

**MODEL ICT SERVICES AGREEMENT - BASELINE  
PRECEDENT CLAUSES FOR CONSIDERATION  
WHEN CONTRACTING FOR OUTPUTS OR  
OUTCOMES**

**DATED**

200◆

(1) [*THE AUTHORITY*]

**-and-**

(2) [*THE CONTRACTOR*]

**AGREEMENT**

relating to

[ ]

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## IMPORTANT NOTICE

- **This model ICT Services Agreement:**
  - should be read in conjunction with the Key Commercial Principles for UK Government ICT services agreements published by the Office of Government Commerce ("OGC"). For projects with multiple suppliers you will also need to consider the additional guidance given in section 2 of the Key Commercial Principles document(Multi-Supplier Issues). Additionally, this Agreement contains guidance notes highlighting the issues that need to be considered and the assumptions that have been made in drafting clauses of the Agreement. The guidance notes contained in the Agreement are not part of the Agreement and should be removed before the Agreement is sent to any potential contractor or other interested party;
  - is intended to be used as a starting point to assist you with drafting your ICT Services Agreement where the Authority will be buying-in services from a Contractor involving the implementation and operation of a new system and associated services. It does not purport to be a complete contract and must, in all cases, be carefully adapted to the particular circumstances (which may include taking out parts of the agreement which are not relevant to your project or not appropriate for the size of your project). Some of the concepts dealt with in this Agreement are necessarily complex and a number of provisions are inter-dependent. It is assumed that you will develop this document with appropriate professional advice and that you and your advisers will tailor it to your particular requirements. Neither OGC nor its advisers are responsible in any way for the use that you may make of this document;
  - assumes that the Contractor will own any assets employed in the delivery of the Services. Further provisions will be required if this is not the case, or if the Authority will require the transfer of assets on termination or expiry of the Agreement. Guidance Note 2 (Payment, Affordability and Asset Ownership) provides further guidance on the issues relating to assets;
  - may be used as the starting point for an outsourcing contract and it contains elements that are appropriate to this type of agreement. However, you will need to make provision with the assistance of your professional advisors for those outsourcing elements that are specific to the nature of your project, including in respect of the transfer of assets and provision in respect of employment and pensions;
  - assumes that the Authority is taking tax advice from its specialist tax advisers;
  - assumes that the law of England and Wales will apply;
  - generally reflects the law and practice as at its original drafting date of October 2004, although a number of its provisions have since been updated. You must ensure that the document is reviewed in detail and updated by your legal advisers and that any changes after this date are taken into account;
  - contains a number of different optional clauses. It is very unlikely that you will need all the provisions and you should consider each provision carefully in light of the specific project for which this Agreement is to be used;
  - has been drafted in contemplation that the procurement to which it relates will be conducted through the competitive dialogue procedure;
  - contains square brackets in clauses which indicate provisions that will need consideration and potentially amending to suit a particular project.
- **Particular attention should be paid to financial limits applied to the limitations of liability of each of the parties to this Agreement.**

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-

THIS AGREEMENT is made on

200◆

**BETWEEN:**

- (1) [NAME OF THE AUTHORITY] of ◆ ("Authority"); and
- (2) [NAME OF THE CONTRACTOR] a company registered in England and Wales under company number ◆ whose registered office is at ◆ ("Contractor").

**INTRODUCTION**

A *[Note - set out description of background and objectives of the procurement.]*

**IT IS AGREED** as follows:

**SECTION A - PRELIMINARIES**

**1. DEFINITIONS AND INTERPRETATION**

*[Guidance: This clause refers the reader to schedule 1 where terms used in the Agreement are defined. The clause also deals with points of interpretation and precedence of different parts of the Agreement over others. The definitions included in schedule 1 will need to be checked for relevance and suitability for your project. Additional definitions will need to be added for any other terms you wish to use.]*

1.1 In this Agreement the definitions set out in schedule 1 (Definitions) shall apply.

*[Guidance: Unless words are expressly defined, the courts will interpret non-technical terms in accordance with their "ordinary and natural" meaning, or the meaning which the parties are to be inferred to have intended by the use of the words they choose. Therefore, it is a good idea to include certain definitions to avoid any uncertainty. For example, "Default" has been given a precise meaning in this Agreement. Defined terms can also be a useful "shorthand" for referring to lengthy meanings which would otherwise make the clauses themselves repetitious and confusing to follow. For example "Project Specific IPRs". Defined terms:*

- *should begin with a capital letter in the body of the document;*
- *reflect the sense of what they are defining; and*
- *not be incorporated from previous agreements or standard precedents without thinking carefully about their appropriateness.]*

1.2 In this Agreement, unless the context otherwise requires:

1.2.1 the singular includes the plural and vice versa;

1.2.2 reference to a gender includes the other gender and the neuter;

1.2.3 references to an Act of Parliament, statutory provision or statutory instrument include a reference to that Act of Parliament, statutory provision or statutory instrument as amended, extended or re-enacted from time to time and to any regulations made under it. The impact of any such amendment, extension or re-enactment on this Agreement shall be dealt with in accordance with clause 47 (Change in Law); and

*[Guidance: Clause 1.2.3 covers two issues. First, it ensures that legislation referred to in the Agreement that is amended during the course of the Agreement shall be read as including any legislation that amends, extends or re-enacts it. Second, it refers to clause 47 which deals with the impact of such changes to the legislation on the Agreement and the parties' obligation under it.]*

1.2.4 any phrase introduced by the words "including", "includes", "in particular", "for example" or similar, shall be construed as illustrative and without limitation to the generality of the related general words.

*[Guidance: The objective of this provision is to make it clear that any example which follows the words "includes", "including" or "in particular" is illustrative, not definitive. It removes the need to say "including but not limited to" within the Agreement.]*

1.3 The headings in this Agreement are for ease of reference only and shall not affect its interpretation.

1.4 References to clauses and schedules are, unless otherwise provided, references to the clauses of and schedules to this Agreement.

*[Guidance: The objective of this provision is to remove the need to say, for example, "Clause 2 of this Agreement" throughout the Agreement.]*

1.5 Without prejudice to clauses 9.4 and 12.2, if there is any conflict between the clauses and the schedules and/or any annexes to the schedules and/or any other documents referred to in this Agreement, the conflict shall be resolved in accordance with the following order of precedence:

1.5.1 the clauses and schedule 1 (Definitions);

1.5.2 schedules 2.1 (Services Description) and 2.2 (Service Levels);

1.5.3 any other schedules and their annexes (except for schedule 4.1);

1.5.4 schedule 4.1 (Contractor Solution); and

1.5.5 any other document referred to in this Agreement or any other document attached to this Agreement.

*[Guidance: Consider whether any such document is intended to be contractually binding. If it is then it should be specified in the definition of "Agreement" in schedule 1. In deciding what documents will comprise the "Agreement" (in addition to the terms and the schedules) consider also whether any document may contradict what is stated elsewhere in the Agreement, whether it uses the defined terms in schedule 1 and whether it adds anything that is not already set out elsewhere.]*

*The schedules should not normally prevail over the clauses, as it is important that the core terms and conditions are never undermined.]*

1.6 Save in respect of the Charges (which shall be adjusted in accordance with schedule 7.1 (Charges and Invoicing)), if an amount or sum is expressed to be "subject to indexation" at a point in time, it shall be adjusted by reference to the percentage change in the [RPIx][Retail Prices Index (all items excluding mortgages)] over the most recent 12 months for which published data is available at that point in time.

*[Guidance: The purpose of clause 1.6 is to ensure that the aggregate liability sums to which it applies in clauses 52.2 and 52.3 are aligned regularly with any changes in inflation during the term of the Agreement by using the Retail Prices Index. It is not intended that this indexation should apply to the Charges, which should be adjusted in accordance with an agreed methodology set out in schedule 7.1 (Charges and Invoicing). Consider whether the Retail Prices Index is the appropriate index to use for the Services being supplied.]*

1.7 Subject to the provisions of clauses 5 - 8 (inclusive), neither party to this Agreement shall be liable for any Default of its obligations under this Agreement to the extent that such Default is caused by a failure or delay by the other party in performing its obligations under this Agreement, provided and to the extent that the affected party notifies the other party of such failure or delay within 30 days of the affected party becoming aware of its occurrence and of its likely impact.

*[Guidance: This clause adds a procedural hurdle (notification) for a party wishing to escape liability for breach on the basis that the other party caused it to commit the breach (e.g. by not providing information or access).]*

*[Guidance: Consider whether a Conditions Precedent clause is necessary. For example the Agreement may be conditional on the Contractor providing a parent company guarantee (although best practice is to have this completed before you sign the Agreement). It is usual to have this type of clause near the beginning of the document.]*

## **2. DUE DILIGENCE**

*[Guidance: Guidance Note 1 (Key Commercial Principles), section 1 - 5 (Due Diligence) sets out the considerations for a due diligence exercise. It is important to give the Contractor sufficient opportunity to carry out due diligence prior to the award of the Agreement. This benefits both parties in identifying any issues and incorporating any issues into the draft of the Agreement, as appropriate, before signing the Agreement. It also obviates the need for the Authority to give any warranties or assurances with respect to any information supplied and/or the Operating Environment.]*

*This clause is drafted on the basis that due diligence has been completed and therefore the risk of providing the Services has transferred to the Contractor, as the party best able to manage this risk. Exceptionally, if it is not possible for due diligence to be carried out prior to the award of contract then consider post-award verification.]*

*[Guidance: It is in both parties' interests to ensure that due diligence is carried out in a timely and effective fashion. Bidders should be encouraged to produce a list of their due diligence requirements as soon as reasonably practical in support of their solution design, specifically identifying the due diligence issues that impact materially on price. The Authority should, as far as possible, seek to support the Bidders' reasonable requests for data and site access in support of due diligence and ensure that there is sufficient time for the necessary checks to be carried out. However, in the event that it becomes clear that either:*

*a) the Authority is unable to provide reasonable access to reasonably requested sites/information; or*

*b) it is unreasonable to expect the Bidders to take the risk that the provided due diligence information which is critical to solution design and/or delivery costs is inaccurate (e.g. because the information may have been produced by a third party) then the Authority should consider the use of a price-variation mechanism.*

**The use of such a price-varying mechanism should only be considered in exceptional circumstances and following a full review of the risks of adopting it in the context of any particular project.**

*If the Authority decides to use a price-variation mechanism, the Bidders should be asked to identify any due diligence issues arising as a direct result of either a) or b) above as pricing assumptions and quantify the impact on the price (both positive and negative) of the information not being as currently assumed or understood. The price-variation mechanism should include a time-limited resolution period - typically a few weeks, though more time may be required for complex issues - during which any required price adjustment must be made. If the procurement is following the Competitive Dialogue process, the pre-agreed price-variation mechanism should be developed and agreed between the parties during the Dialogue phase of the procurement process. It should then still be permissible to deal with these issues after Final Tenders have been submitted and once a preferred Bidder has been appointed, provided that this does not result in modifying substantial aspects of the tender, distort competition or have a discriminatory effect.]*

- 2.1 The Contractor acknowledges that it:
  - 2.1.1 has made and shall make its own enquiries to satisfy itself as to the accuracy and adequacy of any information supplied to it by or on behalf of the Authority;
  - 2.1.2 has raised all relevant due diligence questions with the Authority before the Effective Date; and
  - 2.1.3 has entered into this Agreement in reliance on its own due diligence alone.
- 2.2 The Contractor acknowledges that it has inspected the Operating Environment and has advised the Authority of any aspect of the Operating Environment that is not suitable for the provision of the Services and that the specified actions to remedy the unsuitable aspects of the Operating Environment, together with a timetable for and

the costs of those actions, have been specified in the relevant parts of the Agreement for the Pre-Operational Phase.

*[Guidance: This is the recommended position whereby the responsibility for assessing the suitability of the Operating Environment lies with the Contractor. Responsibility for resolving any issues that are identified can then be allocated and included as part of the Agreement. If the default position is not acceptable, a joint assessment could be carried out, although responsibility for the assessment will be difficult to divide. The Authority will need to assess the risks in adopting this approach before agreeing to a joint assessment and clause 2.2 will need to be amended.]*

2.3 If the Contractor has either failed to inspect the Operating Environment or failed to notify the Authority of any required remedial actions in accordance with clause 2.2 then the Contractor shall not be entitled to recover any additional costs or charges from the Authority relating to any unsuitable aspects of the Operating Environment except in respect of any latent structural defect in the Authority Premises. The onus shall be on the Contractor to prove to the Authority that any work to the Authority Premises is required in respect of a latent structural defect and that the additional costs or charges are reasonable and necessary. The Contractor shall not incur such additional costs or charges without obtaining the Authority's prior written consent.

2.4 Any disputes relating to due diligence shall be resolved through the Dispute Resolution Procedure.

## **SECTION B - SERVICE IMPLEMENTATION**

### **3. IMPLEMENTATION PLAN**

*[Guidance: This clause assumes that during the Pre-Operational Phase the Contractor will be responsible for the design, build, testing, implementation and roll-out of the Contractor Solution for the delivery of the Services. This whole process is referred to for simplicity as "implementation".*

*It is assumed that the steps in the process of implementation will be set out in schedule 6.1 (Implementation Plan), which will contain a project plan and identify the "milestones" to be achieved along the way. Depending on the nature and scale of the project the Implementation Plan may be simple or highly complex. It should be discussed as part of the procurement process and particular care should be taken to understand and articulate the dependencies that the Contractor may have on the Authority or third parties that may affect its ability to achieve the plan.*

*This drafting anticipates that the Implementation Plan will contain, as a minimum, a list of milestones, a description of what the milestone deliverables are, due dates for achievement of each of the milestones and what constitutes Authority to Proceed (which is the commencement of the Operational Phase). It is envisaged that only some of the milestones will attract payments (of amounts to be set out in schedule 7.1 (Charges and Invoicing)). The objective of this clause is to make the milestone dates in the plan contractually binding so that failure to achieve them will result in financial implications for the Contractor. Depending on the project other dates will have lesser significance.*

*It is recommended that, as a minimum, an Outline Implementation Plan containing all the key milestones is agreed pre-contract. If further detailed planning is required the clause will need to be modified to include a*

*process to cover the Contractor submitting the detailed Implementation Plan to the Authority for approval. Failure to achieve approval within a specified period of time or after a specified number of iterations may be used to trigger certain rights for the Authority (e.g. termination if sufficiently serious).*

*The drafting envisages that the project will be divided into two parts: an implementation phase and an operating phase. For each Service line the Contractor will be required to implement the Operational Service but may not provide that Operational Service until it has achieved Authority to Proceed (given in the form of a Milestone Achievement Certificate) for the relevant Service. The concept of "acceptance" used in respect of supply contracts or system developments is not considered to be appropriate to a services agreement. Instead the achievement of "Authority to Proceed" ensures that the Contractor retains the solution suitability risk. Larger projects will require the implementation of a number of services, in which case "Authority to Proceed" must be achieved in respect of each Operational Service. Further guidance is to be found in Guidance Note 1 (Key Commercial Principles), section 1 - 1.2 (Authority to Proceed).*

*Following the issue of a Milestone Achievement Certificate in respect of Authority to Proceed the Contractor may be expected to achieve further Milestones relating to the Operational Service. For example, an obligation to demonstrate that satisfactory system "scalability" or a period of stable operational use has been achieved. Such a Milestone will mark the achievement of a Contract Performance Point (CPP), which should also be included in the Implementation Plan. Achievement of a CPP is also marked by the issue of a Milestone Achievement Certificate. Guidance on the timing and application of CPPs is to be found in Guidance note 1 ( Key Commercial Principles), section 1 - 1.4 (Contract Performance Point). Note that until a CPP has been achieved, Milestone Payments may be subject to claw back rights which should be set out in schedule 7.1 (Charging and Invoicing).*

*Detail of the Implementation Plan will have particular significance in relation to the operation of the following clauses and therefore should be drafted with these clauses in mind: 4 (Testing); 5 (Implementation Delays - General Provisions); 6 (Delays Due to Contractor Default); 7 (Delays to Milestones due to Authority Cause); 8 (Delays Not Due to One Party); and 11 (Effect of Authority Cause In the Operational Phase).]*

- 3.1 The Contractor shall provide the Services in accordance with the Implementation Plan.
- 3.2 The Contractor shall deliver a draft Detailed Implementation Plan to the Authority within [ ] months of the Effective Date. The Detailed Implementation Plan should be sufficiently detailed as is necessary to manage the implementation projects effectively. Once agreed with the Authority (agreement not to be unreasonably delayed or withheld), the Contractor shall monitor the performance against the Implementation Plan.
- 3.3 All changes to the Outline Implementation Plan shall be subject to the Change Control Procedure. The Detailed Implementation Plan shall only be varied in accordance with the process set out in paragraph 4.8 of schedule 6.1 (Implementation Plan).

#### **4. TESTING**

*[Guidance: Testing provisions are critical aspects of any agreement for the delivery of ICT-enabled services primarily because a significant amount of the contract price will usually become payable (i.e. on Authority to Proceed) and/or previous milestone payments cease to be recoverable (i.e. on Achieving a Contract Performance Point). Guidance Note 1 (Key Commercial Principles), section 1 - 1 (Payment Profile,*

*Milestones and Value for Money Provisions) and schedule 6.2 (Testing procedures) should be considered in relation to this clause).*

*The failure of the Milestone to pass a test will be relevant to the payment of Delay Payments to the Authority (see clause 6 (Delays Due to Contractor Default)). Therefore a robust and detailed testing regime is required notwithstanding the fact that the Contractor's System or Contractor Solution should never be formally "accepted" in order to ensure that solution suitability and performance risks remain with the Contractor via the service performance regime.*

*The testing regime should be discussed fully during dialogue stage to ensure that it is clearly articulated within the Testing Procedures. This clause has been drafted on the basis that the Testing Procedures will contain full details of: the procedures to be followed by each of the parties in testing the Milestone; the categories of Test Issues with applicable severity ratings; the procedures for re-testing where the testing has not been successful; the Test Success Criteria; the issue of Non-conformance Reports showing the results of the Testing; and the stage at which a Milestone Achievement Certificate (which may signify Authority to Proceed) will be awarded. Testing is conducted in respect of any Deliverables that may form part of the relevant Milestone but non-Test related verification may be required as well to identify whether the relevant Milestone has been Achieved. Any non-conformities in the Milestone must also be identified in the relevant Non-conformance Report.*

*The Test Success Criteria will usually be based on the Service Description and Contractor Solution and the parties will need to work closely together to agree the criteria to be used. Appropriate tests will need to be in place to confirm the successful Achievement of all Milestones, including Authority to Proceed and the Contract Performance Point.*

*The Contractor will be responsible for carrying out the testing. The Authority will want to consider its involvement in the tests. The level of its involvement will be dependent on the significance of any particular Milestone, including whether any payments are due under it. The Authority's role should be made clear in schedule 6.2 to ensure that it is satisfied that the services have been delivered to specification.]*

- 4.1 When the Contractor has completed the Services in respect of a Milestone it shall submit any Deliverables relating to that Milestone for Testing and the parties shall follow the applicable provisions of the Testing Procedures.
- 4.2 Each party shall bear its own costs in respect of the Testing Procedures. However, if a Milestone does not Achieve the Test Success Criteria, any costs incurred by the Authority in re-Testing or as a result of the failure to Achieve the Test shall be the responsibility of the Contractor.
- 4.3 If the Contractor successfully completes the requisite Tests, the Authority shall issue a Milestone Achievement Certificate. Notwithstanding the issuing of any Milestone Achievement Certificate, the Contractor shall remain solely responsible for ensuring that the Contractor Solution as designed and developed is suitable for the delivery of the Services, for ensuring that the Services are implemented in accordance with this Agreement and that the Service Levels are achieved during the Operational Phase. No rights of estoppel or waiver shall arise as a result of the issue of a Milestone Achievement Certificate (or conditional Milestone Achievement Certificate pursuant to clause 6.2.1 (Delays Due to Contractor Default)).

4.4 If the Contractor does not successfully complete or Achieve any Test, the provisions of clauses 5 (Implementation Delays - General Provisions), 6 (Delays Due to Contractor Default), 7 (Delays to Milestones due to Authority Cause) and 8 (Delays Not Due to One Party) shall apply as appropriate.

## 5. IMPLEMENTATION DELAYS - GENERAL PROVISIONS

*[Guidance: The objective of this clause is to deal with the issue of Delays prior to live operation of the Service. Guidance Note 1 ( key Commercial Principles), section 1 - 2 (Delays) offers guidance on the Delay provisions. Given that the allocation of responsibility for Delay can be genuinely difficult, the progress of the project should not be held up while the issue is debated. Therefore:*

- *the Contractor's primary obligation under this clause, regardless of fault, is to notify the Authority and fix the cause of the Delay without holding up the process; and*
- *the clause contains provision for any arguments about responsibility for the Delay to be resolved, subsequently through the Dispute Resolution Procedure if necessary.*

*The notification provisions are important as, pursuant to clause 5.4, the Authority will not be liable to pay the Contractor any compensation if it does not comply with the notification requirements within the specified timescale set out in clause 5.2. These notification obligations seek to mitigate against a situation where the Contractor only raises issues of Delay due to Authority Cause late in the day when a significant claim or alleged claim may have built up. In practice this may be in response to (and possibly an attempt to counter) an Authority claim for alleged breaches by the Contractor.]*

5.1 If, at any time, the Contractor becomes aware that it will not (or is unlikely to) Achieve any Milestone by the Milestone Date it shall immediately notify the Authority of the fact of the Delay and summarise the reasons for it.

5.2 The Contractor shall, as soon as possible and in any event not later than 10 Working Days after the initial notification under clause 5.1, give the Authority full details in writing of:

5.2.1 the reasons for the Delay;

5.2.2 the consequences of the Delay; and

5.2.3 if the Contractor claims that the Delay is due to an Authority Cause, the reason for making that claim.

5.3 Whether the Delay is due to an Authority Cause or not, the Contractor shall make all reasonable endeavours to eliminate or mitigate the consequences of the Delay.

5.4 Where the Contractor considers that a Delay is being caused or contributed to by an Authority Cause the Authority shall not be liable to compensate the Contractor for

Delays to which clauses 7 or 8 apply unless the Contractor has fulfilled its obligations set out in, and in accordance with, clauses 5.1, 5.2 and 5.3.

- 5.5 Any Disputes about or arising out of Delays shall be resolved through the Dispute Resolution Procedure. Pending the resolution of the Dispute both parties shall continue to work to resolve the causes of, and mitigate the effects of, the Delay.

### **Correction Plan**

- 5.6 The Contractor shall submit a draft Correction Plan where:

5.6.1 it becomes aware that it will not Achieve a Milestone by the Milestone Date;  
or

5.6.2 it has failed to Achieve a Milestone by its Milestone Date, whether that failure arises because of:

5.6.2.1 a failure to submit any or all Deliverables in respect of that Milestone;

5.6.2.2 the failure of the Milestone successfully to complete or Achieve any Test; or

5.6.2.3 where there are no Tests in respect of the relevant Milestone, any non-conformance in respect of that Milestone.

- 5.7 The draft Correction Plan shall identify the issues arising out of the Delay and the steps that the Contractor proposes to take to Achieve the Milestone in accordance with this Agreement.

- 5.8 The draft Correction Plan shall be submitted to the Authority for its approval as soon as possible and in any event not later than 10 Working Days (or such other period as the Authority may permit and notify to the Contractor in writing) after the initial notification under clause 5.1 or the issue of a Non-conformance Report.

- 5.9 The Authority shall not withhold its approval of a draft Correction Plan unreasonably. If the Authority does not approve the draft Correction Plan it shall inform the Contractor of its reasons and the Contractor shall take those reasons into account in the preparation of a further draft Correction Plan, which shall be resubmitted to the Authority within [five] Working Days of the rejection of the first draft.

5.10 The Contractor shall comply with its Correction Plan following its approval by the Authority.

*[Guidance: If the Implementation Plan sets long-stop dates for any of the Milestones, then any Correction Plan submitted must Achieve the Milestones by the relevant long-stop date. Note that if the Authority does not approve of the Correction Plan, or if it is not implemented, the Authority may be entitled to terminate in accordance with clause 55.1.5.3(b) and the Contractor will not be entitled to submit a further plan in accordance with the Remedial Plan Process.]*

## **6. DELAYS DUE TO CONTRACTOR DEFAULT**

*[Guidance: This clause sets out a process to deal with Delays that are the fault of the Contractor. The key objectives of the clause are (i) to incentivise the Contractor to meet the project timetable; and (ii) to compensate the Authority for any failure to do so in the form of Delay Payments.*

*The clause also provides a remedial process to mitigate the effect of the Delay on future Milestones within the Implementation Plan. Delay Payments will be payable regardless of the existence of a Correction Plan.*

*Delay Payments are to be set out in schedule 7.1 (Charges and Invoicing). Delay Payments are intended to be a way of adjusting the price to reflect late delivery but are likely to be treated by the courts as a form of liquidated damages and the following points should be considered in developing the regime:*

- *The amount of the Delay Payments must not be excessive and unreasonable or the courts will view them as unenforceable penalties. Penalties try to "punish" the Contractor for its breach (rather than compensate the customer for its loss);*
- *Liquidated damages should be a genuine pre-estimate, assessed and agreed by both parties, of the losses likely to be suffered by the non-breaching party. If the amounts are difficult to quantify, then a "best guess" procedure should be operated. Ideally, a record should be kept of the calculations underlying any amounts specified in the contract, or the formula used should be incorporated into the agreement; and*
- *Whether a term is a genuine pre-estimate of loss, and not a penalty, will be decided by reference to the time the agreement was agreed and not the time of the breach.*

*Guidance Note 1 (Key Commercial Principles), section 1 - 2 (Delays), 3 (Delay Payments) and 26 (Exclusive Financial Remedies) should be considered in relation to this clause and related schedules.]*

6.1 If a Deliverable does not satisfy the Test Success Criteria and/or a Milestone is not Achieved due to the Contractor's Default, the Authority shall issue a Non-conformance Report to the Contractor categorising the Test Issues as described in the Testing Procedures or setting out in detail the non-conformities of the Deliverable where no testing has taken place, including any other reasons for the relevant Milestone not being Achieved and the consequential impact on any other Milestones. The Authority will then have the options set out in clause 6.2.

6.2 The Authority may at its discretion (without waiving any rights in relation to the other options) choose to:

6.2.1 issue a Milestone Achievement Certificate conditional on the remediation of the Test Issues, or the non-conformities of the Deliverable where no testing has taken place, in accordance with an agreed Correction Plan; and/or

6.2.2 [if the Test Issue is a Material Test Issue, refuse to issue a conditional Milestone Achievement Certificate as specified in clause 6.2.1 the escalate the matter in accordance with the Dispute Resolution Procedure and if the matter cannot be resolved exercise any right it may have under clause 55.1 (Termination for Cause by the Authority); and/or]

*[Guidance: It is envisaged that there will be different severity categories of failure set out in schedule 6.2 and that it would only be in the rare cases that the failure was so fundamental (i.e. Material Test Issues) that termination would be contemplated. It will therefore be very important to consider the types of failure which could occur during the testing period and the severity categories into which such failures would fall. By categorising the failures the Testing regime can then specify how it wishes to deal with the different categories in terms of the Authority's rights and the prioritising of the failures for remedying.]*

6.2.3 require the payment of Delay Payments, which shall be payable by the Contractor on demand, where schedule 7.1 (Charging and Invoicing) identifies that Delay Payments are payable in respect of the relevant Milestone. The Delay Payments will accrue on a daily basis from the relevant Milestone Date and will continue to accrue until the date when the Milestone is Achieved in accordance with the Correction Plan.

6.3 Where schedule 7.1 (Charging and Invoicing) does not identify the payment of Delay Payments in respect of a Milestone the Authority reserves its rights. Otherwise Delay Payments are provided as the primary remedy for the Contractor's failure to Achieve the relevant Milestone Date and it shall be the Authority's exclusive financial remedy except where:

6.3.1 the Authority is otherwise entitled to or does terminate this Agreement for the Contractor's Default or for Force Majeure; [or]

6.3.2 the failure to Achieve the Milestone exceeds a period of [six] months after the relevant Milestone Date[; or]

6.3.3 *[specify other grounds particular to the project e.g. the failure of a particular Milestone to meet a particular long-stop date].*

*[Guidance: The suitability of the triggers in this clause will depend on the context and content of the rest of the Agreement.]*

6.4 Where the Authority issues a conditional Milestone Achievement Certificate as specified in clause 6.2.1, it can choose (but does not have to) to revise the failed Milestone Date and any subsequent Milestone Date.

6.5 Any Correction Plan shall be agreed before the issue of a conditional Milestone Achievement Certificate unless the Authority is willing to agree otherwise. In the latter case the Contractor shall submit a Correction Plan for approval by the Authority within [10] Working Days of receipt of the Non-conformance Report.

## **7. DELAYS TO MILESTONES DUE TO AUTHORITY CAUSE**

*[Guidance: This clause provides that where delay in Achieving a Milestone is due to a breach of the Authority's obligations, the Contractor is entitled to certain rights and relief. For example, protection from liability for its own breach arising from the Authority's actions. Any compensation payable pursuant to clause 7.4 is subject to the Contractor's obligation to mitigate its loss. Note that the payment of compensation will increase overall projects costs. Therefore, the Authority must consider the effect of any increase in project costs when setting out provisions relating to compensation for delay.]*

7.1 Without prejudice to clause 5.3 and subject to clause 5.4, if the Contractor would have been able to Achieve the Milestone by its Milestone Date but has failed to do so as a result of an Authority Cause the Contractor will have the rights and relief set out in this clause 7.

7.2 The Contractor shall:

7.2.1 subject to clause 7.3, be allowed an extension of time equal to the Delay caused by that Authority Cause;

7.2.2 not be in breach of this Agreement as a result of the failure to Achieve the relevant Milestone by its Milestone Date;

7.2.3 have no liability for Delay Payments in respect of the relevant Milestone to the extent that the Delay results directly from the Authority Cause; and

7.2.4 be entitled to compensation as set out in clause 7.4.

- 7.3 The Authority Representative shall:
- 7.3.1 consider the duration of the Delay, the nature of the Authority Cause and the effect of the Delay and the Authority Cause on the Contractor's ability to comply with the Implementation Plan;
  - 7.3.2 consult with the Contractor Representative in determining the effect of the Delay;
  - 7.3.3 fix a Revised Milestone Date; and
  - 7.3.4 if appropriate, make any consequential revision to subsequent Milestones in the Implementation Plan.

*[Guidance: The Authority must manage and control the effect of a delay, including determining the extent of any extension of time given to the Contractor. In doing so it must consider the cause of the Delay and its effect and balance its need for the Services. Wherever possible the Contractor should seek to mitigate the effect of any Delay which may mean accepting that subsequent Milestones are not automatically extended].*

- 7.4 If the Contractor has incurred any direct loss and/or expense as a result of a Delay due to an Authority Cause, the Contractor shall be entitled to compensation to the extent that it cannot mitigate that loss or expense in accordance with the principles set out in paragraph 4 of schedule 7.1 (Charges and Invoicing). The Contractor shall provide the Authority with any information the Authority may require in order to assess the validity of the Contractor's claim to compensation.

*[Guidance: The parties need to address the issue of compensation for Delay on a project by project basis and set out the applicable principle in schedule 7.1 (Charges and Invoicing), including any limit on the amount recoverable. The Authority may elect to compensate the Contractor either by means of a single payment or by adjusting the Charges during the Operational Phase or by extending the Operational Phase (or a combination of these). The assumptions in the financial model for the project should be used as the basis for calculating the compensation. If the Operational Phase is to be extended then care needs to be taken that this is not incompatible with the OJEU notice.]*

- 7.5 Any Change that is required to the Implementation Plan pursuant to clause 7.3 or the Charges pursuant to clause 7.4 shall be implemented in accordance with the Change Control Procedure. If the Contractor's analysis of the effect of the Delay in accordance with clause 5.2 permits a number of options, then the Authority shall have the right to select which option shall apply.

7.6 The Authority shall not delay unreasonably when considering and determining the effect of a Delay under this clause 7 or in agreeing a resulting Change pursuant to the Change Control Procedure.

7.7 The Contractor shall [and shall procure that each Sub-contractor shall] take and continue to take all reasonable steps to eliminate or mitigate any losses and/or expenses that it incurs as a result of an Authority Cause.

## **8. DELAYS NOT DUE TO ONE PARTY**

*[Guidance: The objective of this clause is provide a process for the apportionment of responsibility for Delay in the event that it is due to a combination of the Contractor's Default and Authority Cause. Without such an apportionment mechanism the Authority is unlikely to be able to enforce any proportion of Delay Payments in these circumstances, as Courts have not been prepared to step in and rule what a fair proportion would be in absence of any express agreement on this point by the parties. In such circumstances the Courts have preferred to rule that no liquidated damages should be claimable given the difficulties of apportionment.]*

Without prejudice to clause 5.3 and subject to clause 5.4, where a Delay is attributable in part to the Contractor's Default and in part to an Authority Cause the parties shall negotiate in good faith with a view to agreeing a fair and reasonable apportionment of responsibility for the Delay. The parties agree that Delay Payments and compensation payable pursuant to clause 7.4 (Delays to Milestones Due to Authority Cause) shall be recoverable subject to reductions to reflect the extent to which the Authority or the Contractor respectively has contributed to the Delay. If necessary, the parties may escalate the matter in accordance with the Dispute Resolution Procedure and if the matter cannot be resolved by agreement then [either party may] [with the agreement of both parties, the parties may] refer the matter to an expert for determination.

## **SECTION C - SERVICE SUPPLY**

### **9. SERVICES**

*[Guidance: The objective of this clause and the related schedules 2.1 (Services Description) and 4.1 (Contractor Solution) is to identify the Services and the obligations that apply to them. Refer to schedule 2.1 (Services Description) for guidance on the applicable considerations.*

*The suggested approach is to:*

- *agree a draft Services Description setting out issue as part of the discussion documents Authority's requirements (ie detailed description of what the Authority wants). Both parties must work together to agree the Service Description, which will reduce the possibility of conflicting statements in the Agreement and the scope for contractual disputes. The Services Description should articulate between different types of Services that the Authority may require (e.g. Core Services, Additional Services and Future Services);*
- *include in the Agreement a description of the baseline Contractor solution (i.e. Schedule 4.1*

*(Contractor Solution)), which should be a technical description of how the Services will be provided. The inclusion of a defined technical baseline is important, as the Authority may wish to have some right of control over changes to the Contractor Solution as well as some right of control over the quality of the ICT being used in the Contractor Solution. The baseline position will also be important when operating the Change Control Procedures. This right should not stop the Contractor from devising an innovative means of satisfying the requirements. Nor should it expose the Authority to the risk of approval of the solution, as the ultimate responsibility of the Contractor should be to provide the Services in accordance with the Services Description and NOT the Contractor Solution;*

- *set out in this clause the key standards that are to apply to the Services (e.g. Good Industry Practice, Contractor's own established procedures and practices, the relevant Security Policy, relevant Quality Plans, HR Policies and overarching ICT strategies). Using the default drafting as a starting point, an appropriate list of relevant standards needs to be devised for each project and the clause amended accordingly. Any potential conflict between the relevant standards and the Services Description and/or Contractor Solution also needs to be addressed; and*
- *set out the obligations of the Contractor regarding integration of the Authority's existing system and the Contractor Solution.]*

9.1 The Contractor shall provide the Services from the Commencement Date and shall ensure that the Services:

9.1.1 comply in all respects with the Services Description as set out in schedule 2.1 (Services Description); and

9.1.2 are supplied in accordance with the Contractor Solution and the terms of this Agreement.

9.2 Without prejudice to clause 9.1, the Contractor shall supply the Operational Services:

9.2.1 from receipt of a Milestone Achievement Certificate in respect of Authority to Proceed; and

9.2.2 in accordance with clause 10.

9.3 The Contractor shall perform its obligations under this Agreement including those in relation to the Services in accordance with:

9.3.1 Good Industry Practice;

9.3.2 the Contractor's own established procedures and practices;

9.3.3 the Security Policy;

9.3.4 the Quality Plans; [and]

9.3.5 [the HR Policies; and]

*[Guidance: Consider suitability of including HR Policies here given the Authority's positive obligation regarding discrimination legislation and the need to adhere to appropriate codes of conduct, etc.]*

9.3.6 [the Authority's ICT strategy]. *[Guidance: Only include if applicable.]*

9.4 The Contractor shall draw any conflict between any of the requirements of clause 9.1 and the requirements of clause 9.3 to the attention of the Authority and shall comply with the Authority's decision on the resolution of that conflict.

9.5 The Contractor shall ensure that the Services and the Contractor System integrate with the Authority System to the extent necessary to achieve the successful provision of the Services.

*[Guidance: This is a very general requirement. Ideally the specifics of integration will be captured within the Services Description and/or Contractor Solution.]*

9.6 In the event of the Contractor's failure to provide the Services or to comply with the its obligations in accordance with this Agreement, the Authority may, without prejudice to its other rights, require the Contractor to re-perform the Services or to comply with its obligations.

#### **[Additional Services]**

*[Guidance: this drafting envisages that the "Additional Services" (see definition) are described in the schedule 2.1 (Services Description), schedule 2.2 (Service Levels) and priced for in schedule 7.1 (Charges and Invoicing). In effect, clauses 9.7 to 9.11 allow the Authority to "call-off" services which are additional to the core Services. Any Additional Services requirement must have been expressly referred to in the OJEU Notice. If Additional Services are not required then clauses 9.7 to 9.11 should be deleted. See also guidance below with reference to Future Services.*

*When considering the impact of adding the Additional Services you should consider the impact on any Services that are currently being supplied or any Services that will be supplied as a later part of the project.]*

9.7 [The Authority may require the Contractor to provide any or all of the Additional Services by giving notice in writing. The Contractor acknowledges that the Authority is not obliged to take any Additional Services from the Contractor and that nothing prevents the Authority from receiving services that are the same as or similar to the Additional Services from any third party.]

9.8 [If there has been an agreed Change to the Contractor Solution prior to the Authority's request for the Additional Services, then the Contractor shall notify the

Authority within [10] Working Days of the request (or such other period as the parties may agree) of the impact that the agreed Change will have on the relevant Additional Services.]

***[Guidance: When considering the impact of a Change under clause 26 (Change Control) you should also consider the impact on Additional Services or Future Services.]***

9.9 [If, following receipt of the Contractor's impact analyses pursuant to clause 9.8, the Authority confirms in writing that it wishes to proceed with its requirement for the Additional Services the Contractor shall:

9.9.1 implement the relevant Additional Services in accordance with the Additional Services Implementation Plan; and

9.9.2 subject the relevant Additional Services to Testing.]

9.10 [Following the successful implementation of the Additional Services:

9.10.1 any additional charges for the Additional Services shall be incorporated in the Charges as specified in [paragraph [ ]] of schedule 7.1 (Charges and Invoicing);

***[Guidance: See note below paragraph 8.5 of schedule 7.1 (Charges and Invoicing)]***

9.10.2 any services levels in respect of the Additional Services shall be incorporated in the Service Levels schedule; and

9.10.3 the relevant Additional Services implemented in accordance with these clauses 9.7 and 9.10 (inclusive) shall become part of the Services for the purpose of all other sections, clauses, obligations and rights contained within this Agreement.]

9.11 [The parties shall implement any Additional Services requested by the Authority in accordance with the Change Control Procedure modified to reflect the fact that the terms on which the Additional Services will be supplied have already been agreed.]

***[Guidance: No provision is made here for Future Services (i.e. services not fully defined and priced) as these will need to be carefully considered on a case by case basis and procurement law issues will need to be addressed. Any Future Services requirement must have been expressly referred to in the OJEU Notice.]***

## 10. SERVICE LEVELS

*[Guidance: The objective of this clause together with schedule 2.2 (Service Levels) is to set out the Service Levels at which the Services are to be provided and to set out the parties' rights and obligations where those Service Levels are not met. The provisions of this clause 10 must be aligned with those in schedule 2.2 (Service Levels) and any duplications or inconsistencies removed.*

*Guidance Note 1 (Key Commercial Principles), section 1 - 4 (Service Levels and Service Credits) and 26 (Exclusive Financial Remedies) advise on what should be included in the Service Levels and Service Credits regime and should be consulted when reviewing and discussing this clause and the schedule with bidders during the dialogue phase.*

*In the event of a failure to meet the Service Levels, the first obligation on the Contractor is to notify the Authority and to restore the Services, regardless of fault (if the failure is due to an Authority Cause the Contractor will be entitled to relief in accordance with Clause 11 (Effect of Authority Cause in the Operational Phase). If the performance falls below a pre-agreed threshold, Service Credits will accrue. Service Credits are an abatement of the Charges so that you are not paying the full price for poor quality service. Therefore, Service Credits should:*

- *not be set at punitive levels;*
- *within certain pre-agreed parameters, be the exclusive financial remedy for failure to meet the Service Levels. What these parameters should be will be an important consideration in each project as highlighted by the relevant drafting notes below clause 10.4.*
- *vary in accordance with the severity of the Contractor's underperformance. Typically this is done through some form of points mechanism.*

*It is important to reserve the flexibility to review and adjust the Service Levels and/or Service Credits over the life of the Agreement in order to reflect changes in the Authority's business and clauses 10.6 and 10.7 includes sample drafting to deal with these issues.]*

10.1 The Contractor shall provide the Operational Services to meet or exceed the Service Levels from the ATP Milestone Date. The remaining provisions of this clause 10 are subject to the provisions of clause 11 (Effect of Authority Cause in the Operational Phase).

10.2 If there is a Service Failure or if the Contractor believes that there will be a Service Failure, the Contractor shall:

10.2.1 notify the Authority immediately of the Service Failure or likely Service Failure;

10.2.2 provide the Authority with a Correction Plan of the action that it will take to rectify the Service Failure or to prevent the Service Failure from taking place or recurring, within [10] Working Days from the day the Contractor notifies the Authority under clause 10.2.1;

- 10.2.3 take all remedial action that is reasonable to rectify or to prevent the Service Failure from taking place or recurring; and
- 10.2.4 carry out the action plan agreed under clause 10.2.2 in accordance with its terms.
- 10.3 Subject to the annual Service Credit limit in clause 52.2.4, where applicable the Contractor shall automatically credit the Authority with Service Credits in accordance with schedule 7.1 (Charges and Invoicing). Service Credits shall be shown as a deduction from the amount due from the Authority to the Contractor in the next invoice then due to be issued under this Agreement. If no invoice is due to be issued then the Contractor shall issue a credit note against the previous invoice and the amount for the Service Credits shall be repayable by the Contractor as a debt within [10] Working Days of issue.
- 10.4 Where Service Credits are provided as a remedy for Service Failure in respect of the relevant Services it shall be the Authority's exclusive financial remedy except where:
  - 10.4.1 the aggregate number of Service Failures (whether the Service Failure relates to the same or to different parts of the Services) exceeds [*specify a pre-specified number*] over a period of [three] consecutive months;
  - 10.4.2 any Service Failure that exceeds the Service Threshold;
  - 10.4.3 the failure to perform the Services in accordance with the Service Levels has arisen due to [theft, gross negligence, fraud, or wilful default]; [or]
  - 10.4.4 [the Service Failure results in:
    - 10.4.4.1 corruption or loss of data;
    - 10.4.4.2 [*specify other grounds particular to contract e.g. the Service Failure triggers a compensation payment to other third parties*];  
or]
  - 10.4.5 the Authority is otherwise entitled to or does terminate this Agreement for the Contractor's Default pursuant to clauses 55.1 and 55.3.

**[Guidance: The suitability of each of the triggers in this clause will depend on the context and content of the rest of the Agreement.]**

*The Authority will need to ensure that the Service Credits reflect the reduction in the quality of the Services accurately. When drafting schedule 2.2 the Authority should use some worked examples and check that the results reflect expectations.]*

10.5 Where Service Credits are not provided as a remedy for a Service Failure and the Contractor has failed to address such a Service Failure to the reasonable satisfaction of the Authority, then the Authority may, on written notice to the Contractor, withhold a proportionate amount of the Service Charges for those Services until such time as the relevant [Service Failure is remedied][Services are restored]. [Provided that the relevant [Service Failure is remedied][Services are restored], the Authority shall resume payment of the relevant part of the Service Charges, including payment of the amount retained.]

*[Guidance: Guidance Note 1 (Key Commercial Principles), section 1 - 22 (Escalating Remedies) recommends that the Authority should reserve a right to withhold service payments where the Contractor is not addressing problems with Services that are not covered by the Service Credit regime. However, the Authority is not entitled to keep the withheld payments for itself since this would conflict with the purpose of the Service Credit regime.]*

10.6 The Authority and the Contractor shall review the Service Levels [every six months] throughout the Term and make any changes in accordance with the Change Control Procedure to reflect changes in the Authority's requirements.

*[Guidance: The following clauses 10.7-9 provide the Authority with additional flexibility and authority in fine-tuning the service performance to meet evolving business need. In most cases it is expected that variations to the Service Credit model will be conducted through the provisions of Clause 10.6.*

*Guidance: The purpose of the following provisions is to fine tune the Contractors' behaviour in supporting the services. Changes are made unilaterally because the use of the Change Control Procedure to make bilateral Changes would permit the Contractor to negate the effect of the change by a variation of the Charges. The process should be used to make small changes: it should not be used to load one or two service levels, which would have a negative overall effect on the Services.]*

10.7 Not more than [*insert frequency*] during the Term the Authority may, on at least three months written notice, change the Service Credits applicable to one or more Service Levels provided that:

10.7.1 the principal purpose of this change is to reflect changes in the Authority's business requirements and priorities, or to reflect changing industry standards;

10.7.2 the change is not specifically intended to penalise the Contractor for poor performance in relation to any particular Service Levels; and

- 10.7.3 there is no increase in the total value of Service Credits potentially payable.
- 10.8 If the Contractor reasonably believes that any proposed change, which is requested by the Authority under clause 10.7, would materially and adversely increase Costs, the Contractor shall be entitled to submit a price variation request (supported by appropriate evidence, which should include but not be limited to an updated Financial Model) within [10] Working Days of the date of receiving the Authority's written notice.
- 10.9 The Authority shall then review the Contractor's price variation request submitted under clause 10.8 and, within [15] Working Days shall respond to the Contractor and do one of the following:
- 10.9.1 accept the Contractor's price variation request and make any required changes in accordance with the Change Control Procedure; or
- 10.9.2 where the Authority considers the Contractor's price variation request to be unreasonable, the Authority may reject the Contractor's price variation request and proceed to implement its proposed change to the Service Credits in accordance with the provisions of clause 10.7; or
- 10.9.3 decide not to proceed with the change.

## **11. EFFECT OF AUTHORITY CAUSE IN THE OPERATIONAL PHASE**

- 11.1 If the Contractor would have provided the Operational Services in accordance with the Service Levels and/or this Agreement but has failed to do so as a result of an Authority Cause the Contractor will have the rights and relief set out in clause 11.2.
- 11.2 The Contractor shall:
- 11.2.1 (in measuring the performance of any affected Service) be treated as though the relevant Service had met the relevant Service Level to the extent that the Service Failure is due to any Authority Cause; and
- 11.2.2 not be treated as being in breach of this Agreement to the extent that non-performance or breach is due to any Authority Cause; and

*[Guidance: note that the Contractor's relief is limited to the extent that the Authority has contributed to cause of the breach. This requires a balancing of the contributions of each party in line with the provisions of clause 8 (Delays Not Due to One Party).]*

11.2.3 be entitled to the Charges for the relevant Services affected by the Authority Cause as if it had not occurred.

11.3 If the Contractor claims that clause 11.1 applies, and in order to claim the rights and reliefs in clause 11.2, it shall provide the Authority with details of the Authority Cause [as part of the management information that it is obliged to provide at the end of the relevant Measurement Period][within [10] Working Days].

11.4 Any Disputes about or arising out of whether an Authority Cause applies to the Contractor's failure to provide the Services in accordance with the Service Levels and/or this Agreement shall be resolved through the Dispute Resolution Procedure. Pending the resolution of the Dispute both parties shall continue to resolve the causes of, and mitigate the effects of such failure.

## **12. STANDARDS**

*[Guidance: Where the Contractor will be developing software for the Authority's use, whether or not the Authority will own it, consider the standards that the Contractor or the software should be required to meet and whether the Contractor should be required to follow a particular design methodology (e.g. waterfall, rapid application development, rational unified process, etc). Also, consider any requirement for the Deliverables to conform to any particular standards, e.g. BS 17799 or PAS56, or for the Contractor to comply with any performance or management standards, e.g. PRINCE2 or ISO9001.]*

*[For this clause to add benefit, schedule 2.3 (Standards) must set out the standards which are to apply to a particular project.]*

12.1 The Contractor shall comply with the Standards in performing its obligations under this Agreement.

12.2 The Contractor shall discuss with the Authority any conflict that the Contractor reasonably believes that there is or will be between any of the Standards or between any of the Standards and any other obligation under this Agreement, and shall comply with the Authority's decision on the resolution of that conflict.

## **13. QUALITY ASSURANCE AND PERFORMANCE MONITORING**

### **Quality Plans**

*[Guidance: If possible, the parties should seek to agree the Quality Plans prior to contract approval. If this is done the plans can be attached to the Agreement as a schedule. Clauses 13.1 and 13.2 would then be redundant and should be deleted. If it is not possible then the parties should seek to have a draft Quality Plan that can be amended as part of the first phase of the project. Most suppliers will have plans that can be adapted to provide such a draft with minimal effort. This clause does not provide for attaching draft plans to the Agreement.]*

13.1 [The Contractor shall develop, [before the Commencement Date] [within *insert period*] Working Days of] the Effective Date, Quality Plans that:

13.1.1 ensure that all aspects of the Services are the subject of quality management systems;[ and

13.1.2 are consistent with ISO 9001:2000 or any equivalent standard which is generally recognised as having replaced it.]]

*[Guidance: Set out the ISO standard in this clause, if it is not already stated in schedule 2.3 (Standards).]*

13.2 [The Contractor shall obtain the Authority Representative's written approval of the Quality Plans developed pursuant to clause 13.1 before beginning to implement them, which approval shall not be unreasonably withheld or delayed. The Contractor acknowledges and accepts that the Authority's approval shall not act as an endorsement of the Quality Plans and shall not relieve the Contractor of its responsibility for ensuring that the Services are provided to the standard required by this Agreement.]

13.3 The Contractor shall procure that the Services are carried out in compliance with the Quality Plans.

13.4 Any Changes to the Quality Plans shall be agreed in accordance with the Change Control Procedure.

### **Quality Monitoring**

13.5 The Authority Representative may carry out audits of the Contractor's quality management systems (including all relevant Quality Plans and any quality manuals and procedures) at regular intervals. The parties anticipate that these audits will be carried out at intervals of approximately [three] months, but the Authority Representative may carry out other periodic monitoring or spot checks at any other time. In each case, the Contractor shall co-operate, and shall procure that its Sub-contractors co-operate, with the Authority Representative, including by providing the Authority Representative with all information and documentation, and access to any relevant Contractor Personnel and/or to any relevant Site, which he reasonably requires in connection with his rights under this clause 13.5 at no additional charge to the Authority.

## **Performance Monitoring**

13.6 The Authority may monitor the performance of the Services by the Contractor.

*[Guidance: How, what and where such monitoring occurs will depend on the nature of the services. This clause may need to be expanded to provide for (for example) access to the Contractor's premises, personnel and/or materials].*

13.7 The Authority may increase the extent to which this monitoring is conducted if the quality of the Services is degraded in any way. The Authority shall give the Contractor prior notification of its intention to increase the level of monitoring.

13.8 The Contractor shall co-operate, and shall procure that its Sub-contractors co-operate, with the Authority in carrying out the monitoring referred to in clause 13.6 at no additional charge to the Authority.

13.9 If the Contractor believes that the Authority's monitoring of the Services is unreasonable the Contractor may escalate the issue with the Authority using the Escalation Process.

## **14. SERVICES IMPROVEMENT**

*[Guidance: The generic obligations for continuous improvement described in this clause 14 may be superseded or complemented by specific obligations to be described in schedule 2.4 (Continuous Improvement). If there are no specific obligations then schedule 2.4 (Continuous Improvement) can be deleted.*

*The Authority should take care to ensure that it does not add new services to the Agreement under the pretext of service improvement. To do so may result in the inadvertent breach of the procurement regulations.]*

*[Guidance: The provisions of schedule 2.2 (Service Levels) provide for the conduct of customer satisfaction surveys and service reports to provide additional information to the Authority on the success of the project and a view of how well the Contractor is performing the Services from the perspective of the end user. The provisions anticipate that schedule 2.2 (Service Levels) will set out the mechanisms to put such surveys and reports in place. When deciding whether the project requires these provisions, consider the nature of the Services to be provided, the duration of the contract and the costs involved in conducting service reviews. If the Services do not have end users then those provisions in schedule 2.2 (Service Levels) will not be applicable.]*

14.1 The Contractor shall have an ongoing obligation throughout the Term to identify new or potential improvements to the Services in accordance with this clause 14 [and schedule 2.4 (Continuous Improvement)]. As part of this obligation the Contractor shall identify and report to the Management Board [quarterly] in the first Contract Year and once every [six] months for the remainder of the Term on:

- 14.1.1 the emergence of new and evolving relevant technologies which could improve the ICT Environment and/or the Services, and those technological advances potentially available to the Contractor and the Authority which the parties may wish to adopt; and/or
  - 14.1.2 new or potential improvements to the Services including the [quality, responsiveness, procedures, benchmarking methods, likely performance mechanisms and customer support services in relation to the Services] [**Guidance: revise the list as appropriate for the Services being procured**]; and/or
  - 14.1.3 new or potential improvements to the interfaces or integration of the Services with other services provided by third parties or the Authority which might result in efficiency or productivity gains or in reduction of operational risk; and/or
  - 14.1.4 changes in business processes and ways of working that would enable the Services to be delivered at lower costs and/or at greater benefits to the Authority.
- 14.2 The Contractor shall ensure that the information that it provides to the Authority shall be sufficient for the Authority to decide whether any improvement should be implemented. The Contractor shall provide any further information that the Authority requests.
- 14.3 The Authority shall at all times be responsible for determining its own ICT strategy. The Authority may notify the Contractor of any changes to the Authority's ICT strategy and request the Contractor to consider, review and respond to that strategy. If, in the Contractor's opinion, any notified change to the Authority ICT strategy would impact upon the provision of the Services, the Contractor shall refer the matter [to the Management Board/the Change Control Procedure].

***[Guidance: the approach taken to dealing with such changes will depend upon the form of the governance arrangements in schedule 8.1 (Governance).]***

14.4 If the Authority wishes to incorporate any improvement identified by the Contractor the Authority shall send the Contractor a Change Request and the parties shall:

14.4.1 develop a plan for the implementation of the improvement within [20] Working Days of the Authority's Change Request for the approval of the Authority;

14.4.2 implement the improvement in accordance with the provisions of an implementation plan approved by the Authority; and

14.4.3 submit the improvements to testing in accordance with the provisions of clause 4 (Testing).

## 15. EQUIPMENT

15.1 [Unless otherwise agreed in writing by the Authority, all Contractor Equipment will be used by the Contractor solely for the purposes of providing the Services to the Authority and will not be used for the Contractor's own purposes or in providing any other services to third parties.]

*[Guidance: In practice, it is unusual for Contractor Equipment to be used exclusively for the provision of the Services. Therefore, only retain this provision if it is imperative for the Authority to have exclusive rights of use of all Contractor Equipment (including hardware) and to ensure it has the right to take over such equipment on termination. If privacy of data, etc., are the concerns then consider whether such issues can be resolved without insisting on exclusive rights. The downside of requiring exclusive rights is that it prevents one of the "easy wins" of cost reductions achieved by economies of scale.]*

15.2 The Contractor shall be solely responsible for the cost of carriage of Contractor Equipment to the Sites and to the Authority Premises, including its off-loading, removal of all packaging and all other associated costs. Likewise on termination or expiry the Contractor shall be responsible for the removal of all relevant Contractor Equipment from the Authority Premises, including the cost of packing, carriage and making good the Authority Premises following removal.

15.3 All the Contractor's property located on the Sites, including Contractor Equipment, shall remain at the sole risk and responsibility of the Contractor[, except that the Authority shall be liable for loss of or damage to any of the Contractor's property located on Authority Premises which is due to the negligent act or omission of the Authority].

*[Guidance: include words in square brackets if this would otherwise result in an increased premium for the Contractor]*

- 15.4 Subject to any express provision of the Business Continuity and Disaster Recovery Plan to the contrary, the loss or destruction for any reason of the Contractor Equipment held on any Site shall not relieve the Contractor of its obligation to supply the Services in accordance with the Service Levels.

*[Guidance: The Contractor should not be relieved of its obligations automatically for the costs or destruction of its equipment. The Business Continuity and Disaster Recovery Plan should provide a supply of the Services, possibly at reduced levels, in the event of such a loss occurring. In the event that those plans fail, then the Contractor should become fully liable for non-delivery of the Services.]*

## **SECTION D - PAYMENT AND VALUE FOR MONEY PROVISIONS**

### **16. CHARGING AND INVOICING**

*[Guidance: Guidance Note 2 (Payment, Affordability and Asset Ownership) provides guidance on issues that relate to Charges or their abatement. Schedule 7.1 will need to be consistent with clauses and schedules in the Agreement, particularly those dealing with Delay, Delay Payments and compensation (clauses 5, 6, 7 and 8), Milestones triggering payments and Milestone failures triggering repayment of payments (schedules 6.1 and 7.1), Services, Additional Services (clause 9), Service Credits (clause 10), and any commercial exploitation arrangements for IPRs licensed to the Contractor by the Authority (clause 36).*

*This clause is drafted on the basis that all payments due under this Agreement together with any abatements such as Service Credits will be specified in schedule 7.1 as well as the mechanisms by which the Charges will be calculated, abatements applied and invoices issued.*

*The parties will also need to consider what they are expecting to be included within the amount of the Charges. For example, clause 16.4 contains details of other costs and expenses that fall outside the Charges and that are borne by each party.]*

- 16.1 In consideration of the Contractor carrying out its obligations, including the provision of the Services under this Agreement, the Authority shall pay the Charges to the Contractor in accordance with the payment profile and the invoicing procedure specified in schedule 7.1 (Charges and Invoicing).
- 16.2 The Contractor shall ensure that a term is included in any Sub-contract permitted under this Agreement which requires the Contractor to pay any undisputed sums due to the relevant Sub-contractor within a specified period that does not exceed 30 days from the date the Contractor receives the Sub-contractor's invoice.
- 16.3 The Contractor shall not suspend the supply of the Services unless the Contractor is entitled to terminate this Agreement under clause 55.6 for failure to pay undisputed Charges. Interest shall be payable on the late payment of any undisputed Charges

properly invoiced in accordance with the Late Payment of Commercial Debts (Interest) Act 1998.

- 16.4 Except as otherwise provided, the parties shall each bear their own costs and expenses incurred in respect of compliance with their obligations under clauses 4.2 (Testing), 13 (Quality Assurance and Performance Monitoring), 24 (Audits), [41 (Protection of Personal Data)], 42 (Freedom of Information) and, to the extent specified therein, clause 60 (Step-In Rights). *[Guidance: The charges schedule may define limits on this.]*

## **17. TAX**

*[Guidance: Under s77A Value Added Tax Act 1994 and s18 Finance Act 2003 the Authority could become liable for any VAT which has been paid to the Contractor but which is not then accounted for by the Contractor to HM Customs & Excise. The indemnity in clause 17.2 safeguards the Authority against this secondary liability. It has been drafted specifically in respect of UK services supplied by UK suppliers: it will require amendment where the Authority deals with non-UK suppliers, including direct deals with non-UK parent companies. In such circumstances the Authority should consult its specialist tax advisers.]*

- 17.1 The Charges are stated exclusive of VAT, which shall be added at the prevailing rate as applicable and paid by the Authority following delivery of a valid VAT invoice.
- 17.2 The Contractor shall indemnify the Authority on a continuing basis against any liability, including any interest, penalties or costs incurred, which is levied, demanded or assessed on the Authority at any time in respect of the Contractor's failure to account for or to pay any VAT relating to payments made to the Contractor under this Agreement. Any amounts due under this clause 17.2 shall be paid in cleared funds by the Contractor to the Authority not less than five Working Days before the date upon which the tax or other liability is payable by the Authority.

## **18. RECOVERY OF SUMS DUE**

*[Guidance: Consider appropriate set-off policies in accordance with the scope of your project and amend this clause accordingly. In particular, consider whether this clause should relate to wider set-off rights in respect of cross-cutting programmes.]*

The Authority may retain or set off any amount owed [to it or any Contracting Authority or any other Crown Body] by the Contractor against any amount due to the Contractor under this Agreement [or under any other agreement between the Contractor and the Authority or Contracting Authority or any other Crown Body].

## 19. VALUE FOR MONEY

*[Guidance: Schedule 7.3 should set out the mechanisms to be used by the parties that demonstrate how the Contractor is providing value for money in the Agreement, including gain-sharing, benchmarking and financial audits. Guidance Note 1 (Key Commercial Principles), section 1 - 1.5 (Value for Money Provisions) and Guidance Note 2 (Payment, Affordability and Asset Ownership) provide further guidance on the operation and employment of these mechanisms.]*

The parties shall comply with their obligations set out in schedule 7.3 (Value for Money Provisions).

## 20. FINANCIAL MODEL

The provisions of schedule 7.5 (Financial Model) shall apply in relation to the Financial Model and the parties shall comply with their respective obligation in schedule 7.5.

## SECTION E - CONTRACT GOVERNANCE

### 21. REPRESENTATIVES

*[Guidance: This clause assumes that schedule 9.3 (Key Personnel) will specify the Authority Representative and the Contractor Representative as Key Personnel. However, it may be more appropriate to limit schedule 9.3 to a list of the Contractor's Key Personnel (in accordance with clause 28) and create a separate schedule for the contact details of key appointments, service of notices under clause 70, etc. Details should include name, title, contact details.]*

21.1 Each party appoints the persons named as such in schedule 9.3 (Key Personnel) as the Authority Representative and the Contractor Representative respectively. The Representatives shall have the authority to act on behalf of their respective party on the matters set out in, or in connection with, this Agreement. Either party may, by further written notice to the other party, revoke or amend the authority of its Representative or appoint a new Representative.

21.2 The respective Representatives shall be sufficiently senior within the organisation of the appointing party, and granted sufficient authority by that party, to ensure full cooperation in relation to the operation and the management of this Agreement.

21.3 The Authority may require the Contractor to replace the Contractor Representative in accordance with clause 28.9 (Key Personnel).

### 22. GOVERNANCE

*[Guidance: This clause assumes that schedule 8 (Governance) will include all the detail as to how the Agreement and project will be governed. Detail should include: a structure of various committees or individuals to be responsible for different elements of the Agreement and to meet, report on and make*

*decisions within their allocated remit; and obligations on the Contractor to produce information and reports charting the progress of the project, and for the escalation of issues.]*

The parties agree to manage this Agreement through the governance structure detailed in schedule 8 (Governance).

## **23. SUPPLY CHAIN RIGHTS**

*[Guidance: In respect of large procurements it is very likely that the Contractor will wish to sub-contract some of its obligations. Alternatively, the Contractor may be the prime contractor in a consortium formed to provide the Services. In either case, the Authority will require the inclusion of provisions that permit it rights over the supply chain. Further guidance on the issues is provided in Guidance Note 1 (Key Commercial Principles), section 1 - 28 (Supply Chain Rights).]*

*[Guidance: Not all provisions set out in Clause 23 will be relevant or appropriate to all Contracts. Projects should therefore review their need for specific supply chain rights and obligations on a case-by-case basis.]*

### **Sub-contracting**

23.1 The Contractor shall not sub-contract any of its obligations under this Agreement without the Authority's prior written consent, which, subject to clause 23.2, shall not be unreasonably withheld or delayed.

23.2 The Authority may withhold or delay its consent where it considers that:

23.2.1 the appointment of a proposed Sub-contractor may prejudice the provision of the Services or may be contrary to the interests of the Authority; [and/or]

23.2.2 the proposed Sub-contractor is considered to be unreliable and/or has not provided reasonable services to its other customers[; and/or

23.2.3 the proposed Sub-contractor employs unfit persons].

*[Guidance: Who will be "unfit" will depend on the nature of the project and the identity of the Authority.]*

23.3 Subject to clause 23.4, in making a request pursuant to clause 23.1 the Contractor shall provide the Authority with the following information about the proposed Sub-contractor:

23.3.1 its name, registered office and company registration number;

23.3.2 a copy of the proposed Sub-contract;

- 23.3.3 [the purposes for which the proposed Sub-contractor will be employed, including the scope of any services to be provided by the proposed Sub-contractor;]
- 23.3.4 [if relevant, confirmation that the Sub-contract requires the proposed Sub-contractor to comply with any relevant Service Levels;]
- 23.3.5 where the proposed Sub-contractor is also an Affiliate of the Contractor, evidence that demonstrates to the reasonable satisfaction of the Authority that the proposed Sub-contract has been agreed on "arms-length" terms; and
- 23.3.6 any further information reasonably requested by the Authority.

*[Guidance: Clauses 23.3.3 and 23.3.4 can be deleted where this information is provided in the Sub-contract. However, before deleting these clauses, consider the possibility that the Contractor will seek approval of the proposed Sub-contractor before it has agreed the material terms of the Sub-contract.]*

- 23.4 If the supply of information required pursuant to clause 23.3 would amount to a breach of any rules and regulations of any exchange on which the shares of the Contractor are admitted for listing and/or trading, or any other rules or regulations with which the Contractor is obliged to comply as a result of that listing, the Contractor shall provide the Authority with the relevant information to the fullest extent permitted by those rules and regulations.
- 23.5 [The Authority has consented to the engagement of the Sub-contractors listed in schedule 4.3 (Notified Sub-contractors) subject to the provision by the Contractor of the information listed in clause 23.3 within 20 Working Days of the Effective Date (or such other period that the Authority may permit and notified to the Contractor in writing).]

*[Guidance: This clause permits pre-authorization of Sub-contractors. If there will be no pre-authorized sub-contractors, then it can be deleted. Note that the Contractor must still provide the Authority with information relating to the Sub-contract, whether this is actually provided before or after the Effective Date. This information is necessary to permit the Authority to understand the relationship between the Contractor and Sub-contractor and to ensure the certainty of supply of the sub-contracted services.*

*Guidance: The restrictions placed on Sub-contracts in the clause below may be unnecessary or may be unworkable if the Contractor needs to engage a number of Sub-contractors to deliver the Services. The Authority should consider whether only some of the restrictions should apply or whether they should apply only to material Sub-contracts. For example 'material sub-contracts' could be defined by reference to their value or importance to the overall delivery of the project. For further discussion please refer to the guidance notes within schedule 4.3 (Notified Sub-contractors).*

*Guidance: The Authority should recognise that, in some cases, the Contractor will wish to subcontract to a (material) Sub-contractor using a pre-existing contractual relationship with existing contractual terms. In such cases, the Authority should seek assurances and evidence from the Contractor that any such contract provides incentives that are consistent with the Agreement and will secure value for money at least equivalent to a bespoke contractual arrangement. Before agreeing to the use of any pre-existing arrangement that is material to the delivery of Services, the Authority should therefore seek access to its key terms and conditions, in order to establish whether its incentives are consistent with those of the main Agreement.]*

- 23.6 The Contractor shall not make use of a pre-existing contract with any [material] Sub-contractor, listed as such in Schedule 4.3 (Notified Sub-contractors), without the prior written consent of the Authority, which shall not be unreasonably withheld or delayed.
- 23.7 The Contractor shall ensure, except where the Authority has given its prior written consent under clause 23.6, that each [material] Sub-contract shall include:
- 23.7.1 a right under the Contracts (Rights of Third Parties) Act 1999 for the Authority to enforce the terms of that Sub-contract as if it were the Contractor;
  - 23.7.2 a provision enabling the Contractor to assign, novate or otherwise transfer any of its rights and/or obligations under the Sub-contract to the Authority;
  - 23.7.3 [a provision requiring the Sub-contractor to enter into a direct confidentiality agreement with the Authority on the same terms as set out in clause 43 (Confidentiality);]
  - 23.7.4 [a provision requiring the Sub-contractor to comply with protection of data requirements pursuant to clauses 40 (Authority Data) and 41 (Protection of Personal Data);]
  - 23.7.5 [a provision requiring the Sub-contractor to comply with the restrictions on corrupt gifts and payments pursuant to clause 64 (Prevention of Corruption);]
  - 23.7.6 [a provision restricting the ability of the Sub-contractor to further Sub-contract elements of the service provided to the Contractor without first seeking the consent of the Authority]; and

23.7.7 a provision enabling the Contractor, the Authority or any other person on behalf of the Authority to step-in on substantially the same terms as are set out in clause 60 (Step-in Rights).

*[Guidance: consider also flowing down provisions into Sub-contracts to deal with Project Specific IPR (see guidance to clause 38) and Exit Management (see guidance to clause 59.3.4).]*

### **Termination of Sub-contracts**

23.8 The Contractor shall not terminate or materially amend the terms of any Sub-contract without the Authority's prior written consent, which shall not be unreasonably withheld or delayed.

23.9 The Authority may require the Contractor to terminate a Sub-contract where the acts or omissions of the relevant Sub-contractor have given rise to the Authority's right of termination pursuant to clause 55.1 (Termination for Cause by the Authority).

*[Guidance: This right permits the Authority to seek the termination of the Sub-contract instead of exercising its right to terminate the Agreement.]*

23.10 [The Authority may terminate [this Agreement][require the Contractor to terminate the relevant Sub-contract] if there is a Change of Control of a material Sub-contractor on the same terms as those set out in clause 55.4 (Termination for Change of Control).]

### **Competitive Terms**

*[Guidance: The following competitive terms clause should only be considered in the event that the Authority has a more favourable contract with a supplier of commodity goods or services (e.g. standard application software) and following an assessment of the risk to the Authority if these goods/services subsequently contribute to service delivery failure (with services likely to carry greater risk than goods). Normally such arrangements would be with market leaders and for supplies/services that are or are planned to be in widespread use.]*

23.11 If the Authority is able to obtain from any Sub-contractor or any other third party more favourable commercial terms with respect to the supply of any goods, software or services used by the Contractor or the Contractor Personnel in the supply of the Services, then the Authority may:

23.11.1 require the Contractor to replace its existing commercial terms with that person with the more favourable commercial terms obtained by the Authority in respect of the relevant item; or

- 23.11.2 subject to clause 23.13, enter into a direct agreement with that Sub-contractor or third party in respect of the relevant item.
- 23.12 If the Authority exercises either of its options pursuant to clause 23.11, then the Charges shall be reduced by an amount that is agreed in accordance with the Change Control Procedure.
- 23.13 The Authority's right to enter into a direct agreement for the supply of the relevant items is subject to:
- 23.13.1 the Authority making the relevant item available to the Contractor where this is necessary for the Contractor to provide the Services; and
- 23.13.2 any reduction in the Charges taking into account any unavoidable costs payable by the Contractor in respect of the substituted item, including in respect of any licence fees or early termination charges.

#### **Retention of Legal Obligations**

- 23.14 Despite the Contractor's right to sub-contract pursuant to this clause 23, the Contractor shall remain responsible for all acts and omissions of its Sub-contractors and the acts and omissions of those employed or engaged by the Sub-contractors as if they were its own. An obligation on the Contractor to do, or to refrain from doing, any act or thing shall include an obligation upon the Contractor to procure that its employees, staff, agents and Sub-contractors' employees, staff and agents also do, or refrain from doing, such act or thing.

## **24. AUDITS**

*[Guidance: It is very important to an Authority that it can gain access to certain information held by the Contractor in relation to the Services and to make checks as to how the Services are being provided. The purpose of clause 24.1 is to set out the purposes for which the Authority may conduct an audit. It is only an illustrative list and should be reviewed on a case by case basis and amended, as necessary, to meet the requirements of specific projects. However, care should be taken so that the audit rights that are required by the Authority in order to comply with its own legal duties and requirements are not deleted and the Authority's position compromised. The Authority's legal advisers should be consulted on this.]*

*The Authority should endeavour to provide notice of its intention to conduct an audit pursuant to clause 24.5. The Contractor may want the Authority to accept more commitment than this clause provides for but there will be circumstances where the Authority cannot do so. For example: where an audit is required to confirm compliance with the Security Policy; the Authority has reasonable grounds to suspect that the Contractor is in material breach of its obligations or other circumstances (e.g. fraud) have arisen which would give rise to the Authority having the right to terminate this Agreement; the Authority has reasonably held concerns about the solvency of the Contractor; or where an audit is required by a Regulatory Body. Consequently, the Authority cannot commit to always giving prior notice of an audit.*

*The Authority will want to ensure that the audit rights are not duplicated, contradicted or undermined by other requests for information that may be included in the Agreement, for example, in schedule 8.1 (Governance).]*

24.1 The Authority may, not more than [twice in any Contract Year] [and for a period of [12 months] following the Term], conduct audits for the following purposes:

*[Guidance: The Authority may agree to limit its post-contract right of audit to specific grounds where appropriate to do so. However, key grounds such as an audit of Charges, audits under the National Audit Act and audits required by Regulatory Bodies should be retained.]*

24.1.1 to verify the accuracy of Charges (and proposed or actual variations to them in accordance with this Agreement), [any cost reduction and income generation initiatives carried out pursuant to clause 14 (Services Improvement)], and/or the costs of all suppliers (including Sub-contractors) of the Services [at the level of detail agreed in schedule 7.1 (Charges and Invoicing)];

24.1.2 to review the integrity, confidentiality and security of the Authority Data;

24.1.3 to review the Contractor's compliance with the Data Protection Act 1998, the Freedom of Information Act 2000 in accordance with clauses 41.2.10 (Protection of Personal Data) and 42 (Freedom of Information) and any other legislation applicable to the Services;

24.1.4 to review the Contractor's compliance with its obligations under clauses 9.1 and 9.3 (Services) and 13 (Quality Assurance and Performance Monitoring);

24.1.5 to review the Contractor's compliance with its obligations set out in schedule 7.3 (Value for Money Provisions);

24.1.6 to review any records created during the design and development of the Contractor's System and pre-operational environment such as information relating to Testing;

24.1.7 to review any books of account kept by the Contractor in connection with the provision of the Services;

24.1.8 to carry out the audit and certification of the Authority's accounts;

- 24.1.9 to carry out an examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority has used its resources;
- 24.1.10 to verify the accuracy and completeness of any Management Information delivered or required by this Agreement;
- 24.1.11 to inspect the ICT Environment (or any part of it);
- 24.1.12 to inspect the Authority's Assets, including the Authority's IPRs, equipment, facilities and maintenance, for the purposes of ensuring that the Authority's assets are secure and that any register of assets is up to date;
- 24.1.13 to ensure that the Contractor is complying with the Standards; and/or
- 24.1.14 any other audit that may be required by any Regulatory Body.

*[Note: This clause contains only an illustrative list, which should be reviewed on case by case basis and amended, if necessary, to meet requirements of specific projects.]*

- 24.2 The Authority shall use its reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt the Contractor or delay the provision of the Services.
- 24.3 Subject to the Authority's obligations of confidentiality, the Contractor shall on demand provide the Authority (and/or its agents or representatives) with all reasonable co-operation and assistance in relation to each audit, including:
  - 24.3.1 all information requested by the Authority within the permitted scope of the audit;
  - 24.3.2 reasonable access to any Sites controlled by the Contractor and to any equipment used (whether exclusively or non-exclusively) in the performance of the Services;
  - 24.3.3 access to the Contractor System; and
  - 24.3.4 access to Contractor Personnel.
- 24.4 The Contractor shall implement all measurement and monitoring tools and procedures necessary to measure and report on the Contractor's performance of the

Services against the applicable Service Levels at a level of detail sufficient to verify compliance with the Service Levels.

*[Guidance: Ensure that schedule 2.2 (Service Levels) makes provision for the monitoring of and reporting on Service Levels.]*

24.5 The Authority shall endeavour to (but is not obliged to) provide at least [15] Working Days notice of its intention to conduct an audit.

24.6 The parties agree that they shall bear their own respective costs and expenses incurred in respect of compliance with their obligations under this clause, unless the audit identifies a material Default by the Contractor in which case the Contractor shall reimburse the Authority for all the Authority's reasonable costs incurred in the course of the audit.

24.7 If an audit identifies that:

24.7.1 the Contractor has failed to perform its obligations under this Agreement in any material manner, the parties shall agree and implement a remedial plan. If the Contractor's failure relates to a failure to provide any information to the Authority about the Charges, proposed Charges or the Contractor's costs, then the remedial plan shall include a requirement for the provision of all such information;

24.7.2 the Authority has overpaid any Charges, the Contractor shall pay to the Authority the amount overpaid within [20] Working Days. The Authority may deduct the relevant amount from the Charges if the Contractor fails to make this payment; and

24.7.3 the Authority has underpaid any Charges, the Authority shall pay to the Contractor the amount of the under-payment [less the cost of audit incurred by the Authority if this was due to a Default by the Contractor in relation to invoicing] within [20] Working Days.

## **25. RECORDS AND REPORTS**

*[Guidance: Schedule 8.4 (Records Provisions) should detail the reports to be kept and their contents. These will need to be agreed between the parties but should include records setting out the history of the performance of the Agreement (such as Milestone Achievement Certificates) and periodic reports that indicate the Contractor's performance (such as Management Information).]*

The parties shall comply with the provisions of schedule 8.4 (Records Provisions) in relation to the keeping of records and the making of reports.

## **26. CHANGE CONTROL**

*[Guidance: The Change Control Procedure is critical to the Authority as it will set out the process that must be followed (unless the Agreement stipulates otherwise) for agreeing any change to the Agreement.]*

Any requirement for a Change shall be subject to the Change Control Procedure.

*[Guidance: When considering the impact of a Change you should also consider the impact on any other Services that are currently being supplied, will be supplied as a later part of the project or which fall into the category of Additional Services or Future Services.]*

## **27. DISPUTES**

*[Guidance: The Dispute Resolution Procedure in schedule 8.3 should provide for an escalation of measures, including commercial negotiations through a number of executive levels, mediation and then either arbitration or litigation.]*

27.1 The parties shall resolve Disputes arising out of or in connection with this Agreement in accordance with the Dispute Resolution Procedure.

27.2 The Contractor shall continue to provide the Services in accordance with the terms of this Agreement until a Dispute has been resolved.

## **SECTION F - PERSONNEL**

### **28. CONTRACTOR PERSONNEL**

28.1 The Authority may refuse admission to the Authority Premises and/or direct the Contractor to end the involvement in the provision of the Services of any of the Contractor Personnel whom the Authority believes represents a security risk or does not have the required levels of training and expertise or where the Authority has other grounds for doing so. The decision of the Authority shall be final and it shall not be obliged to provide any reasons.

28.2 The Contractor shall use its best endeavours to ensure continuity of personnel and to ensure that the turnover rate of its [staff][Key Personnel] engaged in the provision or management of the Services [is at least as good at the prevailing industry norm for similar services, locations and environments][does not exceed [ ]% in any Contract Year].

## Relevant Convictions

*[Guidance: Consider whether, because of the nature of the Services or the recipients of the Services, it is necessary to bar any of the Contractor Personnel who have criminal convictions. Examples of a general clause and one specific to Services involving access to children or other vulnerable persons are set out below. The ability of the Authority to require the disclosure of spent convictions will depend on the role of the Authority and the reason for the disclosure. The right to do so will not apply in all instances and the Authority should seek specific legal advice on the following clauses and the definitions of Conviction and Relevant Conviction.]*

28.3 The Contractor shall ensure that no person who discloses that he has a Relevant Conviction, or who is found by the Contractor to have any Relevant Convictions (whether as a result of a police check or through the Criminal Records Bureau procedures or otherwise), is employed or engaged in the provision of any part of the Services [involving ] *[Guidance: you may wish to limit this to particular activities e.g. financial processing]* without the Authority's prior and express written consent.

28.4 For each of the Contractor Personnel who, in providing the Services, has, will have or is likely to have access to children, vulnerable persons or other members of the public to whom the Authority owes a special duty of care the Contractor shall (and shall procure that the relevant Sub-contractor shall):

28.4.1 carry out a policy check with the records held by DfES;

28.4.2 conduct thorough questioning regarding any Relevant Convictions; and

28.4.3 ensure a police check is completed and such other checks as may be carried out through the Criminal Records Bureau,

and the Contractor shall not (and shall ensure that a Sub-contractor shall not) engage or continue to employ in the provision of the Services any person who has a Relevant Conviction or [what would reasonably be regarded as] an inappropriate record.

## Key Personnel

*[Guidance: Key Personnel will be those employees of the Contractor who are important or valuable to the project because they have a pivotal role. Changes to such personnel, particularly at certain critical points in the contract, will have a disproportionate effect on its success. The following provisions are aimed at securing that information and also ensuring that any Key Personnel or replacement to any Key Personnel are suitable. The Authority will need to consider which of the Contractor's personnel it wants to be made subject to these provisions and include them in the list of Key Personnel at schedule 9.3. This list should be limited to key roles within the project e.g. key managers and technical staff appointments.]*

- 28.5 The parties have agreed to the appointment of the Key Personnel listed in schedule 9.3 (Key Personnel) as at the Effective Date. The Contractor shall and shall procure that any Sub-contractor shall obtain the prior written consent of the Authority before removing or replacing any Key Personnel during the Term (including when carrying out Exit Management), and, where possible, at least [three] months written notice must be provided by the Contractor of its intention to replace Key Personnel.
- 28.6 The Authority shall not unreasonably delay or withhold its consent to the appointment of a replacement for any relevant Key Personnel by the Contractor or Sub-contractor. The Authority may interview the candidates for Key Personnel positions before they are appointed.
- 28.7 The Contractor acknowledges that the Key Personnel are essential to the proper provision of the Services to the Authority. The Contractor shall ensure that the role of any Key Personnel is not vacant for any longer than [10] Working Days and that any replacement shall be as or more qualified and experienced as the previous incumbent and fully competent to carry out the tasks assigned to the Key Personnel whom he or she has replaced.
- 28.8 The Contractor shall ensure that each of the Key Personnel shall work for such a period of time in the performance of the Services that is commensurate with and sufficient to perform the obligation of that person's role unless the Authority otherwise gives its prior written consent. To the extent that it can do so without disregarding its statutory obligations, the Contractor shall take all reasonable steps to ensure that it retains the services of all the Key Personnel.
- 28.9 The Authority may identify any of the Contractor Personnel as Key Personnel, who will then be included on the list of Key Personnel by the Contractor. The Authority may also require the Contractor to remove any Key Personnel that the Authority considers in any respect unsatisfactory.
- 28.10 The Authority shall not be liable for the cost of replacing any Key Personnel and the Contractor shall indemnify the Authority against all Employee Liabilities that may arise in this respect.

### **[Staffing Security]**

- 28.11 [The Contractor shall comply with the Staff Vetting Procedures in respect of all Contractor Personnel employed or engaged in the provision of the Services. The Contractor confirms that all Contractor Personnel employed or engaged by the Contractor at the Effective Date were vetted and recruited on a basis that is equivalent to and no less strict than the Staff Vetting Procedures.]
- 28.12 [The Contractor shall provide training on a continuing basis for all Contractor Personnel employed or engaged in the provision of the Services in compliance with the Security Policy and Security Plan.]

### **[Terms and Conditions of Services Employees]**

*[Guidance: These provisions will apply only in respect of local authorities and best value authorities.]*

- 28.13 [The Authority has a statutory duty pursuant to Part I of the Local Government Act 1999 to have regard to the Code of Practice on Workforce Matters in Local Authority Service Contracts. Accordingly, the Contractor shall comply with, and shall procure that any Sub-contractor complies with, the conditions set out in schedule 9.2 (Terms and Conditions of Services Employees).]

## **29. EMPLOYMENT INDEMNITY**

*[Guidance: Where Contractor Personnel will work alongside the Authority's employees, whether at the Contractor's or the Authority's premises, there is a possibility that any acts or omissions of the Contractor or its employees could give rise to claims against the Authority. This indemnity is intended to ensure that responsibility for resolving these claims remains with the Contractor. It is not intended to cover issues arising out of a TUPE transfer, which are dealt with in clause 30 and schedule 9.1 (Staff Transfer).]*

The Contractor shall indemnify the Authority against all Employee Liabilities that may arise as a result of any claims brought against the Authority by any of the Authority's employees or former employees and/or any of the Contractor Personnel where such claim arises from any act or omission of the Contractor or any Contractor Personnel.

## **30. STAFF TRANSFER**

*[Guidance: This clause assumes that the Authority is procuring a new Service, with provisions contained in schedule 9.1 (Staff Transfer) that anticipate the Employment Regulations applying on expiry or early termination. If the Authority is transferring an existing service to the Contractor, or the Contractor is replacing an existing supplier to whom the Authority had outsourced the Services, then the Employment Regulations will apply on commencement and this clause and schedule 9.1 (Staff Transfer) should be modified accordingly. The schedule will then need to set out the respective obligations of the parties to any*

*transferring employees. This will need to ensure that the Authority complies with the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector.]*

The parties acknowledge that the expiry or termination of this Agreement may constitute a relevant transfer for the purposes of the Employment Regulations. The provisions of schedule 9.1 (Staff Transfer) will apply on such expiry or termination.

### **31. HEALTH AND SAFETY**

*[Guidance: The Authority will need to supply the Contractor with a copy of the Authority's up to date rules regarding health and safety prior to contract signature for this clause to have effect.*

*If the Authority is to spend significant periods (i.e. more than incidental to audits, etc) of time at the Contractor's premises, then the Contractor should provide a copy of its equivalent policies to the Authority. Authority employees may then be required to comply with this policy]*

31.1 The Contractor acknowledges that it has been supplied with a copy of the Authority's rules regarding health and safety. The Contractor agrees to comply with these rules, and any additional rules made known to the Contractor from time to time by the Authority together with all applicable statutory rules and regulations regarding these matters. The Authority will be responsible for procuring that its employees and agents also comply with these rules and regulations.

31.2 Either party shall notify the other as soon as practicable of any health and safety hazards at the Authority Premises of which it becomes aware. The Contractor will draw these hazards to the attention of the Contractor Personnel and will instruct those persons in connection with any necessary associated safety measures.

### **32. EQUALITY AND DIVERSITY**

The Contractor shall, and shall procure that the Contractor Personnel, comply with any applicable anti-discrimination legislation [and with the Authority's equality and diversity policy *[Guidance - amend to reflect details of the Authority's policy]* as may be amended from time to time, copies of which will be provided by the Authority to the Contractor at the Contractor's written request].

### **33. NON-SOLICITATION**

*[Guidance: The purpose of this clause is to ensure that no solicitation of staff takes place between the Authority and Contractor for the duration of the Agreement and 12 months thereafter. It also ensures that knowledge held by the staff of each party about the project remains with the Authority or the Contractor, as applicable, during this period.]*

Except in respect of any Staff Transfer, the Authority and the Contractor shall not, and the Contractor shall procure that any Sub-contractor shall not, during the Term and for 12 months following the termination of this Agreement either directly or indirectly solicit or entice away (or seek to attempt to solicit or entice away) from the employment of the other party any person employed by such other party in the provision of the Services or (in the case of the Authority) in the receipt and/or administration of the Services.

## **SECTION G - INTELLECTUAL PROPERTY, DATA AND CONFIDENTIALITY**

*[Guidance: In addition to clauses regarding data and confidentiality, this section deals with the different types of intellectual property rights (IPRs) (such as copyright, patents, database rights) that may reside in the software, equipment (including hardware), data, and other documentation and processes related to the project. The suitability of each clause will depend on what IPRs are used or created in relation to a particular project. Guidance Note 1 (Key Commercial Principles), section 1 - 7 (Intellectual Property Rights) sets out the issues to be considered in identifying IPRs in different software, etc., and assessing whether the Authority should own any Project Specific IPRs or take a licence. Guidance Note 3 (Owning and Licensing of Intellectual Property) sets out further guidance on the ownership of IPR by Contracting Authorities contained in the "Successful Delivery Toolkit" to be found on OGC's website.]*

*For each project it will be necessary to:*

- *identify the relevant software, hardware, data, etc. There will be various types of software involved in the project and the Authority will need to establish with the Contractor where commercial off-the-shelf software can be used instead of software specifically developed for the project as this may alleviate some of the issues regarding ownership, control and risk if the Contractor become insolvent.*
- *keep the details of the software, hardware, data, etc., up to date. Details of the Software should be listed in schedule 5.1 and Contractor Equipment (including hardware) should be listed in the Contractor Solution;*
- *establish how important the Specially Written Software and Project Specific IPRs are to a project and whether they are likely to be capable of being commercially exploited. The Authority can then establish which party is best able to exploit the IPR that resides in the software, etc. Decisions should be reached by balancing the costs and benefits of IPR ownership for the Authority (opportunities for commercial exploitation, control over its use) against the Authority being granted the right to use IPR for the life of the contract and any subsequent contract in which case a reduction (and/or share of the benefits) should be sought in the contract price; and*
- *ensure that the arrangements for IPR ownership or licensing is reflected in this section of the Agreement.*

*It is essential that all the IPR issues are identified (as specified above) and the clauses amended as necessary. This includes putting in place any separate licensing terms for Contractor Software or Third Party Software. It is recommended that the Authority takes specialist legal advice in relation to IPR clauses.]*

### **34. INTELLECTUAL PROPERTY RIGHTS**

*[Guidance: This clause is specifying what IPRs in certain software, etc., belong to each party. The ownership by the Authority or the Contractor of such items is not likely to be controversial as they are not intended to be items developed specifically for the project or, if they are, there is unlikely to be contention as to ownership. The Authority will need to consider whether there are any other items that should be listed here. If either party acquires IPRs that are inconsistent with the ownership specified in clause 34.1 then*

*clause 34.2 stipulates that such IPRs are to be assigned to the other party. This clause should be amended to reflect the actual agreed ownership of IPRs under the project. ]*

34.1 Except as expressly set out in this Agreement:

34.1.1 the Authority shall not acquire any right, title or interest in or to the Intellectual Property Rights of the Contractor or its licensors, including:

34.1.1.1 the Contractor Software;

34.1.1.2 the Third Party Software;

34.1.1.3 the Project Specific IPRs;

34.1.1.4 the Specially Written Software; or

34.1.1.5 the Contractor's Background IPRs,

and

34.1.2 the Contractor shall not acquire any right, title or interest in or to the Intellectual Property Rights of the Authority or its licensors, including:

34.1.2.1 the Authority Software;

34.1.2.2 the Authority Data;

34.1.2.3 [the Database;]

*[Guidance: See the guidance note at the start of clause 37 (Assignment of IPR in the Database) for an explanation of the ownership of this right.]*

34.1.2.4 [the Project Specific IPRs;]

34.1.2.5 [the Authority's documentation, processes and procedures]; and

34.1.2.6 [the Authority's Know-How] *[Guidance: Add definitions as appropriate]*

*[Guidance: The Authority will need to include a definition at schedule 1 for Authority's Know-How. If the know-how is purely information then it may not have any IPRs vesting in it and could be deleted from this clause. Instead it can be protected by non-disclosure provisions contained in clause 43 (Confidentiality). It is recommended that legal advice be taken on this point.]*

34.2 Where either party acquires, by operation of law, title to Intellectual Property Rights that is inconsistent with the allocation of title set out in clause 34.1, it shall assign in writing such Intellectual Property Rights as it has acquired to the other party on the request of the other party (whenever made).

### **35. LICENCES GRANTED BY THE CONTRACTOR**

*[Guidance: This clause covers the licensing by the Contractor to the Authority of the Specially Written Software, the Project Specific IPRs, the Contractor Software and Third Party Software.*

*Guidance is provided at the beginning of this section G on assessing which party is best placed to own the Specially Written Software and Project Specific IPRs. The scope of all the licences in this clause 35 need to be carefully considered to ensure that they enable the Authority to use the IPRs for the purposes it requires whilst being realistic and not driving the cost of the project upwards in order to obtain a wider scope of licence that is not needed.*

*The Specially Written Software is licensed on the Enhanced Licence Terms (as opposed to the Standard Licence Terms) set out in schedule 5.2 (Licence Terms) to reflect where the Authority wishes to retain more control over and have wider use of the IPRs (clause 35.1). In contrast the Contractor Software and Third Party Software is licensed on the Standard Licence Terms (clauses 35.3 and 35.4). The Authority will need to consider whether this arrangement meets its requirements as to the use it intends to make of the different categories of software.*

*Where the Third Party Software is commercially available software then the Authority will need to be realistic about its requirements for the use of any Enhanced Licence Terms or Standard Licence Terms. Also, consider the possibility that the Authority will require a licence of Third Party Software in order to conduct any Testing of the Contractor Solution. (Note that the licences for the Contractor's products are effective immediately from the start of the Agreement).]*

35.1 The Contractor hereby grants, or shall procure the direct grant, to the Authority of a licence of the Specially Written Software (including any Contractor's Background IPRs or IPRs owned by a third party that are embedded in or which are an integral part of the Specially Written Software) on the Enhanced Licence Terms.

*[Guidance: Careful consideration must be given so that this licence is as broad or narrow as it needs to be for the intended use of the Contractor's Background IPRs and any third party components integral to the Specially Written Software. The Enhanced Licence terms should be sufficient to ensure that the Authority can sub-license the Specially Written Software (including any embedded components) to other Contracting Authorities, to a Replacement Contractor or to other third parties providing services to the Authority who require use of the Specially Written Software.]*

35.2 The Contractor hereby grants, or shall procure the direct grant, to the Authority of a licence to Use the Project Specific IPRs for any purpose relating to the Services or to the exercise of the Authority's business or function on the Enhanced Licence Terms, including the right to sub-license the Project Specific IPRs to other Contracting Authorities, to the Replacement Contractor or to any other third party providing services to the Authority, provided in each case that such rights shall not extend to the commercial exploitation of the Project Specific IPRs.

*[Guidance: Clause 35.2 will not be required if the Authority will own the Project Specific IPRs in accordance with clause 38 (Project Specific IPR and Specially Written Software).]*

35.3 The Contractor hereby grants to the Authority a licence of the Contractor Software on the Standard Licence Terms.

35.4 [The Third Party Software shall be licensed to the Authority on the [Standard Licence Terms]][terms set out in schedule 5.2 (Licence Terms)].]

**[OR]**

[The Contractor shall procure that the owners or the authorised licensors of any Third Party Software hereby grants a direct licence to the Authority on the Standard Licence Terms. If the Contractor cannot obtain for the Authority a licence materially in accordance with the Standard Licence Terms the Contractor will consult with the Authority on whether the rights that can be obtained are nevertheless acceptable to the Authority or whether the Contractor should seek to use an alternative provider of software.]

*[Guidance: The grant of a direct licence of Third Party Software to the Authority is the default position. The terms of the direct licence should be agreed prior to contract signature. If the terms are not agreed until post contract signature then there will be a risk that the terms will be unacceptable and the Authority will need to source alternative software, amend the Agreement or accept terms that are not suitable.*

*Therefore, it will be important to explore the availability of suitable licence terms at an early stage in the solution design process (i.e. during the procurement phase and before contract award) so that at the time of contract signature the licensing terms are agreed. Ideally these licence terms should replicate the Standard Licence Terms in schedule 5.2, but if they cannot be obtained then the Contractor should liaise with the Authority to see if agreement can be reached on alternative terms.*

*If the Third Party Software is commercially available software then the Authority will need to be realistic as to the terms on which it will be able to obtain for the Third Party Software. There will be clear benefits however to using commercially available software including the availability of fixes as well as upgrades to the software and the comfort that if the third party licensor became insolvent it may be bought by a competitor who would continue to provide that software. If there is a possibility that the third party product will not be purchased and/or its products supported on insolvency, the Authority should consider the risks of this occurring and the steps that it might take to mitigate its effect.*

*The Authority will need to weigh up the implications of a direct licence (including in respect of the Charges) with the third party licensor as opposed to a sub-licence from the Contractor, including:*

- *a sub-licence could create problems if the Contractor became insolvent or was otherwise in breach of its licence terms. This concern could be met by including a provision in the licence between the third party licensor and the Contractor which stated that if the Contractor became insolvent then the benefit of that licence would automatically transfer to the Authority. Failing this, a new licence would need to be bought from the third party licensor for the Third Party Software, which would result in an increase in project costs.*

- *the Contractor may be able to obtain a better deal both financially and in relation to the terms of the licence through volume purchasing arrangements with the third party licensor. Consider also the possibility that the Authority may already have an "enterprise-wide" deal with the licensor.*
- *a direct licence between the Authority and the third party licensor would give the Authority more control over the licence. This may not necessarily be a good thing if it means that the Contractor does not have the ability to enforce licence terms if the software is defective or the licensor is failing to maintain it.*
- *the Authority will not be entitled to benefit from the IPR indemnity where it has a direct licence. However, indemnities or warranties may be available under the terms of the direct licence. The scope and/or value of these will be dependent on the ability of the Authority to agree terms with the licensor.*

*If the Authority does not have a direct licence of the Third Party Software provision must be made to ensure that the licence is novated to the Authority if the Agreement is terminated. If the Authority will take a direct licence, then clause 35.4 will need to be amended accordingly.]*

35.5 The Contractor shall, if requested by the Authority in accordance with schedule 8.5 (Exit Management), grant or procure the grant to the Replacement Contractor of a licence to Use any Contractor Software, Contractor's Background IPRs or Third Party Software on the Standard Licence Terms [subject to the Replacement Contractor entering into reasonable confidentiality undertakings with the Contractor].

*[Guidance: The Authority will need to have specified in schedule 8.5 whether payment is due for the licences to the Replacement Contractor and who is meeting such the cost of such payments.]*

35.6 The Contractor hereby grants to the Authority a non-exclusive licence to copy the Documentation for any purpose connected with the receipt of the Services or that is incidental to the exercise of the rights granted to the Authority under this Agreement.

## **36. LICENCES GRANTED BY THE AUTHORITY**

*[Guidance: Clause 36.1 contains a licence granted by the Authority to the Contractor to use certain Authority Software, etc., so that it can perform its Services under the Agreement. The Authority will need to consider for each project what rights need to be granted. Such licence will terminate on the termination or expiry of the Agreement (under clause 36.4).]*

36.1 The Authority hereby grants to the Contractor a royalty-free, non-exclusive, non-transferable licence during the Term to use:

36.1.1 the Authority Software;

36.1.2 [the Database;]

36.1.3 [the Authority's documentation, processes and procedures]; and

36.1.4 [the Authority's Know-How];

*[Guidance: The Authority will need to include a definition at schedule 1 for Authority's Know-How. If the know how is purely information then it may not have any IPRs vesting in it and could be deleted from this clause. Instead it can be protected by non-disclosure provisions contained in clause 43 (Confidentiality). It is recommended that legal advice be taken on this point.]*

36.1.5 [the Specially Written Software from the date the relevant rights are transferred to the Authority in accordance with clause 38.2;] [and]

*[Guidance: This clause should be deleted if the Authority will not own the Specially Written Software.]*

36.1.6 [the Project Specific IPRs from the date the relevant rights are transferred to the Authority in accordance with clause 38.2;] [and]

*[Guidance: This clause should be deleted if the Authority will not own the Project Specific IPRs.]*

36.1.7 the Authority Data; and]

36.1.8 [*any others*].

36.2 The licence granted in clause 36.1:

36.2.1 includes the right to grant sub-licences to Sub-contractors provided that any relevant Sub-contractor has entered into a confidentiality undertaking with the Contractor on the same terms as set out in clause 43 (Confidentiality); and

36.2.2 is granted solely to the extent necessary for performing the Services in accordance with this Agreement. The Contractor shall not, and shall procure that the Sub-contractors do not, use the licensed materials for any other purpose or for the benefit of any person other than the Authority.

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

36.4 In the event of the termination or expiry of this Agreement, the licence referred to in clause 36.1, any sub-licence granted in accordance with clause 36.2.1 and any licence granted in accordance with clause 36.3 shall terminate automatically and the Contractor shall deliver to the Authority all material licensed to the Contractor pursuant to clause 36.1 or clause 36.3 in the Contractor's possession or control.

### **37. [ASSIGNMENT OF IPR IN DATABASES]**

*[Guidance: The Database is the sub-set of the Project Specific IPRs that an Authority is most likely to wish to own. On termination of the Agreement, it is the Authority's right to use the database that will be important to it and not necessarily the software platform on which it resides. This clause provides for the assignment of the rights in the Database to the Authority from either the Effective Date or from the moment of creation. The Contractor will require a licence to use, maintain, develop, enhance and operate the Database. This is provided in clause 36.1.2. Guidance Note 1 (Key Commercial Principles), section 1 - 7.5 (IPR in Data and Databases) provides further guidance on these issues.]*

- 37.1 [The Contractor hereby assigns to the Authority, with full title guarantee, title to and all rights and interest in the Database or shall procure that the first owner of the Database assigns it to the Authority on the same basis.
- 37.2 The assignment under clause 37.1 shall either take effect on the Effective Date or as a present assignment of future rights that will take effect immediately on the coming into existence of the Database, as appropriate.
- 37.3 The Contractor shall waive or procure a waiver of any moral rights in the Database assigned to the Authority under this Agreement.
- 37.4 [To the extent that it is necessary for the Authority to obtain the full benefits of ownership of the Database, the Contractor hereby grants to the Authority and shall procure that any relevant third party licensor shall grant to the Authority a perpetual, irrevocable, non-exclusive, assignable, royalty-free and global licence to Use, sub-license and/or commercially exploit any Contractor's Background IPRs or IPRs owned by a third party that are embedded in or which are an integral part of the Database.]]

*[Guidance: This clause will not be necessary in all cases. It depends on the nature of the project and the extent to which the Contractor can utilise past work to develop the Database. If it is required, the clause recognises that the Database will contain Contractor's Background IPRs that is not specially developed for the Authority. The Authority will require a licence if it wishes to use and commercially exploit its database rights.*

*The licence in clause 37.4 is drafted on the basis that it needs to be broad enough not to hinder the use of the Database which is owned by the Authority. Careful consideration must be given so that this licence is as broad or narrow as it needs to be for the intended use of the Contractor's Background IPRs.]*

### **38. [PROJECT SPECIFIC IPR AND SPECIALLY WRITTEN SOFTWARE]**

*[Guidance: Clause 38 is to be used where the Authority will own the IPRs in the Project Specific IPRs and/or the Specially Written Software. If it is, then clauses 35.1 and 35.2 should be deleted and this clause amended to reflect what is to be owned by the Authority. If it is not, then this clause should be deleted. The Authority is referred to:*

- *the guidance notes at the beginning of this section G on evaluating who is best placed to own software and exploit it; and*
- *the guidance notes set out below clause 35 (Licences Granted by the Contractor).*

*Clause 38.3 ensures that the moral rights (these are essentially the rights of an original author or creator of a copyright work, such as an item of software) that cannot be assigned to another party are waived by the Contractor or that such a waiver is procured by the Contractor (for example where the moral rights vest in a Sub-contractor).*

*Clause 38.5.2 is where the Authority has agreed to grant the Contractor a licence of the Project Specific IPRs and/or Specially Written Software for the Contractor's commercial exploitation. The Charges schedule will need to set out any commercial arrangements.]*

- 38.1 [The Contractor hereby assigns to the Authority, with full title guarantee, title to and all rights and interest in the Project Specific IPRs [and the Specially Written Software] or shall procure that the first owner of the Project Specific IPRs [and the Specially Written Software] assigns them to the Authority on the same basis.
- 38.2 The assignment under clause 38.1 shall either take effect on the Effective Date or as a present assignment of future rights that will take effect immediately on the coming into existence of the relevant Project Specific IPRs [and the Specially Written Software], as appropriate.
- 38.3 The Contractor shall waive or procure a waiver of any moral rights in any copyright works assigned to the Authority under this Agreement.
- 38.4 If requested to do so by the Authority, the Contractor shall without charge to the Authority execute all documents and do all such further acts as the Authority may require to perfect the assignment under clause 38.1 or shall procure that the owner of the Project Specific IPRs [and the Specially Written Software] does so on the same basis.
- 38.5 The Authority shall grant to the Contractor a licence of the Project Specific IPRs [and the Specially Written Software] to enable:
- 38.5.1 the Contractor to provide the Services; and
- 38.5.2 the creation of works for other customers that are adapted or derived from the Project Specific IPRs [and the Specially Written Software][subject to the commercial exploitation arrangements specified schedule 7.1 (Charges and Invoicing).]

*[Guidance: The licence granted back by the Authority to the Contractor is narrower than those*

*granted by the Contractor to the Authority in clause 35. The Contractor may want a wider licence and the Authority will need to consider this in relation to its likely use of the Project Specific IPRs and Specially Written Software. The Contractor may also argue that it has not recouped all of its investment costs in the IPRs it has developed for the Authority and therefore should not pay for the licence. The Authority will want to consider the extent to which the Contractor will be able to recoup its capital if it was permitted to commercially exploit the IPRs and, therefore, whether some payment to the Authority is justified.]*

38.6 [Subject to clause 38.7 and to the extent only that this is necessary to enable the Authority to obtain the full benefits of ownership of the Specially Written Software as an integrated product, the Contractor hereby grants to the Authority and shall procure that any relevant third party licensor shall grant to the Authority a perpetual, irrevocable, non-exclusive, assignable, royalty-free and global licence to Use, sub-license and/or commercially exploit any Contractor's Background IPRs or IPRs owned by a third party that are embedded in or which are an integral part of the Specially Written Software, provided that, where the Specially Written Software consists of customisation of Contractor Software and/or Third Party Software, this clause 38.6 shall not have the effect of granting to the Authority any greater rights over the Contractor Software and/or the Third Party Software than the Standard Licence Terms.]

*[Guidance: This clause will only be relevant where there is Specially Written Software that is to be owned by the Authority. The clause recognises that Specially Written Software will contain Contractor's Background IPRs or software components (routines or code that the Contractor uses for other software that it has developed itself or which have been taken from software "libraries") that is not specially written but is a building block used in the Specially Written Software and that the Authority will require a licence if it wishes to use and commercially exploit such IPRs.*

*Very often standard software products are customised using tools that are part of the package. The proviso to clause 38.6 makes it clear that it is not intended for the Authority to acquire extensive rights over the basic proprietary product just because the Specially Written Software interoperates with it.*

*The licence in clause 38.6 is drafted on the basis that it needs to be broad enough not to hinder the use of the Specially Written Software which is owned by the Authority. Careful consideration must be given so that this licence is as broad or narrow as it needs to be for the intended use of the Contractor's Background IPRs and the software components integral to the Specially Written Software.]*

38.7 [The Contractor will deliver to the Authority the Specially Written Software in both Source Code and binary code forms [within seven days of *[specify]*] [and shall provide updates of the Source Code on each new release of the Specially Written Software] *[or specify period]* on media that is reasonably acceptable to the Authority.]

## 39. ESCROW

*[Guidance: Guidance Note 1 (Key Commercial Principles), section 1 - 8 (Source Code, Deposit and Delivery) sets out the key requirements for an escrow agreement and also the particular considerations when considering escrow arrangements in relation to Specially Written Software.]*

*The Authority will not usually have access to the source code of Software licensed to it: the Software will be supplied in binary code form. There are certain instances such as Contractor breach or insolvency where access to source code may be required by the Authority in order to ensure continued receipt of the Services or Replacement Services. For these reasons the Authority may want to ensure, in particular, that the source code of Specially Written Software owned by the Contractor will be put in escrow. Note that if the Specially Written Software is transferred to the Authority pursuant to clause 38 (Project Specific IPR and Specially Written Software) the Authority will automatically have possession of the Source Code, which precludes the need to place it in escrow.*

*It will be the exception that source code for applications other than the Specially Written Software will be deposited. Commercially available software is unlikely to become unavailable even if the software house becomes insolvent as there will usually be a purchase of its business or assets and the software will continue to be available and supported. However, it will be necessary to conduct an assessment of the risks on a project basis.*

*An escrow arrangement requires the Contractor to deposit the source code with a third party escrow agent. The terms of the escrow agreement between the Authority, Contractor and escrow agent will specify the circumstances under which the source code can be released to the Authority. Schedule 5.3 should set out the escrow terms, including the release events, timing and regularity of updating the software, verification of software and the costs of initial storage fees, release fees and recurring fees.*

*Clause 39.2 covers the situation where the Contractor is unable to put the source code of Third Party Software in escrow. The Authority will clearly want to check the economic standing of the third party licensor and understand the extent to which the other parts of the ICT Environment are dependent on the Third Party Software in the event that the third party became insolvent.]*

- 39.1 The Contractor shall [not less than [10] Working Days [before *[specify time]*] or such other periods as the Authority may require] deposit the Source Code of such part of the Software that consists of Deposited Software in escrow with *[insert name of escrow agent]* on the basis of the [appropriate standard agreement or on such other terms as the Authority, the Contractor and *[insert name of escrow agent]* shall agree][terms set out in schedule 5.3 (Escrow Terms)]. [The Contractor shall ensure that the deposited version of the Source Code is the current version of the Deposited Software and that the deposited version is kept up-to-date as the Deposited Software is modified or upgraded. [The Contractor shall pay the initial storage fees under the escrow agreement and the Authority shall pay the release fees.]

*[Guidance: The time frame for the deposit of the source code will depend on what software it relates to and when it is available. The Authority could require evidence that the source code has been deposited as part of its due diligence exercise, completion agenda, as a condition precedent or as part of Testing.]*

- 39.2 Where the Contractor is unable to procure compliance with the provisions of clause 39.1 in respect of any Third Party Software, it shall provide the Authority with

written evidence of its inability to comply with these provisions and shall agree with the Authority a suitable alternative to escrow that affords the Authority the nearest equivalent protection. The Contractor shall be excused from its obligations under clause 39.1 only to the extent that the parties have agreed on a suitable alternative.

- 39.3 In circumstances where the Authority obtains the release of the Source Code from escrow, the Contractor hereby grants to the Authority a perpetual, assignable, royalty-free and non-exclusive licence to Use and support the Source Code version of the Deposited Software to the extent necessary for the receipt of the Services or any Replacement Services or the Authority's normal business undertakings.

#### **40. AUTHORITY DATA**

*[Guidance: This clause contains obligations on the Contractor as to how it should deal with Authority Data (which is essentially data supplied to the Contractor by the Authority or Personal Data under the Data Protection Act 1998 where the Authority is the Data Controller. However, note that Personal Data is also governed under clause 41).]*

- 40.1 The Contractor shall not delete or remove any proprietary notices contained within or relating to the Authority Data.
- 40.2 The Contractor shall not store, copy, disclose, or use the Authority Data except as necessary for the performance by the Contractor of its obligations under this Agreement or as otherwise expressly authorised in writing by the Authority.
- 40.3 To the extent that Authority Data is held and/or processed by the Contractor, the Contractor shall supply that Authority Data to the Authority as requested by the Authority in the format specified in schedule 2.1 (Services Description) [and/or in schedule 8.5 (Exit Management)].
- 40.4 Upon receipt or creation by the Contractor of any Authority Data and during any collection, processing, storage and transmission by the Contractor of any Authority Data, the Contractor shall take all precautions necessary to preserve the integrity of the Authority Data and to prevent any corruption or loss of the Authority Data.
- 40.5 The Contractor shall perform secure back-ups of all Authority Data and shall ensure that up-to-date back-ups are stored off-site in accordance with the Business Continuity and Disaster Recovery Plan. The Contractor shall ensure that such back-ups are available to the Authority at all times upon request and are delivered to the Authority at no less than *[insert period]* monthly intervals.

*[Guidance: the obligation placed on the Contractor in this clause is very general. The Business Continuity and Disaster Recovery Plan should therefore set out more detailed requirements, including, for example, the regularity of back-ups, special requirements, storage, tape rotation, maintenance of data, etc. Alternatively, these requirements could be added as a specific Service within schedule 2.1 (Service Description).]*

40.6 The Contractor shall ensure that any system on which the Contractor holds any Authority Data, including back-up data, is a secure system that complies with the Security Policy.

40.7 If the Authority Data is corrupted, lost or sufficiently degraded as a result of the Contractor's Default so as to be unusable, the Authority may:

40.7.1 require the Contractor (at the Contractor's expense) to restore or procure the restoration of the Authority Data and the Contractor shall do so as soon as practicable but not later than *[insert period ]*; and/or

40.7.2 itself restore or procure the restoration of the Authority Data, and shall be repaid by the Contractor any reasonable expenses incurred in doing so.

*[Guidance: the Contractor will only be able to restore data that it has actually backed-up. Anything lost after that must be restored by the Authority under the second option. If the Contractor has failed to take back-ups then the Authority will be obliged to restore data itself and recharge expenses to the Contractor. This emphasises the need to ensure the Contractor complies with a specific obligation to take back-ups.]*

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

## **41. PROTECTION OF PERSONAL DATA**

*[Guidance: This clause sets out provisions from data protection legislation that the Authority (or its contractors) is required to meet in relation to Personal Data. Any changes therefore should be treated with caution and not made without taking advice from specialist data protection advisers or lawyers.]*

*It will be important to double check whether or not the Contractor can meet the level of security required in this clause. The details of the security should be transparent and form part of the detail of the instructions/service description. The onus will be on the Authority to assess whether or not the Contractor can provide the right level of security in consideration of the nature of the data and the use of the data.]*

41.1 With respect to the parties' rights and obligations under this Agreement, the parties agree that the Authority is the Data Controller and that the Contractor is the Data Processor.

- 41.2 The Contractor shall:
- 41.2.1 Process the Personal Data only in accordance with instructions from the Authority (which may be specific instructions or instructions of a general nature as set out in this Agreement or as otherwise notified by the Authority to the Contractor during the Term);
  - 41.2.2 Process the Personal Data only to the extent, and in such manner, as is necessary for the provision of the Services or as is required by Law or any Regulatory Body;
  - 41.2.3 implement appropriate technical and organisational measures to protect the Personal Data against unauthorised or unlawful processing and against accidental loss, destruction, damage, alteration or disclosure. These measures shall be appropriate to the harm which might result from any unauthorised or unlawful Processing, accidental loss, destruction or damage to the Personal Data and having regard to the nature of the Personal Data which is to be protected;
  - 41.2.4 take reasonable steps to ensure the reliability of any Contractor Personnel who have access to the Personal Data;
  - 41.2.5 obtain prior written consent from the Authority in order to transfer the Personal Data to any Sub-contractors or Affiliates for the provision of the Services;
  - 41.2.6 ensure that all Contractor Personnel required to access the Personal Data are informed of the confidential nature of the Personal Data and comply with the obligations set out in this clause 41;
  - 41.2.7 ensure that none of Contractor Personnel publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by the Authority;
  - 41.2.8 notify the Authority (within [five] Working Days) if it receives:
    - 41.2.8.1 a request from a Data Subject to have access to that person's Personal Data; or

- 41.2.8.2 a complaint or request relating to the Authority's obligations under the Data Protection Legislation;
- 41.2.9 provide the Authority with full cooperation and assistance in relation to any complaint or request made, including by:
  - 41.2.9.1 providing the Authority with full details of the complaint or request;
  - 41.2.9.2 complying with a data access request within the relevant timescales set out in the Data Protection Legislation and in accordance with the Authority's instructions;
  - 41.2.9.3 providing the Authority with any Personal Data it holds in relation to a Data Subject (within the timescales required by the Authority);  
and
  - 41.2.9.4 providing the Authority with any information requested by the Authority;
- 41.2.10 permit the Authority or the Authority Representative (subject to reasonable and appropriate confidentiality undertakings), to inspect and audit, in accordance with clause 24 (Audits), the Contractor's data Processing activities (and/or those of its agents, subsidiaries and Sub-contractors) and comply with all reasonable requests or directions by the Authority to enable the Authority to verify and/or procure that the Contractor is in full compliance with its obligations under this Agreement;
- 41.2.11 provide a written description of the technical and organisational methods employed by the Contractor for processing Personal Data (within the timescales required by the Authority); and
- 41.2.12 not Process Personal Data outside the European Economic Area without the prior written consent of the Authority and, where the Authority consents to a transfer, to comply with:
  - 41.2.12.1 the obligations of a Data Controller under the Eighth Data Protection Principle set out in Schedule 1 of the Data Protection Act 1998 by providing an adequate level of protection to any Personal Data that is transferred; and

41.2.12.2 any reasonable instructions notified to it by the Authority.

41.3 The Contractor shall comply at all times with the Data Protection Legislation and shall not perform its obligations under this Agreement in such a way as to cause the Authority to breach any of its applicable obligations under the Data Protection Legislation.

## 42. FREEDOM OF INFORMATION

*[Guidance: This clause is necessary to ensure the Authority's compliance with the Freedom of Information Act 2000. There are several points to note:*

- *This clause is intended to cover all information related to the Agreement emanating from the Contractor and information provided to the Contractor from the Authority.*
- *Depending on the precise nature of the services and the information, this clause may be required to survive the Agreement.*
- *Additional auditing and document management provisions may be required.*

*For these reasons the Authority should obtain specific advice regarding the application of the FOIA, the Code of Practice on Government Information and the Environmental Information Regulations to the Agreement and the specific project.*

*The primary responsibility for responding to FOIA requests, and the costs of discharging those responsibilities, rests with the Authority. However, it may on occasion be necessary for the Authority to seek support from the Contractor in complying with these obligations (e.g. where the Contractor holds the relevant data). These costs to the Contractor will, in the considerable majority of projects, not be substantial and should be subsumed within the ongoing service management overhead. However, in exceptional circumstances, under certain conditions, the services being procured could become the subject of public interest and hence generate a disproportionately high number of FOIA requests. If the Authority believes such a situation could occur, a clause should be inserted to establish a mechanism requiring the Contractor to monitor effort expended in servicing FOIA requests, which should be reviewed by the Parties on a regular basis as part of routine contract management procedures. This mechanism should provide visibility to the Authority to assist fulfilment of its responsibility for responding to FOIA requests, and also allow for the Contractor to be paid reasonable additional costs where the volume of FOIA requests exceeds an agreed threshold over a period (e.g. one year). It would be expected that any such threshold would be at least an order of magnitude greater than the excepted "normal" level of FOIA requests.]*

42.1 The Contractor acknowledges that the Authority is subject to the requirements of the Code of Practice on Government Information, FOIA and the Environmental Information Regulations and shall assist and cooperate with the Authority to enable the Authority to comply with its Information disclosure obligations.

- 42.2 The Contractor shall and shall procure that its Sub-contractors shall:
- 42.2.1 transfer to the Authority all Requests for Information that it receives as soon as practicable and in any event within [two] Working Days of receiving a Request for Information;
  - 42.2.2 provide the Authority with a copy of all Information in its possession, or power in the form that the Authority requires within [five] Working Days (or such other period as the Authority may specify) of the Authority's request; and
  - 42.2.3 provide all necessary assistance as reasonably requested by the Authority to enable the Authority to respond to the Request for Information within the time for compliance set out in section 10 of the FOIA or regulation 5 of the Environmental Information Regulations.
- 42.3 The Authority shall be responsible for determining in its absolute discretion and notwithstanding any other provision in this Agreement or any other agreement whether the Commercially Sensitive Information and/or any other Information is exempt from disclosure in accordance with the provisions of the Code of Practice on Government Information, FOIA or the Environmental Information Regulations.

*[Guidance: The Contractor's Commercially Sensitive Information is listed in schedule 4.2. This list should be agreed with the Authority and should include the duration (if applicable) that such information should remain confidential for. Commercially Sensitive Information is a subset of the Contractor's Confidential Information and should contain a narrow list of information. This will assist the Authority in respect of compliance with FOIA and the section 45 code published by the Department of Constitutional Affairs.]*

- 42.4 In no event shall the Contractor respond directly to a Request for Information unless expressly authorised to do so by the Authority.
- 42.5 The Contractor acknowledges that (notwithstanding the provisions of clause 42) the Authority may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 ("**the Code**"), be obliged under the FOIA, or the Environmental Information Regulations to disclose information concerning the Contractor or the Services:
- 42.5.1 in certain circumstances without consulting the Contractor; or

42.5.2 following consultation with the Contractor and having taken their views into account;

provided always that where 42.5.1 applies the Authority shall, in accordance with any recommendations of the Code, take reasonable steps, where appropriate, to give the Contractor advanced notice, or failing that, to draw the disclosure to the Contractor's attention after any such disclosure.

42.6 The Contractor shall ensure that all Information is retained for disclosure [in accordance with schedule 8.4 (Records Provisions)] and shall permit the Authority to inspect such records as requested from time to time.

42.7 The Contractor acknowledges that the Commercially Sensitive Information listed in schedule 4.2 is of indicative value only and that the Authority may be obliged to disclose it in accordance with clause 42.5.

### **43. CONFIDENTIALITY**

*[Guidance: This clause contains standard confidentiality provisions restricting the use that can be made by the Contractor of the Authority's Confidential Information and vice versa.]*

43.1 Except to the extent set out in this clause or where disclosure is expressly permitted elsewhere in this Agreement, each party shall:

43.1.1 treat the other party's Confidential Information as confidential[ and safeguard it accordingly]; and

43.1.2 not disclose the other party's Confidential Information to any other person without the owner's prior written consent.

43.2 Clause 43.1 shall not apply to the extent that:

43.2.1 such disclosure is a requirement of Law placed upon the party making the disclosure, including any requirements for disclosure under the FOIA, Code of Practice on Access to Government Information or the Environmental Information Regulations pursuant to clause 42 (Freedom of Information);

43.2.2 such information was in the possession of the party making the disclosure without obligation of confidentiality prior to its disclosure by the information owner;

- 43.2.3 such information was obtained from a third party without obligation of confidentiality;
  - 43.2.4 such information was already in the public domain at the time of disclosure otherwise than by a breach of this Agreement; or
  - 43.2.5 it is independently developed without access to the other party's Confidential Information.
- 43.3 The Contractor may only disclose the Authority's Confidential Information to the Contractor Personnel who are directly involved in the provision of the Services and who need to know the information, and shall ensure that such Contractor Personnel are aware of and shall comply with these obligations as to confidentiality.
- 43.4 The Contractor shall not, and shall procure that the Contractor Personnel do not, use any of the Authority's Confidential Information received otherwise than for the purposes of this Agreement.
- 43.5 [At the written request of the Authority, the Contractor shall procure that those members of the Contractor Personnel identified in the Authority's notice signs a confidentiality undertaking prior to commencing any work in accordance with this Agreement.]

***[Guidance: The requirement for a direct undertaking is onerous and should be used only where this is strictly necessary. Employees of the Contractor should be under an obligation of confidence to the Contractor and Sub-contractors, advisors, etc., should be retained under contracts imposing a like obligation. Note that the Supply Chain Rights in clause 23 requires the Contractor to impose conditions into its Sub-contracts. The Authority might consider imposing like obligations of confidentiality.]***

- 43.6 Nothing in this Agreement shall prevent the Authority from disclosing the Contractor's Confidential Information:
- 43.6.1 to any Crown Body or any other Contracting Authority. All Crown Bodies or Contracting Authorities receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other Crown Bodies or other Contracting Authorities on the basis that the information is confidential and is not to be disclosed to a third party which is not part of any Crown Body or any Contracting Authority;

- 43.6.2 to any consultant, contractor or other person engaged by the Authority or any person conducting an Office of Government Commerce gateway review;
  - 43.6.3 for the purpose of the examination and certification of the Authority's accounts; or
  - 43.6.4 for any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority has used its resources.
- 43.7 The Authority shall use all reasonable endeavours to ensure that any government department, Contracting Authority, employee, third party or Sub-contractor to whom the Contractor's Confidential Information is disclosed pursuant to clause 43.6 is made aware of the Authority's obligations of confidentiality.
- 43.8 Nothing in this clause 43 shall prevent either party from using any techniques, ideas or know-how gained during the performance of the Agreement in the course of its normal business to the extent that this use does not result in a disclosure of the other party's Confidential Information or an infringement of IPR.

## **SECTION H - CONTRACTOR AND AUTHORITY PROTECTIONS**

### **44. GENERAL OBLIGATIONS OF THE PARTIES**

#### **Contractor's Obligations**

- 44.1 The Contractor shall:
- 44.1.1 at all times allocate sufficient resources to provide the Services in accordance with the terms of this Agreement;
  - 44.1.2 subject to clause 47 (Change in Law) obtain, and maintain throughout the duration of this Agreement, all the consents, licences and permissions (statutory, regulatory contractual or otherwise) it may require and which are necessary to enable the provision of the Services;
  - 44.1.3 provide to the Authority's other suppliers as are notified to the Contractor periodically, such reasonable co-operation, information (including any Documentation), advice and assistance in connection with the Services to enable any such person to create and maintain technical or organisational

interfaces with the Services and, on the ending of this Agreement for any reason, to enable the timely transition of the Services (or any of them) to any Replacement Contractor; and

*[Guidance: this clause provides a general obligation for the Contractor to co-operate with the Authority's other suppliers, during and after the Agreement. Consider setting out more specific obligations as part of the Services Description or as a separate schedule. Additional provisions might be included to deal with issues of cost, risk, interfaces and governance.]*

44.1.4 provide the Authority with such assistance as the Authority may require during the Term in respect of the supply of the Services.

44.2 In respect of network, communications, computer or other equipment provided by a third party contractor that do or are required to interface with the Contractor System, the Contractor shall have primary management responsibility for incident or problem resolution, including:

44.2.1 for ensuring that such requirement does not interfere with the provision of the Services in accordance with this Agreement; and

44.2.2 for taking all necessary steps within its power to ensure that the interface is successfully achieved,

provided that if it is subsequently agreed by the parties, or determined in accordance with the Dispute Resolution Procedure, that the third party supplier should have been responsible, or partly responsible, for resolving the relevant incident, the Contractor may recover its reasonable additional expenses for resolving the issue to the extent that the third party contractor is agreed or is determined to have been responsible and to the extent that the Authority is able to recover an equivalent amount from the relevant third party contractor.

*[Guidance: As a service provider, the Contractor is required to ensure the uninterrupted supply of the Services. This clause requires a "fix first, argue later" approach. It requires the Contractor to take responsibility for the failure of any part of the Contractor Solution to the extent it relates to the supply of the Services regardless whether it has direct control. An outline balancing procedure is provided to permit the Contractor to recover costs where it is subsequently determined that one of the Authority's other contractors should have had responsibility for resolving the issue. Where the project brings together a number of suppliers it may be appropriate to provide for governance of the inter-relationships between the contracting suppliers in a separate schedule.]*

*As a general principle, the Contractor Solution should use "Commercial Off-the-Shelf" products wherever possible, which should reduce cost and overall risk. However, if the Contractor Solution has a high dependency on complex third party technology or the Contractor Solution is unavoidably reliant on third party technology that is known to have reliability issues, the Agreement should make express provision for liability in respect of such dependencies.]*

44.3 The Contractor shall ensure that the release of any new Software or upgrade to Software complies with the interface requirements in the Services Description, shall notify the Authority [three] months before the release of any new Software or upgrade to Software, and will co-ordinate its activity with the Authority to ensure it minimises any disruption to the Services, the ICT Environment or the Authority's operations.

44.4 [Any change in the way in which the Contractor provides the Services which would materially increase the Authority's risk or reduce the effect of the governance provisions of the Agreement shall [require the Authority's prior written approval][be agreed in accordance with the Change Control Procedure].]

*[Guidance: The level of permissible intervention by the Authority depends on the nature of the Services and this clause should be reviewed accordingly.]*

#### **Authority's Responsibilities**

*[The Authority will need to consider carefully any responsibilities that the Contractor wants to include in schedule 3 to ensure that it does not undermine the Contractor's responsibilities in accepting the risk for the provision of the Services and to ensure that it is capable of complying with the relevant requirement.]*

44.5 The Authority shall comply with the Authority's Responsibilities set out in schedule 3 (Authority Responsibilities).

#### **Contractor and Authority Responsibilities**

44.6 The Contractor and the Authority agree to comply with their respective obligations and may exercise their respective rights pursuant to schedule 7.4 (Financial Distress).

### **45. WARRANTIES**

*[Guidance: This clause contains only an illustrative list, which should be reviewed on a case by case basis and amended, if necessary, to meet the requirements of specific projects.]*

45.1 Each party warrants, represents and undertakes that:

45.1.1 it has full capacity and authority to enter into and to perform this Agreement;

45.1.2 this Agreement is executed by a duly authorised representative of that party;

45.1.3 there are no actions, suits or proceedings or regulatory investigations pending or, to that party's knowledge, threatened against or affecting that party before any court or administrative body or arbitration tribunal that might affect the

ability of that party to meet and carry out its obligations under this Agreement; and

45.1.4 once duly executed this Agreement will constitute its legal, valid and binding obligations.

45.2 The Contractor warrants, represents and undertakes for the duration of the Term that:

45.2.1 all personnel used to provide the Services will be vetted in accordance with Good Industry Practice, the Security Policy and the Standards;

*[Guidance: Vetting can occur at two levels. Firstly, to ensure that the Contractor's staff are suitably qualified and experienced to supply the services anticipated under this Agreement. This is what is currently anticipated by this clause. However, the Authority may also require the Contractor to carry out security vetting of its staff. If security is an issue, the Authority will need to stipulate its requirements (usually by creating including a security policy as an attachment to the Agreement) and requiring the Contractor to comply with them.]*

45.2.2 it has and will continue to hold all necessary (if any) regulatory approvals from the Regulatory Bodies necessary to perform the Contractor's obligations under this Agreement;

45.2.3 it has and will continue to have all necessary rights in and to the Contractor Software or the Third Party Software and/or the Contractor's Background IPRs, or any other materials made available by the Contractor and/or the Sub-contractors to the Authority necessary to perform the Contractor's obligations under this Agreement;

45.2.4 in performing its obligations under this Agreement, all Software used by or on behalf of the Contractor will:

45.2.4.1 be currently supported versions of that Software; and

45.2.4.2 perform in all material respects in accordance with its specification,

45.2.5 as at the Effective Date all statements and representations in the Contractor's ***[Response to the ITT - or insert names of any other documents to be warranted correct - e.g. Pricing Models/Implementation Plan etc.]*** are to the best of its knowledge, information and belief, true and accurate and that it will advise the Authority of any fact, matter or circumstance of which it may

become aware which would render any such statement or representation to be false or misleading;

*[Guidance: The parties will need to agree a list of the information that is to be included in clause 45.2.5. Only those documents that are material to determining what it is that the Authority is buying should be contained in this list. In particular, a balance must be achieved in receiving updates of all information and the effort required to produce, supply and analyse this information. If the list is too long this task will become a full-time commitment and an unnecessary distraction from the main purpose of the Agreement.]*

45.2.6 the *[insert list of appropriate documents e.g. Business Process Manual etc.]* will contain all necessary information and explanation required for the purpose of executing the Exit Plan and for suitably qualified employees of the Authority or of the Replacement Contractor to be able to use the Software and receive the Services and to perform the Replacement Services on termination or expiry; and

45.2.7 the Contractor System and assets used in the performance of the Services:

45.2.7.1 will be free of all encumbrances *[except...insert details of any exceptions re equipment leases etc.]*;

45.2.7.2 *[will be Date Compliant; and]*

45.2.7.3 *[will be Euro Compliant.]*

45.2.8 it shall at all times comply with Law in carrying out its obligations under this Agreement.

45.3 Except as expressly stated in this Agreement, all warranties and conditions whether express or implied by statute, common law or otherwise are hereby excluded to the extent permitted by law.

45.4 For the avoidance of doubt the fact that any provision within this Agreement is expressed as a warranty shall not preclude any right of termination the Authority may have in respect of breach of that provision by the Contractor.

## **46. [GUARANTEE]**

*[Guidance: The requirement for a guarantee should be considered both during discussion of the procurement approach and following the financial assessment of the bidders. It is not always necessary to obtain a guarantee: bonds or letters of credit provide alternative protection.]*

- 46.1 [Before the Effective Date, the Contractor shall procure that the Guarantor shall:
  - 46.1.1 execute and deliver to the Authority the Guarantee; and
  - 46.1.2 deliver to the Authority a certified copy extract of the board minutes of the Guarantor approving the execution of the Guarantee.]

#### **47. CHANGE IN LAW**

*[Guidance: Guidance Note 1 (Key Commercial Principles), section 1 - 29 (Changes in Law) sets out the general principles to consider in relation to Change in Law. A Specific Change in Law that is foreseeable before the Effective Date should be dealt with specifically and should not be treated as qualifying change for the purpose of this clause. ]*

- 47.1 The Contractor shall neither be relieved of its obligations to supply the Services in accordance with the terms of this Agreement nor be entitled to an increase in the Charges as the result of:
  - 47.1.1 a General Change in Law; or
  - 47.1.2 a Specific Change in Law where the effect of that Specific Change in Law on the Services is known at the Effective Date.

*[Guidance: The parties should agree those matters of pending legislation that are to be taken into account for the purposes of clause 47.1.2.]*

- 47.2 If a Specific Change in Law occurs or will occur during the Term (other than those referred to in clause 47.1.2), the Contractor shall notify the Authority of the likely effects of that change, including:
  - 47.2.1 whether any Change is required to the Services, the Charges or this Agreement; and
  - 47.2.2 whether any relief from compliance with the Contractor's obligations is required, including any obligation to Achieve a Milestone and/or to meet the Service Levels at any time.
- 47.3 As soon as practicable after any notification in accordance with clause 47.1, the parties shall discuss and agree the matters referred to in that clause and any ways in which the Contractor can mitigate the effect of the Specific Change of Law, including:

- 47.3.1 providing evidence that the Contractor has minimised any increase in costs or maximised any reduction in costs, including in respect of the costs of its Sub-contractors;
  - 47.3.2 demonstrating that a foreseeable Specific Change in Law had been taken into account by the Contractor before it occurred;
  - 47.3.3 giving evidence as to how the Specific Change in Law has affected the cost of providing the Services; and
  - 47.3.4 demonstrating that any expenditure that has been avoided, for example which would have been required under the provisions of clause 14 (Services Improvement), has been taken into account in amending the Charges.
- 47.4 Any increase in the Charges or relief from the Contractor's obligations agreed by the parties pursuant to clause 47.3 shall be implemented in accordance with the Change Control Procedure.

## **SECTION I - RISK PROTECTION**

### **48. SECURITY REQUIREMENTS**

*[Guidance: Schedule 2.5 provides for the creation of the Security Plan. This should be based on the security requirements and the Security Policy. The Authority will want to ensure that it has not drafted the Security Policy in a way which constrains the output specification of the Services by assuming (and requiring) an identical form of service provision methodology for the future.]*

- 48.1 The Contractor shall comply, and shall procure the compliance of the Contractor Personnel, with the Security Policy and the Security Plan and the Contractor shall ensure that the Security Plan produced by the Contractor fully complies with the Security Policy.
- 48.2 The Authority shall notify the Contractor of any changes or proposed changes to the Security Policy.
- 48.3 If the Contractor believes that a change or proposed change to the Security Policy will have a material and unavoidable cost implication to the Services it may submit a Change Request. In doing so, the Contractor must support its request by providing evidence of the cause of any increased costs and the steps that it has taken to mitigate those costs. Any change to the Charges shall then be agreed in accordance with the Change Control Procedure.

48.4 Until and/or unless a change to the Charges is agreed by the Authority pursuant to clause 48.3 the Contractor shall continue to perform the Services in accordance with its existing obligations.

### **Malicious Software**

*[Guidance: Rather than going into too much detail in this clause, it is better to have a specific technical section in the Services Description setting out what is required by way of anti-virus measures and amend clauses 48.5 to 48.7 accordingly. The Authority should consider, for example, responsibility for the management of the network, in particular responsibility for managing firewalls and gateway guards, and for procedures, including acceptable use policies. When setting out responsibility for the consequences of the infection of computer systems by a virus the Authority will need to consider the possible causes of infection, including the possibility that the virus originates from the Internet and not from the Authority's or the Contractor's system.]*

48.5 The Contractor shall, as an enduring obligation throughout the Term, use the latest versions of anti-virus definitions available [from an industry accepted anti-virus software vendor] to check for and delete Malicious Software from the ICT Environment.

48.6 Notwithstanding clause 48.5, if Malicious Software is found, the parties shall cooperate to reduce the effect of the Malicious Software and, particularly if Malicious Software causes loss of operational efficiency or loss or corruption of Authority Data, assist each other to mitigate any losses and to restore the Services to their desired operating efficiency.

48.7 Any cost arising out of the actions of the parties taken in compliance with the provisions of clause 48.6 shall be borne by the parties as follows:

48.7.1 by the Contractor where the Malicious Software originates from the Contractor Software, the Third Party Software or the Authority Data (whilst the Authority Data was under the control of the Contractor); and

48.7.2 by the Authority if the Malicious Software originates from the Authority Software or the Authority Data (whilst the Authority Data was under the control of the Authority).

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

*[Guidance: This clause assumes that schedule 8.6 (Business Continuity and Disaster Recovery Provisions) will set out full details in relation to business continuity and disaster recovery. This clause sets out the ongoing testing of the plan during the Term. The Authority will need to consider the type of disaster recovery services it requires from the Contractor including the extent it wishes to share the back up facilities with other third parties and record these requirements in schedule 8.6.]*

- 49.1 The parties shall comply with the provisions of the BCDR Plan and the provisions of schedule 8.6 (Business Continuity and Disaster Recovery Provisions).
- 49.2 The Contractor shall ensure that it is able to implement the BCDR Plan at any time in accordance with its terms.
- 49.3 [The Contractor shall undertake regular risk assessments in relation to the provision of the Services not less than once every six months and shall provide the results of, and any recommendations in relation to, those risk assessments to the Authority promptly in writing following each review.]
- 49.4 [The Contractor shall establish, maintain, and review its own internal processes and procedures with respect to the identification of any threats or risks to the provision of the Services, how such threats and risks may be mitigated and how the provision of the Services may be maintained in the event of any such identified threats or risks materialising.]

## **50. FORCE MAJEURE**

*[Guidance: Force Majeure addresses the implications for each of the parties when one party is unable to perform its obligations under the Agreement due to events beyond its control: Guidance Note 1 (Key Commercial Principles), section 1 - 16 (Force Majeure), 17(Termination for Force Majeure), and 18 (Compensation on Termination for Force Majeure) provide further explanation. The ambit of the definition of Force Majeure and the provisions below may need to be adjusted depending on the specific circumstances of a project.*

*There is a long stop provision in clause 55.8 where either party may terminate (or partially terminate) the Agreement if the Force Majeure has continued for more than the requisite number of days. Clause 58.4 provides sample wording on compensation on termination pursuant to clause 55.8.]*

- 50.1 Subject to the remaining provisions of this clause 50, either party to this Agreement may claim relief from liability for non-performance of its obligations to the extent this is due to a Force Majeure Event. In particular, the Contractor shall be relieved from its Delay Payment obligation to the extent that the Achievement of any Milestone is affected by the Force Majeure Event, its Service Credits obligation to the extent that the Services are affected by the Force Majeure Event and the Charges shall be reduced to the extent that the Authority does not receive the Services as a result of the Force Majeure Event.

- 50.2 A party cannot claim relief if the Force Majeure Event is attributable to its wilful act, neglect or failure to take reasonable precautions against the relevant Force Majeure Event.
- 50.3 The Contractor cannot claim relief from a Force Majeure Event to the extent that it is required to comply with the BCDR Plan but has failed to do so [(unless this failure is also due to a Force Majeure Event affecting the operation of the BCDR Plan).]
- 50.4 An Affected Party cannot claim relief as a result of a failure or delay by any other person in the performance of that other person's obligations under a contract with the Affected Party (unless that other person is itself prevented from or delayed in complying with its obligations as a result of a Force Majeure Event).
- 50.5 The Affected Party shall immediately give the other party written notice of the Force Majeure Event. The notification shall include details of the Force Majeure Event together with evidence of its effect on the obligations of the Affected Party, and any action the Affected Party proposes to take to mitigate its effect.
- 50.6 As soon as practicable following after the Affected Party's notification, the parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and to facilitate the continued performance of this Agreement. Where the Contractor is the Affected Party, it shall take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.
- 50.7 The Affected Party shall notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification, this Agreement shall continue to be performed on the terms existing immediately before the occurrence of the Force Majeure Event unless agreed otherwise by the parties.

## **SECTION J - INDEMNITIES, LIABILITY AND INSURANCE**

### **51. IPR INDEMNITY**

*[Guidance: This clause provides for an indemnity from the Contractor to the Authority against losses, etc., arising from an IPR Claim (resulting from the use of IPRs provided to the Authority or used as part of the Services). Guidance Note 1 (Key Commercial Principles), section 1 - 24 (Indemnities) should be referred to in reviewing this clause and considering whether any other indemnities are required by the Authority given the nature of a particular project.*

*Note that the Authority will not be entitled to benefit from the IPR indemnity in respect of the Third Party Software where it has a direct licence of that software, although it will get the benefit of any warranty provided in respect of the relevant licence.*

*Clause 51 is a standard clause for ICT services contracts and is protecting the Authority from potential losses, etc., that it has no control over. Any changes should therefore be treated with caution and specialist advice obtained from the Authority's legal advisers.]*

- 51.1 The Contractor shall at all times, during and after the Term, on written demand indemnify the Authority and keep the Authority indemnified against all losses, damages, costs or expenses and other liabilities (including legal fees) incurred by, awarded against or agreed to be paid by the Authority arising from an IPR Claim.
- 51.2 The Authority agrees that:
  - 51.2.1 it will notify the Contractor in writing of any IPR Claim;
  - 51.2.2 it will allow the Contractor to conduct all negotiations and proceedings and will provide the Contractor with such reasonable assistance required by the Contractor, each at the Contractor's cost, regarding the IPR Claim; and
  - 51.2.3 it will not, without first consulting with the Contractor, make an admission relating to the IPR Claim.
- 51.3 The Contractor shall consider and defend the IPR Claim diligently using competent counsel and in such a way as not to bring the reputation of the Authority into disrepute.
- 51.4 The Contractor shall not settle or compromise any IPR Claim without the Authority's prior written consent (not to be unreasonably withheld or delayed).

*[Guidance: Clause 51.4 is not appropriate where the only IPR provided relates to commercial off-the-shelf software ("COTS"). In this case, withholding consent may prejudice any settlement. It will always be required for bespoke developments (where the Authority should consider the effect of the Contractor conceding a claim that leaves it unable to deliver the Services or to deliver services that are materially different to those required) and should be retained where a mixture of bespoke and COTS software will be provided. In the latter case, it would be "unreasonable" for the Authority to refuse consent where the settlement affected COTS software only.]*

- 51.5 If an IPR Claim is made, or the Contractor anticipates that an IPR Claim might be made, the Contractor may, at its own expense and sole option, either:
  - 51.5.1 procure for the Authority the right to continue using the relevant item which is subject to the IPR Claim; or

51.5.2 replace or modify the relevant item with non-infringing substitutes provided that:

51.5.2.1 the performance and functionality of the replaced or modified item is at least equivalent to the performance and functionality of the original item;

51.5.2.2 the replaced or modified item does not have an adverse effect on any other Services or the ICT Environment;

*[Guidance: Any replaced or modified Services should also be compatible with the overall operating system and not just those parts to be supplied by the Contractor. The aim is to ensure that the overall functionality of the Contractor Solution remains capable of meeting the Authority's requirements.]*

51.5.2.3 there is no additional cost to the Authority; and

51.5.2.4 the terms of the Agreement shall apply to the replaced or modified Services.

51.6 If the Contractor elects to modify or replace an item pursuant to clause 51.5.2 or to procure a licence in accordance with clause 51.5.1, but this has not avoided or resolved the IPR Claim, then the Authority may terminate this Agreement by written notice with immediate effect and, without prejudice to the indemnity set out in clause 51.1, the Contractor shall be liable for all reasonable and unavoidable costs of the substitute items and/or services including the additional costs of procuring, implementing and maintaining the substitute items.

51.7 The provisions of clauses 51.1 to 51.6 (inclusive) shall not apply in respect of any IPR Claim caused by:

51.7.1 any use by or on behalf of the Authority of the Software, or the use of the Authority Software by or on behalf of the Contractor, in either case in combination with any item not supplied pursuant to this Agreement; or

51.7.2 the use by the Authority of the Software, or the use of the Authority Software by the Contractor, in either case in a manner not reasonably to be inferred from the Services Description or the provisions of this Agreement.

## 52. LIMITATIONS ON LIABILITY

*[Guidance: Guidance Note 1 (Key Commercial Principles), section 1 - 23 (Liability) considers the requirements for a limitation of liability clause. The Authority should always consider seeking professional advice when considering this clause 52. You may also wish to refer to the guidance on liability in government contracts to be found on OGC's website.]*

- 52.1 Neither party limits its liability for:
  - 52.1.1 death or personal injury caused by its negligence, or that of its employees, agents or Sub-contractors (as applicable); or
  - 52.1.2 fraud or fraudulent misrepresentation by it or its employees; or
  - 52.1.3 breach of any obligation as to title implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982.

### Financial Limits

*[Guidance: The Agreement should reflect the value of the risk in the limits on liability set out in clauses 52.2 and 52.3. However, note that the contract may become uneconomic if the Contractor is obliged to accept liability limits that are disproportionate to the value of the contract. Also, consider whether the risks faced by each party are equal. For example, if there is a greater risk to the Authority than to the Contractor, then the Authority should require a higher limit on the Contractor's liability than on its own or vice versa.]*

*Consideration needs to be given to setting liability limits in the light of the project's risk and payment profile. Advice on doing so should also be sought from your professional advisors.]*

- 52.2 Subject to clause 52.1, the Contractor's total aggregate liability:
  - 52.2.1 in respect of the indemnity in clauses 17.2 (Tax), [29 (Employment Indemnity)][, **other clauses**] and 51 (IPR Indemnity), shall be unlimited;

*[Guidance: The indemnities listed in clause 52.2.1 represent third party liabilities that are not quantifiable but which the Contractor is in a position to prevent or to control. Consequently, these indemnities should not be limited.]*

- 52.2.2 for all loss of or damage to the Authority Premises, property or assets (including technical infrastructure, assets or equipment but excluding any loss or damage to the Authority's Data or any other data) of the Authority caused by the Contractor's Default shall in no event exceed £[xxxxx] (subject to indexation);

- 52.2.3 for all loss, destruction, corruption, degradation, inaccuracy or damage to the Authority Data caused by the Contractor's Default shall be £[xxxxx] (subject to indexation);
- 52.2.4 in respect of Services Credits shall be limited in each Contract Year to £[xxxxx] [the greater of £[xxxxx] (subject to indexation) or [xx]% of the annual Charges];
- 52.2.5 in respect of Delay Payments shall be limited [in each Contract Year] [for the Pre-Operational Phase] to £[xxxxx] [the greater of £[xxxxx] (subject to indexation) or [xx]% of the [implementation] [annual] Charges].
- 52.2.6 in respect of all other claims, losses or damages, whether arising from tort (including negligence), breach of contract or otherwise under or in connection with this Agreement shall in no event exceed £[xxxxx] (subject to indexation) or, if greater, an amount equivalent to [xx]% of the [aggregate Charges paid, due or which would have been payable in the future (prior to the calculation of any reduction to those Charges pursuant to this Agreement) under this Agreement].
- 52.3 Subject to clause 52.1, the Authority's total aggregate liability, in addition to its obligation to pay the Charges as and when they fall due for payment:
- 52.3.1 for all Defaults by the Authority resulting in loss of or damage to the property or assets (including technical infrastructure, assets or equipment) of the Contractor shall in no event exceed £[xxxxx] (subject to indexation);
- 52.3.2 for the Termination Payment shall not exceed £[xxxxx] (subject to indexation) and for the Compensation Payment shall not exceed £[xxxxx] (subject to indexation); and
- [Guidance: Termination Payments and Compensation Payments are payable in accordance with clause 58 (Payments Made on Termination).]*
- 52.3.3 in respect of all other Defaults by the Authority shall in no event exceed the greater of:
- 52.3.3.1 an amount equivalent to the total Charges paid or properly invoiced and due to be paid under this Agreement in the [12] month period immediately preceding the event giving rise to the liability; or

52.3.3.2 £[xxx].

*[Guidance: The default value in clause 52.3.3.2 should reflect the minimum acceptable threshold for the Authority's liability. This value will apply during periods, such as the first year of the contract, where the variable limit in clause 52.3.3.1 falls below the default value. The default value will need to reflect the risk profile for the project, but should not be set automatically at the average annual Charges.]*

52.4 Subject to clauses 52.1 and 52.5, neither party will be liable to the other party for:

52.4.1 any indirect, special or consequential loss or damage; or

52.4.2 any loss of profits, turnover, business opportunities or damage to goodwill (whether direct or indirect).

52.5 The Authority may, amongst other things, recover as a direct loss:

52.5.1 any additional operational and/or administrative costs and expenses arising from the Contractor's Default;

52.5.2 any wasted expenditure or charges rendered unnecessary and/or incurred by the Authority arising from the Contractor's Default; [and]

52.5.3 the additional cost of procuring Replacement Services for the remainder of the Term[; and]

52.5.4 [any anticipated savings].

*[Guidance: Clause 52.5.4 will only be relevant where the Contractor's solution includes specific commitments to deliver savings and/or accepts a significant proportion of the risk of delivery of those savings (in other words some significant element of the Contractor's payment, but not "routine" gainshare, which may or may not be achieved and is conditional on the delivery of anticipated savings). ]*

52.6 The parties expressly agree that if any limitation or provision contained or expressly referred to in this clause 52 is held to be invalid under any Law, it will be deemed omitted to that extent, and if any party becomes liable for loss or damage to which that limitation or provision applied, that liability will be subject to the remaining limitations and provisions set out in this clause 52.

52.7 Nothing in this clause 52 shall act to reduce or affect a party's general duty to mitigate its loss.

## **53. INSURANCE**

*[Guidance: Guidance Note 1 (Key Commercial Principles), section 1 - 25 (Insurance) should be considered in relation to this clause. The Contractor's insurance cover will have been assessed as part of the selection process and as a general rule the Authority should not require additional project specific insurance unless there is a clear case for doing so. Note that some larger suppliers may self-insure. Clause 53.2 is only relevant if the Authority obtains a parent company guarantee. This clause should be discussed with your professional advisors and amended accordingly.]*

53.1 [Subject to clauses 53.2,] the Contractor shall take out and maintain or procure the maintenance of the Insurances in accordance with the provisions of schedule 2.6 (Insurance Requirements).

53.2 [If at any time the Contractor is unable to maintain any of the Insurances, the Contractor shall promptly procure that the Guarantor provides the Authority with equivalent cover by means of a letter of credit.]

## **SECTION K - TERM, TERMINATION AND EXIT MANAGEMENT**

### **54. TERM**

This Agreement will begin on the Effective Date and, unless terminated at an earlier date by operation of Law or in accordance with clause 55, will terminate at:

54.1 the end of the Initial Term; or

54.2 if the Authority elects to extend the Initial Term, at the end of the Extension Period.

### **55. TERMINATION RIGHTS**

*[Guidance: Guidance Note 1 (Key Commercial Principles), section 1 - 12 (Termination Events for Contractor Default) provides an explanation of the issues relevant to the right to terminate for Contractor Default.*

*Both in the development of Agreement and before it exercises any of the termination rights in this clause, the Authority should allow the Contractor the opportunity to address the problem before a termination right is triggered. Please refer to Guidance Note 1 (Key Commercial Principles), section 1 - 22 (Escalating Remedies) for further guidance.*

*Clause 55.1 contains a sample of the rights that the Authority can exercise for Contractor Default. The Authority will need to consider the importance and relevance of these provisions to a particular project and add to or delete the rights as appropriate.]*

## 55.1 Termination for Cause by the Authority

55.1.1 The Authority may terminate this Agreement by giving written notice of termination to the Contractor if one or more of the circumstances set out in clause 55.1.5 exist.

55.1.2 Where the Authority is terminating this Agreement for a material Default of this Agreement or one of the specific provisions in clause 55.1.5.5 it may rely on a single material Default or on a number of Defaults or repeated Defaults that taken together constitute a material Default.

55.1.3 Subject to clause 55.1.4, where a material Default is capable of remedy the parties shall follow the Remedial Plan Process provided that if the Remedial Plan Process fails then termination shall occur on the last day of the period specified by the Authority in its Termination Notice served in accordance with the Remedial Plan Process.

55.1.4 The parties shall not follow the Remedial Plan Process where the Contractor has already failed to resolve the relevant Default in accordance with a Correction Plan pursuant to clause 5 (Implementation Delays - General Provisions) or 10 (Service Levels).

55.1.5 The circumstances giving rise to the Authority's right to terminate are:

55.1.5.1 the Contractor is in material Default which it has failed to remedy in accordance with the Remedial Plan Process;

55.1.5.2 the Contractor commits a material breach of this Agreement which is irremediable;

55.1.5.3 the Contractor's failure to:

- (a) Achieve a Milestone by its associated Milestone Date; and
- (b) comply with a Correction Plan because:
  - (i) the Contractor does not submit or resubmit a Correction Plan for approval within the timescales required or at all;

- (ii) the Authority does not approve the proposed Correction Plan on the second occasion of seeking approval; or
- (iii) the Contractor fails to resolve one or more of the issues identified in accordance with clause 5.1 and/or 5.2 in the time and/or manner set out in the Correction Plan;

55.1.5.4 [pursuant to:

- (a) clause 51.6 (where a modification or replacement of an item pursuant to clause 51.5.2 or where procuring a licence in accordance with clause 51.5.1 has not avoided or resolved an IPR Claim); or
- (b) clause 64 (Prevention of Corruption);]

55.1.5.5 the Contractor is in material Default of:

- (a) clause 41 (Protection of Personal Data);
- (b) clause 42 (Freedom of Information);
- (c) clause 43 (Confidentiality); or
- (d) the requirements set out in schedule 2.5 (Security Requirements and Plan);

55.1.5.6 the Contractor's level of performance constitutes a Critical Service Failure as defined by Schedule 2.2; [*Note: Specify appropriate thresholds*]

55.1.5.7 an Insolvency Event affecting the Contractor occurs; [or]

55.1.5.8 [in respect of schedule 7.4 (Financial Distress):

- (a) the long term, unsecured, un-subordinated debt rating of the Contractor[ or the Guarantor] issued by [*nominated Rating Agency*] is downgraded below [*rating level*] or the rating

with [*one or other of two further Rating Agencies*] falls to an equivalent level; or

- (b) if the Contractor[ or the Guarantor] undergoes an adverse financial event at any point during the Term which may have a material affect on the provision of the Services (as determined in accordance with schedule 7.4 (Financial Distress);]

*[Guidance: This right of termination will need to be reviewed following agreement of schedule 7.4 by the parties. Professional advice will be required when discussing the provisions of this schedule.]*

55.1.5.9 as a result of the Contractor's Default the Authority suffers damages that exceed [x% of] the aggregate value of liability caps as set out in clause 52 (Limitations on Liability);

55.1.5.10 [the Guarantor is in anticipatory breach of the Guarantee (without the Guarantee being replaced with a comparable guarantee to the satisfaction of the Authority) or the Guarantor suffers an Insolvency Event; or]

55.1.5.11 [the occurrence of:

- (a) any breach; or
- (b) any event which with the giving of notice, lapse of time, determination of materiality or fulfilment of any other applicable condition or any combination of the foregoing would constitute an event of breach,

which is continuing, unremedied and unwaived, under or in connection with any document or arrangement relating to any obligation (whether present or future, contingent or otherwise, as principal or surety or otherwise) of the Contractor [or the Guarantor or any subsidiary undertaking of the Guarantor] in respect of money that has been borrowed exclusively for the purposes of financing the provision of the Services by the Contractor;]

55.1.5.12 [the Contractor committing a Default (other than as a consequence of a Default by the Authority) which results in the criminal investigation, prosecution and conviction of the Contractor or any Sub-contractor under the Health and Safety Regime. In determining whether to exercise any right of termination pursuant to this clause 55.1.5.12 the Authority shall:

- (a) act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing it; and
- (b) give all due consideration, where appropriate, to action other than termination of this Agreement;]

55.1.5.13 [there has been a disaster and the Contractor has not acted in accordance with its obligations under the BCDR Plan and such failure to act is in itself a material Default or the result of such failure to act has a material adverse impact on the Authority;] [or]

55.1.5.14 [the Contractor makes any public announcement or a director of the board of directors of the Contractor advises an officer of the Authority that the Contractor is no longer going to continue to develop or to offer the provision of services similar to the Services [and there is evidence that such announcement will materially adversely impact the ability of the Contractor to provide the Services].

55.2 The rights of the Authority (to terminate or otherwise) under this clause 55 are in addition (and without prejudice) to any other right or remedy which the Authority or any [Contracting Authority] may have to claim the amount of loss or damage suffered by the Authority [or the Contracting Authority] on account of the acts or omissions of the Contractor (or to take any action other than termination of this Agreement).

### 55.3 **Termination for Convenience by the Authority**

*[Guidance: The intention of the parties is that the Agreement should run its full course. However, there may be circumstances in which the Authority is unable to continue with the relationship. For example, for a change of government policy. To meet this possibility the Authority must retain the right to terminate voluntarily. If it does so, it will be obliged to make a Termination Payment (and a Compensation Payment depending on the amount of notice of termination which is given) to*

*compensate the Contractor for loss of profit and any breakage costs. Guidance Note 1 (Key Commercial Principles), section 1 - 15 (Termination for Convenience by the Authority) provides a further explanation of the issues. See also clause 58 (Payments Made on Termination).*

*Guidance: Whilst an open right of termination for convenience represents a risk, albeit one that rarely occurs, to a Contractor this could potentially mean that it could fail to realise a large proportion of its planned revenue. This risk is especially concerning in the early stages of the contract term. The Authority may therefore wish to consider whether the immediate business future is sufficiently certain to allow it to forgo this right for an initial period. In such cases, the first sentence of clause 55.3.1 could be amended to read:*

*"The Authority may terminate this Agreement for convenience at any time following the [anniversary date to be agreed between the parties] anniversary of the Effective Date on giving written notice to the Contractor."*

55.3.1 The Authority may terminate this Agreement for convenience at any time on giving written notice to the Contractor. The amount of notice given affects the payments that the Authority is obliged to make as a consequence of termination and this is dealt with in clause 58 (Payments made on Termination).

55.3.2 Subject to any obligation to provide the Services in accordance with the Exit Plan, the Contractor's obligation to provide the Services shall end on the date set out in the Authority's notice.

55.3.3 Without prejudice to clause 55.3.2 and unless otherwise stipulated by the Authority in its notice of termination, any Services that have not commenced at the date of the Authority's notice shall be cancelled automatically [and irrevocably].

55.3.4 This right of termination is in addition to any other rights of the Authority under this Agreement and its exercise shall be without prejudice to any claim, remedy or right of action that either party may have in relation to this Agreement.

#### **55.4 Termination for Change of Control**

*[Guidance: The Authority should know who it is contracting with at all times. If there is a fundamental change in the ownership of the Contractor to the extent that the Authority would not have contracted with that party at the outset (for example because that new contractor would not have met the pre-qualification criteria) then it should have the right to terminate. However, this should not be an enduring right and clause 55.4.1 sets out limits on its use. The Authority may also wish to consider extending this right to the change of control of material sub-contractors.]*

55.4.1 The Authority may terminate this Agreement by written notice without penalty if there is a Change of Control to which the Authority objects except where the Authority:

55.4.1.1 has given its prior written consent to the particular Change of Control, which subsequently takes place as proposed; or

55.4.1.2 has not served its notice within [six] months of the later of the date the Change of Control took place or the date on which the Authority was given notice of the Change of Control.

55.4.2 The Contractor shall notify the Authority in writing within one month of any Change of Control taking place.

55.5 **[Partial Termination]**

55.5.1 [Subject to the provisions of clause[s 55.5.2, 55.5.3 and] 56 (Remedial Plan Process), the Authority may, by [one] month's prior written notice, require the Partial Termination of any part of the Services on the occurrence in relation to that part of a material Default by the Contractor, where the Default is not capable of remedy or, if the Default is capable of remedy, the Default has not been remedied in accordance with the Remedial Plan Process.

*[Guidance: The Authority may also wish to consider whether it wishes to provide for the possibility for partial termination in circumstances other than Contractor Default, eg insolvency, voluntary termination by Authority.]*

55.5.2 [On receipt of the Authority's notice of Partial Termination, the Contractor may respond to the Authority in writing within the notice period provided for in clause 55.5.1 as follows:

55.5.2.1 accept the Partial Termination of this Agreement; or

55.5.2.2 reject the Partial Termination of this Agreement.]

55.5.3 [If the Contractor rejects the Partial Termination the Authority may, in its sole discretion and within [one] month of receiving the Contractor's election under clause 55.5.2.2, terminate the whole Agreement.]

*[Guidance: In many cases where the basic set-up of the Services means that they all inter-relate partial termination may not be a practical possibility or it may have an adverse impact on the economics of the project as a whole. The provision contained in clauses 55.5.2 and 55.5.3 together constitute one approach for dealing with that concern.]*

55.5.4 The parties shall agree the effect of any Change made necessary to the Agreement by the Partial Termination, including the effect the Partial Termination may have on any other Services and the Charges, in accordance with the Change Control Procedure, provided that:

55.5.4.1 the Contractor shall not be entitled to an increase in the charges if the Partial Termination arises pursuant to clause 55.5.1; and

55.5.4.2 any increase to the Charges (if any) shall not be unreasonable and in any event shall be calculated in accordance with the Contractor's financial model in schedule 7.1 (Charges and Invoicing); and

55.5.4.3 the Contractor shall not be entitled to reject the Change].

*[Guidance: Delete clause 55.5.4.3 if clauses 55.5.2 and 55.5.3 are retained.]*

55.5.5 Termination in accordance with this clause 55.5 shall be without prejudice to any right of action or remedy of either party which has accrued or which subsequently accrues.]

## **55.6 Termination by the Contractor**

[The Contractor may terminate this Agreement only if the Authority is in material breach of its obligation to pay undisputed Charges by giving the Authority 90 days written notice specifying the breach and requiring its remedy. The Contractor's right of termination under this clause 55.6 shall not apply to non-payment of the Charges by the Authority where such non-payment is due to the Authority exercising its rights under clause 18 (Recovery of Sums Due).]

55.7 The Contractor shall not exercise, or purport to exercise, any right to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly set out in this Agreement.

*[Guidance: The only ground on which the Contractor should be entitled to terminate is the Authority's prolonged non-payment of the Charges. ]*

## 55.8 Termination for Continuing Force Majeure Event

*[Guidance: Note that the basic set-up of the Services may mean that they all inter-relate and, therefore, Partial Termination may not be a practical possibility or that it may have an adverse impact on the viability of the project as a whole. The provision contained in clauses 55.5.2 and 55.5.3 may be adopted and used here to constitute an approach for dealing with that concern. The alternative drafting provides the possibility of having different thresholds depending on the effect of the Force Majeure Event.]*

[Either party may, by written notice to the other, terminate this Agreement[, or require the Partial Termination of any part of the Services on the occurrence in relation to that part,] if a Force Majeure Event endures for a continuous period of more than [120] days.]

**[OR]**

[Either party may, by written notice to the other, terminate this Agreement[, or require the Partial Termination of any part of the Services on the occurrence in relation to that part,] if:

55.8.1 a Force Majeure Event occurs which affects all or a substantial part of the Services for a continuous period of more than [90] days; or

55.8.2 a Force Majeure Event occurs which affects a part but not a substantial part of the Services for a continuous period of more than [120] days.]

## 56. REMEDIAL PLAN PROCESS

*[Guidance: This clause sets out a process giving the Contractor the opportunity to remedy material Defaults committed by it prior to any termination rights arising. Clauses 55.1.3 and 55.5.1 require this process to be followed before a right of termination or partial termination arises. However, it should not apply where a remedial plan process already applies, e.g. the Correction Plan process in clause 6 (Delays Due to Contractor Default).]*

56.1 Subject to clause 55.1.3 or 55.5.1, if the Contractor commits a material Default and the Default is capable of remedy, the Authority may not terminate this Agreement in whole or in part without first operating the Remedial Plan Process.

56.2 The Remedial Plan Process is as follows:

56.2.1 The Authority notifies the Contractor that it considers that the Contractor is in material Default and that it requires a Remedial Plan. The notice may specify the matters complained of in outline but must contain sufficient detail so that it is reasonably clear what the Contractor has to remedy.

- 56.2.2 The Contractor shall serve a draft Remedial Plan within [20] Working Days (or any other period agreed by the parties) even if the Contractor disputes that it is responsible for the matters complained of.
- 56.2.3 If the Authority considers that the draft Remedial Plan is insufficiently detailed to be properly evaluated, or will take too long to complete or will not remedy the matters complained of then it may either agree a further time period for the development and agreement of the Remedial Plan or escalate any issues with the draft Remedial Plan using the Escalation Process.
- 56.2.4 If despite the measures taken under clause 56.2.3 a Remedial Plan cannot be agreed within [10] Working Days of the date of its submission then the Authority may elect to end the Remedial Plan Process at the end of the escalation period set out in the Dispute Resolution Procedure and serve a Termination Notice which will take effect unless the Contractor remedies the Default within a period specified in the Termination Notice which shall not be less than [30] days from the date on which the Termination Notice is sent to the Contractor.
- 56.2.5 If a Remedial Plan is agreed between the parties but the Contractor fails to implement the Remedial Plan the Authority may either give the Contractor a further opportunity to resume full implementation of the Remedial Plan or escalate any issues arising out of the failure to implement the Remedial Plan using the Escalation Process.
- 56.2.6 If the reasons for the Contractor's failure to implement the Remedial Plan have not been resolved despite the use of the Escalation Process in accordance with clauses 56.2.3 or 56.2.5, and the Contractor has not otherwise remedied the Default, then the Authority may serve a Termination Notice and the Agreement shall terminate on the last day of the period specified by the Authority in its notice, which shall not be less than [30] days from the date on which the Termination Notice is sent to the Contractor.
- 56.2.7 The Authority shall not be obliged to follow the Remedial Plan Process if a Remedial Plan has been implemented but the Contractor has failed to remedy the Default by those means or if there is a repetition of substantially the same material Default within a period of three months following the conclusion of

the Remedial Plan. In either case the Authority may serve a Termination Notice and the Agreement shall terminate on the last day of the period specified by the Authority in its notice, which shall not be less than [30] days from the date on which the Termination Notice is sent to the Contractor, unless the Contractor remedies the Default within that period.

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

57.1 Following the service of a Termination Notice for any reason the Contractor shall continue to be under an obligation to provide the Services to the required Service Levels and to ensure that there is no degradation in the standards of the Services until the date of the termination.

*[Guidance: Note that the parties are obliged to comply with the Exit Plan pursuant to clause 59, which deals with the process of exiting this agreement and the management of that process. This provision seeks to ensure that the Contractor does not start to run the Service down in anticipation of the end of the Agreement following the service of a Notice of Termination.]*

57.2 In the event of termination or expiry, the Contractor shall:

57.2.1 repay to the Authority all Charges it has been paid in advance in respect of Services not provided by the Contractor as at the date of expiry or termination;

57.2.2 cease to use the Authority Data and, at the direction of the Authority:

57.2.2.1 provide the Authority and/or the Replacement Contractor with a complete and uncorrupted version of the Authority Data in electronic form in a format and on media agreed with the Authority and/or the Replacement Contractor; and

57.2.2.2 on the earlier of the receipt of the Authority's written instructions or 12 months after the date of expiry or termination, destroy all copies of the Authority Data;

57.2.3 comply with its obligations contained in the Exit Plan; and

57.2.4 provide access during normal working hours to the Authority and/or the Replacement Contractor for up to 12 months after expiry or termination to:

57.2.4.1 such information relating to the Services as remains in the possession or control of the Contractor; and

57.2.4.2 such members of the Contractor Personnel as have been involved in the design, development and provision of the Services and who are still employed by the Contractor, provided that the Authority and/or the Replacement Contractor shall pay the reasonable costs of the Contractor actually incurred in responding to requests for access under this clause 57.2.4.

*[Guidance: Where the Services include processes that are repeated infrequently (for example the running of an annual report) it will be necessary to ensure the post-contract transfer of relevant knowledge.]*

57.3 The provisions of clauses 24 (Audits), 33 (Non-Solicitation), 34 (Intellectual Property Rights), 35 (Licences Granted by the Contractor), 41 (Protection of Personal Data), 42 (Freedom of Information), 43 (Confidentiality), 51 (Indemnities), 52 (Limitations on Liability), 57 (Consequences of Termination), 66 (Severance), 68 (Entire Agreement), 69 (Third Party Rights) and 71 (Governing Law and Jurisdiction) [**Note - additional clauses to be inserted when document is agreed**], and the provisions of schedules 1 (Definitions), 7.1 (Charges), 9.1 (Staff Transfer) [and] 8.5 (Exit Management) [**and any other relevant schedules**] shall survive the termination or expiry of this Agreement.

## **58. PAYMENTS MADE ON TERMINATION**

*[Guidance: Guidance Note 1 (Key Commercial Principles), section 1 - 15 (Termination for Convenience by the Authority) provides a further explanation of the relevant issues.]*

58.1 Save for any payments in respect of any assets made in accordance with schedule 8.5 (Exit Management), the Authority shall not make a payment to the Contractor:

58.1.1 on the expiry of the Term;

58.1.2 for Termination for Cause by the Authority in accordance with clause 55.1 or for Partial Termination in accordance with clause 55.5.1; or

58.1.3 for termination for Change of Control in accordance with clause 55.4.1.

*[Guidance: Schedule 8.5 (Exit Management) may contain payments for relating to the provision of any Services in the conduct of that plan. It may also contain payments for any assets transferred to the Authority on exit. The calculation of these costs should be provided for in schedule 8.5 (Exit Management). Schedule 8.5 (Exit Management) should not contain any compensation for early termination in addition to the Termination Payment or Compensation Payment.]*

58.2 The Authority shall pay the Contractor the Termination Payment if this Agreement is terminated by the Authority pursuant to clause 55.2 (Termination for Convenience by Authority) or by the Contractor pursuant to clause 55.6 (Termination by the Contractor).

*[Guidance: The Compensation Payment provides compensation for voluntary termination by the Authority where the Authority has not given adequate notice. It should be calculated on a formulaic basis taking into account the factors identified in Guidance Note 1 (Key Commercial Principles), section 1 - 15 (Termination for Convenience by the Authority).]*

58.3 If:

58.3.1 the notice given by the Authority pursuant to clause 55.2 (Termination for Convenience by Authority) is less than 12 months; or

58.3.2 the period between the date of the material breach by the Authority referred to in clause 55.6 (Termination by the Contractor) and the date on which termination pursuant to clause 55.6 (Termination by the Contractor) takes effect is less than 12 months,

the Authority shall also make the Compensation Payment calculated in accordance with schedule 7.2 (Payments on Termination).

58.4 The costs of termination incurred by the parties shall lie where they fall if either party terminates or partially terminates this Agreement pursuant to clause 55.8 (Termination for Continuing Force Majeure Event).

58.5 The Compensation Payment and/or the Termination Payment shall be the Contractor's sole remedy for the Authority's termination of this Agreement in accordance with clause 55.2 (Termination for Convenience by the Authority) or the Contractor's termination of this Agreement in accordance with clause 58.5 (Termination by the Contractor).

## **59. EXIT MANAGEMENT**

*[Guidance: Planning for the end of the Agreement should start prior to contract award. In practice it is unusual for the parties to have the opportunity to develop an exit plan prior to execution of the Agreement. Therefore, the Exit Plan will be agreed soon after execution of the Agreement. Once agreed the plan should*

*be updated regularly. Consideration for the contents of the Exit Plan are set out in schedule 8.5: Exit Management but should at least contain the Authority's requirements relating to exit.]*

59.1 The Authority and the Contractor shall comply with the Exit Management requirements set out in schedule 8.5 (Exit Management) and any current Exit Plan. Notwithstanding any other provision of this Agreement the Authority shall have the rights set out in clause 59.2:

59.1.1 if an Insolvency Event occurs, the Authority's rights under clause 59.2 shall be exercisable by the Authority at any time before the winding up of the Contractor or any other consequence of the occurrence of those events, including the appointment of a liquidator, receiver, manager or administrator;

59.1.2 in the event of termination of this Agreement for any reason; and/or

59.1.3 upon the expiry of this Agreement.

59.2 The Contractor shall not, without the Authority's consent, encumber any Contractor Equipment in any way which would require the consent of a third party to the exercise by the Authority of its rights under schedule 8.5 (Exit Management) or which would in some other way restrict the exercise by the Authority of its rights under that schedule. For the purposes of this clause 59.2 "encumber" [does not include any leasing agreement but] shall include any interest or equity of any person (including any right to acquire, option or right of pre-emption) or any mortgage, charge, pledge, lien, assignment, security interest, any other security agreement or arrangement [(except for a floating charge attaching generally to the assets and undertaking of the Contractor which has not crystallised)] or which otherwise restricts the Contractor's ability to use and deal with the relevant item of Contractor Equipment.

*[Guidance: Often the better approach is to have pre-agreed leasing arrangements and to consider if a direct agreement with the lessor is required. If the Authority is concerned about the possibility of being affected by a floating charge then a specific agreement with the proprietor of the charge will be needed.]*

59.3 Unless the Authority otherwise requires, during the time between service of a notice of termination of this Agreement, or for Partial Termination in accordance with clause 55.5, and such termination or exercise taking effect, the Contractor shall take all steps, which are necessary and consistent with its continuing obligations, to mitigate any losses, costs, liabilities and expenses which the Contractor may incur as a result of the termination, including to:

- 59.3.1 cancel all capital and recurring cost commitments in connection with the Implementation Plan and/or the provision of Services on the most cost-effective terms;
- 59.3.2 terminate all relevant contracts or the relevant parts of relevant contracts with its Sub-contractors in connection with the provision of Services on the most favourable terms as can be achieved in the particular circumstances, having first ascertained from the Authority whether such contracts are required to be transferred to the Authority or Replacement Contractor instead;
- 59.3.3 reduce labour costs by the redeployment or release of Contractor Personnel other than Key Personnel to the extent possible in the circumstances; and
- 59.3.4 apply any insurance monies available to the reduction of any unavoidable costs remaining in respect of the required actions in clauses 59.3.1 to 59.3.3 (inclusive).

*[Guidance: Consider if any other steps should be specified in relation to the particular subject-matter of this Agreement, including whether the Contractor should be required to flow down equivalent obligations/rights to its sub-contractors therefore reducing any impact for the Authority.]*

*No specific obligation is placed on the Contractor to insure against the early termination. However, if this insurance has been procured and the Contractor calls upon the policy, the Authority should not be required to compensate the Contractor for the amounts recovered.]*

59.4 [If the cost of any Contractor Equipment has not been fully paid for through Milestone payments or otherwise amortised at the time of expiry or termination of this Agreement, the Authority shall pay the Contractor the Net Book Value of any Contractor Equipment that the Authority elects to have transferred to it in accordance with schedule 8.5 (Exit Management).]

59.5 If the Contractor does not fulfil its obligations in accordance with clause 59.3, the Authority shall not pay any sums in excess of those which the Authority would have paid had such action been taken.

## **60. STEP-IN RIGHTS**

*[Guidance: There are difficult issues that will need to be resolved when considering this clause, including access rights and the Contractors' concerns about confidentiality in relation to third parties (i.e. if there are shared use assets). Before any exercise of its right under this paragraph the Authority should balance the consequences of doing so with its right to exercise any other remedy under the Agreement in respect of Contractor Defaults. Guidance Note 1 (Key Commercial Principles), section 1 - 21 (Step-In Rights) provides further explanation of the issues.]*

*The grounds that trigger step-in listed in clause 60.1 include those that are recommended as the basic requirement and adds (in square brackets) other triggers that might also be considered appropriate to many projects. Consider whether there are any other project specific grounds for the exercise of this step-in right, which might include circumstances relating to security (i.e. in respect of national security) or where there is a serious risk in respect of the public perception of the Contractor's competence and standing.]*

60.1 The Authority may take action under this clause in the following circumstances:

60.1.1 [there is a Default entitling the Authority to terminate in accordance with clause 55.1 (Termination for Authority Cause);]

60.1.2 there is a Default by the Contractor that is materially preventing or materially delaying the performance of the Services or any part of the Services;

60.1.3 there is a Delay that has or the Authority reasonably anticipates will result in the Contractor's failure to Achieve a Milestone in respect of Authority to Proceed or CPP by its Milestone Date;

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

60.1.5 [the Contractor has accrued Service Credits in any period of [6] [consecutive] months in excess of £[xxxxxx];] ***[Note: Specify appropriate threshold]***

***[Guidance: Note that this is also provided as a ground for termination under clause 55.1.5.6. The Authority will need to consider whether the nature of the Services are such that it can improve them by step-in or whether it should provide a ground for termination for Contractor Default and remove one instance accordingly. It would be possible to retain in both provisions, although the default position is to remove this provision as a right of step-in.]***

60.1.6 [the Contractor has accrued Delay Payments in excess of £[xxxxxx];] ***[Note: Specify appropriate threshold]***

60.1.7 [where the Contractor is not in breach of its obligations under this Agreement but the Authority considers that the circumstances constitute an emergency;]

***[Guidance: What can constitute an emergency will depend on the role of the Authority and the nature of the Services. An example would be the need of the civil powers to take over the distribution of utilities due to civil disturbance. The Authority should not concede this right without full consideration of the issues.]***

60.1.8 [where a Regulatory Body has advised the Authority that the exercise by the Authority of its rights under this clause is necessary];

60.1.9 because a serious risk exists to the health or safety of persons, property or the environment;

60.1.10 to discharge a statutory duty; and/or

60.1.11 on the occurrence of an Insolvency Event in respect of the Contractor.

**Action To Be Taken Prior To Exercise Of The Right Of Step-in**

60.2 Before the Authority exercises its right of step-in under this clause 60 it shall permit the Contractor the opportunity to demonstrate to the Authority's reasonable satisfaction within [ ] Working Days that the Contractor is still able to provide the Services in accordance with the terms of this Agreement and/or remedy the circumstances giving rise to the right to step-in without the requirement for the Authority to take action.

60.3 If the Authority is not satisfied with the Contractor's demonstration pursuant to clause 60.2, the Authority may:

60.3.1 where the Authority considers it expedient to do so, require the Contractor by notice in writing to take those steps that the Authority considers necessary or expedient to mitigate or rectify the state of affairs giving rising to the Authority's right to step-in;

60.3.2 appoint any person to work with the Contractor in performing all or a part of the Services (including those provided by any Sub-contractor); or

60.3.3 take the steps that the Authority considers appropriate to ensure the performance of all or part of the Services (including those provided by any Sub-contractor).

60.4 The Contractor shall co-operate fully and in good faith with the Authority, or any other person appointed in respect of clause 60.3.2, and shall adopt any reasonable methodology in providing the Services recommended by the Authority or that person.

## Exercise of the Right of Step-in

60.5 If the Contractor:

60.5.1 fails to confirm within 10 Working Days of a notice served pursuant to clause 60.3.1 that it is willing to comply with that notice; or

60.5.2 fails to work with a person appointed in accordance with clause 60.3.2; or

60.5.3 fails to take the steps notified to it by the Authority pursuant to clause 60.3.3,

then the Authority may take action under this clause either through itself or with the assistance of third party contractors, provided that the Contractor may require any third parties to comply with a confidentiality undertaking equivalent to clause 43 (Confidentiality).

60.6 If the Authority takes action pursuant to clause 60.5, the Authority shall serve notice ("**Step-in Notice**") on the Contractor. The Step-in Notice shall set out the following:

60.6.1 the action the Authority wishes to take and in particular the Services it wishes to control;

60.6.2 the reason for and the objective of taking the action and whether the Authority reasonably believes that the primary cause of the action is due to the Contractor's Default;

60.6.3 the date it wishes to commence the action;

60.6.4 the time period which it believes will be necessary for the action;

60.6.5 whether the Authority will require access to the Contractor's premises and/or the Sites;

60.6.6 to the extent practicable, the effect on the Contractor and its obligations to provide the Services during the period the action is being taken.

60.7 Following service of a Step-in Notice, the Authority shall:

60.7.1 take the action set out in the Step-in Notice and any consequential additional action as it reasonably believes is necessary to achieve (together, the "**Required Action**");

- 60.7.2 keep records of the Required Action taken and provide information about the Required Action to the Contractor;
- 60.7.3 co-operate wherever reasonable with the Contractor in order to enable the Contractor to continue to provide any Services in relation to which the Authority is not assuming control; and
- 60.7.4 act reasonably in mitigating the cost that the Contractor will incur as a result of the exercise of the Authority's rights under this clause.
- 60.8 For so long as and to the extent that the Required Action is continuing, then:
- 60.8.1 the Contractor shall not be obliged to provide the Services to the extent that they are the subject of the Required Action;
- 60.8.2 subject to clause 60.9, the Authority shall pay to the Contractor the Charges after the deduction of any applicable Service Credits, Delay Payments and the Authority's costs of taking the Required Action.
- 60.9 If the Required Action results in:
- 60.9.1 the degradation of any Services not subject to the Required Action; or
- 60.9.2 the non-Achievement of a Milestone,
- beyond that which would have been the case had the Authority not taken the Required Action, then the Contractor shall be entitled to an agreed adjustment of the Charges, provided that the Contractor can demonstrate to the reasonable satisfaction of the Authority that the Required Action has led to the degradation or non-Achievement.
- [Guidance: The parties may either seek to agree what the Authority will pay following any exercise of the Authority's step-in rights or seek to develop a formula for calculating the payment in schedule 7.1 (Charges and Invoicing). However the payment is calculated the Authority should only be required to pay that part of the Charges that represents the value of the Services that it receives net of the effect of step-in and its step-in costs. The Contractor will be concerned that any reduction in the Services will have been caused by the Authority's intervention. The onus of proving this should always remain with the Contractor. The parties will need to resolve the matter as a Dispute if they cannot agree the amount of any uplift in the Charges to reflect this.]*
- 60.10 Before ceasing to exercise its step in rights under this clause the Authority shall deliver a written notice to the Contractor ("**Step-Out Notice**"), specifying:

- 60.10.1 the Required Action it has actually taken; and
- 60.10.2 the date on which the Authority plans to end the Required Action ("**Step-Out Date**") subject to the Authority being satisfied with the Contractor's ability to resume the provision of the Services and the Contractor's plan developed in accordance with clause 60.11.
- 60.11 The Contractor shall, following receipt of a Step-Out Notice and not less than [20] Working Days prior to the Step-Out Date, develop for the Authority's approval a draft plan ("**Step-Out Plan**") relating to the resumption by the Contractor of the Services, including any action the Contractor proposes to take to ensure that the affected Services satisfy the requirements of this Agreement.
- 60.12 If the Authority does not approve the draft Step-Out Plan, the Authority shall inform the Contractor of its reasons for not approving it. The Contractor shall then revise the draft Step-Out Plan taking those reasons into account and shall re-submit the revised plan to the Authority for the Authority's approval. The Authority shall not withhold or delay its approval of the draft Step-Out Plan unnecessarily.
- 60.13 The Contractor shall bear its own costs in connection with any step-in by the Authority under this clause 60[, provided that the Authority shall reimburse the Contractor's reasonable additional expenses incurred directly as a result of any step-in action taken by the Authority under:
- 60.13.1 clauses 60.1.4 or 60.1.7; or
- 60.13.2 clauses 60.1.8, 60.1.9 and 60.1.10 (insofar as the primary cause of the Authority serving the Step-In Notice is identified as not being the result of a Contractor's Default).]

## **SECTION L - MISCELLANEOUS AND GOVERNING LAW**

### **61. ASSIGNMENT AND NOVATION**

- 61.1 The Contractor shall not assign, novate or otherwise dispose of or create any trust in relation to any or all of its rights and obligations under this Agreement without the prior written consent of the Authority.

- 61.2 The Authority may:
- 61.2.1 assign, novate or otherwise dispose of any or all of its rights and obligations under this Agreement and any associated third party licences to any other Contracting Authority; or
  - 61.2.2 novate this Agreement and any associated third party licences to any other body which substantially performs any of the functions that previously had been performed by the Authority. If this transfer increases the burden of the Contractor's obligations under this Agreement the Contractor shall be entitled to any additional Charges that are reasonable by way of compensation and which can be agreed through the Change Control Procedure.

*[Guidance: This provision provides for the possibility that the Authority may be merged with another public authority or privatised. The following provisions govern the continuing status of the Agreement and go on to set out changes that should occur automatically in the event that the Authority is privatised or its functions passed to a private company.]*

- 61.3 A change in the legal status of the Authority shall not (subject to clause 61.4) affect the validity of this Agreement and this Agreement shall be binding on any successor body to the Authority.
- 61.4 If this Agreement is novated to a body which is not a Contracting Authority, or a body which is not a Contracting Authority succeeds the Authority, (both "**transferee**" in the rest of this clause):
- 61.4.1 the Contractor shall be entitled to exercise a right of termination if:
    - 61.4.1.1 the transferee suffers an Insolvency Event; or
    - 61.4.1.2 the transferee commits:
      - (a) a material Default which Default, subject to the exercise of a process equivalent to the Remedial Plan Process, is not remedied within [30] days after notice of Default from the Contractor to the transferee requiring its remedy; or
      - (b) a material Default which is irremediable;
  - 61.4.2 the transferee may only assign, novate or otherwise dispose of its rights and obligations under this Agreement (or any part) with the prior written consent

of the Contractor (which consent shall not be unreasonably withheld or delayed); and

61.4.3 the following clauses shall be varied from the date of the novation or the date of the Authority's change of status (as appropriate) as if this Agreement had been amended by the parties in accordance with the Change Control Procedure:

61.4.3.1 in clauses 18 (Recovery of Sums Due) and 64.1.1, 64.1.2 and 64.2.2 (Prevention of Corruption) the words "or any other Crown Body" shall be deleted; and

61.4.3.2 the definition of "Crown Body" in schedule 1 shall be deleted and clause 43.6.1 (Confidentiality) shall be deleted.

61.5 [The Management Board shall be notified of, but shall not be required to pass any resolution on, any assignment, transfer or disposal by [the Contractor] [either party] in accordance with this clause 61. The [Contractor][party proposing to effect an assignment, transfer, disposal or request] shall provide the [Authority][other] with all relevant information as the [Authority][other] may reasonably request.]

## **62. WAIVER AND CUMULATIVE REMEDIES**

62.1 The rights and remedies provided by this Agreement may be waived only in writing by the relevant Representative in a manner that expressly states that a waiver is intended, and such waiver shall only be operative with regard to the specific circumstances referred to.

62.2 Unless a right or remedy of the Authority is expressed to be an exclusive right or remedy, the exercise of it by the Authority is without prejudice to the Authority's other rights and remedies. Any failure to exercise or any delay in exercising a right or remedy by either party shall not constitute a waiver of that right or remedy or of any other rights or remedies.

62.3 The rights and remedies provided by this Agreement are cumulative and, unless otherwise provided in this Agreement, are not exclusive of any right or remedies provided at law or in equity or otherwise under this Agreement.

### **63. RELATIONSHIP OF THE PARTIES**

Nothing in this Agreement is intended to create a partnership, or legal relationship of any kind that would impose liability upon one party for the act or failure to act of the other party, or to authorise either party to act as agent for the other party. Neither party shall have authority to make representations, act in the name of, or on behalf of, or to otherwise bind the other party.

### **64. PREVENTION OF CORRUPTION**

*[Guidance: This is a fundamental requirement for all public procurements and which applies to all Contracting Authorities. This clause may require amendment to suit your particular circumstances. Note that the clause will be amended automatically if the Agreement is subsequently transferred to the private sector (clause 61.4.3). This amendment does not revoke the underlying principle.]*

64.1 The Contractor shall not:

64.1.1 offer or agree to give any person working for or engaged by the Authority or any other Crown Body any gift or other consideration which could act as an inducement or a reward for any act or failure to act connected to this Agreement, or any other agreement between the Contractor and the Authority or any Crown Body, including its award to the Contractor and any of the rights and obligations contained within it; nor

64.1.2 enter into this Agreement if it has knowledge that, in connection with it, any money has been, or will be, paid to any person working for or engaged by the Authority or any other Crown Body by or for the Contractor, or that an agreement has been reached to that effect, unless details of any such arrangement have been disclosed in writing to the Authority before execution of this Agreement.

64.2 If the Contractor (including any Contractor employee, Sub-contractor or agent, in all cases whether or not acting with the Contractor's knowledge) breaches:

64.2.1 clause 64.1; or

64.2.2 the Prevention of Corruption Acts 1889 - 1916 in relation to this Agreement or any other contract with the Authority or any Crown Body,

the Authority may terminate this Agreement by written notice with immediate effect.

64.3 Any termination under clause 64.2 shall be without prejudice to any right or remedy which has already accrued, or subsequently accrues, to the Authority.

64.4 Notwithstanding clause 27 (Disputes), any dispute relating to:

64.4.1 the interpretation of clauses 64.1 to 64.3 inclusive; or

64.4.2 the amount or value of any gift, consideration or commission,

shall be determined by the Authority and the decision shall be final and conclusive.

## **65. PUBLICITY AND BRANDING**

65.1 The Contractor shall not:

65.1.1 make any press announcements or publicise this Agreement or its contents in any way; or

65.1.2 use the Authority's name or brand in any promotion or marketing or announcement of orders;

without the prior written consent of the Authority, which shall not be unreasonably withheld or delayed.

65.2 Each party acknowledges to the other that nothing in this Agreement either expressly or by implication constitutes an endorsement of any products or services of the other party (including the Services, the Contractor System and the Authority System) and each party agrees not to conduct itself in such a way as to imply or express any such approval or endorsement.

## **66. SEVERANCE**

*[Guidance: If the effect of the severance frustrates the fundamental purpose of the Agreement then it should be terminated. If included, the extension to this clause permits the parties to try and resolve the frustration caused by the severance without the need for a further procurement exercise. However, care must be taken to ensure that this exercise does not increase the benefit to the Contractor under the Agreement, e.g. by increasing the amount that the Contractor can recover, improving the terms on which the Services are supplied or the scope of the Services. To do so may result in an infringement of the procurement regulations.]*

If any provision of this Agreement is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed without effect to the remaining provisions. [If a provision of this Agreement that is fundamental to the

accomplishment of the purpose of this Agreement is held to any extent to be invalid, the Contractor and the Authority shall immediately commence good faith negotiations to remedy that invalidity].

## **67. FURTHER ASSURANCES**

Each party undertakes at the request of the other, and at the cost of the requesting party to do all acts and execute all documents which may be necessary to give effect to the meaning of this Agreement.

## **68. ENTIRE AGREEMENT**

*[Guidance: As a general rule documents that the parties wish to rely on, and to have any contractual effect, should be attached to the Agreement. Where this may cause difficulties, for example due to the quantity or the nature of the documents, consider the possibility of scanning the documents onto an optical disc and attaching a copy of the disc to the Agreement. The Agreement should include a table of contents of the documents on the disc and the documents should be saved in a read-only format.]*

68.1 This Agreement, together with the documents [referred to in it] [attached to it], constitutes the entire agreement and understanding between the parties in respect of the matters dealt with in it and supersedes, cancels and nullifies any previous agreement between the parties in relation to such matters [notwithstanding the terms of any previous agreement or arrangement expressed to survive termination].

68.2 Each of the parties acknowledges and agrees that in entering into this Agreement and the documents [referred to in it] [attached to it] it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or undertaking (whether negligently or innocently made) other than as expressly set out in this Agreement. The only remedy available to either party in respect of any such statements, representation, warranty or understanding shall be for breach of contract under the terms of this Agreement.

68.3 Nothing in this clause 68 shall operate to exclude any liability for fraud.

## **69. THIRD PARTY RIGHTS**

*[Guidance: Consider whether any third parties should be granted any rights under this Agreement. If they are, then consider whether those rights, whether general or specific, are to be included in the Agreement. Also, consider whether third parties should be consulted when the parties seek to make any Changes to the Agreement; the default position is that they should not, which should be made express in the Agreement. Legal advice may be required in determining these issues.]*

69.1 Subject to clause 43.6 (Confidentiality), and paragraph 8 of schedule 9.1 (Staff Transfer), a person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement but this does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

69.2 Any rights created under clause 69.1 may be altered or extinguished by the parties without the consent of the third party beneficiaries.

## 70. NOTICES

70.1 Any notices given under or in relation to this Agreement shall be in writing, signed by or on behalf of the party giving it and shall be served by delivering it personally or by sending it by pre-paid first class post, recorded delivery or registered post or by fax to the address and for the attention of the relevant party notified for such purpose or to such other address as that party may have stipulated in accordance with this clause. Notices shall not be sent by e-mail.

*[Guidance: Notices sent under this provision represent key documents in the management of the contract: it is not intended to refer to day-to-day correspondence. Consequently, notices should not be sent by email as the primary means of communication. Unlike faxes or letters where delivery can be easily identified, emails can be received without sufficient publicity. It is also not always possible for tracking devices to confirm the moment when an email is actually received or read. Emails may be used to send an advance copy of a notice provided that delivery is calculated in accordance with one of the other means, i.e. fax, post or hand delivery.]*

70.2 A notice shall be deemed to have been received:

70.2.1 if delivered personally, at the time of delivery;

70.2.2 in the case of pre-paid first class post, three Working Days from the date of posting; and

70.2.3 in the case of fax [or email], on the day of transmission if sent before 16:00 hours of any Working Day and otherwise at 09:00 hours on the next Working Day and provided that, at the time of transmission of a fax, an error-free transmission report has been received by the sender.

70.3 In proving service, it shall be sufficient to prove that the envelope containing the notice was addressed to the relevant party at its address previously notified for the receipt of notices (or as otherwise notified by that party) and delivered either to that address or into the custody of the postal authorities as pre-paid first class post,

recorded delivery, registered post or airmail letter, or that the notice was transmitted by fax to the fax number of the relevant party at its fax number previously notified for the receipt of notices (or as otherwise notified by that party).

**71. GOVERNING LAW AND JURISDICTION**

This Agreement shall be governed by and construed in accordance with English law and without prejudice to the Dispute Resolution Procedure each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales.

**IN WITNESS** of which this Agreement has been duly executed by the parties.

**SIGNED** for and on behalf of [*Authority*]

**SIGNED** for and on behalf of [*Contractor*]

Signature.....

Signature.....

Name: .....

Name.....

Position: .....

Position.....

Date.....

Date.....

*[Guidance: the appropriate form of execution clause will need to be considered for each set of parties].*

## SCHEDULE

### Definitions

*[Note: As schedules are completed additional defined terms will need to be included into this schedule 1. Definitions will also need to be reviewed and amended as necessary to ensure that they remain appropriate for use in respect of the particular needs of the project. Before amending any defined term do a check of the Agreement (including all schedules) to consider the effect of such change in the context of each clause/paragraph in which the term is used.]*

Unless the context otherwise requires the following expressions shall have the meanings set out below.

<b>"Achieve"</b>	in respect of a Test, to successfully pass a Test without any Test Issues and, in respect of a Milestone, the issue of a Milestone Achievement Certificate in respect of that Milestone in accordance with schedule 6.2 (Testing Procedures), and <b>"Achieved"</b> and <b>"Achievement"</b> shall be construed accordingly;
<b>["Additional Services "]</b>	[the services described as such in schedule 2.1 (Services Description) which are to be provided by the Contractor if requested by the Authority in accordance with clause 9.7 (Additional Services);]
<b>["Additional Services Implementation Plan"]</b>	[the implementation plan to effect the Additional Services agreed between the parties prior to the Effective Date and, if not agreed, to be developed by the Contractor and approved the Authority;]
<b>"Affected Party"</b>	the party seeking to claim relief in respect of a Force Majeure Event;
<b>"Affiliate"</b>	in relation to a body corporate, any other entity which directly or indirectly Controls, is Controlled by, or is under direct or indirect common Control with, that body corporate from time to time;
<b>"Agreement"</b>	the clauses of this Agreement together with the schedules and annexes to it [and any documents [referred to or] attached to it];  <i>[Guidance: consider whether it is appropriate to give contractual effect to documents which are merely referred to in the Agreement or its schedules - may introduce uncertainty].</i>
<b>"Assets"</b>	means all assets and rights used by the Contractor to provide the Services in accordance with this Service Agreement but excluding the Authority Assets;

<b>"ATP Milestone Date"</b>	the Milestone Date on which the Contractor is granted Authority to Proceed in respect of the [relevant Operational Service][Operational Services];
<b>"Authority Assets"</b>	means the Authority Materials, the specially written material, the authority infrastructure and any other data, software, assets, equipment or other property owned by the Authority and which is or may be used in connection with the provision or receipt of the Services;
<b>"Authority Cause"</b>	any breach by the Authority of any of the Authority's Responsibilities (unless caused or contributed to by the Contractor or as the result of any act or omission by the Authority to which the Contractor has given its prior consent);
<b>"Authority Confidential Information"</b>	all Personal Data and any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, know-how, personnel, and suppliers of the Authority, including all IPRs, together with all information derived from any of the above, and any other information clearly designated as being confidential (whether or not it is marked "confidential") or which ought reasonably be considered to be confidential;
<b>"Authority Data"</b>	<ul style="list-style-type: none"> <li>(a) the data, text, drawings, diagrams, images or sounds (together with any database made up of any of these) which are embodied in any electronic, magnetic, optical or tangible media, and which are: <ul style="list-style-type: none"> <li>(i) supplied to the Contractor by or on behalf of the Authority; or</li> <li>(ii) which the Contractor is required to generate, process, store or transmit pursuant to this Agreement; or</li> </ul> </li> <li>(b) any Personal Data for which the Authority is the Data Controller;</li> </ul>
<b>"Authority Materials"</b>	<p>means the Authority Data together with any materials, documentation, information, programs and codes supplied by the Authority to the Contractor, the IPR in which:</p> <ul style="list-style-type: none"> <li>(i) are owned or used by or on behalf of the Authority; and</li> <li>(ii) are or may be used in connection with the provision or receipt of the Services,</li> </ul> <p>but excluding any specially written material, Contractor Material and Third Party Material;</p>

<b>"Authority Premises"</b>	means premises owned, controlled or occupied by the Authority or its Affiliates which are made available for use by the Contractor or its Sub-contractors for provision of the Services (or any of them) on the terms set out in this Agreement or any separate agreement or licence;
<b>"Authority's Responsibilities"</b>	the responsibilities of the Authority specified in schedule 3 (Authority Responsibilities);
<b>"Authority Representative"</b>	the representative appointed by the Authority pursuant to clause 21.1 (Representatives);
<b>"Authority Software"</b>	software which is owned by or licensed to the Authority, including software which is or will be used by the Contractor for the purposes of providing the Services but excluding the Contractor Software;
<b>"Authority System"</b>	<p>the Authority's computing environment (consisting of hardware, software and/or telecommunications networks or equipment) used by the Authority or the Contractor in connection with this Agreement which is owned by or licensed to the Authority by a third party and which interfaces with the Contractor System or which is necessary for the Authority to receive the Services;</p> <p><i>[Guidance: Consider whether this definition should be limited to the Authority System existing at the Effective Date or as developed by the provision of the Services.]</i></p>
<b>"Authority to Proceed"</b>	the point at which the Contractor is authorised to provide the Operational Services to the Authority provided in the form of a Milestone Achievement Certificate relating to the Milestone which is recorded as being linked to ATP in the Outline Implementation Plan;
<b>"Base Case Financial Model"</b>	means the Financial Model projecting Costs and Charges in relation to the provision of Services prepared by the Contractor as at the of this Service Agreement consistent with the requirements in schedule 7.5 (Financial Model);
<b>"Base Cost"</b>	<p>means the direct cost to the Contractor, calculated per Man Day, of employing the Contractor Personnel, expressed per individual, and including (without limitation):</p> <ul style="list-style-type: none"> <li>(a) salary cost;</li> <li>(b) staff training;</li> <li>(c) work place accommodation;</li> <li>(d) ICT equipment and tools;</li> </ul>

- (e) pension allowances;
- (f) car allowances; and
- (g) any other fringe benefits;

<b>"BCDR Plan"</b>	any plan [prepared pursuant to schedule 8.6 (Business Continuity and Disaster Recovery Provisions)/set out in schedule 8.6 (Business Continuity and Disaster Recovery Provisions)], as may be amended from time to time];  <i>[Guidance: Ideally the Business Continuity and Disaster Recovery Plan will be agreed before execution of the Agreement and updated subsequently as the Service evolves]</i>
<b>"Capital Costs"</b>	means those costs which would be treated as capital costs according to generally accepted accounting principles within the UK which shall include the cost to be charged in respect of Assets by the Contractor to the Authority or (to the extent that risk and title in any Asset is not held by the Contractor) any cost actually incurred by the Contractor in respect of those Assets;
<b>"Change"</b>	any change to this Agreement;
<b>"Change Control Procedure"</b>	the procedure for changing this Agreement, as set out in schedule 8.2 (Change Control Procedure);
<b>"Change of Control"</b>	a change in Control of the Contractor[ or a material Sub-contractor];  <i>[Guidance: a change of Control in the material Sub-contractor may give rise to a right to terminate in accordance with clause 23.10.]</i>
<b>"Change in Law"</b>	any change in Law, which impacts on the performance of the Services which comes into force after the Effective Date;
<b>"Charges"</b>	the charges for the provision of the Services set out in and derived in accordance with schedule 7.1 (Charges and Invoicing), including any Milestone Payment, Stage Payment or Service Charge;
<b>["Commencement Date]</b>	[the date on which the Services start, being ◆ ;]  <i>[Guidance: Exceptionally, the Agreement may be subject to conditions precedent or otherwise the date the Contractor starts to supply the Services may be delayed. In this case the Agreement should become enforceable following signature (i.e. the Effective Date) but will need to stipulate when the Contractor is to start providing the Services. This will be the Commencement Date.]</i>

<b>"Commercially Sensitive Information"</b>	the information listed in schedule 4.2 comprising the information of a commercially sensitive nature relating to the Contractor, its IPR or its business or which the Contractor has indicated to the Authority that, if disclosed by the Authority, would cause the Contractor significant commercial disadvantage or material financial loss;
<b>"Comparable Supply"</b>	the supply of services to another customer of the Contractor that are the same or similar to the Services;
<b>"Compensation Payment"</b>	the payment calculated in accordance with paragraph 3 of schedule 7.2 (Payments on Termination);
<b>"Confidential Information"</b>	the Authority's Confidential Information and/or the Contractor's Confidential Information;
<b>"Contract Performance Point" or "CPP"</b>	is the date after the ATP Milestone Date on which the Contractor has demonstrated that the Contractor Solution or any relevant Service is working satisfactorily in its operating environment [which date is anticipated to be linked to the Milestone which is referred to as the "ATP Milestone" in the Outline Implementation Plan];
<b>"Contract Year"</b>	a period of 12 months [(or shorter period in the period immediately prior to the end of the Term)] commencing on the Effective Date or on an anniversary of the Effective Date;
<b>"Contracting Authority"</b>	any contracting authority as defined in Regulation 5(2) of the Public Contracts (Works, Services and Supply) (Amendment) Regulations 2000 other than the Authority;
<b>"Contractor's Background IPRs"</b>	<p>(a) IPRs owned by the Contractor before the Effective Date, for example those subsisting in the Contractor's standard development tools, program components or standard code used in computer programming or in physical or electronic media containing the Contractor's Know-How or generic business methodologies; and/or</p> <p>(b) IPRs created by the Contractor independently of this Agreement,</p> <p>but excluding IPRs owned by the Contractor subsisting in the Contractor Software;</p>
<b>"Contractor's Confidential Information"</b>	any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, know-how, personnel and suppliers of the Contractor, including IPRs, together with all information derived from the above, and any other information clearly designated as being confidential (whether or not it is marked as "confidential") or which ought reasonably to be considered to be

	confidential, including the Commercially Sensitive Information;
<b>"Contractor Equipment"</b>	the hardware, computer and telecoms devices and equipment supplied by the Contractor or its Sub-contractors (but not hired, leased or loaned from the Authority) for the provision of the Services;
<b>"Contractor's Group"</b>	the Contractor, its ultimate holding company and all subsidiaries of its ultimate holding company, the definitions of "holding company" and "subsidiary" being those set out in sections 736 and 736A of the Companies Act 1985;
<b>"Contractor Materials"</b>	means the Contractor Software together with the Documentation relating to the Contractor Software;
<b>"Contractor Personnel"</b>	all employees, agents, consultants and contractors of the Contractor and/or of any Sub-contractor;
<b>"Contractor Representative"</b>	the representative appointed by the Contractor pursuant to clause 21.1 (Representatives);
<b>"Contractor Software"</b>	software which is proprietary to the Contractor, including software which is or will be used by the Contractor for the purposes of providing the Services including the software specified as such in schedule 5.1 (Software);
<b>"Contractor System"</b>	the information and communications technology system used by the Contractor in performing the Services including the Software, the Contractor Equipment and related cabling (but excluding the Authority System);
<b>"Control"</b>	means that a person possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of the other person (whether through the ownership of voting shares, by contract or otherwise) and <b>"Controls"</b> and <b>"Controlled"</b> shall be interpreted accordingly;
<b>"Conviction"</b>	other than for minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-over orders (including any spent convictions as contemplated by section 1(1) of the Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of schedule 1 of the Rehabilitation of Offenders Act 1974 (Exemptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order, [or being placed on a list kept pursuant to section 1 of the Protection of Children Act 1999 or being made the subject of a prohibition or restriction under section 218(6) of the Education Reform Act 1988];

<b>"Correction Plan"</b>	the Contractor's plan for the remediation of any: <ul style="list-style-type: none"> <li>(a) Test Issues or the resolution of any non-conformities in any Deliverable to be agreed in accordance with clause 5 (Implementation Delays - General Provisions); or</li> <li>(b) Service Failure in accordance with clause 10.2.2 (Service Levels);</li> </ul>
<b>"C.O. Statement"</b>	the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector;
<b>"Costs"</b>	means the costs to be incurred by the Contractor in providing the Services including the Base Cost and the Overhead;
<b>"Crown Body"</b>	any department, office or agency of the Crown;
<b>"Data Controller"</b>	shall have the same meaning as set out in the Data Protection Act 1998;
<b>"Data Processor"</b>	shall have the same meaning as set out in the Data Protection Act 1998;
<b>"Data Protection Legislation"</b>	the Data Protection Act 1998, the EU Data Protection Directive 95/46/EC, the Regulation of Investigatory Powers Act 2000, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (SI 2000/2699), the Electronic Communications Data Protection Directive 2002/58/EC, the Privacy and Electronic Communications (EC Directive) Regulations 2003 and all applicable laws and regulations relating to processing of personal data and privacy, including where applicable the guidance and codes of practice issued by the Information Commissioner;
<b>"Data Subject"</b>	shall have the same meaning as set out in the Data Protection Act 1998;
<b>["Database"]</b>	[the rights in or to the database developed and supplied by the Contractor to the Authority in accordance with [the terms of this Agreement][the Contractor Solution][the Service Description];]
<b>["Date Compliant"]</b>	[means that no previous or future date change has had or will have any adverse impact on the performance or functionality of the Contractor System;]

<b>"Default"</b>	any breach of the obligations of the relevant party (including but not limited to fundamental breach or breach of a fundamental term) or any other default, act, omission, negligence or statement of the relevant party, its employees, servants, agents or Sub-contractors in connection with or in relation to the subject-matter of this Agreement and in respect of which such party is liable to the other;
<b>"Delay"</b>	the period of time by which the implementation of the Services by reference to the Implementation Plan is delayed arising from a failure to Achieve a Milestone;
<b>"Delay Payments"</b>	the amounts payable by the Contractor to the Authority in respect of a Delay and specified in schedule 7.1 (Charges and Invoicing);
<b>"Deliverable"</b>	an item, feature or service associated with the provision of the Services or a change in the provision of the Services which is required to be delivered by the Contractor at a Milestone Date or at any other stage during in the performance of this Agreement;
<b>"Deposited Software"</b>	the Software the Source Code of which is to be placed in escrow as listed in schedule 5.1 (Software);
<b>"Detailed Implementation Plan"</b>	means the plan developed in accordance with paragraph 4 of schedule 6.1 (Implementation Plan);
<b>"Dispute"</b>	any dispute, difference or question of interpretation arising out of or in connection with this Agreement, including any dispute, difference or question of interpretation relating to the Services, failure to agree in accordance with the Change Control Procedure or any matter where this Agreement directs the parties to resolve an issue by reference to the Dispute Resolution Procedure;
<b>"Dispute Resolution Procedure"</b>	the dispute resolution procedure set out in schedule 8.3 (Dispute Resolution Procedure);
<b>"Documentation"</b>	descriptions of the Services and Service Levels, technical specifications, user manuals, operating manuals, process definitions and procedures, and all such other documentation as: <ul style="list-style-type: none"> <li>(a) is required to be supplied by the Contractor to the Authority under this Agreement;</li> <li>(b) is required by the Contractor in order to provide the Services; or</li> <li>(c) has been or shall be generated for the purpose of providing the Services;</li> </ul>

<b>"Effective Date"</b>	the date on which this Agreement is signed by both parties;
<b>"Employee Liabilities"</b>	all claims, including claims for redundancy payments, unlawful deduction of wages, unfair, wrongful or constructive dismissal compensation, compensation for sex, race or disability discrimination, claims for equal pay, compensation for less favourable treatment of part-time workers, and any claims (whether in tort, contract or statute or otherwise), demands, actions, proceedings and any award, compensation, damages, tribunal awards, fine, loss, order, penalty, disbursement, payment made by way of settlement and costs and expenses reasonably incurred in connection with a claim or investigation (including any investigation by the Equal Opportunities Commission, the Disability Rights Commission, or the Commission for Racial Equality or other enforcement, regulatory or supervisory body and of implementing any requirements which may arise from such investigation), and any legal costs and expenses;
<b>"Employment Regulations"</b>	the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended or replaced or any other Regulations implementing the Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses;
<b>"Enhanced Licence Terms"</b>	the licence terms set out in Part B of schedule 5.2 (Licence Terms);
<b>"Environmental Information Regulations"</b>	the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such regulations;
<b>"Escalation Process"</b>	the initial stages of the process for dealing with Disputes without the intervention of third parties as set out in paragraph ) schedule 8.3 (Dispute Resolution Procedure);
<b>"Euro Compliant"</b>	means that: (i) the introduction of the euro within [England and Wales][any part of the UK] shall not affect the performance or functionality of any relevant items nor cause such items to malfunction, end abruptly, provide invalid results or adversely affect the Authority's business; (ii) all currency-reliant and currency-related functions (including all calculations concerning financial data) of any relevant items enable the introduction and operation of the euro; and (iii) in particular each and every relevant item shall, to the extent it performs or relies upon currency-related functions (including all calculations concerning financial data):

- (a) be able to perform all such functions in any number of currencies and/or in euros;
- (b) during any transition phase applicable to [England and Wales][the UK], be able to deal with multiple currencies and in relation to the euro and the national currency of [England and Wales][UK] dual denominations;
- (c) recognise accept, display and print all the euro currency symbols and alphanumeric codes which may be adopted by any government and other European Union body in relation to the euro;
- (d) incorporate protocols for dealing with rounding and currency conversion;
- (e) recognise data irrespective of the currency in which it is expressed (which includes the euro) and express any output data in the national currency of [England and Wales][the UK] and/or the euro; and
- (f) permit the input of data in euro and display an outcome in euro where such data, supporting the Authority's normal business practices, operates in euro and/or the national currency of [England and Wales][the UK];

**"Exit Management"**

the obligations and rights of the respective parties pertaining to managing a smooth transition from the provision of the Services by the Contractor to the provision of Replacement Services by the Authority or any Replacement Contractor, all as set out in schedule 8.5 (Exit Management);

**"Extension Period"**

the Authority's option to extend the Initial Term by a period [of [x] years][not exceeding [x] years];

*[Guidance: Any extension must have been specified in the OJEU Notice]*

**"Financial Model"**

means the Base Case Financial Model or where an Updated Financial Model exists, the most recent Updated Financial Model;

**"Force Majeure Event"**

any cause affecting the performance by a party of its obligations arising from acts, events, omissions, happenings or non-happenings beyond its reasonable control, including acts of God, riots, war or armed conflict, acts of terrorism, acts of government, local government or Regulatory Bodies, fire, flood, storm or earthquake, or disaster but excluding any industrial dispute relating to the Contractor, the Contractor Personnel or any

other failure in the Contractor or the Sub-contractor's supply chain;

*[Guidance: this definition (although standard) may be tailored.]*

**"FOIA"**

the Freedom of Information Act 2000 and any subordinate legislation made under this Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such legislation;

**"Future Services"**

the services described as such in schedule 2.1 (Services Description) which are to be provided by the Contractor if requested by Authority in accordance with clause 9.[ ] (Future Services);

*[Guidance: to be included only if desired - see guidance under clause 9 (Services)].*

**"General Change in Law"**

a Change in Law where the change is of a general legislative nature (including taxation or duties of any sort affecting the Contractor) or which affects or relates to a Comparable Supply;

**"Good Industry Practice"**

the exercise of that degree of skill, care, prudence, efficiency, foresight and timeliness as would be expected from a leading company within the relevant industry or business sector;

**["Guarantee"**

the deed of guarantee in favour of the Authority entered into by the Guarantor on or about the date of this Agreement (which is in the form set out in schedule 10 (Guarantee)), or any guarantee acceptable to the Authority that replaces it from time to time;]

**["Guarantor"]**

[ ], a company registered in [ ] and whose registered office is at [ ];

**"Health and Safety Regime"**

the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc. Act 1974 (and associated regulations), the Fire Precautions Act 1971, the Environmental Protection Act 1998, the Water Industry Act 1991, the Water Resources Act 1991 and any similar or analogous health, safety or environmental legislation in force from time to time;

*[Guidance: Only use if Authority requires the right to termination at 55.1.5.12]*

<b>["HR Policies"]</b>	<p>[the Authority's human resources policies as attached (as an appendix to schedule 2.1 (Services Description) );]</p> <p><i>[Guidance: Consider clause 9.3.5 to determine if any specific policies re human resources need to be referenced]</i></p>
<b>"ICT"</b>	information and communications technology;
<b>"ICT Environment"</b>	the Authority System and the Contractor System;
<b>"Implementation Plan"</b>	means the Outline Implementation Plan or (if and when approved by the Authority pursuant to clause 3 (Implementation Plan)) the Detailed Implementation Plan as updated in accordance with paragraph 4 of schedule 6.1 (Implementation Plan) from time to time;
<b>"Information"</b>	has the meaning given under section 84 of the Freedom of Information Act 2000;
<b>"Initial Term"</b>	<p>the period of [<i>x months or y years</i>] from the [Effective Date][Planned ATP Milestone Date][ATP Milestone Date];</p> <p><i>[Guidance: Consider the effect of a Delay on the ability of the Contractor to achieve a return on the project or of the Authority to receive value for money if the duration of the operational supply is artificially foreshortened if the Initial Term commences on a fixed date. It may be more appropriate to accept that the Initial Term will commence on a variable date determined by completion of the Pre-Operational Phase. Note that for larger projects there will be a number of Planned ATP Milestone Dates/ATP Milestone Dates. It will be necessary to determine which of these will initiate the Initial Term and the OJEU should be drafted accordingly.]</i></p>
<b>"Insolvency Event"</b>	<p>the occurrence of any of the following events (or any event analogous to any of the following in a jurisdiction other than England and Wales) in relation to the relevant entity:</p> <ul style="list-style-type: none"> <li>(a) [the entity passing a resolution for its winding up or a court of competent jurisdiction making an order for the entity to be wound up or dissolved or the entity being otherwise dissolved;]</li> <li>(b) [the appointment of an administrator of or, the making of an administration order in relation to the entity or the appointment of a receiver or administrative receiver of, or an encumbrancer taking possession of or selling, the whole or part of the entity's undertaking, assets, rights or revenue;]</li> <li>(c) [the entity entering into an arrangement, compromise or composition in satisfaction of its debts with its creditors or any class of them or takes steps to obtain</li> </ul>

a moratorium or makes an application to a court of competent jurisdiction for protection from its creditors;]

- (d) the entity being unable to pay its debts or being [capable of being] deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986; or
- (e) [the entity entering into any arrangement, compromise or compromise or composition in satisfaction of its debts with its creditors;]

However, a resolution by the relevant entity or a court order that such entity be wound up for the purpose of a bona fide reconstruction or amalgamation shall not amount to an Insolvency Event;

*[Guidance: This definition does not deal with personal insolvency, which may, in exceptional circumstances, be pertinent.]*

**"Insurances"**

all or any of the insurances required to be maintained by the Contractor pursuant to this Agreement as set out in schedule 2.6 (Insurance Requirements);

**["Investment Grade"]**

[with respect to the Contractor or the Guarantor, a rating from a Rating Agency equal to or greater than (i) "BA1" from Moody's (or its equivalent grade in the event of a change in rating scales by Moody's), or (ii) "BB+" from Standard and Poor's or Fitch (or its equivalent grade in the event of a change in rating scales by Standard and Poor's or Fitch, as appropriate);]

**"Intellectual Property Rights" or "IPRs"**

- (a) copyright, rights related to or affording protection similar to copyright, rights in databases, patents and rights in inventions, semi-conductor topography rights, trade marks, rights in Internet domain names and website addresses and other rights in trade names, designs, [Know-How, trade secrets and other rights in Confidential Information];
- (b) applications for registration, and the right to apply for registration, for any of the rights listed at (a) that are capable of being registered in any country or jurisdiction; and
- (c) all other rights having equivalent or similar effect in any country or jurisdiction;

<b>"IPR Claim"</b>	any claim of infringement or alleged infringement (including the defence of such infringement or alleged infringement) of any IPR used to provide the Services or as otherwise provided by the Contractor (or to which the Contractor has provided access) to the Authority in the fulfilment of its obligations;
<b>"Key Personnel"</b>	those members of the Contractor Personnel described in schedule 9.3 (Key Personnel) as such is modified by agreement by the parties;
<b>"Know-How"</b>	all ideas, concepts, schemes, information, knowledge, techniques, methodology, and anything else in the nature of know how relating to the Services but excluding know how already in the Contractor's or the Authority's possession before this Agreement;
<b>"Law"</b>	any applicable law, statute, bye-law, regulation, order, regulatory policy, guidance or industry code, rule of court or directives or requirements of any Regulatory Body, delegated or subordinate legislation or notice of any Regulatory Body;
<b>"Man Day"</b>	means 7.5 Man Hours, whether or not such hours are worked consecutively and whether or not they are worked on the same day;
<b>"Man Hours"</b>	means the hours spent by the Contractor Personnel properly working on the Services including time spent travelling (other than to and from the Contractor's offices, or to and from the premises at which the services are to be principally performed) but excluding lunch breaks;
<b>"Malicious Software"</b>	any software program or code intended to destroy, interfere with, corrupt, or cause undesired effects on program files, data or other information, executable code or application software macros, whether or not its operation is immediate or delayed, and whether the malicious software is introduced wilfully, negligently or without knowledge of its existence;  <i>[Guidance: this definition needs approval by the project's technical advisors]</i>
<b>"Management Board"</b>	the contract management board whose roles and responsibilities are outlined in schedule 8.1 (Governance);
<b>"Management Information"</b>	the management information specified in schedule 2.2 (Service Levels), schedule 7.1 (Charges and Invoicing) and schedule 8.1 (Governance) to be provided by the Contractor to the Authority;

<b>"Material Test Issue"</b>	<p>has the meaning given in schedule 6.2 (Testing Procedure);</p> <p><i>[Guidance: Refer to clause 6.2.2 and the related guidance note on the use of this defined term when drafting schedule 6.2 (Testing Procedures)]</i></p>
<b>"Measurement Period"</b>	has the meaning given in schedule 2.2 (Service Levels)
<b>"Milestone"</b>	<p>an event or task described in the Implementation Plan which, if applicable, must be completed by the relevant Milestone Date, including a milestones in respect of Authority to Proceed and any CPP;</p>
<b>"Milestone Achievement Certificate"</b>	<p>has the meaning given in schedule 6.2 (Testing Procedure);</p> <p><i>[Guidance: The procedure for the award of a Milestone Achievement Certificate should be set out in the Testing Procedures, including in respect of the grant of a Milestone Achievement Certificate where the relevant deliverable will not be subjected to any Testing.</i></p> <p><i>Note that the payment of Charges may be triggered by the grant of a Milestone Achievement Certificate. Therefore, consider whether there is a requirement to verify that the relevant Milestone has been properly Achieved where there is no related Testing.]</i></p>
<b>"Milestone Date"</b>	the date set against the relevant Milestone in the Implementation Plan;
<b>"Milestone Payment"</b>	a payment identified in schedule 7.1 (Charges and Invoicing) made following the issue of a Milestone Achievement Certificate;
<b>"month"</b>	a calendar month and <b>"monthly"</b> shall be interpreted accordingly;
<b>"Net Book Value"</b>	the value of any item being its purchase price less an amount equal to the amortisation of such item [in a straight line] at the time such value is to be calculated;
<b>"Non-conformance Report"</b>	a report including detail of the reasons why any Test has failed or of any non-conformities in respect of any Milestone;
<b>"Operational Phase"</b>	the phase in which the Contractor will deliver the Operational Services, identified as such in the Implementation Plan and commencing from the Operational Service Commencement Date;
<b>"Operational Service Commencement Date"</b>	The date on which the Operational Services commence as identified in the Implementation Plan;

<b>"Operational Services"</b>	the operational services described as such in the Services Description;
<b>"Operating Environment"</b>	the Authority System and the Sites;
<b>"Outline Implementation Plan"</b>	means the Plan set out at paragraph 2 of schedule 6.1 (Implementation Plan);
<b>"Overhead"</b>	means those costs which are intended to recover a proportion of the Contractor's indirect corporate costs, which shall not include any Base Costs or Capital Costs or any cost separately included in the Base Cost or Capital Cost;
<b>"Partial Termination"</b>	the partial termination of this Agreement to the extent that it relates to the provision of any part of the Service as further provided for in clause 55.5 (Termination);
<b>"Personal Data"</b>	shall have the same meaning as set out in the Data Protection Act 1998;
<b>"Planned ATP Milestone Date"</b>	the date set out in the Implementation Plan for the Achievement of the Milestone relating to Authority to Proceed;  <i>[Guidance: For larger projects there will be a number of Planned ATP Milestone Dates.]</i>
<b>"Pre-Operational Phase"</b>	the phase during which the Contractor will deliver Pre-Operational Services, being the period from the Commencement Date until the date of successful achievement of the ATP Milestone (as recorded in the appropriate Milestone Achievement Certificate);
<b>"Pre-Operational Services"</b>	the services provided by the Contractor for the design, build, test, implementation and roll out of the Operational Services as described in the Services Description;
<b>"Process"</b>	has the meaning given to it under the Data Protection Legislation but, for the purposes of this Agreement, it shall include both manual and automatic processing;
<b>["Project Accounts"]</b>	<i>[Note: Clause 24 (Audits) envisages an agreement as to the level of detail of financial information that "open book" entails]</i>
<b>"Project Specific IPRs"</b>	<ul style="list-style-type: none"> <li>(a) IPRs in items created by the Contractor (or by a third party on behalf of the Contractor) specifically for the purposes of this Agreement and updates and amendments of these items; [and/or</li> <li>(b) IPRs arising as a result of the performance of the</li> </ul>

Contractor's obligations under this Agreement];

but which shall not include the Contractor's Background IPRs or the Specially Written Software;

"Quality Plans"	the Contractor's plan that reflects the quality management systems as further described in clause 13 (Quality Assurance and Performance Monitoring);
["Rating Agency"]	[each of: (i) Moody's Investors Services, Inc., (or any successor to the ratings business thereof) ( <b>Moody's</b> ) and its Affiliates; (ii) Standard and Poor's Ratings Services, a division of the McGraw Hill Companies Inc (or any successor to the ratings business thereof) ( <b>Standard and Poor's</b> ) and its Affiliates; and (iii) Fitch Ratings Ltd (or any successor to the ratings business thereof) ( <b>Fitch</b> ) and its Affiliates;]
"Regulatory Bodies"	those government departments and regulatory, statutory and other entities, committees and bodies which, whether under statute, rules, regulations, codes of practice or otherwise, are entitled to regulate, investigate, or influence the matters dealt with in this Agreement or any other affairs of the Authority and " <b>Regulatory Body</b> " shall be construed accordingly;
"Relevant Conviction"	a Conviction that is relevant to the nature of the Services to be provided [ <i>or specify e.g. involving dishonesty, violence, sexual offence</i> ];
"Remedial Plan"	the plan referred to in clause 56 (Remedial Plan Process) to correct a material Default;
"Remedial Plan Process"	the process set out in clause 56 (Remedial Plan Process);
"Replacement Contractor"	any third party service provider of Replacement Services appointed by the Authority from time to time;
"Replacement Services"	any services which are substantially similar to any of the Services and which the Authority receives in substitution for any of the Services following the expiry or termination or Partial Termination of this Agreement, whether those services are provided by the Authority internally and/or by any third party;
"Representatives"	either or both of the Authority Representative and the Contractor Representative;
"Request for Information"	a request for information or an apparent request under the Code of Practice on Access to Government Information, FOIA or the Environmental Information Regulations;
"Required Action"	has the meaning given in clause 6.2.7.1 (Step-In Rights);

<b>"Revised Milestone Date"</b>	any revised date which is set for the Achievement of a Milestone;
<b>"Security Plan"</b>	the Contractor's security plan prepared pursuant to paragraph 3 of schedule 2.5 (Security Requirements and Plan) an outline of which is set out in Appendix of schedule 2.5 (Security Requirements);
<b>"Security Policy"</b>	the Authority's security policy annexed to schedule 2.5 (Security Requirements and Plan) as updated from time to time;
<b>"Service Charges"</b>	period payments made in accordance with schedule 7.1 (Charges and Invoicing) in respect of the supply of the Operational Services;
<b>"Service Credits"</b>	the sums payable in respect of the failure by the Contractor to meet one or more Service Levels as specified in schedule 7.1 (Charges and Invoicing);
<b>"Service Failure"</b>	a failure to deliver any part of the Services in accordance with the Service Levels;
<b>"Service Levels"</b>	the levels of service required to be provided, as prescribed in schedule 2.2 (Service Levels);
<b>"Service Threshold"</b>	the level below which the quality of any Services becomes unacceptable to the Authority as set out in schedule 2.2 (Service Levels);
<b>"Services"</b>	any and all of the services to be provided by the Contractor under this Agreement including those set out in schedule 2.1 (Services Description);
<b>"Services Description"</b>	the description of the Services set out in schedule 2.1 (Services Description);
<b>"Services Employees"</b>	those employees of the Contractor who shall from time to time be engaged in the performance of the Services in the relevant part of the undertaking within the Contractor and who may be transferred on the expiry or termination of this Agreement under the Employment Regulations to the Authority or a Replacement Contractor;
<b>"Sites"</b>	any premises from which the Services are provided or from which the Contractor manages, organises or otherwise directs the provision or the use of the Services or where any part of the Contractor System is situated or where any physical interface with the Authority System takes place;
<b>"Software"</b>	Specially Written Software, Contractor Software and Third Party Software;

<b>"Source Code"</b>	computer programs and/or data in eye-readable form and in such form that it can be compiled or interpreted into equivalent binary code together with all technical information and documentation necessary for the use, reproduction, modification and enhancement of such software;
<b>"Specially Written Software"</b>	any software created by the Contractor (or by a third party on behalf of the Contractor) specifically for the purposes of this Agreement;
<b>"Specific Change in Law"</b>	a Change in Law that relates specifically to the business of the Authority and which would not affect a Comparable Supply;
<b>"Staff Transfer"</b>	the transfer of staff pursuant to the Employment Regulations under this Agreement;
<b>["Staff Vetting Procedures"]</b>	[the Authority's procedures for the vetting of personnel whose role will involve the handling of information of a sensitive or confidential nature or the handling of which is subject to any relevant security measures;]
<b>"Stage Payments"</b>	any payment made in respect of a Milestone or on any other date in either case as identified in schedule 7.1 (Charges and Invoicing);  <i>[Guidance: Stage Payments made other than for delivery of value to the Authority should be made only where it results in clear and demonstrable value for money or pricing benefits to the Authority. Any Stage Payment made other than for delivery of value must be covered by a letter of credit to the Authority provided by the Contractor. Refer to Guidance Note 2 (Payment, Affordability and Asset Ownership) for further guidance.]</i>
<b>"Standard Licence Terms"</b>	the licence terms set out in Part A of schedule 5.2 (Standard Licence Terms);
<b>"Standards"</b>	[the British or international standards][Authority's internal policies and procedures] [Government codes of practice] and [guidance] referred to in schedule 2.3 (Standards) together with any other specified policies or procedures identified in schedule 2.3 (Standards);
<b>"Sub-contract"</b>	any contract or agreement or proposed contract or agreement between the Contractor and any third party whereby that third party agrees to provide to the Contractor the Services or any part thereof or facilities or services necessary for the provision of the Services or any part thereof or necessary for the management, direction or control of the Services or any part thereof;

<b>"Sub-contractor"</b>	the third party with whom the Contractor enters into a Sub-contract or its servants or agents and any third party with whom that third party enters into a Sub-contract or its servants or agents;
<b>"Contractor Solution"</b>	the Contractor's solution for the Services attached to this Agreement at schedule 4.1 (Contractor Solution);
<b>"Term"</b>	the period commencing on the Effective Date and ending on the expiry of the Initial Term or any Extension Period or on earlier termination of this Agreement;
<b>"Termination Notice"</b>	a notice to terminate this Agreement or part of the Services either immediately or at a date specified in the notice;
<b>"Termination Payment"</b>	the payment calculated in accordance with the formula set out in paragraph 2 of schedule 7.2 (Payments on Termination);
<b>"Tests" and "Testing"</b>	any tests required to be carried out under this Agreement, as further described in schedule 6.2 (Testing Procedure);
<b>"Testing Procedures"</b>	the applicable testing procedures and Test Success Criteria set out in schedule 6.2 (Testing Procedure);
<b>"Test Success Criteria"</b>	the test success criteria referred to in paragraph 13 of schedule 6.2 (Testing Procedure);
<b>"Third Party Materials"</b>	the Third Party Software together with the Documentation relating to the Third Party Software;
<b>"Third Party Software"</b>	software which is proprietary to any third party [other than an Affiliate of the Contractor] which is or will be used by the Contractor for the purposes of providing the Services, [including the software] [and] specified as such in schedule 5.1 (Software);
<b>"UK"</b>	the United Kingdom;
<b>"Updated Financial Model"</b>	means the Base Case Financial Model as updated pursuant to paragraph 4.1 of schedule 7.5 (Financial Model);
<b>"Use"</b>	<ul style="list-style-type: none"> <li>(a) with respect to the Standard Licence Terms, the right to load, execute, store, transmit, display and copy (for the purposes of loading, execution, storage, transmission or display) that Software;</li> <li>(b) with respect to the Enhanced Licence Terms for Software, the right to load, execute, store, transmit, display, copy (for the purposes of loading, execution, storage, transmission or display), modify, adapt, enhance, reverse compile, decode, translate, or</li> </ul>

otherwise utilise that Software; and

- (c) with respect to the Enhanced Licence Terms for Project Specific IPR other than Software, the right to copy, adapt, publish (including on the ICT Environment), distribute or otherwise use any other Project Specific IPR;

**"VAT"**

value added tax as provided for in the Value Added Tax Act 1994; and

**"Workforce Code"**

the Code of Practice on Workforce Matters in Local Authority Service Contracts;

**"Working Day"**

any day other than a Saturday, Sunday or public holiday in England and Wales.