

**Official – Commercial**  
**AGREEMENT RELATING TO THE SERVICE AND MAINTENANCE OF FIXED AND MOBILE RN DETECTION**  
**EQUIPMENT**

**DATED**

**11/07/2019**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**- and –**

**LEONARDO MW LTD**

**AGREEMENT**

**relating to**

**THE SERVICE AND MAINTENANCE OF FIXED**  
**AND MOBILE RN DETECTION EQUIPMENT**

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**THIS AGREEMENT IS DATED**

**11/07/2019**

**BETWEEN**

- (1) **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**, whose principal place of business is 2 MARSHAM STREET, LONDON, SW1P 4DF (the “**Authority**”); and
- (2) **LEONARDO MW LTD.** (a limited liability company registered in England and Wales with company number (02426132), whose registered office is at **Sigma House, Christopher Martin Road, Basildon, Essex, SS14 3EL** (the “**Supplier**”),
- (together the “**Parties**” and each a “**Party**”).

**BACKGROUND**

- A. The Authority placed a contract notice 2017/S 120-242764 on 27 June 2017 (the “OJEU Notice”) in the Official Journal of the European Union seeking tenders from providers of support and maintenance services and supply of RN detection equipment interested in entering into a contract for the supply of such equipment and maintenance services to the Authority.
- B. In response to the Invitation to Tender, the Supplier submitted a tender to the Authority on 07/01/2019 through which it represented to the Authority that it is capable of delivering the support and maintenance services and supply of RN detection equipment in accordance with the Authority's requirements as set out in the Invitation to Tender and, in particular, the Supplier made representations to the Authority in the Tender in relation to its competence, professionalism and ability to provide the supply of such equipment and maintenance services.
- C. On the basis of the Tender, the Authority selected the Supplier to enter into the Agreement services to provide the RN detection equipment and maintenance services in accordance with this Agreement.
- D. The Parties have agreed to contract with each other for the provision of the Goods and Services in accordance with the terms and conditions set out below.

**IT IS AGREED** as follows:

**1 DEFINITIONS AND INTERPRETATION**

- 1.1 In this Agreement, including its recitals, unless the context otherwise requires the capitalised words and expressions set out in Schedule 1 (Definitions) shall have the meanings given to them therein.
- 1.2 The interpretation and construction of this Agreement shall be subject to the

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following provisions:

- (a) words importing the singular meaning include where the context so admits the plural meaning and vice versa;
- (b) words importing the masculine include the feminine and the neuter;
- (c) the words "include", "includes" and "including" "for example" and "" and words of similar effect are to be construed as if they were immediately followed by the words "without limitation" and shall not limit the general effect of the words which precede them;
- (d) references to any person shall include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assigns or transferees;
- (e) the schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement;
- (f) references to any statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended by any subsequent enactment, modification, order, regulation or instrument as subsequently amended or re-enacted;
- (g) headings are included in this Agreement for ease of reference only and shall not affect the interpretation or construction of this Agreement;
- (h) references to "clauses" and "schedules" are, unless otherwise provided, references to the clauses of and schedules to this Agreement. References to "paragraphs" are, unless otherwise provided, references to paragraphs of the schedule in which the references are made;
- (i) terms or expressions contained in this Agreement which are capitalised, but which do not have an interpretation in Clause 1 (Definitions and Interpretation) shall be interpreted in accordance with the common interpretation within the relevant market sector/industry where appropriate. Otherwise they shall be interpreted in accordance with the dictionary meaning;
- (j) reference to a clause is a reference to the whole of that clause unless stated otherwise; and
- (k) in the event of and only to the extent of any conflict between the clauses of or schedules to this Agreement, the conflict shall be resolved in accordance with the following order of precedence:

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- (i) the Clauses of this Agreement;
- (ii) Schedule 1 (Definitions);
- (iii) Schedule 2.1 (Services Description);
- (iv) any other Schedules and their annexes (other than Schedule 4.1 (Supplier Solution)); and
- (v) Schedule 4.1 (Supplier Solution).

## **2 DUE DILIGENCE**

2.1 The Supplier acknowledges that it:

- (a) shall make its own enquiries to satisfy itself as to the accuracy and adequacy of any information supplied to it by or on behalf of the Authority;
- (b) shall raise all relevant due diligence questions with the Authority within a reasonable time before the Milestone Date for Milestone 3; and
- (c) has entered into this Agreement in reliance on its own due diligence alone.

## **3 CONDITION PRECEDENT**

3.1 This Agreement is conditional upon the valid execution and delivery to the Authority of the Guarantee in accordance with this Clause 3 (the “**Condition Precedent**”). The Authority may in its sole discretion at any time agree to waive the Condition Precedent by giving the Supplier notice in writing.

3.2 The Supplier shall procure the execution and delivery of the Guarantee by its Guarantor as soon as possible and in any case within 20 Working Days of the Effective Date. In the event that the Authority is not satisfied that the Supplier has complied with this Clause 3 within 20 Working Days after Effective Date then, unless the Condition Precedent is waived by the Authority in accordance with Clause 3.1:

- (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.

3.3 The Supplier shall consult with the Authority in relation to the steps it takes to satisfy this Clause 3 (Condition Precedent) 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 within 20 Working Days after the date of this Agreement.

#### **4 CONTRACT PERIOD**

- 4.1 This Agreement shall take effect on the Effective Date and unless terminated at an earlier date by operation of law or in accordance with Clause 38 (Termination and Step-In Rights), terminate:
- (a) at the expiry of the Initial Term Expiry Date; or
  - (b) if the Authority elects to extend the Initial Term under Clause 4.2, the Extension Term Expiry Date.
- 4.2 Subject to Clause 4.3, the Authority may extend the Term beyond the Initial Term Expiry Date by a period not exceeding 24 months either as a single event or multiple stages by giving the Supplier at least 60 Working Days' notice before the Initial Term Expiry Date or (where relevant) the Extension Term Expiry Date.
- 4.3 Where the Authority has elected to extend the Term under Clause 4.2 under no circumstances shall the Extension Term Expiry Date fall more than two (2) years after the Initial Term Expiry Date.

#### **5 SUPPLY OF SERVICES**

- 5.1 In consideration for the payment of the Contract Charges, the Supplier shall supply the Authority with Services during the Term in accordance with:
- (a) the requirements set out in Schedule 2.1 (Services Description);
  - (b) the Standards;
  - (c) the Service Levels;
  - (d) all applicable Laws, including but not limited to, any obligation implied by sections 12, 13 and 14 of the Sale of Goods Act 1979 and section 2 of the Supply of Goods and Services Act 1982; and
  - (e) the other requirements as set out in this Agreement.
- 5.2 The Supplier shall at all times during the Term ensure that:
- (a) where the provision of the Services involves the supply of Goods, the Goods are free from defects in design and workmanship and are fit for the purpose that such Goods are ordinarily used for and for any particular purpose made known to the Supplier by the Authority;
  - (b) the Services are supplied in accordance with the Supplier Solution, except to the extent that the Supplier Solution conflicts with Schedule 2.1 (Services Description) (in which case Schedule 2.1 (Services Description))

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shall prevail to the extent of the conflict); and

- (c) it does not do anything or permit anything to be done in the delivery of the Services that might embarrass the Authority or bring the Authority's name into disrepute.
- 5.3 The Supplier shall at all times comply with the Standards, and where applicable shall maintain accreditation with the relevant Standards' authorisation body. To the extent that the standard to which the Services must be provided has not been specified in this Agreement, the Supplier shall agree the relevant standard for the provision of the Services with the Authority prior to the supply of the Services commencing and, in any event, the Supplier shall perform its obligations under this Agreement in accordance with the Law and Good Industry Practice.
- 5.4 The Supplier shall ensure that the Supplier Personnel shall at all times during the Term:
- (a) faithfully and diligently perform those duties and exercise such powers as necessary in connection with the provision of the Services;
  - (b) obey all lawful instructions and reasonable directions of the Authority and provide the Services to the reasonable satisfaction of the Authority; and
  - (c) apply all due skill, care, diligence and are appropriately experienced, qualified and trained.
- 5.5 The Supplier shall perform its obligations under this Agreement in a timely manner.
- 5.6 The Authority may inspect and examine the manner in which the Supplier supplies the Services at the Premises during normal business hours on reasonable notice.
- 5.7 If the Authority informs the Supplier in writing that the Authority reasonably believes that any part of the Services does not meet the requirements of this Agreement or differs in any way from those requirements, the Supplier shall at its own expense re-schedule and carry out the Services in accordance with the requirements of this Agreement within such reasonable time as may be specified by the Authority.
- 5.8 The Supplier shall be responsible for all damage to or shortage or loss of Goods or Spares ("**Deficient Supplies**") if:
- (a) the Deficient Supplies are notified in writing to the Supplier within three (3) Working Days of receipt of the Deficient Supplies; and
  - (b) the Deficient Supplies have been handled by the Authority in accordance with the Supplier's instructions.
- 5.9 The Supplier shall replace or repair all Deficient Supplies to the Authority's
- Terms and Conditions



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reasonable satisfaction and at the Supplier's cost.

5.10 The Supplier agrees that the Authority relies on the skill and judgment of the Supplier in the supply of the Services and the performance of its obligations under this Agreement.

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

(a) the existence of an unresolved Dispute; and/or

(b) any failure by the Authority to pay any Contract Charges,

unless the Supplier is entitled to terminate this Agreement under Clause 38.2(a) (Termination by the Supplier) for failure to pay undisputed Contract Charges.

## **6 IMPLEMENTATION PLAN AND TESTING**

### **6.1 Implementation**

6.1.1 The Parties shall comply with the provisions of Schedule 6.1 (Implementation Plan) during the Implementation Period.

6.1.2 The Supplier shall:

(a) comply with the Implementation Plan; and

(b) ensure that each Milestone is Achieved on or before the relevant Milestone Date.

### **6.2 Testing**

6.2.1 The Parties shall comply with the provisions of Schedule 6.2 (Testing Procedures) in relation to the procedures to determine whether a Milestone or Service Acceptance Test has been Achieved. Service Acceptance Testing is comprised of:

(a) Service Management Readiness Testing (SMRT), the objective of this testing is to verify and confirm the service configuration details as presented in the target environment as specified in the Operational Configuration Data document which outlines the following attributes:

(b) Business portfolio and business service;

(c) IT Service and Service Components;

(d) Internal and External Assessment Groups;

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- (e) Company;
- (f) Support Groups;
- (g) Users;
- (h) Incident Symptoms;
- (i) Incident / Change Templates;
- (j) Blackout and Maintenance Schedules;
- (k) SLAs;
- (l) Reporting;
- (m) Knowledge.

6.2.2 SMRT is performed when a new service is being delivered into the Strategic Service Desk or when alterations to any of the above to the existing service already in the Strategic Service Desk are made.

6.2.3 Site Acceptance Testing (SAT) the objective of this testing is to verify the solution at a specific Border Force site to test and verify the solution taking into account any local environmental factors, this could include:

- (a) Verify the local Cyclamen build;
- (b) RN detection capability (taking into account background radiation);
- (c) Alarms including NORM alarms;
- (d) Cameras and ANPR;
- (e) Local IT stack Business Continuity and Disaster Recovery (BCDR);
- (f) Integration with port systems e.g. traffic management.

## **7 AUTHORITY RESPONSIBILITIES**

The Authority shall comply with the applicable Authority Responsibilities set out in Schedule 3 (Authority Responsibilities).

## **8 PROVISION AND REMOVAL OF EQUIPMENT**

8.1 Unless otherwise agreed in writing between the Parties, the Supplier shall provide all the Equipment necessary for the provision of the Services.

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- 8.2 The Supplier shall not deliver any Equipment nor begin any work on the Authority Premises without obtaining Approval.
- 8.3 All Equipment brought onto Authority Premises shall be at the Supplier's own risk and the Authority shall have no liability for any loss of or damage to any Equipment unless and to the extent that the Supplier is able to demonstrate that such loss or damage was caused by or contributed to by the Authority's default. The Supplier shall be wholly responsible for the haulage or carriage of the Equipment to such premises and the removal thereof when it is no longer required by the Authority and in each case at the Supplier's sole cost. Unless otherwise stated in this Agreement, Equipment brought onto the Authority Premises will remain the property of the Supplier.
- 8.4 The Supplier shall maintain all items of Equipment within the Authority Premises in a safe, serviceable and clean condition in accordance with Good Industry Practice.
- 8.5 The Supplier shall, at the Authority's written request, at its own expense and as soon as reasonably practicable:
- (a) remove from that Authority Premises and Equipment which in the reasonable opinion of the Authority is either hazardous, noxious or not in accordance with this Agreement; and
  - (b) if requested to by the Authority, replace such items with suitable substitute items of Equipment within five (5) Working Days or as agreed by the Authority a period of time that is reasonable and acceptable to the Authority.
- 8.6 Upon termination or expiry of this Agreement, the Supplier shall remove the Equipment together with any other materials used by the Supplier to provide the Goods and Services and shall leave the Authority Premises in a clean, safe and tidy condition in accordance with Good Industry Practice. The Supplier is solely responsible for making good any damage to the Authority Premises or any objects contained thereon, other than fair wear and tear, which is caused by the Supplier or Supplier Personnel.

**9 GUARANTEE PERIOD**

- 9.1 Where the Supplier supplies Goods under this Agreement, the Supplier shall guarantee such Goods shall be free from faults and/or defects for the longer of:
- (a) the Guarantee Period; or
  - (b) the term of the manufacturer's guarantee
- (the "**Defined Period**")

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- 9.2 If, within the Defined Period or twenty-five (25) Working Days thereafter, the Authority gives notice in writing to the Supplier of any defect in any of the Goods as may have arisen during the Defined Period under proper and normal use, the Supplier shall (without prejudice to any other rights and remedies which the Authority may have) promptly remedy such defects (whether by repair or replacement as the Authority shall, acting reasonably, elect) at no cost to the Authority.

## 10 DELIVERY

- 10.1 In relation to commencing and/or supplying the Services:

- (a) time shall be of the essence for delivery; and
- (b) if the Supplier fails to deliver the Services within the times agreed in writing between the Supplier and the Authority (as defined within Schedule 2.1 (Services Description) and Schedule 2.2 (Performance)) without Approval, the Authority may release itself from any obligation to accept and pay for the Services, without prejudice to any other rights and remedies of the Authority.

- 10.2 Except where otherwise provided in this Agreement, the Goods and/or Spares shall be delivered and installed, and the Services provided by the Supplier Personnel at such place or places as agreed in writing between the Supplier and the Authority.

- 10.3 Where the Goods or Spares are delivered by the Supplier, the point of Delivery shall be when the Goods or Spares have been removed from the transporting vehicle at the Premises and installed, or securely stored. Where the Goods or Spares are collected by the Authority, the point of delivery shall be when the Goods or Spares are loaded on the Authority's vehicle.

- 10.4 Except where otherwise provided in this Agreement, Delivery shall include the unloading, stacking or installation of the Goods and / or Spares by the Supplier Personnel or the Supplier's suppliers or carriers at such place as the Authority or duly authorised person shall reasonably direct.

- 10.5 In the event that not all of the Services are Delivered by the relevant dates set out in this Agreement or by dates agreed in writing between the Supplier and the Authority ("**Undelivered Goods or Services**"), the Authority shall be entitled to withhold payment of the Contract Charges for any Undelivered Goods or Services until such time as the Undelivered Goods or Services are Delivered.

- 10.6 The Authority shall not be under any obligation to accept or pay for any Goods delivered in excess of the quantity agreed in writing between the Supplier and the Authority ("**Excess Goods**"). If the Authority elects not to accept Excess Goods it shall give notice in writing to the Supplier to remove them within five (5) Working

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Days of such notice and the Supplier shall reimburse the Authority any Contract Charges and/or other expenses incurred by the Authority as a result of the Excess Goods (including but not limited to the costs of moving and storing the Excess Goods). Following receipt of such notice from the Authority to remove Excess Goods, if the Supplier does not remove such Excess Goods within five (5) Working Days the Authority may, at its absolute discretion, dispose of the Excess Goods and charge the Supplier for the costs of such disposal. The risk in any Excess Goods shall remain with the Supplier at all times.

