of the copyright and other IPRs 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;

“Operate”

the second of the Service Components comprised mainly of operating the Service in accordance with the Performance Indicators but also including a number of Projects, such as the Mid Term Strategic Review and "Hardware Refresh"

“Operational Change”

any change to the Controlled Document which in all respects, when implemented:

- (a) will not affect the Charges and will not result in any other costs to the Authority;
- (b) may change the way in which the Services are delivered but will not adversely affect the output of the Services or increase the risks in performing or receiving the Services;
- (c) will not adversely affect the interfaces or interoperability of the Services with any of the Authority's IT infrastructure;

“Operational Service Commencement Date” or “OSCD”

in relation to an Operational Service, the later of:

- (a) the date upon which the Supplier Achieves the relevant ATP Milestone in the Transition Plan; and
- (b) for new elements of the Operational Service to be introduced as part of a Project, the date upon which the Supplier Achieves the relevant ATP

	Milestone as defined in the relevant Project Plan;
“Operational Services”	the operational services described in Component 2 and Component 3 in the Services Description excluding any of the services provided as part of the Projects;
“Operations Manager”	has the meaning given in Schedule 8.1 (<i>Governance</i>);
“Other Supplier”	any supplier to the Authority (other than the Supplier) which is notified to the Supplier from time to time and/or of which the Supplier should have been aware;
“Outline Project Plan”	the outline plan(s) set out at Annex 2 of Schedule 6.1 (<i>Transition and Project Plans</i>) which shall provide the outline project plan(s) for the implementation of Component-3 - Enhance;
“Outline Transition Plan”	the outline plan set out at Annex 1 of Schedule 6.1 (<i>Transition and Project Plans</i>) which shall provide the outline transition plan(s) for Component 1 - Transition;
“Partial Termination”	the partial termination of this Agreement to the extent that it relates to the provision of any part of the Services as further provided for in Clause 33.2(b)(<i>Termination by the Authority</i>) or 33.3(b) (<i>Termination by the Supplier</i>);
“Payment”	a payment to be made to an ESR User;
“Payroll Schedule”	has the meaning given in Schedule 2.2 (Performance Levels);
“Performance Failure”	a KPI Failure or an SPI Failure;
“Performance Indicators”	the Key Performance Indicators and the Subsidiary Performance Indicators;
“Performance Indicator Control Document ”	a Controlled Document and has the meaning given in paragraph 1.2.7.1 of Part B of Schedule 4.1(Solution) ;
“Performance Management Board”	Has the meaning given in Schedule 8.1 (<i>Governance</i>) and Schedule 2.2 (Performance Levels);
“Performance Monitoring Reports”	has the meaning given in Schedule 2.2 (<i>Performance Levels</i>);
“Permitted Maintenance”	has the meaning given in Clause 9.4 (<i>Maintenance</i>) ;

“Personal Data”	personal data (as defined in the Data Protection Act 1998) which is Processed by the Supplier or any Sub-contractor on behalf of the Authority or a Central Government Body pursuant to or in connection with this Agreement;
“Plan”	means either the Transition Plan and/or one or more of the Project Plans, as the case may be;
“Pilot Trust”	those User Organisations that are to be agreed by the Parties for the initial roll-out of certain Enhancements at Cutover in accordance with Paragraph 9.4 of Schedule 4.1 C;
“Pilot Phase”	the period from Cutover to full roll-out of an Enhancement where such Enhancement is first made available to Pilot Trusts;
“Priority 1 Service Call”	has the meaning given in Schedule 2.2 (Performance Levels);
“Process”	has the meaning given to it under the DPA and “Processed” and “Processing” shall be construed accordingly;
“Production Environment”	the technical environment necessary to deliver the Operational Services;
“Programme Board”	the body described in Paragraph 6 of Schedule 8.1 (Governance);
“Programme Overview Plan”	the overall plan for the Services attached in Annex 9 of Schedule 4.1 (Solution);
“Prohibited Act”	<ul style="list-style-type: none"> (a) to directly or indirectly offer, promise or give any person working for or engaged by the Authority a financial or other advantage to: <ul style="list-style-type: none"> (i) induce that person to perform improperly a relevant function or activity; or (ii) reward that person for improper performance of a relevant function or activity; (b) to directly or indirectly request, agree to receive or accept any financial or other advantage as an inducement or a reward for improper performance of a relevant function or activity in connection with this Agreement;

