



## DPS Agreement

### 1. DEFINITIONS AND INTERPRETATION

1.1 The definitions and rules of interpretation in this clause 1.1 apply in this Agreement.

**Application:** means the application submitted by the Participant to the Authority for a place on the DPS.

**Approval:** means the prior written approval of the Authority.

**Award Criteria:** means the award criteria which will be used to select a Provider for a particular service under a mini-competition before placing an Order.

**Call-off Terms:** means the terms and conditions available on Redimo which will apply to all Contracts.

**Confidential Information:** means any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, know-how, personnel and suppliers of the Supplier, including intellectual property rights, together with all information derived from the above, and any other information clearly designated as being confidential (whether or not it is marked as "confidential") or which ought reasonably to be considered to be confidential.

**Contract:** means a contract made pursuant to the DPS for the provision of Services made between the Authority and the Participant comprising an Order Form, its appendices, and the Call-off Terms (as may be amended pursuant to clause 0).

**DPS:** means the dynamic purchasing system established by the Authority for the appointment of suppliers to deliver the Services, including the Participant, pursuant to regulation 34 of the Regulations.

**EIR:** mean the Environmental Information Regulations 2004 (*SI 2004/3391*) together with any guidance and/or codes of practice issued by the Information Commissioner or relevant government department in relation to such regulations.

**FOIA:** means the Freedom of Information Act 2000 and any subordinate legislation made under that Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant government department in relation to such legislation.

**Guidance:** means any guidance issued or updated by the UK government from time to time in relation to the Regulations.

**Information:** has the meaning given under section 84 of the FOIA.

**Month:** means a calendar month.

**OJEU Notice:** means the contract notice published in the Official Journal of the European Union to advertise the DPS.

**Order:** means an order for Services sent by the Authority to the Participant in accordance with the award procedures in clause 0.

**Order Form:** means a document setting out details of an Order in the form set out in Redimo or as otherwise agreed in accordance with clause 0.

**Participant:** means the supplier appointed to the DPS.

**Party:** means the Authority and/or the Participant.

**Prohibited Act:** the following constitute Prohibited Acts:

- to directly or indirectly offer, promise or give any person working for or engaged by the Authority a financial or other advantage to:
  - induce that person to perform improperly a relevant function or activity; or reward that person for improper performance of a relevant function or activity;

- to directly or indirectly request, agree to receive or accept any financial or other advantage as an inducement or a reward for improper performance of a relevant function or activity in connection with the DPS;
- committing any offence:
  - under the Bribery Act 2010;
  - under legislation creating offences concerning fraudulent acts;
  - at common law concerning fraudulent acts relating to this DPS or any contract with the Authority; or
  - defrauding, attempting to defraud or conspiring to defraud the Authority.

**Providers:** means the Participant and others appointed under the DPS.

**Redimo:** the Authority's electronic contract management system.

**Regulations:** means the Public Contracts Regulations 2015 (*SI 2015/102*).

**Requests for Information:** means a request for information or an apparent request under the FOIA or the EIR.

**RFQ:** means a request for quotation submitted by the Authority to Providers substantially in the form set out in Redimo in order to select Providers to provide particular Services.

**Services:** means the services described in the Order Form.

**Staff:** means all persons employed by the Participant together with the Participant's servants, agents and suppliers used in the performance of its obligations under Contracts.

**Tender:** means the documents submitted to the Authority in response to an RFQ.

**Working Days:** means any day other than a Saturday, Sunday or public holiday in England and Wales.

1.2 The interpretation and construction of these terms are subject to the 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" are to be construed as if they were immediately followed by the words "without limitation";
- 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) references to "it" when referring to the Participant shall mean "he" or "she" if the Participant is an individual;
- 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 for ease of reference only and shall not affect the interpretation or construction of these terms;
- h) reference to a clause is a reference to the whole of that clause unless stated otherwise.

## 2. EXECUTION

2.1 Execution of documents under the DPS is carried out in accordance with EU Directive 99/93 (Community framework for electronic signatures) and the Electronic Communications Act 2000.

## 3. SCOPE

3.1 These terms govern the relationship between the Parties in respect of the operation of the DPS.

3.2 If the Authority appoints the Participant to the DPS the Participant shall be eligible to receive Orders for Services.

3.4 The Authority may from time to time invite the Participant to submit a Tender for Services by publishing an RFQ and consequently order Services from the Participant in accordance with the procedure set out in clause 4.

3.5 The Participant understands and acknowledges that the Authority is not obliged to place Orders under the DPS or at all.

- 3.6 If the Authority requires Services it shall:
- 3.6.1 enter into a contract with the Participant for these Services materially in accordance with the terms of the Contract; and
  - 3.6.2 comply with the ordering procedure in clause 0.
- 3.7 The Participant acknowledges that, if it is appointed to the DPS, no form of exclusivity or volume guarantee has been granted by the Authority for the Services and that the Authority is at all times entitled to enter into other contracts and arrangements with other Providers or other Participants for the provision of any or all services which are the same as or similar to the Services.

#### 4. AWARD PROCEDURES

- 4.1 If the Authority decides to source Services through the DPS it will satisfy its requirements by awarding a Contract following a mini-competition conducted in accordance with the requirements of clause 0.
- 4.2 If the Authority runs a mini-competition for Services it shall:
- a) identify the Providers capable of performing the Services;
  - b) supplement and refine the Call-off Terms only to the extent permitted by and in accordance with the requirements of the Regulations and Guidance;
  - c) invite Tenders by conducting a mini-competition for the Services in accordance with the Regulations and Guidance and in particular:
  - d) consult in writing the Providers capable of performing the Services and issue to them an RFQ and invite them, within a specified time limit, to submit a Tender;
  - e) inform the relevant Providers of the Award Criteria to be applied in the mini-competition;
  - f) set a time limit for the receipt by it of the Tenders which takes into account factors such as the complexity of the subject matter of the Services and the time needed to submit Tenders;
  - g) keep each Tender confidential until the expiry of the time limit for the receipt by it of the Tenders;
  - h) apply the Award Criteria to any compliant Tenders submitted through the mini-competition; and
  - i) subject to clause 4.4 place an Order with the successful Provider.
- 4.3 The Participant will keep all its Tenders open for acceptance for 30 days (or such other period specified in the invitation to tender issued by the Authority in accordance with this clause 0).
- 4.4. Notwithstanding the fact that the Authority has followed the procedure set out above, the Authority may cancel, postpone, delay or end the procedure without placing an Order for Services or awarding a Contract. The Authority shall not be obliged to place any Order for Services.
- 4.5 Subject to clauses 0 to 4.4, the Authority may place an Order with the Participant in substantially the form set out in Redimo or such similar or analogous form agreed with the Participant.
- 4.6 Following receipt of an Order, the Participant shall, within 3 Working Days, acknowledge receipt of the Order and either notify the Authority:
- a) with detailed reasons that it is unable to fulfil the Order; or
  - b) that it is able to fulfil the Order by indicating acceptance of the Order Form in Redimo.
- 4.7 If the Participant starts performance of the Services the Authority may deem this to be conclusive evidence that it has accepted the Order and the terms of the Contract.
- 4.8 If the Participant:
- a) notifies the Authority that it is unable to fulfil an Order; or
  - b) the time limit referred to in clause 4.6 has expired;
- then the Order shall lapse and the Authority may then send that Order to another Provider in accordance with the procedure set out in clause 4.5.
- 4.9 If the Participant modifies or imposes conditions on the fulfilment of an Order, then the Authority may either:
- a) reissue the Order incorporating the modifications or conditions; or
  - b) treat the Participant's response as notification of its inability to fulfil the Order and the provisions of clause 4.8 shall apply.

- 4.10 The placement of an Order is an "invitation to treat" by the Authority. Accordingly, the Participant shall indicate acceptance of the Order in Redimo which shall constitute its offer to the Authority. The Authority shall signal its acceptance of the Participant's offer and the formation of a Contract in Redimo.

#### **5. CONTRACT PERFORMANCE AND PRECEDENCE OF DOCUMENTS**

- 5.1 The Participant shall perform all Contracts in accordance with the requirements of the Call-off Terms.
- 5.2 If there is any conflict or inconsistency between documents such conflict or inconsistency shall be resolved according to the following order of priority:
- 5.2.1 the clauses of the Contract;
  - 5.2.2 the Order Form except Appendix 2 of the Order Form;
  - 5.2.3 these terms and Appendix 2 of the Order Form;
  - 5.2.4 any other document referred to in the clauses of the Contract; and
  - 5.2.5 Appendix 2 of the Order Form.

#### **6. WARRANTIES AND REPRESENTATIONS**

- 6.1 The Participant warrants and represents to the Authority that:
- a) it has full capacity and authority and all necessary consents to enter into and to perform its obligations under the Call-off Terms;
  - b) in applying to join the DPS it has not committed any Prohibited Act;
  - c) all information, statements and representations contained in the Application are true, accurate and not misleading save as may have been specifically disclosed in writing to the Authority and it will promptly advise the Authority of any fact, matter or circumstance of which it may become aware that would render any such information, statement or representation to be false or misleading;
  - d) no claim is being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of its knowledge and belief, pending or threatened against it or any of its assets that will or might affect its ability to perform its obligations under the DPS and any Contract which may be entered into with the Authority;
  - e) it is not subject to any contractual obligation, compliance with which is likely to have an effect on its ability to perform its obligations under the DPS and any Contract;
  - f) no proceedings or other steps have been taken and not discharged (or, to the best of its knowledge, are threatened) for the winding up of the Participant 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 Participant's assets or revenue; or
  - g) if the Participant is an individual, he is not subject to any bankruptcy order or petition.

#### **7. SERVICE PRE-REQUISITES**

- 7.1 The Participant shall be responsible for obtaining all licences, authorisations, consents or permits required in relation to the performance of its obligations under the DPS and any Contract.

#### **8. CONFIDENTIALITY**

- 8.1 Subject to clause 8.2, each Party shall:
- 8.1.1 treat all Confidential Information it receives as confidential, protect it accordingly and not disclose it to any other person without the prior written permission of the disclosing Party; and
  - 8.1.2 not use or exploit the disclosing Party's Confidential Information in any way except for the purposes anticipated under this agreement.
- 8.2 Notwithstanding clause 8.1, a Party may disclose Confidential Information which it receives from the other Party:
- a) where disclosure is required by applicable law or by a court of competent jurisdiction;
  - b) to its auditors or for the purposes of regulatory requirements;
  - c) on a confidential basis, to its professional advisers;
  - d) to the Serious Fraud Office where the Party has reasonable grounds to believe that the other Party is involved in activity that may constitute a criminal offence under the Bribery Act 2010;

- e) where the receiving Party is the Participant, to the Staff on a need to know basis to enable performance of its obligations under this agreement provided that the Participant shall procure that any Staff to whom it discloses Confidential Information pursuant to this clause 8.2.(e) shall observe the Participant's confidentiality obligations under these terms; and
- f) where the receiving Party is the Authority:
- g) on a confidential basis to the employees, agents, consultants and contractors of the Authority;
- h) on a confidential basis to any other central Government body, any successor body to a central Government body or any company to which the Authority transfers or proposes to transfer all or any part of its business;
- i) to the extent that the Authority (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions; or
- j) in accordance with clause 10.

and for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on the Authority under this clause 8.

- 8.3 The Parties acknowledge that, except for any information which is exempt from disclosure in accordance with the provisions of the FOIA, these terms are not Confidential Information. The Authority may consult the Participant to inform it of its decision regarding any redactions but shall have the final decision in its absolute discretion whether any of these terms is exempt from disclosure in accordance with the provisions of the FOIA.

#### **9. OFFICIAL SECRETS ACTS**

- 9.1 The Participant shall comply with and shall ensure that its Staff comply with, the provisions of:
- 9.1.1 the Official Secrets Acts 1911 to 1989; and
  - 9.1.2 section 182 of the Finance Act 1989.
- 9.2 If the Participant or its Staff fail to comply with this clause 9, the Authority may terminate the Participant's participation in the DPS with immediate effect by giving notice to the Participant.

#### **10. FREEDOM OF INFORMATION**

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

#### **11. PUBLICITY**

- 11.1 Unless otherwise directed by the Authority, the Participant shall not make any press announcements or publicise its participation in the DPS in any way without the Approval.
- 11.2 The Authority shall be entitled to publicise the DPS in accordance with any legal obligation on the Authority or otherwise.

11.3 The Participant shall not do anything that may damage the reputation of the Authority or bring the Authority into disrepute.

## **12. TERMINATION AND SUSPENSION**

12.1 The Authority may terminate the Participants participation in the DPS by serving written notice on the Participant with effect from the date specified in such notice:

- a) where the Authority terminates a Contract awarded to the Participant as a consequence of a material breach by the Participant;
- b) any warranty given by the Participant in clause 6 is found to be untrue or misleading; or
- c) if any of the provisions of Regulation 73(1) of the Regulations apply.

12.2 Without affecting any other right or remedy available to it, the Authority may terminate the Participant's participation in the DPS with immediate effect by giving written notice to the Participant if:

- a) the Participant suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or is deemed either unable to pay its debts or as having no reasonable prospect of so doing, in either case, within the meaning of section 268 of the Insolvency Act 1986 or has any partner to whom any of the foregoing apply;
- b) the Participant commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than for the sole purpose of a scheme for a solvent amalgamation of Participant with one or more other companies or the solvent reconstruction of the Participant;
- c) a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of the Participant other than for the sole purpose of a scheme for a solvent amalgamation of the Participant with one or more other companies or the solvent reconstruction of the Participant;
- d) an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over the Participant;
- e) the holder of a qualifying floating charge over the assets of the Participant has become entitled to appoint or has appointed an administrative receiver;
- f) a person becomes entitled to appoint a receiver over the assets of the Participant or a receiver is appointed over the assets of the Participant;
- g) the Participant is the subject of a bankruptcy petition or order;
- h) a creditor or encumbrancer of the Participant attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the Participant's assets and such attachment or process is not discharged within 14 days;
- i) any event occurs, or proceeding is taken, with respect to the Participant in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause a) to clause h) (inclusive); or
- j) the Participant suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.

12.3 The Participant shall notify the Authority immediately if the Participant undergoes a Change of Control. The Authority may terminate the Participant's participation in the DPS by giving notice in writing to the Participant with immediate effect within 6 Months of:

- a) being notified that a Change of Control has occurred; or
- b) where no notification has been made, the date that the Authority becomes aware of the Change of Control;

but shall not be permitted to terminate where Approval was granted before the Change of Control.

12.4 The Authority may terminate the Participant's participation in the DPS at any time by giving 3 Months' written notice to the Participant.

## **13. SUSPENSION OF PARTICIPANT**

13.1 Without prejudice to the Authority's rights to terminate the Participant's participation in the DPS in clause 12, the Authority may suspend the Participant's right to receive Orders by giving notice in writing to the Participant. If the Authority provides notice to the Participant in accordance with this

clause 13, the Participant shall be suspended for the period set out in the notice or such other period notified to the Participant by the Authority in writing from time to time.

- 13.2 The provisions of clauses 1, 5, 6, 11, 14 and 15 shall survive termination, together with any other provision which is either expressed to or by implication is intended to survive termination.

#### **14. DISPUTE RESOLUTION**

- 14.1 If a dispute arises out of or in connection with the DPS or the performance, validity or enforceability of it (**Dispute**) the Parties shall follow the procedure set out in this clause 14:

14.1.1 either Party shall give to the other written notice of the Dispute, setting out its nature and full particulars (**Dispute Notice**), together with relevant supporting documents. On service of the Dispute Notice, the Authority and the Participant shall attempt in good faith to resolve the Dispute;

14.1.2 if the Authority and Participant are for any reason unable to resolve the Dispute within 60 days of service of the Dispute Notice the Parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the Parties, the mediator shall be nominated by CEDR Solve. To initiate the mediation, a Party must serve notice in writing (**ADR notice**) to the other Party to the Dispute, requesting mediation. A copy of the ADR notice should be sent to CEDR Solve. The mediation will start not later than 30 days after the date of the ADR notice.

- 14.2 Neither Party may commence any court or arbitration proceedings under clause 14 in relation to the whole or part of the Dispute until 60 days after service of the ADR notice, provided that the right to issue proceedings is not prejudiced by a delay.

- 14.3 If the Dispute is not resolved within 60 days after service of the ADR notice, or either Party fails to participate or to continue to participate in the mediation before the expiration of the said period of 60 days, or the mediation terminates before the expiration of the said period of 60 days, the Dispute shall be finally resolved by the courts of England and Wales.

#### **15. PREVENTION OF BRIBERY**

- 15.1 The Participant:

15.1.1 shall not, and shall procure that the Staff shall not commit a Prohibited Act; and

15.1.2 warrants, represents and undertakes that it is not aware of any financial or other advantage being given to any person working for or engaged by the Authority, or that an agreement has been reached to that effect, in connection with the DPS, excluding any arrangement of which full details have been disclosed in writing to the Authority.

- 15.2 The Participant shall, if requested, provide the Authority with any reasonable assistance, at the Authority's reasonable cost, to enable the Authority to perform any activity required by any relevant government or agency in any relevant jurisdiction for the purpose of compliance with the Bribery Act 2010.

- 15.3 The Participant shall have an anti-bribery policy (which shall be disclosed to the Authority) to prevent any Staff from committing a Prohibited Act and shall enforce it where appropriate.

- 15.4 If any breach of clause 15.1 is suspected or known, the Participant must notify the Authority immediately.

- 15.5 If the Participant notifies the Authority that it suspects or knows that there may be a breach of clause 16, the Participant must respond promptly to the Authority's enquiries, co-operate with any investigation, and allow the Authority to audit books, records and any other relevant documents.

- 15.6 The Authority may terminate the Participants participation in the DPS by written notice with immediate effect if the Participant or its Staff breaches clause 15.

- 15.7 Any notice of termination under clause 15.6 must specify:

- a) the nature of the Prohibited Act;
- b) the identity of the party whom the Authority believes has committed the Prohibited Act; and
- c) the date on which the Participant's participation in the DPS will terminate.

- 15.8 Any dispute relating to:

- a) the interpretation of this clause 15; or

b) the amount or value of any gift, consideration or commission,  
shall be determined by the Authority and its decision shall be final and conclusive.

15.9 Any termination under this clause 15 will be without prejudice to any right or remedy which has already accrued or subsequently accrues to the Authority.

**16. SUBCONTRACTING AND ASSIGNMENT**

16.1 The Participant shall not assign, novate, sub-contract or otherwise dispose of any or all of its rights and obligations under the DPS without Approval.

16.2 The Authority shall be entitled to novate its rights under the DPS to any other body which substantially performs any of the functions that previously had been performed by the Authority.

**17. GOVERNING LAW AND JURISDICTION**

17.1 The DPS and any dispute or claim arising out of or in connection with it (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

17.2 Each Party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with the DPS including non-contractual disputes or claims.