

**CONTRACT FOR PRISONER AND NON-PRISONER FOOD SUPPLY**

**DATED**

**2025**

**(1) THE SECRETARY OF STATE FOR JUSTICE**

**and**

**(2) BFS GROUP LIMITED (T/A BIDFOOD)**

**AGREEMENT**

relating to

the supply of Prisoner and Non-Prisoner Food



Government Legal Department

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**BETWEEN:**

- (1) **The Secretary of State for Justice**, acting on behalf of the Crown, of 102 Petty France, London, SW1H 9AJ (the "**Authority**"); and
- (2) **BFS Group Limited (trading as Bidfood)** a company registered in England and Wales under company number 00239718, whose registered office is at 814 Leigh Road, Slough, England, SL1 4BD (the "**Supplier**")

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

**INTRODUCTION**

- (A) The Authority wishes to engage a supplier to facilitate the wholesale supply of food for prisoners and non-prisoners across Sites in England and Wales.
- (B) On 30<sup>th</sup> July 2024, the Authority advertised on the Find a Tender service (reference 2024/S 000-023789) inviting prospective suppliers to submit proposals for the wholesale supply of food and ancillary services.
- (C) The Supplier is a leading wholesale supplier of food and ancillary services.
- (D) On the basis of the Supplier's response to the advertisement and a subsequent tender process, the Authority selected the Supplier as its preferred supplier.
- (E) The Parties have agreed to contract with each other in accordance with the terms and conditions set out below.

**IT IS AGREED** as follows:

**SECTION A – PRELIMINARIES**

**1 DEFINITIONS AND INTERPRETATION**

- 1.1 In this Agreement, unless otherwise provided or the context otherwise requires, capitalised expressions shall have the meanings set out in Schedule 1 (*Definitions*) or the relevant Schedule in which that capitalised expression appears.
- 1.2 In this Agreement, unless the context otherwise requires:
  - 1.2.1 the singular includes the plural and vice versa;
  - 1.2.2 reference to a gender includes the other gender and the neuter;

- 1.2.3 references to a person include an individual, company, body corporate, corporation, unincorporated association, firm, partnership or other legal entity or Crown Body;
  - 1.2.4 a reference to any Law includes a reference to that Law as amended, extended, consolidated or re-enacted from time to time;
  - 1.2.5 the words "**including**", "**other**", "**in particular**", "**for example**" and similar words shall not limit the generality of the preceding words and shall be construed as if they were immediately followed by the words "without limitation";
  - 1.2.6 references to "**writing**" include typing, printing, lithography, photography, display on a screen, electronic and facsimile transmission and other modes of representing or reproducing words in a visible form, and expressions referring to writing shall be construed accordingly;
  - 1.2.7 the headings are for ease of reference only and shall not affect the interpretation or construction of this Agreement;
  - 1.2.8 unless otherwise provided references to "**Clauses**" and "**Schedules**" are references to the clauses and schedules of this Agreement and references in any Schedule to "**Paragraphs**", "**Parts**" and "**Annexes**" are, unless otherwise provided, references to the paragraphs, parts and annexes of the Schedule or the Part of the Schedule in which the references appear; and
  - 1.2.9 references to this Agreement are references to this Agreement as amended from time to time.
- 1.3 Where a standard, policy or document is referred to in this Agreement by reference to a hyperlink, then if the hyperlink is changed or no longer provides access to the relevant standard, policy or document, the Supplier shall notify the Authority and the Parties shall update this Agreement with a reference to the replacement hyperlink.
- 1.4 If there is any conflict between the Clauses and the Schedules and/or any Annexes to the Schedules, the conflict shall be resolved in accordance with the following order of precedence:
- 1.4.1 the Clauses and Schedule 1 (*Definitions*);
  - 1.4.2 Schedules 2 (*Specification*) and 3 (*Performance Levels*) and their Annexes;



- 1.4.3 any other Schedules and their Annexes (other than Schedule 8 (*Supplier Solution*) and its Annexes); and
- 1.4.4 Schedule 8 (*Supplier Solution*) and its Annexes (if any).
- 1.5 The Schedules and their Annexes form part of this Agreement.
- 1.6 In entering into this Agreement, the Authority is acting as part of the Crown.

## **2 DUE DILIGENCE**

### **2.1 The Supplier acknowledges that:**

- 2.1.1 the Authority has delivered or made available to the Supplier all of the information and documents that the Supplier considers necessary or relevant for the performance of its obligations under this Agreement;
- 2.1.2 it has made its own enquiries to satisfy itself as to the accuracy and adequacy of the Due Diligence Information;
- 2.1.3 it has satisfied itself (whether by inspection or having raised all relevant due diligence questions with the Authority before the Effective Date) of all relevant details relating to:
  - (a) the Authority Requirements;
  - (b) the suitability of the existing and (to the extent that it is defined or reasonably foreseeable at the Effective Date) future Operating Environment;
  - (c) the operating processes and procedures and the working methods of the Authority; and
  - (d) the existing contracts (including any licences, support, maintenance and other agreements relating to the Operating Environment) referred to in the Due Diligence Information which may be novated to, assigned to or managed by the Supplier under this Agreement and/or which the Supplier will require the benefit of for the provision of the Products and Services; and
- 2.1.4 it has advised the Authority in writing of:

- (a) each aspect, if any, of the Operating Environment that is not suitable for the provision of the Online Ordering System or the supply of the Products and Services;
  - (b) the actions needed to remedy each such unsuitable aspect; and
  - (c) a timetable for and, to the extent that such costs are to be payable to the Supplier, the costs of those actions,
- and such actions, timetable and costs are fully reflected in this Agreement, including the Services Description and/or Authority Responsibilities as applicable.

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

- 2.2.1 any unsuitable aspects of the Operating Environment;
- 2.2.2 any misinterpretation of the Authority Requirements; and/or
- 2.2.3 any failure by the Supplier to satisfy itself as to the accuracy and/or adequacy of the Due Diligence Information.

### **3 WARRANTIES**

3.1 The Authority represents and warrants that:

- 3.1.1 it has full capacity and authority to enter into and to perform this Agreement;
- 3.1.2 this Agreement is executed by its duly authorised representative;
- 3.1.3 there are no actions, suits or proceedings or regulatory investigations before any court or administrative body or arbitration tribunal pending or, to its knowledge, threatened against it that might affect its ability to perform its obligations under this Agreement; and
- 3.1.4 its obligations under this Agreement constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar Laws affecting creditors' rights generally and subject, as to

enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or law).

3.2 The Supplier represents and warrants that:

- 3.2.1 it is validly incorporated, organised and subsisting in accordance with the Laws of its place of incorporation;
- 3.2.2 it has full capacity and authority to enter into and to perform this Agreement;
- 3.2.3 this Agreement is executed by its duly authorised representative;
- 3.2.4 it has all necessary consents and regulatory approvals to enter into this Agreement;
- 3.2.5 it has notified the Authority in writing of any actions, suits or proceedings or regulatory investigations before any court or administrative body or arbitration tribunal pending or, to its knowledge, any threatened against it or any of its Affiliates that might affect its ability to perform its obligations under this Agreement;
- 3.2.6 its execution, delivery and performance of its obligations under this Agreement will not constitute a breach of any Law or obligation applicable to it and will not cause or result in a default under any agreement by which it is bound;
- 3.2.7 its obligations under this Agreement constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar Laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or law);
- 3.2.8 all written statements and representations in any written submissions made by the Supplier as part of the procurement process, including without limitation its response to the selection questionnaire and invitation to tender (if applicable), its tender and any other documents submitted remain true and accurate except to the extent that such statements and representations have been superseded or varied by this Agreement or to the extent that the Supplier has otherwise disclosed to the Authority in writing prior to the date of this Agreement;

- 3.2.9 it has notified the Authority in writing of any Occasions of Tax Non-Compliance and any litigation in which it is involved that is in connection with any Occasion of Tax Non-Compliance;
  - 3.2.10 it has all necessary rights in and to any Intellectual Property Rights in the Products and Services, Deliverables, and any other materials made available by the Supplier (and/or any Sub-contractor) to the Authority which are necessary for the performance of the Supplier's obligations under this Agreement and/or the receipt of or use of the Products and Services or Deliverables by the Authority or any End User;
  - 3.2.11 the Financial Model submitted as part of the Supplier Tender is a true and accurate reflection of the Supplier's costs and Supplier Profit Margin forecast by the Supplier and the Supplier does not have any other internal financial model in relation to the Products and Services inconsistent with the Financial Model;
  - 3.2.12 it is not subject to any contractual obligation, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under this Agreement;
  - 3.2.13 no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, are threatened) for the winding up of the Supplier or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, manager, administrator or similar officer in relation to any of the Supplier's assets or revenue; and
  - 3.2.14 within the previous twelve (12) months, no Financial Distress Events have occurred or are subsisting (or any events that would be deemed to be Financial Distress Events under this Agreement had this Agreement been in force) and there are currently no matters that it is aware of that could cause a Financial Distress Event to occur or subsist.
- 3.3 The Supplier represents, warrants, and undertakes that:
- 3.3.1 the Products and Services and any Deliverables shall comply in each and every respect with the Specification, the terms of the relevant Order and with all other requirements of the Authority as set out in this Agreement;
  - 3.3.2 the Products, Services and any Deliverables shall be suitable for the purposes as set out in the Specification, shall be of satisfactory quality, and comply with the Standards and requirements set out in this Agreement;
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- 3.3.3 the Products and their supply shall comply in each and every respect with all Applicable Law, Guidance and Good Industry Practice for the time being in force, which is applicable to the Products, including without limitation as to the quality, safety, sale, use, manufacture, storage and/or supply of the Products including without limitation any product safety and food standards, and any industry codes of practice and any requirements in Law relating to traceability, handling, loading, unloading, packaging, labelling and Delivery;
- 3.3.4 the Products will be free from defects and will be useable safely and without causing death, injury, loss or damage;
- 3.3.5 it shall ensure that, prior to actual delivery of the Products to the Authority, the Products are manufactured, stored and/or distributed using reasonable skill and care and in accordance with Good Industry Practice;
- 3.3.6 the Charges for the Products and Services represent Value for Money;
- 3.3.7 where any samples of the Products are supplied to and approved by the Authority the Products shall correspond to any approved sample;
- 3.3.8 it shall ensure that all facilities used to manufacture, store and distribute the Products are kept in a state and condition necessary to enable the Supplier to comply with its obligations in connection with this Agreement;
- 3.3.9 it has, or its manufacturers and Sub-contractors have, manufacturing and warehousing capacity sufficient to comply with its obligations under this Agreement;
- 3.3.10 it will ensure that sufficient stock levels are maintained to comply with its obligations under this Agreement in accordance with Clause 5 (*Supply of Products and Services*);
- 3.3.11 where the Products are required to be stored at a certain temperature, it shall provide or shall procure the provision of, complete and accurate temperature records for each delivery of the Products during the period of transport and/or storage of the Products from the point of manufacture to the point of delivery to the Authority;
- 3.3.12 where there is any Documentation instruction information including without limitation user information or leaflets, that accompany the Products such information shall be comprehensive, accurate, in English

(with a Welsh language translation of any Documentation to be provided by the Supplier at the Authority's request) and prepared in accordance with Good Industry Practice and it shall provide a sufficient number of copies to the Authority and provide updated copies should the instruction information change at any time during the Term;

- 3.3.13 all Products delivered to the Authority (including frozen Products) shall, at the point of Delivery, have a Shelf Life that is at least as long as the Shelf Life required in respect of those Products, as set out in the relevant Technical Specifications;
- 3.3.14 all necessary instructions or recommendations relating to the handling, use, storage, life expectancy and durability of the Products will have been provided by the Supplier to the Authority. Such instructions or recommendations shall comply with all applicable Law for the time being in force, and shall be complete and accurate so as to enable the Products to be sold, used, stored and retained safely and without any deterioration in its nature, substance or quality (subject to any Shelf Life indicated on such Products);
- 3.3.15 where it supplies Products for delivery in the UK from a territory outside the UK, it shall (unless agreed otherwise in writing) obtain any necessary licences and consents for the exportation and transportation of the Products from such territory and for the importation of such Products into the UK including all declarations, warrants or returns required by HMRC;
- 3.3.16 it has and shall maintain a properly documented system of quality controls and processes covering all aspects of its obligations under this Agreement and/or under Law and/or Guidance and shall at all times comply with such quality controls and processes;
- 3.3.17 it shall not make any significant changes to its system of quality controls and processes in relation to the Products without notifying the Authority in writing at least twenty-one (21) days in advance of such change (such notice to include the details of the consequences which follow such change being implemented), except when a health and safety issue necessitates a change being implemented urgently, in which case the Supplier shall notify the Authority as soon as reasonably practicable before or after implementing such change;

- 3.3.18 without prejudice to Clauses 6.23 to 6.29 (*Substitute Products and Alternative Products*), it shall not make any changes to the Products otherwise than in accordance with Clause 6.8 without the prior written consent of the Authority;
- 3.3.19 where any act of the Supplier requires the notification to and/or approval by any regulatory or other competent body in accordance with any Law or Guidance, the Supplier shall comply fully with such notification and/or approval requirements;
- 3.3.20 receipt of the Products, Services or any Deliverables by or on behalf of the Authority and use of the Products, Services or any Deliverables or of any other item or information supplied, or made available, to the Authority will not infringe any third-party rights, including without limitation any Intellectual Property Rights;
- 3.3.21 without prejudice to Clause 9.8, it will promptly (and in any event within one (1) Working Day) notify the Authority of any health and safety hazard which has arisen, or the Supplier is aware may arise, in connection with the Products and take such steps as are reasonably necessary to ensure the health and safety of persons likely to be affected by such hazards;
- 3.3.22 it will fully and promptly respond to all requests for information regarding this Agreement and the Services and Products at the frequency and in the format that the Authority may reasonably require;
- 3.3.23 it is solely responsible for compliance with General Food Law as it is applicable in each and every respect to this Agreement. For the avoidance of doubt, the Authority is not responsible or liable (in whole or in part) for such compliance;
- 3.3.24 it shall provide the Authority with all allergen information for all Products supplied under this Agreement and any other information that are required by Law in accordance with Schedule 24 (*Reports and Records Provisions*). The Supplier warrants that any documents that it supplies relating to the Products are valid and that the information contained in such documents is correct; and
- 3.3.25 all statement, warranties or representations made by or on behalf of the Supplier in respect of the Products are correct and shall be incorporated into this Agreement.

- 3.4 The representations and warranties set out in Clauses 3.2 and 3.3 shall be deemed to be repeated by the Supplier on the Effective Date (if later than the date of signature of this Agreement) by reference to the facts then existing.
- 3.5 Each of the representations and warranties set out in Clauses 3.1, 3.2 and 3.3 shall be construed as a separate representation and warranty and shall not be limited or restricted by reference to, or inference from, the terms of any other representation, warranty or any other undertaking in this Agreement.
- 3.6 If at any time a Party becomes aware that a representation or warranty given by it under Clause 3.1, 3.2 or 3.3 has been breached, is untrue or is misleading, it shall immediately notify the other Party of the relevant occurrence in sufficient detail to enable the other Party to make an accurate assessment of the situation.
- 3.7 For the avoidance of doubt, the fact that any provision within this Agreement is expressed as a warranty shall not preclude any right of termination which the Authority may have in respect of breach of that provision by the Supplier.
- 3.8 Except as expressly stated in this Agreement, all warranties and conditions whether express or implied by statute, common law or otherwise are hereby excluded to the extent permitted by Law.
- 3.9 If the Supplier is in breach of the warranties at Clause 3.2 and/or Clause 3.3 (whether as a result of negligence, fault or otherwise), then, without prejudice to any other right or remedy of the Authority, the Authority shall be entitled to reject and/or return the Products and the Supplier shall indemnify and keep the Authority indemnified against any loss, damages, costs, expenses (including without limitation legal costs and expenses), claims, investigation, inquiries or proceedings (threatened or actual) suffered or incurred by the Authority as a result of such breach.



## SECTION B – THE PRODUCTS AND SERVICES

### 4 TERM

4.1 This Agreement shall:

4.1.1 come into force on the Effective Date; and

4.1.2 unless terminated at an earlier date by operation of Law or in accordance with Clause 39 (*Termination Rights*), terminate:

(a) at the end of the Initial Term; or

(b) if the Authority elects to extend the Initial Term in accordance with Clause 4.2, at the end of the relevant Extension Period.

4.2 The Authority may extend the Agreement:

4.2.1 for a period of up to twenty-four (24) months beyond the expiry of the Initial Term by giving at least twenty (20) Working Days' written notice to the Supplier before the end of the Initial Term (the "**First Extension Period**"); and

4.2.2 for a period of up to twelve (12) months beyond the expiry of the First Extension Period by giving at least twenty (20) Working Days' written notice to the Supplier before the end of the First Extension Period,

(each an "**Extension Period**").

4.3 If notice to extend is not given by the Authority in accordance with Clause 4.2, the Agreement shall automatically expire at the end of the Initial Term or the First Extension Period as the case may be.

### Condition Precedent

4.4 Not used.

### 5 SUPPLY OF PRODUCTS AND SERVICES

5.1 Nothing in this Agreement confers any exclusivity or guarantee of or commitment to particular volumes of Products to be purchased by the Authority from the Supplier under this Agreement.

- 5.2 The Supplier shall provide:
- 5.2.1 the Implementation Activities from (and including) the Effective Date; and
  - 5.2.2 the Services and commence supply of the Products from (and including) the Supply Commencement Date.
- 5.3 The Supplier shall ensure that the Products and Services:
- (a) comply in all respects with the Specification;
  - (b) are supplied in accordance with the Supplier Solution and the provisions of this Agreement;
  - (c) are of satisfactory quality (within the meaning of the Sale of Goods Act 1979 and any Law, as amended) and fit for the purpose held out by the Supplier or made known to the Supplier by the Authority expressly or by implication; and
  - (d) are free from Defects.
- 5.4 The Supplier shall:
- 5.4.1 perform its obligations under this Agreement, including in relation to the supply of the Products and Services in accordance with:
    - (a) all applicable Law and Guidance;
    - (b) Good Industry Practice;
    - (c) the Standards (including, without limitation, any ethical standard requirement set out in the Specification);
    - (d) the Delivery Requirements;
    - (e) the Supplier's own established procedures and practices to the extent the same do not conflict with the requirements of Clause 5.4.1(a) to 5.4.1(d);
  - 5.4.2 provide the Products and Services using efficient business processes and ways of working having regard to the Authority's obligation to ensure Value for Money.

## **The Sites**

- 5.5 The Parties acknowledge and agree that:

- 5.5.1 the Authority can make Orders for the Products and request Services under this Agreement in respect of the Sites; and
- 5.5.2 in the event that an Approved User requests to place orders directly for products which are the same as the Products and require services that are the same as the Services, then the Supplier shall offer terms and pricing for such products and services which are no higher than or more onerous than those in this Agreement.
- 5.6 Where a Site no longer has a requirement for the delivery of Products and Services from the Supplier under this Agreement, the Authority shall use reasonable endeavours to notify the Supplier in advance of such Site ceasing to place Orders.
- 5.7 The Authority may add additional Sites to the scope of this Agreement (thereby allowing it to make Orders for Products and receive Services under this Agreement to such Sites) by giving the Supplier at least ninety (90) days' prior written notice (or such shorter period as the Parties may agree). In or as soon as reasonably practicable following such notice, the Authority shall provide the following information to the Supplier:
  - 5.7.1 the Delivery Location, Site Details. and any other access or security requirements or restrictions in respect of such additional Site(s);
  - 5.7.2 the Delivery Windows during which Products can be Delivered to the Site(s), which shall be added to the Delivery Schedule in respect of such additional Site(s); and
  - 5.7.3 any other information that the Supplier reasonably requests in order to make arrangements to provide the Services and deliver the Products in respect of the additional Site(s).
- 5.8 For the avoidance of doubt, the Authority shall pay the Charges in respect of any Services and/or Products delivered to new Sites, but the Unit Price shall not be increased as a result of the addition of any Site(s).