- (c) an offence:
 - (i) under the Bribery Act 2010 (or any legislation repealed or revoked by such Act);
 - (ii) under legislation or common law concerning fraudulent acts; or
 - (iii) defrauding, attempting to defraud or conspiring to defraud the Authority; or
 - (d) any activity, practice or conduct which would constitute one of the offences listed under (c) above if such activity, practice or conduct had been carried out in the UK;
- “Project Board”** the project management board described in Paragraphs 2.4 and 5 of Schedule 8.1 (*Governance*);
- “Project Commencement Date”** the commencement date for a Project;
- “Project Plan”** any of the Outline Project Plan(s) or (if and when approved by the Authority pursuant to Paragraph 5 of Schedule 6.1 (*Transition and Project Plans*)) the Detailed Project Plans as updated in accordance with Paragraph 6 of Schedule 6.1 (*Transition and Project Plans*) from time to time;
- “Project Specific IPRs”**
- (a) Intellectual Property Rights in items created by the Supplier (or by a third party on behalf of the Supplier) specifically for the purposes of this Agreement and any updates and amendments of these items including database schema; and/or
 - (b) Intellectual Property Rights arising as a result of the performance of the Supplier’s obligations under this Agreement;
- but shall not include the Supplier Background IPRs or the Specially Written Software;
- “Project”** means any of the projects in scope as part of Component 2 - Operate, Component 3 - Enhance Schedule 8.5 (Exit) or otherwise agreed by the Parties in a Change Request;
- “Proving Period”** the period between Cutover and the achievement of the final milestone relating to that cutover event being achieved (i.e. the relevant CPP milestone)

“Quality Plans”	has the meaning given in Clause 6.1 (<i>Transition and Project Plans</i>);
“Quarter”	the first three Service Periods and each subsequent three Service Periods (save that the final Quarter shall end on the date of termination or expiry of this Agreement);
“Readiness Review”	the review taking place as part of Milestone 5 for Component 3 - Enhance to assess the readiness for implementation roll-out of an Enhancement;
“Recipient”	has the meaning given in Clause 21.1 (<i>Confidentiality</i>);
“Rectification Plan Failure”	<ul style="list-style-type: none"> (a) the Supplier failing to submit or resubmit a draft Rectification Plan to the Authority within the timescales specified in Clauses 27.4 (<i>Submission of the draft Rectification Plan</i>) or 27.8 (<i>Agreement of the Rectification Plan</i>); (b) the Authority, acting reasonably, rejecting a revised draft of the Rectification Plan submitted by the Supplier pursuant to Clause 27.8 (<i>Agreement of the Rectification Plan</i>); (c) the Supplier failing to rectify a material Default within the later of: <ul style="list-style-type: none"> (i) 30 Working Days of a notification made pursuant to Clause 27.2 (<i>Notification</i>); and (ii) where the Parties have agreed a Rectification Plan in respect of that material Default and the Supplier can demonstrate that it is implementing the Rectification Plan in good faith, the date specified in the Rectification Plan by which the Supplier must rectify the material Default; and/or (d) following the successful implementation of a Rectification Plan, the same Notifiable Default recurring within a period of 6 months for the same (or substantially the same) root cause as that of the original Notifiable Default;
“Rectification Plan Process”	the process set out in Clauses 27.4 (<i>Submission of the Rectification Plan</i>) to 27.9 (<i>Agreement of the Rectification Plan</i>);
“Rectification Plan”	a plan to address the impact of, and prevent the

	reoccurrence of, a Notifiable Default;
“Reimbursable Expenses”	has the meaning given in Schedule 7.1 (<i>Charges and Invoicing</i>);
“Release Plan ”	the Controlled Document WPC-010 described at paragraph 1.2.7.5 of Part B of Schedule 4.1 (Solution);
“Relevant Requirements”	all applicable Law relating to bribery, corruption and fraud, including the Bribery Act 2010 and any guidance issued by the Secretary of State for Justice pursuant to section 9 of the Bribery Act 2010;
“Relevant Tax Authority”	HMRC, or, if applicable, the tax authority in the jurisdiction in which the Supplier is required to submit a tax return;
“Relevant Transfer”	a transfer of employment to which the Employment Regulations applies;
“Relief Notice”	has the meaning given in Clause 31.3 (<i>Authority Cause</i>);
“Remedial Adviser Failure”	has the meaning given in Clause 29.6 (<i>Remedial Adviser</i>);
“Remedial Adviser”	the person appointed pursuant to Clause 29.2 (<i>Remedial Adviser</i>);
“Replacement Services”	any services which are the same as or substantially similar to any of the Services and which the Authority receives in substitution for any of the Services following the expiry or termination or Partial Termination of this Agreement, whether those services are provided by the Authority internally and/or by any third party;
“Replacement Supplier”	any third party service provider of Replacement Services appointed by the Authority from time to time (or where the Authority is providing replacement Services for its own account, the Authority);
“Request for Information”	a request for information under the FOIA or the EIRs;
“Required Action”	has the meaning given in Clause 30.1(a) (<i>Step-In Rights</i>);
“Response Time”	has the meaning given in Schedule 2.2 (Performance Levels);
“Restricted Countries”	has the meaning given in Clause 23.3 (<i>Protection of</i>

Personal Data);

“Reward KPI”	has the meaning given in Schedule 2.2 (Performance Levels);
“Reward Pool”	has the meaning given in Schedule 7.1 (<i>Charges and Invoicing</i>);
“Risk and Issue Log”	the Controlled Document(s) that contain the risks and issues relating to this Agreement;
“Roll Out Work Package”	the Work Package to be agreed to address the roll out strategy of Tranche 1 as more particularly set out in Paragraph 9.4 of Part C of Schedule 4.1 (Solution);
“Satisfaction Survey”	has the meaning set out in Schedule 2.2 (<i>Performance Levels</i>);
“Security Management Plan”	the Supplier's security plan as attached as Annex 2 of Schedule 2.4 (<i>Security Management</i>) and as subsequently developed and revised pursuant to Paragraphs 3 and 4 of Schedule 2.4 (<i>Security Management</i>);
“Security Manager”	has the meaning given in paragraph 4.7.4.2 of Schedule 2.1 (<i>Service Description</i>) and Schedule 8.1 (Governance);
“Security Management Plan ”	the Controlled Document set out at Annex 2 to Schedule 2.4 (<i>Security Management Plan</i>);
“Security Policy”	the Authority's security policy, the current copy of which is contained in Annex 1 of Schedule 2.4 (<i>Security Management</i>), as updated from time to time and notified to the Supplier;
“Self-Service”	the element of the ESR System that allows ESR Users to view information and execute transactions themselves rather than via a HR intermediary;
“Service Call”	a request for help, support or assistance by the Authorised Contacts regardless of whether these are received online, by telephone or otherwise. Service Calls are also referred to as "SC";
“Service Charges”	the periodic payments made in accordance with Schedule 7.1 (<i>Charges and Invoicing</i>) in respect of the supply of the Operational Services;

“Service Commencement Date”	the date on which the Supplier is to commence provision of the first of the Services;
“Service Component”	each of the 3 core services to be provided by the Supplier pursuant to this Agreement: Component 1 - Transition, Component 2 - Operate and Component 3 - Enhance;
“Service Credit Cap”	<p>(a) in the period of 12 months from the first Operational Service Commencement Date to occur after the Effective Date, <i>Information redacted under Section 43 of FOIA</i> of the Estimated Initial Service Charges; and</p> <p>(b) during the remainder of the Term, <i>Information redacted under Section 43 of FOIA</i> of the Service Charges paid and/or due to be paid to the Supplier under this Agreement in the period of 12 months immediately preceding the Service Period in respect of which Service Credits are accrued;</p>
“Service Credits”	credits payable by the Supplier due to the occurrence of 1 or more KPI Failures, calculated in accordance with Paragraph 3 of Part C of Schedule 7.1 (<i>Charges and Invoicing</i>);
“Service Desk”	has the same meaning as "Help Desk";
“Service Downtime”	The period of time during which any of the Services are not Available;
“Service Period”	<p>a calendar month, save that:</p> <p>(a) the first service period shall begin on the first Operational Service Commencement Date and shall expire at the end of the calendar month in which the first Operational Service Commencement Date falls; and</p> <p>(b) the final service period shall commence on the first day of the calendar month in which the Term expires or terminates and shall end on the expiry or termination of the Term;</p>
“Service Points”	in relation to a KPI Failure, the points that are set out against the relevant Key Performance Indicator in the fifth column of the table in Annex 1 of Schedule 2.2 (<i>Performance Levels</i>);

