



**ABERDEENSHIRE COUNCIL**

**STANDARD TERMS AND CONDITIONS**

**RELATING TO THE PROCUREMENT OF SERVICES**

**(VERSION: JULY 2021)**

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## A – 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 Contract 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 Contract and Schedule Part 5 shall apply.
- 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; and
- 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.

## **B – ACCESS AND PERSONNEL AND CONTRACT MANAGEMENT**

### **8 Premises and Equipment**

- 8.1 Except where the Council expressly agrees in writing otherwise, the Supplier shall supply or make available all equipment, materials or tools of whatever nature necessary for the proper

performance of the Services and the Supplier will ensure that such equipment, materials or tools are:

- 8.1.1 in good and safe condition;
  - 8.1.2 in full working order;
  - 8.1.3 fit for the purpose for which they are being used by the Supplier;
  - 8.1.4 used strictly in accordance with the relevant manufacturer's instructions; and
  - 8.1.5 without prejudice to Clauses 8.1.1-8.1.4 inclusive, conform at all times to all applicable legal requirements.
- 8.2 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.
- 8.3 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.
- 8.4 The Supplier shall be wholly responsible for the carriage of its equipment and materials to the Premises and the removal thereof and in each case at the Supplier's sole cost.
- 8.5 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 Premises.

## **9 Supplier Personnel 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 Supplier Personnel who may require admission to the Premises pursuant to Clause 8.
- 9.2 If the Council, acting reasonably, believes that admission to the Premises of a Supplier Personnel 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 Supplier Personnel.
- 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 Supplier Personnel to perform the tasks of an excluded Supplier Personnel at the cost of the Supplier.
- 9.4 The Supplier will comply with, and ensure that its Supplier Personnel comply with, the Council's reasonable instructions with regard to accessing and occupying the Premises, including any health and safety requirements. All Supplier Personnel at the Premises will carry an identity card issued by and bearing the name of the Supplier or relevant Sub-Contractor.

## **10 Supplier Personnel**

- 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 a Supplier Personnel 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 Part 3 (Criminal Checks) of the Schedule, 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 Supplier Personnel the Supplier will use such persons to discharge those duties, unless the Council has agreed to changes.
- 10.5 The individual consultant terms and conditions set out in Part 1 (Individual Consultants) of the Schedule shall apply if the Supplier is an individual, or the where the Supplier is a Company, but the Tender Documents stipulate that the Services are to be provided by a particular individual who is an employee or subcontractor of the Supplier.
- 10.6 The terms and conditions set out in Part 2 (TUPE) of the Schedule shall apply.
- 10.7 The Parties shall comply with the terms and conditions set out in Part 3 (Criminal Checks) of the Schedule.
- 10.8 Nothing in the Contract shall have the effect of making any Supplier Personnel an employee of the Council.
- 10.9 If the Council states in the Contract Award Letter that it has concluded that the conditions in Section 61M(1) of ITEPA 2003 are met in respect of the engagement of the individual performing the Services under the Contract, the Charges shall be the "deemed direct payment" for the purposes of Section 61N(3) of ITEPA 2003, Sections 61R(1) to (3) inclusive of ITEPA 2003 shall apply thereto and the Council shall account to HMRC for the tax and national insurance contributions chargeable under PAYE in relation to the aforesaid deemed direct payment (the "**PAYE Amount**").
- 10.10 If Clause 10.9 applies the Council shall be entitled to retain the PAYE Amount from the Charges for the purpose of remitting the same to HMRC.
- 10.11 If the Council, in reliance on the written statements, records and documents produced by the Supplier to the Council prior to the Parties entering into the Contract, has stated in the Contract Award Letter that it has concluded that the conditions in Section 61M(1) of ITEPA 2003 are not met in respect of the engagement of the individual performing the Services under this Contract and the Council has incorrectly determined that such conditions are not met due to the aforesaid written statements, records and documents being false, incorrect or incomplete, the Supplier indemnifies the Council against any liability, including any interest, penalties or costs incurred, that is levied, demanded or assessed on the Council in connection with the Contract pursuant to Chapter 10 of Part 2 of ITEPA 2003 plus any additional value added tax due on the indemnified amount.

## **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.

## **C – 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 (Five Million Pounds Sterling); and
  - 14.2.2 in respect of all other claims, losses or damages, whether arising from delict (including negligence), breach of contract or otherwise under or in connection with the Contract, the maximum aggregate liability of a Party shall be £1,000,000 (One Million Pounds Sterling).
- 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**

Subject to Clause 14, 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, any Supplier Personnel 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.

## **D – ASSIGNATION AND SUB-CONTRACTING**

### **17 Assigation 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.
- 17.4 Where the Supplier is permitted to sub-contract part of the Services, the Supplier shall impose obligations on its Sub-Contractor in the same terms as those imposed on it pursuant to this agreement and shall procure that the Sub-Contractor complies with such terms.

## **E – DEFAULT AND TERMINATION**

### **18 Guarantee**

- 18.1 Where the Supplier is a Subsidiary, if the Contract Award Letter specifies that a parent company guarantee is required, the Supplier shall deliver to the Council, on demand, such 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 Award Letter 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 the Liquidated Damages Amount for each period of 7 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 Contract, 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 Contract) 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; or
  - 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.

### **23A Termination for Council's Convenience**

- 23A.1 The Council shall be entitled, at the Council's convenience, to terminate the Contract by serving 30 days written notice to the Supplier without need for legal proceedings or a court decision.
- 23A.2 The Council shall not be liable for any of the Supplier's anticipated costs, losses or loss of profit or business arising out of or in relation to the termination of the Contract under this Clause.

### **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), 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 Without prejudice to Clause 24.2, upon expiry or termination of the Contract, the Supplier shall:
- 24.3.1 give all reasonable assistance to the Council and any incoming supplier of the Services; and
  - 24.3.2 return to the Council any sums prepaid in respect of the Services not provided by the date of expiry or termination (howsoever arising).
- 24.4 Payments due to the Council under Clause 24.2 and Clause 24.3.2 shall be made within 14 days of the date of termination of the Contract.
- 24.5 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.

## **F – HEALTH & SAFETY, NON-DISCRIMINATION AND ENVIRONMENTAL CONSIDERATIONS**

## 26 Health & safety

- 26.1 The Supplier shall comply with, and shall ensure its Supplier Personnel and Sub-Contractor/s comply with, all Applicable Laws relating to health and safety, including the Health and Safety at Work Act 1974 and any regulations, subordinate legislation, codes of practice and guidance notes relating to health and safety matters.
- 26.2 The Supplier takes full responsibility for the adequacy and safety of its operations and methods concerned with the performance of its services for the Council.
- 26.3 If either Party becomes aware, during the performance of the Contract, of any incident likely to create a risk to the health and safety of any person, whether Council employee, Supplier Personnel or any other third party, it shall notify the other promptly and both Parties will cooperate fully with regard to any incident investigation that may be required.

## 27 Non-discrimination and Equality Duties

- 27.1 The Supplier confirms that, to the best of its knowledge and belief, it has complied with the Equality Act 2010 (the “**Act**”) and continues to comply with the Act in a manner which is proportionate and relevant to the nature of the Contract.
- 27.2 The Supplier performs his obligations under the Contract in a non-discriminatory manner and promotes equality and works towards achieving best practice as identified in the codes of practice issued by the Equality and Human Rights Commission.
- 27.3 The Supplier recognises that the Council must, in the exercise of its functions, have due regard to the need to:
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 27.4 The Supplier recognises that in performing this contract the Supplier is exercising public functions on behalf of the Council and, therefore, the Supplier has and will continue to have due regard to the matters referred to in sub-section 27.3 while performing its obligations under this contract.
- 27.5 The Supplier recognises that the Council has a responsibility to monitor the extent to which performance of the Contract extends to socially excluded groups. In recognition of this, the Supplier agrees, where appropriate and practicable, to work towards providing monitoring information to the Council in relation to employment and service provision by the following categories:
- gender reassignment,
  - age,
  - marriage and civil partnership,
  - sexual orientation,
  - disability,
  - religion or belief,
  - sex,
  - pregnancy, maternity, and

- race.

- 27.6 The Supplier does not discriminate directly or indirectly, or by way of victimisation or harassment, against any person on grounds of gender reassignment, age, marriage and civil partnership, sexual orientation, disability, religion or belief, sex, pregnancy and maternity and race contrary to the Act.
- 27.7 The Supplier notifies the Council in writing as soon as it becomes aware of any investigation of or proceedings brought against the Supplier under the Act. Where any investigation is undertaken by a person or body empowered to conduct such investigation, and/or proceedings are instituted in connection with any matter relating to the Supplier's performance of the Contract being in contravention of the Act, the Supplier, free of charge,
- provides any information requested in the timescale allotted,
  - attends any meetings as required and permit the Supplier's staff to attend,
  - promptly allows access to and investigation of any document or data deemed to be relevant,
  - allows itself and any staff of the Supplier to appear as witness in any ensuing proceedings, and
  - co-operates fully and promptly in every way required by the person or body conducting such investigation during the course of that investigation.

Where any such investigation is conducted or proceedings are brought under the Act which arise directly or indirectly out of any act or omission of the Supplier, its agents or subcontractors or the staff of the Supplier, and where there is a finding against the Supplier in such investigation or proceedings, the Supplier indemnifies the Council with respect to all costs, charges and expenses arising out of or in connection with any such investigation or the Council may have been ordered or required to pay to Others.

- 27.8 In recognition of the Council's legal obligation to tackle discrimination and promote equality and diversity in all its functions and policies under the Act, the Supplier may be required to complete a questionnaire and/or provide information to the Council's officers on the extent and quality of the Supplier's equality and diversity policies and practice. Good practice in this regard will be recognised by the Council, but, poor practice may result in the Council issuing a letter to comply describing the nature of improvement required and associated timescales. If the Supplier fails to improve practice in this regard, the Council may take further action, up to and including the termination of the Contract.
- 27.9 In the event that the Supplier enters into any subcontract in connection with the Contract, it shall impose obligations on its subcontractors in proportionate and relevant terms substantially similar to those imposed on it pursuant to this clause.

## **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; or
  - 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.

## **G – 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 Without prejudice to the generality of clause 30.1 the Supplier shall provide the Council with copies of any information or Records the Council may require to comply with a request for information under the Information Legislation (whether or not the Supplier agrees that the information ought to be disclosed) within 7 Business Days of being requested to provide the information or Records by the Council.
- 30.3 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:
- 30.3.1 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
  - 30.3.2 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 Except to the extent set out in this Clause 31 or where disclosure is expressly permitted elsewhere in the Contract, each Party shall treat the other Party's Confidential Information as confidential and safeguard it accordingly and shall not disclose such Confidential Information to any other person without the other Party's prior written consent.
- 31.2 The Supplier may disclose the Council's Confidential Information to the Supplier Personnel who are directly involved in the provision of the Services and who need to know the information to enable the Supplier to comply with its obligations under the Contract, and shall procure that any Supplier Personnel to whom it discloses the Council's Confidential Information pursuant to this Clause 31.2 shall observe the Supplier's confidentiality obligations under the Contract.
- 31.3 Clause 31.1 does not prohibit a Party from disclosing the other Party's Confidential Information:
- (a) pursuant to an order of a court of competent jurisdiction;
  - (b) to any person having a statutory or regulatory right to request and receive the Confidential Information;
  - (c) where the Confidential Information is legitimately known to that Party or lawfully in its possession at the last date of signature of the Contract;
  - (d) where the Confidential Information is already in the public domain other than as a result of disclosure by that Party in breach of any obligation of confidentiality owed to the other Party; or
  - (e) pursuant to Parliamentary obligation placed upon the Party making the disclosure or pursuant to the rules of the London Stock Exchange or any governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the London Stock Exchange or any governmental or regulatory authority concerned.
- 31.4 Nothing in the Contract shall prevent the Council from disclosing the Supplier's Confidential Information to:
- 31.4.1 its own members, employees, agents and permitted sub-contractors who need to know it; and
  - 31.4.2 its auditors, professional advisers and HM Revenue & Customs for the purpose of the examination and certification of the Council's accounts.
- 31.5 Without prejudice to the parties' other obligations under the Contract, if directed to do so by the Council at any time and in any event promptly following termination of the Contract, the Supplier shall return to the Council or destroy all Confidential Information of the Council and shall certify that it does not retain any such Confidential Information, save to the extent that any Confidential Information needs to be retained by the Supplier in order to enforce any of its rights or remedies under the Contract.
- 31.6 This Clause 31 is subject to the provisions of Clause 31A (Data Protection).
- 31.7 This Clause 31 shall survive termination of the Contract.

## **31A Data Protection**

- 31A.1 The Parties shall comply with the terms and conditions of Part 4 (Data Protection) of the Schedule.

31A.2 This Clause 31A 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) including any communication to the London Stock Exchange's regulatory information service, 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.

## **H – 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.

## **I - 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.
- 35.6 No Charges shall be due in respect of Services which are not capable of being performed as a result of a Force Majeure Event.

### **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 Supplier Personnel or Sub-Contractors:
- 36.3.1 commits any of the Prohibited Acts;
  - 36.3.2 commits any offence under the Bribery Act 2010 or any other 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; or
  - 36.3.3 commits 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 Legislation by unlawfully processing personal data in connection with any blacklisting activities.

### **37 Notices**

- 37.1 Any notice to be given to one Party by the other in connection with the Contract shall be validly served if given in writing and delivered personally, by recorded delivery or registered post or, subject to Clause 37.3, by email, to the address stated in the Contract Award Letter for the relevant Party, 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 shall be deemed to have been given:
- 37.2.1 if delivered personally, at the time of delivery; or

37.2.2 provided the relevant notice is not returned as undelivered, (i) in the case of recorded delivery or registered post, two (2) Business Days after the day of posting; and (ii) in the case of email, four (4) hours after sending.

37.3 Notices sent under Clause 23 (Termination), Clause 23A (Termination for Council's Convenience) and Clause 35 (Force majeure) may be served by email, only if the original notice is then delivered to the recipient by personal delivery, recorded delivery or registered post in the manner set out in Clause 37.1. Failure to send any such original notice by personal delivery, recorded delivery or registered post in accordance with Clause 37.1 shall invalidate the service of the related e-mail transmission. The deemed time of delivery of such notice shall be the deemed time of delivery of the original notice as set out in Clause 37.2 or, if earlier, the time of response or acknowledgement by the other Party to the email in which the notice was delivered.

37.4 Clauses 37.1 to 37.3 inclusive 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 and Records**

- 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 any Supplier Personnel 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.
- 42.4 The Supplier shall manage the Records (including keeping, storing, securing, archiving, preserving, destroying or otherwise disposing of the Records) in accordance with the Records Management Plan and that notwithstanding the expiry or early termination of this Contract. The Supplier shall further provide the Council with all assistance reasonably requested by the Council to assist the Council in complying with its obligations under the Public Records (Scotland) Act 2011 and the Records Management Plan where such compliance is in respect of records created or to be created by the Supplier on behalf of the Council in terms of the Contract. This assistance will be at no cost to the Council.

## **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 SubContractor or Supplier Personnel 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 Third Party Rights**

45.1 No express third party right and no purported right is conferred by this Contract or any agreement, deed or instrument entered into or under it in connection with the Contracts (Third Party Rights) (Scotland) Act 2017.

**46 Agreement**

46.1 The Contract Award Letter constitutes an offer by the Council to purchase the Services subject to and in accordance with the terms and conditions of the Contract.

46.2 The offer comprised in the Contract Award Letter shall be deemed accepted by the Supplier on receipt by the Council of a copy of the Contract Award Letter countersigned by the Supplier, or in the absence of receipt, the Supplier's commencement of or continuation of performance of the Services will constitute acceptance.

46.3 The Contract comprises of the Conditions (including the Schedule), the Specification, the Tender Documents and the Contract Award Letter.

46.4 The Contract constitutes the entire agreement between the Parties in respect of its subject matter and supersedes and extinguishes all prior negotiations, arrangements, understanding, course of dealings or agreements made between the Parties in relation to its subject matter, whether written or oral.

46.5 In the event of any conflict, and only to the extent of that conflict the following order of priority will apply:

(First) the Contract Award Letter;

(Second) the Conditions (including the Schedule);

(Third) the Specification; and

(Fourth) the Tender Documents.

**47 Counterparts**

47.1 The Contract may be executed in any number of counterparts and by each of the Parties on separate counterparts.

**48 Law and Jurisdiction**

48.1 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 or if pursuant to Schedule Part 1 Clause 34 does not apply.

**49 Definitions**

In these Conditions:

**"Account Representative"** means each of the representatives appointed by the Supplier and the Council pursuant to Clause 11;

**"Applicable Law"** means all applicable laws, consents and approvals, including legislative provisions, sub-ordinate legislation, legally binding codes of practice and the common law;

**"Business Day"** means a day, other than a Saturday or Sunday, on which the banks in Aberdeen are open for general commercial business;

**"Charges"** means the charges and fees payable in relation to the Contract, which shall be quoted, invoiced and payable in Pounds Sterling;

**"Conditions"** means these terms and conditions, including the Schedule;

**"Confidential Information"** means all confidential information (however recorded or preserved) disclosed by a Party or its employees, officers, representatives, advisers or subcontractors to the other Party and that Party's employees, officers, representatives, advisers or sub-contractors in connection with the Contract which information is either labelled as such or should reasonably be considered as confidential because of its nature and the manner of its disclosure including all information relating to Intellectual Property Rights, the business, affairs, developments, trade secrets, know-how and personnel of the party disclosing the information. For the avoidance of doubt, confidential information may include Inside Information within the meaning of UK MAR as amended by the Market Abuse (Amendment) (EU Exit) Regulations (SI 2019/310), the Financial Services (Electronic Money, Payment Services and Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/1212), the Gibraltar (Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/680) and the Securities Financing

Transactions, Securitisation and Miscellaneous Amendments (EU Exit) Regulations 2020 (SI 2020/1385). ;

**"Contract"** means the contract between the Council and the Supplier for the supply of Services, comprising the Contract Award Letter, the Conditions, the Tender Documents and the Specification, constituted in accordance with Clause 46.2;

**"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;

**"Contract Award Letter"** means the letter issued by the Council to the Supplier notifying the Supplier of its award of the Contract which, together with these Conditions, the Specification and the Tender Documents, forms part of and constitutes the Contract;

**"Dispute"** means any dispute or difference between the Council or the Supplier arising from or in connection with a Contract;

**"Dispute Resolution Procedure"** means the procedure set out in Clause 34.

**"Default"** means non-compliance with or default against any obligation under the Contract by the Supplier;

**"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 Supplier Personnel.

**"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;

**"Holding Company"** has the meaning given in Section 1159 of the Companies Act 2006;

**"Information Legislation"** means the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004;

**"Intellectual Property Rights"** means patents, trademarks, 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);

**"Insolvency Event"** means

Where the Supplier is a Company, a partnership or firm, or a number of persons acting together in any capacity:

- (i) 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;
- (ii) the making of any composition, compromise, assignation or arrangement with any of the Supplier's creditors;
- (iii) the appointment of a liquidator, receiver, administrator, administrative receiver, compulsory manager or similar officer in respect of the Supplier; or
- (iv) the occurrence of any similar event under the law of any other jurisdiction,
- (v) and shall include the occurrence of any of these events with regard to a Parent Company of the Supplier.

Where the Supplier is an individual:

- (i) the presentation of a petition for the Supplier's bankruptcy or the sequestration of the Supplier's estate;
- (ii) the making of a criminal bankruptcy order against the Supplier;
- (iii) 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;
- (iv) the apparent insolvency of the Supplier within the meaning of the Bankruptcy (Scotland) Act 1985; or
- (v) the occurrence of any similar event under the law of any other jurisdiction.

**"Invoice"** means an invoice issued by the Supplier to the Council indicating Charges payable together with any taxes or additional charges, if applicable;

**"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;

**"ITEPA 2003"** means the Income Tax (Earnings and Pensions) Act 2003 (as amended by Section 6 and Schedule 1 of the Finance Act 2017);

**"Key Performance Indicators"** means the indicators set out in the Specification against which successful performance of the Contract will be measured and monitored;

**"Law"** means all applicable laws, consents and approvals, including legislative provisions, subordinate legislation, legally binding codes of practice and the common law;

**"Liquidated Damages Amount"** means the amount of liquidated damages set out in the Specification;

**"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; **"Parent Company"** has the meaning given to it in the Companies Act 2006;

**"Parties"** means the Council and the Supplier, and "Party" means either of them;

**"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;

**"Progress Reports"** has the meaning given to it in Clause 12.1;

**"Records"** means any files, documents, information or other records whether provided by the Council to the Supplier or created by or on behalf of the Supplier or created by a third party and have come into the possession of the Supplier and which relate to the carrying out of the Services or the delivery of the Contract or the management, administration, organisation or planning of them whether in writing or on magnetic or other media;



**“Records Management Plan”** means the Council’s records management plan as approved by the Keeper of the Records (and as reviewed from time to time) all in accordance with the Public Records (Scotland) Act 2011 which plan is published by the Council on its website;

**“Schedule”** means the schedule in 4 Parts annexed to these Conditions;

**“Services”** means the services to be performed by the Supplier for the Council as specified in the Contract;

**“Specification”** means the document or documents issued to the Supplier by the Council, specifying matters in connection with a particular requirement for Services including the quantity and type of Services, the performance requirements, limits of liability, and insurance;

**“Subsidiary”** has the meaning given in Section 1159 of the Companies Act 2006;

**“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 **“SubContractor”** and **“Sub-Contracting”** shall be similarly construed;

**“Supplier”** means the party awarded the Contract by the Council, pursuant to the Contract Award Letter;

**“Supplier Personnel”** all directors, officers, employees, agents, consultants and contractors of the Supplier and/or of any Sub-Contractor engaged in the performance of the Supplier’s obligations under the Contract;

**“Tender Documents”** means the tender documents submitted by the Supplier to the Council following the launch of a tender process by the Council;

**“Term”** means the period of the Contract as set out in the Contract Award Letter, unless terminated earlier by Law or in accordance with the terms and conditions of the Contract;

**“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);

**“UK MAR”** Regulation (EU) No 596/2014) of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (Text with EEA relevance) 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;

**"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.

### **Interpretation**

- 48.1 In these Conditions, unless the context otherwise requires:
- 48.1.1 a reference to a person includes natural persons, companies, partnerships, bodies corporate and other legal entities;
  - 48.1.2 a reference to one gender includes references to all other genders;
  - 48.1.3 the singular includes the plural and vice versa;
  - 48.1.4 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;
  - 48.1.5 any reference to a document shall include any variation, amendment, or supplement to such document;
  - 48.1.6 headings are included for ease of reference only and shall not affect the interpretation or construction of these Conditions;
  - 48.1.7 references to numbered Clauses are, unless otherwise provided, references to Clauses of these Conditions;
  - 48.1.8 references to paragraphs are, unless otherwise provided, references to paragraphs of the Part of the Schedule in which they are referred;
  - 48.1.9 the meaning of general words is not to be restricted by any particular examples preceding or following those general words;
  - 48.1.10 an obligation to do something includes an obligation to procure it to be done;
  - 48.1.11 an obligation not to do something includes an obligation not to wilfully allow it to be done;
  - 48.1.12 the word "including" means "including without limitation"; and
  - 48.1.13 a reference to "approval" or "consent" shall mean consent in writing.
- 48.2 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.

This is the Schedule referred to in the foregoing Aberdeenshire Council Standard Terms and Conditions relating to the procurement of services

## **SCHEDULE**

### **Part 1 – Individual consultants**

#### **1 Illness**

- 1.1 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.
- 1.2 No Charges shall be payable in accordance with the Contract in respect of any period during which the Services are not provided.

#### **2 Substitute**

- 2.1 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.
- 2.2 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.

#### **3 Availability and commitment**

- 3.1 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.
- 3.2 The Supplier may be engaged, employed or concerned in any other business, trade, profession or other activity which does not place the Supplier in a conflict of interest with the Council or cause a breach of any of the Supplier's obligations under the Contract. 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 to the extent necessary required to deliver the Services in accordance with the Contract.

#### **4 Dispute Resolution**

- 4.1 The Dispute Resolution Procedure shall not apply.

### **Part 2 - TUPE**

#### **1 Definitions**

In this Part 2 of the Schedule:

- 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;

**“Commencement Date”** means the date on which the contracts of employment of the Employees transfer from the Council to the Supplier, pursuant to the TUPE Regulations, upon the commencement of the provision of the Services by the Supplier;

- 1.2 “**Employee Charges**” means all liabilities, costs, expenses and outgoings in relation to each Employee including 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 essentially or fundamentally the same as 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 essentially or fundamentally the same as the Services to the Council;
- 1.5 “**New Contractor**” means any successor to the Supplier in the provision of the Services or services essentially or fundamentally the same as 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 essentially or fundamentally the same as 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 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) beginning at the earlier of either (i) six months before the 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 Subcontractor 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 paragraph 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 paragraphs 2.5 and 2.6 of this Part 2 of the Schedule; 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 Retransferring Employees

shall, if the TUPE Regulations are applicable, 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 paragraphs 3.3 to 3.15 inclusive of this Part 2 of the Schedule 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 paragraph 3.3 of this Part 2 of the Schedule for its own costing purposes and disclosing it to prospective bidders for the provision to the Council of services the same as or essentially or fundamentally the same as the Services or any part thereof.
- 3.5 The information provided under paragraph 3.3 of this Part 2 of the Schedule 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 Data Protection Legislation). 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 paragraph 3.4 of this Part 2 of the Schedule;
  - 3.5.2 it will keep the personal data secure in accordance with the Data Protection Legislation;
  - 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 28 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 Retransferring Employees;
  - 3.8.2 the information set out in paragraph 3.3 of this Part 2 of the Schedule, 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 Data Protection Legislation.
- 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 paragraph 3.8 of this Part 2 of the Schedule 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 paragraphs 3.3, 3.8 and 3.9 of this Part 2 of the Schedule 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 Retransferring 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 paragraph 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 Retransferring 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 paragraph 3 of this Part 2 of the Schedule and;
- 3.16.2 that in the event of a claim on any indemnity in terms of paragraph 3 of this Part 2 of the Schedule 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 paragraph 3.16.

## Part 3 - Criminal Checks

### 1. Definitions

In this Part 3 of the Schedule:

- 1.1 “**Disclosure**” means a criminal record certificate or enhanced criminal record certificate issued by Disclosure Scotland under Part V of the Police Act 1997;
- 1.2 “**Disclosure Information**” means: (a) disclosure records disclosed under section 52, 53 or 54 of the PVG Act; and (b) any information in such a disclosure record which is obtained by virtue of section 51, 52, 53 or 54 of the PVG Act;
- 1.3 “**Disclosure Scotland**” means an agency of the Scottish Government that discharges the functions of Scottish Ministers under the Police Act 1997 and in particular provides disclosure of conviction information and manages the PVG Scheme on behalf of the Scottish Government, based for the time being at the Scottish Criminal Record Office, Pacific Quay, Glasgow, G51 1EA;
- 1.4 “**Individual**” any natural person that is used, or is considered to be used, by the Supplier to provide the Services (or any part thereof) on either a paid or unpaid basis and, for the avoidance of doubt, includes any person recruited (or considered for recruitment) directly by the Supplier, by an employment or similar agency used by the Supplier or by a Sub-contractor, and also includes the Supplier where he/she is a natural person;
- 1.5 “**Overseas Criminal Record Check**” a criminal record certificate in respect of an Individual obtained from the police or judicial authority of the country in which the Individual resided or worked (except for the United Kingdom);
- 1.6 “**Protected Persons**” means persons falling within the definition of a child or protected adult as set down in Sections 97 and 94 respectively of the PVG Act;
- 1.7 “**PVG Act**” means the Protection of Vulnerable Groups (PVG) (Scotland) Act 2007;
- 1.8 “**PVG Scheme**” means the scheme established under section 44 of the PVG Act managed by Disclosure Scotland for individuals undertaking Regulated Work;
- 1.9 “**Registered Person**” persons registered with Disclosure Scotland under section 120 of the Police Act 1997;
- 1.10 “**Regulated Work**” is defined in section 91 of the PVG Act;
- 1.11 “**Scheme Record**” means the document defined in section 48 of the PVG Act;
- 1.12 “**Short Scheme Record**” means a short scheme record as defined in section 53 of the PVG Act;
- 1.13 “**Sub-contractor**” any third party with whom the Supplier enters into a contract in respect of the performance of the Services (or any part thereof) by that third party, which shall include the provision by that third party to the Supplier of facilities or services, such as agency staff, necessary for the provision of the Services and any third party with whom that third party enters into such a contract; and
- 1.14 “**Vetting Information**” is as defined in section 49 of the PVG Act.

## 2. Criminal Checks

- 2.1 Where delivery of the Services requires any Individual to undertake Regulated Work, the Supplier shall for the duration of the Term comply with all of the relevant requirements, including the establishment of and adherence to effective procedures, of the PVG Act.
- 2.2 The Supplier shall ensure that all Supplier Personnel have undergone adequate training in respect of the PVG Act (the level, content and regularity of such training shall be proportionate to the person's role and responsibility with respect to the PVG Act), including, without prejudice to the generality of paragraph 2.1 of this Part 3 of the Schedule, the duty to make referrals in accordance with sections 2 and 3 of the PVG Act.
- 2.3 The Supplier shall procure that all Individuals undertaking Regulated Work in connection with the delivery of the Services shall, prior to their commencing such Regulated Work, obtain the following from Disclosure Scotland:
- (a) a Scheme Record in respect of the Individual for the type(s) of Regulated Work to be undertaken by him/her in the delivery of the Services; or
  - (b) where the Individual evidences existing membership of the PVG Scheme for the type(s) of Regulated Work to be undertaken by him/her in the delivery of the Services:
    - (i) a Short Scheme Record (where there is no Vetting Information in relation to the Individual); or
    - (ii) a Scheme Record (where there exists Vetting Information in relation to the Individual).
- 2.4 Where required in terms of the Contract, the Supplier shall procure that all Individuals are rechecked (by obtaining a Scheme Record or Short Scheme Record (as appropriate) in respect of the Individual) not less than every three years, or such other period as specified in the Contract.
- 2.5 The Supplier shall procure that all Individuals involved in the delivery of Services which fall outside of the scope of Regulated Work shall, prior to commencing delivery of such Services, obtain the appropriate level of Disclosure from Disclosure Scotland and, in particular:
- (a) the appropriate level of Disclosure shall be determined by reference to Part V of the Police Act 1997 and, for the avoidance of doubt, by reference to any regulations made under that Act and guidance issued by Disclosure Scotland; and
  - (b) such Disclosure shall be obtained not less than every three (3) years for each Individual.
- 2.6 The Supplier shall comply with the following in respect of applications for a Scheme Record or a Short Scheme Record as referred to in paragraph 2.3 of this Part 3 of the Schedule and applications for a Disclosure as referred to in paragraph 2.5 of this Part 3 of the Schedule:
- (a) except in respect of the Individuals referred to in paragraphs 2.6(b) and 2.6(c) of this Part 3 of the Schedule, the Supplier shall either:
    - (iii) be a Registered Person and countersign and submit the aforesaid applications to Disclosure Scotland itself; or
    - (iv) use a third party Registered Person (known as an umbrella body) to countersign and submit the aforesaid applications to Disclosure Scotland on its behalf;

- (b) in respect of Individuals employed or engaged by a Sub-contractor, the Supplier shall procure that the Sub-contractor shall either:
    - (v) be a Registered Person and countersign and submit the aforesaid applications to Disclosure Scotland itself; or
    - (vi) use a third party Registered Person (known as an umbrella body) to countersign and submit the aforesaid applications to Disclosure Scotland on its behalf; and
  - (c) where the Supplier is an Individual, and if required by the Council, the Supplier shall in respect of her/his own application permit the Council to arrange submission of the application to Disclosure Scotland. Where the Supplier is required to procure in respect of an Individual a Scheme Record or Short Scheme Record in accordance with paragraph 2.3 of this Part 3 of the Schedule or a Disclosure in accordance with paragraph 2.5 of this Part 3 of the Schedule, and the Individual has spent a continuous period of three calendar months or more residing or working out with the United Kingdom within the period of five years prior to the Individual commencing delivery of the Services, the Supplier shall procure that appropriate Overseas Criminal Record Checks are obtained in respect of such Individual prior to he/she commencing delivery of the Services.
- 2.7 The Supplier shall procure that the contents of the Scheme Records or Short Scheme Records referred to in paragraph 2.3 of this Part 3 of the Schedule, the Disclosures referred to in paragraph 2.5 of this Part 3 of the Schedule, and the contents of the Overseas Criminal Record Checks referred to in paragraph 2.6 of this Part 3 of the Schedule are used as part of the process to make recruitment and ongoing employment decisions in respect of Individuals and, where any of the aforesaid disclose that an Individual has convictions, reprimands, warnings, cautions or any other relevant information, the Supplier shall procure that a risk assessment is conducted in respect of the Individual's proposed or continued provision of the Services and that such risk assessment is applied in making appropriate arrangements to safeguard and protect the interests of all Protected Persons. The "Scotland Works for You" Guidance on evaluating the meaning of a person's criminal record to a job or opportunity they have applied for can be found at <https://www.mygov.scot/scotland-works-for-you/>.
- 2.8 The Supplier shall procure that a record of the risk assessments referred to in paragraph 2.7 of this Part 3 of the Schedule is kept and maintained and shall, on request by the Council, disclose that record to the Council, except that the Supplier shall (acknowledging that it is an offence under Section 66 of the PVG Act for a party having access to Disclosure Information under sections 51, 52, 53 or 54 of the PVG Act to disclose it to any other person) ensure that no Disclosure Information is disclosed to the Council other than as permitted under the PVG Act.
- 2.9 The Supplier shall not employ or engage any person in the provision of Regulated Work in connection with delivery of the Services who is placed under consideration for listing or is barred from carrying out Regulated Work.
- 2.10 In the event that the Supplier is notified that a person employed or engaged in the provision of the Regulated Work in connection with delivery of the Services is placed under consideration for listing or becomes barred from carrying out Regulated Work, the Supplier shall immediately remove that person from the provision of such Regulated Work.
- 2.11 In the event that the Supplier offers Regulated Work in connection with delivery of the Services to a person who is under consideration for listing or barred from carrying out Regulated Work or fails to remove a person from such Regulated Work if they have been notified that they are under consideration for listing or barred from carrying out Regulated Work, this will be deemed

a material Default of the Supplier entitling the Council to terminate this agreement with immediate effect by written notice to the Supplier.

- 2.12 The Supplier shall record and store information disclosed to it in connection with Disclosures and/or the PVG Scheme as detailed in the Code of Practice published by the Scottish Government under section 122 of Part V of the Police Act 1997 (as may be amended from time to time).
- 2.13 Before allowing any Sub-contractor to undertake Regulated Work in connection with the delivery of the Services, the Supplier shall:
- (a) obtain the written consent of the Council to the aforesaid sub-contracting of the Services; and
  - (b) enter into a written agreement with the Sub-contractor which give effect to the terms set out in this Part 3 of the Schedule such that they apply to the Sub-contractor, and,

for the avoidance of doubt, the Supplier shall remain fully liable for all acts or omissions of any Sub-contractor.

- 2.14 The Supplier shall deliver to the Council on its request from time to time:
- (a) a written statement from the Supplier (duly signed by the Supplier) in terms that the Supplier warrants to the Council that it has complied with paragraphs 2.3 – 2.9 inclusive of this Part 3 of the Schedule; and
  - (b) where a Sub-contractor undertakes Regulated Work in connection with delivery of the Services, a written statement from the Sub-contractor (duly signed by the Subcontractor) confirming compliance with paragraphs 2.3 – 2.9 inclusive of this Part 3 of the Schedule by the Sub-contractor in respect of any Individuals employed or engaged by it.

## **Part 4 – Data Protection**

### **1. Definitions**

In this Part 4 of the Schedule:

- 1.1 **“Council Personal Data”** means Personal Data for which the Council is the Data Controller, including Personal Data which is disclosed by or on behalf of the Council to the Supplier (or the Supplier Personnel) or any Sub-Contractor, or which the Supplier (or the Supplier Personnel) or any Sub-Contractor is required to generate, process, store or transmit pursuant to the Contract;
- 1.2 **“Data Controller”** has the meaning given to “controller” as set down in the Data Protection Legislation;
- 1.3 **“Data Loss Event”** any event that results, or may result, in unauthorised access to Council Personal Data held by the Supplier or a Sub-processor, and/or actual or potential loss and/or destruction of Council Personal Data in breach of the Contract, and including any Personal Data Breach;
- 1.4 **“Data Processor”** has the meaning given to “processor” as set down in the Data Protection Legislation;

- 1.5 **“Data Protection Impact Assessment”** an assessment by the Council of the impact of the envisaged Processing on the protection of Council Personal Data;
- 1.6 **“Data Protection Legislation”** means all applicable data protection and privacy legislation in force from time to time in the UK including (i) UK GDPR; (ii) the Data Protection Act 2018; and (iii) all other Law concerning the processing of personal data and privacy, including the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2426/2003) all as the same are amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 and the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2020;
- 1.7 **“Data Subject”** has the meaning set down in the Data Protection Legislation;
- 1.8 **“Data Subject Access Request”** a request made by, or on behalf of, a Data Subject in accordance with rights granted pursuant to the Data Protection Legislation to access their Personal Data;
- 1.9 **“International Organisation”** has the meaning set down in the Data Protection Legislation;
- 1.10 **“Personal Data”** has the meaning set down in the Data Protection Legislation;
- 1.11 **“Personal Data Breach”** has the meaning set down in the Data Protection Legislation;
- 1.12 **“Personal Data Processing Detail and Instructions”** means, with regard to any Council Personal Data to be Processed by the Supplier under or in connection with the Contract, the description of (a) the subject matter, nature and purpose of the Processing; (b) the duration of the Processing; (c) the types of Personal Data and categories of Data Subject; and (d) the Council’s instructions to the Supplier in respect of the Processing, including any Security Measures that are required to be adhered to by the Supplier, as set out in the Specification or the Contract Award Letter;
- 1.13 **“Processing”** has the meaning set down in the Data Protection Legislation, and **“Process”** or **“Processed”** shall be construed accordingly;
- 1.14 **“Security Measures”** appropriate technical and organisational measures which may include pseudonymising and encrypting Council Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Council Personal Data can be restored in a timely manner after an incident or a Data Loss Event, and regularly assessing and evaluating the effectiveness of the such measures adopted by it; and which shall include those outlined in the Personal Data Processing Detail and Instructions; and
- 1.15 **“Sub-processor”** any third party appointed by the Supplier, including any agent, SubContractor or professional adviser, to Process Council Personal Data on behalf of the Supplier.
- 1.16 **“UK GDPR”** means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation) 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

## 2. Data Protection

- 2.1 The Council and the Supplier acknowledge that for the purposes of the Contract and the Processing of Council Personal Data by the Supplier (or any Sub-Contractor):
- (a) the Council is the Data Controller of the Council Personal Data and the Supplier shall be the Data Processor; and
  - (b) the Personal Data Processing Detail and Instructions sets out the subject matter, nature and purpose of the Processing, the duration of the Processing and the types of Personal Data and categories of Data Subject.
- 2.2 The Supplier shall provide all reasonable assistance to the Council in the preparation of any Data Protection Impact Assessment prior to commencing any Processing. Such assistance may, at the discretion of the Council, include:
- (a) a systematic description of the envisaged Processing operations and the purpose of the Processing;
  - (b) an assessment of the necessity and proportionality of the Processing operations in relation to the Services;
  - (c) an assessment of the risks to the rights and freedoms of Data Subjects; and
  - (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Council Personal Data.
- 2.3 The Supplier shall, in relation to any Council Personal Data processed in connection with its obligations under the Contract:
- (a) Process the Council Personal Data only in accordance with written instructions of the Council (which may be specific instructions or instructions of a general nature as set out in the Contract (and in particular as set out in this Part 4 of the Schedule and in the Personal Data Processing Detail and Instructions) or as otherwise notified by the Council to the Supplier), unless the Supplier is required by Law to Process the Council Personal Data (and where the Supplier is relying on the Law as the basis for Processing the Council Personal Data, the Supplier shall promptly notify the Council of this before performing the Processing required by Law unless the relevant Law prohibits the Supplier from so notifying the Council);
  - (b) notify the Council immediately if it considers that any of the Council's instructions infringe the Data Protection Legislation;
  - (c) ensure that it has in place Security Measures, which are appropriate to protect against a Data Loss Event, which the Council may reasonably reject (but failure to reject shall not amount to approval by the Council of the adequacy of the Security Measures), having taken account of the:
    - (i) nature of the data to be protected;

- (ii) harm that might result from a Data Loss Event;
  - (iii) state of technological development; and
  - (iv) cost of implementing any measures;
- (d) on the Council's request, provide to the Council a written explanation of the Security Measures it has taken to satisfy paragraph 2.3(c) of this Part 4 of the Schedule;
- (e) ensure that:
  - (i) the Supplier Personnel do not Process Council Personal Data except in accordance with the Contract (and in particular the Personal Data Processing Detail and Instructions); and
  - (ii) it takes all reasonable steps to ensure the reliability and integrity of any Supplier Personnel who have access to the Council Personal Data and ensure that they:
    - (A) are aware of and comply with the Supplier's duties under this Part 4 of the Schedule;
    - (B) are subject to appropriate confidentiality undertakings with the Data Processor or any Sub-processor;
    - (C) are informed of the confidential nature of the Council Personal Data and do not publish, disclose or divulge any of the Council Personal Data to any third party unless directed in writing to do so by the Council or as otherwise permitted by the Contract; and
    - (D) have undergone adequate training in the use, care, protection and handling of Personal Data;
- (f) not transfer Council Personal Data outside of the UK or to any International Organisation unless the prior written consent of the Council has been obtained and the following conditions are fulfilled:
  - (i) the Council or the Supplier has provided appropriate safeguards in relation to the transfer in accordance with UK GDPR Article 46 or section 73 of the Data Protection Act 2018 as determined by the Council, or the transfer is based on an adequacy decision in accordance with UK GDPR Article 45 or section 74 of the Data Protection Act 2018;
  - (ii) the Data Subject has enforceable rights and effective legal remedies;
  - (iii) the Supplier complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Council Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist the Council in meeting its obligations); and
  - (iv) the Supplier complies with any reasonable instructions notified to it in advance by the Council with respect to the processing of the Council Personal Data;



- (g) unless the Supplier is required by Law to retain the Council Personal Data;
  - (i) upon the Council's demand during the Term or on the expiry or earlier termination of the Contract, return, securely destroy and/or permanently delete (at the option of the Council) the Council Personal Data; and
  - (ii) within two weeks of (A) any demand by the Council during the Term made in accordance with paragraph 2.3(g)(i) of this Part 4 of the Schedule; and (B) the expiry or earlier termination of the Contract, certify in writing to the Council that such return, destruction and/ or deletion has occurred.

2.4 Subject to paragraph 2.6 of this Part 4 of the Schedule, the Supplier shall notify the Council immediately (and within no later than two Business Days) of receipt by it or a Sub-processor of:

- (a) a Data Subject Access Request (or purported Data Subject Access Request) in respect of Council Personal Data;
- (b) a request to rectify, block or erase any Council Personal Data;
- (c) any other request, complaint or communication relating to either Party's obligations under the Data Protection Legislation;
- (d) any communication from the Information Commissioner or any other regulatory authority in connection with Council Personal Data processed under the Contract; or
- (e) a request from any third party for disclosure of Council Personal Data where compliance with such request is required or purported to be required by Law.

2.5 Subject to paragraph 2.6 of this Part 4 of the Schedule, the Supplier shall notify the Council immediately (and within no later than twenty-four hours) of the occurrence of a Data Loss Event.

2.6 The Supplier's obligation to notify under paragraphs 2.4 and 2.5 of this Part 4 of the Schedule shall include the provision of further information to the Council in phases, as details become available.

2.7 Taking into account the nature of the Processing, the Supplier shall provide the Council with full assistance in relation to either Party's obligations under the Data Protection Legislation and any complaint, communication or request made under paragraph 2.4 of this Part 4 of the Schedule or in the case of a Data Loss Event (and insofar as possible within the timescales reasonably required by the Council) including by promptly providing:

- (a) the Council with full details and copies of the complaint, communication or request;
- (b) such assistance as is reasonably requested by the Council to enable the Council to comply with a Data Subject Access Request within the relevant timescales set out in the Data Protection Legislation;

- (c) the Council, at its request, with any Council Personal Data it holds in relation to a Data Subject;
  - (d) assistance as requested by the Council following any Data Loss Event; and
  - (e) assistance as requested by the Council with respect to any request from the Information Commissioner's Office, or any consultation by the Council with the Information Commissioner's Office.
- 2.8 On the occurrence of a Data Loss Event, the Supplier shall provide information to the Council on the Data Loss Event, including the nature of the Data Loss Event, the nature of the Personal Data affected, the categories and number of Data Subjects concerned, the number of Personal Data records concerned, measures taken to address the Data Loss Event and the possible consequences and adverse effect of the Data Loss Event.
- 2.9 The Supplier shall maintain:
- (a) complete and accurate records and information to demonstrate its compliance with this Part 4 of the Schedule; and
  - (b) a log of Data Loss Events including facts, effects and remedial action taken by the Supplier and shall provide to the Council a copy of such log, records and information for inspection on the Council's request to the Supplier.
- 2.10 On the Council giving at least three (3) Business Days' notice to Supplier, permit the Council, or a third-party auditor acting under the Council's directions, to conduct, data privacy and security audits, assessments and inspections concerning the Supplier's data security and privacy procedures relating to the Processing of the Council Personal Data, its compliance with this Part 4 of the Schedule and the Data Protection Legislation (except that the requirement of the Council to give notice to the Supplier of an audit in advance shall not apply if the Council believes that the Supplier is in breach of any of its obligations under this Part 4 of the Schedule).
- 2.11 Each Party shall designate its own data protection officer if required by the Data Protection Legislation.
- 2.12 Before allowing any Sub-processor to Process any Council Personal Data, the Supplier must:
- (a) notify the Council in writing of the intended Sub-processor and Processing;
  - (b) obtain the written consent of the Council to the Processing;
  - (c) enter into a written agreement with the Sub-processor which give effect to the terms set out in this Part 4 of the Schedule such that they apply to the Sub-processor; and
  - (d) provide the Council with such information regarding the Sub-processor as the Council may reasonably require.
- 2.13 The Supplier shall remain fully liable for all acts or omissions of any of its Sub-processors.

- 2.14 The Council may, at any time on not less than 30 Business Days' notice, revise this Part 4 of the Schedule by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme.
- 2.15 The Supplier shall, immediately on demand, fully indemnify the Council and keep the Council fully and effectively indemnified against all costs, claims, demands, expenses (including legal costs and disbursements on a full indemnity basis), losses (including direct and indirect losses and loss of profits), actions, proceedings and liabilities of whatsoever nature arising from or incurred by the Council in connection with any failure of the Supplier or any Sub-processor to comply with the provisions of this Part 4 of the Schedule and/or the Data Protection Legislation in respect of its processing of Council Personal Data.

### **Part 5 – Supplier Incentive Scheme**

1. For the purposes of this Part 5 of the Schedule, the following definitions shall apply:
  - 1.1. **“Invoiced Debt”** means the gross amount (including, without limitation, all fees, charges, expenses and other sums invoiced, including any applicable VAT and other taxes) that is invoiced to the Council by the Supplier (including all sums invoiced) under or in connection with the Contract;
  - 1.2. **“Invoice Payment Date”** the date on which the Council executes its payment run in respect of the relevant Invoiced Debt;
  - 1.3. **“Rebate”** means in respect of any Invoiced Debt, such amount of that Invoiced Debt that is calculated in accordance with para 3 of this Part 5 of the Schedule;
  - 1.4. **“Trigger Date”** means for any undisputed Invoiced Debt, the date the relevant invoice is received by Council, such date being the date recorded Council's accounts payable system as the registration date. For any disputed Invoiced Debt, the Trigger Date shall be the date on which the dispute has been resolved to the mutual satisfaction of the parties.
2. Notwithstanding any other terms of the Contract, for the duration of the Term, the Supplier acknowledges and agrees that in consideration of Council paying an Invoiced Debt owed to the Supplier under or in connection with this Contract prior to the date by which such payment of that Invoiced Debt would otherwise be required under the terms of this Contract, the Council shall be entitled to deduct and retain from that Invoiced Debt, for its own benefit, the Rebate.
3. The Rebate is calculated with reference to the supplier incentive scheme rebate table in the Contract Award Letter by establishing the number of days that have elapsed between the Trigger Date and the Invoice Payment Date. In summary, the Rebate is sum of the percentage set out opposite the number of days elapsed on that table multiplied by the Invoiced Debt. More specifically, Rebates are applied against the value of each line item on an invoice. The result of this calculation is rounded to the nearest pence. Once the Rebates for all line items have been calculated, they are aggregated to provide the total Rebate value to be deducted from the Supplier's invoice on early payment of the invoice.
4. The Supplier shall receive a debit note indicating the value of the Rebate that has been applied.

5. For the avoidance of doubt, nothing in para 2 of this Part 5 of the Schedule shall:
  - 5.1. affect the date by which payment of an Invoiced Debt is required to be made by the Council;  
or
  - 5.2. require the Council to make early payment to the Supplier in respect of any Invoiced Debt.
6. In the event the Supplier, acting reasonably, considers that Council has incorrectly applied a Rebate, the following procedure shall be followed:
  - 6.1. the Supplier shall raise a query in respect of that Rebate with the Council within seven (7) days of the relevant Rebate being applied;
  - 6.2. if the Supplier does not raise a genuine query under para. 6.1 within seven (7) days of the relevant Rebate being applied, the Council shall be deemed to have applied the Rebate correctly in that instance and shall be entitled to retain that Rebate; and
  - 6.3. the Council and the Supplier shall use reasonable endeavours to resolve any query raised in accordance with para 6.1 in a timely manner, including making relevant personnel available for the purpose of resolving any such query.