## **11 OWNERSHIP AND RISK IN GOODS AND SPARES**

### **11.1 Spares**

- 11.1.1 Title to the Spares in the Spares Pool shall at all times vest in the Authority.
- 11.1.2 On or before the Service Commencement Date, the Authority shall hand possession of the Spares in the Spares Pool to the Supplier for the Supplier enable the Supplier to perform its obligations under Annex 3 (Spares and Consumables) of Schedule 2.1 (Services Description).
- 11.1.3 While the Spares in the Spares Pool is in the possession of the Supplier, the Supplier shall hold all Spares in the Spares Pool on behalf of the Authority with the Supplier acting as trustee. In no circumstances shall the title in any of the Spares in the Spares Pool transfer to the Supplier unless agreed between the Parties in writing.
- 11.1.4 While the Spares are in the possession of the Supplier, the Supplier shall be liable for any loss or damage of any kind to the Spares in the Spares Pool caused for any reason except the Supplier performing its obligations under Annex 3 of Schedule 2.1 (Services Description) and the Supplier shall ensure that it has obtained sufficient insurance to enable it to replace any lost or damaged Spares at no cost to the Authority.

### **11.2 Goods**

- 11.2.1 Ownership and passing of title in any Goods (excluding Spares) shall, without prejudice to any other rights or remedies of the Authority, pass to the Authority upon Delivery of the Goods.
- 11.2.2 Ownership and passing of title in replacement Spares that are added to the Spares Pool (“**Replacement Spares**”) shall, without prejudice to any other rights and remedies of the Authority, pass to the Authority at the point that the Supplier confirms that such Replacement Spares have been delivered to the Supplier and are available for use in the Spares Pool.

## **12 AUTHORITY’S PROPERTY**

- 12.1 Where the Authority hands over possession of Property to the Supplier to enable Terms and Conditions

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the provision of the Services by the Supplier, such Property shall be and remain the property of the Authority or the Authority's agents. The responsibility of the insurance of such Property shall remain with the Authority.

- 12.2 The Supplier irrevocably licenses the Authority and its agents to enter upon any premises of the Supplier during normal business hours on reasonable notice to recover any of the Authority's Property, handed over to the Supplier for the provision of Services.
- 12.3 The Supplier shall not in any circumstances have a lien over or any other interest in the Property and at all times the Supplier shall possess the Property as fiduciary agent and bailee of the Authority. The Supplier shall take all reasonable steps to ensure that the title of the Authority to the Property and the exclusion of any such lien or other interest are brought to the notice of all Sub-contractors and other appropriate persons and shall, at the Authority's request, store the Property separately and ensure that it is clearly identifiable as belonging to the Authority.
- 12.4 The Property shall be deemed to be in good condition when received by or on behalf of the Supplier unless the Supplier notifies the Authority otherwise in writing within five (5) Working Days of receipt.
- 12.5 The Supplier shall maintain the Property in good order and condition (excluding fair wear and tear) and shall use the Property solely in connection with this Agreement and for no other purpose without Approval.
- 12.6 The Supplier shall ensure the security of all the Property whilst in its possession, either on the Premises or elsewhere during the supply of the Services and shall, where relevant, ensure that it complies with security requirements set out in Schedule 2.4 (Security Management).
- 12.7 The Supplier shall be liable for all loss of, or damage to, the Property, (excluding fair wear and tear), unless such loss or damage was caused by the Authority's Default. The Supplier shall inform the Authority within two (2) Working Days of becoming aware of any defects appearing in or losses or damage occurring to the Property.

### **13 SERVICE LEVELS AND SUPPLIER RELIEF**

- 13.1 The Supplier shall provide the Goods and Services to meet or exceed the Service Levels set out in Schedule 2.2 (Performance). Any failure to meet the Service Levels shall entitle the Authority to Service Credits calculated in accordance with the provisions of Schedule 7.1 (Contract Charges) Part B: Adjustments to the Contract Charges and Risk Register.
- 13.2 The Supplier shall, in accordance with the provisions of Schedule 2.2 (Performance), implement all measurement and monitoring tools and procedures necessary to measure and report on the Supplier's performance of the Services

against the applicable Service Levels at a level of detail sufficient to verify compliance with the Service Levels.

### 13.3 **Supplier Relief and Authority Cause**

13.3.1 Notwithstanding any other provision of this Agreement, if the Supplier has failed to:

- (a) Achieve a Milestone by its Milestone Date;
- (b) Provide the Services in accordance with the Service 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 13.3):

- (d) 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;
- (e) the Authority shall not be entitled to exercise any rights that may arise as a result of that Supplier Non-Performance:
  - (i) to terminate this Agreement pursuant to Clause 38.1.1(b) (Termination by the Authority); or
  - (ii) to take action pursuant to Clause 38.4 (Step-In Rights);
- (f) where the Supplier Non-Performance constitutes the failure to Achieve a Milestone by its Milestone Date:
  - (i) 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;
  - (ii) if the Authority, acting reasonably, considers it appropriate, the Implementation Plan shall be amended to reflect any consequential revisions required to subsequent Milestone Dates; and
  - (iii) the Supplier shall be entitled to claim compensation subject to and in accordance with the principles set out in Paragraph 5 of Part B of Schedule 7.1 (Contract Charges); and/or

(g) where the Supplier Non-Performance constitutes a Service Level Failure:  
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- (i) the Supplier shall not be liable to accrue Service Credits;
- (ii) the Supplier shall be entitled to invoice for the Service Charges for the relevant Services affected by the Authority Cause,

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

13.3.2 In order to claim any of the rights and/or relief referred to in Clause 13.3.1, the Supplier shall as soon as reasonably practicable (and in any event within 10 Working Days) after becoming aware that an Authority Cause has caused, or is reasonably 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, or likely effect, on the Supplier’s ability to meet its obligations under this Agreement;
- (c) any steps which the Authority can take to eliminate or mitigate the consequences and impact of such Authority Cause; and
- (d) the relief and/or compensation claimed by the Supplier.

13.3.3 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.

13.3.4 The Supplier shall 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.

13.3.5 Without prejudice to Clause 5.11 (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.

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- 13.4 Any Variation that is required to the Implementation Plan or to the Contract Charges pursuant to this Clause 13.3 shall be implemented in accordance with the Variation Procedure.

**14 DISRUPTION**

- 14.1 The Supplier shall take reasonable care to ensure that in the performance of its obligations under this Agreement it does not disrupt the operations of:
- (a) the Authority and/or its employees;
  - (b) any other contractor engaged by the Authority; or
  - (c) any other party engaged by the Authority.
- 14.2 The Supplier shall immediately inform the Authority of any actual or potential industrial action, whether such action be by the Supplier's own employees or others, which affects or might affect the Supplier's ability at any time to perform its obligations under this Agreement.
- 14.3 In the event of industrial action by the Supplier Personnel or any other such potential supply chain disruption which may cause Service provision issues, the Supplier shall seek Approval to its proposals for the continuance of the supply of the Goods and Services in accordance with its obligations under this Agreement.
- 14.4 If the Supplier's proposals referred to in Clause 14.3 are considered insufficient or unacceptable by the Authority acting reasonably then this Agreement may be terminated by the Authority by notice in writing.

**15 REMEDIES FOR INADEQUATE PROVISION OF THE SERVICES**

**15.1 Rectification Plan**

In the event that:

- (a) there is, or is reasonably likely to be, a Delay;
- (b) the circumstances described in paragraphs 3.3(b), 3.4, 6.3, 6.6 and/or 8.2 of Schedule 2.2 (Performance) exist; and/or
- (c) the Supplier commits a material Default that is capable of remedy (and for these purposes a material Default may be a single material 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 material Default),

(each a “**Notifiable Default**”), the Supplier shall notify the Authority of the Terms and Conditions

Notifiable Default as soon as practicable but in any event within 3 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 a Rectification Plan Failure or other Supplier Termination Event, 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.

## **15.2 Notification**

If:

- (a) the Supplier notifies the Authority pursuant to Clause 15.1 that there is or is likely to be a Notifiable Default; 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 must rectify),

then, unless the Notifiable Default also constitutes a Supplier Termination Event and the Authority serves a Termination Notice, the Supplier shall comply with the Rectification Plan Process.

## **15.3 Submission of the draft Rectification Plan**

15.3.1 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 of a Notifiable Default pursuant to Clause 15.2 (Notification). The Supplier shall submit a draft Rectification Plan even if the Supplier disputes that it is responsible for the Notifiable Default.

15.3.2 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).

15.3.3 The Supplier shall promptly provide to the Authority any further documentation that the Authority reasonably requires assessing 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 5 of Schedule 8.6 (Dispute Resolution Procedure).

#### **15.4 Agreement of the Rectification Plan**

15.4.1 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 (but not to be limited to) where it considers that 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.

15.4.2 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 first draft.

15.4.3 If the Authority consents to the Rectification Plan:

- (a) the Supplier shall immediately start work on the actions set out in the Rectification Plan; and
- (b) the Authority may no longer terminate this Agreement in whole or in part on the grounds of the relevant Notifiable Default (unless a Rectification Plan Failure occurs).

#### **16 MONITORING OF CONTRACT PERFORMANCE AND GOVERNANCE**

16.1 The Supplier shall comply with the arrangements for monitoring the Services set out in Schedule 2.2 (Performance).

16.2 The Supplier shall provide all Management Information in accordance with Schedule 8.2 (Management Information).

16.3 The Parties shall comply with the governance provisions set out in Schedule 8.5 (Governance and Contract Management).

## **17 CONTINUOUS IMPROVEMENT AND PROFIT SHARING**

### **17.1 Continuous Improvement**

- 17.1.1 The Supplier shall have an ongoing obligation throughout the Term to plan, keep under review and identify new or potential Improvements pursuant to which it will regularly review with the Authority the Services and the manner in which it is providing the Services with a view to reducing the Authority's costs (including the Contract Charges) and/or improving the quality and efficiency of the Services ("**Improvement Considerations**").
- 17.1.2 The Supplier will document the Improvement Considerations and any potential Improvements identified through a Continuous Improvement Plan which will be provided as part of the Management Information in accordance with Schedule 8.2 (Management Information).
- 17.1.3 Where the Authority wishes for the Supplier to implement any Improvements identified in a Continuous Improvement Plan, it shall provide notice to the Supplier that the relevant Improvements shall be implemented (subject to compliance with UK and EU procurement Law where applicable).
- 17.1.4 The Supplier shall ensure that the information that it provides to the Authority in accordance with this Clause 17.1 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 in connection with any Improvements identified by the Supplier.
- 17.1.5 Improvements shall be implemented by following the Variation Procedure, updating Schedule 7.1 (Contract Charges) and Schedule 7.4 (Financial Model) as required. For the avoidance of doubt, all Improvements shall be implemented at no additional cost to the Authority.
- 17.1.6 Where an Improvement will reduce the Authority's costs (including the Contract Charges) the benefit may be shared with the Supplier in accordance with paragraph 6 of Schedule 7.3 (Value for Money and Benchmarking).

### **17.2 Benchmarking**

- 17.2.1 The Authority may, by serving written notice on the Supplier, require Benchmark Reviews of any or all of the Services, Contract Charges and/or Service Levels in accordance with paragraph 5 of Schedule 7.3 (Value for Money and Benchmarking).
- 17.2.2 The results of the Benchmark Reviews shall be dealt with in accordance with paragraph 5 of Schedule 7.3 (Value for Money and Benchmarking).

### **17.3 Value for Money**

- 17.4 The Parties shall comply with their obligations as set out in Schedule 7.3 (Value for Money and Benchmarking).

## **18 PREMISES AND SITES**

- 18.1 The Supplier is responsible for obtaining the necessary permissions for access and occupation of Sites, including Port access requirements, as defined in RNMC SM12 of Schedule 2.1 (Services Description) to enable it to provide the Services to meet the Service Levels.

### **18.2 Inspection of Premises**

- 18.2.1 The Supplier shall inspect the Premises and satisfy itself that it has received all due diligence information about the Premises before the Premises Inspection Date.

- 18.2.2 As of the Premises Inspection Date, the Supplier represents and warrants that it has inspected the Premises and has satisfied itself that it has received all due diligence information about the Premises, and has advised the Authority of any aspect of the Premises that is not suitable for the provision of the Goods and Services and specified actions to remedy the unsuitable aspects of the Authority's Premises and Sites, together with a timetable for and the costs of those actions, have been specified in the Supplier Solution.

- 18.2.3 If the Supplier has either failed to inspect the Premises or failed to notify the Authority of any required remedial actions in accordance with Clause 1 then the Supplier shall not be entitled to recover any additional costs or charges from the Authority relating to any unsuitable aspects of the Premises and Sites except in respect of any latent structural defect in the Premises and Sites. The onus shall be on the Supplier to prove to the Authority's reasonable satisfaction that any work to the Premises and Sites is required in respect of a latent structural defect and that the additional costs or charges are reasonable and necessary. The Supplier shall not incur such additional costs or charges without obtaining Approval.

### **18.3 Authority Premises**

The Authority will grant permission to the Authorised Personnel, as required to enable the delivery of this service, access to the Authority Premises subject to meeting the Authority's security clearance requirements.

## **19 PAYMENT AND CONTRACT CHARGES**

### **19.1 Contract Charges**

In consideration of the Supplier's performance of its obligations under this Agreement, the Authority shall pay the Contract Charges and any VAT in accordance with Schedule 7.1 (Contract Charges).

**19.2 Invoicing, Payment and VAT**

- 19.2.1 The Authority shall pay all properly due Contract charges in cleared funds within 30 days of receipt by the Authority of an accurate, Valid Invoice.
- 19.2.2 Where the Supplier enters into a Sub-contract it shall ensure that a provision is included in such Sub-contract which requires payment to be made of all sums due by the Supplier to the Sub-contractor within a specified period not exceeding thirty (30) days from the receipt of a validly issued invoice, in accordance with the terms of the Sub-contract.
- 19.2.3 The Supplier shall indemnify the Authority on demand and on a continuing basis against any liability, including without limitation any interest, penalties or costs, which are suffered or incurred by or levied, demanded or assessed on the Authority 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 19.2.2 shall be paid by the Supplier to the Authority not less than five (5) Working Days before the date upon which the tax or other liability is payable by the Authority.
- 19.2.4 The Supplier shall not suspend the supply of the Services (as applicable) unless the Supplier is entitled to terminate this Agreement under Clause 38.2.

**19.3 Recovery of Sums Due**

- 19.3.1 Wherever under this Agreement any sum of money is recoverable from or payable by the Supplier to the Authority (including any sum which the Supplier is liable to pay to the Authority in respect of any breach of this Agreement), the Authority may unilaterally deduct that sum from any sum then due, or which at any later time may become due to the Supplier under this Agreement or under any other agreement or contract with the Authority.
- 19.3.2 Any overpayment by either Party, including but not to be limited to the Contract Charges or of VAT, shall be a sum of money recoverable by the Party who made the overpayment from the Party in receipt of the overpayment.
- 19.3.3 The Supplier shall make any payments due to the Authority without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise unless the Supplier has a valid court order requiring an amount equal to such deduction to be paid by the Authority to the Supplier.
- 19.3.4 All payments due shall be made within a reasonable time unless otherwise specified in this Agreement, in cleared funds, to such bank or building society account as the recipient Party may from time to time direct.
- 19.3.5 If the Authority fails to pay the Supplier undisputed sums of money when due, the

Supplier shall notify the Authority in writing of such failure to pay (a “**Failure to Pay Notice**”). If the Authority fails to pay such undisputed sums within 30 days after the Failure to Pay Notice, the Supplier may instigate the Dispute Resolution Procedure, save that such right shall not apply where the failure to pay is due to the Authority exercising its rights under Clauses 19.3.1 to 19.3.4 (Recovery of Sums Due). Interest shall be payable by the Authority on the late payment of any undisputed sums of money properly invoiced in accordance with the Late Payment of Commercial Debts (Interest) Act 1998.

#### **19.4 Financial Model**

##### **19.4.1 The Supplier shall:**

- (a) maintain complete and accurate records of, and supporting documentation for, all invoices submitted to the Authority and all payments made by the Authority under this Agreement in accordance with generally accepted accounting principles applied on a consistent basis;
- (b) maintain Open Book Accounts in accordance with the provisions of Clause 44 (Records and Audit Access and Open Book Accounting);
- (c) provide the Authority with such documentation and other information in relation to each invoice submitted to the Authority under this Agreement as may be reasonably requested by the Authority in order to verify that the invoice is accurate and conforms to the provisions of this Agreement (including the Financial Model); and
- (d) deliver Outturn Financial Models to the Authority in accordance with Schedule 7.4 (Financial Model).