“Service Requirement”	means the service requirement for this Agreement as captured in Component 1 - Transition, Component 2 - Operate and Component 3 - Enhance or otherwise in a Change Request.
“Service Transfer Date”	has the meaning given in Schedule 9.1 (<i>Staff Transfer</i>);
“Services Description”	the services description set out in Schedule 2.1 (<i>Services Description</i>);
“Services”	any and all of the services to be provided by the Supplier under this Agreement, including those set out in Schedule 2.1 (<i>Services Description</i>);
“Sites”	<p>any premises (including the Authority Premises, the Supplier’s premises or third party premises):</p> <p>(a) from, to or at which:</p> <ul style="list-style-type: none"> (i) the Services are (or are to be) provided; or (ii) the Supplier manages, organises or otherwise directs the provision or the use of the Services; or <p>(b) where:</p> <ul style="list-style-type: none"> (i) any part of the ESR System is situated; or (ii) any physical interface with the Authority System takes place;
“Software”	the Authority Software, Supplier Software and Third Party Software;
“Solution”	the Supplier’s solution for the ESR System and the Services attached to this Agreement at Schedule 4.1 (<i>Solution</i>) and to include the individual Work Packages described in those Annexes;
“Source Code”	computer programs and/or data in eye-readable form and in such form that it can be compiled or interpreted into equivalent binary code together with all related design comments, flow charts, technical information and documentation necessary for the use, reproduction, maintenance, modification and enhancement of such software;
“Specially Written Software”	any software (including database software, linking instructions, test scripts, compilation instructions and

test instructions) created by the Supplier (or by a Sub-contractor or other third party on behalf of the Supplier) specifically for the purposes of this Agreement, including any modifications or enhancements to Supplier Software or Third Party Software created specifically for the purposes of this Agreement;

“Specific Change in Law”	a Change in Law that relates specifically to the business of the Authority and which would not affect a Comparable Supply;
“SPI Failure”	a failure to meet the Target Performance Level in respect of a Subsidiary Performance Indicator;
“SPI Service Threshold”	shall be as set out against the relevant Subsidiary Performance Indicator in Table 2 in Part A of Annex 1 of Schedule 2.2 (<i>Performance Levels</i>);
“Staffing Information”	has the meaning given in Schedule 9.1 (<i>Staff Transfer</i>);
“Standards”	the standards, policies and/or procedures identified in Schedule 2.3 (<i>Standards</i>);
“Step-In Notice”	has the meaning given in Clause 30.1 (<i>Step-In Rights</i>);
“Step-In Trigger Event”	<ul style="list-style-type: none"> (a) any event falling within the definition of a Supplier Termination Event; (b) a Default by the Supplier that is materially preventing or materially delaying the performance of the Services or any material part of the Services; (c) a Force Majeure Event that is materially preventing or materially delaying the performance of the Services or any material part of the Services; (d) the Authority considers that the circumstances constitute an emergency despite the Supplier not being in breach of its obligations under this Agreement; (e) the Authority being advised by a regulatory body that the exercise by the Authority of its rights under Clause 30 (<i>Step-In Rights</i>) is necessary; (f) the existence of a serious risk to the health or safety of persons, property or the environment in

connection with the Services; and/or

- (g) a need by the Authority to take action to discharge a statutory duty;
- (h) a Material KPI Failure;
- (i) a Material SPI Failure; or
- (j) in respect of a Project, a cumulative Delay in delivering the Project of 2 months or more from the proposed go live date agreed by the Parties at the start of Project.