## **6 ORDER PROCESS**

### **Online Ordering System**

- 6.1 Subject to any Service Downtime due to Permitted Maintenance and Emergency Maintenance, for the duration of the Term and any Termination Assistance Period, the Supplier shall make the Online Ordering System available to the Authority at no

additional charge in accordance with Clause 21.4 (*Online Ordering System*) and meeting the requirements of Appendix G of the Specification.

- 6.2 The Authority shall issue each Site with a number of account codes (the number of which shall be determined by the Authority), reflecting different cost centres, which are accessible by the relevant system user(s) (on behalf of the Authority and the relevant Site Representative) within that Site. The Supplier shall create a separate unique reference for each account code at each Site. The Supplier shall treat each Order as a discrete transaction to effectively manage traceability and reconciliation of every Order.
- 6.3 The Supplier shall create and maintain a rolling schedule of planned maintenance to the Online Ordering System, such maintenance to take place outside of the hours of 6am to 7pm (UK time) ("**Permitted Maintenance**"). Permitted Maintenance shall be notified by the Supplier to the Authority in each Performance Monitoring Report in accordance with Paragraph 1.2(p) of Schedule 3 (*Performance Levels*).
- 6.4 The Supplier shall give as much notice as is reasonably practicable to the Authority prior to carrying out any Emergency Maintenance.
- 6.5 The Supplier shall carry out any necessary maintenance (whether Permitted Maintenance or Emergency Maintenance) where it reasonably suspects that the Online Ordering System has or may have developed a fault. Any such maintenance shall be carried out in such a manner and at such times so as to avoid (or, where this is not possible, so as to minimise) disruption to the Online Ordering System. For the avoidance of doubt, the Supplier shall not be relieved of any KPI obligations during any period of Emergency Maintenance.
- 6.6 In the event that the Online Ordering System is unavailable between 6am and 7pm on any day (whether as a result of Emergency Maintenance, network issues, or for any other reason), the Authority may place Orders for Products via telephone or email to such telephone number or email address as notified in writing by the Supplier to the Authority from time to time, and the Supplier shall acknowledge and fulfil such Orders in accordance with this Clause 6 (*Order Process*) and Clause 7 (*Delivery of Products*).

## **The Catalogue**

- 6.7 The Supplier shall maintain the Catalogue and the Supplier Product Specifications in accordance with Paragraphs 1.7 and 2.1 of the Specification.

- 6.8 The Products set out in the Catalogue may be updated from time to time in accordance with the Catalogue Change Procedure.

### Order Process

- 6.9 At any time from the Supply Commencement Date, a Site Representative acting through an Online Ordering System User may, on behalf of the Authority, order Products for their allocated Site by submitting to the Supplier an Order via the Online Ordering System (or, in the event of unavailability of the Online Ordering System, in accordance with Clause 6.6). The Authority shall ensure that each order shall relate to a single Site and shall specify:
- 6.9.1 the type and quantity of Products required; and
  - 6.9.2 subject to Clause 6.13, the Delivery Window in which the Order shall be Delivered.
- 6.10 Subject to Service Downtime arising from Permitted Maintenance or Emergency Maintenance (and without prejudice to any KPI obligations in Schedule 3 (*Performance Levels*)), the Supplier shall have the ability to receive Orders twenty-four (24) hours per day, seven (7) days per week (including weekends and public holidays), but shall not be expected to process such Orders at the time of receipt where this is outside the hours of 6am and 7pm during Working Days. When an Order is processed in accordance with this Clause 6.10, the Supplier shall ensure that the relevant Products are allocated to the Site as soon as possible.
- 6.11 The Supplier shall not be required to carry out a delivery to a Site unless the total value (by reference to the Catalogue) of any Orders to be delivered to such Site:
- 6.11.1 during a given Delivery Schedule (which shall include Orders placed in relation to all accounts at that Site) equates to a total value of £150 or more. Where the total value of all such Orders is less than £150, delivery shall be subject to agreement between the relevant Site Representative and the Supplier, and the Authority acknowledges that a reasonable and proportionate delivery charge may be applied to such Orders by the Supplier (as agreed with the relevant Site Representative); and
  - 6.11.2 outside of a given Delivery Schedule (which shall include Orders placed in relation to all accounts at that Site) equates to a total value of £300 or more. Where the total value of all such Orders is less than £300, delivery shall be subject to agreement between the relevant Site Representative and the Supplier, and the Authority acknowledges that a reasonable and

proportionate delivery charge may be applied to such Order by the Supplier (as agreed with the relevant Site Representative),

provided that the minimum order values shall be subject to indexation annually after the Supply Commencement Date in accordance with Schedule 15 (*Charges and Invoicing*).

6.12 Upon receiving an Order for Products, the Supplier shall:

6.12.1 promptly acknowledge receipt and (subject to Clauses 6.11 and 6.23) acceptance of the Order; and

6.12.2 subject to Clause 6.13, deliver the Products to the relevant Delivery Location during the Delivery Window selected by the Online Ordering System User in the Order in accordance with Clause 7.

6.13 The Authority shall use reasonable endeavours to ensure that Orders placed in accordance with Clause 6.9 are submitted by no later than midday on the day that falls three (3) Working Days before the Delivery Window selected by the Site Representative in the Order (the **“Ordering Deadline”**). Where the Authority is unable to meet the Ordering Deadline:

6.13.1 due to an Emergency, Clause 6.21 shall apply; or

6.13.2 for any other reason, Clause 6.22 shall apply.

6.14 The Authority may at any time prior to the dispatch of the Products amend or cancel an Order via the Online Ordering System or by written notice to the Supplier without liability to the Supplier.

#### **Non-Catalogue Requests**

6.15 The Authority may from time to time, make a Non-Catalogue Request to the Supplier in writing, which for the avoidance of doubt includes email, and must clearly specify the products, the quantities sought and the Delivery Window during which the Authority requires delivery of the products.

6.16 On receipt of a Non-Catalogue Request, the Supplier shall consider its contents and, acting reasonably, provide its response within ten (10) Working Days or such shorter period as agreed between the Parties. The Supplier’s response shall, as a minimum, include the following details:

- 6.16.1 confirmation as to whether the Supplier can fulfil the Non-Catalogue Request (in whole or in part), having used reasonable endeavours to do so; and
  - 6.16.2 the Unit Price that will be payable for the products in the Non-Catalogue Request.
- 6.17 Following the Supplier's response to a Non-Catalogue Request, the Supplier's Unit Price quoted in accordance with Clause 6.16.2 shall be effective for the period specified in the Supplier's response and, during this period, if a Site Representative submits an Order for the relevant products and in the quantities sought in the Non-Catalogue Request, the Unit Price for those products shall be deemed to be the price offered by the Supplier in response to the Non-Catalogue Request.

### **Top Up Orders and Emergency Orders**

- 6.18 The Authority may place Top Up Orders and/or Emergency Orders from time to time and the terms and conditions of this Agreement shall apply to such Top Up Orders and Emergency Orders, except where expressly provided otherwise.
- 6.19 The Authority shall endeavour to ensure that Site Representatives minimise their use of Top Up Orders and Emergency Orders and shall not use Top Up Orders and Emergency Orders as a substitute for the standard ordering procedure.
- 6.20 The Supplier shall deliver all Top Up Orders during the relevant Delivery Window and shall contact the relevant Site Representative to agree the delivery arrangements where necessary.

### **Emergency Orders - ordering procedure**

- 6.21 In the event of an Emergency (as determined by the Authority), a Site Representative may place an Emergency Order, and the following procedure shall apply:
  - 6.21.1 The Site Representative shall place an Order via the Online Ordering System or via telephone or email to such telephone number or email address identified for such purpose in the Supplier Tender (as may be updated from time to time by written notice to the Authority), identifying it as an Emergency Order together with the required timescales for delivery.
  - 6.21.2 The Supplier shall as soon as possible provide confirmation in writing that it is treating the Order as an Emergency Order.

- 6.21.3 The relevant Site Representative and the Supplier shall, with reference to the Site Representative's requirements communicated in accordance with Clause 6.21.1, agree the delivery arrangements and charges for the Emergency Order (such agreement not to be unreasonably withheld or delayed). The Supplier acknowledges that such delivery will be required as a matter of urgency.
- 6.22 If, other than in an Emergency, the Authority requires an Order to be delivered at short notice (such as in advance of the next Delivery Window) the Supplier shall use all reasonable endeavours to meet the relevant Site Representative's requirements and shall contact the relevant Site Representative to agree the delivery arrangements for the Order. The Authority shall use reasonable endeavours to ensure that Site Representatives minimise their requirement for such deliveries and acknowledges that, where the Supplier is required to employ additional resources to make the delivery, a proportionate delivery charge may be applied to such Orders by the Supplier. For the avoidance of doubt, Emergency Orders are not taken into account when measuring compliance with the Product Availability KPI (KPI1), the Compliant Delivery KPI (KPI2), and the Timely Deliveries KPI (KPI3), as set out in Schedule 3 (*Performance Levels*).

#### **Substitute Products and Alternative Products**

- 6.23 Subject to Clause 6.24, if the Supplier is unable to supply any Products included in an Order due to unavailability, the Supplier shall:
- 6.23.1 in the first instance, undertake reasonable efforts to source the Products from elsewhere to enable delivery to take place during the selected Delivery Window in accordance with the Order;
  - 6.23.2 if such Products cannot be sourced and delivered during the selected Delivery Window, substitute the unavailable Products for Substitute Products which can be delivered during the Delivery Window;
  - 6.23.3 if no Substitute Products can be sourced and delivered during the selected Delivery Window due to unavailability, substitute the Products included in the Order for Alternative Products which can be delivered during the selected Delivery Window.
- 6.24 When the Supplier becomes aware that:



- 6.24.1 a Substitute Product will be required, the Supplier shall notify the relevant Site Representative as soon as reasonably practicable of the Substitute Product that will be provided;
  - 6.24.2 an Alternative Product will be required, the Supplier shall notify the relevant Site Representative as soon as practicable of the Alternative Product that it proposes to provide. The Supplier shall not deliver the Alternative Product without first having obtained the approval of the relevant Site Representative.
- 6.25 The Supplier shall ensure that all Substitute Products and Alternative Products shall:
  - 6.25.1 comply with the Technical Specifications, the Quality Standards, all applicable Laws, and the requirements of this Agreement;
  - 6.25.2 be of the same quality as, or better quality than, the Products included in the Order; and
  - 6.25.3 be supplied in an equivalent volume to the Products included in the Order and in a similar pack and/or Product Case size as far as possible; where the Supplier proposes to deliver a Substitute Product or Alternative Product in a Product Case size which is less than the minimum Product Case size in the relevant Technical Specification, the Supplier shall not do so without having first obtained the approval of the relevant Site Representative.
- 6.26 The Supplier shall minimise the provision of Substitute Products and Alternative Products by ensuring that Products in the Catalogue are available for Order.
- 6.27 For the avoidance of doubt, the supply of Substitute Products and Alternative Products shall not necessitate changes to the Catalogue, save that the Authority reserves the right to require Products to be removed from the Catalogue if those Products are being substituted on a regular basis.
- 6.28 If the Supplier substitutes the same Products with Substitute Products or Alternative Products in respect of deliveries to more than one Site within a single two (2) consecutive week period, the Supplier shall promptly advise the Authority in writing of:
  - 6.28.1 the reason for the substitutions;
  - 6.28.2 the action the Supplier proposes to take to remedy the situation; and

- 6.28.3 the Substitute Products or Alternative Products that have or will be offered to the affected Sites.
- 6.29 If any Products become unavailable on a permanent or long-term basis, the Supplier shall propose a change to the Catalogue to introduce replacement Products in accordance with the Catalogue Change Procedure.
- 7 DELIVERY OF PRODUCTS**
- 7.1 The Supplier shall deliver the Products specified in an Order in accordance with the Specification, Delivery Requirements, Clause 5 (*Supply of Products and Services*) and this Clause 7 (*Delivery of Products*).
- 7.2 Where the Supplier fails to make a Delivery during the Delivery Window selected by the Online Ordering System User in accordance with Clause 6.9.2, then the Supplier shall at its own cost procure that a further attempt at delivery is made to the relevant Site during an alternative Delivery Window to be agreed between the Parties (which may or may not be a Delivery Window included in the Delivery Schedule), which shall be no later than two (2) Working Days from the original Delivery Window). In the event that the Supplier fails to redeliver in accordance with this Clause 7.2, then the Authority may at its option (without prejudice to any other rights or remedies in this Agreement):
- 7.2.1 reject the delayed Products, in which case the provisions of Clause 9.3 shall apply; or
- 7.2.2 accept the delayed Products (during another revised Delivery Window which shall be agreed between the Parties).
- 7.3 Delivery shall be completed when the Products have been unloaded at the Delivery Location and such delivery has been received by a duly authorised agent, employee or location representative of the Authority. The Authority shall use reasonable endeavours to procure that such duly authorised agent, employee or location representative of the Authority is at the Delivery Location during the Delivery Window in order to accept such delivery.
- 7.4 The Supplier shall provide a Delivery Note in accordance with the Specification.
- 7.5 Part deliveries and/or deliveries outside of the Delivery Window may be refused unless the Authority has previously agreed in writing to accept such deliveries. Where delivery of the Products is refused by the Authority in accordance with this

Clause 7.5, the Supplier shall be responsible for all risks, costs and expenses associated with the re-delivery of the Products. Where the Authority accepts delivery more than five (5) days before the day on which the relevant Delivery Window falls, the Authority shall be entitled to charge the Supplier for the costs of insurance and storage of the Products until the date on which the Delivery Window falls.

- 7.6 Unless otherwise agreed with the Authority in writing, the Supplier shall be responsible for carriage, insurance, transport, all relevant licences, all related costs, and all other costs associated with the delivery of the Products to the Delivery Location and unloading of the Products at the Delivery Location. Without limitation to the foregoing provision of this Clause 7.6, unless otherwise agreed with the Authority in writing, the Supplier shall be responsible for obtaining all export and import licences for the Products and shall be responsible for any delays to the delivery time due to such licences not being available when required. In the case of any Products supplied from outside the United Kingdom, the Supplier shall ensure that accurate information is provided to the Authority as to the country of origin of the Products and shall be liable to the Authority for any extra duties or taxes for which the Authority may be accountable should the country of origin prove to be different from that set out in the Order.
- 7.7 All third party carriers or any Sub-contractors engaged to deliver the Products shall at no time be an agent of the Authority and accordingly the Supplier shall be liable to the Authority for the acts and omissions of all third party carriers and Sub-contractors engaged to deliver the Products to the Authority.

## **8 PASSING OF RISK AND TITLE**

- 8.1 Risk in the Products shall pass to the Authority when the Products are Delivered as specified in this Agreement.
- 8.2 Ownership of the Products shall pass to the Authority on the earlier of:
- 8.2.1 full payment for such Products; or
  - 8.2.2 Delivery of the Products at the Delivery Location or at the point such Products are taken into use.
- 8.3 All tools, equipment and materials of the Supplier required in the performance of the Supplier's obligations under this Agreement shall be and remain at the sole risk of the Supplier, whether or not they are situated at a Delivery Location or Authority Premises.

## 9 INSPECTION, REJECTION, RETURNS AND RECALL

- 9.1 The Supplier shall permit any person authorised by the Authority to inspect work being undertaken in relation to the Products and/or the storage facilities used in the storage of the Products at all reasonable times at the Supplier's premises or at the premises of any Sub-contractor, manufacturer or agent of the Supplier in order to confirm that the Products are being manufactured and/or stored in accordance with Good Industry Practice and in compliance with the requirements of this Agreement and/or that stock holding and quality assurance processes are in accordance with the requirements of this Agreement.
- 9.2 Without prejudice to the provisions of Clause 9.6, the Authority shall visually inspect the Products within a reasonable time following delivery and may by written notice reject any Products found to be damaged, or delivered late, or otherwise not in accordance with the requirements of this Agreement ("**Rejected Products**"). The whole of any delivery may be rejected if a reasonable sample of the Products taken indiscriminately from that delivery is found not to conform in all material respects with the requirements of the Agreement.
- 9.3 Without prejudice to the provisions of Clause 9.6, upon the rejection of any Products in accordance with Clause 9.2, the Supplier shall at the Authority's written request:
- 9.3.1 collect the Rejected Products at the Supplier's risk and expense during the Delivery Window following the issue of written notice from the Authority rejecting the Products (or such other time agreed between the Parties) and reimburse the Authority for any Charges paid in connection with the Products (including without limitation any pre-payment or advance payments), along with any costs reasonably incurred by the Authority as a result of any such rejection; and
  - 9.3.2 without extra charge, promptly (and in any event within two (2) Working Days or such other time agreed by the Parties in writing, acting reasonably) supply replacements for the Rejected Products to the Authority subject to the Authority not cancelling its purchase obligations in accordance with Clause 9.6 (provided that, in the event that the Supplier fails to deliver replacements for the Rejected Products in the time required under this Clause 9.3.2, the Authority may at its option either reject such replacements, in which case Clause 9.3.1 shall apply, or accept such replacements.

- 9.4 If the Supplier requests and the Authority accepts that the Rejected Products should be disposed of by the Authority rather than collected by the Supplier in accordance with Clause 9.3.1, the Authority reserves the right to charge the Supplier for the costs associated with the disposal of the Rejected Products and the Supplier shall promptly pay any such costs.
- 9.5 Risk and title in respect of any Rejected Products shall pass to the Supplier on the earlier of: (a) collection by the Supplier in accordance with Clause 9.3; or (b) immediately following the expiry of five (5) Working Days from the Authority issuing written notification rejecting the Products. If Rejected Products are not collected within five (5) Working Days of the Authority issuing written notification rejecting the Products, the Authority may at its option: (a) return the Rejected Products at the Supplier's risk and expense and charge the Supplier for the cost of storage from the expiry of five (5) Working Days from the date of notification of rejection; or (b) destroy the Rejected Products and charge the Supplier for the any costs incurred in respect of such destruction.
- 9.6 Where the Authority rejects any Products in accordance with Clauses 9.2 and/or 9.7 and the Authority does not require replacement Products, the Authority may by written notice cancel its purchase obligations in relation to such quantity of Rejected Products. Should the Authority have paid (in whole or in part) for such Rejected Products, the Supplier shall refund such payment along with any costs reasonably incurred by the Authority as a result of any such rejection to the Authority within thirty (30) days of the Authority cancelling such purchase obligations and informing the Supplier that the Authority does not require replacements for such Rejected Products.
- 9.7 Without prejudice to any other provisions of this Agreement or any other warranties or guarantees applicable to the Products supplied, if at any time following the date of the delivery of any Products, all or any part of such Products are found to be defective or otherwise not in accordance with the requirements of this Agreement ("**Defective Products**"), the Supplier shall, at the Authority's discretion, upon written notice of rejection from the Authority, treat such Defective Products as Rejected Products in accordance with Clauses 9.2 to 9.6.

- 9.8 Where the Supplier is required by Law, Guidance, and/or Good Industry Practice to order a product recall (“**Requirement to Recall**”) in respect of the Products, the Supplier shall:
- 9.8.1 promptly (taking into consideration the potential impact of the continued use of the Products by End Users and the Authority as well as compliance by the Supplier with any regulatory requirements) notify the Authority in writing of the recall together with the circumstances giving rise to the recall;
  - 9.8.2 from the date of the Requirement to Recall, treat the Products the subject of such recall as Defective Products in accordance with Clause 9.7;
  - 9.8.3 consult with the Authority as to the most efficient method of executing the recall of the Products and use its reasonable endeavours to minimise the impact on the Authority of the recall; and
  - 9.8.4 indemnify and keep the Authority indemnified against, any loss, damages, costs, expenses (including without limitation legal costs and expenses), claims or proceedings suffered or incurred by the Authority as a result of such Requirement to Recall.

#### **Supplier covenants**

- 9.9 The Supplier shall:
- 9.9.1 comply with all Law, Guidance and Policies in place and as updated from time to time in so far as is relevant to the supply of the Products and Services and otherwise in the performance of its obligations under this Agreement;
  - 9.9.2 at all times allocate sufficient resources with the appropriate technical expertise to supply the Products and Services in accordance with this Agreement;
  - 9.9.3 subject to Clause 18 (*Change*), obtain, and maintain throughout the duration of this Agreement, all the consents, approvals, licences and permissions (statutory, regulatory contractual or otherwise) that it may require and which are necessary for the provision of the Products and Services;

- 9.9.4 ensure that any equipment used in the manufacture and delivery of the Products and Services:
- (a) meets all accreditation and other requirements set out in the Specification;
  - (b) comply with all relevant Law and Guidance;
  - (c) are fit for their intended purpose; and
  - (d) are maintained fully in accordance with any manufacturer's specification (in the case of equipment) and in accordance with Good Industry Practice;
- 9.9.5 minimise any disruption to the Operating Environment and Authority's operations when carrying out its obligations under this Agreement;
- 9.9.6 co-operate with the Other Suppliers and provide reasonable information (including any documentation), advice and assistance in connection with the Products to any Other Supplier and, on the expiry or termination of this Agreement for any reason, to enable the timely transition of the provision of Products (or any of them) to the Authority and/or to any Replacement Supplier;
- 9.9.7 to the extent it is legally able to do so, hold on trust for the sole benefit of the Authority, all warranties and indemnities provided by third parties or any Sub-contractor in respect of the Products and Services and, where any such warranties are held on trust, at its cost enforce such warranties in accordance with any reasonable directions that the Authority may notify from time to time to the Supplier;
- 9.9.8 unless it is unable to do so, assign to the Authority on the Authority's written request and at the cost of the Supplier any such warranties and/or indemnities as are referred to in Clause 9.9.7;
- 9.9.9 provide the Authority with such assistance as the Authority may reasonably require during the Term and any Termination Assistance Period in respect of the supply of the Products and Services;
- 9.9.10 gather, collate and provide such information and co-operation as the Authority may reasonably request for the purposes of ascertaining the Supplier's compliance with its obligations under this Agreement;

- 9.9.11 notify the Authority in writing as soon as reasonably possible and in any event within one (1) month of any change of Control taking place;
  - 9.9.12 notify the Authority in writing within ten (10) Working Days of their occurrence, of any actions, suits or proceedings or regulatory investigations before any court or administrative body or arbitration tribunal pending or, to its knowledge, threatened against it that might affect its ability to perform its obligations under this Agreement; and
  - 9.9.13 ensure that neither it, nor any of its Affiliates, embarrasses the Authority or otherwise brings the Authority into disrepute by engaging in any act or omission in relation to this Agreement which is reasonably likely to diminish the trust that the public places in the Authority.
- 9.10 An obligation on the Supplier to do, or to refrain from doing, any act or thing shall include an obligation upon the Supplier to procure that all Sub-contractors and Supplier Personnel also do, or refrain from doing, such act or thing.

### **Packaging and Labelling**

- 9.11 The Supplier shall:
- 9.11.1 ensure that the Products are stored and packaged in such a manner to ensure the integrity of the Products are maintained during storage and transport;
  - 9.11.2 comply with all obligations imposed on it by Law and Guidance relevant to the Products in relation to packaging, identification and obligations following end of use by the Authority;
  - 9.11.3 unless otherwise agreed with the Authority in writing, ensure that the Products are securely packed in trade packages of a type normally used by the Supplier for deliveries of the same or similar products in the same quantities within the United Kingdom and in relation to Products imported into the United Kingdom for the purposes of the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 and all applicable product and safety liability legislation in force in the United Kingdom from time to time, the Supplier shall assume all obligations for all activities performed outside the United Kingdom in relation to the Products and the packaging, in addition to any other obligations the Supplier may have pursuant to such regulations and other legislation;



- 9.11.4 comply with the Packaging and Packaging Waste Directive (94/62/EC) as implemented in the UK by the Packaging (Essential Requirements) Regulations 2015 (SI 2015/1640);
- 9.11.5 upon request by the Authority, the Supplier shall remove and dispose of all pallets, cages and other delivery equipment (which shall remain the property of the Supplier or its Sub-contractor) within the period specified by the Authority;
- 9.11.6 comply with any labelling requirements in respect of the Products:
  - (a) required by the Specification (including but not limited to Paragraph 14.4 of the Specification relating to Allergenic Ingredients);
  - (b) agreed with the Authority; and/or
  - (c) required to comply with Law or Guidance,and shall ensure that any labelling in respect of the Products is in English (with a Welsh language translation for Products to be delivered at the Authority's request).

#### **Continuing obligation to provide the Products and Services**

- 9.12 The Supplier shall continue to perform all of its obligations under this Agreement and shall not suspend the supply of the Products or Services, notwithstanding:
  - 9.12.1 the existence of an unresolved Dispute; and/or
  - 9.12.2 any failure by the Authority to pay any Charges.

#### **Power of attorney**

- 9.13 By way of security for the performance of its obligations under Clauses 9.9.7 and 9.9.8 (*Supplier covenants*) the Supplier:
  - 9.13.1 hereby irrevocably appoints the Authority as its agent and attorney to act with full power and authority in the Supplier's name and on its behalf to do all such acts and execute all such documents as may be necessary or desirable to enforce any such warranties and/or effect any such assignment as are referred to in such Clauses and to delegate one or more of the powers conferred on it by this Clause 9.13 (other than the power to

delegate) to officer(s) appointed for that purpose by the Authority and may vary or revoke such delegation at any time;

9.13.2 shall promptly, at its own expense, execute any deed that the Authority may reasonably require to create or perfect the appointment of the power of attorney referred to in this Clause 9.13; and

9.13.3 ratifies and confirms, and agrees to ratify and confirm, anything that any of its attorneys may do in the proper and lawful exercise, or purported exercise, of all or any of the rights, powers, authorities and discretions referred to in this Clause 9.13.

## **10 AUTHORITY PREMISES**

### **Authority Premises**

10.1 The Authority shall, subject to the Supplier's compliance with Clauses 10.2 and 10.4 and the Delivery Requirements, provide the Supplier with access to such parts of the Authority's Premises during the Delivery Window (or at such other date or times as the Authority may determine) as the Supplier reasonably requires for the purposes only of properly providing the Services and delivering the Products, subject to any restrictions or requirements set out in the Delivery Requirements.

10.2 The Supplier shall (and shall ensure that any Supplier Personnel on any Authority Premises shall) observe and comply with such rules, regulations and requirements (including those relating to security arrangements) as may be in force from time to time for the conduct of personnel when on the Authority Premises as determined by the Authority including, but not limited to, those rules, policies and standards set out in Schedule 4 (*Standards*) and Schedule 5 (*Security Management*).

10.3 Any access to the Authority Premises and any labour and equipment provided by the Authority in connection with delivery is provided without acceptance by the Authority of any liability whatsoever to the extent permitted by law.

### **HMPPS Security Breach**

10.4 The Supplier shall ensure that it does not and shall procure that its personnel, employees, agents, contractors and representatives do not commit an HMPPS Security Breach.

10.5 For the purposes of this Agreement an “**HMPPS Security Breach**” shall mean a breach of any Authority security requirements or policies (as amended or updated from time to time) which shall include (without limitation) the following acts:

- 10.5.1 bringing, throwing or otherwise conveying any Category A, Category B or Category C items into or out of any Authority Premises by whatever means;
- 10.5.2 causing another person to bring, throw or otherwise convey a Category A, Category B or Category C item into or out of any Authority Premises by whatever means;
- 10.5.3 leaving any Category A, Category B or Category C items in any place (inside or outside of any Authority Premises) intending it to come into the possession of a prisoner;
- 10.5.4 giving a prisoner a Category A, Category B or Category C item; and
- 10.5.5 an offence under section 40D of the Prison Act 1952.

<b>Category A items</b>	Drugs, explosives, firearms, or ammunition and any other offensive weapon.
<b>Category B items</b>	Alcohol, mobile telephones, cameras, sound recording devices (or constituent part of the latter three items).
<b>Category C items</b>	Tobacco, money, clothing, food, drink, letters, paper, books, tools, information technology equipment (save in respect of the Supplier complying with its obligations under this Agreement).

## 11 IMPLEMENTATION

11.1 The Parties shall comply with the provisions of Schedule 13 (*Implementation Plan*) in relation to the agreement and maintenance of the Agreed Implementation Plan.

11.2 The Supplier shall:

- 11.2.1 comply with the Outline Implementation Plan until such time that it is Approved and becomes the Agreed Implementation Plan, at which point the Supplier shall comply with the Agreed Implementation Plan; and
- 11.2.2 ensure that each Milestone is Accepted on or before its Milestone Date.

- 11.3 If the Supplier becomes aware that there is, or there is reasonably likely to be, a Delay it shall:
- 11.3.1 notify the Authority in accordance with Clause 31 (Rectification Plan Process); and
  - 11.3.2 comply with the Rectification Plan Process in order to address the impact of the Delay or anticipated Delay; and
  - 11.3.3 use all reasonable endeavours to eliminate or mitigate the consequences of any Delay or anticipated Delay.
- 11.4 Where the Supplier does not comply with Clause 11.2.2 (for whatever reason), the Authority reserves the right, but shall not be required, to extend the Implementation Period (and therefore delay the Planned Supply Commencement Date) for the duration necessary to ensure compliance with Clause 11.2.2.

## **12 TRAINING AND HELPDESK**

- 12.1 The Supplier shall provide free of charge training to the Online Ordering System Users relating to the use of the Online Ordering System, such training to:
- 12.1.1 be delivered at the locations (online or in person) and frequency as the Parties may agree from time to time (acting reasonably), including in accordance with any timings and requirements included in the Agreed Implementation Plan;
  - 12.1.2 include the provision of clear and accurate training materials to support the training;
  - 12.1.3 be delivered in accordance with Good Industry Practice by suitably qualified training personnel; and
  - 12.1.4 meet any requirements and/or descriptions set out in the Specification and the Supplier Tender or other reasonable requirements of the Authority.
- 12.2 The Supplier and the Authority shall once in each Contract Year meet at the Annual Contract Review Meeting to discuss and agree the training needs of the Authority, and required training content and schedule for the upcoming Contract Year.

- 12.3 The Supplier shall provide, free of charge, a helpdesk facility providing support to Online Ordering System Users in the use of the Online Ordering System, such helpdesk to:
- 12.3.1 be available between the hours of 9am and 5pm on Working Days;
  - 12.3.2 be delivered in accordance with Good Industry Practice by suitably qualified personnel;
  - 12.3.3 meet any requirements and/or descriptions set out in the Specification and the Supplier Tender or other reasonable requirements of the Authority; and
  - 12.3.4 provide fault fixing support in a manner which ensures that the Online Ordering System Availability and Product Complaint KPIs, as defined and set out in Schedule 3 (*Performance Levels*), are met.
- 12.4 The Supplier shall during the Term maintain and make available to the Authority updated materials and support documentation relating to the use of the Online Ordering System.

### **13 KEY PERFORMANCE INDICATORS**

- 13.1 The Supplier shall:
- 13.1.1 provide the Products and Services in such a manner so as to meet or exceed the Target Performance Level for each Performance Indicator from the Supply Commencement Date; and
  - 13.1.2 comply with the provisions of Schedule 3 (*Performance Levels*) in relation to the monitoring and reporting on its performance against the Performance Indicators.
- 13.2 If in any Quarter a Material KPI Failure occurs, the Supplier shall comply with the Rectification Plan Process.

#### **Critical Performance Failure**

- 13.3 If a Critical Performance Failure occurs, the Authority may exercise its rights to terminate this Agreement in whole or in part pursuant to Clause 39.2.1 (Termination by the Authority).

## Changes to Key Performance Indicators

- 13.4 Not more than once in each Contract Year the Authority may, on giving the Supplier at least three (3) months' notice change the weighting that applies in respect of one or more specific KPIs.
- 13.5 The Supplier shall not be entitled to object to any changes made by the Authority under Clause 13.4, or increase the Charges as a result of such changes, provided that:
- 13.5.1 the total number of KPIs does not exceed seven (7);
  - 13.5.2 the Service Credit Cap is not increased above the level set out in Clause 28.4.3(i); and
  - 13.5.3 the principal purpose of the change is to reflect changes in the Authority's business requirements and/or priorities or to reflect changing industry standards.

## Unacceptable KPI Failure

- 13.6 If in any Service Period an Unacceptable KPI Failure occurs:
- 13.6.1 the Authority shall (subject to the Service Credit Cap set out in Clause 28.4.3 (Financial and other limits)) be entitled to withhold and retain as compensation for the Unacceptable KPI Failure a sum equal to any Charges which would otherwise have been due to the Supplier in respect of that Service Period (such sum being **"Compensation for Unacceptable KPI Failure"**); and
  - 13.6.2 if the Authority withholds and retains such Compensation for Unacceptable KPI Failure, any Service Credits that would otherwise have accrued during the relevant Product Delivery Period shall not accrue,
- provided that the operation of this Clause 13.6 shall be without prejudice to any right which the Authority may have to terminate this Agreement and/or claim damages from the Supplier as a result of such Unacceptable KPI Failure.
- 13.7 The Supplier:
- 13.7.1 agrees that the application of Clause 13.6 is commercially justifiable where an Unacceptable KPI Failure occurs; and

- 13.7.2 acknowledges that it has taken legal advice on the application of Clause 13.6 and has had the opportunity to price for that risk when calculating the Charges.

## **Complaints and Incidents**

- 13.8 The Supplier shall manage all Complaints and Incidents promptly and professionally and in accordance with the Specification and any relevant Performance Indicators.
- 13.9 The Supplier shall notify the Authority if it identifies a KPI Failure or Service delivery issue as a result of receiving a Complaint.

## **14 CONTINUOUS IMPROVEMENT**

- 14.1 The Supplier shall have an ongoing obligation throughout the Term to identify new or potential improvements to the performance of the Supplier's obligations under this Agreement in accordance with this Clause 14.1. As part of this obligation the Supplier shall, at least once every twelve (12) months in one of the Quarterly "Value for Money Reports" referred to in Schedule 24 (*Reports and Records Provisions*), identify and report at the relevant Contract Review Meeting on:
- 14.1.1 changes in business processes and ways of working that would enable the Products and Services to be delivered at lower cost and/or with greater benefits to the Authority;
  - 14.1.2 changes to the business processes and ways of working that would enable reductions in the total energy consumed in provision of the Services or the manufacture and delivery of the Products; and/or
  - 14.1.3 any savings which could be made by the Authority where the volume of Products ordered by the Authority increases materially over the course of any Contract Year.
- 14.2 If the Authority wishes to incorporate any improvement identified by the Supplier, the Authority shall send the Supplier a Change Request in accordance with the Change Control Procedure.
- 14.3 The Supplier shall at least once every twelve (12) months:
- 14.3.1 conduct a full and comprehensive review of the Products and Services and, in accordance with the requirements in Schedule 24 (*Reports and*

*Records Provisions*), the Charges to demonstrate that they continue to be Value for Money to the Authority; and

- 14.3.2 conduct a full and comprehensive review of all standard operating procedures (including any quality assurance processes as further described in the Specification) in respect of the delivery of Products and Services.
- 14.4 The Supplier shall ensure that the information that it provides to the Authority shall be sufficient for the Authority to decide whether any improvement should be implemented. The Supplier shall provide any further information that the Authority requests.
- 14.5 The Supplier shall notify the Authority immediately (and in any event within one (1) Working Day) on becoming aware of any breach of this Agreement, failure to deliver the Products and Services in accordance with the Performance Indicators, or any event that may lead to such a breach of this Agreement or failure to deliver the Products and Services in accordance with the Performance Indicators by the Supplier.



## SECTION C – PAYMENT, TAXATION AND VALUE FOR MONEY PROVISIONS

### 15 FINANCIAL AND TAXATION MATTERS

#### Charges and Invoicing

- 15.1 In consideration of the Supplier carrying out its obligations under this Agreement, including the supply of Products and Services, the Authority shall pay the Charges to the Supplier in accordance with the pricing and payment profile and the invoicing procedure specified in Schedule 15 (*Charges and Invoicing*).
- 15.2 Unless otherwise stated in the Order, the Charges shall:
- 15.2.1 be subject to any Deductions applied in accordance with Schedule 15;
  - 15.2.2 be the entire price payable by the Authority to the Supplier in respect of the provision of the Products, Deliverables and Services and include, without limitation:
    - (a) packaging, packing, materials, addressing, labelling, loading, delivery to and unloading at the Delivery Location, the cost of any import or export licences, all appropriate taxes (excluding VAT), duties and tariffs, any expenses arising from import and export administration, any installation costs and associated works, the costs of all associated documentation and information supplied or made accessible to the Authority in any media, and any training in relation to the use, storage, handling or operation of the Products;
    - (b) any royalties, licence fees or similar expenses in respect of the making, use or exercise by the Supplier if any Intellectual Property Rights for the purposes of performing this Agreement and any licence rights granted to the Authority;
    - (c) costs and expenses in relation to supplies and materials used by the Supplier or any third party in the manufacture of the Products and the supply of the Services (including in relation to the provision of the Online Ordering System) and any other costs incurred by the Supplier in association with the manufacture and supply of the Products and the supply of the Services.
- 15.3 Except as otherwise provided, each Party shall bear its own costs and expenses incurred in respect of compliance with its obligations under Clauses 14 (*Continuous*

*Improvement), 17 (Records, Reports, Audits and Open Book Data), 25 (Transparency and Freedom of Information) and 26 (Protection of Personal Data).*

- 15.4 If the Authority fails to pay any undisputed Charges properly invoiced under this Agreement in accordance with the payment term set out in Schedule 15 (*Charges and Invoicing*), the Supplier shall have the right to charge interest on the overdue amount at the applicable rate under the Late Payment of Commercial Debts (Interest) Act 1998, accruing on a daily basis from the due date up to the date of actual payment, whether before or after judgment.

#### **VAT**

- 15.5 The Charges are stated exclusive of VAT, which shall be added at the prevailing rate as applicable and paid by the Authority following delivery of a valid VAT invoice.
- 15.6 The Supplier shall indemnify the Authority on a continuing basis against any liability, including any interest, penalties or costs incurred, that is levied, demanded or assessed on the Authority at any time in respect of the Supplier's failure to account for or to pay any VAT relating to payments made to the Supplier under this Agreement. Any amounts due under this Clause 15.6 shall be paid in cleared funds by the Supplier to the Authority not less than five (5) Working Days before the date upon which the tax or other liability is payable by the Authority.

#### **Set-off and Withholding**

- 15.7 The Authority may set off any amount owed by the Supplier to the Authority against any amount due to the Supplier under this Agreement.
- 15.8 If the Authority wishes to set off any amount owed by the Supplier to the Authority against any amount due to the Supplier pursuant to Clause 15.7, it shall give notice to the Supplier within thirty (30) days of receipt of the relevant invoice, setting out the Authority's reasons for withholding or retaining the relevant Charges.

#### **Financial Distress**

- 15.9 The Parties shall comply with the provisions of Schedule 18 (*Financial Distress*) in relation to the assessment of the financial standing of the Supplier and other specified entities and the consequences of a change to that financial standing.

## **Promoting Tax Compliance**

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

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

15.10.2 promptly provide to the Authority:

- (a) details of the steps which the Supplier is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors that it considers relevant; and
- (b) such other information in relation to the Occasion of Tax Non-Compliance as the Authority may reasonably require.

## **SECTION D – CONTRACT GOVERNANCE**

### **16 GOVERNANCE**

- 16.1 The Parties shall comply with the provisions of Schedule 21 (*Governance*) in relation to the management and governance of this Agreement.

### **17 RECORDS, REPORTS, AUDITS AND OPEN BOOK DATA**

- 17.1 The Supplier shall comply with the provisions of:
- 17.1.1 Schedule 24 (*Reports and Records Provisions*) in relation to the maintenance and retention of Records; and
  - 17.1.2 Part A of Schedule 19 (*Financial Reports and Audit Rights*) in relation to the maintenance of Open Book Data.
- 17.2 The Parties shall comply with the provisions of:
- 17.2.1 Part B of Schedule 19 (*Financial Reports and Audit Rights*) in relation to the provision of the Financial Reports; and
  - 17.2.2 Part C of Schedule 19 (*Financial Reports and Audit Rights*) in relation to the exercise of the Audit Rights by the Authority or any Audit Agents.

### **18 CHANGE**

#### **Change Control Procedure**

- 18.1 Any requirement for a Change shall be subject to the Change Control Procedure, provided that a Catalogue Change shall be made in accordance with the Catalogue Change Procedure.

#### **Change in Law**

- 18.2 The Supplier shall neither be relieved of its obligations to supply the Products or Services in accordance with the terms and conditions of this Agreement nor be entitled to an increase in the Charges as the result of:
- 18.2.1 a General Change in Law; or

- 18.2.2 a Specific Change in Law where the effect of that Specific Change in Law on the provision and delivery of the Products or Services is reasonably foreseeable at the Effective Date.
- 18.3 If a Specific Change in Law occurs or will occur during the Term (other than as referred to in Clause 18.2.2), the Supplier shall:
- 18.3.1 subject to this Clause 18.3, be entitled to a reasonable adjustment in the Charges to compensate the Supplier for any losses under the Agreement from the Specific Change in Law;
  - 18.3.2 notify the Authority as soon as reasonably practicable of the likely effects of that change, including whether any Change is required to the Products or Services or the Specification, the Charges or this Agreement; and
  - 18.3.3 provide the Authority with evidence:
    - (a) that the Supplier has minimised any increase in costs or maximised any reduction in costs, including in respect of the costs of its Sub-contractors; and
    - (b) as to how the Specific Change in Law has affected the cost of providing the Products or Services.
- 18.4 Subject to the Supplier's compliance with Clause 18.3, the Supplier shall be entitled to a reasonable and proportionate adjustment to the Charges to reflect the increased costs of the Supplier in supplying the Products and Services as a result of a Specific Change in Law. Any such variation in the Charges shall be implemented in accordance with the Change Control Procedure.

## SECTION E – SUPPLIER PERSONNEL AND SUPPLY CHAIN

### 19 SUPPLIER PERSONNEL

#### 19.1 The Supplier shall:

- 19.1.1 provide in advance of any admission to Authority Premises a list of the names of all Supplier Personnel requiring such admission, specifying the capacity in which they require admission and giving such other particulars as the Authority may reasonably require;
- 19.1.2 ensure that all Supplier Personnel:
  - (a) are appropriately qualified, trained and experienced to supply the Products and Services and deliver any training or helpdesk support with all reasonable skill, care and diligence;
  - (b) are vetted in accordance with Good Industry Practice and, where applicable, the security requirements set out in Schedule 2 (*Specification*) or such other vetting requirements that the Authority may notify to the Supplier from time to time;
  - (c) (where appropriate) comply with the Transport Managers and Delivery Drivers Handbook; and
  - (d) comply with all reasonable requirements of the Authority concerning conduct at the Authority Premises including any security requirements or policies of the Authority concerning conduct at the Authority Premises as notified to the Supplier from time to time;
- 19.1.3 retain overall control of the Supplier Personnel at all times so that the Supplier Personnel shall not be deemed to be employees, agents or contractors of the Authority; and
- 19.1.4 be liable at all times for all acts or omissions of Supplier Personnel, so that any act or omission of a member of any Supplier Personnel which results in a Default under this Agreement shall be a Default by the Supplier.

#### Key Personnel

- 19.2 The Supplier shall ensure that the Key Personnel fulfil the Key Roles at all times during the Term. Schedule 29 (*Key Personnel*) lists the Key Roles and names of the persons

who the Supplier shall appoint to fill those Key Roles at the Supply Commencement Date.

- 19.3 The Authority may identify any further roles as being Key Roles and, following agreement to the same by the Supplier, the relevant persons selected to fill those Key Roles shall be included on the list of Key Personnel.
- 19.4 The Supplier shall not remove or replace any Key Personnel (including when carrying out Exit Management) unless:
- 19.4.1 requested to do so by the Authority;
  - 19.4.2 the person concerned resigns, retires or dies or is on maternity leave, paternity leave or shared parental leave or long-term sick leave;
  - 19.4.3 the person's employment or contractual arrangement with the Supplier or a Sub-contractor is terminated for material breach of contract by the employee; or
  - 19.4.4 the Supplier obtains the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).
- 19.5 The Supplier shall:
- 19.5.1 notify the Authority promptly of the absence of any Key Personnel (other than for short-term sickness or holidays of two (2) weeks or less, in which case the Supplier shall ensure appropriate temporary cover for that Key Role);
  - 19.5.2 ensure that any Key Role is not vacant for any longer than ten (10) Working Days;
  - 19.5.3 give as much notice as is reasonably practicable of its intention to remove or replace any member of Key Personnel and, except in the cases of death, unexpected ill health or a material breach of the Key Personnel's employment contract, this will mean at least sixty (60) Working Days' notice;
  - 19.5.4 ensure that all arrangements for planned changes in Key Personnel provide adequate periods during which incoming and outgoing personnel work together to transfer responsibilities and ensure that such change does not have an adverse impact on the performance of the Services;

- 19.5.5 use all reasonable endeavours to minimise the number of changes in Key Personnel;
- 19.5.6 replace (temporarily or permanently, as appropriate) any Key Personnel as soon as practicable if any Supplier Personnel have been removed or are unavailable for any reason whatsoever;
- 19.5.7 bear the programme familiarisation and other costs associated with any replacement of any Key Personnel; and
- 19.5.8 ensure that any replacement for a Key Role:
  - (a) has a level of qualifications and experience appropriate to the relevant Key Role; and
  - (b) is fully competent to carry out the tasks assigned to the Key Personnel whom they have replaced; and
- 19.5.9 create and maintain an organogram depicting the Key Roles and Key Personnel, which the Supplier shall share during each Performance Board in accordance with Schedule 21 (*Governance*).

#### **Employment Indemnity**

19.6 The Parties agree that:

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



## **Income Tax and National Insurance Contributions**

- 19.7 Where the Supplier or any Supplier Personnel are liable to be taxed in the UK or to pay national insurance contributions in respect of consideration received under this Agreement, the Supplier shall:
- 19.7.1 at all times comply with the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax, and the Social Security Contributions and Benefits Act 1992 and all other statutes and regulations relating to national insurance contributions, in respect of that consideration; and
  - 19.7.2 indemnify the Authority against any income tax, national insurance and social security contributions and any other liability, deduction, contribution, assessment or claim arising from or made in connection with the provision of the Products and Services by the Supplier or any Supplier Personnel.

## **20 SUPPLY CHAIN RIGHTS AND PROTECTIONS**

### **Advertising Sub-contract Opportunities**

- 20.1 The Supplier shall:
- 20.1.1 subject to Clauses 20.3 and 20.4, advertise on Contracts Finder all Sub-contract opportunities arising from or in connection with the provision of the Products and Services above a minimum threshold of £25,000 that arise during the Term;
  - 20.1.2 within ninety (90) days of awarding a Sub-contract to a Sub-contractor, update the notice on Contracts Finder with details of the successful Sub-contractor;
  - 20.1.3 monitor the number, type and value of the Sub-contract opportunities placed on Contracts Finder advertised and awarded in its supply chain during the Term;
  - 20.1.4 provide reports on the information at Clause 20.1.3 to the Authority in the format and frequency as reasonably specified by the Authority; and
  - 20.1.5 promote Contracts Finder to its suppliers and encourage those organisations to register on Contracts Finder.

- 20.2 Each advert referred to in Clause 20.1 above shall provide a full and detailed description of the Sub-contract opportunity with each of the mandatory fields being completed on Contracts Finder by the Supplier.
- 20.3 The obligation at Clause 20.1 shall only apply in respect of Sub-contract opportunities arising after the Effective Date.
- 20.4 Notwithstanding Clause 20.1 the Authority may, by giving its prior written approval, agree that a Sub-contract opportunity is not required to be advertised on Contracts Finder.

#### **Appointment of Sub-contractors**

- 20.5 The Supplier shall exercise due skill and care in the selection and appointment of any Sub-contractors to ensure that the Supplier is able to:
- 20.5.1 manage any Sub-contractors in accordance with Good Industry Practice;
  - 20.5.2 comply with its obligations under this Agreement in the delivery of the Products and Services; and
  - 20.5.3 assign, novate or otherwise transfer to the Authority or any Replacement Supplier any of its rights and/or obligations under each Sub-contract that relates exclusively to this Agreement.
- 20.6 Prior to sub-contracting any of its obligations under this Agreement, the Supplier shall notify the Authority in writing of:
- 20.6.1 the proposed Sub-contractor's name, registered office and company registration number;
  - 20.6.2 the products, services or materials to be provided by the proposed Sub-contractor; and
  - 20.6.3 where the proposed Sub-contractor is an Affiliate of the Supplier, evidence that demonstrates to the reasonable satisfaction of the Authority that the proposed Sub-contract has been agreed on "arm's-length" terms.
- 20.7 If requested by the Authority within ten (10) Working Days of receipt of the Supplier's notice issued pursuant to Clause 20.6, the Supplier shall also provide:
- 20.7.1 a copy of the proposed Sub-contract;

- 20.7.2 details of the proposed Sub-contractor's quality management processes, lead times and contingency plans;
  - 20.7.3 details of the procurement policy and evaluation undertaken in the proposed appointment of the Sub-contractor; and
  - 20.7.4 any further information reasonably requested by the Authority.
- 20.8 The Authority may, within ten (10) Working Days of receipt of the Supplier's notice issued pursuant to Clause 20.6 (or, if later, receipt of any further information requested pursuant to Clause 20.7), object to the appointment of the relevant Sub-contractor if it considers that:
- 20.8.1 the appointment of a proposed Sub-contractor may prejudice the provision of the Products or Services and/or may be contrary to the interests of the Authority;
  - 20.8.2 the proposed Sub-contractor is unreliable and/or has not provided reasonable services to its other customers;
  - 20.8.3 the proposed Sub-contractor employs unfit persons; and/or
  - 20.8.4 the proposed Sub-contractor should be excluded in accordance with Clause 20.22 (*Termination of Sub-contracts*);
- in which case, the Supplier shall not proceed with the proposed appointment.
- 20.9 If:
- 20.9.1 the Authority has not notified the Supplier that it objects to the proposed Sub-contractor's appointment by the later of ten (10) Working Days of receipt of:
    - (a) the Supplier's notice issued pursuant to Clause 20.6; and
    - (b) any further information requested by the Authority pursuant to Clause 20.7; and
  - 20.9.2 the proposed Sub-contract is not a Key Sub-contract (which shall require the written consent of the Authority in accordance with Clause 20.10 (*Appointment of Key Sub-contractors*),
- the Supplier may proceed with the proposed appointment.

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

20.10 Where the Supplier wishes to enter into a Key Sub-contract or replace a Key Sub-contractor, it must obtain the prior written consent of the Authority, such consent not to be unreasonably withheld or delayed. For these purposes, the Authority may withhold its consent to the appointment of a Key Sub-contractor if it reasonably considers that:

- 20.10.1 the appointment of a proposed Key Sub-contractor may prejudice the provision of the Products or Services or may be contrary to the interests of the Authority;
- 20.10.2 the proposed Key Sub-contractor is unreliable and/or has not provided reasonable products or services to its other customers; and/or
- 20.10.3 the proposed Key Sub-contractor employs unfit persons; and/or
- 20.10.4 the proposed Key Sub-contractor should be excluded in accordance with Clause 20.22 (*Termination of Sub-contracts*).

20.11 The Authority consents to the appointment of the Key Sub-contractors listed in Schedule 10 (*Notified Key Sub-contractors*).

20.12 Except where the Authority has given its prior written consent, the Supplier shall ensure that each Key Sub-contract shall include:

- 20.12.1 provisions which will enable the Supplier to discharge its obligations under this Agreement;
- 20.12.2 a right under CRTPA for the Authority to enforce any provisions under the Key Sub-contract which are capable of conferring a benefit upon the Authority;
- 20.12.3 a provision enabling the Authority to enforce the Key Sub-contract as if it were the Supplier;
- 20.12.4 a provision enabling the Supplier to assign, novate or otherwise transfer any of its rights and/or obligations under the Key Sub-contract to the Authority or any Replacement Supplier without restriction (including any need to obtain any consent or approval) or payment by the Authority;

- 20.12.5 obligations no less onerous on the Key Sub-contractor than those imposed on the Supplier under this Agreement in respect of:
- (a) data protection requirements set out in Clauses 23 (*Authority Data and Security Requirements*) and 26 (*Protection of Personal Data*);
  - (b) FOIA requirements set out in Clause 25 (*Transparency and Freedom of Information*);
  - (c) the obligation not to embarrass the Authority or otherwise bring the Authority into disrepute set out in Clause 9.9.13 (*Supplier Covenants*);
  - (d) the keeping of records in respect of the Products and Services being provided under the Key Sub-contract, including the maintenance of Open Book Data; and
  - (e) the conduct of Audits set out in Part C of Schedule 19 (*Financial Reports and Audit Rights*).
- 20.12.6 provisions enabling the Supplier to terminate the Key Sub-contract on notice on terms no more onerous on the Supplier than those imposed on the Authority under Clauses 39.1 (*Termination by the Authority*);
- 20.12.7 a provision restricting the ability of the Key Sub-contractor to sub-contract all or any part of the products or services provided to the Supplier under the Key Sub-contract without first seeking the written consent of the Authority;
- 20.12.8 a provision enabling the Supplier, the Authority or any other person on behalf of the Authority to procure replacement products further to Clause 35 (*Replacement Products*);
- 20.12.9 a provision requiring the Key Sub-contractor to participate in and, if required by the Authority in the relevant Multi-Party Procedure Initiation Notice, to procure the participation of all or any of its Sub-contractors in the Multi-Party Dispute Resolution Procedure; and

20.12.10 a provision requiring the Key Sub-contractor to:

- (a) promptly notify the Supplier and the Authority in writing of any of the following of which it is, or ought to be, aware:
  - (i) the occurrence of a Financial Distress Event in relation to the Key Sub-contractor; or
  - (ii) any fact, circumstance or matter of which it is aware which could cause the occurrence of a Financial Distress Event in relation to the Key Sub-contractor,
  - (iii) and in any event, provide such notification within ten (10) Working Days of the date on which the Key Sub-contractor first becomes aware of such); and
- (b) co-operate with the Supplier and the Authority in order to give full effect to the provisions of Schedule 18 (*Financial Distress*), including meeting with the Supplier and the Authority to discuss and review the effect of the Financial Distress Event on the continued performance and delivery of the Products or Services, and contributing to and complying with the Financial Distress Remediation Plan, and providing the information specified at Paragraph 4.3(b)(ii) of Schedule 18 (*Financial Distress*).

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

### **Supply chain protection**

20.14 The Supplier shall ensure that all Sub-contracts (which in this Clause includes any contract in the Supplier's supply chain made wholly or substantially for the purpose of performing or contributing to the performance of the whole or any part of this Agreement, including any manufacturers of the Products) contain provisions:

- 20.14.1 giving the Supplier a right to terminate the Sub-contract if the Sub-contractor fails to comply in the performance of the Sub-contract with legal obligations in the fields of environmental, social or labour law;
- 20.14.2 requiring the Supplier or other party receiving products or services under the contract to consider and verify invoices under that contract in a timely fashion;

- 20.14.3 that if the Supplier or other party fails to consider and verify an invoice in accordance with Clause 20.14.3, the invoice shall be regarded as valid and undisputed for the purpose of Clause 20.14.4 after a reasonable time has passed;
- 20.14.4 requiring the Supplier or other party to pay any undisputed sums which are due from it to the Sub-contractor within a specified period not exceeding thirty (30) days of verifying that the invoice is valid and undisputed;
- 20.14.5 giving the Authority a right to publish the Supplier's compliance with its obligation to pay undisputed invoices within the specified payment period; and
- 20.14.6 requiring the Sub-contractor to include a clause to the same effect as this Clause 20.14 in any contracts it enters into wholly or substantially for the purpose of performing or contributing to the performance of the whole or any part of this Agreement.

20.15 The Supplier shall:

- 20.15.1 pay any undisputed sums which are due from it to a Sub-contractor within thirty (30) days of verifying that the invoice is valid and undisputed;
- 20.15.2 report to the Authority on an annual basis as part of the Contract Review Report (as set out in Schedule 24) a summary of its compliance with Clause 20.15.1, such data to be certified each Quarter by a director of the Supplier as being accurate and not misleading.

20.16 Without prejudice to Clause 20.15.1, the Supplier shall:

- 20.16.1 pay any sums which are due from it to any Sub-contractor or Unconnected Sub-contractor pursuant to any invoice (or other notice of an amount for payment) on the earlier of:
  - (a) the date set out for payment in the relevant Sub-contract or Unconnected Sub-contract; or
  - (b) the date that falls sixty (60) days after the day on which the Supplier receives an invoice (or otherwise has notice of an amount for payment); and

- 20.16.2 report to the Authority as part of its Contract Review Report a summary of its compliance with Clause 20.16.1, such data to be certified every Quarter by a director of the Supplier as being accurate and not misleading.
- 20.17 If any reporting in accordance with this Clause 20 shows that in either of the last two (2) six (6) month periods the Supplier failed to pay 95% or above of all Sub-contractor or Unconnected Sub-contractor invoices (or other notice of an amount for payment) within sixty (60) days of receipt, the Supplier shall within fifteen (15) Working Days of submission of the latest Contract Review Report submit to the Authority an action plan (the “**Action Plan**”) for improvement. The Action Plan shall include, but not be limited to, the following:
- 20.17.1 identification of the primary causes of failure to pay 95% or above of all Sub-contractor or Unconnected Sub-contractor invoices (or other notice of an amount for payment) within sixty (60) days of receipt;
- 20.17.2 actions to address each of the causes set out in Clause 20.17.1; and
- 20.17.3 a mechanism for and commitment to regular reporting on progress to the Supplier’s Board.
- 20.18 The Action Plan shall be certificated by a director of the Supplier and the Action Plan or a summary of the Action Plan published on the Supplier’s website within ten (10) Working Days of the date on which the Action Plan is submitted to the Authority.
- 20.19 Where the Supplier fails to pay any sums due to any Sub-contractor or Unconnected Sub-contractor in accordance with the terms set out in the relevant Sub-contract or Unconnected Sub-contract, the Action Plan shall include details of the steps the Supplier will take to address this.
- 20.20 The Supplier shall comply with the Action Plan, or any similar action plan connected to the payment of Sub-contractors or Unconnected Sub-contractors which is required to be submitted to the Authority as part of the procurement process and such action plan shall be included as part of the Supplier’s Solution (to the extent it is not already included).
- 20.21 Notwithstanding any provision of Clauses 24 (*Confidentiality*) and 27 (*Publicity and Branding*), if the Supplier notifies the Authority (whether in an Contract Review Report or otherwise) that the Supplier has failed to pay a Sub-contractor’s undisputed invoice within thirty (30) days of receipt or that it has failed to pay 95% or above of its Sub-Contractors or Unconnected Sub-contractors within sixty (60) days after the day on which the Supplier receives an invoice or otherwise has notice of an amount for
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payment, or the Authority otherwise discovers the same, the Authority shall be entitled to publish the details of the late or non-payment (including on government websites and in the press).

### **Termination of Sub-contracts**

20.22 The Authority may require the Supplier to terminate:

20.22.1 a Sub-contract where:

- (a) the acts or omissions of the relevant Sub-contractor have caused or materially contributed to the Authority's right of termination pursuant to Clause 39.2.1 (*Termination by the Authority*);
- (b) the relevant Sub-contractor or any of its Affiliates have embarrassed the Authority or otherwise brought the Authority into disrepute by engaging in any act or omission which is reasonably likely to diminish the trust that the public places in the Authority, regardless of whether or not such act or omission is related to the Sub-contractor's obligations in relation to the Products or Services or otherwise;
- (c) the relevant Sub-contractor has failed to comply in the performance of its Sub-contract with legal obligations in the fields of environmental, social or labour law; and/or
- (d) the Authority has found grounds for exclusion of the Sub-contractor in accordance with Clause 20.27; and

20.22.2 a Key Sub-contract where there is a change of Control of the relevant Key Sub-contractor, unless:

- (a) the Authority has given its prior written consent to the particular change of Control, which subsequently takes place as proposed; or
- (b) the Authority has not served its notice of objection within six (6) months of the later of the date the change of Control took place or the date on which the Authority was given notice of the change of Control.

### **Competitive Terms**

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

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

20.23.1 require the Supplier to replace its existing commercial terms with that person with the more favourable commercial terms obtained by the Authority in respect of the relevant item; or

20.23.2 enter into a direct agreement with that Sub-contractor or third party in respect of the relevant item.

20.24 If the Authority exercises either of its options pursuant to Clause 20.23, then the Charges shall be reduced by an amount that is agreed in accordance with the Change Control Procedure.

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

20.25.1 the Authority making the relevant item available to the Supplier where this is necessary for the Supplier to provide the Products or Services; and

20.25.2 any reduction in the Charges taking into account any unavoidable costs payable by the Supplier in respect of the substituted item, including in respect of any licence fees or early termination charges.

### **Retention of Legal Obligations**

20.26 Notwithstanding the Supplier's right to sub-contract pursuant to this Clause 20, the Supplier shall remain responsible for all acts and omissions of its Sub-contractors and the acts and omissions of those employed or engaged by the Sub-contractors as if they were its own. In respect of any element of the Products or Services delivered by Supplier Personnel and/or which are Sub-contracted by the Supplier, an obligation on the Supplier to do or to refrain from doing any act or thing under this Agreement, shall include an obligation on the Supplier to procure that the Supplier Personnel and the Sub-contractor also do or refrain from doing such act or thing in their delivery of those elements of the Products or Services.

### **Exclusion of Sub-contractors**

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

20.27.1 if the Authority finds there are compulsory grounds for exclusion, the Supplier shall replace or shall not appoint the Sub-contractor;

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

### **Appointment of Manufacturers**

20.28 The Supplier shall exercise due skill and care in the selection and appointment of any manufacturers of the Products to ensure that the Supplier is able to:

20.28.1 manage any manufacturer in accordance with Good Industry Practice; and

20.28.2 comply with its obligations under this Agreement in the delivery of the Products and Services.

20.29 The Supplier must ensure that all manufacturers have in place and comply with appropriate policies as the Authority may reasonably require, including (without limitation), a modern slavery policy.

## SECTION F – INTELLECTUAL PROPERTY, DATA AND CONFIDENTIALITY

### 21 INTELLECTUAL PROPERTY RIGHTS

21.1 Except as expressly provided for in this Agreement or otherwise agreed in writing:

21.1.1 the Authority does not acquire any right, title or interest in or to the Intellectual Property Rights of the Supplier or its licensors, namely:

- (a) the Online Ordering System;
- (b) the Supplier Background IPRs; and
- (c) any Know-How, trade secrets or Confidential Information of the Supplier contained in the Online Ordering System or Project Specific IPR; and

21.1.2 the Supplier does not acquire any right, title or interest in or to the Intellectual Property Rights of the Authority or its licensors, including:

- (a) the Authority Data; and
- (b) the Authority Background IPRs; and

21.1.3 neither Party has the right to use the other Party's IPRs, including any use of the other Party's names, logos or trademarks.

21.2 Where either Party acquires, by operation of law, ownership of Intellectual Property Rights that is inconsistent with the requirements of this Clause 21 (*Intellectual Property Rights*), it must assign in writing the Intellectual Property Rights concerned to the other Party on the other Party's request (whenever made).

#### Project-Specific IPRs

21.3 The Supplier agrees to:

21.3.1 transfer to the Authority, or procure the transfer to the Authority of all Intellectual Property Rights in the Project Specific IPRs; and

21.3.2 execute all such assignments required to transfer properly any rights in the Project Specific IPRs to the Authority.

#### Licences granted by the Supplier

21.4 The Supplier grants the Authority a non-exclusive, royalty-free, irrevocable, transferable, sub-licensable, worldwide licence for the duration of the Term and any

Termination Assistance Period for the Authority and its personnel to access and use the Online Ordering System, the Supplier Background IPRs and Third-Party IPRs in accordance with the terms of this Agreement and the Specification.

### **Licences granted by the Authority**

21.5 The Authority grants the Supplier a licence to the

21.5.1 the Project-Specific IPR;

21.5.2 the Authority Data; and

21.5.3 the Authority Background IPRs,

that:

21.5.4 is non-exclusive, royalty-free and non-transferable;

21.5.5 is sub-licensable to any Sub-contractor where:

(a) the Sub-contractor enters into a confidentiality undertaking with the Supplier on terms that are no less onerous than Clause 24 of this Agreement; and

(b) the sub-licence does not purport to provide the sub-licensee with any wider rights than those granted to the Supplier under this Clause;

21.5.6 allows the Supplier and any sub-licensee to use, copy and adapt any licensed IPRs for the purpose of fulfilling its obligations under this Agreement; and

21.5.7 terminates at the later of:

(a) the expiry of the Term; or

(b) the end of any Termination Assistance Period.

21.6 When the licence granted under Clause 21.5 terminates, the Supplier must, and must ensure that each Sub-contractor granted a sub-licence under Clause 21.5.5:

21.6.1 immediately cease all use of the licensed IPR;

21.6.2 either:

(a) at the discretion of the Authority, return or destroy documents and other tangible materials that contain any of the licensed IPR; or

- (b) if the Authority has not made an election within six (6) months of the termination of the licence, destroy the documents and other tangible materials that contain any of the licensed IPR; and
- 21.6.3 ensure, so far as reasonably practicable, that any licensed IPR held in electronic, digital or other machine-readable form ceases to be readily accessible from any computer, word processor, voicemail system or any other device of the Supplier.

## **22 IPRs INDEMNITY**

- 22.1 The Supplier shall at all times, during and after the Term, on written demand indemnify the Authority and each other Indemnified Person, and keep the Authority and each other Indemnified Person indemnified, against all Losses incurred by, awarded against or agreed to be paid by an Indemnified Person arising from an IPRs Claim.
- 22.2 If an IPRs Claim is made, or the Supplier anticipates that an IPRs Claim might be made, the Supplier may, at its own expense and sole option, either:
  - 22.2.1 procure for the Authority or other relevant Indemnified Person the right to continue using the relevant item which is subject to the IPRs Claim; or
  - 22.2.2 replace or modify the relevant item with non-infringing substitutes provided that:
    - (a) the performance and functionality of the replaced or modified item is at least equivalent to the performance and functionality of the original item;
    - (b) there is no additional cost to the Authority or relevant Indemnified Person (as the case may be); and
    - (c) the terms and conditions of this Agreement shall apply to the replaced or modified Products or Services.
- 22.3 If the Supplier elects to procure a licence in accordance with Clause 22.2.1 or to modify or replace an item pursuant to Clause 22.2.2, but this has not avoided or resolved the IPRs Claim, then:
  - 22.3.1 the Authority may terminate this Agreement (if subsisting) with immediate effect by written notice to the Supplier; and

- 22.3.2 without prejudice to the indemnity set out in Clause 22.1, the Supplier shall be liable for all reasonable and unavoidable costs of the substitute items and/or services including the additional costs of procuring, implementing and maintaining the substitute items.

## **23 AUTHORITY DATA AND SECURITY REQUIREMENTS**

- 23.1 The Supplier shall not store, copy, disclose, or use the Authority Data except as necessary for the performance by the Supplier of its obligations under this Agreement or as otherwise expressly authorised in writing by the Authority.
- 23.2 The Supplier shall preserve the integrity of Authority Data and prevent the corruption or loss of Authority Data at all times that the relevant Authority Data is under its control or the control of any Sub-contractor.
- 23.3 The Supplier shall ensure that any system on which the Supplier holds any Authority Data, including back-up data, is a secure system that complies with any reasonable security requirements provided by the Authority to the Supplier from time to time.
- 23.4 If the Authority Data is corrupted, lost or sufficiently degraded as a result of the Supplier's Default so as to be unusable, the Authority may:
- 23.4.1 require the Supplier (at the Supplier's expense) to restore or procure the restoration of Authority Data to the extent and in accordance with the requirements specified in Schedule 26 (*Service Continuity and Corporate Resolution Planning*) and the Supplier shall do so as soon as practicable but not later than five (5) Working Days from the date of receipt of the Authority's notice; and/or
- 23.4.2 itself restore or procure the restoration of Authority Data, and shall be repaid by the Supplier any reasonable expenses incurred in doing so to the extent and in accordance with the requirements specified in Schedule 26 (*Service Continuity and Corporate Resolution Planning*).
- 23.5 The Supplier shall comply with the requirements of Schedule 5 (*Security Management*).

## **24 CONFIDENTIALITY**

- 24.1 For the purposes of this Clause 24, the term "**Disclosing Party**" shall mean a Party which discloses or makes available directly or indirectly its Confidential Information

and "**Recipient**" shall mean the Party which receives or obtains directly or indirectly Confidential Information.

- 24.2 Except to the extent set out in this Clause 24 or where disclosure is expressly permitted elsewhere in this Agreement, the Recipient shall:
- 24.2.1 treat the Disclosing Party's Confidential Information as confidential and keep it in secure custody (which is appropriate depending upon the form in which such materials are stored and the nature of the Confidential Information contained in those materials);
  - 24.2.2 not disclose the Disclosing Party's Confidential Information to any other person except as expressly set out in this Agreement or without obtaining the owner's prior written consent;
  - 24.2.3 not use or exploit the Disclosing Party's Confidential Information in any way except for the purposes anticipated under this Agreement; and
  - 24.2.4 immediately notify the Disclosing Party if it suspects or becomes aware of any unauthorised access, copying, use or disclosure in any form of any of the Disclosing Party's Confidential Information.
- 24.3 The Recipient shall be entitled to disclose the Confidential Information of the Disclosing Party where:
- 24.3.1 the Recipient is required to disclose the Confidential Information by Law, provided that Clause 25 (*Transparency and Freedom of Information*) shall apply to disclosures required under the FOIA or the EIRs;
  - 24.3.2 the need for such disclosure arises out of or in connection with:
    - (a) any legal challenge or potential legal challenge against the Authority arising out of or in connection with this Agreement;
    - (b) the examination and certification of the Authority's accounts (provided that the disclosure is made on a confidential basis) or for any examination pursuant to section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority is making use of any Products or Services provided under this Agreement; or
    - (c) the conduct of a Crown Body review in respect of this Agreement; or



- 24.3.3 the Recipient has reasonable grounds to believe that the Disclosing Party is involved in activity that may constitute a criminal offence under the Bribery Act 2010 and the disclosure is being made to the Serious Fraud Office.
- 24.4 If the Recipient is required by Law to make a disclosure of Confidential Information, the Recipient shall as soon as reasonably practicable and to the extent permitted by Law notify the Disclosing Party of the full circumstances of the required disclosure including the relevant Law and/or regulatory body requiring such disclosure and the Confidential Information to which such disclosure would apply.
- 24.5 The Supplier may disclose the Confidential Information of the Authority on a confidential basis only to:
- 24.5.1 Supplier Personnel who are directly involved in the provision of the Products or Services and need to know the Confidential Information to enable performance of the Supplier's obligations under this Agreement;
- 24.5.2 its auditors; and
- 24.5.3 its professional advisers for the purposes of obtaining advice in relation to this Agreement.

Where the Supplier discloses Confidential Information of the Authority pursuant to this Clause 24.5, it shall remain responsible at all times for compliance with the confidentiality obligations set out in this Agreement by the persons to whom disclosure has been made.

- 24.6 The Authority may disclose the Confidential Information of the Supplier (which for the avoidance of doubt shall include, but shall not be limited to, benchmarking data provided by the Supplier in a Value for Money Report in accordance with Schedule 24 (*Reports and Records Provision*) and Open Book Data provided by the Supplier in accordance with Schedule 15 (*Charges and Invoicing*)):
- 24.6.1 on a confidential basis to any Crown Body for any proper purpose of the Authority or of the relevant Crown Body;
- 24.6.2 to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
- 24.6.3 to the extent that the Authority (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;

- 24.6.4 on a confidential basis to a professional adviser, consultant, supplier or other person engaged by any of the entities described in Clause 24.6.1 (including any benchmarking organisation) for any purpose relating to or connected with this Agreement;
- 24.6.5 on a confidential basis for the purpose of the exercise of its rights under this Agreement, including without limitation Exit Management rights; or
- 24.6.6 on a confidential basis to a proposed Successor Body in connection with any assignment, novation or disposal of any of its rights, obligations or liabilities under this Agreement,

and for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on the Authority under this Clause 24.

- 24.7 Nothing in this Clause 24 shall prevent a Recipient from using any techniques, ideas or know-how gained during the performance of this Agreement in the course of its normal business to the extent that this use does not result in a disclosure of the Disclosing Party's Confidential Information or an infringement of Intellectual Property Rights.

## 25 TRANSPARENCY AND FREEDOM OF INFORMATION

- 25.1 The Parties acknowledge that:

- 25.1.1 the content of this Agreement, including any changes to this Agreement agreed from time to time, except for:

- (a) any information which is exempt from disclosure in accordance with the provisions of the FOIA, which shall be determined by the Authority; and
- (b) Commercially Sensitive Information; and
- (c) the Publishable Performance Information,

(together the "**Transparency Information**") are not Confidential Information.

- 25.2 Notwithstanding any other provision of this Agreement, the Supplier hereby gives its consent for the Authority to publish to the general public the Transparency Information in its entirety (but with any information which is exempt from disclosure in accordance with the provisions of the FOIA redacted). The Authority shall, prior to

publication, consult with the Supplier on the manner and format of publication and to inform its decision regarding any redactions but shall have the final decision in its absolute discretion.

- 25.3 The Supplier shall assist and co-operate with the Authority to enable the Authority to publish the Transparency Information.
- 25.4 If the Authority believes that publication of any element of the Transparency Information would be contrary to the public interest, the Authority shall be entitled to exclude such information from publication. The Authority acknowledges that it would expect the public interest by default to be best served by publication of the Transparency Information in its entirety. Accordingly, the Authority acknowledges that it will only exclude Transparency Information from publication in exceptional circumstances and agrees that where it decides to exclude information from publication it will provide a clear explanation to the Supplier.
- 25.5 The Authority shall publish the Transparency Information in a format that assists the general public in understanding the relevance and completeness of the information being published to ensure the public obtain a fair view on how the Agreement is being performed, having regard to the context of the wider commercial relationship with the Supplier.
- 25.6 The Supplier agrees that any Information it holds that is reasonably relevant to or that arises from the provision of the Products or Services shall be provided to the Authority on request unless the cost of doing so would exceed the appropriate limit prescribed under section 12 of the FOIA. The Authority may disclose such information under the FOIA and the EIRs and may (except for Commercially Sensitive Information, Confidential Information (subject to Clause 24.6.3) and Open Book Data) publish such Information. The Supplier shall provide to the Authority within five (5) Working Days (or such other period as the Authority may reasonably specify) any such Information requested by the Authority.
- 25.7 The Supplier acknowledges that the Authority is subject to the requirements of the FOIA and the EIRs. The Supplier shall:
- 25.7.1 provide all necessary assistance and cooperation as reasonably requested by the Authority to enable the Authority to comply with its obligations under the FOIA and EIRs;

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

## **26 PROTECTION OF PERSONAL DATA**

- 26.1 The Supplier shall indemnify the Authority against any and all Losses incurred by the Authority due to breach by the Supplier of Data Protection Legislation or Clause 26.

### **Status of the Controller**

- 26.2 The Parties acknowledge that for the purposes of the Data Protection Legislation, the nature of the activity carried out by each of them in relation to their respective obligations under this Agreement will determine the status of each Party under the Data Protection Legislation. A Party may act as:
- 26.2.1 "Controller" (where the other Party acts as the "Processor");
  - 26.2.2 "Processor" (where the other Party acts as the "Controller");
  - 26.2.3 "Joint Controller" (where both Parties are considered to jointly control the same Personal Data);

26.2.4 “Independent Controller” of the Personal Data where the other Party is also “Controller” of the same Personal Data in its own right (but there is no element of joint control),

and the Parties shall set out in Schedule 31 (*Processing Personal Data*) which scenario or scenarios are intended to apply under this Agreement.

**Where one Party is Controller and the other Party its Processor**

26.3 The Parties acknowledge that for the purposes of the Data Protection Legislation, where one Party processes Personal Data as a Processor, it may do so on behalf of the other Party as the Controller.

26.4 Schedule 31 (*Processing Personal Data*) sets out the details of the Personal Data processing activities that may be carried out by the Processor on behalf of the Controller. To the extent that a Party processes Personal Data on behalf of the other Party as Processor, the Processor shall comply with this Clause 26.

26.5 The only processing that either Party when acting as Processor is authorised to do is listed in Schedule 31 (*Processing Personal Data*). The term "processing" and any associated terms are to be read in accordance with Article 4 of the UK GDPR.

26.6 The Processor shall notify the Controller immediately if it considers that any of the Controller's instructions infringe the Data Protection Legislation.

26.7 The Processor shall provide all reasonable assistance to the Controller in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of the Controller, include assisting with the following tasks and/or providing the following information:

26.7.1 a systematic description of the envisaged processing operations and the purpose of the processing;

26.7.2 an assessment of the necessity and proportionality of the processing operations in relation to the Services;

26.7.3 an assessment of the risks to the rights and freedoms of Data Subjects;  
and

26.7.4 the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal Data.

26.8 The Processor shall, in relation to any Personal Data processed in connection with its obligations under this Agreement:

26.8.1 shall process the Personal Data only in accordance with Schedule 31 (*Processing Personal Data*) unless the Processor is required to do otherwise by Law. If it is so required, the Processor shall promptly notify the Controller before processing the Personal Data unless prohibited by Law;

26.8.2 ensure that it has in place Protective Measures, including the measures set out in Clause 23 (*Authority Data and Security Requirements*), which the Controller may reasonably reject (but failure to reject shall not amount to approval by the Controller of the adequacy of the Protective Measures) having taken account of the:

- (a) nature of the data to be protected;
- (b) harm that might result from a Data Loss Event;
- (c) state of technological development; and
- (d) cost of implementing any measures;

26.8.3 ensure that:

- (a) the Processor Personnel do not process Personal Data except in accordance with this Agreement (and in particular Schedule 31 (*Processing Personal Data*));
- (b) it takes all reasonable steps to ensure the reliability and integrity of any Processor Personnel who have access to the Personal Data and ensure that they:
  - (i) are aware of and comply with the Processor's duties under this Clause, Clauses 24 (*Confidentiality*) and 23 (*Authority Data and Security Requirements*);
  - (ii) are subject to appropriate confidentiality undertakings with the Processor or any Sub-processor;
  - (iii) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any

third party unless directed in writing to do so by the Controller or as otherwise permitted by this Agreement; and

- (iv) have undergone adequate training in the use, care, protection and handling of Personal Data;

26.8.4 not transfer Personal Data outside of the United Kingdom, other than to the Controller, unless the prior written consent of the Controller has been obtained and the following conditions are fulfilled:

- (a) the destination country has been recognised as adequate by the UK government in accordance with the Data Protection Legislation;
- (b) the Controller or the Processor has provided appropriate safeguards in relation to the transfer in accordance with Data Protection Legislation as determined by the Controller;
- (c) the Data Subject has enforceable rights and effective legal remedies;
- (d) the Processor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist the Controller in meeting its obligations); and
- (e) the Processor complies with any reasonable instructions notified to it in advance by the Controller with respect to the processing of the Personal Data; and

26.8.5 at the written direction of the Controller, delete or return Personal Data (and any copies of it) to the Controller on termination of the Agreement unless the Processor is required by Law to retain the Personal Data.

26.9 The Processor shall, in respect of any transfers of Personal Data outside of the United Kingdom that are authorised by the Controller in accordance with Clause 26.8.4, to the extent permitted by Law:

26.9.1 provide all reasonable assistance to the Controller to enable the Controller to carry out a transfer risk assessment in respect of such transfers if required to ensure compliance with the Data Protection Legislation;

26.9.2 notify the Controller immediately if it becomes aware of any change to the relevant country's data protection laws;

- 26.9.3 work with the Controller to implement any additional safeguards or supplementary measures reasonably requested by the Controller to ensure compliance with Data Protection Legislation;
- 26.9.4 notify the Controller immediately if it becomes aware of any request from a government or law enforcement agency (“**Requesting Body**”) in any third country for a copy of, or access to, Personal Data (a “**Request**”) and, in such circumstances:
  - (a) inform the Requesting Body that Personal Data may not be disclosed to the Requesting Body without the Authority's consent; and
  - (b) not provide a copy of or access to Personal Data, or allow a copy or access to be provided, in response to any Request without the Authority's prior written consent.
- 26.10 Subject to Clause 26.11, the Processor shall notify the Controller immediately if it:
  - 26.10.1 receives a Data Subject Request (or purported Data Subject Request);
  - 26.10.2 receives a request to rectify, block or erase any Personal Data;
  - 26.10.3 receives any other request, complaint or communication relating to either Party's obligations under Data Protection Legislation;
  - 26.10.4 receives any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data processed under this Agreement;
  - 26.10.5 receives a request from any third Party for disclosure of Personal Data where compliance with such request is required or purported to be required by Law; or
  - 26.10.6 becomes aware of a Data Loss Event.
- 26.11 The Processor's obligation to notify under Clause 26.10 shall include the provision of further information to the Controller in phases, as details become available.
- 26.12 Taking into account the nature of the processing, the Processor shall provide the Controller with full assistance in relation to the Controller's obligations under Data Protection Legislation any complaint, communication or request made under Clause



26.9 and any Data Loss Event (and insofar as possible within the timescales reasonably required by the Controller) including by promptly providing:

- 26.12.1 the Controller with full details and copies of the complaint, communication, or request;
- 26.12.2 such assistance as is reasonably requested by the Controller to enable it to comply with a Data Subject Request within the relevant timescales set out in the Data Protection Legislation;
- 26.12.3 the Controller, at its request, with any Personal Data it holds in relation to a Data Subject;
- 26.12.4 assistance as requested by the Controller following any Data Loss Event; and/or
- 26.12.5 assistance as requested by the Controller with respect to any request from the Information Commissioner's Office, or any consultation by the Controller with the Information Commissioner's Office.

26.13 The Processor shall maintain complete and accurate records and information to demonstrate its compliance with this Clause. This requirement does not apply where the Processor employs fewer than 250 staff, unless:

- 26.13.1 the Controller determines that the processing is not occasional;
- 26.13.2 the Controller determines the processing includes special categories of data as referred to in Article 9(1) of the UK GDPR or Personal Data relating to criminal convictions and offences referred to in Article 10 of the UK GDPR; or
- 26.13.3 the Controller determine that the processing is likely to result in a risk to the rights and freedoms of Data Subjects.

26.14 The Processor shall allow for audits of its Data Processing activity by the Controller or the Controller's designated auditor.

26.15 The Parties shall designate a Data Protection Officer if required by the Data Protection Legislation.

- 26.16 Before allowing any Sub-processor to process any Personal Data related to this Agreement, the Processor must:
- 26.16.1 notify the Controller in writing of the intended Sub-processor and processing;
  - 26.16.2 obtain the written consent of the Controller; and
  - 26.16.3 enter into a written agreement with the Sub-processor which contains terms substantially equivalent to those set out in this Clause 26 such that they apply to the Sub-processor;
  - 26.16.4 provide the Controller with such information regarding the Sub-processor as the Controller may reasonably require.
- 26.17 The Processor shall remain fully liable for all acts or omissions of any of its Sub-processors.
- 26.18 The Authority may, at any time on not less than thirty (30) Working Days' notice, revise this Clause by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when incorporated by attachment to this Agreement).
- 26.19 The Parties agree to take account of any guidance issued by the Information Commissioner's Office. The Authority may on not less than thirty (30) Working Days' notice to the Supplier amend this Agreement to ensure that it complies with any guidance issued by the Information Commissioner's Office.

#### **Where the Parties are Joint Controllers of Personal Data**

- 26.20 In the event that the Parties are Joint Controllers in respect of Personal Data under this Agreement, the Parties shall implement Clauses that are necessary to comply with Article 26 of the UK GDPR based on the terms set out in Annex 1 to Schedule 31 (*Processing Personal Data*).

#### **Where the Parties are Independent Controllers of Personal Data**

- 26.21 With respect to Personal Data provided by one Party to another Party for which each Party acts as Controller but which is not under the Joint Control of the Parties, each Party undertakes to comply with the applicable Data Protection Legislation in respect of their processing of such Personal Data as Controller and shall not do anything to cause the other Party to be in breach of it.

- 26.22 Where a Party has provided Personal Data to the other Party in accordance with Clause 26.21, the recipient of the Personal Data will provide all such relevant documents and information relating to its data protection policies and procedures as the other Party may reasonably require.
- 26.23 The Parties shall be responsible for their own compliance with Articles 13 and 14 of the UK GDPR in respect of the processing of Personal Data for the purposes of this Agreement.
- 26.24 The Parties shall only provide Personal Data to each other:
- 26.24.1 to the extent necessary to perform the respective obligations under this Agreement;
  - 26.24.2 in compliance with the Data Protection Legislation (including by ensuring all required fair processing information has been given to affected Data Subjects);
  - 26.24.3 where the provision of Personal Data from one Party to another involves transfer of such data to outside the UK and/or the EEA, if the prior written consent of the non-transferring Party has been obtained and the following conditions are fulfilled:
    - (a) the destination country has been recognised as adequate by the UK government in accordance with the Data Protection Legislation;
    - (b) the Controller or the Processor has provided appropriate safeguards in relation to the transfer in accordance with Data Protection Legislation as determined by the Controller;
    - (c) the Data Subject has enforceable rights and effective legal remedies;
    - (d) the Processor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist the Controller in meeting its obligations); and
    - (e) the Processor complies with any reasonable instructions notified to it in advance by the Controller with respect to the processing of the Personal Data; and
  - 26.24.4 where it has recorded it in Schedule 31 (Processing Personal Data).

- 26.25 Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, each Party shall, with respect to its processing of Personal Data as independent Controller, implement and maintain appropriate technical and organisational measures to ensure a level of security appropriate to that risk, including, as appropriate, the measures referred to in Article 32(1)(a), (b), (c) and (d) of the UK GDPR, and the measures shall, at a minimum, comply with the requirements of the Data Protection Legislation, including Article 32 of the UK GDPR.
- 26.26 A Party processing Personal Data for the purposes of this Agreement shall maintain a record of its processing activities in accordance with Article 30 of the UK GDPR and shall make the record available to the other Party upon reasonable request.
- 26.27 Where a Party receives a request by any Data Subject to exercise any of their rights under the Data Protection Legislation in relation to the Personal Data provided to it by the other Party pursuant to this Agreement ("**the Request Recipient**"):
- 26.27.1 the other Party shall provide any information and/or assistance as reasonably requested by the Request Recipient to help it respond to the request or correspondence, at the cost of the Request Recipient; or
  - 26.27.2 where the request or correspondence is directed to the other party and/or relates to the other party's Processing of the Personal Data, the Request Recipient will:
    - (a) promptly, and in any event within five (5) Working Days of receipt of the request or correspondence, inform the other party that it has received the same and shall forward such request or correspondence to the other party; and
    - (b) provide any information and/or assistance as reasonably requested by the other party to help it respond to the request or correspondence in the timeframes specified by Data Protection Legislation.
- 26.28 Each party shall promptly notify the other Party upon it becoming aware of any Data Loss Event relating to Personal Data provided by the other party pursuant to this Agreement and shall:
- 26.28.1 do all such things as reasonably necessary to assist the other Party in mitigating the effects of the Data Breach;
-

- 26.28.2 implement any measures necessary to restore the security of any compromised Personal Data;
  - 26.28.3 work with the other Party to make any required notifications to the Information Commissioner's Office or any other regulatory authority and affected Data Subjects in accordance with the Data Protection Legislation (including the timeframes set out therein); and
  - 26.28.4 not do anything which may damage the reputation of the other Party or that Party's relationship with the relevant Data Subjects, save as required by Law.
- 26.29 Personal Data provided by one Party to the other Party may be used exclusively to exercise rights and obligations under this Agreement as specified in Schedule 31 (Processing Personal Data).
- 26.30 Personal Data shall not be retained or processed for longer than is necessary to perform each Party's obligations under this Agreement which is specified in Schedule 31 (Processing Personal Data).
- 26.31 Notwithstanding the general application of Clauses 26.3 to 26.19 to Personal Data, where the Supplier is required to exercise its regulatory and/or legal obligations in respect of Personal Data, it shall act as an Independent Controller of Personal Data in accordance with Clause 26.21 to 26.30.

## **27 PUBLICITY AND BRANDING**

- 27.1 The Supplier shall not:
- 27.1.1 make any press announcements or publicise this Agreement or its contents in any way; or
  - 27.1.2 use the Authority's name or brand in any promotion or marketing or announcement of orders,
- without the prior written consent of the Authority, which shall not be unreasonably withheld or delayed.
- 27.2 Each Party acknowledges to the other that nothing in this Agreement either expressly or by implication constitutes an endorsement of any products or services of the other Party (including the Products or Services) and each Party agrees not to conduct itself in such a way as to imply or express any such approval or endorsement.

## SECTION G – LIABILITY, INDEMNITIES, AND INSURANCE

### 28 LIMITATIONS ON LIABILITY

#### Unlimited liability

28.1 Neither Party limits its liability for:

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

28.2 The Supplier's liability in respect of the indemnities in Clause 3.9 (*Warranties*), Clause 15.6 (*VAT*), Clause 19.6 (*Employment Indemnity*), Clause 19.7 (*Income Tax and National Insurance Contributions*), Clause 21.1 (*IPRs Indemnity*), Clauses 29.1.1 and 29.1.3 (*Indemnity*), and Schedule 28 (*Staff Transfer*) shall be unlimited.

28.3 The Authority's liability in respect of the indemnities in Clause 19.6 (*Employment Indemnity*) and Schedule 28 (*Staff Transfer*) shall be unlimited.

#### Financial and other limits

28.4 Subject to Clauses 28.1 and 28.2 (*Unlimited Liability*) and Clause 28.7 (*Consequential losses*):

- 28.4.1 the Supplier's aggregate liability in respect of loss of or damage to the Authority Premises or other property or assets of the Authority (including technical infrastructure, assets or equipment but excluding any loss or damage to the Authority's Data or any other data) that is caused by Defaults of the Supplier occurring in each and any Contract Year, which shall include the Supplier's liability under the indemnity at Clause 29.1.2, shall in no event exceed ten million pounds (£10 million);

- 28.4.2 the Supplier's aggregate liability in respect of:
- (a) loss or damage to Authority Data;
  - (b) breach of the Data Protection Legislation,
- that is caused by Default of the Supplier occurring in each and any Contract Year shall in no event exceed three million pounds (£3 million);

- 28.4.3 the Supplier's aggregate liability in respect of all:
- (i) Service Credits; and
  - (ii) Compensation for Unacceptable KPI Failure,
- incurred in respect of any Service Period shall not exceed a sum equal to three percent (3%) of the Charges paid and payable to the Supplier in the Service Period to which the Service Credit relates (the “**Service Credit Cap**”); and

- 28.4.4 the Supplier's aggregate liability in respect of all other Losses incurred by the Authority under or in connection with this Agreement as a result of Defaults by the Supplier shall in no event exceed:

- (a) in relation to Defaults occurring during any Contract Year, an amount equal to one hundred and twenty five percent (125%) of the Charges paid and/or due to be paid to the Supplier under this Agreement in the relevant Contract Year; and
- (b) in relation to Defaults occurring after the end of the Term, an amount equal to one hundred and twenty five percent (125%) of the Charges paid and/or due to be paid to the Supplier in the 12 month period immediately prior to the last day of the Term,

provided that where any Losses referred to this Clause 28.4.3 have been incurred by the Authority as a result of the Supplier's abandonment of this Agreement or the Supplier's wilful default, wilful breach of a fundamental term of this Agreement or wilful repudiatory breach of this Agreement, the references in such Clause to one hundred and twenty five percent (125%) shall be deemed to be references to two hundred percent (200%).

- 28.5 Deductions from Charges shall not be taken into consideration when calculating the Supplier's liability under Clause 28.4.3.

28.6 Subject to Clauses 28.1 and 28.3 (*Unlimited Liability*) and Clause 28.7 (*Consequential Losses*) and without prejudice to the Authority's obligation to pay the Charges as and when they fall due for payment:

28.6.1 the Authority's aggregate liability in respect of all Losses incurred by the Supplier under or in connection with this Agreement as a result of Defaults of the Authority shall in no event exceed:

(a) in relation to Defaults occurring during any Contract Year, an amount equal to the total Charges paid and/or due to be paid under this Agreement in the relevant Contract Year; and

(b) in relation to Defaults occurring after the end of the Term, an amount equal to the total Charges paid and/or due to be paid to the Supplier in the twelve (12) month period immediately prior to the last day of the Term.

### **Consequential Losses**

28.7 Subject to Clauses 28.1, 28.2 and 28.3 (*Unlimited Liability*) and Clause 28.8, neither Party shall be liable to the other Party for:

28.7.1 any indirect, special or consequential Loss; or

28.7.2 any loss of profits, turnover, business opportunities or damage to goodwill (in each case whether direct or indirect).

28.8 Notwithstanding Clause 28.7 but subject to Clause 28.4, the Supplier acknowledges that the Authority may, amongst other things, recover from the Supplier the following Losses incurred by the Authority to the extent that they arise as a result of a Default by the Supplier:

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

28.8.2 any wasted expenditure or charges;

28.8.3 extra costs incurred purchasing replacement or alternative products;

28.8.4 costs associated with testing new Products;

28.8.5 costs associated with public health investigations, including Public Health England and Health Services Safety Investigations Body;



- 28.8.6 costs associated with providing additional resourcing requirements (including without limitation, security resource or replacement for incapacitated resource);
- 28.8.7 any costs associated with any claim brought by a third party or compensation or interest paid to a third party by the Authority; and
- 28.8.8 any fine or penalty incurred by the Authority pursuant to Law and any costs incurred by the Authority in defending any proceedings which result in such fine or penalty.

## 29 INDEMNITY

29.1 The Supplier shall be liable to the Authority for, and shall indemnify and keep the Authority indemnified against, any loss, damages, costs, expenses (including without limitation legal costs and expenses), claims or proceedings in respect of:

- 29.1.1 any injury or allegation of injury to any person, including injury resulting in death; and/or
- 29.1.2 any loss of or damage to property (whether real or personal); and
- 29.1.3 any breach of Clause 3.3.20 of this Agreement,

that arise or result from the Supplier's negligent acts or omissions or breach of contract in connection with the performance of this Agreement including the supply of the Products or Services, including any faulty Products or Products that do not comply with General Food Law except to the extent that such loss, damages, costs, expenses (including without limitation legal costs and expenses), claims or proceedings have been caused by any act or omission by, or on behalf of, or in accordance with the instructions of, the Authority.

### Conduct of indemnity claims

- 29.1.4 Where under this Agreement one Party indemnifies the other Party, the Parties shall comply with the provisions of Schedule 27 (*Conduct of Claims*) in relation to the conduct of claims made by a third person against the Party having (or claiming to have) the benefit of the indemnity.

### Mitigation

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

including any Losses for which the relevant Party is entitled to bring a claim against the other Party pursuant to the indemnities in this Agreement.

### **30      INSURANCE**

- 30.1    The Supplier shall comply with the provisions of Schedule 6 (*Insurance Requirements*) in relation to obtaining and maintaining insurance.

## SECTION H – REMEDIES AND RELIEF

### 31 RECTIFICATION PLAN PROCESS

#### 31.1 In the event that:

- 31.1.1 there is, or is reasonably likely to be a Delay; and/or
- 31.1.2 in any Quarter there has been:
  - (a) a Material KPI Failure; and/or
  - (b) a Material PI Failure; and/or
- 31.1.3 the Supplier commits a material Default of this Agreement or a material failure to meet the Authority Requirements that is capable of remedy (and for these purposes a material Default or failure may be a single material Default or failures or a number of Defaults or failures or repeated Defaults or failures (whether of the same or different obligations and regardless of whether such Defaults or failures are remedied) which taken together constitute a material Default or failure); and/or
- 31.1.4 there is any KPI Failure arising in respect of the same KPI two (2) or more consecutive Quarters,

(each a "**Notifiable Default**"), the Supplier shall notify the Authority of the Notifiable Default as soon as practicable but in any event within three (3) Working Days of becoming aware of the Notifiable Default, detailing the actual or anticipated effect of the Notifiable Default and, unless the Notifiable Default also constitutes a Rectification Plan Failure or other Supplier Termination Event, the Authority may not terminate this Agreement in whole or in part on the grounds of the Notifiable Default without first following the Rectification Plan Process.

#### Notification

#### 31.2 If:

- 31.2.1 the Supplier notifies the Authority pursuant to Clause 31.1 that a Notifiable Default has occurred; or
- 31.2.2 the Authority notifies the Supplier that it considers that a Notifiable Default has occurred (setting out sufficient detail so that it is reasonably clear what the Supplier has to rectify),

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

- 31.3 The "**Rectification Plan Process**" shall be as set out in Clauses 31.4 (*Submission of the draft Rectification Plan*) to 31.9 (*Agreement of the Rectification Plan*).

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

- 31.4 The Supplier shall submit a draft Rectification Plan to the Authority for it to review as soon as possible and in any event within ten (10) Working Days (or such other period as may be agreed between the Parties) after the original notification pursuant to Clause 31.2 (*Notification*). The Supplier shall submit a draft Rectification Plan even if the Supplier disputes that it is responsible for the Notifiable Default.

- 31.5 The draft Rectification Plan shall set out:

- 31.5.1 full details of the Notifiable Default that has occurred, including a root cause analysis;
- 31.5.2 the actual or anticipated effect of the Notifiable Default; and
- 31.5.3 the steps which the Supplier proposes to take to rectify the Notifiable Default (if applicable) and to prevent such Notifiable Default from recurring, including timescales for such steps and for the rectification of the Notifiable Default (where applicable).

- 31.6 The Supplier shall promptly provide to the Authority any further documentation that the Authority reasonably requires to assess the Supplier's root cause analysis. If the Parties do not agree on the root cause set out in the draft Rectification Plan, either Party may refer the matter to be determined by an expert in accordance with Paragraph 6 of Schedule 23 (*Dispute Resolution Procedure*).

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

- 31.7 The Authority may reject the draft Rectification Plan by notice to the Supplier if, acting reasonably, it considers that the draft Rectification Plan is inadequate, for example because the draft Rectification Plan:

- 31.7.1 is insufficiently detailed to be capable of proper evaluation;
- 31.7.2 will take too long to complete;
- 31.7.3 will not prevent reoccurrence of the Notifiable Default; and/or

31.7.4 will rectify the Notifiable Default but in a manner which is unacceptable to the Authority.

31.8 The Authority shall notify the Supplier whether it consents to the draft Rectification Plan as soon as reasonably practicable. If the Authority rejects the draft Rectification Plan, the Authority shall give reasons for its decision and the Supplier shall take the reasons into account in the preparation of a revised Rectification Plan. The Supplier shall submit the revised draft of the Rectification Plan to the Authority for review within five (5) Working Days (or such other period as agreed between the Parties) of the Authority's notice rejecting the first draft.

31.9 If the Authority consents to the Rectification Plan:

31.9.1 the Supplier shall immediately start work on the actions set out in the Rectification Plan; and

31.9.2 the Authority may no longer terminate this Agreement in whole or in part on the grounds of the relevant Notifiable Default;

save in the event of a Rectification Plan Failure or other Supplier Termination Event.

31.10 The Parties shall meet and discuss the Supplier's performance against any Rectification Plan at the next Performance Management Meeting.

## **32 DELAY PAYMENTS**

32.1 If the Key Milestones have not all been Accepted by the Planned Supply Commencement Date, the provisions of Paragraph 1 of Part C of Schedule 15 (Charges and Invoicing) shall apply in relation to the payment of Delay Payments.

32.2 Delay Payments shall be the Authority's exclusive financial remedy for the Supplier's failure to obtain Acceptance of the Key Milestones by the Planned Supply Commencement Date except where:

32.2.1 the Authority is entitled to or does terminate this Agreement pursuant to Clause 39.2 (Termination by the Authority); or

32.2.2 the Delay exceeds the Delay Deduction Period.

## **33 REMEDIAL ADVISER**

33.1 If:

- 33.1.1 any of the Intervention Trigger Events occur; or
- 33.1.2 the Authority reasonably believes that any of the Intervention Trigger Events are likely to occur,

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

- 33.1.3 a meeting between Operational Contract Managers to discuss the Intervention Cause; and/or
- 33.1.4 the appointment as soon as practicable by the Supplier of a Remedial Adviser, as further described in this Clause 33.

For the avoidance of doubt, if the Intervention Cause is also a Supplier Termination Event, the Authority has no obligation to exercise its rights under this Clause 33.1 prior to or instead of exercising its right to terminate this Agreement.

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

33.2.1 the Remedial Adviser shall be:

- (a) a person selected by the Supplier and approved by the Authority; or
- (b) if none of the persons selected by the Supplier have been approved by the Authority (or no person has been selected by the Supplier) within ten (10) Working Days following the date on which the Intervention Notice is given, a person identified by the Authority;

33.2.2 the terms of engagement and start date agreed with the Remedial Adviser must be approved by the Authority; and

33.2.3 any right of the Authority to terminate this Agreement pursuant to Clause 36.2.2 (Termination by the Authority) for the occurrence of that Intervention Cause shall be suspended for sixty (60) Working Days from (and including) the date of the Intervention Notice (or such other period as may be agreed between the Parties) (the “**Intervention Period**”).

33.3 The Remedial Adviser’s overall objective shall be to mitigate the effects of, and (to the extent capable of being remedied) to remedy, the Intervention Cause and to avoid the occurrence of similar circumstances in the future. In furtherance of this objective (but without diminishing the Supplier’s responsibilities under this Agreement), the

Parties agree that the Remedial Adviser may undertake any one or more of the following actions:

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

33.4 The Supplier shall:

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

33.5 The Supplier shall be responsible for:

33.5.1 the costs of appointing, and the fees charged by, the Remedial Adviser;  
and

33.5.2 its own costs in connection with any action required by the Authority  
and/or the Remedial Adviser pursuant to this Clause 33.

33.6 If:

33.6.1 the Supplier:

(a) fails to perform any of the steps required by the Authority in an  
Intervention Notice; and/or

(b) is in Default of any of its obligations under Clause 33.4; and/or

33.6.2 the relevant Intervention Trigger Event is not rectified by the end of the  
Intervention Period,

(each a “**Remedial Adviser Failure**”), the Authority shall be entitled to terminate this  
Agreement pursuant to Clause 39.2.2 (*Termination by the Authority*).

#### **34 STEP-IN RIGHTS**

34.1 On the occurrence of a Step-In Trigger Event, the Authority may serve notice on the  
Supplier (a “**Step-In Notice**”) that it will be taking action under this Clause 34 (“**Step-  
in Rights**”), either itself or with the assistance of a third party (provided that the  
Supplier may require any third parties to comply with a confidentiality undertaking  
equivalent to Clause 24 (*Confidentiality*)). The Step-In Notice shall set out the  
following:

34.1.1 the action the Authority wishes to take and in particular the Services that  
it wishes to control (the “**Required Action**”);

34.1.2 the Step-In Trigger Event that has occurred and whether the Authority  
believes that the Required Action is due to the Supplier's Default;

34.1.3 the date on which it wishes to commence the Required Action;

34.1.4 the time period which it believes will be necessary for the Required  
Action;

34.1.5 whether the Authority will require access to the Supplier's premises  
and/or the Sites; and



- 34.1.6 to the extent practicable, the impact that the Authority anticipates the Required Action will have on the Supplier's obligations to provide the Services during the period that the Required Action is being taken.
- 34.2 Following service of a Step-In Notice, the Authority shall:
  - 34.2.1 take the Required Action set out in the Step-In Notice and any consequential additional action as it reasonably believes is necessary to achieve the Required Action;
  - 34.2.2 keep records of the Required Action taken and provide information about the Required Action to the Supplier;
  - 34.2.3 co-operate wherever reasonable with the Supplier in order to enable the Supplier to continue to provide the Services in relation to which the Authority is not assuming control; and
  - 34.2.4 act reasonably in mitigating the cost that the Supplier will incur as a result of the exercise of the Authority's rights under this Clause 34.
- 34.3 For so long as and to the extent that the Required Action is continuing, then:
  - 34.3.1 the Supplier shall not be obliged to provide the Products or Services to the extent that they are the subject of the Required Action;
  - 34.3.2 no Deductions shall be applicable in relation to Charges in respect of Services that are the subject of the Required Action and the provisions of Clause 34.4 shall apply to Deductions from Charges in respect of other Services; and
  - 34.3.3 the Authority shall pay to the Supplier the Charges after subtracting any applicable Deductions and the Authority's costs of taking the Required Action.
- 34.4 If the Supplier demonstrates to the reasonable satisfaction of the Authority that the Required Action has resulted in:
  - 34.4.1 the degradation of the supply of the Products or any Services not subject to the Required Action; or
  - 34.4.2 the non-Acceptance of a Milestone,

beyond that which would have been the case had the Authority not taken the Required Action, then the Supplier shall be entitled to an agreed adjustment of the Charges.

34.5 Before ceasing to exercise its step in rights under this Clause 34 the Authority shall deliver a written notice to the Supplier (a “**Step-Out Notice**”), specifying:

34.5.1 the Required Action it has actually taken; and

34.5.2 the date on which the Authority plans to end the Required Action (the “**Step-Out Date**”), which shall be as soon as reasonably practicable, subject to the Authority being satisfied with the Supplier's ability to resume the supply of Products and provision of the Services and the Supplier's plan developed in accordance with Clause 34.6.

34.6 The Supplier shall, following receipt of a Step-Out Notice and not less than twenty (20) Working Days prior to the Step-Out Date, develop for the Authority's approval a draft plan (a “**Step-Out Plan**”) relating to the resumption by the Supplier of the supply of Products and Services, including any action the Supplier proposes to take to ensure that the affected Products and Services satisfy the requirements of this Agreement.

34.7 If the Authority does not approve the draft Step-Out Plan, the Authority shall inform the Supplier of its reasons for not approving it. The Supplier shall then revise the draft Step-Out Plan taking those reasons into account and shall re-submit the revised plan to the Authority for the Authority's approval. The Authority shall not withhold or delay its approval of the draft Step-Out Plan unnecessarily.

34.8 The Supplier shall bear its own costs in connection with any step-in by the Authority under this Clause 34, provided that the Authority shall reimburse the Supplier's reasonable additional expenses incurred directly as a result of any step-in action taken by the Authority under:

34.8.1 limbs (c) or (d) of the definition of a Step-In Trigger Event; or

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

## **35 REPLACEMENT PRODUCTS**

35.1 Where there is:

- 35.1.1 a Material KPI Failure;
- 35.1.2 a failure to deliver any of the Implementation Activities by the Supply Commencement Date;
- 35.1.3 a material Default;
- 35.1.4 a material failure to comply with the Authority Requirements;;
- 35.1.5 an actual or anticipated threat (in the reasonable opinion of the Authority) to the health and safety of prisoners, non-prisoners and any recipient of the Products as a result of an issue with the Products; or
- 35.1.6 a Rectification Plan Failure,

then without prejudice to any other rights and remedies of the Authority (including any right to reject any Products in accordance with Clause 9 or any rights to terminate this Agreement in accordance with Clause 39), the Authority may temporarily suspend the provision of the Products under this Agreement, and may either itself or with the assistance of a third party (including any Key Sub-contractors of the Supplier) procure replacement products until such time as the Supplier has demonstrated to the Authority's reasonable satisfaction that it is capable of delivering the Products in accordance with the terms of this Agreement.

- 35.2 For the period of such suspension, the Authority shall be entitled to recover from the Supplier any additional costs incurred by the Authority in the procuring of such replacement products.

## **36 AUTHORITY OBLIGATIONS**

- 36.1 Notwithstanding any other provision of this Agreement, subject to the Supplier supplying the Products and Services in accordance with this Agreement the Authority shall:
  - 36.1.1 pay the Supplier for the Products and Services in accordance with Clause 15 and Schedule 15 (*Charges and Invoicing*)
  - 36.1.2 provide copies or give the Supplier access to any policies or other materials as are relevant to the supply and delivery of the Products and Services;
  - 36.1.3 use reasonable endeavours to provide the Supplier with reasonable and proportionate co-operation necessary to enable the Supplier to comply

with its obligations under this Agreement. The Supplier shall at all times provide reasonable advance written notification to the Authority of any such co-operation necessary in circumstances where such co-operation will require the Authority to plan for and/or allocate specific resources in order to provide such co-operation;

36.1.4 carry out the Authority Responsibilities.

### **37 AUTHORITY CAUSE**

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

37.1.1 obtain the Acceptance of a Milestone by its Milestone Date;

37.1.2 provide the Services or deliver the Products in accordance with the Target Performance Levels; and/or

37.1.3 comply with its obligations under this Agreement,

(each a “**Supplier Non-Performance**”),

and can demonstrate that the Supplier Non-Performance would not have occurred but for an Authority Cause, then (subject to the Supplier fulfilling its obligations in this Clause 37):

(a) the Supplier shall not be treated as being in breach of this Agreement to the extent the Supplier can demonstrate that the Supplier Non-Performance was caused by the Authority Cause;

(b) the Authority shall not be entitled to exercise any rights that may arise as a result of that Supplier Non-Performance:

(i) to terminate this Agreement pursuant to Clause 39.2 (*Termination by the Authority*); or

(ii) to take action pursuant to Clauses 33 (*Remedial Adviser*) or 34 (*Step-In*);

(c) where the Supplier Non-Performance constitutes the failure to obtain the Acceptance of a Milestone by its Milestone Date:

- (i) the Milestone Date shall be postponed by a period equal to the period of Delay that the Supplier can demonstrate was caused by the Authority Cause;
- (ii) if the Authority, acting reasonably, considers it appropriate, the Agreed Implementation Plan shall be amended to reflect any consequential revisions required to subsequent Milestone Dates and/or the Planned Supply Commencement Date resulting from the Authority Cause;

37.1.4 where the Supplier Non-Performance constitutes a KPI Failure:

- (i) the Supplier shall not be liable to accrue Service Credits;
- (ii) the Authority shall not be entitled to withhold and retain any Compensation for Unacceptable KPI Failure pursuant to Clause 13.6.1 (*Unacceptable KPI Failure*); and
- (iii) the Supplier shall be entitled to invoice for the Charges for the relevant Services affected by the Authority Cause,

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

37.2 In order to claim any of the rights and/or relief referred to in Clause 37.1, the Supplier shall as soon as reasonably practicable (and in any event within ten (10) Working Days) after becoming aware that an Authority Cause has caused, or is reasonably likely to cause, a Supplier Non-Performance, give the Authority notice (a “**Relief Notice**”) setting out details of:

37.2.1 the Supplier Non-Performance;

37.2.2 the Authority Cause and its effect, or likely effect, on the Supplier’s ability to meet its obligations under this Agreement;

37.2.3 any steps which the Authority can take to eliminate or mitigate the consequences and impact of such Authority Cause; and

37.2.4 the relief and/or compensation claimed by the Supplier.

37.3 Following the receipt of a Relief Notice, the Authority shall as soon as reasonably practicable consider the nature of the Supplier Non-Performance and the alleged Authority Cause and whether it agrees with the Supplier’s assessment set out in the

Relief Notice as to the effect of the relevant Authority Cause and its entitlement to relief and/or compensation, consulting with the Supplier where necessary.

37.4 The Supplier shall use all reasonable endeavours to eliminate or mitigate the consequences and impact of an Authority Cause, including any Losses that the Supplier may incur and the duration and consequences of any Delay or anticipated Delay.

37.5 Without prejudice to Clause 9.12 (Continuing obligation to provide the Services), if a Dispute arises as to:

37.5.1 whether a Supplier Non-Performance would not have occurred but for an Authority Cause; and/or

37.5.2 the nature and/or extent of the relief and/or compensation claimed by the Supplier,

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

37.6 Any Change that is required to the Agreed Implementation Plan or to the Charges pursuant to this Clause 37 shall be implemented in accordance with the Change Control Procedure.

## **38 FORCE MAJEURE**

38.1 Subject to the remaining provisions of this Clause 38 (and, in relation to the Supplier, subject to its compliance with its obligations in Schedule 26 (*Service Continuity and Corporate Resolution Planning*)), a Party may claim relief under this Clause 38 from liability for failure to meet its obligations under this Agreement for as long as and only to the extent that the performance of those obligations is directly prevented by a Force Majeure Event. Any failure or delay by the Supplier in performing its obligations under this Agreement which results from a failure or delay by an agent, Sub-contractor or supplier shall be regarded as due to a Force Majeure Event only if that agent, Sub-contractor or supplier is itself impeded by a Force Majeure Event from complying with an obligation to the Supplier.

38.2 The Affected Party shall as soon as reasonably practicable issue a Force Majeure Notice, which shall include details of the Force Majeure Event, its effect on the

obligations of the Affected Party and any action the Affected Party proposes to take to mitigate its effect.

- 38.3 If the Supplier is the Affected Party, it shall not be entitled to claim relief under this Clause 38 to the extent that consequences of the relevant Force Majeure Event:
- 38.3.1 are capable of being mitigated, but the Supplier has failed to do so;
  - 38.3.2 should have been foreseen and prevented or avoided by a prudent provider of products or services similar to the Products and Services, operating to the standards required by this Agreement; or
  - 38.3.3 are the result of the Supplier's failure to comply with its Service Continuity Plan (except to the extent that such failure is also due to a Force Majeure Event that affects the execution of the Service Continuity Plan).
- 38.4 Subject to Clause 38.5, as soon as practicable after the Affected Party issues the Force Majeure Notice, and at regular intervals thereafter, the Parties shall consult in good faith and use reasonable endeavours to agree any steps to be taken and an appropriate timetable in which those steps should be taken, to enable continued provision of the Products and Services affected by the Force Majeure Event.
- 38.5 The Parties shall at all times following the occurrence of a Force Majeure Event and during its subsistence use their respective reasonable endeavours to prevent and mitigate the effects of the Force Majeure Event. Where the Supplier is the Affected Party, it shall take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.
- 38.6 Where, as a result of a Force Majeure Event:
- 38.6.1 an Affected Party fails to perform its obligations in accordance with this Agreement, then during the continuance of the Force Majeure Event:
    - (a) the Authority shall not be entitled to exercise its rights to terminate this Agreement in whole or in part as a result of such failure other than pursuant to Clause 39.2.2 (*Termination by the Authority*); and
    - (b) neither Party shall be liable for any Default arising as a result of such failure;

- 38.6.2 the Supplier fails to perform its obligations in accordance with this Agreement:
- (a) the Authority shall not be entitled to:
    - (i) during the continuance of the Force Majeure Event to exercise its rights under Clause 33 (Remedial Adviser) and/or Clause 34 (Step-in Rights) as a result of such failure; and
    - (ii) receive Delay Payments pursuant to Clause 32 to the extent that the delay in achieving the Planned Supply Commencement Date has been caused by the Force Majeure Event; and
    - (iii) receive Service Credits or withhold and retain any of the Charges as compensation pursuant to Clause 13.6.1 (*Unacceptable KPI Failure*) to the extent that a Performance Failure has been caused by the Force Majeure Event.
  - (b) the Supplier shall be entitled to receive payment of the Charges (or a proportional payment of them) only to the extent that the Products and Services (or part of the Products and Services) continue to be performed or delivered in accordance with the terms of this Agreement during the occurrence of the Force Majeure Event.
- 38.7 The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement.
- 38.8 Relief from liability for the Affected Party under this Clause 38 shall end as soon as the Force Majeure Event no longer causes the Affected Party to be unable to comply with its obligations under this Agreement and shall not be dependent on the serving of notice under Clause 38.7.



## **SECTION I – TERMINATION AND EXIT MANAGEMENT**

### **39 TERMINATION RIGHTS**

#### **Termination by the Authority**

- 39.1 The Authority may terminate this Agreement for convenience at any time by giving the Supplier at least twelve (12) months' written notice.
- 39.2 The Authority may terminate this Agreement by issuing a Termination Notice to the Supplier:
- 39.2.1 if a Supplier Termination Event occurs;
  - 39.2.2 if a Force Majeure Event endures for a continuous period of more than ninety (90) days; or
  - 39.2.3 if the Agreement has been substantially amended to the extent that the Public Contracts Regulations 2015 require a new procurement procedure, and this Agreement shall terminate on the date specified in the Termination Notice.
- 39.3 Where the Authority:
- 39.3.1 is terminating this Agreement under Clause 39.2.1 due to the occurrence of either limb (b), (h) and/or (i) of the definition of Supplier Termination Event, it may rely on a single material Default or on a number of Defaults or repeated Defaults (whether of the same or different obligations and regardless of whether such Defaults are cured) which taken together constitute a material Default; and/or
  - 39.3.2 has the right to terminate this Agreement under Clause 39.2.1 or Clause 39.2.2, it may, prior to or instead of terminating the whole of this Agreement, serve a Termination Notice requiring the partial termination of this Agreement to the extent that it relates to any part of the Products and/or Services which are materially affected by the relevant circumstances.

#### **Partial Termination**

- 39.4 The Parties shall agree the effect of any Change necessitated by a Partial Termination in accordance with the Change Control Procedure, including the effect the Partial

Termination may have on any other Products, Services and the Charges, provided that:

- 39.4.1 the Supplier shall not be entitled to an increase in the Charges in respect of the Products or Services that have not been terminated if the Partial Termination arises due to the occurrence of a Supplier Termination Event;
- 39.4.2 any adjustment to the Charges (if any) shall be calculated in accordance with the Financial Model and must be reasonable; and
- 39.4.3 the Supplier shall not be entitled to reject the Change.

## **40 CONSEQUENCES OF EXPIRY OR TERMINATION**

### **General Provisions on Expiry or Termination**

- 40.1 The provisions of Clauses 15.5 and 15.6 (VAT), 15.7 and 15.8 (*Set-off and Withholding*), 17 (*Records, Reports, Audits, Assurance and Open Book Data*), 19.6 (*Employment Indemnity*), 19.7 (*Income Tax and National Insurance Contributions*), 21 (*Intellectual Property Rights*), 24 (*Confidentiality*), 25 (*Transparency and Freedom of Information*), 26 (*Protection of Personal Data*), 28 (*Limitations on Liability*), 40 (*Consequences of Expiry or Termination*), 46 (*Severance*), 48 (*Entire Agreement*), 49 (*Third Party Rights*), 51 (*Disputes*) and 52 (*Governing Law and Jurisdiction*), and the provisions of Schedules 1 (*Definitions*), 15 (*Charges and Invoicing*), 19 (*Financial Reports and Audit Rights*), 23 (*Dispute Resolution Procedure*), 24 (*Reports and Records Provisions*), and 25 (*Exit Management*) shall survive the termination or expiry of this Agreement.

### **Exit Management**

- 40.2 The Parties shall comply with the provisions of Schedule 25 (*Exit Management*) and any current Exit Plan in relation to orderly transition of the Products and Services to the Authority or a Replacement Supplier.

### **Payments by the Authority**

- 40.3 If this Agreement is terminated (in part or in whole), or the Term expires, the only payments that the Authority shall be required to make as a result of such termination

(whether by way of compensation or otherwise) are payments in respect of unpaid Charges for Products and Services received up until the Termination Date.

**Payments by the Supplier**

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

## **SECTION J – MISCELLANEOUS AND GOVERNING LAW**

### **41 COMPLIANCE**

#### **Health and Safety**

41.1 The Supplier shall perform its obligations under this Agreement (including those in relation to the Products and Services) in accordance with:

41.1.1 all applicable Law regarding health and safety; and

41.1.2 the Health and Safety Policy whilst at the Authority Premises.

41.2 Each Party shall notify the other as soon as practicable of any health and safety incidents or material health and safety hazards at the Authority Premises of which it becomes aware, and which relate to or arise in connection with the performance of this Agreement. The Supplier shall instruct the Supplier Personnel to adopt any necessary associated safety measures in order to manage any such material health and safety hazards.

#### **Employment Law**

41.3 The Supplier must perform its obligations meeting the requirements of all applicable Law regarding employment.

#### **Equality and Diversity**

41.4 The Supplier shall:

41.4.1 perform its obligations under this Agreement (including those in relation to the Products and Services) in accordance with:

(a) all applicable equality Law (whether in relation to race, sex, gender reassignment, age, disability, sexual orientation, religion or belief, pregnancy, maternity or otherwise);

(b) the Authority's equality and diversity policy as provided to the Supplier from time to time and provide evidence of its compliance upon reasonable request from the Authority; and

(c) any other requirements and instructions which the Authority reasonably imposes in connection with any equality obligations imposed on the Authority at any time under applicable equality Law; and

- 41.4.2 take all necessary steps, and inform the Authority of the steps taken, to prevent unlawful discrimination designated as such by any court or tribunal, or the Equality and Human Rights Commission or (any successor organisation); and
- 41.4.3 provide copies upon request of the Supplier's equality and diversity policy, and notify the Authority of any update to such policy.

### **Environment and Sustainability**

- 41.5 The Supplier shall at all times comply with the environmental and sustainability requirements set out in the Specification, Schedule 4 (*Standards*), and in any Authority policy from time to time.

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

- 41.6 The Supplier shall comply with the provisions of:
  - 41.6.1 the Official Secrets Acts 1911 to 1989; and
  - 41.6.2 section 182 of the Finance Act 1989.

### **Conflicts of Interest**

- 41.7 The Supplier:
  - 41.7.1 must take action to ensure that neither the Supplier nor the Supplier Personnel are placed in the position of an actual, potential or perceived Conflict of Interest.
  - 41.7.2 must promptly notify and provide details to the Authority if an actual, potential or perceived Conflict of Interest happens or is expected to happen.
- 41.8 The Authority will consider whether there are any appropriate measures that can be put in place to remedy an actual, perceived or potential Conflict of Interest. If, in the reasonable opinion of the Authority, such measures do not or will not resolve an actual or potential Conflict of Interest, the Authority may terminate this Agreement in

accordance with Clause 39.2 immediately by giving notice in writing to the Supplier where there is or may be an actual or potential Conflict of Interest.

## **Modern Slavery**

### **41.9 The Supplier:**

- 41.9.1 shall not use, nor allow its Sub-contractors to use forced, bonded or involuntary prison labour;
- 41.9.2 shall not require any Supplier Personnel or the personnel of any Sub-contractors to lodge deposits or identity papers with their employer and shall be free to leave their employer after reasonable notice;
- 41.9.3 warrants and represents that it has not been convicted of any slavery or human trafficking offences anywhere around the world;
- 41.9.4 warrants that to the best of its knowledge it is not currently under investigation, inquiry or enforcement proceedings in relation to any allegation of slavery or human trafficking offences anywhere around the world;
- 41.9.5 shall make reasonable enquires to ensure that its officers, employees and sub-contractors have not been convicted of slavery or human trafficking offences anywhere around the world;
- 41.9.6 shall have and maintain throughout the Term its own policies and procedures to ensure its compliance with the Modern Slavery Act 2015 and include in its contracts with its Sub-contractors anti-slavery and human trafficking provisions;
- 41.9.7 shall implement due diligence procedures to ensure that there is no slavery or human trafficking in any part of its supply chain performing obligations under the Agreement;
- 41.9.8 shall prepare and deliver to the Authority, an annual slavery and human trafficking report setting out the steps it has taken to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its business;
- 41.9.9 shall not use, nor allow its employees or Sub-contractors to use physical abuse or discipline, the threat of physical abuse, sexual or other

harassment and verbal abuse or other forms of intimidation of its employees or Sub-contractors;

- 41.9.10 shall not use or allow child or slave labour to be used by its Sub-contractors;
- 41.9.11 shall report the discovery or suspicion of any slavery, trafficking, forced labour, child labour, involuntary prison labour or labour rights abuses by it or its Sub-contractors to the Authority and the Modern Slavery Helpline and relevant national or local law enforcement agencies;
- 41.9.12 if the Supplier is in Default under Clauses 41.9.1 to 41.9.11 the Authority may by notice:
  - (a) require the Supplier to remove from performance of the Agreement any Sub-contractor, Supplier Personnel or other persons associated with it whose acts or omissions have caused the Default; or
  - (b) immediately terminate the Agreement in accordance with Clause 39.2.1; and
- 41.9.13 shall, if the Supplier or the Authority identifies any occurrence of modern slavery connected to this Agreement, comply with any request of the Authority to follow the Rectification Plan Process to submit a remedial action plan which follows the form set out in Annex D of the Tackling Modern Slavery in Government Supply Chains guidance to PPN 02/23 (Tackling Modern Slavery in Government Supply Chains);

41.10 If the Supplier notifies the Authority pursuant to Clause 41.9.11 it shall respond promptly to the Authority's enquiries, co-operate with any investigation, and allow the Authority to audit any books, records and/or any other relevant documentation in accordance with the Agreement.

41.11 If the Supplier is in Default under Clause 41.9 the Authority may by notice:

- 41.11.1 require the Supplier to remove from performance of the Agreement any Sub-Contractor, Supplier Personnel or other persons associated with it whose acts or omissions have caused the Default; or
- 41.11.2 immediately terminate the Agreement in accordance with Clause 39.2.1.

## Whistleblowing

41.12 As soon as it is aware of it the Supplier and Supplier Personnel must report to the Authority any actual or suspected breach of:

41.12.1 Law;

41.12.2 Clauses 41.1 to 41.9 or 41.13; or

41.12.3 Clause 45.

41.13 The Supplier must not retaliate against any of the Supplier Personnel who in good faith reports a breach listed in this Clause to the Authority or a Prescribed Person.

## 42 ASSIGNMENT AND NOVATION

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

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

42.2.1 any Crown Body; or

42.2.2 to a body other than a Crown Body (including any private sector body) which performs any of the functions that previously had been performed by the Authority,

and the Supplier shall, at the Authority's request, enter into a novation agreement in such form as the Authority shall reasonably specify in order to enable the Authority to exercise its rights pursuant to this Clause 42.2.

42.3 A change in the legal status of the Authority such that it ceases to be a Crown Body shall not (subject to Clause 42.4) affect the validity of this Agreement and this Agreement shall be binding on any successor body to the Authority.

42.4 If the Authority assigns, novates or otherwise disposes of any of its rights, obligations or liabilities under this Agreement to a body which is not a Crown Body or if a body which is not a Crown Body succeeds the Authority (any such body a "**Successor Body**"), the Supplier shall have the right to terminate for an Insolvency Event affecting the Successor Body identical to the right of termination of the Authority under limb



(j) of the definition of Supplier Termination Event (as if references in that limb (j) to the Supplier were references to the Successor Body).

#### **43 WAIVER AND CUMULATIVE REMEDIES**

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

#### **44 RELATIONSHIP OF THE PARTIES**

- 44.1 Except as expressly provided otherwise in this Agreement, nothing in this Agreement, nor any actions taken by the Parties pursuant to this Agreement, shall create a partnership, joint venture or relationship of employer and employee or principal and agent between the Parties, or authorise either Party to make representations or enter into any commitments for or on behalf of any other Party.

#### **45 PREVENTION OF FRAUD AND BRIBERY**

- 45.1 The Supplier represents and warrants that neither it, nor to the best of its knowledge any Supplier Personnel, have at any time prior to the Effective Date:
- 45.1.1 committed a Prohibited Act or been formally notified that it is subject to an investigation or prosecution which relates to an alleged Prohibited Act; and/or
  - 45.1.2 been listed by any government department or agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in government procurement programmes or contracts on the grounds of a Prohibited Act.

- 45.2 The Supplier shall not during the term of this Agreement:
- 45.2.1 commit a Prohibited Act; and/or
  - 45.2.2 do or suffer anything to be done which would cause the Authority or any of the Authority's employees, consultants, contractors, sub-contractors or agents to contravene any of the Relevant Requirements or otherwise incur any liability in relation to the Relevant Requirements.
- 45.3 The Supplier shall during the term of this Agreement:
- 45.3.1 establish, maintain and enforce, and require that its Sub-contractors establish, maintain and enforce, policies and procedures which are adequate to ensure compliance with the Relevant Requirements and prevent the occurrence of a Prohibited Act;
  - 45.3.2 have in place reasonable prevention measures (as defined in sections 45(3) and 46(4) of the Criminal Finance Act 2017) to ensure that Associated Persons of the Supplier do not commit tax evasion facilitation offences as defined under that Act;
  - 45.3.3 keep appropriate records of its compliance with its obligations under Clause 45.3.1 and make such records available to the Authority on request; and
  - 45.3.4 take account of any guidance about preventing facilitation of tax evasion offences which may be published and updated in accordance with Section 47 of the Criminal Finances Act 2017.
- 45.4 The Supplier shall immediately notify the Authority in writing if it becomes aware of any breach of Clause 45.1 and/or 45.2, or has reason to believe that it has or any of the Supplier Personnel have:
- 45.4.1 been subject to an investigation or prosecution which relates to an alleged Prohibited Act;
  - 45.4.2 been listed by any government department or agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in government procurement programmes or contracts on the grounds of a Prohibited Act; and/or
  - 45.4.3 received a request or demand for any undue financial or other advantage of any kind in connection with the performance of this Agreement or

otherwise suspects that any person or Party directly or indirectly connected with this Agreement has committed or attempted to commit a Prohibited Act.

45.5 If the Supplier makes a notification to the Authority pursuant to Clause 45.4, the Supplier shall respond promptly to the Authority's enquiries, co-operate with any investigation, and allow the Authority to Audit any books, Records and/or any other relevant documentation in accordance with Clause 17 (*Records, Reports, Audits and Open Book Data*).

45.6 If the Supplier is in Default under Clauses 45.1 and/or 45.2, the Authority may by notice:

45.6.1 require the Supplier to remove from performance of this Agreement any Supplier Personnel whose acts or omissions have caused the Default; or

45.6.2 immediately terminate this Agreement.

45.7 Any notice served by the Authority under Clause 45.6 shall specify the nature of the Prohibited Act, the identity of the Party who the Authority believes has committed the Prohibited Act and the action that the Authority has elected to take (including, where relevant, the date on which this Agreement shall terminate).

## **46 SEVERANCE**

46.1 If any provision of this Agreement (or part of any provision) is held to be void or otherwise unenforceable by any court of competent jurisdiction, such provision (or part) shall to the extent necessary to ensure that the remaining provisions of this Agreement are not void or unenforceable be deemed to be deleted and the validity and/or enforceability of the remaining provisions of this Agreement shall not be affected.

46.2 In the event that any deemed deletion under Clause 46.1 is so fundamental as to prevent the accomplishment of the purpose of this Agreement or materially alters the balance of risks and rewards in this Agreement, either Party may give notice to the other Party requiring the Parties to commence good faith negotiations to amend this Agreement so that, as amended, it is valid and enforceable, preserves the balance of risks and rewards in this Agreement and, to the extent that is reasonably possible, achieves the Parties' original commercial intention.

46.3 If the Parties are unable to agree on the revisions to this Agreement within five (5) Working Days of the date of the notice given pursuant to Clause 46.2, the matter shall be dealt with in accordance with Paragraph 4 (*Commercial Negotiation*) of Schedule 23 (*Dispute Resolution Procedure*) except that if the representatives are unable to resolve the dispute within thirty (30) Working Days of the matter being referred to them, this Agreement shall automatically terminate with immediate effect. The costs of termination incurred by the Parties shall lie where they fall if this Agreement is terminated pursuant to this Clause 46.3.

#### **47 FURTHER ASSURANCES**

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

#### **48 ENTIRE AGREEMENT**

48.1 This Agreement constitutes the entire agreement between the Parties in respect of its subject matter and supersedes and extinguishes all prior negotiations, arrangements, understanding, course of dealings or agreements made between the Parties in relation to its subject matter, whether written or oral.

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

48.3 Nothing in this Clause 48 shall exclude any liability in respect of misrepresentations made fraudulently.

#### **49 THIRD PARTY RIGHTS**

49.1 The provisions of Clause 21.1 (*IPRs Indemnity*), and the provisions of Paragraph 6 (*Exit Assistance*) of Schedule 25 (*Exit Management*) (together "**Third Party Provisions**") confer benefits on persons named or identified in such provisions other than the Parties (each such person a "**Third Party Beneficiary**") and are intended to be enforceable by Third Parties Beneficiaries by virtue of the CRTPA.

49.2 Subject to Clause 49.1, a person who is not a Party to this Agreement has no right under the CRTPA to enforce any term of this Agreement but this does not affect any

right or remedy of any person which exists or is available otherwise than pursuant to that Act.

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

49.4 Any amendments or modifications to this Agreement may be made, and any rights created under Clause 49.1 may be altered or extinguished, by the Parties without the consent of any Third Party Beneficiary.

## **50 NOTICES**

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

50.2 Subject to Clause 50.4, the following table sets out the method by which notices may be served under this Agreement and the respective deemed time and proof of service:

Manner of Delivery	Deemed time of service	Proof of service
Email	9.00am on the first Working Day after sending	Dispatched as a pdf attachment to an e-mail to the correct e-mail address without any error message.
Personal delivery	On delivery, provided delivery is between 9.00am and 5.00pm on a Working Day. Otherwise, delivery will occur at 9.00am on the next Working Day.	Properly addressed and delivered as evidenced by signature of a delivery receipt
Prepaid, Royal Mail Signed For™ 1st Class or other prepaid, next Working Day service providing proof of delivery.	At the time recorded by the delivery service, provided that delivery is between 9.00am and 5.00pm on a Working Day. Otherwise, delivery will occur at 9.00am on the same Working Day (if delivery before 9.00am) or on the next Working Day (if after 5.00pm).	Properly addressed prepaid and delivered as evidenced by signature of a delivery receipt

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

	Supplier	Authority
Contact	The text has been redacted under the exemptions set out by the Freedom of Information Act	The text has been redacted under the exemptions set out by the Freedom of Information Act

<b>Address</b>	814 Leigh Road,  Slough Trading Estate,  Slough,  SL1 4BD	MoJ, 1st Floor  5 Wellington Place  Leeds  LS1 4AP
<b>Email</b>	contractsteam@bidfood.co.uk	<b>The text has been redacted under the exemptions set out by the Freedom of Information Act</b>

50.4 The following notices may only be served as an attachment to an email if the original notice is then sent to the recipient by personal delivery or recorded delivery in the manner set out in the table in Clause 50.2:

50.4.1 Force Majeure Notices;

50.4.2 Termination Notices; and

50.4.3 Dispute Notices.

50.5 Failure to send any original notice by personal delivery or recorded delivery in accordance with Clause 50.4 shall invalidate the service of the related e-mail transmission. The deemed time of delivery of such notice shall be the deemed time of delivery of the original notice sent by personal delivery or Royal Mail Signed For™ 1st Class delivery (as set out in the table in Clause 50.2) or, if earlier, the time of response or acknowledgement by the other Party to the email attaching the notice.

50.6 This Clause 50 does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution (other than the service of a Dispute Notice under Schedule 23 (*Dispute Resolution Procedure*)).

## **51 DISPUTES**

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

## **52 GOVERNING LAW AND JURISDICTION**

- 52.1 This Agreement and any issues, disputes or claims (whether contractual or non-contractual) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the laws of England and Wales.
- 52.2 Subject to Clause 51 (*Disputes*) and Schedule 23 (*Dispute Resolution Procedure*) (including the Authority's right to refer the dispute to arbitration), the Parties agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (whether contractual or non-contractual) that arises out of or in connection with this Agreement or its subject matter or formation.

This Agreement has been duly executed by the Parties on the date which appears at the head of its page 1.



**SIGNED** for and on behalf of )  
**BFS Group Limited** by a director: )  
)  
)

Signature:

Name (block capitals):

**Director**

**SIGNED** for and on behalf of )  
**The Secretary of State of Justice** )  
)  
)

Signature:

Name (block capitals):

Position: