



Standards
& Testing
Agency

TEST OPERATIONS SERVICES

Services Agreement for the Delivery of Test Operations Services

Volume 1

Main Body Agreement and Schedules 1 to 7



Standards
& Testing
Agency

TEST OPERATIONS SERVICES

Services Agreement for the Delivery of Test Operations Services

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**THE SECRETARY OF STATE FOR EDUCATION ACTING
THROUGH THE STANDARDS & TESTING AGENCY**

And

**CAPITA BUSINESS
SERVICES LIMITED**

SERVICES AGREEMENT

for the delivery of Test Operations Services (TOPS)

CONTRACT NUMBER: STA 1000

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This Agreement is made on this 11th day of July 2018

BETWEEN:

- (1) **THE SECRETARY OF STATE FOR EDUCATION** acting through the Standards and Testing Agency, an executive agency of the Department for Education whose offices are located at Sanctuary Buildings, Great Smith Street, London SW1P 3BT ("**STA**");

AND

- (2) **CAPITA BUSINESS SERVICES LIMITED**, a private limited company with registration number 02299747 whose registered office is at 30 Berners Street, LONDON W1T 3LR (the "**Supplier**");

Background:

- (A) Acting on behalf of the Secretary of State for Education, STA has responsibility for the development and delivery of statutory assessment and testing of Pupils in England up to the end of school Year 6.
- (B) Following a competition carried out by STA in order to identify a service provider to provide test operations services in respect of Pupils up to the end of Year 6, the Supplier was selected as the tenderer who submitted the most economically advantageous tender and demonstrated that it had the required experience and expertise with regard to test operations services.
- (C) The Supplier has agreed to supply, and STA has agreed to receive, test operations services in order to assist STA in discharging its responsibility referred to in recital (A) above.
- (D) A failure by the Supplier to provide the Services completely, on time, securely and in accordance with the quality standards and Service Levels set out in this Agreement is likely to:
- (i) bring significant distress and damage to Pupils, Schools and their teachers;
 - (ii) result in substantial detriment to the reputation and integrity of Her Majesty's Government, STA and the National Curriculum Assessments, by causing the general public to lose confidence in Her Majesty's Government, STA and the Tests; and
 - (iii) cause STA to be in breach of its statutory duty.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

As used in this Agreement, the following terms and expressions have the meanings set out below:

"2020 Test Cycle"	means the Test Cycle relating to the 2019/20 academic year's National Curriculum Assessments;
"2021 Test Cycle"	means the Test Cycle relating to the 2020/21 academic year's National Curriculum Assessments;
"2022 Test Cycle"	means the Test Cycle relating to the 2021/22 academic year's National Curriculum Assessments;
"2023 Test Cycle"	means the Test Cycle relating to the 2022/2023 academic year's National Curriculum Assessments;
"2024 Test Cycle"	means the Test Cycle relating to the 2023/2024 academic year's National Curriculum Assessments;
"2025 Test Cycle"	means the Test Cycle relating to the 2024/2025 academic year's National Curriculum Assessments;

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"Acceptance"	means a notification made by STA to the Supplier stating that a Product has successfully passed the Acceptance Tests, and "Accept", "Accepted" and "Accepts" shall be construed accordingly;
"Acceptance Criteria"	means in respect of any Product, the criteria set out in the Product Description for that Product, which the Product must comply with in order to pass the Acceptance Tests;
"Acceptance Date"	has the meaning given to it in Clause 7.2.5 (Acceptance Testing);
"Acceptance Test"	means a test conducted in accordance with Clause 7.2 (Acceptance Testing) for the purposes of determining whether or not a Product complies with the Acceptance Criteria;
"Accurate Item Level Data"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Accurate Pupil Level Data"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4(Services);
"Acquired Rights Directive"	means the European Council Directive 77/187/EEC on the approximation of laws of European member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, as amended or re-enacted from time to time;
"Admission Agreement"	means the agreement to be entered into by which the Supplier agrees to participate in the Schemes as amended from time to time;
"Affected Party"	has the meaning given to it in Clause 27.1 (Force Majeure Events);
"Affected Services"	has the meaning given to it in Clause 7.3.3.4(b) (Approval Process);
"Agreement"	means this agreement comprising the recitals, Clauses and Schedules hereto including anything incorporated by reference herein;
"Approval Process" "Approved"	has the meaning given to it in Clause 7.3.1 (Approval Process) and anything that has successfully undergone the Approval Process shall be deemed to be, "Approved" and the terms "Approve" and "Approval" shall be construed accordingly;
"Assessment and Reporting Arrangements"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Audit Rights"	means the audit and access rights referred to in Part 4 (Financial Reports and Audit Rights) of Schedule 7 (Financial Matters);
"Boycott"	means a significant teachers' union (i.e. a teachers' union that is recognised by the Trades Union Congress) instructing its members to boycott the National Curriculum Assessments;
"Brand Guidelines"	means the brand guidelines as set out in Schedule 14 (Brand Guidelines);
"Business Continuity Plan"	has the meaning given to it in Clause 26.1 (Disaster Recovery and Business Continuity);
"Business Day"	means a day other than a Saturday, Sunday or bank holiday in England;

"Central Government Body"	means a body listed in one of the following sub-categories of the Central Government classification of the Public Sector Classification Guide, as published and amended from time to time by the Office for National Statistics: <ul style="list-style-type: none"> (a) Government Department; (b) Non-Departmental Public Body or Assembly Sponsored Public Body (advisory, executive, or tribunal); (c) Non-Ministerial Department; or (d) Executive Agency;
"Change"	has the meaning given to it in Clause 28.1 (Change);
"Change Authorisation Note" or "CAN"	has the meaning given to it in of Schedule 8 (Change Control Procedure);
"Change Control Procedure"	means the procedure for making changes to this Agreement specified in Schedule 8 (Change Control Procedure);
"Change in Law"	means any change in Law which impacts on the performance on the Services which comes into force after the Effective Date;
"Change of Control"	when applied to any person, shall be deemed to have occurred on each occasion on which any person or persons other than those who ultimately Control such person at the Effective Date subsequently acquire ultimate Control of the first person mentioned;
"Change Request"	has the meaning given to it in Schedule 8 (Change Control Procedure);
"Charges"	means the charges for the Services specified in Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters) and all other charges payable by STA to the Supplier under this Agreement;
"Comments Process"	means the process (referred to as the "Comments Process") as set out in paragraph 2.1 of the introduction to Schedule 4 (Services);
"Component"	means part of a Test Paper, for example, a single booklet such as "mathematics Paper 1" or some other element, such as a spelling or arithmetic Test;
"Confidential Information"	means <ul style="list-style-type: none"> (a) Information including all Personal Data, which (however it is conveyed) is provided by the Disclosing Party pursuant to or in anticipation of this Agreement that relates to: <ul style="list-style-type: none"> (i) the Disclosing Party Group; or (ii) the operations, business affairs, developments, intellectual property rights, trade secrets, know-how and/or personnel of the Disclosing Party Group; (b) other Information provided by the Disclosing Party pursuant to or in anticipation of this Agreement that is clearly designated as being confidential or equivalent or that ought reasonably to be considered to be confidential (whether or not it is so marked)

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which comes (or has come) to the Recipient's attention or into the Recipient's possession in connection with this Agreement;

- (c) the Identified Confidential Information;
- (d) discussions, negotiations, and correspondence between the Disclosing Party or any of its directors, officers, employees, consultants or professional advisers and the Recipient or any of its directors, officers, employees, consultants and professional advisers in connection with this Agreement and all matters arising therefrom; and
- (e) Information derived from any of (a) to (d) (inclusive) above, but not including any Information which:
 - (i) was in the possession of the Recipient without obligation of confidentiality prior to its disclosure by the Disclosing Party;
 - (ii) the Recipient obtained on a non-confidential basis from a third party who is not, to the Recipient's knowledge or belief, bound by a confidentiality agreement with the Disclosing Party or otherwise prohibited from disclosing the information to the Recipient;
 - (iii) was already generally available and in the public domain at the time of disclosure otherwise than by a breach of this Agreement or breach of a duty of confidentiality;
 - (iv) was independently developed without access to the Confidential Information; or
 - (v) relates to the Supplier's:
 - A. performance under this Agreement; or
 - B. failure to pay any Sub-contractor as required pursuant to Clause 14.3.4 (Payment Terms);

"Configuration Documentation"	has the meaning given to it in Clause 30.1.1 (Escrow);
"Conformance Activities"	has the meaning given to it in Clause 9.3.5.4 (c);
"Conformity Report"	means the report referred to in Clauses 9.3.5.4 or 9.3.5.8 which is to be issued by the Supplier;
"Consultation Commencement Date"	has the meaning given to it in Clause 12.2 (Consultation Right);
"Consultation Notice"	has the meaning given to it in Clause 12.1 (Consultation Right);
"Contract Inception Report"	means the Supplier's initial financial model, containing Open Book Data as set out in Annex 2 (Contract Inception Report) of Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters). This Contract Inception Report while formulated by the Supplier shall be in a form which must be approved by STA;
"Contract Year"	means any period of 12 consecutive months commencing on the 1st of September or an anniversary thereof during the Term;

"Control"	shall be determined by reference to the provisions of Section 416 of the Income and Corporation Taxes Act 1988 where used in the context of a "Change of Control";
"Controller"	has the meaning given to it in the GDPR;
"Costs"	has the meaning given to it in Part 4 (Financial Reports and Audit Rights) of Schedule 7 (Financial Matters);
"COTS Third Party Software"	means software which: <ul style="list-style-type: none"> (a) <ul style="list-style-type: none"> (i) the Supplier or a relevant third party has made generally available commercially prior to the Effective Date (whether by way of sale, lease or licence) on standard terms which are not typically negotiated by the Supplier or relevant third party save as to price; and (ii) has a significant customer base (excluding Group Companies of, and other entities related to, the Supplier or relevant third party) with respect to the date of first release and the relevant market; and / or (b) is indicated as COTS Third Party Software in Schedule 18 (Data, Software And Materials);
"Crown Body"	means any department, office or agency of the Crown or the Houses of Parliament;
"Cure Notice"	has the meaning given to it in Clause 7.2.2 (Acceptance Testing);
"Datafeed"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Data Loss Event"	means any event that results, or may result, in unauthorised access to Personal Data held by the Supplier under this Agreement, and/or actual or potential loss and/or destruction of Personal Data in breach of this Agreement, including any Personal Data Breach;
"Data Protection Impact Assessment"	means an assessment by the Controller of the impact of the envisaged processing on the protection of Personal Data;
"Data Protection Legislation"	means <ul style="list-style-type: none"> (a) the GDPR, the LED and any applicable national implementing Laws as amended from time to time; (b) the DPA 2018 to the extent that it relates to processing of Personal Data and privacy; and (c) all applicable Law about the processing of personal data and privacy;
"Data Protection Officer"	has the meaning given to it in the GDPR;
"Data Subject"	has the meaning given to it in the GDPR;

"Data Subject Access Request"	means a request made by, or on behalf of, a Data Subject in accordance with rights granted pursuant to the Data Protection Legislation to access their Personal Data;
"Default"	means any breach by a Party of its obligations under this Agreement (including a fundamental breach or breach of a fundamental term) or breach of any warranty, condition or any other term or any default including but not limited to a Service Failure or the Supplier's failure to meet a Service Level, any act, omission, negligence, or misstatement of a Party or its employees, agents or subcontractors in connection with or in relation to the subject matter of this Agreement and in respect of which such Party is liable to the other;
"Defective Service"	has the meaning given to it in Clause 10.2.1 (Rectification);
"Delay Credit"	means the amounts payable by the Supplier to STA for the Supplier's failure to achieve a Key Milestone by the Key Milestone Date pursuant to Clause 8 (Certification of Key Milestones And Delays/Delay And Performance Credits);
"Dependencies"	means, in respect of a Service, the dependencies and Key Dependencies set out in Part 2 (Dependencies) of Schedule 4 (Services) and such that are agreed pursuant to this Agreement or a CAN, each a "Dependency" . In no event shall any activity to be performed by the Supplier (including as set out in Part 1 (Statement of Requirements) of Schedule 4 (Services) be considered to be a Dependency and for the avoidance of doubt any such Dependencies shall be restricted to only those activities that are within the direct control of STA;
"Deposited Materials"	has the meaning given to it in Clause 30.1.4 (Escrow)
"DES" or "Data Exchange Standards"	means the Data Exchange Standards as set out in Schedule 3 (Data Exchange Standards) as replaced and/or updated by STA in accordance with STA's policies and procedures throughout the Term;
"Disclosing Party"	has the meaning given to it in Clause 34 (Confidentiality);
"Disclosing Party Group"	(a) where the Disclosing Party is the Supplier, the Supplier and Group Company of the Supplier; and (b) where the Disclosing Party is STA, STA and any Central Government Body with which STA or the Supplier interacts in connection with this Agreement;
"Dispute"	means any dispute or disagreement between the Parties arising out of or in connection with this Agreement, including any question regarding the existence, validity or termination of this Agreement;
"Dispute Resolution Procedure"	means the procedure for resolving Disputes set out in Clause 37 (Governing Law, Dispute Resolution and Arbitration) which shall apply for the resolution of Disputes save where expressly stated otherwise in this Agreement;
"Disputed Amount"	has the meaning given to it in Clause 14.6.1 (Disputed Items);
"Document Dispute Resolution Procedure"	means the procedure for the resolution of Disputes that arise in relation to documents which shall only apply where expressly stated to be applicable in this Agreement and which procedure is set out in Annex C Schedule 6 (Governance, Service Management and Performance Monitoring);

"Documents"	has the meaning given to it in Clause 38.1 (Retention of Documents);
"DPA 2018"	means Data Protection Act 2018;
"DSAM"	means DfE Security Assurance Model;
"Effective Date"	means, the date of this Agreement;
"Eligible Employees"	means any Fair Deal Employee who at the relevant time is an eligible employee as defined in the Admission Agreement;
"Employment Losses"	<p>means any award, compensation, damages, tribunal awards, fine, loss, order, penalty, disbursement, payment made by way of settlement and costs, expenses and legal costs reasonably incurred in connection with a claim or investigation related to employment including in relation to the following:</p> <ul style="list-style-type: none"> (a) redundancy payments including contractual or enhanced redundancy costs, termination costs and notice payments; (b) unfair, wrongful or constructive dismissal compensation; (c) compensation for discrimination on grounds of sex, race, disability, age, religion or belief, gender reassignment, marriage or civil partnership, pregnancy and maternity or sexual orientation or claims for equal pay; (d) compensation for less favourable treatment of part-time workers or fixed term employees; (e) outstanding employment debts and unlawful deduction of wages including any PAYE and national insurance contributions; (f) employment claims whether in tort, contract or statute or otherwise; (g) all claims, actions, proceedings, orders, demands, complaints, investigations (save for any claims for personal injury which are covered by insurance); and (h) any investigation relating to employment matters by the Equality and Human Rights Commission or other enforcement, regulatory or supervisory body and of implementing any requirements which may arise from such investigation;
"Employment Regulations"	means TUPE or any other Regulations implementing the Acquired Rights Directive;
"Environmental Information Regulations"	means the Environmental Information Regulations 2004;
"Escrow Agreement"	has the meaning given to it in Clause 30.5 (Escrow);
"Escrow Provider"	has the meaning given to it in Clause 30.1 (Escrow);
"Exception Report"	means the written report prepared by the Supplier's Operations Manager on a deviation by the Supplier from any plan agreed with STA. The report will describe the deviation, its causes and impact and options and

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	recommendations for mitigating or eliminating adverse consequences of the deviation;
"Executive Sponsor Board Meeting"	has the meaning given to it in Annex B to Schedule 6 (Governance, Service Management and Performance Monitoring);
"Exit Information Document"	has the meaning given to it in Clause 40.1.3 (Exit Management Plan);
"Exit Management Plan"	means the plan set out in Schedule 9 (Exit Management Plan) as updated from time to time in accordance with Clause 40.1 (Exit Management Plan and Exit Information);
"Exit Phase"	means, in relation to the expiry or termination of this Agreement, the period that starts on the earliest of: <ul style="list-style-type: none"> (a) the date on which either Party serves notice to terminate the Agreement in accordance with Clause 39 (Termination); (b) 3 months prior to the expiry of the Term; or (c) the date on which STA notifies the Supplier that STA is about to commence a procurement exercise with a view to appointing a supplier to provide the Services or services similar to the Services following the expiry or termination of this Agreement, and ends on the later of: <ul style="list-style-type: none"> (i) the date of Acceptance of the final Product as set out in any Product Description for a Test Cycle pursuant to this Agreement; (ii) the completion of the activities, obligations and tasks set out in the Exit Management Plan;
"Expected Term"	means the period beginning on the Effective Date and ending at 00.01 on the day after the final day of the 2023 Test Cycle and which for the avoidance of doubt does not include any extension period pursuant to Clause 3.2 (Term);
"Expenditure Already Incurred"	has the meaning given to it in Part 2 (Payment on Termination) of Schedule 7 (Financial Matters);
"Expert"	means a person appointed to act as an expert in accordance with paragraph 4 of Annex C or paragraph 1.4 of Annex D of Schedule 6 (Governance, Service Management and Performance Management);
"Fair Deal Employees"	means those Transferring Former Supplier Employees who originally transferred pursuant to a Relevant Transfer under the Employment Regulations (or the predecessor legislation to the Employment Regulations), from employment with a public sector employer and who were once eligible to participate in the Schemes and who at the Relevant Transfer Date become entitled to the protection of New Fair Deal;
"Financial Distress Event"	the occurrence of one or more of the events listed in paragraph 3.1 of Part 3 (Financial Distress) of Schedule 7 (Financial Matters);
"Financial Distress Service Continuity Plan"	means a plan setting out how the Supplier will ensure the continued performance and delivery of the Services in accordance with this Agreement in the event that a Financial Distress Event occurs;

"Financial Model"	has the meaning given to it in Part 4 (Financial Reports and Audit Rights) of Schedule 7 (Financial Matters);
"Financial Report"	has the meaning given to it in Part 4 (Financial Reports and Audit Rights) of Schedule 7 (Financial Matters);
"Financial Transparency Objectives"	has the meaning given to it in Part 4 (Financial Reports and Audit Rights) of Schedule 7 (Financial Matters);
"FOIA"	means the Freedom of Information Act 2000 as amended and any subordinate legislation made under that Act from time to time together with any guidance and/or codes of practice issued by the UK Information Commissioner in relation to such legislation;
"FOIA/EIR Request for Information"	means a request for Information or an apparent request under FOIA or the Environmental Information Regulations received by STA, the Supplier, the Subcontractors or another relevant regulatory authority or public body (as defined by FOIA) or public authority (as defined by the Environmental Information Regulations) which relates to this Agreement or the Services;
"Force Majeure Event"	means an act or event (excluding any Boycott) affecting the performance by a Party of its obligations hereunder arising directly from events beyond its reasonable control including natural disaster, fire, flood, terrorist attack or an industrial dispute affecting a third party (other than an industrial dispute affecting a Subcontractor or Group Company of the Supplier) for which a substitute third party is not reasonably available, provided always that the Party whose performance is affected has taken all steps (if any) which it could reasonably be expected to have taken in order to prevent such act or event occurring;
"Former Supplier"	means a supplier supplying services to STA before the Relevant Transfer Date that are the same as or substantially similar to the Services (or any part of the Services) and shall include any sub-contractor of such supplier (or any sub-contractor of any such sub-contractor);
"Further Comment Period"	has the meaning given to it in Clause 7.3.3.2 (Approval Process);
"GDPR"	means the General Data Protection Regulation (Regulation (EU) 2016/679);
"GDS"	means the Government Digital Service, the unit of the Government of the United Kingdom's Cabinet Office tasked with transforming the provision of government digital services;
"GDS Service Design Manual"	means the Government Digital Service manual which is available at https://www.gov.uk/service-manual/agile-delivery/agile-government-services-introduction ;
"GDS Service Standards"	means the following standards: the GDS Technology Code of Practice as set out at https://www.gov.uk/government/publications/technology-code-of-practice/technology-code-of-practice and the GDS Digital Service Standard as set out at https://www.gov.uk/service-manual/service-standard (both as may be amended from time to time);
"General Change in Law"	means a Change in Law where the change is of a general legislative nature (including taxation or duties of any sort affecting the Supplier) or which affects or relates to the supply of services to another customer of the Supplier that are the same or similar to any of the Services;

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"Goal"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services) and there are 16 such Goals numbered 1 to 16 set out in Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Good Industry Practice"	means the exercise of that degree of skill, care, diligence, prudence, foresight and judgment which would reasonably be expected from a skilled, experienced and market leading operator engaged in the provision of services similar to the Services and this shall include taking active steps to and introducing protective measures to mitigate the risk of a security and/or confidentiality breach in relation to this Agreement;
"Government"	means the government of the United Kingdom from time to time;
"GOV.UK Assessments"	means the assessments undertaken by GDS to assess whether a service, system or such other deliverable that is intended to be run from the GOV.UK government internet domain, satisfies the GDS Service Standards;
"GOV.UK Deliverables"	has the meaning given to it in Clause 9.3.5.2;
"HMG Policy Framework"	means Her Majesty's Government's Policy Framework published by the Cabinet Office, Government Security Profession and National Security Intelligence, as amended and updated from time to time, the current version of which is set out in Schedule 12 (Security Policy);
"Incident"	means a compromise of the Services or breach of the Agreement in respect of the Services;
"Indemnified Materials"	has the meaning given to it in Clause 32.5.5 (Intellectual Property Indemnity);
"Identified Confidential Information"	<p>means Confidential Information provided by the Supplier as identified in Schedule 21 (FOIA/Supplier's Identified Confidential Information) that falls within one of the following categories:</p> <ul style="list-style-type: none"> (a) The itemised pricing and costs paid to the Supplier for the Services. For the avoidance of doubt, the total amount that is to be paid to the Supplier under this Agreement shall not be deemed to be Identified Confidential Information in any respect whatsoever; (b) the Supplier's confidential financial information; and (c) any other information which the Parties expressly agree will be treated as Identified Confidential Information; <p>and for the avoidance of doubt and notwithstanding anything stated to the contrary in this Agreement, information to be provided to the STA or any Successor Operator pursuant to the Exit Management Plan shall not be deemed to be Identified Confidential Information;</p>
"Indexation"	means the adjustment of an amount or sum in accordance with paragraphs 2.1.8 to 2.1.10 (inclusive) of Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters);
"Indirect Losses"	means both direct and indirect loss of profits, loss of use, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature but excluding any loss of profits that are part of the Charges or the Supplier Breakage Costs;

"Information"

has the meaning given to it under Section 84 of the Freedom of Information Act 2000 as amended to the extent it relates to this Agreement, its negotiation and/or procurement and/or subject-matter and/or the Services;

"Insolvency Event"

occurs if:

- (a) a Party suspends, or threatens to suspend, payment of its debts, or is unable to pay its debts as they fall due or admits inability to pay its debts, or:
 - (i) (being a company or a LLP) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986, or
 - (ii) (being a partnership) is deemed unable to pay its debts within the meaning of section 222 of the Insolvency Act 1986;
- (b) a Party commences negotiations with one or more of its creditors (using a voluntary arrangement, scheme of arrangement or otherwise) with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with one or more of its creditors or takes any step to obtain a moratorium pursuant to Section 1A and Schedule A1 of the Insolvency Act 1986 other than (in the case of a company, a LLP or a partnership) for the sole purpose of a scheme for a solvent amalgamation of that Party with one or more other companies or the solvent reconstruction of that Party;
- (c) a person becomes entitled to appoint a receiver over the assets of a Party or a receiver is appointed over the assets of that Party;
- (d) a creditor or encumbrancer of a Party attaches or takes possession of, or a distress, execution or other such process is levied or enforced on or sued against, the whole or any part of that Party's assets and such attachment or process is not discharged within 14 days;
- (e) a Party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business;
- (f) where a Party is a company, a LLP or a partnership:
 - (i) a petition is presented (which is not dismissed within 14 days of its service), a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that Party other than for the sole purpose of a scheme for a solvent amalgamation of that Party with one or more other companies or the solvent reconstruction of that Party;
 - (ii) an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is filed at Court or given or if an administrator is appointed, over that Party;
 - (iii) (being a company or a LLP) the holder of a qualifying floating charge over the assets of that Party has become entitled to appoint or has appointed an administrative receiver; or

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- (iv) (being a partnership) the holder of an agricultural floating charge over the assets of that Party has become entitled to appoint or has appointed an agricultural receiver; or
 - (g) any event occurs, or proceeding is taken, with respect to a Party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned above;
- "Insurance Policies"** has the meaning given to it in Clause 36.1.1 (Levels of Insurance);
- "Intellectual Property Rights"** means:
- (a) copyright, rights related to or affording protection similar to copyright, rights in databases, patents and rights in inventions, semi-conductor topography rights, service marks, logos, database rights, trade marks, rights in internet domain names and website addresses and other rights in trade or business names, design rights (whether registerable or otherwise), Know-How, trade secrets and moral rights and other similar rights or obligations;
 - (b) applications for registration, and the right to apply for registration, for any of the rights listed in (a) that are capable of being registered in any country or jurisdiction; and
 - (c) all other rights whether registerable or not having equivalent or similar effect in any country or jurisdiction (including but not limited to the United Kingdom) and the right to sue for passing off;
- "Invitation To Participate in Competitive Dialogue" or "IPCD"** means the invitation to participate in competitive dialogue for the delivery of the Services issued by STA and dated the 11th day of December 2015 subject to any subsequent amendments made to this document by STA;
- "IPCD Response"** means the Supplier's best and final offer to STA for the delivery of the Services in response to the Invitation To Participate in Competitive Dialogue;
- "Key Dependency"** means a key Dependency, as listed in Part 2 (Dependencies) of Schedule 4 (Services) and such that are subsequently agreed in accordance with this Agreement including through a CAN;
- "Key Milestone"** means a Milestone listed as being a Key Milestone and described in Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/ Delay, Service and Performance Credits) or a CAN. For the avoidance of doubt there are eleven Key Milestones (KM Set-Up, KM1 to KM9 (inclusive) and KM Exit);
- "Key Milestone Acceptance Certificate"** means a certificate which shall be issued by STA in accordance with this Agreement when a relevant Key Milestone has been achieved by the Supplier;
- "Key Milestone Achievement Date"** has the meaning ascribed to it in Clause 8.2.1 (Certification of Key Milestones And Delays/ Delay And Performance Credits);
- "Key Milestone Acceptance Criteria"** means the Key Milestone acceptance criteria as set out in Table A of paragraph 1 of Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/Delay, Service and Performance Credits);

"Key Milestone Date"	means, in respect of a Key Milestone, the scheduled date for completion of that relevant Key Milestone as set out in Table B of paragraph 2.2 of Schedule 5 (Key Milestone Acceptance Criteria, And Service Levels/ Delay, Service and Performance Credits) and which will be updated from time to time by STA throughout the Term;
"Key Milestone Payment"	means the Charges which shall become payable by STA to the Supplier upon the completion of each Key Milestone in accordance with paragraph 1 (Payment Schedules) of Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters);
"Key Performance Indicator" or "KPI"	means the key performance indicators set out in paragraph 4 of Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/ Delay, Service and Performance Credits);
"Key Personnel"	means the Supplier Personnel referred to in Annex A.1 to Schedule 6 (Governance, Service Management and Performance Monitoring) which references may be amended from time to time in accordance with the terms of this Agreement;
"Key Stage 2"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Key Subcontractor"	means any person which, in the opinion of STA, performs (or would perform if appointed) a critical role in the provision of all or any part of the Services as listed in Schedule 15 (Key Subcontractors) which Schedule 15 may be amended from time to time in accordance with the terms of this Agreement;
"Key Subcontractor Supplier Agreements"	means agreements, contracts or licences between Key Subcontractors and their suppliers, the benefit of which are used wholly or mainly in the provision of the Services, as identified in Schedule 15 (Key Subcontractors), and any replacements thereof;
"KPI Service Threshold"	shall be as set out against the relevant Key Performance Indicators in paragraph 4 of Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/Delay, Service and Performance Credits);
"Law"	means any law, statute, subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of section 2 of the European Communities Act 1972, regulation, order, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements of any regulatory body with which the Parties are bound to comply;
"LCIA"	means the London Court of International Arbitration;
"LED"	means Law Enforcement Directive (<i>Directive (EU) 2016/680</i>);
"Live Marking"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Losses"	means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses) and charges whether arising in contract, tort (including negligence), breach of statutory duty or arising in connection with judgments, proceedings, internal costs or demands or otherwise howsoever (but excluding any Indirect Losses);

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"Management Information"	means:
	(a) the management information to be provided to STA by the Supplier as specified in the Product Descriptions; and
	(b) any other detailed and collated data provided by the Supplier to STA which provides visibility of the progress of Operational Delivery;
"Management Meeting"	means the meetings between the Relationship Managers as referred to in Schedule 6 (Governance, Service Management and Performance Management);
"Marker"	means an individual contracted by the Supplier for Live Marking for a current Test Cycle;
"Marker Register"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Mark Scheme"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Marking Capacity Model"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Milestone"	means any event or task identified as such in the Set-Up Plan or the Operational Delivery Plan;
"Milestone Date"	means, in respect of a Milestone, the scheduled date for completion set against that Milestone in the Set-Up Plan and Operational Delivery Plan;
"National Curriculum Assessments Materials"	means all materials associated with the National Curriculum Assessments. These include test booklets, mark schemes and supporting documents;
"National Curriculum Assessments"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"NCA Tools"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"NDA"	means a non-disclosure agreement in a form substantially similar to that set out in Schedule 17 (NDA);
"New Fair Deal"	means the revised Fair Deal position set out in the HM Treasury guidance: "Fair Deal for staff pensions: staff transfer from central government" issued in October 2013;
"Notice"	has the meaning given to it in Clause 47.7.1 (Notices);
"Notified Subcontractor"	means a subcontractor identified in Schedule 15 (Key Subcontractors) to whom Transferring Former Supplier Employees will transfer on the Relevant Transfer Dates);

“Occasion of Tax Non-Compliance” means

- (a) any tax return of the Supplier submitted to a Relevant Tax Authority on or after 1 October 2012 that is found on or after 1 April 2013 to be incorrect as a result of:
 - (i) a Relevant Tax Authority successfully challenging the Supplier under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle;
 - (ii) the failure of an avoidance scheme which the Supplier was involved in and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or
- (b) any tax return of the Supplier submitted to a Relevant Tax Authority on or after 1 October 2012 that gives rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax related offences which is not spent at the Effective Date or to a civil penalty for fraud or evasion

and a “Relevant Tax Authority” for the purpose of this term shall be HMRC, or, if applicable a tax authority in the jurisdiction in which the Supplier is established;

“Onscreen Marking Solution” has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);

“Open Book Data” has the meaning given to it in Part 4 (Financial Reports and Audit Rights) of Schedule 7 (Financial Matters);

“Open Source Software” means computer software that has its source code made available subject to an open-source licence under which the owner of the copyright and other Intellectual Property Rights in such software provides the rights to use, study, change and distribute the software to any and all persons and for any and all purposes free of charge;

“Operational Delivery” means the delivery of the Operational Services as described in the Operational Delivery PID;

“Operational Delivery Infrastructure” means the assets, materials, buildings, systems, data, software and documentation (including that held in escrow); people; contracts and sub-contracts with its suppliers; strategies, plans and procedures and any other resources required by the Supplier or its subcontractors to undertake Operational Delivery;

“Operational Delivery PID” means the PRINCE 2 project initiation document describing the detailed project management approach for Operational Delivery as updated from time to time by the Supplier including project scope, constraints, deliverables, risk register, quality plan and specific project controls;

“Operational Delivery Plan” means the PRINCE 2 project plan as set out in Schedule 2 (Operational Delivery Plan) (being a subset of the Operational Delivery PID) which provides a statement of how and when successful Operational Delivery will be achieved by showing the major products, activities and resources required as updated from time to time by the Supplier;

“Operational Services” means the Supplier’s obligations as set out in Goal 2 to Goal 16 (inclusive) as set out in Part 1 (Statement of Requirements) of Schedule 4 (Services);

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“Operational Services Commencement Date”	means the date referred to in Clause 2.2 (Effective Date and Operational Services Commencement Date) on which the Supplier shall commence the provision of the Operational Services (other than those Operational Services which it is stipulated are to be performed by the Supplier as from the Effective Date);
“Operations Manager”	means as the context requires, the Operations Manager of STA or the Operations Manager of the Supplier respectively who shall act as the day-to-day point of contact between the Parties in relation to the performance of the Services;
“OSS”	means the Open Source Software identified in Schedule 22 (Supplier’s Solution);
“Other Party”	has the meaning given to it in Clause 27.1.1 (Force Majeure Events);
“Partial Termination”	means the partial termination of this Agreement to the extent that it relates to the provision of any part of the Services as further provided for in paragraph 7 of Part 2 (Payment on Termination) of Schedule 7 (Financial Matters);
“Performance Credit”	means the amount payable by the Supplier to STA at the election of STA in accordance with Clause 8.7 (Certification of Key Milestones, And Delays/Delay And Performance Credits) and in the following circumstances: <ul style="list-style-type: none"> (a) where the Supplier has committed two Persistent Defaults during the period of time outlined in the said Clause 8.7; or (b) any of the circumstances outlined in paragraphs 1.5 and 1.6 of Annex D (Remedial Plan) of Schedule 6 (Governance, Service Management And Performance Management);
“Persistent Default”	has the meaning given to it in Clause 39.3.2.1 (Termination by STA – Default);
“Personal Data”	has the meaning given to it in the GDPR;
“Personal Data Breach”	has the meaning given to it in the GDPR;
“Personnel”	means the Markers and the employees, agents and subcontractors of the Supplier or of its Subcontractors engaged in the provision of the Services;
“Phonics Screening Check”	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
“PID”	means Project Initiation Document in accordance with PRINCE2 methodology;
“PQQ Response”	means the Supplier’s response to the pre-qualification questionnaire issued by STA which pre-qualification questionnaire was issued by STA in order to enable STA to select service providers that qualified to be issued an IPCD;
“Pricing Summary”	means the summary of the Contract Inception Reports set out in Annex1 to Part 1(Payment and Pricing) of Schedule 7 (Financial Matters) and which sets out the Supplier’s Charges for the delivery of the Services;
“PRINCE 2”	means the “Projects in a Controlled Environment 2009 Edition”, project management protocol as set out in “Managing Successful Projects with PRINCE 2” ISBN 9780113310593;
“Processor”	has the meaning given in the GDPR;

"Product"	means in respect of a Product Description, all of the services and deliverables described in that Product Description;
"Product Description"	means any one of the product descriptions as generated by the Supplier and Approved by STA pursuant to Clause 9.2 (Product Descriptions);
"Production and Logistics Plan" or "production and logistics plan"	has the meaning given to it in paragraph 4 of Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/Delay, Service and Performance Credits;)
"Project Quality Plan"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Proposal"	has the meaning given to it in: <ul style="list-style-type: none"> (a) in relation to the Comments Process, in paragraph 2.1 (Comments Process) of the "introduction" section of Schedule 4 (Services); and (b) in relation to the Approval Process, Clause 7.3.2 (Approval Process);
"Protective Measures"	means appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of such measures adopted;
"Pupils"	means pupils attending a School and taking National Curriculum Assessments from time to time and the term "Pupil" shall be construed accordingly;
"Pupil Registration"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Pupil Registration Data"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Quality Review Form"	has the meaning given to it in Clause 7.3.3.2 (b) (Approval Process);
"Recipient"	has the meaning given to it in Clause 34 (Confidentiality)
"Regulations"	means any Laws, regulations including but not limited to: any regulations in force as issued from time to time by the Office of Qualifications and Examinations; STA's policies and procedures as set out in Schedule 19 (Policies and Procedures); regulatory constraints; and obligations or rules (including binding codes of conduct and binding statements of principle incorporated and contained in such rules) applicable to the existence or operation of this Agreement or the provision of the Services from time to time;
"Regulatory Authority"	means the Office of Qualifications and Examinations Regulation, the National Audit Office, Information Commissioner's Office, the Department for Business, Innovation and Skills, Her Majesty's Revenue & Customs and any other regulatory or governmental body (except for STA in its capacity as a contracting party to this Agreement) charged with enforcing the Regulations from time to time;
"Regulatory Change"	has the meaning given to it in Clause 17.3.1 (Changes to Regulations);



“Redundancy Costs”	has the meaning given to it in Part 2 (Payment on Termination) of Schedule 7 (Financial Matters);
“Relationship Manager”	means, as the context requires, the relationship manager of either STA or the Supplier, whose functions are identified in Schedule 6 (Governance, Service Management and Performance Monitoring);
“Relevant Requirements”	has the meaning given to it in Clause 45.5.1 (Prevention of Corruption);
“Relevant Transfer”	has the meaning given to it in TUPE;
“Relevant Transfer Date”	means in relation to a Relevant Transfer, the date upon which the Relevant Transfer takes place;
“Remedial Plan”	means the plan for the rectification of Defaults by the Supplier the process for which is set out at Annex D of Schedule 6 (Governance, Service Management and Performance Management);
“Review”	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
“Right”	has the meaning given to it in Clause 47.4 (Waiver);
“Scaled Score”	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
“Schemes”	means the Principal Civil Service Pension Scheme available to Civil Servants and employees of bodies under the Superannuation Act 1972 (and eligible employees of other bodies admitted to participate under a determination under section 25 of the Public Service Pensions Act 2013), as governed by rules adopted by Parliament; the Partnership Pension Account and its (i) Ill health Benefits Scheme and (ii) Death Benefits Scheme; the Civil Service Additional Voluntary Contribution Scheme; the Designated Stakeholder Pension Scheme and “alpha” introduced under the Public Service (Civil Servants and Others) Pensions Regulations 2014;
“School”	means a school or other establishment required by Regulations to administer National Curriculum Assessments;
“Schools Census”	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
“Security Document”	has the meaning given to it Clause 25.4.5 (Security);
“Service Credit”	has the meaning given to it in Schedule 5 (Key Milestone Acceptance Criteria, Service Levels, Delay and Service Credits);
“Service Credit Cap”	has the meaning given to it in Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/Delay, Service And Performance Credits);
“Service Failure”	means any instance or instances where the Supplier does not provide the Services in accordance with this Agreement;
“Service Levels”	means, without prejudice to the Supplier's obligations to deliver all of the Services, the levels for delivery of the Services (as specified in Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/Delay, Service And Performance Credits);
“Services”	means the Operational Services and any services set out in a CAN and any other functions or services which the Supplier is obliged to carry out under this Agreement from time to time (including functions or services carried out by the Supplier during Set-Up);

"Service Transfer Date"	means the date of a Service Transfer;
"Service Transfer"	means any transfer of the Services (or any part of the Services), for whatever reason, from the Supplier or any Subcontractor to a Successor Operator;
"Set-Up"	means the process of assembling and testing the Operational Delivery Infrastructure required for Operational Delivery Including the activities referred to in Clause 4.2 (Set-Up) and as described in the Set-Up PID;
"Set-Up Milestone"	means a Milestone listed as being a Set-Up Milestone in Annex 1a (Set-Up Milestone Payments) to Schedule 7 Part 1 (Payment and Pricing). For the avoidance of doubt there are fifteen Set-Up Milestones numbered "Set Up: MS1" to "Set-Up MS 15";
"Set-Up Milestone Acceptance Certificate"	means a certificate which shall be issued by STA in accordance with this Agreement when a relevant Set-Up Milestone has been achieved by the Supplier;
"Set-Up PID"	means the PRINCE 2 project initiation documentation describing the detailed project management approach for the delivery of Set-Up by the Supplier including project scope, constraints, deliverables, risk register, quality plan and the specific project controls;
"Set-Up Plan"	means the PRINCE 2 project plan as set out in Schedule 1 (Set-Up Plan) (being a subset of the Set-Up PID) that provides a statement of how and when Set-Up will be achieved by showing the major products, activities and resources required;
"SME"	means a micro, small or medium-sized enterprise defined in accordance with the European Commission Recommendation 2003/361/EC and any subsequent revisions;
"Source Code"	means the computer programming code of the Software, in human-readable form and in such form that it can be compiled or interpreted into equivalent object code, together with all technical information and documentation (including all specifications, input and output formats, algorithms and file structures) that are necessary for the use, reproduction, modification and enhancement of the Software or that have been used for such purposes;
"Software"	means the Supplier Software, the Third Party Software, the STA Software and any Specially Written Software not otherwise included in the foregoing;
"Software as a Service"	means software which is provided to the market as a service rather than in a tangible form and which is made available through an internet connection via a web browser;
"Specially Written Software"	means any software which: <ul style="list-style-type: none"> (a) is created by the Supplier (or by a third party on behalf of the Supplier) specifically for the purposes of this Agreement on or after the Effective Date or before the Effective Date but in anticipation of the delivery of the Services and includes, without limitation, any such addition, enhancement, modification or development to the Supplier Software or the Third Party Software; and/or (b) is identified as Specially Written Software in Schedule 18 (Data, Software And Materials); <p>but excluding in all cases, STA Software;</p>

"Specific Change in Law"

means a Change in Law, change in regulation, change in policy or change in STA's statutory function or duties that relates specifically to the business of STA and which impacts the Services;

"STA Comments"

has the meaning given to it in:

- (a) in relation to the Comments Process, in paragraph 2.1 (Comments Process) of the "introduction" section of Schedule 4 (Services); and
- (b) in relation to the Approval Process, Clause 7.3.3.2 (Approval Process);

"STA Data"

means all data or records of whatever nature and by whomsoever created and in whatever form relating to the conduct of the National Curriculum Assessments, Pupils, Markers, STA employees or otherwise relating to the operations or functions of STA, whether subsisting before the Effective Date or as created or Processed as part of, or in connection with, the Services (including the data and records identified in Schedule 18 (Data, Software and Materials));

"STA Materials"

means all National Curriculum Assessments, Product Descriptions, Set-Up PID, Operational Delivery PID, correspondence (with STA, Regulatory Authorities, Schools, Markers, or which otherwise relates to the Services), training materials, advertising or marketing literature and other material of a similar nature produced by the Supplier for STA, or in conjunction with STA, under this Agreement (including the materials identified in Schedule 18 (Data, Software and Materials)) but excluding the Supplier Software and Third Party Software). Ownership of STA Materials shall be vested in STA;

"STA Policies and Procedures"

means the policies and procedures listed in Schedule 19 (Policies and Procedures), as amended and updated by STA from time to time through a CAN;

"STA Premises"

means those premises which are owned, leased or occupied by STA from time to time;

"STA Recovery Plans"

has the meaning given to it in Clause 26.1.3 (Disaster Recovery and Business Continuity);

"STA Service Provider"

has the meaning given to it in Clause 13.1 (Third Party Co-operation);

"STA Software"

means any software:

- (a) the Intellectual Property Rights in which are owned by STA; and/or
- (b) which is identified as such in Schedule 18 (Data, Software and Materials), either as at the Effective Date or subsequently through the Change Control Procedure

and any additions, enhancements, modifications or developments thereto, whether made before or after the Effective Date and whether created by the Supplier (or by a third party on behalf of the Supplier) or by or on behalf of STA;

"Staffing Information"

has the meaning given to it in Clause 40.1.4.8 (Exit Management Plan and Exit Information);

"Statement of Requirements" or "SoR"

means Part 1 (Statement of Requirements) of Schedule 4 (Services);

"Step-In Notice"

has the meaning given to it in Clause 11.1.1 (Initiation of Right to Step-In);

"Step-Out Notice"	has the meaning given to it in Clause 11.3.1 (End of Step-In Period);
"Subcontractor"	means any third party (including a Key Subcontractor and any of the Supplier's Group Companies) who agrees to provide to the Supplier or a subcontractor of the Supplier, all or any part of the Services or facilities or services which are material for the provision of the Services or any part thereof or necessary for the management, direction or control of the Services or any part thereof;
"Subcontractor's Final Staff List"	means the relevant list of all Subcontractor personnel wholly or mainly assigned to the provision of the Services or any part of the Services at the date of such list;
"Subcontractor's Provisional Staff List"	means a list prepared by the Subcontractor of all relevant Subcontractor personnel who are wholly or mainly assigned to the provision of the Services or any part of the Services as at the date of such a list;
"Sub-Licensee"	has the meaning given to it in Clause 31.5.2 (Assignment and Sub-Licensing);
"Sub-processor"	means any third party appointed to process Personal Data on behalf of the Supplier in relation to this Agreement;
"Successor Operator"	means the entity or entities (which may include STA) and/or subcontractors of such entity or entities succeeding the Supplier in the provision or operation of the Services or services similar to all or part of the Services;
"Supplier Agreement Novation Materials"	has the meaning given to it in Clause 30.1.3 (Escrow);
"Supplier Agreements"	means the agreements, contracts or licences, the benefit of which are used wholly or mainly in the provision of the Services including, for the avoidance of doubt, contracts with Markers, but which shall not include agreements necessary for the Supplier to provide services to its other customers;
"Supplier Assets"	means the assets, equipment (including computer hardware) and other items used wholly or mainly in the provision of the Services but shall not include: (i) assets or equipment necessary for the Supplier to provide services to its other customers; or (ii) the Supplier Software;
"Supplier Breakage Costs"	has the meaning given to it in Part 2 (Payment on Termination) of Schedule 7 (Financial Matters);
"Supplier Personnel"	means all directors, officers, employees, agents, consultants and contractors of the Supplier and/or of any Subcontractor engaged in the performance of the Supplier's obligations under this Agreement;
"Supplier's Final Staff List"	means the relevant list of all Supplier Employees wholly or mainly assigned to the provision of the Services or any part of the Services at the date of such list;
"Supplier Profit"	has the meaning given to it in Part 2 (Payment on Termination) of Schedule 7 (Financial Matters);
"Supplier's Provisional Staff List"	means a provisional list prepared by the Supplier of all employees who are wholly or mainly assigned to the provision of the Services or any part of the Services at the date of such list;

"Supplier Software"	means any software:
	(a) the Intellectual Property Rights in which are owned by the Supplier (or any Group Company of the Supplier) and which is used in the provision of the Services; and/or
	(b) which is identified as such in Schedule 18 (Data, Software and Materials)
	including any Specially Written Software that is an addition, enhancement, modification or development to the foregoing and any other additions, enhancements, modifications and developments to the foregoing but excluding in all cases:
"Supplier Software Materials"	has the meaning given to it in Clause 30.1.1(Escrow);
"Supplier's Solution"	means the Supplier's best and final offer for the provision of the Services in response to the IPCD as set out at Schedule 22 (Supplier's Solution);
"Supporting Documentation"	has the meaning given to it in paragraph 4.5 of Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters);
"System"	means the computer systems used by or on behalf of the Supplier to provide the Services including the Software and the computer hardware comprised in the Supplier Assets;
"System Development Acceptance"	has the meaning ascribed in Clause 25.1.3.4 (System Development Acceptance Testing);
"System Development Acceptance Tests"	has the meaning ascribed in Clause 25.1.1 (System Development Acceptance Testing);
"Teacher Assessment"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Term"	means the period beginning on the Effective Date and ending at 00.01 on either:
	(a) if this Agreement has not been extended in accordance with Clause 3.2 (Term), the day after the final day of the 2023 Test Cycle; or
	(b) if this Agreement has been extended in accordance with Clause 3.2 (Term), the day after the final day of the 2024 Test Cycle or the day after the final day of the 2025 Test Cycle as the case may be; or,
	(c) if earlier than (a) and (b), upon the date that termination takes effect in accordance with the terms of this Agreement;
"Termination Notice"	means a notice in writing in accordance with Clause 39 (Termination) served by one Party on the other to initiate the termination of this Agreement;
"Territory"	means the United Kingdom (and the locations, to the extent that they are outside the United Kingdom, of the Service Children's Education Schools), it being understood that, insofar as the Services include the operation and maintenance of a website on which the Trade Marks are mentioned, no territorial restriction shall apply to the use of the Trade Marks on such website;

"Test Cycle"	means the period of time that commences on the 1st of September in any given year (year 1) and ends on the 31st of January in the year after the year immediately following year 1 (year 3) during which a Test takes place in a School during the month of May in the year following year 1 (year 2);
"Test Paper"	means the entire Test instrument for a subject, which has not yet been taken by a Pupil, and may be comprised of a number of Components, for example, Key Stage 2 mathematics has three Components: Paper 1, Paper 2 and Paper 3;
"Test Script"	means any Test Paper Components, answer booklets and any modified Test Scripts completed by a Pupil in a subject. A Test Script may be composed of more than one answer booklet per Component and there may be multiple Components, and multiple booklets, per Test Script;
"Test"	has the meaning given to it in Appendix 2 of Part 1 (Statement of Requirements) of Schedule 4 (Services);
"Third Party Software"	means any software <ul style="list-style-type: none"> (a) the Intellectual Property Rights in which are owned by a third party (other than any Group Company of the Supplier) and which is used in the provision of the Services; and/or (b) which is identified as such in Schedule 18 (Data, Software and Materials) including any Specially Written Software that is an addition, enhancement, modification or development to the foregoing and any additions, enhancements, modifications and developments to the foregoing but excluding in all cases STA Software;
"Third Party Software Materials"	has the meaning given to it in Clause 30.1.2 (Escrow);
"Time and Materials Basis"	means the cost of direct labour and the direct cost of materials and equipment usage;
"TOPS Portal"	means the secure online system for Schools, local authorities, multi-academy trusts, Markers and STA that supports all Test marking and teacher assessment administration activities for key stage 1, Key Stage 2 and the Phonics Screening Check;
"Trade Marks"	means the registered and unregistered trademarks, names, logos and devices specified in writing by STA to the Supplier from time to time in respect of the Services;
"Transferring Employees"	means the employees of the Supplier or any Subcontractor who are wholly or mainly assigned to the provision of the Services or any part of the Services immediately prior to the Service Transfer Date and are liable to transfer to STA or a Successor Operator pursuant to TUPE and/or the Acquired Rights Directive and who have not validly objected to the transfer in accordance with Regulation 4(7) of TUPE and "Transferring Employee" means any one of such employees;
"Transferring Former Supplier Employees"	means in relation to a Former Supplier, those employees of the Former Supplier to whom the Employment Regulations will apply on the Service Transfer Date;
"Transferring Supplier Employees"	means those employees of the Supplier and/or the Supplier's Subcontractors to whom the Employment Regulations will apply on the Service Transfer Date;



- "TUPE"** means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), as amended or replaced or any other UK Regulations implementing the Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employee's rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses;
- "Unrecovered Costs"** means the Costs incurred by the Supplier in the performance of this Agreement (as summarised in the Financial Model) to the extent that the same remain at the date of termination of the Agreement to be recovered through Charges that but for the termination of this Agreement would have been payable by STA after the date of termination in accordance with Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters) as such Costs and Charges are forecast in the Financial Model;
- "VAT"** means value added tax in accordance with the provisions of the Value Added Tax Act 1994 as amended from time to time
- "Virus"** means any "back door", "time bomb", "Trojan Horse", "worm", "drop dead device", "virus" or other computer software routine intended or designed to:
- (a) disable, damage, erase, disrupt or impair the normal operation of; or
 - (b) provide unauthorised access to, computer systems or any software stored on those computer systems; and
- "Website"** means the html script for each website created or developed by the Supplier in accordance with the Statement of Requirements, a CAN, or otherwise in the performance of Services and for the avoidance of doubt does not include the database supporting that html script.

1.2 Singular, Plural, Gender

References to one gender include all genders and references to the singular include the plural and vice versa.

1.3 References to Persons and Companies

References to:

- 1.3.1 a person shall include any company, partnership or unincorporated association (whether or not having separate legal personality); and
- 1.3.2 a company shall include any company, corporation or any body corporate, wherever incorporated.

1.4 References to Subsidiaries and Holding Companies

The words "holding company" and "subsidiary" shall have the same meaning in this Agreement as their respective definitions in the Companies Act 2006.

1.5 Connected Persons

A person shall be deemed to be connected with another if that person is connected with such other within the meaning of Section 839 of the Income and Corporation Taxes Act 1988.

1.6 Schedules etc.

References to this Agreement shall include any Recitals, Clauses and Schedules to it and references to Clauses and Schedules are to Clauses of, and Schedules to, this Agreement. References to paragraphs and Parts are to paragraphs and parts of the Schedules.

1.7 Headings

Headings shall be ignored in interpreting this Agreement.

1.8 Includes

The words "includes" and "including" are to be construed without limitation.

1.9 Information

References to books, records or other information mean books, records or other information in any form including paper, electronically stored data, magnetic media, film and microfilm.

1.10 Modification to the Law and Regulations

1.10.1 References to a Regulation include:

1.10.1.1 that Regulation as from time to time modified, re-enacted or consolidated whether before or after the Effective Date;

1.10.1.2 any past Regulation (as from time to time modified, re-enacted or consolidated) which that Regulation has directly or indirectly replaced; and

1.10.1.3 any subordinate legislation made from time to time under that Regulation.

1.10.2 Reference to a Regulatory Authority shall include any successor to that Regulatory Authority.

1.10.3 A reference to any Law includes a reference to that Law as amended, extended, consolidated or re-enacted from time to time;

1.11 Legal Terms

References to any English legal term shall, in respect of any jurisdiction other than England which is relevant to the provision of the Services and/or receipt of the Services, be construed as references to the term or concept which most nearly corresponds to it in that jurisdiction.

1.12 Parties

Where the context allows, references to the "Parties" means STA and the Supplier and their respective successors and permitted assigns and "Party" shall mean STA or the Supplier. Also, where the context allows, references to a "third party" or "third parties" shall not include the Group Companies of the Supplier.

1.13 Precedence between Clauses, Schedules and other documents

Subject to Clause 1.14 (Precedence between the Supplier's Solution and Product Descriptions), to the extent that there is any conflict, apparent conflict or ambiguity in or between any provisions of this Agreement as set out below, the provisions shall be applied in the following descending order of precedence:

1.13.1 the Clauses; then

1.13.2 Schedule 4 Part 1 (Statement of Requirements); then

1.13.3 the rest of the Schedules other than Schedule 22 (Supplier's Solution); then

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- 1.13.4 Schedule 22 (Supplier's Solution); then
- 1.13.5 any other document referred to in this Agreement.
- 1.14 **Precedence between the Supplier's Solution and Product Descriptions**

To the extent that there is any conflict, apparent conflict or ambiguity in or between the Supplier's Solution or the Operational Delivery PIDs and/or Product Descriptions, the Operational Delivery PIDs and/or Product Descriptions shall prevail and to the extent that there is any conflict, apparent conflict or ambiguity in or between the Operational Delivery PIDs and/or Product Descriptions and any Schedule other than Schedule 22 (Supplier's Solution), the provisions of that Schedule shall prevail.
- 1.15 **No review, comment, certification or approval by STA under this Agreement (whether under the Acceptance Test process, the Approvals Process, the Comments Process, the System Development Acceptance process or otherwise) shall operate to:**
 - 1.15.1 exclude or limit the Supplier's obligation or liabilities under this Agreement or by Law;
 - 1.15.2 transfer any risk to STA to the effect that the deliverable subject to the test, review, comment, certification or approval is complete and/or will meet and/or satisfy the Statement of Requirements; or
 - 1.15.3 prejudice (or constitute any waiver of) STA's rights under this Agreement or by Law, including STA's right subsequently to reject any or all elements of the deliverable to which the test, review, comment, certification or approval relates.
- 1.16 **Notwithstanding the issue of any certification, approval, authorisation or other comment by STA under this Agreement (whether under the Acceptance Test process, the Approval Process, the Comments Process, the System Development Acceptance process or otherwise), the Supplier shall remain solely responsible for ensuring that:**
 - 1.16.1 the Supplier's Solution as designed and developed is suitable for the delivery of the Services and meets the Statement of Requirements; and
 - 1.16.2 the Services are implemented in accordance with this Agreement.
- 2. **EFFECTIVE DATE AND OPERATIONAL SERVICES COMMENCEMENT DATE**
 - 2.1 This Agreement shall come into force between the Parties on the Effective Date.
 - 2.2 The Operational Services Commencement Date of this Agreement shall be the date following successful completion of Set-Up pursuant to Clause 4.1 (Set-Up).
- 3. **TERM**
 - 3.1 This Agreement commences on the Effective Date and will expire at the end of the Expected Term, unless terminated earlier in accordance with Clause 39 (Termination) or extended in accordance with Clause 3.2 below.
 - 3.2 STA shall have the sole and absolute right to require an extension of the Expected Term of this Agreement for up to two further Test Cycles (i.e. the 2024 Test Cycle which extension period shall end at 00.01 on the day after the final day thereof and the 2025 Test Cycle 00.01 which extension period shall end at 00.01 on the day after the final day thereof or where the extension is for both the 2024 and 2025 Test Cycles, which extension period shall end at 00.01 on the day of the 2025 Test Cycle) by giving the Supplier written notice of its intention to do so and:
 - 3.2.1 in the case of an extension to cover the 2024 Test Cycle alone or to cover both the 2024 and 2025 Test Cycles, such notice shall be sent prior to the date occurring on the later of: (i) 01 August 2023; and (ii) the date of the Key Milestone Acceptance Certificate for KM7 for the 2023 Test Cycle; and

3.2.2 in the case of an extension to cover the 2025 Test Cycle such notice shall be sent prior to the date occurring on the later of: (i) 01 August 2024; and (ii) the date of the Key Milestone Acceptance Certificate for KM7 for the 2024 Test Cycle.

and the Supplier shall comply with any such requirement of STA for an extension of the Expected Term.

3.3 Where an extension is required by STA pursuant to Clause 3.2, the terms and conditions of this Agreement (including as to pricing applicable to the 2024 Test Cycle and 2025 Test Cycle respectively as set out in Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters) shall continue unchanged in full force and effect, save that STA shall be entitled to request (through the Change Control Procedure) that the Supplier performs all or only part of the Services.

4. SET UP AND OPERATIONAL DELIVERY

Set-Up

4.1 Save where the STA in its sole discretion waives compliance with the same, it shall be a condition (solely for the benefit of STA) of this Agreement for the Supplier's delivery of the Operational Services that the Supplier shall complete Set-Up by 23:59 on the 31st day of August, 2019 and the date following the date of completion of Set-Up shall be the Operational Services Commencement Date. A failure by the Supplier to complete Set-Up by the date first mentioned in this Clause 4.1 and where the STA in its sole discretion does not waive the condition referred to, shall cause this Agreement to automatically cease in accordance with Clause 39.8 (Cessation of the Agreement for Failure To Complete Set-Up) and without any liability or cost whatsoever accruing to STA and without prejudice to any other remedy which STA is entitled to under this Agreement or at Law. STA shall be entitled following such cessation of the Agreement:

4.1.1 to recover from the Supplier, the reasonable costs incurred by STA in respect of the competition through which the Supplier was selected to provide the Services.

4.1.2 to recover from the Supplier any interim Charges paid by STA to the Supplier in relation to Set-Up pursuant to Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters).

4.2 For successful completion of Set-Up, the Supplier must have completed the activities set out in paragraph 2.5 of Goal 1 of Part 1 (Statement of Requirements) of Schedule 4 (Services) by the time and date referred to in Clause 4.1 above.

Operational Delivery

4.3 In respect of any Test Cycle throughout the Term, the Parties shall perform their respective obligations as stated in the Operational Delivery PID.

5. NOT USED

6. KEY MILESTONES

6.1 Subject to Clauses 20.1 (Dependencies) and 27.1 (Force Majeure Events), the Supplier shall ensure that all of the Key Milestones are completed by their Key Milestone Dates. If, at any time, the Supplier is aware (or ought reasonably to anticipate) that any of the Key Milestones will not or are unlikely to be completed by their Key Milestone Dates, and not in any way limiting STA's rights under any other provision of this Agreement and/or at law, it shall:

6.1.1 immediately inform STA in writing of the reasons for not meeting that Key Milestone Date;

6.1.2 inform STA in writing of the consequences of not meeting the Key Milestone Date (including any impact on the likelihood of other Key Milestones being completed by their respective Key Milestone Dates);

6.1.3 inform STA in writing of the steps it will take to mitigate against the consequences of not meeting the Key Milestone Date;

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- 6.1.4 provide all additional resources necessary to ensure that the Key Milestone is completed as soon as reasonably practicable; and
 - 6.1.5 provide STA with daily updates in writing of progress against the Key Milestone and any Service Levels related to that Key Milestone, from the Key Milestone Date until that Key Milestone has been met.
- 6.2 The Supplier shall throughout the Term, monitor progress towards the Key Milestones against the Key Milestone Dates in order to identify, as soon as reasonably practicable, whether a Key Milestone is unlikely to be completed by the relevant Key Milestone Date.

7. ACCEPTANCE

7.1 Acceptance Test

- 7.1.1 The Supplier shall submit each Product for an Acceptance Test against the Acceptance Criteria referred to in Clause 9.2 (Product Descriptions), which Acceptance Test (unless otherwise agreed in writing by the Parties) shall be carried out in accordance with this Clause 7. For the avoidance of doubt, Acceptance Tests shall not apply to the certification by STA of Key Milestones being achieved by the Supplier, such certification being done in accordance with Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/Delay, Service And Performance Credits).

7.2 Acceptance Testing

- 7.2.1 When the Supplier reasonably believes that a Product meets the Acceptance Criteria in full, it shall notify STA of this fact and provide STA with evidence that such Acceptance Criteria have been met in full. Following this, STA will carry out the Acceptance Test described in the relevant Product Description in order to verify that the Product meets the Acceptance Criteria in full in accordance with such Product Description and within the timescales set out in the Operational Delivery Plan and Set-Up Plan respectively.
- 7.2.2 If the Acceptance Test conducted pursuant to Clause 7.2.1 does not demonstrate that the Acceptance Criteria have been met in full, STA shall notify the Supplier in writing, specifying those criteria which have not been met (such notification being a "**Cure Notice**"). On receipt of a Cure Notice, the Supplier shall cure the relevant defects within the time stipulated by STA and conduct further Acceptance Tests (in accordance with Clause 7.2.1).
- 7.2.3 If the further Acceptance Test conducted under Clause 7.2.2 does not demonstrate that the Acceptance Criteria have been met in full, STA shall notify the Supplier in writing, specifying those criteria which have not been met. On receipt of that notification, the Supplier shall cure the relevant defects within the time stipulated by STA and STA shall conduct a further Acceptance Test in accordance with Clause 7.2.2. Where such a further Acceptance Test still does not demonstrate that the Acceptance Criteria have been met in full then this shall be deemed a material Default and STA shall have the sole and absolute right to terminate the Agreement under Clause 39.3.2.1 (Termination by STA—Default) provided that:
 - 7.2.3.1 such right of termination by STA pursuant to this Clause 7.2.3 shall be with immediate effect and such material Default shall be deemed not to be capable of remedy by the Supplier;
 - 7.2.3.2 where any documents are in Dispute between the Parties at any stage of an Acceptance Test under this Agreement then the Parties shall immediately apply the Document Dispute Resolution Procedure to the exclusion of any other dispute resolution procedure under this Agreement for the purpose of rapidly resolving any such Disputes and where relevant, continue the Acceptance Test immediately thereafter;
 - 7.2.3.3 where the sole basis or final part of an Acceptance Test is dependent on the resolution of a Dispute in respect of a document then in such a case,

the result of the Document Dispute Resolution Procedure shall conclude the Acceptance Test and as such, shall determine whether or not Acceptance has been achieved under this Agreement; and

7.2.3.4 where Acceptance is required in order for the Supplier to achieve a Key Milestone by the relevant Key Milestone Date then the original Key Milestone Date shall be postponed by no longer than the number of days that the Parties take to resolve any Dispute over a document using the Document Dispute Resolution Procedure. Such postponement of the original Key Milestone Date shall not in any circumstances exceed 8 (eight) Business Days in the event that an Expert is not appointed to resolve a Dispute over a document as part of the Document Dispute Resolution Procedure and shall not in any circumstances exceed 17 (seventeen) Business Days in the event that an Expert is appointed to resolve a Dispute over a document as part of the Document Dispute Resolution Procedure. In either case, where an Expert is appointed pursuant to the Document Dispute Resolution Procedure or where an Expert is not appointed, the postponed Key Milestone Date shall for the purpose of this Agreement become the Key Milestone Date and the Supplier's failure to achieve the Key Milestone by the original Key Milestone Date shall be deemed to not be a Default under this Agreement.

7.2.4 STA shall bear its own costs in conducting the first Acceptance Test and considering the results of the same in respect of any Product. The Supplier shall reimburse STA for the costs reasonably incurred by STA in conducting any further Acceptance Tests and considering the results of the same for a Product and in respect of which STA has served a Cure Notice.

7.2.5 If an Acceptance Test conducted under Clauses 7.2.1, 7.2.2 or 7.2.3 demonstrates that the Acceptance Criteria have been met, STA shall promptly notify the Supplier in writing of its Acceptance. The date of such Acceptance shall be the "**Acceptance Date**". At the same time as it Accepts a Product, STA shall be entitled to provide the Supplier with a list of failings in the Product to meet the Acceptance Criteria, which the Supplier shall remedy following the Acceptance Date. The Supplier shall remedy these failings promptly and within the time stipulated by STA. In addition, Acceptance of a Product shall be without prejudice to any of STA's other rights under this Agreement and, without limitation, the failure to identify a failure in a Product under this Clause 7 shall not preclude STA from requiring the Product to be fully completed at a later stage so that it complies with the requirements for such Product under this Agreement (provided that STA gives written notice to the Supplier of such requirements within 3 months of the Product being used in live operations) and neither shall it relieve the Supplier from its obligation to provide the Services.

7.3 Approval Process

7.3.1 Save for Clauses 7.1, 7.2, 8 (Certification of Key Milestones, Delays and Delay Credits) and 25 (System) where specific acceptance/approval processes apply under this Agreement, the Parties agree that wherever STA's approval is referred to and/or required in Part 1 (Statement of Requirements) of Schedule 4 (Services), or in accordance with Clause 9.2.3 Product Descriptions) or is otherwise required with regard to the Services the Parties shall comply with this Clause 7.3 to obtain STA approval (the "**Approval Process**").

7.3.2 In order to obtain STA approval as required for any element of the Statement of Requirements or as otherwise may be relevant to the Services the Supplier shall submit each relevant item for approval accompanied by a copy of any related document to be reviewed and/or a statement of the proposed course of action (the entire contents of a submission being referred to as the "**Proposal**").

7.3.3 The Supplier shall ensure that it provides STA with an opportunity to review any Proposal in accordance with the following Approval Process:

7.3.3.1 the Supplier shall submit the required Proposal to STA in time for the Approval Process to be completed prior to any relevant Milestone Dates or other deadlines;

7.3.3.2 if the Supplier has received any comments from STA ("**STA Comments**") within five (5) Business Days of STA's receipt of the Proposal, then the Supplier shall promptly and in any event within three (3) Business Days of receipt of the relevant STA Comments:

- (a) incorporate any STA Comments into the Proposal;
- (b) where it is of the view acting reasonably that STA Comments cannot be incorporated, provide STA with reasons as to why those STA Comments were not incorporated into the Proposal (such reasons to be set out in a written response from the Supplier to STA (a "Quality Review Form"); and
- (c) resubmit the Proposals to STA for evaluation. STA shall conduct such evaluation within 2 Business Days after STA's receipt of such re-submitted Proposal (the "**Further Comment Period**");

7.3.3.3 for the purposes of the timing referred to in Clause 7.3.3.2, the Approval Process shall be complete in respect of the relevant Proposal when either: (i) the Further Comment Period has expired without STA having approved the Proposal (provided always that a Proposal shall not be treated as being approved unless and until STA expressly approves it in writing (including a written statement by STA as to which Milestone(s) to which such STA approval relates); or (ii) STA has approved the Proposal;

7.3.3.4 if STA does not approve a Proposal, then:

- (a) any Dispute regarding the Proposal shall be escalated in accordance with the Document Dispute Resolution Procedure; and
- (b) the Supplier shall continue to provide the Services affected by the Proposal (the "**Affected Services**") notwithstanding the operation of such escalation,
- (c) provided always that STA shall be entitled to require the Supplier to cease providing all or part of the Affected Services for any period up to the final resolution of such Dispute; and
- (d) notwithstanding anything to the contrary in this Agreement, STA shall be entitled to provide the STA Comments by email.

7.4 Where any matter under this Agreement has been Approved or Accepted, the Supplier shall perform the Services in accordance with what has been so Approved or Accepted.

8. **CERTIFICATION OF KEY MILESTONES AND DELAYS/DELAY AND PERFORMANCE CREDITS**

8.1 The Parties agree that the achievement by the Supplier of Key Milestones by the relevant Key Milestone Dates in any Test Cycle during the Term, are material to the Supplier's delivery of the Services.

8.2 Determination of Key Milestone Achievement Date

8.2.1 The Key Milestone Achievement Date for each Key Milestone shall be the date stated as such on the Key Milestone Acceptance Certificate as issued by STA in respect of that relevant Key Milestone.

8.3 Issue of Key Milestone Acceptance Certificate

- 8.3.1 The Supplier shall notify STA when it considers that a Key Milestone has been achieved in accordance with this Agreement (including under Clause 8.3.4 or 8.3.5).
- 8.3.2 STA shall promptly request such information and promptly undertake such tests and/or investigations as it considers necessary and reasonable to satisfy itself that all Key Milestone Acceptance Criteria relevant to that Key Milestone have been achieved by the Supplier and that the relevant Key Milestone has been achieved by the Supplier.
- 8.3.3 Once STA is satisfied, acting reasonably, and within 30 days of being so satisfied, that in relation to a Key Milestone all relevant Key Milestone requirements as set out in this Agreement and Key Milestone Acceptance Criteria have been met, then STA will consider that a Key Milestone has been achieved and STA shall issue a Key Milestone Acceptance Certificate which shall record the date the Supplier correctly notified STA of the achievement of the relevant Key Milestone.
- 8.3.4 Subject to Clauses 8.3.5 and 8.6, in the event that either:
- 8.3.4.1 the Supplier has failed to notify STA under Clause 8.3.1 that the Supplier considers that the Key Milestone has been achieved; or
- 8.3.4.2 STA is not satisfied that a Key Milestone has been achieved,
- the Supplier shall re-perform the Key Milestone and STA shall repeat the steps in Clauses 8.3.2 and 8.3.3 in order for the Supplier to seek to achieve the Key Milestone Achievement Date for the relevant Key Milestone.
- 8.3.5 As between the Parties the issue of a Key Milestone Acceptance Certificate shall be conclusive as to whether, and/or the date on which, the relevant Key Milestone has been completed and save as otherwise stated in this Clause 8.3, the entitlement of the Supplier to submit an invoice for the relevant Key Milestone Payment in accordance with Clause 14 (Charges and Financial Distress).

8.4 Delay to a Key Milestone

- 8.4.1 Subject to Clauses 8.8, 20.1 (Dependencies) and 27.1 (Force Majeure Events), if a Key Milestone has not been achieved by the relevant Key Milestone Date, the Supplier shall with STA having the sole and absolute right to determine this, pay to STA in respect of the relevant Key Milestone the Delay Credits applicable to the Key Milestone as set out in Table B of paragraph 2 of Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/Delay, Service And Performance Credits).
- 8.4.2 Unless otherwise agreed in writing by the Parties, the value of the Delay Credits in respect of any Key Milestone shall be as set out in Table B of Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/Delay, Service And Performance Credits).

8.5 In all respects, payment of Delay Credits in accordance with this Clause 8 is without prejudice to STA's other rights and remedies under this Agreement or at law. The Supplier acknowledges that the Delay Credits are a genuine pre- estimate of the loss STA is likely to suffer as a result of any delay (but not failure to provide the Services). The Parties acknowledge that all Key Milestones relate to any or all Test Cycles during which the Supplier provides the Services including any Test Cycle that is the result of an extension to this Agreement pursuant to Clause 3.2 (Term).

8.6 For any Test Cycle and subject to Clauses 20.1 (Dependencies) and 27.1 (Force Majeure Events), if the Supplier has failed to achieve the provision of Accurate Item Level Data and Accurate Pupil Level Data by the relevant Key Milestone Date for the provision of such data, this shall be deemed to be a material Default for which STA shall, without prejudice to its other rights under this Agreement or otherwise, be entitled to immediately serve a Termination Notice pursuant to Clause 39.3.2.1 (Termination by STA – Default).

8.7 Performance Credits

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- 8.7.1 At the election of STA to neither exercise its right to terminate this Agreement nor invoke the Remedial Plan procedure (where applicable) in respect of the Persistent Defaults referred to in this Clause 8.7 and subject to Clause 8.8, where at any Key Milestone Date for a specified Key Milestone, two or more Persistent Defaults by the Supplier have occurred since the immediately preceding Key Milestone Date or in the case of Key Milestone 1 alone, two or more Persistent Defaults by the Supplier have occurred from the commencement date of the Test Cycle in question, the Supplier shall pay to STA, a Performance Credit which shall equal 0.25% (a quarter of one percent) of the Charges that are payable to the Supplier by STA for the Test Cycle during which the Persistent Defaults occur.
- 8.7.2 For the purpose of Clause 8.7.1, a specified Key Milestone is a Key Milestone to which a Performance Credit could apply as set out in Table B of paragraph 2.2 of Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/Delay, Service And Performance Credits).
- 8.7.3 The Supplier acknowledges that any Performance Credits payable in accordance with this Clause 8.7 are a genuine pre-estimate of the loss that STA is likely to suffer as a result of the occurrence of two Persistent Defaults by the Supplier (but not of failure to provide the Services) in the circumstances set out in Clause 8.7.1. The Parties acknowledge that all specified Key Milestones as referred to in Clause 8.7.2 above shall relate to any or all Test Cycles during which the Supplier provides the Services including any Test Cycle that is the result of an extension to this Agreement pursuant to Clause 3.2 (Term).
- 8.7.4 Save where expressed to the contrary in this Agreement (including in Clause 8.7.1 above) In all respects, payment of Performance Credits in accordance with this Clause 8 is without prejudice to STA's other rights and remedies under this Agreement or at law, and shall be payable irrespective of whether STA elects to rely on, invoke or enforce any such other rights and remedies.
- 8.8 In no circumstances shall the aggregate of Delay Credits and Performance Credits payable by the Supplier in any one Test Cycle exceed 20% (twenty percent) of the Charges that are payable to the Supplier by STA for that Test Cycle.
- 9. SERVICES**
- 9.1 Appointment
- 9.1.1 While not in any way limiting STA's rights to have the Services performed by the Supplier on those specific dates that are set out in this Agreement, the Supplier shall comply with all of its obligations as set out in this Agreement and acknowledges that the timely delivery of the Services is essential to STA's proper discharge of its functions and powers.
- 9.1.2 The Supplier shall provide or carry out all activities, functions and services necessary for the delivery of the Products in accordance with the Product Descriptions.
- 9.2 Product Descriptions
- 9.2.1 The Supplier shall produce an updated Operational Delivery Plan by the Key Milestone Date set out for Key Milestone One (KM1) in each Test Cycle during the Term. The Operational Delivery Plan for KM1 shall be based on the draft Test instruments available at the time together with the volumes required and shall set out the Supplier's detailed delivery methodology through a set of Product Descriptions. The final Operational Delivery Plan shall be provided by the Supplier within 10 Business Days from the date that STA hands over the live Test instrument(s) to the Supplier.
- 9.2.2 Such Supplier generated Product Descriptions, as contemplated by Clause 9.2.1 shall be in accordance with the Product Description template as set out in Part 3 (Product Description Template) of Schedule 4 (Services) and shall describe how the Statement of Requirements (as set out in Part 1 (Statement of Requirements) of Schedule 4 (Services)), Milestones and Service Levels shall be met/achieved by the Supplier based

upon the Supplier's Solution and in sufficient detail to permit STA to investigate the robustness and operational detail of the Supplier's updated Operational Delivery Plan.

- 9.2.3 The Supplier shall submit updated Product Descriptions to STA for approval by STA before the completion of KM. 9 for each Test Cycle.
- 9.2.4 In accordance with the Approvals Process set out at Clause 7.3 (Approval Process), STA shall Approve the Product Descriptions acting reasonably and by reference to the requirements set out in the Statement of Requirements (for the avoidance of doubt, if in STA's opinion the proposed Product Description or any associated Acceptance Criteria is non-compliant with STA's requirements in the Statement of Requirements, it shall be reasonable for STA to withhold Approval). Subject to Clauses 1.15 and 1.16 (Definitions and Interpretation), the Parties agree that the STA Approved Product Descriptions shall describe what the Supplier shall deliver to STA during each Test Cycle.
- 9.2.5 The Supplier shall ensure that all Product Descriptions are maintained and reviewed and updated annually provided that each such update shall be subject to the Approval Process and in particular shall deliver to STA a copy of any Product Description:
- 9.2.5.1 within 10 days of it being updated (whether to reflect the consequences of a Change or otherwise);
 - 9.2.5.2 in accordance with Clause 9.2.3 above; and
 - 9.2.5.3 within 10 days of a Termination Notice being served.
- 9.2.6 The Supplier shall provide any Product Description to STA within 2 Business Days of STA's request.
- 9.2.7 STA may from time to time review any Product Description and the Supplier shall amend such Product Descriptions within the time stipulated by STA in accordance with any reasonable recommendations made by STA, including by providing further detail in a Product Description. Where such recommendation by STA results from anything other than a Supplier breach, or indication of non-compliance by the Supplier of its obligations under this Agreement, the costs and effects of the proposed amendment to the Product Descriptions shall be dealt with through the Change Control Procedure.
- 9.2.8 The Supplier shall prepare a Product Description in respect of any new Services ordered through the Change Control Procedure within the time stipulated in the agreed CAN. Such Product Description shall be in English and contain information of the type (and to a similar level of detail) specified in the template Product Description set out in Part 3 (Product Description Template) of Schedule 4 (Services), such information being that which is reasonably necessary for STA to understand how the Deliverables are delivered in accordance with this Agreement.
- 9.2.9 In accordance with the Approval Process set out at Clause 7.3 (Approval Process), STA shall approve the Product Description prepared by the Supplier in respect of any new Service ordered through the Change Control Procedure pursuant to Clause 9.2.8 acting reasonably and by reference to the requirements set out in the relevant CAN. For the avoidance of doubt, if in STA's opinion the proposed Product Description or any associated Acceptance Criteria is non-compliant with the STA requirements in Schedule 4 (Services), or does not contain sufficient information or details, it shall be reasonable for STA to withhold approval. Subject to Clauses 1.15 and 1.16 (Definitions and Interpretation), the Parties agree that the STA approved Product Description in accordance with this Clause 9.2.9 describes what the Supplier shall deliver to STA during each Test Cycle where relevant.
- 9.2.10 While the content of the Product Descriptions shall be owned by STA, STA hereby acknowledges and agrees that insofar as it is lawful and within central government policy to do so, STA shall treat the content of the Product Descriptions as Identified Confidential Information.

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9.3 Service Standards

- 9.3.1 The Supplier shall ensure that all of its obligations under this Agreement, including in respect of the Services, are provided in accordance with the following (and to the extent that there are inconsistencies between these, then the following descending order of precedence shall apply:
- 9.3.1.1 the Operational Delivery PIDs (unless otherwise agreed in writing by the Parties); and then
 - 9.3.1.2 the STA Policies and Procedures.
- 9.3.2 The Supplier shall also ensure that all of its obligations under this Agreement, including in respect of the Services, are provided in accordance with Good Industry Practice and so as to safeguard the integrity and reputation of STA and of the Tests.
- 9.3.3 Without prejudice to Clause 9.3.1, the Supplier shall ensure that the Services shall, as a minimum, meet the requirements set out in the Statement of Requirements (as may be amended through the Change Control Procedure).
- 9.3.4 Unless otherwise agreed in writing by the Parties in accordance with Clause 28 (Change), the Supplier shall, and shall procure that its Subcontractors (excluding the Markers) shall, only provide the Services from the fixed locations or premises specified in Schedule 16 (Approved Locations) (other than UK Post Office branches used by the Markers for the distribution of marked Test Scripts or any distribution depots (including any parcel distribution centres) controlled by a Subcontractor). At the request of STA the Supplier shall provide an up-to-date list of the locations of any distribution depots controlled by a Subcontractor and used in the provision of the Services from time to time.
- 9.3.5 Compliance With Standards Used Across Government
- 9.3.5.1 The Supplier shall comply with the standards set out in Schedule 24 (Standards).
 - 9.3.5.2 The Parties, working together with the Government Digital Service and with regard to the GDS Service Design Manual shall cooperate in a spirit of mutual trust and confidence and in good faith to agree which elements of the Services, System and any other deliverables or aspects of the Services, fall within the scope of the GDS Service Standards for the purposes of performing this Agreement (the "GOV.UK Deliverables").
 - 9.3.5.3 The Parties will use reasonable endeavours to agree the final list of GOV.UK Deliverables pursuant to Clause 9.3.5.2 within four (4) weeks of the Effective Date or such longer period as the Parties may agree provided that any failure by the Parties to reach agreement as to what such longer period will be shall be referred to the Dispute Resolution Procedure.
 - 9.3.5.4 The Supplier shall within six (6) weeks of the final list being agreed pursuant to clause 9.3.5.3, or such longer period as the Parties may agree provided that any failure by the Parties to reach agreement as to what such longer period will be shall be referred to the Dispute Resolution Procedure, review the GOV.UK Deliverables against the GDS Service Standards and shall prepare and submit to STA and GDS a Conformity Report which provides full details of:
 - (a) the nature of each GOV.UK Deliverable and how it fits within the context of the Supplier Solution, System and the overall Service;
 - (b) whether or not each individual GOV.UK Deliverable complies with the GDS Service Standards, by addressing each of the GDS Service Standards in turn and whether the GOV.UK Deliverable, as designed, proposed and set out in the Supplier Solution, would be capable of passing a GOV.UK Assessment, with evidence of compliance and non-compliance where appropriate (including

evidence that would be required by GDS in order for the GOV.UK Deliverables to pass the GOV.UK Assessments);

- (c) if non-compliant how the GOV.UK Deliverable could be made to conform with the GDS Service Standards (with regard to the Service Design Manual), including the activities, timescales, personnel, roles, responsibilities, dependencies, costs and other tasks which would be required in order to make it conform ("**Conformance Activities**");
- (d) any other details required by STA and GDS to understand the conformity position; and
- (e) where not already covered in (a) to (e) above, any other impact that the Conformance Activities would have using the criteria set out at paragraph 1.11 of Schedule 8 (Change Control Procedure)

and STA, in cooperation with GDS, will provide assistance and information as may be reasonably required by the Supplier to help the Supplier to prepare the Conformity Report and to assist with the Supplier's planning of the timings and activities in respect of the GOV.UK Assessments. STA shall reimburse the Supplier for reasonable costs incurred in relation to Clauses 9.3.5.2, 9.3.5.3 and this Clause 9.3.5.4.

- 9.3.5.5 Once the Conformity Report has been submitted in accordance with Clause 9.3.5.4, STA shall work with GDS to review the Conformity Report and shall, as soon as is reasonably practicable, provide a response to the Supplier against each aspect of the Conformity Report which either Approves, rejects or requires the Supplier to modify the Conformity Report. The Supplier shall during the review period provide any additional information or assistance as may be reasonably required by STA to make its decision.
- 9.3.5.6 In respect of any aspects of the Conformity Report that are rejected or require modification at the instance of STA, the Supplier shall revise the Conformity Report (taking into account STA and GDS' comments) and shall re-submit it within one (1) week of receiving STA's response pursuant to clause 9.3.5.5. STA shall review the revised Conformity Report within one (1) week of the date of receipt from the Supplier and shall provide a response to the Supplier as to whether the Conformity Report is Approved in full or whether there remain aspects which are disputed.
- 9.3.5.7 The provisions of Clauses 9.3.5.5 and 9.3.5.6 shall apply again to any re-submitted Conformity Report provided that either Party may refer any disputed matters for resolution by the Document Dispute Resolution Procedure at any time.
- 9.3.5.8 If STA Approves the Conformity Report, then the Supplier shall as soon as reasonably practicable integrate the Conformance Activities into any existing Set-Up Plan, Operational Delivery Plans or any other plans/activities in order to ensure that the GOV.UK Deliverables are delivered in compliance with the GDS Service Standards. Any changes required to the Agreement to integrate the Conformance Activities shall be subject to the Change Control Procedure.
- 9.3.5.9 The Supplier shall continue to review the delivery of the Services against the GDS Service Standards as an ongoing obligation throughout the Term and without prejudice to the provisions set out in Clauses 9.5.3.2 to 9.5.3.8 above or the Supplier's obligation to ensure that the GOV.UK Deliverables are compliant with the GDS Service Standards, The Supplier shall promptly notify STA and provide an updated Conformance Report as soon as it becomes aware that any aspect of Service delivery is at risk of failing a GOV.UK Assessment.

9.3.6 Marking

The Parties acknowledge that the quality of the marking of the Tests to be performed as part of the Services ("Quality of Marking") is critical and that any failures in the Quality of Marking are likely to have an adverse impact on the reputation, credibility and integrity of the National Curriculum Assessments and of STA.

9.3.7 Reputation

Without prejudice to any other applicable provision of this Agreement, the Supplier shall ensure that the Supplier and all Personnel shall at all times uphold the good name and reputation of Her Majesty's Government, STA and the National Curriculum Assessments and act in a manner that is appropriate given that good name and reputation, and not do or omit to do anything that might damage the reputation or integrity of, or public confidence in, Her Majesty's Government, STA or the National Curriculum Assessments.

9.4 Service Levels

9.4.1 The Supplier shall ensure that the Services meet or exceed the Service Levels.

9.4.2 The Supplier shall ensure that it puts in place processes and procedures sufficient to monitor accurately its performance against the Service Levels and shall provide reports containing such performance information to STA in accordance with the Product Descriptions.

9.5 Service Credits

9.5.1 Subject to Clauses 20 (Dependencies) and 27.1 (Force Majeure Events), if the Supplier fails to perform the Services in accordance with the Service Levels, the Supplier will promptly calculate and pay Service Credits to STA in accordance with Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/ Delay, Service And Performance Credits). The Supplier shall, in relation to the next invoice STA is due to pay under the Agreement upon the achievement of a Key Milestone (and the issue of a Key Milestone Acceptance Certificate by STA to that effect), issue a credit note for an amount equal to any Service Credits payable or, where no further invoices are due to be paid (or where the amount of any further invoice(s) to be paid is lower than the amount of the relevant Service Credits), the Supplier shall pay such Service Credits to STA by electronic bank transfer within 10 Business days of the end of the month in which they accrue.

9.5.2 The total value of the Service Credits payable by the Supplier for each month in a Test Cycle shall be limited to the Service Credit Cap.

9.5.3 Without prejudice always to any other financial remedy expressly set out in this Agreement (including but not limited to Delay Credits under Clause 8 (Certification of Key Milestones And Delays/Delay And Performance Credits), Service Credits payable in accordance with this Clause 9 shall be STA's exclusive financial remedy for any failure by the Supplier to achieve the Service Levels for which Service Credits are payable, save for or unless:

9.5.3.1 this Agreement is terminated due to a Default by the Supplier;

9.5.3.2 the Supplier commences proceedings against STA for any alleged breach of this Agreement by STA;

9.5.3.3 STA exercises any right of step-in pursuant to Clause 11 (Step-In);

9.5.3.4 the Supplier has over the previous 12 month period accrued Service Credits in excess of the Service Credit Cap;

9.5.3.5 the failure by the Supplier to achieve one or more Service Levels:

- (a) breaches the relevant KPI Service Threshold; or
- (b) has arisen due to wilful default by the Supplier or any of the Supplier Personnel; or
- (c) results in:
 - (i) the corruption or loss of any STA Data (in which case the remedies available to STA under this Agreement for corruption or loss of STA Data shall also be available); and/or
 - (ii) STA being required to make a compensation payment to one or more third parties;

9.5.3.6 the Supplier has fraudulently misreported its performance against any Service Level.

10. SERVICE FAILURES

10.1 Duty to Warn

The Supplier shall immediately warn STA whenever the Supplier has reasonable grounds to believe that any development (including failure on the part of the Supplier to carry out its obligations and responsibilities under this Agreement) will have, or threatens to have, a detrimental effect on the Services. At STA's request, the Supplier shall use its best endeavours to prevent such a development from occurring and to prevent its reoccurrence and to propose a contingency plan to STA that will be put into effect in the event that any such development does occur. This obligation is without prejudice to any other obligations of the Supplier under this Agreement.

10.2 Rectification

10.2.1 Subject to Clauses 10.2.2 (Rectification), 20.1 (Dependencies) and 27.1 (Force Majeure Events), if the Supplier fails to perform the Services in accordance with this Agreement, and that failure (in STA's reasonable opinion) has or is likely to have material consequences for STA, the National Curriculum Assessments or Schools and/or the Supplier commits a Service Failure or fails to meet a Service Level under this Agreement then, without prejudice to any other rights or remedies it may have under this Agreement or otherwise, STA may require the Supplier by notice in writing (which notice shall specify details of the Default), at the Supplier's own expense, to remedy any default or to perform or re-perform (where such re-performance is possible) any non-conforming Services (a "**Defective Service**") as soon as reasonably practicable and in any event within the following time periods:

10.2.1.1 where the failure impacts the delivery of a Key Milestone, within one day (or such other period as may be specified in writing by STA (which may include by email));

10.2.1.2 where the failure, apart from affecting the delivery of a Key Milestone or a Service Level, otherwise relates to a Key Milestone or a Service Level, within 3 days (or such other period as may be specified in writing by STA (which may include by email)); and

10.2.1.3 in all other cases, within 5 days (or such other period as may be specified in writing by STA (which may include by email)).

10.2.2 If the Supplier has failed to meet a Milestone or fails to meet a Service Level or to remedy a default, or perform or re-perform any Defective Service in accordance with Clause 10.2.1, STA shall be entitled to instruct a third party to remedy any Default or perform or re-perform the Defective Service on STA's behalf, the reasonable costs of which shall be borne by the Supplier.

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10.3 Investigation

If the Supplier fails to perform a material element of the Services which shall include but not be limited to achieving the Key Milestones or any Service Level as set out in Schedule 5 (Key Milestone Acceptance Criteria And Service Levels/Delay, Service And Performance Credits) then, without prejudice to any other rights or remedies it may have under this Agreement or otherwise, STA may require the Supplier by notice in writing to carry out an investigation into the cause of such failure. The Supplier shall carry out such an investigation in accordance with Good Industry Practice and at its own cost and shall provide a complete and accurate report of that investigation to STA within the time stipulated by STA.

11. STEP-IN

11.1 Initiation of Right to Step-In

11.1.1 Subject to Clause 11.1.2, STA may, by notice in writing to the Supplier (the "**Step- In Notice**") and with immediate effect where specified by STA, either itself or by a third party nominated by STA, take over provision of the Services or any part of the Services if:

11.1.1.1 the Supplier has failed to meet a Key Milestone Date or it is likely in STA's reasonable opinion (based on the Management Information compared with empirical data from previous test cycles) that the Supplier will fail to meet a Key Milestone;

11.1.1.2 there is a breach of this Agreement which in the reasonable opinion of STA is likely to have a material adverse effect on STA or the provision of the Services;

11.1.1.3 it is likely in the reasonable opinion of STA that there will be a material breach of this Agreement which is likely to have a material adverse effect on STA or the provision of the Services;

11.1.1.4 a Force Majeure Event occurs which materially prevents or delays the performance of the Services or any part of the Services;

11.1.1.5 STA has reasonable grounds to suspect an act (or series of acts) of fraud are being committed in relation to the Services and either: (a) in STA's reasonable opinion such an act(s) is, or are likely to, compromise the security, and/or the safe delivery, of the National Curriculum Assessments or the results of a Test Cycle; or (b) such act(s) has or have been investigated pursuant to Clause 33.2.1.2 (Suspected Fraud) and the results of such investigation are in STA's reasonable opinion insufficient to properly identify if a fraud has been committed, the source of the fraud and/or to safeguard the security and safe delivery of the Tests;

11.1.1.6 STA is entitled to serve a Termination Notice pursuant to Clause 39.3 (Termination by STA - Default);

11.1.1.7 STA serves a Termination Notice pursuant to Clause 39.4 (Termination by STA - Other); or

11.1.1.8 a regulatory authority, properly exercising its regulatory powers, either requires STA to exercise its step-in rights pursuant to this Clause 11, or indicates that it would be prudent to do so. STA shall give the Supplier as much notice as reasonably practicable that a regulatory authority might require such an exercise or make such an indication.

11.1.2 Subject to Clause 11.1.5 and where STA acting reasonably considers that it is practicable to do so, before issuing a Step-In Notice on the bases of Clauses 11.1.1.2 to 11.1.1.8, STA will:

- 11.1.2.1 issue the Supplier with a notice to remedy specifying that it is a notice given under this Clause 11.1.2 and identifying any of the events listed in Clause 11.1.1 including reasonable details of the circumstances which permit STA to exercise its right to step-in.
- 11.1.2.2 Within 7 days (unless otherwise agreed between the Parties in writing) of receipt of a notice to remedy under this Clause 11.1.2, the Supplier will prepare a remedial plan for STA detailing the steps to be taken by the Supplier to remedy the event in question.
- 11.1.2.3 If STA considers that the remedial plan is unacceptable (acting reasonably), it may proceed to issue the Step-In Notice under Clause 11.1.
- 11.1.2.4 If STA accepts the remedial plan, the Supplier will implement the remedial plan immediately.
- 11.1.2.5 Neither STA's acceptance of, nor participation in, any remedial plan shall prejudice STA's rights and remedies and neither shall it constitute a waiver or acquiescence (including any acceptance that the Supplier has performed the Services in accordance with this Agreement).
- 11.1.3 Each of Clauses 11.1.1.1 to 11.1.1.8 (inclusive) will be taken to constitute a separate right and will be construed independently of each other.
- 11.1.4 The Step-In Notice shall specify in reasonable detail:
 - 11.1.4.1 the basis on which STA is entitled to exercise its rights of step-in;
 - 11.1.4.2 the affected Services;
 - 11.1.4.3 how it proposes to remedy or perform the affected Services and the identity of any third party STA proposes to use to do so; and
 - 11.1.4.4 if the step-in is urgent for the purposes of Clause 11.1.5, in which case the step-in shall commence with immediate effect on the issuance of the Step-In Notice.
- 11.1.5 Where STA does not indicate that the step-in is urgent in the relevant Step-In Notice, then as soon as practicable following receipt of the Step-In Notice served under this Clause 11.1, the Relationship Managers shall discuss the potential exercise of STA's rights and:
 - 11.1.5.1 any alternative course of action which the Supplier may undertake to remedy the event giving rise to STA's right to step-in; and
 - 11.1.5.2 the manner in which STA shall exercise its step-in rights including how it will engage any third party to act on its behalf (if at all) in accordance with Clause 11.2 (Exercise of Step-In Right).

If the Relationship Managers have failed to reach agreement on the matters set out in this Clause 11.1.5 within 5 days of the Step-In Notice being served, STA may forthwith exercise its rights of step-in under this Clause 11.
- 11.2 Exercise of Step-In Right
 - 11.2.1 In exercising its right of step-in, STA may itself provide, or may employ a third party to provide, the Services or any part thereof.
 - 11.2.2 The Supplier shall co-operate fully with, and provide all reasonable assistance to, STA and any third party engaged by STA to enable the provision of the Services pursuant to the exercise of STA's right to step-in under this Clause 11. The Supplier's assistance shall include:

- 11.2.2.1 Allowing and completing and executing whatever documentation is required for STA or the third party (in the context of procuring that the Services are delivered in accordance with this Agreement) to have control (equivalent to the control that the Supplier has in its relevant contractual arrangements) over the management of relevant Personnel and Subcontractors;
 - 11.2.2.2 allowing STA or the third party reasonable access to the Supplier's premises and equipment and using its best endeavours to procure STA's reasonable access to the premises and equipment of the Supplier's Subcontractors as needed to provide the Services identified in the Step-In Notice;
 - 11.2.2.3 allowing STA or the third party reasonable access to such management records and systems which relate to the Services identified in the Step-In Notice as is reasonably necessary to enable performance of same; and
 - 11.2.2.4 if requested by STA, providing to STA for provision to any third party participating in step-in on behalf of STA, notice confirming that STA is exercising its rights in compliance with the terms of this Clause 11.
- 11.2.3 If STA exercises its rights under this Clause 11:
- 11.2.3.1 STA shall not be obliged to pay or make any payments (whether by way of Charges under Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters) or otherwise) to the Supplier for a Service insofar as STA is providing that Service, save that:
 - (a) if STA uses any assets, resources or employees of the Supplier, the Supplier shall be entitled to charge the costs associated with the use on a Time and Materials Basis; and
 - (b) STA shall reimburse the Supplier's reasonable costs incurred in order to deliver the Key Milestone which immediately follows such step-in by STA and which the Supplier has been unable to deliver as a result of such step-in by STA together with any additional expenses incurred by the Supplier directly as a result of the step-in by STA taken under Clause 11.1.1.8. (insofar as the primary cause of STA's step-in is identified as not being the result of a Default by the Supplier).
 - 11.2.3.2 the Supplier shall be liable to pay any additional reasonable costs directly incurred by STA as a result of the exercise of this right by STA save where STA exercises this right pursuant to Clauses 11.1.1.3, 11.1.1.4 and 11.1.1.8;
 - 11.2.3.3 STA shall procure that any third party appointed by it may not have any access to any premises, information, persons or materials pursuant to this Clause 11.2 unless it has first entered into an NDA with STA which covers the confidentiality of the Supplier's Identified Confidential Information and undertakes to abide by such security and health and safety requirements as the Supplier may reasonably require; and
 - 11.2.3.4 STA shall, and shall procure that any third party engaged by it in relation to its exercise of rights of step-in under this Clause 11 shall, when exercising those rights, use reasonable skill and care and shall use reasonable endeavours not to disrupt any services provided by the Supplier to its other customers.
- 11.2.4 The Supplier shall not be liable for any failure to meet Service Levels or Key Milestones or to perform any other obligation solely to the extent that: (i) the failure to meet a Service Level arises as a direct result of the step-in and in respect of a Service which STA is

managing; or (ii) any other failure arises as a direct result of STA doing an act in the course of the Services in respect of which STA has stepped in.

11.3 End of Step-In Period

11.3.1 Before ceasing to exercise its step-in rights in accordance with Clause 11.2, STA shall deliver written notice to the Supplier, specifying the date it plans to conclude such action (the "**Step-Out Notice**").

11.3.2 The Supplier shall, following receipt of a Step-Out Notice,

11.3.2.1 meet with STA to discuss the findings of STA as a result of the exercise of its rights under this Clause 11.

11.3.2.2 Following that meeting, the Supplier shall develop a plan to address STA's findings (which it shall provide to STA within 10 days of the meeting) and devote sufficient resources to implement that plan and any other recommendations of STA to improve the Services.

11.3.2.3 Where STA has exercised its rights of step-in pursuant to Clauses 11.1.1.6 or 11.1.1.7 inclusive (and no Default has been subsequently identified following a Dispute Resolution Procedure), any changes to the Services recommended by STA pursuant to this Clause 11.3.2 shall be discussed under the Change Control Procedure.

11.3.3 Subject to Clause 11.2.4, exercise by STA of its rights under Clauses 11.1 and 11.2 shall be without prejudice to any other rights or remedies of STA, including any right of termination of the Services (or any part of them) under Clause 39 (Termination).

12. CONSULTATION RIGHT

12.1 Without prejudice to any of its rights under this Agreement or otherwise, STA may, solely and absolutely having the right to determine this, on the occurrence of any of the events listed in Clauses 11.1.1.1 to 11.1.1.8 (inclusive) (Initiation of Right to Step-In), require the Supplier by written notice (the "**Consultation Notice**") to:

12.1.1 invite STA to participate in meetings with the Supplier and/or any Subcontractors;

12.1.2 organise meetings with STA, the Supplier and/or a Subcontractor (provided that the Supplier is given the opportunity to be present at any meeting between STA and a Subcontractor);

12.1.3 attend meetings with STA and a Subcontractor; and

12.1.4 write reports for STA in connection with the issues giving rise to the exercise by STA of its right to issue a Consultation Notice, providing proposed solutions and rectification plans where reasonably required, in order to discuss and agree how to resolve the issue or issues giving rise to STA's service of the Consultation Notice.

12.2 STA's right of consultation under Clause 12.1 shall begin on the date on which the Supplier is deemed to have received the Consultation Notice in accordance with Clause 47.7 (Notices) (the "**Consultation Commencement Date**"). STA shall inform the Supplier in writing of the date on which it wishes to cease to exercise its consultation right, such date to be no later than 3 months after the Consultation Commencement Date.

12.3 For the avoidance of doubt, all steps taken by each Party pursuant to this Clause 12 shall be at its own expense.

13. THIRD PARTY CO-OPERATION

13.1 The Supplier shall be open and co-operative with, and provide reasonable assistance to, any third party providing services to STA or any third party to whom STA contracts or delegates any of its rights and obligations under this Agreement (each such third party being a "STA Service Provider"). This assistance shall include (subject to the relevant STA Service Provider entering into an NDA with STA where such assistance involves the disclosure of the Supplier's Identified Confidential Information as referred to under Clause 34 (Confidential Information) to a STA Service Provider) at STA's option:

13.1.1 providing such information about the manner in which the Services are provided as is reasonably necessary for STA Service Providers to provide their services to STA or carry out such activities as have been delegated to them by STA;

13.1.2 if relevant, making available to, or accepting information from, such STA Service Providers;

13.1.3 developing interfaces so that the System can communicate and interface automatically with the systems used by STA Service Providers where such interfaces are required for the operation of this Agreement provided that where the development of such interfaces shall give rise to a Change, this shall be governed by the Change Control Procedure; and

13.1.4 meeting with STA and STA Service Providers to discuss the Services and the services provided by third parties.

13.2 The Supplier shall inform STA of any disputes or disagreements between it and any STA Service Providers that arise when fulfilling its obligations under this Clause 13 and shall use its reasonable endeavours to resolve any such disputes or disagreements. STA shall provide all reasonable assistance to the Supplier to enable the resolution of such disputes.

14. CHARGES AND FINANCIAL DISTRESS

14.1 Payment of Charges

With effect from the Effective Date, the Supplier shall be entitled to charge and invoice STA for the Charges in accordance with Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters); and Clause 14.2 (Charging Principles).

14.2 Charging Principles

14.2.1 In the event that the Supplier achieves a Key Milestone at its first attempt to do so by the relevant Key Milestone Date and has been issued with an Acceptance Certificate by STA in accordance with Clause 8.3 (Issue of Key Milestone Acceptance Certificate) then the Supplier shall be entitled to invoice STA for the relevant Key Milestone Payment and STA shall pay the undisputed amount of such Key Milestone Payment within 30 days of receipt by STA of the relevant invoice.

14.2.2 If the Supplier at its first attempt fails to achieve the relevant Key Milestone Acceptance Criteria for a Key Milestone then the Supplier shall not be entitled to invoice STA for the relevant Key Milestone Payment until such a time as the Supplier shall be able to achieve the relevant Key Milestone Acceptance Criteria for the Key Milestone and has been issued with an Acceptance Certificate by STA.

14.2.3 Subject to Clauses 20.1 (Dependencies) and 27.1 (Force Majeure Events) if the Supplier fails to achieve the relevant Key Milestone Acceptance Criteria for a Key Milestone by the relevant Key Milestone Date then Delay Credits shall be payable by the Supplier to STA in accordance with Clause 8.4 (Delay to a Key Milestone).

14.2.4 The Supplier shall not charge STA for any goods or services provided under or in connection with this Agreement, or for any costs the Supplier may incur in fulfilling any of its obligations under this Agreement, except to the extent that this Agreement (as

amended by CANs from time to time in accordance with the procedure in Schedule 8 (Change Control Procedure) expressly provides for the payment of such charges.

14.3 Payment Terms

- 14.3.1 Subject to Clause 14.6 (Disputed Items), all undisputed invoices submitted by the Supplier in accordance with this Agreement shall be paid by STA within 30 days of receipt.
- 14.3.2 All charges, costs and expenses due under this Agreement must be invoiced by the Supplier as part of the Charges within 6 months of the date the Supplier is first entitled to invoice such sums. The Supplier irrevocably waives the right to receipt of payment of any sums not invoiced within this period.
- 14.3.3 The Supplier shall, after 1 January but prior to 31 January in each calendar year of the Term, inform STA, in writing, of any charges, costs and expenses:
- 14.3.3.1 due under this Agreement which are still eligible to be invoiced taking into account Clause 14.3.2, but which have not yet been so invoiced; and
 - 14.3.3.2 that are expected to become due under this Agreement prior to 31 March in the same calendar year.
- 14.3.4 The Supplier shall procure that all Subcontractor invoices submitted to the Supplier in relation to any subcontract shall (if undisputed) be paid within a specified period from the receipt by the Supplier of a valid invoice not exceeding 30 days.

14.4 Late Payment

If either Party has not paid any undisputed amounts properly invoiced to it by the other Party within 10 Business Days of receiving notice from the other Party that such amounts are due and will start to accrue interest if not paid within 10 Business Days (such notice not to be sent until the amounts become due), then those amounts shall accrue interest in accordance with the Late Payment of Commercial Debts (Interest) Act 1998 from the date that such payment became due until such payment is made.

14.5 Set Off

STA may retain and set off any undisputed amount owed to it by the Supplier under this Agreement against any undisputed amount that STA owes to the Supplier under this Agreement.

14.6 Disputed Items

If STA in good faith disputes its obligation to pay all or part of an invoice submitted by the Supplier in connection with this Agreement, then notwithstanding anything to the contrary in this Agreement:

- 14.6.1 STA must notify the Supplier of the amount which it disputes being obligated to pay (the "Disputed Amount") and the reasons why it considers it is not obligated to pay the Disputed Amount;
- 14.6.2 STA's failure to pay the Disputed Amount shall be deemed to not be a breach of this Agreement;
- 14.6.3 the Parties must as soon as reasonably practicable discuss and use their respective reasonable endeavours to agree whether, or how much of, the Disputed Amount is properly payable to the Supplier; and
- 14.6.4 if the Parties are unable to reach agreement pursuant to Clause 14.6.3 within 10 Business Days, then either Party may refer the matter to the Dispute Resolution Procedure to determine whether all or part of the Disputed Amount is properly due and payable under this Agreement.

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14.7 Financial Distress

14.7.1 The Parties shall comply with the provisions of Part 3 (Financial Distress) of Schedule 7 (Financial Matters) in relation to the assessment of the financial standing of the Supplier and the consequences of a change to that financial standing.

15. TAXATION

15.1 Tax Indemnity

15.1.1 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 Agreement, the Supplier shall:

15.1.1.1 at all times comply with the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax, and the Social Security Contributions and Benefits Act 1992 and all other statutes and regulations relating to national insurance contributions, in respect of that consideration; and

15.1.1.2 indemnify STA against any income tax, national insurance and social security contributions and any other liability, deduction, contribution, assessment or claim arising from or made in connection with the provision of the Services by the Supplier or any Supplier Personnel.

15.1.2 STA may, at any time during the Term, ask the Supplier to provide information which demonstrates how the Supplier complies with Clause 15.1.1.1 or why that Clause does not apply to it.

15.1.3 A request under Clause 15.1.2 above may specify the information which the Supplier must provide and the period within which that information must be provided.

15.1.4 STA may terminate this Agreement by serving a Termination Notice on the Supplier pursuant to Clause 39.3.2.1 (Termination by STA – Default) if:

15.1.4.1 in the case of a request mentioned in Clause 15.1.2 above, the Supplier:

(a) fails to provide information in response to the request within a reasonable time or within the period specified by STA; or

(b) provides information which is inadequate to demonstrate either how the Supplier complies with Clause 15.1.1 or why that Clause does not apply to it;

15.1.4.2 STA receives information which demonstrates that, at any time when Clause 15.1.1 applies, the Supplier is not complying with that Clause.

15.1.5 STA may supply any information which it receives pursuant to Clause 15.1.2 to the Commissioners of Her Majesty's Revenue and Customs for the purpose of the collection and management of revenue for which they are responsible.

15.1.6 The Supplier warrants and represents to STA that it is an independent contractor and, as such, bears sole responsibility for the payment of tax and national insurance contributions which may be found due from it in relation to any payments or arrangements made under this Agreement or in relation to any payments made by the Supplier to its officers or employees in connection with this Agreement.

15.1.7 The Supplier will account to the appropriate authorities for any income tax, national insurance, VAT and all other taxes, liabilities, charges and duties relating to any payments made to the Supplier under this Agreement or in relation to any payments made by the Supplier to its officers or employees in connection with this Agreement.

- 15.1.8 The Supplier authorises STA to provide HM Revenue and Customs and all other departments or agencies of the Government with any information which they may request as to fees and/or expenses paid or due to be paid under this Agreement whether or not STA is obliged as a matter of law to comply with such request.
- 15.2 VAT
- 15.2.1 The Charges are inclusive of VAT, which shall be calculated by the Supplier at the prevailing rate as applicable and paid by STA following delivery of a valid VAT invoice.
- 15.2.2 The Supplier shall indemnify STA on a continuing basis against any liability, including any interest, penalties or costs incurred, that is levied, demanded or assessed on the STA at any time in respect of the Supplier's failure to account for or to pay any VAT relating to payments made to the Supplier under this Agreement. Any amounts due under this Clause 15.2.2 shall be paid in cleared funds by the Supplier to STA not less than five Business Days before the date upon which the tax or other liability is payable by STA. Provided that and for the avoidance of doubt, where the Supplier fails to correctly calculate any VAT relating to the Charges paid to the Supplier and this has resulted in STA paying less to the Supplier than the Charges that would have been payable had the Supplier correctly calculated such VAT, STA shall not be liable to make any further payment to the Supplier to make up the amount that would have been payable by STA if the Supplier had correctly calculated such VAT.
- 15.2.3 From the Effective Date and where during the Term, there is any change in Law which has the effect of increasing or reducing the rate of VAT payable in respect of the Services (which shall for the avoidance of doubt include where all or some of the Services are stated to no longer be subject to VAT or where all or some of the Services which were previously not subject to VAT are now stated to be subject to VAT) , the Supplier shall be entitled to increase or obliged to reduce the Charges as the case may be for the duration of the applicability of any such change in Law and by an amount that reflects any additional VAT or any reduction in VAT payable by the Supplier in respect of the Services as a direct result of such a change in Law.
- 15.3 Indemnity Payments
- 15.3.1 Where any payment is made under this Agreement by or on behalf of the Supplier to STA and that sum is subject to a charge to taxation in the hands of STA, the sum payable shall be increased to such sum as shall ensure that after payment of such taxation (and after giving credit for any tax relief available in respect of the matter giving rise to the payment) STA shall be left with a sum equal to the sum that it would have received in the absence of such a charge to taxation.
- 15.4 Promoting Tax Compliance
- 15.4.1 If, at any point during the Term, an Occasion of Tax Non-Compliance occurs, the Supplier shall:
- 15.4.1.1 notify STA in writing of such fact within 10 Business Days of its occurrence; and
- 15.4.1.2 promptly provide to STA:
- (a) details of the steps which the Supplier is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors that it considers relevant; and
- (b) such other information in relation to the Occasion of Tax Non-Compliance as STA may reasonably require.

16. WARRANTIES

16.1 STA represents and warrants that:

- 16.1.1 it has full capacity and authority to enter into and to perform this Agreement;
- 16.1.2 this Agreement is executed by its duly authorised representative;
- 16.1.3 there are no actions, suits or proceedings or regulatory investigations before any court or administrative body or arbitration tribunal pending or, to its knowledge, threatened against it that might affect its ability to perform its obligations under this Agreement; and
- 16.1.4 its obligations under this Agreement constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar Laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or law).

16.2 The Supplier represents and warrants that:

- 16.2.1 it is validly incorporated, organised and subsisting in accordance with the Laws of its place of incorporation;
- 16.2.2 it has full capacity and authority to enter into and to perform this Agreement;
- 16.2.3 this Agreement is executed by its duly authorised representative;
- 16.2.4 it has all necessary consents and regulatory approvals to enter into this Agreement;
- 16.2.5 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 any of its Group Companies that might affect its ability to perform its obligations under this Agreement;
- 16.2.6 its execution, delivery and performance of its obligations under this Agreement will not constitute a breach of any Law or obligation applicable to it and will not cause or result in a default under any agreement by which it is bound;
- 16.2.7 its obligations under this Agreement constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar Laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or law);
- 16.2.8 all written statements and representations in any written submissions made by the Supplier as part of the procurement process, including without limitation its PQQ Response and IPCD Response, the Supplier's Solution and any other documents submitted remain true and accurate except to the extent that such statements and representations have been superseded or varied by this Agreement or to the extent that the Supplier has otherwise disclosed to STA in writing prior to the date of this Agreement;
- 16.2.9 it has notified STA in writing of any Occasions of Tax Non-Compliance and any litigation in which it is involved that is in connection with any Occasion of Tax Non-Compliance;
- 16.2.10 it has all necessary rights in and to the Supplier Software, the Third Party Software, Intellectual Property Rights relating to the delivery of the Services, and any other materials made available by the Supplier (and/or any Sub-contractor) to the STA which are necessary for the performance of the Supplier's obligations under this Agreement and/or the receipt of the Services by the STA;

- 16.2.11 the Contract Inception Report is a true and accurate reflection of their costs for providing the Services and the Supplier's 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 Financial Model;
- 16.2.12 it is not subject to any contractual obligation, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under this Agreement; and
- 16.2.13 no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, are threatened) for the winding up of the Supplier or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, manager, administrator or similar officer in relation to any of the Supplier's assets or revenue.
- 16.3 Each of the representations and warranties set out in Clauses 16.1 and 16.2 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 other undertaking in this Agreement.
- 16.4 If at any time a Party becomes aware that a representation or warranty given by it under Clause 16.1 or 16.2 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.
- 16.5 For the avoidance of doubt, the fact that any provision within this Agreement is expressed as a warranty shall not preclude any right of termination which the STA may have in respect of breach of that provision by the Supplier.
- 16.6 Except as expressly stated in this Agreement, all warranties and conditions whether express or implied by statute, common law or otherwise are hereby excluded to the extent permitted by Law.

17. REGULATIONS

17.1 Compliance

- 17.1.1 Save where STA determines that a Regulatory Change is not required in accordance with Clause 17.3.3.1, the Supplier shall comply, and shall ensure that its Subcontractors and Personnel comply, with all Regulations at all times when performing the Services, insofar as such Regulations apply to the Services.
- 17.1.2 Subject to Clause 20.1 (Dependencies) and 27.1 (Force Majeure Events), the Supplier shall ensure the Services are performed so that STA complies with all Regulations, to the extent STA's compliance with the Regulations is dependent on the Services.
- 17.1.3 Each of the Parties shall advise the other immediately it becomes aware of any non-compliance or suspected non-compliance by the Supplier with the provisions of Clause 17.1.1 or 17.1.2 in connection with the performance of the Services. If such an event occurs, the Supplier shall promptly make available to STA any information that STA reasonably requires for the purposes of any further investigation of such non-compliance or suspected non-compliance.
- 17.1.4 Subject to Clause 17.1.5, the Supplier shall:
- 17.1.4.1 provide to STA any information, reports or assistance requested by the Office of Qualifications and Examinations Regulation in the exercise of its powers under the Regulations, in an open and co-operative manner;
 - 17.1.4.2 in respect of a request labelled a "Request for Information" by STA, respond promptly and in any event within one Business Day from the Supplier's receipt of such request via email, telephone, letter or fax;

17.1.4.3 in respect of a request labelled a "Request for Justification" by STA, respond promptly and in any event within 3 Business Days from the Supplier's receipt of such request via email, telephone, letter or fax; and

17.1.4.4 in respect of a request labelled a "Request for Clarification/Understanding" by STA, respond promptly and in any event within 2 Business Days from the Supplier's receipt of such request via email, telephone, letter or fax,

and attend and report to a maximum of ten meetings with STA and its nominees (which may include the Office of Qualifications and Examinations Regulation) during each Test Cycle, to discuss any aspect of the Services (including any risks and issues that may lead to a significant failing in National Curriculum Assessment arrangements), as and when reasonably required by STA provided that the meetings referred to under this Clause 17.1.4 do not include those meetings referred to in Schedule 6 (Governance, Service Management and Performance Monitoring).

17.1.5 If the Supplier reasonably believes that compliance with a request under Clause 17.1.4 requires such analysis or effort that it is not possible to comply with the timelines set out in Clause 17.1.4, then the Supplier shall notify STA of the following matters within one Business Day of receipt of the relevant request:

17.1.5.1 the reason for the Supplier's inability to comply with the

17.1.5.2 request within the relevant timelines;

17.1.5.3 details of the work required to comply with the request; and

17.1.5.4 a proposed date by which the Supplier can comply with the request,

and the Supplier shall comply with the request as soon as possible and in any event within any extensions to timelines referred to in Clause 17.1.4 that have been granted by STA.

17.1.6 Unless otherwise requested in writing by STA, the Supplier shall provide all responses to the requests referred to in Clause 17.1.4 and Clause 17.1.5 to STA and not the Office of Qualifications and Examinations Regulation directly. However, if pursuant to the Regulations, the Office of the Qualifications and Examinations Regulation has contacted the Supplier directly to request information relating to this Agreement or the Services from the Supplier (such request being known as a "**Regulatory Request**"), then, unless it is expressly prevented from doing so by the Regulations or the Office of Qualifications and Examinations Regulation:

17.1.6.1 the Supplier shall immediately notify STA of such Regulatory Request and provide STA a copy of the correspondence relating to the Regulatory Request;

17.1.6.2 the Supplier shall consult with STA over the content of the Supplier's response to the Regulatory Request (to the extent reasonably practicable within any timelines imposed upon the Supplier by the Office of Qualifications and Examinations Regulation for compliance with the Regulatory Request); and

17.1.6.3 the Supplier shall, at the same time as providing its response to the Regulatory Request to the Office of Qualifications and Examinations Regulation, also provide STA with a copy of such response.

17.2 Correspondence

If the Supplier receives any correspondence from any regulatory authority (save to the extent in respect of: (i) corporation tax; or (ii) national insurance for employees of the Supplier) that relates to the Services, it shall immediately provide a copy of that correspondence to STA unless it is prevented from doing so by the Regulations or a regulatory authority. The Supplier shall give STA a reasonable

opportunity to discuss and make representations on the practical and written response to such correspondence, and shall only respond to the Regulatory Authority if:

- 17.2.1 the terms of the response have been approved by STA (such approval not to be unreasonably withheld or delayed); or
- 17.2.2 the Supplier is expressly required by Regulations to respond to the regulatory authority without STA's consent provided that as far as it is lawful to do so, the Supplier shall still make available a copy of the response to STA for sighting.

17.3 Changes to Regulations

- 17.3.1 If a change to any Regulation means a change to the Services or Charges is required (a "**Regulatory Change**"), the Supplier shall, subject to Clauses 17.3.2 and 17.3.3, make that Regulatory Change as soon as possible except where a Regulatory Change is also a Change in Law (in which case, the provisions of Clause 28.3 (Change in Law).
- 17.3.2 The Parties shall seek to agree the details and cost of the Regulatory Change in accordance with the Change Control Procedure.
- 17.3.3 If there is any disagreement between the Parties regarding any Regulatory Change or potential Regulatory Change:
 - 17.3.3.1 STA shall have the right to determine: (i) whether a Regulatory Change is required; and (ii) how the Supplier shall implement that Regulatory Change, in which case the Supplier shall promptly implement the Regulatory Change as determined by STA in accordance with this Clause 17.3.3.1; and
 - 17.3.3.2 STA shall pay to the Supplier the costs of implementing the Regulatory Change which shall be equivalent to the Supplier's reasonable costs, calculated on a Time and Materials Basis, save that if the Regulatory Change is carried out for other customers of the Supplier, STA shall only bear an equitable proportion of the Supplier's reasonable costs.

18. GOVERNANCE AND SERVICE MANAGEMENT

18.1 Service Management

The Supplier shall provide STA with the Management Information in accordance with Part 1 (Statement of Requirements) of Schedule 4 (Services) and this Agreement in general. Unless otherwise agreed Management Information shall be updated at the frequency and to the level of detail set out in Part 1 (Statement of Requirements) of Schedule 4 (Services) or in the Product Descriptions and shall be made available to STA via a web portal or through an agreed interface with STA's computer system.

18.2 Relationship Managers

The principal points of contact between STA and the Supplier in relation to issues arising out of this Agreement or the performance of the Services shall be the Relationship Managers. Each Party shall ensure that its Relationship Manager is authorised to make decisions in connection with this Agreement and enter into binding commitments in respect of such decisions on its behalf. Both Relationship Managers shall at all times act openly and transparently. Either Party may change the identity of its Relationship Manager at any time by written notice to the other.

18.3 Meetings of Relationship Managers

- 18.3.1 Each Party must, to the extent reasonably practicable, give the other at least 3 Business Days written notice of any matters which it wishes to discuss at the next Management Meeting.

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- 18.3.2 Within 15 Business Days of the start of every month following the Effective Date and during the Term, or at such other frequency as the Parties may agree, the Parties shall procure that their respective Relationship Managers meet (each such meeting a "**Management Meeting**") for the purposes set out in Meeting B1 at Annex B (Meetings) to Schedule 6 (Governance, Service Management and Performance Management).
- 18.3.3 The Relationship Managers shall use all reasonable endeavours to resolve any disputes escalated to the Management Meeting by either Party and where such escalations cannot be resolved by the Relationship Managers, they shall escalate any such issue to an Executive Sponsor Board Meeting as defined in Meeting B5 at Annex B (Meetings) to Schedule 6 (Governance, Service Management and Performance Management).
- 18.3.4 The Parties agree that meetings between the Parties pursuant to this Agreement shall be chaired and held in accordance with Schedule 6 (Governance, Service Management and Performance Management).
- 18.3.5 In the event of a major security alert or other major and urgent event impacting upon the Services, either Party shall be entitled to ask for a meeting between the Relationship Managers as soon as possible and the other Party shall comply with such request.

18.4 Operations Managers

The day-to-day point of contact between STA and the Supplier in relation to the performance of the Services shall be the respective Operations Managers of STA and the Supplier. The Operations Managers shall at all times act openly and transparently.

18.5 Meetings of the Operations Managers

- 18.5.1 The Parties shall procure that their respective Operations Managers meet (each such meeting a weekly or daily "**Operational Checkpoint Meeting**") for the purposes set out in Meeting B3 at Annex B (Meetings) of Schedule 6 (Governance, Service Management and Performance Management).
- 18.5.2 The Operations Managers shall use all reasonable endeavours to resolve any disputes escalated to the Operational Checkpoint Meeting by either Party and where such escalations cannot be resolved by the Operations Managers, they shall escalate any such issue to a Management Meeting.

19. **CONTINUOUS IMPROVEMENT, INNOVATION AND BENCHMARKING**

- 19.1 The Supplier agrees to provide year on year service improvements and innovation that increase the efficiency, effectiveness, quality and value-for-money of the Services throughout the Term.
- 19.2 For the avoidance of doubt, the completion of Set-Up by the Supplier shall not prevent the Supplier from proposing and implementing subsequent improvements to the Services pursuant to this Clause 19.
- 19.3 The Supplier shall continuously improve Operational Delivery throughout the Term in order to ensure that the delivery of the Services is optimised and where appropriate, matches international best practice in relation to the testing and assessment of a Pupil's level of development and attainment.
- 19.4 The introduction of innovations to and continuous improvements of Operational Delivery must be undertaken through a structured and planned approach agreed with STA provided that where the introduction of innovations and/or continuous improvements gives rise to a Change then the Change Control Procedure shall govern the implementation of such innovations and/or continuous improvements. Furthermore, such innovations and continuous improvements may be proposed at any time throughout the Term provided that regardless of when such innovations and/or continuous improvements are proposed STA shall have the sole and absolute right to decide when it shall progress such proposals.
- 19.5 Innovations must have a positive material impact on the method of Operational Delivery and will be expected to deliver tangible and measurable benefits in terms of:

- 19.5.1 improved value for money;
 - 19.5.2 improved efficiency and effectiveness;
 - 19.5.3 reduced burden on Schools;
 - 19.5.4 improved satisfaction of Schools and stakeholders;
 - 19.5.5 improved quality of marking; and
 - 19.5.6 reduction of risk to the delivery of the Services.
- 19.6 All proposals for innovation by the Supplier must be based on and substantiated by clear evidence of how each innovation will improve service quality and provide a detailed justification of the return on investment. No proposal for innovation will be considered by STA where such a proposal for innovation does not demonstrate a positive return on investment during the Term and propose a mechanism for measuring the achievement of the anticipated benefits of introducing the innovation.
- 19.7 Where net cost savings are achieved through the implementation of an improvement or innovation these will be shared on a 50/50 basis between the Supplier and STA where the proposal for improvement or innovation was initiated solely by the Supplier and for the avoidance of doubt, in calculating such net cost savings, the Supplier's verifiable costs incurred for the implementation of an improvement or innovation shall be deducted from the gross savings achieved.
- 19.8 Any net cost savings achieved through continuous improvement or innovation that was not initiated solely by the Supplier will be retained by STA alone.
- 19.9 STA has the sole and absolute right to reject any proposal for innovation by the Supplier irrespective of any anticipated net cost savings.
- 19.10 No proposal for innovation by the Supplier will be considered by STA that would have the effect of reducing any aspect of the quality of the Services.
- 19.11 The introduction of all innovations must be managed through the Change Control Procedure. With respect to continuous improvement, where the Supplier is of the view that a Change will or has occurred as a result of continuous improvement, the Supplier shall propose this to STA and where STA agrees that indeed a Change will or has occurred, then this will be managed through the Change Control Procedure.
- 19.12 **Benchmarking**
- The Parties shall comply with the provisions of Schedule 25 (Benchmarking) in relation to the benchmarking of any or all of the Services.
- 20. DEPENDENCIES**
- 20.1 The Parties acknowledge and agree that the proper performance of a particular Service depends on the Dependencies affecting that Service. Subject to the Supplier's compliance with the remaining provisions of this Clause 20:
- 20.1.1 the Supplier shall not be liable for any failure to achieve, or any delay in achieving, a Key Milestone to the extent that such failure to achieve, or delay in achieving, such Key Milestone arises directly from a failure or delay in any Key Dependency being met;
 - 20.1.2 the Supplier shall not be liable for any failure to perform, or any delay in performing, any of its other obligations under this Agreement (which are not obligations to achieve Key Milestones) to the extent that such failure to perform, or delay in performing, such obligations arises directly from a failure or delay in any Dependency being met; and

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- 20.1.3 in respect of any one event, the Supplier's compliance with its obligations under this Clause 20 shall alleviate it from its similar reporting and rectification obligations under Clauses 6 (Key Milestones) and 10.2 (Rectification).
- 20.2 The Supplier shall, if it is aware of, or ought reasonably to anticipate, a failure or delay in the Dependencies being fulfilled, notify STA of this fact immediately and in any event within three (3) Business Days of the date on which it became aware of, or ought reasonably to have anticipated such failure or delay. STA shall, if it is aware of a failure or delay in the Dependencies being fulfilled, notify the Supplier of the failure as soon as reasonably possible. Any notices given by the Supplier or STA under this Clause 20.2 shall expressly state that they are notices given under this Clause 20.2.
- 20.3 The Supplier shall ensure that any notice given pursuant to Clause 20.2 includes details of:
- 20.3.1 the possible impact of any failure or delay in the relevant Dependency being fulfilled on the Supplier's ability to perform the Services; and
- 20.3.2 the remedial steps that the Supplier proposes to take in order to mitigate the consequences (whether operational, financial or otherwise) of such failure or delay in the relevant Dependency being fulfilled, including any consequences that may impact the delivery of the Services in accordance with the Service Levels and including the taking of steps identified in the non-exhaustive list of remedial steps set out against the relevant Dependency, and STA shall, upon receipt of any notice given pursuant to Clause 20.2 either agree or reject the Supplier's proposals for remedial steps as set out in such Supplier's notice. If the Supplier does not receive a response that accepts or rejects the Supplier's remedial steps from STA within a reasonable timeframe (which shall not in any event exceed 3 Business Days), the Supplier shall escalate the matter in accordance with the Dispute Resolution Procedure.
- 20.4 If STA agrees the remedial steps as proposed by the Supplier in a notice issued by the Supplier under Clause 20.2 then the Supplier shall in accordance with Good Industry Practice carry out those remedial steps and the Parties agree that the Supplier shall be entitled to invoice STA as follows:
- 20.4.1 on a Time and Materials Basis for any direct, reasonable and verifiable costs that it incurs; and
- 20.4.2 for the relevant portion of reasonable overheads incurred and profits lost as shown by the content of the Open Book Data
- 20.4.3 as a result of the relevant Dependency not being met and/or in the performance of the agreed remedial steps.
- 20.5 Notwithstanding anything to the contrary in this Agreement, no Dependency shall in any event be deemed to be an obligation of STA. Save to the extent provided for in Clauses 20.1, 20.2, 20.4 and 20.6, the Supplier shall not have any remedy in respect of the non-fulfilment of any Dependency.
- 20.6 To the extent that the Supplier has failed to perform a Service by reason of a material failure or delay in any Dependency being fulfilled, the Supplier shall not be entitled to invoice STA for that Service in accordance with this Agreement provided that the Supplier shall perform that Service as soon as reasonably possible and be entitled to invoice STA for this following its performance of the Service.
- 20.7 The Supplier shall not be entitled to rely on any condition assumption or dependency to exclude or limit the Supplier's obligations or liabilities under this Agreement or by Law unless it is expressly set out in the Clauses of this Agreement or it is a Dependency set out in Part 2 (Dependencies) of Schedule 4 (Services).

21. PROTECTION OF DATA, FREEDOM OF INFORMATION AND TRANSPARENCY

21.1 Protection of Personal Data

- 21.1.1 The Parties acknowledge that for the purposes of the Data Protection Legislation, STA is the Controller and the Supplier is the Processor. The only processing that the Supplier is

authorised to do is listed in Schedule 26 (Authorised Processing Of Personal Data) by STA and may not be determined by the Supplier.

- 21.1.2 The Supplier shall notify STA immediately if it considers that any of STA's instructions infringe the Data Protection Legislation.
- 21.1.3 The Supplier shall provide all reasonable assistance to STA in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of STA, include:
 - 21.1.3.1 a systematic description of the envisaged processing operations and the purpose of the processing;
 - 21.1.3.2 an assessment of the necessity and proportionality of the processing operations in relation to the Services;
 - 21.1.3.3 an assessment of the risks to the rights and freedoms of Data Subjects; and
 - 21.1.3.4 the measures envisaged to address the risks to the rights and freedoms of Data Subjects, including safeguards, security measures and mechanisms to ensure the protection of Personal Data.
- 21.1.4 The Supplier shall, in relation to any Personal Data processed in connection with its obligations under this Agreement:
 - 21.1.4.1 process that Personal Data only in accordance with Schedule 26 (Authorised Processing Of Personal Data), unless the Supplier is required to do otherwise by Law. If it is so required the Supplier shall promptly notify STA before processing the Personal Data unless prohibited by Law from making such prior notification;
 - 21.1.4.2 ensure that it has in place Protective Measures, including the measures as are set out in Clause 26.1.3 (Disaster Recovery and Business Continuity), Schedule 12 (Security Policy) and Schedule 18 (Data, Software and Materials), which are appropriate to protect against a Data Loss Event, which STA may reasonably reject (but failure to reject shall not amount to approval by STA of the adequacy of the Protective Measures), having taken account of the:
 - (a) nature of the data to be protected;
 - (b) harm that might result from a Data Loss Event;
 - (c) state of technological development; and
 - (d) cost of implementing any measures;
 - 21.1.4.3 ensure that:
 - (a) the Supplier Personnel do not process Personal Data except in accordance with this Agreement (and in particular Schedule 26 (Authorised Processing of Personal Data));
 - (b) it takes all reasonable steps to ensure the reliability and integrity of any Supplier Personnel who have access to the Personal Data and ensure that they:
 - i. are aware of and comply with the Supplier's obligations under this Clause 21.1, Clauses 34 (Confidentiality) and 25.4 (Security);

- ii. are subject to appropriate confidentiality undertakings with the Supplier or any Sub-processor;
 - iii. are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third Party unless directed in writing to do so by STA or as otherwise permitted by this Agreement; and
 - iv. have undergone adequate training in the use, care, protection and handling of Personal Data;
- 21.1.4.4 not transfer Personal Data outside of the EU (or the United Kingdom where no longer part of the EU) unless the prior written consent of STA has been obtained and the following conditions are fulfilled and where such consent is given by STA, Schedule 26 (Authorised Processing of Personal Data) will be updated to reflect this:
- (a) STA or the Supplier has provided appropriate safeguards in relation to the transfer (whether in accordance with GDPR Article 46 or LED Article 37) as determined by STA;
 - (b) the Data Subject has enforceable rights and effective legal remedies in the place where Personal Data is to be transferred;
 - (c) the Supplier complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist STA in meeting its obligations); and
 - (d) the Supplier complies with any reasonable instructions notified to it in advance by STA with respect to the processing of the Personal Data.
- 21.1.4.5 at the written direction of STA, to delete or return Personal Data (and any copies of it) to STA on termination or expiry of the Agreement unless the Supplier is required by Law to retain the Personal Data.
- 21.1.5 Subject to Clause 21.1.6, the Supplier shall notify STA immediately if it:
- 21.1.5.1 receives a Data Subject Access Request (or purported Data Subject Access Request);
 - 21.1.5.2 receives a request to rectify, block or erase any Personal Data;
 - 21.1.5.3 receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Legislation;
 - 21.1.5.4 receives any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data processed under this Agreement;
 - 21.1.5.5 receives a request from any third Party for disclosure of Personal Data where compliance with such request is required or purported to be required by Law; or
 - 21.1.5.6 becomes aware of a Data Loss Event.
- 21.1.6 The Supplier's obligation to notify under Clause 21.1.5 shall include the provision of further information to STA in phases, as details become available.

- 21.1.7 Taking into account the nature of the processing, the Supplier shall provide STA with full assistance in relation to either Party's obligations under the Data Protection Legislation and any complaint, communication or request made under Clause 21.1.5 (and insofar as possible within the timescales reasonably required by STA) including by promptly providing:
- 21.1.7.1 STA with full details and copies of the complaint, communication or request;
 - 21.1.7.2 such assistance as is reasonably requested by STA to enable STA to comply with a Data Subject Access Request within the relevant timescales set out in the Data Protection Legislation;
 - 21.1.7.3 STA, at its request, with any Personal Data it holds in relation to a Data Subject;
 - 21.1.7.4 assistance as requested by STA following any Data Loss Event;
 - 21.1.7.5 assistance as requested by STA with respect to any request from the Information Commissioner's Office, or any consultation by STA with the Information Commissioner's Office.
- 21.1.8 The Supplier shall maintain complete and accurate records and information to demonstrate its compliance with this Clause 21.1.
- 21.1.9 The Supplier shall allow for audits of its Data Processing activity by STA or STA's designated auditor.
- 21.1.10 The Supplier shall designate a Data Protection Officer if required by the Data Protection Legislation.
- 21.1.11 Before allowing any Sub-processor to process any Personal Data related to this Agreement, the Supplier must:
- 21.1.11.1 notify STA in writing of the intended Sub-processor and processing;
 - 21.1.11.2 obtain the written consent of STA;
 - 21.1.11.3 enter into a written agreement with the Sub-processor which give effect to the terms set out in this Clause 21.1 such that they apply to the Sub-processor; and
 - 21.1.11.4 provide STA with such information regarding the Sub-processor as STA may reasonably require.
- 21.1.12 The Supplier shall remain fully liable for all acts or omissions of any Sub-processor.
- 21.1.13 The Supplier may, at any time on not less than 30 Business Days' notice, seek through the Change Control Procedure to revise this Clause by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme.
- 21.1.14 The Parties agree to take account of any guidance issued by the Information Commissioner's Office. STA may on not less than 30 Business Days' notice to the Supplier amend this Agreement to ensure that it complies with any guidance issued by the Information Commissioner's Office.

21.2 Freedom of Information

- 21.2.1 The Supplier acknowledges that STA is subject to the requirements of FOIA and the Environmental Information Regulations and shall assist and co-operate with STA to enable STA to comply with its Information disclosure obligations.
- 21.2.2 The Supplier shall and shall procure that its Subcontractors shall (at their own cost):
- 21.2.2.1 transfer to STA all FOIA/EIR Requests for Information related to this Agreement or the provision of the whole or any part of the Services immediately and, in any event, within 1 Business Day of receiving a FOIA/EIR Request for Information;
 - 21.2.2.2 provide STA with a copy of all Information in response to a FOIA/EIR Request for Information in its possession or power in the form that STA requires as soon as practicable and in any event within 10 Business Days (or such other period as STA may specify) of STA's request; and
 - 21.2.2.3 provide all necessary assistance as reasonably requested by STA to enable STA to respond to any FOIA/EIR Request for Information within the time for compliance set out in Section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.
- 21.3 STA shall have the final decision under this Agreement, as to whether any Information (whether held by or on behalf of STA or the Supplier) is exempt from disclosure in accordance with the provisions of FOIA or the Environmental Information Regulations. STA will use reasonable endeavours to notify the Supplier in advance of any disclosure and provide the Supplier with an opportunity to respond where such disclosure may involve the Supplier's Identified Confidential Information or trade secrets or commercially sensitive information. STA will take the contents of Schedule 21 (FOIA/Supplier's Identified Confidential Information) into consideration when making any decision to release Information under the provisions of the FOIA or the Environmental Information Regulations.
- 21.4 In no event shall the Supplier respond directly to a FOIA/EIR Request for Information unless expressly authorised to do so in writing by STA.
- 21.5 Subject to Clause 21.3, the Supplier acknowledges that STA may be obliged to disclose Information without consulting or obtaining consent from the Supplier, or despite having taken the Supplier's views into account.
- 21.6 The Supplier shall ensure that all Information is retained for disclosure in accordance with Clause 38 (Audit, Open Book Accounting and Documents) and shall permit STA to inspect such records as requested from time to time.
- 21.7 Transparency
- 21.7.1 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 Agreement is not Confidential Information and shall be made available to the public 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 (and/or any updates or replacement thereof) and the "Transparency Principles" referred to therein. STA shall determine whether any of the content of this Agreement is exempt from disclosure in accordance with the provisions of the FOIA. STA may consult with the Supplier to inform its decision regarding any redactions but shall have the final decision in its absolute discretion.
 - 21.7.2 Notwithstanding any other provision of this Agreement, the Supplier hereby gives its consent for STA to publish this Agreement in its entirety (but with any information which is exempt from disclosure in accordance with the provisions of the FOIA redacted), including any changes to this Agreement as agreed from time to time.
 - 21.7.3 The Supplier shall assist and cooperate with STA to enable STA to publish this Agreement.

21.7.4 Subject to any statutory or HM Government policy requirement on STA to publish or disclose any specific Identified Confidential Information pursuant to the HM Government transparency obligations and save for the publication of the annual Charges payable to the Supplier (which STA shall be entitled to publish) STA agrees that it shall use reasonable endeavours to not voluntarily publish any Identified Confidential Information.

22. COMPLAINTS

22.1 The Supplier shall deal with, and be responsible for, resolving complaints from any third party (including Schools) that directly relate to the Services (whether such complaints are received by the Supplier, its Subcontractors or STA) in accordance with Schedule 13 (Complaints Procedure) and STA's reasonable instructions. STA's complaints shall be dealt with and resolved at the meetings held pursuant to Clause 18 (Governance and Service Management) or Clause 37 (Governing Law, Dispute Resolution and Arbitration).

22.2 The Supplier shall immediately and in any case within one Business Day, inform STA in writing on receipt of a complaint from a third party (including a School) relating to the Services, the National Curriculum Assessments, STA or the Supplier, together with details of the complaint, the relevant surrounding circumstances and the Supplier's proposed resolution of the complaint.

22.3 Without prejudice to the importance of its obligations under this Agreement, the Supplier acknowledges that the courteous, efficient and effective handling of complaints from Schools is an important part of the Services and that the Supplier's failure to handle such complaints courteously, efficiently, effectively and in accordance with Schedule 13 (Complaints Procedure) may adversely affect STA's reputation and the reputation of the National Curriculum Assessments and each such failure to handle complaints courteously, efficiently and effectively by the Supplier shall count towards "a series of Defaults the combination of which is a Persistent Default" as explained in Clause 39.3.2.1 (Termination by STA— Default) for which STA shall have the right to terminate the Agreement pursuant to that same Clause.

23. PERSONNEL

23.1 General

23.1.1 The Supplier shall ensure that it provides an adequate number of suitably qualified, skilled and experienced Personnel who shall provide the Services with due care and skill and such adequate number of suitably qualified, skilled and experienced Personnel shall be made available by the Supplier to provide the Services throughout the Term notwithstanding the transfer of any of the existing Personnel under TUPE to STA or a Successor Operator before the end of the Term.

23.1.2 Except for those Markers who are identified in the Marker Register provided by STA during Set-Up, the Personnel shall be vetted by the Supplier in accordance with Schedule 12 (Security Policy).

23.1.3 The Supplier shall ensure that any dealings with Schools which occur in the course of providing the Services are effected in a professional and competent manner.

23.1.4 Save as necessitated by operation of law, the Personnel shall at all times remain the employees of the Supplier and shall not become employees of STA and any instruction issued by STA is issued to the Supplier and not directly to the Personnel.

23.2 Key Personnel

23.2.1 Schedule 6 (Governance, Service Management and Performance Management) contains the names of the Supplier's key employees engaged in the provision of the Services.

23.2.2 Without prejudice to its obligations under Clause 23.2.3, the Supplier shall notify STA prior to the Key Personnel being unable to devote the full time equivalent of their respective roles as agreed with STA and as set out in Schedule 6 in order to enable the Supplier discharge its obligations in accordance with the standards set out in this Agreement.

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- 23.2.3 Without prejudice to its obligations under Clause 23.2.2, if any of the Key Personnel ceases to, or shall cease to be, involved in the provision of the Services, then the Supplier shall promptly nominate another employee of the Supplier to act as one of the Key Personnel in place of that person. Prior to doing so, the Supplier shall:
 - 23.2.3.1 ensure the individual has the appropriate ability and qualifications;
 - 23.2.3.2 notify STA of its intention to appoint that individual and the terms of such appointment;
 - 23.2.3.3 introduce the individual to appropriate representatives of STA; and
 - 23.2.3.4 provide STA with such information about the individual as is reasonably requested by STA.
- 23.2.4 If STA reasonably objects in writing to the individual proposed under Clause 23.2.3, the Supplier shall not assign that individual to the position and shall promptly and in any case within five (5) Business Days, propose to STA another individual of suitable ability and qualifications.
- 23.2.5 If, during the Term, STA reasonably considers that any member of the Supplier's Key Personnel is not appropriately qualified or suitable to the delivery of the Services STA shall promptly notify the Supplier, and the Supplier shall promptly propose to STA, a substitute to the relevant individual (such substitute to be an individual of suitable ability and qualifications). The Parties shall agree a reasonable time period for transition of such Key Personnel.
- 23.2.6 All costs of training any replacement Supplier employee to act as Key Personnel, or other handover costs, shall be borne by the Supplier provided that and it is hereby agreed between the Parties that the Supplier alone shall manage and bear any liability or costs resulting from any claim brought by the Supplier's Personnel pursuant to STA's exercise of its right under Clauses 23.2.4 and 23.2.5.
- 23.3 Attrition of Supplier's employees
 - 23.3.1 Without limiting its other obligations under this Agreement, the Supplier shall, as requested by STA, provide comprehensive information as to the number of Supplier's employees currently engaged in the provision of the Services.
- 23.4 Onsite Personnel
 - 23.4.1 STA shall permit the Personnel to access STA Premises at reasonable times where such access is reasonably necessary to provide the Services and (unless otherwise agreed in writing by the Parties) the Supplier has requested such access on not less than 5 Business days' prior notice in writing.
 - 23.4.2 The Personnel shall comply with STA's health and safety and security procedures while on STA Premises and shall produce suitable identification on request. STA reserves the right to remove any Personnel from STA Premises if they fail to comply with these requirements.
- 23.5 Removal of Personnel

The Supplier shall immediately remove any Personnel from the provision of the Services where such Personnel are involved in any instances of:

 - 23.5.1 fraud;
 - 23.5.2 gross misconduct (which shall include conduct resulting in them being removed from STA Premises under Clause 23.4.2);

23.5.3 gross negligence or gross incompetence; or

23.5.4 breaches of confidentiality or security.

provided that and it is hereby agreed between the Parties that the Supplier alone shall manage and bear any liability and/or cost resulting from any claim brought by the Supplier's Personnel pursuant to any action carried out by the Supplier under this Clause 23.

23.6 Solicitation of Employees

23.6.1 Except as expressly permitted by this Agreement, neither Party shall (without the written consent of the other Party) at any time during the Term and for a period of one year following expiry or termination of this Agreement:

23.6.1.1 solicit or endeavour to entice away from, or discourage from being employed or hired by the other Party, any person who is at that time, or was at any time in the previous six months, an employee of the other Party engaged with the delivery of the Services; and

23.6.1.2 employ (except where such employment is effected in connection with the operation of TUPE) or attempt to employ, or hire or attempt to hire, the services of (as consultants or otherwise) any person who is at that time, or was at any time in the previous 6 months, an employee of the other Party engaged with the delivery of the Services.

23.6.2 Each of Clauses 23.6.1.1 and 23.6.1.2 shall be taken to constitute a separate obligation and shall be construed independently of each other.

23.6.3 The restrictions in this Clause 23.6 shall:

23.6.3.1 not apply to a Party if a person who is or was an employee of the other Party is employed as a result of a response by that person to a public advertisement; and

23.6.3.2 cease to apply to STA if it serves a Termination Notice pursuant to Clause 39.3 (Termination by STA – Default).

23.7 Use of Apprentices

The Supplier shall comply with the provisions of Schedule 23 (Apprenticeship and Skills Requirements).

24. EQUALITY AND DIVERSITY

24.1 The Supplier shall have a written policy outlining its position, rules and procedures in relation to issues of equality and diversity (Supplier's Equality and Diversity policy) with demonstrable impact and outcome, that complies with Clause 24.2 or shall sign a statement confirming adoption of STA's Equality and Diversity policy for the duration of the Term. The Supplier shall upon request by STA, issue a signed statement to the effect that it has and operates the Supplier's Equality and Diversity policy or confirm to STA that it has adopted STA's Equality and Diversity policy.

24.2 The Supplier's Equality and Diversity policy shall relate to all forms of unlawful discrimination which is prohibited under Article 14 of the European Convention on Human Rights and the Equality Act 2010.

24.3 The Supplier with regard to itself shall ensure and with regard to its Subcontractors shall use its best endeavours to ensure that, in carrying out its obligations under this Agreement, neither it nor any of its Subcontractors commits or incites another to commit an act of discrimination rendered unlawful, or any act of discrimination which if committed by STA would be rendered unlawful, by the Equality Act 2010 or the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 or

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the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 or the Human Rights Act 1998.

24.4 The Supplier shall ensure that it and its Subcontractors perform their obligations under this Agreement in a manner which enables STA to comply and to demonstrate compliance with the general public duty imposed on STA under the Equality Act 2010. In particular, but without prejudice to the generality of the foregoing, the Supplier shall, subject to Clause 24.5:

24.4.1 comply with all reasonable policies developed by STA with regard to compliance with the duties imposed on STA by and under the Equality Act 2010 as are relevant to the provision of the Services and as are amended and notified to the Supplier by STA from time to time;

24.4.2 comply with all reasonable directions from STA with regard to the provision of the Services in accordance with the Equality Act 2010;

24.4.3 collect and supply to STA such data and other information as STA may reasonably request with a view to ensuring and demonstrating compliance with the Equality Act 2010; and

24.4.4 provide all reasonable assistance, and consultation and liaison with STA with regard to any assessment of the impact on and relevance to the provision of the Services of the duties imposed by the Equality Act 2010 and the development or modification of the Equality Act 2010 policies relevant to the provision of the Services.

24.5 Where:

24.5.1 any requirement imposed on the Supplier under this Clause 24 to comply with the Equality Act 2010 or other legislation referred to in this Clause 24 constitutes an addition or alteration to the policies and requirements specified in this Agreement; and

24.5.2 STA is satisfied that in complying with that requirement the Supplier will incur expenditure significantly additional to that which would otherwise be incurred by the Supplier in complying with the Regulations in general,

such requirement shall be incorporated into this Agreement through the Change Control Procedure. Prior to any such Change taking effect, the Supplier shall use all reasonable endeavours to comply with the requirement.

25. SYSTEM

25.1 System Development Acceptance Testing

25.1.1 Without prejudice to Clause 25.1.7, when the Supplier has completed the creation and development and or modification of any System for the purpose of Service delivery pursuant to this Agreement, the Supplier shall conduct such tests as are described in the agreed Product Description for such a System. When such testing is completed, the Supplier shall give STA 5 Business Days' notice that the tests required to demonstrate the System meets the requirements set out in the agreed Product Description or any Product Description identified in a PID under Set-Up (the "**System Development Acceptance Tests**") shall take place and permit STA to witness such System Development Acceptance Tests. Without prejudice to the foregoing, the Supplier shall, at the same time as it provides such notice to STA that the System Development Acceptance Tests shall take place, also provide STA with all reasonable assistance and information that STA may require to complete any test assurance checklists used by STA to provide internal assurance to STA around the System Development Acceptance Tests.

25.1.2 The System Development Acceptance Tests shall be carried out in a test environment. STA and its nominees (which may include the Office of Qualifications and Examinations Regulation), shall be entitled to attend the System Development Acceptance Tests and shall be provided with such assistance, data and information as are reasonably necessary to determine whether the System Development Acceptance Tests have been carried out properly.

- 25.1.3 If, following the testing conducted pursuant to Clauses 25.1.1 and 25.1.2 (System Development Acceptance Testing), STA reasonably considers that:
- 25.1.3.1 the System Development Acceptance Tests have been passed;
 - 25.1.3.2 the System does not exhibit, and will not exhibit when put into production, any material faults;
 - 25.1.3.3 the System meets (and will meet when put into production) the STA requirements as set out in the agreed Product Description; and
 - 25.1.3.4 the training materials relevant to the System have been developed in accordance with Good Industry Practice and are sufficient to enable the Supplier to conduct its training obligations pursuant to the Statement of Requirements it shall promptly and within 10 Business Days following the relevant test notify the Supplier accordingly ("**System Development Acceptance**");
- 25.1.4 Notification by STA of System Development Acceptance shall be subject to Clauses 1.15 and 1.16 (Definitions and Interpretation).
- 25.1.5 If, following the System Development Acceptance Testing, STA does not believe that the criteria set out in Clause 25.1.3 have been met, it shall inform the Supplier of this fact within 10 Business Days following the relevant test, giving reasons.
- 25.1.6 On receipt of such information under Clause 25.1.5, the Supplier shall, at its own cost, work to cure the relevant defects as soon as possible and shall re-submit the System for further System Development Acceptance Testing in accordance with Clause 25.1 (System Development Acceptance Testing). For the avoidance of doubt and subject to Clause 25.1.8, this process shall be repeated until System Development Acceptance is notified by STA in accordance with Clause 25.1.3. This is subject to the proviso that, without in any way limiting STA's rights under Clauses 4.1 and 4.2 (Set-Up), where STA is unable to grant System Development Acceptance in respect of any one System on 3 (three) consecutive occasions, this shall be deemed as a material Default on the part of the Supplier. In such circumstances STA shall have the right to terminate this Agreement in accordance with Clause 39.3.2.1 (Termination by STA – Default), except where:
- 25.1.6.1 the previous version of such System has been granted System Development Acceptance by STA;
 - 25.1.6.2 the Supplier demonstrates to STA's reasonable satisfaction that it is technically feasible to continue to use or revert to such previous version whilst continuing to comply with the Supplier's obligations under this Agreement; and
 - 25.1.6.3 STA is satisfied, acting reasonably, that use of such previous version will not adversely affect the operation of the Services or the Tests, nor the discharge of STA's statutory obligations
- in which case the Supplier shall, upon notice in writing given by STA, continue to use or revert to such previous version, pending achievement of System Development Acceptance or other agreed remedial action.
- 25.1.7 The Parties hereby agree that the Supplier shall develop the System in accordance with Good Industry Practice, in a transparent way and the Supplier shall provide on demand by STA:
- 25.1.7.1 access to or copies of all relevant documentation within 5 Business Days of STA notification;
 - 25.1.7.2 demonstrations and on-site visits to allow STA to perform reasonable assessments and inspections of the Supplier's System development

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activity and testing practices and for STA to test the System and the Software at various stages of development; and

25.1.7.3 any information regarding analysis, design, development, information security, testing and post-testing activities required by STA within 5 Business Days of notification by STA,

in order that STA may satisfy itself that the Supplier is developing the System in accordance with the requirements set out in the agreed Product Description.

25.1.8 Late System Development Acceptance (Set-Up)

25.1.8.1 If System Development Acceptance has not occurred by or before the time and date specified in Clause 4.1 (Set-Up) then the provisions of Clause 4.1 shall apply.

25.1.9 For the avoidance of doubt, with regard to System Development Acceptance under this Clause 25.1, Clause 7(Acceptance) shall not apply.

25.2 Capacity, Compatibility and Interoperability

25.2.1 The Supplier shall ensure that at all times the System has adequate capability, capacity and availability for all the processing and other functions necessary for the performance of the Services in accordance with this Agreement, including compliance with the Regulations.

25.2.2 The Supplier shall maintain, at its own cost, all required authorisations and licences in respect of the System.

25.2.3 The Supplier shall ensure that the System and the Software are compatible and shall interoperate with the specifications for STA and specified STA Service Providers (as agreed by STA in the Product Descriptions) information technology systems (as amended and updated by STA from time to time through a CAN), the current version of which such specifications is set out in Schedule 3 (Data Exchange Standards).

25.3 Technology Refresh

25.3.1 Without limiting any of its other obligations under this Agreement and subject to Clause 25.3.2, the Supplier shall:

25.3.1.1 keep the System (including code such as firmware used to support hardware forming part of the System) throughout the Term maintained, updated and/or replaced (as appropriate) at no additional cost to STA so that:

- (a) each element of the Software remains under appropriate support arrangements provided or authorised by the owner of the Intellectual Property Rights therein throughout the Term;
- (b) each element of the hardware forming part of the System remains under appropriate support arrangements throughout the Term; and
- (c) the risk of regular failure due to age during the Term is minimised to reasonably acceptable levels in view of the nature of the asset, the age related failure risk profile of the asset and in line with Good Industry Practice;

25.3.1.2 ensure that:

- (a) the Personnel engaged in maintaining and developing the System remain knowledgeable of developments and advancements in

information technology and methods of delivering services similar to the Services both in general and with regard to information technology; and

- (b) any computer hardware used or incorporated from time to time within the System for the purposes of, or in connection with, the performance of the Services is capable of executing (at a reasonable standard of usability) the current versions of the Software being used on the System and satisfies any minimum system requirements for such Software.

25.3.2 The Supplier shall provide STA with advance notice of any proposed upgrade to the System and, where that proposed upgrade might affect the provision of the Services, obtain STA's prior written consent to the upgrade and agree the implementation of it in accordance with the Change Control Procedure. For the avoidance of doubt, the Supplier shall solely bear the cost of any such upgrade.

25.4 Security

25.4.1 Without limiting any of its other obligations under this Agreement, the Supplier shall:

25.4.1.1 comply with, and procure that Subcontractors and Markers comply with the relevant aspects of, the HMG Policy Framework 2014 as set out in Schedule 12 (Security Policy);

25.4.1.2 introduce and maintain all appropriate technical and organisational measures to ensure that National Curriculum Assessments Materials and STA Data are kept confidential and secure at all times as agreed with STA from time to time;

25.4.1.3 not, and shall procure that the Subcontractors and Markers shall not, disclose live National Curriculum Assessments Materials to any third parties without STA's prior written consent;

25.4.1.4 ensure that STA Data in electronic form is kept logically separate from the data of any of the Supplier's other customers;

25.4.1.5 ensure that STA Data which is not in electronic form is kept physically separate from the data of the Supplier and any of the Supplier's other customers; and

25.4.1.6 not supply services to other persons from any part of STA Premises.

25.4.2 The Supplier shall not knowingly, negligently or intentionally introduce a Virus into the System and shall take precautions in accordance with Good Industry Practice designed to prevent:

25.4.2.1 any Virus from being introduced into the System or the networks and systems of STA, including ensuring that Virus protection software is used at all times and kept up-to-date;

25.4.2.2 unauthorised access to the locations from where the Services are provided; and

25.4.2.3 unauthorised access or use of the System, STA Data or the networks and systems of STA.

25.4.3 The Supplier shall notify STA promptly and in any event within 24 hours should any of the events against which precautions must be taken in accordance with Clause 25.4.2 occur, and shall promptly take all steps necessary to remedy the event and prevent its reoccurrence.

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- 25.4.4 The Supplier shall, and shall procure that its Subcontractors shall, co-operate with any security audit or investigation which is carried out by or on behalf of STA including providing access, information or material in its possession or control and implementing new security measures. STA shall not carry out routine security audits or investigations at the same Supplier or Subcontractor site more than twice in any Contract Year, unless STA solely and absolutely having the right to determine this and acting reasonably believes that there has been, or is likely to be, a breach of this Clause 25.4.
- 25.4.5 The Supplier shall prepare a security document in accordance with the requirements listed in the HMG Policy Framework April 2014 to support the build and recovery process related to the System (hereinafter in this Clause 25 the "**Security Document**"). The Security Document shall be prepared prior to the conduct of the first System Development Acceptance Tests required under this Clause 25, and it shall be updated prior to any subsequent System Development Acceptance Tests for newly-developed Systems or for significant modifications to the Systems. The Security Document shall be owned only by the Supplier and made available to STA's nominated subject matter expert (such subject matter expert shall either be a member of STA's staff or a contractor of STA agreed by the Parties (such agreement not to be unreasonably withheld or delayed)) to inspect (upon reasonable request) once following the Effective Date and once following each change that has an impact on the Security Document, on the Supplier's premises and during the Supplier's normal business hours. The Supplier shall ensure that this Security Document includes:
- 25.4.5.1 Operating System: a detailed outline of the operating system level security implemented by the Supplier, including group policies, lightweight directory access protocol configurations, domain and user accounts and related access permissions;
- 25.4.5.2 Database: confirmation of the base security requirements that the Supplier adhered to for any database or data source used in connection with the Website, including in respect of connectivity e.g. virtual private network connections for data transformation services/SQL server integration services packages. The Security Document provided by the Supplier must detail any key administration credentials required for system build or recovery; and
- 25.4.5.3 Application: a detailed account of security aspects specific to the System, including administrator or specific end-user credentials, Secured Socket Layer (SSL) certificate details, domain/sub-domain configuration and any additional security layers.
- 25.4.6 The Supplier shall indemnify and hold harmless STA against each loss, liability, damage and cost arising as a result of a breach of its obligations under this Clause 25.4. STA shall take reasonable steps to mitigate any loss, liability, damage and cost which it claims from the Supplier under this Clause 25.4.
- 25.4.7 Any breach of the HMG Policy Framework April 2014 by the Supplier shall be deemed to be a material Default.
- 25.5 Back Up
- 25.5.1 Without prejudice to the Supplier's obligations under Clause 21 (Protection of Data, Freedom of Information and Transparency), the Supplier shall ensure that backup copies of STA Data held in electronic form are taken in as agreed with STA during Set-Up, written to disc and kept in a secure physical location separate from the primary copy of STA Data until the expiry or termination of this Agreement and for a period of 6 months thereafter.
- 25.5.2 Without prejudice to the Service Levels or to any other provision of this Agreement, the Supplier shall:
- 25.5.2.1 restore or recreate any STA Data that has been lost, corrupted or destroyed as a result of any Default by the Supplier where it either has a

backup copy of the underlying data or has a copy of the underlying data in its possession or control (including data in the possession or control of its Subcontractors or the Markers);

25.5.2.2 where possible, restore or recreate any STA Data that has been lost, corrupted or destroyed as a result of any Default by the Supplier where it ought to have retained a backup copy or other record of the underlying data in accordance with its obligations under this Agreement, but has failed to comply with such obligations; and

25.5.2.3 to the extent reasonably practicable, restore or recreate any STA Data that has been lost, corrupted or destroyed as a result of any Default by the Supplier where neither of the circumstances in Clause 25.5.2.1 or Clause 25.5.2.2 apply.

Such restoration or recreation under this Clause 25.5.2 shall be carried out promptly by the Supplier and at the Supplier's own cost. The provisions of this Clause 25.5.2 are in addition to, and shall be without prejudice, to any other right or remedy of STA under this Agreement or otherwise.

26. DISASTER RECOVERY AND BUSINESS CONTINUITY

26.1 The Supplier undertakes that it has, at the Effective Date, and shall continue to have in place for the Term, an up-to-date disaster recovery and business continuity plan ("**Business Continuity Plan**"):

26.1.1 based on the draft Business Continuity Plan set out in Schedule 11 (Business Continuity Plan), but without prejudice to the remaining provisions of this Clause 26.1 and to the provisions of Clause 26.2.1;

26.1.2 in accordance with the minimum standards prescribed from time to time by any Regulatory Authority;

26.1.3 that is aligned with STA's disaster recovery and business continuity plans to the extent such plans have been notified to the Supplier and to the extent they relate to the Services, events that could affect the Services or failures in the Services (the "**STA Recovery Plans**");

26.1.4 that set out clearly the conditions and circumstances under which the Business Continuity Plan will be invoked outlining both:

26.1.4.1 the system recovery procedures to be followed in the event of a major system failure, including suitable redundancy and fall-over contingencies; and

26.1.4.2 the alternative processes (including business processes) that the Supplier shall adopt in the event of disruption to the Services;

26.1.5 that is designed to prevent any loss of data prior to the date on which any disruption occurs to a maximum of 4 hours before the time of the last successfully completed transaction prior to the disruption occurring;

26.1.6 that is designed to ensure that the Supplier's systems are recovered within a maximum of 24 hours;

26.1.7 based (in addition to any other risk profiles that the Supplier shall develop in accordance with Good Industry Practice) upon any risk profiles developed;

26.1.8 addressing the various possible levels of failure or disruptions to services, and the steps taken to remedy the different levels of failure and disruption;

- 26.1.9 highlighting key contacts that the Supplier must inform in the event of a failure or disaster, along with detailed recovery instructions, locations of any STA Data or other data to be restored and any media or software;
- 26.1.10 outlining the steps to be taken by the Supplier upon resumption of Services, such steps being designed to address any residual effect of the disruption (including a root cause analysis); and
- 26.1.11 designed to ensure that the STA Security Requirements continue to be adhered to when such Business Continuity Plan is invoked; and
- 26.1.12 without limiting the generality of the foregoing, in accordance with Good Industry Practice, provided that if any changes either: (a) to the minimum standards prescribed under Clause 26.1.2; or (b) to STA's disaster recovery and business continuity plans in Clause 26.1.3 occur after the Effective Date then any related changes to the Business Continuity Plan shall be agreed through the Change Control Procedure.

26.2 The Supplier shall:

26.2.1 provide STA, during Set-Up, with a copy of the Business Continuity Plan for STA's review and approval. Following STA notifying the Supplier of the results of this review, the Supplier shall within 5 Business Days amend the Business Continuity Plan in accordance with any recommendations made by STA (provided such recommendations are not inconsistent with the criteria set out in Clause 26.1 and shall resubmit the Business Continuity Plan to STA for STA's further review and approval. The Supplier shall in addition to providing STA with a copy of the Business Continuity Plan during Set-Up shall:

- 26.2.1.1 annually during the Term;
- 26.2.1.2 in the event of any material change to the System, the supporting infrastructure to the Services or underlying business processes;
- 26.2.1.3 after any invocation of the Business Continuity Plan; and
- 26.2.1.4 on request from STA from time to time,

review and update, and provide STA with a copy of: (a) the revised Business Continuity Plan (including the risk analysis upon which such plans are based); and (b) a report summarising the findings of the Supplier's review of the Business Continuity Plan, any changes in the risk profile of the Services and the Supplier's proposals for addressing the changes in such risk profile (including any proposed impact on the Services, Charges and Operational Delivery Plan) for STA's review. Following STA's review of such revised Business Continuity Plan and/or report, the Supplier shall amend the Business Continuity Plan in accordance with the recommendations by STA that are reasonably required to ensure continuity of the Services and compliance with Clause 26.1; and

26.2.2 not make any material changes to the Business Continuity Plan without STA's prior written approval. For the avoidance of doubt, it shall be considered a material Default by the Supplier where a Business Continuity Plan has not been submitted by the Supplier and approved by STA within 3 months of the respective dates of any of the events listed in Clause 26.2.1 or such other time period as may be agreed by STA in writing.

26.3 The Supplier shall test the Business Continuity Plan to ensure its effectiveness:

- 26.3.1 upon approval of the Business Continuity Plan by STA pursuant to Clause 26.2; and
- 26.3.2 when STA requests such a test on not less than 5 Business Days' notice in writing, provided that STA shall not require the Supplier to undertake more than two tests whether of any or all of the elements of the Business Continuity Plan in a Contract Year provided that such testing is not to take place during the period from April to August.

- 26.4 STA shall be invited to participate in and attend such tests and shall be given all information and co-operation as may be reasonably requested in order to enable it to monitor such tests, including access to premises, locations and Systems from which the Services are provided (or from which the Services will be provided in the event of a disaster), the results of any such testing and details of the steps taken to remedy any shortcomings or failings in the Business Continuity Plan identified as part of such testing. The Supplier shall provide to STA, the results of any test undertaken in accordance with Clause 26.3 within 5 Business Days of such test having been completed. Until one such test shows no material shortcomings or failings, additional tests carried out under Clause 26.3 following a failed test (and for the avoidance of doubt, the successful test itself) shall not count among the number of tests allowed in any Contract Year. The Parties may vary the requirements of Clause 26.1 from time to time through the Change Control Procedure.
- 26.5 The Supplier shall provide a copy of the then current Business Continuity Plan to STA on request from time to time.
- 26.6 Should a disaster or any other event envisaged in the Business Continuity Plan occur, the Supplier shall immediately notify STA and:
- 26.6.1 implement the Business Continuity Plan as expeditiously as possible in the circumstances; and
- 26.6.2 assist STA in implementing the STA Recovery Plans.
- 26.7 In carrying out Clauses 26.6.1 and 26.6.2, the Supplier shall not treat STA any less favourably than any other customer of the Supplier.
- 26.8 Within 30 Business Days after the Business Continuity Plan has been invoked, the Supplier shall review the Business Continuity Plan to ensure that it was effective, remedy any deficiencies in the Business Continuity Plan (including in accordance with the STA's reasonable requirements), update the Business Continuity Plan accordingly and present the updated Business Continuity Plan to STA for review in accordance with Clause 26.2.2.

27. **FORCE MAJEURE**

27.1 Force Majeure Events

Neither Party shall be liable to the other for its failure to comply with its obligations to the extent that its compliance with its obligations is prevented by any Force Majeure Event, provided that the Party relying on the Force Majeure Event (the "**Affected Party**"):

- 27.1.1 gives written notice to the other Party (the "**Other Party**") immediately and in any case within one Business Day of becoming aware that the Force Majeure Event has occurred, or is likely to occur, and such notice shall contain the following information:
- 27.1.1.1 details of the Force Majeure Event;
- 27.1.1.2 the date from which the Force Majeure Event has prevented or hindered, or will prevent or hinder, the Affected Party in the performance of its obligations hereunder;
- 27.1.1.3 its obligations hereunder so affected; and
- 27.1.1.4 its best estimate of the date upon which it shall be able to resume performance of its affected obligations hereunder;
- 27.1.2 in the case of the Supplier, continues at all times to take steps in accordance with Good Industry Practice, and uses its best endeavours, to resume full performance of its obligations under this Agreement;
- 27.1.3 in the case of STA, uses its best endeavours to resume full performance of its obligations under this Agreement;

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27.1.4 provides at reasonable intervals (such intervals to be of a period no longer than 5 Business Days) updated information to the other Party on the status of the Force Majeure Event and the steps taken to resume full performance of its obligations; and

27.1.5 uses its best endeavours to mitigate the consequences of the Force Majeure Event.

27.2 Contingency Plans

Notwithstanding anything to the contrary in this Agreement (including in Clause 27.1), the Supplier shall not be able to rely on a Force Majeure Event to excuse itself from liability for any failure to perform its obligations under this Agreement to the extent such failure results from the Supplier's non-compliance with Clause 26 (Disaster Recovery and Business Continuity) (unless such non-compliance itself has directly resulted from the Force Majeure Event in respect of which the Supplier has fulfilled its obligations under Clause 27.1).

27.3 Financial Consequences

Notwithstanding anything to the contrary in this Agreement, to the extent the provision of the Services or part thereof is prevented or materially affected by a Force Majeure Event, STA's obligation to pay the Charges shall accordingly be reduced by an equitable amount (which in the case of:

27.3.1 delay to the timelines for delivering a Product, would be the delay of payment for that Product until it has been completed; and

27.3.2 in the case of failure to deliver ongoing services for a period, would be a reduction of an amount equal to the total Charges for those services for that period).

27.4 Termination

Where either Party is unable in accordance with this Clause 27 to perform any of its obligations under this Agreement for a continuous period of 90 days, then:

27.4.1 where the Supplier is the Affected Party, STA may, at any time thereafter, and provided that performance or punctual performance by the Supplier of any of its obligations under this Agreement still subsists, by issuing a Termination Notice to the Supplier, terminate this Agreement as a whole or in part; or

27.4.2 where STA is the Affected Party, the Supplier may, at any time thereafter, by issuing a Termination Notice to STA, terminate any of the Services that are materially impacted by the Force Majeure Event.

27.5 Boycott

Boycott is not a Force Majeure Event under this Agreement. In the event of any Boycott (and without prejudice to STA's other rights and remedies), the Supplier shall continue to provide the Services and:

27.5.1 STA shall be entitled to reduce the volume of the Services; and

27.5.2 in which case, notwithstanding any other provision of this Agreement, the Charges shall be adjusted in accordance with the provisions relating to re-pricing on the occurrence of any Boycott at paragraph 2.1.5 of Part 1 (Payment and Pricing) of Schedule 7 (Financial Matters) in order to reflect such reduction in volume.

27.6 For the avoidance of doubt, industrial action other than Boycott shall constitute a Force Majeure Event as defined in this Agreement.

28. CHANGE

Where:

28.1 Either Party wishes to make a change to this Agreement or any document agreed pursuant to the terms of this Agreement, including but not limited to:

28.1.1 the addition of new services or Dependencies or the modification of existing services or Dependencies;

28.1.2 the addition of new Service Levels or modification of existing Service Levels;

28.1.3 where after Partial Termination of the Agreement for STA's convenience, STA wishes to continue to receive those Services that have not been terminated; or

28.1.4 where the Supplier expresses to STA that it wishes to make a change to the way in which the Services, or any part of them, are delivered particularly where such change would alter the end user experience of Schools, STA or other stakeholders in any way,

28.1.5 (each a "Change"), then the provisions of Schedule 8 (Change Control Procedure) shall apply in respect of that Change. All Changes must be made in accordance with the provisions of Schedule 8 (Change Control Procedure).

28.2 Any variations to the Charges to be made as a result of the relevant Change shall be subject to the following:

28.2.1 any increase in the Charges must be no greater than the direct, reasonable and verifiable costs of implementing the Change (which in the case of the Supplier shall be calculated on a Time and Materials Basis together with the relevant portion of reasonable overheads incurred and profits lost as shown by the content of the Open Book Data) and once calculated such increase in the Charges must be stated on the CAN as a maximum fixed or capped price for implementing the Change;

28.2.2 if the Change shall result in a decrease in the cost of providing the Services or other financial benefit to the Supplier, the Charges shall be reduced by an equitable amount;

28.2.3 if the Change is carried out for other customers of the Supplier, STA shall only bear an equitable proportion of the Supplier's cost; and

28.2.4 any variation must be fair and reasonable and be supported by appropriate evidence.

28.3 Change in Law

28.3.1 The Supplier shall neither be relieved of its obligations to supply the Services in accordance with the terms and conditions of this Agreement nor be entitled to an increase in the Charges as the result of:

28.3.1.1 a General Change in Law; or

28.3.1.2 a Specific Change in Law where the effect of that Specific Change in Law on the Services is reasonably foreseeable at the Effective Date.

28.3.2 If a Specific Change in Law occurs or will occur during the Term (other than as referred to in Clause 28.3.1.2), the Supplier shall:

28.3.2.1 notify STA as soon as reasonably practicable of the likely effects of that change, including:

(a) whether any change is required to the Services, the Charges or this Agreement; and

(b) whether any relief from compliance with the Supplier's obligations is required, including any obligation to achieve a Key Milestone and/or to meet the Service Levels; and

- 28.3.2.2 provide STA with evidence:
- (a) that the Supplier has minimised any increase in costs or maximised any reduction in costs, including in respect of the costs of its Subcontractors;
 - (b) as to how the Specific Change in Law has affected the cost of providing the Services; and
 - (c) demonstrating that any expenditure that has been avoided, for example which would have been required under the provisions of Clause 19 (Continuous Improvement, Innovation and Benchmarking), has been taken into account in amending the Charges.

28.3.2.3 Any variation in the Charges or relief from the Supplier's obligations resulting from a Specific Change in Law (other than as referred to in Clause 28.3.1.2) shall be implemented in accordance with the Change Control Procedure.

29. FURTHER ASSURANCES

29.1 Each Party undertakes at the request of the other and at its own cost, save where expressly stated to the contrary in this Agreement, to do all acts and execute all documents which may be necessary to give effect to this Agreement.

30. ESCROW

30.1 The Supplier shall ensure that the following items as set out in Clauses 30.1.1 to 30.1.3 below are, by 23:59 on the 31st of August 2019, given to STA's chosen escrow provider NCC Group Escrow Limited, or such other reputable provider of escrow services operating in the United Kingdom as STA shall select ("Escrow Provider"), to be placed in escrow:

30.1.1 all Supplier Software together with the relevant Source Codes and associated documentation, including documentation that fully documents and explains the configuration of the Software as part of the System such that a reasonably skilled programmer or analyst would be able to understand, recreate, maintain, modify and correct such configuration ("**Configuration Documentation**") (together, "**Supplier Software Materials**"); and

30.1.2 all Third Party Software, except for COTS Third Party Software and OSS, together with the relevant Source Code and associated documentation, and Configuration Documentation for all Third Party Software (including for COTS Third Party Software and OSS) (together, "Third Party Software Materials");

30.1.3 Novation agreements of:

30.1.3.1 each Supplier Agreement, such novation agreements to be in a form approved by STA and which:

- (a) shall have the effect of STA replacing the Supplier as a party to the Supplier Agreement; and
- (b) shall expressly state that the novation shall not come into operation until STA shall so elect by giving notice of such election to the parties thereto on or after the applicable trigger events referred to in Clause 30.5

together with the relevant Supplier Agreements; and

30.1.3.2 each Key Subcontractor Supplier Agreement, such novation agreements to be in a form approved by STA and which:

- (a) shall have the effect of STA replacing the Key Subcontractor as a party to the Key Subcontractor Supplier Agreement; and
- (b) shall expressly state that the novation shall not come into operation until STA shall so elect by giving notice of such election to the parties thereto on or after the applicable trigger events referred to in Clause 30.5, provided that STA agrees that it shall not make such an election unless and until the Supplier Agreement to which a Key Subcontractor Supplier Agreement relates as identified in Schedule 15 (Key Subcontractors) is terminated for breach or an Insolvency Event or for any other reason equivalent to those set out in Clause 39.3 (Termination by STA – Default)

together with the relevant Key Subcontractor Supplier Agreements;

(together, the novation agreements referred to in Clauses 30.1.3.1 and 30.1.3.2 shall be known as, "**Supplier Agreement Novation Materials**")

30.1.4 the materials referred to in Clauses 30.1.1 to 30.1.3 altogether shall be as identified in Schedule 20 (Escrow),

(together, the "**Deposited Materials**").

30.2 STA shall bear the cost for any charges payable to the Escrow Provider for the initial deposit of the Deposited Materials and the storage fees and any applicable integrity testing, verification and release fees in respect of the Deposited Materials.

30.3 Without prejudice to its rights and remedies under this Agreement, at law or in equity, STA shall be entitled to withhold payments in respect of Services relating to any Supplier Software and/or Third Party Software, the Deposited Materials in respect of which have not been given by the Supplier to be placed in escrow with the Escrow Provider as required by, and within the time period stipulated in Clause 30.1.

30.4 The Supplier shall ensure that all Deposited Materials are updated whenever there is a change to them and, in any event, at least once in each Contract Year. For the avoidance of doubt, such updating of the Supplier Agreement Novation Materials shall include the Supplier placing with the Escrow Provider updated Supplier Agreement Novation Materials in respect of Supplier Agreements and Key Subcontractor Supplier Agreements that are new, which have been amended and/or are replacements of previous Supplier Agreements and Key Subcontractor Supplier Agreements which fulfill the requirements set out in Clause 30.1.3.

30.5 The Parties hereby agree that the Deposited Materials shall be placed in escrow pursuant to the following:

30.5.1 in respect of Supplier Software Materials and Supplier Agreement Novation Materials, tripartite agreement(s) between STA, the Supplier and the Escrow Provider; and

30.5.2 in respect of Third Party Software Materials, quad partite agreement(s) between STA, the Supplier, the owner of the Intellectual Property Rights in the applicable Third Party Software and the Escrow Provider (and the Supplier shall procure that each owner of the Intellectual Property Rights in the applicable Third Party Software shall execute such an agreement).

Without prejudice to the preceding part of this Clause 30.5, such agreements shall be on the Escrow Provider's applicable standard terms of agreement (amended as necessary to be consistent with the provisions of this Clause 30) and the Supplier shall fully cooperate with STA and assist STA to ensure that the terms of agreement expressly provide that the following shall be the events which trigger the release of the Deposited Materials (each agreement on such terms, being an "**Escrow Agreement**"):

- 30.5.3 for the Supplier Agreement Novation Materials, an Insolvency Event or the termination of this Agreement pursuant to Clauses 39.3 (Termination by STA – Default), 39.7.2 or 39.7.3 (Termination as stipulated by the Public Contracts Regulations 2015);
 - 30.5.4 for the Supplier Software Materials, (i) an Insolvency Event in respect of the Supplier; or (ii) termination of this Agreement pursuant to Clauses 39.3 (Termination by STA – Default), 39.7.2 or 39.7.3 (Termination as stipulated by the Public Contracts Regulations 2015); or (iii) the assignment of the Intellectual Property Rights in the Supplier Software to a third party where the Supplier has failed first to procure that the assignee enters into an Escrow Agreement with STA and the Escrow Provider.
 - 30.5.5 for the Third Party Software Materials, (i) an Insolvency Event in respect of the owner of the Intellectual Property Rights in the applicable Third Party Software; or (ii) a material breach by such owner of its obligations under the applicable Supplier Agreement which it has failed to remedy within a reasonable period; or (iii) the assignment of the Intellectual Property Rights in the Third Party Software to another third party where the Supplier has failed first to procure that the assignee enters into an Escrow Agreement with STA, the Supplier and the Escrow Provider.
- 30.6 In the event of the Supplier Software Materials and / or Third Party Software Materials being released in accordance with the terms of the applicable Escrow Agreement, the Supplier grants to STA a worldwide, non-exclusive, non-transferable (subject to the provisions of Clause 30.6), royalty-free licence to run, use, maintain, modify and enhance those Deposited Materials including:
- 30.6.1 the right to transfer that licence to any third party in accordance with a Regulatory Authority's request; and
 - 30.6.2 the right to permit its subcontractors or suppliers (subject to the confidentiality restrictions set out in the applicable Escrow Agreement) to access, run, use, maintain, modify and enhance the Deposited Materials exclusively on behalf of STA,
- in each case for the purposes of arranging the performance of, or performing, any part of the Services (or services similar to the Services), provided that in respect of the release of Third Party Software Materials where and for so long as the Supplier is able to satisfy STA, acting reasonably, that it can continue to meet its obligations in respect of such Third Party Software under this Agreement, this shall not prejudice the Supplier's ongoing obligation and right to provide, and STA's ongoing right to receive and obligation to pay for, Services related thereto under this Agreement.
- 30.7 In the event of Supplier Software Materials and / or Third Party Software Materials being released in accordance with the applicable Escrow Agreement:
- 30.7.1 as a result of an Insolvency Event occurring in respect of the Supplier or owner of the Intellectual Property Rights in the applicable Third Party Software, or the termination of this Agreement as a consequence of an Insolvency Event, or assignment of the Intellectual Property Rights in the applicable software, the licence referred to in Clause 30.6 shall be perpetual; and
 - 30.7.2 as a result of the termination of this Agreement (other than as a consequence of an Insolvency Event) or material breach by the third party owner of its obligations as to maintenance or modification of the applicable Third Party Software under the applicable Supplier Agreement or Key Subcontractor Supplier Agreement, the licence referred to in Clause 30.6 shall be limited to a period ending on the date that is the later of:
 - 30.7.2.1 if this Agreement has not prior to its termination been extended in accordance with Clause 3.2 (Term), the day after the last day of the Expected Term;
 - 30.7.2.2 if this Agreement has prior to its termination been extended in accordance with Clause 3.2 (Term), the day after the final day of the 2024 Test Cycle or the day after the final day of the 2025 Test Cycle (as the case may be); and

30.7.2.3 18 months from the date of termination of this Agreement.

30.8 STA shall be entitled to integrity test or verify, or request the Escrow Provider or another third party to integrity test or verify (subject to such third party having executed an NDA with STA), any Deposited Materials placed in escrow in accordance with this Clause 30 on STA's request, at its own cost and in accordance with the terms of the applicable Escrow Agreement. The Supplier shall cooperate with, and support and assist, the STA, Escrow Provider and / or other third party, as applicable, in the conduct of such integrity test / verification, to the extent required by STA and STA shall pay the Supplier therefor on a Time and Materials Basis together with the relevant portion of reasonable overheads incurred and profits lost as shown by the content of the Open Book Data) If any such integrity test or verification determines that the Deposited Materials are incomplete or defective or do not comply in any way with this Clause 30, the Supplier shall reimburse STA for the cost of the integrity test or verification, as applicable, and STA shall not be liable for the costs of the Supplier's cooperation, support and assistance (and the Supplier shall reimburse any such costs already paid by STA).

30.9 The Supplier agrees that at the request of STA, the Supplier shall immediately make available to STA or the Escrow Provider, any Source Codes and associated documentation (including Configuration Documentation) for the STA Software or Specially Written Software respectively which are within the control of the Supplier in order for these to be integrated with the Supplier Software and/or the Third Party Software in readiness for any event that will trigger the release of the Deposited Materials pursuant to Clause 30.5.

30.10 A breach of this Clause 30 shall be considered a material Default of this Agreement.

31. **BRANDING OF THE SERVICE**

31.1 Licence of Trade Marks

With effect from the Effective Date, STA hereby grants the Supplier a non-exclusive royalty-free licence to use the Trade Marks during the Term (and the Exit Phase) in the Territory in relation to, the National Curriculum Assessments or related materials as is reasonably necessary and exclusively for the provision of the Services.

31.2 Quality and Control

31.2.1 STA Materials must carry the Trade Marks that STA requires (if any). The right to use the Trade Marks is conditional on the Supplier's compliance with STA's Brand Guidelines (as amended by STA from time to time upon notice with immediate effect to the Supplier). Any change to the STA Brand Guidelines after the Effective Date shall be a Change pursuant to Clause 28 (Change).

31.2.2 The Supplier shall not affix any trade marks (other than the Trade Marks) or other promotional information to any STA Materials (including Tests, Markers' materials and any marketing materials) or any other materials delivered or made available to Schools without STA's prior written consent.

31.2.3 The Supplier shall obtain STA's prior written approval for any material including Tests, Markers' materials and marketing materials or items in respect of which STA Trade Marks are used and STA solely and absolutely having the right to determine this may permit that the Supplier only presents for approval representative samples of such items or materials.

31.3 Ownership of Marks and Goodwill

31.3.1 The Supplier acknowledges that it does not have any right, title or interest in or to the Trade Marks other than such as may be granted to it under this Clause 31. The Supplier shall not knowingly do or permit anything to be done in connection with its use of the Trade Marks which could jeopardise the validity or goodwill of the Trade Marks. The Supplier shall not make any representation or do any act which may be taken to indicate that it has any right, title or interest in or to the ownership or use of the Trade Marks, except as expressly allowed under the terms of this Clause 31.

- 31.3.2 The Supplier shall, if so required by STA, upon reasonable notice include on all goods on which the Trade Marks appear and on all printed matter and electronic or digital material relating to goods or services supplied under any of the Trade Marks a statement, in a form to be notified by STA to the Supplier from time to time, to give notice of STA's ownership of the Trade Marks.
- 31.3.3 All goodwill resulting from the use by the Supplier of a Trade Mark, whether before or during the Term or the Exit Phase, shall inure to the benefit of STA. The Supplier agrees to execute such documents as STA may reasonably require in order for STA to obtain the full benefit of such goodwill.
- 31.3.4 No application for registration of any of the Trade Marks may be made other than by STA, and the Supplier shall not make, or attempt to make, any such application. The Supplier shall, if requested by STA, co-operate with STA in securing or attempting to secure registration of the Trade Marks anywhere in the Territory (which shall include providing such written details and further samples of the National Curriculum Assessments Materials and any other materials produced in connection with this Agreement as STA may reasonably request). STA shall (subject to the immediately following sentence) reimburse the Supplier for its reasonable costs incurred in complying with this Clause 31.3.4 (such costs to be reasonably evidenced by receipts or other supporting documents). In respect of any request (or sequence of requests relating to the same subject matter), the Supplier shall obtain STA's written consent (which consent shall not be unreasonably withheld or delayed) before incurring total costs in aggregate of over [REDACTED] in complying with this Clause 31.3.4 and acknowledges that, if it fails to do so, it shall not be entitled to invoice STA for the amount of such costs being in excess of [REDACTED].
- 31.3.5 Except as provided by this Clause 31, the Supplier shall not make any use of the Trade Marks or the name of STA.

31.4 Infringement

The Supplier shall immediately give notice in writing to STA if it becomes aware of any actual, threatened or suspected infringement or passing off by any third party of any of STA's rights in and to the Trade Marks. STA shall solely and absolutely have the right to determine what action, if any, shall be taken in respect of such matter and shall have sole control over, and shall conduct any such action at its own cost and for its own benefit.

31.5 Assignment and Sub-Licensing

- 31.5.1 This Clause 31 and the licence contained herein is personal to the Supplier. The Supplier shall not assign, transfer, sub-license, mortgage, charge, or in any other way dispose of or purport to dispose of its rights or obligations under this Clause 31. The licence granted, however, shall extend to all Key Subcontractors and to any Subcontractor appointed by the Supplier and engaged in printing in each case for the purposes of such persons performing their obligations to the Supplier entered into pursuant to this Agreement, provided that such person has agreed in writing (such agreement to be provided to STA at its request) to use the Trade Marks in accordance with the provisions of this Clause 31. The licence contained in this Clause 31 shall not extend to any other third party not referred to in this Clause 31.5.1 unless the Supplier obtains the written consent of STA.
- 31.5.2 Without prejudice to the generality of Clause 31.5.1, in the event that the Supplier wishes a third party (the "Sub-Licensee") to use the Trade Marks, the Supplier shall obtain STA's prior written consent to such sub-licence (which consent shall not be unreasonably withheld or delayed), and if such consent is given, shall procure that the Sub-Licensee shall enter into a trademark licence directly with STA, containing provisions substantially the same as set out in this Clause 31 prior to any use being made of the Trade Marks by the Sub-Licensee.
- 31.5.3 Without prejudice to any other provision of this Agreement, the Supplier shall be responsible to STA for the acts and omissions of its Sub-Licensees and Subcontractors as if they were those of the Supplier itself.

32. SOFTWARE, DATA AND MATERIALS

32.1 STA Software

- 32.1.1 STA hereby grants to the Supplier, the Supplier Group Companies and the persons referred to in Clause 31.5.1 (Assignment and Sub-Licensing) a non-transferable, non-exclusive, royalty-free, licence to use, modify, adapt and enhance STA Software (and any associated documentation) for the Term and the Exit Phase, solely to the extent reasonably necessary for the provision of the Services and the performance of the Supplier's obligations in accordance with the terms of this Agreement.
- 32.1.2 All Intellectual Property Rights in STA Software (including, for the avoidance of doubt, any modification, adaptation or enhancement thereto) shall remain with, or vest upon creation, in STA. The Supplier hereby assigns to STA, with full title guarantee, title to and all rights and interest in any STA Software created by the Supplier (or by a third party on behalf of the Supplier) which does not otherwise vest in STA, or shall procure that the first owner of such rights and interest in such STA Software assigns them to STA on the same basis.
- 32.1.3 The assignment under Clause 32.1.2 shall either take effect on the Effective Date or as a present assignment of future rights that will take effect immediately on the coming into existence of the relevant STA Software, as appropriate.
- 32.1.4 The Supplier shall waive or procure a waiver of any moral rights in any copyright works assigned to STA under this Agreement.
- 32.1.5 If requested to do so by STA, the Supplier shall without charge to STA execute all documents and do all such further acts as STA may require to perfect the assignment under Clause 32.1.2 or shall procure that the owner of such STA Software does so on the same basis.
- 32.1.6 The Supplier shall ensure that all STA Software created by the Supplier (or by a third party on behalf of the Supplier) will be based on appropriate open standards, that it will be readily separable from other software owned, developed or used by the Supplier and capable of transmission to STA in Source Code and binary code forms, and that no further permissions or consents will be required (whether from the Supplier or a third party) to enable STA to obtain the full benefits of ownership of such STA Software.
- 32.1.7 The Supplier will deliver any STA Software created by the Supplier (or by a third party on behalf of the Supplier) to STA in both Source Code and binary code forms, together with all associated documentation, within seven days of any request to do so by STA, and provide updates of the Source Code and binary code forms on each new release thereof, on media that is reasonably acceptable to STA.
- 32.1.8 The Supplier shall not obtain any right, title or interest to STA Software save as set out in Clause 32.1.1.

32.2 STA Data and Materials

- 32.2.1 STA hereby grants the Supplier and the Supplier Group Companies and the persons referred to in Clause 31.5.1 (Assignment and Sub-Licensing) a non-transferable, non-exclusive, royalty-free licence in relation to the Intellectual Property Rights in STA Data and STA Materials for the Term and the Exit Phase, to use them solely to the extent reasonably necessary for the provision of the Services and the performance of the Supplier's obligations in accordance with the terms of this Agreement.
- 32.2.2 All Intellectual Property Rights in STA Data and STA Materials shall remain at all times with or vest in STA. At STA's request, the Supplier shall execute, or procure from a relevant third party the execution of, any formal assignment or other document required to give effect to this Clause 32.2.2. The Supplier shall not obtain any right, title or interest to STA Data or STA Materials save as set out in Clause 32.2.1.

- 32.2.3 The Supplier shall provide Datafeeds to STA on the dates set out in Schedule 5 (Key Milestone Acceptance Criteria, Service Levels and Delay and Service Credits), in accordance with validation and quality requirements as defined in the DES in Schedule 3 (Data Exchange Standards).
- 32.2.4 Without limiting Clause 32.2.3, the Supplier shall, at least monthly during the Term and the Exit Phase (or as otherwise requested by STA), give STA free of charge a copy in its then current format of all, or if so requested part, of the STA Data then in the Supplier's possession, custody or control, which is in electronic form. Upon request the Supplier shall also supply copies of STA Data or STA Materials which are held by the Supplier in electronic form to STA as soon as reasonably practicable and in any event within 5 Business Days.
- 32.2.5 In addition to its obligations under Clauses 32.2.3 and 32.3.4, on STA's request, and for a reasonable additional charge assessed on a Time and Materials Basis and previously agreed with STA, the Supplier shall give STA a copy of all, or part, of STA Data or STA Materials then in the Supplier's possession, custody or control, whether in electronic form or not, and in such format as is requested by STA.
- 32.2.6 The Supplier shall take such steps as STA may require in order to enforce STA's rights in relation to one or all of the STA Data, STA Software and STA Materials against third parties provided that STA shall (subject to the provisions of this Clause 32.2.6) reimburse the Supplier in respect of any costs reasonably incurred by the Supplier in taking such steps. In respect of any request (or sequence of requests relating to the same subject matter), the Supplier shall obtain STA's written consent before incurring total costs of over [REDACTED] in complying with this Clause 32.2.6 and acknowledges that, if it fails to do so, it shall not be entitled to invoice STA for the amount of such costs being in excess of [REDACTED].

32.3 Specially Written Software

- 32.3.1 STA shall not obtain any right, title or interest to Specially Written Software, save as set out in this Clause 32.3 and Clause 32.4.
- 32.3.2 To the extent that the Specially Written Software is capable of use by STA on a standalone basis from the Supplier Software and Third Party Software, the Supplier hereby grants, or shall procure the grant of, to STA a perpetual, irrevocable, transferrable, non-exclusive, royalty-free licence to use and modify the Intellectual Property Rights in such Specially Written Software, together with a right to sub-licence the same to STA Service Providers. The Supplier shall waive or procure a waiver of any moral rights in any copyright works assigned to STA under this Agreement.
- 32.3.3 To the extent that the Specially Written Software is not capable of use by STA on a standalone basis but only in conjunction with other Supplier Software or Third Party Software, the Supplier hereby grants, or shall procure the grant of, to STA and any STA Service Provider of a non-transferable, non-exclusive, royalty-free licence to use the Intellectual Property Rights in such Specially Written Software, provided that STA subsequently acquires, and for such period as STA maintains, a licence to use the other Supplier Software or Third Party Software which the Supplier shall procure is made available to STA on terms no less favourable to STA than those on which such software is usually made commercially available by the Supplier or the relevant third party.
- 32.3.4 The Supplier shall deliver the Specially Written Software referred to in Clause 32.3.2 to STA in both Source Code and binary code forms, together with all associated documentation, within seven days of any request to do so by STA, and provide updates of the Source Code and binary code forms on each new release of the Specially Written Software, on media that is acceptable to STA, STA acting reasonably in determining what is acceptable.

32.4 Licensing of the Supplier Materials

While not in any way limiting the provisions of Clause 30 (Escrow) or Clause 32.3 (Specially Written Software), the Supplier hereby grants, or shall procure the grant of, to STA and any STA Service Provider, a non-transferable, non-exclusive, royalty-free licence to use the Intellectual Property Rights in the Supplier Software and the Third Party Software for the Term and the Exit Phase, to the extent reasonably necessary for STA to exercise its rights and to receive the Services in accordance with this Agreement.

32.5 Intellectual Property Indemnity

32.5.1 The Supplier shall hold STA harmless against any reasonable costs, claims, demands, expenses and damages of whatsoever nature incurred by STA, arising out of any claim that the use by STA of the Indemnified Materials (as defined in Clause 32.5.5) infringes the Intellectual Property Rights of any third party. For the avoidance of doubt, this indemnity shall not apply:

32.5.1.1 to any infringement of Intellectual Property Rights which arises from the use of the Indemnified Materials by STA other than in accordance with the Supplier's reasonable instructions;

32.5.1.2 to any adaptation, modification or enhancement made by STA to the indemnified Materials without the Supplier's prior approval;

32.5.1.3 to the extent claims under it result from STA breaching any third party licence in respect of the Indemnified Materials;

32.5.1.4 to the extent claims under it result from patent claims against STA resulting from the use of Indemnified Materials that are developed to STA's design (to the extent such claims result from that design); or

32.5.1.5 to the extent claims under it result from claims of copyright or database rights infringement resulting from STA using Indemnified Materials which contain copyright works or databases provided by STA.

32.5.2 STA shall notify the Supplier promptly in writing of any claim pursuant to Clause 32.5.1 of which it is aware, and shall not make any admission or take any other action which might be prejudicial to any proceedings without the express prior written consent of the Supplier (such consent not to be unreasonably withheld or delayed).

32.5.3 The Supplier may conduct, at the Supplier's expense, any litigation and negotiations for a settlement of a claim pursuant to Clause 32.5.1. STA shall give the Supplier all reasonable assistance required by the Supplier in support of any such defence or action.

32.5.4 If any of the Indemnified Materials is held to constitute an infringement, the Supplier without prejudice to any other right granted to STA under this Agreement or at Law, shall at its own expense and option do one of the following:

32.5.4.1 procure for STA the right to continue using the material;

32.5.4.2 modify the material so that the material is non-infringing without materially detracting from its overall performance; or

32.5.4.3 replace the infringing material with other non-infringing items or services having a capability materially equivalent to the infringing materials.

32.5.5 The "Indemnified Materials" shall mean:

32.5.5.1 the Supplier Software, any STA Software that has been created, modified or adapted by the Supplier or a Subcontractor pursuant to this Agreement and any other materials used or made available in the provision of the Services by the Supplier and the receipt of the Services by STA and STA

Software that is in control of the Supplier under the Agreement and during the Term.

32.6 Open Source Software

- 32.6.1 The Supplier hereby represents that the Supplier Software, Third Party Software and the Specially Written Software (together the "Project Software") do not contain any Open Source Software other than the OSS and that the Project Software excluding the OSS remains separable from or merely links or binds by name to the interfaces of the OSS.
- 32.6.2 The Supplier shall not at any time during the Term without the STA's express written consent include in or aggregate with the Project Software any Open Source Software other than the OSS, or make any changes to the Project Software which require it to be aggregated with or operated in conjunction with any Open Source Software other than the OSS.
- 32.6.3 The Supplier warrants that the OSS is licensed upon terms which permit its use by the Supplier, the STA and the STA's end users for all purposes contemplated by this Agreement.
- 32.6.4 For the avoidance of doubt and with regard to the STA Software that is within the control of the Supplier, the Supplier shall not without STA's prior written consent, include in or aggregate with the STA Software any Open Source Software whatsoever including the OSS.

32.7 Software As A Service

The provisions of this Clause 32 shall apply to all Software that is used in the provision of the Services, whether provided to STA in a tangible form for use on STA's, or any STA Service Provider's, systems or made available to STA and STA Providers as Software as a Service. In the case of Supplier Software and / or Third Party Software (as applicable) stated in the Supplier's Solution to be made available by way of Software as a Service, STA acknowledges that (subject always to the provisions of Clause 30 (Escrow)) it may not be provided with a physical copy of such software and that use of such software is restricted to use by way of Software as a Service, and the provisions of this Clause 32 shall be construed accordingly.

32.8 Configuration Documentation

Without prejudice to the provisions of Clause 30 (Escrow), the Supplier shall provide a copy of the Configuration Documentation to STA as soon as reasonably practicable following written request by STA from time to time. STA shall have the right to use the same to understand, recreate, maintain, modify and correct the configuration of the Software following release of any of the Deposited Materials, and / or following termination or expiry of the Agreement where STA has any ongoing right to use any part of the Software, and / or to exercise any other right or remedy that STA may have under the Agreement (including under Clause 11(Step-In)).

33. FRAUD

33.1 Prevention of Fraud

The Supplier shall not commit an act of fraud, and shall put in place measures in accordance with Good Industry Practice, which measures shall have the aim of preventing acts of fraud by any of its Personnel or Subcontractors in respect of the National Curriculum Assessments, STA or otherwise under or in connection with this Agreement.

33.2 Suspected Fraud

- 33.2.1 If STA has reasonable grounds to suspect acts of fraud are being committed in relation to the Services, it may:

- 33.2.1.1 in relation to any suspected act (or series of acts) of fraud which in STA's reasonable opinion is (or are) likely to compromise the security and/or the safe delivery of the Tests or the results of a Test Cycle, exercise its right to step-in under Clause 11 (Step-In); and/or
- 33.2.1.2 in relation to any suspected act (or series of acts) of fraud, investigate whether such act(s) of fraud are in fact taking place. The Supplier shall cooperate and provide all reasonable assistance to STA, STA's representatives or any person authorised by the Regulations investigating such matters. Following such investigation, STA may be entitled to exercise rights of step-in in accordance with Clause 11.1.1.5 (Initiation of Right to Step-In).
- 33.2.2 If it is found that the Supplier or any of its Personnel or Subcontractors is engaged in or has committed an act of fraud in connection with the Services, then, in the event that such act of fraud:
 - 33.2.2.1 has a material adverse impact on the reputation of STA (or, to the extent it is not made public, would have had such an impact if it were made public); or
 - 33.2.2.2 relates to the theft or fraudulent appropriation of Test Papers and Mark Schemes while they remain confidential pursuant to this Agreement,

this shall be deemed a material Default by the Supplier and STA shall be entitled to serve a Termination Notice on the Supplier in accordance with Clause 39.3.2.7 (Termination by STA – Default).

34. CONFIDENTIALITY

- 34.1 For the purposes of this Clause 34, 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.
- 34.2 Except to the extent set out in this Clause 34 or where disclosure is expressly permitted elsewhere in this Agreement, the Recipient shall:
 - 34.2.1 treat the Disclosing Party’s Confidential Information as confidential and keep it in secure custody (which is appropriate depending upon the form in which such materials are stored and the nature of the Confidential Information contained in those materials);
 - 34.2.2 not disclose the Disclosing Party’s Confidential Information to any other person except as expressly set out in this Agreement or without obtaining the owner’s prior written consent;
 - 34.2.3 not use or exploit the Disclosing Party’s Confidential Information in any way except for the purposes anticipated under this Agreement; and
 - 34.2.4 immediately notify the Disclosing Party if it suspects or becomes aware of any unauthorised access, copying, use or disclosure in any form of any of the Disclosing Party’s Confidential Information.
- 34.3 The Recipient shall be entitled to disclose the Confidential Information of the Disclosing Party where:
 - 34.3.1 the Recipient is required to disclose the Confidential Information by Law, provided that Clause 21.2 (Freedom of Information) shall apply to disclosures required under the FOIA or the EIRs;
 - 34.3.2 the need for such disclosure arises out of or in connection with:
 - (i) any legal challenge or potential legal challenge against STA arising out of or in connection with this Agreement;

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- (ii) the examination and certification of STA's accounts (provided 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 STA is making use of any Services provided under this Agreement; or
 - (iii) the conduct of a Central Government Body review in respect of this Agreement; or
- 34.3.3 the Recipient has reasonable grounds to believe that the Disclosing Party is involved in activity that may constitute a criminal offence under the Bribery Act 2010 and the disclosure is being made to the Serious Fraud Office.
- 34.4 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.
- 34.5 The Supplier may disclose the Confidential Information of STA on a confidential basis only to:
 - 34.5.1 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 Agreement;
 - 34.5.2 its auditors; and
 - 34.5.3 its professional advisers for the purposes of obtaining advice in relation to this Agreement.

Where the Supplier discloses Confidential Information of STA pursuant to this Clause 34.5, it shall remain responsible at all times for compliance with the confidentiality obligations set out in this Agreement by the persons to whom disclosure has been made.
- 34.6 STA may disclose the Confidential Information of the Supplier:
 - 34.6.1 on a confidential basis to any Central Government Body for any proper purpose of STA or of the relevant Central Government Body;
 - 34.6.2 to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
 - 34.6.3 to the extent that STA (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;
 - 34.6.4 on a confidential basis to a professional adviser, consultant, supplier or other person (including any benchmarking organisation) engaged by any Central Government Body for any purpose relating to or connected with this Agreement;
 - 34.6.5 on a confidential basis for the purpose of the exercise of its rights under this Agreement, including the Audit Rights, its step-in rights pursuant to Clause 11 (Step-In) and rights in relation to the Exit Management Plan; or
 - 34.6.6 on a confidential basis to a proposed Successor Operator in connection with any assignment, novation or disposal of any of its rights, obligations or liabilities under this Agreement,

and for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on STA under this Clause 34.
- 34.7 Nothing in this Clause 34 shall prevent a Recipient from using any techniques, ideas or know-how gained during the performance of this Agreement in the course of its normal business to the extent

that this use does not result in a disclosure of the Disclosing Party's Confidential Information or an infringement of Intellectual Property Rights.

34.8 Injunctive Relief

Each Party acknowledges that damages may not be an adequate remedy for breach of this Clause 34 and agrees that the Party whose information is being, or is likely to be, disclosed shall be entitled to seek injunctive relief from any Court of competent jurisdiction for any breach of this Clause 34.

35. LIMITATIONS OF LIABILITY

Unlimited liability

35.1 Neither Party limits its liability for:

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

35.2 The Supplier's liability in respect of the indemnities in Clause 15.1 (Tax Indemnity), Clause 15.2 (VAT), Clause 32.5 (Intellectual Property Indemnity) and Clause 41 (Employees) shall be unlimited.

Financial and other limits

35.3 The Supplier's aggregate liability in respect of all Losses incurred by STA as a result of the Supplier's breach of GDPR in relation to this Agreement and occurring in each and every Contract Year shall in no event exceed the sterling equivalent at the time any monies are paid, of [REDACTED] in respect of the Contract Year in question. This cap in respect of the Supplier's breach of GDPR shall be separate from and over and above any other liability cap under this Agreement.

35.4 STA's aggregate liability in respect of all Losses incurred by the Supplier as a result of STA's breach of GDPR in relation to this Agreement and occurring in each and every Contract Year shall in no event exceed the sterling equivalent at the time any monies are paid, of [REDACTED] in respect of the Contract Year in question. This cap in respect of STA's breach of GDPR shall be separate from and over and above any other liability cap under this Agreement.

35.5 Subject to Clauses 35.1, 35.2 (Unlimited Liability) and 35.3, the Supplier's aggregate liability in respect of all Losses incurred by STA under or in connection with this Agreement as a result of Defaults by the Supplier occurring:

- 35.5.1 between the Effective Date and the end of the initial Contract Year of this Agreement; and
- 35.5.2 in each and any subsequent Contract Year

shall in no event exceed the sum of [REDACTED] in respect of the period or Contract Year in question;

35.6 Deductions from Charges shall not be taken into consideration when calculating the Supplier's liability under Clause 35.5.

35.7 Subject to Clauses 35.1 (Unlimited Liability) and 35.4 and without prejudice to STA's obligation to pay the Charges as and when they fall due for payment, STA's aggregate liability in respect of all Losses incurred by the Supplier under or in connection with this Agreement as a result of Defaults of STA and in respect of any Supplier Breakage Costs shall in no event exceed [REDACTED]

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Consequential Losses

- 35.8 Subject to Clauses 35.1, 35.2 (*Unlimited Liability*) and Clause 35.9, neither Party shall be liable to the other Party for any Indirect Losses.
- 35.9 Notwithstanding Clause 35.8 but subject to Clause 35.5, the Supplier acknowledges that STA may, amongst other things, recover from the Supplier the following as Losses incurred by STA to the extent that they arise as a result of a Default by the Supplier:
- 35.9.1 any additional operational and/or administrative costs and expenses incurred by STA, including costs relating to time spent by or on behalf of STA (including the cost of management time and that of other personnel, both internal and external) in dealing with the consequences of the Default and for services to replace any of the Services;
 - 35.9.2 any wasted expenditure or charges;
 - 35.9.3 the additional cost of procuring services to replace the Services for the remainder of the Term and/or replacement deliverables, which shall include any incremental costs associated with such replacement Services above those which would have been payable under this Agreement;
 - 35.9.4 any compensation or interest paid to a third party by STA; and
 - 35.9.5 any fine or penalty incurred by STA pursuant to Law and any costs incurred by STA in defending any proceedings which result in such fine or penalty.

Mitigation

- 35.10 Each Party shall use all reasonable endeavours to mitigate any loss or damage suffered arising out of or in connection with this Agreement, including any Losses for which the relevant Party is entitled to bring a claim against the other Party.

36. INSURANCE

36.1 Levels of Insurance

- 36.1.1 The Supplier shall, at its own expense maintain in effect such insurance policies with a reputable third party insurance company as it is required to hold under applicable law and such other policies, at such coverage limits, as a prudent business conducting similar operations would maintain (the "**Insurance Policies**").
- 36.1.2 Without prejudice to Clause 36.1.1 but subject to Clause 36.1.2), the Insurance Policies shall include the following cover in respect of risks relating to or connected with the provision of the Services and/or risks related to or connected with this Agreement:
- 36.1.2.1 professional indemnity insurance with a minimum level of cover of [REDACTED] for any one claim;
 - 36.1.2.2 public liability insurance with a minimum level of cover of [REDACTED] for any one claim; and
 - 36.1.2.3 employer's liability insurance with a minimum level of cover of [REDACTED] for any one claim.

36.2 Maintenance of insurance

- 36.2.1 The Supplier shall maintain the Insurance Policies in Clause 36.1.2.1 during the Term and for a period of 3 years afterwards. The Supplier shall maintain the Insurance Policies identified in Clauses 36.1.2.2 and 36.1.2.3 during the Term and warrants that these Insurance Policies insure the Supplier on the basis of claims made against the Supplier.

- 36.2.2 If the Supplier does not at any relevant time have in place Insurance Policies as required by Clause 36.1 (Levels of Insurance), STA may (but is not obliged to) upon written notice to the Supplier effect and maintain such insurance on the Supplier's behalf and at the Supplier's cost, and the Supplier hereby authorises STA to act on its behalf for this purpose. Any sums of money spent by STA to effect and maintain such insurance on the Supplier's behalf shall be deemed as sums due and owed to STA by the Supplier under this Agreement.
- 36.2.3 STA may at any time require the Supplier to provide brokers' notes summarising any Insurance Policy and receipts or other evidence of premiums paid. The Supplier shall inform STA of any cancellation or non-renewal of any Insurance Policy, to be maintained in accordance with Clause 36.2.1.
- 36.2.4 The Supplier shall at all times comply with the terms of the Insurance Policies (including paying all premiums and other moneys payable, notifying circumstances which might give rise to claims, and making claims), and shall not do, or permit to be done, anything which might render any Insurance Policy void or voidable or entitle the insurer to refuse to pay any claim or part of a claim.
- 36.2.5 If in connection with this Agreement the Supplier is entitled to make a claim under any Insurance Policy, the Supplier shall make and pursue the claim expeditiously and at its own cost, the Supplier shall keep STA notified of such claims and (if requested by STA in writing) the progress of those claims.

37. GOVERNING LAW, DISPUTE RESOLUTION AND ARBITRATION

37.1 Governing Law and Jurisdiction

This Agreement and any Disputes arising under it shall be governed by and construed in accordance with the laws of England and Wales and subject to Clause 37.3 (Arbitration) the courts of England and Wales shall have exclusive jurisdiction over any matters or Disputes arising from this Agreement.

37.2 Dispute Resolution

- 37.2.1 Save as otherwise expressly provided for in this Agreement, in the event of any Dispute arising, either Party may call a meeting of the Relationship Managers of both Parties, such meeting to be held within 10 Business Days of the date of the notice calling the same (unless otherwise agreed in writing by the Parties). Such Relationship Managers shall meet as often as the Parties jointly deem necessary in order to gather and exchange all applicable information with respect to the matter in issue which the Parties believe appropriate and the Relationship Managers shall negotiate to resolve the matter in issue.
- 37.2.2 In the event that, despite the best efforts of the Parties, the Dispute remains unresolved for a period of 5 Business Days or shorter period where agreed by the Parties after the first meeting of Relationship Managers pursuant to Clause 37.2.1, the matter shall be referred to the Executive Sponsor Board Meeting who shall meet to resolve the matter in issue as expeditiously as possible.
- 37.2.3 In the event that, despite the best efforts of the Parties, the Dispute continues to remain unresolved 5 Business Days following the meeting pursuant to Clause 37.2.2 or a shorter period where agreed by the Parties, the matter shall be referred to the Chief Executive Officer of STA and the Chief Executive of the Supplier, who shall meet to resolve the matter in issue as expeditiously as possible.
- 37.2.4 If the Dispute remains unresolved 5 Business Days after the meeting pursuant to Clause 37.2.3 or a shorter period where agreed by the parties then, and only then, shall the Parties be entitled to commence arbitration proceedings pursuant to Clause 37.3 (Arbitration).

37.3 Arbitration

- 37.3.1 In the event that the internal dispute resolution process set out in Clause 37.2 (Dispute Resolution) fails to resolve a Dispute, each of the Parties irrevocably agrees that such Dispute shall be resolved by arbitration in London conducted in the English language and in accordance with the rules of the LCIA by a single arbitrator appointed by the LCIA.
- 37.3.2 An award rendered in connection with arbitration pursuant to this Clause 37.3 shall be final and binding upon the Parties, and any judgment upon such an award may be entered and enforced in any court of competent jurisdiction.
- 37.4 Nothing in Clauses 37.2 and 37.3 shall prevent the Parties from seeking from any court of competent jurisdiction an interim order restraining the other Party from doing any act or compelling the other Party to do any act.

38. AUDIT, OPEN BOOK ACCOUNTING AND DOCUMENTS

38.1 Retention of Documents

38.1.1 The Supplier shall and shall procure that any Subcontractor shall keep such documents (which shall include information that is created and stored electronically or by any other medium) including the documents identified in Annex 1 (Documents To Be Kept By The Supplier) to Part B (Financial Reports) of Part 4 (Financial Reports and Audit Rights) of Schedule 7 (Financial Matters) as STA considers necessary to enable STA to comply with its obligations under the Regulations (including books of account which give a fair and accurate account of receipts and payments received or incurred in connection with the Services) in accordance with Good Industry Practice which are sufficient to enable STA to have a complete and accurate understanding of the Supplier's performance of its obligations under this Agreement (the "**Documents**"). The Supplier shall give a list of the Documents to STA within 10 Business Days following the Operational Services Commencement Date (and such list shall not include marked scripts).

38.1.2 The Documents referred to in Clause 38.1.1 shall be kept in good order and shall be available (including the means to access and view the same at all reasonable times) for inspection by STA, STAs' representatives and any third party identified by STA, including any Governmental audit organisation (which such representatives and third parties shall be deemed as STA for the purpose of this Clause 38.1.2), and the Supplier and/or any Subcontractor shall make available (or, as the case may be, procure the availability of) such items of clarification or substantiation as may be required by STA in relation thereto including such oral or written explanations as may be considered necessary by STA (acting reasonably).

38.1.3 The Supplier shall and shall procure that any Subcontractor shall provide STA with a copy of any or all of the Documents referred to in Clause 38.1.1 free of charge within five (5) Business Days of STA's request for the same.

38.1.4 The Supplier shall, and shall procure that any Subcontractor shall, retain all the Documents referred to in Clause 38.1.1 throughout the Term and for six (6) years following the expiry or termination of this Agreement. STA shall have the right to audit any and all such records at any reasonable time on reasonable notice during the Term of this Agreement and during the six (6) year period following the expiry or termination of this Agreement, whichever is the earlier.

38.2 The Supplier shall comply with the provisions of Part 4 (Financial Reports and Audit Rights) of Schedule 7 (Financial Matters).

38.3 Audit of Markers

Without prejudice to the generality of Clause 38 and Part C (Audit Rights) of Schedule 7 (Financial Matters), but provided that no audit under this Clause 38.3 shall be carried out at any time between 1 April and 1 August of each year, STA shall be entitled to carry out an audit of the Markers from time to time, on not less than 10 Business Days' notice, to ensure that Tests are marked in accordance with STA Policies and Procedures. The Supplier shall, and shall use its best endeavours to procure

that the Markers shall, provide STA with all reasonable assistance and co-operation in connection with any such audit, including:

- 38.3.1 details of Markers' names, addresses, qualifications, seniority, ratings, experience and references;
 - 38.3.2 copies of the contracts under which named Markers' services have been engaged;
 - 38.3.3 samples of Tests then in the Supplier's possession or control that have been marked by named Markers. Tests that have been returned to Schools will be deemed to not be within the Supplier's possession or control;
 - 38.3.4 details of any complaints or review requests received in relation to Tests marked by named Markers; and
 - 38.3.5 telephone or online interviews with individual Markers (the total number of Markers interviewed not to exceed the number sufficient to achieve 10% (ten percent) of the total number of Markers engaged in the then current Test Cycle).
- 38.4 Regulatory Audit
- 38.4.1 The Supplier shall, and shall procure that its Subcontractors shall, permit any Regulatory Authority or its designated representative's access to the Supplier's facilities to audit the Supplier's provision of the Services and provide such information and assistance as the Regulatory Authority may require. The Supplier shall ensure it and its Subcontractors are open and co-operative in performing its obligations under this Clause 38.4 and shall attend any meetings requested by the Regulatory Authority.
 - 38.4.2 The Supplier shall, and shall procure that its Subcontractors shall, provide STA with a copy of the results of any report relating to any inspection visit by the Regulatory Authority but only to the extent such report relates to the provision of the Services by the Supplier or to the System (insofar as it supports the provision of the Services).
 - 38.4.3 STA shall provide the Supplier with as much notice of a proposed audit under this Clause 38.4 as is reasonably practicable.
- 38.5 The Supplier shall comply with the provisions of Part B (Financial Reports) of Part 4 (Financial Reports and Audit Rights) of Schedule 7 (Financial Matters).
- 38.6 Acknowledgement
- The Parties acknowledge that any co-location or other information gathering activities that STA is entitled to carry out pursuant to a Product Description shall not be considered as audits for the purposes of this Clause 38.
- 38.7 Maintenance of Records
- 38.7.1 The Supplier shall, and shall procure that any Subcontractor shall, maintain a true and complete set of records of personnel and all activities relating to the performance the Services and all transactions related thereto and a complete up to date and orderly documentary record of all transactions entered into by the Supplier and any Subcontractor for the purposes of the Services including copies of all deeds or agreements whereby a person is appointed to perform any task in relation to the Services and all such other information reasonably required by STA and/or specified in this Agreement.
 - 38.7.2 The Supplier shall provide and shall procure that the Supplier and any Subcontractor shall provide such information STA may reasonably require from time to time to enable them to meet their obligations to provide reports and returns pursuant to any policy or regulatory requirements.