

**CROWN COMMERCIAL SERVICE**

**and**

**THE SUPPLIER**

**HEALTH AND SOCIAL CARE NETWORK (HSCN) ACCESS SERVICES  
DYNAMIC PURCHASING SYSTEM AGREEMENT**

**(Agreement Ref: RM3825)**

## TABLE OF CONTENTS

|           |  |           |
|-----------|--|-----------|
| <b>A.</b> | <b>PRELIMINARIES .....</b>   | <b>4</b>  |
| 1.        | DEFINITIONS AND INTERPRETATION .....                                     | 4         |
| 2.        | DUE DILIGENCE .....  | 6         |
| 3.        | SUPPLIER'S ADMITTANCE.....   | 6         |
| 4.        | SCOPE OF DYNAMIC PURCHASING SYSTEM AGREEMENT .....                       | 7         |
| 5.        | CALL FOR COMPETITION PROCEDURE .....                                     | 7         |
| 6.        | ASSISTANCE IN RELATED PROCUREMENTS .....                                 | 7         |
| 7.        | REPRESENTATIONS AND WARRANTIES .....                                     | 8         |
| 8.        | GUARANTEE .....  | 10        |
| 9.        | NOT USED .....   | 10        |
| <b>B.</b> | <b>DURATION OF DYNAMIC PURCHASING SYSTEM AGREEMENT.....</b>              | <b>10</b> |
| 10.       | DYNAMIC PURCHASING SYSTEM PERIOD.....                                    | 10        |
| <b>C.</b> | <b>DYNAMIC PURCHASING SYSTEM AGREEMENT PERFORMANCE .....</b>             | <b>11</b> |
| 11.       | DYNAMIC PURCHASING SYSTEM AGREEMENT PERFORMANCE .....                    | 11        |
| 12.       | KEY PERFORMANCE INDICATORS .....   | 11        |
| 13.       | CALL OFF PERFORMANCE UNDER THE DYNAMIC PURCHASING SYSTEM AGREEMENT ..... | 11        |
| <b>D.</b> | <b>DYNAMIC PURCHASING SYSTEM AGREEMENT GOVERNANCE.....</b>               | <b>12</b> |
| 14.       | DYNAMIC PURCHASING SYSTEM AGREEMENT MANAGEMENT .....                     | 12        |
| 15.       | RECORDS, AUDIT ACCESS AND OPEN BOOK DATA.....                            | 12        |
| 16.       | CHANGE .....   | 14        |
| <b>E.</b> | <b>MANAGEMENT LEVY, TAXATION AND VALUE FOR MONEY PROVISIONS ....</b>     | <b>16</b> |
| 17.       | MANAGEMENT LEVY .....  | 16        |
| 18.       | PROMOTING TAX COMPLIANCE .....   | 17        |
| <b>F.</b> | <b>SUPPLIER PERSONNEL AND SUPPLY CHAIN MATTERS.....</b>                  | <b>17</b> |
| 19.       | SUPPLY CHAIN RIGHTS AND PROTECTION .....                                 | 17        |
| <b>G.</b> | <b>INTELLECTUAL PROPERTY AND INFORMATION.....</b>                        | <b>19</b> |
| 20.       | INTELLECTUAL PROPERTY RIGHTS .....                                       | 19        |
| 21.       | PROVISION AND PROTECTION OF INFORMATION.....                             | 21        |
| 22.       | PUBLICITY AND BRANDING.....  | 31        |
| 23.       | MARKETING .....  | 32        |
| <b>H.</b> | <b>LIABILITY AND INSURANCE.....</b>                                      | <b>32</b> |
| 24.       | LIABILITY .....  | 32        |
| 25.       | INSURANCE.....   | 34        |
| <b>I.</b> | <b>REMEDIES.....</b>   | <b>34</b> |
| 26.       | AUTHORITY REMEDIES FOR FAILURE TO ACHIEVE KPI TARGETS .....              | 34        |
| <b>J.</b> | <b>TERMINATION AND SUSPENSION .....</b>                                  | <b>34</b> |
| 27.       | AUTHORITY TERMINATION RIGHTS .....                                       | 35        |
| 28.       | SUSPENSION OF SUPPLIER'S APPOINTMENT .....                               | 37        |
| 29.       | CONSEQUENCES OF EXPIRY OR TERMINATION .....                              | 37        |
| <b>K.</b> | <b>MISCELLANEOUS AND GOVERNING LAW .....</b>                             | <b>38</b> |

|  |  |     |
|--|--|-----|
| 30.  | COMPLIANCE .....                         | 38  |
| 31.  | ASSIGNMENT AND NOVATION .....            | 39  |
| 32.  | WAIVER AND CUMULATIVE REMEDIES.....      | 40  |
| 33.  | RELATIONSHIP OF THE PARTIES .....        | 40  |
| 34.  | PREVENTION OF FRAUD AND BRIBERY .....    | 40  |
| 35.  | SEVERANCE.....                           | 42  |
| 36.  | ENTIRE AGREEMENT .....                   | 42  |
| 37.  | THIRD PARTY RIGHTS.....                  | 42  |
| 38.  | NOTICES .....                            | 43  |
| 39.  | COMPLAINTS HANDLING AND RESOLUTION ..... | 44  |
| 40.  | DISPUTE RESOLUTION .....                 | 45  |
| 41.  | TECHNOLOGY EXPENSE MANAGEMENT.....       | 45  |
| 42.  | GOVERNING LAW AND JURISDICTION.....      | 45  |
| DPS SCHEDULE 1: DEFINITIONS .....                                  |  | 46  |
| DPS SCHEDULE 2: SERVICES AND KEY PERFORMANCE INDICATORS.....       |  | 64  |
| PART A – REQUIREMENTS FOR SERVICES .....                           |  | 64  |
| PART B – KEY PERFORMANCE INDICATORS .....                          |  | 67  |
| DPS SCHEDULE 3: TEMPLATE ORDER FORM AND TEMPLATE CALL OFF TERMS .. |  | 70  |
| PART 1: TEMPLATE ORDER FORM .....                                  |  | 70  |
| PART 2: TEMPLATE CALL OFF TERMS.....                               |  | 70  |
| DPS SCHEDULE 4: CALL FOR COMPETITION PROCEDURE .....               |  | 71  |
| DPS SCHEDULE 5: AWARD CRITERIA.....                                |  | 76  |
| DPS SCHEDULE 6: KEY SUB-CONTRACTORS .....                          |  | 79  |
| ANNEX 1: KEY SUB-CONTRACTORS VARIATION FORM.....                   |  | 80  |
| DPS SCHEDULE 7: DPS MANAGEMENT .....                               |  | 82  |
| DPS SCHEDULE 8: MANAGEMENT INFORMATION .....                       |  | 89  |
| ANNEX 1: FINANCIAL MI REPORTING TEMPLATE .....                     |  | 92  |
| DPS SCHEDULE 9: ANNUAL SELF AUDIT CERTIFICATE.....                 |  | 93  |
| DPS SCHEDULE 10: TEMPLATE GUARANTEE .....                          |  | 95  |
| DPS SCHEDULE 11: INSURANCE REQUIREMENTS .....                      |  | 105 |
| ANNEX 1: REQUIRED INSURANCES.....                                  |  | 108 |
| DPS SCHEDULE 12: VARIATION FORM .....                              |  | 112 |

This Dynamic Purchasing System Agreement is made

**BETWEEN:**

- (1) the Minister for the Cabinet Office ("Cabinet Office") as represented by Crown Commercial Service, which is an executive agency and operates as a trading fund of the Cabinet Office, whose offices are located at 9th Floor, The Capital, Old Hall Street, Liverpool L3 9PP (the "Authority"); and
- (2) (the "Supplier").

**RECITALS:**

- A The Authority placed a contract notice **[Insert the OJEU reference number]** on **[Insert the date]** (the "**OJEU Notice**") in the Official Journal of the European Union inviting providers of HSCN Connectivity Services to apply to be admitted to a Dynamic Purchasing System for the supply of the Services to Contracting Bodies.
- B The HSCN Connectivity Services supplied under this DPS are required to be compliant with the HSCN Compliance Document Set;
- C The Supplier made a request to participate by submitting its response to the Authority's Selection Questionnaire ("**SQ**") in response to the OJEU Notice (the "**SQ Response**").
- D Through the SQ Response, the Supplier represented to the Authority that it is capable of delivering the Services and, in particular, the Supplier made representations to the Authority in the SQ Response in relation to suitability, economic and financial standing and technical and professional ability.
- E On the basis of the Supplier's responses in the SQ Response, the Supplier was admitted to the Dynamic Purchasing System to provide the Services to Contracting Bodies from time to time on a call off basis in accordance with this Dynamic Purchasing System Agreement.
- F This Dynamic Purchasing System Agreement sets out the award and Call for Competition procedure for purchasing the Services which may be required by Contracting Bodies, the template terms and conditions for any Call Off Agreement which Contracting Bodies may enter into and the obligations of the Supplier during and after the Dynamic Purchasing System Period.
- G It is the Parties' intention that there will be no obligation for any Contracting Body to award any Call Off Agreements under this Dynamic Purchasing System Agreement during the Dynamic Purchasing System Period.

**A. PRELIMINARIES**

**1. DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

- 1.1.1 In this Dynamic Purchasing System Agreement, unless the context otherwise requires, capitalised expressions shall have the meanings set out in DPS Schedule 1 (Definitions) or the relevant DPS Schedule in which that capitalised expression appears.

- 1.1.2 If a capitalised expression does not have an interpretation in DPS Schedule 1 (Definitions) or the relevant DPS Schedule, it shall have the meaning given to it in this Dynamic Purchasing System Agreement. If no meaning is given to it in this Dynamic Purchasing System Agreement, it shall in the first instance be interpreted in accordance with the common interpretation within the relevant market sector/industry where appropriate. Otherwise, it shall be interpreted in accordance with the dictionary meaning.

## 1.2 Interpretation

- 1.2.1 In this Dynamic Purchasing System Agreement, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) reference to a gender includes the other gender and the neuter;
- (c) references to a person include an individual, company, body corporate, corporation, unincorporated association, firm, partnership or other legal entity or Crown Body;
- (d) a reference to any Law includes a reference to that Law as amended, extended, consolidated or re-enacted from time to time;
- (e) the words "**including**", "**other**", "**in particular**", "**for example**" and similar words shall not limit the generality of the preceding words and shall be construed as if they were immediately followed by the words "without limitation";
- (f) references to "writing" include typing, printing, lithography, photography, display on a screen, electronic and facsimile transmission and other modes of representing or reproducing words in a visible form and expressions referring to writing shall be construed accordingly;
- (g) references to: "**representations**" shall be construed as references to present facts; to "**warranties**" as references to present and future facts; and to "**undertakings**" as references to obligations under this Dynamic Purchasing System Agreement;
- (h) references to "**Clauses**" and "**DPS Schedules**" are, unless otherwise provided, references to the clauses and schedules of this Dynamic Purchasing System Agreement and references in any DPS Schedule to paragraphs, parts, annexes and tables are, unless otherwise provided, references to the paragraphs, parts, annexes and tables of the DPS Schedule or the part of the DPS Schedule in which the references appear;
- (i) any reference to this Dynamic Purchasing System Agreement includes DPS Schedule 1 (Definitions) and the DPS Schedules; and
- (j) the headings in this Dynamic Purchasing System Agreement are for ease of reference only and shall not affect the interpretation or construction of this Dynamic Purchasing System Agreement.

- 1.2.2 Subject to Clause 1.2.3, in the event and to the extent only of a conflict between any of the provisions of this Dynamic Purchasing System

Agreement, the conflict shall be resolved, in accordance with the following descending order of precedence:

- (a) the Clauses and DPS Schedule 1 (Definitions);
  - (b) DPS Schedules 2 to 12;
  - (c) HSCN Compliance Document Set.
- 1.2.3 If there is any conflict between the provisions of this Dynamic Purchasing System Agreement and provisions of any Call Off Agreement, the provisions of this Dynamic Purchasing System Agreement shall prevail over those of the Call Off Agreement save that any refinement to the Template Order Form and Template Call Off Terms permitted for the purposes of a Call Off Agreement under Clause 5 (Call for Competition Procedure) and DPS Schedule 4 (Call for Competition Procedure) shall prevail over DPS Schedule 3 (Template Order Form and Template Call Off Terms).

## **2. DUE DILIGENCE**

2.1 The Supplier acknowledges that:

- 2.1.1 the Authority has delivered or made available to the Supplier all of the information and documents that the Supplier considers necessary or relevant for the performance of its obligations under this Dynamic Purchasing System Agreement;
- 2.1.2 it has made its own enquiries to satisfy itself as to the accuracy of the Due Diligence Information;
- 2.1.3 it has raised all relevant due diligence questions with the Authority before the DPS Commencement Date, has undertaken all necessary due diligence and has entered into this Dynamic Purchasing System Agreement in reliance on its own due diligence alone; and
- 2.1.4 it shall not be excused from the performance of any of its obligations under this Dynamic Purchasing System Agreement on the grounds of, nor shall the Supplier be entitled to recover any additional costs or charges, arising as a result of any:
  - (a) misrepresentation of the requirements of the Supplier in the SQ or elsewhere;
  - (b) failure by the Supplier to satisfy itself as to the accuracy and/or adequacy of the Due Diligence Information; and/or
  - (c) failure by the Supplier to undertake its own due diligence.

## **3. SUPPLIER'S ADMITTANCE**

- 3.1 The Authority hereby admits the Supplier to the Dynamic Purchasing System as a potential provider of the Services and the Supplier shall be eligible to be considered for the award of Call Off Agreements by the Authority and Other Contracting Bodies during the Dynamic Purchasing System Period.
- 3.2 In consideration of the Supplier agreeing to enter into this Dynamic Purchasing System Agreement and to perform its obligations under it the Authority agrees to pay and the Supplier agrees to accept on the signing of

this Dynamic Purchasing System Agreement the sum of one pound (£1.00) sterling (receipt of which is hereby acknowledged by the Supplier).

#### **4. SCOPE OF DYNAMIC PURCHASING SYSTEM AGREEMENT**

4.1 Without prejudice to Clause 37 (Third Party Rights), this Dynamic Purchasing System Agreement governs the relationship between the Authority and the Supplier in respect of the provision of the Services by the Supplier.

4.2 The Supplier acknowledges and agrees that:

4.2.1 there is no obligation whatsoever on the Authority or on any Other Contracting Body to invite or select the Supplier to provide any Services and/or to purchase any Services under this Dynamic Purchasing System Agreement; and

4.2.2 in entering into this Dynamic Purchasing System Agreement no form of exclusivity has been conferred on the Supplier nor volume or value guarantee granted by the Authority and/or Other Contracting Bodies in relation to the provision of the Services by the Supplier and that the Authority and Other Contracting Bodies are at all times entitled to enter into other contracts and agreements with other suppliers for the provision of any or all Services which are the same as or similar to the Services.

4.3 In the event that any Other Contracting Body makes an approach to the Supplier with a request for the supply of Equivalent Services, the Supplier shall promptly and in any event within five (5) Working Days of the request by the Other Contracting Body, and before any supply of Equivalent Services is made, inform such Other Contracting Body of the existence of this Dynamic Purchasing System and the Other Contracting Body's ability to award Call Off Agreements for Services pursuant to this Dynamic Purchasing System Agreement.

#### **5. CALL FOR COMPETITION PROCEDURE**

5.1 If the Authority or any Other Contracting Body decides to source any of the Services through this Dynamic Purchasing System Agreement, then it shall be entitled at any time in its absolute and sole discretion during the Dynamic Purchasing System Period to award Call Off Agreements for the Services from the Supplier by following the procedure set out in DPS Schedule 4 (Call for Competition Procedure).

5.2 The Supplier shall comply with the relevant provisions in DPS Schedule 4 (Call for Competition Procedure).

#### **6. ASSISTANCE IN RELATED PROCUREMENTS**

6.1 Where a Relevant Supplier is bidding to provide New Services in circumstances where the Supplier or an Affiliate of the Supplier is already providing (or due to provide) Legacy Services to a Contracting Body, the Supplier shall promptly provide the relevant Contracting Body and/or, if so required by the Contracting Body, the Relevant Supplier with all reasonable information and assistance, including information about Non-Exclusive Assets, as may be required from time to time to enable the relevant Contracting Body and/or the Relevant Supplier, as appropriate, to:

6.1.1 carry out appropriate due diligence with respect to the provision of the New Services;

- 6.1.2 effect a smooth transfer and/or inter-operation (as the case may be) between the Legacy Services and the New Services;
  - 6.1.3 carry out a fair Call for Competition Procedure for the New Services; and
  - 6.1.4 make a proper assessment as to the risk related to the New Services.
- 6.2 When performing its obligations in Clause 6.1 the Supplier shall act consistently, applying principles of equal treatment and non-discrimination, with regard to requests for assistance from and dealings with each Relevant Supplier.

## **7. REPRESENTATIONS AND WARRANTIES**

### **7.1 Each Party represents and warrants that:**

- 7.1.1 it has full capacity and authority to enter into and to perform this Dynamic Purchasing System Agreement;
- 7.1.2 this Dynamic Purchasing System Agreement is executed by its duly authorised representative;
- 7.1.3 there are no actions, suits or proceedings or regulatory investigations before any court or administrative body or arbitration tribunal pending or, to its knowledge, threatened against it (or, in the case of the Supplier, any of its Affiliates) that might affect its ability to perform its obligations under this Dynamic Purchasing System Agreement; and
- 7.1.4 its obligations under this Dynamic Purchasing System Agreement constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms subject to applicable (as the case may be for each Party) 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).

### **7.2 The Supplier represents and warrants that:**

- 7.2.1 it shall, for the duration of this Dynamic Purchasing System Agreement and any Call Off Agreements, maintain HSCN Compliance, and the Authority shall have the right to check compliance over the life of the DPS Agreement;
- 7.2.2 it shall be HSCN Stage 2 Compliant prior to submitting a valid tender for evaluation as part of the Call for Competition Procedure;
- 7.2.3 it shall, for the duration of this Dynamic Purchasing System Agreement and any Call Off Agreements, comply with the HSCN Compliance Document Set;
- 7.2.4 it is validly incorporated, organised and subsisting in accordance with the Laws of its place of incorporation;
- 7.2.5 it has obtained and will maintain all licences, authorisations, permits, necessary consents (including, where its procedures so require, the consent of its Parent Company) and regulatory approvals to enter into and perform its obligations under this Dynamic Purchasing System Agreement;

- 7.2.6 it has not committed or agreed to commit a Prohibited Act and has no knowledge that an agreement has been reached involving the committal by it or any of its Affiliates of a Prohibited Act, save where details of any such arrangement have been disclosed in writing to the Authority before the DPS Commencement Date;
- 7.2.7 its execution, delivery and performance of its obligations under this Dynamic Purchasing System Agreement does not and will not constitute a breach of any Law or obligation applicable to it and does not and will not cause or result in a breach of any agreement by which it is bound;
- 7.2.8 as at the DPS Commencement Date, all written statements and representations in any written submissions made by the Supplier as part of the procurement process, its SQ Response, 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 Dynamic Purchasing System Agreement;
- 7.2.9 if the Charges payable under this Dynamic Purchasing System Agreement exceed or are likely to exceed five million pounds (£5,000,000), as at the DPS Commencement Date, it has notified the Authority in writing of any Occasions of Tax Non-Compliance or any litigation that it is involved in connection with any Occasions of Tax Non Compliance;
- 7.2.10 it has and shall continue to have all necessary rights in and to (including but not limited to title and/or any necessary licences) the Intellectual Property Rights and other materials which are necessary for the performance of the Supplier's obligations under this Dynamic Purchasing System Agreement and/or the receipt of the Services by Contracting Bodies;
- 7.2.11 it shall take all steps, in accordance with Good Industry Practice, to prevent the introduction, creation or propagation of any disruptive elements (including any virus, worms and/or Trojans, spyware or other malware) into systems, data, software or the Authority's Confidential Information (held in electronic form) owned by or under the control of, or used by, the Authority and/or Other Contracting Bodies.
- 7.2.12 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 Dynamic Purchasing System Agreement;
- 7.2.13 it is not affected by an Insolvency Event and no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, have been or 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;
- 7.2.14 for the duration of this Dynamic Purchasing System Agreement and any Call Off Agreements and for a period of twelve (12) Months after the termination or expiry of this Dynamic Purchasing System Agreement or, if later, any Call Off Agreements, the Supplier shall not employ or offer employment to any staff of the Authority or the staff of

any Contracting Body who has been associated with the procurement and/or provision of the Services except where:

- (a) the Supplier has written approval from the relevant Contracting Body which shall not be unreasonably withheld; or
- (b) the member of staff is employed following a successful application submitted in response to a job advertisement placed by the Supplier in the national, regional or professional press or in any other form of media used for recruitment; and

7.2.15 in performing its obligations under this Dynamic Purchasing System Agreement and any Call Off Agreement, the Supplier shall not (to the extent possible in the circumstances) discriminate between Contracting Bodies on the basis of their respective sizes.

7.3 Each of the representations and warranties set out in Clauses 7.1 and 7.2 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 undertaking in this Dynamic Purchasing System Agreement.

7.4 If at any time a Party becomes aware that a representation or warranty given by it under Clauses 7.1 and 7.2 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.

7.5 For the avoidance of doubt, the fact that any provision within this Dynamic Purchasing System Agreement is expressed as a warranty shall not preclude any right of termination the Authority may have in respect of the breach of that provision by the Supplier which constitutes a material Default of this Dynamic Purchasing System Agreement.

7.6 Each time that a Call Off Agreement is entered into, the warranties and representations in Clauses 7.1 and 7.2 shall be deemed to be repeated by the Supplier with reference to the circumstances existing at the time.

## **8. GUARANTEE**

8.1 Where the Authority has notified the Supplier that their admittance to this DPS is conditional upon receipt of a valid DPS Guarantee, then on or prior to their admittance to this DPS, as a condition for admittance to this DPS, the Supplier must have delivered to the Authority:

- 8.1.1 an executed DPS Guarantee from a DPS Guarantor; and
- 8.1.2 a certified copy extract of the board minutes and/or resolution of the DPS Guarantor approving the execution of the DPS Guarantee.

8.2 The Authority may in its sole discretion at any time agree to waive compliance with the requirement in Clause 8.1 by giving the Supplier notice in writing.

## **9. NOT USED**

## **B. DURATION OF DYNAMIC PURCHASING SYSTEM AGREEMENT**

### **10. DYNAMIC PURCHASING SYSTEM PERIOD**

10.1 This Dynamic Purchasing System Agreement shall take effect on the DPS Commencement Date and shall expire, unless it is terminated earlier in accordance

with the terms of this Dynamic Purchasing System Agreement or otherwise by the operation of Law, either:

10.1.1 at the end of the Initial DPS Period; or

10.1.2 where the Authority elects to extend the Initial DPS Period in accordance with Clause 10.2 below.

10.2 The Authority may extend the duration of this Dynamic Purchasing System Agreement by giving the Supplier no less than three (3) Months' written notice prior to the expiry of the then current DPS Period. Each extension period may be up to a maximum of twenty-four (24) Months.

10.3 The maximum duration of this Dynamic Purchasing System will not exceed seventy-eight (78) Months.

10.4 The Authority acknowledges that the DPS will not be terminated within the initial three (3) Months from the DPS Commencement Date.

## **C. DYNAMIC PURCHASING SYSTEM AGREEMENT PERFORMANCE**

### **11. DYNAMIC PURCHASING SYSTEM AGREEMENT PERFORMANCE**

11.1 The Supplier shall perform its obligations under this Dynamic Purchasing System Agreement in accordance with:

11.1.1 the requirements of this Dynamic Purchasing System Agreement, including each of the DPS Schedules;

11.1.2 the terms and conditions of the respective Call Off Agreements;

11.1.3 Good Industry Practice;

11.1.4 all applicable Standards; and

11.1.5 in compliance with all applicable Law.

11.2 The Supplier shall bring to the attention of the Authority any conflict between any of the requirements of Clause 11.1 and shall comply with the Authority's decision on the resolution of any such conflict.

### **12. KEY PERFORMANCE INDICATORS**

12.1 The Supplier shall at all times during the DPS Period comply with the Key Performance Indicators and achieve the KPI Targets set out in Part B of DPS Schedule 2 (Services and Key Performance Indicators).

### **13. CALL OFF PERFORMANCE UNDER THE DYNAMIC PURCHASING SYSTEM AGREEMENT**

13.1 The Supplier shall perform all its obligations under all Call Off Agreements entered into with the Authority or any Other Contracting Body:

13.1.1 in accordance with the requirements of this Dynamic Purchasing System Agreement; and

13.1.2 in accordance with the terms and conditions of the respective Call Off Agreements.

13.2 The Supplier shall draw any conflict in the application of any of the requirements of Clauses 13.1.1 and 13.1.2 to the attention of the Authority and shall comply with the Authority's decision on the resolution of any such conflict.

## **D. DYNAMIC PURCHASING SYSTEM AGREEMENT GOVERNANCE**

### **14. DYNAMIC PURCHASING SYSTEM AGREEMENT MANAGEMENT**

14.1 The Parties shall manage this Dynamic Purchasing System Agreement in accordance with DPS Schedule 7 (DPS Management) and shall comply with DPS Schedule 8 (Management Information).

### **15. RECORDS, AUDIT ACCESS AND OPEN BOOK DATA**

15.1 The Supplier shall keep and maintain, until the later of:

15.1.1 seven (7) years after the date of termination or expiry of this Dynamic Purchasing System Agreement; or

15.1.2 seven (7) years after the date of termination or expiry of the last Call Off Agreement to expire or terminate; or

15.1.3 such other date as may be agreed between the Parties,

full and accurate records and accounts of the operation of this Dynamic Purchasing System Agreement, including Call-Off Agreements entered into with Contracting Bodies, the Services provided pursuant to the Call Off Agreements, and the amounts paid by each Contracting Body under the Call Off Agreements and those supporting tests and evidence that underpin the provision of the annual Self Audit Certificate and supporting Audit Report.

15.2 The Supplier shall keep the records and accounts referred to in Clause 15.1 in accordance with Good Industry Practice and Law.

15.3 The Supplier shall provide the Authority with a completed and signed annual Self Audit Certificate in respect of each Contract Year. Each Self Audit Certificate shall be completed and signed by an authorised senior member of the Supplier's management team or by the Supplier's external auditor and the signatory must be professionally qualified in a relevant audit or financial discipline.

15.4 Each Self Audit Certificate should be based on tests completed against a representative sample of 10% of transactions carried out during the period of being audited or 25 transactions (whichever is less) and should provide assurance that:

15.4.1 Orders are clearly identified as such in the Order processing and invoicing systems and, where required, Orders are correctly reported in the MI Reports;

15.4.2 all related invoices are completely and accurately included in the MI Reports; and

15.4.3 all Charges to Contracting Bodies comply with any requirements under this Dynamic Purchasing System Agreement on maximum mark-ups, discounts, charge rates, fixed quotes (as applicable).

15.5 Each Self Audit Certificate shall be supported by an Audit Report that provides details of the methodology applied to complete the review, the sampling techniques applied, details of any issues identified and remedial action taken.

15.6 The Supplier shall afford any Auditor access to the records and accounts referred to in Clause 15.1 at the Supplier's premises and/or provide such records and accounts or copies of the same, as may be required and agreed with any of the Auditors from time to time, in order that the Auditor may carry out an inspection

to assess compliance by the Supplier and/or its Sub-Contractors of any of the Supplier's obligations under this Dynamic Purchasing System Agreement, including for the following purposes to:

- 15.6.1 verify the accuracy of the Charges and any other amounts payable by a Contracting Body under a Call Off Agreement (including proposed or actual variations to them in accordance with this Dynamic Purchasing System Agreement);
- 15.6.2 verify the costs of the Supplier (including the costs of all Sub-Contractors and any third party suppliers) in connection with the provision of the Services;
- 15.6.3 verify the Open Book Data in respect of specific Call Off Agreements: Open Book Data may only be required by the Auditor where the total contract value of the Call Off Agreement exceeds, or is expected to exceed, three million pounds (£3,000,000);
- 15.6.4 verify the Supplier's and each Sub-Contractor's compliance with the applicable Law;
- 15.6.5 identify or investigate actual or suspected Prohibited Acts, impropriety or accounting mistakes or any breach or threatened breach of security and in these circumstances the Authority shall have no obligation to inform the Supplier of the purpose or objective of its investigations;
- 15.6.6 identify or investigate any circumstances which may impact upon the financial stability of the Supplier, the DPS Guarantor and/or any Sub-Contractors or their ability to perform the Services;
- 15.6.7 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;
- 15.6.8 review any books of account and the internal contract management accounts kept by the Supplier in connection with this Dynamic Purchasing System Agreement;
- 15.6.9 carry out the Authority's internal and statutory audits and to prepare, examine and/or certify the Authority's annual and interim reports and accounts;
- 15.6.10 enable the National Audit Office 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;
- 15.6.11 verify the accuracy and completeness of any Management Information delivered or required by this Dynamic Purchasing System Agreement;
- 15.6.12 review any MI Reports and/or other records relating to the Supplier's performance of the Services and to verify that these reflect the Supplier's own internal reports and records;
- 15.6.13 review the integrity, confidentiality and security of the Authority's Personal Data; and/or

15.6.14 receive from the Supplier on request summaries of all central Government public sector expenditure placed with the Supplier including through routes outside the DPS in order to verify that the Supplier's practice is consistent with the Government's transparency agenda which requires all public sector bodies to publish details of expenditure on common goods and services.

15.7 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 pursuant to the Call Off Agreements, save insofar as the Supplier accepts and acknowledges that control over the conduct of Audits carried out by the Auditors is outside of the control of the Authority.

15.8 Subject to the Authority's obligations of confidentiality, the Supplier shall on demand provide the Auditors with all reasonable co-operation and assistance in relation to each Audit, including by providing:

15.8.1 all information within the scope of the Audit requested by the Auditor;

15.8.2 reasonable access to any sites controlled by the Supplier and to equipment used in the provision of the Services; and

15.8.3 access to the Supplier Personnel.

15.9 If an Audit reveals that the Supplier has underpaid an amount equal to or greater than one per cent (1%) of the Management Levy due in respect of any one Contract Year or year of any Call Off Agreements then, without prejudice to the Authority's other rights under this Dynamic Purchasing System Agreement, the Supplier shall reimburse the Authority its reasonable costs incurred in relation to the Audit.

15.10 If an Audit reveals that:

15.10.1 the Supplier has underpaid an amount equal to or greater than five per cent (5%) of the Management Levy due during any Contract Year of this Dynamic Purchasing System Agreement and any Call Off Agreement; and/or

15.10.2 a material Default has been committed by the Supplier;

then the Authority shall be entitled to terminate this Dynamic Purchasing System Agreement for material Default.

15.11 The Parties agree that they shall bear their own respective costs and expenses incurred in respect of compliance with their obligations under this Clause, save as specified in Clause 15.9.

## **16. CHANGE**

### **16.1 Variation Procedure**

16.1.1 Subject to the provisions of this Clause 16, the Authority may request a variation to this Dynamic Purchasing System Agreement provided that such variation does not amount to a material change of this Dynamic Purchasing System Agreement within the meaning of the Regulations and the Law. Such a change once implemented is hereinafter called a "**Variation**".

16.1.2 The Authority may, at its own instance or where in its sole and absolute discretion it decides to having been requested to do so by

the Supplier, request a Variation by completing and sending the Variation Form as set out in DPS Schedule 12 (Variation Form) to the Supplier giving sufficient information for the Supplier to assess the extent of the proposed Variation and any additional cost that may be incurred.

16.1.3 The Supplier shall respond to the Authority's request pursuant to Clause 16.1.2 within the time limits specified in the Variation Form. Such time limits shall be reasonable and ultimately at the discretion of the Authority having regard to the nature of the proposed Variation.

16.1.4 In the event that the Supplier is unable to agree to the Variation the Authority may:

- (a) agree to continue to perform its obligations under this Dynamic Purchasing System Agreement without the Variation; or
- (b) terminate this Dynamic Purchasing System Agreement with immediate effect.

## **16.2 Legislative Change**

16.2.1 The Supplier shall not be relieved of its obligations under this Dynamic Purchasing System Agreement as the result of:

- (a) a General Change in Law; or
- (b) a Specific Change in Law where the effect of that Specific Change in Law on the Services is reasonably foreseeable at the DPS Commencement Date.

16.2.2 If a Specific Change in Law occurs or will occur during the DPS Period (other than as referred to in Clause 16.2.1(b)), the Supplier shall:

- (a) notify the Authority as soon as reasonably practicable of the likely effects of that change including whether any variation is required to the Services or this Dynamic Purchasing System Agreement; and
- (b) provide the Authority with evidence:
  - (i) that the Supplier has minimised any increase in costs or maximised any reduction in costs, including in respect of the costs of its Sub-Contractors;
  - (ii) as to how the Specific Change in Law has affected the cost of providing the Services; and
  - (iii) demonstrating that any expenditure that has been avoided.

16.2.3 Any relief from the Supplier's obligations resulting from a Specific Change in Law (other than as referred to in Clause 16.2.1(b)) shall be implemented in accordance with Clause 16.1 (Variation Procedure).

## **16.3 Changes to the HSCN Compliance Document Set and to HSCN Compliance**

16.3.1 The Supplier shall not be relieved of its obligations under this Dynamic Purchasing System Agreement as the result of a change to the HSCN Compliance Document Set and/or a change to HSCN

Compliance (a “**Change in HSCN Obligations**”) unless agreed in accordance with 16.1 (Variation Procedure).

16.3.2 If a Change in HSCN Obligations occurs or the Supplier becomes aware that a Change in HSCN Obligations will occur during the DPS Period (other than as referred to in Clause 16.2.1(b)), the Supplier shall:

- (a) notify the Authority as soon as reasonably practicable of the likely effects of that change including whether any variation is required to the Services or this Dynamic Purchasing System Agreement; and
- (b) provide the Authority with evidence:
  - (i) that the Supplier has minimised any increase in costs or maximised any reduction in costs, including in respect of the costs of its Sub-Contractors;
  - (ii) as to how the Change in HSCN Obligations has affected the cost of providing the Services; and
  - (iii) demonstrating any expenditure that has been avoided.

16.3.3 Where the Supplier notifies the Authority under 16.3.2, the Authority may share this information with the HSCN Authority.

16.3.4 Any relief from the Supplier's obligations resulting from a Change in HSCN Obligations (other than as referred to in Clause 16.3.2(b)) shall be implemented in accordance with Clause 16.1 (Variation Procedure).

## **E. MANAGEMENT LEVY, TAXATION AND VALUE FOR MONEY PROVISIONS**

### **17. MANAGEMENT LEVY**

17.1 The Supplier agrees to pay to the Authority the Management Levy in accordance with this Clause 17.

17.2 The Authority shall be entitled to submit invoices to the Supplier in respect of the Management Levy due each Month based on the Management Information provided pursuant to DPS Schedule 8 (Management Information).

17.3 Unless otherwise agreed in writing, the Supplier shall pay by BACS (or by such other means as the Authority may from time to time reasonably require) the amount stated in any invoice submitted under Clause 17.2 to such account as shall be stated in the invoice (or otherwise notified from time to time by the Authority to the Supplier) within thirty (30) calendar days of the date of issue of the invoice.

17.4 The Management Levy shall apply to the full Charges as specified in each and every Call Off Agreement and shall not be varied as a result of any discount or any reduction in the Charges due to the application of any Service Credits (as defined in DPS Schedule 3 (Template Order Form and Template Call Off Terms)) and/or any other deductions made under any Call Off Agreement.

17.5 Interest shall be payable on any late payments of the Management Levy under this Dynamic Purchasing System Agreement in accordance with the Late Payment of Commercial Debts (Interest) Act 1998.

17.6 The Supplier acknowledges and agrees that the Authority may at any time during the Dynamic Purchasing System Period and upon serving two months' written notice, introduce a new electronic system to monitor and collect the Management Levy (the "**System**") and upon receipt of the written notice the Supplier shall use its best endeavours to implement the System.

17.7 In the event that any new electronics system to monitor and collect is introduced, the Authority reserves the right to revert to a manual system to monitor and collect the Management Levy, upon providing two months' written notice to the Supplier.

## **18. PROMOTING TAX COMPLIANCE**

18.1 This Clause 18 shall apply if the Charges payable under this Dynamic Purchasing System Agreement are or are likely to exceed five million pounds (£5,000,000) during the Dynamic Purchasing System Period

18.2 If, at any point during the DPS Period, an Occasion of Tax Non-Compliance occurs, the Supplier shall:

18.2.1 notify the Authority in writing of such fact within five (5) Working Days of its occurrence; and

18.2.2 promptly provide to the Authority:

(a) details of the steps that the Supplier is taking to address the Occasion of Tax Non-Compliance, together with any mitigating factors that it considers relevant; and

(b) such other information in relation to the Occasion of Tax Non-Compliance as the Authority may reasonable require.

18.3 In the event that the Supplier fails to comply with this Clause 18 and/or does not provide details of proposed mitigating factors which in the reasonable opinion of the Authority are acceptable, then the Authority reserves the right to terminate this Dynamic Purchasing System Agreement for material Default.

## **F. SUPPLIER PERSONNEL AND SUPPLY CHAIN MATTERS**

### **19. SUPPLY CHAIN RIGHTS AND PROTECTION**

#### **19.1 Appointment and Management of Sub-Contractors**

19.1.1 Subject to Clause 19.3 (Performance of Sub-Contractors), the Supplier may sub-contract the Services (or part thereof) to Sub-Contractors, provided that the Supplier shall not add, replace or remove a Key Sub-Contractor except in accordance with this Clause 19 (Supply Chain Rights and Protection). For the avoidance of doubt, the Authority has consented to the engagement of the Key Sub-Contractors listed in the Supplier's SQ Response subject to the results of any financial standing and/or credit rating checks the Authority may conduct from time to time.

19.1.2 Where during the DPS Period the Supplier wishes to add, replace or remove a Key Sub-Contractor, it shall seek the Approval of the Authority by completing and submitting the Key Sub-Contractors Form as set out in Annex 1 of DPS Schedule 6 (Key Sub-Contractors) and shall at the time of requesting such consent, provide the Authority

with the information detailed in Clause 19.1.3. Without prejudice to the scope of this discretion, circumstances in which the Authority may deny its Approval include where the Authority considers that:

- (a) the addition, removal or replacement of a Key Sub-Contractor may prejudice the provision of the Services or may be contrary to the Authority's interests;
- (b) the appointment of a new or proposed replacement Key Sub-Contractor may prejudice the provision of the Services or may be contrary to the Authority's interests;
- (c) the financial standing and/or the credit rating of a Key Sub-Contractor may prejudice the provision of the Services or may be contrary to the Authority's interests;
- (d) adversely impacts on the Supplier's ability to supply the Services under this Dynamic Purchasing System Agreement;
- (e) the new or proposed replacement Key Sub-Contractor is unreliable and/or has not provided reasonable services to its other customers;
- (f) the new or proposed replacement Key Sub-Contractor employs unfit persons; and/or
- (g) the appointment of a new or proposed replacement Key Sub-Contractor would be contrary to any Law.

19.1.3 The Supplier shall provide the Authority with the following information in respect of the proposed new or replacement Key Sub-Contractor:

- (a) the proposed new or replacement Key Sub-Contractor's name, registered office and company registration number;
- (b) the scope/description of any Services to be provided by the proposed new or replacement Key Sub-Contractor;
- (c) where the proposed new or replacement Key Sub-Contractor is an Affiliate of the Supplier, evidence that demonstrates to the reasonable satisfaction of the Authority that the proposed new or replacement Key Sub-Contract has been agreed on "arm's length" terms; and
- (d) the proposed new or replacement Key Sub-Contract's price expressed as a percentage of the total projected DPS Charges over the DPS Period.

19.1.4 The Supplier shall pay any undisputed sums which are due from the Supplier to a Sub-Contractor or Key Sub-Contractor within thirty (30) days from the receipt of a valid invoice;

19.1.5 Notwithstanding any provision of Clauses 21.3 (Confidentiality) and 22 (Publicity and Branding) if the Supplier notifies the Authority that the Supplier has failed to pay an undisputed Sub-Contractor's invoice within thirty (30) days of receipt, or the Authority otherwise discovers the same, the Authority shall be entitled to publish the details of the late payment or non-payment (including on government websites and in the press).

## **19.2 Supply Chain Protection**

19.2.1 The Supplier shall ensure that all Sub-Contracts contain a provision:

- (a) requiring the Supplier to pay any undisputed sums which are due from the Supplier to the Sub-Contractor within a specified period not exceeding thirty (30) days from the receipt of a valid invoice;
- (b) requiring that any invoices submitted by a Sub-Contractor shall be considered and verified by the Supplier in a timely fashion and that undue delay in doing so shall not be sufficient justification for failing to regard an invoice as valid and undisputed;
- (c) conferring a right to the Authority and any Contracting Authority with whom the Supplier has entered a Call Off Agreement to publish the Supplier's compliance with its obligation to pay undisputed invoices within the specified payment period.
- (d) 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; and
- (e) requiring the Sub-Contractor to include in any Sub-Contract which it in turn awards suitable provisions to impose, as between the parties to that Sub-Contract, requirements to the same effect as those required by this Clause 19.2.

#### **19.3 Performance of Sub-Contractors**

19.3.1 Where a Sub-Contractor and/or Key Sub-Contractor or its Affiliates have caused, generated contributed to or otherwise been involved in material adverse publicity relating to or involving the Authority, or otherwise brought the Authority into disrepute by engaging in, enabling or allowing 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 or Key Sub-Contractor's obligations in relation to the Services or otherwise, the Authority shall be entitled to:

- (a) terminate this Dynamic Purchasing System Agreement for material Default; and/or
- (b) communicate such to the HSCN Authority.

#### **19.4 Retention of Legal Obligations**

19.4.1 Notwithstanding the Supplier's right to sub-contract pursuant to this Clause 19, 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.

### **G. INTELLECTUAL PROPERTY AND INFORMATION**

#### **20. INTELLECTUAL PROPERTY RIGHTS**

##### **20.1 Allocation of title to IPR**

20.1.1 Save as granted under this Dynamic Purchasing System Agreement (including but not limited to Clause 20.1.5 below), neither Party shall

acquire any right, title or interest in or to the Intellectual Property Rights of the other Party.

20.1.2 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 20.1.1, 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).

20.1.3 Subject to Clauses 20.1.4, neither Party shall have any right to use any of the other Party's names, logos or trademarks on any of its products or services without the other Party's prior written consent.

20.1.4 Subject to full compliance with the Branding Guidance, the Supplier shall be entitled to use the Authority's logo exclusively in connection with the provision of the Services during the DPS Period and for no other purpose.

20.1.5 The Supplier hereby grants to the Authority, or shall procure the direct grant to the Authority of, a perpetual, worldwide, royalty-free, non-exclusive and irrevocable licence to use (which shall include the right to load, execute, interpret, store, transmit, display, copy (for the purposes of loading, execution, interpretation, storage, transmission or display), modify, adapt, enhance, reverse compile, decode and translate) all IPRs in any materials, documents and / or data solely and exclusively created or generated by the Supplier or otherwise arising pursuant to the Supplier's performance of its obligations hereunder except for any IPR created by the Supplier in respect of a specific Call Off Agreement.

20.1.6 The Authority may sub-license the rights granted pursuant to Clause 20.1.5 provided that:

- (a) the sub-licence is on terms no broader than those granted to the Authority; and
- (b) the Supplier has received a confidentiality undertaking in its favour.

20.1.7 The Authority may assign, novate or otherwise transfer its rights and obligations under the licence granted pursuant to Clause 20.1.5 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.

## **20.2 IPR Indemnity**

20.2.1 The Supplier shall ensure and procure that the availability, provision and use of the Services as permitted under the Call Off Agreement and the performance of the Supplier's responsibilities and obligations hereunder shall not infringe any Intellectual Property Rights of any third party.

20.2.2 The Supplier shall during and after the DPS Period, on written demand indemnify the Authority against all Losses incurred by or awarded against or agreed to be paid by the Authority (whether before

or after the making of the demand pursuant to the indemnity hereunder) arising from an IPR Claim.

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

- (a) procure for the Authority the right to continue using the relevant item which is subject to the IPR 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;
  - (iii) there is no additional cost to the Authority; and
  - (iv) the terms and conditions of this Dynamic Purchasing System Agreement shall apply to the replaced or modified Services.

20.2.4 If the Supplier elects to procure a licence in accordance with Clause 20.2.3(a) or to modify or replace an item pursuant to Clause 20.2.3(b), but this has not avoided or resolved the IPR Claim, then:

- (a) the Authority may terminate this Dynamic Purchasing System Agreement by written notice with immediate effect; and
- (b) without prejudice to the indemnity set out in Clause 20.2.2, the Supplier shall be liable for all reasonable and unavoidable costs of the substitute items and/or services including the additional costs of procuring, implementing and maintaining the substitute items.

20.2.5 The Supplier shall promptly notify the Authority (in writing) of any IPR Claim of which it is aware.

20.2.6 The Authority shall:

- (a) notify the Supplier in writing of any IPR Claim of which it is aware;
- (b) allow (subject to Clause 20.2.7) the Supplier to conduct all negotiations and proceedings and provide the Supplier with such reasonable assistance required by the Supplier, each at the Supplier's cost, regarding the IPR Claim; and
- (c) not, without first consulting with the Supplier, make an admission relating to the IPR Claim.

20.2.7 The Supplier shall consider and defend the IPR Claim diligently using competent counsel and in such a way as not to bring the Authority into disrepute.

## **21. PROVISION AND PROTECTION OF INFORMATION**

### **21.1 Sharing of Information with the HSCN Authority**

21.1.1 The Supplier acknowledges and agrees that all information associated with this DPS that is received by the Authority from, or relating to, the Supplier may be shared by the Authority with the HSCN Authority.

## 21.2 **Provision of Management Information**

21.2.1 The Supplier shall, at no charge to the Authority, submit to the Authority complete and accurate Management Information in accordance with the provisions of DPS Schedule 8 (Management Information).

21.2.2 The Supplier grants the Authority a non-exclusive, transferable, perpetual, irrevocable, royalty free licence to:

- (a) use and to share with any Other Contracting Body, the HSCN Authority and Relevant Person; and/or
- (b) publish (subject to any information that is exempt from disclosure in accordance with the provisions of FOIA being redacted),

any Management Information supplied to the Authority for the Authority's normal operational activities including but not limited to administering this Dynamic Purchasing System Agreement and/or all Call Off Agreements, monitoring public sector expenditure, identifying savings or potential savings and planning future procurement activity.

21.2.3 The Authority shall in its absolute and sole discretion determine whether any Management Information is exempt from disclosure in accordance with the provisions of the FOIA.

21.2.4 The Authority may consult with the Supplier to help with its decision regarding any exemptions under Clause 21.2.3 but, for the purpose of this Dynamic Purchasing System Agreement, the Authority shall have the final decision in its absolute and sole discretion.

## 21.3 **Confidentiality**

21.3.1 For the purposes of this Clause 21.3, the term “**Disclosing Party**” shall mean a Party which discloses or makes available directly or indirectly its Confidential Information and “**Recipient**” shall mean the Party which receives or obtains directly or indirectly Confidential Information.

21.3.2 Except to the extent set out in this Clause 21.3 or where disclosure is expressly permitted elsewhere in this Dynamic Purchasing System Agreement, the Recipient shall:

- (a) treat the Disclosing Party's Confidential Information as confidential and keep it in secure custody (which is appropriate depending upon the form in which such materials are stored and the nature of the Confidential Information contained in those materials); and
- (b) not disclose the Disclosing Party's Confidential Information to any other person except as expressly set out in this Dynamic Purchasing System Agreement or without obtaining the Disclosing Party's prior written consent;

- (c) not use or exploit the Disclosing Party's Confidential Information in any way except for the purposes anticipated under this Dynamic Purchasing System Agreement; and
- (d) immediately notify the Disclosing Party if it suspects or becomes aware of any unauthorised access, copying, use or disclosure in any form of any of the Disclosing Party's Confidential Information.

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

- (a) the Recipient is required to disclose the Confidential Information by Law, provided that Clause 21.5 (Freedom of Information) shall apply to disclosures required under the FOIA or the EIRs;
- (b) the need for such disclosure arises out of or in connection with:
  - (i) any legal challenge or potential legal challenge against the Authority arising out of or in connection with this Dynamic Purchasing System Agreement;
  - (ii) the examination and certification of the Authority's accounts (provided that the disclosure is made on a confidential basis) or for any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority is making use of its resources; or
  - (iii) the conduct of a Central Government Body review in respect of this Dynamic Purchasing System Agreement; or
  - (iv) the HSCN Compliance Document Set ;
- (c) the Recipient has reasonable grounds to believe that the Disclosing Party is involved in activity that may constitute a criminal offence under the Bribery Act 2010 and the disclosure is being made to the Serious Fraud Office;
- (d) such information was in the possession of the Disclosing Party without obligation of confidentiality prior to its disclosure by the information owner;
- (e) such information was obtained from a third party without obligation of confidentiality;
- (f) such information was already in the public domain at the time of disclosure otherwise than by a breach of this Dynamic Purchasing System Agreement or breach of a duty of confidentiality; and
- (g) the information is independently developed without access to the Disclosing Party's Confidential Information.

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

21.3.5 Subject to Clauses 21.3.2 and 21.3.3, the Supplier may only disclose the Confidential Information of the Authority on a confidential basis to:

- (a) Supplier Personnel who are directly involved in the provision of the Services and need to know the Confidential Information to enable the performance of the Supplier's obligations under this Dynamic Purchasing System Agreement; and
- (b) its professional advisers for the purposes of obtaining advice in relation to this Dynamic Purchasing System Agreement.

21.3.6 Where the Supplier discloses the Confidential Information of the Authority pursuant to Clause 21.3.5, it shall remain responsible at all times for compliance with the confidentiality obligations set out in this Dynamic Purchasing System Agreement by the persons to whom disclosure has been made.

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

- (a) to any Central Government Body or Other Contracting Body on the basis that the information may only be further disclosed to Central Government Bodies or Other Contracting Bodies;
- (b) to the British Parliament and any committees of the British Parliament or if required by any British Parliamentary reporting requirement;
- (c) to the extent that the Authority (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;
- (d) on a confidential basis to a professional adviser, consultant, supplier or other person engaged by any of the entities described in Clause 21.3.7(a) (including any benchmarking organisation) for any purpose relating to or connected with this Dynamic Purchasing System Agreement;
- (e) on a confidential basis for the purpose of the exercise of its rights under this Dynamic Purchasing System Agreement;
- (f) to the HSCN Authority;
- (g) to a proposed transferee, assignee or novatee of, or successor in title to the Authority; and
- (h) for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on the Authority under this Clause 21.3.7.

21.3.8 For the avoidance of doubt, the Confidential Information that the Authority may disclose under Clause 21.3.7 shall include information relating to Call Off Agreements, including service levels, pricing information (which includes information on prices tendered pursuant to any competition conducted in accordance with DPS Schedule 4 (Call for Competition Procedure), even where such a competition does not result in the award of a Call Off Agreement), and the terms of any Call Off Agreement may be shared with any Central Government Body or Other Contracting Body from time to time.

21.3.9 Nothing in this Clause 21.3 shall prevent a Recipient from using any techniques, ideas or Know-How which the Recipient has gained during the performance of this Dynamic Purchasing System Agreement in the course of its normal business to the extent that this use does not result in a disclosure of the Disclosing Party's Confidential Information or an infringement of Intellectual Property Rights.

21.3.10 In the event that the Supplier fails to comply with Clauses 21.3.2 to 21.3.5, the Authority reserves the right to terminate this Dynamic Purchasing System Agreement for material Default.