“Step-Out Date”	has the meaning given in Clause 30.5(b) (<i>Step-In Rights</i>);
“Step-Out Notice”	has the meaning given in Clause 30.5 (<i>Step-In Rights</i>);
“Step-Out Plan”	has the meaning given in Clause 30.6 (<i>Step-In Rights</i>);
“Sub-contract”	any contract or agreement (or proposed contract or agreement) between the Supplier (or a Sub-contractor) and any third party whereby that third party agrees to provide to the Supplier (or the Sub-contractor) all or any part of the Services or facilities or services which are material for the provision of the Services or any part thereof or necessary for the management, direction or control of the Services or any part thereof including those listed in Schedule 4.4 (<i>Authorised Sub-Contracts</i>);
“Sub-contractor”	any third party with whom: <ul style="list-style-type: none"> (a) the Supplier enters into a Sub-contract; or (b) a third party under (a) above enters into a Sub-contract, or the servants or agents of that third party;
“Subsidiary Performance Indicator”	the performance indicators set out in Table 2 of Part A of Annex 1 of Schedule 2.2 (<i>Performance Levels</i>);
“Successor Body”	has the meaning given in Clause 36.4 (<i>Assignment and Novation</i>);
“Supplier Background IPRs”	(a) Intellectual Property Rights owned by the Supplier or its Sub-contractors before the Effective Date, for example those subsisting in the Supplier's standard development tools, program components

or standard code used in computer programming or in physical or electronic media containing the Supplier's Know-How or generic business methodologies; and/or

- (b) Intellectual Property Rights created by the Supplier or its Sub-contractors independently of this Agreement,

including the Supplier Background IPRs listed as such in Schedule 5.1 (*IPRs granted by Supplier*) and any enhancement or modifications to such Intellectual Property Rights but excluding those specifically created for the purpose of this Agreement and any Intellectual Property Rights owned by the Supplier subsisting in the Supplier Software;

“Supplier Confidential Information”

means any information, which has been designated as confidential in Schedule 4.2 of this Agreement, as amended from time to time by the Programme Board;

“Supplier Enhance Delivery Lead”

Means the Supplier's Employee whose role is described in Paragraph 8.2.1 of Part C of Schedule 4.1 (Solution);

“Supplier Equipment”

the hardware, computer and telecoms devices and equipment used by the Supplier or its Sub-contractors as part of the Supplier System for the provision of the Solution;

“Supplier Leadership Team”

has the meaning given in Schedule 8.1 (*Governance*);

“Supplier Non-Performance”

has the meaning given in Clause 31.2 (*Authority Cause*);

“Supplier Personnel”

all directors, officers, employees, agents, consultants and contractors of the Supplier and/or of any Sub-contractor engaged in the performance of the Supplier's obligations under this Agreement;

“Supplier Profit Margin”

has the meaning given in Schedule 7.1 (*Charges and Invoicing*);

“Supplier Profit”

has the meaning given in Schedule 7.1 (*Charges and Invoicing*);

“Supplier Project Team”

has the meaning given in Schedule 8.1 (*Governance*);

“Supplier Representative”

the representative appointed by the Supplier pursuant to Clause 11.3 (*Representatives*);

- “Supplier Security Manager”** has the meaning given in Schedule 8.1 (*Governance*);
- “Supplier Software”** software which is proprietary to the Supplier (or an Affiliate of the Supplier) or its Sub-contractors and which is or will be used by the Supplier for the purposes of providing the Services, including any enhancements or modifications to such software but excluding such enhancements or modifications specifically created for the purpose of this Agreement. This includes the software listed in Schedule 5.1 (IPRs granted by Supplier);
- “Supplier System”** the Supplier Software, Supplier Background IPRs and, as at the Effective Date, those other rights and assets set out in Schedule 2.6 (*Legacy Assets*) due to transfer to the Supplier, the Supplier Equipment, configuration and management utilities, calibration and testing tools (but excluding the Authority Assets and the Authority System);
- “Supplier Termination Event”**
- (a) the Supplier’s level of performance constituting a Critical KPI Failure;
 - (b) the Supplier’s level of performance constituting a Critical SPI Failure;
 - (c) the Supplier committing a material Default which is irremediable;
 - (d) a Remedial Adviser Failure;
 - (e) a Rectification Plan Failure;
 - (f) where a right of termination is expressly reserved in this Agreement, including pursuant to:
 - (i) Clause 19 (*IPRs Indemnity*);
 - (ii) Clause 39.6(b) (*Prevention of Fraud and Bribery*); and/or
 - (iii) Paragraph 4 of Schedule 7.4 (*Financial Distress*);
 - (g) the representation and warranty given by the Supplier pursuant to Clause 3.2(e) (*Warranties*) being materially untrue or misleading;
 - (h) the Supplier committing a material Default under Clause 10.10 (*Promoting Tax Compliance*) or failing to provide details of steps being taken and mitigating factors pursuant to Clause 10.10 (*Promoting Tax Compliance*) which in the

reasonable opinion of the Authority are acceptable;

