

## G-Cloud 13 Call-Off Contract

This Call-Off Contract for the G-Cloud 13 Framework Agreement (RM1557.13) includes:

### **G-Cloud 13 Call-Off Contract**

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## Part A: Order Form

Buyers must use this template order form as the basis for all Call-Off Contracts and must refrain from accepting a Supplier's prepopulated version unless it has been carefully checked against template drafting.

<b>Platform service ID number</b>	542044645157649
<b>Call-Off Contract reference</b>	1735
<b>Call-Off Contract title</b>	Provision of a Learning Management System and talent software
<b>Call-Off Contract description</b>	SCW is seeking the provision of Hosting and Support for a Learning Management System utilising the Crown Commercial Service(CCS) G-Cloud 13 Lot 2 framework agreement RM1557.13. The term of the contract will be an initial 12 months with the option to extend for a further 12 months.
<b>Start date</b>	1 <sup>st</sup> March 2025
<b>Expiry date</b>	28 <sup>th</sup> February 2026 (plus an additional optional 12-month contract extension expiring 28 <sup>th</sup> February 2027)
<b>Call-Off Contract value</b>	Up to £90,000
<b>Charging method</b>	Invoice / BACs
<b>Purchase order number</b>	TBC

This Order Form is issued under the G-Cloud 13 Framework Agreement (RM1557.13).

Buyers can use this Order Form to specify their G-Cloud service requirements when placing an Order.

The Order Form cannot be used to alter existing terms or add any extra terms that materially change the Services offered by the Supplier and defined in the Application.

There are terms in the Call-Off Contract that may be defined in the Order Form. These are identified in the contract with square brackets.

<b>From the Buyer</b>	NHS England on behalf of South, Central and West Commissioning Support Unit  Omega House,  112 Southampton Rd,  Eastleigh  SO50 5PB
<b>To the Supplier</b>	Think Associates t/a Think Learning  Tel: 01273 025078  Mocatta House  Trafalgar Place  Brighton & Hove  Brighton  BN1 4DU  UK  Company number: 05178209
<b>Together the 'Parties'</b>	

## Principal contact details

### For the Buyer:

Title: Ms

Name: [REDACTED]

Email: [REDACTED]@nhs.net

Phone: [REDACTED]

### For the Supplier:

Title: Ms

Name: [REDACTED]

Email: [REDACTED]@think-learning.com

Phone: [REDACTED]

## Call-Off Contract term

<b>Start date</b>	This Call-Off Contract Starts on <b>1<sup>st</sup> March 2025</b> and is valid for an initial period of 12 months.
<b>Ending (termination)</b>	<p><b>28<sup>th</sup> February 2026.</b> The notice period for the Supplier needed for Ending the Call-Off Contract is at least <b>90</b> Working Days from the date of written notice for undisputed sums (as per clause 18.6).</p> <p>The notice period for the Buyer is a maximum of <b>30</b> days from the date of written notice for Ending without cause (as per clause 18.1).</p>

<b>Extension period</b>	<p>This Call-Off Contract can be extended by the Buyer for <b>one</b> period of up to 12 months, by giving the Supplier <b>3 months</b> written notice before its expiry. The extension period is subject to clauses 1.3 and 1.4 in Part B below.</p> <p>If a buyer is a central government department and the contract Term is intended to exceed 24 months, then under the Spend Controls process, prior approval must be obtained from the Government Digital Service (GDS). Further guidance:</p> <p><a href="https://www.gov.uk/service-manual/agile-delivery/spend-controls-check-if-you-need-approval-to-spend-money-on-a-service">https://www.gov.uk/service-manual/agile-delivery/spend-controls-check-if-you-need-approval-to-spend-money-on-a-service</a></p>
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### Buyer contractual details

<b>G-Cloud Lot</b>	<p>This Call-Off Contract is for the provision of Services Under:</p> <ul style="list-style-type: none"> <li>• Lot 2: Cloud software.</li> </ul>
<b>G-Cloud Services required</b>	<p>The Services to be provided by the Supplier under the above Lot are listed in Framework Schedule 4 and outlined below:</p> <ul style="list-style-type: none"> <li>• <b>Provision of a Learning Management System.</b></li> </ul>
<b>Additional Services</b>	<b>Not required</b>
<b>Location</b>	<p>The Services will be delivered in a remote capacity, with minimum travel requirements to be agreed by both parties in advance plus any expenses for travel.</p>
<b>Quality Standards</b>	<p>Supplier quality standards outlined in the G-Cloud 13 service agreement</p>
<b>Technical Standards:</b>	<p>The technical standards used as a requirement for this Call-Off Contract are:</p> <ul style="list-style-type: none"> <li>• The Totara Learning Management Application Software, at least v 16</li> <li>• Upgrades included with the maintenance costs during the contract term.</li> <li>• Hosting of the software in secure Data Centre facilities</li> </ul>

	<p>that is compliant with GDPR and NHS Data Security Standards.</p> <ul style="list-style-type: none"> <li>• Technical and application support for the software including core maintenance and access to a support team for any issues / queries.</li> <li>• Ability to support Single Sign-On (SSO)</li> <li>• Able to enable Multifactor Authentication (MFA), differentiated by audience segment (i.e., Different options for different user groups). Compatibility with Microsoft Authenticator App and FID02 tokens System auditing</li> <li>• Including Cyber Essentials Plus and ISO27001 certified as a minimum</li> </ul>
<b>Service level agreement:</b>	The service level and availability criteria required for this Call-Off Contract are as per Think Learning Hosting, GDPR and Support SLAs
<b>Onboarding</b>	The onboarding plan for this Call-Off Contract is as stated within G-Cloud13 Service definition document and as per the service offering registered on the G Cloud 13 framework.

<b>Offboarding</b>	<p>The offboarding plan for this Call-Off Contract is as stated within G-Cloud13 Service definition document and as per the service offering registered on the G Cloud 13 framework Lot 2 Cloud Software.</p>
<b>Limit on Parties' liability</b>	<p>The annual total liability of either Party for all Property Defaults will not exceed <b>£150,000</b>.</p> <p>The annual total liability for Buyer Data Defaults will not exceed <b>£100,000</b> or 125% of the Charges payable by the Buyer to the Supplier during the Call-Off Contract Term (whichever is the greater).</p> <p>The annual total liability for all other Defaults will not exceed the greater of <b>£ 100,000</b> or 125% of the Charges payable by the Buyer to the Supplier during the Call-Off Contract Term (whichever is the greater).</p>
<b>Insurance</b>	<p>The insurance(s) required will be:</p> <ul style="list-style-type: none"> <li>• a minimum insurance period of 6 years following the expiration or Ending of this Call-Off Contract</li> <li>• professional indemnity insurance cover to be held by the Supplier and by any agent, Subcontractor or consultant involved in the supply of the G-Cloud Services. This professional indemnity insurance cover will have a minimum limit of indemnity of £1,000,000 for each individual claim or any higher limit the Buyer requires (and as required by Law)</li> <li>• employers' liability insurance with a minimum limit of £5,000,000 or any higher minimum limit required by Law.</li> </ul>
<b>Buyer's responsibilities</b>	<p>The Buyer is responsible for ensuring the Supplier has the relevant access to data when appropriate</p>
<b>Buyer's equipment</b>	<p>The Buyer's equipment to be used with this Call-Off Contract includes Personal Computers and Internet.</p> <p>Reason to access application.</p>

<b>Payment method</b>	The payment method for this Call-Off Contract is Invoice / BACS.
<b>Payment profile</b>	The payment profile for this Call-Off Contract is annually in advance
<b>Invoice details</b>	The Supplier will issue electronic invoices monthly in arrears. The Buyer will pay the Supplier within 30 days of receipt of a valid invoice.
<b>Who and where to send invoices to</b>	<p>Invoices will be sent to:</p> <p>NHS England on behalf of South, Central and West Commissioning Support Unit,</p> <p>ODF Payables M425,</p> <p>Phoenix House,</p> <p>Topcliffe Lane,</p> <p>Wakefield,</p> <p>WF3 1WE</p>
<b>Invoice information required</b>	<p>All invoices must include;</p> <ul style="list-style-type: none"> <li>• the Purchase Order number;</li> <li>• total value excluding Value Added Tax (VAT);</li> <li>• the VAT percentage;</li> <li>• the total value including VAT;</li> <li>• a contact name and telephone number of an appropriate individual</li> <li>• in the Supplier's finance department in the event of administrative queries; and the banking details for payment to the Supplier via electronic transfer of funds (name and address of bank, sort code, account name and number).</li> </ul>
<b>Invoice frequency</b>	Invoice will be sent to the Buyer annually in advance and as additional projects are agreed.



<b>Call-Off Contract value</b>	The total value of this Call-Off Contract is up to a maximum of £90,000 (exc VAT)				
<b>Call-Off Contract charges</b>	The breakdown of the Charges is:				
	<b>Active number of users per year</b>	<b>Totara TXP Learn Subscription</b>	<b>Hosting and Maintenance</b>	<b>Client Services and Support</b>	<b>Total</b>
	5,000 (YR1)				
	5,000 (YR2)				
				<b>Total</b>	<b>£57,99</b>

This Order is for the G-Cloud Services outlined below. It is acknowledged by the Parties that the volume of the G-Cloud Services used by the Buyer may vary during this Call-Off Contract.

### Supplier's information

<b>Subcontractors or partners</b>	<p>The following is a list of the Supplier's Subcontractors or Partners</p> <p>Hosting Partner – Hyve Ltd</p>
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### Call-Off Contract charges and payment

The Call-Off Contract charges and payment details are in the table below. See Schedule 2 for a full breakdown.

## Additional Buyer terms

<b>Performance of the Service</b>	<p>This Call-Off Contract will include the following Implementation Plan, exit and offboarding plans and milestones:</p> <p>As described in the Think Learning Proposal, Tender Response, G-Cloud SLA and Totara Learn service description.</p>
<b>Personal Data and Data Subjects</b>	<p>Annex 1) of Schedule 7 is being used.</p>


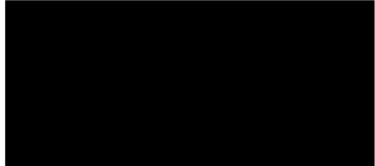
### 1. Formation of contract

- 1.1 By signing and returning this Order Form (Part A), the Supplier agrees to enter into a CallOff Contract with the Buyer.
- 1.2 The Parties agree that they have read the Order Form (Part A) and the Call-Off Contract terms and by signing below agree to be bound by this Call-Off Contract.
- 1.3 This Call-Off Contract will be formed when the Buyer acknowledges receipt of the signed copy of the Order Form from the Supplier.
- 1.4 In cases of any ambiguity or conflict, the terms and conditions of the Call-Off Contract (Part B) and Order Form (Part A) will supersede those of the Supplier Terms and Conditions as per the order of precedence set out in clause 8.3 of the Framework Agreement.

### 2. Background to the agreement

- 2.1 The Supplier is a provider of G-Cloud Services and agreed to provide the Services under the terms of Framework Agreement number RM1557.13

<b>Signed</b>	Supplier	Buyer
<b>Name</b>	██████████	██████████

<b>Title</b>	Client Relationship Manager	Director of People SCW
<b>Signature</b>		
<b>Date</b>	08/11/2024	08.11.24

2.2 The Buyer provided an Order Form for Services to the Supplier.

## Customer Benefits

For each Call-Off Contract please complete a customer benefits record, by following this link:

[G-Cloud 13 Customer Benefits Record](#)

## Part B: Terms and conditions

### 1. Call-Off Contract Start date and length

- 1.1 The Supplier must start providing the Services on the date specified in the Order Form. 1.2 This Call-Off Contract will expire on the Expiry Date in the Order Form. It will be for up to 36 months from the Start date unless Ended earlier under clause 18 or extended by the Buyer under clause 1.3.
- 1.3 The Buyer can extend this Call-Off Contract, with written notice to the Supplier, by the period in the Order Form, provided that this is within the maximum permitted under the Framework Agreement of 1 period of up to 12 months.
- 1.4 The Parties must comply with the requirements under clauses 21.3 to 21.8 if the Buyer reserves the right in the Order Form to set the Term at more than 24 months.

### 2. Incorporation of terms

- 2.1 The following Framework Agreement clauses (including clauses and defined terms referenced by them) as modified under clause 2.2 are incorporated as separate Call-Off Contract obligations and apply between the Supplier and the Buyer:
- 2.3 (Warranties and representations)
  - 4.1 to 4.6 (Liability)
  - 4.10 to 4.11 (IR35)
  - 10 (Force majeure)
  - 5.3 (Continuing rights)
  - 5.4 to 5.6 (Change of control)
  - 5.7 (Fraud)
  - 5.8 (Notice of fraud)
  - 7 (Transparency and Audit)
  - 8.3 (Order of precedence)
  - 11 (Relationship)
  - 14 (Entire agreement)
  - 15 (Law and jurisdiction)
  - 16 (Legislative change)
  - 17 (Bribery and corruption)
  - 18 (Freedom of Information Act)

- 19 (Promoting tax compliance)
- 20 (Official Secrets Act)
- 21 (Transfer and subcontracting)
- 23 (Complaints handling and resolution)
- 24 (Conflicts of interest and ethical walls)
  
- 25 (Publicity and branding)
  
- 26 (Equality and diversity)
- 28 (Data protection)
- 31 (Severability)
- 32 and 33 (Managing disputes and Mediation)
- 34 (Confidentiality)
- 35 (Waiver and cumulative remedies)
- 36 (Corporate Social Responsibility)
- paragraphs 1 to 10 of the Framework Agreement Schedule 3

2.2 The Framework Agreement provisions in clause 2.1 will be modified as follows:

- 2.2.1 a reference to the 'Framework Agreement' will be a reference to the 'Call-Off Contract'
- 2.2.2 a reference to 'CCS' or to 'CCS and/or the Buyer' will be a reference to 'the Buyer'
- 2.2.3 a reference to the 'Parties' and a 'Party' will be a reference to the Buyer and Supplier as Parties under this Call-Off Contract
  
- 2.3 The Parties acknowledge that they are required to complete the applicable Annexes contained in Schedule 7 (Processing Data) of the Framework Agreement for the purposes of this Call-Off Contract. The applicable Annexes being reproduced at Schedule 7 of this Call-Off Contract.
  
