

## **NHS Wales Standard Terms and Conditions for the Provision of Goods and Services**

**Version: 4**

**Issued: September 2023**

*[Guidance: please note the guidance provided in this document in italics is for internal purposes only and should be removed before being shared with third parties.]*

**NHS WALES STANDARD TERMS AND CONDITIONS FOR THE PROVISION OF GOODS  
AND SERVICES**

**FRONT PAGE**

**Indicate the selected option by marking “X” in the column “Select Relevant Agreement.”**

These Terms and Conditions can be used for letting a contract on a stand alone basis, or as a Framework Agreement where the call off contract is directly awarded to single/multiple Contractors. Where indicated in the table below that these Terms and Conditions are to be used as a Framework Agreement, they constitute the framework agreement and the call off contract terms and conditions.

*[Guidance: please note these Terms and Conditions are **NOT** suitable for use as a framework agreement requiring a mini-competition to be undertaken.]*

<b>Delivery Arrangement</b>	<b>Authority letting the Contract</b>	<b>Authority placing the Purchase Order</b>	<b>Purchase Order creates a Contract between</b>	<b>Select Relevant Agreement</b>
Direct Delivery	Single Organisation Contract-single Contractor	Authority e.g. sole HB/Trust/SHA	Authority letting the agreement and the Supplier	
Direct Delivery	Regional Contract with a single Authority lead	Authority or Beneficiary e.g. Authority letting agreement and regional Beneficiaries	Authority or Beneficiary placing the PO and the Contractor	
Direct Delivery	Single Organisation Framework Agreement- single or multiple Contractors	Authority e.g. sole HB/Trust/SHA	Authority and the Contractor	
Direct Delivery	(NWSSP/Velindre) All Wales Multi Organisation Framework	Beneficiary e.g. Multiple HB/Trust/SHA	Beneficiary placing the PO and the Contractor	

	Agreement- single or multiple Contractors			
<b>Delivery via Supply Chain Stores</b>	(NWSSP/Velindre) All Wales Multi Organisation Framework- single or multiple Contractors	NWSSP/Velindre	NWSSP/Velindre and the Contractor	

### **This Contract**

By this Contract, it is agreed between the Authority, any Beneficiary and the Contractor (as hereinafter defined) that these Terms and Conditions shall govern and shall be incorporated into any Specific Contract for the sale and purchase of goods and any ancillary services which is entered into between the Parties in the manner set out in this Contract.

### **Specific Contracts**

Where a Purchase Order is issued by the Authority on terms that the same incorporates these terms and conditions (as amended to apply to any particular case), a Specific Contract for the sale and purchase of the goods and services specified in the Purchase Order will be made or alternatively deemed to be made between the Authority and the Contractor on the Commencement Date of that Purchase Order and upon the terms stated in that Purchase Order. Any provision to the contrary in any document issued by or on behalf of the Contractor, whether before or after the date of the Purchase Order, shall be deemed to have no effect.

Reference in this document to a Contract includes this Contract and any Specific Contract formed pursuant to the provisions of this document.

Please ensure each Purchase Order issued contains the following wording:

***“This Purchase Order and any Specific Contract thereby created is subject to the NHS Wales Standard Terms and Conditions for Provision of Goods and Services, together with any optional Schedules, Optional or Extra Key Provisions agreed and Services at the time of contract award. In the event the Specific Contract terms and conditions are modified or varied, then the***

***conditions as modified or varied shall be incorporated into the Specific Contract.”***

The Authority and the Contractor undertake to comply with the provisions of the relevant Schedules to be included in the Contract where indicated below in the performance of the Contract. Schedules 1 to 7 shall apply to this Contract. Optional schedules shall only apply when checked.

The Contractor shall supply to the Authority and/or Beneficiary, and the Authority and/or Beneficiary shall receive and pay for, the Goods and Services on the terms of the Contract.

The Definitions and Interpretations in Schedule 3 apply to the use of all capitalised terms in this Contract.

**For the avoidance of doubt, any actions or work undertaken by the Contractor prior to the receipt of a Purchase Order covering the relevant Goods and Services shall be undertaken at the Contractor’s risk and expense and the Contractor shall only be entitled to invoice for Goods and Services covered by a valid Purchase Order.**

### Schedules

<b>Schedule 1</b>	Key Provisions
<b>Schedule 2</b>	General Terms and Conditions
<b>Schedule 3</b>	Definitions and Interpretations
<b>Schedule 4</b>	Specification and Tender Response Document
<b>Schedule 5</b>	Pricing
<b>Schedule 6</b>	Data Processing
<b>Schedule 7</b>	Transfer of Staff

### Optional Schedules

<b>Schedule 8</b>	Third Party Beneficiaries	<input type="checkbox"/> (only applicable if this box is checked)
<b>Schedule 9</b>	Business Continuity Plan	<input type="checkbox"/> (only applicable if this box is checked)
<b>Schedule 10</b>	Contractor's Network & Information Security	<input type="checkbox"/> (only applicable if this box is checked)
<b>Schedule 11</b>	Retendering and Handover	<input type="checkbox"/> (only applicable if this box is checked)

*[Guidance: If you have Optional Schedule requirements specific to a particular agreement, check the box above with an 'X' and populate the relevant Schedule. If a Schedule does not apply please leave the relevant box blank.]*

## **SCHEDULE 1**

### **KEY PROVISIONS**

#### **1 Application of the Key Provisions**

- 1.1 The standard Key Provisions at Clauses 1 to 7 of this Schedule 1 shall apply to this Contract.
- 1.2 The optional Key Provisions at Clauses 8 to 9 of this Schedule 1 shall only apply to this Contract where they have been checked and information completed as applicable.
- 1.3 Extra Key Provisions shall only apply to this Contract where such provisions are set out at the end of this Schedule 1.

#### **2 Contract Term**

- 2.1 This Contract commences on the Commencement Date.
- 2.2 The Contract Term of this Contract shall be as set out in the Purchase Order or where not set out in the Purchase Order as set out in the Specification and Tender Response Document.
- 2.3 The Contract Term may be extended in accordance with Clause 19.2 of Schedule 2 provided that the duration of this Contract shall be no longer than originally advertised by the Authority and/or Beneficiary (including any options to extend).

#### **3 Contract Managers**

The Contract Managers at the commencement of this Contract shall be as set out in the Specification and Tender Response Document or as otherwise agreed between the Parties in writing.

#### **4 Management levels for escalation and dispute resolution**

- 4.1 Unless otherwise agreed by the Parties in writing, the management levels at which a dispute will be dealt with are as follows:

<b>Level</b>	<b>Authority representative</b>	<b>Contractor representative</b>
1	Contract Manager	Contract Manager
2	Assistant Director or equivalent	Assistant Director or equivalent

3	Director or equivalent	Director or equivalent
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## **5 Order of precedence**

5.1 Subject always to Clause 1.12 of Schedule 3, should there be a conflict between any other parts of this Contract the order of priority for construction purposes shall be:

- 5.1.1 the provisions on the Front Page of this, the NHS Wales Terms and Conditions for the Provision of Goods and Services version 4 2023 Edition;
- 5.1.2 Schedule 1: Key Provisions;
- 5.1.3 Schedule 4: Specification and Tender Response Document (in respect only of the Authority's or Beneficiary's statement and requirements contained therein);
- 5.1.4 Schedule 2: General Terms and Conditions;
- 5.1.5 Schedule 3 Definitions and Interpretations;
- 5.1.6 Schedule 5: Pricing;
- 5.1.7 the order in which all subsequent Schedules, if any, appear; and
- 5.1.8 any other documentation forming part of the Contract in the date order in which such documentation was created with the more recent documentation taking precedence over older documentation to the extent only of any conflict.

*[Guidance: Key Provision 5 addresses the order of precedence of various parts of the agreement for construction purposes. This should be carefully checked to confirm that it is appropriate with any changes made accordingly.]*

## **6 Beneficiaries**

- 6.1 Any of the Beneficiaries are entitled to place Purchase Orders.
- 6.2 For the avoidance of doubt, any successor bodies of any of the above entities shall be entitled to place Purchase Orders and shall be deemed Beneficiaries for the purposes of this Contract.

*[Guidance: Ensure the names of those contracting authorities entitled to use the agreement, is consistent with the relevant OJEU contract notice for the agreement. This may be by including a link to a relevant list of such bodies. The Beneficiary who places the Purchase Order as the contracting entity becomes the Authority as defined in this Contract. The Authority may place Purchase Orders on behalf of other Beneficiaries.]*

## **7 Application of TUPE at the commencement of the provision of Goods and Services**

7.1 In the event of a Final Judicial Determination or otherwise should the Authority's view be that the award of this Contract does not give rise to a transfer of employment of any employee or employees of the Authority or an incumbent contractor to the Contractor pursuant to TUPE, the provisions of Part A of Schedule 7 shall apply.

7.2 In the event of a Final Judicial Determination or otherwise should the Authority's view be that the award of this Contract does give rise to a transfer of employment of any employee or employees of the Authority or a Third Party to the Contractor pursuant to TUPE the following provisions shall apply:-

7.2.1 Should any employee or employees transfer from the Authority to the Contractor, under TUPE the provisions of Part B and Part D of Schedule 7 shall apply.

7.2.2 Should any employee or employees transfer from the incumbent contractor to the Contractor under TUPE, the provisions of Part C and, as appropriate, Part D of Schedule 7 shall apply.

7.2.3 Should any employee or employees transfer both from the Authority and from the incumbent contractor to the Contractor under TUPE, the provisions of Parts B, C and, as appropriate, Part D of Schedule 7 shall apply.

*[Guidance: Please note that legal advice should be sought from the Employment Team at NWSSP and your local HR department, on the question of whether or not TUPE is considered to apply. If it is considered to apply, further advice should be sought from the Commercial Team at NWSSP.]*

*[Where the Authority is entering into a Contract on behalf of a Beneficiary **Schedule 7 should not be used** and legal advice should be sought from the Commercial Team at NWSSP. This is because the Beneficiary will be required to provide an indemnity.]*



## **Optional Key Provisions**

*[Guidance: These optional Key Provisions enable the Authority to:*

- (a) vary some of the default provisions in the General Terms and Conditions as appropriate to the agreement (e.g. Key Provision 9 allows for the insurance levels and/or types to be varied from the default position set out in the Contract); and*
- (b) add provisions relevant to a particular agreement that are not part of the default provisions in the General Terms and Conditions (e.g. there is an option to specify particular quality assurance standards).*

*If any of the optional Key Provisions apply, this must be indicated in the draft agreement issued at the tender stage by checking the boxes with an 'X', completing the text in square brackets as appropriate and adding any required schedules. If a Clause does not apply, leave the relevant box blank.]*

### **8      Quality assurance standards ☐ (only applicable if this box is checked and the standards are listed)**

8.1      The following quality assurance standards shall apply, as appropriate, to the provision of the Services:

8.2      ***[insert standards]***.

*[Guidance: If you have quality assurance requirements specific to a particular agreement, such as compliance with and maintenance of ISO 9001, check the box above and insert the requirements in the second line.]*

### **9      Different levels and/or types of insurance ☐ (only applicable to the Contract if this box is checked and the table sets out the requirements)**

9.1      The Contractor shall put in place and maintain in force the following insurances (pursuant to cl 30 below) with the following minimum cover per claim:

<b>Type of insurance required</b>	<b>Minimum cover per claim</b>
Employer's liability insurance	
Public liability insurance	
Professional indemnity insurance	

Cyber Security Insurance	
Insert other types of insurance as appropriate	

*[Guidance: This Clause relates to Clause 30 of Schedule 2 of this agreement. Clause 30 of Schedule 2 of this agreement requires the Contractor to have in place an adequate minimum level of cover or any sum as required by law. If this default position is not appropriate in relation to the nature and risks of the particular agreement, you need to check the box above and insert in the table what different types and/or levels of insurance the Contractor must have in place. Consider the need for Cyber Security insurance if the nature of the contract to be entered into requires this type of insurance. Refer to Welsh Risk Pool if advice on insurance levels is required.]*

### **Extra Key Provisions**

*[Guidance: Insert extra Key Provisions (if any) as required by the particular agreement. Where the detail of the issue will be dealt with in a Schedule, remember to cross reference the Schedule in the Key Provisions and refer to it in the Table of Schedules on the Front Page of this agreement. Also remember to draft and add any new definitions as required for any extra Key Provisions added.]*

## **SCHEDULE 2**

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- 9. Property and Risk**
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- 14. Safety, Quality and Efficacy of Medicinal Products**
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- 38. Arrangements on Termination**
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- 62. Anti Slavery
- 63. Formation of Contract
- 64. Law & Jurisdiction

*[Guidance: clauses 47 and 57 are optional clauses - in the event these clauses are not used they should be marked “**NOT USED**” to ensure the clause numbering remains consistent throughout.]*

## **1. Appointment**

- 1.1 The Authority appoints the Contractor to provide the Goods and Services:
  - 1.1.1 promptly and in any event within any time targets as may be set out in this Contract;
  - 1.1.2 in accordance with all other provisions of this Contract;
  - 1.1.3 in accordance with any quality assurance standards as set out in the Specification and Tender Response Document and/or the Purchase Order;
  - 1.1.4 in accordance with the Law and Guidance;
  - 1.1.5 in accordance with Good Industry Practice;
  - 1.1.6 in accordance with the Policies (including, when on any premises of the Authority and/or Beneficiary or on any other premises where it works alongside the Authority's and/or Beneficiary's staff, any racial discrimination and equal opportunities policies), rules, procedures and the quality standards of the Authority and/or Beneficiary as amended from time to time;
  - 1.1.7 in a professional and courteous manner so as to reflect and promote the image of the Authority and/or Beneficiary.
- 1.2 In complying with its obligations under this Contract, the Contractor shall, and shall procure that all Staff shall, act in accordance with the NHS values as set out in the NHS Constitution from time to time.
- 1.3 The Contractor shall comply fully with its obligations set out in the Specification and Tender Response Document;
- 1.4 The Contractor shall ensure that all relevant consents, authorisations, licences and accreditations required to supply the Goods and Services to the Authority and/or Beneficiary;
- 1.5 If there are any Major Incidents (as defined in the Authority's Major Incident Policy) and/or a Critical Incident (and where such definitions may be updated by the Emergency Planning Society) that in any way relate to or involve the use of the Goods and Services by the Authority and/or Beneficiary, the Contractor shall cooperate fully with the Authority and/or Beneficiary in relation to the Authority's and/or Beneficiary's application of the Policies on

reporting and responding to all Major and/or Critical Incidents, including incidents requiring investigation, and shall respond promptly to any reasonable and proportionate queries, questions and/or requests for information that the Authority and/or Beneficiary may have in this context in relation to the Goods and Services.

- 1.6 The Contractor accepts the terms of appointment as provided in Clauses 1.1-1.5 in consideration of the Contract Price.

## **2. Performance of the Goods and Services**

- 2.1 Subject to Clause 26.1, the Contractor shall provide at its own expense all Staff, equipment, tools, appliances, materials, items, technology or other resources required for the provision of the Goods and Services.
- 2.2 To the extent that the Specification and Tender Response Document includes the date, format and method of delivery of the Goods and Services and Deliverables and/or the applicable performance measures, performance due-by dates, minimum performance levels and methods of performance measurement in respect of the Goods and Services, the Contractor will abide by the same.
- 2.3 Time shall be of the essence with regard to the performance of the obligations of the Contractor under the Contract.
- 2.4 The Authority and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Authority and/or Beneficiary to derive the full benefit of the Contract. At all times in the performance of the Goods and Services, the Contractor will co-operate fully with any other contractors appointed by the Authority and/or Beneficiary in connection with other goods and services at the Location.
- 2.5 In addition to any more specific obligations imposed by the terms of the Contract, it shall be the duty of the Contractor to notify the Authorised Officer of all significant changes to staffing, rates of pay or conditions of employment, or hours of work or other technological changes at least one Month prior to the implementation of any such revised arrangements.
- 2.6 The Contractor shall provide information in a format, medium and at times specified by the Authority and/or Beneficiary, related to the performance of the Goods and Services as may be reasonably required.
- 2.7 In providing the Goods and Services, the Contractor shall use Good Industry Practice to ensure that any computer systems and/or related hardware and/or

software it uses are free from corrupt data, viruses, worms and any other computer programs which might cause harm or disruption to the Authority's and/or Beneficiary's computer systems.

- 2.8 If at any time the Contractor becomes aware of any act or omission or any proposed act or omission by the Authority and/or Beneficiary or by any member, official or member of staff of the Authority and/or Beneficiary which prevents or hinders or may prevent or hinder the Contractor from providing the Goods and Services in accordance with the Contract then the Contractor shall immediately inform the Authorised Officer of that fact. For the avoidance of doubt, the Contractor's compliance with this Clause shall not in any way relieve the Contractor of any of its obligations under the Contract.
- 2.9 The Authority and/or Beneficiary shall provide the Contractor with copies of its policies, rules, procedures and quality standards (and shall promptly inform the Contractor of any amendments to such documents) to enable the Contractor to comply with its obligations under the Contract.
- 2.10 The Authority and/or Beneficiary may, where necessary, require the Contractor to set up and maintain appropriate policies, rules, procedures and quality standards in relation to the employment of his own staff whilst carrying out their duties in relation to the Contract at the Location. This shall include, but not be limited to, disciplinary and grievance procedures. The Contractor shall provide the Authority and/or Beneficiary with copies of such policies, rules, procedures and quality standards (and shall promptly inform the Authority and/or Beneficiary of any amendments to such documents).
- 2.11 The Contractor will immediately notify the Authorised Officer of any actual or potential problems relating to the Contractor's own suppliers that affects or might affect the Contractor's ability to provide the Goods and Services.
- 2.12 The Contractor will be responsible for providing and maintaining the Goods and Services at all times and will ensure continuity of supply (at no extra cost to the Authority and/or Beneficiary) in accordance with the Specification and Tender Response Document. The Contractor must have in place contingency plans and arrangements which are approved by the Authority to ensure continuity of supply (Business Continuity Plan) at no additional cost.
- 2.13 The Contractor will immediately notify the Authorised Officer of any actual or potential industrial action, including strike action, whether such action be of his own staff or others, that affects or might affect his ability at any time to provide the Goods and Services.
- 2.14 The Contractor will be responsible for providing and maintaining the Goods and Services during industrial action, at no additional cost.



- 2.15 In the event of the Contractor being unable to maintain the Goods and Services, the Contractor shall without prejudice to the remedies of the Authority and/or Beneficiary permit the Authorised Officer and his staff, to have access to and unrestricted use of such machinery, equipment and materials which being the property of the Contractor which are deemed necessary to maintain the Goods and Services by the Authorised Officer during industrial action, or any other such occurrence, without additional charge.
- 2.16 In the event of a Major Incident (as defined in the Authority's Major Incident Policy) and/or a Critical Incident (and where such definitions may be updated by the Emergency Planning Society) the Contractor shall perform the Goods and Services in accordance with the relevant section of the Specification and Tender Response Document.
- 2.17 The Contractor will ensure that its Staff, Sub-Contractors or agents working at the Location (or any other NHS Wales premises) shall not smoke whilst at the Location. The Contractor shall ensure they comply with the Smoke-Free Premises etc (Wales) Regulations 2007 during the Contract Term.

### **3. Deliverables**

- 3.1 Wherever the Goods and Services require the Contractor to provide a Deliverable:
- 3.1.1 such Deliverable will be delivered in the form prescribed and in accordance with the Specification and Tender Response Document. If no such form is prescribed in the Specification and Tender Response Document, the Contractor will provide Deliverables in a professional form to comply with the requirements (including as to time of delivery) notified to the Contractor by the Authorised Officer;
- 3.1.2 the Authority and/or Beneficiary may accept such Deliverable or reject it in its reasonable discretion on the grounds that such Deliverable is (in whole or in part) not of satisfactory quality and/or does not meet the brief set out in the Specification and Tender Response Document or the requirements otherwise made known to the Contractor by the Authority and/or Beneficiary;
- 3.1.3 the Authority and/or Beneficiary will not reject any Deliverable (wholly or in part) without providing written reasons to the Contractor as to why such Deliverable has been rejected;
- 3.1.4 any dispute as to whether the Authority and/or Beneficiary has exercised its right to reject any Deliverable reasonably shall be resolved by the Dispute Resolution Procedure; and

- 3.1.5 any Deliverables which are rejected shall be replaced promptly by the Contractor (at no extra charge to the Authority and/or Beneficiary) by Deliverables which are reasonably satisfactory to the Authorised Officer.
- 3.2 The Contractor shall comply fully with its obligations set out in the Specification and Tender Response Document (to include, without limitation, the KPIs and all obligations in relation to the quality, performance characteristics, supply, delivery and installation and training in relation to use of the Goods).
- 3.3 Unless otherwise agreed by the Parties In Writing, the Goods shall be new, consistent with any sample, and shall comply with any applicable specification set out in this Contract (to include, without limitation, the provisions of the Authority's and/or Beneficiary's requirements set out in the Specification and Tender Response Document and the Contractor's response to such requirements) and any applicable manufacturers' specifications.
- 3.4 The Contractor shall ensure that all relevant consents, authorisations, licences and accreditations required to supply the Goods are in place prior to the delivery of any Goods to the Authority and/or Beneficiary.
- 3.5 If there are any incidents that in any way relate to or involve the use of the Goods and Services by the Authority and/or Beneficiary, the Contractor shall cooperate fully with the Authority and/or Beneficiary in relation to the Authority's and/or Beneficiary's application of the Policies on reporting and responding to all incidents, including serious incidents requiring investigation, and shall respond promptly to any reasonable and proportionate queries, questions and/or requests for information that the Authority and/or Beneficiary may have in this context in relation to the Goods.
- 3.6 If there are any quality, performance and/or safety related reports, notices, alerts or other communications issued by the Contractor or any regulatory or other body in relation to the Goods and/or the Services, the Contractor shall promptly provide the Authority and/or Beneficiary with a copy of any such reports, notices, alerts or other communications.
- 3.7 Upon receipt of any such reports, notices, alerts or other communications pursuant to Clause 3.6 the Authority and/or Beneficiary shall be entitled to request further information from the Contractor and/or a meeting with the Contractor, and the Contractor shall cooperate fully with any such request.
- 3.8 The Contractor accepts the terms of appointment as provided in Clauses 3.1 – 3.7 in consideration of the Contract Price.

## **4. Delivery**

- 4.1 The Contractor shall deliver the Goods in accordance with any delivery timescales, delivery dates and delivery instructions (to include, without limitation, as to delivery location and delivery times) set out in the Specification and Tender Response Document, Purchase Order or as otherwise agreed with the Authority In Writing.
- 4.2 Delivery shall be completed when the Goods have been unloaded at the Location and such delivery has been accepted by a duly authorised Person of the Authority and/or Beneficiary. The Authority and/or Beneficiary shall procure that such duly authorised Person of the Authority and/or Beneficiary is at the delivery location in order to accept such delivery.
- 4.3 Unless agreed in advance with the Authority and/or Beneficiary, if the Goods are delivered more than 5 days before the date specified in the Purchase Order (or such other date which the Authority and/or Beneficiary has acknowledged in Writing), the Authority and/or Beneficiary shall be entitled at its sole discretion to refuse to take delivery or to charge for insurance and storage of the Goods until the contractual date for delivery.
- 4.4 In the event that the Authority and/or Beneficiary require next day or short notice deliveries which are not provided for in the Specification and Tender Response Document, the Contractor may pass on any reasonable, pre-agreed additional costs relating to the delivery of the Goods to the Authority and/or Beneficiary placing the Purchase Order.
- 4.5 In the event that the Authority and/or Beneficiary has specified a date in the Purchase Order but has not been ready to receive the Goods on that date, the Contractor may charge reasonable, pre-agreed additional costs of return, storage and redelivery to the Authority and/or Beneficiary, notwithstanding Clause 16.
- 4.6 Any carrier engaged in the carriage and/or delivery of the Goods shall be deemed to be an agent of the Contractor and not the Authority and/or Beneficiary.

- 4.7 Part deliveries may be rejected unless the Authority and/or Beneficiary has previously agreed In Writing to accept such deliveries.
- 4.8 Unless otherwise stated in the Purchase Order, the Contractor for the purposes of this Contract is the importer and is responsible for obtaining all export and import licences for the Goods and for paying any VAT and associated costs in connection with such importation and shall be responsible for any delays due to such obligations not being carried out by the Contractor under this Clause 4.8.
- 4.9 In the case of any Goods supplied from outside the United Kingdom, the Contractor shall ensure that accurate information is provided to the Authority and/or Beneficiary as to the country of origin of the Goods and shall be liable to the Authority and/or Beneficiary for any additional duties or taxes for which the Authority and/or such Beneficiary may be accountable should the country of origin prove to be different from that advised by the Contractor.
- 4.10 Where the Authority and/or Beneficiary agrees In Writing to accept delivery by instalments the Contract will be construed as a Specific Contract in respect of each instalment. Failure by the Contractor to deliver any one instalment may allow the Authority and/or Beneficiary at its option to treat the whole Contract as repudiated depending upon the circumstances of the non-delivery, such option not to be unreasonably invoked.
- 4.11 Any arrangement to deliver the Goods where carriage is to be charged separately or any arrangement by which the Goods are collected by the Authority and/or Beneficiary in return for a discount on the Contract Price shall be recorded In Writing and signed by a duly authorised signatory on behalf of the Authority and/or Beneficiary. Where due to an emergency such arrangements cannot be committed to writing and signed off as aforesaid the Parties shall confirm such arrangements In Writing as soon as possible thereafter.
- 4.12 The Contractor will ensure that its staff, Sub-Contractors or agents delivering Goods to the Location (or otherwise performing the terms of the Contract at the Location) shall not smoke whilst at the Location. The Contractor shall

procure that they comply with The Smoke-free Premises etc. (Wales) Regulations 2007 (as amended).

- 4.13 The Contractor will ensure that the Goods are provided in accordance with the Law as applicable and with Good Industry Practice.

## **5. Time**

- 5.1 The time of delivery shall be (i) as stated on the face of the Purchase Order (or otherwise agreed In Writing by the Parties) alternatively (ii) if no time for delivery is expressly agreed then delivery shall be made within 14 days of receipt of the Purchase Order.
- 5.2 Where the time of delivery has been expressly stated in the Purchase Order or otherwise agreed In Writing then time for delivery shall be of the essence without prejudice to any other right or remedy of the Authority and/or Beneficiary. For the avoidance of doubt time shall not be of the essence where delivery is to be made within 14 days of receipt of the Purchase Order pursuant to clause 5.1(ii) above.
- 5.3 The Parties may by agreement In Writing vary the time of delivery provided that a minimum of 3 days' notice is given by the Party seeking the variation to the other Party In Writing.
- 5.4 Failure by the Contractor to deliver the Goods or any part of them within the time agreed in accordance with Clause 5.1 (or as varied in accordance with Clause 5.3) shall (without prejudice to any other rights or remedies to which such failure may give rise) entitle the Authority to terminate the Purchase Order and purchase other goods of the same or similar description to make good such default and recover from the Contractor the amount by which the cost of purchasing other goods exceeds the amount that would have been payable to the Contractor in respect of the Goods replaced by such purchase, provided that the Authority uses all reasonable endeavours to mitigate its losses in this respect.

## **6. Packaging**

- 6.1 Where the Goods are imported into the United Kingdom then for the purposes of the Producer Responsibility Obligations (Packaging Waste) Regulations

2007 (as amended) the Contractor shall assume the rolled-up obligations for all the activities performed outside the United Kingdom in relation to the Goods and the packaging which is used for the containment, protection, handling, delivery and presentation of the Goods in addition to any other obligations the Contractor may have pursuant to the said Regulations.

6.2 The Goods shall be securely packed in trade packages of a type normally used by the Contractor for commercial deliveries of the same or similar goods either in retail or in bulk quantities within the United Kingdom.

6.3 The following details shall be shown on the outside of every package unless otherwise specified in the Purchase Order:

6.3.1 a description of the Goods which shall include, without limitation, the weight of the Goods where available and the Authority's and/or Beneficiary's Purchase Order number;

6.3.2 the quantity in the package where available;

6.3.3 any special directions for storage;

6.3.4 the expiry date of the contents where available;

6.3.5 the batch number; and

6.3.6 the name of the manufacturer of the Goods and the Contractor.

## **7. Identification of Goods**

7.1 All Goods that customarily bear any mark, tab, brand, label or other device indicating place of origin, inspection by any government or other body or standard of quality must be delivered with all the said marks, tabs, brands, labels, serial numbers or other devices intact and legible.

## **8. Containers and Pallets**

8.1 The Contractor shall collect without charge any returnable containers (including pallets) within 21 days of the date of the relevant delivery note unless otherwise instructed by the Authority and/or Beneficiary. Empty containers not so removed may be returned by the Authority and/or Beneficiary at the Contractor's expense or otherwise disposed of at the

Authority's and/or Beneficiary's discretion. The Contractor shall credit in full any charged containers upon collection or return.

## **9. Property and Risk**

- 9.1 Risk in the Goods shall pass to the Authority and/or Beneficiary when the Goods have been delivered in accordance with Clause 2.
- 9.2 Notwithstanding delivery, property in the Goods shall not have passed from the Contractor until the full Contract Price of such Goods has been paid.
- 9.3 All tools, equipment and materials of the Contractor required in the performance of the Contractor's obligations under the Contract shall be and remain at the sole risk of the Contractor whether or not they are situated at the Location.

## **10. Tools etc**

- 10.1 Any tools, patterns, materials, drawings, specifications and/or other data provided by the Authority and/or Beneficiary to the Contractor in connection with the Purchase Order will at all times be at the Contractor's risk and remain the property of the Authority and/or Beneficiary and shall be delivered up to the Authority and/or Beneficiary immediately on request and are to be used by the Contractor solely for the purpose of completing the Purchase Order.
- 10.2 Any tools (such as jigs, dies etc) which the Contractor may construct or acquire specifically in connection with the Goods will remain the property of the Contractor unless it is agreed In Writing that the property of the tools will be transferred to the Authority and/or Beneficiary upon payment by the Authority and/or Beneficiary of a charge.

## **11. Rejection Of Goods**

- 11.1 Without prejudice to the operation of Clause 11.4, the Goods shall be inspected on behalf of the Authority and/or Beneficiary within a reasonable time after delivery under Clause 2 of the Contract and may be rejected if found to be defective or inferior in quality to or differing in form or material from the requirements of the Contract, or if they do not comply with any term, whether expressed or implied, of the Contract.

- 11.2 Without prejudice to the operation of Clause 11.4, the Authority and/or Beneficiary shall notify the Contractor of:
- 11.2.1 the discovery of any defect within a reasonable time of its discovery and shall give the Contractor all reasonable opportunities to investigate such defect; and
  - 11.2.2 any shortage or damage caused in transit and found on delivery within 14 days of delivery or such time as agreed by the Parties.
- 11.3 The whole of any delivery may be rejected if a reasonable sample of the Goods taken indiscriminately from that delivery is found not to conform in every material respect to the requirements of the Contract.
- 11.4 The Authority's and/or Beneficiary's right of rejection shall continue irrespective of whether the acts or omissions of the Authority and/or Beneficiary might, apart from the provisions of this sub-clause, amount to acceptance of the Goods. In particular, taking delivery, inspection, use or payment by the Authority and/or Beneficiary of the Goods or part of them shall not constitute acceptance, waiver or approval and shall be without prejudice to any right or remedy that the Authority and/or Beneficiary may have against the Contractor provided that the right of rejection shall cease within a reasonable time from the date on which the Authority and/or Beneficiary discovers or might reasonably be expected to discover the latent defect or other relevant breach of contract.
- 11.5 Goods so rejected after delivery shall be removed by the Contractor at its own expense within 14 days from the date of notification of rejection. If the Contractor fails to remove them within such period the Authority and/or Beneficiary may return the rejected Goods at the Contractor's risk and expense and charge the Contractor for the cost of storage from the date of rejection.

## **12. Quality**

- 12.1 The Goods shall be of first class quality, new, and shall be supplied strictly in accordance with the Specification and Tender Response Document and/or any sample previously provided to the Authority and/or Beneficiary and,



unless otherwise agreed In Writing, shall conform to all relevant standards, specifications, conditions, all applicable UK and European laws and regulations and all work performed by the Contractor shall be in accordance with Good Industry Practice. For the avoidance of doubt, the Contractor warrants that the Goods are not scrap goods.

- 12.2 The Contractor warrants its expertise and confirms the accuracy of all statements and representations made in respect of the Goods prior to and subsequent to, the Purchase Order.
- 12.3 The Contractor agrees to assign to the Authority and/or Beneficiary upon request the benefit of any warranty, guarantee or similar right which it has against any third party manufacturer or supplier of the Goods or any part thereof.

### **13. Sustainable development**

- 13.1 The Contractor shall comply in all material respects with applicable environmental and social and labour law requirements in force from time to time in relation to the Goods. Where the provisions of any such law are implemented by the use of voluntary agreements, the Contractor shall comply with such agreements as if they were incorporated into English and Welsh law subject to those voluntary agreements being cited in the Specification and Tender Response Document. Without prejudice to the generality of the foregoing, the Contractor shall:
  - 13.1.1 comply with all Policies and/or procedures and requirements set out in the Specification and Tender Response Document in relation to any stated environmental and social and labour requirements, characteristics and impacts of the Goods and the Contractor's supply chain;
  - 13.1.2 maintain relevant policy statements documenting the Contractor's significant labour, social and environmental aspects as relevant to the Goods being supplied and as proportionate to the nature and scale of the Contractor's business operations; and

13.1.3 maintain plans and procedures that support the commitments made as part of the Contractor's significant labour, social and environmental policies, as referred to at this Clause 13.

13.2 The Contractor shall meet reasonable requests by the Authority and/or Beneficiary for information evidencing the Contractor's compliance with the provisions of Clause 13.1.

## **14. Safety, Quality and Efficacy of Medicinal Products**

14.1 The sale, supply, importation, manufacture or assembly of such of the Goods as are either medicinal products within the meaning of the Medicines Act 1968 or medical devices within the meaning of the Medical Devices Regulations 2002 shall comply respectively with the provisions of the Medicines Acts 1968 and 1971 as from time to time amended or with the provisions of the Medical Devices Regulations SI 2002/618 from time to time amended, and the provisions of any relevant regulations made under these respective pieces of legislation.

14.2 In the event that the Contractor is in breach of Clause 14.1 then without prejudice to any other right or remedy of the Authority and/or Beneficiary, the Authority and/or Beneficiary shall be entitled to reject the Goods and the Contractor shall indemnify the Authority and/or Beneficiary against all costs, claims or liabilities made against or incurred by the Authority and/or Beneficiary as a result of such breach, including the cost of purchasing alternative goods and all administrative costs incurred by the Authority and/or Beneficiary in inviting and awarding tenders for the supply of such alternative goods.

## **15. Performance Measurement**

15.1 In addition to any more specific obligations imposed by the terms of the Contract, it shall be the duty of the Contractor to provide the Goods and Services to the satisfaction of the Authorised Officer.

15.2 The Contractor shall institute and maintain a properly documented system of quality control as set out in the Specification and Tender Response Document to the satisfaction of the Authorised Officer.

- 15.3 In addition to any other rights of the Authority and/or Beneficiary under the Contract, the Authorised Officer shall be entitled to inspect the Contractor's quality control system referred to in Clause 15.2 above.
- 15.4 During the Contract Term, the Authorised Officer may inspect and examine the provision of the Goods and Services being carried out at the Location without notice at any time. The Contractor shall provide to the Authority all such facilities as the Authority may require for such inspection and examination.
- 15.5 The Contractor shall allow the Authority and any Person, firm or organisation authorised by the Authority to have access to and to audit all records maintained by the Contractor in relation to the provision of the Goods and Services. The Contractor shall assist the Authority or any party authorised by the Authority (as the case may be) in the conduct of the audit.
- 15.6 If any part of any Service is found to be defective or different in any way from the Specification and Tender Response Document or otherwise has not been provided in accordance with the Contract other than as a result of a default or negligence on the part of the Authority and/or Beneficiary, the Contractor shall at its own expense re-perform the Goods and Services in question (without additional remuneration therefore) within such time as the Authority and/or Beneficiary may reasonably specify failing which the Authority and/or Beneficiary shall be entitled to procure performance of the defective Goods and Services from a third party or to execute the tasks in question itself. If the cost to the Authority and/or Beneficiary of executing or procuring such Goods and Services exceeds the amount that would have been payable to the Contractor for such Goods and Services, the excess shall be paid by the Contractor to the Authority and/or Beneficiary on demand in addition to any other sums payable by the Contractor to the Authority and/or Beneficiary in respect of the breach of Contract.
- 15.7 If the performance of the Contract by the Contractor is delayed by reason of any act or default on the part of the Authority and/or Beneficiary or, by any other cause that the Contractor could not have reasonably foreseen or prevented and for which it was not responsible, the Authority and/or Beneficiary's Representative shall allow the Contractor a reasonable extension of time for completion of the Goods and Services so affected. In the event the Parties cannot agree on the extension of time to be permitted, the dispute shall be dealt with in accordance with Clause 23 (Dispute Resolution Procedure).
- 15.8 For each Specific Contract, the Authority and/or Beneficiary shall ascertain whether the Contractor's provision of the Service in question meets any performance criteria as specified in the Specification and Tender Response Document or, if the criteria are not so specified, meets the standards of Good

Industry Practice for the provision of the Goods and Services. On or before the fifteenth Working Day of each Month during the Contract Term and within 14 days after termination of the Contract, the Authority and/or Beneficiary may:

- 15.8.1 in respect of the Goods and Services during the preceding Month, provide to the Contractor a notice (each called a "Performance Notice") which shall set out a statement of the Authority's and/or Beneficiary dissatisfaction with the Contractor's performance and provision of the Goods and Services;
- 15.8.2 each Performance Notice issued by the Authority and/or Beneficiary shall include a proposed rebate of the Contract Price or Service Credit commensurate to the under-performance of the Contractor and or where applicable a Service Credit for failure to adhere to a Service Level as recorded in the Performance Notice;
- 15.8.3 if the Contractor disputes any matter referred to in any Performance Notice and/or the proposed rebate of the Contract Price, the Contractor may raise this objection with the Authority and/or Beneficiary and if this matter is not resolved within 7 days the matter shall be referred to the Dispute Resolution Procedure; and
- 15.8.4 if the Contractor has not raised any objection to the Performance Notice within 7 days of receipt (or such other period as agreed between the Parties) then that Performance Notice shall be deemed to have been accepted by the Contractor and the rebate on the Contract Price or where applicable a Service Credit referred to therein shall become immediately effective.
- 15.9 The Authority and/or Beneficiary's rights under Clause 15.8 are without prejudice to any other rights or remedies the Authority and/or Beneficiary may be entitled to.
- 15.10 On request, the Contractor shall submit to the Authority and/or Beneficiary progress reports detailing its adherence to the timetable (if any) as set out in the Specification and Tender Response Document in a format approved by the Authority and/or Beneficiary. The submission and acceptance of such reports shall not prejudice any other rights or remedies of the Authority and/or Beneficiary under the Contract.
- 15.11 If required by the Authority and/or Beneficiary, the Parties shall co-operate in sharing information and developing performance measurement criteria with the object of improving the Parties' efficiency. Any such agreements shall be fully recorded In Writing by the Authority and/or Beneficiary as the case may be.

## **16. Contract Price and Payment**

- 16.1 In consideration of the Contractor's due and proper performance of its obligations under the Contract, the Contractor shall charge the Authority and/or Beneficiary the Contract Price in accordance with this Clause 16.
- 16.2 The only sums payable by the Authority and/or Beneficiary to the Contractor for the provision of the Goods and Services shall be the Contract Price. All other costs, charges, fees and expenses of whatever kind arising out of or in connection with the Contract shall be the responsibility of the Contractor.
- 16.3 The Contract Price shall be net i.e. after the deduction of all agreed discounts. The amount of any duty additional to the Contract Price and any early settlement discounts shall be shown separately in the Contract.
- 16.4 The Authority and/or Beneficiary shall be entitled to withhold payment of the Contract Price for non performance of the Service or Deliverables pending receipt and acceptance of the same.
- 16.5 The Contractor should be aware the Authority and/or Beneficiary adopts as best practice the All Wales "No Purchase Order, No Pay Policy" a copy of which is available on request. Unless otherwise agreed In Writing by the Authority and/or Beneficiary and the Contractor, within 15 days of the end of each Month, the Contractor shall invoice the Authority and/or Beneficiary for any Goods and Services provided by the Contractor in that Month. Such invoice shall be rendered on the Contractor's own invoice form clearly marked with the Authority's and/or Beneficiary Purchase Order number. Invoices must show the period to which they relate and the aspects of the Goods and Services for which payment is claimed together with the agreed charging rates and any other details the Authority and/or Beneficiary may require. Failure to provide such information will entitle the Authority and/or Beneficiary to delay payment of the Contract Price until 30 days after such information is provided.
- 16.6 Subject to Clauses 16.4 and 16.7, the Authority and/or Beneficiary shall pay any invoice submitted by the Contractor in accordance with Clause 16.5 within 30 days of receipt by the Authority and/or Beneficiary of such invoice. The Authority and/or Beneficiary shall pay such invoice(s) by BACS (Bank Automated Clearing System) if it so chooses or by any alternate means which may be agreed between the Authority and/or Beneficiary and the Contractor.
- 16.7 The Authority and/or Beneficiary may at any time, without notice to the Contractor, set off any liability of the Contractor to the Authority and/or Beneficiary against any liability of the Authority and/or Beneficiary to the Contractor, whether either liability is present or future, liquidated or unliquidated, and whether or not either liability arises under this agreement. Any exercise by the Authority and/or Beneficiary of its rights under this clause

shall not limit or affect any other rights or remedies available to it under this Contract or otherwise.

- 16.8 The invoice provided to the Authority and/or Beneficiary by the Contractor in accordance with Clause 16.5 shall show the VAT calculations separately.
- 16.9 The Contractor will keep accurate books and records in relation to the provision of the Goods and Services in accordance with sound and prudent financial management and business practice. All such books and records shall be made available to the Authority at regular intervals of not less than quarterly.
- 16.10 No payment of or on account of the Contract Price shall constitute any admission by the Authority and/or Beneficiary as to proper performance by the Contractor of its obligations.
- 16.11 In the event of the Authority and/or Beneficiary breaching Clause 16.6, the Contractor shall be entitled to charge interest on the outstanding amount owed by the Authority and/or Beneficiary. Interest under this clause will accrue at 4% above the Bank of England's base rate from time to time, but at 4% a year for any period when the base rate is below 0%. The parties agree this is a substantial remedy for the purposes of the Late Payment of Commercial Debts (Interest) Act 1998. For the avoidance of doubt, the Contractor acknowledges it shall not be entitled to suspend the supply of Goods and Services to the Authority and/or Beneficiary for any breach of Clause 16.6; and the remedy provided under this Clause 16.11 is the Contractor's sole remedy.
- 16.12 Subject to Clause 16.1, clause 16.13 and Clause 17.6, the Contract Price shall not change during the Contract Term.
- 16.13 The Contractor may apply to the Authority In Writing once in any Year (other than the first Year) to increase the Contract Price by such percentage as is equivalent to any percentage increase in the Index during the previous Year. The Contractor is required to provide industry evidence to the Authority in support of any proposed increase. The Authority may in its absolute discretion agree to such an increase either in accordance with the percentage increase in the Index during the previous Year or at such other rate it deems appropriate. If the Authority agrees to an increase it will apply from the date of the notice sent by the Authority to the Contractor informing them of its decision. If the Index shows a percentage decrease in the previous Year, the Authority may apply that decrease to the Contract Price in the following Year.
- 16.14 If a proposed variation to the Specification and Tender Response Document under Clause 16.13 also involves a proposed variation to the Contract Price and the Parties cannot reach agreement on the adjustment to the Contract

Price within the 90 day period specified in Clause 33 both Parties shall jointly and immediately refer the matter to Dispute Resolution as required by Clause 34.

- 16.15 The Authority shall issue a Purchase Order to the Contractor in respect of any Goods and Services to be supplied to the Authority and/or Beneficiary under this Contract. The Contractor shall comply with the terms of such Purchase Order as a term of this Contract. For the avoidance of doubt, any actions or work undertaken by the Contractor under this Contract prior to the receipt of a Purchase Order covering the relevant Goods and Services shall be undertaken at the Contractor's risk and expense and the Contractor shall only be entitled to invoice for Goods and Services covered by a valid Purchase Order.
- 16.16 Where the Contract Price is or may become subject to any pricing requirements of any statutory pricing regulation schemes, the Parties shall comply with such requirements as required by law from time to time and specifically as required by the statutory pricing regulation scheme (and any future regulation) or to the extent applicable to the Contractor from time to time as an industry member of a voluntary scheme, including any reductions in price by reason of the application of such schemes.

## **17. Value for Money and Benchmarking**

- 17.1 The Contractor shall throughout the Contract Term identify (and notify the Authority of) any potential costs savings and opportunities for improved value for money for the Authority and/or Beneficiary. The Authority may make a written request each Year to the Contractor requesting details of how the Contractor is attempting to identify and (where agreed with the Authority) deliver improved costs savings and value for money.
- 17.2 The Contractor shall ensure that the information that it provides to the Authority in accordance with Clause 17.1 shall be sufficient for the Authority to determine whether or not the Contractor is complying with the obligation in Clause 17.1. The Contractor shall provide such further information that the Authority reasonably requests in connection with Clause 17.1, within a reasonable time after such request.
- 17.3 The Authority may regularly benchmark the Contract Price and performance of the Contract by the Contractor. Any benchmarking will be against third party suppliers ("Benchmark Contractors") providing services substantially the same as the Contractor is required to provide under the Contract to organisations that are similar to the Authority (or have similar requirements for the purchase of services similar to the Goods and Services) during the Contract Term. This benchmarking will compare the Contract Price and level of performance of the Contract with the prices being charged and services

offered by the Benchmark Contractors at that time. The aim is to provide the Authority with reasonably detailed information for comparison purposes.

- 17.4 The Authority shall be entitled to disclose the results of any benchmarking of the Contract Price and performance of the Contract to any Beneficiary or Beneficiaries.
- 17.5 The Contractor shall use its best endeavours and act in good faith to provide information requested by the Authority in order to undertake the benchmarking referred to in this Clause 17, such information requested to be at the discretion of the Authority acting reasonably.
- 17.6 The Parties agree this clause 17 is an important term of the Contract. If the results of a benchmarking exercise demonstrates that the Contract Price is too high because it does not reflect the market price then the Contract Price shall be reduced as soon as reasonably practicable (and the Contract varied in accordance with Clause 32 (Variation of the Contract)) to reflect the outcome of the benchmarking exercise.
- 17.7 For the avoidance of doubt the results of any benchmarking review shall not result in any increase to the Contract Price or any decrease in the performance of the Contract.

## **18. Resources**

- 18.1 The Contract Price includes payment in full for all facilities and resources required by the Contractor to provide the Goods and Services in accordance with the Contract. Any facilities or resources needed or used by the Contractor to provide the Goods and Services shall be provided by the Contractor without additional cost to the Authority and/or Beneficiary.
- 18.2 The Contractor warrants that it has satisfied itself that it possesses the abilities and experience in all respects to provide the Goods and Services pursuant to the Contract to the reasonable satisfaction of the Authority.

## **19. Contract Term**

- 19.1 The Contract shall commence and (subject to any earlier lawful termination) remain in force for the Contract Term.
- 19.2 The Authority may, by notice In Writing, extend the Contract Term, provided that the said notice shall have been given to the Contractor either no later than 12 weeks before the end of the Contract Term, or as otherwise agreed



by the parties, provided that the duration of this Contract shall be no longer than the total term specified in the Key Provisions.

## **20. Authorised Officers**

- 20.1 Any notice, information or communication given to or made by an Authorised Officer shall be deemed to have been given or made by the Authority.

## **21. Staff**

- 21.1 The Contractor shall be entirely responsible for the employment and conditions of service of his Staff employed in the Contract.
- 21.2 The Contractor will employ sufficient Staff to ensure that all of the Goods and Services are provided at all times and in all respects in complete conformity with the Specification and Tender Response Document. This will include, but not be limited to, the Contractor providing a sufficient reserve of trained and competent Staff to provide the Goods and Services during Staff holidays or absence due to sickness or voluntary absence. In relation to the Goods and Services, the Contractor will employ only such persons as are careful, skilled and experienced in the duties required of them, and will ensure that every such person is properly and sufficiently trained and instructed (at the Contractor's expense) and carries out the Goods and Services with regard to:
- 21.2.1 the task or tasks that person has to perform;
  - 21.2.2 all relevant provisions of the Contract;
  - 21.2.3 all relevant policies, rules, procedures and standards of the Authority and/or Beneficiary (including any Equality Act 2010 discrimination and equality and diversity policies);
  - 21.2.4 the need for those working in a health service environment to observe the highest standards of hygiene, customer care, courtesy and consideration;
  - 21.2.5 the need to keep confidential all information howsoever acquired whether relating to the Authority and/or Beneficiary and its business, or relating to patients, including but not limited to patient identity, clinical conditions and treatment.
- 21.3 The Contractor will, when recruiting potential Staff for the purpose of the Contract, act in accordance with the Contract.
- 21.4 The Contractor shall ensure that Staff of appropriate levels of experience and expertise perform the Goods and Services to achieve cost efficiency.

- 21.5 The Authority reserves the right to reject Staff whom they consider to be unsuitable for the duties proposed but shall not be liable in any way for any rejection and shall be indemnified by the Contractor should any loss be suffered in respect of said rejection. Where Staff are rejected the Contractor shall provide alternative Staff acceptable to the Authority. In addition, the Authorised Officer may (but not unreasonably or vexatiously) instruct the Contractor to take disciplinary action against or to remove from work in or about the provision of the Goods and Services any person employed by the Contractor and the Contractor shall immediately comply with such instruction, and in the case of a removal from work shall, as soon as it is reasonably practicable thereafter provide a substitute.
- 21.6 The Contractor shall ensure that any Staff to whom reference is made by name in the Specification and Tender Response Document are actively involved in the provision of the Goods and Services or are replaced with other named Staff acceptable to the Authorised Officer. The Contractor acknowledges that if it is ever the wish of the Contractor to change the partners and/or Staff committed to provide the Goods and Services as provided for in the Specification and Tender Response Document it shall first give notice of such wish to the Authorised Officer explaining the reasons for such wish together with full details of any proposed replacement partner and/or member of Staff. The Authority shall be under no obligation to approve or accept any such replacement person. If any of the partners or Staff referred to in the Specification and Tender Response Document cease, in the reasonable opinion of the Authority, to provide and be responsible for the provision of the Goods and Services and the quality of those Goods and Services then the Authority may terminate the Contract in accordance with Clause 36 paying only for the Goods and Services provided up to the date of such termination and shall have no further obligation to pay and shall have no further liability arising out of such termination.
- 21.7 The Contractor shall:
- 21.7.1 ensure that it complies with all current employment legislation and in particular, that it does not unlawfully discriminate within the meaning of the Equality Act 2010 (or any re-enactment thereof) or any other relevant legislation relating to discrimination in the employment of Staff for the purpose of providing the Goods and Services. The Contractor shall take all reasonable steps (at its own expense) to ensure that any Staff employed in the provision of the Goods and Services do not unlawfully discriminate within the meaning of this Clause 21.7 and shall impose on any Sub-Contractor obligations substantially similar to those imposed on the Contractor by this Clause 21.7; and
- 21.7.2 in the management of its affairs and the development of its equality and diversity policies, the Contractor shall co-operate with the Authority and/or Beneficiary in respect of the Authority's and/or Beneficiary's

obligations to comply with statutory equality duties. The Contractor shall take such steps as the Authority and/or Beneficiary considers appropriate to promote equality and diversity, including race and sex equality, equality of opportunity for disabled people, gender equality, and equality relating to religion and belief, sexual orientation and age in the provision of the Goods and Services.

- 21.8 The Contractor shall procure that all potential Staff or persons performing any of the Goods and Services during the Contract Term who may reasonably be expected in the course of their employment or engagement to have access to children or other vulnerable persons and/or access to persons receiving clinical services and/or medical services are required to:
- 21.8.1 complete an application form in which they are required to disclose all Convictions and to consent to such details being made available to the Authority and/or Beneficiary;
- 21.8.2 obtain standard and enhanced Disclosure and Barring Service (DBS) checks through the DBS before the Contractor engages the potential Staff or persons in the provision of the Goods and Services to the Authority and/or Beneficiary.
- 21.9 The Contractor shall take all necessary steps to procure that such potential Staff or persons obtain standard and enhanced disclosures from the DBS including, without limitation, the Contractor being registered with the DBS.
- 21.10 The Contractor shall procure that no person who discloses any Convictions upon being questioned about their Convictions in accordance with Clause 21.8.1, or who is found to have any Convictions following receipt of standard and enhanced disclosures from the DBS in accordance with Clause 21.8.2, or who fails to obtain standard and enhanced disclosures from the DBS upon request by the Contractor in accordance with Clause 21.8.2 is employed without the Authority's and/or Beneficiary's prior written consent.
- 21.11 The Contractor shall procure that the Authority and/or Beneficiary is kept advised at all times of any member of Staff who, subsequent to his/her commencement of employment as a member of Staff receives a Conviction or whose previous Convictions become known to the Contractor. If the Authority and/or Beneficiary, acting reasonably, considers that the Conviction has a material bearing upon the suitability of the individual concerned to be engaged in the provision of the Goods and Services, such person shall only continue to have access to the persons receiving health services and/or have substantial access to children/vulnerable persons with the Authority's and/or Beneficiary prior written consent, which consent may be subject to such conditions as the Authority and/or Beneficiary may impose (in its absolute discretion). The Contractor shall indemnify and keep indemnified the Authority and/or Beneficiary against any Loss arising out of any claim by any person in respect of whom the Authority and/or Beneficiary denies consent to continue to

provide Goods and Services as a result of such person disclosing or receiving a Conviction.

21.12 The Contractor shall procure that the Authority and/or Beneficiary is kept advised at all times of any:

21.12.1 disciplinary incident relating to his Staff involving visitors, or the Authority's and/or Beneficiary's staff or property; and

21.12.2 incidence of serious misconduct involving his Staff.

21.13 The Contractor shall only employ Staff for the purposes of the Contract who:

21.13.1 fulfil any minimum training and qualification requirements as set out in the Specification and Tender Response Document and also all training and qualification requirements that may be deemed necessary by the Authorised Officers, legislation, or any special bodies or associations;

21.13.2 are in good health and have a standard of oral and personal hygiene acceptable to the Authority and/or Beneficiary;

21.13.3 are medically and physically fit in so far as the requirements of the work are concerned.

21.14 The Contractor shall not employ in or about the provision of the Goods and Services any person who has suffered from, has signs of, is under treatment for, or who is suffering from any medical condition which is known to, or does potentially place the health of the Authority's and/or Beneficiary's staff, residents, patients or visitors at risk. In all such cases, the Contractor is required to notify the Authorised Officer of each particular incident. The Contractor may receive and will accept such instruction as to the immediate and future working capability of the affected member of Staff, upon the Authority's and/or Beneficiary's premises. Such instruction may necessitate the need for further investigation, which shall be the duty and responsibility of the Contractor at his own expense.

21.15 The Authorised Officer may, but not unreasonably or vexatiously, require any person employed by the Contractor in or about the provision of the Goods and Services to be medically examined at any time during their employment.

21.16 Any medical examination or certification of any member of the Contractor's Staff required by the Contract shall be arranged by and shall be at the expense of the Contractor provided always that the Authority shall be entitled at their own expense, to require any medical examination to be carried out by a medical practitioner nominated by the Authority.

21.17 The Contractor will comply with the Authority's and/or Beneficiary's policy and procedures on cross infection and notifiable diseases and will co-operate with and act upon the advice of the Authority's and/or Beneficiary's infection control representative.

21.18 As a condition of employment in the Contract, the Contractor's Staff:

21.18.1 shall not corruptly solicit or receive any bribe or other consideration from any person, or fail to account for monies or property received in connection with duties under the Contract assignments;

21.18.2 shall not be uncivil to persons encountered in the course of work, or make unnecessary use of authority in connection with the discharge of the Contract assignment instructions;

21.18.3 shall not act in a manner reasonably likely to bring discredit upon the Authority and/or Beneficiary;

21.18.4 shall be properly and presentably dressed in such uniform as is detailed in the Specification and Tender Response Document or agreed between the Parties (the "Contract Uniform");

21.18.5 shall not wear the Contractor's uniform, the Contract Uniform or identification, or use his equipment on the Authority's and/or Beneficiary, the Beneficiary's premises unless fulfilling the terms of the Contract;

21.18.6 shall maintain proper standards of appearance and deportment whilst at work;

21.18.7 shall not at any time be on duty under the influence of alcohol or drugs;

21.18.8 shall on being charged with any criminal offence, notify the Contractor immediately;

21.18.9 shall not neglect, nor without due and sufficient cause omit, to discharge promptly and diligently a required task within the terms of the Contract;

21.18.10 shall not misuse or abuse the staff of the Authority and/or Beneficiary;

21.18.11 shall not smoke while on the Authority's and/or Beneficiary's premises, except in those areas where smoking is expressly permitted.

- 21.19 The Contractor shall provide its Staff with a form of identification that is acceptable to the Authority and/or Beneficiary and which Staff shall display on their clothing at all times when they are at the Location.
- 21.20 The Contractor and his Staff shall confine themselves to the locality of their work and shall cause as little interference and disruption as possible with other personnel and activities at the Location.
- 21.21 The Authority and/or Beneficiary shall not be liable for loss of, or damage to, the personal property of Contractor's Staff, howsoever caused and even if caused by the negligence of the Authority and/or the Beneficiary.
- 21.22 It is the joint responsibility of the Contractor and his Staff to ensure that the Staff supplied to carry out the Goods and Services have not worked excessive hours which could prejudice the standards of service or the health or wellbeing of the Staff. In accordance with the Working Time Regulations 1998 it is the responsibility of the Contractor to keep records of hours worked for each member of Staff.

## **22. Control and Supervision of Staff**

- 22.1 Any notice, information, instruction or other communication given or made to the Contract Manager shall be deemed to have been given or made to the Contractor.
- 22.2 The Contract Manager shall be suitably qualified in accordance with the Specification and Tender Response Document. In addition a work history/biography will be submitted to the Authorised Officer for approval prior to any interview.
- 22.3 The Contractor shall forthwith give notice In Writing to the Authorised Officer of the identity of the person appointed as Contract Manager and of any subsequent appointment. Until notice of a subsequent appointment shall have been given the Authority and/or Beneficiary shall be entitled to treat as Contract Manager the person last notified to the Authorised Officer as being the Contract Manager.
- 22.4 The Contractor shall ensure that the Contract Manager, or a competent deputy who is duly authorised to act on his behalf, is available to the Authority and/or Beneficiary at all times when any member of Staff of the Contractor is on duty for the provision of the specified Goods and Services.
- 22.5 The Contractor shall inform the Authorised Officer of the identity of any person authorised to act for any period as deputy for the Contract Manager before the start of that period.

- 22.6 The Contract Manager or his deputy shall consult with the Authorised Officer and such other of the Authority's and/or Beneficiary own supervisory staff as may from time to time be specified by the Authorised Officer as often as may reasonably be necessary for the efficient provision of the Goods and Services in accordance with the Contract.
- 22.7 The Contractor shall provide a sufficient complement of supervisory Staff in addition to the Contract Manager, to ensure that the Contractor's Staff engaged in and about the provision of the Goods and Services at the Location are adequately supervised and properly perform their duties at all times.
- 22.8 All persons appointed to managerial and supervisory positions in accordance with the Specification and Tender Response Document must be persons acceptable to the Authorised Officer who will have the right, in his sole discretion, to veto the appointment of any candidate who is deemed to be unsuitable.
- 22.9 The Contractor's Staff engaged in and about the provision of the Goods and Services shall primarily be under the control and direction of the Contractor's own supervisory Staff but nevertheless while on the Authority's and/or Beneficiary's premises will obey all reasonable instructions given to them by the Authority's and/or Beneficiary's supervisory staff in any matter occasioned by the operational needs of the relevant Service or the health, safety or welfare of anyone.
- 22.10 The Contractor shall ensure that his Staff carry out their duties and behave while on the Authority's and/or Beneficiary's premises in an orderly manner and in as quiet a manner as may reasonably be practicable having regard to the nature of the duties being performed by them. The Contractor's Staff shall not cause any unreasonable or unnecessary disruption to the routines, practices, and procedures of the Authority's and/or Beneficiary's staff, patients or visitors, or any of the staff of any other contractors.

## **23. Health and Safety**

- 23.1 While at the Location, the Contractor shall comply, and shall ensure that its Staff comply with, the requirements of relevant Health and Safety and other relevant legislation, including regulations and codes of practice issued thereunder, and with the Authority's and/or Beneficiary's own policies and procedures.
- 23.2 The Contractor shall at all times maintain a specific Health and Safety at Work policy relating to the employment of his own Staff whilst carrying out their duties in relation to the Contract on the Authority's and/or Beneficiary's premises.

- 23.3 The Contractor will be required to nominate a Health and Safety Representative to liaise with the Authorised Officer on all Health and Safety matters.
- 23.4 The Contractor's Staff shall follow a system of accident recording in accordance with the Authority's and/or Beneficiary accident recording procedure and the Contractor's own accident reporting procedures.
- 23.5 All incidents which may be required to be reported to an enforcing body shall as soon as reasonably practicable be brought to the attention of the Authorised Officer.
- 23.6 The Contractor shall ensure the co-operation of its Staff in all prevention measures designed against fire, or any other hazards, and shall notify the Authority and/or Beneficiary of any change in the Contractor's working practices or other occurrences likely to increase such risks or to cause new hazards.
- 23.7 The Contractor's Staff shall be trained to recognise situations which involve an actual or potential hazard including:
- 23.7.1 danger of personal injury to any person on the Authority's and/or Beneficiary's premises and where possible, without personal risk, make safe any such situation; or report any such situation to the Authorised Officer;
  - 23.7.2 fire risks and fire precautions and procedures including attendance at fire lectures/drills in accordance with the Authority's and/or Beneficiary's policies;
  - 23.7.3 security;
  - 23.7.4 risk management;
  - 23.7.5 major incident.
- 23.8 The Contractor shall provide such first aid facilities and ensure that his Staff abide by such first aid procedures as shall be required by the Authority and/or Beneficiary as detailed in the Specification and Tender Response Document.
- 23.9 The Contractor shall at any time ensure that the equipment used and procedures operated conform to the Authority's and/or Beneficiary's Fire Policy as detailed in the Specification and Tender Response Document.
- 23.10 The Contractor shall co-operate with the Authority's and/or Beneficiary's Fire, Security and Safety Advisors and shall comply with their reasonable instructions.



- 23.11 The Contractor will comply with COSHH and COSHH hazard management and control.

## **24. Location**

- 24.1 Subject to satisfactory agreement between the Parties on price, the Authority and/or Beneficiary reserves the right to increase or reduce the number of Locations under the Contract at any time during the Contract Term.
- 24.2 Without prejudice to any other right or remedy the Authority and/or Beneficiary will endeavour to give as much notice as possible of increases or reductions to the number of Locations under the Contract, although a minimum period of time is not specified in these conditions.
- 24.3 Upon commencement of this Contract the Authority and/or Beneficiary shall grant a non exclusive and revocable licence to the Contractor to enter upon the Locations for the sole purpose of providing the Goods and Services to the Authority and/or, as the case may be, the Beneficiary, subject to the provisions of Clauses 21 and 36, for the term of the Contract. The licence thereby granted shall be subject to the conditions of the Contract and shall not be deemed to create a relationship of Landlord and Tenant as between the Authority and/or, as the case may be, the Beneficiary and the Contractor.

## **25. Use of Authority Sites**

- 25.1 The Authority and/or, as the case may be, the Beneficiary shall during the Contract Term permit the Contractor to use in connection with the provision of the Goods and Services certain Sites at the Location as set out in the Specification and Tender Response Document.
- 25.2 The Contractor shall use the Sites only in connection with the provision of the Goods and Services and shall ensure that the Contractor's Staff use the Sites only for that purpose.
- 25.3 The Contractor shall ensure that, in providing the Goods and Services, the Sites have a clean, tidy and professional appearance and that they are properly secured.
- 25.4 The permission given to the Contractor to use the said Sites is personal to the Contractor and the Contractor's Staff and shall cease immediately upon termination of the Contract. Only the Contractor's own Staff and persons making deliveries to the Contractor in connection with the provision of the Goods and Services may enter or use any part of the Sites without the prior written permission of the Authorised Officer and/or Beneficiary.
- 25.5 For the avoidance of doubt it is hereby declared that the permission to enter and use the said Sites constitutes a licence granted in favour of the

Contractor and does not constitute a grant of a tenancy of the whole or any part of the Sites. The Authority and/or Beneficiary retains full possession and control over such Sites at all times and the Contractor shall not receive exclusive possession of, or any estate or interest in, any such Sites.

- 25.6 The Authority and/or Beneficiary reserves the right at all times to permit third parties to use the Sites, subject to the rights granted to the Contractor pursuant to the Contract.
- 25.7 The Authority and/or Beneficiary will provide a sufficient supply of water, gas and electricity to operate equipment used to provide the Goods and Services.
- 25.8 The Authority and/or Beneficiary will arrange for the disposal of refuse from authorised collection points.
- 25.9 The Contractor will not alter or modify any part of the Sites without the written permission of the Authorised Officer, unless alteration or modification is part of the Goods and Services to be provided by the Contractor. If alteration or modification of the Sites is to be provided by the Contractor, Clause 38.4 will apply.

## **26. Equipment and Materials**

- 26.1 The Contractor shall be responsible at its expense for the provision and installation of all equipment and materials used in connection with the Contract except where these are loaned to the Contractor by the Authority and/or Beneficiary in accordance with Clause 27 or transferred into the ownership of the Contractor under Clause 26.12 and 26.13.
- 26.2 Where equipment and materials are supplied by the Authority and/or Beneficiary these will be serviced and maintained by the Authority and/or the Beneficiary.
- 26.3 The Contract Manager shall forthwith inform the Authorised Officer of any defects appearing in or losses of, or damage, occurring to the Authority's and/or Beneficiary's equipment. The Contractor shall be liable to pay to the Authority and/or Beneficiary the cost of any replacement necessary as a result of loss or damage caused deliberately or negligently by the Contractor's Staff as shall be determined at the sole discretion of the Authority acting reasonably.
- 26.4 In accordance with the Specification and Tender Response Document, the Contractor will, at his own expense, obtain and install all necessary equipment for the provision of the Goods and Services.

- 26.5 The Contractor shall ensure that all equipment used in connection with the Contract is maintained in good working order in compliance with manufacturer's instructions and current legislation.
- 26.6 All equipment and materials used by the Contractor shall comply with latest relevant British Standard or European equivalent specifications where such exist and the Contractor shall upon request furnish the Authorised Officer with evidence to prove that such equipment and materials comply with this condition.
- 26.7 The Contractor shall:
- 26.7.1 establish effective planned maintenance programmes; and
  - 26.7.2 make adequate arrangements for emergency remedial maintenance, to ensure continuity of the Goods and Services; and
  - 26.7.3 agree all equipment purchases with the Authority; and
  - 26.7.4 ensure compliance with all regulations covering the inspection and testing of all equipment used at the Location in the provision of the Goods and Services; and
  - 26.7.5 maintain records, open for inspection by the Authority of maintenance testing and certification.
- 26.8 Any communication or electrical equipment used by the Contractor in connection with the Contract shall not cause any interference with or damage to any equipment used by the Authority and/or Beneficiary.
- 26.9 Any communication or electrical equipment proposed to be used by the Contractor in connection with the Contract shall, at the discretion of the Authority be tested and approved by the Authority before use on the Authority's and/or Beneficiary. Notwithstanding this Clause 26.9 the Contractor shall be liable for any damage caused by any communication or electrical equipment used in connection with the Contract.
- 26.10 The Authority reserves the right to inspect equipment used by the Contractor in or about the provision of the Goods and Services at any time and the Contractor shall comply with any directions of the Authorised Officer as to the manner in which such equipment shall be used.
- 26.11 The Authority and/or Beneficiary shall not be responsible, charged or chargeable for any equipment or materials brought on site by the Contractor.
- 26.12 At the commencement of the Contract all equipment transferred to the Contractor shall be valued by an independent valuer appointed jointly by the

Authority and/or Beneficiary and the Contractor. Ownership of this equipment shall be transferred to the Contractor without charge.

- 26.13 On conclusion of the Contract, all equipment, whether provided by the Contractor or transferred into the ownership of the Contractor by the Authority and/or Beneficiary will be re-valued and transferred into the ownership of the Authority and/or Beneficiary as set out in the Specification and Tender Response Document. Where there is any increase or decrease in value of the equipment, this shall be added to or deducted from the Contractor's final payment. Transfer of the equipment to the Authority and/or Beneficiary shall be without charge excepting any change in value.

## **27. Loan of Authority Equipment**

- 27.1 The Contractor shall satisfy himself that any Loaned Equipment is suitable for the purpose intended.
- 27.2 The Contractor shall be liable for any damage to any Loaned Equipment caused by misdirection or misuse due to negligence or default on the part of the Contractor, his servants or agents.
- 27.3 The Contractor shall not be liable for any damage to the Loaned Equipment caused by a defect in or faulty operation of the Loaned Equipment.
- 27.4 The Authority and/or Beneficiary shall have the right to withdraw Loaned Equipment at any time and shall be under no liability whatsoever for failing to lend equipment at any time.

## **28. Assignment**

- 28.1 The Contractor or, as the case may be, any authorised Sub-Contractor shall not assign, transfer or subcontract the whole or any part of the Contract (or, as the case may be, any authorised sub-contract) without the prior written consent of the Authority.
- 28.2 Subject to Clause 28.1 above if consent to assign, transfer or subcontract is requested by the Contractor from the Authorised Officer the Authority may insist upon the production to it (inter alia) of all reasonable information and documentation relevant to:
- 28.2.1 the financial viability;
- 28.2.2 competence; and
- 28.2.3 relevant experience of the proposed assignee, transferee or Sub-Contractor;

- 28.2.4 as reasonable and valid pre-conditions of its consent under Clause 28.1 and shall be entitled to a reasonable time to consider such information and documentation.
- 28.3 The Contractor shall warrant to the Authority, as a condition of the granting of consent to any assignment or sub-contracting that any Sub-Contractor or Assignee will fully comply with Clause 28.
- 28.4 If with the Authority's and/or Beneficiary's consent the Contractor sub-contracts the provision of Goods and Services:
- 28.4.1 every act or omission of the Sub-Contractor shall for the purposes of the Contract be deemed to be the act or omission of the Contractor and the Contractor shall be liable to the Authority and/or Beneficiary thereafter as if such act or omission had been committed or omitted by the Contractor itself;
- 28.4.2 the Contractor shall ensure that it has appropriate and adequate insurance is in place for the life of the sub-contract to include the acts and omissions of any Sub-Contractor and that the Contractor and Sub-Contractor will fully comply with Clause 28;
- 28.4.3 the Contractor shall engage the most appropriate and qualified sub-contractor to undertake the provision of the Goods and Services.
- 28.5 The Contractor acknowledges and accepts that the Authority is subject to the Public Contracts Regulations 2015 (as amended) and that those regulations place constraints on the Authority's ability to agree any assignment or transfer of the Contract. The Contractor shall not do or cause or permit to be done anything that would put the Authority in breach of the Public Contracts Regulations 2015 (as amended) and indemnifies the Authority in the event of any breach which occurs and is attributable to the Contractor.
- 28.6 Where the Contractor enters into a sub-contract it must ensure that a provision is included which:
- 28.6.1 requires payment to be made of all sums due by a Contractor to the Sub-Contractor within a specified period not exceeding 30 days from the receipt of a valid invoice as defined by the sub-contract requirements and provides that, where the Authority or Beneficiary has made payment to the Contractor in respect of Goods and Services and the Sub-Contractor's invoice relates to such Goods and Services then, to that extent, the invoice must be treated as valid and, provided the Contractor is not exercising a right of retention or set-off in respect of a sum otherwise due by the Sub-Contractor to the Contractor, payment must be made to the Sub-Contractor without deduction;

28.6.2 notifies the Sub-Contractor that the sub-contract forms part of a larger contract for the benefit of the Authority or Beneficiary and that should the Sub-Contractor have any difficulty in securing the timely payment of an invoice, that matter may be referred by the Sub-Contractor to the Authority or Beneficiary; and

28.6.3 in the same terms as that set out in this Condition 28.6 (including for the avoidance of doubt this Condition 28.6.3) subject only to modification to refer to the correct designation of the equivalent party as the Contractor and Sub-Contractor as the case may be.

## **29. Indemnity and Limitation of liability**

### **Indemnity**

29.1 The Contractor shall be liable to the Authority and/or Beneficiary for, and shall indemnify and keep the Authority and/or Beneficiary indemnified against, any loss, damages, costs, expenses (including without limitation legal costs and expenses), claims or proceedings in respect of:

29.1.1 any injury or allegation of injury to any person, including injury resulting in death;

29.1.2 any loss of or damage to property (whether real or personal) and whether the property of the Authority, a Beneficiary or any third party;

29.1.3 any breach of Clause 41 (Intellectual Property), 46 (Data Protection) [and 47 (Information Security)]; and/or

29.1.4 any failure by the Contractor to commence the delivery of the Goods and Services by the Commencement Date;

that arise or result from the Contractor's negligent acts or omissions or breach of contract in connection with the performance of this Contract including the provision of the Goods and Services, except to the extent that such loss, damages, costs, expenses (including without limitation legal costs and expenses), claims or proceedings have been caused by any act or omission by, or on behalf of, or in accordance with the instructions of the Authority and/or Beneficiary under a claim or proceedings by the Beneficiary.

29.2 Liability under Clauses 29.1.1 and 29.1.3 shall be unlimited. Liability under any other indemnity provision in this Contract shall be subject to the limitation of liability set out in Clause 29.5.

- 29.3 In relation to all third party claims against the Authority and/or Beneficiary, which are the subject of any indemnity given by the Contractor under this Contract, the Authority shall use its reasonable endeavours to and shall use its reasonable endeavours to procure that the Beneficiary shall, transfer the conduct of such claims to the Contractor unless restricted from doing so. Such restrictions may include, without limitation, any restrictions:
- 29.3.1 relating to any legal, regulatory, governance, information governance, or confidentiality obligations on the Authority and/or Beneficiary; and/or
- 29.3.2 relating to the Authority's and/or Beneficiary's membership of any indemnity and/or risk pooling arrangements, or any relevant insurance policy taken out by the Authority or Beneficiary.
- 29.3.3 Such transfer shall be subject to the Parties agreeing appropriate terms for such conduct of the third party claim by the Contractor (to include, without limitation, the right of the Authority and/or Beneficiary to be informed and consulted on the ongoing conduct of the claim following such transfer and any reasonable cooperation required by the Contractor).

### **Limitation of Liability**

- 29.4 Nothing in this Contract shall exclude or restrict the liability of either Party:
- 29.4.1 for death or personal injury resulting from its own negligence;
- 29.4.2 for fraud or fraudulent misrepresentation; or
- 29.4.3 in any other circumstances where liability may not be limited or excluded under any applicable law.
- 29.5 Subject to Clauses 29.2, 29.4, 29.6 and 29.8 the total liability of each Party to the other under or in connection with this Contract whether arising in contract, tort, negligence, breach of statutory duty, misrepresentation, restitution or otherwise shall be limited in aggregate to the greater of:
- 29.5.1 five million GBP (£5,000,000); or
- 29.5.2 one hundred and twenty five percent (125%) of the total Contract Price paid or payable by the Authority and Beneficiary to the Contractor for the Goods and Services under the Contract.
- 29.6 There shall be no right to claim losses, damages and/or other costs and expenses under or in connection with this Contract whether arising in contract (to include, without limitation, under any relevant indemnity), tort, negligence, breach of statutory duty or otherwise to the extent that any losses, damages and/or other costs and expenses claimed are in respect of loss of production,

loss of business opportunity or are in respect of indirect loss of any nature suffered or alleged. For the avoidance of doubt, without limitation, the Parties agree that for the purposes of this Contract the following costs, expenses and/or loss of income shall be direct recoverable losses (to include under any relevant indemnity) provided such costs, expenses and/or loss of income are properly evidenced by the claiming Party:

29.6.1 extra costs incurred purchasing replacement or alternative services;

29.6.2 costs associated with advising, screening, testing, treating, retreating or otherwise providing healthcare to patients;

29.6.3 the costs of extra management time;

29.6.4 loss of income due to an inability to provide health care services;

29.6.5 wasted expenditure incurred by the Authority and/or Beneficiary in anticipation of completion of the Contract;

29.6.6 sums paid by the Authority to the Contractor pursuant to the Contract, in respect of any Goods and Services not provided in accordance with the Contract;

in each case to the extent to which such costs, expenses and/or loss of income arise or result from the other Party's breach of contract, negligent act or omission, breach of statutory duty, and/or other liability under or in connection with this Contract.

29.7 Each Party shall at all times take all reasonable steps to minimise and mitigate any loss for which that Party is entitled to bring a claim against the other pursuant to this Contract.

29.8 If the total Contract Price paid or payable to the Contractor over the Contract Term is less than or equal to one million pounds (£1,000,000), then the figure of five million pounds (£5,000,000) at Clause 29.5.1 shall be replaced with one million pounds (£1,000,000).

29.9 The Contract Price of the Goods and Services under the Contract has been negotiated and agreed on the basis that the Parties may limit their liability to each other as set out in the Contract and the Parties each confirm that they will themselves bear or insure against any loss for which the other Party has limited its liability under the Contract.

### **30. Insurance**

30.1 The Contractor shall ensure that it takes out and maintains sufficient insurance, with a reputable insurance office, to cover the risks set out in clause 30.4. The sums insured shall be not less than such sums, save where



the Authority or Beneficiary has expressly specified alternative insurance sums set out in Schedule 1 Key Provision 9, in which case those sums stated shall apply.

30.2 The Contractor shall be responsible for the payment of premiums and shall not be entitled to re-charge the same or any part thereof to the Authority or any Beneficiary.

30.3 The Contractor shall produce to the Authority or any Beneficiary proper evidence of the existence of insurance, and, if required, copy policy terms, forthwith upon receipt of a written request to do so.

30.4 The insurances required are as follows:

30.4.1 insurance against the Contractor's liability under Clause 29.

[30.4.2 professional indemnity insurance for clinical services in the sum of ten million pounds (£10,000,000) and for non-clinical services in the sum of five million pounds (£5,000,000) per claim or series of related claims to be held for six (6) years from expiry of the Contract to cover all liability under the Contract for breach of any duty arising in the provision of professional services in connection with the Contract (including clinical negligence claims where appropriate) and shall ensure that all professional consultants or Sub-Contractors involved in the provision of the Goods and Services hold and maintain appropriate cover;]

30.4.3 employer's liability insurance in the sum of five million pounds (£5,000,000) per claim or series of related claims in respect of the Contractor's Staff in accordance with the Employer's Liability (Compulsory Insurance) Act 1969, any re-enactment thereof, or any other statutory requirement for such insurance;

30.4.4 public liability insurance in the sum of ten million pounds (£10,000,000) per claim or series of related claims covering any liability for death, injury, loss or damage (whether to physical property or economic loss or otherwise) sustained by third parties as a consequence of the performance of the Contract and/or the Goods supplied thereunder;

[30.4.5 insurance against any loss, damage or liability to any person for loss or misuse of data (including but not limited to Personal Data), loss or damage caused by malfunctioning or failure of computer systems, and loss caused by computer viruses or malware of any description. For non-digital services cover is required in the sum of one million pounds (£1,000,000) and for digital services in the sum of ten million pounds (£10,000,000) per claim or series of related claims.]

*[Guidance: the insurance levels in this clause 30 are subject to any amendment to the insurance levels as specified in Schedule 1 Key Provision 9. Clauses 30.4.2 and 30.4.5 are optional clauses for use where the nature of the contract requires this type of insurance. Contract value alone is not representative of the level of insurance required. Refer to Welsh Risk Pool for further advice on insurance levels if required.]*

- 30.5 The amount of any indemnity cover shall not relieve the Contractor of any liabilities under this Contract. It shall be the responsibility of the Contractor to determine the amount of indemnity cover that will be adequate to enable it to satisfy its potential liabilities under this Contract. Accordingly, the Contractor shall be liable to make good any deficiency if the proceeds of any indemnity cover arrangement is insufficient to cover the settlement of any claim.
- 30.6 The Contractor warrants that it shall not take any action or fail to take any reasonable action or (in so far as it is reasonable and within its power) permit or allow others to take or fail to take any action, as a result of which its insurance cover may be rendered void, voidable, unenforceable, or be suspended or impaired in whole or in part, or which may otherwise render any sum paid out under such insurances repayable in whole or in part.
- 30.7 The Contractor shall from time to time and in any event within five (5) Business Days of written demand provide documentary evidence to the Authority that insurance arrangements taken out by the Contractor pursuant to Clause 30 and the Specification and Tender Response Document are fully maintained and that any premiums on them and/or contributions in respect of them (if any) are fully paid.
- 30.8 Upon the expiry or earlier termination of this Contract, the Contractor shall ensure that any ongoing liability it has or may have arising out of this Contract shall continue to be the subject of appropriate indemnity arrangements for the period of twenty one (21) years from termination or expiry of this Contract or until such earlier date as that liability may reasonably be considered to have ceased to exist.

## **31. Review**

- 31.1 The Contractor shall attend formal, minuted review meetings (each such meeting being a "Review"), as required by the Authorised Officer, to discuss the Authority's levels of satisfaction in respect of the Contractor's performance under the Contract and to agree any necessary action to address areas of dissatisfaction. The Contractor will not unreasonably obstruct or withhold its agreement to any such necessary action. Such Reviews shall be attended by duly authorised and sufficiently senior employees of the Authority and the

Contractor together with any other relevant attendees. The Parties shall agree a standing agenda for such Reviews.

## **32. Variation of the Contract**

- 32.1 Any variation to the terms of the Contract must be recorded In Writing and executed by a director (if the Contractor is a company) or an authorised signatory of the Contractor (if the Contractor is not a company) and the Authorised Officer. Such record of the variation in question must address all consequential amendments required to be made to the Contract as a result of such variation, including adjustment to the Contract Price.
- 32.2 Variations will take effect as from the date specified in the signed record of variation and shall not have retrospective effect unless expressly provided for in such record.
- 32.3 Each record of variation must be dated and sequentially numbered. Each of the Authority and the Contractor will be entitled to an original executed counterpart of the record of variation.
- 32.4 Save as provided in any such record of variation, the Contract will continue in full force and effect.

## **33. Variation of the Specification and Tender Response Document**

- 33.1 The Authority may at any time propose to the Contractor any reasonable variation or addition to the Specification and Tender Response Document (and any consequential variation to the Contract Price) and the Contractor shall not unreasonably withhold or delay its consent to such variation.
- 33.2 The Contractor may at any time propose In Writing to the Authority (with supporting information) any reasonable variation to the Specification and Tender Response Document (and any consequential variation to the Contract Price) where the Contractor is able to demonstrate to the Authority that such variation would improve value for money to the Authority (including the quality of the Goods or the way they are delivered or provided pursuant to the Contract).

- 33.3 The Contractor shall ensure that the information it provides to the Authority in accordance with Clause 33.2 shall be sufficient for the Authority to decide (at its sole and absolute discretion) whether or not to accept the proposed variation. The Contractor acknowledges and accepts that the Authority is subject to the Public Contracts Regulations 2015 (as amended).
- 33.4 The Parties shall use their reasonable efforts to reach agreement on any variation proposed by the Contractor within 90 days of receipt by the Authority of written notification of the proposed variation.
- 33.5 Where the Authority is required to undertake any testing following the Contractor's proposal pursuant to Clause 33.2 the costs of such testing shall be met by the Contractor.
- 33.6 Subject to:
- 33.6.1 the Authority being satisfied (in its sole discretion) that the improvement proposed by the Contractor should be implemented; and
  - 33.6.2 the Contractor meeting the costs of any testing pursuant to Clause 36.2; the Contractor's request for a variation shall be adopted as a variation to the Contract in accordance with Clause 32 (Variation of the Contract).
- 33.7 No such variation or addition shall affect the continuation of this Contract.
- 33.8 Any change to the Goods or other variation to this Contract shall only be binding once it has been agreed In Writing and signed by an authorised representative of both Parties in accordance with Clause 32.
- 33.9 Where, upon receiving the prior written approval of the Authority, the Contractor charges and invoices the Authority for work undertaken under this Clause 33 it shall be in accordance with the Charge Out Rates.

## **34. Dispute Resolution Procedure**

- 34.1 During any dispute, including any dispute as to the validity of the Contract, it is mutually agreed that the Contractor shall continue its performance of the provisions of the Contract (unless the Authority and/or Beneficiary requests In Writing that the Contractor does not do so). In the event that it were held or agreed that the Contract is invalid, it is agreed that the Contractor is entitled to reasonable remuneration in relation to Goods and Services and Deliverables supplied up to the point the Contract is declared or agreed to be invalid.

- 34.2 If a dispute arises between the Authority and/or Beneficiary and the Contractor in relation to any matter which cannot be resolved by the Authorised Officer and the Contract Manager either of them may refer such dispute to the Dispute Resolution Procedure.
- 34.3 In the first instance each of the Authority and/or Beneficiary and the Contractor shall arrange for a more senior representative than those referred to in Clause 34.2 to meet solely in order to resolve the matter in dispute. Those senior representatives shall be provided with a concise written statement of the relevant factual background; the issues in dispute; the relevant contractual provisions and implications which shall be an agreed statement as far as practicable, clearly identifying those issues or facts that are genuinely in dispute. Such meeting(s) shall be minuted and shall be chaired by the Authority and/or Beneficiary (but the chairman shall not have a casting vote). Such meeting(s) shall be conducted in such manner and at such venue (including a meeting conducted over the telephone, by Zoom or Teams meeting or any other remote means) as to promote a consensual resolution of the dispute in question at the discretion of the chairman.
- 34.4 If the meeting(s) referred to in Clause 34.3 does not resolve the matter in question then the Parties will attempt to settle it by mediation in accordance with the Centre for Effective Dispute Resolution ("CEDR") Model Mediation Procedure or any other model mediation procedure as agreed by the Parties. To initiate a mediation the Parties may give notice In Writing (a "Mediation Notice") to the other requesting mediation of the dispute and shall send a copy thereof to CEDR or an equivalent mediation organisation as agreed by the Parties asking them to nominate a mediator. The mediation shall commence within 28 days of the Mediation Notice being served. Neither Party will terminate such mediation until each of them has made its opening presentation and the mediator has met each of them separately for at least one hour. Thereafter paragraph 14 of the Model Mediation Procedure will apply (or the equivalent paragraph of any other model mediation procedure agreed by the Parties). Neither Party to the mediation will commence legal proceedings against the other until 30 days after such mediation of the dispute in question has failed to resolve the dispute. The Parties will co-operate with any person appointed as mediator providing him with such information and other assistance as he shall require and will pay his costs, as he shall determine or in the absence of such determination such costs will be shared equally.

## **35. Environmental Considerations**

- 35.1 The Contractor shall comply in all material respects with applicable environmental laws and regulations in force from time to time in relation to the Goods and Services. Where the provisions of any such legislation are implemented by the use of voluntary agreements or codes of practice, the

Contractor shall comply with such agreements or codes of practices as if they were incorporated into English and Welsh law subject to those voluntary agreements being specified in the tender documentation.

35.2 Without prejudice to the generality of the foregoing, the Contractor shall:

35.2.1 comply with all reasonable stipulations of the Authority and/or Beneficiary aimed at minimising packaging in relation to Goods and Services which are the subject of the contract, or any products supplied by the Contractor to the Authority and/or Beneficiary, as part of the performance of the Goods and Services, are supplied;

35.2.2 promptly provide such data as may reasonably be requested by the Authority and/or Beneficiary from time to time regarding the weight and type of packaging according to material type used in relation to all Goods and Services supplied to the Authority and/or Beneficiary under or pursuant to the Contract;

35.2.3 comply with all obligations imposed on it in relation to any Goods and Services supplied to the Authority and/or Beneficiary as part of the performance of the Goods and Services by the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (as amended) (or any other equivalent legislation or applicable Law;

35.2.4 label all products supplied to the Authority and/or Beneficiary by the Contractor under the Contract and the packaging of those products, to highlight environmental and safety information as required by Law;

35.2.5 unless otherwise agreed with the Authority and/or Beneficiary, insofar as any products supplied under the Contract comprise or include electrical or electronic equipment, manage the said equipment and associated consumables at end of life to facilitate recovery, treatment and recycling and provide any information which the Authority and/or Beneficiary may reasonably require from time to time regarding the costs of such activity;

35.2.6 promptly provide all such information regarding the environmental impact of any products supplied or used under the Contract as may reasonably be required by the Authority and/or Beneficiary to permit informed choices by end users;

35.2.7 where goods are imported in to the UK then for the purposes of the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (as amended) the Contractor shall assume the rolled-up obligations for all activities performed outside the United Kingdom in relation to the goods and the packaging which is used for the containment, protection, handling, delivery and presentation of the

goods in addition to any other obligations he may have pursuant to the said regulations.

- 35.3 The Contractor shall comply within a reasonable time with all reasonable requests by the Authority and/or Beneficiary for information or documentation evidencing the Contractor's compliance with the provisions of this Clause 35.

## **36. Term and Termination**

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

36.1.1 a material failure (in whole or in part) by the Contractor to perform any material obligation of the Contract or under the Contract provided that if capable of remedy such failure has not been remedied to the Authority's and/or Beneficiary's reasonable satisfaction within a period of 30 days following written notice demanding remedy of the failure in question being served by the Authority and/or Beneficiary on the Contractor (a material failure shall include a repeated breach of a term or terms of the Contract where each individual breach may not represent a material failure but taken together as a whole shall constitute a pattern of behaviour which represents a material failure of the Contract); or

36.1.2 the Contractor becomes Insolvent or otherwise ceases to be capable of providing the Goods and Services; or

36.1.3 the Contractor is in default of any duty of care or any fiduciary or statutory duty owed to the Authority and/or Beneficiary and/or any patient, member of staff or agent of the Authority and/or Beneficiary; or

36.1.4 If the Contractor is a corporation and there is a Change of Control of the Contractor during the Contract Term which, in the reasonable opinion of the Authority, will have a material impact on the provision of the Goods and Services or the image of the Authority; or

36.1.5 the Contractor purports to assign the Contract in breach of Clause 28 (Assignment); or

36.1.6 the Contractor shall have offered or given or agreed to give to any Person any gift or consideration of any kind as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any action in relation to the obtaining or execution of the Contract or any other contract with the Authority and/or Beneficiary, or for showing or forbearing to show favour or disfavour to any person in relation to the Contract or any

other contract with the Authority and/or Beneficiary; or similar acts have been done by any person employed by it or acting on its behalf (whether with or without the knowledge of the Contractor); or

36.1.7 if the Contractor is in breach of either Clause 52 (Inducements to Purchase) or Clause 53 (Prevention of Corruption and Bribery) (or both); or

36.1.8 if the contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9) of the Public Contracts Regulations 2015 (as amended); or

36.1.9 the Contractor has, at the time of contract award, been in one of the situations referred to in regulation 57(1) of the Public Contracts Regulations 2015 (as amended), including as a result of the application of regulation 57(2), and should therefore have been excluded from the procurement procedure; or

36.1.10 the Contract should not have been awarded to the Contractor in view of a serious infringement of the obligations under Regulation 73 of The Public Contracts Regulations 2015 as amended; or

36.1.11 the Contractor ceases, or threatens to cease, to carry on all or substantially the whole of its business; or

36.1.12 the NHS Business Services Authority has notified the Authority that the Contractor or any Sub-Contractor of the Contractor has, in the opinion of the NHS Business Services Authority, failed in any material respect to comply with its obligations in relation to the NHS Pension Scheme (including those under any Direction Letter) as assumed pursuant to the provisions of Part D of Schedule 7;

36.2 The Authority and/or Beneficiary shall be entitled to recover from the Contractor the amount of any Loss resulting from termination under Clause 36.1. For the purpose of this Clause, Loss shall include reasonable cost to the Authority and/or Beneficiary of the time spent by its officers (and staff and agents) in terminating the Contract and making alternative arrangements with an alternative contractor for the provision of the Goods and Services. The Contractor acknowledges it shall be a reasonable measure for the Authority and/or Beneficiary to engage a Replacement Contractor following termination under Clause 36.1 and to recover the cost of engaging a Replacement Contractor as a Loss incurred from the Contractor.



[Termination for convenience by the Authority]

*[Guidance: Clause 36.3 is an optional clause only to be used where it is a requirement for the Authority to be able terminate the Contract for convenience without there being any default on the part of the Contractor. If clause 36.3 is not used mark as "NOT USED" to ensure numbering consistency.]*

- [36.3 The Authority may, at its sole discretion, terminate this contract without specifying any reason for the determination (and irrespective of whether the Contractor is or has ever been in breach of the terms of this Contract) by giving notice of termination In Writing, specifying the date of termination, which shall be a date not less than [insert period] after the date of the notice of termination.]
- 36.4 The Contractor may terminate the Contract in the following circumstance, by giving 30 days' notice In Writing:
- 36.4.1 if the Authority and/or Beneficiary has committed a material breach of the Contract; and
- 36.4.2 the Contractor has brought the breach of Contract to the attention of the Authorised Officer and and/or Beneficiary; and
- 36.4.3 the Authority and/or Beneficiary has not corrected the said breach of Contract within a reasonable period of time.
- 36.5 The Contractor agrees that upon termination for any reason (under Clause 36.1 or otherwise) or expiry of the Contract it shall not be entitled to make a claim against the Authority and/or Beneficiary in relation to costs incurred by the Contractor in providing the Goods and Services or costs incurred in acquiring equipment and/or materials used in the provision of the Goods and Services or in engaging third parties in connection with the Goods and Services whether or not such costs were amortised in the calculation of the Contract Price payable by the Authority and/or Beneficiary under the Contract. For the avoidance of doubt, the Contractor will not be restricted from making any claim in respect of the Contract Price to the extent the Contract Price is outstanding and due and payable.
- 36.6 The Authority and the Contractor agree that termination (in whole or in part) or expiry of the Contract shall not affect such obligations of either Party which clause 37 of the Contract provides shall survive the termination or expiry of the Contract or the continuance of the part or parts not terminated where the Contract is terminated in part only.
- 36.7 Any termination (in whole or in part) of the Contract will not prejudice the rights, obligations and duties of each Party arising prior to such termination taking effect.

## **37. Survival of Clauses on Termination**

- 37.1 On termination of this Contract the following clauses shall survive and continue in full force and effect:

Clause 29 (Limitation of liability);  
Clause 30 (Insurance);  
Clause 34 (Dispute Resolution);  
Clause 37 (Survival of Clauses on Termination);  
Clause 38 (Arrangements on Termination);  
Clauses 39 & 39A (Re-tendering and Handover & Employee Information-TUPE);  
Clause 40 (Revised Code of Practice on Workforce Matters, Fair Deal on Pensions and Cabinet Office Statement);  
Clause 41 (Intellectual Property);  
Clause 45 (Confidentiality and Freedom of Information);  
Clause 46 (Data Protection);  
[Clause 47 (Information Security)];  
Clause 55 (Third Party Rights);  
[Clause 56 (Third Party Beneficiaries)];  
Clause 64 (Law and Jurisdiction); and  
Schedule 7 (Transfer of Staff).

*[Guidance: delete clauses 47 (Information Security) and 56 (Third Party Beneficiaries) if not used.]*

## **38. Arrangements on Termination**

- 38.1 After termination or expiry all data, documents and records (whether stored electronically or otherwise) relating in whole or in part to the Goods and Services (including any Deliverables which remain to be completed as at the date of termination or expiry) and all other items provided on loan or otherwise to the Contractor by the Authority and/or Beneficiary shall be delivered by the Contractor to the Authority and/or Beneficiary provided that the Contractor shall be entitled to keep copies thereof to the extent that the information contained therein does not relate solely to the Goods and Services or to the extent that the Contractor is required by law to maintain copies thereof or to the extent that the Contractor was possessed of such data documents and records prior to the date of the Contract. In addition, the Contractor shall co-operate fully with the Authority and/or Beneficiary during the handover consequent upon termination of the Contract. This co-operation shall extend to full access to all documents, reports, summaries and any other information required to achieve an effective transition without disruption to routine operational requirements.
- 38.2 The Contractor shall retain all papers, files, records and vouchers relating to the provision of the Goods and Services as provided for under Clause 36.1 for the period of 12 years after the date of the termination of the Contract and

thereafter shall not destroy them but deliver them to the Authority and/or Beneficiary.

- 38.3 Upon termination of the Contract under Clause 36.1, all equipment and materials provided and/or assembled by (or which are in the process of being provided or assembled by) the Contractor or materials and parts of Sites or Locations which are being altered or modified by the Contractor, in accordance with the Contract shall be transferred into the ownership of the Authority and/or Beneficiary regardless of whether the assembly of such equipment and materials or the alteration or modification of such Sites or Locations has been completed.
- 38.4 The Contractor shall cooperate fully with the Authority or, as the case may be, any Replacement Contractor during any re-procurement and handover period prior to and following the expiry or earlier termination of this Contract.

### **39. Re-Tendering and Handover**

*[Guidance: Complete optional Schedule 11 to be used where detailed provisions relating to Retendering and Handover are required.]*

- 39.1 The Contractor shall allow access to the Sites, in the presence of a representative of the Authority, to any person representing any Replacement Contractor whom the Authority has selected to offer for the future provision of services. For the purpose of such access, where the site is on the Contractor's premises, the Authority shall give the Contractor seven days' notice of a proposed visit together with a list showing the names of all persons who will be attending those premises.
- 39.2 All persons who attend the Contractor's premises for the purposes of Clause 39.1 shall comply with the Contractor's security procedures, subject to such compliance not being in conflict with the objective of the visit.
- 39.3 The Contractor shall co-operate fully and free of charge with the Authority and/or Beneficiary during the handover arising from the completion or earlier termination of the Contract. This co-operation, during the setting up operations period of the Replacement Contractor, shall extend to allowing full access to, and providing copies of all documents, reports, summaries and other information necessary in order to achieve an effective transition without disruption to the routine operational requirements.
- 39.4 Within ten Working Days of being so requested by the Authority, the Contractor shall transfer to the Authority, or any person designated by the Authority, free of charge, all computerised filing, recordings, documentation, planning and drawings held on software and utilised in the provision of the services. The transfer shall be made in a fully indexed and catalogued disk

format to operate on a proprietary software package identical to that used by the Authority and/or Beneficiary.

### **39A Employee Information and the application of TUPE at the end of the Contract**

- 39A.1 Where a Successor or the Authority provides the Goods and Services or services which are fundamentally or essentially the same as the Goods and Services in succession to the Contractor or Sub-Contractor (in whole or in part) upon the expiry or early termination of this Contract (howsoever arising) the Contractor shall adhere to any Final Judicial Determination, or otherwise the Authority's view, as to whether and to what extent TUPE, the Cabinet Office Statement, the Revised Code and/or the Fair Deal for Staff Pensions (as appropriate) apply. If any Final Judicial Determination or otherwise the Authority's view is that TUPE, the Cabinet Office Statement, the Revised Code and/or the Fair Deal for Staff Pensions (as appropriate) apply in respect of any Contractor Personnel then Clause 39A.11 to Clause 39A.14 of this Contract and (where relevant) the provisions of Part D of Schedule 7 shall apply.
- 39A.2 Within the last nine (9) months before the expiry of this Contract, or after notice of termination of this Contract has been served by either Party pursuant to any provision of this Contract permitting such earlier determination, the Contractor shall be required, within twenty eight (28) days of receiving a written request from the Authority and to the extent permitted by Law, to supply to the Authority and keep updated all information requested by the Authority as to the terms and conditions of employment and employment history of any Contractor Personnel (including but not limited to all employee liability information as defined by reg.11 of TUPE) and the Contractor shall warrant such information is full, complete and accurate.
- 39A.3 No later than twenty eight (28) days prior to the Subsequent Transfer Date, the Contractor shall provide a final list to the Successor and the Authority, containing the names of all the Subsequent Transferring Employees whom the Contractor expects will transfer to the Successor or the Authority. That list shall be subject to any Final Judicial Determination of, or otherwise the

Authority's view as to, the existence and/or scope of the transfer pursuant to Clause 29. Together with its list of employees expected to transfer, the Contractor shall supply all employee liability information as defined in reg.11 of TUPE in relation to those Subsequent Transferring Employees.

- 39A.4 If the Contractor does not comply with its obligations under Clauses 39A.2 and 39A.3, the Authority may withhold payment under Clause 16.4 and/or Clause 16.8 of this Contract and such non-compliance shall be deemed to be a breach of those Clauses.
- 39A.5 The Contractor shall be liable to the Authority for, and shall indemnify and keep the Authority indemnified against, any loss, damages, costs, expenses (including without limitation legal costs and expenses), claims or proceedings that arise or result from any deficiency or inaccuracy in the information which the Contractor is required to provide under Clauses 39A.2 and 39A.3 of this Contract.
- 39A.6 Subject to Clauses 39A.7 and 39A.8 of this Contract, during the period of nine (9) months preceding the expiry of this Contract or after notice of termination of this Contract has been served by either Party, the Contractor shall not, and shall procure that any Sub-Contractor shall not, without the prior written consent of the Authority, such consent not to be unreasonably withheld or delayed:
- 39A.6.1 make, propose or permit any material changes to the terms and conditions of employment or other arrangements of any of the Contractor Personnel;
  - 39A.6.2 increase or seek to increase the emoluments (excluding cost of living increases awarded in the ordinary course of business) payable to any of the Contractor Personnel;
  - 39A.6.3 replace any of the Contractor Personnel or increase the total number of employees providing the Goods and Services;
  - 39A.6.4 deploy any person other than the Contractor Personnel to perform the Goods and Services;

- 39A.6.5 terminate or give notice to terminate the employment or arrangements of any of the Contractor Personnel;
  - 39A.6.6 increase the proportion of working time spent on the Goods and Services by any of the Contractor Personnel; or
  - 39A.6.7 introduce any new contractual term or customary practice concerning the making of any lump sum payment on the termination of employment of any of the Contractor Personnel.
- 39A.7 Clause 39A.6 of this Contract shall not prevent the Contractor or any Sub-Contractor from taking any of the steps prohibited in that Clause in circumstances where the Contractor or Sub-Contractor is required to take such a step pursuant to any requirement of Law or pursuant to a collective agreement in force at that time.
- 39A.8 Where the obligations on the Contractor under Clause 39A of this Contract are subject to the Data Protection Legislation, the Contractor will, and shall procure that any Sub-Contractor will, use its best endeavours to seek the consent of the Contractor Personnel to disclose any information covered under the Data Protection Legislation and utilise any other exemption or provision within the Data Protection Legislation which would allow such disclosure.
- 39A.9 Having as appropriate gained permission from any Sub-Contractor, the Contractor hereby permits the Authority to disclose information about the Contractor Personnel to any Interested Party provided that the Authority informs the Interested Party in writing of the confidential nature of the information.
- 39A.10 If upon the expiry or early termination of the Contract, any Final Judicial Determination or otherwise the Authority's view is that TUPE does not apply in respect of any Contractor Personnel, then all Employment Liabilities and any other liabilities in relation to the Contractor Personnel shall remain with the Contractor or Sub-Contractor (as appropriate). The Contractor will indemnify and keep indemnified the Authority in relation to any Employment Liabilities arising out of or in connection with any allegation or claim raised by any Contractor Personnel.

39A.11 In accordance with TUPE and any other policy or arrangement applicable, the Contractor shall, and will procure that any Sub-Contractor shall, comply with its obligations to inform and consult the appropriate representatives of any of its employees affected by the subsequent transfer of the Goods and Services or services which are fundamentally or essentially the same as the Goods and Services (in whole or in part).

39A.12 The Contractor will and shall procure that any Sub-Contractor will on or before any Subsequent Transfer Date:

39A.12.1 pay all wages, salaries and other benefits of the Subsequent Transferring Employees and discharge all other financial obligations (including reimbursement of any expenses and any contributions to retirement benefit schemes) in respect of the period between the Transfer Date and the Subsequent Transfer Date;

39A.12.2 account to the proper authority for all PAYE, tax deductions and national insurance contributions payable in respect of the Subsequent Transferring Employees in the period between the Transfer Date and the Subsequent Transfer Date;

39A.12.3 pay any Successor or the Authority, as appropriate, the amount which would be payable to each of the Subsequent Transferring Employees in lieu of accrued but untaken holiday entitlement as at the Subsequent Transfer Date;

39A.12.4 pay any Successor or the Authority, as appropriate, the amount which fairly reflects the progress of each of the Subsequent Transferring Employees towards achieving any commission, bonus, profit share or other incentive payment payable after the Subsequent Transfer Date wholly or partly in respect of a period prior to the Subsequent Transfer Date; and

39A.12.5 subject to any legal requirement, provide to the Successor or the Authority, as appropriate, all personnel records relating to the Subsequent Transferring Employees including, without prejudice to the generality of the foregoing, all records relating

to national insurance, PAYE and income tax. The Contractor shall for itself and any Sub-Contractor warrant that such records are accurate and up to date.

39A.13 The Contractor will and shall procure that any Sub-Contractor will indemnify and keep indemnified the Authority and/or a Successor in relation to any Employment Liabilities arising out of or in connection with any claim arising from:

- 39A.13.1 the Contractor's or Sub-Contractor's failure to perform and discharge its obligations under Clause 39.A.12 of this Contract;
- 39A.13.2 any act or omission by the Contractor or Sub-Contractor in respect of the Subsequent Transferring Employees occurring on or before the Subsequent Transfer Date;
- 39A.13.3 any allegation or claim by any person who is not a Subsequent Transferring Employee but who alleges that their employment should transfer or has transferred to the Successor or the Authority, as appropriate;
- 39A.13.4 any emoluments payable to a person employed or engaged by the Contractor or Sub-Contractor (including without limitation all wages, accrued holiday pay, bonuses, commissions, PAYE, national insurance contributions, pension contributions and other contributions) payable in respect of any period on or before the Subsequent Transfer Date;
- 39A.13.5 any allegation or claim by any of the Subsequent Transferring Employees on the grounds that the Successor or Authority, as appropriate, has failed to continue a benefit provided by the Contractor or Sub-Contractor as a term of such Subsequent Transferring Employee's contract as at the Subsequent Transfer Date where it was not reasonably practicable for the Successor or Authority, as appropriate, to provide an identical benefit but where the Successor or Authority, as appropriate, has provided (or offered to provide where such benefit is not accepted by the Subsequent Transferring Employee) an



alternative benefit which, taken as a whole, is no less favourable to such Subsequent Transferring Employee; and

39A.13.6 any act or omission of the Contractor or any Sub-Contractor in relation to its obligations under regulation 13 of TUPE, or in respect of an award of compensation under regulation 15 of TUPE except to the extent that the liability arises from the Successor's or Authority's failure to comply with regulation 13(4) of TUPE.

39A.14 The Contractor will, or shall procure that any Sub-Contractor will, on request by the Authority provide a written and legally binding indemnity in the same terms as set out in Clause 39A.13 of this Contract to any Successor in relation to any Employment Liabilities arising up to and including the Subsequent Transfer Date.

39A.15 The Contractor will indemnify and keep indemnified the Authority and/or any Successor in respect of any Employment Liabilities arising from any act or omission of the Contractor or Sub-Contractor in relation to any other Contractor Personnel who is not a Subsequent Transferring Employee arising during any period whether before, on or after the Subsequent Transfer Date.

39A.16 If any person who is not a Subsequent Transferring Employee claims, or in the event of a Final Judicial Determination that their contract of employment has been transferred from the Contractor or any Sub-Contractor to the Authority or Successor pursuant to TUPE or claims that their employment would have so transferred had they not resigned or been dismissed, then:

39A.16.1 the Authority will, or shall procure that the Successor will, within seven (7) days of becoming aware of that fact, notify the Contractor in writing of the same;

39A.16.2 the Successor, the Authority or the Contractor (or a Sub-Contractor) may offer employment to such person within twenty eight (28) days of the notification by the Authority or Successor;

39A.16.3 if such offer of employment is accepted, the Contractor will immediately release the person from its employment (if applicable); and

39A.16.4 irrespective of whether any offer of employment under clause 39A.16.2 is made or accepted, the Contractor (or Sub-Contractor, as applicable) shall indemnify the Successor and/or or the Authority in respect of all liabilities arising in respect of any such person.

#### **40. Revised Code of Practice on Workforce Matters, Fair Deal policy and Cabinet Office Statement**

40.1 Without prejudice to the provisions of Schedule 7, the Contractor is committed to complying with and undertakes to comply with the Revised Code of Practice on Workforce Matters (Procurement Advice Note) (PAN) for the Public Sector in Wales).

40.2 The Contractor further undertakes to comply with (i) A Fair Deal for Staff Pensions, and (ii) the Cabinet Office “Statement of practice on staff transfers”.

#### **41. Intellectual Property**

41.1 The Contractor warrants and undertakes to the Authority and/or Beneficiary that either it owns or is entitled to use and will continue to own or be entitled to use all Intellectual Property Rights used in the development and provision of the Goods and Services and/or necessary to give effect to the Goods and Services and/or to use any Deliverables, matter or any other output supplied to the Authority and/or Beneficiary as part of the Goods and Services.

41.2 The Contractor hereby grants to the Authority and/or Beneficiary, for the life of the use by the Authority and/or Beneficiary of any Deliverables, material or any other output supplied to the Authority and/or Beneficiary in any format as part of the Goods and Services, an irrevocable, royalty-free, non-exclusive licence to use, modify, adapt or enhance such items in the course of the Authority’s and/or Beneficiary normal business operations. For the avoidance of doubt, unless specified otherwise in any Purchase Order and/or the Specification and Tender Response Document, the Authority and/or Beneficiary shall have no rights to commercially exploit (e.g. by selling to third parties) any deliverables, matter or any other output supplied to the Authority and/or Beneficiary in any format as part of the Goods and Services.

41.3 The Contractor shall indemnify the Authority and/or Beneficiary against all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis)

and all and other reasonable professional costs and expenses) suffered or incurred by the Authority and/or Beneficiary arising out of or in connection with any claim made against the Authority and/or Beneficiary for actual or alleged infringement of a third party's Intellectual Property Rights arising out of or in connection with the supply or use of the Goods and Services.

41.4 If any third party makes a claim, or notifies an intention to make a claim, against the Authority and/or Beneficiary that may reasonably be considered likely to give rise to a liability under this indemnity (**Claim**), the Authority and/or Beneficiary shall:

41.4.1 as soon as reasonably practicable, give written notice of the Claim to the Contractor, specifying the nature of the Claim in reasonable detail;

41.4.2 not make any admission of liability, agreement or compromise in relation to the Claim without the prior written consent of the Contractor, such consent not to be unreasonably withheld;

41.4.3 give the Contractor and its professional advisers access at reasonable times (on reasonable prior notice) to its premises and its officers, directors, employees, agents, representatives or advisers, and to any relevant assets, accounts, documents and records within the power or control of the Authority and/or Beneficiary, to enable the Contractor and its professional advisers to examine them and to take copies (at the Contractor's expense to assess the Claim); and

41.4.4 be deemed to have given the Contractor sole authority to avoid, dispute, compromise or defend the Claim.

41.5 Nothing in this clause 41 shall restrict or limit the Authority and/or Beneficiary's general obligation at law to mitigate a loss it may suffer or incur as a result of an event that may give rise to a claim under this indemnity.

## **42. Electronic Product Information and Electronic Trading System**

42.1 The Contractor shall provide the Authority and/or Beneficiary, as the case may be, with the Service Information in such manner and upon such media as agreed between the Contractor and the Authority and/or Beneficiary from time to time for the sole use by the Authority and/or Beneficiary.

42.2 The Contractor warrants that the Service Information is complete and accurate as at the date upon which it is delivered to the Authority and/or Beneficiary and that the Service Information does not contain any data or

statement which gives rise to any liability on the part of the Authority and/or Beneficiary following publication of the same in accordance with this Clause 42.

- 42.3 The Contractor shall keep the Service Information under continuous review. In the event the Service Information ceases to be complete and accurate, the Contractor shall promptly notify the Authority and/or Beneficiary In Writing of any modification or addition to or any inaccuracy or omission in the Service Information.
- 42.4 The Contractor grants the Authority and/or Beneficiary a non-exclusive royalty free licence in perpetuity to use and exploit the Service Information and any Intellectual Property therein for the purpose of illustrating the range of goods and services (including, without limitation, the Goods and Services) available pursuant to the Authority and/or Beneficiary contracts from time to time. No right to illustrate or advertise the Product Information is granted to the Contractor by the Authority and/or Beneficiary as a consequence of the licence conferred by this Clause 42.4 or otherwise under the terms of this Contract.
- 42.5 The Authority and/or Beneficiary may reproduce for its sole use the Service Information provided by the Contractor in the Authority's catalogue and/or Beneficiary's catalogue from time to time which shall be made available on the National Health Service internal communications network in electronic format or made available on the Authority's external website and/or Beneficiary's external website or any other electronic media of the Authority and/or Beneficiary from time to time.
- 42.6 Before any publication of the Service Information (electronic or otherwise) is made by the Authority and/or Beneficiary, the Authority and/or Beneficiary will submit a copy of the relevant sections of the Authority's catalogue and/or Beneficiary's catalogue to the Contractor for approval, such approval not to be unreasonably withheld or delayed. For the avoidance of doubt the Contractor shall have no right to compel the Authority and/or Beneficiary to exhibit the Product Information in any Product Catalogue as a result of the approval given by it pursuant to this Clause 42.6 or otherwise under the terms of this Contract.
- 42.7 If requested In Writing by the Authority and/or Beneficiary, the Contractor and the Authority and/or Beneficiary shall forthwith negotiate in good faith an agreement to use the Electronic Trading System.
- 42.8 Subject to Clauses 29 and 42.9, the Contractor agrees to indemnify and keep indemnified the Authority and/or Beneficiary against any liability, loss, costs, expenses, claims or proceedings whatsoever arising out of or in connection with any statement relating to the services (including, without limitation, the

Goods and Services) or information or material on or description of the services (including, without limitation, the Goods and Services) provided by or on behalf of the Contractor which is included in the Authority's catalogue and/or Beneficiary's catalogue from time to time (as the case may be) or any associated material produced by the Authority and/or Beneficiary for the purpose of illustrating the range of services (including, without limitation, the Goods and Services) available pursuant to the Authority and/or Beneficiary contracts from time to time.

- 42.9 The Contractor shall not be required to indemnify or keep indemnified the Authority and/or Beneficiary against any liability, loss, costs, expenses, claims or proceedings whatsoever arising under Clause 42.8 as a result of the Authority and/or Beneficiary's wilful or negligent misrepresentation of any statement relating to the goods and services (including, without limitation, the Goods and Services) or information or material on or description of the goods and services (including, without limitation, the Goods and Services) provided by or on behalf of the Contractor which is included in the Authority's catalogue and/or Beneficiary's catalogue from time to time (as the case may be) or any associated material produced by the Authority and/or Beneficiary (as the case may be) for the purpose of illustrating the range of goods and services (including, without limitation, the Goods and Services) available pursuant to the Authority and/or Beneficiary contracts from time to time.

#### Electronic Trading System

- 42.10 Unless the Authority confirms otherwise In Writing the Contractor shall use the Electronic Trading System (and comply with its requirements) throughout the Contract Term. The Contractor shall be deemed to have satisfied itself prior to the Commencement Date that it is able and will continue to be able for the duration of the Contract Term to comply with the Electronic Trading System.
- 42.11 Subject to Clause 42.10 the Contractor shall use the Electronic Trading System to facilitate, amongst other things, the following: Purchase Order placement, the provision of sales information, invoicing, creation of credit notes and the exchange of such other information relating to the Contract as the Authority and/or Beneficiary may reasonably require from time to time.
- 42.12 In the event the Contractor fails to comply with either Clause 42.10 or Clause 42.11 the Authority and/or Beneficiary shall be entitled to reduce (and the Contractor agrees to such reduction) the amount payable on any invoice issued pursuant to Clause 16 (Contract Price and Payment) by 1% of the amount invoiced by the Contractor from the time of the failure to comply until the Contractor remedies that failure. The Parties agree the level of the reduction is a reasonable pre-estimate of the costs to the Authority and/or Beneficiary of having to deal with the non-compliance.

- 42.13 If there are persistent breaches of either Clause 42.10 or Clause 42.11 (or both) by the Contractor this will amount to “material failure” for the purposes of Clause 36.1.1 (Termination).
- 42.14 The Contractor shall ensure that the following information is provided in electronic form (unless the parties agree otherwise in advance and In Writing that such information be provided in physical form):
- 42.14.1 a service delivery note shall accompany the provision of the Goods and Services as appropriate;
- 42.14.2 an invoice shall be rendered on the Contractor's own invoice form; and
- 42.14.3 any service provision note and invoice shall be clearly marked with Authority's and/or Beneficiary's Purchase Order number, name and address of the Authority and/or Beneficiary and the description of the Goods and Services supplied, and shall show separately any additional charge not included in the Contract Price.

### **43. Sales Information**

- 43.1 If requested by the Authority and/or Beneficiary, the Contractor shall provide the Authority and/or Beneficiary with statements giving accurate and complete details of the quantity and value of the Goods and Services provided by the Contractor to the Authority and/or Beneficiary pursuant to the Contract. The frequency, format and level of detail to be included in such statements shall be as specified by the Authority in the Purchase Order (or, if no such description is set out in or attached to the Purchase Order, as set out in or attached to any documentation inviting the Contractor to tender for the appointment to provide the Goods and Services, including any documentation issued, or made available, to the Contractor by any Beneficiary or as may otherwise be agreed between the Parties In Writing).
- 43.2 The Contractor shall keep at its normal place of business detailed, accurate and up to date records of the quantity and value of the Goods and Services provided by it to any Authority and/or Beneficiary, on or after the date of the Contract and pursuant to the Contract with accurate details of the identity of the Authority and/or Beneficiary to which such Goods and Services were provided. Subject to any other auditing process being agreed between the Authority and/or Beneficiary and the Contractor In Writing, the Authority and/or Beneficiary shall be entitled by prior appointment to enter the Contractor's normal place of business during normal office hours and to inspect such records in order to verify whether any statement supplied by the Contractor to the Authority and/or Beneficiary pursuant to Clause 43.1.

## **44. Audit and Accounts**

### **44.1 For the purpose of:**

44.1.1 the examination and certification of the Authority and/or Beneficiary's accounts; or

44.1.2 any examination pursuant to section 6(1) of the National Audit Act 1983 or any re-enactment thereof of the economy, efficiency and effectiveness with which the Authority and/or Beneficiary has used its resources,

the Comptroller and Auditor General and the Authority and/or Beneficiary or its auditors may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Contractor and may require the Contractor to produce such oral or written explanation as he considers necessary. The Contractor acknowledges that it will fully cooperate with any counter fraud policy or investigation, whether carried out by the Counter Fraud and Security Management Service, or any equivalent body, successor or function, at any time. For the avoidance of doubt it is hereby declared that the carrying out of an examination under Section 6(3)(d) of the National Audit Act 1983 or any re-enactment thereof in relation to the Contractor is not a function exercisable under this Contract.

## **45. Confidentiality and Freedom of Information**

45.1 In respect of any Confidential Information it may receive from the other party (the "Discloser") and subject always to the remainder of this Clause 45, each party (the "Recipient") undertakes to keep secret and strictly confidential and shall not disclose any such Confidential Information to any third party, without the Discloser's prior written consent provided that:

45.1.1 the Recipient shall not be prevented from using any general knowledge, experience or skills which were in its possession prior to the commencement of the Contract;

45.1.2 the provisions of this Clause 45 shall not apply to any Confidential Information which:-

45.1.2.1 is in or enters the public domain other than by breach of the Contract or other act or omissions of the Recipient;

45.1.2.2 is obtained by a third party who is lawfully authorised to disclose such information; or

45.1.2.3 is authorised for release by the prior written consent of the Discloser; or

45.1.2.4 the disclosure of which is required to ensure the compliance of the Authority and/or Beneficiary with the Freedom of Information Act 2000 (the "FOIA").

- 45.2 Nothing in this Clause 45 shall prevent the Recipient from disclosing Confidential Information where it is required to do so by judicial, administrative, governmental or regulatory process in connection with any action, suit, proceedings or claim or otherwise by applicable law or, where the Contractor is the Recipient, to the Contractor's immediate or ultimate holding company provided that the Contractor procures that such holding company complies with this Clause 45 as if any reference to the Contractor in this Clause 45 were a reference to such holding company.
- 45.3 The Contractor authorises the Authority and/or Beneficiary to disclose the Confidential Information to such Person(s) as may be notified to the Contractor In Writing by the Authority from time to time to the extent only as is necessary for the purposes of auditing and collating information so as to ascertain a realistic market price for the Goods and Services supplied in accordance with the Contract, such exercise being commonly referred to (including in this Contract) as "benchmarking". The Authority and/or Beneficiary shall use reasonable endeavours to ensure that such person(s) keeps the Confidential Information confidential and does not make use of the Confidential Information except for the purpose for which the disclosure is made. The Authority and/or Beneficiary shall not without good reason claim that the lowest price available in the market is the realistic market price.
- 45.4 The Contractor acknowledges that the Authority and/or Beneficiary are or may be subject to the FOIA. The Contractor notes and acknowledges the FOIA and both the respective Codes of Practice on the Discharge of Public Authorities' Functions and on the Management of Records (which are issued under section 45 and 46 of the FOIA respectively) and the Environmental Information Regulations 2004 as may be amended, updated or replaced from time to time. The Contractor will act in accordance with the FOIA, these Codes of Practice and these Regulations (and any other applicable codes of practice or guidance notified to the Contractor from time to time) to the extent that they apply to the Contractor's performance under the Contract.
- 45.5 The Contractor agrees that:
- 45.5.1 without prejudice to the generality of Clause 45.2, the provisions of this Clause 45 are subject to the respective obligations and commitments of the Authority and/or Beneficiary under the FOIA and both the respective Codes of Practice on the Discharge of Public Authorities' Functions and on the Management of Records (which are issued under section 45 and 46 of the FOIA respectively) and the Environmental Information Regulations 2004;



- 45.5.2 subject to Clause 45.5.3, the decision on whether any exemption applies to a request for disclosure of recorded information is a decision solely for the Authority and/or Beneficiary (as the case may be);
- 45.5.3 where the Authority and/or Beneficiary is managing a request as referred to in Clause 45.4, the Contractor shall co-operate with the Authority and/or Beneficiary making the request and shall respond within five (5) Working Days of any request by it for assistance in determining how to respond to a request for disclosure.
- 45.6 The Contractor shall and shall procure that its Sub-Contractors shall:
- 45.6.1 transfer any request for information, as defined under section 8 of the FOIA, to the Authority and/or Beneficiary as soon as practicable after receipt and in any event within five (5) Working Days of receiving a request for information;
- 45.6.2 provide the Authority and/or Beneficiary with a copy of all information in its possession or power in the form that the Authority and/or Beneficiary requires within five (5) Working Days (or such other period as the Authority and/or Beneficiary may specify) of the Authority and/or Beneficiary requesting that Information; and
- 45.6.3 provide all necessary assistance as reasonably requested by the Authority and/or Beneficiary to enable the Authority and/or Beneficiary to respond to a request for information within the time for compliance set out in section 10 of the FOIA.
- 45.7 The Authority and/or Beneficiary (as the case may be) may consult the Contractor in relation to any request for disclosure of the Contractor's Confidential Information in accordance with all applicable guidance.
- 45.8 The Parties, including any Beneficiary, acknowledge that, the content of this Contract is not Confidential Information. The Authority and/or Beneficiary shall be responsible for determining in its absolute discretion whether any of the content of the Contract is exempt from disclosure in accordance with the provisions of the FOIA.
- 45.9 Notwithstanding any other term of the Contract, the Contractor hereby gives his consent for the Authority and/or Beneficiary to publish in the public domain the Contract in its entirety including any changes to the Contract that may from time to time be agreed (subject to the redaction of any information which is exempt from disclosure in accordance with the provisions of either the FOIA or the EIR as the case may be).
- 45.10 If the Authority and/or Beneficiary elects to publish the Contract:

- 45.10.1 the Authority and/or Beneficiary (as the case may be) may consult with the Contractor in order to determine whether any information contained in the Contract should be redacted prior to publication;
- 45.10.2 any final decision in relation to the redaction of information shall be a matter for the Authority and/or Beneficiary (as the case may be) in their absolute discretion.
- 45.10.3 the Contractor shall give such assistance and co-operation to the Authority and/or Beneficiary (as the case may be) as they shall reasonably require in order to publish the Contract.
- 45.11 This Clause 45 shall remain in force without limit in time in respect of Confidential Information which comprises Personal Data or which relates to a patient, his or her treatment and/or medical records. Save as aforesaid and unless otherwise expressly set out in the Contract, this Clause 45 shall remain in force for a period of 3 years after the termination or expiry of this Contract.
- 45.12 In the event that the Contractor fails to comply with this Clause 45, the Authority reserves the right to terminate the Contract by notice In Writing with immediate effect.

## **46. Data Protection**

- 46.1 The Parties will comply with all applicable requirements of the Data Protection Legislation. This Clause 46 is in addition to, and does not relieve, remove or replace, a party's obligations under the Data Protection Legislation.
- 46.2 The Parties acknowledge that where the Contractor is processing personal data under or in connection with this Contract that for the purposes of the Data Protection Legislation, the Authority and/or Beneficiary where applicable is the data controller and the Contractor is the data processor (where **Data Controller** and **Data Processor** have the meanings as defined in the Data Protection Legislation). Where the Contractor is processing personal data Schedule 6 sets out the scope, nature and purpose of processing by the Contractor, the duration of the processing and the types of Personal Data (as defined in the Data Protection Legislation "Personal Data") and categories of data subject.
- 46.3 Without prejudice to the generality of Clause 46.1, the Authority and/or Beneficiary will ensure that it has all necessary appropriate consents and notices in place to enable lawful transfer of the Personal Data to the Contractor for the duration and purposes of this Contract.
- 46.4 Without prejudice to the generality of Clause 46.1, the Contractor shall, in relation to any Personal Data processed in connection with the performance by the Contractor of its obligations under this agreement:

- 46.4.1 process that Personal Data only on the written instructions of the Authority and/or Beneficiary where applicable unless the Contractor is required by Domestic Law or EU Law to process that Personal Data. Where the Contractor is relying on Domestic Law or EU Law as the basis for processing Personal Data, the Contractor shall promptly notify the Authority and/or Beneficiary where applicable of this reliance, including the basis on which the Contractor claims that it is entitled so to rely, before performing the processing required by the Domestic Law or EU Law unless the Domestic or EU Law prohibits the Contractor from so notifying the Authority and/or Beneficiary where applicable;
- 46.4.2 ensure that it has in place appropriate technical and organisational measures, reviewed and approved by the Authority and/or Beneficiary where applicable, to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it);
- 46.4.3 ensure that all personnel who have access to and/or process Personal Data are obliged to keep the Personal Data confidential; and
- 46.4.4 not transfer any Personal Data outside of the UK or European Economic Area unless the prior written consent of the Authority and/or Beneficiary where applicable has been obtained and the following conditions are fulfilled:
- 46.4.4.1 the Authority, Beneficiary or the Contractor has provided appropriate safeguards in relation to the transfer;
  - 46.4.4.2 the data subject has enforceable rights and effective legal remedies;
  - 46.4.4.3 the Contractor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred; and

- 46.4.4.4 the Contractor complies with reasonable instructions notified to it in advance by the Authority and/or Beneficiary where applicable with respect to the processing of the Personal Data;
  - 46.4.4.5 assist the Authority and/or Beneficiary, in responding to any request from a Data Subject and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;
  - 46.4.4.6 notify the Authority and/or Beneficiary without undue delay on becoming aware of a Personal Data breach;
  - 46.4.4.7 at the written direction of the Authority and/or Beneficiary, delete or return Personal Data and copies thereof to the Authority and/or Beneficiary on termination of the agreement unless required by Domestic Law or EU Law to store the Personal Data; and
  - 46.4.4.8 maintain complete and accurate records and information to demonstrate its compliance with this Clause 46 and allow for audits by the Authority and/or Beneficiary or the Authority's and or Beneficiary's designated auditor.
- 46.5 The Authority does not consent to the Contractor appointing any third party processor of Personal Data under this Contract.
- 46.6 Either Party may, at any time on not less than 30 days' notice, revise this Clause 46 by replacing it with any applicable controller to processor standard clauses or similar terms forming party of an applicable certification scheme (which shall apply when replaced by attachment to this agreement).
- 46.7 The Contractor's liability under this clause 46 shall be unlimited and the Contractor shall indemnify and keep the Authority and/or Beneficiary indemnified against, any loss, damages, costs, expenses (including without limitation legal costs and expenses) claims or proceedings whatsoever or however arising from the Contractor's unlawful or unauthorised Processing, destruction and/or damage to Personal Data in connection with this Contract.
- 46.8 Nothing in this Clause 46 shall operate to limit or exclude the Contractor's liability for:
  - 46.8.1 any of its direct statutory obligations under Applicable Data Protection Laws; or

46.8.2 any liability imposed under Article 82 of the EU GDPR or Article 82 of the UK GDPR.

*[Guidance: clause 46 is drafted on the basis that the Authority is the Data Controller and the Contractor is the Data Processor. If this is not the case clause 46 will need amending to reflect the correct position. If advice is needed please refer to the Procurement Lead who may take advice from Legal & Risk Services.]*

## **47. [Information Security]**

[47.1 Without limitation to any other information governance requirements set out in this Contract, the Contractor shall:

47.1.1 notify the Authority and/or Beneficiary where applicable forthwith of any information security breaches or near misses (including without limitation any potential or actual breaches of confidentiality or actual information security breaches) in line with the Authority's and/or Beneficiary's information governance Policies; and

47.1.2 fully cooperate with any audits or investigations relating to information security and any privacy impact assessments undertaken by the Authority and/or Beneficiary and shall provide full information as may be reasonably requested by the Authority and/or Beneficiary in relation to such audits, investigations and assessments.

47.2 Where required in accordance with the Specification and Tender Response Document, the Contractor, and the Contractor shall procure that any Sub-Contractor shall, shall ensure that it puts in place and maintains an information security management plan appropriate to this Contract, the type of Goods and Services being provided and the obligations placed on the Contractor. The Contractor shall ensure that such plan is consistent with any relevant Policies, Guidance, Good Industry Practice and with any relevant quality standards as may be set out in the Key Provisions and/or the Specification and Tender Response Document.

47.3 Where required in accordance with the Specification and Tender Response Document, the Contractor shall obtain and maintain valid certification under the HM Government Cyber Essentials Scheme at the level and for the scope set out in the Specification and Tender Response Document. Where the HM Government Cyber Essentials Scheme is amended the Contractor shall comply with all amendments in order to maintain Cyber Essentials certification.

47.4 Where required in accordance with the Specification and Tender Response Document, the Contractor shall obtain and maintain valid ISO 27001 certification under the ISO Scheme at the level and for the scope set out in the Specification and Tender Response Document. Where the ISO Scheme is amended the Contractor shall comply with all amendments in order to maintain ISO 27001 certification.

## **Contractor's System and security of networks**

47.5 In relation to the Contractor's Systems and software, the Contractor warrants that:

47.5.1 it has [,and that each Subcontractor has,] obtained ISO 14001:2015 certification for its environmental management and shall comply with, and maintain, such certification requirements during the Term;

47.5.2 all Software used by or on behalf of the Contractor pursuant to this Contract will:

47.5.2.1 be currently supported versions of that Software;

47.5.2.2 be free of material defects and errors; and

47.5.2.3 perform in accordance with the user manuals and the published specification for such Software.

47.6 With regard anti-virus software:

47.6.1 the Contractor shall, throughout the Term, use the latest versions of anti-virus software available from an industry accepted anti-virus software vendor to check for and delete Malicious Software from the Contractor's System; and

47.6.2 if, notwithstanding clause 47.6.1, Malicious Software is found, the parties shall co-operate with the other to reduce the effect of the Malicious Software and, particularly if Malicious Software causes loss of operational efficiency or loss or corruption of the Authority's and/or Beneficiary's Data, assist each other to mitigate any losses and restore the Goods and Services to their original operating efficiency. The costs of complying with this clause 47.6.2 shall be apportioned between the parties on a pro rata basis according to fault.

47.7 In relation to the security of the Contractor's network and information systems, the Contractor:

47.7.1 warrants that the information in Schedule 10 (Contractor's Network And Information Security) is up to date and accurate and that it will update the Authority and/or Beneficiary immediately if there are any changes to such information;

47.7.2 shall notify the Authority and/or Beneficiary immediately if it becomes aware of any security incident affecting its network and information systems that could potentially affect the Authority and/or Beneficiary, and respond without delay to all queries and requests for information from the Authority and/or Beneficiary about any security incident, whether discovered by the Contractor or the Authority and/or

Beneficiary, in particular noting the extent of the Authority and/or Beneficiary's reporting obligations under the Network and Information Systems Regulations 2018 (NISR) and that the Authority and/or Beneficiary may be required to comply with statutory or other regulatory timescales;

47.7.3 shall, without prejudice to the Contractor's obligations in **Error! Bookmark not defined.** (Business Continuity Plan), use its best endeavours to ensure business continuity for the Authority and/or Beneficiary at all times; and

47.7.4 agrees to co-operate with the Authority and/or Beneficiary in all aspects of its compliance with the NISR including, without limitation, any requests for information if there is a suspected or actual security incident and any inspections by regulators.

47.8 The Contractor shall, at its own cost, provide for the carriage of all elements of the Contractor's System from and to the premises at which it is to be used in the provision of the Goods and Services. If any element of the Contractor's System is to be installed at the Authority and/or Beneficiary's Premises, the Contractor shall ensure that it leaves such premises clean, tidy and free from damage.

47.9 The Contractor shall ensure that, at all times, its maintenance and operating procedures are sufficient to ensure that the Goods and Services are provided in accordance with the Service Levels.

47.10 All of the Contractor's property located on the Authority and/or Beneficiary's Premises, including all elements of Contractor's System, shall remain at the sole risk and responsibility of the Contractor, except that the Contractor shall not in any circumstances be liable for the loss of or damage to any of the Contractor's property located on any Authority's and/or Beneficiary's Premises which is due to the negligent act or omission of the Authority and/or Beneficiary.

47.11 In the event of any breach of the Contractor's information security systems whereby the Authority or any Beneficiary sustains loss or damage (including the costs of taking reasonable steps to remedy or lessen the effects of such breach upon the Authority or the Beneficiary), or is or may be rendered liable to any third party, the Contractor's liability under this clause 47 shall be unlimited and the Contractor agrees to indemnify the Authority/Beneficiary against such loss, damage or liability (whether ascertained by judgment or compromise) or legal costs.]

*[Guidance: clause 47 Information Security is an optional clause where the nature of the contract requires this clause (along with optional Schedule 10). In the event clause 47 is not required delete clause and insert wording "NOT*

*USED” to maintain consistent clause numbering. If advice is needed please refer to Procurement Lead who may take advice from Legal & Risk Services.]*

## **48. Business Continuity Plan**

- 48.1 The Contractor shall submit as part of its tender submission a robust contingency plan which is to be in place and, agreed with the Authority prior to the Commencement Date, to ensure that the Contractor's performance of the Contract to the Authority will be maintained in the event of disruption (including, but not limited to, disruption to information technology systems or Supply Chain to the Contractor's operations, and those of Sub-Contractors to the Contractor, however caused ("Business Continuity Plan").
- 48.2 The Contractor shall ensure that the Business Continuity Plan aligns and continues to be aligned with Good Industry Practice and the relevant provisions of ISO: 2000 (as amended) and all other industry standards from time to time in force.
- 48.3 The Contractor shall make the Business Continuity Plan available for the Authority to inspect and to practically test at any reasonable time, and the Contractor shall promptly act upon and incorporate the Authority's reasonable comments upon the Business Continuity Plan.
- 48.4 The Contractor shall regularly review, test and update the Business Continuity Plan in accordance with Good Industry Practice, and it shall also do this in the following instances:
  - 48.4.1 in the event of a material change to the Contractor's business operations; and/or
  - 48.4.2 in the event of a change to the Specification and Tender Response Document in accordance with Clause 22 (Variation to Specification); and/or
  - 48.4.3 on the occurrence of any event which may increase the likelihood of the need to implement the Business Continuity Plan (including the identification of any threat to the Contractor, the Authority and/or Beneficiary or performance of the Contract);
  - 48.4.4 the Authority may request (such request to be made on reasonable grounds) any additional reviews by notifying the Contractor to such effect In Writing, whereupon the Contractor shall conduct such reviews in accordance with the Authority's written requirements.
- 48.5 If an event occurs which materially and adversely affects the business operations of the Contractor and this causes a material failure in the performance of the Contract by the Contractor then the Contractor shall immediately implement the Business Continuity Plan (and shall inform the



Authority and/or Beneficiary promptly that it has implemented the Business Continuity Plan). In all other instances the Contractor shall only implement or test the Business Continuity Plan either where it will have no impact on the performance of the Contract or with the prior written consent of the Authority and/or Beneficiary (which shall not be unreasonably withheld or delayed).

*[Guidance: the requirement for a robust Business Continuity Plan is to be included as part of the Instructions To Bidders and the BCP is to be incorporated in Schedule 9.]*

## **49. The Human Rights Act 1998**

- 49.1 The Contractor shall, and shall use reasonable endeavours to ensure that its staff or agents and/or Sub-Contractors shall, at all times, act in a way which is compatible with the Convention rights within the meaning of Section 1 of the Human Rights Act 1998.
- 49.2 The Contractor agrees to indemnify and keep indemnified the Authority and/or Beneficiary against all loss, costs, proceedings or damages whatsoever arising out of or in connection with any breach by the Contractor of its obligations under Clause 49.1.

## **50. Standing and Authority**

- 50.1 The Contractor warrants to the Authority that it has all necessary corporate standing and authorisation to enter into and be bound by the terms of the Contract. At all times in connection with the Contract, the Contractor shall be an independent contractor and nothing in the Contract shall create a relationship of agency or partnership or a joint venture as between the Contractor and the Authority and/or Beneficiary and accordingly the Contractor shall not be authorised to bind the Authority and/or Beneficiary.

## **51. Relationship of the parties**

- 51.1 The Contractor shall not incur any liabilities on behalf of the Authority and/or Beneficiary; or make any representations or give any warranty on behalf of the Authority and/or Beneficiary; or, enter into any contract or obligation on behalf of the Authority and/or Beneficiary.

## **52. Inducements to Purchase**

- 52.1 The Contractor shall not offer to the Authority or any of its staff or agents and/or Beneficiary or any of its staff or agents as a variation of the Contract, or as an agreement collateral to it, any advantage other than a cash discount against the Contract Price or training of the staff of the Authority and/or Beneficiary in connection with the Goods and Services.

## **53. Prevention of Corruption and Bribery**

### **53.1 The Contractor will :**

53.1.1 not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;

53.1.2 comply with the Authority's and/or Beneficiary's Ethics, Anti-bribery and Anti-corruption Policies (as the Authority and/or Beneficiary may update them from time to time) (the "Relevant Policies");

53.1.3 maintain in place throughout the term of this Contract its own policies and procedures, including, but not limited to, adequate procedures under the Bribery Act 2010, to ensure compliance with the Relevant Policies and Clause 53.1, and will enforce them where appropriate;

53.1.4 promptly report to the Authority and/or Beneficiary any request or demand for any undue financial or other advantage of any kind received by the Contractor in connection with the performance of this Contract;

53.1.5 immediately notify the Authority and/or Beneficiary if a foreign public official becomes an officer or employee of the Contractor or acquires a direct or indirect interest in the Contractor (and the Contractor warrants that it has no foreign public officials as officers, staffs or direct or indirect owners at the Commencement Date); and

53.1.6 within three (3) Months of the date of this Contract, and annually thereafter, certify to the Authority and/or Beneficiary In Writing signed by an officer of the Contractor, compliance with this Clause 53 by the Contractor and all Persons associated with it and all Subcontractors. The Contractor shall provide such supporting evidence of compliance as the Authority and/or Beneficiary may reasonably request.

53.2 The Contractor shall ensure that any Person associated with the Contractor who is performing services in connection with this Contract does so only on the basis of a written contract which imposes on and secures from such Person terms equivalent to those imposed on the Contractor in this Clause 53 ("Relevant Terms"). The Contractor shall be responsible for the observance and performance by such Persons of the Relevant Terms, and shall be directly liable to the Authority and/or Beneficiary for any breach by such Persons of any of the Relevant Terms.

53.3 Breach of this Clause 53 shall be deemed a material breach of this Contract which is not capable of remedy.

- 53.4 For the purposes of this Clause 53, the meaning of 'adequate procedures' and 'foreign public official' and whether a person is associated with another person shall be determined in accordance with section 7(2) of the Bribery Act 2010 (and any guidance issued under section 9 of that Act), sections 6(5) and 6(6) of that Act and section 8 of that Act respectively. For the purposes of this Clause 53 a Person associated with the Contractor includes any Sub-Contractor of the Contractor.

## **54. General**

- 54.1 Save as required by law and/or the requirements of any relevant stock exchange and Clause 42 no publicity shall be made by any of the Parties relating to any matter in connection with the Contract without the prior written consent of the other Party.
- 54.2 Any decision, act or thing that the Authority and/or Beneficiary is required or authorised to take or do under the Contract may be taken or done by any person authorised, either generally or specifically, by the Authority and/or Beneficiary to take or do that decision, act or thing, provided that upon receipt of a written request the Authority and/or Beneficiary shall inform the Contractor of the name of any Person so authorised.
- 54.3 The Contractor shall from time to time upon the request of the Authority and/or Beneficiary, execute any additional documents and do any other acts or things which may reasonably be required to implement the provisions of the Contract.
- 54.4 Any provision of the Contract which is held to be invalid or unenforceable in any jurisdiction shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining provisions hereof and any such invalidity or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in any other jurisdiction.
- 54.5 This Contract constitutes the entire agreement between the Parties, and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter. The Contractor acknowledges and agrees that it has not relied on any representation, warranty or undertaking (whether written or oral) in relation to the subject matter of the Contract and therefore irrevocably and unconditionally waives any rights it may have to claim damages against the Authority and/or Beneficiary for any misrepresentation (whether made carelessly or not) or for breach of any warranty unless the representation relied upon is set out in the Contract or unless such representation was made fraudulently.

- 54.6 The failure by the Authority, the Contractor and/or Beneficiary to insist upon the strict performance of any provision, term or condition of the Contract or to exercise any right or remedy consequent upon the breach thereof shall not constitute a waiver of any such breach or any subsequent breach of such provision, term or condition.
- 54.7 Each Party shall bear its own expenses in relation to the preparation, execution and implementation of the Contract including all costs legal fees and other expenses so incurred.
- 54.8 The Contractor warrants represents and undertakes to the Authority and/or Beneficiary that there are no pending or threatened actions or proceedings before any court or administrative agency which would materially adversely affect the financial condition, business or operations of the Contractor and that there are no material contracts existing to which the Contractor is a party which prevent it from entering into the Contract; and that the Contractor has satisfied itself as to the nature and extent of the risks assumed by it under the Contract and gathered all information necessary to perform its obligations under the Contract and all other obligations assumed by it.
- 54.9 The rights and remedies provided in the Contract are cumulative and not exclusive of any rights or remedies provided by the Law, or by any other contract or document.

## **55. Third Party Rights**

- 55.1 The Authority and the Contractor acknowledge that they have entered into the Contract for the benefit of each of the Beneficiaries [and each of the Third Party Beneficiaries]. Accordingly, the Authority and the Contractor agree that (in addition to the Authority's right to enforce the Contract) each of the Beneficiaries [and each of the Third Party Beneficiaries] may enforce any term of the Contract.
- 55.2 Save as provided in Clause 55.1 of the Contract and Clause 1.14 of Part D of Schedule 7, a Person who is not a Party to the Contract shall have no rights pursuant to the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Contract .
- 55.3 All or any of the provisions of the Contract may be rescinded or varied by the Parties in their entirety or in part without the consent of or the need to give any notice to any Person not a Party to it.
- 55.4 The Contractor agrees that it will not raise as a defence or set off against any claim brought against it by any Beneficiary [or any Third Party Beneficiary] any matter which would have been available to the Contractor by way of defence or set off if proceedings had been brought against the Contractor by the Authority or by way of counterclaim against such of the Beneficiaries [or

Third Party Beneficiaries] if such Beneficiary or [Third Party Beneficiary] had been a Party to the Contract.

*[Guidance: delete reference to Third Party Beneficiary/ies if not applicable.]*

## **56. [Third Party Beneficiaries]**

56.1 In the event that any Third Party Beneficiary wishes to enforce its rights under Clause 56.1 the following provisions shall apply:

56.1.1 The Third Party Beneficiaries shall have the same rights as the Beneficiaries under the Contract and shall comply with all the terms of the Contract which apply to the Beneficiaries;

56.1.2 The Third Party Beneficiaries agree that the Contract is for use within the NHS and accordingly to exercise their rights under the Contract only in relation to the provision of Goods and Services to the Authority and/or Beneficiary and not for any other purpose whatsoever. In exercising their rights under the Contract the Third Party Beneficiaries shall at all times treat all information concerning the Contract with the strictest confidence and in accordance with Clause 45;

56.1.3 The Third Party Beneficiaries shall not enter into any obligations in the name of the Authority and/or Beneficiary and shall not make any representations or give any warranties on behalf of the Authority and/or Beneficiary;

56.1.4 Where Goods and Services or Deliverables are ordered by any Third Party Beneficiary the Contractor agrees that it shall provide such Goods and Services or Deliverables to such Third Party Beneficiary and invoices for the Goods and Services or Deliverables supplied to such Third Party Beneficiary shall be issued by the Contractor to, and in the name of, such Third Party Beneficiary and such Third Party Beneficiary shall be liable for settlement thereof;

56.1.5 The Authority and/or Beneficiary shall not be liable to any Third Party Beneficiary for any acts or omissions of the Contractor or for any loss, damage or other expenses incurred or suffered by any Third Party Beneficiary as a result of such Third Party Beneficiary exercising its rights under the Contract;

56.2 Each Third Party Beneficiary undertakes to indemnify and keep indemnified the Authority and/or Beneficiary from and against all costs, claims, demands, liabilities, damages, losses and expenses (including all legal expenses) incurred or suffered by the Authority and/or Beneficiary:

56.2.1 arising out of or in connection with any act or omission of the Third Party Beneficiary or any breach of any term of the Contract by the Third Party Beneficiary;

56.2.2 a result of any claim, loss, injury, damage, expense or delay suffered or incurred by the Contractor or any third party arising directly or indirectly from or in any way connected with the acts or omissions of the Third Party Beneficiary in enforcing its rights under the Contract, whether wilful, reckless, fraudulent, negligent, dishonest or otherwise;

and the Third Party Beneficiary shall at its own expense take out and maintain adequate insurance in respect of such liabilities and provide evidence of such insurance as the Authority may reasonably request from time to time;

56.3 In the event of any dispute:

56.3.1 between the Contractor and any Third Party Beneficiary relating to any act or omission of such Third Party Beneficiary or any breach of any term of the Contract by such Third Party Beneficiary;

56.3.2 between the Authority and/or Beneficiary and any Third Party Beneficiary relating to the provision of Goods and Services by the Third Party Beneficiary to the Authority and/or Beneficiary;

56.3.3 the Authority reserves the right to suspend such Third Party Beneficiary's rights under the Contract until such dispute has been resolved;

56.3.4 If the Contractor makes a claim against any Third Party Beneficiary for any act or omission of such Third Party Beneficiary or any breach of the Contract by such Third Party Beneficiary the Contractor agrees that it shall not include the Authority and/or Beneficiary as a party to any proceedings against such Third Party Beneficiary;

56.3.5 The Authority shall notify any Third Party Beneficiary which is removed from Schedule 8 (Third Party Beneficiaries Schedule) and such Third Party Beneficiary shall immediately cease to place Purchase Orders under the Contract.]

*[Guidance: clause 56 applies where there are named Third Party Beneficiaries (see Schedule 8). In the event clause 56 is not required please delete clause and insert "NOT USED" to ensure consistent clause numbering.]*

## **57. Equality and Non-discrimination**

- 57.1 The Contractor shall comply with the Equality Act 2010 ("2010 Act") and any other applicable equality legislation.
- 57.2 The Contractor acknowledges and agrees that the Authority and/or Beneficiary is subject to the public sector equality duty set out in section 149 of the 2010 Act.
- 57.3 The Contractor must, in respect of its performance of this Contract, comply with section 149 of the 2010 Act and warrants and undertakes to have due regard in its performance of this Contract to:
- 57.3.1 eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the 2010 Act;
  - 57.3.2 advance equality of opportunity between persons who share a relevant protected characteristic (as defined in the 2010 Act) and persons who do not share it;
  - 57.3.3 foster good relations between persons who share a relevant protected characteristic (as defined in the 2010 Act) and persons who do not share it;
  - 57.3.4 and for the avoidance of doubt this obligation shall apply irrespective of whether the Contractor is a public authority for the purposes of such section.
- 57.4 Without prejudice to Clause 57.3 the Contractor shall:
- 57.4.1 comply with the Authority's and/or Beneficiary's instructions and directions and any Policies and codes of practice issued by it from time to time in relation to the 2010 Act; and
  - 57.4.2 promptly notify and keep the Authority and/or Beneficiary informed (with full supporting details if requested) of all complaints and investigations in relation to the 2010 Act.
- 57.5 The Contractor shall provide to the Authority and/or Beneficiary such information as the Authority and/or Beneficiary may reasonably require to:
- 57.5.1 monitor the equity of access to the Goods and Services; and

57.5.2 fulfil its obligations under legislation (including any sub-ordinate legislation); and

57.5.3 monitor equality of opportunity in employment.

57.6 The Authority and/or Beneficiary and the Contractor shall each undertake Equality Impact Assessments in accordance with the legislation (including any sub-ordinate legislation).

57.7 The Contractor shall notify the Authority and/or Beneficiary immediately of any investigation of or proceedings against the Contractor under the 2010 Act and shall cooperate fully and promptly with any requests of the person or body conducting such investigation or proceedings, including allowing access to any documents or data required, attending any meetings and providing any information requested.

57.8 The Contractor shall indemnify the Authority and/or Beneficiary against all costs, claims, charges, demands, liabilities, damages, losses and expenses incurred or suffered by the Authority and/or Beneficiary arising out of or in connection with any investigation conducted or any proceedings brought under the 2010 Act due directly or indirectly to any act or omission by the Contractor, its agents, staff or Sub-Contractors.

57.9 The Contractor shall impose on any Sub-Contractor obligations substantially similar to those imposed on the Contractor by this Clause 57.

## **58. Notices**

58.1 Any notice to be given under the Contract shall either be delivered personally, sent by facsimile or sent by first class recorded delivery post (airmail if overseas) or electronic mail. The address for service of each Party shall be its registered office or such other address as either Party may previously have notified to the other Party In Writing. A notice shall be deemed to have been served:

58.1.1 if personally delivered, at the time of delivery;

58.1.2 if sent by facsimile at the time of transmission;

58.1.3 if posted, at the expiration of 48 hours or (in the case of airmail seven days) after the envelope containing the same was delivered into the custody of the postal authorities; and

58.1.4 if sent by electronic mail, a telephone call is made to the recipient warning the recipient that an electronic mail message has been sent to him (as evidenced by a contemporaneous note of the Party sending the notice) and a hard copy of such notice is also sent by first class



recorded delivery post (airmail if overseas) on the same day as that on which the electronic mail is sent.

- 58.2 In proving such service it shall be sufficient to prove that personal delivery was made, or that the envelope containing such notice was properly addressed and delivered into the custody of the postal authority as prepaid first class, recorded delivery or airmail letter (as appropriate) or that the facsimile was transmitted on a tested line or that the correct transmission report was received from the facsimile machine sending the notice as the case may be.

## **59. Force Majeure**

- 59.1 No Party shall be entitled to bring a claim for a breach of obligations under the Contract by the other Party or incur any liability to the other Party for any Loss or damages incurred by that party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that event of Force Majeure.
- 59.2 In the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.
- 59.3 As soon as practicable, following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the Contract.
- 59.4 If the Force Majeure in questions prevails for a continuous period in excess of 15 days after the date on which the Force Majeure begins, the Party not in default is then entitled to give notice In Writing to the defaulting Party to terminate this Contract. This notice to terminate must specify the termination date. Once a notice to terminate is given, this Contract will terminate on the termination date set out in the notice.

## **60. Welsh Language Obligations**

- 60.1 The Contractor warrants and undertakes that it will not perform this Contract in such a way as to render the Authority and/or Beneficiary in breach of its obligations in respect of the Welsh language including but not limited to its obligations under the Government of Wales Act 2006, the Welsh Language (Wales) Measure 2011 and The Welsh Language Standards (no.7) Regulations 2018.

## **61. Anti Slavery**

- 61.1 In performing its obligations under the Contract the Contractor shall:

61.1.1 comply with all applicable anti-slavery and human trafficking laws, statutes, and regulations from time to time in force including the Modern Slavery Act 2015; and

61.1.2 comply with the Authority's and/or Beneficiary's Anti-Slavery policy.

## **62. Wellbeing of Future Generations (Wales) Act 2015**

62.1 The Contractor shall assist the Authority and/or Beneficiary to meet its obligations under the Well-being of Future Generations (Wales) Act 2015 when performing the Goods and Services under the Contract. Such assistance under this Clause shall include providing the Authority and/or Beneficiary with information required to meet it or their annual reporting requirements under the Well-being of Future Generations (Wales) Act 2015.

## **63. National Minimum Wage**

63.1 Without prejudice to any other provisions of this Contract, the Contractor shall and shall ensure that the Contractor Personnel shall:

63.1.1 ensure that all employees engaged in the provision of the Goods and Services are paid an hourly wage (or equivalent of an hourly wage) no less than the rate applicable to a particular worker as set out in The National Minimum Wage Regulations 2015, as amended by Statutory Instruments and as may be further amended; or as set out in any other statutory provision which may be enacted in England and Wales which imposes obligations on a contractor in respect of a minimum remuneration for employees engaged in the provision of services; and

63.1.2 ensure that no employees engaged in the provision of the Goods and Services are paid less than the amount to which they are entitled in their respective contracts of employment.

63.2 The Contractor shall provide to the Authority and/or Beneficiary such information concerning the National Minimum Wage as the Authority and/or Beneficiary or its nominees may reasonably require from time to time and within the deadline the Authority and/or Beneficiary reasonably impose.

63.3 A failure by the Contractor to comply with clause 63.1 shall constitute a material breach of this Contract entitling the Authority and/or Beneficiary to terminate the Contract at its absolute discretion. For the avoidance of doubt, a failure by the Contractor to ensure the Contractor Personnel comply with clauses 63.1.1 and 63.1.2 shall not for the purposes of this clause 63.3 be regarded as a material breach of this Contract.

## **64. Law & Jurisdiction**

64.1 This Contract shall be deemed to be a contract made in Wales and shall be governed by and interpreted in accordance with the law of England and Wales, as it applies in Wales. All disputes arising under or in connection with it shall

(subject to Clause 34 above) be submitted in the first instance to the non-exclusive jurisdiction of the Courts in Cardiff.

### **SCHEDULE 3**

#### **Defined Terms and Interpretation**

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

**"Actuary"** means a Fellow of the Institute and Faculty of Actuaries;

**"Affected Party"** means, in the context of Clause 59 the Party whose obligations under the Contract have been affected by the Force Majeure Event;

**"Anti-Slavery Policy"** the Authority's anti slavery policy as amended by notification to the Contractor from time to time;

**"Applicable Data Protection Laws"** means:

- (i) to the extent the UK GDPR applies, the law of the United Kingdom or of a part of the United Kingdom which relates to the protection of personal data;
- (ii) to the extent the EU GDPR applies, the law of the European Union or any member state of the European Union to which the Contractor is subject, which relates to the protection of personal data;

**"Authorised Officer"** means a person designated as such by the Authority from time to time as notified In Writing to the Contractor to act as the representative of the Authority for all purposes connected with the Contract, including any authorised representative of such person;

**"Authority"** means the Beneficiary placing the Purchase Order or, if a Third Party Beneficiary places the Purchase Order, the Beneficiary to which the Third Party Beneficiary supplies Goods and Services;

**"Authority's Premises"** means the premises identified in the Specification which are to be made available for use by the Contractor for the provision of the Goods and Services on the terms set out in this Contract;

**"Beneficiary"** means any or all of:

Welsh Ministers which, for the avoidance of doubt, includes staff of the Welsh Government who are exercising functions on behalf of the Welsh ministers;  
GPs;  
health service bodies referred to in Section 7 of the National Health Service (Wales) Act 2006;  
the Medical Research Council;  
any care Trust as defined in section 35 of the National Health Service (Wales) Act 2006;  
anybody replacing or providing similar or equivalent services to the above;  
any statutory successor to any of the above;

and **"Beneficiaries"** shall be construed accordingly;

**"Broadly Comparable"** means certified by an Actuary as satisfying the condition that there are no identifiable Eligible Employees who would overall suffer material detriment in terms of their future accrual of Pension Benefits under the scheme compared with the NHS Pension Scheme assessed in accordance with Annex A of Fair Deal for Staff Pensions;

**"Business Continuity Plan"** means, the document agreed by the Parties in accordance with Clause 48 and attached at Schedule 9;

**"Cabinet Office Statement"** means the Cabinet Office Statement of Practice - Staff Transfers in the Public Sector 2000 (as revised in 2013) as may be amended or replaced;

**"Code of Practice on Workforce Matters"** means the Revised Code;

**"Contractor Personnel"** means any employee, agent, consultant and/or contractor of the Contractor or Sub-Contractor who is either partially or fully engaged in the performance of the Goods and Services;

**"COSHH"** means the Control of Substances Hazardous to Health Regulations 2002;

**"Change of Control"** means any sale or other disposal of any legal, beneficial or equitable interest in any or all of the equity share capital of a corporation (including the control over the exercise of voting rights conferred on that equity share capital or the control over the right to appoint or remove directors) provided that a "Change of Control" shall be deemed not to have occurred if after any such sale or disposal the same entities directly or indirectly exercise the same degree of control over the relevant corporation;

**"Charge Out Rates"** the daily rate of Contractor personnel set out in the Pricing Schedule;

**"Claim"** has the meaning given in clause 41.4;

**"Commencement Date"** means the date, set out in the Purchase Order on which the provision of the Goods and Services is to start;

**"Confidential Information"** means information, data and material of any nature which either Party may receive or obtain in connection with the operation of the Contract:

- (i) which comprises Personal Data or (in the case of the Authority and/or Beneficiary) which relates to any patient or his or her treatment or medical history; or

(ii) the release of which is likely to prejudice the commercial interests of the Authority and/or Beneficiary, or Third Party Beneficiary or the Contractor respectively; or

(iii) which is a trade secret;

**"Contract"** means the Purchase Order, the provisions on the Front Page and all Schedules of these NHS Wales Standard Terms and Conditions for the Provision of Goods and Services and for the avoidance of doubt all other terms, conditions or warranties other than any terms, conditions or warranties implied by law, are excluded unless expressly accepted In Writing by the Authority and/or Beneficiary;

**"Contractor"** means the Person who provides the Goods and Services (and any ancillary goods) to the Authority and/or Beneficiary in accordance with the Contract;

**"Contractor Personnel"** means any employee, agent, consultant and/or contractor of the Contractor or Sub-Contractor who is either partially or fully engaged in the performance of the Goods and Services;

**"Contractor's Equipment"** means all equipment that the Contractor supplies or is required to supply for the performance of the Goods and Services (and any ancillary goods) in accordance with the Contract whether owned, leased or hired;

**"Contractor's System"** means the information and communications technology system to be used by the Contractor in performing the Goods and Services, including the Software, the Contractor's Equipment and communications links between the Contractor's Equipment and the Authority's and/or Beneficiary's Operating Environment;

**"Contract Manager"** means a person designated as such by the Contractor from time to time as notified In Writing to the Authority to act as the duly authorised representative of the Contractor for all purposes connected with the Contract, including any authorised representative of such person;

**"Contract Price"** means the monies payable by the Authority and/or Beneficiary to the Contractor for the performance by the Contractor of its obligations under the Contract as set out in this Purchase Order and in any other Purchase Orders issued in association with the Contract. In the absence of agreement by the Parties to the contrary, the Contract Price shall be inclusive of all taxes, duties, expenses and disbursements save for VAT (if applicable) and shall include the costs of all equipment, materials and training supplied by the

Contractor, all travelling expenses involved and all royalties, licence fees or similar expenses in respect of the making, use or exercise by the Contractor of any Intellectual Property or Intellectual Property Rights for the purpose of performance of the Contract;

**"Contract Term"** means (subject to earlier termination in accordance with its terms or by operation of law) the duration of the Contract as set out in the Purchase Order;

**"Controller"** means as defined in the Data Protection Legislation;

**"Convictions"** means other than in relation to minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-over orders (including any spent convictions as contemplated by Section 1(1) of the Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exemptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order to include the Offender Rehabilitation Act 2014;

**"Costs"** includes costs, charges, outgoings and expenses of every description;

**"Critical Incident"** means an episode where supportive resources are required;

**"Data Protection Legislation" means:**

- (i) to the extent the UK GDPR applies, the law of the United Kingdom or of a part of the United Kingdom which relates to the protection of Personal Data;
- (ii) to the extent the EU GDPR applies, the law of the European Union or any member state of the European Union to which the Authority and/or Beneficiary or Contractor is subject, which relates to the protection of personal data;

**"Data Subject"** means as defined in the Data Protection Legislation;

**"Deliverable"** means any data, report, drawing, specification, design, invention, plan, program, document, contract, and/or other material produced by or to be produced by or acquired by or to be acquired by the Contractor in the course of the performance of the Goods and Services;

**"Direction Letter"** means an NHS Pensions Direction letter issued by the Secretary of State in exercise of the powers conferred by section 7 of the Superannuation (Miscellaneous Provisions) Act 1967 and issued to the Contractor or a Sub-Contractor of the Contractor (as appropriate) relating to the terms of participation of the Contractor or Sub-Contractor in the NHS Pension Scheme in respect of the Eligible Employees;

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

**"Domestic Law"** means the law of the United Kingdom or a part of the United Kingdom;

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

**"Eligible Employees"** means each of the Transferred Staff who immediately before the Employee Transfer Date was a member of, or was entitled to become a member of, or but for their compulsory transfer of employment would have been entitled to become a member of, either the NHS Pension Scheme or a Broadly Comparable scheme as a result of their employment or former employment with an NHS Body (or other employer which participates automatically in the NHS Pension Scheme) and being continuously engaged for more than 50% of their employed time with the Authority (in the case of Transferring Employees) or a Third Party (in the case of Third Party Employees) in the delivery of services the same as or similar to the Goods and Services.

For the avoidance of doubt a member of Staff who is or is entitled to become a member of the NHS Pension Scheme as a result of being engaged in the Goods and Services and being covered by an "open" Direction Letter or other NHS Pension Scheme "access" facility but who has never been employed directly by an NHS Body (or other body which participates automatically in the NHS Pension Scheme) is not an Eligible Employee entitled to Fair Deal for Staff Pensions protection under Part D of Schedule 7;

**"Employee"** means an employee within the meaning of the TUPE Regulations 2006, and "employed" is to be interpreted accordingly;

**"Employee Transfer Date"** means the Transferred Staff's first day of employment with the Contractor (or its Sub-Contractor);



**"Employment Liabilities"** means all claims, demands, actions, proceedings, damages, compensation, tribunal awards, fines, Costs (including but not limited to reasonable legal costs), expenses and all other liabilities whatsoever;

**"Equality Impact Assessment"** means a published process for narrowing the inequalities that exist in Wales between people from different ethnic backgrounds, people with disabilities, men and women (including transgendered people), people with different sexual orientations, people in different age groups, people with different religions or beliefs and people from different social and economic groups;

**"EU GDPR"** means the General Data Protection Regulation ((EU) 2016/679);

**"EU Law"** means the law of the European Union or any member state of the European Union;

**"Fair Deal for Staff Pensions"** means guidance issued by HM Treasury entitled "Fair Deal for staff pensions: staff transfer from central government" issued in October 2013 (as amended, supplemented or replaced);

**"Final Judicial Determination"** means any judicial determination in the Employment Tribunal, County Court or High Court in respect of which any rights of appeal have lapsed or been exhausted, or otherwise the determination of the relevant appellate court in respect of which any further rights of appeal have lapsed or been exhausted;

**"Force Majeure Event"** means one or more of the following to the extent that it is not attributable to the Contractor or the Contractor's staff: war, civil war (whether declared or undeclared), riot or armed conflict; radioactive, chemical or biological contamination; pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speed; acts of terrorism; explosion; fire; flood; extraordinarily severe weather conditions which are both unforeseen and for which precautions are not customarily taken by prudent business organisations so as to avoid or mitigate the impact thereof; industrial action which affects the provision of the Goods and Services, but which is not confined to the workforce of the Contractor or is site specific; pestilence; epidemic; pandemic; the actions (other than the giving of notice under Article 50 of the Treaty on the European Union and related actions agreeing the terms on which the UK may leave the EU or the terms on which the UK may trade with the EU or any one or

more of its Member States after the UK's departure) of governmental authorities to the extent that such actions are implemented either pursuant to emergency powers or otherwise outside the usual course of governmental business; or act of God, or other event which is beyond the reasonable control of the Party in question and could not have been avoided or mitigated by the exercise of all reasonable care by that Party and further provided that such event materially affects the ability of the Party seeking to rely upon it to perform its obligations under the Contract. Force Majeure may not be relied upon by the Contractor where the event would have been avoided through the successful implementation of the Contractor's Business Continuity Plan. For the avoidance of doubt the Covid-19 pandemic and any regulations, restrictions, or other steps enacted or ordered by Government (whether before or after the date of this Contract) to be taken in response thereto are not classified as a Force Majeure Event;

**"Good Industry Practice"** means the exercise of that degree of skill, diligence and foresight which would reasonably and ordinarily be expected from a skilled and experienced Contractor engaged in the provision of services similar to the Goods and Services under the same or similar circumstances as those applicable to the Contract and which are in accordance with any codes of practice published by relevant trade associations;

**"GPs"** means medical practitioners providing General Medical Services or Personal Medical Services under the National Health Service (Wales) Act 2006 (whether operating in partnership with others or not);

**"Guidance"** means any applicable guidance, direction or determination and any policies, advice or industry alerts which apply to the Goods and Services, to the extent that the same are published and publicly available or the existence or contents of them have been notified to the Contractor by the Authority and/or Beneficiary and/or have been published and/or notified to the Contractor by the Department of Health, Monitor, NHS Wales, the Medicines and Healthcare Products Regulatory Agency, the European Medicine Agency the European Commission, the Care Quality Commission and/or any other regulator or competent body;

**"HM Government Cyber Essentials Scheme"** means the HM Government Cyber Essentials Scheme as further defined in the documents relating

to this scheme published at:

<https://www.gov.uk/government/publications/cyber-essentials-scheme-overview>;

**"Index"** means the index nominated by the Authority relevant to the Contract to be entered into and which is maintained by The Office For National Statistics;

**"Insolvent"** means:

- (i) if the Contractor is an individual, that individual or where the Contractor is a partnership, any partner(s) in that firm becomes bankrupt or shall have a receiving order, administration order or interim order made against him, or shall make any composition or scheme of arrangement with or for the benefit of his creditors, or shall make any conveyance or assignment for the benefit of his creditors, or shall purport to do so, or any application shall be made for sequestration of his estate, or a trust deed shall be granted by him for the benefit of his creditors;
- (ii) if the Contractor is a company, the passing by the Contractor of a resolution for its winding-up or the making by a court of competent jurisdiction of an order for the winding-up of the Contractor or the dissolution of the Contractor, or if an administrator is appointed, or documents are filed with the court for the appointment of an administrator or notice of intention to appoint an administrator is given by the Contractor or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986), or the appointment of a receiver over, or the taking possession or sale by an encumbrancer of any of the Contractor's assets, or if the Contractor makes an arrangement with its creditors generally or makes an application to a court of competent jurisdiction for protection from its creditors generally; and
- (iii) any event in any jurisdiction other than England and Wales which is analogous to any of the above;

**"Intellectual Property"** means any and all patents, trademarks, service marks, domain names, registered designs, utility models, applications for and the right to make applications for any of such rights, inventions, know-how, unregistered trademarks and service marks, trade and business names, including rights in any get-up or trade dress, copyrights, (including rights in computer software and in websites) unregistered design rights and other rights in designs and rights in databases, subsisting anywhere in the world; the right for the maker of a database to prevent extraction or reutilisation or both of the whole or a substantial part of the content of that database, as described in Directive 96/9/EC on the legal protection of databases; rights under licences, consents, orders, statutes or otherwise in respect of any

rights of the nature specified in this definition "Intellectual Property";  
and rights of the same or similar effect or nature as or to those above  
in each case in any jurisdiction;

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

**"Interested Party"** means any organisation which has a legitimate interest in providing services of the same or similar nature to the Goods and Services in immediate or proximate succession to the Contractor or any Sub-Contractor and who had confirmed such interest in writing to the Authority;

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

**"Key Provisions"** means the key provisions set out in Schedule 1;

**"KPI"** means the key performance indicators as set out in the Specification and Tender Response Document, if any;

**"Law"** means any applicable legal requirements including, without limitation:

- (i) any applicable statute or proclamation or any delegated or subordinate legislation or regulation as applicable in England and Wales;
- (ii) any retained EU law within the meaning of EUWA including without limitation retained:
  - a. EU case law within the meaning of section 6(7) of EUWA;
  - b. Direct EU legislation within the meaning of s.20(1) of EUWA;
  - c. Direct principal and minor EU legislation within the meaning of s.7(6) of EUWA; and
  - d. general principles of EU law within the meaning of s.6(7) of EUWA;
- (iii) any applicable judgment of a relevant court of law which is a binding precedent in England and Wales;
- (iv) requirements set by any regulatory body as applicable in England and Wales;
- (v) any relevant codes of practice as applicable in England and Wales;  
and

- (vi) any relevant collective agreement and/or international law provisions (to include, without limitation, as referred to in (i) to (v) above);

**"Legacy Scheme"** means the pension scheme of which the Eligible Employees are members, or are eligible for membership of, or are in a waiting period to become a member of, prior to the Relevant Transfer;

**"Loaned Equipment"** means equipment owned by the Authority and/or Beneficiary which is loaned to the Contractor for the purposes of the Contract;

**"Location"** means the location for the provision of the Goods and Services as set out in the Contract or as otherwise agreed In Writing between the Authority and the Contractor;

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

**"Major Incident"** means an incident where the Goods and Services cannot be provided within the resources allocated;

**"Malicious Software"** means any software program or code intended to destroy, interfere with, corrupt or have a disruptive effect on program files, data or other information, executable code or application software macros, whether or not its operation is immediate or delayed, and whether such software program or code is introduced wilfully, negligently or without knowledge of its existence;

**"Measures"** means any measures proposed by the Contractor or any Sub-Contractor within the meaning of regulation 13(2)(d) of TUPE;

**"Month"** means a calendar month;

**"NHS Body"** has the meaning given to it under Section 22(6) of the National Health Service (Wales) Act 2006 and/or Section 275 of the National Health Service act 2006 as amended by section 138(2)(c) of Schedule 4 to the Health and Social Care 2012, as appropriate;

**"NHS Pensions"** means NHS Pensions (being a division of the NHS Business Services Authority) acting on behalf of the Secretary of State as the administrators of the NHS Pension Scheme or such other body as may from time to time be responsible for relevant administrative functions of the NHS Pension Scheme, including the Pensions Division of the NHS Business Services Authority;

- "NHS Pensions Scheme"** means the National Health Service Pension Scheme for England and Wales, established pursuant to the Superannuation Act 1972 and governed by subsequent regulations under that Act including the NHS Pension Scheme Regulation;
- "NHS Pension Scheme Arrears"** means any failure on the part of the Contractor or any Sub-Contractor to pay employer's contributions or deduct and pay across employee's contributions to the NHS Pension Scheme or meet any other financial obligations under the NHS Pension Scheme or any Direction Letter in respect of the Eligible Employees;
- "NHS Pension Scheme Regulations"** means, as appropriate, any or all of the National Health Service Pension Scheme Regulations 1995 (SI 1995/300), the National Health Service Pension Scheme Regulations 2008 (SI 2008/653) and any subsequent regulations made in respect of the NHS Pension Scheme, each as amended from time to time;
- "Operating Environment"** means collectively, the platform, environment and conditions on, in, or under which the Software is intended to be installed and operate, as set out in the Specification and Tender Response Document, including such structural, functional and other features, conditions and components such as hardware, operating software and system architecture and configuration;
- "Party"** means any party to the Contract individually and "Parties" refers to all of the parties to the Contract collectively. A Party shall include all permitted assigns of the Party in question. All persons who are not a Party to the Contract are third parties;
- "Payment Date"** means twenty (20) Working Days after the last of the conditions in Clause 1.7 of Part D of Schedule 7 has been satisfied;
- "Pension Benefits"** means any benefits (including but not limited to pensions related allowances and lump sums) relating to old age, invalidity or survivor's benefits provided under an occupational pension scheme;
- "Performance Notice"** means a notice as defined in Clause 15;
- "Person"** includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association and a reference to a person includes a reference to that person's successors and permitted assigns;
- "Personal Data"** means as defined in the Data Protection Legislation;
- "Personal Data Breach"** means as defined in the Data Protection Legislation;
- "Premature Retirement Rights"** rights to which any Transferred Staff (had they remained in the employment of an NHS Body or other employer which participates automatically in the NHS Pension Scheme) would have been or is entitled under the NHS Pension Scheme Regulations, the NHS Compensation for Premature Retirement Regulations 2002

(SI 2002/1311), the NHS (Injury Benefits) Regulations 1995 (SI 1995/866) and section 45 of the General Whitley Council conditions of service, or any other legislative or contractual provision which replaces, amends, extends or consolidates the same from time to time;

**"Policies"** means the policies, rules and procedures of the Authority and/or Beneficiary as notified to the Contractor from time to time;

**"Principles"** as defined in Clause 40.1;

**"Product Catalogue"** means an online electronic catalogue system which holds data and information on prices and products used by NHS Wales;

**"Product Information"** means information concerning the Goods and Services supplied by the Contractor to the Authority and/or Beneficiary in accordance with Clause 42 for inclusion in the Authority's Product Catalogue and/or Beneficiary's Product Catalogue from time to time;

**"Purchase Order"** means the purchase order issued by the Authority to the Contractor for the provision of the Goods and Services pursuant to these terms and conditions;

**"Replacement Contractor"** means any contractor engaged to replace the Contractor or any Sub-Contractor of the Contractor;

**"Revised Code"** means the code entitled "Revised Code of Practice on Workforce Matters (Procurement Advice Note (PAN) for the Public Sector in Wales)" issued by the Welsh Government and dated June 2014 (as amended, supplemented or replaced);

**"Schedules"** means a schedule of this Contract;

**"Service Credits"** shall mean as defined within the Specification and Tender Response Document for failure to adhere to Service Levels;

**"Service Levels"** shall mean as defined with the Specification and Tender Response Document;

**"Service Information"** means information concerning the Goods and Services provided by the Contractor to the Authority in accordance with Clause 42.1 for inclusion in the Authority's catalogue and/or Beneficiary's catalogue from time to time;

**"Services"** means the services and where the context permits any ancillary goods provided by the Contractor pursuant to, and in accordance with, the Contract;

**"Sites"** means those areas at the Location for the use of the Contractor and his staff in the provision of the Goods and Services, as set out in the Specification;

- “Software”** means the Contractor's Software, the Specially Written Software and the Third Party Software including, but not limited to, the software listed in the Contractor's Tender Response Document;
- “Specially Written Software”** means any software code (excluding any Background IPR) which is created by the Contractor (or by a third party on behalf of the Contractor) specifically for the purposes of this Contract;
- “Specific Contract”** means where a Purchase Order is issued by the Authority on terms that the same incorporates the Contract terms and conditions as amended to apply to any particular case;
- “Specification and Tender Response Document”** means the document as set out in Schedule 4 as amended and or /updated in accordance with this Contract;
- “Staff”** means all persons employed or engaged by the Contractor to perform its obligations under this Contract, including any Sub-Contractors and persons employed or engaged by such Sub-Contractors;
- “Sub-Contractor”** means a party to a sub-contract other than the Contractor;
- “Subsequent Transfer Date”** means the point in time, if any, at which services which are fundamentally or essentially the same as the Goods and Services (either in whole or in part) are first provided by a Successor or the Authority, as appropriate, giving rise to a relevant transfer under TUPE;
- “Subsequent Transferring Employees”** means any employee who, immediately prior to the Subsequent Transfer Date, is organised to perform the Goods and Services (either in whole or in part) and is assigned to an organised grouping of employees which will perform the Goods and Services fundamentally or essentially the same as the Goods and Services (in whole or in part) on behalf of the Successor or the Authority (as appropriate) after the Subsequent Transfer Date;
- “Successor”** means any third party who provides services fundamentally the same as the Goods and Services (either in whole or in part) in immediate or subsequent succession to the Contractor upon the expiry or earlier termination of this Contract;
- “Term”** means the Contract term as set out in the Key Provisions;
- “Third Party”** means any supplier of services fundamentally the same as the Goods and Services (either in whole or in part) immediately before the Transfer Date;
- [“Third Party Beneficiary”** means each of the non-NHS bodies set out in the Special Conditions as may be amended from time to time by the Authority and/or Beneficiary;]



**"Third Party Software"** means software which is proprietary to any third party and that is either licensed to the Authority and/or Beneficiary or is used by the Contractor in the provision of the Goods and Services, excluding any of the Authority's and/or Beneficiary's Software but including the software specified in the Contractor's Tender Response Document;

**"Transfer Amount"** means an amount paid in accordance with Clause 1.7 of Part D of Schedule 7 and calculated in accordance with the assumptions, principles and timing adjustment referred to in Clause 1.6 of Part D of Schedule 7 in relation to those Eligible Employees who have accrued defined benefit rights in the NHS Pension Scheme or a Third Party's Broadly Comparable scheme and elected to transfer them to the Contractor's Broadly Comparable scheme or the NHS Pension Scheme under the Transfer Option;

**"Transfer Date"** means the date the Contractor actually commences delivery of the Goods and Services;

**"Transfer Option"** an option given to each Eligible Employee with either:

- (i) accrued rights in the NHS Pension Scheme; or
- (ii) accrued rights in a Broadly Comparable scheme,

as at the Employee Transfer Date, to transfer those rights to the Contractor's (or its Sub-Contractor's) Broadly Comparable scheme or back into the NHS Pension Scheme (as appropriate), to be exercised by the Transfer Option Deadline, to secure year-for-year day-for-day service credits in the relevant scheme (or actuarial equivalent, where there are benefit differences between the two schemes);

**"Transfer Option Deadline"** means the first Working Day to fall at least three (3) months after the notice detailing the Transfer Option has been sent to each Eligible Employee;

**"Transferred Staff"** means those employees (including Transferring Employees and any Third Party Employees) whose employment transfers to the Contractor or to a Sub-Contractor by operation of TUPE, the Cabinet Office Statement or for any other reasons, as a result of the award of this Contract;

**"Transferring Employees"** means all those employees, if any, who are organised to perform the Goods and Services (either in whole or in part) and assigned immediately before the Transfer Date to an organised grouping of employees performing the Goods and Services and which will provide the Goods and Services or services fundamentally or essentially the same as the Goods and Services (in whole or in part) following the Transfer Date;

**"TUPE"** means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (2006/246) and/or any other regulations or other

legislation enacted for the purpose of implementing or transposing the Acquired Rights Directive (77/187/EEC, as amended by Directive 98/50 EC and consolidated in 2001/23/EC) into English and Welsh law;

**“UK GDPR”** has the meaning given to it in section 3(10) (as supplemented by section 205(4)) of the Data Protection Act 2018;

**“Welsh Ministers”** means Welsh Ministers appointed under section 48 of the Government of Wales Act 2006 and Deputy Welsh Ministers appointed under section 50 of that Act;

**“Working Day”** means any day which is not a Saturday, a Sunday or a Bank Holiday in Wales;

**“Year”** means during the Contract Term, any 12 Month period commencing on the Commencement Date or an anniversary thereof;

- 1.1 In these terms and conditions, all references to any statute or statutory provision shall be deemed to include references to any statute or statutory provision which amends, extends, consolidates, re-enacts or replaces the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made thereunder and any conditions attaching thereto
- 1.2 Any headings to Clauses, together with the front cover and the index are for convenience only and shall not affect the meaning of these terms and conditions. Unless the contrary is stated references to Clauses shall mean the Clauses of these terms and conditions.
- 1.3 Unless otherwise expressly defined in these terms and conditions, the words used in these terms and conditions shall bear their natural meaning. The Parties have had equal opportunity to take legal advice and the contra proferentem rule shall not apply to the interpretation of these terms and conditions.
- 1.4 Where the words "including", "include(s)" or "in particular" are used in this Contract, they are deemed to have the words without limitation following them. Where the context permits, words other and otherwise are illustrative and shall not limit the sense of the words preceding them. The ejusdem generis principle is not to be applied when interpreting these terms and

conditions. General words are not to be given a restrictive meaning where they are followed by examples intended to be included within the general words.

- 1.5 In these terms and conditions, words importing any particular gender include all other genders.
- 1.6 In these terms and conditions, words importing the singular only shall include the plural and vice versa.
- 1.7 Subject to the contrary being stated expressly or implied from the context in these terms and conditions, all communication between the Parties shall be In Writing.
- 1.8 All monetary amounts are expressed in pounds sterling.
- 1.9 Except where an express provision of these terms and conditions states the contrary, each and every obligation of a Party under the terms and conditions is to be performed at that Party's cost.
- 1.10 Any reference to a Party "procuring" another person to act or omit to act in a certain manner shall mean that the Party so procuring shall be liable for any default on the part of the person acting or omitting to act in that manner.
- 1.11 All references to the Contract include (subject to all relevant approvals) a reference to the Contract as amended, supplemented, substituted, novated or assigned from time to time.
- 1.12 Where there is a conflict between the Contractor's responses to the Authority's requirements and any other part of this Agreement, such other part of this Agreement shall prevail.

**SCHEDULE 4**  
**SPECIFICATION AND TENDER RESPONSE DOCUMENT**

*[Guidance on Cyber Security: Where applicable Cyber Security details should be included within the Specification and Tender Response Schedule.*

*In determining the appropriate level of security Procurement shall be guided by the Welsh Health Circular WHC (2017) 025 'Guidance on Cyber Security and Information Governance requirements relating to suppliers and the supply chain '.]*

*Consideration should be given on whether to include appropriate service levels and Service Credits to encourage the correct behaviours by the Contractor.*

## **SCHEDULE 5**

### **PRICING**

*[Guidance on Charge Out Rates: Also include Contractors fixed Charge Out Rates for work undertaken under clause 33 for any reasonable variation or addition to the Specification and Tender Response Document including any other commercial offers and assurances]*

## **SCHEDULE 6**

### **DATA PROTECTION**

*[Guidance: Populate this schedule where the Contractor is processing personal data in accordance with clause 46]*

Data Processing

Processing, Personal Data and Data Subjects

1. Processing by the Contractor

1.1 Scope

1.2 Nature

1.3 Purpose of processing

1.4 Duration of the processing

2.Types of personal data

3.Categories of data subject

**SCHEDULE 7**  
**TRANSFER OF EMPLOYEES**

**Part A – Where there is a Final Judicial Determination or otherwise the Authority’s view is that no employees transfer (or one or more particular employees do not transfer) to the Contractor under TUPE upon award of this Contract**

- 1.1 Where there is a Final Judicial Determination or otherwise the Authority’s view is that no employees transfer (or one or more particular employees do not transfer) under TUPE at the commencement of the provision of Goods and Services by the Contractor, the Parties will proceed on the assumption that TUPE, the Cabinet Office Statement, the Revised Code and/or a Fair Deal for Staff Pensions (as appropriate), of Practice on Workforce Matters shall not apply so as to transfer the employment of any employees (or the particular employee or employees) of the Authority or an incumbent contractor to the Contractor.
- 1.2 If any person who was an employee of the Authority or a Third Party before the Transfer Date claims, or it is determined, that their contract of employment has been transferred from the Authority or Third Party to the Contractor or a Sub-Contractor pursuant to TUPE, or claims or it is determined that their employment would have so transferred had they not resigned or been dismissed, then:
- 1.2.1 the Contractor will, within seven (7) days of becoming aware of that fact, give notice in writing to the Authority;
  - 1.2.2 the Contractor (or the Authority or Third Party, where such a person is not already employed by that party) may offer employment to such person within twenty-eight (28) days of the notification by the Contractor;
  - 1.2.3 if such offer of employment is accepted, the person shall be immediately released from any employment with the Authority or the Authority will procure such a release from any employment by a Third Party, as applicable in the circumstances;
  - 1.2.4 Irrespective of whether any offer of employment under clause 1.2.2 is made or accepted, the Contractor (or Sub-Contractor, as applicable) shall be responsible for and indemnify the Authority in respect of all liabilities arising in respect of any such person and shall (where relevant) be bound

to apply the Revised Code and/or the Fair Deal for Staff Pensions, as appropriate, in respect of any such person in accordance with the provisions of Part D of this Schedule 7. The Contractor will in turn be indemnified by the Third Party (incumbent contractor) pursuant to clause 39A of Schedule 2 of the Third Party's (incumbent contractor's) contract with the Authority.



**Part B – Where there is a Final Judicial Determination or otherwise the Authority’s view is that an employee or employees transfer(s) from the Authority under TUPE upon award of this Contract**

- 1.1 Where there is a Final Judicial Determination or otherwise the Authority’s view is that an employee or employees transfer(s) under TUPE at the commencement of the provision of Goods and Services under this Contract, the Parties will proceed on the assumption that the contracts of employment of the Transferring Employees will transfer on the Transfer Date to the Contractor (or any Sub-Contractor, as applicable) pursuant to TUPE, the Cabinet Office Statement, the Revised Code and/or the Fair Deal for Staff Pensions, as appropriate.
- 1.2 The Contractor agrees, or shall ensure by written agreement that any Sub-Contractor shall agree, to accept the Transferring Employees into its employment on the Transfer Date upon their then current terms and conditions of employment (including the right to continued access to the NHS Pension Scheme or access to a Broadly Comparable pension scheme which shall be dealt with in accordance with Part D of this Schedule 7) and with full continuity of employment.
- 1.3 Clause 1.2 of Part B of this Schedule 7 (and any subsequent agreement by any Sub-Contractor), is subject to the right of any employee identified as a Transferring Employee to object to being transferred to the Contractor or any Sub-Contractor.
- 1.4 The Contractor shall, or shall ensure by written agreement that any Sub-Contractor shall:
  - 1.4.1 not later than twenty eight (28) days after issue of a notice in writing to it from the Authority, provide the Authority with the information required under regulation 13(4) of TUPE. The Contractor shall be liable to the Authority for, and shall indemnify and keep the Authority indemnified against, any loss, damages, costs, expenses (including without limitation legal costs and expenses), claims or proceedings that arise or result from any breach of this obligation;
  - 1.4.2 provide such assistance and information to the Authority as it may reasonably request to facilitate a smooth and efficient handover of the Transferring Employees to the Contractor or any Sub-Contractor (including attendance at any meetings with Transferring Employees, trade unions and employee representatives);
  - 1.4.3 comply with its obligations to inform and, if necessary, consult the appropriate representatives of any employees who are affected by the relevant transfer in accordance with regulation 13 of TUPE; and
  - 1.4.4 comply with its obligation to consult the appropriate representatives of the Transferring Employees about any Measures it envisages taking, in accordance with regulation 13(6) of TUPE.

- 1.5 The Authority will on or before the Transfer Date:
- 1.5.1 pay all wages, salaries and other benefits of the Transferring Employees (including any contributions to retirement benefit schemes) and discharge all other financial obligations (including reimbursement of any expenses) owing to the Transferring Employees in respect of the period before the Transfer Date;
  - 1.5.2 procure that any loans or advances made to the Transferring Employees before the Transfer Date are repaid to it;
  - 1.5.3 account to the proper authority for all PAYE tax deductions and national insurance contributions payable in respect of the Transferring Employees in the period before the Transfer Date; and
  - 1.5.4 pay the Contractor the amount which would be payable to each of the Transferring Employees in lieu of accrued but untaken holiday entitlement as at the Transfer Date.
- 1.6 The Authority shall:
- 1.6.1 provide such assistance and information to the Contractor as it may reasonably request to facilitate a smooth and efficient handover of the Transferring Employees to the Contractor or any Sub-Contractor, including the provision of all employee liability information identified in regulation 11 of TUPE in relation to the Transferring Employees; and
  - 1.6.2 comply with its obligations to inform and, if necessary, consult the appropriate representatives of any employees who are affected by the relevant transfer in accordance with regulation 13 of TUPE.
- 1.7 The Authority shall indemnify and keep indemnified the Contractor in relation to any Employment Liabilities arising out of or in connection with any claim which arises as a result of any act or omission of the Authority (excluding the imposition of its view as to whether or not TUPE applies) in relation to the Transferring Employees prior to the Transfer Date save for where such act or omission results from complying with the instructions of the Contractor or Sub-Contractor, including the Contractor or Sub-Contractor failing to comply with its obligations under regulation 13 of TUPE, but only to the extent that such claim is brought by:
- 1.7.1 any of the Transferring Employees (whether on their own behalf or in their capacity as employee representatives); or
  - 1.7.2 any trade union, staff association or staff body recognised by the Authority in respect of any of the Transferring Employees or any employee representatives acting on behalf of any of the Transferring Employees.
- 1.8 The Contractor shall be responsible for or shall procure that any relevant Sub-Contractor shall be responsible from the Transfer Date for all remuneration,

benefits, entitlements and outgoings in respect of the Transferring Employees and other Staff.

- 1.9 The Contractor shall indemnify and will keep indemnified the Authority in relation to any Employment Liabilities arising out of or in connection with:
  - 1.9.1 any act or omission of the Contractor or Sub-Contractor on or after the Transfer Date (or any other event or occurrence after the Transfer Date) in respect of any Transferring Employee or Staff (including but not limited to any liability which arises because a Transferring Employee's employment with the Contractor or Sub-Contractor is deemed to include their previous continuous employment with the Authority);
  - 1.9.2 any act or omission of the Contractor or Sub-Contractor in relation to its obligations under regulation 13 of TUPE, or in respect of an award of compensation under regulation 15 of TUPE except to the extent that the liability arises from the Authority's failure to comply with regulation 13 of TUPE;
  - 1.9.3 any allegation or claim by a Transferring Employee or any other employee of the Authority that in consequence of the transfer of Goods and Services to the Contractor or Sub-Contractor there has or will be a substantial change in such Transferring Employee's working conditions to their detriment within regulation 4(9) of TUPE; and
  - 1.9.4 any allegation or claim that the termination of employment of any of the Transferring Employees or any other employee of the Authority whether on or before the Transfer Date which arises as a result of any act or omission by the Contractor or Sub-Contractor save for where such act or omission results from complying with the instructions of the Authority.
- 1.10 If any person who was an employee of the Authority immediately before the Transfer Date who is not a Transferring Employee claims or it is determined that their contract of employment has been transferred from the Authority to the Contractor or any Sub-Contractor pursuant to TUPE, or claims or it is determined that their employment would have so transferred had they not resigned or been dismissed:
  - 1.10.1 the Contractor will, within seven (7) days of becoming aware of that fact, give notice in writing to the Authority;
  - 1.10.2 the Contractor (or the Authority, where such a person is not already employed by it) may offer employment to such person within twenty eight (28) days of the notification by the Contractor;
  - 1.10.3 if such offer of employment is accepted, the Authority or the Contractor or Sub-Contractor, as applicable in the circumstances, shall immediately release the person from their employment; and
  - 1.10.4 irrespective of whether any offer of employment under clause 1.10.2 is made or accepted, the Contractor (or Sub-Contractor, as applicable)

shall be responsible for and indemnify the Authority in respect of all liabilities arising in respect of any such person and shall (where relevant) be bound to apply the Revised Code and/or the Fair Deal for Staff Pensions, as appropriate, in respect of any such person in accordance with Part D of this Schedule 7.

**Part C – Where there is a Final Judicial Determination or otherwise the Authority’s view is that an employee or employees transfer(s) from the incumbent contractor under TUPE upon award of this Contract**

- 1.1 Where there is a Final Judicial Determination or otherwise the Authority’s view is that an employee or employees transfer(s) from the incumbent contractor to the Contractor under TUPE at the commencement of the provision of Goods and Services under this Contract, the Parties will proceed on the assumption that the contracts of the Third Party Employees will transfer on the Transfer Date to the Contractor (or a Sub-Contractor, as applicable) pursuant to TUPE, the Cabinet Office Statement, the Revised Code and/or the Fair Deal for Staff Pensions, as appropriate.
- 1.2 The Contractor agrees, or shall ensure by written agreement that any Sub-Contractor shall agree, to accept the Third Party Employees into its employment on the Transfer Date upon their then current terms and conditions of employment and including (where relevant) the right to secure access or continued access to the NHS Pension Scheme or access or continued access to a Broadly Comparable pension scheme in accordance with the Cabinet Office Statement, the Revised Code and/or Fair Deal for Staff Pensions, as appropriate (which shall be dealt with in accordance with Part D of this Schedule 7) and with full continuity of employment.
- 1.3 The Contractor’s agreement in Clause 1.2 of Part C of this Schedule 7 (and any subsequent agreement by any Sub-Contractor), is subject to the right of any Third Party Employee to object to being transferred to the Contractor or any Sub-Contractor.
- 1.4 The Contractor will, or shall ensure by written agreement that any Sub-Contractor will:
  - 1.4.1 not later than twenty eight (28) days after issue of a notice in writing to it from the Authority, provide the Third Party with the information required under regulation 13(4) of TUPE. The Contractor shall be liable to the Authority for, and shall indemnify and keep the Authority and any Third Party indemnified against, any loss, damages, costs, expenses (including without limitation legal costs and expenses), claims or proceedings that arise or result from any breach of this obligation;
  - 1.4.2 provide such assistance and information to the Third Party as it may reasonably request to facilitate a smooth and efficient handover of the Third Party Employees to the Contractor or any Sub-Contractor (including attendance at any meetings with Third Party Employees, trade unions and employee representatives);
  - 1.4.3 comply with its obligations to inform and, if necessary, consult the appropriate representatives of any employees who are affected by the relevant transfer in accordance with regulation 13 of TUPE; and

- 1.4.4 comply with its obligation to consult the appropriate representatives of the Third Party Employees about any Measures it envisages in accordance with regulation 13(6) of TUPE.
- 1.5 The Contractor shall be responsible for or shall procure that any relevant Sub-Contractor shall be responsible from the Transfer Date, for all remuneration, benefits, entitlements and outgoings in respect of the Third Party Employees and other Staff.
- 1.6 The Contractor shall indemnify and will keep indemnified the Authority and any Third Party in relation to any Employment Liabilities arising out of or in connection with:
  - 1.6.1 any act or omission of the Contractor or a Sub-Contractor on or after the Transfer Date (or any other event or occurrence after the Transfer Date) in respect of any Third Party Employee (including but not limited to any liability which arises because a Third Party Employee's employment with the Contractor or a Sub-Contractor is deemed to include their previous continuous employment with the Third Party);
  - 1.6.2 any act or omission of the Contractor or a Sub-Contractor in relation to its obligations under regulation 13 of TUPE, or in respect of an award of compensation under regulation 15 of TUPE except to the extent that the liability arises from the Third Party's failure to comply with regulation 13 of TUPE;
  - 1.6.3 any claim or allegation by a Third Party Employee or any other employee of the Authority or Third Party that in consequence of the transfer of Goods and Services to the Contractor or a Sub-Contractor there has or will be a substantial change in their working conditions to their detriment within regulation 4(9) of TUPE; and
  - 1.6.4 any claim or allegation that the termination of employment of any of the Third Party Employees or any other employee of the Third Party whether on or before the Transfer Date which arise as a result of any act or omission by the Contractor or a Sub-Contractor.
- 1.7 The Authority shall use reasonable endeavours to transfer to the Contractor or any Sub-Contractor the benefit of any indemnity it has from the Third Party.
- 1.8 If any person who was an employee of the incumbent contractor before the Transfer Date who is not a Third Party Employee claims or it is determined that their contract of employment has been transferred from the incumbent contractor to the Contractor or any Sub-Contractor pursuant to TUPE, or claims or it is determined that their employment would have so transferred had they not resigned or been dismissed:
  - 1.8.1 the Contractor will, within seven (7) days of becoming aware of that fact, give notice in writing to the Authority;

- 1.8.2 the Contractor (or the incumbent contractor, where such a person is not already employed by it) may offer employment to such person within twenty eight (28) days of the notification by the Contractor;
- 1.8.3 if such offer of employment is accepted, the incumbent contractor or Sub-Contractor, as applicable in the circumstances, shall immediately release the person from their employment; and
- 1.8.4 irrespective of whether any offer of employment under clause 1.8.2 is made or accepted, the Contractor (or Sub-Contractor, as applicable) shall be responsible for and indemnify the Authority in respect of all liabilities arising in respect of any such person and shall (where relevant) be bound to apply the Revised Code and/or the Fair Deal for Staff Pensions, as appropriate, in respect of any such person in accordance with Part D of this Schedule 7. The Contractor will in turn be indemnified by the incumbent contractor pursuant to clause 39A of Schedule 2 of the incumbent contractor's contract with the Authority.

## **Part D - Provisions regarding pensions**

### **1.1 General**

The Contractor shall procure that, if relevant, each of its Sub-Contractors shall comply with the provisions in this Schedule 7 as if references to the Contractor were to the Sub-Contractor.

### **1.2 Membership of the NHS Pension Scheme**

- 1.2.1 In accordance with the Cabinet Office Statement, the Revised Code and/or Fair Deal for Staff Pensions (as appropriate) the Contractor to which the employment of any Eligible Employee transfers as a result of the award of this Contract, if not an NHS Body or other employer which participates automatically in the NHS Pension Scheme, shall on or before the Employee Transfer Date, secure a Direction Letter to enable the Eligible Employees to retain either continuous active membership of or eligibility for, the NHS Pension Scheme, or as appropriate re-join or secure eligibility for the NHS Pension Scheme for so long as they remain employed in connection with the delivery of the Goods and Services under this Contract.
- 1.2.2 The Contractor must supply to the Authority a complete copy of the Direction Letter as soon as reasonably practicable after the Employee Transfer Date.
- 1.2.3 The Contractor shall comply with the terms of the Direction Letter (including any terms which change as a result of changes in Law) for so long as it remains bound by the terms of the Direction Letter.
- 1.2.4 Where any Staff (including any Transferred Staff) omitted from the Direction Letter supplied in accordance with Part D of this Schedule 7 is subsequently found to be an Eligible Employee, the Contractor (or its Sub-Contractor if relevant) will ensure that that person is treated as an Eligible Employee from the Employee Transfer Date so that their Pension Benefits and Premature Retirement Rights are not adversely affected.
- 1.2.5 The Contractor shall ensure that all data relating to the Eligible Employees and the NHS Pension Scheme is up to date and is provided to the Authority as requested from time to time.



### **1.3 Contributions payable**

- 1.3.1 The Contractor shall pay to the NHS Pension Scheme all such amounts as are due under the Direction Letter and shall deduct and pay to the NHS Pension Scheme such employee contributions as are required by the NHS Pension Scheme.
- 1.3.2 Where during the Term the standard employer contribution rate which the Contractor is required to pay into the NHS Pension Scheme pursuant to the terms of its Direction Letter is increased to a rate which is over and above the rate which was applicable to the Contractor as at the date of this Contract and such rate increase results in an increased cost to the Contractor overall in relation to the provision of the Goods and Services ("Cost Increase"), the Contractor shall (subject to Clause 1.3.3 of Part D of this Schedule 7 and the provision of supporting information) be entitled to recharge a sum equal to the Cost Increase to the Authority. The Contractor shall only be entitled to recharge any Cost Increase to the Authority pursuant to this Clause 1.3.2 of Part D of this Schedule 7 in circumstances where the Cost Increase arises solely as a direct result of a general increase in the employer contribution rate applicable to all employers participating in the NHS Pension Scheme and not in circumstances where the employer contribution rate applicable to the Contractor is increased for any other reason, including as a result of any acts or omissions of the Contractor which give rise to any costs or additional charges (including interest) being charged to the Contractor which are over and above the minimum employer contributions payable by an employer in the NHS Pension Scheme (including as a result of a failure by the Contractor to comply with the terms of its Direction Letter or to meet its obligations to the NHS Pension Scheme).
- 1.3.3 The Contractor must supply all such information as the Authority may reasonably request from time to time in order to support any claim made by the Contractor pursuant to Clause 1.3.2 of Part D of this Schedule 7 in relation to a Cost Increase.
- 1.3.4 Where during the Term the standard employer contribution rate which the Contractor is required to pay in relation to the NHS Pension

Scheme pursuant to the terms of its Direction Letter is decreased as part of a general reduction in the standard employer contribution rate applicable to all employers participating in the NHS Pension Scheme to a rate which is lower than that which was applicable as at the date of this Contract and such decrease results in a cost saving for the Contractor (a “Cost Saving”), the Authority shall be entitled to reduce the amounts payable to the Contractor under this Contract by an amount equal to the Cost Saving. The Authority shall be entitled to deduct any Cost Saving from sums otherwise payable by the Authority to the Contractor under this Contract.

#### **1.4 Broadly Comparable Pension Benefits**

1.4.1 If the Authority in its sole discretion agrees that the Contractor or Sub-Contractor need not provide the Eligible Employees with access to the NHS Pension Scheme, the Contractor must ensure that, with effect from the Employee Transfer Date until the day before the Subsequent Transfer Date, the Eligible Employees are offered access to a scheme under which the Pension Benefits are Broadly Comparable to those provided under the NHS Pension Scheme.

1.4.2 The Contractor must supply to the Authority details of its Broadly Comparable scheme and provide a full copy of the valid certificate of Broad Comparability covering all Eligible Employees, as soon as it is able to do so and in any event no later than twenty eight (28) days before the Employee Transfer Date.

#### **1.5 Transfer Option where Broadly Comparable Pension Benefits are provided**

1.5.1 As soon as reasonably practicable and in any event no later than twenty (20) Working Days after the Employee Transfer Date, the Contractor must provide the Eligible Employees with the Transfer Option, where a Third Party offered, or the Contractor offers, a Broadly Comparable scheme.

#### **1.6 Calculation of Transfer Amount**

1.6.1 The Authority shall use reasonable endeavours to procure that twenty (20) Working Days after the Transfer Option Deadline, the Transfer

Amount is calculated by the Third Party's Actuary or the Authority's Actuary (as appropriate) on the following basis and notified to the Contractor along with any appropriate underlying methodology.

1.6.2 If the Third Party offers a Broadly Comparable scheme to Eligible Employees:

- (i) the part of the Transfer Amount which relates to benefits accrued in that Broadly Comparable scheme other than those in Clause 1.6.2 (ii) of Part D of this Schedule 7 below must be aligned to the funding requirements of that scheme; and
- (ii) the part of the Transfer Amount which relates to benefits accrued in the NHS Pension Scheme (having been previously bulk transferred into the Third Party's Broadly Comparable scheme), must be aligned to whichever of:
  - (A) the funding requirements of the Third Party's Broadly Comparable scheme; or
  - (B) the principles under which the Third Party's Broadly Comparable scheme received a bulk transfer payment from the NHS Pension Scheme (together with any shortfall payment),

gives the higher figure, provided that where the principles require the assumptions to be determined as at a particular date, that date shall be the Employee Transfer Date.

1.6.3 In the case of Transferring Employees or any Third Party Employees who have access to the NHS Pension Scheme (and who are classed as Eligible Employees), the Transfer Amount shall be calculated by the NHS Pension Scheme's Actuary on the basis applicable for bulk transfer terms from the NHS Pension Scheme set by the Department of Health from time to time.

1.6.4 Each Party shall promptly provide to the Actuary calculating or verifying the Transfer Amount any documentation and information which that Actuary may reasonably require.

## **1.7 Payment of Transfer Amount**

Subject to:

- 1.7.1 the period for acceptance of the Transfer Option having expired; and
- 1.7.2 the Contractor having provided the trustees or managers of the Third Party's pension scheme (or NHS Pensions, as appropriate) with completed and signed forms of consent in a form acceptable to the Third Party's pension scheme (or NHS Pensions) from each Eligible Employee in respect of the Transfer Option; and
- 1.7.3 the calculation of the Transfer Amount in accordance with Clause 1.6 of Part D of this Schedule 7; and
- 1.7.4 the trustees or managers of the Contractor's (or any Sub-Contractor's) Broadly Comparable scheme (or NHS Pensions, as appropriate) having confirmed in writing to the trustees or managers of the Third Party's pension scheme (or NHS Pensions, as appropriate) that they are ready, willing and able to receive the Transfer Amount and the bank details of where the Transfer Amount should be sent, and not having revoked that confirmation,

the Authority will use reasonable endeavours to procure that the Third Party's pension scheme (or the NHS Pension Scheme, as appropriate) shall, on or before the Payment Date, transfer to the Contractor's Broadly Comparable scheme (or NHS Pension Scheme) the Transfer Amount in cash, together with any cash or other assets which are referable to additional voluntary contributions (if any) paid by the Eligible Employees which do not give rise to salary-related benefits.

## **1.8 Credit for Transfer Amount**

- 1.8.1 Subject to prior receipt of the Transfer Amount, by the trustees or managers of the Contractor's Broadly Comparable scheme (or NHS Pensions, as appropriate), the Contractor must procure that year-for-year day-for-day service credits are granted in the Contractor's (Broadly Comparable scheme (or NHS Pension Scheme), or an actuarial equivalent agreed by the Authority's Actuary (and NHS Pension Scheme Actuary) in accordance with Code of Practice on Workforce Matters and/or Fair Deal for Staff Pensions (as appropriate) as a suitable reflection of the differences in benefit structure between the NHS Pension Scheme and the Contractor's pension scheme.

1.8.2 To the extent that the Transfer Amount is or shall be insufficient to provide benefits in the receiving scheme on the basis set out in Clause 1.8.1 above, the Contractor shall be liable to make a top-up payment into the receiving scheme such that benefits shall be provided by the receiving scheme on the basis set out in Clause 1.8.1. above.

## **1.9 Premature Retirement Rights**

1.9.1 From the Employee Transfer Date until the day before the Subsequent Transfer Date, the Contractor must provide Premature Retirement Rights in respect of the Eligible Employees that are identical to the benefits they would have received had they remained employees of an NHS Body or other employer which participates automatically in the NHS Pension Scheme.

## **1.10 Breach and Cancellation of any Direction Letter(s) and Right of Set-Off**

1.10.1 The Contractor agrees that it shall notify the Authority if it breaches the terms of the Direction Letter. The Contractor also agrees that the Authority is entitled to make arrangements with NHS Pensions for the Authority to be notified if the Contractor breaches the terms of this Direction Letter.

1.10.2 If the Authority is entitled to terminate this Contract pursuant to Clause 36.1.12 of Schedule 2, the Authority may in its sole discretion instead of exercising its right under Clause 36.1.12 of Schedule 2 permit the Contractor to offer Broadly Comparable Pension Benefits, on such terms as decided by the Authority.

1.10.3 If the Authority is notified by NHS Pensions of any NHS Pension Scheme Arrears, the Authority shall be entitled to deduct all or part of those arrears from any amount due to be paid by the Authority to the Contractor having given the Contractor five (5) Working Days' notice of its intention to do so, and to pay any sum deducted to NHS Pensions in full or partial settlement of the NHS Pension Scheme Arrears. This set-off right is in addition to and not instead of the Authority's right to terminate the Contract under Clause 36.1.12 of Schedule 2.

## **1.11 Compensation**

1.11.1 If the Contractor is unable to provide the Eligible Employees with either:

- i. membership of the NHS Pension Scheme (having used its best endeavours to secure a Direction Letter); or
- ii. a Broadly Comparable scheme,

the Authority may in its sole discretion permit the Contractor to compensate the Eligible Employees in a manner that is Broadly Comparable or equivalent in cash terms, the Contractor having consulted with a view to reaching agreement any recognised trade union or, in the absence of such body, the Eligible Employees. The Contractor must meet the costs of the Authority in determining whether the level of compensation offered is reasonable in the circumstances.

## **1.12 Contractor Indemnities Regarding Pension Benefits and Premature Retirement Rights**

- 1.12.1 The Contractor must indemnify and keep indemnified the Authority and any Successor against all Losses arising out of any claim by any Eligible Employee that the provision of (or failure to provide) Pension Benefits and Premature Retirement Rights from the Employee Transfer Date, or the level of such benefit provided, constitutes a breach of his or her employment rights.
- 1.12.2 The Contractor must indemnify and keep indemnified the Authority, NHS Pensions and any Successor against all Losses arising out of the Contractor (or its Sub-Contractor) allowing anyone who is not an Eligible Employee to join or claim membership of the NHS Pension Scheme at any time during the Term.
- 1.12.3 The Contractor must indemnify the Authority, NHS Pensions and any Successor against all Losses arising out of its breach of this Part D of this Schedule 7 or the terms of the Direction Letter.

## **1.13 Sub-Contractors**

- 1.13.1 If the Contractor enters or has at the Commencement Date entered into a sub-contract for delivery of all or part of the Goods and Services it shall impose obligations on its Sub-Contractor in the same terms as those imposed on the Contractor in relation to Pension Benefits and Premature Retirement Benefits by this Part D of this Schedule 7, including requiring that:
  - (i) if the Contractor has secured a Direction Letter, the Sub-Contractor also secures a Direction Letter in respect of the Eligible Employees for their future service with the Sub-Contractor as a condition of being awarded the sub-contract; or
  - (ii) if the Contractor has offered the Eligible Employees access to a pension scheme under which the benefits are Broadly Comparable to those provided under the NHS Pension Scheme, the Sub-Contractor either secures a Direction Letter in respect of the Eligible Employees or provides Eligible Employees with access to a scheme with Pension Benefits which are Broadly Comparable to those

provided under the NHS Pension Scheme and in either case the option for Eligible Employees to transfer their accrued rights in the Contractor's pension scheme into the Sub-Contractor's Broadly Comparable scheme (or where a Direction Letter is secured by the Sub-Contractor, the NHS Pension Scheme) on the basis set out in Clause 1.8 of Part D of this Schedule 7, except that the Contractor or the Sub-Contractor as agreed between them, must make up any shortfall in the transfer amount received from the Contractor's pension scheme.

#### **1.14 Direct Enforceability by the Eligible Employees**

1.14.1 Notwithstanding Clause 55.2 of Schedule 2, the provisions of this Part D of this Schedule 7 may be directly enforced by an Eligible Employee against the Contractor and the Parties agree that the Contracts (Rights of Third Parties) Act 1999 shall apply to the extent necessary to ensure that any Eligible Employee shall have the right to enforce any obligation owed to him or her by the Contractor under this Part D of this Schedule 7 in his or her own right under section 1(1) of the Contracts (Rights of Third Parties) Act 1999.

1.14.2 Further, the Contractor must ensure that the Contracts (Rights of Third Parties) Act 1999 shall apply to any sub-contract to the extent necessary to ensure that any Eligible Employee shall have the right to enforce any obligation owed to them by the Sub-Contractor in his or her own right under section 1(1) of the Contracts (Rights of Third Parties) Act 1999.

#### **1.15 Pensions on Transfer of Employment on Exit**

1.15.1 In the event of any termination or expiry or partial termination or expiry of this Contract which results in a transfer of the Eligible Employees, the Contractor must (and if offering a Broadly Comparable scheme, must use all reasonable efforts to procure that the trustees or managers of that pension scheme must):

- (i) not adversely affect pension rights accrued by the Eligible Employees in the period ending on the Subsequent Transfer Date;
- (ii) within thirty (30) Business Days of being requested to do so by the Authority or Successor, (or if the Successor is offering Eligible Employees access to the NHS Pension Scheme, by NHS Pensions), provide a transfer amount calculated in accordance with Clause 1.6 of this Part D of this Schedule 7; and
- (iii) do all acts and things, and provide all information and access to the Eligible Employees, as may in the reasonable opinion of the

Authority be necessary or desirable and to enable the Authority and/or the Successor to achieve the objectives of the Revised Code and/or Fair Deal for Staff Pensions (as appropriate).



**SCHEDULE 8\***

**[THIRD PARTY BENEFICIARY (IES)]**

Name and address of Beneficiary	Contact	Telephone and email address

*[Guidance: clause 56 applies where there are named Third Party Beneficiaries (see Schedule 8). In the event clause 56 is not required please delete clause and insert "NOT USED" to ensure consistent clause numbering.]*

**SCHEDULE 9**

**BUSINESS CONTINUITY PLAN**

*[Guidance-optional Schedule 9, where relevant, to be agreed by the Parties and inserted here in accordance with clause 48]*

**SCHEDULE 10**

**CONTRACTOR'S NETWORK AND INFORMATION SECURITY**

*[Guidance-optional Schedule 10 to be included if optional clause 47 used]*

## **SCHEDULE 11**

### **RETENDERING AND HANDOVER**

*[Guidance-optional Schedule 11 to be included where there is a need for more detailed requirements than those stated in clause 39.]*