

ABERDEENSHIRE COUNCIL

STANDARD TERMS AND CONDITIONS

RELATING TO THE PROCUREMENT OF SERVICES

VERSION 4

Documentation Control

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PART 1 – SUPPLY OF SERVICES AND PAYMENT

1 Provision of Services

- 1.1 The Supplier shall provide the Services in accordance with this Contract and in return for the payment of the Charges.
- 1.2 The Supplier shall ensure that the Services:
- 1.2.1 are provided with all reasonable skill, care and diligence; and
 - 1.2.2 are supplied in accordance with the terms of the Contract.
- 1.3 The Supplier shall ensure that it receives and maintains any licences, permissions, authorisations, consents and permits that it needs to carry out its obligations under the Contract.

2 Scheduling of Services

- 2.1 Where the Contract requires the Services to:
- 2.1.1 commence on a certain date;
 - 2.1.2 be completed by a certain date; or
 - 2.1.3 be provided for a certain period,
- the Supplier will comply with such requirements.
- 2.2 If Services are to be provided in distinct elements, the Supplier will comply with any reasonable request of the Council as to the order in which the Services will be provided.

3 Conflict of Interest

- 3.1 Where the Contract is one for the provision of professional Services, the Supplier shall ensure that it has no conflict of interest such as may be likely to prejudice its independence and objectivity in performing the Contract (a "Conflict").
- 3.2 Where the Supplier becomes aware of any Conflict during the performance of this Contract (whether the Conflict existed before the award of this Contract or arises during its performance) it shall immediately notify the Council in writing of the Conflict, giving particulars of its nature and the circumstances in which it exists or arises and the Supplier's proposals for avoiding or removing the Conflict (the "Proposals"). The Supplier shall provide such further information as the Council may reasonably require in relation to the Conflict and the Proposals.
- 3.3 Where the Council is of the opinion that a Conflict notified to it under Clause 3.2 is not capable of being avoided or removed by the implementation of Proposals, the Council may terminate the Contract forthwith by notice in writing to the Supplier.
- 3.4 Where the Council is of the opinion that a Conflict notified to it under Clause 3.2 is capable of being avoided or removed by the implementation of Proposals:
- 3.4.1 if the Supplier fails to implement the Proposals; or
 - 3.4.2 if, in the opinion of the Council, implementation of the Proposals does not avoid or remove the Conflict,

the Council may terminate the Contract forthwith by notice in writing to the Supplier.

4 Deliverables

- 4.1 In this Clause 4, "**Deliverables**" mean any outputs deriving from the provision of Services pursuant to the Contract including all reports, financial models, recommendations and advice.
- 4.2 The Council shall be entitled to rely upon the Deliverables, other than those stated to be draft or to the extent stated to be subject to further work, incomplete or not in final form.
- 4.3 The Supplier may issue Deliverables in draft form, or state them to be subject to further work, incomplete or not in final form, but if requested to do so the Supplier may not unreasonably refuse to issue such Deliverables in final form, nor unreasonably delay that issue.
- 4.4 The Supplier acknowledges that it shall have no right to be identified as the author of any Deliverable, and waives any such rights conferred by law.

5 Payment

- 5.1 The Council shall pay to the Supplier the Charges in return for the supply of the Services in accordance with the Contract.
- 5.2 The Council shall pay the Supplier within 30 days of the date of receipt by the Council of a valid Invoice from the Supplier, unless the Specification or Contract Award Letter provides for a different period.
- 5.3 If the Specification or Contract Award Letter provides, the Council shall be entitled to a discount for prompt payment at the level and with reference to the payment periods set out in the Specification or Contract Award Letter.
- 5.4 All Charges set out in the Contract are quoted:
- 5.4.1 exclusive of Value Added Tax, which, if payable will be shown separately on the Supplier's Invoice;
 - 5.4.2 inclusive of the cost of any equipment or materials used in the provision of the Services, and any costs of accommodation and subsistence, unless the Specification provides otherwise.
- 5.5 The Charges shall be the entire amount payable by the Council in respect of the Contract.
- 5.6 The Supplier will comply with the Council's reasonable requests in respect of the form of Invoices and the consolidation or division of Invoices to reflect different parts of the performance of the obligations under the Contract.
- 5.7 The Council may pay the Supplier by electronic transfer of funds, by cheque or by means of a corporate purchasing card (and any transaction fees incurred by the Supplier in relation to any such payment method shall be for the Supplier's account).

6 Set off

- 6.1 The Council may, without prejudice to any other rights or remedies it may have, set off any amount owed to it by the Supplier under the Contract against any amounts payable by it to the Supplier under the Contract or any other contract or otherwise.
- 6.2 The Supplier shall not be entitled to assert any credit, set-off or counterclaim against the Council in order to justify withholding payment of any amount in whole or in part.

7 Late payment

- 7.1 If a Party fails to make any payment due to the other under the Contract by the due date, then the defaulting Party shall pay interest on the late payment for the period from the due date to the date of payment at a rate of 3% above the base rate set from time to time by The Royal Bank of Scotland plc.
- 7.2 The interest on late payment as provided for in Clause 7.1 or otherwise shall not apply to periods during which payments are disputed in good faith by the party due to make payment.

PART 2 – ACCESS AND PERSONNEL AND CONTRACT MANAGEMENT

8 Access to Premises

- 8.1 If the Supplier requires to access or occupy any of the Premises for the purpose of performing the Contract, the Council will make such access or occupation available to the Supplier free of charge for the sole purpose of performing the Contract, subject to the provisions of the Contract.
- 8.2 The Supplier will not deliver to the Premises any equipment or materials necessary to provide the Services, and will not commence any work at the Premises, until it has agreed details with the Council with regards to the date and time of access, and the proposed delivery or working method including safety cases and method statements.
- 8.3 Any equipment and materials of the Supplier required to perform the Contract will be kept and shall remain at the sole risk of the Supplier, whether or not they are located in or at any Council Premises.

9 Employees at the Premises

- 9.1 On the reasonable request of the Council, the Supplier shall provide a list of the names and addresses of all Employees who may require admission to the Premises pursuant to Clause 8, together with a disclosure certificate obtained from Disclosure Scotland to the level specified by the Council, if such a certificate is required by the Council, acting reasonably.
- 9.2 If the Council, acting reasonably, believes that admission to the Premises of an Employee would be likely to cause offence, put health and safety at risk, or be otherwise undesirable, then the Council may refuse the admission of such an Employee.
- 9.3 In the event of the Council refusing admission under Clause 9.2, the Supplier will observe the Council's refusal and provide a suitable alternative Employee to perform the tasks of an excluded Employee at the cost of the Supplier.
- 9.4 The Supplier will comply with, and ensure that its Employees comply with, the Council's reasonable instructions with regard to accessing and occupying the Premises, including any health and safety requirements. All Employees at the Premises will carry an identity card issued by and bearing the name of the Supplier or relevant Sub-Contractor.

10 Employees

- 10.1 The Supplier shall employ, engage and train suitably qualified and experienced staff to enable the Supplier to perform its obligations under the Contract.
- 10.2 On the reasonable request of the Council, the Supplier will provide the Council with:
- 10.2.1 a list of names of all people having a role in the performance of the Supplier's obligations under the Contract;
 - 10.2.2 a description of the part each of these people will play in performing the Supplier's obligations under Contract, and

- 10.2.3 details of these people's qualifications, experience and previous employment or such other evidence as may reasonably be required to establish that they are suitably qualified and experienced for performing the Supplier's obligations under the Contract.
- 10.3 If the Council determines on reasonable grounds that an Employee involved in the performance of the Contract should no longer be involved in the performance (including where a disclosure certificate has been required by the Council pursuant to Clause 9.1, and that certificate is not available or has ceased to be available) then, following notice by the Council to that effect, the Supplier will take all reasonable steps to comply with such notice without delay, at the cost of the Supplier.
- 10.4 Subject to Clause 10.3, if the Contract indicates any duties to be carried out by any particular employee or representative of the Supplier (or Sub-Contractor) the Supplier will use such persons to discharge those duties, unless the Council has agreed to changes.
- 10.5 If the Contract Award Letter specifies that the individual consultant conditions are to apply, the terms and conditions set out in Annex 1 of these Conditions shall apply.
- 10.6 If the Contract Award Letter specifies that the TUPE conditions are to apply, the terms and conditions set out in Annex 2 of these Conditions shall apply.
- 10.7 Nothing in the Contract shall have the effect of making any Employee an employee of the Council.

11 Account representative

- 11.1 Both Parties shall appoint an Account Representative to be their representative for all purposes connected with the delivery of the Contract for the duration of the Term.
- 11.2 Each Party shall notify the other:
- 11.2.1 on the identity of the first appointed Account Representative; and
- 11.2.2 immediately if there is a change in the identity of its Account Representative.
- 11.3 The Account Representatives shall meet to discuss and resolve any Contract management issues which arise during the Term. Such meetings shall be conducted in accordance with any particular requirements set out in the Specification but in any event will be conducted in good faith.

12 Progress reporting

- 12.1 If and when asked by the Council, the Supplier must provide reports showing the progress of the performance of the Contract, the associated costs and performance of the Supplier against the Key Performance Indicators ("Progress Reports").
- 12.2 The Council may from time to time specify the format of Progress Reports, and the Supplier will adopt that format.
- 12.3 The Supplier must issue Progress Reports two Business Days in advance of any review meetings scheduled pursuant to Clause 11.3.

13 Improvement and incentivisation

- 13.1 Throughout the duration of the Contract, the Supplier will seek to identify changes to the Contract which could result in the Council saving money or securing demonstrable better value for money through the implementation of:
- 13.1.1 changes to processes relating to the way in which the Contract is performed by either party or the Parties; and/or

13.1.2 an alternative solution that meets the requirements of the Specification and does not compromise either the delivery or quality of the supply,

and as and when identified will propose such changes to the Council.

13.2 The Council shall not be obliged to agree to any changes proposed pursuant to Clause 13.1 but if such a change is agreed (pursuant to Clause 44) the Supplier shall be entitled to 40% of any savings (or additional demonstrable value for money) derived, with 60% being for the account of the Council.

13.3 The methodology for the calculation of the savings and the timing and method of payment shall be recorded in the variation to the Contract referred to in Clause 13.2.

PART 3 – LIABILITY, INDEMNITY AND INSURANCE

14 Limitation of Liability

14.1 Each Party's liability to the other under the Contract shall be limited to the amounts stated in the Specification, each to the extent permitted by law.

14.2 If there is no limit of liability stated in the Specification, then the Parties' liability shall be limited as follows:

14.2.1 the maximum aggregate liability of a Party in relation to physical damage to property caused by that Party shall be £5,000,000; and

14.2.2 the maximum aggregate liability of a Party in relation to the Contract (including any damage to property) shall be £10,000,000.

14.3 The limitations in Clauses 14.1 and 14.2 shall not apply to liability resulting from any fraud, or any liability for personal injury or death.

15 Indemnity

The Supplier will indemnify and keep indemnified the Council against all actions, claims, demands, costs and expenses incurred by or made against the Council which arise in connection with anything done or omitted to be done in connection with the Contract by the negligence or other wrongful act or omission of the Supplier, an Employee or Sub-Contractor.

16 Insurance

16.1 During the Term and for 12 months after the expiry of the Term, the Supplier shall maintain in force with reputable insurers:

16.1.1 employer's liability insurance and public liability insurance in the sum of not less than £5,000,000 in respect of any one incident and unlimited as to numbers of claims;

16.1.2 professional indemnity insurance and product liability insurance to the values (if any) identified in the Specification;

16.1.3 adequate insurances covering all the Supplier's other liabilities under the Contract; and

16.1.4 such other insurances as may be identified in the Specification.

16.2 On the Council's reasonable request, the Supplier shall exhibit satisfactory evidence of the insurance policies referred to in this Clause 16, together with satisfactory evidence of payment of the premia in respect of each insurance.

PART 4 – ASSIGNATION AND SUB-CONTRACTING

17 Assignment and sub-contracting

- 17.1 The Supplier shall not be entitled to assign, novate, sub-contract or otherwise transfer or dispose of its interest in the Contract or any part thereof without the Council's prior written consent, such consent not to be unreasonably withheld or delayed.
- 17.2 The Council shall be entitled to assign, novate, sub-contract or otherwise transfer or dispose of its interest in the Contract or any part thereof without the consent of the Supplier.
- 17.3 The Supplier shall remain fully liable for the actions and defaults of all of its Sub-Contractor and sub-contracting will not relieve the Supplier of its obligations or duties under the Contract.

PART 5 – DEFAULT AND TERMINATION

18 Guarantee

- 18.1 If the Supplier is a Subsidiary, the Supplier shall deliver to the Council, on demand, a parent company guarantee granted and duly executed by a Holding Company of the Supplier (in a form to the satisfaction of the Council, acting reasonably) which guarantees the performance and liabilities of the Supplier in connection with the Contract.
- 18.2 If the Supplier has more than one Holding Company, the Council may determine which Holding Company shall grant the guarantee referred to in Clause 18.1.

19 Performance bond

- 19.1 If the Contract requires the delivery of a performance bond in respect of the Supplier's performance of its obligations pursuant to the Contract, the Supplier shall put in place and maintain such a bond and deliver it to the Council on demand. The level of the performance bond will be determined by the Council, acting reasonably. The consent of the Council will be required to the identity of the proposed provider of the bond and the form of the performance bond, and the Council will act reasonably in giving that consent.

20 Default

- 20.1 If the Supplier is in Default, the Council will notify the Supplier if it is aware of that Default.
- 20.2 If a Default is not material (in the reasonable opinion of the Council) and is capable of remedy, the Council will give the Supplier the opportunity to remedy that Default.
- 20.3 If a Default, taken together with any other Defaults, is material (in the reasonable opinion of the Council) and is capable of remedy the Council may, but shall not be obliged to, give the Supplier the opportunity to remedy the Default. The Council shall act reasonably in reaching that determination.
- 20.4 If the Supplier is to be given the opportunity to remedy any Default (pursuant to Clause 20.2 or 20.3) the Council shall notify the Supplier, specifying the Default and requiring the Supplier to remedy such a Default, and the Supplier will:
- 20.4.1 remedy the Default as soon as possible after the notice; and
- 20.4.2 use reasonable endeavours to assist the Council in mitigating the effects of the Default,
- all at the cost of the Supplier.

21 Liquidated damages

- 21.1 If the Supplier is given the opportunity to remedy any Default the Supplier shall pay to the Council a sum equal to 5% of the Total Contract Price for each period of 30 days day elapsing from the date the Default arises until the date the Default is remedied to the reasonable satisfaction of the Council, provided that the amount payable by the Supplier under this Clause 21.1 shall not exceed a sum equal to 15% of the Total Contract Price.
- 21.2 All sums payable under Clause 21.1 shall be set off against and shown as a deduction of the amount payable (before calculation of value added tax) in the next invoice raised by the Supplier under this Agreement, but to the extent not accounted for by deductions in this way the Council may at any time (including after termination or expiry of this Agreement) invoice the Supplier for amounts due pursuant to Clause 21.1.
- 21.3 If this agreement is terminated no additional liability shall accrue under Clause 21.1 in relation to any period after termination, but any liability existing under Clause 21.1 at termination shall be unaffected.

22 Withholding of Sums Payable

- 22.1 If the Supplier is in Default, the Council shall be entitled to withhold any sum which is payable by the Council to the Supplier until the Default has been remedied.
- 22.2 Any sums withheld pursuant to Clause 22.1 shall be reasonable and commensurate with regard to:
- 22.2.1 the amount of any loss or any additional costs which the Council has incurred or may incur in consequence of the Default; and
- 22.2.2 the extent to which the Default has caused or will cause a reduction in the quality or extent of the Supplier's performance of the Contract.

23 Termination

- 23.1 The Contract shall terminate automatically on the expiry of the Term.
- 23.2 The Council may at any time terminate the Contract with immediate effect by notice in writing to the Supplier:
- 23.2.1 on the occurrence of an Insolvency Event;
- 23.2.2 if the Council discovers that the Tender Documents or any other document or information submitted or provided by the Supplier to the Council is false, erroneous, or misleading in any material respect;
- 23.2.3 if there is a Default which the Supplier has been given the opportunity to remedy pursuant to Clause 20, but which the Supplier has failed to remedy within 30 days of receipt of the notice from the Council specifying the Default and requiring the Supplier to remedy such a Default;
- 23.2.4 if there has been an Unauthorised Change of Control;
- 23.2.5 on the occurrence of a Default which is not capable of remedy, or a Default which is material and in relation to which the Council has determined that the Supplier is not to be given the opportunity to remedy.
- 23.3 The Council shall be entitled to terminate the Contract by giving not less than 30 Business Days' notice to the Supplier.
- 23.4 The Supplier must not commit any breach of the Employment Relations Act 1999 (Blacklists) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act

1992, or commit any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities. Breach of this Clause is a material default which shall entitle the Council to terminate the contract with immediate effect.

24 Consequences of Termination

- 24.1 Termination or expiry of the Contract shall not prejudice or affect any right of action or remedy of either Party which has accrued or will accrue.
- 24.2 On the termination of the Contract pursuant to Clause 23.2.2 (errors etc in tender documents) or Clause 36 (Anti-corruption) or if the Default leading to termination related to a failure to provide the Services, the Supplier will indemnify the Council in respect of:
- 24.2.1 any costs and expenses reasonably and properly incurred by the Council as a result of such termination;
 - 24.2.2 the costs and expenses reasonably and properly incurred by the Council in procuring services similar to the Services on a temporary basis until the appointment of a successor to the Supplier, but only to the extent that such costs and expenses exceed the Charges that would have been payable (or a reasonable estimate of such Charges, to the extent unknown) had the Contract not been terminated; and
 - 24.2.3 the costs and expenses reasonably and properly incurred by the Council in carrying out the tendering or reappointment process referred to in Clause 24.2.2.
- 24.3 Termination of the Contract will not affect the continued operation of those Clauses which are stated to survive termination, or any other of the provisions of the Contract which, having regard to their terms, are intended to survive termination or expiry.

25 Transfer of Responsibility

- 25.1 On the expiry or termination of the Contract and for up to 6 months after that date, the Supplier shall cooperate with the Council's reasonable requests in relation to facilitating an orderly and efficient transfer of the performance of the Supplier's obligations under the Contract to the Council or to a third party.
- 25.2 This Clause 25 shall survive termination of the Contract.

PART 6 – HEALTH & SAFETY, NON-DISCRIMINATION AND ENVIRONMENTAL CONSIDERATIONS

26 Health & safety

- 26.1 The Supplier shall comply with, and be responsible for ensuring its Employees and Sub-Contractor comply with, all necessary health and safety precautions in connection with the performance of the Contract.
- 26.2 Each Party shall be responsible for notifying the other promptly following the development or occurrence of any health and safety hazards which arise in connection with the performance of the Contract.

27 Non-discrimination

- 27.1 The Supplier shall comply with the Discrimination Legislation and any related codes of practice and shall not unlawfully discriminate within the meaning and scope of the Discrimination Legislation or such codes of practice.
- 27.2 The Supplier shall notify the Council immediately on the commencement of any investigation or proceedings against the Supplier under the Discrimination Legislation and shall cooperate fully and promptly with any requests of the person or body conducting such investigation or proceedings.

28 Environmental considerations

- 28.1 The Supplier will ensure that any materials and equipment used in the provision of the Services will not:
- 28.1.1 endanger the health and safety of persons (assuming that such persons act reasonably);
 - 28.1.2 cause significant damage to the environment during manufacture, use, or disposal, or consume a disproportionate amount of energy during manufacture, use, or disposal, or which lead to unnecessary waste;
 - 28.1.3 contain materials derived from threatened species or environments.
- 28.2 The Supplier will comply with all Applicable Laws relating to environmental matters which are relevant to the Contract and shall use reasonable endeavours to comply with relevant environmental codes of practice or voluntary arrangements.

PART 7 –INTELLECTUAL PROPERTY AND DISCLOSURE

29 Intellectual property rights

- 29.1 The Supplier will indemnify and keep indemnified the Council against all actions, claims, demands, costs and expenses incurred by or made against the Council which arise in connection with any breach by the Supplier of any Intellectual Property Right of any third party in relation to the Services or otherwise relating to the performance of the Contract.
- 29.2 All rights (including ownership and Intellectual Property Rights) in any Materials made available to the Supplier by the Council shall remain owned by the Council.
- 29.3 Subject to Clause 29.4, all Intellectual Property Rights in any Materials produced or prepared by the Supplier (or any Sub-Contractor) as part of the provision of the Services or otherwise in performance of the Contract shall vest in, be assigned to and be owned by the Council. Without prejudice to that vesting, assignation and ownership, on the demand of the Council, the Supplier will sign and deliver any document reasonably required by the Council to vest ownership of such Intellectual Property Rights in the Council.
- 29.4 To the extent that there are Intellectual Property Rights in any Materials which are provided by the Supplier to the Council as part of the provision of the Services or otherwise in performance of the Contract and which were in existence prior to the commencement of the Services, the Supplier hereby grants to the Council all necessary licence rights in relation to such Intellectual Property Rights to allow it to use the Materials for all purposes contemplated or envisaged by the Contract, such licence to be non-exclusive and royalty free. Without prejudice to that licence, on the demand of the Council, the Supplier will sign and deliver any document reasonably required by the Council to licence such Intellectual Property Rights to the Council.

30 Freedom of Information

- 30.1 The Supplier acknowledges that the Council is required to act in accordance with the requirements of the Information Legislation and the Supplier undertakes to provide such assistance as the Council may reasonably require to enable it to comply with such requirements.
- 30.2 Decisions as to whether the Information Legislation requires the disclosure of any information provided by the Supplier or which relates in any way to the Supplier or the Contract may be made by the Council without reference to the Supplier, but the Council will:
- 30.2.1 use reasonable endeavours to consult with the Supplier in accordance with the relevant Information Legislation code of practice before disclosing or publishing any information under the Information Legislation which relates in any way to the Supplier or the Contract; and

- 30.2.2 have regard to the confidential nature of any information relating to the Supplier or the Contract in making decisions about disclosure of information under the Information Legislation.

31 Confidentiality

- 31.1 Subject to Clause 31.2, all information of a confidential nature obtained by the Supplier from the Council and in connection with the Contract ("**Confidential Information**") will be treated by the Supplier in confidence, and the Supplier will not use it for other purposes or disclose it other than to the extent required to perform the Contract.
- 31.2 Clause 31.1 does not prohibit the disclosure by the Supplier of any Confidential Information which the Supplier is obliged by law to disclose or which is legitimately known to the Supplier other than through its disclosure to the Supplier by the Council.
- 31.3 Where the Supplier processes information about individuals in the performance of the Contract it shall comply fully with the requirements of the Data Protection Act 1998.
- 31.4 This Clause 31 shall survive termination of the Contract.

32 Publicity

- 32.1 The Supplier shall not make any public statement (including in any tender exercise or marketing material) relating to the details, existence or performance of the Contract, or the fact the Council is a customer of the Supplier, without the Council's prior written approval.
- 32.2 Clause 32.1 shall not apply to the extent the Supplier is required to make any disclosure in order to properly discharge the Contract, comply with a legal requirement or instruct professional advisers in connection with the Contract.

33 Issued property

- 33.1 All Issued Property shall remain the property of the Council and shall be used by the Supplier only for the purposes of the Contract.
- 33.2 The Supplier will notify the Council as soon as reasonably practicable if any Issued Property is not in good condition when received by or on behalf of the Supplier.
- 33.3 The Supplier undertakes to keep safe all Issued Property and to return all Issued Property to the Council, with the exception of any Issued Property consumed or incorporated for the purposes of the Contract.
- 33.4 The Supplier shall indemnify the Council in respect of all losses of or damage to Issued Property (including waste of Issued Property) arising from the Supplier's use of inappropriate storage, bad workmanship or negligence, other than any losses or damage which arise from the normal and proper use of Issued Property for the purposes of the Contract.
- 33.5 The Supplier will return all Issued Property on demand, at any time, and within 7 days of the termination or expiry of the Contract. To the extent that Issued Property includes working papers or other written materials, at the same time as the Supplier returns such Issued Property it shall also return copies it has made of such Issued Property and any other materials of whatsoever nature prepared by the Council using the information in such Issued Property (other than to the extent retention is required by Applicable Law).
- 33.6 Neither the Supplier nor any other party shall have a lien on any Issued Property and the Supplier shall take all reasonable steps to ensure that the title of the Council to and the exclusion of any such lien in respect of Issued Property are brought to the notice of all persons dealing with any Issued Property.

PART 8 – DISPUTE RESOLUTION PROCEDURE

34 Dispute resolution procedure

34.1 Where a Dispute arises which is referred to the Dispute Resolution Procedure, the Parties will first seek to resolve any Dispute by its escalation within the Parties' organisational structures.

34.2 There shall be two levels of escalation, and at each level each Party will ensure that an appropriate representative, matching the description below, is available for the purposes of the Dispute Resolution Procedure.

<u>Level</u>	<u>Representative</u>
First Level	person with managerial responsibility for overseeing the Contract
Second Level	director or person at director level with senior managerial responsibility for the general contracting activities of the Party (and for the Council shall be the Head of Procurement or a nominee at that level),

34.3 An individual representing a Party at one level may not represent that Party at a higher level.

34.4 A meeting of the representatives at the first level shall take place as soon as possible after any Dispute arises, and in any event within 5 Business Days.

34.5 If a Dispute is resolved at either level, the resolution shall be reduced to writing, without delay, and signed by both Parties. Once signed by both Parties, the resolution shall be binding on the Parties.

34.6 Unless the resolution of a Dispute is reduced to writing and signed by both Parties, any discussions and negotiations connected with the Dispute will be carried out without prejudice to the rights of the Parties in any future legal or other proceedings, and no such discussions and negotiations may be produced or relied upon in evidence in any such proceedings.

34.7 If a Dispute has not been resolved, reduced to writing and signed by both Parties within 5 Business Days of the first meeting at the first level, the Dispute shall be referred to the second level, and the representatives at the second level shall meet within 3 Business Days of the reference to that level. If not resolved, reduced to writing and signed by both Parties within 20 Business Days of it arising, either Party may seek to resolve it as it sees fit.

34.8 Neither party shall raise proceedings in court relating to any Dispute (other than proceedings seeking interim interdict or interim relief) unless the Dispute has been escalated in accordance with this Clause 34 and the Dispute has not been resolved and the resolution recorded within 20 Business Days of it arising.

PART 9 - MISCELLANEOUS

35 Force majeure

35.1 Subject to Clauses 35.2 to 35.5, neither party shall be liable to the other for any delay or failure in performing its obligations under the Contract to the extent that such delay or failure is caused by a Force Majeure Event which by its nature could not have been foreseen by such party or, if it could have been foreseen, was unavoidable, provided that the affected Party shall use all reasonable endeavours to cure any such events or circumstances and resume performance under the Contract.

35.2 If occurrence of a Force Majeure Event prevents either Party from carrying out its obligations under the Contract for a continuous period of more than 30 Business Days, the other Party may terminate this Contract immediately by serving written notice on the other Party.

35.3 If the Supplier is in Default and pursuant to Clause 20 has been given the opportunity to remedy that Default, and subsequently a Force Majeure Event occurs which will prevent the Supplier from

remedying that Default with the period allowed for remedy, the Council may terminate this Contract immediately by serving written notice on the Supplier.

- 35.4 If either Party becomes aware of the occurrence of a Force Majeure Event which is likely to lead to failure to perform or a delay in performance, it shall notify the other Party as to the circumstances and the period for which it is estimated that such failure or delay is likely to continue.
- 35.5 A party affected by Force Majeure shall:
- 35.5.1 notify the other Party in writing within 2 Business Days of the occurrence of a Force Majeure Event;
 - 35.5.2 use reasonable endeavours to continue to perform, or resume performance of, its obligations under this Contract; and
 - 35.5.3 not be relieved from any obligation to pay any sum of money to the other party.

36 Anti-corruption

- 36.1 In this Clause 36, "Prohibited Acts" means any of the following:
- 36.1.1 to offer, give or agree to give to any or servant of the Council any gift or consideration of any kind as an inducement or reward for doing or not doing (or having done or not having done) any act in relation to the obtaining or performance of any contract with the Council, or for showing or not showing favour or disfavour to any person in relation to any contract with the Council; and/or
 - 36.1.2 to enter into any contract with the Council in connection with which commission has been paid or has been agreed to be paid by it or on its behalf, or to its knowledge, unless before such contract is made particulars of any such commission and the terms and conditions of any such agreement for the payment of it have been disclosed in writing to the Council.
- 36.2 The Supplier shall not do (and warrants that in relation to the Contract it has not done) any of the Prohibited Acts.
- 36.3 The Council is entitled to terminate the Contract immediately on written notice to the Supplier if the Supplier, its Employees or Sub-Contractors:
- 36.3.1 commits any of the Prohibited Acts; or
 - 36.3.2 commits any offence under Applicable Law relating to bribery or corruption, with or without the knowledge of the Supplier, in relation to the Contract or any other contract with the Council.

37 Notices

- 37.1 Any notice or communication to be given to one Party by the other in connection with the Contract shall be validly served if given in writing and delivered by hand, or sent by recorded delivery, courier, [fax or email] to the Party to the address detailed in the Specification, or in any event its principal place of business or registered office (where the Party is a company) or such other address as a Party has specified to the other in writing from time to time.
- 37.2 A notice delivered or sent to the correct address of a Party shall be deemed to be effectively given on the day when in the ordinary course of the means of sending it would first be received by the addressee in normal business hours.
- 37.3 This Clause 37 shall not apply to the service of any documents in connection with any legal proceedings which shall be served in accordance with Applicable Law.

38 Severance

- 38.1 If any provision of the Contract is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions of the Contract shall continue in full force and effect as if the Contract had been executed with the invalid, illegal or unenforceable provision eliminated.
- 38.2 In the event of a holding of invalidity so fundamental as to prevent the accomplishment of the purpose of the Contract, if the Council requests, the Parties shall immediately commence negotiations in good faith to remedy the invalidity.

39 Waiver

- 39.1 The failure of either Party to exercise any right or remedy shall not constitute a waiver of that right or remedy.
- 39.2 No waiver shall be effective unless it is communicated to the other Party in writing.
- 39.3 A waiver of any right or remedy arising from a breach of the Contract shall not constitute a waiver of any right or remedy arising from any other breach of the Contract.

40 Remedies

- 40.1 Unless otherwise stated in the Contract:
- 40.1.1 the exercise of any one remedy shall not exclude the exercise of any other remedy; and
 - 40.1.2 the remedies available to the Parties under the Contract are cumulative and may be exercised concurrently or separately.
- 40.2 Any payments made under Clause 21 (Liquidated Damages) shall not preclude the Council from recovering loss by the exercise of another remedy, other than to the extent such loss has already been compensated for through payments under those clauses

41 Warranties and Representations

- 41.1 The Supplier warrants and represents that:
- 41.1.1 it has full capacity and all necessary consents required to enter into and to perform its obligations under the Contract;
 - 41.1.2 to the best of its knowledge it is not restricted in any way from entering into and performing the Contract;
 - 41.1.3 it shall perform its obligations under the Contract with all reasonable skill, care and diligence and in accordance with Good Industry Practice.

42 Audit access

- 42.1 The Supplier shall grant to the Council and the Council's Auditors, access to the Records and shall provide such reasonable assistance at all times to the Council or the Council's Auditors as the Council or the Council's Auditors may reasonably require in relation to the Records, all for the purposes of enabling the Council or the Council's Auditors to carry out:
- 42.1.1 an audit of the Supplier's compliance with the Contract;
 - 42.1.2 an audit of all activities carried out and security precautions taken in connection with the performance of the Contract;

- 42.1.3 an audit of the Council's discharge of its responsibilities and duties (in so far as relevant to the Contract);
- 42.1.4 an examination of the Supplier's accounts.
- 42.2 Without prejudice to Clause 42.1, in the event of an investigation into suspected fraudulent activity or other impropriety by the Supplier or an Employee or Sub-Contractor:
 - 42.2.1 the Council and/or the Council Auditors may enter any premises of the Supplier and access the Records, which shall be made available to them (whether they are held at such premises or otherwise) by the Supplier; and
 - 42.2.2 the Supplier shall render all necessary assistance to the conduct of such investigation.
- 42.3 The Council will ensure that any representative of the Council who is given access to any premises or Records by the Supplier in accordance with Clause 42 reduces the disruption to the Supplier and the Supplier's business to the extent reasonably practicable.

43 No agency

The Contract shall not have the effect of creating the relationship of agency between the Supplier and the Council, and the Supplier will ensure that it does not purport, and no Sub-Contractor or Employee purports, by act or omission, to act or represent itself as agent of the Council, or leads any party to believe that such purports a relationship of agency exists.

44 Variation

Any variation to the Contract, including amendments to these terms and conditions, shall only be binding when agreed in writing between the Parties.

45 Entire agreement

- 45.1 At the date of signing by both Parties, the Contract constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of the Contract. Each Party acknowledges and agrees that it has not entered into this Contract on the basis of any representation or warranty made by the other, other than as incorporated in this Contract.
- 45.2 In the event of any conflict, and only to the extent of that conflict:
 - 45.2.1 the Contract Award Letter will take precedence and will prevail over these Conditions and the Specification; and
 - 45.2.2 these Conditions will take precedence any will prevail over the Specification.

46 Law and Jurisdiction

These Conditions and the Contract shall be governed by and construed in accordance with Scots law, and the Parties irrevocably submit to the exclusive jurisdiction of the Scottish courts if a dispute cannot be resolved pursuant to Clause 34.

Definitions

- 1 In these Conditions:
- 1.1 "**Account Representative**" means each of the representatives appointed by the Supplier and the Council pursuant to Clause 11;
- 1.2 "**Applicable Law**" means all applicable laws, consents and approvals, including legislative provisions, sub-ordinate legislation, legally binding codes of practice and the common law;
- 1.3 "**Business Day**" means a day, other than a Saturday or Sunday, on which the banks in Aberdeen are open for general commercial business;
- 1.4 "**Charges**" means the charges and fees payable in relation to the Contract, which shall be quoted, invoiced and payable in Pounds Sterling;
- 1.5 "**Conditions**" means these terms and conditions;
- 1.6 "**Contract**" means the contract between the Council and the Supplier for the supply of Services entered into pursuant to the Contract Award Letter and the documents referred to in the Contract Award Letter, including but not limited to the Specification;
- 1.7 "**Contract Award Date**" means the date of the Contract Award Letter;
- 1.8 "**Council's Auditors**" means the Council's internal auditors, Audit Scotland, and any other organisation or body which may from time to time have cause to audit the accounts or activities of the Council;
- 1.9 "**Contract Award Letter**" means the letter issued by the Council to the Supplier notifying the Supplier of its award of the Contract and detailing the documentation which, together with these Conditions and the Specification, forms part of and constitutes the Contract;
- 1.10 "**Discrimination Legislation**" means the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 or the Equality Act 2010 and all applicable European Directives and legislation relating to discrimination;
- 1.11 "**Dispute**" means any dispute or difference between the Council or the Supplier arising from or in connection with a Contract;
- 1.12 "**Dispute Resolution Procedure**" means the procedure set out in Clause 34.
- 1.13 "**Default**" means non-compliance with or default against any obligation under the Contract by the Supplier;
- 1.14 "**Employee**" means an officer, servant, employee, appointee or agent of the Supplier, and any person carrying out the duties or obligations of the Supplier in connection with the Contract, or at the Premises in connection with the Contract at the express or implied invitation of the Supplier or any other Employee;
- 1.15 "**Force Majeure Event**" means any event beyond a party's reasonable control including failure of energy sources or transport infrastructure, war, terrorism, civil commotion, interference by civil or military authorities, nuclear, chemical or biological contamination, explosions, collapse of building structures, fires, floods, storms, earthquakes, loss at sea, epidemics or similar events or natural disasters, but specifically excluding any industrial disputes affecting any Employees.
- 1.16 "**Good Industry Practice**" means in relation to any undertaking and any circumstances, the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in the same type of undertaking under the same or similar circumstances;

- 1.17 **"Holding Company"** has the meaning given in Section 1159 of the Companies Act 2006;
- 1.18 **"Information Legislation"** means the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004;
- 1.19 **"Intellectual Property Rights"** means patents, trade marks, service marks, design rights (whether registrable or otherwise), applications for any of the foregoing, copyright, database rights, know-how, trade or business names and other similar rights or obligations whether registrable or not in any country (including the United Kingdom);
- 1.20 **"Insolvency Event"** means
- 1.20.1 Where the Supplier is a Company, a partnership or firm, or a number of persons acting together in any capacity:
- 1.20.1.1 the making or passing of any resolution, order or petition for the winding up, dissolution, administration or reorganisation of the Supplier, or a declaration of a moratorium in relation to any indebtedness of the Supplier;
- 1.20.1.2 the making of any composition, compromise, assignation or arrangement with any of the Supplier's creditors;
- 1.20.1.3 the appointment of a liquidator, receiver, administrator, administrative receiver, compulsory manager or similar officer in respect of the Supplier; or
- 1.20.1.4 the occurrence of any similar event under the law of any other jurisdiction,
- and shall include the occurrence of any of these events with regard to a Parent Company of the Supplier.
- 1.20.2 Where the Supplier is an individual:
- 1.20.2.1 the presentation of a petition for the Supplier's bankruptcy or the sequestration of the Supplier's estate;
- 1.20.2.2 the making of a criminal bankruptcy order against the Supplier;
- 1.20.2.3 the making of any composition or arrangement with or for the benefit of the Supplier's creditors, or any conveyance or assignation for the benefit of the Supplier's creditors, or an administrator is appointed to the Supplier's affairs;
- 1.20.2.4 the apparent insolvency of the Supplier within the meaning of the Bankruptcy (Scotland) Act 1985; or
- 1.20.2.5 the occurrence of any similar event under the law of any other jurisdiction.
- 1.21 **"Invoice"** means an invoice issued by the Supplier to the Council indicating Charges payable together with any taxes or additional charges, if applicable;
- 1.22 **"Issued Property"** means anything issued or otherwise made available to the Supplier for any purpose by or on behalf of the Council including working papers and other written materials;
- 1.23 **"Key Performance Indicators"** means the indicators set out in the Specification against which successful performance of the Contract will be measured and monitored;
- 1.24 **"Law"** means all applicable laws, consents and approvals, including legislative provisions, subordinate legislation, legally binding codes of practice and the common law;

- 1.25 **"Materials"** means all materials in which there are Intellectual Property Rights, including designs reports, documents, specifications, instructions, plans, drawings, patents, models or designs whether in writing, or on magnetic or other media or distributed electronically;
- 1.26 **"Parent Company"** has the meaning given to it in the Companies Act 2006;
- 1.27 **"Parties"** means the Council and the Supplier, and "Party" means either of them;
- 1.28 **"Premises"** means any premises of the Council being a location where Services are to be provided, or which will require to be entered or accessed in order for Services to be provided;
- 1.29 **"Progress Reports"** has the meaning given to it in Clause 12.1;
- 1.30 **"Records"** means any files, documents or other records which relate to delivery of the Contract or the management, administration, organisation or planning of them whether in writing or on magnetic or other media;
- 1.31 **"Services"** means the services to be performed by the Supplier for the Council as specified in the Contract;
- 1.32 **"Specification"** means the document or documents issued to the Supplier by the Council, specifying matters in connection with a particular requirement for Services, including, but not limited to the quantity and type of Services, the performance requirements and limits of liability and insurance;
- 1.33 **"Subsidiary"** has the meaning given in Section 1159 of the Companies Act 2006;
- 1.34 **"Sub-Contract"** means any contract or proposed contract between the Supplier and any third party in respect of the performance of the Contract (or any part thereof). The terms "Sub-Contractor" and "Sub-Contracting" shall be similarly construed;
- 1.35 **"Supplier"** means the party awarded the Contract by the Council, pursuant to the Contract Award Letter;
- 1.36 **"Tender Documents"** means the tender documents submitted by the Supplier to the Council following the launch of a tender process by the Council;
- 1.37 **"Term"** means the period of the Contract, beginning on the Contract Award Date and ending on the earlier of (i) the end date indicated in the Specification, (ii) the date of termination pursuant to these Conditions and (iii) the expiry of the Contract when all obligations (contingent or otherwise) have been performed and discharged;
- 1.38 **"Total Contract Price"** means the total amount payable by the Council to the Supplier pursuant to the Contract on the assumption that the Contract is fully performed and including all amounts paid and payable (in both cases excluding value added tax);
- 1.39 **"Unauthorised Change of Control"** means an event which has not been approved in advance by the Council which means that the person who Controls the Supplier ceases to do so, or another person acquires Control of the Supplier, where "Control" means the power of a person to secure that the affairs of the Supplier are conducted in accordance with the wishes of that person (i) by means of the holding of shares or the possession of voting power in or in relation to the Supplier or any other entity, or (ii) by virtue of any powers conferred by the articles of association or any other document regulating the Supplier or any other entity.

2 Interpretation

- 2.1 In these Conditions, unless the context otherwise requires:
- 2.1.1 a reference to a person includes natural persons, companies, partnerships, bodies corporate and other legal entities;
- 2.1.2 a reference to one gender includes references to all other genders;

- 2.1.3 the singular includes the plural and vice versa;
 - 2.1.4 any reference to any statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted by any subsequent statute, enactment, order, regulation or instrument;
 - 2.1.5 any reference to a document shall include any variation, amendment, or supplement to such document;
 - 2.1.6 headings are included for ease of reference only and shall not affect the interpretation or construction of these Conditions;
 - 2.1.7 references to numbered Clauses are, unless otherwise provided, references to Clauses of these Conditions;
 - 2.1.8 the meaning of general words is not to be restricted by any particular examples preceding or following those general words;
 - 2.1.9 an obligation to do something includes an obligation to procure it to be done;
 - 2.1.10 an obligation not to do something includes an obligation not to wilfully allow it to be done;
 - 2.1.11 the word "including" means "including without limitation"; and
 - 2.1.12 a reference to "approval" or "consent" shall mean consent in writing.
- 2.2 If more than one person is detailed in the Contract as the Supplier, references in these Conditions to the "Supplier" shall be interpreted and construed as each such person on a joint and several basis.

Annex 1 – Individual consultants**1 Commitment of time**

- 1.1 Unless prevented by ill health or accident, the Supplier shall devote at least the number of days specified in the Contract Award Letter in each calendar month to the carrying out of the Services, together with such additional time if any as may be necessary for their proper performance.
- 1.2 If no number of days is specified in the Contract Award Letter, Clause 1.1 of this Annex will not apply.

2 Illness

- 2.1 Without prejudice to Clause 35 (Force Majeure) if the Supplier is unable to provide the Services due to illness or injury, the Supplier shall advise the Council of that fact as soon as reasonably practicable.
- 2.2 No Charges shall be payable in accordance with the Contract in respect of any period during which the Services are not provided.

3 Substitute

- 3.1 The Supplier may, with the prior written consent of the Council, appoint a suitably qualified and skilled substitute consultant to perform the Services on his behalf.
- 3.2 The substitute shall be a Sub-contractor for the purposes of the Contract, but the Council may also require that the substitute consultant enters into direct undertakings with the Council in a form to the reasonable satisfaction of the Council, including undertakings with regard to confidentiality.

4 Availability and commitment

- 4.1 The Supplier shall use reasonable endeavours to ensure that the Supplier is available at all times on reasonable notice to provide such assistance or information as the Council may require.
- 4.2 The Supplier shall give priority to the provision of the Services to the Council over any other business activities undertaken by the Supplier during the course of the provision of the Services.

Annex 2 - TUPE

1 Definitions

In this Annex:

- 1.1 “**Assigned Employees**” means the employees of the Supplier or any Sub-contractor who are from time to time engaged in the performance of the Services;
- 1.2 “**Employee Charges**” means all liabilities, costs, expenses and outgoings in relation to each Employee including, but not limited to salaries, wages, bonus (even if not due and payable at that time), accrued holiday pay, National Insurance Contributions, pension contributions, PAYE remittances and payments in respect of any other emoluments;
- 1.3 “**Employee Liabilities**” means any costs, claims, liabilities and expenses (including legal expenses) relating to or arising out of the employment of the Employees including negligence claims, unfair dismissal, redundancy, unlawful discrimination, breach of contract, claims in relation to pension entitlement, unlawful deduction of wages and equal pay;
- 1.4 “**Employees**” means the employees (if any) of the Council and/or any Preceding Contractor who, immediately before the Commencement Date, are (i) part of an organised grouping of employees which has as its principal purpose the carrying out of all or part of the Services or services which are materially similar to the Services for the Council or (ii) wholly or mainly assigned to the carrying out of all or part of the Services or services which are materially similar to the Services to the Council;
- 1.5 “**New Contractor**” means any successor to the Supplier in the provision of the Services or services similar to the Services (or part thereof) to the Council;
- 1.6 “**Preceding Contractor**” means any person who provides to the Council the Services or services which are materially similar to the Services, immediately prior to the Commencement Date;
- 1.7 “**Re-transfer Date**” means the date or dates on which the contracts of employment of the Re-transferring Employees transfer from the Supplier or any Sub-Contractor to the Council or a New Contractor pursuant to the TUPE Regulations upon the cessation or partial cessation of provision of the Services by the Supplier or any Sub-Contractor;
- 1.8 “**Re-transferring Employee Charges**” means all liabilities, costs, expenses and outgoings in relation to each Re-transferring Employee including, but not limited to salaries, wages, bonus (even if not due and payable at that time), accrued holiday pay, National Insurance Contributions, pension contributions, PAYE remittances and payments in respect of any other emoluments;
- 1.9 “**Re-transferring Employee Liabilities**” means any costs, claims, liabilities and expenses (including legal expenses) relating to or arising out of the employment of the Re-transferring Employees including negligence claims, unfair dismissal, redundancy, unlawful discrimination, breach of contract, claims in relation to pension entitlement, unlawful deduction of wages and equal pay;
- 1.10 “**Re-transferring Employees**” means those employees of the Supplier or any Sub-contractor who are (i) part of an organised grouping of employees which has as its principal purpose the carrying out of the Services (or part thereof) for the Council or (ii) are wholly or mainly assigned to the carrying out of the Services (or part thereof) for the Council, in either case immediately prior to the relevant Re-transfer Date;
- 1.11 “**Transfer Assistance Period**” means the period (or periods) commencing on the earlier of (i) the date falling nine months before expiry of the Contract or (ii) the date when the Supplier becomes aware that it is to cease providing the Services (in whole or in part) and ending, in either case, on the relevant Re-transfer Date; and
- 1.12 “**TUPE Regulations**” means the Transfer of Undertakings (Protection of Employment) Regulations 2006.

2 TUPE – Commencement Date

- 2.1 The Council and the Supplier agree that the TUPE Regulations will apply so that:
- 2.1.1 the contracts of employment between the Council (or the Preceding Contractor) and the Employees and;
 - 2.1.2 any collective agreement between the Council (or the Preceding Contractor) and any trade union recognised by the Council (or the Preceding Contractor) in respect of any Employee,
- shall have effect on and after the Commencement Date as if originally made between the Supplier or any Sub-contractor and the Employees, or between the Supplier or such Sub-contractor and the relevant trade union (as the case may be).
- 2.2 All Employee Charges shall be apportioned on a time basis so that the part of the Employee Charges accruing in the period up to close of business on the day before the Commencement Date shall be borne and discharged by the Council (or the Preceding Contractor, as the case may be) and the part of the Employee Charges accruing in the period commencing on the Commencement Date shall be borne and discharged by the Supplier.
- 2.3 The Council will indemnify and keep indemnified the Supplier on demand from and against any Employee Liabilities suffered or incurred by the Supplier in relation to any Employee which relate to or arise out of any act or omission by the Council or any other event or occurrence in each case before the Commencement Date for which the Supplier is or becomes liable by reason of the operation of the TUPE Regulations and/or any judicial decision interpreting the same. The indemnity in this Clause 2.3 will not apply:
- 2.3.1 to any Employee Liabilities in respect of any Employee who immediately prior to the Commencement Date was not an employee of the Council;
 - 2.3.2 in so far as the Supplier undertakes to indemnify the Council in terms of Clauses 2.5 and 2.6 of this Annex; or
 - 2.3.3 in respect of the Supplier's obligation in terms of the TUPE Regulations to employ the Employees on the terms and conditions of employment on which they were employed immediately before the Commencement Date and to recognise the Employees' periods of continuous employment as at the Commencement Date.
- 2.4 The Council will indemnify and keep indemnified the Supplier on demand from and against any costs, claims, liabilities and expenses (including legal expenses) suffered or incurred by the Supplier as a result of any failure by the Council to comply with its obligations under Regulation 13(2) of the TUPE Regulations, except to the extent that such failure arises as a result of any failure on the part of the Supplier (or a Sub-contractor) to comply with its obligations under Regulation 13(4) of the TUPE Regulations.
- 2.5 The Supplier will indemnify and keep indemnified the Council on demand from and against any Employee Liabilities suffered or incurred by the Council in relation to any Employee or any representative of any Employee which relate to or arise out of any act or omission by the Supplier or any other event or occurrence in each case on or after the Commencement Date.
- 2.6 The Supplier will indemnify and keep indemnified the Council on demand from and against any Employee Liabilities suffered or incurred by the Council in relation to any claim by any individual whose contract of employment would have had effect on and after the Commencement Date as if originally made between the Supplier or a Sub-contractor and such individual, but for the termination of his or her contract of employment on or before the Commencement Date as a result of an alleged substantial change to their working conditions to the material detriment of such individual.
- 2.7 The Supplier will indemnify and keep indemnified the Council on demand from and against any costs, claims, liabilities and expenses (including legal expenses) suffered or incurred by the

Council as a result of any failure by the Supplier or a Sub-contractor to comply with its obligations under Regulation 13(4) of the TUPE Regulations.

3 TUPE – Expiry and Termination

3.1 The Council and the Supplier agree that, on the cessation or partial cessation of the provision of the Services by the Supplier or any Sub-contractor:

3.1.1 the contracts of employment between the Supplier or any relevant Sub-contractor and the Re-transferring Employees; and

3.1.2 any collective agreement between the Supplier or such any Sub-contractor and any trade union recognised by the Supplier or such Sub-contractor in respect of the Re-transferring Employees

shall, pursuant to the TUPE Regulations, have effect after the Re-transfer Date as if originally made between the Council or any New Contractor and such Re-transferring Employees or between the Council or any New Contractor and the relevant trade union as the case may be.

3.2 If the Council considers that the TUPE Regulations may apply where it is anticipated that the Services or part thereof (or services similar to the Services or part thereof) will begin to be carried out by the Council or by a New Contractor, following the cessation or partial cessation of the provision of the Services or part thereof by the Supplier then the following Clauses 3.3 to 3.15 of this Annex will apply.

3.3 During the Transfer Assistance Period, the Supplier shall, at its own expense, provide the Council in writing with such information as the Council (acting reasonably) may request relating to the Assigned Employees at the time of such request, within such reasonable period as may be specified by the Council, including (but not restricted to):

3.3.1 the number of such Assigned Employees;

3.3.2 the post and a description of the duties of each such Assigned Employee;

3.3.3 the salary or wages and other remuneration paid to each such Assigned Employee;

3.3.4 the date of birth of each such Assigned Employee;

3.3.5 the length of service of each such Assigned Employee;

3.3.6 whether any such Assigned Employee was ever at any time employed by the Council in the provision services analogous or materially similar to the Services or any part thereof;

3.3.7 information on which of the Assigned Employees are and have been involved in providing the Services, whether or not they spend all of their working time on the Services (and, if not, the percentage of their working time generally spent on the Services), what role(s) they carry out and any other information relating to the way the Assigned Employees carry out the Services as may reasonably be requested;

3.3.8 the general terms and conditions of employment of each such Assigned Employee, whether contractual or otherwise (including all particulars of employment that an employer is obliged to give to an employee in terms of section 1 of the Employment Rights Act 1996);

3.3.9 the whole terms and conditions of any occupational pension scheme of which any such Assigned Employee is a member, together with the number of such Assigned Employees who are members of the scheme;

3.3.10 information relating to any collective agreements which relate to the employment of such Assigned Employees;

- 3.3.11 information relating to any legally enforceable obligations on the Supplier or any Sub-contractor, to increase or otherwise vary the remuneration, benefits and other rewards to which such Assigned Employees may be entitled;
- 3.3.12 information on any current or pending negotiations concerning terms and conditions of the employment of such Assigned Employees at the time of such request (including rates of remuneration);
- 3.3.13 details of any disciplinary procedure taken against any such Assigned Employee, or grievance procedure taken by any such Assigned Employee, within the two years before a request for such details;
- 3.3.14 details of any court or tribunal case, claim or action which:
- (a) is outstanding between the Supplier or any Sub-contractor and any such Assigned Employee;
 - (b) has been brought against the Supplier or any Sub-contractor by any employee who was at the time an Assigned Employee, within the two years before a request for such information; and
 - (c) the Supplier or any Sub-contractor has reasonable grounds to believe that any such Assigned Employee may bring, arising out of such Assigned Employee's employment with the Supplier or any Sub-contractor; and
- 3.3.15 such other information as may reasonably be required by the Council which is in the possession of the Supplier or any Sub-contractor at the time of the request or which can reasonably be obtained by the Supplier from any other third party.
- 3.4 The Supplier consents to the Council using the information obtained under Clause 3.3 of this Annex for its own costing purposes and disclosing it to prospective bidders for the provision to the Council of services the same as or materially similar to the Services or any part thereof.
- 3.5 The information provided under Clause 3.3 of this Annex will be anonymised or coded by the Supplier or the relevant Sub-Contractor in such a way so as to prevent the disclosure of "personal data" (as defined in the DPA). If the disclosure of personal data is unavoidable, the Council undertakes to use reasonable endeavours to procure that:-
- 3.5.1 it will only use the personal data for the purposes set out in Clause 3.4 of this Annex;
 - 3.5.2 it will keep the personal data secure in accordance with the DPA;
 - 3.5.3 it will seek to obtain from prospective bidders, to whom the personal data may be disclosed, undertakings (as far as applicable):-
 - (a) not to disclose such personal data;
 - (b) that the personal data may only be used for the purposes of preparing a bid;
 - (c) that the personal data must be kept secure;
 - (d) to return or destroy the information constituting the personal data once a bid has been submitted or the Council makes a decision not to proceed with a bid by the bidder granting the undertaking.
- 3.6 The Supplier will not and will ensure that no Sub-contractor will in the Transfer Assistance Period, without the prior written consent of the Council:

- 3.6.1 materially vary the terms and conditions of any of the Assigned Employees (including rates of remuneration, benefits and other rewards) other than variations made as part of an annual pay review affecting all employees of the Supplier (or the Sub-contractor) of the same or similar grade or except as required by law; or
 - 3.6.2 materially increase or decrease the numbers of Assigned Employees; or
 - 3.6.3 replace, dismiss or serve notice on any of the Assigned Employees, save where the Supplier or the relevant Sub-contractor replaces any such individuals with individuals of equivalent or greater levels of skills and experience.
- 3.7 At any time during the Transfer Assistance Period, the Supplier will allow, and will ensure that any relevant Sub-contractor will allow, the Council or any New Contractor to meet the Assigned Employees and/or their appropriate representatives at their place of work within seven days of receiving a request by the Council or any New Contractor.
- 3.8 Not later than 20 days, before the Re-transfer Date, the Supplier will supply in writing to the Council or, on request by the Council, a New Contractor:
- 3.8.1 the names of the individuals whom the Supplier expects at that time to be the Re-transferring Employees;
 - 3.8.2 the information set out in Clause 3.3 of this Annex, in respect of the Re-transferring Employees instead of the Assigned Employees, updated as near as practicable to the Re-transfer Date.
- Such information will not be anonymised or coded by the Supplier or any Sub-contractor unless that is required to ensure compliance with the DPA.
- 3.9 On or before the Re-transfer Date, the Supplier will deliver to the Council or, on request by the Council, a New Contractor:
- 3.9.1 any updates to the information provided under Clause 3.8 of this Annex to reflect any subsequent changes to the Re-transferring Employees up to and including the Re-transfer Date; and
 - 3.9.2 complete personnel records relating to the Re-transferring Employees.
- 3.10 The Supplier undertakes to ensure that the information provided under Clauses 3.3, 3.8 and 3.9 of this Annex is complete and accurate in all material respects.
- 3.11 All Re-transferring Employee Charges shall be apportioned on a time basis so that the part of the Charges accruing in the period up to close of business on the day before the Re-transfer Date shall be borne and discharged by the Supplier and the part of the Charges accruing in the period commencing on the Re-transfer Date shall be borne and discharged by the Council or the relevant New Contractor.
- 3.12 The Supplier will indemnify and keep indemnified the Council (and/or on demand by the Council, any New Contractor) on demand from and against any Re-transferring Employee Liabilities suffered or incurred by the Council or any New Contractor in relation to any Re-transferring Employee which relate to or arise out of any act or omission by the Supplier or any Sub-contractor or any other event or occurrence in each case before the Re-transfer Date for which the Council and/or any New Contractor is or becomes liable by reason of the operation of the TUPE Regulations and/or any judicial decision interpreting the same. The indemnity in this Clause 3.12 will not apply in respect of the obligation of the Council or a New Contractor in terms of the TUPE Regulations to employ the Re-transferring Employees on the terms and conditions of employment on which they were employed immediately before the Re-transfer Date (other than in relation to benefits for old age, invalidity or survivors provided under an occupational pension scheme) and to recognise Re-transferring Employees' periods of continuous employment as at the Re-transfer Date.

- 3.13 The Supplier will indemnify and keep indemnified the Council (and/or on demand by the Council any New Contractor) on demand from and against any costs, claims, liabilities and expenses (including legal expenses) suffered or incurred by the Council or any New Contractor as a result of any failure by the Supplier or any Sub-contractor to comply with its obligations under Regulation 13(2) of the TUPE Regulations, except to the extent that such failure arises as a result of any failure on the part of the Council to comply with its obligations under Regulation 13(4) of the TUPE Regulations.
- 3.14 The Council will indemnify and keep indemnified the Supplier on demand from and against any Re-transferring Employee Liabilities suffered or incurred by the Supplier in relation to any Re-transferring Employee or any representative of any Re-transferring Employee which relate to or arise out of any act or omission by the Council or any other event or occurrence in each case on or after the Re-transfer Date.
- 3.15 The Council will indemnify and keep indemnified the Supplier on demand from and against any costs, claims, liabilities and expenses (including legal expenses) suffered or incurred by the Supplier as a result of any failure by the Council to comply with its obligations under Regulations 13(4) of the TUPE Regulations.
- 3.16 The Supplier acknowledges and agrees that:
- 3.16.1 the Council may grant an indemnity in favour of each and any New Contractor to the same extent that the Supplier is undertaking to indemnify the Council in terms of Clause 3 of this Annex and;
 - 3.16.2 that in the event of a claim on any indemnity in terms of Clause 3 of this Annex for loss incurred by the Council, that loss shall include the amount, if any, which the Council has paid or is required to pay to any New Contractor by virtue of any indemnity granted by the Council in its favour in accordance with the provisions of this Clause 3.16.