#### **21.4 Transparency**

21.4.1 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 Dynamic Purchasing System Agreement is not Confidential Information. The Authority shall determine whether any of the content of this Dynamic Purchasing System Agreement is exempt from disclosure in accordance with the provisions of the FOIA. The Authority may consult with the Supplier to inform its decision regarding any redactions but shall have the final decision in its absolute discretion.

21.4.2 Notwithstanding any other provision of this Dynamic Purchasing System Agreement, the Supplier hereby gives its consent for the Authority to publish this Dynamic Purchasing System Agreement in its entirety (but with any information which is exempt from disclosure in accordance with the provisions of the FOIA redacted), including any changes to this Dynamic Purchasing System Agreement agreed from time to time.

21.4.3 The Supplier shall assist and cooperate with the Authority to enable the Authority to publish this Dynamic Purchasing System Agreement.

#### **21.5 Freedom of Information**

21.5.1 The Supplier acknowledges that the Authority is subject to the requirements of the FOIA and the EIRs. The Supplier shall:

- (a) provide all necessary assistance and cooperation as reasonably requested by the Authority to enable the Authority to comply with its Information disclosure obligations under the FOIA and EIRs;
- (b) transfer to the Authority all Requests for Information relating to this Dynamic Purchasing System Agreement that it receives as soon as practicable and in any event within two (2) Working Days of receipt;
- (c) provide the Authority with a copy of all Information belonging to the Authority requested in the Request for Information which is in the Supplier's possession or control in the form that the Authority requires within five (5) Working Days (or such other period as the Authority may reasonably specify) of the Authority's request for such Information; and
- (d) not respond directly to a Request for Information unless authorised in writing to do so by the Authority.

21.5.2 The Supplier acknowledges that the Authority may be required under the FOIA and EIRs to disclose Information (including Commercially Sensitive Information) without consulting or obtaining consent from the Supplier. The Authority shall take reasonable steps to notify the Supplier of a Request for Information (in accordance with the Secretary of State's Section 45 Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the FOIA) to the extent that it is permissible and reasonably practical for it to do so but (notwithstanding any other provision in this Dynamic Purchasing System Agreement) for the purpose of this Dynamic Purchasing System Agreement, the Authority shall be responsible for determining in its absolute discretion whether any Commercially Sensitive Information and/or any other information is exempt from disclosure in accordance with the FOIA and/or the EIRs.

## **21.6 Protection of Personal Data**

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

21.6.2 The Supplier shall:

- (a) prior to the Processing of any Personal Data under this DPS Agreement and where requested by the Authority provide a Privacy Impact Assessment ("PIA") to the Authority which will include (but not be limited to);
  - (i) a systematic description of the envisaged processing operations and the purpose of the processing;
  - (ii) an assessment of the necessity and proportionality on the processing operations in relation to the Services;
  - (iii) an assessment of the risks to the rights and freedoms of Data Subjects; and
  - (iv) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal Data;
- (b) Process the Personal Data only in accordance with instructions from the Authority to perform its obligations under this DPS Agreement, except where Processing is and as required by Law or any regulatory body; in which case the Supplier shall inform the Authority of the relevant requirement prior to Processing, unless prevented from doing so by law;
- (c) ensure that at all times it has in place appropriate technical and organisational measures to guard against unauthorised, unlawful processing of the Personal Data and/or accidental loss, destruction or damage to the Personal Data under the DPS Agreement, including all measures required by the Data Protection Laws, and in particular Article 32 of the GDPR;
- (d) not disclose or transfer the Personal Data to or allow the processing of Personal Data by any Sub-Contractor, Affiliate and/or third party without the prior written consent of the Authority, and in the case of any Sub-Contractor or other third party whom

the Supplier wishes to engage for the Processing of Personal Data under this DPS Agreement ("**Sub-processor**") such consent to be conditional upon:

- (i) the Supplier entering into a contract with the Sub-processor which includes terms which are substantially the same as those set out in this clause;
  - (ii) the Supplier remaining fully liable to the Authority for any failure by the Sub-processor to fulfil its obligations in relation to the Processing of Personal Data; and
  - (iii) the use of the Sub-processor being otherwise in accordance with Clause 21.6.3;
- (e) take all reasonable steps to ensure the reliability and integrity of any Supplier Personnel who have access to the Personal Data and ensure that the Supplier Personnel:
- (i) are aware of and comply with the Supplier's duties under this Clause 21.6 and Clause 21.3 (Confidentiality);
  - (ii) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by the Authority or as otherwise permitted by this DPS Agreement; and
  - (iii) have undergone adequate training in the use, care, protection and handling of Personal Data;
- (f) notify the Authority within 48 hours if it :
- (i) receives from a Data Subject (or third party on their behalf):
    - (A) a Data Subject Access Request (or purported Data Subject Access Request);
    - (B) a request to rectify, block or erase any Personal Data; or
    - (C) any other request, complaint or communication relating to the Authority's obligations under the Data Protection Laws;
  - (ii) receives any communication from the Information Commissioner or any other regulatory body in connection with Personal Data; or
  - (iii) 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
  - (iv) considers that any instructions from the Authority infringe the Data Protection Laws;
  - (v) receives any regulator correspondence or any other communication from the Information Commissioner or any other regulatory authority in connection with Personal Data processed under this agreement; or

- (vi) is required by Law to commit an act or omission that would constitute a breach of this Clause 21.6;
- (g) provide the Authority with full cooperation and assistance (within the timescales reasonably required by the Authority) in relation to either Party's obligations under the Data Protection Laws or any complaint, communication or request made as referred to in Clause 21.6.2(e), including by promptly providing:
  - (i) the Authority with full details and copies of the complaint, communication or request;
  - (ii) where applicable, such assistance as is reasonably requested by the Authority to enable the Authority to comply with any request from a Data Subject to exercise any right under the Data Protection Laws (including but not limited to a Data Subject Access Request) within the relevant timescales set out in the Data Protection Laws;
  - (iii) the Authority, on request by the Authority, with any Personal Data it holds in relation to a Data Subject; and
  - (iv) assistance following a Data Loss Event as required by the Authority including with respect to the conduct of a data protection impact assessment and the Authority's consultation with the Information Commissioner's Office;
- (h) if requested by the Authority, provide a written description of the measures that it has taken and technical and organisational security measures in place, for the purpose of compliance with its obligations pursuant to this Clause 21.6 and provide to the Authority copies of all documentation relevant to such compliance including, protocols, procedures, guidance, training and manuals.
- (i) keep a record of all categories of processing activities carried out on behalf of the Authority, containing:
  - (i) the name and contact details of the Supplier and each Sub-processor, and where applicable, the Processor and each Sub-processor's data protection officer;
  - (ii) the categories of processing carried out on behalf of the Authority;
  - (iii) where applicable, any transfers of Personal Data to Restricted Countries or an international organisation; and
  - (iv) the written description of security measures referred to in Clause 21.6.2 (h).

21.6.3 The Supplier shall not Process or otherwise transfer any Personal Data in or to any Restricted Country. If, after the DPS Agreement Commencement Date, the Supplier or any Sub-Contractor wishes to Process and/or transfer any Personal Data in or to any Restricted Country, the following provisions shall apply:

- (a) the Supplier shall submit a Variation request to the Authority which, if the Authority agrees, shall be dealt with in accordance with the Variation Procedure;

- (b) the Supplier shall set out in its Variation request and/or Impact Assessment details of the following:
- (i) the Personal Data which will be transferred to and/or Processed in any Restricted Country;
  - (ii) the Restricted Country or Countries which the Personal Data will be transferred to and/or Processed in; and
  - (iii) any Sub-Contractors or other third parties who will be Processing and/or receiving Personal Data in Restricted Countries;
  - (iv) how the Supplier will ensure an adequate level of protection and adequate safeguards in respect of the Personal Data that will be Processed in and/or transferred to Restricted Countries so as to ensure the Authority's compliance with the Data Protection Laws;
- (c) in providing and evaluating the Variation request and Impact Assessment, the Parties shall ensure that they have regard to and comply with the Authority, Central Government Bodies and Information Commissioner Office policies, procedures, guidance and codes of practice on, and any approvals processes in connection with, the Processing in and/or transfers of Personal Data to any Restricted Country; and
- (d) the Supplier shall comply with such other instructions and shall carry out such other actions as the Authority may notify in writing, including:
- (i) incorporating standard and/or model clauses (which are approved by the European Commission as offering adequate safeguards under the Data Protection Laws) into this DPS Agreement or a separate data processing agreement between the Parties; and
  - (ii) procuring that any Sub-Contractor or other third party who will be Processing and/or receiving or accessing the Personal Data in any Restricted Country either enters into:
    - (A) a direct data processing agreement with the Authority on such terms as may be required by the Authority; or
    - (B) a data processing agreement with the Supplier on terms which are equivalent to those agreed between the Authority and the Sub-Contractor relating to the relevant Personal Data transfer,

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

- 21.6.4 The Supplier shall assist the Authority to comply with any obligations under the Data Protection Laws and shall not perform its obligations under this DPS Agreement in such a way as to cause the Authority to breach any of the Authority's obligations under the Data Protection Laws to the extent the Supplier is aware, or ought reasonably to have been aware, that the same would be a breach of such obligations.
- 21.6.5 The Supplier shall (and shall procure that all Supplier Personnel) comply with any notification requirements under Data Protection Laws and both Parties will duly observe all their obligations under Data Protection Laws which arise in connection with the agreement.
- 21.6.6 The Supplier will, in conjunction with the Authority, in its own right and in respect of the Services, make all necessary preparations to ensure it will be compliant with the provisions of the GDPR upon its implementation.
- 21.6.7 The Supplier will provide all reasonable assistance required by the Customer to enable the Customer to comply with any obligations arising under any relevant law implementing or otherwise giving effect to the NIS Directive, including by making any changes to the technical and organisational security measures implemented in accordance with Clause 21.6.2 21.6.2(c).
- 21.6.8 The Supplier will provide the Authority with the contact details of its data protection officer or other designated individual with responsibility for data protection and privacy to act as the point of contact for the purpose of observing its obligations under Clause 30.7.
- 21.6.9 The Supplier will notify the Authority immediately, and in any event no later than twelve (12) hours, after becoming aware of a Data Loss Event, in particular the Supplier will;
- (a) when notifying the Authority of a Data Loss Event, describe the nature of the event including the categories and approximate number of Data Subjects concerned and the categories and approximate number of Personal Data records concerned;
  - (b) cooperate fully with any Authority investigation into the Data Loss Event including but not limited to the causes and effects (actual or potential);
  - (c) provide immediate access to the Supplier's premises and systems for the purposes of any Authority investigation under this DPS Agreement;
  - (d) take all necessary actions to remedy the causes of the Data Loss Event and to ensure the protection of Personal Data from any further loss;
  - (e) not make any public statement of any kind without the prior approval of the Authority;
  - (f) where appropriate, provide all assistance necessary to enable the Authority to fulfil its obligations to notify the Information Commissioner within seventy two (72) hours after becoming aware of the Data Loss Event.

21.6.10 The Supplier shall indemnify the Authority on a continuing basis against any and all Losses incurred by the Authority arising from the Supplier's Default under this Clause 21.6 and/or any failure by the Supplier or any Sub-Contractor to comply with their respective obligations under Data Protection Laws.

21.6.11 Nothing in this Clause 21.6 shall be construed as requiring the Supplier or any relevant Sub-Contractor to be in breach of any Data Protection Laws.

21.6.12 Immediately upon the termination or expiry of this Agreement (or any part thereof) the Supplier shall cease Processing the Personal Data (or any part thereof, as applicable) (except as necessary to comply with the terms of any Exit Plan or an obligation under any Law), and as soon as reasonably practicable thereafter, at the Customer's option (to be exercised without undue delay), either (i) securely return to the Customer or securely transfer to a new supplier; or (ii) securely wipe from its systems (so that the Personal Data cannot reasonably be recovered or reconstructed), the Personal Data and any copies of it or the information it contains.

## **22. PUBLICITY AND BRANDING**

22.1 The Supplier shall not:

22.1.1 make any press announcements or publicise this Dynamic Purchasing System Agreement in any way; or

22.1.2 use the Authority's name or brand in any promotion or marketing or announcement of Orders,

without Approval (the decision of the Authority to Approve or not shall not be unreasonably withheld or delayed).

22.2 Each Party acknowledges to the other that no element of this Dynamic Purchasing System Agreement either expressly or by implication constitutes an approval and/or endorsement of any products or services of the other Party (including the Services) and each Party agrees not to conduct itself in such a way as to imply or express any such approval and/or endorsement.

22.3 The Authority shall be entitled to publicise this Dynamic Purchasing System Agreement in accordance with any legal obligation upon the Authority, including any examination of this Dynamic Purchasing System Agreement by the National Audit Office pursuant to the National Audit Act 1983 or otherwise.

22.4 The Supplier shall not cause, generate, contribute to or otherwise be involved in material adverse publicity relating to or involving the Authority or any Other Contracting Body, or otherwise bring the Authority or any Other Contracting Body into disrepute by engaging in, enabling or allowing any act or omission which is reasonably likely to diminish the trust that the public places in the Authority or any Other Contracting Body, regardless of whether or not such act or omission is related to the Supplier's obligations in relation to the Services or otherwise.

## **23. MARKETING**

- 23.1 The Supplier shall undertake marketing of this Dynamic Purchasing System Agreement and the Services on behalf of the Authority to Other Contracting Bodies in accordance with the provisions of this Clause 23.
- 23.2 The Supplier shall obtain the Authority's Approval prior to publishing any content in relation to this Dynamic Purchasing System Agreement using any media, including on any electronic medium, and the Supplier will ensure that such content is regularly maintained and updated. In the event that the Supplier fails to maintain or update the content, the Authority may give the Supplier notice to rectify the failure and if the failure is not rectified to the reasonable satisfaction of the Authority within one (1) Month of receipt of such notice, the Authority shall have the right to remove such content itself or require that the Supplier immediately arranges the removal of such content.
- 23.3 The Authority will periodically update and revise marketing materials. The Supplier shall supply current information for inclusion in such marketing materials when required by the Authority.
- 23.4 Such information shall be provided in the form of a completed template, supplied by the Authority together with the instruction for completion and the date for its return.
- 23.5 Failure to comply with the provisions of paragraphs 23.3 and 23.4 may result in the Supplier's exclusion from the use of such marketing materials.
- 23.6 Any marketing materials in relation to this Dynamic Purchasing System Agreement that the Supplier produces must comply in all respects with the Branding Guidance. The Supplier will periodically update and revise such marketing materials.
- 23.7 The Supplier shall be responsible for keeping under review the content of any information which appears on the Supplier's website and which relates to this Dynamic Purchasing System Agreement and ensuring that such information is kept up to date at all times.

## **H. LIABILITY AND INSURANCE**

### **24. LIABILITY**

- 24.1 Neither Party excludes or limits its liability for:
- 24.1.1 death or personal injury caused by its negligence, or that of its employees, agents or Sub-Contractors (as applicable);
  - 24.1.2 bribery or Fraud by it or its employees; or
  - 24.1.3 any liability to the extent it cannot be excluded or limited by Law.
- 24.2 The Supplier does not exclude or limit its liability in respect of the indemnity in Clause 20.2 (IPR Indemnity) and in each case whether before or after the making of a demand pursuant to the indemnity therein.
- 24.3 Subject to Clause 24.1, each Party's total aggregate liability in respect of all Losses incurred under or in connection with this Dynamic Purchasing System Agreement as a result of its defaults shall in no event exceed:

- 24.3.1 in relation to any defaults occurring from the DPS Commencement Date to the end of the first Contract Year, one hundred thousand pounds (£100,000);
- 24.3.2 in relation to any defaults occurring in each subsequent Contract Year following the end of the first Contract Year, that commences during the remainder of the DPS Period, the higher of the sum of one hundred thousand pounds (£100,000) in each such Contract Year and a sum equal to one hundred and twenty five percent (125%) of the Management Levy payable by the Supplier under this Dynamic Purchasing System Agreement in the previous Contract Year; and
- 24.3.3 in relation to any defaults occurring in each Contract Year that commences after the end of the DPS Period, the higher of one hundred thousand pounds (£100,000) in each such Contract Year and a sum equal to one hundred and twenty five percent (125%) of the Management Levy payable by the Supplier under this Dynamic Purchasing System Agreement in the last Contract Year commencing during the DPS Period.
- 24.4 Subject to Clause 24.1, neither Party shall be liable to the other Party for any:
- 24.4.1 indirect, special or consequential Loss;
- 24.4.2 loss of profits, turnover, savings, business opportunities or damage to goodwill (in each case whether direct or indirect).
- 24.5 Subject to Clause 24.2, and notwithstanding Clause 24.4, 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:
- 24.5.1 any Management Levy which are due and payable to the Authority;
- 24.5.2 any reasonable 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;
- 24.5.3 any wasted expenditure or charges;
- 24.5.4 the reasonable additional cost of procuring Replacement Services for the remainder of the DPS Period, which shall include any incremental costs associated with such Replacement Services above those which would have been payable under this Dynamic Purchasing System Agreement;
- 24.5.5 any compensation or interest paid to a third party by the Authority;
- 24.5.6 any fine, penalty or costs incurred by the Authority pursuant to Law.
- 24.6 Each Party shall use all reasonable endeavours to mitigate any loss or damage suffered arising out of or in connection with this Dynamic Purchasing System Agreement.
- 24.7 For the avoidance of doubt, the Parties acknowledge and agree that this Clause 24 shall not limit the Supplier's liability to a Contracting Body under any Call Off Agreement and the Supplier's liability under a Call Off Agreement shall be as provided for in that Call Off Agreement only.

## **25. INSURANCE**

- 25.1 The Supplier shall effect and maintain insurances in relation to the performance of its obligations under this Dynamic Purchasing System Agreement or any Call Off Agreement in accordance with DPS Schedule 11 (Insurance Requirements).
- 25.2 The terms of any insurance or the amount of cover shall not relieve the Contractor of any liabilities arising under this Dynamic Purchasing System Agreement or any Call Off Agreements.

## **I. REMEDIES**

### **26. AUTHORITY REMEDIES FOR FAILURE TO ACHIEVE KPI TARGETS**

- 26.1 Without prejudice to any other rights or remedies arising under this Dynamic Purchasing System Agreement, including under Clause 27.2 (Termination on Material Default), if the Supplier fails to achieve the same KPI Target on two or more occasions within any twelve (12) Month rolling period, the Supplier acknowledges and agrees that the Authority shall have the right to exercise (in its absolute and sole discretion) all or any of the following remedial actions:
- 26.1.1 The Authority shall be entitled to require the Supplier, and the Supplier agrees to prepare and provide to the Authority, an Improvement Plan within ten (10) Working Days of a written request by the Authority for such Improvement Plan. Such Improvement Plan shall be subject to Approval and the Supplier will be required to implement any Approved Improvement Plan, as soon as reasonably practicable.
- 26.1.2 The Authority shall be entitled to require the Supplier, and the Supplier agrees to attend, within a reasonable time one (1) or more meetings at the request of the Authority in order to resolve the issues raised by the Authority in its notice to the Supplier requesting such meetings.
- 26.1.3 The Authority shall be entitled to serve an Improvement Notice on the Supplier and the Supplier shall implement such requirements for improvement as set out in the Improvement Notice.
- 26.1.4 In the event that the Authority has, in its absolute and sole discretion, invoked one or more of the remedies set out above and the Supplier either:
- (a) fails to implement such requirements for improvement as set out in the Improvement Notice; and/or
  - (b) fails to implement an Improvement Plan Approved by the Authority;
- then (without prejudice to any other rights and remedies of termination provided for in this Dynamic Purchasing System Agreement), the Authority shall be entitled to terminate this Dynamic Purchasing System Agreement for material Default.

## **J. TERMINATION AND SUSPENSION**

## **27. AUTHORITY TERMINATION RIGHTS**

### **27.1 Termination in Relation To Guarantee**

27.1.1 Where the Supplier has procured a DPS Guarantee pursuant to Clause 8.1 (Guarantee), the Authority may terminate this Dynamic Purchasing System Agreement by issuing a Termination Notice to the Supplier where:

- (a) the DPS Guarantor withdraws the DPS Guarantee for any reason whatsoever;
- (b) the DPS Guarantor is in breach or anticipatory breach of the DPS Guarantee;
- (c) an Insolvency Event occurs in respect of the DPS Guarantor;
- (d) the DPS Guarantee becomes invalid or unenforceable for any reason whatsoever; or
- (e) the Supplier fails to provide the documentation required by Clause 8.1 by the date so specified by the Authority;

and in each case the DPS Guarantee (as applicable) is not replaced by an alternative guarantee agreement acceptable to the Authority.

### **27.2 Termination on Material Default**

27.2.1 The Authority may terminate this Dynamic Purchasing System Agreement for material Default by issuing a Termination Notice to the Supplier where:

- (a) the Supplier has their HSCN Compliance rejected or revoked by the HSCN Authority;
- (b) the Supplier fails to provide a satisfactory ESPD pursuant to paragraph 2.1.1(k)(ii) of DPS Schedule 4
- (c) the Supplier fails to accept a Call Off Agreement pursuant to paragraph 6.1.3 of DPS Schedule 4 (Call for Competition Procedure);
- (d) a Contracting Body terminates a Call Off Agreement for the Supplier's breach of that Call Off Agreement; and/or
- (e) the Supplier by its act or omission will have committed a material Default as described anywhere in this Dynamic Purchasing System Agreement.

### **27.3 Termination on Failure to Agree a Variation**

27.3.1 In the event that the Supplier is unable to agree to a Variation the Authority may terminate this Dynamic Purchasing System Agreement by issuing a Termination Notice to the Supplier.

### **27.4 Termination in Relation to Financial Standing**

27.4.1 The Authority may terminate this Dynamic Purchasing System Agreement by issuing a Termination Notice to the Supplier where in the reasonable opinion of the Authority there is a material detrimental change in the financial standing and/or the credit rating of the Supplier which:

- (a) adversely impacts on the Supplier's ability to supply the Services under this Dynamic Purchasing System Agreement; or
- (b) could reasonably be expected to have an adverse impact on the Suppliers ability to supply the Services under this Dynamic Purchasing System Agreement.

27.4.2 Any action under 27.4.1 will be aligned with the economic and financial standing tested in the Selection Questionnaire, such that the change in the Supplier's financial standing means the Supplier would no longer be capable of demonstrating compliance with the Selection Questionnaire.

## **27.5 Termination on Insolvency**

27.5.1 The Authority may terminate this Dynamic Purchasing System Agreement by issuing a Termination Notice to the Supplier where an Insolvency Event affecting the Supplier occurs.

## **27.6 Termination on Change of Control**

27.6.1 The Supplier shall notify the Authority immediately in writing and as soon as the Supplier is aware (or ought reasonably to be aware) that it is anticipating, undergoing, undergoes or has undergone a Change of Control and provided such notification does not contravene any Law.

27.6.2 The Supplier shall ensure that any notification made pursuant to Clause 27.6.1 shall set out full details of the Change of Control including the circumstances suggesting and/or explaining the Change of Control.

27.6.3 The Authority may terminate this Dynamic Purchasing System Agreement under Clause 27.6 by issuing a Termination Notice to the Supplier within six (6) Months of:

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

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

27.6.4 Where the Authority is notified or becomes aware that the Supplier is anticipating, undergoing, undergoes or has undergone a Change of Control, the Authority will not unreasonably withhold Approval.

## **27.7 Termination on Unresolved Dispute**

27.7.1 The Authority may terminate this Dynamic Purchasing System Agreement by issuing a Termination Notice to the Supplier in the event of an Unresolved Dispute.

## **27.8 Termination for Breach of Regulations**

27.8.1 The Authority may terminate this Dynamic Purchasing System Agreement by issuing a Termination Notice to the Supplier on the

occurrence of any of the statutory provisos contained in Regulation 73 (1) (a) to (c).

## **27.9 Termination Without Cause**

27.9.1 The Authority shall have the right to terminate this Dynamic Purchasing System Agreement at any time by giving at least three (3) Months written notice to the Supplier.

## **28. SUSPENSION OF SUPPLIER'S APPOINTMENT**

28.1 If the Authority is entitled to terminate this Dynamic Purchasing System Agreement pursuant to Clause 27 (Authority Termination Rights), the Authority may instead elect in its sole discretion to suspend the Supplier's ability to accept Orders under this Dynamic Purchasing System Agreement by giving notice in writing to the Supplier, and the Supplier agrees that it shall not be entitled to enter into any new Call Off Agreement during the period specified in the Authority's notice.

28.2 Any suspension under Clause 28.1 shall be without prejudice to any right of termination which has already accrued, or subsequently accrues, to the Authority.

28.3 The Parties acknowledge that suspension shall not affect the Supplier's obligation to perform any existing Call Off Agreements concluded prior to the suspension notice.

28.4 If the Authority provides notice to the Supplier in accordance with this Clause 28, the Supplier's appointment under this Dynamic Purchasing System Agreement shall be suspended for the period set out in the notice or such other period notified to the Supplier by the Authority in writing from time to time.

28.5 For the avoidance of doubt, no period of suspension under this Clause 28 shall result in an extension of the DPS Period.

## **29. CONSEQUENCES OF EXPIRY OR TERMINATION**

29.1 Notwithstanding the service of a notice to terminate this Dynamic Purchasing System Agreement, the Supplier shall continue to fulfil its obligations under this Dynamic Purchasing System Agreement until the date of expiry or termination of this Dynamic Purchasing System Agreement or such other date as required under this Clause 29.

29.2 Termination or expiry of this Dynamic Purchasing System Agreement shall not cause any Call Off Agreements to terminate automatically. For the avoidance of doubt, all Call Off Agreements shall remain in force unless and until they are terminated or expire in accordance with the provisions of the Call Off Agreement and the Supplier shall continue to pay any Management Levy due to the Authority in relation to such Call Off Agreements, notwithstanding the termination or expiry of this Dynamic Purchasing System Agreement.

29.3 If the Authority terminates this Dynamic Purchasing System Agreement under Clause 27.2 (Termination on Material Default) and then makes other arrangements for the supply of the Services to Contracting Bodies, the Supplier shall indemnify the Authority in full upon demand for the cost of procuring, implementing and operating any alternative or Replacement Services to the Services, no further payments shall be payable by the Authority until the Authority has established and recovered from the Supplier the full amount of such cost.

- 29.4 Within thirty (30) Working Days of the date of termination or expiry of this Dynamic Purchasing System Agreement, the Supplier shall return to the Authority any and all of the Authority's Confidential Information in the Supplier's possession, power or control, either in its then current format or in a format nominated by the Authority, and any other information and all copies thereof owned by the Authority, save that it may keep one copy of any such data or information to the extent reasonably necessary to comply with its obligations under this Dynamic Purchasing System Agreement or under any Law, for a period of up to twelve (12) Months (or such other period as Approved by the Authority and is reasonably necessary for such compliance).
- 29.5 Termination or expiry of this Dynamic Purchasing System Agreement shall be without prejudice to any rights, remedies or obligations of either Party accrued under this Dynamic Purchasing System Agreement prior to termination or expiry.
- 29.6 Termination or expiry of this Dynamic Purchasing System Agreement shall be without prejudice to the survival of any provision of this Dynamic Purchasing System Agreement which expressly (or by implication) is to be performed or observed notwithstanding termination or expiry of this Dynamic Purchasing System Agreement, including the provisions of:
- 29.6.1 Clauses 1 (Definitions and Interpretation), 7 (Representations and Warranties), 11 (Dynamic Purchasing System Agreement Performance), 15 (Records, Audit Access and Open Book Data), 17 (Management Levy), 20 (Intellectual Property Rights), 21.1 (Provision of Management Information), 21.3 (Confidentiality), 21.4 (Transparency), 21.5 (Freedom of Information), 21.6 (Protection of Personal Data), 24 (Liability), 25 (Insurance), 29 (Consequences of Expiry or Termination), 30 (Compliance), 32 (Waiver and Cumulative Remedies), 34 (Prevention of Fraud and Bribery), 35 (Severance), 36 (Entire Agreement), 37 (Third Party Rights), 38 (Notices), 39 (Complaints Handling and Resolution), 40 (Dispute Resolution) and 42 (Governing Law and Jurisdiction); and
- 29.6.2 DPS Schedules 2 (Services and Key Performance Indicators), 6 (Key Sub-Contractors), 7 (DPS Management), 8 (Management Information), 9 (Annual Self Audit Certificate), 10 (Template Guarantee), and 11 (Insurance Requirements).

## **K. MISCELLANEOUS AND GOVERNING LAW**

### **30. COMPLIANCE**

#### **30.1 Compliance with Law**

- 30.1.1 The Parties shall comply with all applicable Law in connection with the performance of this Dynamic Purchasing System Agreement.
- 30.1.2 In the event that the Supplier or the Supplier Personnel fails to comply with Clause 30.1.1, the Authority shall be entitled to terminate this Dynamic Purchasing System Agreement for material Default.

#### **30.2 Equality and Diversity**

- 30.2.1 The Supplier shall:

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

### 30.3 **Official Secrets Act and Finance Act**

30.3.1 The Supplier shall comply with the provisions of:

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

## 31. **ASSIGNMENT AND NOVATION**

31.1 The Supplier shall not assign, novate, or otherwise dispose of or create any trust in relation to any or all of its rights, obligations or liabilities under this Dynamic Purchasing System Agreement or any part of it without Approval.

31.2 The Authority may assign, novate or otherwise dispose of any or all of its rights, liabilities and obligations under this Dynamic Purchasing System Agreement or any part thereof to:

31.2.1 any Other Contracting Body; or

31.2.2 any Central Government Body or other body 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

31.2.3 any private sector body which substantially performs the functions of 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 31.2.

31.3 A change in the legal status of the Authority such that it ceases to be a Contracting Body shall not, subject to Clause 31.4 affect the validity of this Dynamic Purchasing System Agreement and this Dynamic Purchasing System Agreement shall be binding on any successor body to the Authority.

31.4 If the Authority assigns, novates or otherwise disposes of any of its rights, obligations or liabilities under this Dynamic Purchasing System Agreement to a body which is not a Contracting Body or if a body which is not a Contracting Body succeeds the Authority (both "**Transferee**" in the rest of this Clause) the right of termination of the Authority in Clause 27.5 (Termination on Insolvency) shall be

available to the Supplier in the event of the insolvency of the Transferee (as if the references to Supplier in Clause 27.5 (Termination on Insolvency)) and to Supplier or DPS Guarantor in the definition of Insolvency Event were references to the Transferee.

## **32. WAIVER AND CUMULATIVE REMEDIES**

32.1 The rights and remedies under this Dynamic Purchasing System Agreement may be waived only by notice in accordance with Clause 38 (Notices) and in a manner that expressly states that a waiver is intended. A failure or delay by a Party in ascertaining or exercising a right or remedy provided under this Dynamic Purchasing System Agreement or by Law shall not constitute a waiver of that right or remedy, nor shall it prevent or restrict the further exercise thereof.

32.2 Unless otherwise provided in this Dynamic Purchasing System Agreement, rights and remedies under this Dynamic Purchasing System Agreement are cumulative and do not exclude any rights or remedies provided by Law, in equity or otherwise.

## **33. RELATIONSHIP OF THE PARTIES**

33.1 Except as expressly provided otherwise in this Dynamic Purchasing System Agreement, no element of this Dynamic Purchasing System Agreement, nor any actions taken by the Parties pursuant to this Dynamic Purchasing System Agreement, shall create a partnership, joint venture or relationship of employer and employee or principal and agent between the Parties, or authorise either Party to make representations or enter into any commitments for or on behalf of any other Party.

## **34. PREVENTION OF FRAUD AND BRIBERY**

34.1 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 DPS Commencement Date:

34.1.1 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

34.1.2 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.

34.2 The Supplier shall not during the DPS Period:

34.2.1 commit a Prohibited Act; and/or

34.2.2 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.

34.3 The Supplier shall during the DPS Period:

34.3.1 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;
- 34.3.2 keep appropriate records of its compliance with its obligations under Clause 34.3.1 and make such records available to the Authority on request;
- 34.3.3 if so required by the Authority, within twenty (20) Working Days of the DPS Commencement Date, and annually thereafter, certify in writing to the Authority, the compliance with this Clause 34.3 of all persons associated with the Supplier or its Sub-Contractors who are responsible for supplying the Services in connection with this Dynamic Purchasing System Agreement. The Supplier shall provide such supporting evidence of compliance as the Authority may reasonably request; and
- 34.3.4 have, maintain and where appropriate enforce an anti-bribery policy (which shall be disclosed to the Authority on request) to prevent it and any Supplier Personnel or any person acting on the Supplier's behalf from committing a Prohibited Act.
- 34.4 The Supplier shall immediately notify the Authority in writing if it becomes aware of any breach of Clause 34.1, 34.2 or 34.3.2, or has reason to believe that it has or any of the Supplier Personnel has:
- 34.4.1 been subject to an investigation or prosecution which relates to an alleged Prohibited Act;
- 34.4.2 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
- 34.4.3 received a request or demand for any undue financial or other advantage of any kind in connection with the performance of this Dynamic Purchasing System Agreement or otherwise suspects that any person or Party directly or indirectly connected with this Dynamic Purchasing System Agreement has committed or attempted to commit a Prohibited Act.
- 34.5 If the Supplier makes a notification to the Authority pursuant to Clause 34.4, 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 15 (Records, Audit Access and Open Book Data).
- 34.6 If the Supplier breaches Clause 34.1, the Authority may by notice:
- 34.6.1 require the Supplier to remove from the performance of this Dynamic Purchasing System Agreement any Supplier Personnel whose acts or omissions have caused the Supplier's breach; or
- 34.6.2 immediately terminate this Dynamic Purchasing System Agreement for material Default.
- 34.7 Any notice served by the Authority under Clause 34.6 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 Dynamic Purchasing System Agreement shall terminate).

### **35. SEVERANCE**

35.1 If any provision of this Dynamic Purchasing System 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 Dynamic Purchasing System Agreement are not void or unenforceable be deemed to be deleted and the validity and/or enforceability of the remaining provisions of this Dynamic Purchasing System Agreement shall not be affected.

35.2 In the event that any deemed deletion under Clause 35.1 is so fundamental as to prevent the accomplishment of the purpose of this Dynamic Purchasing System Agreement or materially alters the balance of risks and rewards in this Dynamic Purchasing System Agreement, either Party may give notice to the other Party requiring the Parties to commence good faith negotiations to amend this Dynamic Purchasing System Agreement so that, as amended, it is valid and enforceable, preserves the balance of risks and rewards in this Dynamic Purchasing System Agreement and, to the extent that is reasonably practicable, achieves the Parties' original commercial intention.

35.3 If the Parties are unable to resolve any dispute arising under this Clause 35 within sixty (60) Working Days of the date of the notice given pursuant to Clause 35.2, this Dynamic Purchasing System Agreement shall automatically terminate with immediate effect. The costs of termination incurred by the Parties shall lie where they fall if this Dynamic Purchasing System Agreement is terminated pursuant to this Clause 35.

### **36. ENTIRE AGREEMENT**

36.1 This Dynamic Purchasing System Agreement and the HSCN Compliance Document Set referred to in it constitutes the entire agreement between the Parties in respect of the subject matter and supersedes and extinguishes all prior negotiations, course of dealings or agreements made between the Parties in relation to its subject matter, whether written or oral.

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

36.3 Nothing in this Clause 36 shall exclude any liability in respect of misrepresentations made fraudulently.

### **37. THIRD PARTY RIGHTS**

37.1 The provisions of:

37.1.1 Clauses: 4 (Scope of Dynamic Purchasing System Agreement), 5 (Call for Competition Procedure), 6 (Assistance in Related Procurements), 7 (Representations and Warranties), 8 (Guarantee), 13 (Call Off Performance Under the Dynamic Purchasing System Agreement), 15 (Records, Audit Access and Open Book Data), 21 (Provision and Protection of Information), 25 (Insurance), 30.2 (Equality and Diversity) and 37 (Third Party Rights); and

37.1.2 DPS Schedules 2 Part B (Key Performance Indicators), 4 (Call for Competition Procedure), 10 (Template Guarantee), and 11 (Insurance Requirements);

(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 Party Beneficiaries by virtue of the CRTPA.

37.2 Subject to Clause 37.1, a person who is not Party to this Dynamic Purchasing System Agreement has no right to enforce any term of this Dynamic Purchasing System Agreement under the CRTPA but this does not affect any right or remedy of any person which exists or is available otherwise than pursuant to the CRTPA.

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

37.4 Any amendments or modifications to this Dynamic Purchasing System Agreement may be made, and any rights created under Clause 37.1 may be altered or extinguished, by the Parties without the consent of any Third Party Beneficiary.

37.5 The Authority may act as agent and trustee for each Third Party Beneficiary and/or enforce on behalf of that Third Party Beneficiary any Third Party Provision and/or recover any Loss suffered by that Third Party Beneficiary in connection with a breach of any Third Party Provision.

### 38. NOTICES

38.1 Except as otherwise expressly provided within this Dynamic Purchasing System Agreement, any notices issued under this Dynamic Purchasing System Agreement must be in writing. For the purpose of this Clause 38, an e-mail is accepted as being "in writing".

38.2 Subject to Clause 38.3, the following table sets out the method by which notices may be served under this Dynamic Purchasing System Agreement and the respective deemed time and proof of service:

| Manner of Delivery             | Deemed time of delivery                       | Proof of Service  |
|--------------------------------|---|---|
| Email (Subject to Clause 38.3) | 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 |

38.3 The following notices may only be served as an attachment to an email:

38.3.1 any Termination Notice under Clause 27 (Authority Termination Rights), including in respect of partial termination;

38.3.2 any notice in respect of:

- (a) Clause 28 (Suspension of Supplier's Appointment);
- (b) Clause 32 (Waiver and Cumulative Remedies);
- (c) Default or default of the Authority.

38.4 This Clause 38 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.

38.5 For the purposes of this Clause 38, the address of each Party shall be:

38.5.1 For the Authority:

**Crown Commercial Service**

Rosebery Court

St Andrews

Business Park

Norwich NR7 0HS

For the attention of: Crown Commercial Service

email: hscndps@crowncommercial.gov.uk

38.5.2 For the Supplier:

As stated in the Supplier's SQ Response.

38.6 Either Party may change its address for service by serving a notice in accordance with this Clause 38.

38.7 This Clause 38 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 the Dispute Resolution Procedure).

## **39. COMPLAINTS HANDLING AND RESOLUTION**

39.1 Either Party shall notify the other Party of any Complaints made by Other Contracting Bodies, which are not resolved by operation of the Supplier's usual complaints handling procedure within five (5) Working Days of becoming aware of that Complaint and, if the Supplier is the Party providing the notice, such notice shall contain full details of the Supplier's plans to resolve such Complaint.

39.2 Without prejudice to any rights and remedies that a complainant may have at Law (including under this Dynamic Purchasing System Agreement and/or a Call Off Agreement), and without prejudice to any obligation of the Supplier to take remedial action under the provisions of this Dynamic Purchasing System Agreement and/or a Call Off Agreement, the Supplier shall use its reasonable endeavours to resolve the Complaint within ten (10) Working Days and in so doing, shall deal with the Complaint fully, expeditiously and fairly.

39.3 Within two (2) Working Days of a request by the Authority, the Supplier shall provide full details of a Complaint to the Authority, including details of steps taken to achieve its resolution.

#### **40. DISPUTE RESOLUTION**

- 40.1 The Parties shall resolve disputes arising out of or in connection with this Dynamic Purchasing System Agreement through the DPS management process defined in DPS Schedule 7 (DPS Management).
- 40.2 The Supplier shall continue to provide the Services in accordance with the terms of this Dynamic Purchasing System Agreement until a dispute has been resolved.

#### **41. TECHNOLOGY EXPENSE MANAGEMENT**

- 41.1 The Supplier shall provide without charge to a TEM Provider nominated by the Authority the detailed invoice data for each Contracting Body in receipt of Services in an Electronic Data Interchange (EDI) format at the same frequency as it is received by that Contracting Body, subject to the TEM Provider agreeing to enter into a direct confidentiality agreement with the Supplier on terms equivalent to the terms set out in Clause 21.3 (Confidentiality).

#### **42. GOVERNING LAW AND JURISDICTION**

- 42.1 This Dynamic Purchasing System 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.
- 42.2 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 Dynamic Purchasing System Agreement or its subject matter or formation.

## DPS SCHEDULE 1: DEFINITIONS

1. In accordance with Clause 1.1 (Definitions), in this Dynamic Purchasing System Agreement including its recitals the following expressions shall have the following meanings:

|   |  |
|---|--|
| <b>"Affiliates"</b>                           | means in relation to a body corporate, any other entity which directly or indirectly Controls, is Controlled by, or is under direct or indirect common Control of that body corporate from time to time;   |
| <b>"Approval"</b>                             | means the prior written consent of the Authority and "Approve" and "Approved" shall be construed accordingly;  |
| <b>"Audit"</b>                                | means an audit carried out pursuant to Clause 15 (Records, Audit Access and Open Book Data);   |
| <b>"Audit Report"</b>                         | means a report summarising the testing completed and the actions arising following an Audit;   |
| <b>"Auditor"</b>                              | means the Authority, and/or Other Contracting Body who is a party to a Call Off Agreement, and/or the National Audit Office and/or any auditor appointed by the Audit Commission, and /or the representatives of any of them;  |
| <b>"Authority"</b>                            | means the Contracting Body stated in the preamble to this Dynamic Purchasing System Agreement;   |
| <b>"Authority Personal Data"</b>              | means any Personal Data supplied for the purposes of or in connection with this Dynamic Purchasing System Agreement by the Authority to the Supplier;  |
| <b>"Authority Representative"</b>             | means the representative appointed by the Authority from time to time in relation to this Dynamic Purchasing System Agreement;   |
| <b>"Authority's Confidential Information"</b> | means all Authority Personal Data and any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, Know How, personnel, and suppliers of the Authority and/or Other Contracting Bodies, including all IPR, together with all information derived from any of the above, and any other information clearly designated as being confidential (whether or not it is marked "confidential") or which ought reasonably to be considered to be confidential; |
| <b>"Branding Guidance"</b>                    | means the Authority's guidance in relation to the use of branding available at <a href="https://www.gov.uk/current-crown-commercial-service-suppliers-what-you-need-to-know">https://www.gov.uk/current-crown-commercial-service-suppliers-what-you-need-to-know</a>   |
| <b>"Call Off Agreement"</b>                   | means a legally binding agreement (entered into pursuant to the provisions of this Dynamic Purchasing System Agreement) for the provision of the Services made between a Contracting Body and the Supplier, which shall comprise the terms and conditions of the Order Form and of the Template Call Off Terms (amended or refined where required by the Contracting Body and permissible pursuant to DPS Schedule 4 (Call for Competition Procedure);   |

|   |  |
|---|--|
| <b>"Call for Competition Procedure"</b>     | means the process for awarding a Call Off Agreement pursuant to Clause 5 (Call for Competition Procedure) and DPS Schedule 4 (Call for Competition Procedure);   |
| <b>"Call Off Terms"</b>                     | means the Template Call Off Terms (amended or refined if necessary and permissible by the Contracting Body ) as they apply in a Call Off Agreement;  |
| <b>"Central Government Body"</b>            | means a body listed in one of the following sub-categories of the Central Government classification of the Public Sector Classification Guide, as published and amended from time to time by the Office for National Statistics: <ul style="list-style-type: none"> <li>a) Government Department;</li> <li>b) Non-Departmental Public Body or Assembly Sponsored Public Body (advisory, executive, or tribunal);</li> <li>c) Non-Ministerial Department; or</li> <li>d) Executive Agency;</li> </ul> |
| <b>"Change in Law"</b>                      | means any change in Law which impacts on the supply of the Services and performance of the Template Call Off Terms which comes into force after the DPS Commencement Date;   |
| <b>"Change of Control"</b>                  | means a change of control within the meaning of Section 450 of the Corporation Tax Act 2010;   |
| <b>"Charges"</b>                            | means the charges raised under or in connection with a Call Off Agreement from time to time;   |
| <b>"CN-SP Deed"</b>                         | means the deed executed by the Supplier in the form of the template CN-SP Deed available at <a href="https://digital.nhs.uk/health-social-care-network/suppliers">https://digital.nhs.uk/health-social-care-network/suppliers</a>  |
| <b>"Commercially Sensitive Information"</b> | means the Supplier's Confidential Information: <ul style="list-style-type: none"> <li>a) relating to the Supplier, its IPR or its business or information which the Supplier has indicated to the Authority that, if disclosed by the Authority, would cause the Supplier significant commercial disadvantage or material financial loss; and</li> <li>b) that constitutes a trade secret;</li> </ul>  |
| <b>"Comparable Supply"</b>                  | means the supply of goods and/or services to another Contracting Body of the Supplier that are the same or similar to the Services;  |
| <b>"Complaint"</b>                          | means any formal written complaint raised by a Contracting Body in relation to the performance of this Dynamic Purchasing System Agreement or any Call Off Agreement in accordance with Clause 39 (Complaints Handling and Resolution);  |

|                                   |  |
|-----------------------------------|--|
| <b>"Confidential Information"</b> | means the Authority's Confidential Information and/or the Supplier's Confidential Information, as the context requires;  |
| <b>"Contract Year"</b>            | means a consecutive period of twelve (12) Months commencing on the DPS Commencement Date or each anniversary thereof;  |
| <b>"Contracting Bodies"</b>       | means bodies listed in paragraph III.1.1 of the OJEU Notice and <b>"Contracting Body"</b> shall be construed accordingly;  |
| <b>"Control"</b>                  | means control in either of the senses defined in sections 450 and 1124 of the Corporation Tax Act 2010 and <b>"Controlled"</b> shall be construed accordingly;   |
| <b>"Core Component"</b>           | means the component described in paragraph 3.1.2 of Part A of DPS Schedule 2 (Services and Key Performance Indicators);  |
| <b>"Costs"</b>                    | <p>means the following costs (without double recovery) to the extent that they are reasonably and properly incurred by the Supplier in providing the Services:</p> <ul style="list-style-type: none"> <li>a) the cost to the Supplier or the Key Sub-Contractor (as the context requires), calculated per man day, of engaging the Supplier Personnel, including: <ul style="list-style-type: none"> <li>i) base salary paid to the Supplier Personnel;</li> <li>ii) employer's national insurance contributions;</li> <li>iii) pension contributions;</li> <li>iv) car allowances;</li> <li>v) any other contractual employment benefits;</li> <li>vi) staff training;</li> <li>vii) work place accommodation;</li> <li>viii) work place IT equipment and tools reasonably necessary to provide the Services (but not including items included within limb (b) below); and</li> <li>ix) reasonable recruitment costs, as agreed with the Contracting Bodies under any Call Off Agreements;</li> </ul> </li> <li>b) costs incurred in respect of those Supplier Assets which are detailed on the Registers ("Supplier Assets" and "Register" shall have the meaning given to them under Call Off Schedule 1 (Definitions)) and which would be treated as capital costs according to generally accepted accounting principles within the UK, which shall include the cost to be charged in respect of Supplier Assets by the Supplier to the Contracting Bodies or (to the extent that risk and title in any Supplier Asset is not held by the Supplier) any cost actually incurred by the Supplier in respect of those Supplier Assets;</li> </ul> |

- c) operational costs which are not included within (a) or (b) above, to the extent that such costs are necessary and properly incurred by the Supplier in the provision of the Services;

but excluding:

- i) Overhead;
- ii) financing or similar costs;
- iii) maintenance and support costs to the extent that these relate to maintenance and/or support services provided beyond the DPS Period and term of any Call Off Agreements whether in relation to Supplier Assets or otherwise;
- iv) taxation;
- v) fines and penalties; and
- vi) non-cash items (including depreciation, amortisation, impairments and movements in provisions);

**"Crown"**

means the government of the United Kingdom (including the Northern Ireland Assembly and Executive Committee, the Scottish Executive and the National Assembly for Wales), including, but not limited to, government ministers and government departments and particular bodies, persons, commissions or agencies from time to time carrying out functions on its behalf;

**"Crown Body"**

means any department, office or executive agency of the Crown;

**"CRTPA"**

means the Contracts (Rights of Third Parties) Act 1999;

**"Data Controller"**

has the meaning given to it in the Data Protection Laws;

**"Data Loss Event"**

means a breach of any system containing Personal Data that causes unauthorised access to Personal Data, actual or potential loss of Personal Data;

**"Data Processor"**

has the meaning given to it in the Data Protection Laws;

**"Data Protection Laws"**

means any law, statute, subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of section 2 of the European Communities Act 1972, regulation, order, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements of any regulatory body which relates to the protection of individuals with regard to the processing of Personal Data to which a Party is subject including the Data Protection Act 1998 and , with effect from 25 May 2018, the GDPR ;