- (i) the Supplier committing a material Default under:
 - (i) Clause 5.5(j) (*Services*);
 - (ii) Clause 21 (*Confidentiality*);
 - (iii) Clause 22 (*Freedom of Information*);
 - (iv) Clause 23 (*Protection of Personal Data*);
 - (v) Clause 35 (*Compliance*);
 - (vi) any security requirements set out in Schedule 2.1 (*Services Description*), Schedule 2.4 (*Security Management*) or the Security Policy; and/or
 - (vii) any failure by the Supplier to implement the changes are set out in a Benchmark Report referred to in Paragraph 5.9 of Schedule 7.3 (*Benchmarking*);
- (j) an Insolvency Event occurring in respect of the Supplier or the Guarantor;
- (k) the Guarantee ceasing to be valid or enforceable for any reason (without the Guarantee being replaced with a comparable guarantee to the satisfaction of the Authority with the Guarantor or with another guarantor which is acceptable to the Authority);
- (l) a Change of Control of the Supplier or a Guarantor unless:
 - (i) the Authority has given its prior written consent to the particular Change of Control, which subsequently takes place as proposed; or
 - (ii) the Authority has not served its notice of objection within 2 months of the later of the date the Change of Control took place or the date on which the Authority was given notice of the Change of Control; or
- (m) a change of Control of a Key Sub-contractor unless, within 6 months of being notified by the Authority that it objects to such change of Control, the Supplier terminates the relevant Key Sub-contract and replaces it with a comparable Key Sub-contract which is approved by the

Authority pursuant to Clause 15.6 (*Appointment of Key Sub-contractors*);

- (n) a Material KPI Failure re-occurring in respect of the same Key Performance Indicator for the same (or substantially the same) root cause in any of the 3 Measurement Periods subsequent to the Measurement Period in which the initial Material KPI Failure occurred;
- (o) in respect of Transition only, the Supplier not Achieving Transition within 9 weeks of the anticipated Operational Commencement Date as agreed by the Parties at the start of Transition;

“Supporting Materials”

has the meaning given in Clause 16.4(b) (*Specially Written Software and Project Specific IPRs*);

“System Administrator”

the User Organisation's representative appointed by that User Organisation to manage the ESR System locally including administering ESR User rights;

“Take-On Board (TOB)”

the governance arrangements set out in the contract between the Authority and the Former Supplier which describes the relationship between the Authority and the Supplier. In this Agreement, this is referred to as the Transition Board;

“Target Performance Level”

the minimum level of performance for a Performance Indicator which is required by the Authority, as set out against the relevant Performance Indicator in the tables in Annex 1 of Schedule 2.2 (*Performance Levels*);

“Technical Board”

has the meaning given in Schedule 8.1 (Governance);

“Term”

the period commencing on the Effective Date and ending on the expiry of the Initial Term or any Extension Period or on earlier termination of this Agreement;

“Termination Date”

the date set out in a Termination Notice on which this Agreement (or a part of it as the case may be) is to terminate;

“Termination Notice”

a written notice of termination given by one Party to the other, notifying the Party receiving the notice of the intention of the Party giving the notice to terminate this Agreement (or part of this Agreement) on a specified date and setting out the grounds for termination;

“Termination Payment”	the payment determined in accordance with Schedule 7.2 (<i>Payments on Termination</i>);
“Test Issues”	has the meaning given in Schedule 6.2 (<i>Testing Procedures</i>);
“Test Plan”	has the meaning given in Schedule 6.2 (<i>Testing Procedures</i>);
“Test Strategy”	has the meaning given in Schedule 6.2 (<i>Testing Procedures</i>);
“Test Success Criteria”	has the meaning given in Schedule 6.2 (<i>Testing Procedures</i>);
“Tests” and “Testing”	any tests required to be carried out under this Agreement, as further described in Schedule 6.2 (<i>Testing Procedure</i>) and “ Tested ” shall be construed accordingly;
“Third Party Beneficiary”	has the meaning given in Clause 43.1 (<i>Third Party Rights</i>);
“Third Party IPRs”	Intellectual Property Rights owned by a third party which is or will be used and procured by the Supplier for the purposes of providing the Services including the IPRs specified as Third Party IPRs in Schedule 5.3 (<i>IPRs Procured by Supplier</i>) but excluding Intellectual Property Rights owned by the third party subsisting in any Third Party Software;
“Third Party Materials”	the Third Party Software together with the Documentation relating to the Third Party Software;
“Third Party Provisions”	has the meaning given in Clause 43.1 (<i>Third Party Rights</i>);
“Third Party Software”	software which is proprietary to any third party (other than an Affiliate or Sub-contractor of the Supplier) or any Open Source Software which is or will be used and procured by the Supplier for the purposes of providing the Services, including the software specified as such in Schedule 5.3 (<i>IPRs Procured by Supplier</i>);
“Threshold Performance Level”	the KPI Service Threshold or the SPI Service Threshold;
“Total Reward Statement”	the element of the ESR System providing ESR Users who are members of the NHS pension scheme with increased visibility and awareness of their total remuneration package (including pension contributions and value);

“Tranche 1”	means the first tranche of requirements for Component 3 - Enhance as set out in Annex 2 of Schedule 2.1 (Services Description);
“Transferring Assets”	has the meaning given in Paragraph 6.2(a) of Schedule 8.5 (<i>Exit Management</i>);
“Transferring Authority Employees”	has the meaning given in Schedule 9.1 (<i>Staff Transfer</i>);
“Transferring Former Supplier Employees”	has the meaning given in Schedule 9.1 (<i>Staff Transfer</i>);
“Transferring Supplier Employees”	has the meaning given in Schedule 9.1 (<i>Staff Transfer</i>);
“Transition Plan”	the Controlled Document that is the detailed plan based on the Outlined Transition Plan. The Transition Plan is also referred to as the “ Take-on Plan ” in Schedule 2.1 (<i>Services Description</i>);
“Transition Quality Plan”	the Controlled Document described at paragraph 5 of Part A of Schedule 4.1 (Solution);
“Transition Services”	the Transition services described as such in the Services Description;
“Transition”	the first of the Service Components (e.g. ‘the transition of the service from the Current Supplier’) also referred to as Component 1 - Transition;
“Unrecovered Payment”	has the meaning given in Schedule 7.2 (<i>Payments on Termination</i>);
“Updates”	in relation to any Software and/or any Deliverable means a version of such item which has been produced primarily to overcome Defects in, or to improve the operation of, that item;
“Upgrades”	any patch, New Release or upgrade of Software and/or a Deliverable, including standard upgrades, product enhancements, and any modifications, but excluding any Update which the Supplier or a third party software supplier (or any Affiliate of the Supplier or any third party) releases during the Term;

“URP”	User Responsibility Profile;
“User Interface Overview ”	the Controlled Document inserted in Annex 10 of Schedule 4.1 (Solution);
“User Organisation”	<p>means all the organisations that use the ESR System including any and all of the following:</p> <ul style="list-style-type: none">(a) the NHS Business Services Authority ;(b) the ALBs, such as special health authorities, non-departmental public bodies (NDPBs),(c) all NHS bodies including but not limited to health service bodies as defined in section 9 of the NHS Act 2006 and the NHS (Wales) Act 2006 (as updated and amended),(d) NHS Foundation Trusts,(e) Local Health Boards(f) the providers of NHS funded care, and(g) any government department, agency or other statutory body and any successor bodies succeeding to the function of these entities;
“VAT”	value added tax as provided for in the Value Added Tax Act 1994;
“Work Package”	means the Work Package which is part of Schedule 4.1 (Solution) that describes the Supplier's Solution for a Project; and
“Working Day”	any day other than a Saturday, Sunday or public holiday in England and Wales.