#### **20 SUPPLIER PERSONNEL AND KEY PERSONNEL**

20.1 The Supplier shall comply with the Staff Vetting Procedures in respect of all Supplier Personnel employed or engaged in the provision of the Services.

##### **20.2 The Supplier shall:**

- (a) provide in advance of any admission to Authority Premises a list of the names of all Supplier Personnel requiring such admission, specifying the capacity in which they require admission and giving such other particulars as the Authority 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;
  - (ii) are vetted in accordance with Good Industry Practice and, where



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- applicable, the security requirements set out in Schedule 2.1 (*Services Description*) and Schedule 2.4 (*Security Management*); 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) 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.
- 20.3 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).
- 20.4 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.
- 20.5 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.
- 20.6 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).

20.7 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.

**21 ASSISTANCE ON EXPIRY OR TERMINATION**

The Parties shall comply with the provisions of Schedule 8.3. (*Exit Management*) and any current Exit Plan in relation to orderly transition of the Services to the Authority or a Replacement Supplier.

**22 DISASTER RECOVERY AND BUSINESS CONTINUITY**

The Parties shall comply with the provisions of Schedule 8.4 (Business Continuity and Disaster Recovery (BCDR)).

**23 TUPE**

The Parties agree that Schedule 9.1 (Staff Transfer) shall apply.

## **24 INTELLECTUAL PROPERTY RIGHTS**

### **24.1 General provisions**

#### **24.1.1 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, namely:
  - (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 Authority Data; and
  - (iii) the Authority Background IPRs;
- (c) Specially Written Software and Project Specific IPRs (except for any Know-How, trade secrets or Confidential Information contained therein) shall be the property of the Authority.

#### **24.1.2 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 24.1.1, 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).**

#### **24.1.3 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.**

#### **24.1.4 Unless the Authority otherwise agrees in advance in writing:**

- (a) all Specially Written Software and any software element of Project Specific IPRs shall be created in a format, or able to be converted into a format, which is suitable for publication by the Authority as open source software; and
- (b) where the Specially Written Software and any software element of Project Specific IPRs are written in a format that requires conversion before publication as open source software, the Supplier shall also provide the converted format to the Authority.

#### **24.1.5 Where the Authority agrees that any Specially Written Software and/or any software element of Project Specific IPRs should be excluded from Open Source publication,**

the Supplier shall as soon as reasonably practicable provide written details of the impact that such exclusion will have on the Authority's ability to publish other Open Source software under Clause 24.4 (Open Source Publication).

## 24.2 TRANSFER AND LICENCES GRANTED BY THE SUPPLIER

### 24.2.1 Specially Written Software and Project Specific IPRs

Subject to Clause 24.2.16 (Patents) the Supplier hereby agrees to transfer to the Authority, or shall procure the transfer to the Authority of, all rights (subject to Clause 24.1.1(i)) in the Specially Written Software and the Project Specific IPRS including (without limitation):

- (a) the Documentation, Source Code and the Object Code of the Specially Written Software; and
- (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 (together the “**Software Supporting Materials**”);

but not including any Know-How, trade secrets or Confidential Information.

### 24.2.2 The Supplier:

- (a) shall:
  - (i) inform the Authority of all Specially Written Software and any element of Project Specific IPRs that constitutes a modification or enhancement to Supplier Software or Third Party Software; and
  - (ii) deliver to the Authority the Specially Written Software and the software element of Project Specific IPRs in both Source Code and Object Code forms together with relevant Documentation and all related Software 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 Software 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
  - (iii) without prejudice to Clause 24.2.10 (Third Party Software and Third Party IPRs), provide full details to the Authority of any Supplier Background IPRs or Third Party IPRs which are embedded in or which are an integral part of the Specially Written Software or any element of Project Specific IPRs;
- (b) acknowledges and agrees that the ownership of the media referred to in Clause 24.2.2(a)(ii) shall vest in the Authority upon their receipt by the Authority; and

- (c) shall execute all such assignments as are required to ensure that any rights in the Specially Written Software and Project Specific IPRs are properly transferred to the Authority.

**Supplier Software and Supplier Background IPRs**

24.2.3 The Supplier hereby grants to the Authority:

- (a) subject to the provisions of Clause 24.2.16 (Patents) and Clause 39.4.6(ii) (Consequences of expiry or termination), perpetual, royalty-free and non-exclusive licences to use (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)):
  - (i) the Supplier Non-COTS Software for which the Supplier delivers a copy to the Authority 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 other Central Government Body's) business or function;
  - (ii) the Supplier Non-COTS 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 other Central Government Body's) business or function;
- (b) a licence to use the Supplier COTS Software for which the Supplier delivers a copy to the Authority and Supplier COTS Background IPRs on the licence terms identified in a letter in or substantially in the form set out in paragraph 2 of Schedule 5 (Software) and signed by or on behalf of the Parties on or before the Effective Date provided always that the Authority shall remain entitled to sub-license and to assign and novate the Supplier COTS Software and Supplier COTS Background IPRs on equivalent terms to those set out in Clauses 24.2.7 and 24.2.8 in relation to the Supplier Non-COTS Software and Supplier Non-COTS Background IPRs; and
- (c) a perpetual royalty-free non-exclusive licence to use without limitation any Know-How, trade secrets or Confidential Information contained within the Specially Written Software or the Project Specific IPRs.

24.2.4 At any time during the Term or following termination or expiry of this Agreement, the Supplier may terminate the licence granted in respect of the Supplier Non-COTS Software under Clause 24.2.3.1(i) or in respect of the Supplier Non-COTS Background IPRs under Clause 24.2.3.1(ii) by giving 30 days' notice in writing (or such other period as agreed by the Parties) if the Authority or any person to whom the Authority grants a sub-licence pursuant to Clause 24.2.6 (Authority's right to sub license) commits any material breach of the terms of Clause 24.2.3(a)(i) or 24.2.3(a)(ii) or 24.2.6(a)(ii) (as the case may be) which, if the breach is capable of remedy, is not remedied within 20 Working Days after the Supplier gives the Authority written notice specifying the breach and requiring its remedy.

24.2.5 In the event the licence of the Supplier Non-COTS Software or the Supplier Non-COTS Background IPRs is terminated pursuant to Clause 24.2.4, the Authority shall:

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- (a) immediately cease all use of the Supplier Non-COTS Software or the Supplier Non-COTS Background IPRs (as the case may be);
- (b) at the discretion of the Supplier, return or destroy documents and other tangible materials to the extent that they contain any of the Supplier Non-COTS Software and/or the Supplier Non-COTS Background IPRs, provided that if the Supplier has not made an election within 6 months of the termination of the licence, the Authority may destroy the documents and other tangible materials that contain any of the Supplier Non-COTS Software and/or the Supplier Non-COTS Background IPRs (as the case may be); and
- (c) ensure, so far as reasonably practicable, that any Supplier Non-COTS Software and/or Supplier Non-COTS Background IPRs that are held in electronic, digital or other machine-readable form ceases to be readily accessible (other than by the information technology staff of the Authority) from any computer, word processor, voicemail system or any other device containing such Supplier Non-COTS Software and/or Supplier Non-COTS Background IPRs.

**Authority's right to sub-license**

24.2.6 Subject to Clause 24.2.16 (Patents) the Authority may sub-license:

- (a) the rights granted under Clause 24.2.3(a) (Supplier Software and Supplier Background IPRs) to a third party (including for the avoidance of doubt, any Replacement Supplier) provided that:
  - (i) the sub-licence is on terms no broader than those granted to the Authority;
  - (ii) the sub-licence authorises the third party to use the rights licensed in Clause 24.2.3(a) (Supplier Software and Supplier Background IPRs) only 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;
  - (iii) the sub-licensee shall have executed a confidentiality undertaking in favour of the Supplier in or substantially in the form set out in paragraph 3 of Schedule 5 (Software); and
- (b) the rights granted under Clause 24.2.3.1 (Supplier Software and Supplier Background IPRs) to any Approved Sub-Licensee to the extent necessary to use and/or obtain the benefit of the Specially Written Software and/or the Project Specific IPRs provided that:
  - (i) the sub-licence is on terms no broader than those granted to the Authority; and
  - (ii) the Supplier has received a confidentiality undertaking in its favour in or substantially in the form set out in Annex 2 to Schedule 5 (Software) duly executed by the Approved Sub-Licensee.

**Authority's right to assign/novate licences**

- 24.2.7 The Authority may assign, novate or otherwise transfer its rights and obligations under the licences granted pursuant to Clause 24.2.3.1 (Supplier Software and Supplier Background IPRs) to:
- (a) a Central Government Body; or
  - (b) to 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.
- 24.2.8 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 24.2.3 (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 licence granted in Clause 24.2.3 (Supplier Software and Supplier Background IPRs).
- 24.2.9 If a licence granted in Clause 24.2.3 (Supplier Software and Supplier Background IPRs) is novated under Clause 24.2.7 (Authority's right to assign/novate licences) or there is a change of the Authority's status pursuant to Clause 24.2.8, the rights acquired on that novation or change of status shall not extend beyond those previously enjoyed by the Authority.

**Third Party Software and Third Party IPRs**

- 24.2.10 The Supplier shall not use in the provision of the Services (including in any Specially Written Software or in the software element of Project Specific IPRs) any Third Party Non-COTS Software or Third Party Non-COTS IPRs unless in each case it has:
- (a) first procured that the owner or an authorised licensor of the relevant Third Party Non-COTS IPRs or Third Party Non-COTS Software () has granted a direct licence to the Authority on a royalty-free basis to the Authority and on terms no less favourable to the Authority than those set out in Clauses 24.2.3.1 and 24.2.4 (Supplier Software and Supplier Background IPRs) and Clause 24.2.7 (Authority's right to assign/novate licences); or
  - (b) complied with the provisions of Clause 24.2.11.
- 24.2.11 If the Supplier cannot obtain for the Authority a licence in respect of any Third Party Non-COTS Software and/or Third Party Non-COTS IPRs in accordance with the licence terms set out in Clause 24.2.10.1, 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 software providers which the Supplier could seek to use; and
  - (b) use the relevant Third Party Non-COTS Software and/or Third Party Non-COTS IPRs only if the Authority has first approved in writing the terms of the licence from the relevant third party.

24.2.12 The Supplier shall:

- (a) notify the Authority in writing of all Third Party COTS Software and Third Party COTS IPRs that it uses and the terms on which it uses them; and
- (b) unless instructed otherwise in writing by the Authority in any case within 20 Working Days of notification pursuant to Clause 24.2.11.1, use all reasonable endeavours to procure in each case that the owner or an authorised licensor of the relevant Third Party COTS Software and Third Party COTS IPRs grants a direct licence to the Authority on terms no less favourable (including as to indemnification against IPRs Claims) than those on which such software is usually made commercially available by the relevant third party.

24.2.13 Should the Supplier become aware at any time, including after termination, that the Specially Written Software and/or the Project Specific IPRs contain any Intellectual Property Rights for which the Authority does not have a suitable licence, then the Supplier must notify the Authority within 10 days of what those rights are and which parts of the Specially Written Software and the Project Specific IPRs they are found in.

**Termination and Replacement Suppliers**

24.2.14 For the avoidance of doubt, the termination or expiry of this Agreement shall not of itself result in any termination of any of the licences granted by the Supplier or relevant third party pursuant to or as contemplated by this Clause 24.2.

24.2.15 The Supplier shall, if requested by the Authority in accordance with Schedule 8.3 (Exit Management) and at the Supplier's cost:

- (a) grant (or procure the grant) to any Replacement Supplier of:
  - (i) a licence to use any Supplier Non-COTS Software, Supplier Non-COTS Background IPRs, Third Party Non-COTS IPRs and/or Third Party Non-COTS Software on a royalty-free basis to the Replacement Supplier and on terms no less favourable than those granted to the Authority in respect of the relevant Software and/or IPRs pursuant to or as contemplated by this Clause 24.2 subject to receipt by the Supplier of a confidentiality undertaking in its favour in or substantially in the form set out in paragraph 3 of Schedule 5 (Software) duly executed by the Replacement Supplier; and/or
  - (ii) a licence to use any Supplier COTS Software and/or Supplier COTS Background IPRs, on terms no less favourable (including as to indemnification against IPRs Claims) than those on which such software is usually made commercially available by the Supplier; and/or
- (b) use all reasonable endeavours to procure the grant to any Replacement Supplier of a licence to use any Third Party COTS Software and/or Third Party COTS IPRs on terms no less favourable (including as to



indemnification against IPRs Claims) than those on which such software is usually made commercially available by the relevant third party.

### **Patents**

24.2.16 Where a patent owned by the Supplier is necessarily infringed by the use of the Specially Written Software or Project Specific IPRs by the Authority or any Replacement Supplier, the Supplier hereby grants to the Authority and the Replacement Supplier a non-exclusive, irrevocable, royalty-free, worldwide patent licence to use the infringing methods, materials or software solely for the purpose for which they were delivered under this Agreement.

### **24.3 LICENCES GRANTED BY THE AUTHORITY**

24.3.1 The Authority hereby grants to the Supplier a royalty-free, non-exclusive, non-transferable licence during the Term to use the Authority Software, the Authority Background IPRs, the Specially Written Software, the Project Specific IPRs and the Authority Data 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 29 (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.

24.3.2 In the event of the termination or expiry of this Agreement, the licence granted pursuant to Clause 24.3.1 and any sub-licence granted by the Supplier in accordance with Clause 24.3.1 shall terminate automatically on the date of such termination or expiry and the Supplier shall:

- (a) immediately cease all use of the Authority Software, the Authority Background IPRs and the Authority Data (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, the Authority Background IPRs and the Authority Data, 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, the Authority Background IPRs and the Authority Data (); and
- (c) ensure, so far as reasonably practicable, that any Authority Software, Authority Background IPRs and Authority Data 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, Authority Background IPRs and/or Authority Data.

### **24.4 OPEN SOURCE PUBLICATION**

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- 24.4.1 The Supplier agrees that the Authority may at its sole discretion publish as Open Source Software all or part of the Specially Written Software and any software element of the Project Specific IPRs after the Services Commencement Date.
- 24.4.2 The Supplier hereby warrants that the Specially Written Software and any software element of the Project Specific IPRs:
- (a) are suitable for release as Open Source and that any release will not allow a third party to use the Open Source software to in any way compromise the operation, running or security of the Specially Written Software, the Project Specific IPRs or the Authority System;
  - (b) shall not cause any harm or damage to any party using anything published as Open Source and that the Specially Written Software and the Project Specific IPRs do not contain any Malicious Software;
  - (c) do not contain any material which would bring the Authority into disrepute upon publication as Open Source;
  - (d) do not contain any IPR owned or claimed to be owned by any third party which is found, or alleged to be found, in the Specially Written Software and the Project Specific IPRs (“**Non-Party IPRs**”); and
  - (e) will be supplied in a format suitable for publication as Open Source (“**the Open Source Publication Material**”) no later than the Operational Service Commencement Date.
- 24.4.3 The Supplier shall ensure that the Open Source Publication Material provided to the Authority does not include any Supplier Software or Supplier Background IPRs save that which the Supplier is willing to allow to be included in any Open Source publication. In such a case, the Supplier hereby acknowledges that any such Supplier Software or Supplier Background IPRs will become Open Source and will be licensed and treated as such following publication by the Authority and any third party that uses the Open Source Publication Materials on the terms of the Open Source licence used by the Authority when publishing as Open Source.
- 24.4.4 The Supplier hereby indemnifies the Authority against all claims in which the Authority is, or is threatened to be, a party for any alleged infringement of any Non-Party IPRs arising from publication of the Specially Written Software and any software element of the Project Specific IPRs as Open Source under sub-clause 24.4.1.

## 25 SOURCE CODE

- 25.1 In relation to the Specially Written Software and/or Supplier Software used in the performance of Services, the Supplier shall, at such intervals notified by the Authority from time to time, deposit the Source Code of such software in escrow with such person as the Authority shall notify and the Supplier shall ensure that the deposited version of such Source Code is kept up to date as such software is modified or upgraded (the “**Escrow Materials**”).

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- 25.2 The events that will trigger the release of items held in Escrow are contract termination on:
- (a) Material Breach of this Agreement;
  - (b) or an Insolvency Event occurs in relation to the Supplier or the Guarantor.
- 25.3 In circumstances where the Authority obtains the release of the Escrow Materials from Escrow, the Supplier hereby grants to the Authority a perpetual, assignable, royalty-free and non-exclusive licence to Use and support the Source Code version of such software to the extent necessary for the receipt of the Services or any Replacement Services, use of the Goods or the Authority's normal business undertakings.
- 25.4 In relation to the Specially Written Software, the Supplier will, to the extent possible, deliver to the Authority the Source Code in respect of such software at such intervals as the Authority specifies from time to time including at the same time as each new release of the Software.

## **26 IPRS INDEMNITY**

- 26.1 The Supplier shall at all times, during and after the Term, on written demand indemnify the Authority and each other Indemnified Person, and keep the Authority and each other Indemnified Person indemnified, against all Losses incurred by, awarded against or agreed to be paid by an Indemnified Person arising from an IPRs Claim.
- 26.2 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 or other relevant Indemnified Person 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 ICT Environment;
    - (iii) there is no additional cost to the Authority or relevant Indemnified Person (as the case may be); and
    - (iv) the terms and conditions of this Agreement shall apply to the replaced or modified Services.

- 26.3 If the Supplier elects to procure a licence in accordance with Clause 26.226.2(a) or to modify or replace an item pursuant to Clause 26.2(b), but this has not avoided or resolved the IPRs Claim, then:
- (a) the Authority may terminate this Agreement (if subsisting) with immediate effect by written notice to the Supplier; and
  - (b) without prejudice to the indemnity set out in Clause 26.1, 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.

## **27 PROTECTION OF INFORMATION**

### **27.1 Security Requirements**

- 27.1.1 The Supplier shall comply, and shall procure the compliance of the Supplier Personnel, with the Security Policy and the Security Management Plan and Schedule 2.4 (Security Management) and the Supplier shall ensure that the Security Management Plan produced by the Supplier fully complies with the Security Policy.
- 27.1.2 The Authority shall notify the Supplier of any changes or proposed changes to the Security Policy.
- 27.1.3 If the Supplier believes that a change or proposed change to the Security Policy will have a material and unavoidable cost implication to the provision of the Services it may notify the Authority. 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 Contract Charges shall then be agreed in accordance with the procedure set out in Clause 52 (Variation).
- 27.1.4 Until and/or unless a change to the Contract Charges is agreed by the Authority pursuant to Clause 52 (Variation), the Supplier shall continue to perform the Services and provide the Goods and Spares in accordance with its existing obligations.

### **27.2 Malicious Software**

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- 27.2.1 The Supplier shall use the latest versions of anti-virus definitions, and the latest versions of all software available from an industry accepted anti-virus software vendor to check for, contain the spread of, and minimise the impact of Malicious Software in the ICT Environment.
- 27.2.2 Notwithstanding Clause 27.2.1, if Malicious Software is found, the Parties shall co-operate to reduce the effect of the Malicious Software and, particularly if Malicious Software causes loss of operational efficiency or loss or corruption of the Authority Data, assist each other to mitigate any losses and to restore the Services to their desired operating efficiency.
- 27.2.3 Any cost arising out of the actions of the Parties taken in compliance with the provisions of Clause 27.2.1 shall be borne by the Parties as follows:
- (a) by the Supplier where the Malicious Software originates from the Supplier Software and/or systems, the Third Party Software supplied by the Supplier (except where the Authority has waived the obligation set out in Clause 27.2.1) 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 the Authority Data was provided to the Supplier; and
  - (b) otherwise by the Authority.

**27.3 Authority Data**

- 27.3.1 The Supplier shall not delete or remove any proprietary notices contained within or relating to Authority Software and/or the Authority Data.
- 27.3.2 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 Approved by the Authority.
- 27.3.3 To the extent that the 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 and in the format specified in this Agreement (if any) and in any event as specified by the Authority from time to time in writing.
- 27.3.4 To the extent that the Authority Data is held and/or processed by the Supplier, the Supplier shall take responsibility for preserving the integrity of the Authority Data and preventing the corruption or loss of Authority Data.
- 27.3.5 The Supplier shall ensure that any system on which the Supplier holds the Authority Data, including back-up data, is a secure system that complies with the Security Policy and all applicable laws.
- 27.3.6 The Supplier shall ensure that any system on which the Supplier holds the Authority Data which is protectively marked shall be accredited complying with Schedule 2.4 (Security Management) and Information Assurance Policy, taking into account the guidance on Risk Management and Accreditation of Information Systems, HMG IA Standard Number 2 (Risk Management and Accreditation of Information Systems), and the Supplier shall review such accreditation status at least once in each calendar year to assess whether material changes have occurred which could alter

the original accreditation decision. If any such changes have occurred then the Supplier shall resubmit such system for accreditation.

27.3.7 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 BCDR Plan and the Supplier shall do so as soon as practicable but in accordance with the time period notified by the Authority; 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 the BCDR Plan.

27.3.8 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.

## **28 PROTECTION OF PERSONAL DATA**

28.1 The Parties acknowledge that for the purposes of the Data Protection Legislation, the Authority is the Controller and the Supplier is the Processor. The only processing that the Supplier is authorised to do is listed in Schedule 12 (GDPR Schedule of Processing, Personal Data and Data Subjects) by the Authority and may not be determined by the Supplier.

28.2 The Supplier shall notify the Authority immediately if it considers that any of the Authority's instructions infringe the Data Protection Legislation.

28.3 The Supplier shall provide all reasonable assistance to the Authority in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of the Authority, include:

- (a) a systematic description of the envisaged processing operations and the purpose of the processing;
- (b) an assessment of the necessity and proportionality of the processing operations in relation to the Services;
- (c) an assessment of the risks to the rights and freedoms of Data Subjects; and
- (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal

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Data.

- 28.4 The Supplier shall, in relation to any Personal Data processed in connection with its obligations under this Agreement:
- (a) process that Personal Data only in accordance with Schedule 12 (GDPR Schedule of Processing, Personnel Data and Data Subjects), unless the Supplier is required to do otherwise by Law. If it is so required the Supplier shall promptly notify the Authority before processing the Personal Data unless prohibited by Law;
  - (b) ensure that it has in place Protective Measures, which have been reviewed and approved by the Authority as appropriate to protect against a Data Loss Event having taken account of the:
    - (i) nature of the data to be protected;
    - (ii) harm that might result from a Data Loss Event;
    - (iii) state of technological development; and
    - (iv) cost of implementing any measures;
  - (c) ensure that:
    - (i) the Supplier Personnel do not process Personal Data except in accordance with this Agreement (and in particular Schedule 12, (GDPR Schedule of Processing, Personnel Data and Data Subjects);
    - (ii) it takes all reasonable steps to ensure the reliability and integrity of any Supplier Personnel who have access to the Personal Data and ensure that they:
      - (A) are aware of and comply with the Supplier's duties under this clause;
      - (B) are subject to appropriate confidentiality undertakings with the Supplier or any Sub-processor;
      - (C) 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
      - (D) have undergone adequate training in the use, care,

protection and handling of Personal Data; and

- (d) not transfer Personal Data outside of the EU unless the prior written consent of the Authority has been obtained and the following conditions are fulfilled:
  - (i) the Authority or the Supplier has provided appropriate safeguards in relation to the transfer (whether in accordance with GDPR Article 46 or LED Article 37) as determined by the Authority;
  - (ii) the Data Subject has enforceable rights and effective legal remedies;
  - (iii) the Supplier complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist the Authority in meeting its obligations); and
  - (iv) the Supplier complies with any reasonable instructions notified to it in advance by the Authority with respect to the processing of the Personal Data;
- (e) at the written direction of the Authority, delete or return Personal Data (and any copies of it) to the Authority on termination of the Agreement unless the Supplier is required by Law to retain the Personal Data.

28.5 Subject to Clause 28.6, the Supplier shall notify the Authority immediately if it:

- (a) receives a Data Subject Access Request (or purported Data Subject Access Request);
- (b) receives a request to rectify, block or erase any Personal Data;
- (c) receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Legislation;
- (d) receives any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data processed under this Agreement;
- (e) receives 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; or
- (f) becomes aware of a Data Loss Event.



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- 28.6 The Supplier's obligation to notify under Clause 28.5 shall include the provision of further information to the Authority in phases, as details become available.
- 28.7 Taking into account the nature of the processing, the Supplier shall provide the Authority with full assistance in relation to either Party's obligations under Data Protection Legislation and any complaint, communication or request made under Clause 28.5 (and insofar as possible within the timescales reasonably required by the Authority) including by promptly providing:
- (a) the Authority with full details and copies of the complaint, communication or request;
  - (b) such assistance as is reasonably requested by the Authority to enable the Authority to comply with a Data Subject Access Request within the relevant timescales set out in the Data Protection Legislation;
  - (c) the Authority, at its request, with any Personal Data it holds in relation to a Data Subject;
  - (d) assistance as requested by the Authority following any Data Loss Event;
  - (e) assistance as requested by the Authority with respect to any request from the Information Commissioner's Office, or any consultation by the Authority with the Information Commissioner's Office.
- 28.8 The Supplier shall maintain complete and accurate records and information to demonstrate its compliance with this clause. This requirement does not apply where the Supplier employs fewer than 250 staff, unless:
- (a) the Authority determines that the processing is not occasional;
  - (b) the Authority determines the processing includes special categories of data as referred to in Article 9(1) of the GDPR or Personal Data relating to criminal convictions and offences referred to in Article 10 of the GDPR; and
  - (c) the Authority determines that the processing is likely to result in a risk to the rights and freedoms of Data Subjects.
- 28.9 The Supplier shall allow for audits of its Personal Data processing activity by the Authority or the Authority's designated auditor.
- 28.10 The Supplier shall designate a Data Protection Officer if required by the Data Protection Legislation.
- 28.11 Before allowing any Sub-processor to process any Personal Data related to this Agreement, the Supplier must:

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- (a) notify the Authority in writing of the intended Sub-processor and processing;
- (b) obtain the written consent of the Authority;
- (c) enter into a written agreement with the Sub-processor which give effect to the terms set out in this Clause 28 such that they apply to the Sub-processor; and
- (d) provide the Authority with such information regarding the Sub-processor as the Authority may reasonably require.

28.12 The Supplier shall remain fully liable for all acts or omissions of any Sub-processor.

28.13 The Authority may, at any time on not less than 30 Working Days' notice, revise this clause by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when incorporated by attachment to this Agreement).

28.14 The Parties agree to take account of any guidance issued by the Information Commissioner's Office. The Authority may on not less than 30 Working Days' notice to the Supplier amend this agreement to ensure that it complies with any guidance issued by the Information Commissioner's Office.

## **29 CONFIDENTIALITY**

29.1 Except to the extent set out in this Clause 29 or where disclosure is expressly permitted elsewhere in this Agreement, each Party shall:

- (a) treat the other Party's Confidential Information as confidential and safeguard it accordingly; and
- (b) not disclose the other Party's Confidential Information to any other person without the owner's prior written consent.

29.2 Clause 29.1 shall not apply to the extent that:

- (a) such disclosure is a requirement of Law placed upon the Party making the disclosure, including any requirements for disclosure under the FOIA or the Environmental Information Regulations pursuant to Clause 31 (Freedom of Information);
- (b) such information was in the possession of the Party making the disclosure without obligation of confidentiality prior to its disclosure by the information owner;
- (c) such information was obtained from a third party without obligation of

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confidentiality;

- (d) such information was already in the public domain at the time of disclosure otherwise than by a breach of this Agreement; or
- (e) such information is independently developed without access to the other Party's Confidential Information.

29.3 The Supplier may only disclose the Authority's Confidential Information to the Supplier Personnel who are directly involved in the provision of the Services and Goods and who need to know the information, and shall procure that such Applicable Supplier Personnel comply with these obligations as to confidentiality.

29.4 The Supplier shall not, and shall procure that the Supplier Personnel do not, use any of the Authority's Confidential Information received otherwise than for the purposes of this Agreement.

29.5 The Supplier shall procure that those members of Supplier Personnel identified in the Authority's notice sign a confidentiality undertaking prior to commencing any work in accordance with this Agreement.

29.6 In the event that any default, act or omission of any Supplier Personnel causes or contributes (or could cause or contribute) to the Supplier breaching its obligations as to confidentiality under or in connection with this Agreement, the Supplier shall take such action as may be appropriate in the circumstances, including the use of disciplinary procedures in serious cases. To the fullest extent permitted by its own obligations of confidentiality to any Supplier Personnel, the Supplier shall provide such evidence to the affected the Authority as that the Authority may reasonably require (though not so as to risk compromising or prejudicing any disciplinary or other proceedings to demonstrate that the Supplier is taking appropriate steps to comply with this clause, including copies of any written communications to and/or from Supplier Personnel, and any minutes of meeting and any other records which provide an audit trail of any discussions or exchanges with Supplier Personnel in connection with obligations as to confidentiality.

29.7 Nothing in this Agreement shall prevent the Authority from disclosing the Supplier's Confidential Information (including the Management Information obtained under Clause 16 (Monitoring of Contract Performance and Governance):

- (a) to any Crown body. All Crown bodies receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other Crown bodies on the basis that the information is confidential and is not to be disclosed to a third party which is not part of any Crown body or the Authority;
- (b) to Parliament and Parliamentary Committee or if required by any

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Parliamentary reporting requirement;

- (i) on a confidential basis to a professional adviser for any purpose in connection with this Agreement;
- (ii) for the purpose of the examination and certification of the Authority's accounts; or
- (iii) for any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority has used its resources.

29.8 The Authority shall use all reasonable endeavours to ensure that any government department, employee, third party or Sub-contractor to whom the Supplier's Confidential Information is disclosed pursuant to Clause 29.7 is made aware of the Authority's obligations of confidentiality.

29.9 Nothing in this Clause 28.14 shall prevent either party 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 other party's Confidential Information or an infringement of IPR.

29.10 In the event that the Supplier fails to comply with this Clause 29, the Authority reserves the right to terminate this Agreement with immediate effect by notice in writing.

29.11 In order to ensure that no unauthorised person gains access to any Confidential Information or any data obtained in performance of this Agreement, the Supplier undertakes to maintain adequate security arrangements that meet the requirements of Good Industry Practice.

### **30 OFFICIAL SECRETS ACTS AND FINANCE ACT**

30.1 The Supplier shall comply with and shall ensure that its Supplier Personnel comply with, the provisions of:

- (a) the Official Secrets Acts 1911 to 1989; and
- (b) Section 182 of the Finance Act 1989.

30.2 In the event that the Supplier or its Supplier Personnel fail to comply with this Clause 30, the Authority reserves the right to terminate this Agreement with immediate effect by giving notice in writing to the Supplier.

### **31 FREEDOM OF INFORMATION**

31.1 The Supplier acknowledges that the Authority is subject to the requirements of the Terms and Conditions

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FOIA and the Environmental Information Regulations and shall assist and cooperate with the Authority to enable the Authority to comply with its Information disclosure obligations.

31.2 The Supplier shall and shall procure that the Supplier Personnel shall:

- (a) transfer to the Authority all Requests for Information that it receives as soon as practicable and in any event within two (2) Working Days of receiving a Request for Information;
- (b) provide the Authority with a copy of all Information in its possession, or control in the form that the Authority requires within five (5) Working Days (or such other period as the Authority may specify) of the Authority's request; and
- (c) provide all necessary assistance as reasonably requested by the Authority to enable the Authority to respond to the Request for Information within the time for compliance set out in section 10 of the FOIA or regulation 5 of the Environmental Information Regulations.

31.3 the Authority shall be responsible for determining in its absolute discretion and notwithstanding any other provision in this Agreement or any other contract whether the Commercially Sensitive Information and/or any other Information is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations.

31.4 In no event shall the Supplier respond directly to a Request for Information unless authorised in writing to do so by the Authority.

31.5 The Supplier acknowledges that (notwithstanding any other provision of this Agreement) the Authority may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 ("**the Code**"), be obliged under the FOIA, or the Environmental Information Regulations to disclose information concerning the Supplier or the Goods and Services:

- (a) in certain circumstances without consulting the Supplier; or
- (b) following consultation with the Supplier and having taken their views into account,
- (c) provided always that where Clause 31.5 applies the Authority shall, in accordance with any recommendations of the Code, take reasonable steps, where appropriate, to give the Supplier advanced notice, or failing that, to draw the disclosure to the Supplier's attention after any such disclosure.

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- 31.6 The Supplier shall ensure that all Information is retained for disclosure in accordance with the provisions of this Agreement and in any event in accordance with the requirements of Good Industry Practice and shall permit the Authority to inspect such records as requested from time to time.
- 31.7 The Supplier acknowledges that the Commercially Sensitive Information is of indicative value only and that the Authority may be obliged to disclose it in accordance with Clause 31.5.

## **32 TRANSPARENCY**

- 32.1 The Parties acknowledge that, except for any information which is exempt from disclosure in accordance with the provisions of the FOIA, the content of this Agreement is not Confidential Information. the Authority shall be responsible for determining in its absolute discretion whether any of the content of this Agreement is exempt from disclosure in accordance with the provisions of the FOIA.
- 32.2 Notwithstanding any other term of this Agreement, the Supplier hereby gives his consent for the Authority to publish this Agreement in its entirety (but with any information which is exempt from disclosure in accordance with the provisions of the FOIA redacted), including from time to time agreed changes to the Agreement, to the general public.
- 32.3 The Authority may consult with the Supplier to inform its decision regarding any redactions but the Authority shall have the final decision in its absolute discretion.
- 32.4 The Supplier shall assist and cooperate with the Authority to enable the Authority to publish this Agreement.

## **33 WARRANTIES AND REPRESENTATIONS**

- 33.1 The Supplier warrants and represents that at the Effective Date:
- 33.1.1 it is validly incorporated, organised and subsisting in accordance with the Laws of its place of incorporation;
  - 33.1.2 it has full capacity and authority to enter into and to perform this Agreement;
  - 33.1.3 this Agreement is executed by its duly authorised representative;
  - 33.1.4 it has full capacity and authority and all necessary consents licences, permissions (statutory, regulatory, contractual or otherwise), including, where its procedures so require, the consent of its Parent Company, to enter into and perform its obligations under this Agreement;
  - 33.1.5 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 any of its Affiliates that might affect its

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ability to perform its obligations under this Agreement;

- 33.1.6 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;
- 33.1.7 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);
- 33.1.8 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 SQ and ITT (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;
- 33.1.9 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;
- 33.1.10 it has all necessary rights in and to the Licensed Software, the Third Party COTS and Non-COTS IPRs, the Supplier Background IPRs and any other materials 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;
- 33.1.11 the Contract Inception Report is a true and accurate reflection of the Costs and Supplier Profit Margin forecast by the Supplier and the Supplier does not have any other internal financial model in relation to the Services inconsistent with the Financial Model;
- 33.1.12 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
- 33.1.13 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.
- 33.1.14 It has informed the authority that it is or intends to provide services to any foreign government that are the same or substantially similar to the Services.

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- 33.2 The representations and warranties set out in Clause 33.1 shall be deemed to be repeated by the Supplier on the Service Commencement Date (if later than the date of signature of this Agreement) by reference to the facts then existing.
- 33.3 Each of the representations and warranties set out in Clauses 33.1 and 33.2 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.
- 33.4 If at any time a Party becomes aware that a representation or warranty given by it under Clause 33.1 or 33.2 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.
- 33.5 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.
- 33.6 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.
- 33.7 The Supplier acknowledges, warrants and represents that it:
- (a) has received sufficient information to enable it to enter into this Agreement in reliance on its own due diligence alone; and
  - (b) will ensure that it makes sufficient enquires of the Authority before the Milestone Date for Milestone 3 to have received sufficient information required by it in order to determine whether it is able to provide the Goods and Services in accordance with the terms of this Agreement.

The warranty and representation at Clause 33.7(a) shall be restated by the Supplier upon Achievement of Milestone 3.

- 33.8 The Supplier acknowledges and agrees that:
- (a) the warranties, representations and undertakings contained in this Agreement are material and are designed to induce the Authority into entering into this Agreement; and
  - (b) the Authority has been induced into entering into this Agreement on behalf of the Authority's and in doing so has relied upon the warranties, representations and undertakings contained herein.



## **34 LIABILITIES**

### **34.1 UNLIMITED LIABILITY**

#### **34.1.1 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; or
- (d) any liability to the extent it cannot be limited or excluded by Law.

#### **34.1.2 The Supplier's liability in respect of the indemnities in Clause 19.2 (Invoicing, Payment and VAT), Clause 36.1 (*Employment Indemnity*), Clause 36.2 (*Income Tax and National Insurance Contributions*), Clause 26 (*IPRs Indemnity*), Schedule 9.1 (*Staff Transfer*) and the Annexes to Schedule 9.1 (*Staff Transfer*) shall be unlimited.**

#### **34.1.3 The Authority's liability in respect of the indemnities in Clause 36.1 (*Employment Indemnity*), Schedule 9.1 (*Staff Transfer*) and the Annexes to Schedule 9.1 (*Staff Transfer*) shall be unlimited.**

### **34.2 FINANCIAL AND OTHER LIMITS**

Subject to Clauses 34.1.1 (*Unlimited Liability*) and Clause 34.3.1 (*Consequential losses*):

- (a) the Supplier's aggregate liability in respect of loss of or damage to the Authority Premises or other property or assets of the Authority (including technical infrastructure, assets or equipment but excluding any loss or damage to the Authority's Data or any other data) that is caused by Defaults of the Supplier occurring in each and any Contract Year shall in no event exceed £10 million;
- (b) the Supplier's:
  - (i) Monthly liability in respect of Service Credits shall be capped at the Service Credit Cap; and

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- (c) the Supplier's aggregate liability 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, an amount equal to 150% of the Estimated Year 1 Contract Charges;
  - (ii) in relation to Defaults occurring during any subsequent Contract Year, an amount equal to 150% of the Contract Charges paid and/or due to be paid to the Supplier 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 150% of the Contract 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 34.2(c) 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 150% shall be deemed to be references to 200%.

34.2.2 Deductions from Contract Charges shall not be taken into consideration when calculating the Supplier's liability under Clause 34.2 (c).

34.2.3 Subject to Clauses 34.1.1 (*Unlimited Liability*) and Clause 34.3.1(*Consequential Losses*) and without prejudice to the Authority's obligation to pay the Contract Charges as and when they fall due for payment:

- (a) the Authority's total aggregate liability in respect of all Losses incurred by the Supplier under or in connection with this Agreement as a result of early termination of this Agreement by the Authority pursuant to Clause 38.1(a) (*Termination by the Authority*) or by the Supplier pursuant to Clause 38.2(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 3 of Schedule 7.5 (*Payments on Termination*);
  - (ii) in relation to the Breakage Costs Payment, the amount set out in paragraph 2.2 of Schedule 7.5 (*Payments on Termination*); and
  - (iii) in relation to the Compensation Payment, the amount set out in paragraph 5.3 of Schedule 7.5 (*Payments on Termination*); and
- (b) the Authority's aggregate liability in respect of all Losses incurred by the Supplier under or in connection with this Agreement 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

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amount equal to the Estimated Year 1 Contract Charges;

- (ii) in relation to Defaults occurring during any subsequent Contract Year, an amount equal to the total Contract 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 Contract 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.

### 34.3 CONSEQUENTIAL LOSSES

34.3.1 Subject to Clauses 34.1.1, 34.1.2 and 34.1.3 (*Unlimited Liability*) and Clause 34.3.2, 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).

34.3.2 Notwithstanding Clause 34.3.1 but subject to Clause 34.2, the Supplier acknowledges that the Authority may, amongst other things, recover 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) 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;
- (d) any compensation or interest paid to a third party by the Authority;
- (e) any fine or penalty incurred by the Authority pursuant to Law and any costs incurred by the Authority in defending any proceedings which result in such fine or penalty; and

### 34.4 CONDUCT OF INDEMNITY CLAIMS

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.

**34.5 MITIGATION**

Each Party shall use all reasonable endeavours to mitigate any loss or damage suffered arising out of or in connection with this Agreement, including any Losses for which the relevant Party is entitled to bring a claim against the other Party pursuant to the indemnities in this Agreement.

**35 INSURANCE**

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

**36 TAXATION, NATIONAL INSURANCE AND EMPLOYMENT LIABILITY**

**36.1 EMPLOYMENT INDEMNITY**

The Parties agree that:

- (a) the Supplier shall both during and after the Term indemnify the Authority against all Employee Liabilities that may arise as a result of any claims brought against the Authority by any person where such claim arises from any act or omission of the Supplier or any Supplier Personnel; and
- (b) the Authority shall both during and after the Term indemnify the Supplier against all Employee Liabilities that may arise as a result of any claims brought against the Supplier by any person where such claim arises from any act or omission of the Authority or any of the Authority's employees, agents, consultants and contractors.

**36.2 INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS**

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 arising from or made in connection with the provision of the Services by the Supplier or any Supplier Personnel.

**37 FINANCIAL DISTRESS**

37.1 The Parties shall comply with the provisions of Schedule 7.2 (Financial Distress).

## **38 TERMINATION AND STEP-IN RIGHTS**

### **38.1 AUTHORITY TERMINATION RIGHTS**

38.1.1 The Authority may terminate this Agreement by issuing a Termination Notice to the Supplier:

- (a) for convenience at any time, including where the Agreement should not have been entered into in view of a serious infringement of obligations under European Law declared by the Court of Justice of the European Union under Article 258 of the Treaty on the Functioning of the EU;
- (b) if a Supplier Termination Event occurs;
- (c) if a Material Breach occurs;
- (d) if a Force Majeure Event endures for a continuous period of more than 90 days; or
- (e) if the Agreement has been substantially amended to the extent that the Public Contracts Regulations 2015 require a new procurement procedure,

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

38.1.2 Where the Authority:

- (a) is terminating this Agreement under Clause 38.1.1 due to the occurrence of either limb (b) and/or (g) 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 38.1.1, 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.

### **38.2 TERMINATION BY THE SUPPLIER**

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 **£2,382,539.91** and such amount remains outstanding 40 Working Days after the receipt by the Authority of a notice of non-payment from the Supplier; or
- (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 38.2.2 would result in a Partial Termination, the provisions of Clause 38. (Partial Termination) shall apply.

### 38.3 PARTIAL TERMINATION

38.3.1 If the Supplier notifies the Authority pursuant to Clause 38.2.2 (*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 38.4, 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.

38.3.2 The Parties shall agree the effect of any Change necessitated by a Partial Termination in accordance with the Change Control Procedure, including the effect the Partial Termination may have on any other Services and the Contract Charges, provided that:

- (a) the Supplier shall not be entitled to an increase in the Contract 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 Contract Charges (if any) shall be calculated in accordance with the Financial Model and must be reasonable; and
- (c) the Supplier shall not be entitled to reject the Change.

### 38.4 STEP-IN RIGHTS

38.4.1 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 38.4 (*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 29 (*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;

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- (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.

38.4.2 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 38.4.

38.4.3 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;
- (b) no Deductions shall be applicable in relation to Contract Charges in respect of Services that are the subject of the Required Action and the provisions of Clause 38.4 shall apply to Deductions from Contract Charges in respect of other Services; and
- (c) the Authority shall pay to the Supplier the Contract Charges after subtracting any applicable Deductions and the Authority's costs of taking the Required Action.

38.4.4 If the Supplier demonstrates to the reasonable satisfaction of the Authority that the Required Action has resulted 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 Contract Charges.

38.4.5 Before ceasing to exercise its step-in rights under this Clause 38.4 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 38.4.6.
- 38.4.6 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.
- 38.4.7 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.
- 38.4.8 The Supplier shall bear its own costs in connection with any step-in by the Authority under this Clause 38.4, 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).

## **39 CONSEQUENCES OF EXPIRY OR TERMINATION**

### **39.1 GENERAL PROVISIONS ON EXPIRY OR TERMINATION**

The provisions of Clauses 19.2.3 (VAT), 19.3 (Recovery of Sums Due), 44 (*Records, Audit Access and Open Book Accounting*), 36.1 (*Employment Indemnity*), 36.2 (*Income Tax and National Insurance Contributions*), 24 (*Intellectual Property Rights*), 24.2 (Transfer and Licences Granted by the Supplier), 26.1 (*IPRs Indemnity*), 29 (*Confidentiality*), 31 (*Freedom of Information*), 28 (*Protection of Personal Data*), 34 (Liabilities), 39 (*Consequences of Expiry or Termination*), 53 (Severability), 57 (*Entire Agreement*), 59 (The Contracts (Rights of Third Parties) Act 1999), 62 (*Dispute Resolution*) and 64 (*Governing Law and Jurisdiction*), and the provisions of Schedules 1 (*Definitions*), 7.1 (*Contract Charges*), 7.5 (*Payments on Termination*), 8.6 (*Dispute Resolution Procedure*), 8.2 (Management Information), 8.3 (*Exit Management*), and 9.1 (*Staff Transfer*), shall survive the termination or expiry of this Agreement.

### **39.2 EXIT MANAGEMENT**

The Parties shall comply with clause 21.



### **39.3 PAYMENTS BY THE AUTHORITY**

39.3.1 If this Agreement is terminated by the Authority pursuant to Clause 38.1.1(a) or by the Supplier pursuant to Clause 38.2(a), 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(a) of Part D of Schedule 7.1 (Contract Charges) applies, deemed given) by the Authority pursuant to Clause 38.1 (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 38.2 (Termination by the Supplier) to (and including) the Termination Date.

39.3.2 If this Agreement is terminated (in part or in whole) by the Authority pursuant to Clauses 38.1 (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 8.3 (Exit Management); and
- (b) payments in respect of unpaid Contract Charges for Services received up until the Termination Date.

39.3.3 The costs of termination incurred by the Parties shall lie where they fall if:

- (a) either Party terminates or partially terminates this Agreement for a continuing Force Majeure Event pursuant to Clauses 38.1.1(d) or 38.2(b)  
or;
- (b) the Authority terminates this Agreement under Clause 38.1.1(e).

### **39.4 Payments by the Supplier**

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

39.4.2 If this Agreement is terminated (in whole or in part) by the Authority pursuant to Clause 38.1(b) (Termination by the Authority) prior to Achievement of one or more CPP Milestones, the Authority may at any time on or within 12 months of the issue

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of the relevant Termination Notice by issue to the Supplier of written notice (a **“Milestone Adjustment Payment Notice”**) require the Supplier to repay to the Authority an amount equal to the aggregate Milestone Adjustment Payment Amounts in respect of each CPP Milestone to which the Milestone Adjustment Payment Notice relates.

39.4.3 A Milestone Adjustment Payment Notice shall specify:

- (a) each CPP Milestone to which it relates;
- (b) in relation to each such CPP Milestone, each Deliverable relating to that CPP Milestone that the Authority wishes to retain, if any (each such Deliverable being a **“Retained Deliverable”**); and
- (c) those Retained Deliverables, if any, the Allowable Price for which the Authority considers should be subject to deduction of an adjusting payment on the grounds that they do not or will not perform in all material respects in accordance with their specification (such adjusting payment being an **“Allowable Price Adjustment”**),

and may form part of a Termination Notice.

39.4.4 The Supplier shall within 10 Working Days of receipt of a Milestone Adjustment Payment Notice, in each case as applicable:

- (a) notify the Authority whether it agrees that the Retained Deliverables which the Authority considers should be subject to an Allowable Price Adjustment as specified in the relevant Milestone Adjustment Payment Notice should be so subject; and
- (b) in relation to each such Retained Deliverable that the Supplier agrees should be subject to an Allowable Price Adjustment, notify the Authority of the Supplier’s proposed amount of the Allowable Price Adjustment and the basis for its approval;
- (c) provide the Authority with its calculation of the Milestone Adjustment Payment Amount in respect of each CPP Milestone the subject of the relevant Milestone Adjustment Payment Notice using its proposed Allowable Price Adjustment, including details of:
  - (i) all relevant Milestone Payments; and
  - (ii) the Allowable Price of each Retained Deliverable; and
- (d) provide the Authority with such supporting information as the Authority may require.

39.4.5 If the Parties do not agree the calculation of a Milestone Adjustment Payment Amount within 20 Working Days of the Supplier’s receipt of the relevant Milestone Adjustment Payment Notice, either Party may refer the Dispute to the Dispute Resolution Procedure.

39.4.6 If the Authority issues a Milestone Adjustment Payment Notice pursuant to  
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Clause 39.4.2:

- (a) the Authority shall:
- (i) securely destroy or return to the Supplier all Non-retained Deliverables that are in tangible form; and
  - (ii) ensure that all Non-retained Deliverables that are held in electronic, digital or other machine-readable form cease to be readily accessible (other than by the information technology staff of the Authority) from any computer, word processor, voicemail system or any other device containing such all Non-retained Deliverables,
- in each case as soon as reasonably practicable after repayment of the aggregate Milestone Adjustment Payment Amounts repayable pursuant to that Milestone Adjustment Payment Notice; and
- (b) all licences granted pursuant to Clause 24.2 (Transfer and Licences granted by the Supplier) in respect of Specially Written Software and Project Specific IPRs and any Supplier Non-COTS Software and/or Supplier Background IPRs shall terminate upon such repayment to the extent that they relate to the Non-retained Deliverables.

**40 PUBLICITY, MEDIA AND OFFICIAL ENQUIRIES**

- 40.1 The Supplier shall not make any press announcements, make any announcements in the public domain or publicise this Agreement in any way without the Authority's Approval and shall take reasonable steps to ensure that its Supplier Personnel, Sub-Contractors and professional advisers and consultants comply with this Clause 40. Any such press announcements or publicity proposed under this Clause 40 shall remain subject to the rights relating to Confidential Information and Commercially Sensitive Information.
- 40.2 Subject to the rights in relation to Confidential Information and Commercially Sensitive Information the Authority shall be entitled to publicise this Agreement in accordance with any legal obligation upon the Authority, including any examination of this Agreement by the Auditor.
- 40.3 The Supplier shall not do anything or permit to cause anything to be done, which may damage the reputation of the Authority or bring the Authority into disrepute.
- 40.4 For the avoidance of doubt, the Supplier shall not identify the Authority when using its experience as the Supplier under this Agreement in support of any tender process.

#### **41 HEALTH AND SAFETY**

- 41.1 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.
- 41.2 While on the Authority Premises, the Supplier shall comply with any health and safety measures implemented by the Authority in respect of Supplier Personnel and other persons working there.
- 41.3 The Supplier shall notify the Authority immediately in the event of any incident occurring in the performance of its obligations under this Agreement on the Premises where that incident causes any personal injury or damage to property which could give rise to personal injury.
- 41.4 The Supplier shall comply with the requirements and standards set out in Schedule 2.3 (Standards) and of the Health and Safety at Work etc. Act 1974 and any other acts, orders, regulations and codes of practice relating to health and safety, which may as a result of the Supplier's and/or the Supplier Personnel performing any of its obligations (including the provision of the Service, Goods and/or Spares) under this Agreement.
- 41.5 The Supplier shall ensure that its health and safety policy statement (as required by the Health and Safety at Work etc Act 1974) is made available to the Authority on request.

#### **42 ENVIRONMENTAL REQUIREMENTS**

- 42.1 Where relevant, the Supplier shall, when working on the Premises and Sites, perform its obligations under this Agreement in accordance with the Authority's environmental policy, which is to conserve energy, water, wood, paper and other resources, reduce waste and phase out the use of ozone depleting substances and minimise the release of greenhouse gases, volatile organic compounds and other substances damaging to health and the environment.

#### **43 PREVENTION OF BRIBERY AND CORRUPTION**

- 43.1 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

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for participation in government procurement programmes or contracts on the grounds of a Prohibited Act.

43.2 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.

43.3 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 43.3(a) and make such records available to the Authority on request.

43.4 The Supplier shall immediately notify the Authority in writing if it becomes aware of any breach of Clause 43.1 and/or 43.2, 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.

43.5 If the Supplier makes a notification to the Authority pursuant to Clause 43.4, 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 44 (*Records, Reports, Audits and Open Book Data*).

43.6 If the Supplier is in Default under Clauses 43.1 and/or 43.2, 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.

43.7 Any notice served by the Authority under Clause 43.6 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).

#### **44 RECORDS, AUDIT ACCESS AND OPEN BOOK ACCOUNTING**

##### **44.1 Records and Audit Access**

44.1.1 The Supplier shall keep and maintain for seven (7) years after the date of termination or expiry (whichever is the earlier) of this Agreement (or as long a period as may be agreed between the Parties), full and accurate records and accounts of the operation of this Agreement including the Goods and Services provided under it and the amounts paid by the Authority (the “**Records**”).

44.1.2 The Supplier shall keep the Records in accordance with Good Industry Practice and generally accepted accounting principles.

44.1.3 The Supplier shall afford the Authority and the Auditors access to the Records at the Supplier’s premises and/or provide copies of such Records as may be required by the Authority and/or the Auditors from time to time, in order that the Authority and/or the Auditors may carry out an inspection including for the following purposes:

- (a) to conduct the Authority’s internal and statutory audits;
- (b) to prepare, examine and/or certify the Authority’s annual and interim reports and account;
- (c) to verify the accuracy of the Contract Charges (and proposed or actual variations to them in accordance with this Agreement), and/or the costs of all Supplier (including Sub-contractors) of the Services, including reviewing the Financial Model and its application and Open Book Accounting data (Clause 44.2);
- (d) review, verify and quality assess the Records and their maintenance;
- (e) review, verify and quality assess any reports and management information provided pursuant to this Agreement;
- (f) to verify the accuracy of any Financial Model;
- (g) to review the integrity, confidentiality and security of the Authority Data held or used by the Supplier;
- (h) to review the Supplier’s compliance with the Data Protection Legislation in

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accordance with this Agreement and any other Laws;

- (i) to review the Supplier's compliance with its Continuous Improvement obligations set out in Clause 17.1 (Continuous Improvement) and Value for Money obligations set out in Schedule 7.3 (Value for Money and Benchmarking);
- (j) to review the Supplier's compliance with its security obligations set out in Clause 27 (Protection of Information);
- (k) identify or investigate actual or suspected fraud, impropriety or accounting mistakes or any breach or threatened breach of security, provided that, in these circumstances, the Authority will be under no obligation to inform the Supplier of the purpose or objective of its investigations;
- (l) identify or investigate any circumstances which may impact upon the financial stability of the Supplier, the Guarantor and/or any Sub-contractors or their ability to maintain performance of the Services;
- (m) obtain such information as is necessary to fulfil the Authority's obligations to supply information for parliamentary, ministerial, judicial or administrative purposes including the supply of information to the Comptroller and Auditor General;
- (n) inform any statute driven examination of the economy, efficiency and effectiveness of the Authority and the use of its resources;
- (o) assist, perform or satisfy any other audit that may be required by any of the Regulatory Bodies;
- (p) to review any books of account kept by the Supplier in connection with the provision of the Service;
- (q) to carry out an examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority has used its resources;
- (r) to inspect the Supplier's assets, including the Intellectual Property Rights, equipment, facilities and maintenance, for the purposes of ensuring that the Supplier's assets are secure and that any register of assets is up to date; and/or
- (s) to ensure that the Supplier is complying with its obligations under this Agreement.

44.1.4 The Supplier shall on request afford the Authority, the Authority's representatives and/or the Auditor access to such records and accounts as may be required by the Terms and Conditions

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Authority from time to time during the Term and for a period of seven (7) Years after termination or expiry of the Term (whichever is the later).

- 44.1.5 The Authority shall use reasonable endeavours to ensure that the conduct of each Audit does not unreasonably disrupt the Supplier or delay the provision of the Services or supply of Goods save insofar as the Supplier accepts and acknowledges that control over the conduct of audits carried out by the Auditor is outside of the control of the Authority.
- 44.1.6 Subject to the Supplier's rights in respect of Confidential Information, the Supplier shall on demand provide the Auditors with all reasonable co-operation and assistance in relation to each audit, including:
- (a) all reasonable information requested by the Authority within the scope of the audit;
  - (b) reasonable access to sites controlled by the Supplier and to Equipment used in the provision of the Goods and Services; and
  - (c) access to the Supplier Personnel.
- 44.1.7 Save in the case of an Emergency Audit (Clause 44.1.8), the Authority shall provide at least 20 Working Days' notice of any audit it intends to carry out, specifying the locations to be audited, the anticipated time of arrival and the names and titles of the attendees, together with the organisation(s) they represent. Following notification of an audit, the Supplier shall promptly provide the Audit Agents with such access as the Authority and/or the Audit Agents request.
- 44.1.8 The Supplier shall provide (and shall procure that its Sub-contractors provide) Audit Agents with audit access for Emergency Audits as soon as reasonably practicable after such request and in any event within 24 hours of such request.
- 44.1.9 An Emergency Audit may be required by the Authority where:
- (a) the audit is required for reasons of actual or suspected impropriety or fraud;
  - (b) there are reasonable grounds to suspect that the Supplier and/or the Guarantor may be in default under this Agreement or the Guarantee and/or suffering an Adverse Financial Event;
  - (c) other circumstances have arisen, or are believed to have arisen, which would give the Authority the right to terminate this Agreement and/or any part of the Services;
  - (d) there are reasonable grounds to suspect that a security breach has occurred in relation to the System, the Services and/or this Agreement;



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and/or

- (e) the Authority wishes to carry out occasional unannounced security testing to establish compliance with the provisions of this agreement.

44.1.10 In the event of an Emergency Audit, the Authority as soon as reasonably practicable after such request and in any event within 24 hours of such request, shall have access to the Records, the Supplier's premises and/or any Supplier Personnel. The Supplier shall render (and shall procure that its Sub-contractors render) all necessary assistance to the conduct of such investigation at all times during the continuation of this Agreement and for seven years following the end of the contract.

44.1.11 The Parties agree that they shall bear their own respective costs and expenses incurred in respect of compliance with their obligations under this Clause 44.1, unless the audit reveals a Material Breach by the Supplier in which case the Supplier shall reimburse the Authority for the Authority's reasonable costs incurred in relation to the audit.

**44.2 Open Book Accounting**

44.2.1 The Supplier acknowledges the importance to the Authority of the Financial Transparency Objectives and the Authority's need for complete transparency in the way in which the Contract Charges are calculated.

44.2.2 The Supplier acknowledges that the provisions of this Clause 44.2 are designed (amongst other things):

- (a) for the Authority to understand any payment sought from it by the Supplier including an analysis of the Costs, Overhead recoveries (where relevant), time spent by Supplier Personnel in providing the Services and the Supplier Profit Margin;
- (b) for both Parties to be able to understand the Financial Model and Cost forecasts and to have confidence that these are based on justifiable numbers and appropriate forecasting techniques;
- (c) for both Parties to agree the quantitative impact of any Variations that affect ongoing costs and to identify how these could be mitigated and/or reflected in the Contract Charges;
- (d) for both Parties to be able to review, address issues with and re-forecast progress in relation to the provision of the Services;
- (e) for the Parties to challenge each other with ideas for efficiency and improvements; and

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- (f) to enable the Authority to demonstrate that it is achieving value for money for the tax payer relative to current market prices,

(together the “**Financial Transparency Objectives**”).

- 44.2.3 The Supplier undertakes to maintain and procure that Sub-contractors maintain Open Book Accounts, to be made available to the Authority upon request, during the Term and for seven years following termination or expiry of this Agreement.
- 44.2.4 The Supplier agrees to abide by the principles of Open Book Contract Management (OBCM), as detailed in the crown commercial services guidance entitled Open Book Contract Management Guidance (the OBCM Guidance), accessible at [www.gov.uk/government/publications/procurement-policy-note0516-open-book-contact-management](http://www.gov.uk/government/publications/procurement-policy-note0516-open-book-contact-management).
- 44.2.5 During the Term, and for a period of 7 years following the end of the Term, the Supplier shall:
  - (a) maintain and retain the Open Book Accounts; and
  - (b) disclose and allow the Authority and/or the Audit Agents access to the Open Book Accounts.
- 44.2.6 The Supplier shall provide to the Authority a Certificate of Costs whenever a version of the Outturn Financial Model is delivered (per Schedule 7.4 (Financial Model)), and such certificate to be signed by the Supplier’s Director of Finance in the UK or CFO or equivalent or as agreed in advance in writing and certified by such CFO or Director of Finance as being truthful and accurate in all material respects.
- 44.2.7 The Certificate of Costs referred to in paragraph 44.2.6 shall incorporate the information required pursuant to the definition of Open Book Accounts.
- 44.2.8 The Supplier shall use the Outturn Financial Model as the basis of reporting and to implement Open Book Accounts. The Supplier shall use this format when reporting on operational and financial performance of the Supplier and Sub-contractors.
- 44.2.9 The Supplier shall provide financial reports of the Supplier and each of the Sub-contractors to the Authority using the Outturn Financial Model. The Supplier shall use the categories in these reports which are the same as those required in the AET Baseline Financial Model.
- 44.2.10 To the extent necessary to meet the needs of Government transparency and data sharing Requirements the Authority may share the information it receives under this Clause 44.2 with other government departments.

## **45 SUSTAINABILITY AND DISCRIMINATION**

- 45.1 The Supplier shall not unlawfully discriminate within the meaning and scope of any Law, enactment, order or regulation relating to discrimination (whether in race, gender, religion, disability, sexual orientation, age or otherwise).
- 45.2 The Supplier shall take all reasonable steps to secure the observance of Clause 45.1 by all Supplier Personnel.
- 45.3 The Supplier shall comply with the provisions of Schedule 2.6 (Sustainability and CSR).

## **46 PREVENTION OF FRAUD**

- 46.1 The Supplier shall take all reasonable steps, in accordance with Good Industry Practice, to prevent any Fraud by Supplier Personnel and the Supplier (including its shareholders, members and directors) in connection with the receipt of monies from the Authority.
- 46.2 The Supplier shall notify the relevant Authority immediately if it has reason to suspect that any Fraud has occurred or is occurring or is likely to occur save where complying with this provision would cause the Supplier or the Supplier Personnel to commit an offence under the Proceeds of Crime Act 2002 or the Terrorism Act 2000.
- 46.3 If the Supplier or the Supplier Personnel commits any Fraud in relation to this or any other contract with the Authority, other government departments, or other Central Government Body, the Authority may:
- (a) Request the removal of the relevant Supplier's personnel and any associated Sub-contractors
  - (b) terminate this Agreement with immediate effect by giving the Supplier notice in writing; and/or
  - (c) recover in full from the Supplier and the Supplier shall on demand indemnify each Authority in full from any loss sustained by the Authority in consequence of any breach of this Clause 46 including the cost reasonably incurred by the Authority of making other arrangements for the supply of the Services and any additional expenditure incurred by the Authority throughout the remainder of the Term.

## **47 ASSIGNMENT, NOVATION, TRANSFER AND SUB-CONTRACTING**

### **47.1 ASSIGNMENT, NOVATION AND TRANSFER**

47.1.1 The Supplier shall not assign, novate, transfer or in any other way dispose of or create a trust in relation to any or all of its rights, obligations or liabilities under this Agreement without the Authority's prior written consent.

47.1.2 Subject to Clause 47.1.4.2, the Authority may at its discretion assign, novate or otherwise dispose of any or all of its rights and obligations under this Agreement and/or any associated licences to:

- (a) any other body or group of bodies established by the Crown or under statute in order substantially to perform any of the functions that had previously been performed by the Authority; or
- (b) any other body not covered by Clause 47.1.2.1 (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 47.

47.1.3 Any change in the legal status of the Authority such that it ceases to be Central Government Body shall not, subject to Clause 47.1.4, affect the validity of this Agreement. In such circumstances, this Agreement shall bind and inure to the benefit of any successor body to the Authority.

47.1.4 If the rights and obligations of the Authority under this Agreement are assigned and/or if there is a change in the legal status of the Authority such that it ceases to be a Central Government Body (in the remainder of this clause both such bodies being referred to as the "**Transferee**"):

- (a) the rights of termination of the Authority in Clause 38.1 (Termination by the Authority) shall be available to the Supplier in the event of, respectively, the bankruptcy or insolvency, or Default of the Transferee; and
- (b) the Transferee shall only be able to assign, novate or otherwise dispose of its rights and obligations under this Agreement or any part thereof with the previous consent in writing of the Supplier.

47.1.5 For the purposes of Clause 47.1.4 each Party shall at its own cost and expense carry out, or use all reasonable endeavours to ensure the carrying out of, whatever further actions (including the execution of further documents) the other Party reasonably requires from time to time for the purpose of giving that other Party the

full benefit of the provisions of this Agreement.

**47.2 Appointment of Sub-contractors**

47.2.1 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.

47.2.2 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,

**(a "Sub-contract Notice")**

47.2.3 If requested by the Authority within 10 Working Days of receipt of the Sub-contract Notice, the Supplier shall also provide:

- (a) a copy of the proposed Sub-contract; and
- (b) any further information reasonably requested by the Authority.

47.2.4 The Authority may, within 10 Working Days of receipt of the Sub-contract Notice (or, if later, receipt of any further information requested pursuant to Clause 47.2.3, object to the appointment of the relevant Sub-contractor if it considers that:

- (a) the appointment of a proposed Sub-contractor may prejudice the provision of the Services and/or may be contrary to the interests of the Authority;
- (b) the proposed Sub-contractor is unreliable and/or has not provided reasonable services to its other customers;

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- (c) the proposed Sub-contractor employs unfit persons; and/or
- (d) the proposed Sub-contractor should be excluded in accordance with Clause 47.8 (Exclusion of Sub-contractors),

in which case, the Supplier shall not proceed with the proposed appointment.

47.2.5 If:

- (a) the Authority has not notified the Supplier that it objects to the proposed Sub-contractor's appointment by the later of 10 Working Days of receipt of:
  - (i) the Sub-Contract Notice; and
  - (ii) any further information requested by the Authority pursuant to Clause 47.2.3; and
- (b) the proposed Sub-contract is not a Key Sub-contract (which shall require the written consent of the Authority in accordance with 47.3 (*Appointment of Key Sub-contractors*),

the Supplier may proceed with the proposed appointment and, where the Sub-contract is entered into exclusively for the purpose of delivery of the Services, shall notify the Authority that the relevant Sub-contract shall constitute a Third Party Contract for the purposes of Schedule 4.4 (*Third Party Contracts*).

47.2.6 The Authority hereby consents to the Third-Party Contracts set out in Schedule 4.4 (Third Party Contracts).

47.2.7 Where the Authority has consented to the placing of Sub-contracts, copies of each Sub-contract shall, at the request of the Authority, be sent by the Supplier to the Authority as soon as reasonably practicable.

47.2.8 The Authority may, at its sole discretion, require the Supplier to ensure that each Sub-contract shall include:

- (a) a right under the Contracts (Rights of Third Parties) Act 1999 for each Authority to enforce the terms of that Sub-contract as if it were the Supplier;
- (b) a provision enabling the Supplier to assign, novate or otherwise transfer any of its rights and/or obligations under the Sub-contract to the Authority;
- (c) a provision requiring the Sub-contractor to enter into a direct confidentiality agreement with the Authority on the same terms as set out in Clause 29 (Confidentiality);

- (d) a provision requiring the Sub-contractor to comply with protection of data requirements pursuant to Clauses 27 (Protection of Information) and 28 (Protection of Personal Data);
- (e) a provision requiring the Sub-contractor to comply with the restrictions on corrupt gifts and payments pursuant to Clause 43 (Prevention of Bribery and Corruption);
- (f) require the Supplier to pay any undisputed sum due to the relevant sub-contractor within a specified period that does not exceed 30 days from the date the Supplier receives the Sub-contractor's invoice; and
- (g) a provision restricting the ability of the Sub-contractor to further sub-contract elements of the service provided to the Supplier without first seeking the prior written consent of the Authority.

#### 47.3 **Appointment of Key Sub-contractors**

47.3.1 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. For these purposes, the Authority may withhold its consent to the appointment of a Key Sub-contractor if it reasonably 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;
- (c) the appointment of the proposed Key Sub-contractor would constitute an Adverse Financial Event;
- (d) the proposed Key Sub-contractor employs unfit persons; and/or
- (e) the proposed Key Sub-contractor should be excluded in accordance with Clause 47.8.

47.3.2 The Authority consents to the appointment of the Key Sub-contractors listed in Schedule 4.3 (*Notified Key Sub-contractors*).

47.3.3 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;

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- (b) a right under CRTPA for the Authority to enforce any provisions under the Key Sub-contract which are capable of conferring a benefit upon the Authority;
- (c) a provision enabling the Authority to enforce the Key Sub-contract as if it were the Supplier;
- (d) 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 without restriction (including any need to obtain any consent or approval) or payment by the Authority;
- (e) 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 27 (Protection of Information) and 28 (Protection of Personal Data);
  - (ii) the confidentiality provisions set out in Clause 29 (Confidentiality), provided that the Key Sub-contractor must always obtain the Authority's prior written consent before disclosing any of the Authority's Confidential Information;
  - (iii) FOIA requirements set out in Clause 31 (Freedom of Information);
  - (iv) the obligation not to embarrass the Authority or otherwise bring the Authority into disrepute set out in Clause 5.2(c);
  - (v) the keeping of records in respect of the services being provided under the Key Sub-contract, including the maintenance of Open Book Data; and
  - (vi) the conduct of audits set out in Clause 44;
- (f) 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 38 (Termination & Step-in Rights) and 39 (Consequences of Expiry or Termination) and Schedule 7.5 (Payments on Termination) of this Agreement;
- (g) 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;
- (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 38.4 (*Step-in Rights*);



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- (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 an Adverse Financial 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 an Adverse Financial Event in relation to the Key Sub-contractor,
  - (ii) 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
  - (iii) co-operate with the Supplier and the Authority in order to give full effect to the provisions of Schedule 7.2 (Financial Distress), including meeting with the Supplier and the Authority to discuss and review the effect of the Adverse Financial Event on the continued performance and delivery of the Services, and contributing to and complying with the AFE Continuity Plan.

47.3.4 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.

**47.4 Supply Chain Protection**

- (a) The Supplier shall ensure that all Sub-contracts (which in this sub-clause includes any contract in the Supplier's supply chain made wholly or substantially for the purpose of performing or contributing to the performance of the whole or any part of this Agreement) contain provisions:
  - (i) giving the Supplier a right to terminate the Sub-contract if the Sub-contractor fails to comply in the performance of the Sub-contract with legal obligations in the fields of environmental, social or labour law;

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- (ii) requiring the Supplier or other party receiving goods or services under the contract to consider and verify invoices under that contract in a timely fashion;
  - (iii) that if the Supplier or other party fails to consider and verify an invoice in accordance with sub-paragraph (a), the invoice shall be regarded as valid and undisputed for the purpose of sub-paragraph (c) after a reasonable time has passed;
  - (iv) requiring the Supplier or other party to pay any undisputed sums which are due from it to the Sub-contractor within a specified period not exceeding 30 days of verifying that the invoice is valid and undisputed; and
  - (v) giving the Authority a right to publish the Supplier's compliance with its obligation to pay undisputed invoices within the specified payment period; and
  - (vi) requiring the Sub-contractor to include a clause to the same effect as this clause 47.4(a) in any contracts it enters into wholly or substantially for the purpose of performing or contributing to the performance of the whole or any part of this Agreement.
- (b) The Supplier shall:
- (i) pay any undisputed sums which are due from it to a Sub-contractor within 30 days of verifying that the invoice is valid and undisputed;
  - (ii) include within the Performance Monitoring Report produced by it pursuant to Schedule 2.2 (*Performance*) a summary of its compliance with Clause 47.4(b)(i), such data to be certified every three (3) Months by a director of the Supplier as being accurate and not misleading.
- (c) Notwithstanding any provision of Clause 29 (Confidentiality) and Clause 40 (Publicity, Media and Official Enquiries), if the Supplier notifies the Authority (whether in a Performance Monitoring Report or otherwise) that the Supplier has failed to pay a Sub-contractor's undisputed 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).

**47.5 Termination of Sub-contracts**

The Authority may require the Supplier to terminate:

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- (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 38 (Termination & Step-in Rights);
  - (ii) the relevant Sub-contractor or any of its Affiliates have 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;
  - (iii) the relevant Sub-contractor has failed to comply in the performance of its Sub-contract with legal obligations in the fields of environmental, social or labour law; and/or
  - (iv) the Authority has found grounds for exclusion of the Sub-contractor in accordance with Clause 47.8; 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.

#### **47.6 Competitive Terms**

47.6.1 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 favorable commercial terms obtained by the Authority in respect of the relevant item; or
- (b) subject to Clause 47.5 (Termination of Sub-contracts), enter into a direct agreement with that Sub-contractor or third party in respect of the relevant item.

- 47.6.2 If the Authority exercises either of its options pursuant to Clause 47.6.1, then the Contract Charges shall be reduced by an amount that is agreed in accordance with the Variation Procedure.
- 47.6.3 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 Contract Charges taking into account any unavoidable costs payable by the Supplier in respect of the substituted item, including in respect of any license fees or early termination charges.

#### **47.7 Retention of Legal Obligations**

- 47.7.1 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. An obligation on the Supplier to do, or refrain from doing, any act or thing shall include an obligation upon the Supplier to procure that its employees, Supplier Personnel, agents and the Sub-contractors' employees, personnel and agents also do, or refrain from doing, such act or thing.
- 47.7.2 Sub-contracting any part of this Agreement shall not relieve the Supplier of any obligation or duty attributable to the Supplier under this Agreement. The Supplier shall supply such information about proposed Sub-contractors as the Authority may reasonably require in order to enable the Authority to consider whether to grant Approval.

#### **47.8 Exclusion of Sub-contracts**

Where the Authority considers there are grounds for the exclusion of a Sub-contractor under Regulation 57 of the Public Contracts Regulations 2015, then:

- (a) if the Authority finds there are compulsory grounds for exclusion, the Supplier shall replace or shall not appoint the Sub-contractor;
- (b) if the Authority finds there are non-compulsory grounds for exclusion, the Authority may require the Supplier to replace or not to appoint the Sub-contractor and the Supplier shall comply with such a requirement.

### **48 FORCE MAJEURE**

- 48.1 Subject to the remaining provisions of this Clause 48 (and, in relation to the Supplier, subject to its compliance with its obligations in Schedule 8.4 (*Business Continuity and Disaster Recovery*)), a Party may claim relief under this Clause 48 from liability for failure to meet its obligations under this Agreement for as long as

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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.

- 48.2 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.
- 48.3 If the Supplier is the Affected Party, it shall not be entitled to claim relief under this Clause 48 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.
- 48.4 Subject to Clause 48.5, 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.
- 48.5 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.
- 48.6 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 38.1 (Authority Termination Rights) or Clause 38.2 (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) during the continuance of the Force Majeure Event to

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- exercise its rights under Clause 38.4 (Step-in Rights) as a result of such failure;
- (B) to receive Delay Payments pursuant to paragraph 4 of Part B to Schedule 7.1 (Contract Charges) to the extent that the Achievement of any Milestone is affected by the Force Majeure Event; and
- (C) to receive Service Credits, to withhold any of the Service Charges pursuant to Clause 13 (Service Levels and Supplier Relief) 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 Contract 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.
- 48.7 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.
- 48.8 Relief from liability for the Affected Party under this Clause 48 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 48.7.
- 49 WAIVER**
- 49.1 The failure of either Party to insist upon strict performance of any provision of this Agreement, or the failure of either Party to exercise without delay, any right or remedy shall not constitute a waiver of that right or remedy and shall not cause a diminution of the obligations established by this Agreement. No single or partial exercise of any right or remedy by a Party shall prevent or restrict the further exercise of that or any other right or remedy.
- 49.2 No waiver shall be effective unless it is expressly stated to be a waiver and communicated to the other Party in writing in accordance with Clause 60 (Notices).
- 49.3 A waiver by either Party of any right or remedy arising from a breach of this Agreement shall not constitute a waiver of any right or remedy arising from any other or subsequent breach of this Agreement.

**50 CUMULATIVE REMEDIES**

Except as otherwise expressly provided by this Agreement, all remedies available to either Party for breach of this Agreement are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be

deemed an election of such remedy to the exclusion of other remedies and do not exclude any rights or remedies provided in law, in equity or otherwise.

## **51 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 necessary to give effect to the meaning of this Agreement.

## **52 VARIATION**

### **52.1 General**

52.1.1 Subject to the provisions of Clause 52.8 (Updates to the Policies and Processes of HODDaT) and Clause 52.9 (Operational Change), either Party may request a variation to this Agreement provided that such variation is permitted under the Regulations (such a variation once entered into hereinafter referred to as a “**Variation**”).

52.1.2 To the extent that a Variation requires testing or a programme of implementation, the Parties shall follow the procedures set out in Schedule 6.2 (Testing Procedures), and, where appropriate, the Variation Form relating to such a Variation shall specify Deliverables, Milestones and Milestone Dates.

52.1.3 Until a Variation Form has been signed and issued by the Authority in accordance with Clause 52.5.2:

- (a) the Supplier shall continue to supply the Services in accordance with the existing terms of this Agreement as if the proposed Variation did not apply, unless the Authority expressly agrees (or requires) otherwise in writing; and
- (b) any discussions, negotiations or other communications which may take place between the Authority and the Supplier in connection with any proposed Variation, shall be without prejudice to each Party’s other rights under this Agreement.

52.1.4 The Supplier shall:

- (a) within ten (10) Working Days of the Authority’s signature and issue of a Variation Form in accordance with Clause 52.5.2, deliver to the Authority a copy of this Agreement updated to reflect all Variations agreed in the relevant Variation Form and annotated with a reference to the Variation Form pursuant to which the relevant Variations were agreed; and
- (b) thereafter provide to the Authority such further copies of the updated

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Agreement as the Authority may from time to time request.

**52.2 Cost of a Variation**

52.2.1 The Parties shall bear their own costs in relation to preparing each Variation and the costs incurred by the Supplier in undertaking an Impact Assessment shall be borne by the Supplier.

52.2.2 Both Parties' costs incurred in respect of any use of a Variation as a result of any error or Default by the Supplier shall be paid for by the Supplier.

**52.3 Variation Requests**

52.3.1 Either Party may issue a Variation Request to the other Party at any time during the Term.

52.3.2 If the Supplier issues a Variation Request, then it shall also provide an Impact Assessment to the Authority as soon as is reasonably practicable but in any event within ten (10) Working Days of the date of issuing the Variation Request (or such other period as the Parties may agree).

52.3.3 If the Authority issues the Variation Request, then the Supplier shall provide an Impact Assessment as soon as reasonably practical and wherever possible within ten (10) Working Days of the date of receiving the Variation Request or within any longer time period as agreed with the Authority.

**52.4 Impact Assessments**

52.4.1 Each Impact Assessment shall be completed in good faith and shall include:

- (a) details of the proposed Variation including the reason for the proposed Variation; and
- (b) details of the impact of the proposed Variation on the Services, Spares or Goods and the Supplier's ability to meet its other obligations under this Agreement;
- (c) any proposed amendments to the terms of this Agreement that will be required as a result of that impact, including changes to:
  - (i) the Requirements and the Service Levels;
  - (ii) the format of Authority Data, as set out in the Requirements; and
  - (iii) the Milestones, Implementation Plan and any other timetable previously agreed by the Parties;
- (d) details of the cost of implementing the proposed Variation;



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- (e) details of the ongoing costs required by the proposed Variation when implemented, including any increase or decrease in the Contract Charges, any alteration in the resources and/or expenditure required by either Party and any alteration to the working practices of either Party;
- (f) a timetable for the implementation, together with any proposals for the testing of the proposed Variation;
- (g) details of how the proposed Variation will ensure compliance with any applicable Change in Law; and
- (h) such other information as the Authority may reasonably request in (or in response to) the Variation Request.

52.4.2 Subject to the provisions of Clause 52.4.4, the Authority shall review the Impact Assessment and respond to the Supplier in accordance with Clause 52.5 within fifteen (15) Working Days of receiving the Impact Assessment (or such other period as the Parties may agree).

52.4.3 Where the Authority has received a Variation Request and the Authority reasonably considers that it requires further information regarding the proposed Variation so that it may properly evaluate the Variation Request and the Impact Assessment, then within five (5) Working Days of receiving the Impact Assessment (or such other period as the Parties may agree), it shall notify the Supplier of this fact and detail the further information that it requires. The Supplier shall then re-issue the relevant Impact Assessment to the Authority within ten (10) Working Days of receiving such notification (or such other period as the Parties may agree). At the Authority's discretion, the Parties may repeat the process described in this Paragraph 52.4.3 until the Authority is satisfied that it has sufficient information to properly evaluate the Variation Request and Impact Assessment.

52.4.4 The calculation of costs for the purposes of an Impact Assessment shall:

- (a) be based on the Rate Card contained in Schedule 7.1 (Contract Charges);
- (b) include estimated volumes of each type of resource to be employed and the applicable rate from the Rate Card;
- (c) include full disclosure of any assumptions underlying such Impact Assessment;
- (d) include evidence of the cost of any assets required for the Variation; and
- (e) include details of any new Sub-contracts necessary to accomplish the Variation.

**52.5 Acceptance or Rejection of a Variation Request and Impact Assessment**

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- 52.5.1 Within 15 Working Days of receiving the Impact Assessment from the Supplier or within ten (10) Working Days of receiving the further information that it may request pursuant to Clause 52.4.3, the Authority shall evaluate the Variation Request and the Impact Assessment and shall do one of the following:
- (a) approve the proposed Variation, in which case the Parties shall follow the procedure set out in Clause 52.5.2;
  - (b) in its absolute discretion reject the proposed Variation, in which case it shall notify the Supplier of the rejection. The Authority shall not reject any proposed Variation to the extent that the Variation is necessary for the Supplier or the Services to comply with any Changes in Law. If the Authority does reject a Variation, then it shall explain its reasons in writing to the Supplier as soon as is reasonably practicable following such rejection; or
  - (c) in the event that it reasonably believes that a Variation Request or Impact Assessment contains errors or omissions, require the Supplier to modify the relevant document accordingly, in which event the Supplier shall make such modifications within five (5) Working Days of such request. Subject to Clause 52.4.3, on receiving the modified Variation and/or Impact Assessment, the Authority shall approve or reject the proposed Variation within ten (10) Working Days.
- 52.5.2 If the Authority approves the proposed Variation pursuant to Clause 52.5, and it has not been rejected by the Supplier in accordance with Clause 52.5.4, then it shall inform the Supplier and the Supplier shall prepare two copies of a Variation Form which it shall sign and deliver to the Authority for its signature. Following receipt by the Authority of the Variation Form, it shall sign both copies and return one copy to the Supplier. On the Authority's signature the Variation Form shall constitute (or, where the Authority has agreed to or required the implementation of a Variation prior to signature of a Variation Form, shall constitute confirmation of) a binding variation to this Agreement.
- 52.5.3 If the Authority does not sign the Variation Form within ten (10) Working Days, then the Supplier shall have the right to notify the Authority and if the Authority does not sign the Variation Form within five (5) Working Days of such notification, then the Supplier may refer the matter via the Dispute Resolution Procedure.
- 52.5.4 Following an Impact Assessment, if:
- (a) the Supplier reasonably believes that any proposed Variation which is requested by the Authority would:
    - (i) materially and adversely affect the risks to the health and safety of any person; and/or

- (ii) require the Services to be performed in a way that infringes any Law; and/or
- (b) the Supplier demonstrates to the Authority's reasonable satisfaction that the proposed Variation is technically impossible to implement and neither the Supplier Solution nor the Requirements state that the Supplier does have the technical capacity and flexibility required to implement the proposed Variation,

then the Supplier shall be entitled to reject the proposed Variation and shall notify the Authority of its reasons for doing so within five (5) Working Days after the date on which it is obliged to deliver the Impact Assessment pursuant to Clause 52.3.3.

## 52.6 **Fast Track Variation**

52.6.1 To ensure operational efficiency, the Parties acknowledge that there may be circumstances where it is desirable to expedite the processes set out above.

52.6.2 In relation to a proposed Variation, if:

- (a) the Authority reasonably deems such Variation as not being material;
- (b) the proposed Variation does not involve any alteration to, or deviation from, the contractual principles set out in this Agreement; and
- (c) the value of the proposed Variation does not exceed a proposed value of fifty thousand pounds sterling (£50,000),

the Parties shall confirm to each other in writing that they shall use the process set out in paragraphs 52.2 to 52.5 (inclusive) but with reduced timescales, such that any period of fifteen (15) Working Days is reduced to five (5) Working Days, any period of ten (10) Working Days is reduced to two (2) Working Days and any period of five (5) Working Days is reduced to one (1) Working Day.

## 52.7 **Emergency Variation**

52.7.1 Where the Authority requires a Variation to be implemented urgently (an "**Emergency Variation**") it may require the Supplier to implement such Variation without following the Variation Procedure, including without providing an Impact Assessment and without agreeing the Contract Charges. In such cases the Authority shall issue written instructions to the Supplier to proceed with the Variation, the Supplier shall do so, and the Authority shall pay the Contract Charges once agreed (in accordance with the principles in paragraph 52.2).

52.7.2 The Authority may include specific limits on the Supplier's activity in relation to an Emergency Variation; these may include limits relating to:

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- (a) scope;
- (b) duration; and/or
- (c) costs,

and the Authority shall not be liable for any sums where the Supplier exceeded these limits unless this had been agreed in advance by the Authority.

52.7.3 The Parties shall then agree the necessary Variations under the Variation Procedure as soon as possible. The Authority shall act reasonably in relation to this process and shall take into account the fact that the Supplier has been required to proceed on an emergency basis.

**52.8 Updates to Policies and Processes of HODDaT**

52.8.1 The Authority may, from time to time update the Policies and Processes of HODDaT.

52.8.2 Where the Authority updates a Policy or Process of HODDaT (an **“Update”**) and that Update affects the Requirements, it shall provide the Supplier with a draft version of the relevant updated Policy or Process of HODDaT highlighting the Update not less than twenty (20) Working Days before such Policy or Process of HODDaT is to be implemented (an **“Update Notice”**).

52.8.3 Within ten (10) Working Days of receiving an Update Notice, the Supplier shall, where it considers that the Update will affect the delivery of the Services, provide the Authority with a written report outlining the Supplier’s assessment of the impact of the Update on its provision of the Services (an **“Update Impact Assessment”**).

52.8.4 Each Update Impact Assessment shall be completed in good faith and shall include:

- (a) details of the impact of the Update on the Services, Spares or Goods and the Supplier's ability to meet its obligations under this Agreement;
- (b) any proposed amendments to the terms of this Agreement that will be required as a result of the Update, including changes to:
  - (i) the Service Levels;
  - (ii) the format of Authority Data, as set out in the Requirements; and
  - (iii) the Milestones, Implementation Plan and any other timetable previously agreed by the Parties;
- (c) details of the cost of implementing the proposed Update;
- (d) details of the ongoing costs required by the proposed Update when

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implemented, including any increase or decrease in the Contract Charges, any alteration in the resources and/or expenditure required by either Party and any alteration to the working practices of either Party;

- (e) a timetable for the implementation, together with any proposals for the testing of the Update;
- (f) details of how the Update will ensure compliance with any applicable Change in Law; and
- (g) such other information as the Authority may reasonably request in the Update Notice.

52.8.5 Within ten (10) Working Days of receiving an Update Impact Assessment, the Authority may either accept or reject the Update Impact Assessment.

52.8.6 Where the Authority rejects the Update Impact Assessment in accordance with Clause 52.8.5, it shall provide written notice to the Supplier outlining the reasons for rejecting the Update Impact Assessment (an **“Update Impact Assessment Rejection Notice”**).

52.8.7 Within five (5) Working Days of receipt of an Update Impact Assessment Rejection Notice, the Supplier shall provide a replacement Update Impact Assessment in accordance with Clause 52.8.4 and the Authority shall within five (5) Working Days of receiving the replacement Update Impact Assessment either accept the replacement Update Impact Assessment or reject the replacement Update Impact Assessment by referring the matter to the Dispute Resolution Procedure.

52.8.8 Where the Authority accepts an Update Impact Assessment in accordance with Clause 52.8.5 or 52.8.7, it shall provide written notice of such acceptance to the Supplier (an **“Update Impact Assessment Acceptance Notice”**).

52.8.9 Within [five (5) Working Days] of receipt of an Update Impact Assessment Acceptance Notice, the Supplier shall prepare two copies of a Variation Form which it shall sign and deliver to the Authority for its signature. Following receipt by the Authority of the Variation Form, it shall sign both copies and return one copy to the Supplier. On the Authority's signature, the Variation Form shall constitute a binding variation to this Agreement. Where the Authority does not sign the Variation Form within [ten (10)] Working Days of receiving it and has not given the Supplier any reason for not signing, the Supplier may refer the matter to the Dispute Resolution Procedure.

## 52.9 Operational Change

52.9.1 The Authority or Supplier may update or require the update of Configuration Items in the Configuration Management System from time to time (an **“Operational**

**Change”).**

- 52.9.2 Where the Authority or the Supplier makes an Operational Change or requires an Operational Change to be made an **“Operational Change Notice”** will be raised and the Supplier shall implement the Operational Change in accordance with the HODDaT Request for Change Process.
- 52.9.3 Subject to Clause 52.9.4, the Supplier acknowledges that it has factored Operational Change into the Contract Charges and that it shall not be entitled to any variation to the commercial terms of this Agreement or the Contract Charges as a result of an Operational Change.
- 52.9.4 Where the Supplier can demonstrate and the Authority is satisfied that an Operational Charge:
- (a) was not reasonably foreseeable at the Effective Date; and
  - (b) it cannot be implemented without a Variation
- the Supplier may request that the Operational Change be treated as a Variation (an **“Operational Change Variation Request”**).
- 52.9.5 The Authority shall consider the Operational Change Variation Request and either accept it or reject it within ten (10) Working Days.
- 52.9.6 Where the Authority accepts an Operational Change Variation Request under Clause 52.9.4 the Operational Change shall be subject to the Variation Procedure where the Operational Change Notice shall be treated as a Variation Request.
- 52.9.7 Where the Authority rejects an Operational Change Variation Request under Clause 52.9.4 **Error! Reference source not found.** the Supplier shall either:
- (a) implement the Operational Change; or
  - (b) submit the matter to the Dispute Resolution Procedure within five (5) Working Days of the rejection of the Operational Change Variation Request.

## **53 SEVERABILITY**

- 53.1 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.

- 53.2 In the event that any deemed deletion under Clause 53.1 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.
- 53.3 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 53.2, the matter shall be dealt with in accordance with Paragraph 3 (*Commercial Negotiation*) of Schedule 8.6 (*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 53.3.

#### **54 MISTAKES IN INFORMATION**

The Supplier shall be responsible for the accuracy of all drawings, documentation and information supplied to the Authority by the Supplier in connection with the supply of the Services and/or Goods and shall pay the Authority any extra costs occasioned by any discrepancies, errors or omissions therein, except where such mistakes are the fault of the Authority.

#### **55 SUPPLIER'S STATUS**

At all times during the Term the Supplier shall be an independent contractor and nothing in this Agreement shall create a contract of employment, a relationship of agency or partnership or a joint venture between the Parties and, accordingly, neither Party shall be authorised to act in the name of, or on behalf of, or otherwise bind the other Party save as expressly permitted by the terms of this Agreement.

#### **56 CONFLICTS OF INTEREST**

- 56.1 The Supplier shall take appropriate steps to ensure that neither the Supplier nor any Supplier Personnel are placed in a position where there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Supplier or Supplier Personnel and the duties owed to the Authority under the provisions of this Agreement.
- 56.2 The Supplier shall promptly notify the Authority (and provide full particulars to the Authority) if any conflict referred to in Clause 56.1 above arises or is reasonably foreseeable.
- 56.3 The Authority reserves the right to terminate this Agreement immediately by giving notice in writing to the Supplier and/or to take such other steps it deems necessary

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where, in the reasonable opinion of the Authority, there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Supplier and the duties owed to the Authority under the provisions of this Agreement. The actions of the Authority pursuant to this clause shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to the Authority.

- 56.4 The duty to avoid conflicts of interest under Clause 56.1 and to notify under Clause 56.2 shall apply during the Term and for a period of two (2) years after either the expiry of the Term or, where relevant, the termination of this Agreement.

## **57 ENTIRE AGREEMENT**

- 57.1 This Agreement constitutes the entire agreement and understanding between the Parties in respect of the matters dealt with in it and supersedes, cancels or nullifies any previous agreement between the Parties in relation to such matters.
- 57.2 Each of the Parties acknowledges and agrees that in entering into this Agreement it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or undertaking (whether negligently or innocently made) other than as expressly set out in this Agreement.
- 57.3 Nothing in Clauses 57.1 and 57.2 shall operate to exclude Fraud or fraudulent misrepresentation.

## **58 COUNTERPARTS**

- 58.1 This Agreement may be executed in any number of counterparts, each of which when executed shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.
- 58.2 Transmission of an executed counterpart of this agreement (but for the avoidance of doubt not just a signature page) by (a) fax or (b) email (in pdf, jpeg or other agreed format) shall take effect as delivery of an executed counterpart of this agreement. If either method of delivery is adopted, without prejudice to the validity of the agreement thus made, each party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.
- 58.3 No counterpart shall be effective until each Party has executed at least one counterpart.

## **59 THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

- 59.1 The provisions of Clause 26 (IPRs Indemnity), Paragraphs 2.1 and 2.6 of Part A, Paragraphs 2.1, 2.6, 3.1 and 3.3 of Part B, Paragraphs 2.1 and 2.3 of Part C and Paragraphs 1.4, 2.3 and 2.8 of Part D of Schedule 9.1 (Staff Transfer) and the



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provisions of Paragraph 8.9 of Schedule 8.3 (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 CRTPA.

- 59.2 Subject to Clause 59.1, 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.
- 59.3 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.
- 59.4 Any amendments or modifications to this Agreement may be made, and any rights created under Clause 59.1 may be altered or extinguished, by the Parties without the consent of any Third-Party Beneficiary.

## 60 NOTICES

- 60.1 Any notices sent under this Agreement must be in writing.
- 60.2 Subject to Clause 60.4, 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 Signed For™ 1st Class or other prepaid, next working day service providing proof of delivery.	At the time recorded 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	Properly addressed prepaid and delivered as evidenced by signature of a delivery receipt

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	9.00am) or on the next Working Day (if after 5.00pm).	
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- 60.3 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:

	<b>Supplier</b>	<b>Authority</b>
<b>Contact</b>	Anita Broadhead	Paul Newman
<b>Address</b>	B430 Bristol Business Park, Bristol, B16 1EJ	2 Marsham Street, London, SW1P 4DF
<b>Email</b>	anita.broadhead@leonardocompany.com	Paul.newman@homeoffice.gov.uk

- 60.4 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 60.2:

- (a) Step-In Notices;
- (b) Force Majeure Notices;
- (c) Termination Notices; and
- (d) Dispute Notices.

- 60.5 Failure to send any original notice by personal delivery or recorded delivery in accordance with Clause 60.4 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 60.2) or, if earlier, the time of response or acknowledgement by the other Party to the email attaching the notice.

- 60.6 This Clause 60 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 8.6 (Dispute Resolution Procedure)).

## 61 LEGISLATIVE CHANGE

The Supplier shall neither be relieved of its obligations under this Agreement nor be entitled to an increase in the Contract Charges as the result of a General Change in Law.

## **62 DISPUTE RESOLUTION**

Where there is a Dispute, the Parties shall comply with the Dispute Resolution Procedure set out in Schedule 8.6 (Dispute Resolution Procedure).

## **63 NON-SOLICITATION**

63.1 Subject to Clause 63.2, for the Term of the Agreement and not before 6 months after the expiry of this Agreement by effluxion of time or, where relevant, the Termination Date without the prior written consent of the Authority, the Supplier shall not solicit or endeavour to entice away any person employed or otherwise engaged by the Authority or any other person under contract to provide Cyclamen in Great Britain at the prevailing time.

63.2 Clause 63.1 does not prohibit recruitment pursuant to a response to a bona fide public advertisement of an employment vacancy.

63.3 The Supplier is not permitted before the date 6 months after the expiry of this Agreement by effluxion of time or, where relevant, the Termination Date to attempt to contact or interview or solicit information from any employee of the Authority without the express written consent of the Authority (which may be given generally or specifically).

## **64 GOVERNING LAW AND JURISDICTION**

64.1 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.

64.2 Subject to Clause 62 (*Dispute Resolution*) and Schedule 8.6 (*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.

## **65 COLLABORATION**

65.1 The Supplier shall co-operate with the Related Suppliers and provide all reasonable information (including any Documentation), advice and assistance in connection with the provision of the Goods, Spares and/or Services to the Authority and/or Related Suppliers to enable the Authority and/or such Related Suppliers to create and maintain technical and organisational interfaces with the Goods, Spares and/or Services.

65.2 Each Party shall comply with their respective obligations, and may exercise their

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respective rights, under Schedule 11 (Collaboration).

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**IN WITNESS** of which this Agreement has been duly executed by the Parties on the date which appears at the head of its page 1.

SIGNED FOR AND ON BEHALF OF )  
THE SUPPLIER BY A DIRECTOR IN )  
THE PRESENCE OF A WITNESS: )  
 ) Signature:

Name:

**Director**

Witness  
signature:

Witness name:

Witness  
address:

SIGNED FOR AND ON BEHALF OF THE  
SECRETARY OF STATE FOR THE  
HOME DEPARTMENT

Signature:

Name:

Position:

Date:

Witness signature:

Witness name:

Witness address: