

**DATED**

**NHS BUSINESS SERVICES AUTHORITY**

**and**

**DHL SUPPLY CHAIN LIMITED**

**CATEGORY TOWER SERVICES CONTRACT**

**CATEGORY TOWER SEVEN**

**(Contract Ref: Tower 7 - 14101)**



## TABLE OF CONTENT

<b>A.</b>	<b>PRELIMINARIES.....</b>	<b>4</b>
1.	DEFINITIONS AND INTERPRETATION .....	4
2.	DUE DILIGENCE.....	5
3.	REPRESENTATIONS AND WARRANTIES .....	6
4.	CYBER SECURITY .....	8
<b>B.</b>	<b>DURATION OF CONTRACT .....</b>	<b>8</b>
5.	CONTRACT PERIOD .....	8
<b>C.</b>	<b>CONTRACT PERFORMANCE .....</b>	<b>10</b>
6.	IMPLEMENTATION PLAN.....	10
7.	SERVICES .....	12
8.	STANDARDS AND QUALITY .....	17
9.	SERVICE LEVELS AND SERVICE CREDITS .....	18
10.	CRITICAL SERVICE FAILURE .....	19
11.	BUSINESS CONTINUITY AND DISASTER RECOVERY .....	19
12.	DISRUPTION.....	19
13.	SUPPLIER NOTIFICATION OF AUTHORITY CAUSE.....	20
<b>D.</b>	<b>CONTRACT GOVERNANCE .....</b>	<b>20</b>
14.	PERFORMANCE MONITORING, GOVERNANCE AND COLLABORATION.....	20
15.	REPRESENTATIVES.....	20
16.	RECORDS, AUDIT ACCESS AND OPEN BOOK DATA .....	21
17.	CHANGE.....	23
<b>E.</b>	<b>PAYMENT, TAXATION AND VALUE FOR MONEY PROVISIONS .....</b>	<b>26</b>
18.	CONTRACT REMUNERATION AND PAYMENT .....	26
19.	PROMOTING TAX COMPLIANCE.....	28
<b>F.</b>	<b>PERSONNEL AND SUPPLY CHAIN MATTERS .....</b>	<b>29</b>
20.	KEY PERSONNEL .....	29
21.	SUPPLIER PERSONNEL .....	30
22.	STAFF TRANSFER.....	31
23.	SUPPLY CHAIN RIGHTS AND PROTECTION .....	31
<b>G.</b>	<b>PROPERTY MATTERS .....</b>	<b>35</b>
24.	AUTHORITY PREMISES .....	35
25.	AUTHORITY PROPERTY .....	36
26.	SUPPLIER EQUIPMENT .....	37
<b>H.</b>	<b>INTELLECTUAL PROPERTY AND INFORMATION.....</b>	<b>37</b>

	27. INTELLECTUAL PROPERTY RIGHTS.....	37
	28. SECURITY AND PROTECTION OF INFORMATION.....	42
	29. PUBLICITY AND BRANDING .....	51
I.	LIABILITY AND INSURANCE .....	52
	30. LIABILITY .....	52
	31. INSURANCE.....	54
J.	REMEDIES AND RELIEF .....	55
	32. AUTHORITY REMEDIES FOR DEFAULT .....	55
	33. SUPPLIER RELIEF DUE TO AUTHORITY CAUSE .....	57
	34. FORCE MAJEURE.....	58
K.	TERMINATION AND EXIT MANAGEMENT .....	60
	35. AUTHORITY TERMINATION RIGHTS.....	60
	36. SUPPLIER TERMINATION RIGHTS.....	62
	37. TERMINATION BY EITHER PARTY .....	62
	38. PARTIAL TERMINATION, SUSPENSION AND PARTIAL SUSPENSION ...	62
	39. CONSEQUENCES OF EXPIRY OR TERMINATION.....	63
L.	MISCELLANEOUS AND GOVERNING LAW .....	65
	40. COMPLIANCE.....	65
	41. ASSIGNMENT AND NOVATION.....	66
	42. WAIVER AND CUMULATIVE REMEDIES.....	66
	43. RELATIONSHIP OF THE PARTIES.....	67
	44. PREVENTION OF FRAUD AND BRIBERY .....	67
	45. SEVERANCE.....	68
	46. FURTHER ASSURANCES .....	69
	47. ENTIRE AGREEMENT.....	69
	48. THIRD PARTY RIGHTS .....	69
	49. COUNTERPARTS .....	69
	50. NOTICES .....	70
	51. DISPUTE RESOLUTION.....	71
	52. GOVERNING LAW AND JURISDICTION.....	71

This Contract is for the delivery of Category Tower Product Group SEVEN – Large Diagnostic Capital Devices. This Contract is made on

**BETWEEN:**

- (1) **NHS BUSINESS SERVICES AUTHORITY** of Stella House, Goldcrest Way, Newburn Riverside Business Park, Newcastle Upon Tyne NE15 8NY (the "**Authority**");
- (2) **DHL SUPPLY CHAIN LIMITED** which is a company registered in England and Wales under company number 00528867 and whose registered office is at Solstice House, 251 Midsummer Boulevard, Milton Keynes, Bucks, MK9 1EQ (the "**Supplier**").

**RECITALS:**

- A The Authority placed a contract notice 2016/S 249-458178 on 24 December 2016 (the "**OJEU Notice**") in the Official Journal of the European Union together with an invitation to tender (the "**Invitation to Tender**") for the provision of the Services seeking requests to participate from potential providers of the Services interested in entering into a contract for the supply of such Services to the Authority.
- B In response to the Invitation to Tender, the Supplier submitted information to the Authority for pre-qualification and, following assessment by the Authority of that information and further invitation to the Supplier, the Tender to the Authority on 21 August 2017 through which it represented to the Authority that it is capable of delivering the Services in accordance with the Authority's requirements as set out in the Invitation to Tender; in particular, the Supplier made representations to the Authority in the Tender in relation to its competence, professionalism and ability to provide the Services in an efficient and cost effective manner.
- C On the basis of the Tender, the Authority selected the Supplier to enter into an agreement to provide the Services to the Authority from time to time in accordance with this Contract.

**A. PRELIMINARIES**

**1. DEFINITIONS AND INTERPRETATION**

- 1.1 In this Contract, unless the context otherwise requires, capitalised expressions when used throughout this Contract shall have the meanings set out in Schedule 1 (Definitions) or in any other relevant Schedule or Annex in which they are defined.
- 1.2 In this Contract, 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 a reference to the "**Intelligent Client Coordinator**" or "**ICC**" shall be deemed a reference to the Authority;

- 1.2.6 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**";
- 1.2.7 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;
- 1.2.8 references to "**representations**" shall be construed as references to present facts, to "**warranties**" as references to present and future facts and to "**undertakings**" as references to obligations under this Contract;
- 1.2.9 references to "**Clauses**" and "**Schedules**" are, unless otherwise provided, references to the clauses and schedules of this Contract and references in any Schedule to parts, paragraphs, annexes and tables are, unless otherwise provided, references to the parts, paragraphs, annexes and tables of the Schedule in which these references appear; and
- 1.2.10 the headings in this Contract are for ease of reference only and shall not affect the interpretation or construction of this Contract.
- 1.3 In the event of and only to the extent of any conflict between the Clauses and the Schedules, the conflict shall be resolved in accordance with the following order of precedence:
  - 1.3.1 the Clauses;
  - 1.3.2 the Schedules (except Schedule 18 (Tender));
  - 1.3.3 Schedule 18 (Tender). For the avoidance of doubt, the Specification (Schedule 2) shall be read independently and shall take precedence over Schedule 18 (Tender).

## 2. DUE DILIGENCE

- 2.1 Subject to any Allowable Assumptions, 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 Contract;
  - 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 raised all relevant due diligence questions with the Authority before the Commencement Date; and
  - 2.1.4 it has undertaken all necessary due diligence and has entered into this Contract in reliance on its own due diligence alone.
- 2.2 Other than as set out in Schedule 3 (Contract Remuneration, Payment and Invoicing) in relation to any Allowable Assumptions and subject always to Clause 30.1.1, the Supplier shall not be excused from the performance of any of its obligations under this Contract 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 misinterpretation of the requirements of the Authority in this Contract;

2.2.2 any failure by the Supplier to satisfy itself as to the accuracy and/or adequacy of the Due Diligence Information; and/or

2.2.3 failure by the Supplier to undertake its own due diligence.

For the avoidance of doubt, subject to the provisions of Schedule 3 (Contract Remuneration, Payment and Invoicing), nothing in this Clause 2.2 shall prevent the Supplier from recovering any allowable and recoverable costs (including in respect of Allowable Assumptions) as set out in the Costs Register, but any additional costs or charges not forming part of the Costs Register that may be incurred by the Supplier as a result of the events set out at Clauses 2.2.1 to 2.2.3 above shall not be payable by the Authority.

### **3. REPRESENTATIONS AND WARRANTIES**

3.1 Each Party represents and warrants that:

3.1.1 it has full capacity and authority to enter into and to perform this Contract;

3.1.2 this Contract 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 (or, in the case of the Supplier, any of its Affiliates) that might affect its ability to perform its obligations under this Contract; and

3.1.4 its obligations under this Contract constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms subject to applicable (as the case may be for each Party) bankruptcy, reorganisation, insolvency, moratorium or similar Laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or Law).

3.2 The Supplier represents and warrants that:

3.2.1 it is validly organised and subsisting in accordance with the Law;

3.2.2 it has all necessary consents (including, where its procedures so require, the consent of its Parent Company) and regulatory approvals to enter into this Contract;

3.2.3 its execution, delivery and performance of its obligations under this Contract does not and will not constitute a breach of any Law or obligation applicable to it and does not and will not cause or result in a Default under any agreement by which it is bound;

3.2.4 as at the Commencement Date, all written statements and representations in any written submissions made by the Supplier as part of the procurement process, 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 Contract;

3.2.5 if the Remuneration payable under this Contract exceeds or is likely to exceed five (5) million pounds, as at the Commencement Date it has notified the Authority in writing of any Occasions of Tax Non-Compliance or

- any litigation that it is involved in connection with any Occasions of Tax Non Compliance;
- 3.2.6 it has and shall continue to have all necessary rights in and to the Third Party IPR, the Supplier Background IPRs 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 Contract including the receipt of the Services by the Authority;
  - 3.2.7 the Cost Model is a true and accurate reflection of the costs and Supplier Profit Margin forecast by the Supplier and the Supplier does not have any other internal financial model in relation to the Services inconsistent with the Cost Model;
  - 3.2.8 it shall take all steps, in accordance with Good Industry Practice, to prevent the introduction, creation or propagation of any disruptive elements (including any virus, worms and/or trojans, spyware or other malware) into systems, data, software or the Authority's Confidential Information (held in electronic form) owned by or under the control of, or used by, the Authority;
  - 3.2.9 it is not subject to any contractual obligation or material conflict of interest which is likely to have a material adverse effect on its ability to perform its obligations under this Contract;
  - 3.2.10 it is not affected by an Insolvency Event and no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, 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
  - 3.2.11 neither the Supplier nor any of its officers, employees or other persons associated with it:
    - (a) has been convicted of any offence involving slavery and human trafficking; and
    - (b) to the best of its knowledge, has been or is the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence or alleged offence of or in connection with slavery and human trafficking.
- 3.3 Each of the representations and warranties set out in Clauses 3.1 and 3.2 shall be construed as a separate representation and warranty and shall not be limited or restricted by reference to, or inference from, the terms of any other representation, warranty or any undertaking in this Contract.
  - 3.4 If at any time a Party becomes aware that a representation or warranty given by it under Clauses 3.1 and 3.2 has been breached, is untrue or is misleading, it shall immediately notify the other Party of the relevant occurrence in sufficient detail to enable the other Party to make an accurate assessment of the situation.
  - 3.5 For the avoidance of doubt, the fact that any provision within this Contract is expressed as a warranty shall not preclude any right of termination the Authority may have in respect of breach of that provision by the Supplier which constitutes a material Default.

#### 4. CYBER SECURITY

- 4.1 The Supplier shall obtain and submit to the Authority evidence of certification under the Cyber Essentials Scheme at the basic level before it Processes any Cyber Essentials Scheme Data (whether from the Commencement Date or later), and maintain this certification valid and up to date at all times while it continues to Process Cyber Essentials Scheme Data during the Contract Period.
- 4.2 If at any time during the Contract Period, the Supplier is required by the Authority to access the NHS National Information Technology Network (N3), it shall ensure that it obtains and maintains a valid and up to date Information Governance Statement of Compliance covering any periods where such access is required.
- 4.3 In the event that the Supplier fails to comply with the preceding conditions of this Clause 4, the Authority may terminate this Contract by issuing a Termination Notice.

#### B. DURATION OF CONTRACT

#### 5. CONTRACT PERIOD

- 5.1 The Contract Period shall start on the Commencement Date and shall end on the Expiry Date, unless it is terminated earlier in accordance with the terms of this Contract or otherwise by operation of Law.
- 5.2 The Contract Period comprises the Initial Period and any Extension Period. The Initial Period comprises the Implementation Period and the Operational Period.
- 5.3 The Authority shall extend the Operational Period for an Extension Period of one (1) year ("**First Extension**") by giving the Supplier no less than nine (9) Months' written notice before the end of the third (3<sup>rd</sup>) anniversary of the Operational Period Start Date provided that:
  - 5.3.1 within five (5) Business Days from the end of the period of two (2) Months after the second (2<sup>nd</sup>) anniversary of the Operational Period Start Date (the "**First Extension Assessment Period**") the Supplier provides to the Authority an extraordinary outline report and draft savings plan in respect of the First Extension (the "**First Extension Prior Report**") which confirms that:
    - (a) the Supplier has achieved combined Savings of an amount greater or equal to eighty percent (80%) of the combined Target Savings during the first two (2) Contract Years of the Initial Period;
    - (b) the Supplier has met or exceeded Target Service Levels for at least eighty percent (80%) of the total number of Service Levels measured during Contract Year 1 and Contract Year 2 of the Initial Period;
    - (c) the Target Savings applicable to the First Extension shall amount to eighty percent (80%) or higher of the Target Savings for the third Contract Year of the Initial Period;
    - (d) the Target Costs for the First Extension do not exceed the Target Costs for the third Contract Year of the Initial Period by more than five percent (5%);

- (e) the Target Margin for the First Extension is the same as the Target Margin for the first three (3) Contract Years;
- (f) the Authority is satisfied that the First Extension Prior Report is correct; and
- (g) the draft savings plan for the First Extension is consistent with the savings plan provided by the Supplier for the first three (3) Contract Years of the Operational Period and provides a narrative explanation of how this savings plan will be implemented (to include, without limitation, confirmation of any associated updates required to any Category Strategies, Sourcing Strategies or other Deliverables).

5.4 Where the Authority issues such notice under Clause 5.3:

- 5.4.1 the Authority shall notify the Supplier that the Target Service Levels shown in the Supplier's First Extension Prior Report are accepted;
- 5.4.2 the Authority and the Supplier shall agree a final savings plan applicable for the First Extension based on the draft savings plan provided with the Supplier's First Extension Prior Report, and for the avoidance of doubt such final savings plan shall include Target Savings of no less than the amount included in the draft savings plan on which it is based; and
- 5.4.3 by a notice issued by the Authority and signed by the Supplier, the Parties shall amend Schedule 3 (Contract Remuneration, Payment and Invoicing) and Schedule 19 (Commercial Model) to incorporate the final savings plan and any changes to the Cost Register respectively in accordance with the above with effect from the first day of the First Extension without recourse to the Variation Procedure and these amendments shall be deemed a Variation to this Contract as if the Variation Procedure had been followed.

5.5 Provided that the First Extension has taken place, the Authority shall extend the Operational Period for a further Extension Period of one (1) additional year ("**Second Extension**") by giving the Supplier no less than nine (9) Months' written notice before the end of the First Extension provided that:

- 5.5.1 within five (5) Business Days from the end of the period of two (2) Months after the third (3<sup>rd</sup>) anniversary of the Operational Period Start Date (the "**Second Extension Assessment Period**") the Supplier provides to the Authority an extraordinary outline report and draft savings plan in respect of the Second Extension (the "**Second Extension Prior Report**") which confirms that:
  - (a) the Supplier has achieved combined Savings of an amount greater or equal to eighty percent (80%) of the combined Target Savings during the first three (3) Contract Years of the Initial Period;
  - (b) the Supplier has met or exceeded Target Service Levels for at least eighty percent (80%) of the total number of Service Levels measured during Contract Year 2 and Contract Year 3 of the Initial Period;
  - (c) the Target Savings applicable to the Second Extension shall amount to eighty percent (80%) or higher of the Target Savings for the First Extension;

- (d) the Target Costs for the Second Extension do not exceed the Target Costs for the First Extension by more than five percent (5%);
- (e) the Target Margin for the Second Extension is the same as the Target Margin of the First Extension;
- (f) the Authority is satisfied that the Second Extension Prior Report is correct; and
- (g) the draft savings plan for the Second Extension is consistent with the savings plan provided by the Supplier for the First Extension and provides a narrative explanation of how this savings plan will be implemented (to include, without limitation, confirmation of any associated updates required to any Category Strategies, Sourcing Strategies or other Deliverables).

5.6 Where the Authority issues such notice under Clause 5.5:

- 5.6.1 the Authority shall notify the Supplier that the Target Service Levels shown in the Supplier's Second Extension Prior Report are accepted;
- 5.6.2 the Authority and the Supplier shall agree a final savings plan applicable for the Second Extension based on the draft savings plan provided with the Supplier's Second Extension Prior Report, and for the avoidance of doubt, such final savings plan shall include Target Savings of no less than the amount included in the draft savings plan on which it is based; and
- 5.6.3 by a notice issued by the Authority and signed by the Supplier, the Parties shall amend Schedule 3 (Contract Remuneration, Payment and Invoicing) and Schedule 19 (Commercial Model) to incorporate the final savings plan and any changes to the Cost Register respectively in accordance with the above with effect from the first day of the Second Extension without recourse to the Variation Procedure and these amendments shall be deemed a Variation to this Contract as if the Variation Procedure had been followed.

5.7 Where the Authority does not extend the Contract Period under Clauses 5.3 or 5.5, it may elect in its absolute discretion to extend the Contract Period for an Extension Period comprising of a period or periods up to and including two (2) years by giving the Supplier no less than six (6) Months' written notice before the Expiry Date.

5.8 For the avoidance of doubt, where the Contract Period is extended pursuant to any of the preceding provisions in this Clause 5, such extension:

- 5.8.1 shall take effect immediately upon service of the relevant notice by the Authority, and,
- 5.8.2 except in relation to the changes specified in Clauses 5.4 and 5.6 (as applicable) and unless the Parties have agreed otherwise, the Contract shall continue on the same terms that applied prior to service of the Authority's notice.

## **C. CONTRACT PERFORMANCE**

### **6. IMPLEMENTATION PLAN**

6.1 Compliance with the Implementation Plan

- 6.1.1 The Supplier shall comply with the Implementation Plan.
  - 6.1.2 The Supplier shall perform each of the Deliverables identified in the Implementation Plan by the applicable date assigned to that Deliverable in the Implementation Plan so as to ensure that each Implementation Milestone identified in the Implementation Plan is Achieved on or before its Implementation Milestone Date.
  - 6.1.3 The Supplier shall monitor its performance against the Implementation Plan and Implementation Milestones (if any) and any other requirements of the Authority as set out in this Contract and report to the Authority on such performance.
- 6.2 Formation of the Detailed Implementation Plan
- 6.2.1 The Outline Implementation Plan is included in Part A of Schedule 4 (Implementation Plan and Key Personnel) of this Contract.
  - 6.2.2 The Supplier shall submit to the Authority a draft Detailed Implementation Plan which must:
    - (a) include all the requirements of the Outline Implementation Plan;
    - (b) contain additional information at the level of detail necessary to manage the Implementation Period effectively and as the Authority may require; and
    - (c) take account of all dependencies known to, or which should reasonably be known to, the Supplier.
  - 6.2.3 The Supplier shall submit the draft Detailed Implementation Plan to the Authority for Approval (such decision of the Authority to Approve or not shall not be unreasonably delayed or withheld) within a period of thirty (30) days from the Commencement Date.
  - 6.2.4 The Parties agree that the so Approved Detailed Implementation Plan shall replace the Outline Implementation Plan and be deemed to form part of this Contract without recourse to the Variation Procedure.
- 6.3 Review of the Detailed Implementation Plan
- 6.3.1 Subject to Clause 6.3.2, the Supplier shall keep the Detailed Implementation Plan under review in accordance with the Authority's instructions and ensure that it is maintained and updated on a regular basis as may be necessary to reflect the then current state of the provision of the Services. The Authority shall have the right to require the Supplier to include any reasonable changes or provisions in each version of the Detailed Implementation Plan.
  - 6.3.2 Any material changes (whether or not a change is material shall be determined at the sole discretion of the Authority) to the Detailed Implementation Plan shall only be made in accordance with the Variation Procedure. Any non-material changes to the Detailed Implementation Plan shall be agreed by the Parties in writing and each Party shall respond to a request from the other Party for a non-material change within five (5) Business Days of receiving such request. The Supplier shall not attempt to postpone any of the Implementation Milestones using the Variation Procedure or otherwise (except in the event of an Authority Cause which

affects the Supplier's ability to achieve an Implementation Milestone by the relevant Implementation Milestone Date).

6.4 Rectification of Delay in implementation

6.4.1 If the Supplier becomes aware that there is, or there is reasonably likely to be, a Delay under this Contract it shall:

- (a) notify the Authority as soon as practically possible and no later than within two (2) Business Days from becoming aware of the Delay or anticipated Delay;
- (b) include in its notification an explanation of the actual or anticipated impact of the Delay;
- (c) comply with the Authority's instructions in order to address the impact of the Delay or anticipated Delay; and
- (d) use all reasonable endeavours to eliminate or mitigate the consequences of any Delay or anticipated Delay.

6.5 The Authority's obligations under the Implementation Plan

6.5.1 The Authority shall comply with all of its responsibilities and obligations (if any) set out in the Implementation Plan.

## 7. SERVICES

7.1 Provision of the Services

7.1.1 The Supplier acknowledges and agrees that the Authority relies on the skill and judgment of the Supplier in the provision of the Services and the performance of its obligations under this Contract.

7.1.2 The Supplier shall ensure that the Services:

- (a) comply in all respects with the Authority's description of the Services in Schedule 2 (Services) or elsewhere in this Contract;
- (b) are supplied in accordance with the provisions of this Contract; and
- (c) unless otherwise expressly notified by the Authority, are performed fully in accordance with the responses given in the Supplier's Tender.

7.1.3 The Supplier shall, unless expressly instructed otherwise by the Authority, perform its obligations under this Contract in accordance with:

- (a) to the extent that the Supplier is acting as an agent for the Authority, Schedule 15 (Agency Terms);
- (b) all applicable Law;
- (c) Good Industry Practice;
- (d) the Standards;
- (e) the Security Policy (subject to Clause 28 (Security and Protection of Information)); and
- (f) the Supplier's own established procedures and practices to the extent the same do not conflict with the requirements of Clauses 7.1.3(a) to (e).

7.1.4 The Supplier shall:

- (a) at all times allocate sufficient resources with the appropriate technical expertise to supply the Deliverables and to provide the Services in accordance with this Contract;
- (b) subject to Clause 17.1 (Variation Procedure), obtain, and maintain throughout the duration of this Contract, all the consents, approvals, licences and permissions (statutory, regulatory contractual or otherwise) it may require and which are necessary for the provision of the Services;
- (c) ensure that any services recommended or otherwise specified by the Supplier for use by the Authority in conjunction with the Deliverables and/or Services shall enable the Deliverables and/or Services to meet the requirements of the Authority;
- (d) ensure that the Supplier Assets will be free of all encumbrances (except as agreed in writing with the Authority);
- (e) ensure that the Services are fully compatible with any Authority Property or Authority Assets used by the Supplier in connection with this Contract;
- (f) minimise any disruption to the Sites and/or the Authority's operations when providing the Services;
- (g) ensure that any Documentation and training provided by the Supplier to the Authority are comprehensive, accurate and prepared in accordance with Good Industry Practice;
- (h) co-operate with the Other Suppliers and provide reasonable information (including any Documentation), advice and assistance in connection with the Services to any Other Supplier and, on the Expiry Date for any reason, to enable the timely transition of the supply of the Services (or any of them) to the Authority and/or to any Replacement Supplier;
- (i) assign to the Authority, or if it is unable to do so, hold on trust for the sole benefit of the Authority (to the extent it is legally able to do so), all warranties and indemnities provided by third parties or any Sub-Contractor in respect of any Deliverables and/or the Services. Where any such warranties are held on trust, the Supplier shall enforce such warranties in accordance with any reasonable directions that the Authority may notify from time to time to the Supplier;
- (j) provide the Authority with such assistance as the Authority may reasonably require during the Contract Period in respect of the supply of the Services;
- (k) deliver the Services in a proportionate and efficient manner;
- (l) 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 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 Supplier's obligations under this Contract;

- (m) 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 Contract; and
- (n) use any standard documents as may be required by the Authority in the performance of its obligations under the Contract (to include, without limitation, any standard NHS terms and conditions of contract as published by the Department of Health from time to time).

7.1.5 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.

## 7.2 Time of Delivery of the Services

7.2.1 The Supplier shall provide the Services on the date(s) specified in the Implementation Plan or elsewhere in this Contract.

## 7.3 Location and manner of Delivery of the Services

7.3.1 Except where otherwise provided in this Contract, the Supplier shall provide the Services to the Authority through the Supplier Personnel at the Sites.

7.3.2 The Authority may inspect and examine the manner in which the Supplier provides the Services at the Sites and, if the Sites are not the Authority Premises, the Authority may carry out such inspection and examination during normal business hours and on reasonable notice.

## 7.4 Undelivered Services

7.4.1 In the event that any of the Services are not Delivered in accordance with Clauses 7.1 (Provision of the Services), 7.2 (Time of Delivery of the Services) and 7.3 (Location and manner of Delivery of the Services) ("**Undelivered Services**"), the Authority, without prejudice to any other rights and remedies of the Authority howsoever arising, shall be entitled to withhold payment of the applicable Remuneration for the Services that were not so Delivered until such time as the Undelivered Services are Delivered.

## 7.5 Obligation to remedy Default in the supply of the Services

7.5.1 Subject to Clauses 27.9.2 and 27.9.3 (IPR Indemnity) and without prejudice to any other rights and remedies of the Authority howsoever arising (including under Clause 32 (Authority Remedies for Default)), the Supplier shall, where practicable:

- (a) remedy any breach of its obligations in Clause 7.1 (Provision of the Services) within ten (10) Business Days of becoming aware of the relevant Default or being notified of the Default by the Authority or within such other time period as may be agreed with the Authority (taking into account the nature of the breach that has occurred); and

- (b) meet all the costs of, and incidental to, the performance of such remedial work.

7.6 Continuing obligation to provide the Services

7.6.1 The Supplier shall continue to perform all of its obligations under this Contract and shall not suspend the provision of the Services, notwithstanding:

- (a) any withholding or deduction by the Authority of any sum due to the Supplier pursuant to the exercise of a right of the Authority to such withholding or deduction under this Contract;
- (b) the existence of an unresolved Dispute; and/or
- (c) any failure by the Authority to pay any Remuneration,  
unless the Supplier is entitled to terminate this Contract under Clause 36.1 (Termination on Authority Cause for failure to pay) for failure by the Authority to pay undisputed invoices.

7.7 Subject to Clause 30 (Liability) of this Contract, the Supplier shall indemnify the Authority on a continuing basis against all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of reputation and all interest, penalties and legal costs) suffered or incurred by the Authority (whether before or after the making of a demand pursuant to the indemnity hereunder) as a consequence of the Supplier's failure to perform the Services in accordance with the Law, including the Regulations.

7.8 Exclusivity

7.8.1 Subject to Clause 7.8.3 below and unless otherwise agreed by the Authority, the Supplier shall not, and shall procure that none of its Sub-Contractors or Affiliates shall during the Operational Period:

- (a) compete with any other Category Tower by:
- (b) other than in accordance with clause 7.8.2, supplying to any part of the NHS; or
- (c) procuring on behalf of any part of the NHS:
  - (i) goods or services that are the same type of goods or services as another Category Tower is responsible for procuring and/or providing within the FOM; or
  - (ii) goods or services that are the same type of goods or services as another Category Tower is responsible for procuring and/or providing within the FOM; or
- (d) subject to Clause 7.8.4 below, compete with its own Category Tower by providing to any part of the NHS goods or services that are the same type of goods or services as the Supplier is responsible for procuring and/or providing as part of the Services.

7.8.2 During the Contract Period, the Supplier may, and its Sub-Contractors and any Affiliate may:

- (a) supply goods or services to part of the NHS under arrangements procured by another Category Tower within the FOM;

- (b) supply goods or services to any part of the NHS that are not, at the time of supply by the Supplier, the type of goods and services being procured and/or provided within the FOM; and
  - (c) supply any goods or services to any entity that is not part of the NHS.
- 7.8.3 The restrictions set out in Clause 7.8.1 shall not apply to the extent they would require the Supplier, a Sub-Contractor or an Affiliate to breach any legally binding agreement to supply any goods or services, entered into by the Supplier, a Sub-Contractor or an Affiliate (as appropriate) with any third party prior to the Commencement Date.
- 7.8.4 An Affiliate and/or Sub-Contractor may provide to any part of the NHS goods or services that are the same type of goods or services as the Supplier is responsible for procuring and/or providing as part of the Services provided that:
  - (a) the supply of those goods or services will be procured under the Regulations; and
  - (b) the Supplier has: (a) obtained the Authority's Approval for appropriate business separation procedures (to include, without limitation, an appropriate information barrier) in relation to any such procurement under the Regulations in order to: (i) prevent any potential conflict of interest adversely impacting on such procurement; and (ii) ensure compliance with the Law and Good Industry Practice; and (b) obtained the Authority's Approval to the effect that such participation in such procurement shall not in any way prejudice or undermine the obligations of the Supplier to the Authority under this Contract (to include, without limitation, the attainment of the outputs of the specification of the Services and the Service Levels and, more generally, the delivery within the agreed timescales of the real Total System Costs savings, efficiencies and benefits envisaged for the FOM by this Contract as shall be notified by the Authority to the Supplier from time to time).
- 7.9 Non-solicitation of Authority staff involved in receipt and/or administration of the Services
  - 7.9.1 Except in respect of any transfer pursuant to the Employment Regulations, the Supplier shall not, and the Supplier shall procure that any Sub-Contractor shall not, during the Contract Period and for a period of twelve (12) Months following the termination or expiry of this Contract either directly or indirectly solicit or entice away (or seek to attempt to solicit or entice away) from the employment of the Authority any person employed in the receipt and/or administration of the Services provided that the Supplier shall be entitled to employ any such person where such person has responded (without specific solicitation) to a general solicitation through newspapers or other publications of general circulation, placement agents or similar means.
- 7.10 Authority responsibilities

- 7.10.1 The Authority shall comply with the Authority Responsibilities set out in paragraph **Error! Reference source not found.** of Schedule 19 (Commercial Model).
- 7.10.2 The Authority shall:
- (a) deploy sufficient suitably qualified staff to fulfil the Authority's obligations under this Contract;
  - (b) use reasonable endeavours to provide the Supplier with access to appropriate members of the Authority's staff, as such access is reasonably requested by the Supplier, in connection with the performance by the Supplier of its obligations under this Contract throughout the Contract Period;
  - (c) establish the Intelligent Client Coordinator (or an equivalent body) to be responsible, on behalf of the Authority, for governance and risk management processes in connection with this Contract;
  - (d) report to the Supplier at reasonable intervals on progress in connection with the establishment of the Intelligent Client Coordinator (or an equivalent body) and development of the governance regime (as set out in Schedule 20 (Governance));
  - (e) once a Category Strategy has been approved in accordance with paragraph 3.7 of Part A of Schedule 6 (Service Levels and Adjustments), comply with its obligations (if any) under that Category Strategy;
  - (f) once a Joint Campaigns Plan has been approved in accordance with the provisions of Schedule 2 (Services), comply with its obligations (if any) under that Joint Campaigns Plan;
  - (g) enter into a contract (the **"Supporting Technologies Contract"** with a third party supplier of supporting technologies (the **"IT System"**) and shall use its reasonable endeavours to manage and enforce the Supporting Technologies Contract to ensure that the IT System is provided in accordance with the terms of the Supporting Technologies Contract; and
  - (h) ensure that the Supporting Technologies Contract includes licence provisions allowing the Supplier to use the IT System for the purpose of delivering the Services under this Contract.

## 8. STANDARDS AND QUALITY

- 8.1 The Supplier shall at all times during the Contract Period comply with the Standards and Schedule 7 (Standards) and maintain, where applicable, accreditation with the relevant Standards' authorisation body.
- 8.2 Throughout the Contract Period, the Parties shall notify each other of any new or emergent standards which could affect the Supplier's provision, or the receipt by the Authority, of the Services. The adoption of any such new or emergent standard, or changes to existing Standards, shall be agreed in accordance with the Variation Procedure. Any change to an existing Standard which is included in Schedule 7 (Standards) shall, in addition, require the Approval of the Authority.

- 8.3 Where a new or emergent standard is to be developed or introduced by the Authority, the Supplier shall be responsible for ensuring that the potential impact on the Supplier's provision, or the Authority's receipt of the Services is explained to the Authority (within a reasonable timeframe), prior to the implementation of the new or emergent standard.
- 8.4 Where Standards referenced conflict with each other or with best professional or industry practice adopted after the Commencement Date, then the later Standard or best practice shall be adopted by the Supplier. Any such alteration to any Standard or Standards shall require Approval and shall be implemented within an agreed timescale.
- 8.5 Where a standard, policy or document is referred to in Schedule 7 (Standards) 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 agree the impact of such change.

## **9. SERVICE LEVELS AND SERVICE CREDITS**

- 9.1 The Parties shall comply with the provisions of Schedule 6 (Service Levels and Adjustments).
- 9.2 The Supplier shall at all times during the Contract Period provide the Services to meet or exceed the Service Levels and any related Service Level Performance Criteria.
- 9.3 The Supplier acknowledges that any Service Level Failure may have a material adverse impact on the business and operations of the Authority and that it shall entitle the Authority to the rights set out in Schedule 6 (Service Level and Adjustments) including the right to any Service Credits.
- 9.4 The Supplier acknowledges and agrees that any Service Credit is a price adjustment and not an estimate of the Loss that may be suffered by the Authority as a result of the Supplier's failure to meet any Service Levels and any related Service Level Performance Criteria.
- 9.5 A Service Credit shall be the Authority's exclusive financial remedy for a Service Level Failure except where:
  - 9.5.1 the Service Level Failure:
    - (a) amounts to a Critical Service Failure;
    - (b) amounts to a Default leading to the termination of the Contract, in which case the relevant provisions of Clause 39.1 shall apply;
    - (c) results in:
      - (i) the corruption or loss of any Authority Data (in which case the remedies under Clause 28.2.7 (Security and Protection of Information) shall also be available); and/or
      - (ii) the Authority being required to make a compensation payment to one or more third parties;
  - 9.5.2 the Authority is otherwise entitled to recover sums under an express indemnity provided for under this Contract; and/or

- 9.5.3 the Authority is otherwise entitled to or does terminate this Contract pursuant to Clause 35 (Authority Termination Rights) except Clause 35.7 (Termination without cause).
- 9.6 Not more than once in each Contract Year the Authority may, on giving the Supplier at least three (3) Months' notice, change the Service Levels and Service Level Performance Criteria and the Supplier shall not be entitled to object to such changes provided that:
  - 9.6.1 the number of Service Levels are not significantly increased; and
  - 9.6.2 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; and
  - 9.6.3 the Authority shall at all times acts reasonably in making such changes.
- 9.7 The Supplier shall only be entitled to increased Remuneration as a result of such changes where the Supplier can provide the Authority with evidence:
  - 9.7.1 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 relating to implementing such changes;
  - 9.7.2 as to how such change has affected the cost of providing the Services; and
  - 9.7.3 demonstrating that any costs that have been avoided and/or minimised have been taken into account in relation to any proposed increased Remuneration.

For the avoidance of doubt, any agreed increases to the Supplier's Remuneration as a result of such changes shall be separately by implemented by the Variation Procedure.

## **10. CRITICAL SERVICE FAILURE**

- 10.1 Without prejudice to any other right or remedy of the Authority howsoever arising, on the occurrence of a Critical Service Failure the Authority shall be entitled to terminate this Contract in accordance with Clause 35.1.1(a) and/or to claim damages from the Supplier for material Default as a result of such Critical Service Failure. For the avoidance of doubt, this right shall be in addition and without prejudice to the Authority's rights under Clause 32 (Authority Remedies for Default).
- 10.2 The Supplier:
  - 10.2.1 agrees that the application of Clause 10.1 is commercially justifiable where a Critical Service Failure occurs; and
  - 10.2.2 acknowledges that it has taken legal advice on the application of Clause 10.1 and has had the opportunity to price for that risk when calculating the Remuneration.

## **11. BUSINESS CONTINUITY AND DISASTER RECOVERY**

- 11.1 The Parties shall comply with the provisions of Schedule 9 (Business Continuity and Disaster Recovery).

## **12. DISRUPTION**

- 12.1 The Supplier shall take reasonable care to ensure that in the performance of its obligations under this Contract it does not disrupt the operations of the Authority, the operations of other NHS organisations relying on the Services, its employees or any other contractor employed by the Authority.
- 12.2 The Supplier shall immediately inform the Authority of any actual or potential industrial action, whether such action be by the Supplier Personnel or others, which affects or might affect the Supplier's ability at any time to perform its obligations under this Contract.
- 12.3 In the event of industrial action by the Supplier Personnel, the Supplier shall seek Approval to its proposals for the continuance of the supply of the Services in accordance with its obligations under this Contract.
- 12.4 If the Supplier's proposals referred to in Clause 12.3 are considered insufficient or unacceptable by the Authority acting reasonably then the Authority may terminate this Contract by issuing a Termination Notice to the Supplier.
- 12.5 If the Supplier is temporarily unable to fulfil the requirements of this Contract owing to disruption of normal business solely due to an Authority Cause, then subject to Clause 13 (Supplier Notification of Authority Cause), an appropriate allowance by way of an extension of time will be Approved by the Authority. In addition, the Authority will reimburse any additional expense reasonably incurred by the Supplier as a direct result of such disruption.

### **13. SUPPLIER NOTIFICATION OF AUTHORITY CAUSE**

- 13.1 Without prejudice to any other obligations of the Supplier in this Contract to notify the Authority in respect of a specific Authority Cause (including the notice requirements under Clause 36.1.1 (Termination on Authority Cause for failure to pay)), the Supplier shall notify the Authority as soon as reasonably practicable (and in any event within two (2) Business Days of the Supplier becoming aware) that an Authority Cause has occurred or is reasonably likely to occur, giving details of:
  - 13.1.1 the Authority Cause and its effect, or likely effect, on the Supplier's ability to meet its obligations under this Contract; and
  - 13.1.2 any steps which the Authority can take to eliminate or mitigate the consequences and impact of such Authority Cause; and
  - 13.1.3 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.

## **D. CONTRACT GOVERNANCE**

### **14. PERFORMANCE MONITORING, GOVERNANCE AND COLLABORATION**

- 14.1 The Supplier shall comply with the performance monitoring requirements set out in Schedule 6 (Service Levels and Adjustments).
- 14.2 The Parties shall comply with the governance procedures set out in Schedule 20 (Governance).
- 14.3 The Supplier shall comply with the collaboration processes and obligations set out in Schedule 21 (Collaboration).

## 15. REPRESENTATIVES

- 15.1 Each Party shall have a representative for the duration of this Contract who shall have the authority to act on behalf of their respective Party on the matters set out in, or in connection with, this Contract.
- 15.2 The initial Supplier Representative shall be the person notified to the Authority in writing by the Supplier within (5) Business Days of the Commencement Date. Any change to the Supplier Representative shall be agreed in accordance with Clause 21 (Supplier Personnel).
- 15.3 The Authority shall notify the Supplier of the identity of the initial Authority Representative within five (5) Business Days of the Commencement Date. The Authority may, by written notice to the Supplier, revoke or amend the authority of the Authority Representative or appoint a new Authority Representative.

## 16. RECORDS, AUDIT ACCESS AND OPEN BOOK DATA

- 16.1 Subject to any statutory requirement and Clause 16.2, the Supplier shall keep secure and maintain for the Contract Period and six (6) years afterwards, or such longer period as may be agreed between the Parties, full and accurate records of all matters relating to this Contract. To the extent relevant to the Services and the associated records kept, the Supplier shall, and shall procure that its Sub-Contractors shall, comply with The Records Management Code of Practice for Health and Social Care 2016 published by Information Governance Alliance for the Department of Health (as may be updated, superseded or replaced from time to time).
- 16.2 Where any records could be relevant to a claim for personal injury such records shall be kept secure and maintained for a period of twenty one (21) years from the date of expiry or earlier termination of this Contract.
- 16.3 In addition to any other recording keeping and reporting requirements referred to as part of this Contract, the Supplier shall comply with the following open book requirements:
  - 16.3.1 The Supplier shall provide financial information to the Authority on an open book basis to enable the Authority to audit and verify the accuracy of the Service Costs and all Remuneration payable to the Supplier, or any other reasonable purpose the Authority may have ("**Open Book Data**").
  - 16.3.2 The Supplier shall provide the Open Book Data to the Authority in the format required by the Authority from time to time (or, if no format is specified, in accordance with all applicable laws, generally accepted accounting practice and Good Industry Practice). As a minimum, the Open Book Data to be provided to the Authority shall include the following:
    - (a) a profit and loss statement in respect of any revenues and expenses under this Contract;
    - (b) a full breakdown of the Incurred Costs during each Contract Year as against each element of the Services and each relevant obligation under this Contract, including:
      - (i) all capital expenditure (including any capital replacement costs where agreed by the Authority) and operating costs relating to the performance of the Services, including at the request of the Authority an analysis showing: (a) the unit

costs and quantity of consumables and bought in services;  
and (b) manpower resources broken down into the number  
and grade/role of all Service employees;

- (ii) any Allowable Costs that have been apportioned as set out in the Cost Register;
- (iii) all interest, expenses and any other third party financing costs incurred in relation to the provision of the Services as set out in the Cost Register; and
- (iv) confirmation that all methods of cost apportionment within the Allowable Costs are consistent with, and not more onerous than, such methods applied generally in the Parent Company.

16.3.3 The Open Book Data to be retained by the Supplier and provided to the Authority shall include the above information for each member of the Parent Company to the extent that the Parent Company member provides any of the Services or fulfils any of the obligations of the Supplier under this Contract (whether delivered under a Sub-Contract or otherwise).

16.3.4 The Supplier shall retain and provide (as part of the Open Book Data) full and accurate details of any incentive, levy, rebate or other equivalent fee paid by the suppliers of goods and services to the Supplier or any member of the Parent Company to the extent that such payments relate to the provision of the Services or the subject of this Contract ("**Parent Company Rebates**"). With regard to the Parent Company Rebates:

- (a) the Parent Company Rebates shall not include any Supplier Levy which has been paid directly to the Authority's bank account and any rebates paid directly by a Supplier to a Customer; and
- (b) in addition and without prejudice to its rights of access and audit under Clause 16.4, the Authority shall be entitled to audit 2 categories of goods and/or services per quarter to confirm that the value of any Parent Company Rebates has been appropriately taken into account. The Supplier shall provide (and procure that each relevant member of the Parent Company provides) the Authority with any and all assistance, documentation, records and access to personnel as the Authority may reasonably require to conduct this audit, including compliance with its commitments under Clause 16.4. If the audit suggests that the Supplier has not been reporting all Parent Company Rebates, the Authority may conduct further audits at the cost of the Supplier (which for the avoidance of doubt shall not be recoverable in the Costs Payment unless such further audits demonstrate that the Supplier has been declaring all Parent Company Rebates) in order to confirm the extent of the issues.

16.3.5 The Supplier shall provide the Authority with the Open Book Data each Service Period within eight (8) Business Days of the end of the Service Period to which the Open Book Data relates, and shall respond to any reasonable Authority request to answer specific questions relating to the Open Book Data within five (5) Business Days of the date of such request.

- 16.3.6 Compliance with the above shall require the Supplier to keep documentary evidence of all payments made on all Sub-Contracts. For the avoidance of doubt, Sub-Contractors are not required to maintain Open Book Data.
- 16.4 The Authority or an Auditor shall have the right to audit the Supplier's compliance with this Contract including (but not limited to) in order to:
  - 16.4.1 verify the accuracy of the Remuneration and any other amounts payable by the Authority under this Contract (and proposed or actual variations to them in accordance with this Contract);
  - 16.4.2 verify the costs of the Supplier (including the costs of all Sub-Contractors and any third party suppliers) in connection with the provision of the Services; and/or
  - 16.4.3 verify the Open Book Data.
- 16.5 The Supplier shall permit or procure permission for the Authority or the Auditor during normal business hours having given advance written notice of no less than five (5) Business Days, access to any premises and facilities, books and records reasonably required to audit the Supplier's compliance with its obligations under this Contract.
- 16.6 Should the Supplier enter into any Sub-Contract in respect of its obligations under this Contract, the Authority or the Auditor shall have the right to audit and inspect the relevant Sub-Contractor and the following provisions shall apply:
  - 16.6.1 the Supplier shall procure permission for the Authority or the Auditor during normal business hours no more than once in any twelve (12) Months, or as frequently as set out in Clauses 16.6.2 and 16.6.3, having given advance written notice of no less than five (5) Business Days, access to any premises and facilities, books and records used in the performance of the Supplier's obligations under this Contract that are sub-contracted to such Sub-Contractor;
  - 16.6.2 notwithstanding Clause 16.6.1, the rights of the Authority to audit and inspect set out in this Clause 16.6 may be exercised at any time (and expressly more than once in any twelve (12) Months), if the Authority has concerns, such concerns being both reasonable and exercised in good faith, over the performance, service delivery, compliance with contractual obligations, or the costs of any such third party;
  - 16.6.3 where an audit and inspection has taken place under any of the preceding Sub-Clauses of this Clause 16.6, the Authority shall have the right to carry out a further follow up audit and inspection of such Sub-Contractor; and
  - 16.6.4 the Supplier shall cooperate with all audits and inspections and accompany the Authority or the Auditor if requested.
- 16.7 The Parties agree that they shall bear their own respective costs and expenses incurred in respect of compliance with their obligations under this Clause 16, unless the audit reveals a Default by the Supplier, in which case the Supplier shall reimburse the Authority for the Authority's reasonable costs incurred in relation to the audit.

## **17. CHANGE**

- 17.1 Variation Procedure

- 17.1.1 Subject to the provisions of Clause 5.4.3, Clause 5.6.3, this Clause 17 and Schedule 3 (Contract Remuneration, Payment and Invoicing), either Party may request a variation to this Contract provided that such variation does not amount to a substantial modification or a material change of this Contract within the meaning of the Regulations and the Law. Such a change once implemented is hereinafter called a "**Variation**".
- 17.1.2 A Party may request a Variation by completing, signing and sending the Variation Form to the other Party giving sufficient information for the receiving Party to assess the extent of the proposed Variation and any additional cost that may be incurred.
- 17.1.3 Regardless of which Party requested the Variation, if required by the Authority, the Supplier shall carry out an impact assessment of the Variation on the Services (the "**Impact Assessment**"). The Impact Assessment shall be completed in good faith and shall include:
- (a) details of the impact of the proposed Variation on the Services and the Supplier's ability to meet its other obligations under this Contract;
  - (b) details of the cost of implementing the proposed Variation;
  - (c) details of the on-going costs required by the proposed Variation when implemented, including any increase or decrease in the Target Costs, any alteration in the resources and/or expenditure required by either Party and any alteration to the working practices of either Party;
  - (d) a timetable for the implementation, together with any proposals for the testing of the Variation; and
  - (e) such other information as the Authority may reasonably request in (or in response to) the Variation request.
- 17.1.4 Where the Authority anticipates that the cost of a proposed Variation (both the cost of implementing the Variation and the on-going costs) may exceed £10,000, the Supplier shall, where required by the Authority, initiate a more detailed assessment of the reasoning, works, scope, methodology, costs and costs benefit of the proposed Variation ("Business Case"). The Parties may agree to adjust the time limits specified in the Variation Form to allow for the preparation of the Impact Assessment or Business Case as applicable. Guidelines for creating the Business Case can be found on this link: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/469317/green\\_book\\_guidance\\_public\\_sector\\_business\\_cases\\_2015\\_update.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469317/green_book_guidance_public_sector_business_cases_2015_update.pdf).
- 17.1.5 Templates for the different Business Cases can be found on this link: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/341053/Green\\_Book\\_guidance\\_public\\_sector\\_business\\_cases\\_using\\_the\\_Five\\_Case\\_Model\\_templates.odt](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/341053/Green_Book_guidance_public_sector_business_cases_using_the_Five_Case_Model_templates.odt)
- 17.1.6 The receiving Party shall respond to the request within the time limits specified in the Variation Form. Such time limits shall be reasonable and ultimately at the discretion of the Authority having regard to the nature of

the Services and the proposed Variation and under no circumstances will be less than three (3) Business Days.

17.1.7 In the event that:

- (a) the Supplier acting reasonably is unable to agree to or provide the Variation and provides written confirmation of such (together with the reasons) within three (3) Business Days following preparation of the Impact Assessment; and/or
- (b) the Parties are unable to agree a change to the Cost Model that may be included in a request for a Variation or response to it as a consequence thereof,

the Authority may:

- (i) agree to continue this Contract without the Variation; and
- (ii) seek alternative methods for the provision of the proposed Variation (including, without limitation, approaching other potential suppliers and entering into separate contractual arrangements with a third party to deliver such requirements).

For the avoidance of doubt, the Supplier shall only be deemed to be acting reasonably for purposes of Clause 17.1.7 (a) if, following an Impact Assessment, the Supplier reasonably believes that any proposed Variation:

- (a) would materially and adversely affect the risks to the health and safety of any person;
- (b) would require the Services to be performed in a way that infringes any Law;
- (c) is technically impossible to implement provided that the Supplier can demonstrate to the Authority's reasonable satisfaction that: (i) this is the case; and (ii) no other part of this Contract states, warrants, represents or requires that the Supplier does have the technical capabilities required to implement the proposed Variation.

17.1.8 If the Parties agree the Variation in writing, the Supplier shall implement such Variation and be bound by the same provisions so far as is applicable, as though such Variation was stated in this Contract.

17.2 Legislative Change

17.2.1 Subject to Clauses 17.2.2 and 17.2.3, the Supplier shall neither be relieved of its obligations under this Contract nor, unless otherwise agreed between the Parties, be entitled to an increase in its Target Costs as the result of a change in Law (including, without limitation, a Specific Change in Law that was reasonably foreseeable as at the Commencement Date).

17.2.2 If a Specific Change in Law occurs or will occur during the Contract Period (other than one that was reasonably foreseeable as at the Commencement Date, as referred to in Clause 17.2.1), the Supplier shall:

- (a) notify the Authority as soon as reasonably practicable of the likely effects of that change including:

- (i) whether any Variation is required to the provision of the Services, the Supplier's Cost Model, or any other part of this Contract; and
- (ii) whether any relief from compliance with the Supplier's obligations is required, including any obligation to Achieve an Implementation Milestone and/or to meet the Target Service Levels; and
- (b) provide to the Authority with evidence:
  - (i) why such Specific Change in Law could not have reasonably been foreseen by the Supplier as at the Commencement Date;
  - (ii) 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;
  - (iii) as to how the Specific Change in Law has affected the cost of providing the Services; and
  - (iv) demonstrating any costs that have been avoided and/or minimised have been taken into account in relation to any proposed Variation to the Supplier's Cost Model.

17.2.3 Any change required to the provision of the Services, the Supplier's Cost Model or any other part of this Contract and/or any relief from the Supplier's obligations resulting from an unforeseeable (as at the Commencement Date) Specific Change in Law shall be implemented in accordance with the Variation Procedure.

## **E. PAYMENT, TAXATION AND VALUE FOR MONEY PROVISIONS**

### **18. CONTRACT REMUNERATION AND PAYMENT**

#### **18.1 Contract Remuneration**

- 18.1.1 In consideration of the Supplier carrying out its obligations under this Contract, including the provision of the Services, the Authority shall pay the undisputed Remuneration in accordance with the pricing and payment profile and the invoicing procedure in Schedule 3 (Remuneration, Payment and Invoicing).
- 18.1.2 Except as otherwise provided, each Party shall bear its own costs and expenses incurred in respect of compliance with its obligations under Clauses 16 (Records, Audit Access and Open Book Data), 28.5 (Freedom of information) and 28.6 (Protection of Personal Data).
- 18.1.3 If the Authority fails to pay any undisputed Remuneration properly invoiced under this Contract, 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. In relation to payments disputed in good faith, interest under this clause is payable only after the dispute is resolved, on sums

found or agreed to be due, from fourteen (14) calendar days after the dispute is resolved until payment.

## 18.2 Tax

18.2.1 The Remuneration is exclusive of VAT and any other taxes, levies, duties or similar governmental assessments, including use or withholding taxes, which shall be added at the prevailing rate as applicable and paid by the Authority following delivery of a Valid Invoice (unless the Authority provides the Supplier with a valid tax exemption certificate authorised by the Relevant Tax Authority).

18.2.2 The Supplier shall indemnify the Authority on a continuing basis against any liability, including any interest, penalties or costs incurred, which is levied, demanded or assessed on the Authority at any time (whether before or after the making of a demand pursuant to the indemnity hereunder) in respect of the Supplier's failure to account for or to pay any VAT and any other taxes, levies, duties or similar governmental assessments relating to payments made to the Supplier under this Contract. Any amounts due under Clause 18.2 (Tax) shall be paid in cleared funds by the Supplier to the Authority not less than five (5) Business Days before the date upon which the tax or other liability is payable by the Authority.

## 18.3 Retention and set off

18.3.1 The Authority may retain or set off any amount owed to it by the Supplier against any amount due to the Supplier under this Contract or under any other agreement between the Supplier and the Authority.

18.3.2 If the Authority wishes to exercise its right pursuant to Clause 18.3.1 it shall give notice to the Supplier within thirty (30) days of receipt of the relevant invoice, setting out the Authority's reasons for retaining or setting off the relevant amount. Such notice shall discharge the Authority's payment obligations in relation to the relevant amount pursuant to the relevant invoice and the relevant amount shall be deemed to have been paid by the Authority to the Supplier on the date of the relevant notice of retention or set-off given by the Authority to the Supplier in accordance with this Clause 18.3.2. For the avoidance of doubt, to the extent any invoice is paid by the Authority in this way by its due date (such due date to be determined in accordance with Clause 18.1.1 above), the Supplier shall not be entitled to charge interest on the relevant amount in accordance with Clause 18.1.3 above.

18.3.3 The Supplier shall make any payments due to the Authority without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise unless the Supplier has obtained a sealed court order requiring an amount equal to such deduction to be paid by the Authority to the Supplier.

## 18.4 Income tax and national insurance contributions

18.4.1 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 Contract, the Supplier:

- (a) shall, and shall procure that all Supplier Personnel shall, at all times comply with the Income Tax (Earnings and Pensions) Act 2003, IR35 and all other statutes, regulations, HM Revenue and Customs rules and policies relating to income tax, and the Social Security Contributions and Benefits Act 1992 and all other statutes, regulations and associated rules and guidance relating to national insurance contributions, in respect of that consideration; and
  - (b) shall indemnify the Authority against any income tax, national insurance and social security contributions and any other liability, deduction, contribution, assessment or related claim arising from or made (whether before or after the making of a demand pursuant to the indemnity hereunder) in connection with the provision of the Services by the Supplier or any Supplier Personnel.
- 18.4.2 In the event that any one of the Supplier Personnel is a Worker as defined in Schedule 1 (Definitions) who receives consideration relating to the Services, then, in addition to its obligations under Clause 18.4.1, the Supplier shall ensure that its contract with the Worker contains the following requirements:
- (a) that the Authority may, at any time during the Contract Period, request that the Worker provides information which demonstrates how the Worker complies with the requirements of Clause 18.4.1, or why those requirements do not apply to it. In such case, the Authority may specify the information which the Worker must provide and the period within which that information must be provided;
  - (b) that the Worker's contract may be terminated at the Authority's request if:
    - (i) the Worker fails to provide the information requested by the Authority within the time specified by the Authority under Clause 18.4.2(a); and/or
    - (ii) the Worker provides information which the Authority considers is inadequate to demonstrate how the Worker complies with Clauses 18.4.1(a) or 18.4.1(b) or confirms that the Worker is not complying with those requirements; and
  - (c) that the Authority may supply any information it receives from the Worker to HMRC for the purpose of the collection and management of revenue for which they are responsible.

## **19. PROMOTING TAX COMPLIANCE**

- 19.1 If, at any point during the Contract Period, an Occasion of Tax Non-Compliance occurs, the Supplier shall:
- 19.1.1 notify the Authority in writing of such fact within five (5) Business Days of its occurrence; and
  - 19.1.2 promptly provide to the Authority:
    - (a) details of the steps that 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.

- 19.2 In the event that the Supplier fails to comply with this Clause 19 and/or does not provide details of proposed mitigating factors which in the reasonable opinion of the Authority are acceptable, then the Authority may terminate this Contract by issuing a Termination Notice.

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

### **20. KEY PERSONNEL**

- 20.1 The Parties have agreed to the appointment of the Key Personnel. Part B of Schedule 4 (Implementation Plan and Key Personnel) lists the key roles (“**Key Roles**”) and names of the persons who the Supplier shall appoint to fill those Key Roles at the Commencement Date.
- 20.2 The Supplier shall ensure that the Key Personnel fulfil the Key Roles at all times during the Contract Period.
- 20.3 The Authority may identify any further roles as being Key Roles and, following agreement to the same by the Supplier, the relevant person selected to fill those Key Roles shall be included on the list of Key Personnel.
- 20.4 The Supplier shall not remove or replace any Key Personnel (including when carrying out its obligations under Schedule 10 (Exit Management))unless:
  - 20.4.1 requested to do so by the Authority;
  - 20.4.2 the person concerned resigns, retires or dies or is on maternity or long-term sick leave;
  - 20.4.3 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
  - 20.4.4 the Supplier obtains the Authority’s prior written consent (such consent not to be unreasonably withheld or delayed).
- 20.5 The Supplier shall:
  - 20.5.1 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);
  - 20.5.2 ensure that any Key Role is not left uncovered for any longer than ten (10) Business Days;
  - 20.5.3 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 three (3) Months’ notice;
  - 20.5.4 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 provision of the Services;

20.5.5 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 he or she has replaced; and

20.5.6 shall and shall procure that any Sub-Contractor shall not remove or replace any Key Personnel during the Contract Period without Approval.

20.6 The Authority may require the Supplier to remove any Key Personnel that the Authority considers in any respect unsatisfactory, the Authority acting reasonably and in good faith in determining such requirement. The Authority shall not be liable for the costs of the removal or the replacement of any Key Personnel by the operation of this clause.

## **21. SUPPLIER PERSONNEL**

21.1 Supplier Personnel

21.1.1 The Supplier shall:

- (a) provide a list of the names of all Supplier Personnel requiring admission to Authority Premises, specifying the capacity in which they require admission and giving such other particulars as the Authority may reasonably require;
- (b) ensure that all Supplier Personnel:
  - (i) are appropriately qualified, trained and experienced to provide the Services with all reasonable skill, care and diligence;
  - (ii) are vetted in accordance with Good Industry Practice and, where applicable, the Security Policy, the Standards and/or any related staff vetting policies of the Authority as notified to the Supplier from time to time;
  - (iii) obey all lawful instructions and reasonable directions of the Authority (including if so required by the Authority, the ICT Policy) and provide the Services to the reasonable satisfaction of the Authority in accordance with the provisions of this Contract; and
  - (iv) comply with all reasonable requirements of the Authority concerning conduct at the Authority Premises, including the security requirements set out in Schedule 8 (Security);
- (c) subject to Schedule 11 (Staff Transfer), 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;
- (d) use all reasonable endeavours to minimise the number of changes in Supplier Personnel;

- (e) replace (temporarily or permanently, as appropriate) any Supplier Personnel as soon as practicable if any Supplier Personnel have been removed or are unavailable for any reason whatsoever;
  - (f) bear the programme familiarisation and other costs associated with any replacement of any Supplier Personnel; and
  - (g) procure that the Supplier Personnel shall vacate the Authority Premises immediately upon the Expiry Date.
- 21.2 If the Authority reasonably believes that any of the Supplier Personnel are unsuitable to undertake work in respect of this Contract, it may:
  - 21.2.1 refuse admission to the relevant person(s) to the Authority Premises; and/or
  - 21.2.2 direct the Supplier to end the involvement in the provision of the Services of the relevant person(s).
- 21.3 The decision of the Authority as to whether any person is to be refused access to the Authority Premises shall be final and conclusive.

## **22. STAFF TRANSFER**

- 22.1 The Parties agree that:
  - 22.1.1 where the commencement of the provision of the Services or any part of the Services results in one or more Relevant Transfers, Schedule 11 (Staff Transfer) shall apply as follows;
    - (a) where the Relevant Transfer involves the transfer of Transferring Authority Employees, Part A of Schedule 11 (Staff Transfer) and the Annex to Schedule 11 (Pensions) shall apply;
    - (b) where the Relevant Transfer involves the transfer of Transferring Former Supplier Employees, Part B of Schedule 11 (Staff Transfer) and the Annex to Schedule 11 (Pensions) shall apply; and
    - (c) Part C of Schedule 11 (Staff Transfer) may apply;
  - 22.1.2 where commencement of the provision of the Services or a part of the Services does not result in a Relevant Transfer, Part C of Schedule 11 (Staff Transfer) shall apply and Part A and Part B of Schedule 11 (Staff Transfer) shall not apply and the Pensions Annex to Schedule 11 shall apply insofar as it is relevant; and
  - 22.1.3 Part D of Schedule 11 (Staff Transfer) and the Pensions Annex to Schedule 11 shall apply on the expiry or termination of the Services or any part of the Services.
- 22.2 The Supplier shall both during and after the Contract Period 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.

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

- 23.1 Modern Slavery Act

- 23.1.1 The Supplier shall implement due diligence procedures for Sub-Contractors and other participants in its supply chains, to ensure that there is no slavery or human trafficking in its supply chains.
  - 23.1.2 The Supplier shall notify the Authority as soon as it becomes aware of any actual or suspected slavery or human trafficking in a supply chain which has a connection with this Contract.
  - 23.1.3 The Supplier shall publish an annual Slavery and Human Trafficking Statement (as defined in the Modern Slavery Act) and shall deliver to the Authority a copy not later than thirty (30) days after the Commencement Date and each anniversary of the Commencement Date. For the avoidance of doubt, the Supplier shall comply with this requirement as a term of this Contract regardless of whether or not the Supplier is required to publish such a statement in accordance with the relevant provisions of the Modern Slavery Act.
- 23.2 Appointment of Sub-Contractors
- 23.2.1 The Supplier shall exercise due skill and care in the selection of any Sub-Contractors to ensure that the Supplier is able to:
    - (a) manage any Sub-Contractors in accordance with Good Industry Practice;
    - (b) comply with its obligations under this Contract in the Delivery of the Services;
    - (c) 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 Contract; and
    - (d) demonstrate to the Authority, if requested, that such Sub-Contractors represent value for money.
  - 23.2.2 Prior to sub-contacting any of its obligations under this Contract, the Supplier shall notify the Authority and provide the Authority with:
    - (a) the proposed Sub-Contractor's name, registered office and company registration number;
    - (b) the scope of any Services to be provided by the proposed Sub-Contractor; and
    - (c) 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.
  - 23.2.3 If requested by the Authority within ten (10) Business Days of receipt of the Supplier's notice issued pursuant to Clause 23.2.2, the Supplier shall also provide:
    - (a) a copy of the proposed Sub-Contract; and
    - (b) any further information reasonably requested by the Authority.
  - 23.2.4 The Authority may, within ten (10) Business Days of receipt of the Supplier's notice issued pursuant to Clause 23.2.2 (or, if later, receipt of

any further information requested pursuant to Clause 23.2.3), object to the appointment of the relevant Sub-Contractor if they consider that:

- (a) the appointment of a proposed Sub-Contractor may prejudice the provision of the Services or may be contrary to the interests respectively of the Authority under this Contract;
- (b) the proposed Sub-Contractor is unreliable and/or has not provided reasonable services to its other customers;
- (c) the proposed Sub-Contractor employs unfit persons; and/or
- (d) the terms of the proposed Sub-Contract are not consistent with the Supplier's obligations under this Contract (to include, without limitation, the attainment of the outputs of the specification of the Services and the Service Levels and, more generally, the delivery within the agreed timescales of the real Total System Costs savings, efficiencies and benefits envisaged for the FOM by this Contract),

in which case, the Supplier shall not proceed with the proposed appointment.

23.2.5 If the Authority has not notified the Supplier that it objects to the proposed Sub-Contractor's appointment by the later of ten (10) Business Days of receipt of:

- (i) the Supplier's notice issued pursuant to Clause 23.2.2; and
- (ii) any further information requested by the Authority pursuant to Clause 23.2.3,

the Supplier may proceed with the proposed appointment.

### 23.3 Supply chain protection

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

- (a) requiring the Supplier to pay any undisputed sums which are due from it to the Sub-Contractor within a specified period not exceeding thirty (30) days from the receipt of a Valid Invoice;
- (b) requiring that any invoices submitted by a Sub-Contractor shall be considered and verified by the Supplier in a timely fashion and that undue delay in doing so shall not be sufficient justification for failing to regard an invoice as valid and undisputed;
- (c) requiring the Sub-Contractor to include in any Sub-Contract which it in turn awards suitable provisions to impose, as between the parties to that Sub-Contract, requirements to the same effect as those required by sub-clauses (a) and (b) directly above;
- (d) conferring a right to the Authority to publish the Supplier's compliance with its obligation to pay undisputed invoices within the specified payment period; and
- (e) to ensure the compliance of Sub-Contractors with Clause 7.8.1 of this Contract; and
- (f) requiring that all such Sub-Contractors shall not in any way prejudice or undermine the obligations of the Supplier to the Authority under this Contract (to include, without limitation, the

attainment of the outputs of the specification of the Services and the Service Levels and, more generally, the delivery within the agreed timescales of the real Total System Costs savings, efficiencies and benefits envisaged for the FOM by this Contract).

23.3.2 The Supplier shall:

- (a) pay any undisputed sums which are due from it to a Sub-Contractor within thirty (30) days from the receipt of a Valid Invoice;
- (b) include within the Performance Monitoring Reports required under Part E of Schedule 6 (Service Levels and Adjustments) a summary of its compliance with this Clause 23.3.2, such data to be certified each quarter by a director of the Supplier as being accurate and not misleading; and
- (c) not agree to vary the terms of any Sub-Contract without the Approval of the Authority.

23.3.3 Any invoices submitted by a Sub-Contractor to the Supplier shall be considered and verified by the Supplier in a timely fashion. Undue delay in doing so shall not be sufficient justification for the Supplier failing to regard an invoice as valid and undisputed.

23.3.4 Notwithstanding any provision of Clauses 28.3 (Confidentiality) and 29 (Publicity and Branding) if the Supplier notifies the Authority that the Supplier has failed to pay an undisputed Sub-Contractor's invoice within thirty (30) days of receipt, or the Authority otherwise discovers the same, the Authority shall be entitled to publish the details of the late or non-payment (including on government websites and in the press).

23.4 Cyber Essentials Scheme

23.4.1 The Supplier shall ensure that all Sub-Contracts with Sub-Contractors who Process Cyber Essentials Data contain provisions no less onerous on the Sub-Contractors than those imposed on the Supplier under this Contract in respect of the Cyber Essentials Scheme under Clause 4 (Cyber Security).

23.5 Termination of Sub-Contracts

23.5.1 The Authority may require the Supplier to terminate 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 any of the termination events in Clause 35 (Authority Termination Rights) except Clause 35.7 (Termination without cause);
- (b) the relevant Sub-Contractor or its Affiliates 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 Services or otherwise;
- (c) the conduct of the relevant Sub-Contractor or its Affiliates has materially prejudiced or undermined the attainment of the outputs of the specification of the Services and the Service Levels and, more generally, the delivery within the agreed timescales of the

real Total System Costs savings, efficiencies and benefits envisaged for the FOM by this Contract); and/or

- (d) the Supplier agrees any variation to the terms of a Sub-Contract in breach of Clause 23.3.2(c) above.

For the avoidance of doubt, any costs or liabilities incurred by the Supplier arising directly from the termination of any Sub-Contracts in the circumstances above, shall be met by the Supplier.

#### 23.6 Retention of legal obligations

- 23.6.1 Notwithstanding the Supplier's right to Sub-Contract pursuant to this Clause 23 (Supply Chain Rights and Protection), the Supplier shall remain responsible for all acts and omissions of its Sub-Contractors and the acts and omissions of those employed or engaged by the Sub-Contractors as if they were its own.

### **G. PROPERTY MATTERS**

#### **24. AUTHORITY PREMISES**

##### 24.1 Licence to occupy Authority Premises

- 24.1.1 Any Authority Premises shall be made available to the Supplier on a non-exclusive licence basis free of charge and shall be used by the Supplier solely for the purpose of performing its obligations under this Contract. The Supplier shall have the use of such Authority Premises as licensee and shall vacate the same immediately upon completion, termination, expiry or abandonment of this Contract and in accordance with Schedule 10 (Exit Management).
- 24.1.2 The Supplier shall limit access to the Authority Premises to such Supplier Personnel as is necessary to enable it to perform its obligations under this Contract and the Supplier shall co-operate (and ensure that the Supplier Personnel co-operate) with such other persons working concurrently on such Authority Premises as the Authority may reasonably request.
- 24.1.3 Save in relation to such actions identified by the Supplier in accordance with Clause 2 (Due Diligence), should the Supplier require modifications to the Authority Premises, such modifications shall be subject to Approval and shall be carried out by the Authority at the Supplier's expense. The Authority shall undertake any modification work which it approves pursuant to this Clause 24.1.3 without undue delay. Ownership of such modifications shall rest with the Authority.
- 24.1.4 The Supplier shall observe and comply with such rules and regulations as may be in force at any time for the use of such Authority Premises and conduct of personnel at the Authority Premises as determined by the Authority, and the Supplier shall pay for the full cost of making good any damage caused by the Supplier Personnel other than fair wear and tear. For the avoidance of doubt, damage includes without limitation damage to the fabric of the buildings, plant, fixed equipment or fittings therein.
- 24.1.5 The Parties agree that there is no intention on the part of the Authority to create a tenancy of any nature whatsoever in favour of the Supplier or the Supplier Personnel and that no such tenancy has or shall come into being

and, notwithstanding any rights granted pursuant to this Contract, the Authority retains the right at any time to use any Authority Premises in any manner it sees fit.

24.1.6 The provisions of this Clause 24.1 are subject to a right of the Authority to require the Supplier to enter into more detailed licence or lease arrangements with either the Authority or any incumbent or future service provider at the direction of the Authority as maybe required by the Authority from time to time in connection with granting the Supplier access to any particular Authority Premises and the Supplier shall comply with such requirements.

#### 24.2 Security of Authority Premises

24.2.1 The Authority shall be responsible for maintaining the security of the Authority Premises in accordance with the Security Policy. The Supplier shall comply with the Security Policy and any other reasonable security requirements of the Authority while on the Authority Premises.

24.2.2 The Authority shall afford the Supplier upon Approval (the decision to Approve or not will not be unreasonably withheld or delayed) an opportunity to inspect its physical security arrangements.

### 25. AUTHORITY PROPERTY

25.1 Where the Authority issues Authority Property free of charge to the Supplier such Authority Property shall be and remain the property of the Authority and the Supplier irrevocably licences the Authority and its agents to enter upon any premises of the Supplier during normal business hours on reasonable notice to recover any such Authority Property.

25.2 The Supplier shall not in any circumstances have a lien or any other interest on the Authority Property and at all times the Supplier shall possess the Authority Property as fiduciary agent and bailee of the Authority.

25.3 The Supplier shall take all reasonable steps to ensure that the title of the Authority to the Authority Property and the exclusion of any such lien or other interest are brought to the notice of all Sub-Contractors and other appropriate persons and shall, at the Authority's request, store the Authority Property separately and securely and ensure that it is clearly identifiable as belonging to the Authority.

25.4 The Authority Property shall be deemed to be in good condition when received by or on behalf of the Supplier unless the Supplier notifies the Authority otherwise within five (5) Business Days of receipt.

25.5 The Supplier shall maintain the Authority Property in good order and condition (excluding fair wear and tear) and shall use the Authority Property solely in connection with this Contract and for no other purpose without Approval.

25.6 The Supplier shall ensure the security of all the Authority Property whilst in its possession, either on the Sites or elsewhere during the supply of the Services, in accordance with the Authority's Security Policy and the Authority's reasonable security requirements from time to time.

25.7 The Supplier shall be liable for all loss of, or damage to the Authority Property, (excluding fair wear and tear), unless such loss or damage was solely caused by an Authority Cause or by a third party unconnected with the Supplier (excluding, for the

avoidance of doubt, any Sub-Contractors). The Supplier shall inform the Authority immediately of becoming aware of any defects appearing in or losses or damage occurring to the Authority Property.

## **26. SUPPLIER EQUIPMENT**

- 26.1 The Supplier shall not deliver any Supplier Equipment nor begin any work on the Authority Premises without obtaining Approval.
- 26.2 The Supplier shall be solely responsible for the cost of carriage of the Supplier Equipment to the Sites and/or any Authority Premises, including its off-loading, removal of all packaging and all other associated costs. Likewise on the Expiry Date the Supplier shall be responsible for the removal of all relevant Supplier Equipment from the Sites and/or any Authority Premises, including the cost of packing, carriage and making good the Sites and/or the Authority Premises following removal.
- 26.3 All the Supplier's property, including Supplier Equipment, shall remain at the sole risk and responsibility of the Supplier, except that the Authority shall be liable for loss of or damage to any of the Supplier's property located on Authority Premises which is due to the negligent act or omission of the Authority.
- 26.4 Subject to any express provision of the BCDR Plan to the contrary, the loss or destruction for any reason of any Supplier Equipment shall not relieve the Supplier of its obligation to supply the Services in accordance with this Contract, including the Target Service Levels.
- 26.5 The Supplier shall maintain all Supplier Equipment within the Sites and/or the Authority Premises in a safe, serviceable and clean condition.
- 26.6 The Supplier shall, at the Authority's written request, at its own expense and as soon as reasonably practicable:
  - 26.6.1 remove from the Authority Premises any Supplier Equipment or any component part of Supplier Equipment which in the reasonable opinion of the Authority is either hazardous, noxious or not in accordance with this Contract; and
  - 26.6.2 replace such Supplier Equipment or component part of Supplier Equipment with a suitable substitute item of Supplier Equipment.

## **H. INTELLECTUAL PROPERTY AND INFORMATION**

### **27. INTELLECTUAL PROPERTY RIGHTS**

- 27.1 Allocation of title to IPR
  - 27.1.1 Save as expressly granted elsewhere under this Contract:
    - (a) the Authority shall not acquire any right, title or interest in or to the Intellectual Property Rights of the Supplier or its licensors, including the:
      - (i) Supplier Background IPR; and
      - (ii) Third Party IPR, and
    - (b) the Supplier shall not acquire any right, title or interest in or to the Intellectual Property Rights of the Authority or its licensors, including the:

- (i) Authority Background IPR;
- (ii) Authority Data; and
- (iii) Project Specific IPR.

27.1.2 Where either Party acquires, by operation of Law, title to Intellectual Property Rights that is inconsistent with the allocation of title set out in Clause 27.1.1, it shall assign in writing such Intellectual Property Rights as it has acquired to the other Party on the request of the other Party (whenever made). Without prejudice to the generality of the foregoing, the Supplier hereby assigns to the Authority absolutely with full title guarantee (including by way of present assignment of future rights) all rights, titles and other interest in and to the Project Specific IPR.

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

## 27.2 Licences granted by the Authority: Project Specific IPR

27.2.1 The Authority hereby grants to the Supplier a perpetual, royalty-free, irrevocable, non-exclusive licence to use the Project Specific IPR including but not limited to the right to copy, adapt, publish and distribute such Project Specific IPR solely for the purposes of, and to the extent necessary for, the provision of the Services and otherwise for the purposes of the Contract such licence to include the right to grant sub-licences to Sub-Contractors provided that:

- (a) any relevant Sub-Contractor has entered into a confidentiality undertaking with the Supplier on the same terms as set out in Clause 28.3 (Confidentiality); and
- (b) the Supplier shall not, without approval, use the licensed materials for any other purpose or for the benefit of any person other than the Authority.

## 27.3 Licences granted by the Supplier: Supplier Background IPR

27.3.1 The Supplier hereby grants to the Authority a perpetual, royalty-free and non-exclusive licence to use the Supplier Background IPR for any purpose relating to the Services (or substantially equivalent services) or for any purpose relating to the exercise of the Authority's (or, if the Authority is a Central Government Body, any other Central Government Body's) business or function.

27.3.2 At any time during the Contract Period or following the Expiry Date, the Supplier may terminate a licence granted in respect of the Supplier Background IPR under Clause 27.3.1 by giving thirty (30) days' notice in writing (or such other period as agreed by the Parties) if there is an Authority Cause which constitutes a material breach of the terms of Clause 27.3.1 which, if the breach is capable of remedy, is not remedied within twenty (20) Business Days after the Supplier gives the Authority written notice specifying the breach and requiring its remedy.

27.3.3 In the event the licence of the Supplier Background IPR is terminated pursuant to Clause 27.3.2, the Authority shall:

- (a) immediately cease all use of the Supplier Background IPR;

- (b) at the discretion of the Supplier, return or destroy documents and other tangible materials that contain any of the Supplier Background IPR, provided that if the Supplier has not made an election within six (6) Months of the termination of the licence, the Authority may destroy the documents and other tangible materials that contain any of the Supplier Background IPR; and
- (c) ensure, so far as reasonably practicable, that any Supplier Background IPR that is held in electronic, digital or other machine-readable form ceases to be readily accessible (other than by the information technology staff of the Authority) from any computer, word processor, voicemail system or any other device containing Supplier Background IPR.

#### 27.4 Authority's right to sub-license

##### 27.4.1 The Authority may sub-license:

- (a) the rights granted under Clause 27.3.1 (Licences granted by the Supplier: Supplier Background IPR) to a third party (including for the avoidance of doubt, any Replacement Supplier) provided that:
  - (i) the sub-licence is on terms no broader than those granted to the Authority; and
  - (ii) the sub-licence only authorises the third party to use the rights licensed in Clause 27.3.1 (Licences granted by the Supplier: Supplier Background IPR) for purposes relating to the Services (or substantially equivalent services) or for any purpose relating to the exercise of the Authority's (or, if the Authority is a Central Government Body, any other Central Government Body's) business or function; and
- (b) the rights granted under Clause 27.3.1 (Licences granted by the Supplier: Supplier Background IPR) to any Approved Sub-Licensee to the extent necessary to use and/or obtain the benefit of the Project Specific IPR provided that the sub-licence is on terms no broader than those granted to the Authority.

#### 27.5 Authority's right to assign/novate licences

##### 27.5.1 The Authority:

- (a) may assign, novate or otherwise transfer its rights and obligations under the licence granted pursuant to Clause 27.3.1 (Licences granted by the Supplier: Supplier Background IPR) to:
  - (i) a Central Government Body; or
  - (ii) anybody (including any private sector body) which performs or carries on any of the functions and/or activities that previously had been performed and/or carried on by the Authority.
- (b) Where the Authority is a Central Government Body, any change in the legal status of the Authority which means that it ceases to be a Central Government Body shall not affect the validity of any licence granted in Clause 27.3.1 (Licences granted by the Supplier: Supplier Background IPR). If the Authority ceases to be a Central

Government Body, the successor body to the Authority shall still be entitled to the benefit of the licence granted in Clause 27.3.1 (Licences granted by the Supplier: Supplier Background IPR).

- (c) If a licence granted in Clause 27.3.1 (Licences granted by the Supplier: Supplier Background IPR) is novated under Clause 27.5.1(a) or there is a change of the Authority's status pursuant to Clause 27.5.1(b) (both such bodies being referred to as the "**Transferee**"), the rights acquired by the Transferee shall not extend beyond those previously enjoyed by the Authority.

#### 27.6 Third Party IPR

27.6.1 The Supplier shall procure that the owners or the authorised licensors of any Third Party IPR grant a direct licence to the Authority on terms at least equivalent to those set out in Clause 27.3.1 (Licences granted by the Supplier: Supplier Background IPR) and Clause 27.5.1(a) (Authority's right to assign/novate licences). If the Supplier cannot obtain for the Authority a licence materially in accordance with the licence terms set out in Clause 27.3.1 (Licences granted by the Supplier: Supplier Background IPR) and Clause 27.5.1(a) (Authority's right to assign/novate licences) in respect of any such Third Party IPR, the Supplier shall:

- (a) notify the Authority in writing giving details of what licence terms can be obtained from the relevant third party and whether there are alternative providers which the Supplier could seek to use; and
- (b) only use such Third Party IPR if the Authority Approves the terms of the licence from the relevant third party.

#### 27.7 Licence granted by the Authority

27.7.1 The Authority hereby grants to the Supplier a royalty-free, non-exclusive, non-transferable licence during the Contract Period to use the Authority Background IPR and the Authority Data solely to the extent necessary for providing the Services in accordance with this Contract, including (but not limited to) the right to grant sub-licences to Sub-Contractors provided that:

- (a) any relevant Sub-Contractor has entered into a confidentiality undertaking with the Supplier on the same terms as set out in Clause 28.3 (Confidentiality); and
- (b) the Supplier shall not without Approval use the licensed materials for any other purpose or for the benefit of any person other than the Authority.

#### 27.8 Termination of licences

27.8.1 Subject to Clauses 27.3.2 and/or 27.3.3 (Licences granted by the Supplier: Supplier Background IPR), all licences granted pursuant to this Clause 27 (Intellectual Property Rights) (other than those granted pursuant to Clause 27.2.1 (Licence granted by the Authority: Project Specific IPR), Clause 27.6 (Third Party IPR) and 27.7.1 (Licence granted by the Authority)) shall survive the Expiry Date.

27.8.2 The Supplier shall, if requested by the Authority in accordance with Schedule 10 (Exit Management), grant (or procure the grant) to the Replacement Supplier of a licence to use any Supplier Background IPR

and/or Third Party IPR on terms equivalent to those set out in Clause 27.3.1 (Licences granted by the Supplier: Supplier Background IPR) subject to the Replacement Supplier entering into reasonable confidentiality undertakings with the Supplier.

27.8.3 The licence granted pursuant to Clause 27.2.1 (Licence granted by the Authority: Project Specific IPR), Clause 27.7.1 (Licence granted by the Authority) and any sub-licence granted by the Supplier in accordance with Clause 27.2.1 (Licence granted by the Authority: Project Specific IPR) or Clause 27.7.1 (Licence granted by the Authority) shall terminate automatically on the Expiry Date and the Supplier shall:

- (a) immediately cease all use of the Project Specific IPR, the Authority Background IPR and the Authority Data (as the case may be);
- (b) at the discretion of the Authority, return or destroy documents and other tangible materials that contain any of the Project Specific IPR, the Authority Background IPR and the Authority Data, provided that if the Authority has not made an election within six (6) Months of the termination of the licence, the Supplier may destroy the documents and other tangible materials that contain any of the Project Specific IPR, the Authority Background IPR and the Authority Data (as the case may be); and
- (c) ensure, so far as reasonably practicable, that any Project Specific IPR, Authority Background IPR and Authority Data that are 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 containing such Project Specific IPR, Authority Background IPR and/or Authority Data.

## 27.9 IPR Indemnity

27.9.1 The Supplier shall (during and after the Contract Period) on written demand indemnify the Authority against all Losses incurred by, awarded against or agreed to be paid by the Authority (whether before or after the making of the demand pursuant to the indemnity hereunder) arising from an IPR Claim.

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

- (a) procure for the Authority the right to continue using the relevant item which is subject to the IPR Claim; or
- (b) replace or modify the relevant item with non-infringing substitutes provided that:
  - (i) the performance and functionality of the replaced or modified item is at least equivalent to the performance and functionality of the original item;
  - (ii) the replaced or modified item does not have an adverse effect on any other Services;
  - (iii) there is no additional cost to the Authority; and
  - (iv) the terms and conditions of this Contract shall apply to the replaced or modified Services.

For the avoidance of doubt, whichever of the above options is selected, the Supplier shall ensure that there is no disruption to the provision of the Services as a result.

27.9.3 If the Supplier elects to procure a licence in accordance with Clause 27.9.2(a) or to modify or replace an item pursuant to Clause 27.9.2(b), but this has not avoided or resolved the IPR Claim, then:

- (i) the Authority may terminate this Contract by issuing a Termination Notice; and
- (ii) without prejudice to the indemnity set out in Clause 27.9.1, the Supplier shall be liable for all reasonable and unavoidable costs of the substitute services including the additional costs of procuring, implementing and maintaining the substitute items.

## **28. SECURITY AND PROTECTION OF INFORMATION**

### **28.1 Security requirements**

- 28.1.1 The Supplier shall comply with the Security Policy and the requirements of Schedule 8 (Security) including the Security Management Plan.
- 28.1.2 The Authority shall notify the Supplier of any changes or proposed changes to the Security Policy.
- 28.1.3 If the Supplier believes that a change or proposed change to the Security Policy will have a material and unavoidable cost implication to the provision of the Services it may propose a Variation to the Authority. In doing so, the Supplier must support its request by providing evidence of the cause of any increased Target Costs and the steps that it has taken to mitigate those costs. Any change to the Target Costs shall then be subject to the Variation Procedure.
- 28.1.4 Until and/or unless a change to the Target Costs is agreed by the Authority pursuant to the Variation Procedure the Supplier shall continue to provide the Services in accordance with its existing obligations.

### **28.2 Protection of Authority Data**

- 28.2.1 The Supplier shall not delete or remove any proprietary notices contained within or relating to the Authority Data.
- 28.2.2 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 Contract or as otherwise Approved by the Authority.
- 28.2.3 To the extent that Authority Data is held and/or Processed by the Supplier, the Supplier shall supply that Authority Data to the Authority as requested by the Authority in the format (if any) specified by the Authority and in any event as specified by the Authority from time to time in writing.
- 28.2.4 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.
- 28.2.5 The Supplier shall perform secure back-ups of all Authority Data and shall ensure that up-to-date back-ups are stored off-site at an Approved location

in accordance with the BCDR Plan. The Supplier shall ensure that such back-ups are available to the Authority (or to such other person as the Authority may direct) at all times upon request and are delivered to the Authority at no less than six (6) Monthly intervals (or such other intervals as may be agreed in writing between the Parties).

28.2.6 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 the Security Policy and the Security Management Plan.

28.2.7 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:

- (a) require the Supplier (at the Supplier's expense, such that any associated costs shall not be Allowable Costs) to restore or procure the restoration of Authority Data to the extent and in accordance with the requirements specified in Schedule 9 (Business Continuity and Disaster Recovery) or as required by the Authority and the Supplier shall do so as soon as practicable but not later than five (5) Business Days from the date of receipt of the Authority's notice; and/or
- (b) 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 9 (Business Continuity and Disaster Recovery) or as required by the Authority and the costs incurred by the Supplier in making any such repayment shall not be Allowable Costs.

28.2.8 If at any time the Supplier suspects or has reason to believe that the Authority Data is corrupted, lost or sufficiently degraded in any way for any reason, then the Supplier shall notify the Authority immediately and inform the Authority of the remedial action the Supplier proposes to take.

### 28.3 Confidentiality

28.3.1 For the purposes of this Clause 28.3, the term "**Disclosing Party**" shall mean a Party which discloses or makes available directly or indirectly its Confidential Information and "**Recipient**" shall mean the Party which receives or obtains directly or indirectly Confidential Information.

28.3.2 Except to the extent set out in this Clause 28.3 or where disclosure is expressly permitted elsewhere in this Contract, the Recipient shall:

- (a) treat the Disclosing Party's Confidential Information as confidential and keep it in secure custody (which is appropriate depending upon the form in which such materials are stored and the nature of the Confidential Information contained in those materials); and
- (b) not disclose the Disclosing Party's Confidential Information to any other person except as expressly set out in this Contract or without obtaining the owner's prior written consent;
- (c) not use or exploit the Disclosing Party's Confidential Information in any way except for the purposes anticipated under this Contract; and

- (d) immediately notify the Disclosing Party if it suspects or becomes aware of any unauthorised access, copying, use or disclosure in any form of any of the Disclosing Party's Confidential Information.
- 28.3.3 The Recipient shall be entitled to disclose the Confidential Information of the Disclosing Party where:
  - (a) the Recipient is required to disclose the Confidential Information by Law, provided that Clause 28.5 (Freedom of information) shall apply to disclosures required under the FOIA or the EIRs;
  - (b) the need for such disclosure arises out of or in connection with:
    - (i) any legal challenge or potential legal challenge against the Authority arising out of or in connection with this Contract (including where such disclosure is requested or necessary in accordance with the Dispute Resolution Procedure);
    - (ii) the examination and certification of the Authority's accounts (provided that the disclosure is made on a confidential basis) or for any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority is making use of any Services provided under this Contract; or
    - (iii) the conduct of a Central Government Body review in respect of this Contract; or
  - (c) the Recipient has reasonable grounds to believe that the Disclosing Party is involved in activity that may constitute a criminal offence under the Bribery Act 2010 and the disclosure is being made to the Serious Fraud Office.
- 28.3.4 If the Recipient is required by Law to make a disclosure of Confidential Information, the Recipient shall as soon as reasonably practicable and to the extent permitted by Law notify the Disclosing Party of the full circumstances of the required disclosure including the relevant Law and/or regulatory body requiring such disclosure and the Confidential Information to which such disclosure would apply.
- 28.3.5 Subject to Clauses 28.3.2 and 28.3.3, the Supplier may only disclose the Confidential Information of the Authority on a confidential basis to:
  - (a) Supplier Personnel who are directly involved in the provision of the Services and need to know the Confidential Information to enable performance of the Supplier's obligations under this Contract;
  - (b) its professional advisers for the purposes of obtaining advice in relation to this Contract; and
  - (c) its Sub-Contractors (subject to such Sub-Contractors, at the Authority's request, entering into written confidentiality undertakings in favour of the Authority on similar terms as applicable between the Supplier and the Authority under this Contract).
- 28.3.6 Where the Supplier discloses Confidential Information of the Authority pursuant to this Clause 28.3.5, it shall remain responsible at all times for

compliance with the confidentiality obligations set out in this Contract by the persons to whom disclosure has been made.

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

- (a) to any Central Government Body on the basis that the information may only be further disclosed to Central Government Bodies;
- (b) to the United Kingdom Parliament and any committees of the United Kingdom Parliament or if required by any United Kingdom Parliamentary reporting requirement;
- (c) to the extent that the Authority (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;
- (d) on a confidential basis to a professional adviser, consultant, supplier or other person engaged by any of the entities described in Clause 28.3.7(a) for any purpose relating to or connected with this Contract;
- (e) on a confidential basis for the purpose of the exercise of its rights under this Contract; or
- (f) to a proposed transferee, assignee or novatee of, or successor in title to the Authority,

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 28.3.

28.3.8 Nothing in this Clause 28.3 shall prevent a Recipient from using any techniques, ideas or Know-How gained during the performance of this Contract 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.

28.3.9 In the event that the Supplier fails to comply with Clauses 28.3.2 to 28.3.5, the Authority may terminate this Contract by issuing a Termination Notice.

28.4 Transparency

28.4.1 The Parties acknowledge and agree that, except for any information which is exempt from disclosure in accordance with the provisions of the FOIA, the content of this Contract and any Transparency Reports under it is not Confidential Information and shall be made available in accordance with the procurement policy note 13/15 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/458554/Procurement\\_Policy\\_Note\\_13\\_15.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/458554/Procurement_Policy_Note_13_15.pdf) and the Transparency Principles referred to therein. The Authority shall determine whether any of the content of this Contract is exempt from disclosure in accordance with the provisions of the FOIA. The Authority may consult with the Supplier to inform its decision regarding any redactions but shall have the final decision in its absolute discretion.

28.4.2 Notwithstanding any other provision of this Contract, the Supplier hereby gives his consent for the Authority to publish this Contract in its entirety (but with any information which is exempt from disclosure in accordance

with the provisions of the FOIA redacted), including any changes to this Contract agreed from time to time.

- 28.4.3 The Supplier shall assist and cooperate with the Authority to enable the Authority to publish this Contract.

## 28.5 Freedom of information

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

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

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

## 28.6 Protection of Personal Data

- 28.6.1 Where any Personal Data is Processed in connection with the exercise of the Parties' rights and obligations under this Contract, the Parties acknowledge that the Authority is the Data Controller and that the Supplier is the Data Processor.

- 28.6.2 Details of the subject matter and duration of the Processing, the nature and purpose of the Processing, the type of Personal Data and the categories of Data Subjects whose Personal Data is being Processed in connection with the Services are set out in Schedule 23 (Processing of Personal Data).

- 28.6.3 The Supplier shall:

- (a) Process the Personal Data only in accordance with instructions from the Authority to perform its obligations under this Contract;

- (b) ensure that at all times it has in place appropriate technical and organisational measures to guard against unauthorised or unlawful Processing of the Personal Data and/or accidental loss, destruction, or damage to the Personal Data and to ensure a level of security appropriate to the risk, including the measures as are set out in Clauses 28.1 (Security requirements) and 28.2 (Protection of Authority Data), and as appropriate;
  - (i) the pseudonymisation and encryption of Personal Data;
  - (ii) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
  - (iii) the ability to restore the availability and access to Personal Data in a timely manner in the event of a physical or technical incident;
  - (iv) a process of regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the Processing;
- (c) not disclose or transfer the Personal Data to any third party or Supplier Personnel unless necessary for the provision of the Services and, for any disclosure or transfer of Personal Data to any third party, obtain the prior written consent of the Authority (save where such disclosure or transfer is specifically authorised under this Contract);
- (d) take all reasonable steps to ensure the reliability and integrity of any Supplier Personnel who have access to the Personal Data and ensure that the Supplier Personnel:
  - (i) are aware of and comply with the Supplier's duties under this Clause 28.6.3 and Clauses 28.1 (Security requirements), 28.2 (Protection of Authority Data) and 28.3 (Confidentiality);
  - (ii) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by the Authority or as otherwise permitted by this Contract; and
  - (iii) have undergone adequate training in the use, care, protection and handling of Personal Data;
- (e) assist and co-operate with the Authority as requested to ensure the Authority 's compliance with its obligations under the Data Protection Legislation with respect to:
  - (i) carrying out and/or reviewing data protection impact assessments where necessary in accordance with Article 35 of the General Data Protection Regulation;
  - (ii) implementing such technical and organisational measures to enable the Authority to respond to requests from Data Subjects exercising their rights under the Data Protection Legislation, which shall include but not be limited to:

- (A) providing Personal Data and details of the processing of Personal Data to the Authority in response to a Data Subject Access Request; and
    - (B) deleting and/or rectifying Personal Data in response to a request from a Data Subject; and
  - (iii) assisting with any enquiries from, or consultation with, the Information Commissioner or any other regulatory authority;
- (f) notify the Authority within five (5) Business Days if it receives:
  - (i) from a Data Subject (or third party on their behalf):
    - (A) a Data Subject Access Request (or purported Data Subject Access Request);
    - (B) a request to rectify, block or erase any Personal Data; or
    - (C) any other request, complaint or communication relating to the Authority's obligations under the Data Protection Legislation;
  - (ii) any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data; or
  - (iii) 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;
- (g) provide the Authority with full cooperation and assistance (within the timescales reasonably required by the Authority) in relation to any complaint, communication or request made (as referred to at Clause 28.6.3(e)), including by promptly providing:
  - (i) the Authority with full details and copies of the complaint, communication or request;
  - (ii) where applicable, such assistance as is reasonably requested by the Authority to enable the Authority to comply with the Data Subject Access Request within the relevant timescales set out in the Data Protection Legislation; and
  - (iii) the Authority, on request by the Authority, with any Personal Data it holds in relation to a Data Subject; and
- (h) if requested by the Authority, provide a written description of the measures that it has taken and technical and organisational security measures in place, for the purpose of compliance with its obligations pursuant to this Clause 28.6.3 and provide to the Authority copies of all documentation relevant to such compliance including, protocols, procedures, guidance, training and manuals.

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

- (a) the Supplier shall propose a Variation to the Authority which, if it is agreed by the Authority, shall be dealt with in accordance with the Variation Procedure and Clauses 28.6.4(b) to 28.6.4(d);
- (b) the Supplier shall set out in its proposal to the Authority for a Variation details of the following:
  - (i) the Personal Data which will be transferred to and/or Processed in or to any Restricted Country;
  - (ii) the Restricted Country or Countries to which the Personal Data will be transferred to and/or Processed in; and
  - (iii) any Sub-Contractors or other third parties who will be Processing and/or receiving Personal Data in the Restricted Country;
- (c) how the Supplier will ensure an adequate level of protection and adequate safeguards in respect of the Personal Data that will be Processed in and/or transferred to Restricted Countries so as to ensure the Authority's compliance with the Data Protection Legislation;
- (d) in providing and evaluating the Variation, the Parties shall ensure that they have regard to and comply with then-current Authority, Central Government Bodies and Information Commissioner Office policies, procedures, guidance and codes of practice on, and any approvals processes in connection with, the Processing in and/or transfers of Personal Data to any Restricted Countries; and
- (e) the Supplier shall comply with such other instructions and shall carry out such other actions as the Authority may notify in writing, including:
  - (i) incorporating standard and/or model clauses (which are approved by the European Commission as offering adequate safeguards under the Data Protection Legislation) into this Contract or a separate data processing agreement between the Parties; and
  - (ii) procuring that any Sub-Contractor or other third party who will be Processing and/or receiving or accessing the Personal Data in any Restricted Countries either enters into:
    - (A) a direct data processing agreement with the Authority on such terms as may be required by the Authority; or
    - (B) a data processing agreement with the Supplier on terms which are equivalent to those agreed between the Authority and the Sub-Contractor relating to the relevant Personal Data transfer, and
  - (iii) in each case which the Supplier acknowledges may include the incorporation of model contract provisions (which are approved by the European Commission as offering adequate safeguards under the Data Protection Legislation) and technical and organisation measures which the Authority

deems necessary for the purpose of protecting Personal Data.

28.6.5 The Supplier shall not engage another Processor without prior specific or general written authorisation of the Authority. Where the Authority gives the Supplier authorisation to engage another Processor under this clause 28.6.5:

- (i) the Supplier shall ensure that such Processor is subject to the same obligations as are set out in this clause;
- (ii) the Supplier shall at all times remain liable to the Authority for such Processor's performance of its obligations; and
- (iii) if the authorisation given is a general written authorisation, the Supplier shall not make any changes concerning the addition or replacement of other Processors without first obtaining the Authority's written consent to such changes.

28.6.6 The Supplier shall notify the Authority promptly:

- (i) if it becomes aware that in following the instructions of the Authority, it shall be breaching the Data Protection Legislation; or
- (ii) if the Supplier believes it is under a legal obligation to Process the Personal Data other than in accordance with the Authority's instructions and provide the Authority with details of such legal obligation, unless the law prohibits such information on important grounds of public interest.

28.6.7 The Supplier shall:

- (i) notify the Authority promptly (and in any event within 24 hours) of becoming aware of any:
  - (A) actual, suspected or threatened unauthorised exposure, access, disclosure, Processing, use, communication, deletion, revision, encryption, reproduction or transmission of any component of the Personal Data; or
  - (B) unauthorised access or attempted access or apparent attempted access (physical or otherwise) to the Personal Data or any loss of, damage to, corruption of or destruction of such Personal Data; and
- (ii) ensure that such notice includes details of the nature of the breach, including the categories and approximate number of Data Subjects and records concerned and the remediation measures being taken to mitigate and contain the breach.

28.6.8 In the event of a notification under clause 28.6.7, the Authority shall at its sole discretion determine whether to provide notification to the Data Subject, any third party or the Information Commissioner or any other regulatory authority and the Supplier shall not notify the Data Subject, any third party or the Information Commissioner or any other regulatory authority unless such disclosure is required by law or is otherwise approved by the Authority.

28.6.9 The Supplier shall:

- (i) maintain accurate written records of the processing it carries out in connection with this Contract, which shall contain as a minimum:
  - (A) its details, the Authority's details and the details of its data protection officer;
  - (B) the categories of Processing carried out on behalf of the Authority;
  - (C) the details of any transfers to any third countries, where applicable, and the safeguards in place for that transfer; and
  - (D) an accurate record of the technical and organisational measures it has in place in accordance with clause 28.6.3(b);
- (ii) at the Authority's request, make available to the Authority all information necessary to demonstrate the Supplier's compliance with its obligations under this clause, including the records referred to in clause 28.6.9(i); and
- (iii) permit the Authority (or an auditor mandated by the Authority) to inspect and audit the Supplier's facilities, equipment, documents and electronic data relating to the Supplier's data processing activities under this Contract for the purposes of monitoring the Supplier's compliance with its obligations under this clause 28.6.

28.6.10 The Supplier shall use its reasonable endeavours to assist the Authority to comply with any obligations under the Data Protection Legislation and shall not perform its obligations under this Contract in such a way as to cause the Authority to breach any of the Authority's obligations under the Data Protection Legislation to the extent the Supplier is aware, or ought reasonably to have been aware, that the same would be a breach of such obligations.

## 29. PUBLICITY AND BRANDING

29.1 The Supplier shall not:

29.1.1 make any press announcements or publicise this Contract in any way; or

29.1.2 use the Authority's name, mark, logo or brand in any promotion or marketing or announcement of orders,

without Approval and/or in breach of any conditions or other terms specified by the Authority as part of any such Approval.

29.2 Each Party acknowledges to the other that nothing in this Contract either expressly or by implication constitutes an endorsement of any products or services of the other Party (including the Services and Supplier Equipment) and each Party agrees not to conduct itself in such a way as to imply or express any such approval or endorsement.

## **I. LIABILITY AND INSURANCE**

### **30. LIABILITY**

#### **30.1 Unlimited liability**

##### **30.1.1 Neither Party excludes or limits its liability for:**

- (a) death or personal injury caused by its negligence, or that of its employees, agents or Sub-Contractors (as applicable);
- (b) bribery or Fraud by it or its employees;
- (c) 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
- (d) any liability to the extent it cannot be excluded or limited by Law.

##### **30.1.2 The Supplier does not exclude or limit its liability in respect of the Indemnity in Clause 27.9 (IPR Indemnity) and in each case whether before or after the making of a demand pursuant to the Indemnity therein.**

#### **30.2 Financial limits**

##### **30.2.1 Subject to Clause 30.1.1 (Unlimited liability):**

- (a) the Supplier's total aggregate liability in respect of any Losses relating to loss of or damage to tangible property (including any Authority Premises and Authority Property) incurred by the Authority under or in connection with this Contract as a result of Defaults by the Supplier shall in no event exceed two million pounds (£2,000,000);
- (b) in respect of all other Losses not subject to Clause (a) and incurred by the Authority under or in connection with this Contract as a result of Defaults by the Supplier shall in no event exceed:
  - (i) in relation to any Defaults occurring from the Commencement Date to the end of the first Contract Year, the higher of two million pounds (£2,000,000) or a sum equal to one hundred per cent (100%) of the Estimated Year 1 Contract Remuneration;
  - (ii) in relation to any Defaults occurring in any subsequent Contract Year that commences during the remainder of the Contract Period, the higher of two million pounds (£2,000,000) in each such Contract Year or a sum equal to one hundred per cent (100%) of the Remuneration payable to the Supplier under this Contract in the previous Contract Year; and
  - (iii) in relation to any Defaults occurring after the end of the Contract Period, the higher of two million pounds (£2,000,000) or a sum equal to one hundred per cent (100%) of the Remuneration payable to the Supplier under this Contract in the last Contract Year commencing during the Contract Period.

30.2.2 Subject to Clauses 30.1.1 (Unlimited liability), and 30.2.1 (Financial limits) and without prejudice to its obligation to pay the undisputed Remuneration as and when it falls due for payment, the Authority's total aggregate liability in respect of all Losses as a result of Authority Causes shall be limited to:

- (a) in relation to any Authority Causes occurring from the Commencement Date to the end of the first Contract Year, a sum equal to the Target Costs for the first year;
- (b) in relation to any Authority Causes occurring in each subsequent Contract Year that commences during the remainder of the Contract Period, a sum equal to the Remuneration payable to the Supplier under this Contract in the previous Contract Year; and
- (c) in relation to any Authority Causes occurring in each Contract Year that commences after the end of the Contract Period, a sum equal to the Remuneration payable to the Supplier under this Contract in the last Contract Year commencing during the Contract Period.

30.3 Non-recoverable Losses

30.3.1 Subject to Clause 30.1.1 (Unlimited liability) neither Party shall be liable to the other Party for any:

- (a) indirect, special or consequential Loss; and/or
- (b) loss of profits, turnover, savings, business opportunities or damage to goodwill (in each case whether direct or indirect).

30.4 Recoverable Losses

30.4.1 Subject to Clause 30.2.1 (Financial limits), and notwithstanding Clause 30.3.1 (Non-recoverable Losses), 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:

- (a) 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;
- (b) any wasted expenditure or charges;
- (c) the additional cost of procuring Replacement Services for the remainder of the Contract Period (or what would have been the Initial Period or, if the Contract has been extended, the Extension Period, had the Contract not been terminated early in accordance with Clause 35) and/or replacement Deliverables, which shall include any incremental costs associated with such Replacement Services and/or replacement Deliverables above those which would have been payable under this Contract;
- (d) any compensation or interest paid to a third party by the Authority; and
- (e) any fine or penalty incurred by the Authority pursuant to Law (including any fine or penalty imposed by a regulator) and any costs

incurred by the Authority in defending any proceedings which result in such fine or penalty

and the costs to the Supplier associated with any such recovery by the Authority shall not be Allowable Costs.

30.5 Additional liability provisions

- 30.5.1 Each Party shall use all reasonable endeavours to mitigate any loss or damage suffered arising out of or in connection with this Contract.
- 30.5.2 The Authority and the Supplier shall use all reasonable endeavours to act at all times in the best interests of the NHS.
- 30.5.3 Any Deductions shall not be taken into consideration when calculating the Supplier's liability under Clause 30.2.1 (Financial limits).
- 30.5.4 Subject to any rights of the Authority under this Contract (including in respect of an IPR Claim), any claims by a third party where an indemnity is sought by that third party from a Party to this Contract shall be dealt with in accordance with the provisions of Schedule 16 (Conduct of Claims).

## 31. INSURANCE

- 31.1 The Supplier shall effect and maintain any insurances and/or risk pooling arrangements in relation to the performance of its obligations under this Contract and the discharge of any associated liabilities, and shall procure that Sub-Contractors shall do the same in relation to the performance of their obligations and any associated liabilities under any Sub-Contract.
- 31.2 The terms of any insurance and/or risk pooling arrangements or the amount of cover shall not relieve the Supplier of any liabilities arising under this Contract. For the avoidance of doubt and subject also to Clause 31.5 below, any liabilities of the Supplier that are not allowable and recoverable costs as set out in the Costs Register shall not be paid by the Authority to the Supplier.
- 31.3 The Supplier shall meet its insurance obligations under applicable Law in full, including, UK employers' liability insurance and motor third party liability insurance.
- 31.4 The Supplier shall from time to time and in any event within seven (7) calendar days following receipt of written notice from the Authority provide documentary evidence to the Authority of the insurance/risk pooling arrangements taken out by the Supplier pursuant to this Clause 31 together with evidence (as appropriate) that they are fully maintained and that any premiums on them and/or contributions in respect of them (if any) are fully paid.
- 31.5 For the avoidance of doubt, nothing in this Clause 31 shall prevent the Supplier from recovering any allowable and recoverable costs as set out in the Costs Register in relation to insurance premiums specific to this Contract, but any liabilities of the Supplier that the Supplier did, or could reasonably have, put in place insurance and/or other risk pooling arrangements to discharge in accordance with Clause 31.1 shall be deemed not to be allowable costs and/or not to be recoverable costs for the purposes of the Cost Register (in each case to be determined by the Authority acting reasonably). To the extent of any conflict between this Clause 31.5 and other part of this Contract, the provisions of this Clause 31.5 shall take precedence to the extent of such conflict.

## **J. REMEDIES AND RELIEF**

### **32. AUTHORITY REMEDIES FOR DEFAULT**

#### **32.1 Remedies**

32.1.1 In the case of a Default of any of the terms of this Contract by the Supplier (including, without limitation, any breach of any performance requirements or standards that the Supplier is required to comply with under this Contract), the Authority may, without prejudice to its other rights and remedies under this Contract, issue a notice of Default.

32.1.2 Without prejudice to any other right or remedy of the Authority howsoever arising (including under Schedule 6 (Service Levels and Adjustments), Clause 10 (Critical Service Failure), Clause 32.4, Clause 32.5 (Step-In rights) and 35.6 (Termination for multiple Defaults) and subject to the exclusive financial remedy provisions in Clauses 9.5 (Service Levels and Service Credits), if the Supplier commits any Default (which shall be deemed to include, without limitation, any Critical Service Failure) capable of remedy (and for these purposes a Default may be a single Default or a number of Defaults or repeated Defaults - whether of the same or different obligations), the Authority may, as part any notice of Default issued by the Authority pursuant to Clause 32.1.1, instruct the Supplier to comply with the Rectification Plan Process below.

#### **32.2 Rectification Plan Process**

32.2.1 Where the Authority has instructed the Supplier to comply with the Rectification Plan Process pursuant to Clause 32.1.2:

- (a) the Supplier shall submit a draft Rectification Plan to the Authority for it to review and Approve as soon as possible and in any event within five (5) Business Days (or such other reasonable period as the Authority may reasonably specify) from the date of Authority's instructions. The Supplier shall submit a draft Rectification Plan even if the Supplier disputes that it is responsible for the Default giving rise to the Authority's request for a draft Rectification Plan;
- (b) the draft Rectification Plan shall set out:
  - (i) full details of the Default that has occurred, including a root cause analysis;
  - (ii) the actual or anticipated effect of the Default; and
  - (iii) the steps which the Supplier proposes to take to rectify the Default (if applicable) and to prevent such Default from recurring, including timescales for such steps and for the rectification of the Default (where applicable).

32.2.2 The Supplier shall promptly provide to the Authority any further documentation, clarifications and/or amendments to the draft Rectification Plan that the Authority requires in order to: (i) assess the Supplier's root cause analysis; and/or (ii) approve the draft Rectification Plan. 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 in accordance with Schedule 12 (Dispute Resolution Procedure). For the avoidance of doubt, an

Approval by the Authority of any Rectification Plan shall not relieve the Supplier of any continuing responsibility to achieve the Service Levels, or remedy any failure to do so, and no estoppels or waiver shall arise from any such Approval.

32.2.3 The Authority may chose not to Approve by rejecting 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:

- (a) is insufficiently detailed to be capable of proper evaluation;
- (b) will take too long to complete;
- (c) will not prevent reoccurrence of the Default; and/or
- (d) will rectify the Default but in a manner which is unacceptable to the Authority.

32.2.4 The Authority shall notify the Supplier whether it Approves 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.

32.2.5 If the Authority Approves the Rectification Plan, the Supplier shall implement the Rectification Plan.

Any failure by the Supplier to:

- 32.3.1 put forward a draft Rectification Plan in accordance with Clause 32.2.1(a);
- 32.3.2 obtain the Authority's Approval to such Rectification Plan in accordance with Clause 32.2.1(a);
- 32.3.3 comply with such Rectification Plan (including, without limitation, as to its timescales for implementation, which shall be thirty (30) days unless otherwise agreed between the Parties as part of the Approved Rectification Plan); and/or
- 32.3.4 remedy the Default notwithstanding the implementation of such Rectification Plan in accordance with the timescales for implementation,

shall be deemed, for the purposes of Clause 35.1.1(d), a material Default of this Contract by the Supplier not remedied to the satisfaction of the Authority in accordance with the Rectification Plan Process.

32.4 Without prejudice to any other right or remedy of the Authority howsoever arising, where the Authority otherwise becomes entitled to the terminate this Contract in accordance with Clause 35.1.1(d), the Authority may by written notice:

- 32.4.1 suspend this Contract (whereupon the relevant provisions of Clause 38 (Partial Termination, Suspension and Partial Suspension) shall apply) and procure a third party to supply (in whole or in part) the Services pursuant to Clause 38.2; or
- 32.4.2 without terminating or suspending the whole of this Contract, terminate or suspend this Contract in respect of part of the provision of the Services only (whereupon the relevant provisions of Clause 38 (Partial Termination, Suspension and Partial Suspension) shall apply) and, in relation to any partial suspension, procure a third party to supply (in whole or in part) such Services pursuant to Clause 38.2.

32.5 Step-In rights

32.5.1 Without prejudice to any other right or remedy of the Authority howsoever arising, the Authority may exercise its step-in rights as set out in Schedule 17 (Step-In Rights).

**33. SUPPLIER RELIEF DUE TO AUTHORITY CAUSE**

33.1 If the Supplier has failed to:

33.1.1 achieve an Implementation Milestone by its Implementation Milestone Date;

33.1.2 provide the Services in accordance with the Service Levels; or

33.1.3 comply with its obligations under this Contract,

(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 Clause 13 (Supplier Notification of Authority Cause)):

(a) the Supplier shall not be treated as being in breach of this Contract 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 to terminate this Contract pursuant to Clause 35 (Authority Termination Rights) except Clause 35.7 (Termination without Cause);

(c) where the Supplier Non-Performance constitutes the failure to Achieve an Implementation Milestone by its Implementation Milestone Date:

(i) the Implementation 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 Implementation Plan shall be amended to reflect any consequential revisions required to subsequent Implementation Milestone Dates resulting from the Authority Cause; and/or

(d) where the Supplier Non-Performance constitutes a Service Level Failure, the Supplier shall to the extent that the Supplier can demonstrate that the Service Level Failure was caused by the Authority Cause:

(i) be deemed to have met the relevant Service Level and associated Performance Criteria; and

(ii) the Supplier shall be entitled to invoice for the Remuneration for the provision of the relevant Services affected by the Authority Cause,

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

- 33.2 In order to claim any of the rights and/or relief referred to in Clause 33.1, the Supplier shall:
- 33.2.1 comply with its obligations under Clause 13 (Notification of Authority Cause); and
  - 33.2.2 within ten (10) Business Days of becoming aware that an Authority Cause has caused, or is likely to cause, a Supplier Non-Performance, give the Authority notice (a “**Relief Notice**”) setting out details of:
    - (a) the Supplier Non-Performance;
    - (b) the Authority Cause and its effect on the Supplier’s ability to meet its obligations under this Contract; and
    - (c) the relief claimed by the Supplier.
- 33.3 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, consulting with the Supplier where necessary.
- 33.4 Without prejudice to Clause 7.6 (Continuing obligation to provide the Services), if a Dispute arises as to:
- 33.4.1 whether a Supplier Non-Performance would not have occurred but for an Authority Cause; and/or
  - 33.4.2 the nature and/or extent of the relief 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.
- 33.5 Any Variation that is required to the Implementation Plan or to the Remuneration pursuant to this Clause 33 shall be implemented in accordance with the Variation Procedure.

#### 34. FORCE MAJEURE

- 34.1 Subject to the remainder of Clause 34 (and, in relation to the Supplier, subject to its compliance with any obligations in Clause 11 (Business Continuity and Disaster Recovery)), a Party may claim relief under Clause 34 from liability for failure to meet its obligations under this Contract for as long as and only to the extent that the performance of those obligations is directly affected by a Force Majeure Event. Any failure or delay by the Supplier in performing its obligations under this Contract 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. For the avoidance of doubt and unless otherwise directed by the Authority, during a Force Majeure Event, the Supplier shall perform its obligations under the Contract to the fullest extent it is able to do so in order to minimise the impact of that Force Majeure Event on the performance of the Services to the fullest extent possible.
- 34.2 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.

34.3 If the Supplier is the Affected Party, it shall not be entitled to claim relief under Clause 34 to the extent that consequences of the relevant Force Majeure Event:

34.3.1 are capable of being mitigated by any of the provision of any Services including the BCDR Services, but the Supplier has failed to do so; and/or

34.3.2 should have been foreseen and prevented or avoided by a prudent provider of services similar to the Services, operating to the standards required by this Contract.

34.4 Subject to Clause 34.5, 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 Services affected by the Force Majeure Event.

34.5 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.

34.6 Where, as a result of a Force Majeure Event:

34.6.1 an Affected Party fails to perform its obligations in accordance with this Contract, then during the continuance of the Force Majeure Event:

(a) the other Party shall not be entitled to exercise any rights to terminate this Contract in whole or in part as a result of such failure unless the provision of the Services is materially impacted by a Force Majeure Event which endures for a continuous period of more than ninety (90) days; and

(b) the Supplier shall not be liable for any Default and the Authority shall not be liable for any Authority Cause arising as a result of such failure;

34.6.2 the Supplier fails to perform its obligations in accordance with this Contract:

(a) the Authority shall not be entitled during the continuance of the Force Majeure Event to exercise its step-in rights under Clause 32.5 (Authority remedies for Default) and Schedule 17 (Step-in Rights) as a result of such failure; and

(b) the Supplier shall be entitled to receive payment of the Remuneration only to the extent that the Services (or part of the Services) continue to be provided in accordance with the terms of this Contract during the occurrence of the Force Majeure Event.

34.7 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 Contract.

34.8 Relief from liability for the Affected Party under this Clause 34 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 Contract and shall not be dependent on the serving of notice under Clause 34.7.

## **K. TERMINATION AND EXIT MANAGEMENT**

### **35. AUTHORITY TERMINATION RIGHTS**

#### **35.1 Termination on material Default**

35.1.1 The Authority may terminate this Contract for material Default by issuing a Termination Notice to the Supplier where:

- (a) the Supplier commits a Critical Service Failure;
- (b) the representation and warranty given by the Supplier pursuant to Clause 3.2.5 (Representations and Warranties) is materially untrue or misleading and the Supplier fails to provide details of proposed mitigating factors which in the reasonable opinion of the Authority are acceptable;
- (c) the Supplier commits any material Default of this Contract which is not, in the reasonable opinion of the Authority, capable of remedy;
- (d) the Supplier commits a Default, including a material Default, which in the opinion of the Authority is remediable but the Supplier has not remedied such Default to the satisfaction of the Authority in accordance with the Rectification Plan Process; and/or
- (e) the Authority has received notice that the Supplier or any Sub-Contractor of the Supplier has, in the opinion of the Authority, NHS Pensions and/or the Minister for the Civil Service or the administrators of the CSP Schemes for the time being, failed in any material respect to comply with its obligations in relation to the NHS Pension Scheme (including those under any Direction Letter) and/or the CSP Schemes (including those under any Admission Agreement) as assumed pursuant to the provisions of the Annex to Schedule 11 (Pensions).

35.1.2 For the purpose of Clause 35.1.1, a material Default may be a single material Default or a number of Defaults or repeated Defaults (whether of the same or different obligations and regardless of whether such Defaults are remedied) which taken together constitute a material Default.

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

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

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

#### **35.3 Termination on Insolvency**

- 35.3.1 The Authority may terminate this Contract by issuing a Termination Notice to the Supplier where an Insolvency Event affecting the Supplier occurs.
- 35.4 Termination on Change of Control
- 35.4.1 The Supplier shall notify the Authority immediately in writing and as soon as the Supplier is aware (or ought reasonably to be aware) that it is anticipating, undergoing, undergoes or has undergone a Change of Control and provided such notification does not contravene any Law.
- 35.4.2 The Supplier shall ensure that any notification made pursuant to Clause 35.4.1 shall set out full details of the Change of Control including the circumstances suggesting and/or explaining the Change of Control.
- 35.4.3 The Authority may terminate this Contract under Clause 35.4 by issuing a Termination Notice to the Supplier within six (6) Months of:
- (a) being notified in writing that a Change of Control is anticipated or in contemplation or has occurred; or
  - (b) where no notification has been made, the date that the Authority becomes aware that a Change of Control is anticipated or is in contemplation or has occurred,
- but shall not be permitted to terminate where an Approval (such decision to approve shall not be unreasonably withheld or delayed) was granted prior to the Change of Control. For the avoidance of doubt, it shall be reasonable for the Authority to withhold an Approval relating to any Change of Control in circumstances where:
- (a) the Change of Control involves a Restricted Party;
  - (b) is reasonably considered by the Authority as being incompatible with any Laws (applicable to the Supplier or the Authority); or
  - (c) the Authority reasonably considers that such Change of Control would adversely impact on the Authority's supply chain risk profile in the areas or security or financial standing.
- 35.5 Termination for breach of Regulations
- 35.5.1 The Authority may terminate this Contract by issuing a Termination Notice to the Supplier on the occurrence of any of the statutory provisos contained in Regulation 73 (1) (a) to (c).
- 35.6 Termination for multiple Defaults
- 35.6.1 The Authority may terminate this Contract by issuing a Termination Notice if the Supplier commits a Default of this Contract in circumstances where it has already been served with at least three (3) previous valid notices of Default within the last twelve (12) Months as a result of any previous Supplier Defaults (whether or not the Supplier has remedied such Defaults in accordance with a Rectification Plan).
- 35.7 Termination without cause
- 35.7.1 Subject to Clause 39.2, the Authority shall have the right to terminate this Contract at any time by issuing a Termination Notice to the Supplier giving at least three (3) Months' written notice.

35.8 Additional Authority termination rights

35.8.1 The Authority may also terminate this Contract pursuant to any other express termination rights provided as part of any of the provisions of this Contract.

**36. SUPPLIER TERMINATION RIGHTS**

36.1 Termination on Authority Cause for failure to pay

36.1.1 The Supplier may, by issuing a Termination Notice to the Authority, terminate this Contract if the Authority fails to pay an undisputed sum due to the Supplier under this Contract which in aggregate exceeds a sum in excess of one sixth ( $\frac{1}{6}$ ) of the Supplier's Target Costs and such amount remains outstanding thirty (30) Business Days after the receipt by the Authority of a prior written notice of non-payment from the Supplier specifying:

- (a) the Authority's failure to pay; and
- (b) the correct overdue and undisputed sum; and
- (c) the reasons why the undisputed sum is due; and
- (d) the requirement on the Authority to remedy the failure to pay.

For the avoidance of doubt, a right of termination shall not apply where the failure to pay is due to the Authority exercising its rights under this Contract including Clause 18.3 (Retention and set off) or the sum is disputed by the Authority.

36.1.2 The Supplier shall not suspend the supply of the Services for failure of the Authority to pay disputed sums of money (whether in whole or in part).

**37. TERMINATION BY EITHER PARTY**

37.1 Termination for continuing Force Majeure Event

37.1.1 Either Party may, by issuing a Termination Notice to the other Party terminate this Contract if, in accordance with Clause 34.6.1(a) (Force Majeure).

**38. PARTIAL TERMINATION, SUSPENSION AND PARTIAL SUSPENSION**

38.1 Where the Authority has the right to terminate this Contract, the Authority shall be entitled, by giving notice to such effect, to terminate or suspend all or part of this Contract provided always that, if the Authority elects to terminate or suspend this Contract in part, the parts of this Contract not terminated or suspended can, in the Authority's reasonable opinion, operate effectively to deliver the intended purpose of the surviving parts of this Contract.

38.2 Any suspension of this Contract under Clause 38.1 shall be for such period as the Authority may specify and without prejudice to any right of termination which has already accrued, or subsequently accrues, to the Authority and, for the duration of such suspension, the Authority may procure a third party to supply (in whole or in part) the Services the subject of the suspension. Where the Authority exercises any such rights under this Clause 38.2, the Authority shall have the right to charge the Supplier for and the Supplier shall on demand pay any costs reasonably incurred by

the Authority (including any reasonable administration costs) in respect of the supply of any part of the Services by a third party and provided that the Authority uses its reasonable endeavours to mitigate any additional expenditure in obtaining Replacement Services.

38.3 The Parties shall seek to agree the effect of any Variation necessitated by a partial termination, suspension or partial suspension in accordance with the Variation Procedure, including the effect that the partial termination, suspension or partial suspension may have on the provision of any other Services and the Remuneration, provided that:

38.3.1 any adjustment to the Remuneration (if any) shall be calculated in accordance with the Cost Model and must be reasonable;

38.3.2 the Supplier shall not be entitled to:

- (a) an increase in the Remuneration in respect of the provision of the Services that have not been terminated if the partial termination arises due to the exercise of any of the Authority's termination rights under Clause 35 (Authority Termination Rights) except Clause 35.7 (Termination without cause); and
- (b) reject the Variation.

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

39.1 Consequences of termination under Clauses 35.1 (Termination on material Default) and 35.6 (Termination for multiple Defaults)

39.1.1 Without prejudice to any other right or remedy of the Authority (to include under this Contract or provided by Law) and subject to the Authority acting reasonably to mitigate such costs, where the Authority:

- (a) terminates (in whole or in part) this Contract under Clause 35.1 (Termination on material Default) and/or under Clause 35.6 (Termination for multiple Defaults); and
- (b) then makes other arrangements for the supply of the Services,

the Supplier shall in such circumstances, subject to the financial limits set out in Clause 30.2 (Financial limits), indemnify the Authority (whether before or after the making of a demand pursuant to the indemnity hereunder) in relation to the costs referred to in Clause 30.4.1(c) (Recoverable Losses), as may be incurred by the Authority for the remainder of what would have been the Initial Period or, if the Contract has been extended, the Extension Period, had the Contract not been terminated early in accordance with the one or more of the above Clauses.

39.2 Consequences of termination under Clauses 35.7 (Termination without cause) and 36.1 (Termination on Authority Cause for failure to pay)

39.2.1 Subject to Clause 39.2.2, where:

- (a) the Authority terminates (in whole or in part) this Contract under Clause 35.7 (Termination without cause), the Supplier may recover from the Authority any costs that it reasonably and properly incurs in winding down and concluding the provision of the Services; or
- (b) the Supplier terminates this Contract pursuant to Clause 36.1 (Termination on Authority Cause for failure to pay), the Authority

shall indemnify the Supplier against any reasonable and proven Losses which would otherwise represent an unavoidable loss by the Supplier by reason of the termination of this Contract,

in each case provided that the Supplier:

- (i) takes all reasonable steps to mitigate such costs or Losses; and
- (ii) submits to the Authority a fully itemised and costed list of such costs or Losses claimed together with supporting evidence as to expenditure and quantum of such costs and Losses (including such evidence as the Authority may require).

39.2.2 The Authority shall not be liable under Clause 39.2.1 to pay any sum which:

- (a) was claimable under insurance held by the Supplier, and the Supplier has failed to make a claim on its insurance, or has failed to make a claim in accordance with the procedural requirements of the insurance policy;
- (b) would have been claimable under insurance but for the Supplier's failure to comply with its obligation to insure under Clause 31 (Insurance); or
- (c) when added to any sums paid or due to the Supplier under this Contract, exceeds the total sum that would have been payable to the Supplier if this Contract had not been terminated.

39.3 Consequences of termination for other reasons: under Clause 37.1 (Termination for continuing Force Majeure Event)

39.3.1 The costs of termination incurred by the Parties shall lie where they fall if this Contract is terminated or partially terminated:

- (a) by either Party for a continuing Force Majeure Event pursuant to Clause 37.1 (Termination for continuing Force Majeure Event); or
- (b) by the Authority pursuant to:
  - (i) Clause 35.3 (Termination on Insolvency)
  - (ii) Clause 35.4 (Termination on Change of Control)

39.4 Consequences of termination or expiry for any reason

39.4.1 Save as otherwise expressly provided in this Contract:

- (a) termination or expiry of this Contract shall be without prejudice to any rights, remedies or obligations accrued under this Contract prior to termination or expiration and nothing in this Contract shall prejudice the right of either Party to recover any amount outstanding at the time of such termination or expiry; and
- (b) termination or expiry of this Contract shall not affect the continuing rights, remedies or obligations of the Authority or the Supplier under Clauses 16 (Records, Audit Access and Open Book Data), 27 (Intellectual Property Rights), 28.3 (Confidentiality), 28.5 (Freedom of information) 28.6 (Protection of Personal Data), 30 (Liability), 39 (Consequences of Expiry or Termination),

45 (Severance), 47 (Entire Agreement), 48 (Third Party Rights) 51 (Dispute Resolution) and 52 (Governing Law and Jurisdiction), and the provisions of Schedule 1 (Definitions), Schedule 3 (Remuneration, Payment and Invoicing), Schedule 10 (Exit Management), Schedule 11 (Staff Transfer), Schedule 12 (Dispute Resolution Procedure) and, without limitation to the foregoing, any other provision of this Contract which expressly or by implication is to be performed or observed notwithstanding termination or expiry shall survive the Expiry Date.

39.5 Exit management

39.5.1 The Parties shall comply with the exit management provisions set out in Schedule 10 (Exit Management).

**L. MISCELLANEOUS AND GOVERNING LAW**

**40. COMPLIANCE**

40.1 Health and safety

40.1.1 The Supplier shall perform its obligations under this Contract (including those in relation to the Services) in accordance with:

- (a) all applicable Law regarding health and safety; and
- (b) the Authority's health and safety policy (as provided to the Supplier from time to time) whilst at the Authority Premises.

40.1.2 Each Party shall promptly notify the other of as soon as possible 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 Contract.

40.1.3 While on the Authority Premises, the Supplier shall comply with any health and safety measures implemented by the Authority in respect of Supplier Personnel and other persons working there and any instructions from the Authority on any necessary associated safety measures.

40.2 Equality and diversity

40.2.1 The Supplier shall:

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

40.3 Finance Act 1989

40.3.1 The Supplier shall comply with the provisions of section 182 of the Finance Act 1989.

40.4 Environmental requirements

40.4.1 The Supplier shall, when working on the Sites, perform its obligations under this Contract in accordance with the Environmental Policy of the Authority.

40.4.2 The Authority shall provide a copy of its written Environmental Policy (if any) to the Supplier upon the Supplier's written request.

**41. ASSIGNMENT AND NOVATION**

41.1 Subject to Clause 41.2, neither the Supplier nor the Authority shall assign, novate, Sub-Contract or otherwise dispose of or create any trust in relation to any or all of its rights, obligations or liabilities under this Contract or any part of it without the prior written approval of the other Party.

41.2 The Authority may assign, novate or otherwise dispose of any or all of its rights, liabilities and obligations under this Contract or any part thereof to:

41.2.1 any other body established by the Crown or under statute in order substantially to perform any of the functions that had previously been performed by the Authority; or

41.2.2 any body (private sector or public sector) which takes over the responsibility for the operation of the Intelligent Client Co-Ordinator for the Department of Health's Future Operating Model Programme, as may be notified to the Supplier by the Authority from time to time; or

41.2.3 any private sector body which substantially performs the functions of the Authority,

and the Supplier shall, at the Authority's request, enter into a novation agreement in such form as the Authority shall reasonably specify in order to enable the Authority to exercise its rights pursuant to this Clause 41.2.

41.3 A change in the legal status of either the Authority or the Supplier shall not, subject to Clause 41.4, affect the validity of this Contract and this Contract shall be binding on any successor body to the Authority or the Supplier.

41.4 If the Authority assigns, novates or otherwise disposes of any of its rights, obligations or liabilities under this Contract to a private sector body in accordance with Clause 41.2.3 (the "**Transferee**" in the rest of this Clause) the right of termination of the Authority in Clause 35.3 (Termination on Insolvency) shall be available to the Supplier in the event of insolvency of the Transferee as if the references to Supplier in Clause 35.3 (Termination on Insolvency) and in the definition of Insolvency Event were references to the Transferee.

**42. WAIVER AND CUMULATIVE REMEDIES**

42.1 The rights and remedies under this Contract may be waived only by notice in accordance with Clause 50 (Notices) and in a manner that expressly states that a waiver is intended. A failure or delay by a Party in ascertaining or exercising a right or remedy provided under this Contract or by Law shall not constitute a waiver of

that right or remedy, nor shall it prevent or restrict the further exercise of that right or remedy.

- 42.2 Unless otherwise provided in this Contract, rights and remedies under this Contract are cumulative and do not exclude any rights or remedies provided by Law, in equity or otherwise.

#### **43. RELATIONSHIP OF THE PARTIES**

- 43.1 Except as expressly provided otherwise in this Contract, nothing in this Contract, nor any actions taken by the Parties pursuant to this Contract, shall create a partnership, joint venture or relationship of employer and employee or, except as provided in Schedule 15 (Agency Terms), 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.

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

- 44.1 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 Commencement Date:
- 44.1.1 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
  - 44.1.2 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.
- 44.2 The Supplier shall not during the Contract Period:
- 44.2.1 commit a Prohibited Act; and/or
  - 44.2.2 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.
- 44.3 The Supplier shall during the Contract Period:
- 44.3.1 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;
  - 44.3.2 keep appropriate records of its compliance with its obligations under Clause 44.3.1 and make such records available to the Authority on request;
  - 44.3.3 if so required by the Authority, within twenty (20) Business Days of the Commencement Date, and annually thereafter, certify to the Authority in writing that the Supplier and all persons associated with it or its Sub-Contractors or other persons who are supplying the Services in connection with this Contract are compliant with the Relevant Requirements. The Supplier shall provide such supporting evidence of compliance as the Authority may reasonably request; and

- 44.3.4 have, maintain and where appropriate enforce an anti-bribery policy (which shall be disclosed to the Authority on request) to prevent it and any Supplier Personnel or any person acting on the Supplier's behalf from committing a Prohibited Act.
- 44.4 The Supplier shall immediately notify the Authority in writing if it becomes aware of any breach of Clause 44.1, or has reason to believe that it has or any of the Supplier Personnel have:
  - 44.4.1 been subject to an investigation or prosecution which relates to an alleged Prohibited Act;
  - 44.4.2 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
  - 44.4.3 received a request or demand for any undue financial or other advantage of any kind in connection with the performance of this Contract or otherwise suspects that any person or Party directly or indirectly connected with this Contract has committed or attempted to commit a Prohibited Act.
- 44.5 If the Supplier makes a notification to the Authority pursuant to Clause 44.4, 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 16 (Records, Audit Access and Open Book Data).
- 44.6 If the Supplier breaches Clause 44.3, the Authority may:
  - 44.6.1 by notice require the Supplier to remove from performance of this Contract any Supplier Personnel whose acts or omissions have caused the Supplier's breach; or
  - 44.6.2 immediately terminate this Contract by issuing a Termination Notice.
- 44.7 Any notice served by the Authority under Clause 44.6 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 Contract shall terminate).

#### **45. SEVERANCE**

- 45.1 If any provision of this Contract (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 Contract are not void or unenforceable be deemed to be deleted and the validity and/or enforceability of the remaining provisions of this Contract shall not be affected.
- 45.2 In the event that any deemed deletion under Clause 45.1 is so fundamental as to prevent the accomplishment of the purpose of this Contract or materially alters the balance of risks and rewards in this Contract, either Party may give notice to the other Party requiring the Parties to commence good faith negotiations to amend this Contract so that, as amended, it is valid and enforceable, preserves the balance of

risks and rewards in this Contract and, to the extent that is reasonably practicable, achieves the Parties' original commercial intention.

- 45.3 If the Parties are unable to resolve the Dispute arising under Clause 45 within twenty (20) Business Days of the date of the notice given pursuant to Clause 45.2, this Contract shall automatically terminate with immediate effect. The costs of termination incurred by the Parties shall lie where they fall if this Contract is terminated pursuant to this Clause 45.

#### **46. FURTHER ASSURANCES**

- 46.1 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 necessary to give effect to the meaning of this Contract.

#### **47. ENTIRE AGREEMENT**

- 47.1 This Contract and the documents referred to in it constitute the entire agreement between the Parties in respect of the matter and supersede and extinguish all prior negotiations, course of dealings or agreements made between the Parties in relation to its subject matter, whether written or oral.
- 47.2 Neither Party has been given, nor entered into this Contract in reliance on, any warranty, statement, promise or representation other than those expressly set out in this Contract.
- 47.3 Nothing in this Clause 47 shall exclude any liability in respect of misrepresentations made fraudulently.

#### **48. THIRD PARTY RIGHTS**

- 48.1 The provisions of paragraphs 2.1 and 2.6 of Part A, paragraphs 2.1, 2.6, 3.1 and 3.3 of Part B, paragraphs 2.1 and 2.3 of Part C, paragraphs 1.4, 2.3 and 2.8 of Part D of Schedule 11 (Staff Transfer), paragraph 2.1 of the Annex to Schedule 11 (Pensions) and the provisions of paragraph 4.1 of Schedule 10 (Exit Management) (together **"Third Party Provisions"**) confer benefits on persons named in such provisions other than the Parties (each such person a **"Third Party Beneficiary"**) and are intended to be enforceable by Third Parties Beneficiaries by virtue of the CRTPA.
- 48.2 Subject to Clause 48.1, a person who is not a Party to this Contract has no right under the CRTPA to enforce any term of this Contract but this does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.
- 48.3 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.
- 48.4 Any amendments or modifications to this Contract may be made, and any rights created under Clause 48.1 may be altered or extinguished, by the Parties without the consent of any Third Party Beneficiary.

#### **49. COUNTERPARTS**

- 49.1 This Contract may be executed in counterparts, each of which when executed shall constitute a duplicate original, but all counterparts shall together constitute one

agreement. Where this Contract is executed in counterparts, following execution each Party must promptly deliver the counterpart it has executed to the other Party. Transmission of an executed counterpart of this Contract by email in PDF, JPEG or other agreed format shall take effect as delivery of an executed counterpart of this Contract.

## 50. NOTICES

50.1 Except as otherwise expressly provided within this Contract, any notices sent under this Contract must be in writing. For the purpose of Clause 50, an e-mail is accepted as being "in writing".

50.2 Subject to Clause 50.3, the following table sets out the method by which notices may be served under this Contract and the respective deemed time and proof of service:

Manner of delivery	Deemed time of delivery	Proof of Service
Email (Subject to Clauses 50.3 and 50.4)	9.00am on the first Business 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 Business Day. Otherwise, delivery will occur at 9.00am on the next Business Day	Properly addressed and delivered as evidenced by signature of a delivery receipt
Royal Mail Signed For™ 1 <sup>st</sup> Class or other prepaid, next Business 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 Business Day. Otherwise, delivery will occur at 9.00am on the same Business Day (if delivery before 9.00am) or on the next Business Day (if after 5.00pm)	Properly addressed prepaid and delivered as evidenced by signature of a delivery receipt

50.3 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 Royal Mail Signed For™ 1<sup>st</sup> Class or other prepaid in the manner set out in the table in Clause 50.2:

50.3.1 any Termination Notice (Clause 35 (Authority Termination Rights)),

50.3.2 any notice in respect of:

- (a) partial termination, suspension or partial suspension (Clause 38 (Partial Termination, Suspension and Partial Suspension)),
- (b) waiver (Clause 42 (Waiver and Cumulative Remedies))
- (c) Default or Authority Cause; and

- 50.3.3 any Dispute Notice.
- 50.4 Failure to send any original notice by personal delivery or recorded delivery in accordance with Clause 50.3 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.
- 50.5 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 the Dispute Resolution Procedure).
- 50.6 For the purposes of this Clause 50, the address and email address of each Party shall be
- 50.6.1 For the Authority:
- Address: Stella House, Goldcrest Way, Newburn Riverside Business Park,  
Newcastle Upon Tyne NE15 8NY
- Email: **REDACTED**
- REDACTED**
- For the attention of: **NHS Business Services Authority**
- 50.6.2 For the Supplier:
- DHL Supply Chain Limited
- Address: Ocean House, The Ring, Bracknell RG12 1AN
- For the attention of: **REDACTED, Company Secretary**
- 50.7 Each Party shall immediately notify the other in the event of a change in their residential address and/or the address for service of notices set out in Clause 50.6. If the Supplier has reason to believe that the address for service of notices set out in Clause 50.6 may be replaced by an address outside of England and Wales then the Supplier shall irrevocably designate, appoint and empower a service agent to act as its authorised agent to receive notices, demands, service of process and any other legal summons in England and Wales for the purposes of any legal action or proceeding brought or to be brought by the Authority in respect of this Contract, and in doing so shall irrevocably consent to the service of notices and demands, service of process or any other legal summons served in such way.

## **51. DISPUTE RESOLUTION**

- 51.1 The Parties shall resolve Disputes arising out of or in connection with this Contract in accordance with the Dispute Resolution Procedure.
- 51.2 The Supplier shall continue to provide the Services in accordance with the terms of this Contract until a Dispute has been resolved (unless the Authority requests in writing that the Supplier does not do so).

## **52. GOVERNING LAW AND JURISDICTION**

- 52.1 This Contract 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 (Dispute Resolution) and Schedule 12 (Dispute Resolution Procedure), 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 Contract or its subject matter or formation.

**IN WITNESS** of which this Contract has been duly executed by the Parties.

Signed duly authorised for and on behalf of the SUPPLIER

Signature: .....

Name **REDACTED**

Position: CHIEF EXECUTIVE OFFICER GLOBAL LIFE SCIENCES & HEALTHCARE, DHL SUPPLY CHAIN

Date .....

Signed for and on behalf of the AUTHORITY

Signature: .....

Name: **REDACTED**

Position: CHIEF EXECUTIVE OFFICER

Date .....