- 2.4 The Framework Agreement incorporated clauses will be referred to as incorporated Framework clause 'XX', where 'XX' is the Framework Agreement clause number.
  
- 2.5 When an Order Form is signed, the terms and conditions agreed in it will be incorporated into this Call-Off Contract.

### 3. Supply of services

- 3.1 The Supplier agrees to supply the G-Cloud Services and any Additional Services under the terms of the Call-Off Contract and the Supplier's Application.
- 3.2 The Supplier undertakes that each G-Cloud Service will meet the Buyer's acceptance criteria, as defined in the Order Form.

### 4. Supplier staff

- 4.1 The Supplier Staff must:
  - 4.1.1 be appropriately experienced, qualified and trained to supply the Services
  - 4.1.2 apply all due skill, care and diligence in faithfully performing those duties
  - 4.1.3 obey all lawful instructions and reasonable directions of the Buyer and provide the Services to the reasonable satisfaction of the Buyer
  - 4.1.4 respond to any enquiries about the Services as soon as reasonably possible
  - 4.1.5 complete any necessary Supplier Staff vetting as specified by the Buyer
- 4.2 The Supplier must retain overall control of the Supplier Staff so that they are not considered to be employees, workers, agents or contractors of the Buyer.
- 4.3 The Supplier may substitute any Supplier Staff as long as they have the equivalent experience and qualifications to the substituted staff member.
- 4.4 The Buyer may conduct IR35 Assessments using the ESI tool to assess whether the Supplier's engagement under the Call-Off Contract is Inside or Outside IR35.
- 4.5 The Buyer may End this Call-Off Contract for Material Breach as per clause 18.5 hereunder if the Supplier is delivering the Services Inside IR35.
- 4.6 The Buyer may need the Supplier to complete an Indicative Test using the ESI tool before the Start date or at any time during the provision of Services to provide a preliminary view of whether the Services are being delivered Inside or Outside IR35. If the Supplier has completed the Indicative Test, it must download and provide a copy of the PDF with the

14digit ESI reference number from the summary outcome screen and promptly provide a copy to the Buyer.

- 4.7 If the Indicative Test indicates the delivery of the Services could potentially be Inside IR35, the Supplier must provide the Buyer with all relevant information needed to enable the Buyer to conduct its own IR35 Assessment.
- 4.8 If it is determined by the Buyer that the Supplier is Outside IR35, the Buyer will provide the ESI reference number and a copy of the PDF to the Supplier.

## 5. Due diligence

- 5.1 Both Parties agree that when entering into a Call-Off Contract they:
  - 5.1.1 have made their own enquiries and are satisfied by the accuracy of any information supplied by the other Party
  - 5.1.2 are confident that they can fulfil their obligations according to the Call-Off Contract terms
  - 5.1.3 have raised all due diligence questions before signing the Call-Off Contract
  - 5.1.4 have entered into the Call-Off Contract relying on their own due diligence

## 6. Business continuity and disaster recovery

- 6.1 The Supplier will have a clear business continuity and disaster recovery plan in their Service Descriptions.
- 6.2 The Supplier's business continuity and disaster recovery services are part of the Services and will be performed by the Supplier when required.
- 6.3 If requested by the Buyer prior to entering into this Call-Off Contract, the Supplier must ensure that its business continuity and disaster recovery plan is consistent with the Buyer's own plans.

## 7. Payment, VAT and Call-Off Contract charges

- 7.1 The Buyer must pay the Charges following clauses 7.2 to 7.11 for the Supplier's delivery of the Services.



- 7.2 The Buyer will pay the Supplier within the number of days specified in the Order Form on receipt of a valid invoice.
- 7.3 The Call-Off Contract Charges include all Charges for payment processing. All invoices submitted to the Buyer for the Services will be exclusive of any Management Charge.
- 7.4 If specified in the Order Form, the Supplier will accept payment for G-Cloud Services by the Government Procurement Card (GPC). The Supplier will be liable to pay any merchant fee levied for using the GPC and must not recover this charge from the Buyer.
- 7.5 The Supplier must ensure that each invoice contains a detailed breakdown of the G-Cloud Services supplied. The Buyer may request the Supplier provides further documentation to substantiate the invoice.
- 7.6 If the Supplier enters into a Subcontract it must ensure that a provision is included in each Subcontract which specifies that payment must be made to the Subcontractor within 30 days of receipt of a valid invoice.
- 7.7 All Charges payable by the Buyer to the Supplier will include VAT at the appropriate Rate.
- 7.8 The Supplier must add VAT to the Charges at the appropriate rate with visibility of the amount as a separate line item.
- 7.9 The Supplier will indemnify the Buyer on demand against any liability arising from the Supplier's failure to account for or to pay any VAT on payments made to the Supplier under this Call-Off Contract. The Supplier must pay all sums to the Buyer at least 5 Working Days before the date on which the tax or other liability is payable by the Buyer.
- 7.10 The Supplier must not suspend the supply of the G-Cloud Services unless the Supplier is entitled to End this Call-Off Contract under clause 18.6 for Buyer's failure to pay undisputed sums of money. Interest will be payable by the Buyer on the late payment of any
- undisputed sums of money properly invoiced under the Late Payment of Commercial Debts (Interest) Act 1998.
- 7.11 If there's an invoice dispute, the Buyer must pay the undisputed portion of the amount and return the invoice within 10 Working Days of the invoice date. The Buyer will provide a covering statement with proposed amendments and the reason for any non-payment. The Supplier must notify the Buyer within 10 Working Days of receipt of the returned invoice if it accepts the amendments. If it does then the Supplier must provide a replacement valid invoice with the response.

- 7.12 Due to the nature of G-Cloud Services it isn't possible in a static Order Form to exactly define the consumption of services over the duration of the Call-Off Contract. The Supplier agrees that the Buyer's volumes indicated in the Order Form are indicative only.

## 8. Recovery of sums due and right of set-off

- 8.1 If a Supplier owes money to the Buyer, the Buyer may deduct that sum from the Call-Off Contract Charges.

## 9. Insurance

- 9.1 The Supplier will maintain the insurances required by the Buyer including those in this clause.

- 9.2 The Supplier will ensure that:

9.2.1 during this Call-Off Contract, Subcontractors hold third party public and products liability insurance of the same amounts that the Supplier would be legally liable to pay as damages, including the claimant's costs and expenses, for accidental death or bodily injury and loss of or damage to Property, to a minimum of £1,000,000

9.2.2 the third-party public and products liability insurance contains an 'indemnity to principals' clause for the Buyer's benefit

9.2.3 all agents and professional consultants involved in the Services hold professional indemnity insurance to a minimum indemnity of £1,000,000 for each individual claim during the Call-Off Contract, and for 6 years after the End or Expiry Date

9.2.4 all agents and professional consultants involved in the Services hold employer's liability insurance (except where exempt under Law) to a minimum indemnity of £5,000,000 for each individual claim during the Call-Off Contract, and for 6 years after the End or Expiry Date

- 9.3 If requested by the Buyer, the Supplier will obtain additional insurance policies, or extend existing policies bought under the Framework Agreement.

9.4 If requested by the Buyer, the Supplier will provide the following to show compliance with this clause:

9.4.1 a broker's verification of insurance

9.4.2 receipts for the insurance premium

9.4.3 evidence of payment of the latest premiums due

9.5 Insurance will not relieve the Supplier of any liabilities under the Framework Agreement or this Call-Off Contract and the Supplier will:

9.5.1 take all risk control measures using Good Industry Practice, including the investigation and reports of claims to insurers

9.5.2 promptly notify the insurers in writing of any relevant material fact under any Insurances

9.5.3 hold all insurance policies and require any broker arranging the insurance to hold any insurance slips and other evidence of insurance

9.6 The Supplier will not do or omit to do anything, which would destroy or impair the legal validity of the insurance.

9.7 The Supplier will notify CCS and the Buyer as soon as possible if any insurance policies have been, or are due to be, cancelled, suspended, Ended or not renewed.

9.8 The Supplier will be liable for the payment of any:

9.8.1 premiums, which it will pay promptly

9.8.2 excess or deductibles and will not be entitled to recover this from the Buyer

## 10. Confidentiality

10.1 The Supplier must during and after the Term keep the Buyer fully indemnified against all Losses, damages, costs or expenses and other liabilities (including legal fees) arising from any breach of the Supplier's obligations under incorporated Framework Agreement clause

34. The indemnity doesn't apply to the extent that the Supplier breach is due to a Buyer's instruction.

## 11. Intellectual Property Rights

11.1 Save for the licences expressly granted pursuant to Clauses 11.3 and 11.4, neither Party

shall acquire any right, title or interest in or to the Intellectual Property Rights ("IPR"s) (whether pre-existing or created during the Call-Off Contract Term) of the other Party or its licensors unless stated otherwise in the Order Form.

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

11.3 The Buyer grants to the Supplier a royalty-free, non-exclusive, non-transferable licence during the Call-Off Contract Term to use the Buyer's or its relevant licensor's Buyer Data and related IPR solely to the extent necessary for providing the Services in accordance with this Contract, including the right to grant sub-licences to Subcontractors provided that:

11.3.1 any relevant Subcontractor has entered into a confidentiality undertaking with the Supplier on substantially the same terms as set out in Framework Agreement clause 34 (Confidentiality); and

11.3.2 the Supplier shall not and shall procure that any relevant Sub-Contractor shall not, without the Buyer's written consent, use the licensed materials for any other purpose or for the benefit of any person other than the Buyer.

11.4 The Supplier grants to the Buyer the licence taken from its Supplier Terms which licence shall, as a minimum, grant the Buyer a non-exclusive, non-transferable licence during the Call-Off

Contract Term to use the Supplier's or its relevant licensor's IPR solely to the extent necessary to access and use the Services in accordance with this Call-Off Contract.

11.5 Subject to the limitation in Clause 24.3, the Buyer shall:

11.5.1 defend the Supplier, its Affiliates and licensors from and against any third-party claim:

- (a) alleging that any use of the Services by or on behalf of the Buyer and/or Buyer Users is in breach of applicable Law;
- (b) alleging that the Buyer Data violates, infringes or misappropriates any rights of a third party;
- (c) arising from the Supplier's use of the Buyer Data in accordance with this Call-Off Contract; and

11.5.2 in addition to defending in accordance with Clause 11.5.1, the Buyer will pay the amount of Losses awarded in final judgment against the Supplier or the amount of any settlement agreed by the Buyer, provided that the Buyer's obligations under this Clause 11.5 shall not apply where and to the extent such Losses or third-party claim is caused by the Supplier's breach of this Contract.

11.6 The Supplier will, on written demand, fully indemnify the Buyer for all Losses which it may incur at any time from any claim of infringement or alleged infringement of a third party's IPRs because of the:

11.6.1 rights granted to the Buyer under this Call-Off Contract

11.6.2 Supplier's performance of the Services

11.6.3 use by the Buyer of the Services

11.7 If an IPR Claim is made, or is likely to be made, the Supplier will immediately notify the Buyer in writing and must at its own expense after written approval from the Buyer, either:

11.7.1 modify the relevant part of the Services without reducing its functionality or performance

11.7.2 substitute Services of equivalent functionality and performance, to avoid the infringement or the alleged infringement, as long as there is no additional cost or burden to the Buyer

11.7.3 buy a licence to use and supply the Services which are the subject of the alleged infringement, on terms acceptable to the Buyer

11.8 Clause 11.6 will not apply if the IPR Claim is from:

11.8.1 the use of data supplied by the Buyer which the Supplier isn't required to verify under this Call-Off Contract

11.8.2 other material provided by the Buyer necessary for the Services

11.9 If the Supplier does not comply with this clause 11, the Buyer may End this Call-Off Contract for Material Breach. The Supplier will, on demand, refund the Buyer all the money paid for the affected Services.

## 12. Protection of information

### 12.1 The Supplier must:

12.1.1 comply with the Buyer's written instructions and this Call-Off Contract when Processing Buyer Personal Data

12.1.2 only Process the Buyer Personal Data as necessary for the provision of the G-Cloud Services or as required by Law or any Regulatory Body

12.1.3 take reasonable steps to ensure that any Supplier Staff who have access to Buyer Personal Data act in compliance with Supplier's security processes

### 12.2 The Supplier must fully assist with any complaint or request for Buyer Personal Data including by:

12.2.1 providing the Buyer with full details of the complaint or request

12.2.2 complying with a data access request within the timescales in the Data Protection Legislation and following the Buyer's instructions

12.2.3 providing the Buyer with any Buyer Personal Data it holds about a Data Subject  
(within the timescales required by the Buyer)

12.2.4 providing the Buyer with any information requested by the Data Subject

### 12.3 The Supplier must get prior written consent from the Buyer to transfer Buyer Personal Data to any other person (including any Subcontractors) for the provision of the G-Cloud Services.

## 13. Buyer data

### 13.1 The Supplier must not remove any proprietary notices in the Buyer Data.

### 13.2 The Supplier will not store or use Buyer Data except if necessary to fulfil its obligations.

- 13.3 If Buyer Data is processed by the Supplier, the Supplier will supply the data to the Buyer as requested.
- 13.4 The Supplier must ensure that any Supplier system that holds any Buyer Data is a secure system that complies with the Supplier's and Buyer's security policies and all Buyer requirements in the Order Form.
- 13.5 The Supplier will preserve the integrity of Buyer Data processed by the Supplier and prevent its corruption and loss.
- 13.6 The Supplier will ensure that any Supplier system which holds any protectively marked Buyer Data or other government data will comply with:

13.6.1 the principles in the Security Policy Framework:

<https://www.gov.uk/government/publications/security-policy-framework> and the Government Security Classification policy:

<https://www.gov.uk/government/publications/government-securityclassifications>

13.6.2 guidance issued by the Centre for Protection of National Infrastructure on Risk Management:

<https://www.cpni.gov.uk/content/adopt-risk-managementapproach> and Protection of Sensitive

Information and Assets: <https://www.cpni.gov.uk/protection-sensitive-information-and-assets>

13.6.3 the National Cyber Security Centre's (NCSC) information risk management guidance: <https://www.ncsc.gov.uk/collection/risk-management-collection>

13.6.4 government best practice in the design and implementation of system components, including network principles, security design principles for digital services and the secure email blueprint:

<https://www.gov.uk/government/publications/technologycode-of-practice/technology-code-of-practice>

13.6.5 the security requirements of cloud services using the NCSC Cloud Security Principles and accompanying guidance:

<https://www.ncsc.gov.uk/guidance/implementing-cloud-security-principles>

13.6.6 Buyer requirements in respect of AI ethical standards.

13.7 The Buyer will specify any security requirements for this project in the Order

Form.

- 13.8 If the Supplier suspects that the Buyer Data has or may become corrupted, lost, breached or significantly degraded in any way for any reason, then the Supplier will notify the Buyer immediately and will (at its own cost if corruption, loss, breach or degradation of the Buyer Data was caused by the action or omission of the Supplier) comply with any remedial action reasonably proposed by the Buyer.
- 13.9 The Supplier agrees to use the appropriate organisational, operational and technological processes to keep the Buyer Data safe from unauthorised use or access, loss, destruction, theft or disclosure.
- 13.10 The provisions of this clause 13 will apply during the term of this Call-Off Contract and for as long as the Supplier holds the Buyer's Data.

## 14. Standards and quality

- 14.1 The Supplier will comply with any standards in this Call-Off Contract, the Order Form and the Framework Agreement.
- 14.2 The Supplier will deliver the Services in a way that enables the Buyer to comply with its obligations under the Technology Code of Practice, which is at:  
<https://www.gov.uk/government/publications/technology-code-of-practice/technology-code-of-practice>
- 14.3 If requested by the Buyer, the Supplier must, at its own cost, ensure that the G-Cloud Services comply with the requirements in the PSN Code of Practice.
- 14.4 If any PSN Services are Subcontracted by the Supplier, the Supplier must ensure that the services have the relevant PSN compliance certification.
- 14.5 The Supplier must immediately disconnect its G-Cloud Services from the PSN if the PSN

Authority considers there is a risk to the PSN's security and the Supplier agrees that the Buyer and the PSN Authority will not be liable for any actions, damages, costs, and any other Supplier liabilities which may arise.

## 15. Open source

- 15.1 All software created for the Buyer must be suitable for publication as open source, unless otherwise agreed by the Buyer.



- 15.2 If software needs to be converted before publication as open source, the Supplier must also provide the converted format unless otherwise agreed by the Buyer.

## 16. Security

- 16.1 If requested to do so by the Buyer, before entering into this Call-Off Contract the Supplier will, within 15 Working Days of the date of this Call-Off Contract, develop (and obtain the Buyer's written approval of) a Security Management Plan and an Information Security Management System. After Buyer approval the Security Management Plan and Information Security Management System will apply during the Term of this Call-Off Contract. Both plans will comply with the Buyer's security policy and protect all aspects and processes associated with the delivery of the Services.
- 16.2 The Supplier will use all reasonable endeavours, software and the most up-to-date antivirus definitions available from an industry-accepted antivirus software seller to minimise the impact of Malicious Software.
- 16.3 If Malicious Software causes loss of operational efficiency or loss or corruption of Service Data, the Supplier will help the Buyer to mitigate any losses and restore the Services to operating efficiency as soon as possible.
- 16.4 Responsibility for costs will be at the:
- 16.4.1 Supplier's expense if the Malicious Software originates from the Supplier software or the Service Data while the Service Data was under the control of the Supplier, unless the Supplier can demonstrate that it was already present, not quarantined or identified by the Buyer when provided
- 16.4.2 Buyer's expense if the Malicious Software originates from the Buyer software or the Service Data, while the Service Data was under the Buyer's control
- 16.5 The Supplier will immediately notify the Buyer of any breach of security of Buyer's Confidential Information. Where the breach occurred because of a Supplier Default, the Supplier will recover the Buyer's Confidential Information however it may be recorded.

- 16.6 Any system development by the Supplier should also comply with the government's '10 Steps to Cyber Security' guidance:

<https://www.ncsc.gov.uk/guidance/10-steps-cyber-security>

- 16.7 If a Buyer has requested in the Order Form that the Supplier has a Cyber Essentials certificate, the Supplier must provide the Buyer with a valid Cyber Essentials certificate (or equivalent) required for the Services before the Start date.

## 17. Guarantee

- 17.1 If this Call-Off Contract is conditional on receipt of a Guarantee that is acceptable to the Buyer, the Supplier must give the Buyer on or before the Start date:

17.1.1 an executed Guarantee in the form at Schedule 5

17.1.2 a certified copy of the passed resolution or board minutes of the guarantor approving the execution of the Guarantee

## 18. Ending the Call-Off Contract

- 18.1 The Buyer can End this Call-Off Contract at any time by giving 30 days' written notice to the

Supplier, unless a shorter period is specified in the Order Form. The Supplier's obligation to provide the Services will end on the date in the notice.

- 18.2 The Parties agree that the:

18.2.1 Buyer's right to End the Call-Off Contract under clause 18.1 is reasonable considering the type of cloud Service being provided

18.2.2 Call-Off Contract Charges paid during the notice period are reasonable compensation and cover all the Supplier's avoidable costs or Losses

- 18.3 Subject to clause 24 (Liability), if the Buyer Ends this Call-Off Contract under clause 18.1, it will indemnify the Supplier against any commitments, liabilities or expenditure which result in any unavoidable Loss by the Supplier, provided that the Supplier takes all reasonable steps to mitigate the Loss. If the Supplier has insurance, the Supplier will reduce its

unavoidable costs by any insurance sums available. The Supplier will submit a fully itemised and costed list of the unavoidable Loss with supporting evidence.

- 18.4 The Buyer will have the right to End this Call-Off Contract at any time with immediate effect by written notice to the Supplier if either the Supplier commits:

18.4.1 a Supplier Default and if the Supplier Default cannot, in the reasonable opinion of the Buyer, be remedied

18.4.2 any fraud

- 18.5 A Party can End this Call-Off Contract at any time with immediate effect by written notice if:

18.5.1 the other Party commits a Material Breach of any term of this Call-Off Contract (other than failure to pay any amounts due) and, if that breach is remediable, fails to remedy it within 15 Working Days of being notified in writing to do so

18.5.2 an Insolvency Event of the other Party happens

18.5.3 the other Party ceases or threatens to cease to carry on the whole or any material part of its business

- 18.6 If the Buyer fails to pay the Supplier undisputed sums of money when due, the Supplier must notify the Buyer and allow the Buyer 5 Working Days to pay. If the Buyer doesn't pay within 5 Working Days, the Supplier may End this Call-Off Contract by giving the length of notice in the Order Form.

- 18.7 A Party who isn't relying on a Force Majeure event will have the right to End this Call-Off Contract if clause 23.1 applies.

## 19. Consequences of suspension, ending and expiry

- 19.1 If a Buyer has the right to End a Call-Off Contract, it may elect to suspend this Call-Off Contract or any part of it.

- 19.2 Even if a notice has been served to End this Call-Off Contract or any part of it, the Supplier must continue to provide the ordered G-Cloud Services until the dates set out in the notice.

19.3 The rights and obligations of the Parties will cease on the Expiry Date or End Date whichever applies) of this Call-Off Contract, except those continuing provisions described in clause 19.4.

19.4 Ending or expiry of this Call-Off Contract will not affect:

19.4.1 any rights, remedies or obligations accrued before its Ending or expiration

19.4.2 the right of either Party to recover any amount outstanding at the time of Ending or expiry

19.4.3 the continuing rights, remedies or obligations of the Buyer or the Supplier under clauses

- 7 (Payment, VAT and Call-Off Contract charges)
- 8 (Recovery of sums due and right of set-off)
- 9 (Insurance)
- 10 (Confidentiality)
- 11 (Intellectual property rights)
- 12 (Protection of information)
- 13 (Buyer data)
- 19 (Consequences of suspension, ending and expiry)
  
- 24 (Liability); and incorporated Framework Agreement clauses: 4.1 to 4.6, (Liability),  
24 (Conflicts of interest and ethical walls), 35 (Waiver and cumulative remedies)

19.4.4 any other provision of the Framework Agreement or this Call-Off Contract which expressly or by implication is in force even if it Ends or expires.

19.5 At the end of the Call-Off Contract Term, the Supplier must promptly:

19.5.1 return all Buyer Data including all copies of Buyer software, code and any other software licensed by the Buyer to the Supplier under it

19.5.2 return any materials created by the Supplier under this Call-Off Contract if the IPRs are owned by the Buyer

19.5.3 stop using the Buyer Data and, at the direction of the Buyer, provide the Buyer with a complete and uncorrupted version in electronic form in the formats and on media agreed with the Buyer

19.5.4 destroy all copies of the Buyer Data when they receive the Buyer's written instructions to do so or 12 calendar months after the End or Expiry Date, and provide written confirmation to the Buyer that the data has been securely destroyed, except if the retention of Buyer Data is required by Law

19.5.5 work with the Buyer on any ongoing work

19.5.6 return any sums prepaid for Services which have not been delivered to the Buyer, within 10 Working Days of the End or Expiry Date

19.6 Each Party will return all of the other Party's Confidential Information and confirm this has been done, unless there is a legal requirement to keep it or this Call-Off Contract states otherwise.

19.7 All licences, leases and authorisations granted by the Buyer to the Supplier will cease at the end of the Call-Off Contract Term without the need for the Buyer to serve notice except if this Call-Off Contract states otherwise.

## 20. Notices

20.1 Any notices sent must be in writing. For the purpose of this clause, an email is accepted as being 'in writing'.

- Manner of delivery: email
- Deemed time of delivery: 9am on the first Working Day after sending
- Proof of service: Sent in an emailed letter in PDF format to the correct email address without any error message

20.2 This clause does not apply to any legal action or other method of dispute resolution which should be sent to the addresses in the Order Form (other than a dispute notice under this Call-Off Contract).

## 21. Exit plan

21.1 The Supplier must provide an exit plan in its Application which ensures continuity of service and the Supplier will follow it.

- 21.2 When requested, the Supplier will help the Buyer to migrate the Services to a replacement supplier in line with the exit plan. This will be at the Supplier's own expense if the Call-Off Contract Ended before the Expiry Date due to Supplier cause.
- 21.3 If the Buyer has reserved the right in the Order Form to extend the Call-Off Contract Term beyond 36 months the Supplier must provide the Buyer with an additional exit plan for approval by the Buyer at least 8 weeks before the 30 month anniversary of the Start date.
- 21.4 The Supplier must ensure that the additional exit plan clearly sets out the Supplier's methodology for achieving an orderly transition of the Services from the Supplier to the Buyer or its replacement Supplier at the expiry of the proposed extension period or if the contract Ends during that period.
- 21.5 Before submitting the additional exit plan to the Buyer for approval, the Supplier will work with the Buyer to ensure that the additional exit plan is aligned with the Buyer's own exit plan and strategy.
- 21.6 The Supplier acknowledges that the Buyer's right to take the Term beyond 36 months is subject to the Buyer's own governance process. Where the Buyer is a central government department, this includes the need to obtain approval from GDS under the Spend Controls process. The approval to extend will only be given if the Buyer can clearly demonstrate that the Supplier's additional exit plan ensures that:
- 21.6.1 the Buyer will be able to transfer the Services to a replacement supplier before the expiry or Ending of the period on terms that are commercially reasonable and acceptable to the Buyer
- 21.6.2 there will be no adverse impact on service continuity
- 21.6.3 there is no vendor lock-in to the Supplier's Service at exit
- 21.6.4 it enables the Buyer to meet its obligations under the Technology Code Of Practice
- 21.7 If approval is obtained by the Buyer to extend the Term, then the Supplier will comply with its obligations in the additional exit plan.
- 21.8 The additional exit plan must set out full details of timescales, activities and roles and responsibilities of the Parties for:

21.8.1 the transfer to the Buyer of any technical information, instructions, manuals and code reasonably required by the Buyer to enable a smooth migration from the Supplier

21.8.2 the strategy for exportation and migration of Buyer Data from the Supplier system to the Buyer or a replacement supplier, including conversion to open standards or other standards required by the Buyer

21.8.3 the transfer of Project Specific IPR items and other Buyer customisations, configurations and databases to the Buyer or a replacement supplier

21.8.4 the testing and assurance strategy for exported Buyer Data

21.8.5 if relevant, TUPE-related activity to comply with the TUPE regulations

21.8.6 any other activities and information which is reasonably required to ensure continuity of Service during the exit period and an orderly transition

## 22. Handover to replacement supplier

22.1 At least 10 Working Days before the Expiry Date or End Date, the Supplier must provide any:

22.1.1 data (including Buyer Data), Buyer Personal Data and Buyer Confidential Information in the Supplier's possession, power or control

22.1.2 other information reasonably requested by the Buyer

22.2 On reasonable notice at any point during the Term, the Supplier will provide any information and data about the G-Cloud Services reasonably requested by the Buyer (including information on volumes, usage, technical aspects, service performance and staffing). This will help the Buyer understand how the Services have been provided and to run a fair competition for a new supplier.

22.3 This information must be accurate and complete in all material respects and the level of detail must be sufficient to reasonably enable a third party

to prepare an informed offer for replacement services and not be unfairly disadvantaged compared to the Supplier in the buying process.

## 23. Force majeure

- 23.1 If a Force Majeure event prevents a Party from performing its obligations under this Call-Off Contract for more than 30 consecutive days, the other Party may End this Call-Off Contract with immediate effect by written notice.

## 24. Liability

- 24.1 Subject to incorporated Framework Agreement clauses 4.1 to 4.6, each Party's Yearly total liability for Defaults under or in connection with this Call-Off Contract shall not exceed the greater of five hundred thousand pounds (£500,000) or one hundred and twenty-five per cent (125%) of the Charges paid and/or committed to be paid in that Year (or such greater sum (if any) as may be specified in the Order Form).

- 24.2 Notwithstanding Clause 24.1 but subject to Framework Agreement clauses 4.1 to 4.6, the

Supplier's liability:

24.2.1 pursuant to the indemnities in Clauses 7, 10, 11 and 29 shall be unlimited; and

24.2.2 in respect of Losses arising from breach of the Data Protection Legislation shall be as set out in Framework Agreement clause 28.

- 24.3 Notwithstanding Clause 24.1 but subject to Framework Agreement clauses 4.1 to 4.6, the

Buyer's liability pursuant to Clause 11.5.2 shall in no event exceed in aggregate five million pounds (£5,000,000).

- 24.4 When calculating the Supplier's liability under Clause 24.1 any items specified in Clause

24.2 will not be taken into consideration.

## 25. Premises

- 25.1 If either Party uses the other Party's premises, that Party is liable for all loss or damage it causes to the premises. It is responsible for repairing any



damage to the premises or any objects on the premises, other than fair wear and tear.

25.2 The Supplier will use the Buyer's premises solely for the performance of its obligations under this Call-Off Contract.

25.3 The Supplier will vacate the Buyer's premises when the Call-Off Contract Ends or expires.

25.4 This clause does not create a tenancy or exclusive right of occupation.

25.5 While on the Buyer's premises, the Supplier will:

25.5.1 comply with any security requirements at the premises and not do anything to weaken the security of the premises

25.5.2 comply with Buyer requirements for the conduct of personnel

25.5.3 comply with any health and safety measures implemented by the Buyer

25.5.4 immediately notify the Buyer of any incident on the premises that causes any damage to Property which could cause personal injury

25.6 The Supplier will ensure that its health and safety policy statement (as required by the Health and Safety at Work etc Act 1974) is made available to the Buyer on request.

## 26. Equipment

26.1 The Supplier is responsible for providing any Equipment which the Supplier requires to provide the Services.

26.2 Any Equipment brought onto the premises will be at the Supplier's own risk and the Buyer will have no liability for any loss of, or damage to, any Equipment.

26.3 When the Call-Off Contract Ends or expires, the Supplier will remove the Equipment and any other materials leaving the premises in a safe and clean condition.

## 27. The Contracts (Rights of Third Parties) Act 1999

- 27.1 Except as specified in clause 29.8, a person who isn't Party to this Call-Off Contract has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any of its terms. This does not affect any right or remedy of any person which exists or is available otherwise.

## 28. Environmental requirements

- 28.1 The Buyer will provide a copy of its environmental policy to the Supplier on request, which the Supplier will comply with.
- 28.2 The Supplier must provide reasonable support to enable Buyers to work in an environmentally friendly way, for example by helping them recycle or lower their carbon footprint.

## 29. The Employment Regulations (TUPE)

- 29.1 The Supplier agrees that if the Employment Regulations apply to this Call-Off Contract on the Start date then it must comply with its obligations under the Employment Regulations

and (if applicable) New Fair Deal (including entering into an Admission Agreement) and will indemnify the Buyer or any Former Supplier for any loss arising from any failure to comply.

- 29.2 Twelve months before this Call-Off Contract expires, or after the Buyer has given notice to

End it, and within 28 days of the Buyer's request, the Supplier will fully and accurately disclose to the Buyer all staff information including, but not limited to, the total number of staff assigned for the purposes of TUPE to the Services. For each person identified the Supplier must provide details of:

- |        |   |
|--------|---|
| 29.2.1 | the activities they perform               |
| 29.2.2 | age                                       |
| 29.2.3 | start date                                |
| 29.2.4 | place of work                             |
| 29.2.5 | notice period                             |
| 29.2.6 | redundancy payment entitlement            |
| 29.2.7 | salary, benefits and pension entitlements |
| 29.2.8 | employment status                         |
| 29.2.9 | identity of employer                      |

- 29.2.10 working arrangements
- 29.2.11 outstanding liabilities
- 29.2.12 sickness absence
- 29.2.13 copies of all relevant employment contracts and related documents
- 29.2.14 all information required under regulation 11 of TUPE or as reasonably requested by the Buyer

29.3 The Supplier warrants the accuracy of the information provided under this TUPE clause and will notify the Buyer of any changes to the amended information as soon as reasonably possible. The Supplier will permit the Buyer to use and disclose the information to any prospective Replacement Supplier.

29.4 In the 12 months before the expiry of this Call-Off Contract, the Supplier will not change the identity and number of staff assigned to the Services (unless reasonably requested by the Buyer) or their terms and conditions, other than in the ordinary course of business.

29.5 The Supplier will co-operate with the re-tendering of this Call-Off Contract by allowing the Replacement Supplier to communicate with and meet the affected employees or their representatives.

29.6 The Supplier will indemnify the Buyer or any Replacement Supplier for all Loss arising from both:

29.6.1 its failure to comply with the provisions of this clause

29.6.2 any claim by any employee or person claiming to be an employee (or their employee representative) of the Supplier which arises or is alleged to arise from any act or omission by the Supplier on or before the date of the Relevant Transfer

29.7 The provisions of this clause apply during the Term of this Call-Off Contract and indefinitely after it Ends or expires.

29.8 For these TUPE clauses, the relevant third party will be able to enforce its rights under this clause but their consent will not be required to vary these clauses as the Buyer and Supplier may agree.

## 30. Additional G-Cloud services

- 30.1 The Buyer may require the Supplier to provide Additional Services. The Buyer doesn't have to buy any Additional Services from the Supplier and can buy services that are the same as or similar to the Additional Services from any third party.
- 30.2 If reasonably requested to do so by the Buyer in the Order Form, the Supplier must provide and monitor performance of the Additional Services using an Implementation Plan.

## 31. Collaboration

- 31.1 If the Buyer has specified in the Order Form that it requires the Supplier to enter into a Collaboration Agreement, the Supplier must give the Buyer an executed Collaboration Agreement before the Start date.

31.2 In addition to any obligations under the Collaboration Agreement, the Supplier must:

31.2.1 work proactively and in good faith with each of the Buyer's contractors

31.2.2 co-operate and share information with the Buyer's contractors to enable the efficient operation of the Buyer's ICT services and G-Cloud Services

## 32. Variation process

- 32.1 The Buyer can request in writing a change to this Call-Off Contract if it isn't a material change to the Framework Agreement/or this Call-Off Contract. Once implemented, it is called a Variation.
- 32.2 The Supplier must notify the Buyer immediately in writing of any proposed changes to their G-Cloud Services or their delivery by submitting a Variation request. This includes any changes in the Supplier's supply chain.
- 32.3 If Either Party can't agree to or provide the Variation, the Buyer may agree to continue performing its obligations under this Call-Off Contract without the Variation, or End this CallOff Contract by giving 30 days notice to the Supplier.

### 33. Data Protection Legislation (GDPR)

- 33.1 Pursuant to clause 2.1 and for the avoidance of doubt, clause 28 of the Framework Agreement is incorporated into this Call-Off Contract. For reference, the appropriate UK GDPR templates which are required to be completed in accordance with clause 28 are reproduced in this Call-Off Contract document at Schedule 7.

# Schedule 1: Services

## **Service Delivery / Product Requirement**

Facilitate the continued administration and management of learning programmes internally for SCW and for SCW's external customers.

SCW utilises an oracle based system called Electronic Staff Records (ESR) for its HR records. The system must be compatible with and have a suitable interface with this system. Any potential t supplier must demonstrate they have other NHS customers as evidence of familiarity with this interface.

## **System Requirements:**

A re-procurement of a Totara based learning management system.

- The Totara Learning Management Application Software, at least v 16, with an understanding of what version updates will be included within the contract term and contract cost.
- Hosting of the software in secure Data Centre facilities that is compliant with GDPR and NHS Data Security Standards.
- Technical and application support for the software including core maintenance and access to a support team for any issues / queries.
- Ability to support Single Sign-On (SSO)
- Able to enable Multifactor Authentication (MFA), differentiated by audience segment (i.e., Different options for different user groups). Compatibility with Microsoft Authenticator App and FIDO2 tokens System auditing

The preferred product will be accessible at any time, in any location, and by any device capable of an internet connection, ie. mobile phone, laptop, desktop device and will be easy to navigate for both users and the administrative team.

The system should be licensed and scoped initially for 5,000 users. It should be noted that due to an increase in SCW service base and potential increases in the number of customers, there is a requirement to have the option to increase the user licence levels within the contract to up to 20,000 users or to reduce users to 3,000 if required.

The system will be required to host upwards of 500 learning items (as defined below). It will be required that the system can segment and restrict access to items by audience, for example, user group, management, non-management, and bespoke groupings.

Any software upgrades during the contract term will be subject to negotiation and agreement by both parties.

## **Hosting capability and content management**

The system should be able to host with ease links to other systems (i.e., URL to externally hosted websites). It should have the capability to host all the following file types:

- Microsoft office documents (Word, Excel and PowerPoint, versions 97 – 2021)
- PDF (Adobe Acrobat)
- Common graphics file formats such as JPEG, PNG
- Video files (MP4, AVI or HTML5)
- e-learning in multiple formats, including SCORM 1.2, 2004 and AICC, to be hosted on the LMS servers

The system should be able to function as a database for both content management and records management.

### **Staff (learner) database should have the facility to:**

- Upload and interface staff (learners) data from NHS Electronic Staff Records (ESR)
- Maintain database changes via interface with ESR
- Manually upload staff learner (data) for staff not on ESR system
- Manage staff from multiple organisations to whom SCW provides learning service for
- Have unique learning paths for each learner and grouped by type of staff and their organisation
- Create separate dashboards/navigation and control access and visibility of content by set user groups

### **Course database should have the facility to:**

- Create, edit and maintain courses, including course archiving
- Manage course bookings, with users able to create and cancel bookings
- Have course hierarchies
- Associate documents with courses
- Amend settings for eLearning completion from LMS interface, e.g., complete when finished vs complete only when a set mark is achieved
- Accurately log eLearning results
- Generate learning record on completion of eLearning module
- Integrate with MS Outlook to generate calendar entries and update with changed course details/cancellations etc.
- Integrate with MS Teams to provide chat facility for online learning events is preferred but not required.

## **End User Requirements**

Ease of navigation will be a priority. Learners need to be able to access the materials and course information that they are looking for quickly and easily –

recognising that easy search navigation paths and effective search engines and optimisation are vital (including tagging ability for search engine optimisation). The session should provide a method of communication with end users, including the ability to provide:

- Automated and custom booking confirmation, reminders, and manager notifications
- Did not attend (DNA) notifications
- Notifications to the line managers of users

## Schedule 2: Call-Off Contract charges

For each individual Service, the applicable Call-Off Contract Charges (in accordance with the

Supplier's Platform pricing document) can't be amended during the term of the Call-Off Contract. The detailed Charges breakdown for the provision of Services during the Term will include:

For the purposes of this clarification exercise, please complete below the price based on 5,000 user licences for year 1 and optional year 2:

Active number of users per year	Totara TXP Learn Subscription	Hosting and Maintenance	Client Services and Support	Total
5,000 (YR1)				
5,000 (YR2)				
			<b>Total</b>	<b>£57,993.50</b>



If during the contract term, there are any decreases or increases in the number of licences required, please include your prices per line item in the table below. This includes the subscription for Totara Learn and Engage from (v18 onwards)

Active number of users per year	Totara TXP Learn Subscription	Hosting and Maintenance	Client Services and Support
< 3,000 (YR1)			
< 3,000 (YR2)			
<5,000 (YR1)			
<5,000 (YR2)			
<10,000 (YR1)			
<10,000 (YR2)			
<15,000 (YR1)			
<15,000 (YR2)			

## SFIA Rate Card

Standard Rate Card						
	Strategy & architecture	Change & Transformation	Development & implementation	Delivery & Operation	People & skills	Relationships & engagement
1. Follow						
2. Assist						
3. Apply						
4. Enable						
5. Ensure or advise						
6. Initiate or influence						
7. Set strategy or inspire						

### Standards for consultancy day rate cards.

- **Consultant's working day:** 8 hours exclusive of travel and lunch
- **Working week:** Monday to Friday excluding national holidays
- **Office hours:** 9:00am to 5:00pm Monday to Friday (weekdays after 6pm @ x1.5 rate, weekends @ x2 rate)
- **Travel, mileage subsistence:** Payable at standard travel and subsistence rates (Standard class rail and 45p/mile)
- **Mileage:** As for travel, mileage subsistence (45p/mile)
- **Professional indemnity insurance:** Included in day rate

### Schedule 3:

Not used

## Schedule 4: Alternative clauses

### 1. Introduction

1.1 This Schedule specifies the alternative clauses that may be requested in the Order Form and, if requested in the Order Form, will apply to this Call-Off Contract.

### 2. Clauses selected

2.1 The Customer may, in the Order Form, request the following alternative

Clauses:

2.1.1 Scots Law and Jurisdiction

2.1.2 References to England and Wales in incorporated Framework Agreement clause 15.1 (Law and Jurisdiction) of this Call-Off Contract will be replaced with Scotland and the wording of the Framework Agreement and Call-Off Contract will be interpreted as closely as possible to the original English and Welsh Law intention despite Scots Law applying.

2.1.3 Reference to England and Wales in Working Days definition within the Glossary and interpretations section will be replaced with Scotland.

2.1.4 References to the Contracts (Rights of Third Parties) Act 1999 will be removed in clause 27.1. Reference to the Freedom of Information Act 2000 within the defined terms for 'FoIA/Freedom of Information Act' to be replaced with Freedom of Information (Scotland) Act 2002.

2.1.5 Reference to the Supply of Goods and Services Act 1982 will be removed in incorporated Framework Agreement clause 4.1.

2.1.6 References to "tort" will be replaced with "delict" throughout

2.2 The Customer may, in the Order Form, request the following Alternative

Clauses:

2.2.1 Northern Ireland Law (see paragraph 2.3, 2.4, 2.5, 2.6 and 2.7 of this Schedule)

## 2.3 Discrimination

2.3.1 The Supplier will comply with all applicable fair employment, equality of treatment and anti-discrimination legislation, including, in particular the:

- Employment (Northern Ireland) Order 2002
- Fair Employment and Treatment (Northern Ireland) Order 1998
- Sex Discrimination (Northern Ireland) Order 1976 and 1988
  
- Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003
- Equal Pay Act (Northern Ireland) 1970
- Disability Discrimination Act 1995
- Race Relations (Northern Ireland) Order 1997
- Employment Relations (Northern Ireland) Order 1999 and Employment Rights (Northern Ireland) Order 1996
- Employment Equality (Age) Regulations (Northern Ireland) 2006
- Part-time Workers (Prevention of less Favourable Treatment) Regulation 2000
- Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
- The Disability Discrimination (Northern Ireland) Order 2006
- The Employment Relations (Northern Ireland) Order 2004
- Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006
- Employment Relations (Northern Ireland) Order 2004 • Work and Families (Northern Ireland) Order 2006

and will use his best endeavours to ensure that in his employment policies and practices and in the delivery of the services required of the Supplier under this Call-Off Contract he promotes equality of treatment and opportunity between:

- a. persons of different religious beliefs or political opinions
- b. men and women or married and unmarried persons
- c. persons with and without dependants (including women who are pregnant or on maternity leave and men on paternity leave)
- d. persons of different racial groups (within the meaning of the Race Relations (Northern Ireland) Order 1997)
- e. persons with and without a disability (within the meaning of the Disability Discrimination Act 1995)

- f. persons of different ages
- g. persons of differing sexual orientation

2.3.2 The Supplier will take all reasonable steps to secure the observance of clause 2.3.1 of this Schedule by all Supplier Staff.

## 2.4 Equality policies and practices

2.4.1 The Supplier will introduce and will procure that any Subcontractor will also introduce and implement an equal opportunities policy in accordance with guidance from and to the satisfaction of the Equality Commission. The Supplier will review these policies on a regular basis (and will procure that its Subcontractors do likewise) and the Customer will be entitled to receive upon request a copy of the policy.

2.4.2 The Supplier will take all reasonable steps to ensure that all of the Supplier Staff comply with its equal opportunities policies (referred to in clause 2.3 above). These steps will include:

- a. the issue of written instructions to staff and other relevant persons
- b. the appointment or designation of a senior manager with responsibility for equal opportunities
- c. training of all staff and other relevant persons in equal opportunities and harassment matters
- d. the inclusion of the topic of equality as an agenda item at team, management and staff meetings

The Supplier will procure that its Subcontractors do likewise with their equal opportunities policies.

2.4.3 The Supplier will inform the Customer as soon as possible in the event of:

- A. the Equality Commission notifying the Supplier of an alleged breach by it or any Subcontractor (or any of their shareholders or directors) of the Fair Employment and Treatment (Northern Ireland) Order 1998 or
- B. any finding of unlawful discrimination (or any offence under the Legislation mentioned in clause 2.3 above) being made against the Supplier or its

Subcontractors during the Call-Off Contract Period by any Industrial or Fair Employment Tribunal or court,

The Supplier will take any necessary steps (including the dismissal or replacement of any relevant staff or Subcontractor(s)) as the Customer directs and will seek the advice of the Equality Commission in order to prevent any offence or repetition of the unlawful discrimination as the case may be.

2.4.4 The Supplier will monitor (in accordance with guidance issued by the Equality Commission) the composition of its workforce and applicants for employment and will provide an annual report on the composition of the workforce and applicants to the Customer. If the monitoring reveals under-representation or lack of fair participation of particular groups, the Supplier will review the operation of its relevant policies and take positive action if appropriate. The Supplier will impose on its Subcontractors obligations similar to those undertaken by it in this clause 2.4 and will procure that those Subcontractors comply with their obligations.

2.4.5 The Supplier will provide any information the Customer requests (including Information requested to be provided by any Subcontractors) for the purpose of assessing the Supplier's compliance with its obligations under clauses 2.4.1 to 2.4.5 of this Schedule.

## 2.5 Equality

2.5.1 The Supplier will, and will procure that each Subcontractor will, in performing its/their obligations under this Call-Off Contract (and other relevant agreements), comply with the provisions of Section 75 of the Northern Ireland Act 1998, as if they were a public authority within the meaning of that section.

2.5.2 The Supplier acknowledges that the Customer must, in carrying out its functions, have due regard to the need to promote equality of opportunity as contemplated by the Northern Ireland Act 1998 and the Supplier will use all reasonable endeavours to assist (and to ensure that relevant Subcontractor helps) the Customer in relation to same.

## 2.6 Health and safety

2.6.1 The Supplier will promptly notify the Customer of any health and safety hazards which may arise in connection with the performance of its obligations under the Call-Off Contract. The Customer will promptly notify the Supplier of any health and safety hazards which may exist or arise at the Customer premises and which may affect the Supplier in the performance of its obligations under the Call-Off Contract.

2.6.2 While on the Customer premises, the Supplier will comply with any health and safety measures implemented by the Customer in respect of Supplier Staff and other persons working there.

2.6.3 The Supplier will notify the Customer immediately in the event of any incident occurring in the performance of its obligations under the Call-Off Contract on the Customer premises if that incident causes any personal injury or damage to property which could give rise to personal injury.

2.6.4 The Supplier will comply with the requirements of the Health and Safety at Work (Northern Ireland) Order 1978 and any other acts, orders, regulations and codes of practice relating to health and safety, which may apply to Supplier Staff and other persons working on the Customer premises in the performance of its obligations under the Call-Off Contract.

2.6.5 The Supplier will ensure that its health and safety policy statement (as required by the Health and Safety at Work (Northern Ireland) Order 1978) is made available to the Customer on request.

## 2.7 Criminal damage

2.7.1 The Supplier will maintain standards of vigilance and will take all precautions as advised by the Criminal Damage (Compensation) (Northern Ireland) Order 1977 or as may be recommended by the police or the Northern Ireland Office (or, if replaced, their successors) and will compensate the Customer for any loss arising

directly from a breach of this obligation (including any diminution of monies received by the Customer under any insurance policy).



2.7.2 If during the Call-Off Contract Period any assets (or any part thereof) is or are damaged or destroyed by any circumstance giving rise to a claim for compensation under the provisions of the Compensation Order the following provisions of this clause 2.7 will apply.

2.7.3 The Supplier will make (or will procure that the appropriate organisation make) all appropriate claims under the Compensation Order as soon as possible after the CDO Event and will pursue any claim diligently and at its cost. If appropriate, the

Customer will also make and pursue a claim diligently under the Compensation Order. Any appeal against a refusal to meet any claim or against the amount of the award will be at the Customer's cost and the Supplier will (at no additional cost to the Customer) provide any help the Customer reasonably requires with the appeal.

2.7.4 The Supplier will apply any compensation paid under the Compensation Order in respect of damage to the relevant assets towards the repair, reinstatement or replacement of the assets affected.

## Schedule 5: Guarantee

Not used

## Schedule 6: Glossary and interpretations

In this Call-Off Contract the following expressions mean:

Expression	Meaning
<b>Additional Services</b>	Any services ancillary to the G-Cloud Services that are in the scope of Framework Agreement Clause 2 (Services) which a Buyer may request.
<b>Admission Agreement</b>	The agreement to be entered into to enable the Supplier to participate in the relevant Civil Service pension scheme(s).
<b>Application</b>	The response submitted by the Supplier to the Invitation to Tender (known as the Invitation to Apply on the Platform).
<b>Audit</b>	An audit carried out under the incorporated Framework Agreement clauses.
<b>Background IPRs</b>	<p>For each Party, IPRs:</p> <ul style="list-style-type: none"><li>• owned by that Party before the date of this Call-Off Contract (as may be enhanced and/or modified but not as a consequence of the Services) including IPRs contained in any of the Party's Know-How, documentation and processes</li><li>• created by the Party independently of this Call-Off Contract, or</li></ul> <p>For the Buyer, Crown Copyright which isn't available to the Supplier otherwise than under this Call-Off Contract, but excluding IPRs owned by that Party in Buyer software or Supplier software.</p>

<b>Buyer</b>	The contracting authority ordering services as set out in the Order Form.
<b>Buyer Data</b>	All data supplied by the Buyer to the Supplier including Personal Data and Service Data that is owned and managed by the Buyer.
<b>Buyer Personal Data</b>	The Personal Data supplied by the Buyer to the Supplier for purposes of, or in connection with, this Call-Off Contract.
<b>Buyer Representative</b>	The representative appointed by the Buyer under this Call-Off Contract.
<b>Buyer Software</b>	Software owned by or licensed to the Buyer (other than under this Agreement), which is or will be used by the Supplier to provide the Services.
<b>Call-Off Contract</b>	This call-off contract entered into following the provisions of the Framework Agreement for the provision of Services made between the Buyer and the Supplier comprising the Order Form, the Call-Off terms and conditions, the Call-Off schedules and the Collaboration Agreement.

<b>Charges</b>	The prices (excluding any applicable VAT), payable to the Supplier by the Buyer under this Call-Off Contract.
<b>Collaboration Agreement</b>	An agreement, substantially in the form set out at Schedule 3, between the Buyer and any combination of the Supplier and contractors, to ensure collaborative working in their delivery of the Buyer's Services and to ensure that the Buyer receives end-to-end services across its IT estate.
<b>Commercially Sensitive Information</b>	Information, which the Buyer has been notified about by the Supplier in writing before the Start date with full details of why the Information is deemed to be commercially sensitive.
<b>Confidential Information</b>	<p>Data, Personal Data and any information, which may include (but isn't limited to) any:</p> <ul style="list-style-type: none"> <li>• information about business, affairs, developments, trade secrets, know-how, personnel, and third parties, including all Intellectual Property Rights (IPRs), together with all information derived from any of the above</li> <li>• other information clearly designated as being confidential or which ought reasonably be considered to be confidential (whether or not it is marked 'confidential').</li> </ul>
<b>Control</b>	'Control' as defined in section 1124 and 450 of the Corporation Tax Act 2010. 'Controls' and 'Controlled' will be interpreted accordingly.

<b>Controller</b>	Takes the meaning given in the UK GDPR.
<b>Crown</b>	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 carrying out functions on its behalf.

<b>Data Loss Event</b>	Event that results, or may result, in unauthorised access to Personal Data held by the Processor under this Call-Off Contract and/or actual or potential loss and/or destruction of Personal Data in breach of this Agreement, including any Personal Data Breach.
<b>Data Protection Impact Assessment (DPIA)</b>	An assessment by the Controller of the impact of the envisaged Processing on the protection of Personal Data.
<b>Data Protection Legislation (DPL)</b>	(i) the UK GDPR as amended from time to time; (ii) the DPA 2018 to the extent that it relates to Processing of Personal Data and privacy; (iii) all applicable Law about the Processing of Personal Data and privacy.
<b>Data Subject</b>	Takes the meaning given in the UK GDPR

<b>Default</b>	<p>Default is any:</p> <ul style="list-style-type: none"> <li>• breach of the obligations of the Supplier (including any fundamental breach or breach of a fundamental term)</li> <li>• other default, negligence or negligent statement of the Supplier, of its Subcontractors or any Supplier Staff (whether by act or omission), in connection with or in relation to this Call-Off Contract</li> </ul> <p>Unless otherwise specified in the Framework Agreement the Supplier is liable to CCS for a Default of the Framework Agreement and in relation to a Default of the Call-Off Contract, the Supplier is liable to the Buyer.</p>
<b>DPA 2018</b>	Data Protection Act 2018.
<b>Employment Regulations</b>	The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) ('TUPE') .
<b>End</b>	Means to terminate; and Ended and Ending are construed accordingly.
<b>Environmental Information Regulations or EIR</b>	The Environmental Information Regulations 2004 together with any guidance or codes of practice issued by the Information Commissioner or relevant government department about the regulations.
<b>Equipment</b>	The Supplier's hardware, computer and telecoms devices, plant, materials and such other items supplied and used by the Supplier (but not hired, leased or loaned from CCS or the Buyer) in the performance of its obligations under this Call-Off Contract.

<b>ESI Reference Number</b>	The 14 digit ESI reference number from the summary of the outcome screen of the ESI tool.
<b>Employment Status Indicator test tool or ESI tool</b>	The HMRC Employment Status Indicator test tool. The most up-to-date version must be used. At the time of drafting the tool may be found here: <a href="https://www.gov.uk/guidance/check-employment-status-fortax">https://www.gov.uk/guidance/check-employment-status-fortax</a>
<b>Expiry Date</b>	The expiry date of this Call-Off Contract in the Order Form.



<b>Force Majeure</b>	<p>A force Majeure event means anything affecting either Party's performance of their obligations arising from any:</p> <ul style="list-style-type: none"> <li>• acts, events or omissions beyond the reasonable control of the affected Party</li> <li>• riots, war or armed conflict, acts of terrorism, nuclear, biological or chemical warfare</li> <li>• acts of government, local government or Regulatory Bodies</li> <li>• fire, flood or disaster and any failure or shortage of power or fuel</li> <li>• industrial dispute affecting a third party for which a substitute third party isn't reasonably available</li> </ul> <p>The following do not constitute a Force Majeure event:</p> <ul style="list-style-type: none"> <li>• any industrial dispute about the Supplier, its staff, or failure in the Supplier's (or a Subcontractor's) supply chain</li> <li>• any event which is attributable to the wilful act, neglect or failure to take reasonable precautions by the Party seeking to rely on Force Majeure</li> <li>• the event was foreseeable by the Party seeking to rely on Force Majeure at the time this Call-Off Contract was entered into</li> <li>• any event which is attributable to the Party seeking to rely on Force Majeure and its failure to comply with its own business continuity and disaster recovery plans</li> </ul>
<b>Former Supplier</b>	<p>A supplier supplying services to the Buyer before the Start date that are the same as or substantially similar to the Services. This also includes any Subcontractor or the Supplier (or any subcontractor of the Subcontractor).</p>
<b>Framework Agreement</b>	<p>The clauses of framework agreement RM1557.13 together with the Framework Schedules.</p>

<b>Fraud</b>	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 in relation to this Call-Off Contract or
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	defrauding or attempting to defraud or conspiring to defraud the Crown.
<b>Freedom of Information Act or FoIA</b>	The Freedom of Information Act 2000 and any subordinate legislation made under the Act together with any guidance or codes of practice issued by the Information Commissioner or relevant government department in relation to the legislation.
<b>G-Cloud Services</b>	The cloud services described in Framework Agreement Clause 2 (Services) as defined by the Service Definition, the Supplier Terms and any related Application documentation, which the Supplier must make available to CCS and Buyers and those services which are deliverable by the Supplier under the Collaboration Agreement.
<b>UK GDPR</b>	The retained EU law version of the General Data Protection Regulation (Regulation (EU) 2016/679).
<b>Good Industry Practice</b>	Standards, practices, methods and process conforming to the Law and the exercise of that 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 in a similar undertaking in the same or similar circumstances.

<b>Government Procurement Card</b>	The government's preferred method of purchasing and payment for low value goods or services.
<b>Guarantee</b>	The guarantee described in Schedule 5.
<b>Guidance</b>	Any current UK government guidance on the Public Contracts Regulations 2015. In the event of a conflict between any current UK government guidance and the Crown Commercial Service guidance, current UK government guidance will take precedence.
<b>Implementation Plan</b>	The plan with an outline of processes (including data standards for migration), costs (for example) of implementing the services which may be required as part of Onboarding.
<b>Indicative test</b>	ESI tool completed by contractors on their own behalf at the request of CCS or the Buyer (as applicable) under clause 4.6.
<b>Information</b>	Has the meaning given under section 84 of the Freedom of Information Act 2000.
<b>Information security management system</b>	The information security management system and process developed by the Supplier in accordance with clause 16.1.

<b>Inside IR35</b>	Contractual engagements which would be determined to be within the scope of the IR35 Intermediaries legislation if assessed using the ESI tool.
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<b>Insolvency event</b>	<p>Can be:</p> <ul style="list-style-type: none"> <li>• a voluntary arrangement</li> <li>• a winding-up petition</li> <li>• the appointment of a receiver or administrator</li> <li>• an unresolved statutory demand</li> <li>• a Schedule A1 moratorium</li> <li>• a Dun &amp; Bradstreet rating of 10 or less</li> </ul>
<b>Intellectual Property Rights or IPR</b>	<p>Intellectual Property Rights are:</p> <ul style="list-style-type: none"> <li>• 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</li> <li>• 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</li> <li>• all other rights having equivalent or similar effect in any country or jurisdiction</li> </ul>
<b>Intermediary</b>	<p>For the purposes of the IR35 rules an intermediary can be:</p> <ul style="list-style-type: none"> <li>• the supplier's own limited company</li> <li>• a service or a personal service company</li> <li>• a partnership</li> </ul> <p>It does not apply if you work for a client through a Managed Service Company (MSC) or agency (for example, an employment agency).</p>

<b>IPR claim</b>	As set out in clause 11.5.
<b>IR35</b>	IR35 is also known as 'Intermediaries legislation'. It's a set of rules that affect tax and National Insurance where a Supplier is contracted to work for a client through an Intermediary.
<b>IR35 assessment</b>	Assessment of employment status using the ESI tool to determine if engagement is Inside or Outside IR35.

<b>Know-How</b>	All ideas, concepts, schemes, information, knowledge, techniques, methodology, and anything else in the nature of know-how relating to the G-Cloud Services but excluding know-how already in the Supplier's or Buyer's possession before the Start date.
<b>Law</b>	Any law, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, bye-law, regulation, order, regulatory policy, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements with which the relevant Party is bound to comply.
<b>Loss</b>	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 or otherwise and ' <b>Losses</b> ' will be interpreted accordingly.

<b>Lot</b>	Any of the 3 Lots specified in the ITT and Lots will be construed accordingly.
<b>Malicious Software</b>	Any software program or code intended to destroy, interfere with, corrupt, or cause undesired effects on program files, data or other information, executable code or application software macros, whether or not its operation is immediate or delayed, and whether the malicious software is introduced wilfully, negligently or without knowledge of its existence.
<b>Management Charge</b>	The sum paid by the Supplier to CCS being an amount of up to 1% but currently set at 0.75% of all Charges for the Services invoiced to Buyers (net of VAT) in each month throughout the duration of the Framework Agreement and thereafter, until the expiry or End of any Call-Off Contract.
<b>Management Information</b>	The management information specified in Framework Agreement Schedule 6.
<b>Material Breach</b>	Those breaches which have been expressly set out as a Material Breach and any other single serious breach or persistent failure to perform as required under this Call-Off Contract.
<b>Ministry of Justice Code</b>	The Ministry of Justice's Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000.

<b>New Fair Deal</b>	The revised Fair Deal position in the HM Treasury guidance: "Fair Deal for staff pensions: staff transfer from central government" issued in October 2013 as amended.
<b>Order</b>	An order for G-Cloud Services placed by a contracting body with the Supplier in accordance with the ordering processes.
<b>Order Form</b>	The order form set out in Part A of the Call-Off Contract to be used by a Buyer to order G-Cloud Services.
<b>Ordered G-Cloud Services</b>	G-Cloud Services which are the subject of an order by the Buyer.
<b>Outside IR35</b>	Contractual engagements which would be determined to not be within the scope of the IR35 intermediaries legislation if assessed using the ESI tool.
<b>Party</b>	The Buyer or the Supplier and 'Parties' will be interpreted accordingly.

<b>Personal Data</b>	Takes the meaning given in the UK GDPR.
<b>Personal Data Breach</b>	Takes the meaning given in the UK GDPR.
<b>Platform</b>	The government marketplace where Services are available for Buyers to buy.
<b>Processing</b>	Takes the meaning given in the UK GDPR.
<b>Processor</b>	Takes the meaning given in the UK GDPR.



<b>Prohibited act</b>	<p>To directly or indirectly offer, promise or give any person working for or engaged by a Buyer or CCS a financial or other advantage to:</p> <ul style="list-style-type: none"> <li>• induce that person to perform improperly a relevant function or activity</li> <li>• reward that person for improper performance of a relevant function or activity</li> <li>• commit any offence: <ul style="list-style-type: none"> <li>○ under the Bribery Act 2010</li> <li>○ under legislation creating offences concerning Fraud</li> <li>○ at common Law concerning Fraud</li> <li>○ committing or attempting or conspiring to commit Fraud</li> </ul> </li> </ul>
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<b>Project Specific IPRs</b>	<p>Any intellectual property rights in items created or arising out of the performance by the Supplier (or by a third party on behalf of the Supplier) specifically for the purposes of this Call-Off Contract including databases, configurations, code, instructions, technical documentation and schema but not including the Supplier's Background IPRs.</p>
<b>Property</b>	<p>Assets and property including technical infrastructure, IPRs and equipment.</p>

<b>Protective Measures</b>	<p>Appropriate technical and organisational measures which may include: pseudonymisation and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of such measures adopted by it.</p>
<b>PSN or Public Services Network</b>	<p>The Public Services Network (PSN) is the government's highperformance network which helps public sector organisations work together, reduce duplication and share resources.</p>
<b>Regulatory body or bodies</b>	<p>Government departments and other bodies which, whether under statute, codes of practice or otherwise, are entitled to investigate or influence the matters dealt with in this Call-Off Contract.</p>
<b>Relevant person</b>	<p>Any employee, agent, servant, or representative of the Buyer, any other public body or person employed by or on behalf of the Buyer, or any other public body.</p>
<b>Relevant Transfer</b>	<p>A transfer of employment to which the employment regulations applies.</p>

<b>Replacement Services</b>	Any services which are the same as or substantially similar to any of the Services and which the Buyer receives in substitution for any of the services after the expiry or Ending or partial Ending of the Call-Off Contract, whether those services are provided by the Buyer or a third party.
<b>Replacement supplier</b>	Any third-party service provider of replacement services appointed by the Buyer (or where the Buyer is providing replacement Services for its own account, the Buyer).
<b>Security management plan</b>	The Supplier's security management plan developed by the Supplier in accordance with clause 16.1.

<b>Services</b>	The services ordered by the Buyer as set out in the Order Form.
<b>Service data</b>	Data that is owned or managed by the Buyer and used for the GCloud Services, including backup data.

<b>Service definition(s)</b>	The definition of the Supplier's G-Cloud Services provided as part of their Application that includes, but isn't limited to, those items listed in Clause 2 (Services) of the Framework Agreement.
<b>Service description</b>	The description of the Supplier service offering as published on the Platform.
<b>Service Personal Data</b>	The Personal Data supplied by a Buyer to the Supplier in the course of the use of the G-Cloud Services for purposes of or in connection with this Call-Off Contract.
<b>Spend controls</b>	The approval process used by a central government Buyer if it needs to spend money on certain digital or technology services, see <a href="https://www.gov.uk/service-manual/agile-delivery/spend-controlscheck-if-you-need-approval-to-spend-money-on-a-service">https://www.gov.uk/service-manual/agile-delivery/spend-controlscheck-if-you-need-approval-to-spend-money-on-a-service</a>
<b>Start date</b>	The Start date of this Call-Off Contract as set out in the Order Form.

<b>Subcontract</b>	Any contract or agreement or proposed agreement between the Supplier and a subcontractor in which the subcontractor agrees to provide to the Supplier the G-Cloud Services or any part thereof or facilities or goods and services necessary for the provision of the GCloud Services or any part thereof.
<b>Subcontractor</b>	Any third party engaged by the Supplier under a subcontract (permitted under the Framework Agreement and the Call-Off Contract) and its servants or agents in connection with the provision of G-Cloud Services.
<b>Subprocessor</b>	Any third party appointed to process Personal Data on behalf of the Supplier under this Call-Off Contract.
<b>Supplier</b>	The person, firm or company identified in the Order Form.
<b>Supplier Representative</b>	The representative appointed by the Supplier from time to time in relation to the Call-Off Contract.

<b>Supplier staff</b>	All persons employed by the Supplier together with the Supplier's servants, agents, suppliers and subcontractors used in the performance of its obligations under this Call-Off Contract.
<b>Supplier Terms</b>	The relevant G-Cloud Service terms and conditions as set out in the Terms and Conditions document supplied as part of the Supplier's Application.
<b>Term</b>	The term of this Call-Off Contract as set out in the Order Form.
<b>Variation</b>	This has the meaning given to it in clause 32 (Variation process).
<b>Working Days</b>	Any day other than a Saturday, Sunday or public holiday in England and Wales.
<b>Year</b>	A contract year.

## Schedule 7: UK GDPR Information

This schedule reproduces the annexes to the UK GDPR schedule contained within the Framework Agreement and incorporated into this Call-off Contract and clause and schedule references are to those in the Framework Agreement but references to CCS have been amended.

### Annex 1: Processing Personal Data

This Annex shall be completed by the Controller, who may take account of the view of the

Processors, however the final decision as to the content of this Annex shall be with the Buyer at its absolute discretion.

1.1 The contact details of the Buyer's Data Protection Officer are:

@nhs.net

1.2 The contact details of the Supplier's Data Protection Officer are: Rachel Firth, DPO, [info@think-learning.com](mailto:info@think-learning.com)

1.3 The Processor shall comply with any further written instructions with respect to Processing by the Controller.

1.4 Any such further instructions shall be incorporated into this Annex.

Description	Details
Identity of Controller for each Category of Personal Data	<p><b>The Buyer is Controller and the Supplier is Processor</b></p> <p>The Parties acknowledge that in accordance with paragraphs 2 to paragraph 15 of Schedule 7 and for the purposes of the Data Protection Legislation, Buyer is the Controller and the Supplier is the Processor of the Personal Data recorded below:</p>





Categories of Data Subject	[REDACTED]
Plan for return and destruction of the data once the Processing is complete UNLESS requirement under Union or Member State law to preserve that type of data	[REDACTED]

## Appendices

### Appendix A

#### End User Licence Agreements

In using these Services, you agree to be bound by the End User Licence Agreement and Product Licence & Subscription Agreement provided by Totara Learning Ltd, and/or other relevant End User Agreements used in the delivery of the Services. We (Think Associates Ltd, t/a Think Learning) shall bear no liability for non-conformant delivery of services which result from your inability to be bound by these End User Licence Agreement and Product Licence & Subscription Agreements

By using or purchasing Totara services from Think Learning, you agree to be bound by the terms and conditions of the Totara TXP Subscription Agreement. We are able to extend and customise your Totara code, to best fit organisational requirements. Where clients contribute to the development of bespoke functionality enhancements, they have influence over the functionality/features created; we may at our absolute discretion then absorb the cost of hosting/maintaining/upgrading the bespoke code in the codebase (in line with core Totara release versions). We reserve the right to make these developments available to other clients, at our discretion. Intellectual Property which is specifically owned by the client under a proprietary licence (e.g. Competency frameworks, or bespoke e-learning modules) will be provided to the client by us on request at any time during, or immediately after the end of a contract.

If either party terminates an agreement for Services, then we will provide you with a copy of all user and site data. We will not provide a copy of the Totara TXP code, nor copies of any bespoke software code developed in the course of delivering the Service, because each Totara partner is responsible for their own Totara code, and code created by us is for use by our client community only. Before contracting (and/or upgrading to Totara v13), you must read and agree to the Totara Learning Ltd End user licence agreement as presented in this document and updated from time to time at <https://www.totaralearning.com/en/licence>.

### Appendix B

#### Totara TXP Product Licence and Subscription Agreement.

This Subscription Agreement, ("Agreement") is between you ("Customer") and Totara Learning (as defined below) and is effective as of the date this Agreement is accepted by Customer ("Commencement Date"). By accessing, installing or

otherwise using Totara Enterprise Extensions, Customer acknowledges that Customer has read, understands and accepts the terms of this Agreement.

## **1.1 TOTARA ENTITY; DEFINITIONS**

1.1.1 Totara Entity. "Totara Learning" shall refer to:

1.1.2 if Customer is located in New Zealand, Asia, or Oceania (other than Australia): Totara Learning Solutions Ltd, with an address at Level 2, 186 Willis Street, Te Aro, Wellington 6011, New Zealand.

1.1.3 if Customer is located in Australia: Totara Learning (Australia) Pty Limited, ABN 41 620 245 294, with an address at Suite 11, Level 11, GPO Box 4836, 60 Castlereagh Street, Sydney, NSW 2000, Australia.

1.1.4 if Customer is located in Europe, Middle East or Africa: Totara Learning (Europe) Ltd., with an address at Suite 417 4th Floor, Tower Point, 44 North Road Brighton, BN1 1YR, United Kingdom.

1.1.5 if Customer is located in North America, South America, or in a country or region not covered by (a) through (c) above: Totara Learning, Inc., with an address at PO Box 7775 #95930, San Francisco, CA 94120, USA.

## **1.2 Definitions. In this Agreement:**

1.2.1 Customer Computers means computers owned or controlled by Customer.

1.2.2 Documentation means the documentation for the Totara Platform available on Totara Learning's website or that Totara Learning may otherwise make available to Customer from time to time.

1.2.3 Number of Active Users means, with respect to a Production Instance, the total number of unique user accounts through which a user may access Totara Enterprise Extensions whether or not any such accounts are subsequently suspended.

1.2.4 Order means an ordering document, purchase agreement, sales order, agreement or other similar document pursuant to which Customer has purchased a subscription to Totara Enterprise Extensions, whether directly from Totara Learning or indirectly from an authorized partner of Totara Learning.

1.2.5 Production Instance means an instance of the Totara Platform which is deployed to support an active operational learning management business process of the Customer in use by the Customer's personnel.

1.2.6 Supported Environment means the combination of hardware, operating system and database platform that together meet the minimum system configuration requirements for the proper use and operation of the Totara Platform as set out in the Documentation.

1.2.7 Third Party Software means software licensed by third parties including software licensed under open source licenses such as those approved by the Open Source Initiative.

1.2.8 Totara EE Proprietary means software which is a part of Totara Enterprise Extensions but which is not Third Party Software.

1.2.9 Totara EE TPS means software which is part of Totara Enterprise Extensions which is Third Party Software.

1.2.10 Totara Core means the software based on Moodle software as further described in the Documentation.

1.2.11 Totara Enterprise Extensions means certain proprietary software modules developed by Totara Learning, as further described in the Documentation.

1.2.12 Totara Platform means Totara Learning's software platform, consisting of (a) Totara Core, and (b) Totara Enterprise Extensions.

## 1.3 LICENSE AND RESTRICTIONS

1.3.1 License Grant. Subject to Customer's full and ongoing compliance with the terms and conditions of this Agreement, Totara Learning hereby grants Customer a limited, non-exclusive, non-transferable, non-sublicensable right during the Term to: (i) access, use, and modify Totara Enterprise Extensions as part of the Totara Platform for the number of Production Instances for which Customer has purchased a subscription (as indicated in the applicable Orders) and, to the extent such Production Instances are deployed on Customer Computers, reproduce and use a copy of Totara Enterprise Extensions as a part of the Totara Platform on such Customer Computers, in each case, in accordance with the Documentation for its internal business purposes only and (ii) authorize individual users to access and use Totara Enterprise Extensions as part of the Totara Platform (each an "Authorized User") in accordance with the Documentation, provided that Customer shall be responsible for all such access or use of the Totara Platform as if such access or use had been its own. Customer may have additional rights under separate licenses applicable to Totara Core, and Customer's use of Totara Core shall be subject to the terms of those separate licenses.

1.3.2 Restrictions. Except to the extent such restriction is expressly prohibited by applicable law, and other than as expressly set forth in this Agreement, as an express condition to the rights granted to Customer with respect to Totara Enterprise Extensions, Customer will not, and will not assist or permit any third party or Authorized User to: (i) disclose (or allow access to) the source code of Totara Enterprise Extensions (or any information derived from such source code) to any third party who is not under an obligations to keep such source code confidential; (ii) remove or modify any copyright notices in the source code for the Totara Platform or Documentation; (iii) take any action with respect to the implementation of the Totara Platform that would render Totara Enterprise Extensions subject to any obligation or be licensed pursuant to any open source software license terms; (iv) sell, lease, or otherwise transfer to any third party or sublicense Customer's access to or use of the Totara Platform other than to Authorized Users as a part of a larger service that consists of the Totara Platform and additional value adds, content or functionality; (v) use the Totara Platform on behalf of third parties; (vi) use the Totara Platform to violate, misappropriate or infringe the rights of any third party; (vii) interfere with or circumvent any feature of the Totara Platform, including any security or access control mechanism; (viii) use Totara Enterprise Extensions in any way not specifically authorized in this Agreement or in a manner that violates Totara Learning's Acceptable Use Policy (available at <https://help.totaralearning.com/display/TPD/Acceptable+use+policy>; or (ix) attempt to do any of the foregoing.

1.3.3 Active Users. The Number of Active Users for a given Production Instance shall not exceed the number indicated on the applicable Order. Customer acknowledges that Totara Learning or its authorized partners, as applicable, may require Customer to pay additional fees in the event the Number of Active Users for a given Production Instance exceeds the amount indicated on the applicable Order, and Customer agrees to timely pay such amounts.

1.3.4 Third Party Software. Customer acknowledges that some portions of the Totara Platform contain Third Party Software. Use of such Third Party Software may be governed by separate licenses, which shall be identified in the Documentation, on Totara Learning's website, or in other material provided or made available to Customer by or on behalf of Totara Learning.

1.3.5 Modifications. Subject to Totara Learning's rights in Totara Enterprise Extensions, and Documentation, as between Totara Learning and Customer, Customer shall own any enhancements, changes, upgrades, bug fixes, or other modifications made by Customer to Totara Enterprise Extensions, or the Documentation ("Modifications"), provided, however, that in no event may Customer use, distribute, commercialize or otherwise exploit any Modifications or modified version of Totara Enterprise Extensions except in connection with its

authorized use of Totara Enterprise Extensions without Totara Learning's prior written permission. In the event Customer provides any Modifications to Totara Learning, such Modifications shall be deemed Feedback.

1.3.6 Ownership. Customer agrees that as between Customer and Totara Learning, Totara Learning owns all right, title and interest in and to the Totara Platform. Except for the rights explicitly granted to Customer hereunder, nothing in this Agreement shall constitute a transfer or assignment by either party to the other of any intellectual property rights owned or otherwise controlled by such party, and each party hereby reserves all rights not expressly granted hereunder.

1.3.7 Feedback. In the event Customer provides any comments, suggestions, or feedback regarding the Totara Platform, or any improvements, modifications or enhancements to the Totara Platform (collectively, "Feedback"), Customer hereby grants to Totara Learning, under all intellectual property rights Customer currently or may in the future acquire, a worldwide, nonexclusive, irrevocable, perpetual, transferrable, sublicensable, fully paid-up and royalty-free license to use, reproduce, disclose, sublicense, distribute, modify and, make, have made, sell, offer for sale, import, practice any processes or methods related thereto, or otherwise exploit such Feedback without restriction. Customer warrants that it has the rights necessary to provide the Feedback and to grant the foregoing rights to Totara Learning.

1.3.8 Government Rights. Totara Enterprise Extensions and the Documentation are commercial computer software and commercial computer software documentation. If Customer is a U.S. Government agency, this Agreement constitutes the entire agreement between the parties and is binding on government users in accordance with Federal Acquisition Regulation (FAR) 48 CFR 12.212 (for non-defense agencies) or Defense FAR Supplement (DFARS) 48 CFR 227.7202 (for defense agencies).

## 1.4 CUSTOMER RESPONSIBILITIES

1.4.1 Registration. Prior to installing or using the Totara Platform on a Production Instance controlled or maintained by Customer or by an authorized partner of Totara Learning, Customer will ensure that the details of each Production Instance is provided to Totara Learning as Totara Learning or its authorized partners may reasonably request from time to time. Customer may also be required to provide Totara Learning with certain information during registration or installation of the Totara Platform. Customer consents to the provision of such information to Totara Learning and Totara Learning's use of such information. Customer shall promptly notify Totara Learning and, if applicable, its authorized partners in the event of changes to any information provided to Totara Learning or its authorized partners during the Term.

1.4.2 Customer Satisfaction and Feedback. During the Term and for one year after, Customer shall, upon Totara Learning's reasonable request, provide to Totara Learning information about Customer's use of the Totara Platform, including information regarding any issues, feedback, or suggestions that Customers may have with or for the Totara Platform ("Customer Satisfaction Information"). Customer hereby permits Totara Learning to use such Customer Satisfaction Information in order to market, promote and improve the Totara Platform or any of Totara Learning's other products or services.

1.4.3 Supported Environment and Backups. Customer shall ensure that each Production Instance controlled or maintained by Customer is run within a Supported Environment, and shall follow industry standard procedures for maintaining the security and integrity of any data Customer generates or provides on or through the Totara Platform.

1.4.4 Support. Customer acknowledges that Customer may be required to implement maintenance releases or error corrections as a condition to receiving support for the Totara Platform, including from Totara Learning's authorized partners, and that certain outdated versions of the Totara Platform may receive little or no support at all. Without limiting the foregoing, Totara Learning shall not be obligated to provide any support to Customer except as otherwise agreed in writing by Customer and Totara Learning from time to time.

## 1.5 PRIVACY AND DATA PROTECTION

1.5.1 Scope: This Section applies to the extent the parties Process Personal Data subject to EU Data Protection Law in the context of this Agreement.

1.5.2 Definitions:

1.5.3 The terms "Controller", "Data Subject", "Personal Data", "Processor", and "Processing" have the meaning given to these terms in the EU General Data Protection Regulation 2016/679 (as amended and replaced from time to time) ("GDPR").

1.5.4 "EU Data Protection Law" means the GDPR and the e-Privacy Directive 2002/58/EC (as amended by Directive 2009/136/EC, and as amended and replaced from time to time) and their national implementing legislations; the Swiss Federal Data Protection Act (as amended and replaced from time to time); the UK Data Protection Act (as amended and replaced from time to time); and the Data Protection Acts of the EEA countries (as amended and replaced from time to time).

1.5.5 Roles of the parties:

1.5.6 With regard to the Processing of Personal Data in the context of the Agreement, the parties acknowledge and confirm that (1) neither party acts as a Processor on behalf of the other party; (2) each party is an independent Controller; and (3) this Agreement does not create a joint-Controllershship or a Controller-Processor relationship between the parties. The parties acknowledge and agree that the scope of each party's role as independent Controller is limited to the Processing of Personal Data for each party's own Processing purposes in the context of the Agreement.

1.5.7 Obligations of the parties:

1.5.8 Each party confirms and warrants that, in relation to the Processing of Personal Data for its own Processing purposes, including any Personal Data disclosures to the other party, it acts as a Controller and it complies with EU Data Protection Law, in particular by:

1.5.9 Relying on a valid legal ground under EU Data Protection Law for the Processing of Personal Data, including obtaining Data Subjects' appropriate consent if required or appropriate under EU Data Protection Law.

1.5.10 Providing appropriate notice to the Data Subjects regarding the Processing of their Personal Data, in a timely manner and at the minimum with the elements required under EU Data Protection Law.

1.5.11 Responding to Data Subjects' requests to exercise their rights to their Personal Data, if and as required under EU Data Protection Law.

1.5.12 Transferring Personal Data abroad only in accordance with EU Data Protection Law. The parties agree to cooperate in good faith to ensure that international transfers of Personal Data in the context of the Agreement continue to comply with EU Data Protection Law.

1.5.13 Data protection:

1.5.14 Totara Learning will:

1.5.15 only process any personal information received from Customer:

1.5.16 for the purpose of exercising its rights and carrying out its obligations under this Agreement and no other purpose;

1.5.17 in accordance with any instructions issued by Customer from time to time; and



1.5.18 otherwise in accordance with relevant privacy laws; and

1.5.19 will promptly comply with any request from Customer requiring Totara Learning to amend, transfer or delete the personal information.

## **1.6 TERM AND TERMINATION**

1.6.1 Term. Unless terminated earlier in accordance with the terms of this Agreement, this Agreement shall be effecting starting on the Commencement Date and shall continue for so long as Customer has an active Order (the "Term").

1.6.2 Termination Breach or Insolvency. Either party may terminate this Agreement immediately upon notice in the event the other party (i) materially breaches this Agreement and fails to remedy such breach within 15 business days of being notified thereof, or (ii) files for bankruptcy or voluntary reorganization, or ceases to do business in the ordinary course, or undergoes a liquidation or dissolution.

## **1.7 EFFECT OF TERMINATION**

1.7.1 Effect of Termination. Upon termination or expiration of this Agreement, any licenses (except for those granted under an open source license) granted to Customer hereunder shall immediately terminate.

## **1.8 WARRANTY; DISCLAIMERS**

1.8.1 Mutual Warranties. Each party represents and warrants to the other that (a) this Agreement has been duly executed and delivered and constitutes a valid and binding agreement enforceable against such party in accordance with its terms; (b) it has the organizational authority required to execute, deliver and perform under this Agreement; and (c) the execution, delivery and performance of this Agreement does not violate the terms or conditions of any other agreement to which it is a party or by which it is otherwise bound.

1.8.2 Disclaimers: TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, AND EXCEPT AS EXPRESSLY PROVIDED HEREIN, TOTARA LEARNING DOES NOT MAKE, AND EXPRESSLY DISCLAIMS, ALL WARRANTIES OF ANY KIND RELATING TO THE TOTARA PLATFORM, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING, BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE. TOTARA LEARNING DOES NOT WARRANT THAT THE USE OF THE TOTARA PLATFORM WILL BE TIMELY, SECURE, UNINTERRUPTED OR ERROR FREE, OR THAT ANY DEFECTS WILL BE CORRECTED. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY TOTARA LEARNING, ITS AFFILIATES, PARTNERS, EMPLOYEES, AGENTS OR DISTRIBUTORS WILL CREATE A

WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF ANY WARRANTY PROVIDED HEREIN.

## 1.9 CONFIDENTIAL INFORMATION.

1.9.1 Defined. "Confidential Information" means any information, whether in tangible or intangible form, that is disclosed by or on behalf of a party ("Discloser") to the other party ("Recipient") in connection with this Agreement that is in written form and is marked with confidential marking, or that would be understood to be confidential by a reasonable person based on the nature of the information and the circumstances of disclosure; provided, however, that Confidential Information does not include any information that Recipient can establish: (i) was rightfully known to the Recipient prior to receipt from the Discloser without an obligation of confidentiality, (ii) is lawfully obtained by the Recipient from a third party without an obligation of confidentiality, (iii) is independently developed by the Recipient without reference to, or use of the Confidential Information of the Discloser, or (iv) is or becomes publicly available other than as a result of any act of, or failure to act by, the Recipient. Totara Learning's Confidential Information includes the source code to Totara Enterprise Extensions and any information contained in or derived from the source code or the study thereof.

1.9.2 Obligations. Recipient shall: (i) maintain the Confidential Information in confidence, (ii) use at least the same degree of care to maintain the secrecy of the Confidential Information as it uses in maintaining the secrecy of its own confidential information, (iii) always use at least a reasonable degree of care in maintaining the secrecy of the Confidential Information, and (iv) use the Confidential Information only for performing its obligations under this Agreement and exercising its rights under this Agreement, unless otherwise agreed in writing by the Discloser. The Recipient shall not disclose any of the Discloser's Confidential Information to any person except to those Recipient's employees and contractors having a need to know such Confidential Information in order to accomplish the purposes and intent of this Agreement. The Recipient shall ensure that each such employee and contractor has been instructed to keep confidential the Confidential Information of the Discloser and shall ensure that each such consultant has signed a confidentiality agreement covering the Confidential Information of the Discloser.

1.9.3 Exceptions. Notwithstanding the foregoing, if a Recipient is obligated to disclose the Confidential Information of the Discloser pursuant to subpoena or other legal process, it may do so as long as it (i) provides the Discloser prior notice of such disclosure; (ii) cooperates with the Discloser in its efforts to obtain a protective order to protect such Confidential Information from further disclosure; and (iii) only discloses the Confidential Information of the Discloser which the Recipient's counsel informs the Recipient must be disclosed.

1.9.4 Return or Destruction of Materials. Upon termination or expiration of this Agreement for any reason, or upon written request from Discloser, Recipient shall promptly return to Discloser the originals and all copies in its possession or control of Discloser's Confidential Information, and destroy any remaining copies, whether in hard copy or electronic format. Recipient will provide Discloser a written statement signed by an officer confirming the return and destruction of Discloser's Confidential Information. Unless expressly provided for in this Agreement, the Discloser shall retain all rights, title and interest in its Confidential Information.

## 1.10 INDEMNITY; LIMITATIONS ON LIABILITY

1.10.1 Customer Indemnity. Customer shall indemnify, defend and hold Totara Learning and its officers, directors, agents and employees harmless from and against all claims, suits, demands, actions, proceedings, judgments, penalties, damages, losses, liabilities, costs and expenses (including, without limitation, reasonable legal and expert witness fees) resulting from any and all third-party claims arising from or relating to:

1.10.2 Customer's misuse of the Totara Platform; and

1.10.3 actual or alleged infringement or misappropriation of a third party's rights related to any Modifications or any changes to Totara Core made by, for, or at the direction of Customer (including Feedback), except to the extent such infringement or misappropriation is caused by an unaltered version of Totara Enterprise Extensions.

1.10.4 Limitation of Liability:

1.10.5 EXCEPT FOR A PARTY'S BREACH OF ITS CONFIDENTIALITY OBLIGATIONS, ITS INDEMNITY OBLIGATIONS, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, EXEMPLARY, OR SPECIAL LOSSES OR DAMAGES ARISING OUT OF OR RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF BUSINESS OR LOSS OF ANTICIPATED SAVINGS, EVEN IF A PARTY HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY HEREIN. TOTARA LEARNING'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT SHALL BE LIMITED TO THE AMOUNTS RECEIVED BY TOTARA LEARNING IN RESPECT OF CUSTOMER'S USE OF THE TOTARA PLATFORM UNDER THIS AGREEMENT IN THE TWELVE MONTHS IMMEDIATELY PRECEDING THE EVENTS GIVING RISE TO THE CLAIM.

#### 1.10.6 Force Majeure.

1.10.7 Neither party will be liable for, or be considered to be in breach of or default under this Agreement on account of, any delay or failure to perform as required by this Agreement as a result of any cause or condition beyond its reasonable control, including, without limitation, acts of God, acts of war, telecommunications or power outages, failures of the public internet, pandemics or other similar health crisis, strikes, riots, floods, earthquakes, fires and explosions (“Force Majeure Event”), provided that the affected party: (i) notifies the other of the occurrence of the Force Majeure Event, and (ii) uses all commercially reasonable efforts to mitigate the effects of a Force Majeure Event and perform its obligations despite the Force Majeure Event. If a Force Majeure Event continues for more than 60 consecutive business days (or if a party is affected by a Force Majeure Event cumulatively for more than 60 days within a six-month period) then the unaffected party may terminate this Agreement upon notice.

### 1.11 DISPUTE RESOLUTION

1.11.1 Disputes. Except where the Totara Learning entity entering into this Agreement is Totara Learning (Australia) Pty Limited, any dispute or claim arising out of or in connection with this Agreement or the performance, breach or termination thereof, will be resolved by binding arbitration in English at the location specified in accordance with Section 12.8 below, before a single arbitrator, in accordance with the rules specified in accordance with Section 12.8 below, and any award rendered thereon by the arbitrator shall be final, and judgment thereon may be entered in any court of competent jurisdiction. Notwithstanding the foregoing, either party may apply to any court of competent jurisdiction for injunctive relief without breach of this arbitration provision.

#### 1.11.2 NOTICES

1.11.3 Notice. All notices and other communication required or permitted to be given to a party pursuant to this Agreement shall be sent in writing via email and such notice shall be deemed duly given, on the business day that the email is received, provided, however, that if such email is not received prior to 5:30pm local time on a business day, then such notice is deemed to have been received on the immediately following business day. Notices to Totara Learning shall be sent to [subscriptions@totaralearning.com](mailto:subscriptions@totaralearning.com), and notices to Customer shall be sent to the email address provided by Customer to Totara Learning during registration or Totara Learning’s authorized partner. Each party may change its email address for notice by providing notice of such change in accordance with this Section.

## 1.12 GENERAL

1.12.1 Assignment. Customer may not, without Totara Learning's prior written consent, assign any of its rights or obligations hereunder, including in connection with a change of control, merger, sale of all or substantially all of its assets, or similar transaction, each of which, for the avoidance of doubt, shall be deemed an assignment hereunder. Totara Learning may freely assign its rights or obligations under this Agreement. Any assignment in violation of the foregoing shall be null and void. This Agreement shall be binding upon the parties hereto, and their respective successors and permitted assigns.

1.12.2 Compliance with Laws. Each party shall, in performing its respective obligations hereunder with this Agreement, comply with all applicable laws and regulations.

1.12.3 Independent Contractor. The parties' relationship is that of independent contractors, and nothing in this Agreement will be construed to create a partnership, joint venture or employment relationship between the parties, nor authorize either party to bind the other to any warranty, representation, obligation, covenant, or otherwise.

1.12.4 Entire Agreement. This Agreement constitutes the entire agreement (express and implied) between the parties relating to the subject matter of this Agreement and supersedes any prior or contemporaneous agreement, understanding and arrangement relating thereto, whether written or oral, other than the terms of any separate applicable open source license. This Agreement may only be amended, supplemented or novated in writing executed by both parties.

1.12.5 Pay own costs: Except as otherwise provided in this Agreement, each of us will pay our own costs of, and incidental to, the negotiation, preparation, execution and enforcing, or attempting to enforce, this Agreement.

1.12.6 Severability. Any provision in any statute or other law that is inconsistent with this Agreement will not apply, to the extent that contracting out of that provision is permitted, and to the extent such statute or law cannot be contracted out of, the provision of this Agreement that conflicts with such statute or law will be interpreted to give the greatest effect to the original intent while complying with the applicable statute or law, or if incapable of such interpretation will be deemed severable and severed from this Agreement, and the remainder of the Agreement will remain in force.

1.12.7 Waivers. Any delay, failure or forbearance by a party to exercise (in whole or in part) any right, power or remedy under, or in connection with, this

Agreement will not operate as a waiver of such right, power or remedy. The waiver of any breach of any provision of this Agreement will not be effective unless that waiver is in writing and is signed by the party against whom that waiver is claimed. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.

1.12.8      **Governing Law and Jurisdiction.** The laws governing this Agreement, and the jurisdiction and processes for resolving disputes arising hereunder will depend on the Totara Learning entity has entered into this Agreement, as specified in Section 1.1, as follows:

1.12.9      If the Totara Learning entity is Totara Learning Solutions Ltd, this Agreement and all matters arising out of or relating to this Agreement, will be governed by the laws of New Zealand, and subject to Section 10, the parties irrevocably submit to the exclusive jurisdiction of the courts of New Zealand with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement. The location of arbitration under Section 10 will be Wellington, New Zealand, and the arbitration will be conducted in accordance with the Arbitration Act of 1996 other than the provisions of clauses 3(1)(a), 5(1)(a) and 7 of Schedule 2 to the Arbitration Act of 1996.

1.12.10     If the Totara Learning entity is Totara Learning Inc., this Agreement and all matters arising out of or related to this Agreement will be governed by the laws of California, and subject to Section 10, the parties irrevocably submit to the exclusive jurisdiction of the courts located in the City and State of San Francisco, California with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement. The location of arbitration under Section 10 will be San Francisco, California, and the arbitration will be conducted in accordance with the American Arbitration Association's Commercial Arbitration Rules.

1.12.11     If the Totara Learning entity is Totara Learning (Europe) Ltd, this Agreement and all matters arising out of or related to this Agreement will be governed by the laws of England and Wales, and subject to Section 10, the parties irrevocably submit to the exclusive jurisdiction of the courts located in London, England with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement. The location of arbitration under Section 10 will be London, England, and the arbitration will be conducted in accordance with the rules of the London Court of International Arbitration.

1.12.12     If the Totara Learning entity is Totara Learning (Australia) Pty Limited, this Agreement and all matters arising out of or related to this Agreement will be governed by the laws of Australia, and subject to Section 10, the parties irrevocably submit to the exclusive jurisdiction of the courts located in Sydney,

Australia with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement.