



NHS Highland
Conditions of Contract for the Purchase of Services
July 2021

	<u>Page</u>
1. Defined Terms and Interpretation	3
2. Time of Performance	12
3. Contract Price and Payment	13
4. Inspection of Location and Nature of Services	14
5. Tools, Equipment and Materials	15
6. Quality	15
7. Contractor's Personnel	15
8. Manner of Carrying Out the Services	17
9. Performance Measurement	17
10. Health and Safety	18
11. Development of the Contract, Sales Statements and Product Information	19
12. Transfer and Sub-Contracting	19
13. Indemnity	20
14. Insurance	20
15. Variation of the Contract	21
16. Variation of the Specification	21
17. Dispute Resolution Procedure	22
18. Environmental Considerations	22
19. Termination	23
20. Communications	25
21. Intellectual Property	25
22. Audit and Accounts	26
23. Confidentiality and Freedom of Information	27
24. Data Protection	30
25. Liaison and Provision of Information at Termination	34
26. Protecting Vulnerable Groups Scheme	34
27. The Human Rights Act 1998 and the Asylum and Immigration Act 1996	35
28. Power to Agree	35
29. Relationship of the Parties	35
30. Inducements to Purchase	35
31. General	35
32. Diversity	37
33. Publicity	37
34. Notices	37
35. Transfer of Undertakings (Protection of Employment) (TUPE) Regulations	38
36. Specific Performance	40
37. Force Majeure	40
39. Law	40

These Conditions may be varied only with the Written agreement of the Authority. No terms or conditions put forward at any time by the Contractor shall form any part of the Contract unless specifically agreed in Writing by the Authority.

1. Defined Terms and Interpretation

1.1 In these terms and conditions, the words and expressions below will be interpreted to have the meanings adjacent to them:-

1.1.1 **“Affected Employee”** has the meaning ascribed to it in Clause 35;

“Affected Party” means, in the context of Clause 37, the Party whose obligations under the Contract are affected by the Force Majeure Event;

“Appropriate Safeguards” means a legally compliant mechanism(s) for the transfer of Personal Data to a Third Country in respect of which no adequacy regulations have been issued under Section 17A of the Data Protection Act 2018 or Paragraphs 4 and 5 of Schedule 21 of the DPA 2018, as such mechanism(s) may be permitted under the Data Protection Legislation from time to time;

“Authority” means Highland Health Board constituted pursuant to the 1978 Act (more commonly known as NHS Highland), having its headquarters at Assynt House, Beechwood Park, Inverness IV2 3BW;

“Commencement Date” means the date specified in the Invitation to Offer or such other date as may be agreed by the Parties in Writing on which the Contract is to commence;

“Commissioner” shall have the meaning given in the UK GDPR;

“Confidential Information” (a) all information designated as such by either Party in Writing; (b) all Patient Identifiable Information; and (c) all information the disclosure of which would or would be likely to prejudice substantially the commercial or operational interests of any person;

“Contract” means the agreement between the Authority and the Contractor comprising, where applicable, the Invitation to Offer, any Supplementary Conditions of Contract, the Order, the Purchase Order, these terms and conditions and schedules hereto, the Specification, and such variations in Writing as shall subsequently be agreed between the Authority and the Contractor. For the avoidance of doubt, all other terms, conditions or warranties other than any terms, conditions or warranties implied by law in favour of the Authority are excluded from the agreement between the Authority and the Contractor unless expressly accepted in Writing by the Authority. For clarity this includes framework agreements, dynamic purchasing systems and design contests where applicable;

“Contract Period” means (subject to earlier termination in accordance with its terms or by operation of law) the duration of the Contract, starting on the Commencement Date, as set out in the Invitation to Offer or the Order, whichever is applicable, (or if the Invitation to Offer or the Order does not set out such a duration, the period from the Commencement Date until the Authority terminates by giving not less than three (3) months’ notice in Writing to the Contractor;

“Contract Price” means the monies payable by the Authority to the Contractor for the full and proper performance by the Contractor of its obligations under the Contract and shall include all royalties, licence fees or similar expenses in respect of the making, use or exercise by the Contractor of any Intellectual Property or Intellectual Property Rights for the purpose of performing the Contract;

“Contract Standard” means such standard as complies in each and every respect with all relevant provisions of the Contract;

“Contractor” means the Person who supplies the Services to the Authority in accordance with the Contract;

“Contractor’s Personnel” means all persons employed or engaged by the Contractor in the provision of the Services, including any permitted sub-contractor or agent of the Contractor;

“Contractor’s Provisional Staff List” means a list prepared and updated by the Contractor of all the Contractor’s Personnel engaged in, or wholly or mainly assigned to, the provision of the Services or any part of the Services at the date of preparation of the list;

“Controller” shall have the meaning given to it in the UK GDPR;

“Convictions” means, other than in relation to minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-over orders (including any spent convictions as contemplated by Section 1(1) of The Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 Scottish SI 2003/231) or any replacement or amendment to those Orders);

“Costs” includes costs, charges, outgoings and expenses of every description;

“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 (i) the UK GDPR; (ii) the DPA 2018 to the extent that it relates to the Processing of Personal Data and privacy; and (iii) any other Legal Requirements in force from time to time with regards to the Processing of Personal Data

and privacy, which may apply to either Party in respect of its activities under the Contract;

“Data Protection Officer” shall have the meaning given in the UK GDPR;

“Data Subject” shall have the meaning given to it in the UK GDPR;

“Day” means business day, which is defined as Monday to Friday inclusive and excluding Scottish Bank and Public holidays;

“Design Contest” means those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after being out to competition with or without the award of prizes;

“DPA 2018” means the Data Protection Act 2018;

“EEA” means the European Economic Area;

“Electronic Trading System(s)” means such electronic data interchange system and/or world-wide web application and/or other application with such message standards and protocols as the Authority may specify from time to time;

“Force Majeure Event” means one (1) or more of the following to the extent that it is not attributable to the Contractor or the Contractor’s staff:

- (a) war, civil war (whether declared or undeclared), acts of terrorism, riot or armed conflict;
- (b) radioactive, chemical or biological contamination;
- (c) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speed;
- (d) explosion; fire; flood; COVID-19 or other pandemic;
- (e) extraordinarily severe weather conditions which are both unforeseen and for which precautions are not customarily taken by prudent business organisations so as to avoid or mitigate the impact thereof;
- (f) industrial action which affects the supply of the Services, but which is not confined to the workforce of the Contractor or is site specific;
- (g) the actions of governmental authorities to the extent that such actions are implemented either pursuant to emergency powers or otherwise outside the usual course of governmental or public business;

- (h) or other event which is beyond the reasonable control of the Party in question and could not have been avoided or mitigated by the exercise of all reasonable care by that Party and further provided that such event materially affects the ability of the Party seeking to rely upon it to perform its obligations under the Contract;

“Insolvent” means:

- (a) if the Contractor is an individual, that individual or where the Contractor is a partnership, any partner(s) in that firm becomes bankrupt or shall have a receiving order, administration order or interim order made against him, or shall make any composition or scheme of arrangement with or for the benefit of his creditors, or shall make any conveyance or assignment for the benefit of his creditors, or shall purport to do or appears unable to pay or to have no reasonable prospect of being able to pay, a debt within the meaning of Section 268 of the Insolvency Act 1986 or he shall become apparently insolvent within the meaning of the Bankruptcy (Scotland) Act 2016 (as amended) or any application shall be made under the Bankruptcy (Scotland) Act 2016 or Insolvency Act 1986 for the time being in place for sequestration of his estate, or a trust deed shall be granted by him for the benefit of his creditors;
- (b) if the Contractor is a company, the passing by the Contractor of a resolution for its winding-up or the making by a court of competent jurisdiction of an order for the winding-up of the Contractor or the dissolution of the Contractor, or if a receiver, manager or administrator is appointed, or documents are filed with the court for the appointment of a receiver, manager or administrator or notice of intention to appoint a receiver, manager or administrator is given by the Contractor or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986), or circumstances arise which entitle the court or a creditor to appoint a receiver, manager or administrator or which entitle the court to make a winding-up order, or the Company is unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986, or if the Contractor makes an arrangement with its creditors generally or makes an application to a court of competent jurisdiction for protection from its creditors generally; and
- (c) any event under the law of any other jurisdiction other than Scotland which is analogous to any of the above;

“Intellectual Property” means any and all patents, registered and unregistered trademarks and service marks, domain names, registered designs, utility models, applications for and the right to make applications for any of such rights, inventions, Know-How (as defined below), Confidential Information (as defined above), trade and business names, including rights in any get-up or trade dress, copyrights, (including rights in computer software and in websites)

unregistered design rights and other rights in designs and rights in databases, subsisting anywhere in the world; the right for the maker of a database to prevent extraction or re-utilisation or both of the whole or a substantial part of the content of that database, as described in Directive 96/9/EC on the legal protection of databases; rights under licences, consents, orders, statutes or otherwise in respect of any rights of the nature specified in this definition "Intellectual Property"; and rights of the same or similar effect or nature as or to those above in each case in any jurisdiction;

"Intellectual Property Right" includes the right to exploit any Intellectual Property or any right which is similar or analogous to any Intellectual Property; any moral right; any licence, right or interest of any kind arising out of or granted or created in respect of any Intellectual Property; any right to bring an action for passing off or any similar or analogous proceeding;

"Invitation to Offer" means the invitation by the Authority for parties to tender for the supply of the Services;

"In Writing" shall be interpreted to include any document that is recorded in manuscript, typescript, any electronic communication as defined in Section 15 of the Electronic Communications Act 2000 but excluding mobile telephone text messages;

"Joint Controller" shall have the meaning given in Article 26 of the UK GDPR;

"Know-How" means all information not publicly known which is used or required to be used in or in connection with the Services existing in any form (including, but not limited to, that comprised in or derived from engineering, chemical and other data, specifications, formulae, experience, drawings, manuals, component lists, instructions, designs and circuit diagrams, brochures, catalogues and other descriptions) and relating to the design, development, manufacture or production of any products; the operation of any process; the provision of any services; the selection, procurement, construction, installation, maintenance or use of raw materials, plant, machinery or other equipment or processes; the rectification, repair or service or maintenance of products, plant, machinery or other equipment; the supply, storage, assembly or packing of raw materials, components or partly manufactured or finished products; quality control, testing or certification of any Person;

"Law" means any legislation and/or common law insofar as applicable to the performance of the Contract or any part thereof including without limitation:-

- (a) any subordinate legislation; and
- (b) any regulation, order, regulatory policy, mandatory guidance or code of practice, judgement of a relevant court of law, or directives or requirements with which the Authority and/or the Contractor is bound to comply;

“Location” means the location where the Services are to be performed as set out in the Contract or as otherwise agreed in Writing between the Authority and the Contractor;

“Loss” includes losses, liabilities, claims, costs, charges and outgoings of every description (including legal expenses), compensation payable under contracts with suppliers and/or customers, loss of normal operating profits, loss of opportunity, loss of goodwill, loss of revenue from related contracts and pure economic loss;

“New Contractor” means any entity which is awarded a contract by the Authority to provide Services similar or identical to the Services in place of the Contractor (including any NHS entity in the event of the provision of such Services being undertaken in-house) at termination or expiry of the Contract;

“Order” means an order placed on the Contractor pursuant to these terms, which may in electronic format, for the supply of the Services;

“Party” means any party to the Contract individually and **“Parties”** refers to all of the parties to the Contract collectively. A Party shall include all permitted assignees of the Party in question. All persons who are not a Party to the Contract are third parties;

“Patient Identifiable Information” means information relating to the identity, medical condition or history of any patient or prospective patient of the Authority or any other Health Board and any and all data generated and/or derived therefrom;

“Person” includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of Persons or association and a reference to a Person includes a reference to that Person's successors and permitted assignees;

“Personal Data” shall have the meaning given in the UK GDPR;

“Personal Data Breach” shall have the meaning given in the UK GDPR;

“Pre-Transfer Liabilities” means (other than in respect of any claims in relation to pension entitlement under any pension scheme) (1) all claims, including, but not limited to, claims for redundancy payments, unlawful deduction of wages, unfair, wrongful or constructive dismissal compensation, compensation for sex, race or disability discrimination, claims for equal pay, compensation for less favourable treatment of part-time workers, and any claims whether in delict, contract or statute or otherwise, demands, actions, proceedings and any award, compensation, damages, tribunal awards, fine, loss, order, penalty, disbursement, payment made by way of settlement and costs and expenses reasonably incurred in connection with a claim or investigation (including without limitation any investigation 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), and any expenses and legal costs on an indemnity basis; and (2) all losses, costs, claims, demands, actions, fines, penalties, awards, liabilities and expenses incurred (either before, on or after the Service Transfer Date) in connection with or as a result of:-

- (a) any claim or demand by or in respect of the Affected Employees or any of them or any former employee of the Contractor, arising either under statute, contract or at common law from any act, fault or omission of the Contractor in relation to the period prior to the Service Transfer Date; and
- (b) any claim or demand (either under statute or at common law) by any trade union or staff association or any other workers' representatives within the meaning of TUPE arising from or connected with any breach by the Contractor of its obligations to that trade union, staff association or other workers' representatives under TUPE to the extent that such claim or demand relates to the period before the Service Transfer Date, subject always to the Authority and/or any New Contractor having complied with its obligations under Regulation 13 of the TUPE Regulations;

"Processing" shall have the meaning given in the UK GDPR and the terms **"Process"** and **"Processed"** shall be construed accordingly;

"Processor" shall have the meaning given to it in the UK GDPR;

"Protecting Vulnerable Groups Scheme" means the membership scheme (introduced by the Scottish Government and managed and delivered by Disclosure Scotland) to ensure that those who have regular contact with children and protected adults do not have a known history of harmful behaviour;

"Purchase Order" means Written notification sent to the Contractor by the Authority of an order for any of the Services under the Contract in accordance with the Specification, which notification may be in electronic format;

"Receipt of Order or Receipt of Purchase Order" means, if personally delivered, at the time of delivery; if posted, at the expiration of forty eight (48) hours or (in the case of air-mail seven (7) Days) after the envelope containing the same was delivered into the custody of the postal authorities; and if sent by electronic mail, at the time of transmission, provided that a telephone call is made to the recipient warning the recipient that an electronic mail message has been sent to him (as evidenced by a contemporaneous note of the Party sending the notice) and a hard copy of such notice is also sent by first class recorded delivery post (air-mail if overseas) on the same day as that on which the electronic mail is sent;

“Relevant Person” means any person who is a member of the administrative, management or supervisory body of a Contractor or has powers of representation, decision or control in relation to a Contractor;

“Replacement Contractor” means a supplier which, partially or wholly, takes over or acquires the business or assets of the Contractor or acquires ownership of the Contractor following:

- (a) any corporate restructuring of or involving the Contractor; or
- (b) the Contractor becoming Insolvent;

“Representative” shall have the meaning given in the UK GDPR;

“Security Requirements” means the requirements imposed by the Authority to ensure the security of Personal Data as notified to the Contractor;

“Service Transfer Date” means the date of any transfer of the Services (or any part of the Services), for whatever reason, from the Contractor to the Authority or a New Contractor;

“Services” means the services to be provided by the Contractor under the Contract;

“Specification” means a full description of the Services as referred to, set out in or attached to the Invitation to Offer and any response thereto by the Contractor which has been accepted in Writing by the Authority, including any amendments or variations thereof agreed in Writing between the Parties;

“Staffing Information” means in relation to all persons detailed on the Contractor's Provisional Staff List, such information as the Authority may reasonably request (subject to the UK GDPR), but including in an anonymised format:

- (a) their ages, dates of commencement of employment or engagement and gender;
- (b) details of whether they are employees, workers, self-employed, contractors or consultants, agency workers or otherwise;
- (c) the identity of their employer or relevant contracting party;
- (d) their relevant notice periods and any other terms relating to termination of employment or engagement, including any redundancy procedures and contractual redundancy payment schemes;
- (e) the current wages, salaries, profit sharing, incentive and bonus arrangements applicable to them;

- (f) details of other employment-related benefits including (without limitation) medical insurance, life assurance, pension or other retirement benefit schemes, share option schemes and customer car schemes applicable to them;
- (g) any outstanding or potential contractual, statutory or other liabilities in respect of such individuals (including in respect of personal injury claims);
- (h) details of any such individuals on long-term sickness absence, maternity or other statutory leave or otherwise absent from work; and
- (i) copies of all relevant documents and materials relating to such information, including copies of relevant contracts of employment or engagement (or relevant standard contracts if applied generally in respect of such individuals);

“Supplementary Conditions of Contract” means any supplementary conditions of contract referred to by the Authority in the Invitation to Offer or Order;

“the 1978 Act” means the National Health Service (Scotland) Act 1978, as amended.

“Third Country” shall have the meaning given in the UK GDPR;

“TUPE Regulations” means the Transfer of Undertakings (Protection of Employment) Regulations 2006;

“UK GDPR” means the General Data Protection Regulation (Regulation (EU) 2016/679) as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of Section 3 of the European Union (Withdrawal) Act 2018;

“Writing” means any communication in Writing including by electronic means (excluding text messages) and **“Written”** shall be construed accordingly; and

“Year” means during the Contract Period, any twelve (12) month period commencing on the Commencement Date or an anniversary thereof.

- 1.2 In these terms and conditions, all references to any statute or statutory provision shall be deemed to include references to any statute or statutory provision which amends, extends, consolidates or replaces the same and shall include any orders, regulations codes of practice, instruments or other subordinate legislation made thereunder and any conditions attaching thereto.
- 1.3 Any headings to Clauses, together with the front cover and the Index are for convenience only and shall not affect the meaning of these terms and conditions. Unless the contrary is stated, references to Clauses shall mean the Clauses of these terms and conditions.

- 1.4 Unless otherwise expressly defined in these terms and conditions, the words used in these terms and conditions shall bear their natural meaning. The Parties have had equal opportunity to take legal advice and the contra proferentem rule shall not apply to the interpretation of these terms and conditions.
- 1.5 Where a term of these terms and conditions provides for a list of items following the word “**including**” or “**includes**”, then such list is not to be interpreted as being an exhaustive list. Any such list shall not be treated as excluding any item that might have been included in such list having regard to the context of the contractual term in question. The ejusdem generis principle is not to be applied when interpreting these terms and conditions. General words are not to be given a restrictive meaning where they are followed by examples intended to be included within the general words.
- 1.6 In these terms and conditions, words importing any particular gender include all other genders.
- 1.7 In these terms and conditions, words importing the singular only shall include the plural and vice versa.
- 1.8 Subject to the contrary being stated expressly or implied from the context in these terms and conditions, all communication between the Parties shall be in Writing.
- 1.9 All monetary amounts are expressed in Pounds Sterling but, in the event that Pounds Sterling is replaced as legal tender in the United Kingdom by a different currency, then all monetary amounts shall be converted into such other currency at the rate prevailing on the date such other currency first became legal tender in the United Kingdom.
- 1.10 Except where an express provision of these terms and conditions states the contrary, each and every obligation of a Party under the terms and conditions is to be performed at that Party's cost.
- 1.11 Any reference to a Party “**procuring**” another person to act or omit to act in a certain manner shall mean that the Party so procuring shall be liable for any default on the part of the person acting or omitting to act in that manner.
- 1.12 All references to the Contract include (subject to all relevant approvals) a reference to the Contract as amended, supplemented, substituted, novated or assigned from time to time.

2. Time of Performance

- 2.1 The Contractor shall begin performing the Services and complete the performance of the Services on the dates stated in the Invitation to Offer Order or the Purchase Order (whichever is applicable) or as otherwise agreed in Writing by the Parties.
- 2.2 Time is of the essence of the Contract.
- 2.3 The Authority may by Written notice require the Contractor to execute the Services in such order as the Authority may decide. In the absence of such

notice, the Contactor shall submit such detailed programmes of work and progress reports as the Authority may from time to time require.

- 2.4 Failure by the Contractor to perform the Services or any part of them within the time agreed in accordance with Clause 2.1 shall entitle the Authority (at its option) to withdraw such Services from the Order or the Purchase Order to release itself from any obligations to accept and pay for such Services, to purchase other Services of the same or similar description to make good such default and recover from the Contractor the amount by which the cost of purchasing other Services exceeds the amount that would have been payable to the Contractor in respect of the Services replaced by such purchase and all costs incurred by the Authority in purchasing such alternative Services, provided that the Authority uses all reasonable endeavours to mitigate its losses in this respect, all without prejudice to the Authority's other rights and remedies. Three (3) consecutive failures to perform the Services within the time agreed in accordance with Clause 2.1 shall entitle the Authority to terminate the Contract, and recover costs in accordance with Clause 19.

3. Contract Price and Payment

- 3.1 In consideration of the Contractor's due and proper performance of its obligations under the Contract, the Contractor may charge the Authority the Contract Price in accordance with this Clause 3.
- 3.2 The Contract Price shall be net, i.e. after the deduction of all agreed discounts. Unless otherwise stated in the Contract, payment will be made, by BACS (Bank Automated Clearing System), if the Authority so chooses, within thirty (30) days of receipt and agreement of invoices, submitted monthly in arrears, for work completed to the satisfaction of the Authority. The Contractor shall pay valid sub-contractor invoices within thirty (30) days.
- 3.3 Invoices shall not be rendered by the Contractor until satisfactory completion of the Services which are the subject of the Order or the Purchase Order. Where the Parties agree completion of the Services by instalments, the Contractor may render an invoice for each completed instalment. Invoices without an official Purchase Order number shall not be processed and shall be returned in accordance with NHS Highland's No Purchase Order No Pay Policy. Invoices shall be sent to the following address:

NHS HIGHLAND
FINANCE DEPARTMENT
ASSYNT HOUSE
BEECHWOOD PARK
INVERNESS
IV2 3BW

or via e-mail to:

pdf invoices and credit notes singly to:
nhsh.pdfinvoices@nhs.scot

Statements and reminders, **non-pdf** invoices and credit notes can be e-mailed to:

- 3.4 The Authority shall be entitled to deduct from any monies due or to become due to the Contractor any monies owing to the Authority from the Contractor.
- 3.5 Except where otherwise stated in the Order or the Purchase Order, the Contract Price is exclusive of VAT that shall be payable, if applicable, by the Authority in addition to such Contract Price at the rate prevailing as at the tax invoice date. The invoice provided to the Authority by the Contractor in accordance with Clause 3.1 shall show the VAT calculations separately.
- 3.6 The Authority shall not be responsible for the payment of any charges for Services supplied in excess of the Services required by the Order or the Purchase Order or any variation of it, unless the requirement for such additional Services has been authorised in Writing by the Authority by a further Order or Purchase Order.
- 3.7 No payment of or on account of the Contract Price shall constitute any admission by the Authority as to proper performance by the Contractor of its obligations.
- 3.8 In the event of the Authority breaching Clause 3.2, the Contractor shall be entitled to charge interest on the outstanding amount owed by the Authority in accordance with the Late Payment of Commercial Debts (Interest) Act 1998.
- 3.9 Subject to Clauses 3.10 and 3.10, the Contract Price shall not be subject to any increase whatsoever by the Contractor during the Contract Period.
- 3.10 In the event that the Contract is varied under Clause 15 in such a way as to affect the Contract Price and if agreement between the Parties cannot be reached on the adjustment to the Contract Price within three (3) months of such variation taking effect under Clause 15, both Parties shall jointly act to resolve the dispute in accordance with Clause 17 to determine the amount of the said adjustment to the Contract Price.
- 3.11 If the adjusted Contract Price is not so agreed or certified until after such variation under Clause 15 has taken place, the Authority shall continue to pay the Contractor the Contract Price at the rate current prior to the variation, but on determination of the amount of the said adjustment shall pay to the Contractor or be entitled to recover from the Contractor as the case may be such sum if any as is equal to the difference between the amount which should have been paid in accordance with the adjusted Contract Price and the amount which was actually paid.

4. Inspection of Location and Nature of Services

The Contractor is deemed to have inspected the Location before tendering so as to have understood the nature and extent of the Services to be carried out and satisfied himself in relation to all matters connected with the Services and the Location.

5. Tools, Equipment and Materials

- 5.1 Any tools, patterns, materials, drawings, specifications and/or other data provided by the Authority to the Contractor in connection with the Contract will at all times be at the Contractor's risk and remain the property of the Authority and shall be delivered up to the Authority immediately on request and are to be used by the Contractor solely for the purpose of completing the Contract.
- 5.2 Any tools (such as jigs, dies, etc.) which the Contractor may construct or acquire specifically in connection with the Services will remain the property of the Contractor, unless it is agreed in Writing that the property in the tools will be transferred to the Authority upon payment by the Authority of a charge. All tools, equipment and materials of the Contractor required in the performance of the Contractor's obligations under the Contract shall be and remain at the sole risk of the Contractor whether or not they are situated at the Location.

6. Quality

- 6.1 All work performed by the Contractor shall be in accordance with best industry standards and practice.
- 6.2 The Contractor warrants and undertakes that it will apply the necessary skill and expertise to the performance of the Services in accordance with the terms of the Contract, that it will provide sufficient suitably qualified personnel to carry out the Services and will perform the Services in a timely and efficient manner and in accordance with the Specification, the Law and any timescales agreed between the Parties.
- 6.3 The Contractor shall not make any change in its supply chain for the Services or in any of its sub-contractors until it has received Written approval from the Authority. The Contractor shall notify the Authority in Writing immediately in the event that it proposes to make any change in its supply chain or in any of its sub-contractors and shall supply the Authority with all necessary information regarding the proposed change.
- 6.4 The Contractor warrants its expertise and confirms the accuracy of all statements and representations made in respect of the Services prior to and subsequent to, the Order or the Purchase Order.
- 6.5 The Contractor will comply with all community benefit requirements set out in the Invitation to Offer, Order or Purchase Order as applicable.

7. Contractor's Personnel

- 7.1 The Contractor shall employ and procure in and about the provision of the Services only such persons as (one) are careful, skilled and experienced in their occupation, (two) have all necessary qualifications to provide the Services and have the additional training (if any) specified by the Authority in the Specification, and (three) are legally entitled to work in the United Kingdom and, where applicable, satisfy all requirements which the NHS imposes on the employment by the NHS of persons who did not obtain their qualifications in the United Kingdom. The Contractor shall exhibit to the

Authority satisfactory evidence of all relevant qualifications, if requested by the Authority. In the event that the Contractor fails to comply with such obligations at any time during the Contract Period, such failure shall constitute a material failure (incapable of remedy) entitling the Authority to terminate the Contract with notice to that effect.

- 7.2 The Contractor shall ensure that:-
- 7.2.1 all Contractor's Personnel are informed and aware of the standards of performance they are required to provide and are able to meet that standard;
 - 7.2.2 adherence of the Contractor's Personnel to such standards of performance is routinely monitored and that remedial action is taken promptly where such standards are not attained;
 - 7.2.3 quality is improved through the development and implementation of appropriate procedures, policies and standards and systematic monitoring.
- 7.3 The Contractor shall ensure that a sufficient number and standard of Contractor's Personnel is available to meet the requirements of the Contract during holidays or absences. Without prejudice to the generality of this obligation, it shall be the duty of the Contractor to ensure that, during absence through sickness or voluntary absence or during any other circumstances in which Contractor's Personnel are absent, Replacement Contractor's Personnel are available to provide the Services and that all Contractor's Personnel engaged in the provision of the Services who are under training are adequately supervised.
- 7.4 The Contractor shall co-operate with the employees of the Authority where this is necessary for the performance of the Services.
- 7.5 The Contractor shall take the steps reasonably required by the Authority to prevent unauthorised persons being admitted to the Location. If the Authority gives the Contractor notice that any person is not to be admitted to, or is to be removed from the Location or is not to become involved in or is to be removed from involvement in the performance of the Contract, the Contractor shall take all reasonable steps to comply with such notice and if required by the Authority the Contractor shall replace any person removed under this condition with another suitably qualified person and procure that any pass issued to the person removed is surrendered.
- 7.6 If and when instructed by the Authority, the Contractor shall give to the Authority a list of names and addresses of all persons who are or may be at any time concerned with the Services or any part of them, specifying the capacities in which they are so concerned, and giving such other particulars and evidence of identity and other supporting evidence as the Authority may reasonably require.
- 7.7 The decision of the Authority as to whether any person is to be admitted to or is to be removed from the Location or is not to become involved in or is to be removed from involvement in the performance of the Contract and as to whether the Contractor has furnished the information or taken the steps required of him by this condition shall be final and conclusive.

- 7.8 The Contractor shall bear the cost of any notice, instruction or decision of the Authority under this condition.

8. Manner of Carrying Out the Services

- 8.1 The Contractor shall make no delivery of materials, plant or other things nor commence any work at the Location without obtaining the Authority's prior consent.
- 8.2 Access to the Location shall not be exclusive to the Contractor, but only such as shall enable him to carry out the Services concurrently with the execution of work by others. The Contractor shall co-operate with such others as the Authority may reasonably require.
- 8.3 The Authority shall have the power at any time during the progress of the Services to order in Writing:
- 8.3.1 the removal from the Location of any materials which in the opinion of the Authority are either hazardous, noxious or not in accordance with the Contract; and/or
 - 8.3.2 the substitution of proper and suitable materials; and/or
 - 8.3.3 the removal and proper re-execution, notwithstanding any previous test thereof or interim payment therefore, of any work which, in respect of material or workmanship, is not in the opinion of the Authority in accordance with the Contract.

On completion of the Services the Contractor shall remove his plant, equipment and unused materials and shall clear away from the Location all rubbish arising out of the performance of the Services and leave the Location in a neat and tidy condition.

9. Performance Measurement

- 9.1 The Authority shall ascertain whether the Contractor's performance of the Contract meets the performance criteria specified in the Invitation to Offer, Order or Purchase Order, where not so specified, meets the standards of a professional supplier of the Services, in the opinion of the Authority acting reasonably.
- 9.2 On or before the fifteenth (15th) Day of each calendar month from the commencement of the Contract and within ten (10) Days following the termination of the Contract, the Authority may in respect of the supply of the Services during the preceding calendar month provide to the Contractor a notice (each called "a **Performance Notice**") which shall set out a statement of the Authority's dissatisfaction with the Contractor's performance and supply of the Services.
- 9.3 Each Performance Notice shall include a proposed rebate of the Contract Price commensurate to the under-performance of the Contractor, as recorded in the Performance Notice and the rebates referred to therein shall become immediately due and payable to the Authority on the expiry of five (5) Days from the Contractor's receipt of the Performance Notice.

- 9.4 If the Contractor disputes any matter referred to in any Performance Notice and/or the proposed rebate of the Contract Price, the Contractor may raise this objection with the Authority within five (5) Days of receipt of the Performance Notice and, if this matter is not resolved within five (5) Days following receipt by the Authority of such objection, the matter shall be referred to the Dispute Resolution Procedure provided in Clause 17.
- 9.5 If the Contractor has not raised any objection to any matter referred to in the Performance Notice and/or any proposed rebate of the Contract Price within five (5) Days of receipt of the Performance Notice (or such other period as may be agreed between the Parties), then that Performance Notice shall be deemed to have been accepted by the Contractor.
- 9.6 If required by the Authority, the Contractor and the Authority shall co-operate in sharing information and developing performance measurement criteria to be used in such monitoring and performance measurement in terms of this Clause 9 with the object of improving the efficiency of the Contractor.

The provisions of this Clause 9 are without prejudice to any other rights or remedies to which the authority may be entitled.

10. Health and Safety

- 10.1 The Contractor represents and warrants to the Authority that the Contractor has satisfied himself that all necessary processes and procedures are in place to ensure that the Services are carried out without risk to health and safety.
- 10.2 The Contractor shall:
- 10.2.1 comply with all relevant health, safety, fire and environmental legislation and associated codes of practice;
 - 10.2.2 comply with NHS Highland's Health and Safety Policy and Procedures;
<http://intranet.nhsh.scot.nhs.uk/PoliciesLibrary/Documents/a%20Health%20and%20Safety%20-%20MP00%20-%20Health%20and%20Safety%20Policy.pdf>
<http://intranet.nhsh.scot.nhs.uk/PoliciesLibrary/Documents/b%20Health%20and%20Safety%20-%20MP07%20-%20Accountabilities%20and%20Responsibilities%20%20For%20the%20use%20with%20Functional%20Roles.pdf>
 - 10.2.3 ensure that their employees or sub-contractors meet their statutory responsibilities;
 - 10.2.4 ensure that their employees or sub-contractors comply with local rules identified by NHS Highland's capital planning project team(s), estates department, managerial and supervisory staff;
 - 10.2.5 comply with any instructions from the Authority's Health and Safety Practitioner or other Authorised Officer, as it relates to any serious or imminent danger;
 - 10.2.6 liaise directly with the person(s) responsible for monitoring the health and safety performance of the Contractor while on site. This will be identified through the estates/capital planning department;

10.2.7 provide NHS Highland Contracting Manager or host department appropriate documentation where necessary.

11. Development of the Contract, Sales Statements and Product Information

11.1 The Contractor hereby undertakes to the Authority:-

11.1.1 to work continuously with the Authority to improve, develop and vary the terms and conditions of the Contract to reflect changing needs and new developments within the NHS Highland or National Health Service in Scotland and to deliver pro-active cost reductions to the Authority during the period of the Contract. In the implementation of this undertaking, the Contractor undertakes to agree to the variation of the Contract to reflect all such agreements reached between the Contractor and the Authority and notified to the Contractor by the Authority in Writing. Such variations to the Contract shall be recorded by the Parties in Writing in accordance with Clause 15 and 16;

11.1.2 to provide to the Authority Sales Statements and Product Information as defined in the said Contract.

12. Transfer and Sub-Contracting

12.1 The Contractor shall not assign the whole or any part of the Contract. The Contractor shall not sub-contract the production or supply of any Services without the previous consent in Writing of the Authority, such consent not to be unreasonably withheld or delayed.

12.2 The Contractor acknowledges and agrees that by way of illustration only and without restricting or fettering the Authority's right to withhold its consent on reasonable grounds it shall be reasonable for the Authority to withhold its consent where the sub-contracting of the performance of the Services would be contrary to law or contrary to public or government policy or contrary to public morality and decency or which is not in the national interest.

12.3 If, with the Authority's consent, the Contractor sub-contracts the performance of the Services, every act or omission of the sub-contractor shall, for the purposes of the Contract, be deemed to be the act or omission of the Contractor and the Contractor shall be liable to the Authority as if such act or omission had been committed or omitted by the Contractor itself.

12.4 The Authority shall be entitled to assign, novate, contract or otherwise dispose of its rights and obligations under the Contract or any part thereof to:-

12.4.1 any NHS entity; or

12.4.2 any other body (including, but not limited to, any private sector body) which substantially performs any of the functions that previously had been performed by the Authority.

- 12.5 Without prejudice to Clause 12.4, the Contract shall devolve to any successor of the Authority which is a publicly funded organisation, notwithstanding dissolution of the Authority.
- 12.6 Any change in the legal status of the Authority shall not affect the validity of the Contract. In such circumstances, the Contract shall bind and inure to the benefit of any successor body of the Authority.
- 12.7 The Authority shall be entitled to disclose to any body to whom the Contract may be transferred pursuant to the foregoing provisions any Confidential Information of the Contractor which relates to the performance of the Contract by the Contractor. In such circumstances, the Authority shall authorise the said transferee to use such Confidential Information only for the purpose relating to the performance of the Contract and for no other purpose and shall take all reasonable steps to ensure that such body accepts an obligation of confidence in terms similar to Clause 23.

13. Indemnity

- 13.1 Without prejudice to any rights and remedies of the Authority, the Contractor shall indemnify the Authority against all actions, suits, claims, demands, losses, charges, costs and expenses which the Authority may suffer or incur as a result of or in connection with any damage to property or in respect of any injury (whether fatal or otherwise) to any person which may result directly or indirectly from any failure in the provision of the Services or defect in the Services or the act or omission of the Contractor.
- 13.2 Except in the case of breach of Clause 24, in the case of death or personal injury caused by negligence, and fraudulent misrepresentation or in other circumstances where liability may not be so limited under any applicable law, the liability of either Party under or in connection with the Contract, whether arising in contract, delict, negligence, breach of statutory duty or otherwise shall not exceed the sum of FIVE MILLION POUNDS STERLING (£5,000,000) for any one (1) incident in any one (1) Year, unless an alternative figure has been provided by the Authority in the Invitation to Offer in which case that alternative figure shall apply.
- 13.3 The Contract Price for the Services under the Contract has been negotiated and agreed on the basis that the Parties may limit their liability to each other as set out in the Contract and the Parties each confirm that they will themselves bear or insure against any loss for which the other Party has limited its liability under the Contract.

14. Insurance

- 14.1 The Contractor shall effect with a reputable insurance company:-
- 14.1.1 a policy or policies of insurance covering all the matters which are the subject of indemnities under the Contract with a minimum limit of indemnity FIVE MILLION POUNDS STERLING (£5,000,000) per annum for any one (1) incident in any one (1) Year, unless an alternative figure has been provided by the Authority in the Invitation to Offer or Order or such other sum as may be agreed between the Authority and the Contractor in Writing;

14.1.2 Employers Liability insurance in accordance with any legal requirement for the time being in force.

14.2 The Contractor shall at the request of the Authority produce the relevant policy or policies referred to in Clause 14.1 together with the receipts or other evidence of payment of the latest premium due thereunder.

15. Variation of the Contract

15.1 Any variation to the terms of the Contract must be recorded in Writing and executed by an authorised signatory of the Contractor and the Authority. Such record of the variation in question must address all consequential amendments required to be made to the Contract as a result of such variation, including adjustment to the Contract Price.

15.2 Variations will take effect as from the date specified in the signed record of variation and shall not have retrospective effect unless expressly provided for in such record.

15.3 Each record of variation must be dated and sequentially numbered. Each of the Authority and the Contractor will be entitled to an original executed counterpart of the record of variation.

15.4 Save as provided in any such record of variation, the Contract will continue in full force and effect.

15.5 The Authority may agree to substitution of the Contractor with a Replacement Contractor as a Party to the Contract. The Authority may request such information as it considers necessary to allow the Authority to consider any request from the Contractor/or a Replacement Contractor for such a substitution. In the event that the Authority agrees to such substitution, it shall notify the Contractor and/or the Replacement Contractor in Writing and such notification shall specify the date from which such substitution shall take effect (the "**Substitution Date**"). As from the Substitution Date:-

15.5.1 the Replacement Contractor shall assume all responsibilities, obligations and rights of the Contractor under the Contract;

15.5.2 all references to "**Contractor**" shall be deemed to be to the Replacement Contractor; and

15.5.3 the Contract shall be deemed to be between the Authority and the Replacement Contractor;

and the Contractor shall, if necessary at law, execute an assignment of its rights and obligations under the Contract in favour of the Replacement Contractor.

16. Variation of the Specification

16.1 The Authority may at any time propose to the Contractor any reasonable variation or addition to the Specification and the Contractor shall not unreasonably withhold or delay its consent to such variation.

- 16.2 No such variation or addition shall affect the continuation of the Contract.
- 16.3 All such variations must be recorded in Writing in accordance with Clause 15 hereof.

17. Dispute Resolution Procedure

- 17.1 During any dispute, including a dispute as to the validity of the Contract, it is mutually agreed that the Contractor shall continue its performance of the provisions of the Contract (unless the Authority requests in Writing that the Contractor does not do so).
- 17.2 If any dispute arises out of the Contract (other than in relation to any matter in which the Authority has a discretion which is exercised in accordance with the terms of the Contract and which shall be final and conclusive) the Parties will use all of their respective reasonable endeavours to resolve it by negotiation. If negotiations fail to resolve such dispute, the Parties will attempt to settle it by mediation in accordance with the Centre for Dispute Resolution (“**CEDR**”) Model Mediation Procedure or any other model mediation procedure as agreed by the Parties. To initiate mediation, a Party shall give notice in Writing (a “**Mediation Notice**”) to the other Party requesting mediation of the dispute and shall send a copy thereof to CEDR or an equivalent mediation organisation as agreed by the Parties asking them to nominate a mediator in the event that the Parties shall not be able to agree such appointment by negotiation. The mediation shall commence within twenty-eight (28) Days of the Mediation Notice being served. Neither Party will terminate such mediation until each Party has made its opening presentation and the mediator has met each Party separately for at least one (1) hour. Thereafter, paragraph 14 of the CEDR Model Mediation Procedure (or the equivalent paragraph of any other model mediation procedure agreed by the Parties) will apply. Neither Party will commence legal proceedings against the other until thirty (30) Days after such mediation of the dispute in question has failed to resolve the dispute. The Authority and the Contractor will co-operate with any person appointed as mediator providing him with such information and other assistance as he shall require and will pay his costs, as he shall determine or in the absence of such determination such costs will be shared equally.

18. Environmental Considerations

- 18.1 The Contractor shall comply in all material respects with applicable environmental laws and regulations in force from time to time in relation to the Services or any other matter, which is the subject of the Contract. Where the provisions of any such legislation are implemented by the use of voluntary agreements or codes of practice, the Contractor shall comply with such agreements or codes of practice as if they were incorporated into Scottish law, subject to those voluntary agreements being cited in the Invitation to Offer.
- 18.2 The Contractor shall meet all reasonable requests by the Authority for information evidencing the Contractor's compliance with the provisions of this Clause.

19. Termination

19.1 The Authority may terminate the Contract (in whole or in part) by serving not less than three (3) months' Written notice on the other Party.

19.2 The Authority may terminate the Contract (in whole or in part) by serving Written notice on the Contractor in any of the following circumstances:-

19.2.1 with immediate effect as from the date of service of such notice in the event of:-

- (a) a material failure (in whole or in part) by the Contractor to perform any obligation of the Contractor under the Contract provided that (if capable of remedy) such failure has not been remedied to the Authority's reasonable satisfaction within a period of thirty (30) Days following Written notice demanding remedy of the failure in question being served by the Authority on the Contractor; or
- (b) the Contractor failing (in whole or in part) to perform any material obligation of the Contractor owed to the Authority on more than three (3) occasions; or
- (c) the Contractor becoming Insolvent or otherwise ceasing to be capable of supplying the Services provided that no Replacement Contractor has been approved pursuant to Clause 15.5 in which case the Authority shall not be entitled to terminate the Contract on grounds that the Contractor has become Insolvent; or
- (d) the Contractor being in default of any duty of care or any fiduciary or statutory duty owed to the Authority and/or any patient, employee or agent of the Authority; or
- (e) a change of ownership or control of the Contractor which, in the reasonable opinion of the Authority will have a material impact on the supply of the Services or the image of the Authority provided that no Replacement Contractor has been approved pursuant to Clause 15.5 in which case the Authority shall not be entitled to terminate the Contract on grounds of a change in ownership or control of the Contractor; or
- (f) the Contractor sub-contracting or purporting to assign the Contract or any part of the Contract in breach of Clause 12; or
- (g) the Contractor shall have offered or given or agreed to give to any person any gift or consideration of any kind as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any action in relation to the obtaining or execution of the Contract or any other contract with the Authority or for showing or forbearing to show favour or disfavour to any person in relation to the Contract or any other contract with the Authority or similar acts have been done by any person employed by it or acting on its behalf (whether with or without the knowledge of the Contractor); or

- (h) if, in relation to the Contract or any other contract with the Authority, the Contractor or any person employed by it or acting on its behalf shall have committed any offence under the Bribery Act 2010, or shall have given any fee or reward to any officer of the Authority which shall have been exacted or accepted by such officer under colour of his office or employment and is otherwise than such officer's proper remuneration.

19.2.2 on giving fourteen (14) days' Written notice in the event that at any time:

- (a) the Authority considers that procurement of a new contract is required as a result of a substantial modification, or a series of modifications which, taken together, constitute a substantial modification being, and having been, effected to the Contract;
- (b) the Authority becomes aware that the Contractor or any Relevant Person has been convicted of any of the offences listed in Regulation 58(1) of the Public Contracts (Scotland) Regulations 2015; or
- (c) the Authority becomes aware of a declaration by a court of competent jurisdiction that the Contract should not have been awarded to the Contractor in view of a serious infringement of the obligations under the Public Contracts (Scotland) Regulations 2015;

provided always that the Contractor shall be entitled to payment of such proportion of the Contract Price as is due and payable in terms of the Contract up to the date of termination on any of the grounds set out in this Clause 19.2.2.

19.3 The Authority shall be entitled to recover from the Contractor the amount of any Loss resulting from termination under Clauses 2.4, 19.1, or 19.2. For the purpose of this Clause 19, Loss shall include reasonable cost to the Authority of the time spent by its officers in terminating the Contract and in making alternative arrangements for the provision of the Services.

19.4 The Contractor may terminate the Contract in the following circumstance, by giving the Authority not less than one (1) month's Written notice:

19.4.1 if the Authority has committed a material breach of the Contract; and

19.4.2 the Contractor has brought the breach of Contract to the attention of the Authority; and

19.4.3 the Authority has not corrected the said breach of Contract within a reasonable period of time.

19.5 The Contractor agrees that upon termination for any reason (under Clause 19.1 or otherwise) or expiry of the Contract, it shall not be entitled to make a claim against the Authority in relation to costs incurred by the Contractor in

providing the Services or costs incurred in acquiring equipment and/or materials used in the provision of the Services or in engaging third parties in connection with the Services whether or not such costs were amortised in the calculation of the Contract Price payable by the Authority under the Contract. For the avoidance of doubt, the Contractor will not be restricted from making any claim in respect of the Contract Price to the extent the Contract Price is outstanding and due and payable.

- 19.6 The Authority and the Contractor agree that termination (in whole or in part) or expiry of the Contract shall not affect either Party's obligations which the Contract provides shall survive the termination or expiry of the Contract or the continuance of the part or parts not terminated where the Contract is terminated in part only.
- 19.7 Any termination (in whole or in part) of the Contract will not prejudice the rights, obligations and duties of each Party arising prior to such termination taking effect.
- 19.8 In the event that the Contractor anticipates an interruption in the supply of the Services to the Contract Standard and (one) the Contractor has notified the Authority in Writing that the supply of the Services to the Contract Standard will be recommenced within a time period which is acceptable to the Authority; and (two) the Authority elects not to terminate the Contract immediately, but to organise an alternative supply of the Services until such recommencement:-
- 19.8.1 within ten (10) Working Days of the recommencement of the supply of the Services to the Contract Standard, the Contractor shall pay to the Authority a sum representing all loss, costs and expenses which have been incurred by the Authority as a result of the said interruption in supply, including, without limitation, the cost of obtaining an alternative supply of the Services; and
- 19.8.2 the Authority shall be bound to take all reasonable steps to mitigate such loss, costs and expenses.
- 19.9 For the avoidance of doubt, such election by the Authority to obtain an alternative supply of the Services under Clause 19.8 above shall not prejudice the right of the Authority to terminate the Contract in the event that the supply of the Services to the Contract Standard has not recommenced within the time period referred to at Clause 19.8.1 or in the event of any other breach of the Contract by the Contractor.

20. Communications

All Written and oral communications, all documents and the labelling and marking of all packages shall be in English.

21. Intellectual Property

- 21.1 It shall be a condition of the Contract that nothing done by the Contractor in the performance of the Services shall infringe any Person's Intellectual Property Right.

- 21.2 Subject to Clause 13, the Contractor agrees to indemnify and keep indemnified the Authority against any actions, costs, claims, proceedings, expenses and demands arising from the use, application, supply or delivery of any process, article, matter or thing supplied under the Contract that would constitute or is alleged to constitute any infringement of any Person's Intellectual Property Rights or which the Authority may otherwise suffer or incur as a result of or in connection with any breach of Clause 21.1.
- 21.3 The Contract Price shall include all royalties, licence fees or similar expenses in respect of making use or exercise by the Contractor of any invention or design for the purpose of performing the Contract.
- 21.4 All Intellectual Property Rights in any reports, documents, specifications, instructions, plans, drawings, computer programmes, patents, models or designs, whether in Writing or on magnetic or other media:
- 21.4.1 furnished to or made available to the Contractor by the Authority shall remain vested in the Authority absolutely;
- 21.4.2 prepared by or for the Contractor for use, or intended use in relation to the performance of the Contract are hereby assigned to and shall vest in the Authority absolutely and the Contractor shall do all such things and sign all such documentation as may be required to give effect to this provision. The Contractor shall not and shall procure that the Contractor's Personnel shall not (except to the extent necessary for the implementation of the Contract) without prior Written consent of the Authority use or disclose any such reports, documents, specifications, instructions, plans, drawings, patents, models, designs or other material as aforesaid or any other information (whether or not relevant to the Contract) which the Contractor may obtain pursuant to or by reason of the Contract, except information which is in the public domain otherwise than by reason of a breach of this provision, and in particular (but without prejudice to the generality of the foregoing) the Contractor shall not refer to the Authority or the Contract in any advertisement without the Authority's prior Written consent.
- 21.5 The provisions of this Clause 21 shall apply during the continuance of the Contract and after its termination howsoever arising.

22. Audit and Accounts

- 22.1 The Contractor shall keep proper records in respect of the Contract Price due to it under the Contract. The Contractor will positively assist the Authority in the discharge of the Authority's reporting obligations pursuant to the Procurement Reform (Scotland) Act 2014 and shall provide the Authority with accurate and up-to-date information if reasonably requested from time to time.
- 22.2 For the purpose of the examination and certification of the Authority's accounts; or any examination pursuant to Section 6(1) of the National Audit Act 1983 or any re-enactment thereof of the economy, efficiency and effectiveness with which the Authority has used its resources, Audit Scotland, the Accounts Commission, the Auditor General and the Authority or its auditors may examine such documents, information, reports, records

and data, whether in human or machine-readable form as they may reasonably require which are owned, held or otherwise within the control of the Contractor and may require the Contractor to produce such oral or Written explanation as they consider necessary. The Contractor acknowledges that it will fully co-operate with any counter-fraud policy or investigation, whether carried out by the Counter Fraud and Security Management Service, or any equivalent body, successor or function, at any time. For the avoidance of doubt, it is hereby declared that the carrying out of an examination under Section 6(3)(d) of the National Audit Act 1983 or any re-enactment thereof in relation to the Contractor is not a function exercisable under the contract.

- 22.3 The Contractor shall take all reasonable steps to place similar obligations on its sub-contractors in all sub-contracts entered into in relation to the Contract to ensure access by the Authority and its duly authorised representatives, where appropriate, to relevant information of such sub-contractors.

23. Confidentiality and Freedom of Information

Use and Disclosure of Confidential Information

- 23.1 In respect of all Confidential Information provided by, or on behalf of, the Authority to the Contractor and subject to the terms of the Contract, the Contractor undertakes to the Authority that it will:

23.1.1 keep that Confidential Information completely and strictly confidential and keep in safe custody all documentation and media recording of the same;

23.1.2 save as expressly permitted in the Contract, not disclose, copy, reproduce, publish or distribute the whole or any part of that Confidential Information to any person unless authorised in Writing by the Authority;

23.1.3 use that Confidential Information only for the performance of the Contract and will not use that Confidential Information for its own benefit or for the benefit of anyone other than the Authority; and

23.1.4 maintain that Confidential Information as the Authority's property;

provided that the Contractor may, subject to obtaining appropriate confidentiality restrictions no less stringent than those set out in this Clause 23, pass to a sub-contractor such documents and other information which are necessary solely for the sub-contractor's performance of the Contract. If requested to do so by the Authority, the Contractor shall procure that any sub-contractor enters into a direct confidentiality undertaking with the Authority in a form approved by the Authority.

- 23.2 Subject to Clauses 23.3, 23.4 and 23.5, the Authority shall use its reasonable endeavours to keep any Confidential Information provided to it by, or on behalf of, the Contractor confidential and shall use its reasonable endeavours to use such Confidential Information only in connection with the performance of the Contract.

Exceptions

- 23.3 The obligation to maintain the confidentiality of, and the prohibitions and restrictions on use of, the Confidential Information shall not apply to information:
- 23.3.1 which the Party disclosing such information confirms in Writing is not required to be treated as Confidential Information;
 - 23.3.2 which is or comes into the public domain otherwise than through any disclosure prohibited by the Contract;
 - 23.3.3 which is received from a third party who lawfully acquired or developed it and who is under no obligation of confidence in relation to its disclosure;
 - 23.3.4 disclosed pursuant to Clause 23.7 (Scottish Government Health and Social Care Directorate disclosure and disclosure to other Government departments and agencies); or
 - 23.3.5 to the extent required to be disclosed pursuant to Clause 22.

For the purpose of this Clause 23, no Confidential Information shall be deemed to be in the public domain merely because such information is embraced by more general information or in the case of a complex body of information, because one (1) or more elements of it are separately available in the public domain.

- 23.4 Where the Authority receives Confidential Information from the Contractor, the Authority may disclose such Confidential Information to, and permit its use by, any third party for any purpose provided for or contemplated by the Contract.
- 23.5 The Authority shall be entitled to disclose any Confidential Information which it receives from the Contractor to its professional advisors to the extent that the Authority considers that they have a reasonable need to receive and consider the same.

Restricted Use

- 23.6 Save as otherwise expressly permitted in the Contract, the Contractor shall be permitted to disclose the Confidential Information only to its directors, officers, employees, agents and professional advisors who need to see and know it in connection with performance of the Contract (who are hereafter called the “**Permitted Persons**”) and the Contractor agrees to ensure that its Permitted Persons shall not divulge the Confidential Information to any third party and shall deal with the Confidential Information solely in accordance with the terms of the Contract and if required by the Authority, shall procure that such Permitted Persons enter into a confidentiality undertaking in a form approved by the Authority.
- 23.7 The Authority shall be free to disclose the terms of the Contract and any documents connected with the Contract to and within the Scottish Government Health and Social Care Directorate and to other Government departments, agencies and non-departmental public bodies and the Parties agree that the Authority shall be free to use and disclose such information on such terms and in such manner as the Authority sees fit.

23.8 The provisions of this Clause 23 shall survive termination of the Contract.

Remedies for breach of confidentiality

23.9 The Parties acknowledge that damages may not be an adequate remedy for any breach of this Clause 23 by either Party or any of the Contractor's Permitted Persons and the Parties may be entitled to obtain any legal and/or equitable relief, including an interdict, in the event of any breach of this Clause 23.

Return of Confidential Information

23.10 Without prejudice to the Parties' other obligations under the Contract, if directed to do so by the Authority at any time and in any event promptly following termination or expiry, the Contractor shall return to the Authority or destroy all Confidential Information of the Authority and shall certify that it does not retain any such Confidential Information, save to the extent that any Confidential Information needs to be retained:

23.10.1 by the Contractor for the purposes of the provision of the Services;

23.10.2 in cases where there is a partial termination by the Contractor for the purpose of the performance of the remainder of the Contract; or

23.10.3 by the Contractor in order to enforce any of its rights or remedies under the Contract.

Retention of Confidential Information by the Authority

23.11 Notwithstanding termination or expiry, the Authority shall be entitled to retain and use Confidential Information provided to it by or on behalf of the Contractor:

23.11.1 for the purposes of receiving any continuing Services; or

23.11.2 in cases where there is a partial termination, for the purposes of performance of the remainder of the Contract; or

23.11.3 in order to enforce any of its rights or remedies under the Contract; or

23.11.4 in order to maintain a record of the Confidential Information of the Contractor to enable the Authority to establish its continuing obligations under this Clause 23.

23.12 No term of the Contract, whether express or implied (including this Clause 23), shall preclude the Authority from making public under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2014 and/or any codes applicable from time to time relating to access to public authorities' information, details of all matters relating to a Contract unless (i) such details constitute a trade secret; (ii) the disclosure of such details would or would be likely to prejudice substantially the commercial interests of any person (including, but not limited to, the Contractor or the Authority); or (iii) such details fall within such other exemption as may be applicable at the discretion of the Authority in terms of

the said Act and/or Regulations; provided that the Authority will take all reasonable steps to provide the Contractor with notice of such intended disclosures prior to making such information public.

23.13 The Contractor shall:-

23.13.1 comply with any request by the Authority; and

23.13.2 provide all such assistance as may be required by the Authority;

to enable the Authority to comply with its obligations under the Freedom of Information (Scotland) Act 2002 and/or the Environmental Information (Scotland) Regulations 2014 (as the case may be).

23.14 This Clause survives termination of the Contract and shall remain in full force and effect.

24. Data Protection

Personal Data

24.1 For the avoidance of doubt, references in this Clause 24 to the term “**Personal Data**” shall only apply to Personal Data Processed in the course of the performance of the obligations imposed on the Contractor pursuant to or under the Contract where such Personal Data is Processed by the Contractor on behalf of the Authority or shared by the Authority in connection with the Services.

Compliance with Data Protection Legislation

24.2 The Contractor warrants that where the Contractor is a Processor of Personal Data in connection Services in respect of which the Authority is the Controller and/or where the Contractor is in receipt of Personal Data shared by the Authority in connection with the Services, the Contractor will, and will procure that any and all third parties appointed to process Personal Data on behalf of the Contractor in connection with the Contract (“**Contractor-processors**”) will, at all times for the Contract Period, Process Personal Data in compliance with the Data Protection Legislation.

Processing Instructions

24.3 Without prejudice to Clause 24.4, if the Contractor is a Processor of Personal Data of which the Authority is the Controller, the only Processing that the Contractor is authorised to undertake in connection with the performance of the obligations imposed on the Contractor pursuant to or under a Contract is such Processing described in the Contract together with any further Written instructions issued by the Authority from time to time (“**Processing Instructions**”). The subject matter of the Processing, nature and purpose of the Processing is also as set out in the Invitation to Offer, Order or Purchase Order or as otherwise set out by the Authority in Writing and notified to the Contractor from time to time.

24.4 The Contractor warrants that it will, and will procure that any and all Contractor-processors will, at all times for the Contract Period, only Process

the Personal Data for the purposes of the performance of the obligations imposed on the Contractor pursuant to or under the Contract.

24.5 Where the Contractor is a Processor of Personal Data in respect of which the Authority is the Controller, the Contractor shall notify the Authority:

24.5.1 before Processing where such Processing is not in compliance with the Processing Instructions but is required pursuant to Law, and shall inform the Authority of such Law;

24.5.2 immediately if it considers that any of the Authority's instructions infringe the Data Protection Legislation and will provide the Authority with a Written explanation of the reasons why it considers any of the Authority's instructions to be so infringing.

Confidentiality

24.6 The Contractor shall ensure that it takes all reasonable steps to ensure the reliability and integrity of any and all directors, officers, employees, agents, consultants and contractors of the Contractor and/or of any Contractor-processor engaged in the performance of the obligations imposed on the Contractor pursuant to or under the Contract ("**Processing Personnel**") who have access to the Personal Data and ensure that they:

24.6.1 are informed of the confidential nature of the Personal Data and are aware of and comply with the Contractor's duties under the Contract, in particular those obligations set out in this Clause 24;

24.6.2 are subject to appropriate confidentiality undertakings with the Contractor or any Contractor-processor, as the case may be, and

24.6.3 have undergone adequate training in the use, care, protection and handling of Personal Data and on the Data Protection Legislation insofar as it relates to Processing.

Security of Processing

24.7 The Contractor shall ensure that it has in place appropriate technical and organisational measures, which the Contractor shall maintain throughout the Contract Period at its cost and expense, and which are appropriate to the risk, all in compliance with the Data Protection Legislation.

Use of Contractor-processors

24.8 Where the Contractor is a Processor of Personal Data in respect of which the Authority is the Controller, the Contractor shall not allow any Contractor-processor to Process any Personal Data unless the Contractor has obtained the prior Written consent of the Authority in respect of the use of such Contractor-processor in connection with the Processing and the Contractor otherwise complies with Data Protection Legislation. The Contractor shall remain fully liable for all acts or omissions of any Contractor-processor.

24.9 The Contractor shall cease using a Contractor-processor immediately upon receipt of a Written request from the Authority requesting same where the Authority has reasonable grounds for concern about the Contractor-

processor's ability to carry out the Processing in accordance with the Data Protection Legislation.

Assistance to the Authority

- 24.10 The Contractor shall, at its own cost and expense, notify the Authority immediately (and within three (3) Days of receipt of the relevant request, complaint or communication at the latest) if it receives any request, complaint or communication pursuant to or in relation to the Data Protection Legislation relating to any Personal Data and provide the Authority with a copy of same.
- 24.11 The Contractor shall, at no additional cost or expense to the Authority (and insofar as possible, within the timescales reasonably required by the Authority), provide all reasonable assistance to the Authority in ensuring compliance with the obligations under the Data Protection Legislation in relation to:
- 24.11.1 responding to and actioning and/or remedying any requests, complaints or communications as applicable referred to in Clause 24.10;
 - 24.11.2 ensuring the security of the Personal Data; and
 - 24.11.3 the preparation of any Data Protection Impact Assessment required by the Authority^{24.3}.
- 24.12 The Contractor shall, at its own cost and expense, notify the Authority of any Personal Data Breach relating to the Personal Data of which it becomes aware within twenty-four (24) hours of becoming aware of such Personal Data Breach. The Contractor shall, within a period of forty-eight (48) hours of becoming aware of such Personal Data Breach, provide the Authority with all information regarding same and, where such Personal Data Breach involves the Contractor or any Contractor-processor, also provide the Authority with information on the measures taken or proposed to be taken to address the Personal Data Breach, including measures designed to mitigate its effects. If there is a delay in the Contractor providing such information, the Contractor shall provide a Written explanation of the reason for such delay.
- 24.13 Without prejudice to Clause 24.12, where any Personal Data Breach involves the Contractor or any Contractor-processor, the Contractor shall take or procure that such measures as are required to address the Personal Data Breach (including mitigating its effects) are taken within such timescales as are reasonably requested by the Authority.
- 24.14 Where the Contractor is a Processor of Personal Data in respect of which the Authority is the Controller, at the request of the Authority, the Contractor shall provide, at any time throughout the Contract Period, or following the date of termination, to the Authority a copy of all Personal Data held by the Contractor or any Contractor-processor in the format and on the media reasonably specified by the Authority. If the Contractor fails to provide the Authority with same, the Authority may, without limiting its other rights or remedies, enter the Contractor's or Contractor-processor's premises and take a copy of such Personal Data.

International Transfers of Personal Data

- 24.15 The Contractor shall not transfer Personal Data outside of the United Kingdom without the prior Written consent of the Authority.
- 24.16 If the Authority gives its Written consent to a transfer of Personal Data outside of the European Economic Area, the Contractor shall comply with the obligations on a Processor set out in The Data Protection Legislation in relation to such transfer, including adopting Appropriate Safeguards.

Deletion or Return of Personal Data

- 24.17 Where the Contractor is a Processor of Personal Data in respect of which the Authority is the Controller, the Contractor shall, within one (1) month following the date of termination of the Contract, or if earlier, the date of the cessation of those Services pursuant to or in connection with which the Processing of Personal Data by the Contractor on behalf of the Authority was undertaken, at the Written direction of the Authority, securely delete or securely return to the Authority all Personal Data (and any copies of it) unless the Contractor is required by Law to retain the Personal Data. If the Contractor is required by Law to retain the Personal Data, the Contractor shall advise the Authority of such requirement in Writing.

Records and Audits

- 24.18 The Contractor shall maintain complete, accurate and up-to-date Written records of all Processing carried out under or in connection with the Contract in order to demonstrate its compliance with the Contract and its compliance with the requirements of the Data Protection Legislation. Upon request by the Authority, the Contractor shall make such records available to the Authority together with all other necessary information required to demonstrate such compliance.
- 24.19 The Contractor shall, and shall procure that any and all Contractor-processors shall, allow for and contribute to audits, including inspections, conducted by the Authority or by another auditor mandated by the Authority, for the purpose of reviewing and assessing the Contractor's compliance with its obligations under this Clause 24 and the Data Protection Legislation.

Liability

- 24.20 The Contractor shall indemnify and keep indemnified and defend at its own expense, the Authority from and against any and all damage, losses, costs, claims, actions, demands and charges whether arising under statute, contract or at common law incurred by the Authority or for which the Authority may become liable arising from or in connection with any failure by the Contractor or any Contractor-processor or any of their employees or agents to comply with any of the Contractor's obligations under this Clause 24. The indemnity set out in this Clause 24 shall not be subject to any limit of liability in terms of Clause 13.2, but shall not cover any loss of profits, loss of business, loss of business opportunity, loss of goodwill or any consequential loss or indirect loss of any nature.
- 24.21 The Authority shall indemnify and keep indemnified and defend at its own expense the Contractor from and against any and all damage, losses,

costs, claims, actions, demands and charges whether arising under statute, contract or at common law incurred by the Contractor or for which the Contractor may become liable arising solely and directly as a result of failure by the Authority or its employees or agents to comply with any of the Authority's obligations under this Clause 24. The aggregate liability of the Authority in respect of the indemnity set out in this Clause 24.21 shall be subject to the limits of liability in terms of Clause 13.2 and shall not cover any loss of profits, loss of business, loss of business opportunity, loss of goodwill or any consequential loss or indirect loss of any nature.

- 24.22 The provisions of Clauses 24.20 and 24.21 shall not affect the liability of either the Authority or the Contractor to any Data Subject.

25. Liaison and Provision of Information at Termination

- 25.1 The Contractor will positively assist the Authority in ensuring a smooth, timely, risk-reduced transition of services to a New Contractor at the end of the Contract Period.
- 25.2 In anticipation of termination of the Contract (either at natural expiry or earlier termination in accordance with its terms), the Authority may require the Contractor to deliver up to the Authority any data (including Confidential Information) relevant to the provision of the Services on an appropriate media.

26. Protecting Vulnerable Groups Scheme

- 26.1 The Contractor (to the extent permitted by law) shall and shall procure that all potential staff or persons performing any of the Services pursuant to any Contract who may reasonably be expected in the course of their employment or engagement to have access to children, the elderly and/or vulnerable adults:
- 26.1.1 are questioned concerning their Convictions; and
- 26.1.2 only in the case of potential staff who may reasonably be expected in the course of their employment to have access to children, the elderly and/or vulnerable adults, are required to complete a Protecting Vulnerable Groups Scheme form.
- 26.2 No person who discloses any Convictions, or who is found to have any Convictions following the completion of a Protecting Vulnerable Groups Scheme check, in either case of which the Contractor is aware or ought to be aware, may be employed or engaged in the provision of any of Services pursuant to the Contract.
- 26.3 The Contractor shall keep the Authority advised at all times of any person employed or engaged by the Contractor or any sub-contractor in the provision of any Services pursuant to the Contract who, subsequent to his/her commencement of such employment or engagement, receives a Conviction of which the Contractor becomes aware or whose previous Convictions become known to the Contractor.

27. The Human Rights Act 1998 and the Asylum and Immigration Act 1996

- 27.1 The Contractor shall, and shall use all reasonable endeavours to procure that its employees or agents and/or sub-contractors shall, at all times, act in a way which is compatible with the Convention rights within the meaning of Section 1 of the Human Rights Act 1998.
- 27.2 The Contractor shall not, and shall procure that its employees or agents and/or sub-contractors shall not, be in breach of the Asylum and Immigration Act 1996.
- 27.3 Subject to Clause 13, the Contractor agrees to indemnify and keep indemnified the Authority against all Loss, Costs, proceedings or damages whatsoever arising out of or in connection with any breach by the Contractor of its obligations under this Clause 27.

28. Power to Agree

- 28.1 The Contractor warrants to the Authority that it has all necessary power, corporate standing and authorisation to enter into and be bound by the terms of the Contract and that there are no statutory provisions as at the Commencement Date of the Contract that would conflict with the terms herein contained. At all times in connection with the Contract, the Contractor shall be an independent contractor and nothing in the Contract shall create a relationship of agency or partnership or a joint venture as between the Contractor and the Authority and, accordingly, the Contractor shall not be authorised to bind the Authority.
- 28.2 The Contractor warrants that it currently has all and any agreements (including licences) as may be required with any third parties to perform the obligations incumbent upon it under the Contract.
- 28.3 The Contractor warrants that the Contract is executed by duly authorised representatives of the Contractor.

29. Relationship of the Parties

The Contractor shall not incur any liabilities on behalf of the Authority or, make any representations or give any warranty on behalf of the Authority or, enter into any contract or obligation on behalf of the Authority.

30. Inducements to Purchase

The Contractor shall not offer to the Authority or any of its employees or agents as a variation of the Contract, or as an agreement collateral to it, any advantage other than a discount against the Contract Price (which must be detailed within the invoice) or training of the employees of the Authority.

31. General

- 31.1 Any decision, act or thing that the Authority is required or authorised to take or do under the Contract may be taken or done by any person authorised, either generally or specifically, by the Authority to take or do that decision,

act or thing, provided that upon receipt of a Written request the Authority shall inform the Contractor of the name of any person so authorised.

- 31.2 The Contractor shall from time to time upon the request of the Authority, execute any additional documents and do any other acts or things which may reasonably be required to implement the provisions of the Contract.
- 31.3 Any provision of the Contract that is held to be invalid, illegal or unenforceable in any jurisdiction shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining provisions hereof and any such invalidity or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in any other jurisdiction. In the event of a holding of invalidity so fundamental as to prevent the accomplishment of the purposes of the Contract, the Parties shall commence good faith negotiations to remedy such invalidity.
- 31.4 The Contractor acknowledges and agrees that it has not relied on any representation, warranty or undertaking (whether Written or oral) in relation to the subject matter of the Contract and therefore irrevocably and unconditionally waives any rights it may have to claim damages against the Authority for any misrepresentation (whether made carelessly or not) or for breach of any warranty unless the representation relied upon is set out in the Contract or unless such representation was made fraudulently.
- 31.5 **No Waiver**
- 31.5.1 The failure by the Authority or the Contractor to insist upon the strict performance of any provision, term or condition of the Contract or to exercise any right or remedy consequent upon the breach thereof shall not constitute a waiver of any such breach or any subsequent breach of such provision, term or condition;
- 31.5.2 No waiver of any of the provisions of the Contract shall be effective unless it is expressly stated to be a waiver and communicated to the other Party in Writing in accordance with the provisions of Clause 34.
- 31.6 Each Party shall bear its own expenses in relation to the preparation, execution and implementation of the Contract including all costs, legal fees and other expenses so incurred.
- 31.7 The Contractor warrants, represents and undertakes to the Authority that there are no pending or threatened actions or proceedings before any court or administrative agency which would materially adversely affect the financial condition, business or operations of the Contractor and that there are no material contracts existing to which the Contractor is a party which prevent it from entering into the Contract; and that the Contractor has satisfied itself as to the nature and extent of the risks assumed by it under the Contract and gathered all information necessary to perform its obligations under the Contract and all other obligations assumed by it.
- 31.8 Wherever under the Contract any sum of money is recoverable from or payable by the Contractor, that sum may be deducted from any sum then

due, or which at any later time may become due, to the Contractor under the Contract or under any other agreement or contract with the Authority.

- 31.9 The Contractor shall at all times comply with all applicable laws, enactments, orders, regulations and other similar instructions.
- 31.10 The Authority shall be entitled to set-off any amount due by the Contractor to the Authority under the Contract against any amounts due by the Authority to the Contractor under the Contract.
- 31.11 The Contract does not give rise to any rights under the Contract (Third Party Rights) (Scotland) Act 2017 for any third party to enforce or otherwise invoke any term of the Contract.

32. Diversity

- 32.1 The Contractor shall not discriminate unlawfully within the meaning and scope of any Law relating to discrimination (whether in relation to race, gender, disability, religion or otherwise) in employment or performance of the Contract. The Contractor shall take all reasonable steps to ensure the observance of this Clause by all staff and by all contractors and sub-contractors of the Contractor and the Contractor shall ensure that its policies and practices comply with the requirements of such Law, including without limitation, the Race Relations Act 1976, the Disability Discrimination Act 1995 and the Disability Discrimination Act 2005, the Sex Discrimination Act 1975 or the Equality Act 2010 (“**the Anti-Discrimination Legislation**”).
- 32.2 The Contractor shall notify the Authority immediately of any investigation of or proceedings against the Contractor under the Anti-Discrimination Legislation and shall co-operate fully and promptly with any requests of the person or body conducting such investigation or proceedings, including allowing access to any documents or data required, attending any meetings and providing any information requested.
- 32.3 The Contractor shall indemnify the Authority against all costs, claims, charges, demands, liabilities, damages, losses and expenses incurred or suffered by the Authority arising out of or in connection with any investigation conducted or any proceedings brought under the Anti-Discrimination Legislation due directly or indirectly to any act or omission by the Contractor, its agents, employees or sub-contractors.
- 32.4 The Contractor shall impose on any sub-contractor obligations substantially similar to those imposed on the Contractor by this Clause.

33. Publicity

The Contractor shall not advertise or publicly announce that it is supplying the Services or undertaking work for the Authority without the prior consent of the Authority.

34. Notices

- 34.1 Any notice to be given under the Contract shall either be delivered personally, or sent by first class recorded delivery post (air-mail if overseas)

or electronic mail. The address for service of each Party shall be its registered office or such other address as either Party may previously have notified to the other Party in Writing. A notice shall be deemed to have been served:

- 34.1.1 if personally delivered, at the time of delivery;
- 34.1.2 if posted, at the expiration of forty-eight (48) hours or (in the case of air-mail seven (7) Days) after the envelope containing the same was delivered into the custody of the postal authorities; and
- 34.1.3 if sent by electronic mail, at the time of the transmission, provided a telephone call is made to the recipient warning the recipient that an electronic mail message has been sent to him (as evidenced by a contemporaneous note of the Party sending the notice) and a hard copy of such notice is also sent by first class recorded delivery post (air-mail if overseas) on the same day as that on which the electronic mail is sent.

In proving such service, it shall be sufficient to prove that personal delivery was made, or that the envelope containing such notice was properly addressed and delivered into the custody of the postal authority as pre-paid first class, recorded delivery or air-mail letter (as appropriate).

35. Transfer of Undertakings (Protection of Employment) (TUPE) Regulations

35.1 The Contractor agrees that, subject to compliance with the Data Protection Legislation:

- 35.1.1 within twenty (20) days of the earliest of:
 - (a) receipt of the giving of notice of early termination of the Contract or any part thereof; or
 - (b) the date which is twelve (12) months before the expiry of the Contract;

and, in any event, on receipt of a Written request of the Authority at any time, it shall provide the Contractor's Provisional Staff List and the Staffing Information to the Authority or, at the direction of the Authority, to a Replacement Contractor and it shall provide an updated Contractor's Provisional Staff List when reasonably requested by the Contractor or any Replacement Contractor;

- 35.1.2 the Customer shall be permitted to use and disclose the Contractor's Provisional Staff List and the Staffing Information for informing any tenderer or other prospective Replacement Contractor for any services which are substantially the same type of services (or any part thereof) as the Services; and
- 35.1.3 on reasonable request by the Authority, the Contractor shall provide the Authority or at the request of the Authority, the Replacement Contractor, with access (on reasonable notice and during normal

working hours) to such employment records (and provide copies) as the Authority reasonably requests.

- 35.2 The Contractor agrees that once it has provided the Contractor's Provisional Staff List and the Staffing Information pursuant to Clause 35.1 above, it shall not, without the prior Written consent of the Authority, assign any person to the provision of the Services (or the relevant part) which is the subject of a transfer who is not listed in the Contractor's Provisional Staff List and shall not, without the prior Written consent of the Customer (such consent not to be unreasonably withheld or delayed):
- 35.2.1 increase the total number of employees listed on the Contractor's Provisional Staff List save for fulfilling assignments and projects previously scheduled and agreed with the Authority;
 - 35.2.2 make, propose or permit any changes to the terms and conditions of employment of any employees listed on the Contractor's Provisional Staff List;
 - 35.2.3 increase the proportion of working time spent on the Services (or the relevant part) by any of the Contractor's Personnel save for fulfilling assignments and projects previously scheduled and agreed with the Authority;
 - 35.2.4 introduce any new contractual or customary practice concerning the making of any lump sum payment on the termination of employment of any employees listed on the Contractor's Provisional Staff List; and
 - 35.2.5 replace any of the Contractor's Personnel listed on the Contractor's Provisional Staff List or deploy any other person to perform the Services (or the relevant part) or increase the number of employees or terminate or give notice to terminate the employment or contracts of any persons on the Contractor's Provisional Staff List.
- 35.3 The Contractor will promptly notify the Authority or, at the direction of the Authority, the Replacement Contractor of any notice to terminate employment received from any persons listed on the Contractor's Provisional Staff List regardless of when such notice takes effect.
- 35.4 Where there is a transfer pursuant to the TUPE Regulations of the contracts of employment of any of the Contractor's staff (such Contractor's staff being referred to herein as "**Affected Employees**") to the Authority or a New Contractor then the following shall apply:-
- 35.4.1 the Contractor shall comply with the TUPE Regulations, provided always that notwithstanding the TUPE Regulations, the Contractor shall provide all the information which it is required to disclose in terms of Regulation 11 of the TUPE Regulations to the Authority no later than two (2) months before the Service Transfer Date;
 - 35.4.2 the Contractor shall advise the Authority in Writing prior to the Service Transfer Date of any updates to the information referred to at Clause 35.4;

- 35.4.3 the Contractor warrants that the information to be provided by the Contractor in terms of Regulation 11 of the TUPE Regulations will be true, accurate and complete in all material respects;
- 35.4.4 the Contractor shall and does hereby indemnify the Authority and any New Contractor from and against all Pre-Transfer Liabilities relative to the period up to and including the Service Transfer Date.
- 35.5 The provisions of this Clause 35 shall survive following termination of the Contract for any reason whatsoever and without limit in time.

36. Specific Performance

The Parties acknowledge and agree that in the event of a material failure on the part of the Contractor in performance of its obligations under the Contract, the loss or damage incurred by the Authority by reason of such material failure will be such that damages may not be an adequate remedy. Accordingly, the Authority shall have the right to specifically implement the Contractor's obligations under the Contract. Such remedy shall be in addition to and not in lieu or limitation of other remedies provided to the Authority hereunder or otherwise at law or in equity.

37. Force Majeure

- 37.1 No Party shall be entitled to bring a claim for a breach of obligations under the Contract by the other Party or incur any liability to the other Party for any Loss or damages incurred by that Party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that event of Force Majeure.
- 37.2 In the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.
- 37.3 As soon as practicable, following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the Contract.

38. Law

The Contract shall be governed and construed in accordance with the law of Scotland and, subject to Clause 17, both Parties hereby irrevocably submit to the exclusive jurisdiction of the Scottish Courts.