**"Data Subject"**

has the meaning given to it in the Data Protection Laws;

|                                       |   |
|---------------------------------------|---|
| <b>"Data Subject Access Request"</b>  | means a request made by a Data Subject in accordance with rights granted pursuant to the Data Protection Laws, to access his or her Personal Data;;   |
| <b>"Default"</b>                      | means any breach of the obligations of the Supplier (including but not limited to any fundamental breach or breach of a fundamental term) or any other default, act, omission, misrepresentation, negligence or negligent statement of the Supplier or the Supplier Personnel in connection with or in relation to this Dynamic Purchasing System Agreement or the subject matter of this Dynamic Purchasing System Agreement and in respect of which the Supplier is liable to the Authority;  |
| <b>"Disclosing Party"</b>             | means a Party which discloses or makes available directly or indirectly its Confidential Information to the Recipient;  |
| <b>"Dispute"</b>                      | means any dispute, difference or question of interpretation arising out of or in connection with this Dynamic Purchasing System Agreement, including any dispute, difference or question of interpretation relating to the Goods and/or Services, failure to agree in accordance with the procedure for variations in Clause 16.1(Variation Procedure) or any matter where this Dynamic Purchasing System Agreement directs the Parties to resolve an issue by reference to the Dispute Resolution Procedure;   |
| <b>"Dispute Notice"</b>               | means a written notice served by one Party on the other stating that the Party serving the notice believes that there is a Dispute;   |
| <b>"Dispute Resolution Procedure"</b> | means the dispute resolution procedure set out in DPS Schedule 7 Paragraph 4 (Dispute Resolution Procedure);  |
| <b>"DOTAS"</b>                        | means the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HMRC of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to national insurance contributions by the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868) made under section 132A of the Social Security Administration Act 1992; |
| <b>"DPS Commencement Date"</b>        | means [insert date dd/mm/yyyy];   |
| <b>"DPS Guarantee"</b>                | means a deed of guarantee in favour of the Authority in the form set out in DPS Schedule 10 (Template Guarantee) granted pursuant to Clause 8 (Guarantee);  |
| <b>"DPS Guarantor"</b>                | means any person acceptable to the Authority to give a DPS Guarantee;   |

|   |  |
|---|--|
| <b>"DPS Period"</b>                                     | means the period from the DPS Commencement Date ending on the expiry of the Initial DPS Period or any Extension DPS Period or on earlier termination of this DPS Agreement;  |
| <b>"DPS Platform"</b>                                   | means the electronic means used by Crown Commercial Service to host the Dynamic Purchasing System and which can be found at: <a href="https://sid4gov.cabinetoffice.gov.uk/dps">https://sid4gov.cabinetoffice.gov.uk/dps</a> ;   |
| <b>"DPS Schedules"</b>                                  | means the schedules to this Dynamic Purchasing System Agreement;   |
| <b>"DPS Suppliers"</b>                                  | means the suppliers (including the Supplier) appointed under this Dynamic Purchasing System Agreement or agreements on the same or similar terms to this Dynamic Purchasing System Agreement as part of the DPS;   |
| <b>"Due Diligence Information"</b>                      | means any information supplied to the Supplier by or on behalf of the Authority prior to the DPS Commencement Date;  |
| <b>"Dynamic Purchasing System" or "DPS"</b>             | means the arrangements established by the Authority for the procurement of the Services by Contracting Bodies from suppliers (including the Supplier) pursuant to the OJEU Notice;   |
| <b>"Dynamic Purchasing System Agreement"</b>            | means this agreement consisting of the Clauses together with the DPS Schedules and any appendices and annexes to the same;   |
| <b>"Environmental Information Regulations or EIRs"</b>  | means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations;   |
| <b>"Equivalent Services"</b>                            | means services which the Supplier can supply which are the same or similar to the Services;  |
| <b>"European Single Procurement Document" or "ESPD"</b> | means as set out in regulation 59 of The Public Contracts Regulations 2015, and being in this case the evidence for the suppliers SQ Response;   |
| <b>"Extension DPS Period"</b>                           | means such period or periods as may be specified by the Authority pursuant to Clause 10.2(DPS Period);   |
| <b>"Financial MI Reporting Date"</b>                    | means the 7th day of each Month following the Month to which the relevant Management Information relates, or such other date as may be agreed between the Parties;   |
| <b>"FOIA"</b>   | means the Freedom of Information Act 2000 as amended from time to time 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; |
| <b>"Fraud"</b>  | means any offence under Laws creating offences in respect of fraudulent acts (including the Misrepresentation  |

|   |  |
|---|--|
|   | Act 1967) or at common law in respect of fraudulent acts including acts of forgery;  |
| <b>"General Anti-Abuse Rule"</b>                      | means the legislation in Part 5 of the Finance Act 2013; and any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions;   |
| <b>"General Change in Law"</b>                        | means a Change in Law where the change is of a general legislative nature (including taxation or duties of any sort affecting the Supplier) or which affects or relates to a Comparable Supply;  |
| <b>"General Data Protection Regulation" or "GDPR"</b> | means the General Data Protection Regulation EU 2016/679 <a href="http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016R0679">http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016R0679</a> . Further information is available via the Information Commissioners Office (ICO) website here: <a href="https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/">https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/</a> ; |
| <b>"General Tender Response"</b>                      | means a tender submitted by a Supplier during the Call for Competition Procedure in accordance with Schedule 4   |
| <b>"Call for Competition Procedure"</b>               | means the award procedure described in paragraph 2 of DPS Schedule 4 (Call for Competition Procedures);  |
| <b>"Good Industry Practice"</b>                       | means standards, practices, methods and procedures conforming to the Law and the exercise of the degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person or body engaged within the relevant industry or business sector;  |
| <b>"Government"</b>                                   | means the government of the United Kingdom (including the Northern Ireland Assembly and Executive Committee, the Scottish Executive and the National Assembly for Wales), including government ministers and government departments and other bodies, persons, commissions or agencies from time to time carrying out functions on its behalf;   |
| <b>"Halifax Abuse Principle"</b>                      | means the principle explained in the CJEU Case C-255/02 Halifax and others;  |
| <b>"Health and Social Care Network or HSCN"</b>       | means the government's network for health and social care, which helps all organisations involved in health and social care delivery to work together and interoperate;  |
| <b>"HSCN Assurance Mark"</b>                          | means the United Kingdom trade mark numbers 3199404 and 3201273 – it may be used by suppliers who are HSCN Stage 1 Compliant and who have signed the CN-SP Deed;   |
| <b>"HSCN Authority"</b>                               | means the Health and Social Care Information Centre (trading as NHS Digital);  |

|  |   |
|--|---|
| <b>“HSCN Certificate”</b>                                    | means the certification awarded to a supplier which has successfully passed Stage 2 of HSCN Compliance;   |
| <b>“HSCN Compliance” or “HSCN Compliant”</b>                 | means a status as detailed in the document “HSCN Compliance Operating Model” as set out at <a href="https://www.digital.nhs.uk/health-social-care-network/connectivity-suppliers">https://www.digital.nhs.uk/health-social-care-network/connectivity-suppliers</a> , and as updated by the HSCN Authority from time to time;  |
| <b>“HSCN Compliance Document Set”</b>                        | means all documentation and associated processes relating to HSCN Compliance as available at <a href="https://www.digital.nhs.uk/health-social-care-network/connectivity-suppliers">https://www.digital.nhs.uk/health-social-care-network/connectivity-suppliers</a> , and as may be updated by the HSCN Authority from time to time including but not limited to:<br>CN-SP Deed;<br>HSCN Compliance Operating Model;<br>HSCN CN-SP Service Management Requirement Addendum;<br>HSCN Mandatory Supplemental Terms; and<br>HSCN Obligations Framework; |
| <b>“HSCN Connectivity Services”</b>                          | means any service which is offered by a Supplier to provide access to and/or routing over the HSCN;   |
| <b>“HSCN Stage 1 Compliant” or “HSCN Stage 1 Compliance”</b> | mean the first stage of compliance as defined in the HSCN Compliance Operating Model, which forms part of the HSCN Compliance Document Set;   |
| <b>“HSCN Stage 2 Compliant” or “HSCN Stage 2 Compliance”</b> | mean the second stage of compliance as defined in the HSCN Compliance Operating Model, which forms part of the HSCN Compliance Document Set;  |
| <b>“HSCN Obligations Framework”</b>                          | means the obligations framework as available at <a href="https://www.digital.nhs.uk/health-social-care-network/connectivity-suppliers">https://www.digital.nhs.uk/health-social-care-network/connectivity-suppliers</a> , which may be updated from time to time by the HSCN Authority;   |
| <b>"Improvement Plan"</b>                                    | means the plan required by the Authority from the Supplier which shall detail how the Supplier will improve the provision of the Services pursuant to Clause 26.1.1 (Authority Remedies);   |
| <b>"Improvement Notice"</b>                                  | means the notice issued by the Authority to the Supplier pursuant to Clause 26.1.3 (Authority Remedies) which will detail how the Supplier shall improve the provision of the Services;   |
| <b>"Information"</b>   | has the meaning given under section 84 of the Freedom of Information Act 2000 as amended from time to time;   |
| <b>“Initial DPS Period”</b>                                  | means the period of thirty (30) Months from the DPS Commencement Date;  |

**"Insolvency Event"**

means, in respect of the Supplier or DPS Guarantor (as applicable):

- a) a proposal is made for a voluntary arrangement within Part I of the Insolvency Act 1986 or of any other composition scheme or arrangement with, or assignment for the benefit of, its creditors; or
- b) a shareholders' meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding-up is passed (other than as part of, and exclusively for the purpose of, a bona fide reconstruction or amalgamation); or
- c) a petition is presented for its winding up (which is not dismissed within fourteen (14) Working Days of its service) or an application is made for the appointment of a provisional liquidator or a creditors' meeting is convened pursuant to section 98 of the Insolvency Act 1986; or
- d) a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets; or
- e) an application order is made either for the appointment of an administrator or for an administration order, an administrator is appointed, or notice of intention to appoint an administrator is given; or
- f) it is or becomes insolvent within the meaning of section 123 of the Insolvency Act 1986; or
- g) being a "small company" within the meaning of section 382(3) of the Companies Act 2006, a moratorium comes into force pursuant to Schedule A1 of the Insolvency Act 1986; or
- h) where the Supplier or DPS Guarantor is an individual or partnership, any event analogous to those listed in limbs (a) to (g) (inclusive) occurs in relation to that individual or partnership; or
- i) any event analogous to those listed in limbs (a) to (h) (inclusive) occurs under the law of any other jurisdiction;

**"IPR Claim"**

means any claim of infringement or alleged infringement (including the defence of such infringement or alleged infringement) of any IPR by a third party used to provide the Services or as otherwise provided and/or licensed by the Supplier (or to which the Supplier has provided access) to the Authority in the fulfilment of its obligations under this Dynamic Purchasing System Agreement;

**"Intellectual Property Rights" or "IPR"**

means:

- a) copyright, rights related to or affording protection similar to copyright, rights in databases, patents and rights in inventions, semi-conductor topography rights, trade marks, rights in Internet domain names and website addresses and other rights in trade names, designs, Know-How, trade secrets and other rights in Confidential Information;
- b) applications for registration, and the right to apply for registration, for any of the rights listed at (a) that are capable of being registered in any country or jurisdiction; and
- c) all other rights having equivalent or similar effect in any country or jurisdiction;

**"Key Sub-Contract"**

means each Sub-Contract with a Key Sub-Contractor;

**"Key Sub-Contractors"**

means any Sub-Contractor:

- a) listed in the Supplier's SQ Response, and as updated by the Supplier from time to time in accordance with DPS Schedule 7 (Key Sub-Contractors);
- b) which, performs (or would perform if appointed) a critical role in the provision of all or any part of the Services; and/or
- c) is a Material Sub-Contractor

**"Key Performance Indicators" or "KPIs"**

means the performance measurements and targets set out in Part B of DPS Schedule 2 (Services and Key Performance Indicators);

**"Know-How"**

means all ideas, concepts, schemes, information, knowledge, techniques, methodology, and anything else in the nature of know-how relating to the Services but excluding know-how already in the other Party's possession before the DPS Commencement Date;

**"KPI Target"**

means the acceptable performance level for a KPI as set out in relation to each KPI;

**"Law"**

means any law, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of Section 2 of the European Communities Act 1972, regulation, order, regulatory policy, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements with which the Supplier is bound to comply;

**"Legacy Services"**

means services similar to the New Services and/or services which interface with or are intended to interface with or be replaced by the New Services;

**"Losses"**

means all losses, liabilities, damages, costs, expenses (including legal fees), disbursements, costs of

investigation, litigation, settlement, judgment, interest and penalties whether arising in contract, tort (including negligence), breach of statutory duty, misrepresentation on otherwise and **"Loss"** shall be interpreted accordingly;

**"Management Levy"**

means the sum payable by the Supplier to the Authority being an amount equal to one per cent (1%) of all Charges for the Services invoiced to the Contracting Bodies by the Supplier (net of VAT) in each Month throughout the DPS Period and thereafter until the expiry or earlier termination of all Call Off Agreements entered pursuant to this Dynamic Purchasing System Agreement

**"Management Information" or "MI"**

means the management information specified in DPS Schedule 8 (Management Information);

**"Material Sub-Contractor"**

means as defined in the CN-SP Deed as forms part of the HSCN Compliance Document Set ;

**"MI Failure"**

means:

- a) when an MI Report:
  - i) contains any material errors or material omissions or a missing mandatory field; or
  - ii) is submitted using an incorrect MI Reporting Template; or
  - iii) is not submitted by the reporting date (including where a Nil Return should have been filed); and/or
- b) the failure to provide completed Order Forms in accordance with DPS Schedule 4 (Call for Competition Procedure);

**"MI Report"**

means a report containing Management Information submitted to the Authority in accordance with DPS Schedule 8 (Management Information);

**"MI Reporting Templates"**

means the forms of report set out in the Annexes to DPS Schedule 8 (Management Information) setting out the information the Supplier is required to supply to the Authority;

**"MISO"**

means 'Management Information System Online'. An online portal located at <https://miso.ccs.cabinetoffice.gov.uk> provided by the Authority for collection and receipt of Management Information;

**"Month"**

means a calendar month and **"Monthly"** shall be interpreted accordingly;

**"Multi-Party Dispute"**

means a Dispute which involves the Parties and one or more Related Third Parties

|   |   |
|---|---|
| <b>"New Services"</b>                   | means services which a Contracting Body wishes to procure from a third party which are the same or similar to the Services;   |
| <b>"Nil Return"</b>                     | has the meaning given to it in paragraph 3.3 of DPS Schedule 8 (Management Information);  |
| <b>"Non-Exclusive Assets"</b>           | means those assets (if any) which are used by the Supplier or a Key Sub-Contractor in connection with the Services under a Call Off Agreement but which are also used by the Supplier or Key Sub-contractor for any other purposes including ducts, cabinets, cabling and/or shared routers;  |
| <b>"Occasion of Tax Non-Compliance"</b> | means where: <ul style="list-style-type: none"> <li>a) any tax return of the Supplier submitted to a Relevant Tax Authority on or after 1 October 2012 which is found to be incorrect as a result of: <ul style="list-style-type: none"> <li>i) a Relevant Tax Authority successfully challenging the Supplier under the General Anti-Abuse Rule or the Halifax abuse principle or under any tax rules or legislation in any jurisdiction that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax abuse principle;</li> <li>ii) the failure of an avoidance scheme which the Supplier was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime in any jurisdiction; and/or</li> </ul> </li> <li>b) the Supplier's tax affairs give rise on or after 1 April 2013 to a conviction in any jurisdiction for tax related offences which is not spent at the DPS Commencement Date or to a penalty for civil fraud or evasion;</li> </ul> |
| <b>"OJEU Notice"</b>                    | has the meaning given to it in Recital A;   |
| <b>"Open Book Data"</b>                 | means complete and accurate financial and non-financial information which is sufficient to enable the Authority to verify the Charges already paid or payable and Charges forecast to be paid during the DPS Period and term of any Call Off Agreements, including details and all assumptions relating to: <ul style="list-style-type: none"> <li>a) the Supplier's Costs broken down against each Good and/or Service and/or deliverable, including actual capital expenditure (including capital replacement costs) and the unit cost and total actual costs of all hardware and software;</li> <li>b) operating expenditure relating to the provision of the Services including an analysis showing: <ul style="list-style-type: none"> <li>i) the unit costs and quantity of Goods and any other consumables and bought-in services;</li> </ul> </li> </ul>  |

- ii) manpower resources broken down into the number and grade/role of all Supplier Personnel (free of any contingency) together with a list of agreed rates against each manpower grade;
- iii) a list of Costs underpinning those rates for each manpower grade, being the agreed rate less the Supplier Profit Margin; and
- c) Overheads;
- d) all interest, expenses and any other third party financing costs incurred in relation to the provision of the Services;
- e) the Supplier Profit achieved over the DPS Period and term of any Call Off Agreements and on an annual basis;
- f) confirmation that all methods of Cost apportionment and Overhead allocation are consistent with and not more onerous than such methods applied generally by the Supplier;
- g) an explanation of the type and value of risk and contingencies associated with the provision of the Services, including the amount of money attributed to each risk and/or contingency; and
- h) the actual Costs profile for each Service Period under any Call Off Agreements;

**"Order"**

means an order for the provision of the Services placed by a Contracting Body with the Supplier under a Call Off Agreement;

**"Order Form"**

means Part 1 of DPS Schedule 3 (Template Order Form and Template Call Off Terms) as completed and forming part of the Call Off Agreement, which contains details of an Order, together with other information in relation to such Order, including without limitation the description of the Services to be supplied;

**"Other Contracting Bodies"**

means all Contracting Bodies except the Authority and **"Other Contracting Body"** shall be construed accordingly;

**"Overhead"**

means those amounts which are intended to recover a proportion of the Supplier's or the Key Sub-Contractor's (as the context requires) indirect corporate costs (including financing, marketing, advertising, research and development and insurance costs and any fines or penalties) but excluding allowable indirect costs apportioned to facilities and administration in the provision of Supplier Personnel and accordingly included within limb (a) of the definition of "Costs";

**"Party"**

means the Authority or the Supplier and **"Parties"** shall mean both of them;

|   |  |
|---|--|
| <b>"Personal Data"</b>                  | has the meaning given to it in the Data Protection Laws;   |
| <b>"Processing"</b>                     | has the meaning given to it in the Data Protection Laws but, for the purposes of this Dynamic Purchasing System Agreement, it shall include both manual and automatic processing and <b>"Process"</b> and <b>"Processed"</b> shall be interpreted accordingly;   |
| <b>"Prohibited Act"</b>                 | means: <ul style="list-style-type: none"> <li>a) to directly or indirectly offer, promise or give any person working for or engaged by a Contracting Body and/or the Authority a financial or other advantage to: <ul style="list-style-type: none"> <li>i) induce that person to perform improperly a relevant function or activity; or</li> <li>ii) reward that person for improper performance of a relevant function or activity; or</li> </ul> </li> <li>b) committing any offence: <ul style="list-style-type: none"> <li>i) under the Bribery Act 2010; or</li> <li>ii) under legislation creating offences concerning Fraud; or</li> <li>iii) at common law concerning Fraud; or</li> <li>iv) committing (or attempting or conspiring to commit) Fraud;</li> </ul> </li> </ul> |
| <b>"Public Services Network or PSN"</b> | the network of networks delivered through multiple service providers, as further detailed in the PSN operating model; and described at <a href="https://www.gov.uk/government/groups/public-services-network">https://www.gov.uk/government/groups/public-services-network</a> ;   |
| <b>"PSN Service(s)"</b>                 | a service which is offered by a PSN service provider and for which PSN compliance certification has been achieved;   |
| <b>"Regulations"</b>                    | means the Public Contracts Regulations 2015;   |
| <b>"Related Third Party"</b>            | a party to: <ul style="list-style-type: none"> <li>(a) another contract with the Authority or the Supplier which is relevant to this Agreement; or</li> <li>(b) a Sub-contract;</li> </ul>   |
| <b>"Relevant Person"</b>                | means any employee, agent, servant, or representative of the Authority, or of any Other Contracting Body or other public body;   |
| <b>"Relevant Requirements"</b>          | means all applicable Law relating to bribery, corruption and fraud, including the Bribery Act 2010 and any guidance issued by the Secretary of State for Justice pursuant to section 9 of the Bribery Act 2010;  |
| <b>"Relevant Tax Authority"</b>         | means HMRC, or, if applicable, the tax authority in the jurisdiction in which the Supplier is required to submit a tax return;   |

|  |   |
|--|---|
| <b>"Relevant Supplier"</b>                                 | means a third party bidding to provide New Services;  |
| <b>"Replacement Services"</b>                              | means any services which are substantially similar to any of the Services and which are received in substitution for the Services following the expiry or termination of this Dynamic Purchasing System Agreement;  |
| <b>"Requests for Information"</b>                          | means a request for information relating to this Dynamic Purchasing System Agreement or the provision of the Services or an apparent request for such information under the Code of Practice on Access to Government Information, FOIA or the EIRs;   |
| <b>"Request for Proposal" or "RFP"</b>                     | means a request for proposal from a Contracting Body to the DPS Suppliers as described in paragraph 2.1.1(e) of Schedule 4 (Call for Competition Procedure).  |
| <b>"Restricted Country or Restricted Countries"</b>        | means any country or countries that are not within the EEA and which have not been determined to be adequate by the European Commission pursuant to Article 25(6) of Directive 95/46/EC;  |
| <b>"Selection Questionnaire" or "SQ"</b>                   | has the meaning given to it in Recital B of this Dynamic Purchasing System Agreement;   |
| <b>"Selection Questionnaire Response" or "SQ Response"</b> | has the meaning given to it in Recital B of this Dynamic Purchasing System Agreement;   |
| <b>"Self Audit Certificate"</b>                            | means the certificate in the form as set out in DPS Schedule 9 (Annual Self Audit Certificate) to be provided to the Authority in accordance with Clause 15 (Records, Audit Access and Open Book Data);   |
| <b>"Service Period"</b>                                    | has the meaning given to it in DPS Schedule 3 (Template Order Form and Template Call Off Terms) as refined by a Contracting Body in a Call Off Agreement between that Contracting Body and the Supplier;  |
| <b>"Services"</b>  | means the services described in DPS Schedule 2 (Services and Key Performance Indicators) which the Supplier shall make available to Contracting Bodies;   |
| <b>"Services Requirements"</b>                             | means the requirements of the Authority or any other Contracting Body (as appropriate) for the Services from time to time, described in the Statement of Requirements;  |
| <b>"Sites"</b>   | means: <ul style="list-style-type: none"> <li>a) any delivery point for the Services (including the Contracting Body Premises, the Supplier's premises, third party premises, or any non-premises location, such as kerbside cabinets and bus shelters);</li> <li>i) from, to or at which: <ul style="list-style-type: none"> <li>(1) the Services are (or are to be) provided; or</li> </ul> </li> </ul> |

|                                    |   |
|------------------------------------|---|
|                                    | <p>(2) the Supplier manages, organises or otherwise directs the provision or the use of the Services; or</p> <p>ii) where: any part of the Supplier System is situated; or</p> <p>any physical interface with the Contracting Body System takes place;</p>  |
| <b>"Specific Change in Law"</b>    | means a Change in Law that relates specifically to the business of the Authority and which would not affect a Comparable Supply;  |
| <b>"Standards"</b>                 | <p>means:</p> <ul style="list-style-type: none"> <li>a) any standards published by BSI British Standards, the National Standards Body of the United Kingdom, the International Organisation for Standardisation or other reputable or equivalent bodies (and their successor bodies) that a skilled and experienced operator in the same type of industry or business sector as the Supplier would reasonably and ordinarily be expected to comply with when delivering Services to Contracting Bodies under this DPS Agreement;</li> <li>b) any standards that form part of HSCN Compliance and/or the HSCN Compliance Document Set;</li> <li>c) any standards detailed in the specification in DPS Schedule 2 (Services and Key Performance Indicators);</li> <li>d) any standards detailed by the Contracting Body in the Call Off Agreement following a Call for Competition Procedure or agreed between the Parties from time to time;</li> <li>e) any relevant Government codes of practice and guidance applicable from time to time that would apply to a Supplier delivering Services to Contracting Bodies under this DPS Agreement.</li> </ul> |
| <b>"Statement of Requirements"</b> | means a document produced by the Authority or any Other Contracting Body detailing its Services Requirements;   |
| <b>"Strategic Supplier"</b>        | means a supplier that has been identified as strategic by Crown Commercial Service, and as has been communicated to the supplier pursuant to paragraph 2.3 of Schedule 7;   |
| <b>"Sub-Contract"</b>              | means any contract or agreement or proposed agreement between the Supplier and any third party whereby that third party agrees to provide to the Supplier the Services (or any part thereof) or to provide facilities or services necessary for the provision of the Services (or any part thereof) or necessary for the management, direction or control of the provision of the Services or any part thereof;   |

|  |   |
|--|---|
| <b>"Sub-Contractor"</b>                      | means the sub-contractors listed in the Supplier's SQ Response and as updated by the Supplier from time to time in accordance with DPS Schedule 6 (Key Sub-Contractors), and/or any third party engaged by the Supplier from time to time under a sub-contract permitted pursuant to this Dynamic Purchasing System Agreement;  |
| <b>"Supplementary Components"</b>            | means those components described in paragraph [2.1.2] of Part A of DPS Schedule 2 (Services and Key Performance Indicators);  |
| <b>"Supplier"</b>                            | means the person, firm or company that has been admitted to the HSCN Access Services Dynamic Purchasing System Agreement (RM3825) and who is a party to this DPS Agreement;   |
| <b>"Supplier Action Plan"</b>                | means a document, maintained by the Authority, capturing information about the relationship between the Parties including, but not limited to strategic objectives, actions, initiatives, communication channels, risks and Supplier performance;   |
| <b>"Supplier Personnel"</b>                  | means all persons employed or engaged by the Supplier together with the Supplier's servants, agents, suppliers, consultants and Sub-Contractors (and all persons employed by any Sub-Contractor together with the Sub-Contractor's servants, consultants, agents, suppliers and sub-contractors) used in the performance of its obligations under this Dynamic Purchasing System Agreement or any Call Off Agreements;    |
| <b>"Supplier Profit"</b>                     | means, in relation to a period, the difference between the total Charges (in nominal cash flow terms but excluding any Deductions (as defined in Call Off Schedule 1 (Definitions)) and total Costs (in nominal cash flow terms) in respect of any Call Off Agreements for the relevant period;   |
| <b>"Supplier Profit Margin"</b>              | means, in relation to a period, the Supplier Profit for the relevant period divided by the total Charges over the same period in respect of any Call Off Agreements and expressed as a percentage;  |
| <b>"Supplier Representative"</b>             | means the representative appointed by the Supplier from time to time in relation to this Dynamic Purchasing System Agreement;   |
| <b>"Supplier's Confidential Information"</b> | 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 IPRs, together with 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; |

|                                  |  |
|----------------------------------|--|
| <b>"TEM Provider"</b>            | means the Supplier appointed by the Authority to provide technology expense management;  |
| <b>"Template Call Off Terms"</b> | means the template terms and conditions in Annex 2 to DPS Schedule 3 (Template Order Form and Template Call Off terms);  |
| <b>"Template Order Form"</b>     | means the template form in Annex 1 to DPS Schedule 3 (Template Order Form and Template Call Off terms);  |
| <b>"Termination Notice"</b>      | means a written notice of termination given by one Party to the other, notifying the Party receiving the notice of the intention of the Party giving the notice to terminate this Dynamic Purchasing System Agreement on a specified date and setting out the grounds for termination; |
| <b>"Unresolved Dispute"</b>      | has the meaning given to it in paragraph 4.2 of DPS Schedule 7 (DPS Management);   |
| <b>"Variation"</b>               | has the meaning given to it in Clause 16.1.1 (Variation Procedure);  |
| <b>"Variation Form"</b>          | means the form that will be completed and signed by the Parties to effect a variation which shall be in the form set out in DPS Schedule 12 (Variation Form);  |
| <b>"Variation Procedure"</b>     | means the procedure for carrying out a Variation as set out in Clause 16.1 (Variation Procedure);  |
| <b>"VAT"</b>                     | means value added tax in accordance with the provisions of the Value Added Tax Act 1994;   |
| <b>"Working Days"</b>            | means any day other than a Saturday, Sunday or public holiday in England and Wales.  |

## **DPS SCHEDULE 2: SERVICES AND KEY PERFORMANCE INDICATORS**

### **PART A – REQUIREMENTS FOR SERVICES**

#### **1. GENERAL**

1.1 The purpose of this Part A of DPS Schedule 2 (Services and Key Performance Indicators) is to set out the scope of the Services that the Supplier shall make available to all Contracting Bodies under this Dynamic Purchasing System Agreement and to provide a description of what the Services entail together with any specific Standards applicable to the Services. Where branded or specific items are specified in this schedule, the Supplier may substitute those items with EU replacement items of equivalent specification.

#### **2. SPECIFICATION**

2.1 Each Statement of Requirements will include the Core Component (in line with paragraph 2.1.1 below) and may include Supplementary Components (as described in paragraph 2.1.2 below) subject to paragraph 2.3 below:

##### **2.1.1 Core Component:**

- (a) The Core Component provides the functionality and service that is material to the Contracting Body's requirement as further described in paragraph 3.1.2 of this Part A;
- (b) All Orders placed under this DPS must include a Core Component.

##### **2.1.2 Supplementary Components:**

- (a) Supplementary Components are optional ancillary requirements that enhance or otherwise supplement the Core Component and will be set out by the Supplier in their General Tender Response;
- (b) Orders may or may not include Supplementary Components;

2.2 The Contracting Body shall specify the Core Component as part of its Request for Proposal.

2.3 The Supplier shall only offer Supplementary Components to Contracting Bodies who are procuring, or who have procured, a Core Component under this Dynamic Purchasing System.

2.4 The scope of this Dynamic Purchasing System will include the supply, installation (including any building or civil engineering works), testing, management, help desk services, customer service portals, maintenance, technical architecture, system design, project management and related professional services associated with the provision of the Services.

2.5 The scope of this Dynamic Purchasing System may also contain migration and transition support and other related services to enable the successful implementation and performance of solutions procured under this DPS.

2.6 Suppliers are expected to achieve and maintain appropriate security accreditation of the services as may be required by the Authority and Contracting Bodies (i.e. Suppliers shall consider Call-Off Schedule 7).

2.7 For the Supplier to tender to provide HSCN Connectivity Services, the Supplier must have successfully completed the HSCN Stage 2 Compliance and been

awarded the HSCN Certificate. Further information may be found by following this link: <https://www.digital.nhs.uk/health-social-care-network/connectivity-suppliers>.

2.8 If the Supplier wishes to provide PSN Services, such PSN Services must comply with the current PSN compliance and approval processes. Further information may be found following link <https://www.gov.uk/government/groups/public-services-network>.

2.9 The Contracting Body may procure Services funded in whole or in part by the Department for Digital, Culture, Media & Sport (DCMS) Local Full Fibre Networks Programme.

### **3. SCOPE**

#### **3.1 Scope of the DPS**

3.1.1 This DPS provides Services and associated services from HSCN Compliant suppliers, which are comprised of the Core Component and any Supplementary Component(s).

3.1.2 The Core Component must include HSCN Connectivity Services as defined in the HSCN Obligations Framework that forms part of the HSCN Compliance Document Set as available at <https://digital.nhs.uk/health-social-care-network/suppliers>

3.1.3 The HSCN Connectivity Services may be managed and/or unmanaged and may have variables and options around its provision including, but not limited to, the following:

- (a) individual or multiple data connectivity circuits;
- (b) individual or multiple data connectivity technologies, terrestrial, wireless and satellite solutions;
- (c) blended (bonded/aggregated) bandwidth;
- (d) flexible bandwidth;
- (e) burstable bandwidth;
- (f) resiliency level (including Non-Resilient ; Resilient ; Resilient - Diverse ; and Resilient - Fully Diverse); and / or
- (g) multi-tenancy sites (including dynamic bandwidth allocation).

3.1.4 The Supplementary Component(s) may include:

- (a) cloud service access services;
- (b) related consultancy services;
- (c) Internet Service Provider (ISP) and Internet services, including but not limited to in-bound internet services and out-bound internet services;
- (d) Contracting Body-defined VRFs;
- (e) support for classes and/or qualities of service - Contracting Body-defined QoS;
- (f) Network related security and access control solutions, (to defined resilience levels where required) including but not limited to:
  - (i) standalone and integrated managed firewall;

- (ii) closed user groups and virtual private networks (VPN) services; and
  - (iii) Intrusion Prevention Systems (IPS) dedicated services, IPS integrated services, Intrusion Detection Systems (IDS) dedicated services and/or IDS integrated services;
- (g) PSN Services; and/or
  - (h) services that facilitate voice solutions to operate across HSCN, Including but not limited to support for Session Initiation Protocol (SIP) trunking.
- 3.1.5 A variety of Contracting Body payment options, including Pay-As-You-Go, are required for the Core Components and, where appropriate for Supplementary Components

## PART B – KEY PERFORMANCE INDICATORS

### 1. General

- 1.1 The purpose of this Part B is to set out the KPIs by which the Supplier's overall performance under this Dynamic Purchasing System Agreement shall be monitored and managed. The Authority reserves the right to adjust, introduce new, or remove KPIs throughout the DPS Period; however any material changes to KPIs shall be agreed between the Authority and the Supplier in accordance with Clause 16.1 (Variation Procedure).
- 1.2 The Supplier shall comply with all its obligations related to KPIs set out in this Dynamic Purchasing System Agreement including DPS Schedule 7 (DPS Management) and shall use all reasonable endeavours to meet the KPI Targets identified in the table below.
- 1.3 The KPIs from which performance by the Supplier of this Dynamic Purchasing System Agreement will be reported against are set out below:

| Key Performance Indicator (KPI)      | KPI Target   | Measured by   |
|--------------------------------------|--|---|
| <b>ALL DPS SUPPLIERS</b>             |  |   |
| <b>1. DPS MANAGEMENT</b>             |  |   |
| 1.1 Financial MI Returns             | All Financial MI returns to be returned to Crown Commercial Service by the 7th of each month | Confirmation of receipt and time of receipt by the Authority (as evidenced within the Authority's data warehouse (MISO) system) |
| 1.2 Invoices                         | All invoices to be paid within 30 calendar days of issue                                     | Confirmation of receipt and time of receipt by the Authority (as evidenced within the Authority's CODA system)                  |
| 1.3 Supplier certificate. self-audit | To be issued to the Authority on the anniversary of the commencement of                      | Confirmation of receipt and time of receipt   |

|  |   |  |  |
|--|---|--|--|
|  |   | the Dynamic Purchasing System Agreement  | by the Authority   |
| 1.4  | Audit actions   | Actions identified in an Audit Report to be delivered by the dates set out in the Audit Report   | Confirmation by the Authority of completion of the actions by the dates identified in the Audit Report |
| 1.5  | Complaints Handling   | To ensure that 95% of all Complaints are resolved in accordance with the Call Off Complaint Handling Procedure   | Confirmation by the Authority on receipt of Operational MI Report                                      |
| 1.6  | HSCN Compliance   | To ensure the Supplier retains HSCN Compliance throughout the DPS Period. This should be as described in clause 7.2.1.   | Confirmation by the HSCN Authority of Supplier's continued HSCN Compliance                             |
| 1.7  | Migration Performance   | To ensure that, where a Supplier is successful under a Call for Competition, including aggregated procurements, customers are migrated in line with the Supplier's tender submission | Confirmation by the HSCN Authority of Supplier's performance   |
| <b>STRATEGIC SUPPLIERS ONLY</b>                  |   |  |  |
| <b>2. OPERATIONAL EFFICIENCY / PRICE SAVINGS</b> |   |  |  |
| 2.1  | The Supplier to deliver against the Supplier Action Plan to derive further savings over the |  | Confirmation by the Authority of the savings   |

|                                    |   |  |  |
|------------------------------------|---|--|--|
|                                    | DPS Period via<br>continuous<br>improvement and<br>innovation   |  | achieved by<br>the dates<br>identified in<br>the Supplier<br>Action Plan   |
| <b>3. DEMAND SAVINGS</b>           | <b>MANAGEMENT</b>   |  |  |
| 3.1                                | The Supplier to deliver<br>against the Supplier<br>Action Plan to derive<br>further savings over the<br>DPS Period via<br>continuous<br>improvement and<br>innovation |  | Confirmation<br>by the<br>Authority of<br>the savings<br>achieved by<br>the dates<br>identified in<br>the Supplier<br>Action Plan    |
| <b>4. CONTRACTING SATISFACTION</b> | <b>BODY</b>   |  |  |
| 4.1                                | Services to be provided<br>under Call Off<br>Agreements to the<br>satisfaction of<br>Contracting Bodies   |  | Confirmation<br>by the<br>Authority of<br>the Supplier's<br>performance<br>against<br>Contracting<br>Body<br>satisfaction<br>surveys |

**DPS SCHEDULE 3: TEMPLATE ORDER FORM AND TEMPLATE CALL OFF TERMS**

**PART 1: TEMPLATE ORDER FORM**

**PART 2: TEMPLATE CALL OFF TERMS**

DRAFT

## DPS SCHEDULE 4: CALL FOR COMPETITION PROCEDURE

### 1. AWARDING A CALL OFF AGREEMENT

1.1 If the Authority or any Other Contracting Body decides to source its Services Requirement through this Dynamic Purchasing System Agreement then it will award its Services Requirement in accordance with the procedure in this DPS Schedule 4 (Call for Competition Procedure) and the requirements of the Regulations and the Guidance. For the purposes of this DPS Schedule 4, "**Guidance**" shall mean any guidance issued or updated by the UK Government from time to time in relation to the Regulations.

1.2 The Award of any Call Off Agreement under this Dynamic Purchasing System Agreement must be conducted using electronic means.

### 2. CALL FOR COMPETITION PROCEDURE

2.1 The Contracting Body's obligations:

2.1.1 Any Contracting Body awarding a Call Off Agreement under this Dynamic Purchasing System Agreement through a Call for Competition Procedure shall:

- (a) develop a Statement of Requirements;
- (b) identify the DPS Suppliers capable of supplying services that meet the Statement of Requirements (the "**Capable Suppliers**") in accordance with the following provisions:
  - (i) For requirements that do not include PSN Services, the Capable Suppliers are all of the suppliers admitted to the DPS at the point that the Contracting Body undertakes their Call for Competition; or
  - (ii) For requirements that include PSN Services, the Capable Suppliers are all of the suppliers admitted to the DPS who have indicated that they are capable of supplying PSN Services in their SQ Response at the point that the Contracting Body undertakes their Call for Competition;
- (c) amend or refine the Template Order Form and Template Call Off Terms to reflect its Statement of Requirements only to the extent permitted by and in accordance with the requirements of the Regulations and Guidance;
- (d) notify the Capable Suppliers of their intention to undertake a Call for Competition using the messaging function on the DPS Platform;
- (e) invite tenders by issuing the Statement of Requirements, Template Order Form, Template Call Off Terms, award questionnaire, evaluation methodology, award criteria, and any other relevant documentation (the RFP), to the Capable Suppliers; and may include one (1) or more evaluation stages within the evaluation methodology depending upon the nature and complexity of the Services Requirements:

- (f) carry out invitations to tender by electronic means, and outside of the DPS Platform;
- (g) include within the relevant documentation such things as the Contracting Body's environmental policy as referenced in the Template Call Off Terms Clause 42.4;
- (h) keep each General Tender Response confidential until the expiry of the time limit for the receipt by it of tenders;
- (i) set a time limit in the RFP for the receipt by it of the General Tender Responses which takes into account factors such as the complexity of the subject matter of the proposed Call Off Agreement, the time needed to submit General Tender Responses, and the Regulations;
- (j) either:
  - (i) if an Electronic Reverse Auction (as defined in paragraph 3 below) is to be held, notify the Capable Suppliers in the RFP and conduct the Electronic Reverse Auction in accordance with the procedures set out in paragraph 3; or
  - (ii) apply the Call for Competition Award Criteria to compliant tenders:
    - (A) as set out in paragraph 2.2 and 2.3 of DPS Schedule 5 (Award Criteria) for single stage evaluation methodology or the final stage of a multi-stage evaluation methodology; or
    - (B) as set out in paragraph 2.1 of DPS Schedule 5 (Award Criteria) for all stages except the final stage of a multi stage evaluation methodology;

in order to establish which of the General Tender Response(s) provides the most economically advantageous solution;
- (k) request from the supplier of the most economically advantageous solution their European Single Procurement Document:
  - (i) if the supplier's European Single Procurement Document meets the standards set out in the SQ, award in accordance with paragraph 2.1.2(m); or
  - (ii) if the supplier's European Single Procurement Document is not satisfactory deem their General Tender Response non-compliant and on the basis of the award criteria, establish which of the remaining General Tender Responses provides the most economically advantageous solution and repeat the process under 2.2.1(k); and
    - (A) where the supplier's European Single Procurement Document is not satisfactory notify the Authority;

- (l) on the basis set out above, award its Call Off Agreement to the successful DPS Supplier in accordance with paragraph 6, and the Regulations;

2.1.2 The Contracting Body shall provide unsuccessful DPS Suppliers with written feedback giving reasons why their General Tender Responses were unsuccessful.

## 2.2 The Supplier's Obligations:

2.2.1 The Supplier shall in writing, by the time and date specified by the Contracting Body following an RFP pursuant to paragraph 2.1.1(e) above provide the Contracting Body with either:

- (a) a statement to the effect that it does not wish to tender in relation to the relevant RFP; or
- (b) the full details of its General Tender Response made in respect of the relevant RFP; constructed and submitted in accordance with the instructions contained within the RFP. In the absence of any such instructions, the Supplier shall submit their General Tender Response by email to the Contracting Body, including:
  - (i) an email response subject line to comprise unique reference number and Supplier name, so as to clearly identify the Supplier;
  - (ii) a brief summary, in the email (followed by a confirmation letter), stating that the Supplier is bidding for the RFP;
  - (iii) a proposal meeting the Services Requirements defined in the RFP; and
  - (iv) the completed and signed Template Order Form (as completed by the Contracting Body in accordance with paragraph 2.1.1 and as submitted as part of the RFP).

2.2.2 Ensure all General Tender Responses submitted by the Supplier in relation to a Call for Competition Procedure held pursuant to this paragraph 2 shall remain open for acceptance by the Contracting Body for ninety (90) Working Days (or such other period specified in the invitation to tender issued by the relevant Contracting Body in accordance with the Call for Competition Procedure).

## 3. E-AUCTIONS

3.1 The Contracting Body shall be entitled to invite the Supplier to a Call for Competition Procedure that utilises a reverse auction in accordance with the rules and procedures laid down by the Contracting Body in the RFP and in accordance with the Regulations.

3.2 The Supplier acknowledges that Contracting Bodies may wish to undertake an electronic reverse auction, where DPS Suppliers compete in real time by bidding as the auction unfolds ("**Electronic Reverse Auction**").

3.3 Before undertaking an Electronic Reverse Auction, the relevant Contracting Body will make an initial full evaluation of all tenders.

3.4 The Contracting Body will inform the DPS Suppliers of the specification for the Electronic Reverse Auction in the RFP which shall include:

- 3.4.1 the information to be provided at auction, which must be expressed in figures or percentages;
  - 3.4.2 the mathematical formula to be used to determine automatic ranking of bids on the basis of new prices and/or new values submitted;
  - 3.4.3 any limits on the values which may be submitted;
  - 3.4.4 a description of any information which will be made available to DPS Suppliers in the course of the Electronic Reverse Auction, and when it will be made available to them;
  - 3.4.5 the conditions under which DPS Suppliers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
  - 3.4.6 relevant information concerning the electronic equipment used and the arrangements and technical specification for connection;
  - 3.4.7 the date and time of the start of the Electronic Reverse Auction; and
  - 3.4.8 details of when and how the Electronic Reverse Auction will close.
- 3.5 The Electronic Reverse Auction may not start sooner than two (2) Working Days after the date on which the specification for the Electronic Reverse Auction has been issued.
- 3.6 Throughout each phase of the Electronic Reverse Auction the Contracting Body will communicate to all DPS Suppliers sufficient information to enable them to ascertain their relative ranking.
- 3.7 The Supplier acknowledges and agrees that:
- 3.7.1 the Contracting Body and its officers, servants, agents, group companies, assignees and customers (including the Authority) do not guarantee that its access to the Electronic Reverse Auction will be uninterrupted or error-free;
  - 3.7.2 its access to the Electronic Reverse Auction may occasionally be restricted to allow for repairs or maintenance; and
  - 3.7.3 it will comply with all such rules that may be imposed by the Contracting Body in relation to the operation of the Electronic Reverse Auction.
- 3.8 The Contracting Body will close the Electronic Reverse Auction on the basis of:
- 3.8.1 a date and time fixed in advance;
  - 3.8.2 when no new prices or values meeting the minimum differences required pursuant to paragraph 3.4.5 have been received within the prescribed elapsed time period; or
  - 3.8.3 when all the phases have been completed.

#### **4. NO AWARD**

- 4.1 Notwithstanding the fact that the Contracting Body has followed a procedure as set out in this Schedule, the Contracting Body shall be entitled at all times to decline to make an award for its Services Requirement. No element of this Dynamic Purchasing System Agreement shall oblige any Contracting Body to award any Call Off Agreement.

## **5. RESPONSIBILITY FOR AWARDS**

5.1 The Supplier acknowledges that each Contracting Body is independently responsible for the conduct of its award of Call Off Agreements under this Dynamic Purchasing System Agreement and that the Authority is not responsible or accountable for and shall have no liability whatsoever in relation to:

- 5.1.1 the conduct of Other Contracting Bodies in relation to this Dynamic Purchasing System Agreement; or
- 5.1.2 the performance or non-performance of any Call Off Agreements between the Supplier and Other Contracting Bodies entered into pursuant to this Dynamic Purchasing System Agreement.

## **6. CALL OFF AWARD PROCEDURE**

- 6.1.1 Subject to paragraphs 1 to 5 above and this paragraph 6, a Contracting Body may award a Call Off Agreement to the Supplier by sending the Supplier by email or other electronic means, a signed Order Form; and a legally binding agreement shall thereupon be formed on the date of dispatch of (and subject to the terms of) the signed Order Form. For the avoidance of doubt, by signing and returning the Order Form to the Supplier, the Contracting Body is accepting the offer made by the Supplier in their completed General Tender Response.
- 6.1.2 The Parties agree that any document or communication (including any document or communication in the apparent form of a Call Off Agreement) which is not as described in this paragraph 6 shall not constitute a Call Off Agreement under this Dynamic Purchasing System Agreement.
- 6.1.3 The Supplier shall on receipt of an Order Form as described in paragraph 6.1.1 above promptly acknowledge receipt of the Order Form to the Contracting Body concerned.
- 6.1.4 Within five (5) Working Days of receipt of a signed Order Form from the Contracting Body, the Supplier shall send the relevant Order Form to the Authority. The Supplier acknowledges that failure to provide a completed Order Form in accordance with this paragraph 6.1.4 constitutes an MI Failure.

## **DPS SCHEDULE 5: AWARD CRITERIA**

### **1. General**

- 1.1 This DPS Schedule 5 is designed to assist Contracting Bodies when awarding their Services Requirements in accordance with the procedures defined in DPS Schedule 4 (Call for Competition Procedure).
- 1.2 The Contracting Body will award on the basis of the most economically advantageous tender.
- 1.3 The Contracting Body may include one (1) or more evaluation stages within the evaluation methodology depending upon the nature and complexity of the Services Requirements.
- 1.4 This DPS Schedule 5 will include details of the evaluation criteria and any weightings that will be applied to that criteria.

### **2. Call for Competition Award criteria**

- 2.1 Some or all of the following criteria shall be applied to the Services set out in the Suppliers' General Tender Response in the first and any subsequent evaluation stages, with the exception of the final stage, of the evaluation methodology, with percentage weightings from 0% to 100% to be set by the Contracting Body conducting the Call for Competition:

| <b>Criteria Number</b> | <b>Award Criteria</b>                         | <b>Percentage Weighting</b><br>to be set by the Contracting Body<br>conducting the Call for Competition |
|------------------------|---|---|
| 1                      | Technical merit                               |   |
| 2                      | Delivery approach (including delivery period) |   |
| 3                      | Implementation approach                       |   |
| 4                      | Scalability                                   |   |

2.2 The Contracting Body shall apply the criteria specified in the table below for a single stage evaluation methodology, or the final stage of a multi-stage evaluation methodology:

| <b>Award Criteria</b> | <b>Weighting</b>        |
|-----------------------|-------------------------|
| Price                 | 25% or more (up to 75%) |
| Quality               | 25% or more (up to 75%) |

2.3 Some or all of the following sub-criteria may be applied to the Services set out in the Suppliers' General Tender Response for a single stage evaluation methodology, or the final stage of a multi-stage evaluation methodology, with percentage weightings set in accordance with paragraph 2.2 of this Schedule 4:

| <b>Criteria Reference</b> | <b>Award Criteria –</b><br>to be defined by the Contracting Body<br>conducting the Call for Competition | <b>Percentage Weightings –</b><br>to be set in accordance<br>with paragraph 2.2 |
|---------------------------|---|---|
| <b>Price</b>              |   |   |
| A                         | Cost effectiveness  |   |
| B                         | Implementation cost   |   |
| C                         | Running cost  |   |
| D                         | Exit cost   |   |
| E                         | Whole life costs  |   |
| <b>Quality</b>            |   |   |
| F                         | Technical assistance  |   |
| G                         | After sales service   |   |
| H                         | Aesthetic and functional characteristics  |   |
| I                         | Environmental characteristics   |   |
| J                         | Delivery date and delivery period   |   |
| K                         | Period of completion  |   |
| L                         | Service   |   |
| M                         | Transition  |   |
| N                         | Legal/Commercial  |   |
| O                         | Social value  |   |
| P                         | Implementation plan   |   |
| Q                         | Risk and risk management  |   |

## **DPS SCHEDULE 6: KEY SUB-CONTRACTORS**

1. In accordance with Clause 19.1 (Appointment of Key Sub-Contractors), the Supplier is entitled to sub-contract its obligations under this Dynamic Purchasing System Agreement and any Call Off Agreements entered into pursuant to this Dynamic Purchasing System Agreement, to the Key Sub-Contractors listed in the Suppliers SQ Response, and as updated by the Supplier from time to time in accordance with Annex 1 to this Schedule 6 (Key Sub-Contractors).

DRAFT

## ANNEX 1: KEY SUB-CONTRACTORS VARIATION FORM

Variation Form No: [insert sequential number]

BETWEEN:

[insert name of Authority] ("the Authority")

and

[insert name of Supplier] ("the Supplier")

1. This Dynamic Purchasing System Agreement is varied as follows and shall take effect on the date signed by both Parties
2. The Supplier hereby appoints the following Key Sub-Contractors to the Dynamic Purchasing System Agreement:

| Key Sub-Contractor's: Name;<br>Registered Office; and<br>Registration Number. | Scope / Description of Services<br>to be provided. | Is the Key Sub-<br>Contractor an<br>Affiliate (Y/N) |
|---|--|---|
|   |  |   |
|   |  |   |
|   |  |   |
|   |  |   |

3. For each Key Sub-Contractor listed above please provide a comprehensive description of their capability to meet the Services to be provided.

| Key Sub-Contractor's Name | Description |
|---------------------------|-------------|
|                           |             |
|                           |             |
|                           |             |

4. For each Key Sub-Contractor listed above please indicate where they are also a Material Sub-Contractor.

| Key Sub-Contractor's Name | Is the Key Sub-Contractor a Material Sub-Contractor |
|---------------------------|---|
|                           |   |
|                           |   |
|                           |   |

5. Where the proposed Key Sub-Contractor is an Affiliate of the Supplier, please provide in the space below or as a separate appendix to this Appointment of Key Sub-

Contractor Form evidence that demonstrates that the proposed Key Sub-Contract has been agreed on "arm's-length" terms

| Key Sub-Contractor's Name | Evidence |
|---------------------------|----------|
|                           |          |
|                           |          |
|                           |          |

6. Words and expressions in this variation shall have the meanings given to them in the Dynamic Purchasing System Agreement
7. The Dynamic Purchasing System Agreement, including any previous variations, shall remain effective and unaltered except as amended by this variation

Signed by an authorised signatory for and on behalf of the Authority:

Signature

Date

Name (in Capitals)

Address

Signed by an authorised signatory to sign for and on behalf of the Supplier:

Signature

Date

Name (in Capitals)

Address

## DPS SCHEDULE 7: DPS MANAGEMENT

### 1. INTRODUCTION

- 1.1 The successful delivery of this Dynamic Purchasing System Agreement will rely on the ability of the Supplier, and the Authority in developing a strategic relationship immediately following the conclusion of this Dynamic Purchasing System Agreement with the Supplier and maintaining this relationship throughout the DPS Period.
- 1.2 To achieve this strategic relationship, there will be a requirement to adopt proactive DPS management activities which will be informed by quality Management Information, and the sharing of information between the Supplier and the Authority.
- 1.3 This DPS Schedule 7 outlines the general structures and management activities that the Parties shall follow during the DPS Period.

### 2. DPS MANAGEMENT

#### 2.1 DPS Management Structure:

- 2.1.1 The Supplier shall provide a suitably qualified nominated contact (the **"Supplier DPS Manager"**) who will take overall responsibility for delivering the Services required within this Dynamic Purchasing System Agreement, as well as a suitably qualified deputy to act in their absence.
- 2.1.2 The Supplier shall put in place a structure to manage the DPS in accordance with DPS Schedule 2 (Services and Key Performance Indicators).
- 2.1.3 A full governance structure for the DPS will be agreed between the Parties during the Dynamic Purchasing System Agreement implementation stage.

#### 2.2 Supplier Review Meetings

- 2.2.1 Regular performance review meetings will take place at the Parties' premises, on audio and video conferences and any other suitable media as agreed between the Parties throughout the DPS Period and thereafter until the end of the DPS Period (**"Supplier Review Meetings"**).
- 2.2.2 The exact timings and frequencies of such Supplier Review Meetings will be determined by the Authority following the conclusion of the Dynamic Purchasing System Agreement. It is anticipated that the frequency of the Supplier Review Meetings will be once every month or less. The Parties shall be flexible about the timings of these meetings.
- 2.2.3 The purpose of the Supplier Review Meetings will be to review the Supplier's performance under this Dynamic Purchasing System Agreement and, if the Supplier is deemed by the Authority to be a Strategic Supplier, the Supplier's adherence to the Supplier Action Plan. The agenda for each Supplier Review Meeting shall be set by the Authority and communicated to the Supplier in advance of that meeting.

- 2.2.4 The Supplier Review Meetings shall be attended, as a minimum, by the Authority Representative(s) and the Supplier DPS Manager.
- 2.2.5 Supplier Review Meetings may be attended by a representative of the HSCN Authority at the request of either Party.

### 2.3 Strategic Suppliers

- 2.3.1 Where the Supplier has been deemed by the Authority to be a Strategic Supplier, the Authority will notify the Supplier that they are a Strategic Supplier ("**Strategic Supplier**") and the following additional activities will apply:
- 2.3.2 Supplier Action Plan:
  - (a) Following discussions between the Parties following the DPS Commencement Date, the Authority shall produce and issue to the Supplier a draft Supplier Action Plan. The Supplier shall not unreasonably withhold its agreement to the draft Supplier Action Plan. The Supplier Action Plan shall, unless the Authority otherwise Approves, be agreed between the Parties and come into effect within two (2) weeks from receipt by the Supplier of the draft Supplier Action Plan.
  - (b) The Supplier Action Plan shall be maintained and updated on an ongoing basis by the Authority. Any changes to the Supplier Action Plan shall be notified by the Authority to the Supplier. The Supplier shall not unreasonably withhold its agreement to any changes to the Supplier Action Plan. Any such changes shall, unless the Authority otherwise Approves, be agreed between the Parties and come into effect within two (2) weeks from receipt by the Supplier of the Authority's notification.
- 2.3.3 Quarterly Strategic Review Meetings
  - (a) Senior representatives from the Authority and the Supplier will meet at least quarterly, unless agreed otherwise by the Parties, to discuss aspects of the Supplier's strategic performance ("**Quarterly Strategic Review Meeting**").
  - (b) The exact timings and frequencies of such Quarterly Strategic Review Meetings will be determined by the Authority following the conclusion of the Dynamic Purchasing System Agreement.

### 3. KEY PERFORMANCE INDICATORS

- 3.1 The KPIs applicable to this Dynamic Purchasing System Agreement are set out in DPS Schedule 2 (Services and Key Performance Indicators).
- 3.2 The Supplier shall establish processes to monitor its performance against the agreed KPIs. The Supplier shall at all times ensure compliance with the standards set by the KPIs.
- 3.3 The Authority shall review progress against these KPIs to evaluate the effectiveness and efficiency of which the Supplier performs its obligations to fulfil this Dynamic Purchasing System Agreement.
- 3.4 The Supplier's achievement of KPIs shall be reviewed during the Supplier Review Meetings, in accordance with paragraph 2.2 above, and the review and ongoing

monitoring of KPIs will form a key part of the agreement management process as outlined in this DPS Schedule 7.

3.5 The Authority reserves the right to adjust, introduce new, or remove KPIs throughout the DPS Period, however any significant changes to KPIs shall be agreed between the Authority and the Supplier.

3.6 The Authority reserves the right to use and publish the performance of the Supplier against the KPIs without restriction.

#### **4. DISPUTE RESOLUTION PROCEDURE**

4.1 In the event that the Authority and the Supplier are unable to agree the resolution of any dispute escalated to the Supplier Review Meeting, the dispute will be recorded and the matter shall be referred to the Authority Representative and the Supplier Representative in order to determine the best course of action to resolve the matter (which may involve organising an ad-hoc meeting to discuss the dispute).

4.1.1 Where appropriate, matters may also be referred to the HSCN Authority to assist in determining the best course of action to resolve the matter (which may involve organising an ad-hoc meeting to discuss the dispute).

4.1.2 Where appropriate, either party may

- (a) serve a Mediation Notice in respect of the Dispute in which case paragraph 6 shall apply;
- (b) request that the Dispute is referred to an expert in which case paragraph 7 shall apply; and/or
- (c) request that the dispute be referred to arbitration in which case paragraph 8 shall apply to the Dispute.

4.2 In the event that the Parties cannot agree a resolution to the dispute, or if the Dispute remains unresolved after ninety (90) calendar days, (an "**Unresolved Dispute**") the Authority reserves the right to:

4.2.1 Continue to operate this Dynamic Purchasing System Agreement despite the outstanding dispute; or

4.2.2 Terminate this Dynamic Purchasing System Agreement.

#### **5. Multi-Party Disputes**

5.1 All Multi-Party Disputes shall be resolved in accordance with the procedure set out in this paragraph 5 (the "**Multi-Party Dispute Resolution Procedure**").

5.2 If at any time following the issue of a Dispute Notice, the Authority reasonably considers that the matters giving rise to the Dispute involve one or more parties, then the Authority shall be entitled to determine that the Dispute is a Multi-Party Dispute and to serve a notice on the Supplier which sets out the Authority's determination that the Dispute is a Multi-Party Dispute and specifies the Related Third Parties which are to be involved in the Multi-Party Dispute Resolution Procedure, such notice a "**Multi-Party Procedure Initiation Notice**".

5.3 If following the issue of a Dispute Notice but before the Dispute has been referred to Expert Determination or to arbitration in accordance with paragraph 4, the Supplier has reasonable grounds to believe that the matters giving rise to the

Dispute have been contributed to by one or more Related Third Parties, the Supplier may serve a Supplier Request on the Authority.

5.4 The Authority shall (acting reasonably) consider each Supplier Request and shall determine within five (5) Working Days whether the Dispute is:

5.4.1 a Multi-Party Dispute, in which case the Authority shall serve a Multi-Party Procedure Initiation Notice on the Supplier; or

5.4.2 not a Multi-Party Dispute, in which case the Authority shall serve written notice of such determination upon the Supplier and the Dispute shall be treated in accordance with paragraphs 2 to 4.

5.5 If the Authority has determined, following a Supplier Request, that a Dispute is not a Multi-Party Dispute, the Supplier may not serve another Supplier Request with reference to the same Dispute.

5.6 Following service of a Multi-Party Procedure Initiation Notice a Multi-Party Dispute shall be dealt with by a board (in relation to such Multi-Party Dispute, the "Multi-Party Dispute Resolution Board") comprising representatives from the following parties to the Multi-Party Dispute, each of whom shall be of a suitable level of seniority to finalise any agreement with the other parties to settle the Multi-Party Dispute:

5.6.1 the Authority;

5.6.2 the Supplier;

5.6.3 each Related Third Party involved in the Multi-Party Dispute ; and

5.6.4 any other representatives of any of the Parties and/or any Related Third Parties whom the Authority considers necessary,

(together "**Multi-Party Dispute Representatives**").

5.7 The Parties agree that the Multi-Party Dispute Resolution Board shall seek to resolve the relevant Multi-Party Dispute in accordance with the following principles and procedures:

5.7.1 the Parties shall procure that their Multi-Party Dispute Representatives attend, and shall use their best endeavours to procure that the Multi-Party Dispute Representatives of each Related Third Party attend, all meetings of the Multi-Party Dispute Resolution Board in respect of the Multi-Party Dispute;

5.7.2 the Multi-Party Dispute Resolution Board shall first meet within ten (10) Working Days of service of the relevant Multi-Party Procedure Initiation Notice at such time and place as the Parties may agree or, if the Parties do not reach agreement on the time and place within five Working Days of service of the relevant Multi-Party Procedure Initiation Notice, at the time and place specified by the Authority, provided such place is at a neutral location within England and that the meeting is to take place between 9.00am and 5.00pm on a Working Day; and

5.7.3 in seeking to resolve or settle any Multi-Party Dispute, the members of the Multi-Party Dispute Resolution Board shall have regard to the principle that a Multi-Party Dispute should be determined based on the contractual rights and obligations between the Parties and the

Related Third Parties and that any apportionment of costs should reflect the separate components of the Multi-Party Dispute.

5.8 If a Multi-Party Dispute is not resolved between the Parties and all Related Third Parties within twenty five (25) Working Days of the issue of the Multi-Party Procedure Initiation Notice (or such longer period as the Parties may agree in writing), then:

5.8.1 either Party may serve a Mediation Notice in respect of the Multi-Party Dispute in which case paragraph 6 shall apply;

5.8.2 either Party may request that the Multi-Party Dispute is referred to an expert in which case paragraph 7 shall apply; and/or

5.8.3 subject to paragraph 5.9, paragraph 8 shall apply to the Multi-Party Dispute,

and in each case references to the "Supplier" or the "Parties" in such provisions shall include a reference to all Related Third Parties.

5.9 If a Multi-Party Dispute is referred to arbitration in accordance with paragraph 8 or a Dispute becomes a Multi-Party Dispute during the course of arbitration proceedings and either Party is unable to compel a Related Third Party to submit to such arbitration proceedings, the Authority or the Supplier may discontinue such arbitration proceedings and instead initiate court proceedings. The costs of any such discontinued arbitration proceedings shall be borne by the Party which is in a direct contractual relationship with the Related Third Party or, where the Related Third Party is a Sub-Contractor, by the Supplier.

## **6. MEDIATION**

6.1 If a Mediation Notice is served, the Parties shall attempt to resolve the dispute in accordance with the version of CEDR's Model Mediation Procedure which is current at the time the Mediation Notice is served (or such other version as the Parties may agree).

6.2 If the Parties are unable to agree on the joint appointment of an independent person to mediate the Dispute within twenty (20) Working Days from (and including) the service of a Mediation Notice then either Party may apply to CEDR to nominate such a person.

6.3 If the Parties are unable to reach a settlement in the negotiations at the mediation, and only if both Parties so request and the Mediator agrees, the Mediator shall produce for the Parties a non-binding recommendation on terms of settlement. This shall not attempt to anticipate what a court might order but shall set out what the Mediator suggests are appropriate settlement terms in all of the circumstances.

6.4 Any settlement reached in the mediation shall not be legally binding until it has been reduced to writing and signed by, or on behalf of, the Parties (in accordance with the Change Control Procedure where appropriate). The Mediator shall assist the Parties in recording the outcome of the mediation.

## **7. EXPERT DETERMINATION**

7.1 If a Dispute relates to any aspect of the technology underlying the provision of the Services or otherwise relates to a technical matter of an IT, accounting or financing nature and the Dispute has not been resolved accordance with Paragraph 4 or, if applicable, mediation in accordance with Paragraph 6, then either Party may by written notice to the other request (agreement to which request shall not be

unreasonably withheld or delayed) that the Dispute be referred to an expert for determination.

7.2 The expert shall be appointed by agreement in writing between the Parties, but in the event of a failure to agree within ten (10) Working Days of the relevant request made pursuant to Paragraph 7.1, or if the person appointed is unable or unwilling to act, the expert shall be appointed:

- 7.2.1 if the Dispute relates to any aspect of the technology underlying the provision of the Services or a matter of an IT technical nature, on the instructions of the President of the British Computer Society (or any other association that has replaced **the British Computer Society**);
- 7.2.2 if the Dispute relates to a matter of a financial technical nature, on the instructions of the President of the Institute of Chartered Accountants **of England and Wales; or**
- 7.2.3 if the Dispute relates to a matter of a technical nature not falling within Paragraphs 7.2(a) or (b), on the instructions of the **president (or equivalent) of:**
  - (a) an appropriate body agreed between the Parties; or
  - (b) if the Parties do not reach agreement on the relevant body within fifteen (15) Working Days of the relevant request made pursuant to Paragraph 7.1, such body as may be specified by the President of the Law Society on application by either Party.

7.3 The Expert shall act on the following basis:

- 7.3.1 he/she shall act as an expert and not as an arbitrator and shall act fairly and impartially;
- 7.3.2 the Expert's determination shall (in the absence of a material failure to follow the agreed procedures) be final and binding on the Parties;
- 7.3.3 the Expert shall decide the procedure to be followed in the determination and shall be requested to make his/her determination within thirty (30) Working Days of his appointment or as soon as reasonably practicable thereafter and the Parties shall assist and provide the documentation that the Expert requires for the purpose of the determination;
- 7.3.4 any amount payable by one Party to another as a result of the Expert's determination shall be due and payable within twenty (20) Working Days of the Expert's determination being notified to the Parties;
- 7.3.5 the process shall be conducted in private and shall be confidential; and
- 7.3.6 the Expert shall determine how and by whom the costs of the determination, including his/her fees and expenses, are to be paid.

## 8. ARBITRATION

8.1 Subject to compliance with its obligations under Paragraph 4 and to the provisions of Paragraph 7, the Authority may at any time before court proceedings are commenced refer the Dispute to arbitration in accordance with the provisions of Paragraph 8.5.

8.2 Before the Supplier commences court proceedings or arbitration, it shall serve written notice on the Authority of its intentions and the Authority shall have fifteen (15) Working Days following receipt of such notice to serve a reply (a "Counter Notice") on the Supplier requiring the Dispute to be referred to and resolved by arbitration in accordance with Paragraph 8.5 or be subject to the exclusive jurisdiction of the courts of England and Wales. The Supplier shall not commence any court proceedings or arbitration until the expiry of such fifteen (15) Working Day period.

8.3 If the Authority serves a Counter Notice, then:

8.3.1 if the Counter Notice requires the Dispute to be referred to arbitration, the provisions of Paragraph 8.5 shall apply; or

8.3.2 if the Counter Notice requires the Dispute to be subject to the exclusive jurisdiction of the courts of England and Wales, the Dispute shall be so referred to those courts and the Supplier shall not commence arbitration proceedings.

8.4 If the Authority does not serve a Counter Notice within the fifteen (15) Working Day period referred to in Paragraph 8.2, the Supplier may either commence arbitration proceedings in accordance with Paragraph 8.5 or commence court proceedings in the Courts of England and Wales which shall (in those circumstances) have exclusive jurisdiction.

8.5 The Parties hereby confirm that if any arbitration proceedings are commenced pursuant to Paragraphs 8.1 to 8.4:

8.5.1 the Dispute shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration ("LCIA") (subject to Paragraphs 8.5.5, 8.4.6 and 8.4.7);

8.5.2 the arbitration shall be administered by the LCIA;

8.5.3 the LCIA procedural rules in force at the date that the Dispute was referred to arbitration shall be applied and are deemed to be incorporated by reference into this Agreement and the decision of the arbitrator shall be binding on the Parties in the absence of any material failure to comply with such rules;

8.5.4 if the Parties fail to agree the appointment of the arbitrator within ten (10) Working Days from the date on which arbitration proceedings are commenced or if the person appointed is unable or unwilling to act, the arbitrator shall be appointed by the LCIA;

8.5.5 the chair of the arbitral tribunal shall be British;

8.5.6 the arbitration proceedings shall take place in London and in the English language; and

8.5.7 the seat of the arbitration shall be London

## **DPS SCHEDULE 8: MANAGEMENT INFORMATION**

### **1. GENERAL REQUIREMENTS**

- 1.1 The Supplier shall operate and maintain appropriate systems, processes and records to ensure that it can, at all times, deliver timely and accurate Management Information to the Authority in accordance with the provisions of this DPS Schedule 8.
- 1.2 The Supplier shall also supply such Management Information as may be required by a Contracting Body in accordance with the terms of a Call Off Agreement.

### **2. MANAGEMENT INFORMATION AND FORMAT**

- 2.1 The Supplier agrees to provide timely, full, accurate and complete MI Reports to the Authority which incorporates the data, in the correct format, required by the MI Reporting Templates. The initial MI Reporting Templates are set out in the Annexes to this DPS Schedule 8.
- 2.2 The Authority may from time to time make changes to the MI Reporting Templates including to the data required or format of the report and issue a replacement version of the MI Reporting Templates to the Supplier. The Authority shall give notice in writing of any such change to the MI Reporting Templates and shall specify the date from which the replacement MI Reporting Templates must be used for future MI Reports which date shall be at least thirty (30) calendar days following the date of the notice.
- 2.3 If the MI Reporting Templates are amended by the Authority at any time, then the Supplier agrees to provide all future MI Reports in accordance with the most recent MI Reporting Template issued by the Authority.
- 2.4 The Authority may provide the Supplier with supplemental guidance for completing the MI Reporting Templates or submitting MI Reports from time to time which may for example indicate which fields are mandatory and which are optional. The Supplier agrees to complete Monthly MI Reports in accordance with any such guidance.
- 2.5 The Supplier may not make any amendment to the current MI Reporting Templates without the prior Approval of the Authority.
- 2.6 The Authority shall have the right from time to time (on reasonable written notice) to amend the nature of the Management Information which the Supplier is required to supply to the Authority.

### **3. FREQUENCY AND COVERAGE**

- 3.1 All MI Reports must be completed by the Supplier using the appropriate MI Reporting Template and returned to the Authority on or prior to the relevant reporting date every Month during the DPS Period and thereafter, until all transactions relating to Call Off Agreements have permanently ceased as follows:
  - 3.1.1 Financial MI Report by the Financial MI Reporting Date;
- 3.2 Each MI Report should be used (among other things) to report Orders received and transactions occurring during the Month to which the MI Report relates, regardless of when the work was actually completed. For example, if an invoice is raised for October but the work was actually completed in September, the Supplier must report the invoice in October's MI Report and not September's.

- 3.2.1 Each Order received by the Supplier must be reported when the Order is received. Suppliers must also report contract extensions, variations, and terminations.
- 3.2.2 In accordance with the requirements of the Regulations, the Authority will send contract award notices to the EU Publications Office for publication, based on the Orders submitted by the Supplier in their MI Reports.
- 3.3 The Supplier must return the MI Report for each Month even where there are no transactions to report in the relevant Month (a "**Nil Return**").
- 3.4 The Supplier must inform the Authority of any errors or corrections to the Management Information:
  - 3.4.1 in the next MI Report due immediately following discovery of the error by the Supplier; or
  - 3.4.2 as a result of the Authority querying any data contained in an MI Report.

#### 4. SUBMISSION OF THE MONTHLY MI REPORTS

4.1 The completed MI Report shall be completed as follows:

| MI Report | Template                             | By When   | Where |
|-----------|--------------------------------------|-----------|-------|
| Financial | Financial reporting Template Annex 1 | MI at 7th | MISO  |

4.2 The Authority reserves the right (acting reasonably) to specify that the MI Reports be submitted by the Supplier using an alternative communication to that specified in paragraph 4.1 above. The Supplier agrees to comply with any such instructions provided they do not materially increase the burden on the Supplier.

#### 5. DEFECTIVE MANAGEMENT INFORMATION

- 5.1 The Supplier acknowledges that it is essential that the Authority receives timely and accurate Management Information pursuant to this Dynamic Purchasing System Agreement because Management Information is used by the Authority to inform strategic decision making and allows it to calculate the Management Levy.
- 5.2 The Supplier also acknowledges that the provision of completed Order Forms in accordance with paragraph 6.4 of DPS Schedule 4 (Call for Competition Procedures) constitutes an important aspect of the Management Information required by the Authority.
- 5.3 Following an MI Failure the Authority may issue reminders to the Supplier or require the Supplier to rectify defects in the MI Report provided to the Authority. The Supplier shall rectify any deficient or incomplete MI Report as soon as possible and not more than five (5) Working Days following receipt of any such reminder.

### **Meetings**

- 5.4 The Supplier agrees to attend meetings between the Parties in person to discuss the circumstances of any MI Failure(s) at the request of the Authority (without prejudice to any other rights the Authority may have). If the Authority requests such a meeting the Supplier shall propose measures to ensure that the MI Failures are rectified and do not occur in the future. The Parties shall document these measures and continue to monitor the Supplier's performance.

DRAFT

## ANNEX 1: FINANCIAL MI REPORTING TEMPLATE

***The Financial Management Information Reporting Template is as found in the RM3825 HSCN Access Services bid pack unless subsequently revised in accordance with Clause 2 DPS Schedule 8 (Management Information)***

DRAFT

## DPS SCHEDULE 9: ANNUAL SELF AUDIT CERTIFICATE

**[To be signed by Head of Internal Audit, Finance Director or company's external auditor]**

**[Guidance Note: Please seek guidance from the Crown Commercial Service audit team in relation to this point]**

Dear Crown Commercial Service

In accordance with the Dynamic Purchasing System Agreement entered into on **[insert DPS Commencement Date dd/mm/yyyy]** between **[insert name of Supplier]** and the Authority, we confirm the following:

1. In our opinion based on the testing undertaken **[name of Supplier]** has in place suitable systems for identifying and recording the transactions taking place under the provisions of the above Dynamic Purchasing System Agreement.
2. We have tested the systems for identifying and reporting on DPS activity and found them to be operating satisfactorily.
3. We have tested a sample of **[ ] [insert number of sample transactions tested]** Orders and related invoices during our audit for the financial year ended **[insert financial year]** and confirm that they are correct and in accordance with the terms and conditions of the Dynamic Purchasing System Agreement.
4. We have tested from the order processing and invoicing systems a sample of **[ ] [Insert number of sample transactions tested]** public sector orders placed outside the Dynamic Purchasing System Agreement during our audit for the financial year ended **[insert financial year]** and confirm they have been identified correctly as orders placed outside the Dynamic Purchasing System Agreement, an appropriate and legitimately tendered procurement route has been used to place those orders, and those orders should not otherwise have been routed via centralised and mandated procurement processes executed by the Authority.
5. We have also attached an Audit Report which provides details of the methodology applied to complete the review, the sampling techniques applied, details of any issues identified and remedial action taken.

**[Guidance Note: see Clause 15 (Records, Audit Access and Open Book Data) for details of what is required]**

Name:.....

Signed:.....

Head of Internal Audit/ Finance Director/ External Audit firm (delete as applicable)

Date:.....

Professional Qualification held by Signatory:.....

Note to Suppliers: where Crown Commercial Service identifies independently that data accuracy supporting this certificate is flawed we will consider action on a case by case basis, and in some cases where the issues identified are clearly systemic we will

consider whether this behaviour goes beyond poor commercial practice and will seek further guidance from the GLD.

DRAFT

## DPS SCHEDULE 10: TEMPLATE GUARANTEE

**[Guidance Note: this is a draft form of guarantee which can be used to procure either a Dynamic Purchasing System Guarantee and so it will need to be amended to reflect the Beneficiary's requirements. See Clause 8 of the Dynamic Purchasing System Agreement.]**

**[Insert the name of the Guarantor]**

- and -

**[Insert the name of the Beneficiary]**

DEED OF GUARANTEE

## DEED OF GUARANTEE

THIS DEED OF GUARANTEE is made the                      day of                      20[ ]

### BETWEEN:

- (1) [Insert the name of the Guarantor] [a company incorporated in England and Wales] with number [insert company no.] whose registered office is at [insert details of the Guarantor's registered office here] [OR] [a company incorporated under the laws of [insert country], registered in [insert country] with number [insert number] at [insert place of registration], whose principal office is at [insert office details] ("Guarantor"); in favour of
- (2) [The Authority] [Insert name of Contracting Body who is Party to the Guaranteed Agreement] whose principal office is at [ ] ("Beneficiary")

**[Guidance note: Where this deed of guarantee is used to procure a Dynamic Purchasing System Guarantee in favour of the Authority, this paragraph numbered (2) above will set out the details of the Authority.]**

### WHEREAS:

- (A) The Guarantor has agreed, in consideration of the Beneficiary entering into the Guaranteed Agreement with the Supplier, to guarantee all of the Supplier's obligations under the Guaranteed Agreement.
- (B) It is the intention of the Parties that this document be executed and take effect as a deed.

Now in consideration of the Beneficiary entering into the Guaranteed Agreement, the Guarantor hereby agrees with the Beneficiary as follows:

## 1. DEFINITIONS AND INTERPRETATION

In this Deed of Guarantee:

1.1 unless defined elsewhere in this Deed of Guarantee or the context requires otherwise, defined terms shall have the same meaning as they have for the purposes of the Guaranteed Agreement;

1.2 the words and phrases below shall have the following meanings:

**[Guidance Note: Insert and/or settle Definitions, including from the following list, as appropriate to either Dynamic Purchasing System Guarantee or Contract Guarantee]**

|  |   |
|--|---|
| <b>["Authority"]</b>                           | has the meaning given to it in the Dynamic Purchasing System Agreement;   |
| <b>["Beneficiary"]</b>                         | means [the Authority] [insert name of the Contracting Body with whom the Supplier enters into a Contract] and "Beneficiaries" shall be construed accordingly; |
| <b>["Contract"]</b>                            | has the meaning given to it in the Dynamic Purchasing System Agreement;   |
| <b>["Dynamic Purchasing System Agreement"]</b> | means the Dynamic Purchasing System Agreement for the Goods and/or Services dated on or about the date hereof made between the Authority and the Supplier;    |

|                                   |  |
|-----------------------------------|--|
| <b>["Goods"]</b>                  | has the meaning given to it in the Dynamic Purchasing System Agreement;]   |
| <b>["Guaranteed Agreement"]</b>   | means [the Dynamic Purchasing System Agreement] [the Contract] made between the Beneficiary and the Supplier on [insert date];]  |
| <b>["Guaranteed Obligations"]</b> | means all obligations and liabilities of the Supplier to the Beneficiary under the Guaranteed Agreement together with all obligations owed by the Supplier to the Beneficiary that are supplemental to, incurred under, ancillary to or calculated by reference to the Guaranteed Agreement; |
| <b>["Services"]</b>               | has the meaning given to it in the Dynamic Purchasing System Agreement;]   |

- 1.3 references to this Deed of Guarantee and any provisions of this Deed of Guarantee or to any other document or agreement (including to the Guaranteed Agreement) are to be construed as references to this Deed of Guarantee, those provisions or that document or agreement in force for the time being and as amended, varied, restated, supplemented, substituted or novated from time to time;
- 1.4 unless the context otherwise requires, words importing the singular are to include the plural and vice versa;
- 1.5 references to a person are to be construed to include that person's assignees or transferees or successors in title, whether direct or indirect;
- 1.6 the words "other" and "otherwise" are not to be construed as confining the meaning of any following words to the class of thing previously stated where a wider construction is possible;
- 1.7 unless the context otherwise requires, reference to a gender includes the other gender and the neuter;
- 1.8 unless the context otherwise requires, references to an Act of Parliament, statutory provision or statutory instrument include a reference to that Act of Parliament, statutory provision or statutory instrument as amended, extended or re-enacted from time to time and to any regulations made under it;
- 1.9 unless the context otherwise requires, any phrase introduced by the words "including", "includes", "in particular", "for example" or similar, shall be construed as illustrative and without limitation to the generality of the related general words;
- 1.10 references to Clauses and Schedules are, unless otherwise provided, references to Clauses of and Schedules to this Deed of Guarantee; and
- 1.11 references to liability are to include any liability whether actual, contingent, present or future.

## **2. GUARANTEE AND INDEMNITY**

- 2.1 The Guarantor irrevocably and unconditionally guarantees and undertakes to the Beneficiary to procure that the Supplier duly and punctually performs all of the Guaranteed Obligations now or hereafter due, owing or incurred by the Supplier to the Beneficiary.
- 2.2 The Guarantor irrevocably and unconditionally undertakes upon demand to pay to the Beneficiary all monies and liabilities which are now or at any time hereafter

shall have become payable by the Supplier to the Beneficiary under or in connection with the Guaranteed Agreement or in respect of the Guaranteed Obligations as if it were a primary obligor.

2.3 If at any time the Supplier shall fail to perform any of the Guaranteed Obligations, the Guarantor, as primary obligor, irrevocably and unconditionally undertakes to the Beneficiary that, upon first demand by the Beneficiary it shall, at the cost and expense of the Guarantor:

2.3.1 fully, punctually and specifically perform such Guaranteed Obligations as if it were itself a direct and primary obligor to the Beneficiary in respect of the Guaranteed Obligations and liable as if the Guaranteed Agreement had been entered into directly by the Guarantor and the Beneficiary; and

2.3.2 as a separate and independent obligation and liability, indemnify and keep the Beneficiary indemnified against all losses, damages, costs and expenses (including VAT thereon, and including, without limitation, all court costs and all legal fees on a solicitor and own client basis, together with any disbursements,) of whatever nature which may result or which such Beneficiary may suffer, incur or sustain arising in any way whatsoever out of a failure by the Supplier to perform the Guaranteed Obligations save that, subject to the other provisions of this Deed of Guarantee, this shall not be construed as imposing greater obligations or liabilities on the Guarantor than are purported to be imposed on the Supplier under the Guaranteed Agreement.

2.4 As a separate and independent obligation and liability from its obligations and liabilities under Clauses 2.1 to 2.3 above, the Guarantor as a primary obligor irrevocably and unconditionally undertakes to indemnify and keep the Beneficiary indemnified on demand against all losses, damages, costs and expenses (including VAT thereon, and including, without limitation, all legal costs and expenses), of whatever nature, whether arising under statute, contract or at common law, which such Beneficiary may suffer or incur if any obligation guaranteed by the Guarantor is or becomes unenforceable, invalid or illegal as if the obligation guaranteed had not become unenforceable, invalid or illegal provided that the Guarantor's liability shall be no greater than the Supplier's liability would have been if the obligation guaranteed had not become unenforceable, invalid or illegal.

### **3. OBLIGATION TO ENTER INTO A NEW CONTRACT**

3.1 If the Guaranteed Agreement is terminated for any reason, whether by the Beneficiary or the Supplier, or if the Guaranteed Agreement is disclaimed by a liquidator of the Supplier or the obligations of the Supplier are declared to be void or voidable for any reason, then the Guarantor will, at the request of the Beneficiary enter into a contract with the Beneficiary in terms mutatis mutandis the same as the Guaranteed Agreement and the obligations of the Guarantor under such substitute agreement shall be the same as if the Guarantor had been original obligor under the Guaranteed Agreement or under an agreement entered into on the same terms and at the same time as the Guaranteed Agreement with the Beneficiary.

#### **4. DEMANDS AND NOTICES**

4.1 Any demand or notice served by the Beneficiary on the Guarantor under this Deed of Guarantee shall be in writing, addressed to:

4.1.1 [Address of the Guarantor in England and Wales]

4.1.2 [Facsimile Number]

4.1.3 For the Attention of [insert details]

or such other address in England and Wales or facsimile number as the Guarantor has from time to time notified to the Beneficiary in writing in accordance with the terms of this Deed of Guarantee as being an address or facsimile number for the receipt of such demands or notices.

4.2 Any notice or demand served on the Guarantor or the Beneficiary under this Deed of Guarantee shall be deemed to have been served:

4.2.1 if delivered by hand, at the time of delivery; or

4.2.2 if posted, at 10.00 a.m. on the second Working Day after it was put into the post; or

4.2.3 if sent by facsimile, at the time of despatch, if despatched before 5.00 p.m. on any Working Day, and in any other case at 10.00 a.m. on the next Working Day.

4.3 In proving service of a notice or demand on the Guarantor or the Beneficiary it shall be sufficient to prove that delivery was made, or that the envelope containing the notice or demand was properly addressed and posted as a prepaid first class recorded delivery letter, or that the facsimile message was properly addressed and despatched, as the case may be.

4.4 Any notice purported to be served on the Beneficiary under this Deed of Guarantee shall only be valid when received in writing by the Beneficiary.

#### **5. BENEFICIARY'S PROTECTIONS**

5.1 The Guarantor shall not be discharged or released from this Deed of Guarantee by any arrangement made between the Supplier and the Beneficiary (whether or not such arrangement is made with or without the assent of the Guarantor) or by any amendment to or termination of the Guaranteed Agreement or by any forbearance or indulgence whether as to payment, time, performance or otherwise granted by the Beneficiary in relation thereto (whether or not such amendment, termination, forbearance or indulgence is made with or without the assent of the Guarantor) or by the Beneficiary doing (or omitting to do) any other matter or thing which but for this provision might exonerate the Guarantor.

5.2 This Deed of Guarantee shall be a continuing security for the Guaranteed Obligations and accordingly:

5.2.1 it shall not be discharged, reduced or otherwise affected by any partial performance (except to the extent of such partial performance) by the Supplier of the Guaranteed Obligations or by any omission or delay on the part of the Beneficiary in exercising its rights under this Deed of Guarantee;

5.2.2 it shall not be affected by any dissolution, amalgamation, reconstruction, reorganisation, change in status, function, control or

ownership, insolvency, liquidation, administration, appointment of a receiver, voluntary arrangement, any legal limitation or other incapacity, of the Supplier, the Beneficiary, the Guarantor or any other person;

5.2.3 if, for any reason, any of the Guaranteed Obligations shall prove to have been or shall become void or unenforceable against the Supplier for any reason whatsoever, the Guarantor shall nevertheless be liable in respect of that purported obligation or liability as if the same were fully valid and enforceable and the Guarantor were principal debtor in respect thereof; and

5.2.4 the rights of the Beneficiary against the Guarantor under this Deed of Guarantee are in addition to, shall not be affected by and shall not prejudice, any other security, guarantee, indemnity or other rights or remedies available to the Beneficiary.

5.3 The Beneficiary shall be entitled to exercise its rights and to make demands on the Guarantor under this Deed of Guarantee as often as it wishes and the making of a demand (whether effective, partial or defective) in respect of the breach or non-performance by the Supplier of any Guaranteed Obligation shall not preclude the Beneficiary from making a further demand in respect of the same or some other default in respect of the same Guaranteed Obligation.

5.4 The Beneficiary shall not be obliged before taking steps to enforce this Deed of Guarantee against the Guarantor to obtain judgment against the Supplier or the Guarantor or any third party in any court, or to make or file any claim in a bankruptcy or liquidation of the Supplier or any third party, or to take any action whatsoever against the Supplier or the Guarantor or any third party or to resort to any other security or guarantee or other means of payment. No action (or inaction) by the Beneficiary in respect of any such security, guarantee or other means of payment shall prejudice or affect the liability of the Guarantor hereunder.

5.5 The Beneficiary's rights under this Deed of Guarantee are cumulative and not exclusive of any rights provided by law and may be exercised from time to time and as often as the Beneficiary deems expedient.

5.6 Any waiver by the Beneficiary of any terms of this Deed of Guarantee, or of any Guaranteed Obligations shall only be effective if given in writing and then only for the purpose and upon the terms and conditions, if any, on which it is given.

5.7 Any release, discharge or settlement between the Guarantor and the Beneficiary shall be conditional upon no security, disposition or payment to the Beneficiary by the Guarantor or any other person being void, set aside or ordered to be refunded pursuant to any enactment or law relating to liquidation, administration or insolvency or for any other reason whatsoever and if such condition shall not be fulfilled the Beneficiary shall be entitled to enforce this Deed of Guarantee subsequently as if such release, discharge or settlement had not occurred and any such payment had not been made. The Beneficiary shall be entitled to retain this security after as well as before the payment, discharge or satisfaction of all monies, obligations and liabilities that are or may become due owing or incurred to the Beneficiary from the Guarantor for such period as the Beneficiary may determine.

## **6. GUARANTOR INTENT**

6.1 Without prejudice to the generality of Clause 5 (Beneficiary's Protections), the Guarantor expressly confirms that it intends that this Deed of Guarantee shall

extend from time to time to any (however fundamental) variation, increase, extension or addition of or to the Guaranteed Agreement and any associated fees, costs and/or expenses.

## **7. RIGHTS OF SUBROGATION**

7.1 The Guarantor shall, at any time when there is any default in the performance of any of the Guaranteed Obligations by the Supplier and/or any default by the Guarantor in the performance of any of its obligations under this Deed of Guarantee, exercise any rights it may have:

7.1.1 of subrogation and indemnity;

7.1.2 to take the benefit of, share in or enforce any security or other guarantee or indemnity for the Supplier's obligations; and

7.1.3 to prove in the liquidation or insolvency of the Supplier,

only in accordance with the Beneficiary's written instructions and shall hold any amount recovered as a result of the exercise of such rights on trust for the Beneficiary and pay the same to the Beneficiary on first demand. The Guarantor hereby acknowledges that it has not taken any security from the Supplier and agrees not to do so until Beneficiary receives all moneys payable hereunder and will hold any security taken in breach of this Clause on trust for the Beneficiary.

## **8. DEFERRAL OF RIGHTS**

8.1 Until all amounts which may be or become payable by the Supplier under or in connection with the Guaranteed Agreement have been irrevocably paid in full, the Guarantor agrees that, without the prior written consent of the Beneficiary, it will not:

8.1.1 exercise any rights it may have to be indemnified by the Supplier;

8.1.2 claim any contribution from any other guarantor of the Supplier's obligations under the Guaranteed Agreement;

8.1.3 take the benefit (in whole or in part and whether by way of subrogation or otherwise) of any rights of the Beneficiary under the Guaranteed Agreement or of any other guarantee or security taken pursuant to, or in connection with, the Guaranteed Agreement;

8.1.4 demand or accept repayment in whole or in part of any indebtedness now or hereafter due from the Supplier; or

8.1.5 claim any set-off or counterclaim against the Supplier;

8.2 If the Guarantor receives any payment or other benefit or exercises any set off or counterclaim or otherwise acts in breach of this Clause 8, anything so received and any benefit derived directly or indirectly by the Guarantor therefrom shall be held on trust for the Beneficiary and applied in or towards discharge of its obligations to the Beneficiary under this Deed of Guarantee.

## **9. REPRESENTATIONS AND WARRANTIES**

9.1 The Guarantor hereby represents and warrants to the Beneficiary that:

9.1.1 the Guarantor is duly incorporated and is a validly existing company under the laws of its place of incorporation, has the capacity to sue or

be sued in its own name and has power to carry on its business as now being conducted and to own its property and other assets;

9.1.2 the Guarantor has full power and authority to execute, deliver and perform its obligations under this Deed of Guarantee and no limitation on the powers of the Guarantor will be exceeded as a result of the Guarantor entering into this Deed of Guarantee;

9.1.3 the execution and delivery by the Guarantor of this Deed of Guarantee and the performance by the Guarantor of its obligations under this Deed of Guarantee including, without limitation entry into and performance of a contract pursuant to Clause 3) have been duly authorised by all necessary corporate action and do not contravene or conflict with:

- (a) the Guarantor's memorandum and articles of association or other equivalent constitutional documents;
- (b) any existing law, statute, rule or regulation or any judgment, decree or permit to which the Guarantor is subject; or
- (c) the terms of any agreement or other document to which the Guarantor is a Party or which is binding upon it or any of its assets;

9.1.4 all governmental and other authorisations, approvals, licences and consents, required or desirable, to enable it lawfully to enter into, exercise its rights and comply with its obligations under this Deed of Guarantee, and to make this Deed of Guarantee admissible in evidence in its jurisdiction of incorporation, have been obtained or effected and are in full force and effect; and

9.1.5 this Deed of Guarantee is the legal valid and binding obligation of the Guarantor and is enforceable against the Guarantor in accordance with its terms.

## **10. PAYMENTS AND SET-OFF**

10.1 All sums payable by the Guarantor under this Deed of Guarantee shall be paid without any set-off, lien or counterclaim, deduction or withholding, howsoever arising, except for those required by law, and if any deduction or withholding must be made by law, the Guarantor will pay that additional amount which is necessary to ensure that the Beneficiary receives a net amount equal to the full amount which it would have received if the payment had been made without the deduction or withholding.

10.2 The Guarantor shall pay interest on any amount due under this Deed of Guarantee at the applicable rate under the Late Payment of Commercial Debts (Interest) Act 1998, accruing on a daily basis from the due date up to the date of actual payment, whether before or after judgment.

10.3 The Guarantor will reimburse the Beneficiary for all legal and other costs (including VAT) incurred by the Beneficiary in connection with the enforcement of this Deed of Guarantee.

## **11. GUARANTOR'S ACKNOWLEDGEMENT**

11.1 The Guarantor warrants, acknowledges and confirms to the Beneficiary that it has not entered into this Deed of Guarantee in reliance upon, nor has it been induced to enter into this Deed of Guarantee by any representation, warranty or

undertaking made by or on behalf of the Beneficiary (whether express or implied and whether pursuant to statute or otherwise) which is not set out in this Deed of Guarantee.

## **12. ASSIGNMENT**

- 12.1 The Beneficiary shall be entitled to assign or transfer the benefit of this Deed of Guarantee at any time to any person without the consent of the Guarantor being required and any such assignment or transfer shall not release the Guarantor from its liability under this Guarantee.
- 12.2 The Guarantor may not assign or transfer any of its rights and/or obligations under this Deed of Guarantee.

## **13. SEVERANCE**

- 13.1 If any provision of this Deed of Guarantee is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if this Deed of Guarantee had been executed with the invalid, illegal or unenforceable provision eliminated.

## **14. THIRD PARTY RIGHTS**

- 14.1 A person who is not a Party to this Deed of Guarantee shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed of Guarantee. This Clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

## **15. GOVERNING LAW**

- 15.1 This Deed of Guarantee and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in all respects in accordance with English law.
- 15.2 The Guarantor irrevocably agrees for the benefit of the Beneficiary that the courts of England shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any dispute which may arise out of or in connection with this Deed of Guarantee and for such purposes hereby irrevocably submits to the jurisdiction of such courts.
- 15.3 Nothing contained in this Clause shall limit the rights of the Beneficiary to take proceedings against the Guarantor in any other court of competent jurisdiction, nor shall the taking of any such proceedings in one or more jurisdictions preclude the taking of proceedings in any other jurisdiction, whether concurrently or not (unless precluded by applicable law).
- 15.4 The Guarantor irrevocably waives any objection which it may have now or in the future to the courts of England being nominated for the purpose of this Clause on the ground of venue or otherwise and agrees not to claim that any such court is not a convenient or appropriate forum.

- 15.5 [The Guarantor hereby irrevocably designates, appoints and empowers [the Supplier] [a suitable alternative to be agreed if the Supplier's registered office is not in England or Wales] either at its registered office or on facsimile number [insert fax no.] from time to time to act as its authorised agent to receive notices, demands, service of process and any other legal summons in England and Wales for the purposes of any legal action or proceeding brought or to be brought by the

Beneficiary in respect of this Deed of Guarantee. The Guarantor hereby irrevocably consents to the service of notices and demands, service of process or any other legal summons served in such way.]

**[Guidance Note: Include the above provision when dealing with the appointment of English process agent by a non-English incorporated Guarantor]**

IN WITNESS whereof the Guarantor has caused this instrument to be executed and delivered as a Deed the day and year first before written.

EXECUTED as a DEED by

**[Insert name of the Guarantor]** acting by **[Insert/print names]**

Director

Director/Secretary

DRAFT

## **DPS SCHEDULE 11: INSURANCE REQUIREMENTS**

### **1. OBLIGATION TO MAINTAIN INSURANCES**

- 1.1 Without prejudice to its obligations to the Authority under this Dynamic Purchasing System Agreement, including its indemnity obligations, the Supplier shall for the periods specified in this Schedule 11 take out and maintain, or procure the taking out and maintenance of the insurances as set out in Annex 1 (Required Insurances) and any other insurances as may be required by applicable Law (together the “**Insurances**”). The Supplier shall ensure that each of the Insurances is effective no later than the DPS Commencement Date.
- 1.2 The Insurances shall be maintained in accordance with Good Industry Practice and (so far as is reasonably practicable) on terms no less favourable than those generally available to a prudent contractor in respect of risks insured in the international insurance market from time to time.
- 1.3 The Insurances shall be taken out and maintained with independently regulated insurance companies of good financial standing properly licensed to underwrite insurance risks of the type in question.
- 1.4 The Supplier shall ensure that the public and products liability policy shall contain an indemnity to principals clause under which the Authority shall be indemnified in respect of claims made against the Authority in respect of death or bodily injury or third party property damage arising out of or in connection with the Services and for which the Supplier is legally liable.

### **2. GENERAL OBLIGATIONS**

- 2.1 Without limiting the other provisions of this Dynamic Purchasing System Agreement, the Supplier shall:
  - 2.1.1 take or procure the taking of all reasonable risk management and risk control measures in relation to the Services as it would be reasonable to expect of a prudent contractor acting in accordance with Good Industry Practice, including the investigation and reports of relevant claims to insurers;
  - 2.1.2 promptly notify the insurers in writing of any relevant material fact under any Insurances of which the Supplier is or becomes aware; and
  - 2.1.3 hold all policies in respect of the Insurances and cause any insurance broker effecting the Insurances to hold any insurance slips and other evidence of placing cover representing any of the Insurances to which it is a party.

### **3. FAILURE TO INSURE**

- 3.1 The Supplier shall not take any action or fail to take any action or (insofar as is reasonably within its power) permit anything to occur in relation to it which would entitle any insurer to refuse to pay any claim under any of the Insurances.
- 3.2 Where the Supplier has failed to purchase any of the Insurances or maintain any of the Insurances in full force and effect, the Authority may elect (but shall not be obliged) following written notice to the Supplier to purchase the relevant Insurances, and the Authority shall be entitled to recover the reasonable premium and other reasonable costs incurred in connection therewith as a debt due from the Supplier.

#### **4. EVIDENCE OF POLICIES**

4.1 The Supplier shall upon the DPS Commencement Date and within fifteen (15) Working Days after the renewal of each of the Insurances, provide evidence, such reasonable evidence as would be required to verify the insurances are in effect, that the Insurances are in force and effect and meet in full the requirements of this DPS Schedule 11. Receipt of such evidence by the Authority shall not in itself constitute acceptance by the Authority or relieve the Supplier of any of its liabilities and obligations under this Dynamic Purchasing System Agreement.

#### **5. AGGREGATE LIMIT OF INDEMNITY**

5.1 Where the minimum limit of indemnity required in relation to any of the Insurances is specified as being "in the aggregate":

5.1.1 if a claim or claims which do not relate to this Dynamic Purchasing System Agreement are notified to the insurers which, given the nature of the allegations and/or the quantum claimed by the third party(ies), is likely to result in a claim or claims being paid by the insurers which could reduce the level of cover available below that minimum, the Supplier shall immediately submit to the Authority:

- (a) details of the policy concerned; and
- (b) its proposed solution for maintaining the minimum limit of indemnity specified; and

5.1.2 if and to the extent that the level of insurance cover available falls below that minimum because a claim or claims which do not relate to this Dynamic Purchasing System Agreement are paid by insurers, the Supplier shall:

- (a) ensure that the insurance cover is reinstated to maintain at all times the minimum limit of indemnity specified for claims relating to this Dynamic Purchasing System Agreement; or
- (b) if the Supplier is or has reason to believe that it will be unable to ensure that insurance cover is reinstated to maintain at all times the minimum limit of indemnity specified, immediately submit to the Authority full details of the policy concerned and its proposed solution for maintaining the minimum limit of indemnity specified.

#### **6. CANCELLATION**

6.1 The Supplier shall notify the Authority in writing at least five (5) Working Days prior to the cancellation, suspension, termination or non-renewal of any of the Insurances.

#### **7. INSURANCE CLAIMS**

7.1 The Supplier shall promptly notify to insurers any matter arising from, or in relation to, the Services and/or this Dynamic Purchasing System Agreement for which it may be entitled to claim under any of the Insurances. In the event that the Authority receives a claim relating to or arising out of the Services or this Dynamic Purchasing System Agreement, the Supplier shall co-operate with the Authority and assist it in dealing with such claims including without limitation providing information and documentation in a timely manner.

- 7.2 Except where the Authority is the claimant party, the Supplier shall give the Authority notice within twenty (20) Working Days after any insurance claim in excess of five thousand pounds £5,000 relating to or arising out of the provision of the Services or this Dynamic Purchasing System Agreement on any of the Insurances or which, but for the application of the applicable policy excess, would be made on any of the Insurances and (if required by the Authority) full details of the incident giving rise to the claim.
- 7.3 Where any Insurance requires payment of a premium, the Supplier shall be liable for and shall promptly pay such premium.
- 7.4 Where any Insurance is subject to an excess or deductible below which the indemnity from insurers is excluded, the Supplier shall be liable for such excess or deductible. The Supplier shall not be entitled to recover from the Authority any sum paid by way of excess or deductible under the Insurances whether under the terms of this Dynamic Purchasing System Agreement or otherwise.

## **ANNEX 1: REQUIRED INSURANCES**

### **Part A: Third Party Public & Products Liability Insurance**

#### **1. INSURED**

1.1 The Supplier

#### **2. INTEREST**

2.1 To indemnify the Insured in respect of all sums which the Insured shall become legally liable to pay as damages, including claimant's costs and expenses, in respect of accidental:

2.1.1 death or bodily injury to or sickness, illness or disease contracted by any person;

2.1.2 loss of or damage to property;

happening during the period of insurance (as specified in Paragraph 5 of this Annex 1 to this Schedule 11) and arising out of or in connection with the provision of the Services and in connection with this Dynamic Purchasing System Agreement.

#### **3. LIMIT OF INDEMNITY**

3.1 Not less than **£1,000,000** in respect of any one occurrence, the number of occurrences being unlimited, but **£1,000,000** any one occurrence and in the aggregate per annum in respect of products and pollution liability.

#### **4. NOT USED**

#### **5. PERIOD OF INSURANCE**

5.1 From the DPS Commencement Date for the DPS Period and renewable on an annual basis unless agreed otherwise by the Authority in writing.

#### **6. COVER FEATURES AND EXTENSIONS**

6.1 Indemnity to principals clause.

#### **7. PRINCIPAL EXCLUSIONS**

7.1 War and related perils.

7.2 Nuclear and radioactive risks.

7.3 Liability for death, illness, disease or bodily injury sustained by employees of the Insured during the course of their employment.

7.4 Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by applicable Law in respect of such vehicles.

7.5 Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.

7.6 Liability arising out of technical or professional advice other than in respect of death or bodily injury to persons or damage to third party property.

7.7 Liability arising from the ownership, possession or use of any aircraft or marine vessel.

7.8 Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.

#### **8. MAXIMUM DEDUCTIBLE THRESHOLD**

8.1 Not to exceed **10%** for each and every third party property damage claim (personal injury claims to be paid in full).

DRAFT

## **Part B: Professional Indemnity Insurance**

### **1. INSURED**

1.1 The Supplier

### **2. INTEREST**

2.1 To indemnify the Insured for all sums which the Insured shall become legally liable to pay (including claimants' costs and expenses) as a result of claims first made against the Insured during the Period of Insurance by reason of any negligent act, error and/or omission arising from or in connection with the provision of the Services.

### **3. LIMIT OF INDEMNITY**

3.1 Not less than £1,000,000 in respect of any one claim and in the aggregate per annum.

### **4. PERIOD OF INSURANCE**

4.1 From the date of this Dynamic Purchasing System Agreement and renewable on an annual basis unless agreed otherwise by the Authority in writing (a) throughout the DPS Period or until earlier termination of this Dynamic Purchasing System Agreement and (b) for a period of 6 years thereafter.

### **5. COVER FEATURES AND EXTENSIONS**

5.1 Retroactive cover to apply to any claims made policy wording in respect of this Dynamic Purchasing System Agreement or retroactive date to be no later than DPS Commencement Date.

### **6. PRINCIPAL EXCLUSIONS**

6.1 War and related perils

6.2 Nuclear and radioactive risks

### **7. MAXIMUM DEDUCTIBLE THRESHOLD**

7.1 Not to exceed **10%** each and every claim.

## **Part C: United Kingdom Compulsory Insurances**

### **1. GENERAL**

1.1 The Supplier shall meet its insurance obligations under applicable Law in full, including, UK employers' liability insurance and motor third party liability insurance.

DRAFT

## DPS SCHEDULE 12: VARIATION FORM

Variation Form No:

.....

BETWEEN:

**[insert name of Authority ] ("the Authority")**

and

**[insert name of Supplier] ("the Supplier")**

1. This Dynamic Purchasing System Agreement is varied as follows and shall take effect on the date signed by both Parties:

**[Guidance Note: Insert details of the variation]**

2. Words and expressions in this variation shall have the meanings given to them in the Dynamic Purchasing System Agreement.
3. The Dynamic Purchasing System Agreement, including any previous variations, shall remain effective and unaltered except as amended by this variation.

Signed by an authorised signatory for and on behalf of the Authority

Signature

Date

Name (in Capitals)

Address

Signed by an authorised signatory to sign for and on behalf of the Supplier

Signature

Date

Name (in Capitals)

Address

[L/LJ/71754/120014/UKM/84945991.1](#)