

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

**SCHEDULE 25**

**EXIT MANAGEMENT**

## Exit Management

### 1 DEFINITIONS

1.1 In this Schedule, the following definitions shall apply:

<b>“Emergency Exit”</b>	any termination of this Agreement which is a: <ul style="list-style-type: none"><li>(a) termination of the whole or part of this Agreement in accordance with Clause 39 (<i>Termination Rights</i>), except where the period of notice given under that Clause is greater than or equal to six (6) months;</li><li>(b) termination of the provision of the Services or Products for any reason prior to the expiry of any period of notice of termination served pursuant to Clause 39 (<i>Termination Rights</i>); or</li><li>(c) wrongful termination or repudiation of this Agreement by either Party;</li></ul>
<b>“Ethical Wall Agreement”</b>	an ethical wall agreement in a form similar to the draft ethical wall agreement set out at in the Annex to this Schedule;
<b>“Exit Information”</b>	has the meaning given in Paragraph 3.1;
<b>“Exit Manager”</b>	the person appointed by each Party pursuant to Paragraph 2.2 for managing the Parties' respective obligations under this Schedule;
<b>“Ordinary Exit”</b>	any termination of the whole or any part of this Agreement which occurs: <ul style="list-style-type: none"><li>(d) pursuant to Clause 39 (<i>Termination Rights</i>) where the period of notice given by the Party serving notice to terminate pursuant to such Clause is greater than or equal to six (6) months; or</li><li>(e) as a result of the expiry of the Initial Term or any Extension Period;</li></ul>
<b>“Retained Stock”</b>	Products in the possession or control of the Supplier that have been purchased specifically for the Authority;
<b>“Transferable Contracts”</b>	the Sub-contracts, or other agreements which are required for the manufacture and delivery of the Products and are identified as Transferable Contracts in the Exit Plan;
<b>“Transferring Contracts”</b>	has the meaning given in Paragraph 7.3; and
<b>“Transferring Retained Stock”</b>	shall be as further described in Paragraph 7.4.

### 2 OBLIGATIONS DURING THE TERM TO FACILITATE EXIT

2.1 During the Term, the Supplier shall:

- (a) create and maintain a register of all sub-contracts in place with any Key Sub-contractor and any key manufacturer in relation to the Products and Services.
- (b) create and maintain a list of all vehicles used in the delivery of the Products under this Agreement;
- (c) create and maintain a list of Retained Stock maintained by the Supplier.
- (d) create and maintain any other registers as the Parties may agree to be provided as part of the Exit Plan,

together the “**Registers**”.

- 2.2 Each Party shall appoint a person for the purposes of managing the Parties' respective obligations under this Schedule and provide written notification of such appointment to the other Party within three (3) months of the Effective Date. The Supplier's Exit Manager shall be responsible for ensuring that the Supplier and its employees, agents and Sub-contractors comply with this Schedule. The Supplier shall ensure that its Exit Manager has the requisite authority to arrange and procure any resources of the Supplier as are reasonably necessary to enable the Supplier to comply with the requirements set out in this Schedule. The Parties' Exit Managers will liaise with one another in relation to all issues relevant to the termination of this Agreement and all matters connected with this Schedule and each Party's compliance with it.

### **3 OBLIGATIONS TO ASSIST ON RE-TENDERING OF THE SUPPLY PRODUCTS AND SERVICES**

- 3.1 On reasonable notice at any point during the Term, the Supplier shall provide to the Authority and/or its potential Replacement Suppliers (subject to the potential Replacement Suppliers entering into reasonable written confidentiality undertakings), the following material and information in order to facilitate the preparation by the Authority of any invitation to tender and/or to facilitate any potential Replacement Suppliers undertaking due diligence:

- (a) details of the Products and Services;
  - (b) a copy of the Registers, updated by the Supplier up to the date of delivery of such Registers;
  - (c) an inventory of Authority Data in the Supplier's possession or control;
  - (d) details of any key terms of any third party contracts and licences, particularly as regards charges, termination, assignment and novation;
  - (e) a list of on-going and/or threatened disputes in relation to the manufacture and provision of the Products and/or Services;
  - (f) to the extent permitted by applicable Law, all information relating to Transferring Supplier Employees required to be provided by the Supplier under this Agreement; and
  - (g) such other material and information as the Authority shall reasonably require,
- (together, the “**Exit Information**”).

- 3.2 The Supplier acknowledges that the Authority may disclose the Supplier's Confidential Information to an actual or prospective Replacement Supplier or any third party whom the Authority is considering engaging to the extent that such disclosure is necessary in connection with such engagement (except that the Authority may not under this Paragraph 3.2 disclose any Supplier's Confidential Information which is information relating to the Supplier's or its Sub-contractors' prices or costs).

- 3.3 The Supplier shall:

- (a) Notify the Authority within five (5) Working Days of any material change to the Exit Information which may adversely impact upon the potential transfer and/or continuous in the provision of the Products and Services and shall consult with the Authority regarding such proposed material changes; and
  - (b) provide complete updates of the Exit Information on an as-requested basis as soon as reasonably practicable and in any event within ten (10) Working Days of a request in writing from the Authority.
- 3.4 The Supplier may charge the Authority for its reasonable additional costs to the extent the Authority requests more than four (4) updates in any six (6) month period.
- 3.5 The Exit Information shall be accurate and complete in all material respects and the level of detail to be provided by the Supplier shall be such as would be reasonably necessary to enable a third party to:
  - (a) prepare an informed offer for the provision of the Products and Services; and
  - (b) not be disadvantaged in any subsequent procurement process compared to the Supplier (if the Supplier is invited to participate).

#### **4 OBLIGATION TO ENTER INTO AN ETHICAL WALL AGREEMENT ON RE-TENDERING OF THE SUPPLY OF THE PRODUCTS AND SERVICES**

- 4.1 The Authority may require the Supplier to enter into the Ethical Wall Agreement at any point during a re-tendering or contemplated re-tendering of the supply of the Products and Services (or any part thereof).
- 4.2 If required to enter into the Ethical Wall Agreement, the Supplier will return a signed copy of the Ethical Wall Agreement within ten (10) Working Days of receipt. The Supplier's costs of entering into the Ethical Wall Agreement will be borne solely by the Supplier.

#### **5 EXIT PLAN**

- 5.1 The Supplier shall, within three (3) months after the Effective Date, deliver to the Authority an Exit Plan which:
  - (a) sets out the Supplier's proposed methodology for achieving an orderly transition of the provision of the Products and Services from the Supplier to the Authority and/or its Replacement Supplier on the Partial Termination, expiry or termination of this Agreement;
  - (b) complies with the requirements set out in Paragraph 5.2; and
  - (c) is otherwise reasonably satisfactory to the Authority.
- 5.2 The Parties shall use reasonable endeavours to agree the contents of the Exit Plan. If the Parties are unable to agree the contents of the Exit Plan within twenty (20) Working Days of its submission, then such Dispute shall be resolved in accordance with the Dispute Resolution Procedure.
- 5.3 The Exit Plan shall set out, as a minimum:
  - (a) how the Exit Information is obtained;
  - (b) separate mechanisms for dealing with Ordinary Exit and Emergency Exit, the provisions relating to Emergency Exit being prepared on the assumption that the Supplier may be unable to provide the full level of assistance which is required by the provisions relating to Ordinary Exit, and in the case of Emergency Exit, provision for the supply by the Supplier of all such reasonable assistance as the Authority shall require to enable the Authority or its sub-contractors to provide the Products and Services;

- (c) a mechanism for dealing with Partial Termination on the assumption that the Supplier will continue to provide the remaining Products and Services under this Agreement including a timetable, applicable in the case of an Ordinary Exit and an Emergency Exit;
  - (d) the management structure to be employed during both transfer and cessation of the Services in an Ordinary Exit and an Emergency Exit;
  - (e) the management structure to be employed during the Termination Assistance Period;
  - (f) a detailed description of both the transfer and cessation processes, including a timetable, applicable in the case of an Ordinary Exit and an Emergency Exit;
  - (g) how the provision of the Products and Services will transfer to the Replacement Supplier and/or the Authority, including details of the processes, documentation, data transfer, systems migration, security and the segregation of the Authority's technology components from any technology components operated by the Supplier or its Sub-contractors (where applicable);
  - (h) any charges that would be payable for the provision of the Products and Services during any Termination Assistance Period (calculated in accordance with the charges in Schedule 15 (*Charging and Invoicing*));
  - (i) how the Products and Services would continue to be provided (if required by the Authority in accordance with Paragraph 6 of this Schedule) during any Termination Assistance Period;
  - (j) procedures to deal with requests made by the Authority and/or a Replacement Supplier for Staffing Information pursuant to Schedule 28 (*Staff Transfer*); and
  - (k) how each of the issues set out in this Schedule will be addressed to facilitate the transition of the Services from the Supplier to the Replacement Supplier and/or the Authority with the aim of ensuring that there is no disruption to or degradation of the Services during the Termination Assistance Period.
- 5.4 The Parties acknowledge that the migration of the supply of Products and Services from the Supplier to the Authority and/or its Replacement Supplier may be phased, such that the supply of certain of the Products Services are handed over before others.
- 5.5 The Supplier shall review and (if appropriate) update the Exit Plan on a basis consistent with the principles set out in this Schedule in the first month of each Contract Year (commencing with the second Contract Year) and if requested by the Authority following the occurrence of a Financial Distress Event, within fourteen (14) days of such request, to reflect any changes in the Products and Services that have occurred since the Exit Plan was last agreed. Following such update the Supplier shall submit the revised Exit Plan to the Authority for review. Within twenty (20) Working Days following submission of the revised Exit Plan, the Parties shall meet and use reasonable endeavours to agree the contents of the revised Exit Plan. If the Parties are unable to agree the contents of the revised Exit Plan within that twenty (20) Working Day period, such dispute shall be resolved in accordance with the Dispute Resolution Procedure.

#### **Finalisation of the Exit Plan**

- 5.6 Within twenty (20) Working Days after service of a Termination Notice by either Party or six (6) months prior to the expiry of this Agreement, the Supplier will submit for the Authority's approval the Exit Plan in a final form that could be implemented immediately. The final form of the Exit Plan shall be prepared on a basis consistent with the principles set out in this Schedule and shall reflect any changes in the Products and Services that have occurred since the Exit Plan was last agreed.
- 5.7 The Parties will meet and use their respective reasonable endeavours to agree the contents of the final form of the Exit Plan. If the Parties are unable to agree the contents of the Exit Plan

within twenty (20) Working Days following its delivery to the Authority, then such Dispute shall be resolved in accordance with the Dispute Resolution Procedure. Until the agreement of the final form of the Exit Plan, the Supplier shall provide the Products and Services during any Termination Assistance Period in accordance with the principles set out in this Schedule and the last approved version of the Exit Plan (insofar as relevant).

## **6 TERMINATION ASSISTANCE**

### **Notification of Requirements for Termination Assistance**

- 6.1 The Authority shall be entitled to require the provision of Products and Services or other support during a Termination Assistance Period at any time during the Term by giving written notice to the Supplier (a **"Termination Assistance Notice"**) at least four (4) months prior to the date of termination or expiry of this Agreement or as soon as reasonably practicable (but in any event, not later than one (1) month) following the service by either Party of a Termination Notice. The Termination Assistance Notice shall specify:
- (a) the anticipated requirements (e.g. continued provision of Goods and Services etc.) and/or other support (such as training or helpdesk support) required; and
  - (b) the period during which it is anticipated that Products, Services and/or other support will be required, which shall continue no longer than twelve (12) months after the termination or expiry of this Agreement.

### **Termination Assistance Period**

- 6.2 Throughout the Termination Assistance Period, or such shorter period as the Authority may require, the Supplier shall:
- (a) continue to provide the Products and Services, and other support (such as helpdesk or training support) (as applicable);
  - (b) in addition to providing the Products and Services, provide to the Authority any reasonable assistance requested by the Authority to allow the provision of the Products and Services to continue without interruption following the Partial Termination, termination or expiry of this Agreement and to facilitate the orderly transfer of responsibility for and conduct of the Services to the Authority and/or its Replacement Supplier;
  - (c) use all reasonable endeavours to reallocate resources to provide such assistance as is referred to in Paragraph 6.2(b) without additional costs to the Authority;
  - (d) provide the Products and Services at no detriment to the Target Performance Levels, save to the extent that the Parties agree otherwise in accordance with Paragraph 6.3; and
  - (e) at the Authority's request and on reasonable notice, deliver up-to-date Registers to the Authority.
- 6.3 Without prejudice to the Supplier's obligations under Paragraph 6.2(c), if it is not possible for the Supplier to reallocate resources to provide such assistance as is referred to in Paragraph 6.2(b) without additional costs to the Authority, any additional costs incurred by the Supplier in providing such reasonable assistance which is not already in the scope of the Exit Plan shall be subject to the Change Control Procedure.
- 6.4 If the Supplier demonstrates to the Authority's reasonable satisfaction that continued provision of the Products and Services, or the provision of any other support, during the Termination Assistance Period will have a material, unavoidable adverse effect on the Supplier's ability to meet one or more particular Target Performance Level(s), the Parties shall vary the relevant Target Performance Level(s) and/or the applicable Service Credits to take account of such adverse effect.

## **Termination Obligations**

- 6.5 The Supplier shall comply with all of its obligations contained in the Exit Plan in respect of any Partial Termination or termination.
- 6.6 Upon termination or expiry (as the case may be) or at the end of the Termination Assistance Period (or earlier if this does not adversely affect the Supplier's delivery of the Products and Services and its compliance with the other provisions of this Schedule) in respect of the Products and Services that have been terminated, the Supplier shall:
- (a) cease to use the Authority Data;
  - (b) provide the Authority and/or the Replacement Supplier with a complete and uncorrupted version of the Authority Data in electronic form (or such other format as reasonably required by the Authority);
  - (c) erase from any computers, storage devices and storage media that are to be retained by the Supplier after the end of the Termination Assistance Period all Authority Data and promptly certify to the Authority that it has completed such deletion;
  - (d) return to the Authority such of the following as is in the Supplier's possession or control:
    - (i) all materials provided by the Authority to the Supplier under this Agreement;
    - (ii) any Products and Deliverables or other items which have been paid for by the Authority;
    - (iii) any parts of the IT Environment and any other equipment which belongs to the Authority;
  - (e) vacate any Authority Premises unless access is required to continue to deliver the Products and Services;
  - (f) provide access during normal working hours to the Authority and/or the Replacement Supplier for up to twelve (12) months after the Partial Termination, expiry or termination of this Agreement to:
    - (i) such information relating to the Products and Services as remains in the possession or control of the Supplier;
    - (ii) recover any Products and Deliverables which have been paid for by the Authority; and
    - (iii) such members of the Supplier Personnel as have been involved in the design, development and provision of the Services and who are still employed by the Supplier, provided that the Authority and/or the Replacement Supplier shall pay the reasonable costs of the Supplier actually incurred in responding to requests for access under this Paragraph 6.6(f)(iii).
- 6.7 Upon Partial Termination, termination or expiry (as the case may be) or at the end of the Termination Assistance Period (or earlier if this does not adversely affect the Supplier's delivery of the Products or Services and its compliance with the other provisions of this Schedule), each Party shall return to the other Party (or if requested, destroy or delete) all Confidential Information of the other Party in respect of the terminated element of the supply of Products and Services and shall certify that it does not retain the other Party's Confidential Information save to the extent (and for the limited period) that such information needs to be retained by the Party in question for the purposes of providing or receiving any Products or Services or for statutory compliance purposes.

- 6.8 Except where this Agreement provides otherwise, all licences, leases and authorisations granted by the Authority to the Supplier in relation to this Agreement shall be terminated with effect from the end of the Termination Assistance Period.

## **7 SUB-CONTRACTS AND RETAINED STOCK**

- 7.1 Following notice of termination or Partial Termination of this Agreement and during the Termination Assistance Period, the Supplier shall not, in respect of the terminated element of the supply of Products and/or Services, without the Authority's prior written consent, terminate, enter into or vary any Sub-contract except to the extent that such change does not or will not affect the provision of Products, Services or the Charges.
- 7.2 Within seven (7) days of a Termination Notice (or if later no less than three (3) months prior to the end of the Term), the Supplier shall provide a report (the "**Retained Stock Report**") to the Authority detailing:
- 7.2.1 the amounts of Retained Stock in its control at the date of such report;
  - 7.2.2 its proposals for the gradual reduction of the Retained Stock during the period up to the date of termination or expiry (or if later the end of any Termination Assistance Period); and
  - 7.2.3 how much Retained Stock will be in its control at the date of termination or expiry (or if later the end of any Termination Assistance Period) and proposals for the sale or re-use of such Retained Stock to third parties.
- 7.3 Within twenty (20) Working Days of receipt of the Retained Stock Report, the Parties shall meet and work in good faith to agree how Retained Stock should be handled by the Supplier in the period up to the termination or expiry of this Agreement (or if later the end of any Termination Assistance Period).
- 7.4 With effect from the expiry of the Termination Assistance Period (or such earlier date as the Parties may agree), the Supplier shall give the Authority and its nominated Replacement Supplier the option to purchase any of the Retained Stock for the price agreed in writing between the Parties (which shall be no greater than the applicable Charges for such Retained Stock immediately preceding the expiry of the Termination Assistance Period (or such earlier date as the Parties may agree)). Any stock that the Authority and/or its nominated Replacement Supplier elects to purchase in accordance with this Paragraph 7.4 shall be referred to as the "**Transferring Retained Stock**".
- 7.5 Risk and title in the Transferring Retained Stock shall pass to the Authority or the Replacement Supplier (as appropriate) upon delivery and the terms of this Agreement shall apply to any such sale.
- 7.6 Within twenty (20) Working Days of receipt of the up-to-date Registers provided by the Supplier pursuant to Paragraph 6.2(e), the Authority shall provide written notice to the Supplier setting out which, if any, of Transferable Contracts the Authority requires to be assigned or novated to the Authority and/or the Replacement Supplier (the "**Transferring Contracts**") in order for the Authority and/or its Replacement Supplier to provide the Products and Services from the expiry of the Termination Assistance Period. Where requested by the Authority and/or its Replacement Supplier, the Supplier shall provide all reasonable assistance to the Authority and/or its Replacement Supplier to enable it to determine which Transferable Contracts the Authority and/or its Replacement Supplier requires to provide the Products and Services or Replacement Services. Where requested by the Supplier, the Authority and/or its Replacement Supplier shall discuss in good faith with the Supplier which Transferable Contracts are used by the Supplier in matters unconnected to the Services or Replacement Services.
- 7.7 The Supplier shall as soon as reasonably practicable assign or procure the novation to the Authority and/or the Replacement Supplier of the Transferring Contracts. The Supplier shall execute such documents and provide such other assistance as the Authority reasonably requires to effect this novation or assignment.



- 7.8 The Supplier shall hold any Transferring Contracts on trust for the Authority until such time as the transfer of the relevant Transferring Contract to the Authority and/or the Replacement Supplier has been effected.
- 7.9 The Supplier shall indemnify the Authority (and/or the Replacement Supplier, as applicable) against each loss, liability and cost arising out of any claims made by a counterparty to a Transferring Contract which is assigned or novated to the Authority (and/or Replacement Supplier) pursuant to Paragraph 7.7 both:
- (a) in relation to any matters arising prior to the date of assignment or novation of such Sub-contract; and
  - (b) in relation to any matters arising after the date of assignment or novation of such Sub-contract where the loss, liability or cost arises as a result of the Supplier's failure to comply with Clause 21 (*Intellectual Property Rights*).

## **8 SUPPLIER PERSONNEL**

- 8.1 The Authority and Supplier agree and acknowledge that in the event of the Supplier ceasing to provide the Services or part of them for any reason, Schedule 28 (*Staff Transfer*) shall apply.
- 8.2 The Supplier shall not take any step (expressly or implicitly or directly or indirectly by itself or through any other person) to dissuade or discourage any employees engaged in the provision of the Services from transferring their employment to the Authority and/or the Replacement Supplier.
- 8.3 During the Termination Assistance Period, the Supplier shall give the Authority and/or the Replacement Supplier reasonable access to the Supplier's personnel to present the case for transferring their employment to the Authority and/or the Replacement Supplier.
- 8.4 The Supplier shall immediately notify the Authority or, at the direction of the Authority, the Replacement Supplier of any period of notice given by the Supplier or received from any person referred to in the Staffing Information, regardless of when such notice takes effect.
- 8.5 The Supplier shall not for a period of twelve (12) months from the date of transfer re-employ or re-engage or entice any employees, suppliers or Sub-contractors whose employment or engagement is transferred to the Authority and/or the Replacement Supplier, except that this Paragraph shall not apply where the employee, supplier or Sub-contractor applies in response to a public advertisement of a vacancy.

## **9 CHARGES**

- 9.1 During the Termination Assistance Period (or for such shorter period as the Authority may require the Supplier to provide the Products and Services), the Authority shall pay the Charges to the Supplier in respect of the Products and Services provided in accordance with the rates set out in the Schedule 15 (Charging and Invoicing). Any additional termination assistance provided during the Termination Assistance Period shall be charged in accordance with the rates set out in the Exit Plan or, if no rates are set out in the Exit Plan, the rates agreed between the Parties in writing.

## **10 APPORTIONMENTS**

- 10.1 All outgoings and expenses (including any remuneration due) and all rents, royalties and other periodical payments receivable in respect of the Transferring Contracts shall be apportioned between the Authority and the Supplier and/or the Replacement Supplier and the Supplier (as applicable) as follows:
- (a) the amounts shall be annualised and divided by 365 to reach a daily rate;
  - (b) the Authority shall be responsible for (or shall procure that the Replacement Supplier shall be responsible for) or entitled to (as the case may be) that part of

the value of the invoice pro rata to the number of complete days following the transfer, multiplied by the daily rate; and

- (c) the Supplier shall be responsible for or entitled to (as the case may be) the rest of the invoice.

10.2 Each Party shall pay (and/or the Authority shall procure that the Replacement Supplier shall pay) any monies due under Paragraph 10.1 as soon as reasonably practicable.

## ANNEX: DRAFT ETHICAL WALL AGREEMENT

[THE AUTHORITY]

and

[THE COUNTERPARTY]

### ETHICAL WALL AGREEMENT

This Agreement is dated [ ] 20[ ] (the “Effective Date”).

#### BETWEEN:

- (f) [insert NAME OF AUTHORITY] (the “Authority”) [acting on behalf of the Crown] of [insert Authority’s address]; and
- (g) [NAME OF COUNTERPARTY] a [company]/[limited liability partnership] registered in England and Wales under registered number [insert registered number] whose registered office is at [insert Counterparty’s registered address] (the “Counterparty”),

together the “Parties” and each a “Party”.

#### BACKGROUND

- (A) The Authority is obliged to ensure transparency, fairness, non-discrimination and equal treatment in relation to its procurement process pursuant to the Procurement Regulations (defined below). The purpose of this document (“**Agreement**”) is to define the protocols to be followed to prevent, identify and remedy any conflict of interest (whether actual, potential or perceived) in the context of the Purpose (defined below).
- (B) The Authority is conducting a procurement exercise for the [supply/purchase/provision] of [insert details of project/products/services] (the “**Purpose**”).
- (C) The Parties wish to enter into this Agreement to ensure that a set of management processes, barriers and disciplines are put in place to ensure that conflicts of interest do not arise, and that the Counterparty does not obtain an unfair competitive advantage over Other Bidders.

#### IT IS AGREED:

##### 1. Definitions and Interpretation

- 1.1 The following capitalised words and expressions shall have the following meanings in this Agreement and its recitals:

“**Affiliate**” means in relation to a body corporate, any other entity which directly or indirectly Controls, is Controlled by, or is under direct or indirect common Control of that body corporate from time to time;

**“Agreement”** means this ethical walls agreement duly executed by the Parties;

**“Bid Team”** means any Representatives of the Counterparty, any of its Affiliates and/or any Subcontractors connected to the preparation of an ITT Response;

**“Crown Body”** means a body listed in one of the following sub-categories of the Central Government classification of the Public Sector Classification Guide, as published and amended from time to time by the Office for National Statistics, including:

- (a) Government Departments;
- (b) Non-Departmental Public Bodies or Assembly Sponsored Public Bodies (advisory, executive, or tribunal);
- (c) Non-Ministerial Departments; or
- (d) Executive Agencies;

**“Conflicted Personnel”** means any Representatives of:

- (a) the Counterparty;
- (b) any of the Counterparty’s Affiliates; and/or
- (c) any Subcontractors,

who, because of the Counterparty’s, any of its Affiliates’ and/or any Subcontractors’ relationship with the Authority under any Contract, have or have had access to information which creates or may create a conflict of interest or provide the Bid Team with an unfair advantage as regards information Other Bidders would not have;

**“Contract”** means any pre-existing or previous contract between the Authority and:

- (a) the Counterparty;
- (b) any of the Counterparty’s Affiliates;
- (c) any Subcontractor; and
- (d) any other Third Party,

relating to the subject matter of the Purpose at the date of the commencement of the ITT Process;

**“Control”** means the beneficial ownership of more than 50% of the issued share capital of a company or the legal power to direct or cause the direction of the management of the company and **“Controls”** and **“Controlled”** shall be interpreted accordingly;

**“Effective Date”** means the date of this Agreement as set out above;

**“Invitation to Tender”** or **“ITT”** means an invitation to submit tenders issued by the Authority as part of an ITT Process (and shall include an Invitation to Negotiate);

**“ITT Process”** means, with regard to the Purpose, the relevant procedure provided for in the Procurement Regulations (as amended), which the Authority has elected to use to select a contractor or contractors, together with all relevant information, data, correspondence and/or documents issued and/or made available by or on behalf of the Authority as part of that procurement exercise and all information, correspondence and/or documents issued and/or made available by or on behalf of the bidders in response together with any resulting contracts;

**“ITT Response”** means the tender(s) submitted, or to be submitted, by the Counterparty, any of its Affiliates and/or any Subcontractors in response to any invitation(s) to submit bids under the ITT process;

**“Other Bidder”** means any other bidder or potential bidder that is not the Counterparty or any of its Affiliates that has taken or is taking part in the ITT Process;

**“Procurement Process”** means the period commencing on the earlier of: (a) the publication of the first notice in relation to the Purpose; and (b) the execution of this Agreement, and ending on the occurrence of: (i) the publication by the Authority of all contract award notices that result from the ITT Process; or (ii) the abandonment or termination of the ITT Process as notified by the Authority;

**“Procurement Regulations”** means the Public Contracts Regulations 2015, the Public Procurement (Amendment etc.)(EU Exit) Regulations 2020, the Defence and Security Public Contracts Regulations 2011, the Utilities Contracts Regulations 2016, and the Concession Contracts Regulations 2016, each as amended from time to time;

**“Professional Advisor”** means a supplier, subcontractor, advisor or consultant engaged by the Counterparty and/or any of its Affiliates under the auspices of compiling its ITT response;

**“Purpose”** has the meaning given to it in recital B to this Agreement;

**“Representative”** refers to a person’s officers, directors, employees, advisers (including the officers, directors, employees, advisers and agents of any Professional Advisors), agents and, where the context admits, providers or potential providers of finance (including their representatives) to the Counterparty, any of its Affiliates and/or any subcontractors engaged in connection with the ITT Process;

**“Subcontractor”** means an existing or proposed subcontractor of:

- (a) the Counterparty; and/or
- (b) any of the Counterparty’s Affiliates,

who is connected to the preparation of an ITT Response (including key subcontractors named in the ITT Response);

**“Third Party”** means any person who is not a Party, including Other Bidders, their Affiliates and/or their Representatives; and

**“Working Day”** means any day of the week other than a weekend, when Banks in England and Wales are open for business.

- 1.2 Reference to the disclosure of information includes any communication or making available information and includes both direct and indirect disclosure.
- 1.3 Reference to the disclosure of information, or provision of access, by or to the Authority, the Counterparty, any of the Counterparty’s Affiliates and/or any Subcontractors includes disclosure, or provision of access, by or to the Representatives of the Authority, the Counterparty, any of its Affiliates and/or any Subcontractors (as the case may be).
- 1.4 Reference to persons includes legal and natural persons.
- 1.5 Reference to any enactment is to that enactment as amended, supplemented, re-enacted or replaced from time to time.
- 1.6 Reference to clauses and recitals is to clauses of and recitals to this Agreement.
- 1.7 Reference to any gender includes any other.
- 1.8 Reference to writing includes email.

- 1.9 The terms “**associate**”, “**holding company**”, “**subsidiary**”, “**subsidiary undertaking**” and “**wholly owned subsidiary**” have the meanings attributed to them in the Companies Act 2006, except that for the purposes of section 1159(1)(a) of that Act, the words ‘holds a majority of the voting rights’ shall be changed to ‘holds 30% or more of the voting rights’, and other expressions shall be construed accordingly.
- 1.10 The words “**include**” and “**including**” are to be construed without limitation.
- 1.11 The singular includes the plural and vice versa.
- 1.12 The headings contained in this Agreement shall not affect its construction or interpretation.

## **2. Ethical Walls**

- 2.1 In consideration of the sum of £1 payable by the Authority to the Counterparty, receipt of which is hereby acknowledged, the Parties agree to be bound by the terms of this Agreement.

### **Conflicts of Interest**

- 2.2 The Counterparty:
- 2.2.1 shall take all appropriate steps to ensure that neither the Counterparty, nor its Affiliates, nor any Subcontractors nor any Representatives are in a position where, in the reasonable opinion of the Authority, there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Counterparty, any of its Affiliates, any Subcontractors and/or any Representatives and the duties owed to the Authority under any Contract or pursuant to an open and transparent ITT Process; and
  - 2.2.2 acknowledges and agrees that a conflict of interest may arise in situations where the Counterparty, any of its Affiliates, any Subcontractors and/or any Representatives intend to take part in the ITT Process and because of the Counterparty’s, any of its Affiliates’, any Subcontractors’ and/or any Representatives’ relationship with the Authority under any Contract, the Counterparty, any of its Affiliates, any Subcontractors and/or any Representatives have or have had access to information which could provide the Counterparty, any of its Affiliates, any Subcontractors and/or any Representatives with an advantage and render unfair an otherwise genuine and open competitive ITT Process.
- 2.3 Where there is or is likely to be a conflict of interest, or the perception of a conflict of interest, of any kind in relation to the ITT Process, the Counterparty shall take such steps that are necessary to eliminate the conflict of interest to the Authority’s satisfaction, including one or more of the following:
- 2.3.1 not assigning any of the Conflicted Personnel to the Bid Team at any time;
  - 2.3.2 providing to the Authority promptly upon request a complete and up to date list of any Conflicted Personnel and the personnel comprising the Bid Team and reissue such list to the Authority promptly upon any change to it;
  - 2.3.3 ensuring that no act or omission by itself, its Affiliates, any Subcontractors and/or any Representatives results in information of any kind, however conveyed, or in any format and however so stored:
    - (a) about the ITT Process (gleaned from the performance of any Contract or otherwise); and/or
    - (b) which would or could in the opinion of the Authority confer an unfair advantage on the Counterparty in relation to its participation in the ITT Process,

becoming available to the Bid Team where the Authority has not made generally available that information to Other Bidders;

- 2.3.4 ensuring that by no act or omission by itself, its Affiliates, any Subcontractors and/or any Representatives and in particular the Bid Team results in information of any kind, however conveyed, in any format and however so stored about the ITT Process, its operation and all matters connected or ancillary to it becoming available to the Conflicted Personnel;
- 2.3.5 ensure that agreements that flow down the Counterparty's obligations in this Agreement, are entered into as necessary, between the Counterparty and its Affiliates and any Subcontractors [in a form to be approved by the Authority];
- 2.3.6 physically separating the Conflicted Personnel and the Bid Team, either in separate buildings or in areas with restricted access;
- 2.3.7 providing regular training to its Affiliates, any Subcontractors and/or Representatives to ensure it is complying with this Agreement;
- 2.3.8 monitoring Conflicted Personnel movements within restricted areas (both physical and electronic online areas) to ensure it is complying with this Agreement and to ensure adherence to the ethical wall arrangements the Counterparty, its Affiliates, any Subcontractors and/or any Representatives have put in place in order to comply with this Agreement;
- 2.3.9 ensuring that the Conflicted Personnel and the Bid Team are line managed and report independently of each other; and
- 2.3.10 complying with any other action as the Authority, acting reasonably, may direct in connection with the ITT Process and/or this Agreement.

#### **Notification of Conflicts of Interest**

- 2.4 The Counterparty shall:
  - 2.4.1 notify the Authority immediately in writing of all perceived, potential and/or actual conflicts of interest that arise or have arisen;
  - 2.4.2 submit in writing to the Authority full details of the nature of the perceived, potential and/or actual conflict of interest including full details of the risk assessments undertaken, the impact or potential impact of the perceived, potential and/or actual conflict, the measures and arrangements that have been established and/or are due to be established, to eliminate the perceived, potential and/or actual conflict, and the Counterparty's plans to prevent potential conflicts of interests from arising ("**Proposed Avoidance Measures**"); and
  - 2.4.3 seek the Authority's approval to the Proposed Avoidance Measures which the Authority shall have the right to grant, grant conditionally or deny (if the Authority rejects the Proposed Avoidance Measures the Counterparty shall repeat the process set out in this Clause 2.4 until such time as the Authority grants approval or the Counterparty withdraws from the ITT Process).
- 2.5 The Counterparty will provide to the Authority, on demand, any and all information in relation to its adherence with its obligations set out under Clauses 2.2 and 2.3 as reasonably requested by the Authority.
- 2.6 The Authority reserves the right to require the Counterparty to demonstrate the measures put in place by the Counterparty under Clauses 2.2 and 2.3.
- 2.7 The Counterparty acknowledges that any provision of information or demonstration of measures, in accordance with Clauses 2.5 and 2.6, does not constitute acceptance by the

Authority of the adequacy of such measures and does not discharge the Counterparty of its obligations or liability under this Agreement.

#### **Exclusion from the ITT Process**

- 2.8 Where, in the reasonable opinion of the Authority, there has been any breach by the Counterparty of Clauses 2.2, 2.3, or 2.4 or failure to obtain the Authority's approval of the Proposed Avoidance Measures the Authority shall be entitled to exclude the Counterparty, or any of its Affiliates and/or any Representatives, from the ITT Process, and the Authority may, in addition to the right to exclude, take such other steps as it deems necessary.
- 2.9 The actions of the Authority pursuant to Clause 2.8 shall not prejudice or affect any right of action or remedy under this Agreement or at law which shall have accrued or shall thereafter accrue to the Authority.

#### **Bid Costs**

- 2.10 In no event shall the Authority be liable for any bid costs incurred by:
- 2.10.1 the Counterparty or any of its Affiliates, any Representatives and/or any Subcontractors; or
- 2.10.2 any Third Party,
- as a result of any breach of this Agreement by the Counterparty, any of its Affiliates, any Subcontractors and/or Representatives, including where the Counterparty, any of its Affiliates, any Subcontractors or Representatives, or any Third Party is or are excluded from the ITT Process.

#### **Specific Remedies**

- 2.11 The Counterparty acknowledges and agrees that:
- 2.11.1 neither damages nor specific performance are adequate remedies in the event of a breach of the obligations in Clause 2; and
- 2.11.2 in the event of a breach of any of the obligations in Clause 2 which cannot be effectively remedied the Authority shall have the right to terminate both this Agreement and the Counterparty's participation in the ITT Process in each case with immediate effect on written notice.

### **3. Sole Responsibility**

- 3.1 It is the sole responsibility of the Counterparty to comply with the terms of this Agreement, including ensuring its Affiliates, any Subcontractors, and/or any Representatives comply with the terms of this Agreement. No approval by the Authority of any procedures, agreements or arrangements provided by the Counterparty, any of its Affiliates, any Subcontractors and/or their Representatives to the Authority shall discharge the Counterparty's obligations.

### **4. Waiver and Invalidity**

- 4.1 No failure or delay by any Party in exercising any right, power or privilege under this Agreement or by law shall constitute a waiver of that or any other right, power or privilege, nor shall it restrict the further exercise of that or any other right, power or privilege. No single or partial exercise of such right, power or privilege shall prevent or restrict the further exercise of that or any other right, power or privilege.
- 4.2 If any provision of this Agreement is prohibited or unenforceable in any jurisdiction in relation to any Party, such prohibition or unenforceability will not invalidate the remaining provisions of this Agreement, or affect the validity or enforceability of the provisions of this Agreement in relation to any other Party or any other jurisdiction.



## **5. Assignment and Novation**

- 5.1 The Counterparty 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.
- 5.2 The Authority may assign, novate or otherwise dispose of any or all of its rights, obligations and liabilities under this Agreement and/or any associated licences to:
- 5.2.1 any Crown Body; or
  - 5.2.2 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
  - 5.2.3 the Counterparty shall, at the Authority's request, enter into a novation agreement in such form as the Authority may reasonably specify in order to enable the Authority to exercise its rights pursuant to this Clause 5.
- 5.3 A change in the legal status of the Authority such that it ceases to be a Crown Body shall not affect the validity of this Agreement and this Agreement shall be binding on any successor body to the Authority.

## **6. Contracts (Rights of Third Parties) Act 1999**

- 6.1 A person who is not a Party to this Agreement has no right under the Contract (Rights of Third Parties) Act 1999 (as amended, updated or replaced from time to time) 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.

## **7. Transparency**

- 7.1 The Parties acknowledge and agree that the Authority is under a legal duty pursuant to the Procurement Regulations to run transparent and fair procurement processes. Accordingly, the Authority may disclose the contents of this Agreement to Other Bidders (and/or potential Other Bidders) for the purposes of transparency and in order to evidence that a fair procurement process has been followed.

## **8. Notices**

- 8.1 Any notices sent under this Agreement must be in writing.
- 8.2 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:

<b>Manner of Delivery</b>	<b>Deemed time of service</b>	<b>Proof of service</b>
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™ 1 <sup>st</sup> Class or other prepaid, next Working Day service	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	Properly addressed prepaid and delivered as evidenced by signature of a delivery receipt.

Manner of Delivery	Deemed time of service	Proof of service
providing proof of delivery.	Day (if delivery before 9.00am) or on the next Working Day (if after 5.00pm).	

- 8.3 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:

	Counterparty	Authority
Contact		
Address		
Email		

- 8.4 This Clause 8 does not apply to the service of any proceedings or other documents in any legal action or other method of dispute resolution.

## 9. Waiver and Cumulative Remedies

- 9.1 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.
- 9.2 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.

## 10. Term

- 10.1 Each Party's obligations under this Agreement shall continue in full force and effect for period of [ ] years from the Effective Date/~~for the period of the duration of the Procurement Process~~

## 11. Governing Law and Jurisdiction

- 11.1 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.
- 11.2 The Parties agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (whether contractual or non-contractual) that arises out of or in connection with this Agreement or its subject matter or formation.

Signed by the Authority

Name:

Signature:

Position in Authority:

Signed by the Counterparty

Name:

Signature:

Position in Counterparty:

