

DATED _____ **2019**

**(1) THE MAYOR AND BURGESSES OF
THE LONDON BOROUGH OF BEXLEY**

AND

(2) [PROVIDER]

**DYNAMIC PURCHASING SYSTEM AGREEMENT FOR
THE PROVISION OF
TRANSPORT SERVICES TO
THE LONDON BOROUGH OF BEXLEY**

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THIS AGREEMENT is made on

2019

BETWEEN:-

- (1) **THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF BEXLEY** whose principal place of business is at Civic Offices, 2 Watling Street, Bexleyheath Kent DA6 7AT ("**the Council**"); and
- (2) [**PROVIDER**] (Company Number: []) whose registered office is at [] (the "**Provider**").

BACKGROUND

- (A) The Council placed a contract notice in the Official Journal of the European Union seeking responses to its Request to Participate from potential providers for the provision of transport services under the Dynamic Purchasing System established by the Council in accordance with Regulation 34 of the Public Contracts Regulations 2015.
- (B) The Provider submitted a completed Request to Participate in response to the contract notice and on the basis of the Provider's Request to Participate the Council admitted the Provider onto the Dynamic Purchasing System to be able to provide transport services to the Council on a call-off basis.
- (C) This Agreement sets out the award and ordering procedure for Services which may be required, the terms and conditions for any Contract which may be concluded, and the obligations of the Provider during and after the term of this Agreement.
- (D) The Council will place Orders for the Services via the Technology on the terms and conditions of Contract set out in Schedule 5 to this Agreement. The terms and conditions of Contract shall be assigned to any Order placed through these arrangements.
- (E) The Parties acknowledge that there is no guarantee or exclusivity of work to the Provider or to any other provider under these arrangements.
- (F) The Dynamic Purchasing System shall be managed by the Council and potential providers may apply to be appointed to the Dynamic Purchasing System in accordance with the information contained in the DPS Application Guide.

IT IS AGREED as follows:-

1. INTERPRETATION

1.1 Unless the context otherwise requires, the following words and expressions shall have the following meanings:-

- "Accreditation and Enrolment"** means the process of evaluation of a Provider's Request to Participate and the subsequent admittance to the DPS of Providers that fulfil the Council's Selection Criteria.
- "Agreement"** means this agreement together with all Schedules and Appendices hereto
- "Approval"** means the prior written approval of the Council

"Audit"	means an audit carried out pursuant to Clause 16
"Auditor"	means the Council's internal auditor and/or the National Audit Office or an auditor appointed by the Audit Commission as the context requires
"Authorised Officer"	means the officer(s) nominated by the Council in accordance with Clause 15
"Award Criteria"	means the Council's Award Criteria for Contracts referred to in the DPS Operational Guide and as may be further specified in the ITT as the context requires
"Bribery Act"	means the Bribery Act 2010 and any subordinate legislation made under that Act from time to time together with any guidance or codes of practice issued by the relevant government department concerning the legislation.
"Call-Off"	means the issue of an Invitation to Tender in relation to any Contract to be awarded under the Dynamic Purchasing System to a Provider admitted to the Dynamic Purchasing System
"Change in Law"	means any change in Law which impacts on the performance of the Services and comes into force after the Commencement Date.
"Commencement Date"	means [18 th March 2019] or such later date as the Parties may agree
"Commercially Sensitive Information"	means the particular Confidential Information as may be set out in Schedule 8 hereto
"Comparable Supply"	means the supply of services to another customer of the Provider that are the same or similar to any of the Services.
"Complaint"	means any formal complaint raised by the Council in relation to the performance of the Agreement or any Contract in accordance with Clause 34
"Confidential Information"	means any information which has been designated as confidential by any Party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information which would or would be likely to prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights, know-how of either Party and all personal data and sensitive data within the meaning of the DPA/GDPR and any Commercially Sensitive Information as may be set out in Schedule 8 hereto.
"Contract" or "Service Agreement"	means the legally binding call-off agreement (made pursuant to the provisions of this Agreement) for the provision of Services made between the Council and the Provider, comprising an Order and the Contract Terms and Conditions
"Contracting Authority"	has the meaning given in Regulation 2 of the Public Contracts Regulations 2015
"Contract Price"	has the meaning given in clause 13.1

“Contract Terms and Conditions”	means the terms and conditions of a Contract as set out in Schedule 5
“Contract Manager”	means the person nominated by the Provider in accordance with Clause 15, and whose identity and contact details shall be notified to the Council in writing
“Controller”	has the meaning given in the GDPR
“Council Data”	<p>(a) the data, text, drawings, diagrams, images or sounds (together with any database made up of any of these) which are embodied in any electronic, magnetic, optical or tangible media, and which are:</p> <p style="margin-left: 40px;">(i) supplied to the Provider by or on behalf of the Council; and/or</p> <p style="margin-left: 40px;">(ii) which the Provider is required to generate, process, store or transmit pursuant to this Agreement; or</p> <p>(b) any Personal Data for which the Council is the Data Controller.</p>
“Data Loss Event”	means any event that results, or may result, in unauthorised access to Personal Data held by the Processor under this Agreement, and/or actual or potential loss and/or destruction of Personal Data in breach of this Agreement, including any Personal Data Breach
“Data Protection Impact Assessment”	means an assessment by the Controller of the impact of the envisaged processing on the protection of Personal Data.
“Data Protection Legislation”	means (i) the GDPR, the LED and any applicable national implementing Laws as amended from time to time (ii) the DPA 2018 to the extent that it relates to processing of personal data and privacy; (iii) all applicable Law about the processing of personal data and privacy
“Data Protection Officer”	has the meaning given in the GDPR.
“Data Subject”	has the meaning given in the GDPR.
“Data Subject Request”	means a request made by , or on behalf of a Data Subject in accordance with rights granted pursuant to the Data Protection Legislation to access their Personal Data.
“Default”	means any breach of the obligations of the relevant Party (including but not limited to fundamental breach or breach of a fundamental term) or any other default, act, omission, negligence or negligent statement of the relevant Party or the Staff in connection with or in relation to the subject-matter of the Agreement and in respect of which such Party is liable to the other
“DPA 2018”	means the Data Protection Act 2018

“DPS Application Guide”	means the guide produced by the Council detailing the process for joining the DPS in the form included in Schedule 10 (DPS Application Guide) hereto as may be updated by the Council from time to time
“DPS Operational Guide”	means the guide produced by the Council detailing the operation of the DPS in the form included in Schedule 11 (DPS Operational Guide) hereto as may be updated by the Council from time to time
“Dynamic Purchasing System or “DPS”	means the electronic system which is (a) established by the Council hereunder to purchase transport Services; and (b) open throughout its duration for the admission of economic operators which (i); submit a Request to Participate in accordance with the requirements of the Council and (ii) satisfy the Selection Criteria.
“Environmental Information Regulations” or “EIR”	means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations
“FOIA”	means the Freedom of Information Act 2000 and any subordinate legislation made under the Act from time to time, together with any guidance and/or codes of practice issued by the Information Commissioner or relevant government department in relation to such legislation
“Fraud”	means any fraudulent act constituting an offence under Laws or any attempt to defraud any public body in relation to this Agreement
“GDPR”	means the General Data Protection Regulation (<i>Regulation (EU) 2016/679</i>)
“General Change in Law”	means a Change in Law where the change is of a general legislative nature (including taxation or duties of any sort affecting the Provider) or which affects or relates to a Comparable Supply.
“Good Industry Practice”	means standards, practices, methods and procedures conforming to the Law and the degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person or body engaged in a similar type of undertaking under the same or similar circumstances
“Index”	means the ONS Index D7EG Passenger Transport by Road as published by the Office of National Statistics or any government department upon which duties in connection with the compilation and maintenance of the Index have devolved
“Information”	has the meaning given under Section 84 of the Freedom of Information Act 2000
“Intellectual Property Rights”	means patents, inventions, trademarks, service marks, logos, design rights (whether registerable or otherwise), applications for any of the foregoing, copyright, database rights, domain names, trade or business names, moral rights and other similar rights or obligations whether registerable or not in any country (including but not limited to the United Kingdom) and the right to sue for passing off

“ Invitation to Tender ”, “ ITT ” or “ Requirement ”	means the invitation to tender documentation issued by the Council in relation to a Call-Off under the DPS
“ Joint Controllers ”	where two or more Controllers jointly determine the purposes and means of processing.
“ Law ”	means any applicable Act of Parliament, subordinate legislation exercise of the royal prerogative, enforceable community right, regulatory policy, guidance or industry code, judgment of a relevant court of law, or directives or requirements of any Regulatory Body
“ LED ”	means the Law Enforcement Directive (<i>Directive (EU) 2016/680</i>).
“ Lots ” or “ Service Categories ”	means the lots advertised in the OJEU Notice and referred to in the Procurement Documents being Adult Social Care & Health or Children's Services
“ Management Information ”	means the management information specified in Schedule 6
“ Material Default ”	means any breach of Clause 7 (Establishing the DPS, Call-Off and Ordering Procedures), Clause 8 (Warranties and Representations), Clause 9 (Prevention of Bribery and Fraud), Clause 10 (Conflicts of Interest), Clause 11 (Safeguard Against Fraud), Clause 12 (Contract Performance), Clause 14 (Non-Discrimination), Clause 14A (Statutory Requirements and Consents), Clause 15 (Provision of Management Information), Clause 16 (Records and Audit Access), Clause 17 (Confidentiality), Clause 17A (Official Secrets Act), Clause 18 (Data Protection), Clause 19 (Freedom of Information) and Clause 26 (Transfer and Sub-contracting)
“ Month ”	means a calendar month
“ Offer ”	has the meaning given for the term “Tender” below
“ OJEU Notice ”	means the contract notice for the Agreement published in the Official Journal of the European Union
“ Order ”	means an order for Services served by the Council on the Provider via the Technology incorporating (without limitation) the ITT, the Contract Terms and Conditions and the Tender in accordance with the Ordering Procedures
“ Ordering Procedures ”	means the procedures specified in Clause 7 (Establishing the DPS, Call-Off and Ordering Procedures) and in the DPS Operational Guide (as the case may be)
“ Parent Company ”	means any company which is the ultimate Holding Company of the Provider and which is either responsible directly or indirectly for the business activities of the Provider or which is engaged in the same or similar business to the Provider. Holding Company shall have the meaning ascribed by section 1159 of the Companies Act 2006 or any statutory re-enactment or amendment thereto
“ Party ”	means the Council and/or the Provider as the context requires
“ Personal Data ”	has the meaning given in the GDPR.
“ Personal Data Breach ”	has the meaning given in the GDPR

“Processor”	has the meaning given in the GDPR.
“Procurement Documents”	has the meaning given in the Public Contracts Regulations 2015
“Prohibited Act”	means any of the following: <ul style="list-style-type: none"> (a) to directly or indirectly offer, promise or give any person working for or engaged by the Council a financial or other advantage to: <ul style="list-style-type: none"> (i) induce that person to perform improperly a relevant function or activity; or (ii) reward that person for improper performance of a relevant function or activity; (b) to directly or indirectly request, agree to receive or accept any financial or other advantage as an inducement or a reward for improper performance of a relevant function or activity in connection with this Council; (c) committing any offence: <ul style="list-style-type: none"> (i) under the Bribery Act; (ii) under legislation creating offences concerning fraudulent acts; (iii) at common law concerning fraudulent acts relating to this Agreement or any other contract with the Council; or (iv) defrauding, attempting to defraud or conspiring to defraud the Council.
“Protective Measures”	means appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of 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 such measures adopted by it including any outlined in Appendix [1] of Schedule 1.
“Provider”	means the economic entity with whom the Council enters into the Agreement
“Regulations”	means the Public Contracts Regulations 2015
“Regulatory Bodies”	means those government departments and regulatory, statutory and other entities, committees, ombudsmen and bodies which, whether under statute, rules, regulations, codes of practice or otherwise, are entitled to regulate, investigate, or influence the matters dealt with in this Agreement or any other affairs of the Council.
“Requests for Information”	shall have the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term "request" shall apply)

“Request to Participate”	means the accreditation & enrolment documentation issued by the Council (including the Selection Questionnaire) to be completed by Providers seeking admission onto the Dynamic Purchasing System
“Requirement”	has the meaning given for the term “Invitation to Tender” / “ITT” above.
“Selection Criteria”	means the criteria set by the Council to evaluate the responses to the Request to Participate submitted by Providers for their admission onto the Dynamic Purchasing System and which Providers must meet and maintain throughout the Term
“Selection Questionnaire” or “SQ”	means the accreditation & enrolment questionnaire issued by the Council as part of the Request to Participate and completed by the Provider seeking admission onto the Dynamic Purchasing System
“Self-Billing Agreement”	means the agreement between the Council and the Provider included hereto as Schedule 9 (Self-Billing Agreement), whereby the Provider agrees to receive pre-populated Self-Bill Invoices generated via the Technology for the billing and payment of the Contract Price.
“Self-Bill Invoice”	means the invoice produced via the Technology on behalf of the Provider through which the Council shall process payment of the Contract Price.
“Service Agreement”	has the meaning given for the term “Contract” above.
“Service Categories”	has the meaning given for the term “Lots” above.
“Services”	means the transport services detailed in Schedule 1 and in the Order
“Staff”	means all persons employed or engaged by the Provider including the Provider’s servants, agents, suppliers and sub-contractors used in the performance of its obligations under this Agreement or Contracts
“Sub-processor”	means any third Party appointed to process Personal Data on behalf of that Processor related to this Agreement.
“Technology”	the proprietary web-based software owned and operated by the Technology Provider, currently called SProc.Net or such other technology as may be notified by the Council.
“Technology Provider”	the owner and provider of the Technology, currently adam HTT Limited t/a <i>adam</i> or such other technology provider as may be notified by the Council.
“Tender” or “Offer”	means the document(s) submitted by the Provider to the Council via the Technology in response to the Council’s ITT
“Tenderer”	means a company, organisation, individual or other entity participating in the tender process
“Term”	means the period of two (2) years commencing on the Commencement Date subject to early termination of this Agreement or any extension in accordance with the terms hereof

"Variation Procedure"	means the procedure set out in Schedule 7
"Working Days"	means any day other than a Saturday or Sunday or public holiday in England and Wales
"Year"	means a calendar year

1.2 The interpretation and construction of this Agreement shall all be subject to the following provisions:-

- 1.2.1 words importing the singular meaning include where the context so admits the plural meaning and vice versa; words importing the masculine include the feminine and the neuter;
- 1.2.2 references to any person shall include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assigns or transferees;
- 1.2.3 references to any statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended, extended, consolidated or re-enacted by any subsequent enactment, modification, order, regulation or instrument as subsequently amended or re-enacted, and shall also include a reference to any subordinate legislation made under it, relevant guidance or code of practice issued by a competent Council for the time being in force;
- 1.2.4 headings are included in this Agreement for ease of reference only and shall not affect the interpretation or construction of this Agreement;
- 1.2.5 references in this Agreement to any Clause or Sub-Clause or Schedule without further designation shall be construed as a reference to the Clause or Sub-Clause or Schedule to this Agreement so numbered and reference to a Clause is a reference to the whole of that clause unless stated otherwise;
- 1.2.6 the Schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement and any reference to this Agreement shall include the Schedules;
- 1.2.7 the words "include", "includes" and "including" are to be construed as if they were immediately followed by the words "without limitation"; and
- 1.2.8 in the event and to the extent only of any conflict between the Clauses and the remainder of the Schedules, the Clauses shall prevail over the remainder of the Schedules.

2. STATEMENT OF INTENT

- 2.1.1 In delivering the Services, the Provider shall operate at all times in accordance with any and all of the Council's published policies and objectives.
- 2.1.2 the Provider has been appointed and the Council has entered into this Agreement on the basis of the Provider's response to the Request to Participate and, in particular, the representations made by the Provider to the Council in relation to its competence, professionalism and ability to provide the Services in an efficient and cost effective manner.

- 2.1.3 The Provider acknowledges that it will not be able to bid for any further competitions under the DPS following the issue of any Invitation to Tender if it has not signed and returned this Agreement;
- 2.1.4 The Provider shall perform all Contracts entered into with the Council in accordance with:
- (a) The requirements of this Agreement;
 - (b) The terms and conditions of the Contract; and
 - (c) The relevant Legislation, Codes of Conduct and Regulations governing the delivery of the Services.

PART ONE: DPS ARRANGEMENTS AND AWARD PROCEDURE

3. TERM OF AGREEMENT

- 3.1 The Agreement shall take effect on the Commencement Date and (unless it is otherwise terminated in accordance with the terms of this Agreement) shall continue in force for a period of two (2) years.
- 3.2 The Agreement may be extended at the Council's sole discretion for a period or periods not exceeding four years in total.

4. SCOPE OF AGREEMENT

- 4.1 This Agreement governs the relationship between the Council and the Provider in respect of the provision of the Services by the Provider to the Council.
- 4.2 The Council appoints the Provider to the Dynamic Purchasing System and, subject to the terms of this Agreement, the Provider shall be eligible to receive Orders for the Services during the Term. The Council may require the re-submission of an updated Selection Questionnaire or any information provided as part of the Accreditation or Enrolment process and may perform audit checks of any Provider to ensure it continues to meet the minimum standards of the DPS throughout the Term.
- 4.3 The Council (subject to the following provisions of this Clause 4) may at its absolute discretion and from time to time order Services from the Provider in accordance with the Ordering Procedures during the Term. If there is a conflict between Clause 7 (Establishing the DPS, Call-Off and Ordering Procedures) and the Regulations, the Council shall comply with the Regulations.
- 4.4 The Provider acknowledges that there is no obligation for the Council to purchase any Services from the Provider during the Term.
- 4.5 No undertaking or any form of statement, promise, representation or obligation shall be deemed to have been made by the Council in respect of the total quantities or values of the Services to be ordered by it pursuant to this Agreement and the Provider acknowledges and agrees that it has not entered into this Agreement on the basis of any such undertaking, statement, promise or representation.
- 4.6 If and to the extent that any Services under this Agreement are required the Parties shall:

- 4.6.1 enter into a contract for the Services in accordance with the Contract Terms and Conditions;
- 4.6.2 comply with the Ordering Procedures.

4A ROLE OF TECHNOLOGY PROVIDER

- 4A.1 The Provider acknowledges and agrees that the Technology Provider is authorised by the Council on its behalf (without limitation) to:
 - 4A1.1 conduct initial checks in relation to the Accreditation and Enrolment of Providers who have requested to be admitted to the DPS;
 - 4A.2 not used;
 - 4A.3 monitor the Provider's ongoing compliance with the Selection Criteria and may validate the information provided by the Provider with third party agencies or professional bodies;
 - 4A.4 collect and collate Management Information on behalf of the Council.
- 4A.2 Unless otherwise notified in writing by the Council, the Provider agrees to use the Technology for (without limitation) the submission of its completed Request to Participate, Tenders, invoices and for all transactions under the Dynamic Purchasing System in accordance with the DPS Operational Guide.

5. PROVIDER'S APPOINTMENT

The Council appoints the Provider as a potential provider of the Services referred to in the Specification and the Provider shall be eligible to be considered for the award of Orders for such Services by the Council during the Term.

6. NON-EXCLUSIVITY

The Provider acknowledges that, in entering this Agreement, no form of exclusivity or volume guarantee has been granted by the Council for Services from the Provider and that the Council is at all times entitled to enter into other contracts and arrangements with other providers for the provision of any or all services which are the same as or similar to the Services.

7. ESTABLISHING THE DPS, CALL-OFF AND ORDERING PROCEDURES

Establishing the Dynamic Purchasing System

- 7.1 The Dynamic Purchasing System is established by the Council under the Restricted Procedure subject to the provisions in regulation 34 of the Regulations.
- 7.2 The Council shall:
 - 7.2.1 operate the DPS in line with the DPS Operational Guide and may update the DPS Operational Guide at any time;
 - 7.2.2 offer Providers unrestricted, direct access to relevant template documentation relating to the Dynamic Purchasing System by electronic means during the Term;
 - 7.2.3 allow Providers the opportunity to submit a completed Request to Participate within the Dynamic Purchasing System via the Technology as part of the Accreditation and Enrolment process;

- 7.2.4 use reasonable endeavours to complete the evaluation of a completed Request to Participate within 10 Working Days from the date of its submission (but failing that within such longer period as the Council may determine);

Call-Off Procedure

- 7.3 The Council ordering Services under the Dynamic Purchasing System shall:-
- 7.3.1 identify the relevant Services/Lots which its Service requirements fall into;
- 7.3.2 invite all Providers admitted to the relevant Lot to submit Tenders via the Technology for each Call-Off under the DPS;
- 7.3.3 issue the ITT setting out the Council's requirements and including such further information as required and a deadline by which the Providers' Tenders must be submitted;
- 7.3.4 evaluate all Tender submissions received via the Technology within the ITT deadline in accordance with the relevant Award Criteria;
- 7.3.5 once the evaluation is complete the preferred Provider will be selected and all Providers will be notified of the award decision and provided with feedback relating to their submission; and
- 7.3.6 a contract notice will be sent to the OJEU (as applicable).

Ordering Procedure

- 7.4 Subject to clause 7.3, the Council may place an Order by serving an Order via the Technology on the Provider.
- 7.5 The Provider agrees to submit all Tenders via the Technology and that all Tenders shall remain open for acceptance for the duration of the review period specified in the Invitation to Tender issued by the Council in accordance with the Ordering Procedures.

Accepting and Declining Orders

- 7.6 Following receipt of an Order, the Provider shall promptly and in any event within a reasonable period (taking into account all relevant circumstances in relation to the subject matter and nature of an Order) determined by the Council and notified to the Provider in writing either in the ITT or at the same time as the submission of the Order (which in any event shall not exceed two (2) Working Days) acknowledge receipt of the Order via the Technology and either:-
- 7.6.1 notify the Council that it declines to accept the Order; or
- 7.6.2 notify the Council that it accepts the Order
- in accordance with the Ordering Procedures.
- 7.7 Where the Council has issued an Order and the Provider:-
- 7.7.1 notifies the Council that it declines to accept an Order; or
- 7.7.2 the time-limit referred to in Clause 7.6 has expired;

then the offer from the Council to the Provider shall lapse and the Council may offer that Order via the Technology to the Provider that submitted the next most

economically advantageous tender in accordance with the relevant Award Criteria and having due regard to the Provider's ability to meet the Council's requirement.

- 7.8 The Provider in agreeing to accept such an Order pursuant to Clause 7.6 above shall enter a Contract with the Council for the provision of Services referred to in that Order.
- 7.9 If the Provider modifies or imposes conditions on the fulfilment of an Order, then the Council may either at its sole discretion (and subject always to compliance with the Regulations):
- 7.9.1 re-issue the Order incorporating the modifications or conditions; or
 - 7.9.2 treat the Provider's response as notification of its inability to fulfil the Order and the provisions of clause 7.7 shall apply.
- 7.10 The Parties acknowledge and agree that the placement of an Order is an "invitation to treat" by the Council. Accordingly, the Provider's notification that it accepts the Order shall constitute its offer to the Council. The Council by confirming its acceptance of the Provider's offer completes the formation of a Contract.
- 7.11 The Parties agree that it is the reasonable expectation of the Council that the Provider shall accept all Orders notified to it pursuant to this Clause 7 (Establishing the DPS, Call-Off and Ordering Procedures). The Provider shall use best endeavours to accept all such Orders and where an Order is declined provide evidence in writing that it has complied with this clause promptly at the request of the Council.

PART TWO: PROVIDER'S GENERAL OBLIGATIONS

8. WARRANTIES AND REPRESENTATIONS

- 8.1 The Provider warrants and represents to the Council that:-
- 8.1.1 it has full capacity and authority and all necessary consents (including, where its procedures so require, the consent of its Parent Company) to enter into and to perform its obligations under this Agreement;
 - 8.1.2 this Agreement is executed by a duly authorised representative of the Provider;
 - 8.1.3 in entering into this Agreement or any Contract it has not committed any Fraud;
 - 8.1.4 all information, statements and representations contained in the Accreditation and Enrolment, Request to Participate and the SQ response are true, accurate and not misleading and will continue to be so for the Term and it will promptly advise the Council of any fact, matter or circumstance of which it may become aware which would render any such information, statement or representation to be false or misleading;
 - 8.1.5 it has not entered into any agreement with any other person with the aim of preventing tenders being made or as to the fixing or adjusting of the amount of any tender or the conditions on which any tender is made in respect of the Agreement;
 - 8.1.6 it has not caused or induced any person to enter such agreement referred to in Clause 8.1.5 above;

- 8.1.7 it has not offered or agreed to pay or give any sum of money, inducement or valuable consideration directly or indirectly to any person for doing or having done or causing or having caused to be done any act or omission in relation to any other tender or proposed tender for Services under the Agreement;
- 8.1.8 it has not committed any Prohibited Act;
- 8.1.9 no claim is being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of its knowledge and belief, pending or threatened against it or any of its assets which will or might affect its ability to perform its obligations under this Agreement and any Contract which may be entered into with the Council;
- 8.1.10 it is not subject to any contractual obligation, compliance with which is likely to have an effect on its ability to perform its obligations under this Agreement and any Contract which may be entered into with the Council;
- 8.1.11 no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, are threatened) for the winding up of the Provider or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, manager, administrator or similar officer in relation to any of the Provider's assets or revenue; and
- 8.1.12 in the three (3) years prior to the date of this Agreement:-
 - (a) it has conducted all financial accounting and reporting activities in compliance in all material respects with the generally accepted accounting principles that apply to it in any country where it files accounts;
 - (b) it has been in full compliance with all applicable securities laws and regulations in the jurisdiction in which it is established; and
 - (c) it has not performed any act or omission with respect to its financial accounting or reporting which could have an adverse effect on the Provider's position as an ongoing business concern or its ability to fulfil its obligations under this Agreement.

8.2 The Provider shall repeat the warranties and representations throughout the Term.

9. PREVENTION OF BRIBERY AND FRAUD

9.1 The Provider:

- (a) shall not, and shall procure that any of its agents, contractors or sub-contractors and all Staff shall not, in connection with this Agreement commit a Prohibited Act;
- (b) warrants, represents and undertakes that it is not aware of any financial or other advantage being given to any person working for or engaged by the Council, or that an agreement has been reached to that effect, in connection with the execution of this Agreement, excluding any arrangement of which full details have been disclosed in writing to the Council before execution of this Agreement.

9.2 The Provider shall if requested, provide the Council with any reasonable assistance, at the Council's reasonable cost, to enable the Council to perform any activity required by any relevant government or agency in any relevant jurisdiction for the purpose of compliance with the Bribery Act;

- 9.3 The Provider shall have an anti-bribery policy (which shall be disclosed to the Council) to prevent any agents, contractors or sub-contractors or Staff from committing a Prohibited Act and shall enforce it where appropriate.
- 9.4 If any breach of clause 9.1 is suspected or known, the Provider must notify the Council immediately.
- 9.5 If the Provider notifies the Council that it suspects or knows that there may be a breach of clause 9.1, the Provider must respond promptly to the Council's enquiries, co-operate with any investigation, and allow the Council to audit books, records and any other relevant documentation. This obligation shall continue for 12 years following the expiry or termination of this Agreement.
- 9.6 If the Provider, its agents, contractors or sub-contractors or Staff (in all cases whether or not acting with the Provider's knowledge) breaches clause 9.1 the Council may:
- (a) terminate the Agreement by written notice with immediate effect and recover from the Provider the amount of any loss suffered by the Council resulting from the termination, including the cost reasonably incurred by the Council of making other arrangements for the supply of the Services and any additional expenditure incurred by the Council throughout the remainder of the Agreement term; and/or
 - (b) recover in full from the Provider any other loss sustained by the Council in consequence of any breach of that Clause.
- 9.7 Any notice of termination under clause 9.6 must specify:
- (a) the nature of the Prohibited Act;
 - (b) the identity of the party whom the Council believes has committed the Prohibited Act; and
 - (c) the date on which this Agreement will terminate.
- 9.8 Any dispute relating to:
- (a) the interpretation of clause 9.1; or
 - (b) the amount or value of any gift, consideration or commission,
- shall be determined by the Council and its decision shall be final and conclusive.
- 9.9 Any termination under clause 9.6 will be without prejudice to any right or remedy which has already accrued or subsequently accrues to the Council.

10. CONFLICTS OF INTEREST

- 10.1 The Provider shall take appropriate steps to ensure that neither the Provider nor any Staff are placed in a position where (in the reasonable opinion of the Council) there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Provider or Staff and the duties owed to the Council under the provisions of this Agreement or any Contract.
- 10.2 The Provider shall promptly notify and provide full particulars to the Council if such conflict referred to in Clause 10.1 above arises or is reasonably foreseeable to arise.
- 10.3 The Council reserves the right to terminate this Agreement immediately by giving notice in writing to the Provider and/or to take such other steps it deems necessary where, in the reasonable opinion of the Council, there is or may be an actual conflict,

or a potential conflict, between the pecuniary or personal interests of the Provider and the duties owed to the Council under the provisions of this Agreement or any Contract. The action of the Council pursuant to this Clause shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to the Council.

- 10.4 This Clause shall apply during the Term and for a period of two (2) years after its termination or expiry.

11. SAFEGUARD AGAINST FRAUD

The Provider shall safeguard the Council's funding of the Agreement and any Contract against Fraud generally and, in particular, Fraud on the part of the Provider or its Staff. The Provider shall notify the Council if it has reason to suspect that any Fraud has occurred or is occurring or is likely to occur.

12. CONTRACT PERFORMANCE

- 12.1 The Provider shall perform all Contracts entered into with the Council in accordance with:-

12.1.1 the requirements of this Agreement; and

12.1.2 the terms and conditions of the respective Contracts.

- 12.2 In the event of, and only to the extent of any conflict or inconsistency between the terms and conditions of this Agreement, the terms and conditions of a Contract such conflict or inconsistency shall be resolved according to the following order of priority:

12.2.1 the Order except the Contract Terms and Conditions and the Provider's Tender

12.2.2 the Contract Terms and Conditions

12.2.3 the terms and conditions of this Agreement and the Schedules to the Agreement; and

12.2.4 any other document referred to in the Contract; and

12.2.5 the Provider's Tender

13. PRICES FOR SERVICES

- 13.1 The price payable to the Provider by the Council under a Contract for Services shall be set out in the Order (the "**Contract Price**").

- 13.2 Subject to clause 3.1.2 of the Contract Terms and Conditions, the Contract Price shall be fixed for the duration of the Contract.

- 13.3 The Council shall, in addition to the Contract Price pay the Provider a sum equal to the VAT chargeable on the value of the Services supplied in accordance with the Contract.

- 13.4 Unless otherwise notified by the Council, the Parties shall comply with the Self-Billing Agreement for all invoicing and payment transactions for Contracts made pursuant to this Agreement.

- 13.5 No claim by the Provider will be allowed for any addition to the Contract Price for any Contract on the grounds of any matter relating to any document forming part of the Contract or any ambiguity or discrepancy therein on which the Provider could have

satisfied itself by reference to the Customer before the Commencement Date of the Contract.

- 13.6 Any disputes regarding invoices shall be dealt with in accordance with clause 9.2 (Disputes) of the Contract.

14. NON-DISCRIMINATION

14.1 The Provider shall not unlawfully discriminate within the meaning and scope of the Equality Act 2010 or any other law, enactment, order or regulation relating to discrimination (whether in race, gender, age, religion, disability, sexual orientation or otherwise).

14.2 The Provider shall take all reasonable steps to secure the observance of Clause 14.1 by all servants employees or agents of the Provider and all Providers and sub-contractors employed in the execution of the Agreement.

14A STATUTORY REQUIREMENTS, CONSENTS AND CHANGE IN LAW

14A.1 The Provider shall be responsible for obtaining all licenses, authorisations, consents or permits required in relation to the performance of the Agreement and any Contract.

14A.2 The Provider shall neither be relieved of its obligations to supply the Services in accordance with the terms and conditions of this Agreement and any Contract nor be entitled to an increase in the Contract Price as a result of:

14A.2.1 a General Change in Law; or

14A.2.2 a Specific Change in Law where the effect of that Specific Change in Law on the Services is reasonably foreseeable at the Commencement Date.

14A.3 If a Specific Change in Law occurs or will occur during the Term (other than as referred to in Clause 14A2.2), the Provider shall:

14A3.1 notify the Council as soon as reasonably practicable of the likely effects of that change, including:

(a) Whether any variation is required to the Services, the Contract Price or this Agreement; and

(b) Whether any relief from compliance with the Provider's obligations is required; and

14A3.2 provide the Council with evidence;

(a) That the Provider has minimised any increase in costs or maximised any reduction in costs, including in respect of the costs of its sub-contractors;

(b) As to how the Specific Change in Law has affected the cost of providing the Services; and

(c) Demonstrating that any expenditure that has been avoided has been taken into account in amending the Contract Price.

14A.4 Following notification and receipt of evidence in accordance with clause 14A.3 the Council may in its absolute discretion request a variation to the Services, Contract Price and/or the Agreement and the provisions of Clause 14A.5 and Clause 14A.6 shall apply.

- 14A.5 Where the Council requests a variation under Clause 14A.4, it shall specify a time limit within which the Provider shall respond. The time limit shall be reasonable having regard to the nature of the variation. If the Provider accepts the variation it shall confirm the same in writing. Any services carried out by the Provider pursuant to any variation shall be carried out to the standards set out in this Agreement.
- 14A.6 In the event that the Parties are unable to agree the variation to the Specification, the Contract Price_and/or the Agreement, the Council may:
- (a) allow the Provider to fulfil its obligations under the Agreement without implementing the variation; or
 - (b) terminate the Agreement with immediate effect

PART THREE: PROVIDER'S INFORMATION OBLIGATIONS

15. CONTRACT MANAGEMENT AND PROVISION OF MANAGEMENT INFORMATION

- 15.1 The Council shall appoint an Authorised Officer and the Provider shall appoint a Contract Manager to be responsible for liaison with the other Parties concerning management, requests, or other issues arising in connection with the Agreement and any Contract entered into with the Council. The Authorised Officer and Contract Manager may appoint one or more representatives to act on their behalf by providing the other Parties with written notification. Any decision, requests or orders of such representatives shall be deemed to be made by the Authorised Officer and Contract Manager and all references in this Agreement to the Authorised Officer and Contract Manager shall be deemed to include such representatives.
- 15.2 The Provider will comply with the reasonable instructions given by the Authorised Officer or a deputy and where the instruction would amount to a variation to this Agreement, such variation will be dealt with in accordance with this Agreement.
- 15.3 The Authorised Officer is authorised to negotiate the terms of any Orders issued by the Council and is responsible for ensuring that the Services meet or continues to meet the needs of the Council.
- 15.4 The Provider shall submit Management Information to the Council in the form set out in Schedule 6 throughout the Term and thereafter in respect of any Contract entered into with the Council.
- 15.5 Not used.
- 15.6 The Council may make changes to the Management Information which the Provider is required to supply and shall give the Provider at least one (1) month's written notice of any changes.
- 15.7 The Authorised Officer and the Contract Manager shall meet in accordance with the details set out in the Specification and/or **Error! Reference source not found.** and the Provider shall, at each meeting, present its previously circulated Management Information in the format set out in that Schedule.

16. RECORDS AND AUDIT ACCESS

- 16.1 The Provider shall keep and maintain until twelve (12) years after the date of termination or expiry (whichever is the earlier) of this Agreement (or as long a period as may be agreed between the Parties), full and accurate records and accounts of the

operation of this Agreement including the Services provided under it, the Contracts entered into with the Council and the amounts paid by the Council.

- 16.2 The Provider shall keep the records and accounts referred to in Clause 16.1 above in accordance with good accountancy practice.
- 16.3 The Provider shall afford the Council and/or the Auditor such access to such records and accounts as may be required from time to time.
- 16.4 The Provider shall provide such records and accounts (together with copies of the Provider's published accounts) during the Term and for a period of twelve (12) years after expiry of the Term to the Council and the Auditor.
- 16.5 The Council shall use reasonable endeavours to ensure that the conduct of each Audit carried out on its behalf does not unreasonably disrupt the Provider or delay the provision of the Services pursuant to the Contracts, save insofar as the Provider accepts and acknowledges that control over the conduct of Audits carried out by the Auditor is outside of the control of the Council.
- 16.6 Subject to the Council's rights of confidentiality, the Provider shall on demand provide the Auditor with all reasonable co-operation and assistance in relation to each Audit, including:-
- 16.6.1 all information requested by the Auditor within the scope of the Audit;
 - 16.6.2 reasonable access to sites controlled by the Provider and to equipment used in the provision of the Services; and
 - 16.6.3 access to the Staff.
- 16.7 The Parties agree that they shall bear their own respective costs and expenses incurred in respect of compliance with their obligations under this Clause 16, unless the Audit reveals a Material Default by the Provider in which case the Provider shall reimburse the Council's reasonable costs incurred in relation to the Audit.

17. CONFIDENTIALITY

- 17.1 Except to the extent set out in this clause or where disclosure is expressly permitted elsewhere in this Agreement, each Party shall:
- (a) treat the other Party's Confidential Information as confidential and safeguard it accordingly; and
 - (b) not disclose the other Party's Confidential Information to any other person without the owner's prior written consent.
- 17.2 Clause 17.1 shall not apply to the extent that:
- 17.2.1 such disclosure is a requirement of Law placed upon the party making the disclosure, including any requirements for disclosure under the FOIA or the EIR pursuant to clause 19.5 (Freedom of Information);
 - 17.2.2 such information was in the possession of the Party making the disclosure without obligation of confidentiality prior to its disclosure by the information owner;
 - 17.2.3 such information was obtained from a third party without obligation of confidentiality;

- 17.2.4 such information was already in the public domain at the time of disclosure otherwise than by a breach of this Agreement; or
 - 17.2.5 it is independently developed without access to the other party's Confidential Information.
- 17.3 The Provider may only disclose the Council's Confidential Information to its Staff who are directly involved in the provision of the Services and who need to know the information, and shall ensure that such Staff are aware of and shall comply with these obligations as to confidentiality.
- 17.4 The Provider shall not, and shall procure that its Staff do not, use any of the Confidential Information received otherwise than for the purposes of this Agreement.
- 17.5 Nothing in this Agreement shall prevent the Council from disclosing the Provider's Confidential Information:
- 17.5.1 to any Government department or any other public body. Any Government department or public body receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other public bodies or Government department on the understanding that the information is confidential and is not to be disclosed to a third party which is not part of any public body;
 - 17.5.2 to any consultant, contractor or other person engaged by the Council;
 - 17.5.3 for the purpose of the examination and certification of the Council's accounts;
 - 17.5.4 for any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Council has used its resources.
- 17.7 The Council shall use all reasonable endeavours to ensure that any Government department, public body, employee, third party or Sub-contractor to whom the Provider's Confidential Information is disclosed pursuant to clause 17.5 is made aware of the Council's obligations of confidentiality.
- 17.8 Nothing in this clause 17 shall prevent any Party from using any techniques, ideas or know-how gained during the performance of the Agreement in the course of its normal business to the extent that this use does not result in a disclosure of the other party's Confidential Information or an infringement of Intellectual Property Rights.

17A OFFICIAL SECRETS ACT

- 17A.1 The Provider shall comply with and shall ensure that its Staff shall comply with, the provisions of:-
- 17A1.1 the Official Secrets Act 1911 to 1989; and
 - 17A1.2 Section 182 of the Finance Act 1989.
- 17A.2 In the event that the Provider or its Staff fail to comply with this Clause 19, the Council reserves the right to terminate this Agreement with immediate effect by giving notice in writing to the Provider.

18. DATA PROTECTION

- 18.1 The Parties acknowledge that for the purposes of the Data Protection Legislation, the Council is the Controller and the Provider is the Processor unless otherwise

specified in Appendix [1] of Schedule 1. The only processing that the Processor is authorised to do is listed in Appendix [1] of Schedule 1 by the Controller and may not be determined by the Processor.

- 18.2 The Processor shall notify the Controller immediately if it considers that any of the Controller's instructions infringe the Data Protection Legislation.
- 18.3 The Processor shall provide all reasonable assistance to the Controller in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of the Controller, include:
- (a) a systematic description of the envisaged processing operations and the purpose of the processing;
 - (b) an assessment of the necessity and proportionality of the processing operations in relation to the Services;
 - (c) an assessment of the risks to the rights and freedoms of Data Subjects; and
 - (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal Data
- 18.4 The Processor shall, in relation to any Personal Data processed in connection with the Contract
- (a) process that Personal Data only in accordance with Appendix [1] of Schedule 1, unless the Processor is required to do otherwise by Law. If it is so required the Processor shall promptly notify the Controller before processing the Personal Data unless prohibited by Law
 - (b) ensure that it has in place Protective Measures, which are appropriate to protect against a Data Loss Event, which the Controller may reasonably reject (but failure to reject shall not amount to approval by the Controller of the adequacy of the Protective Measures) having taken account of the:
 - (i) nature of the data to be protected
 - (ii) harm that might result from a Data Loss Event;
 - (iii) state of technological development; and
 - (iv) cost of implementing any measures;
 - (c) ensure that:
 - (i) Staff do not process Personal Data except in accordance with this Agreement (and in particular Appendix [1] of Schedule 1)
 - (ii) It takes reasonable steps to ensure the reliability and integrity of any Staff who have access to the Personal Data and ensure that they:
 - (A) are aware of any comply with the Processor's duties under this clause:
 - (B) are subject to appropriate confidentiality undertakings with the Processor or any Sub-processor;

- (C) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third Party unless directed in writing to do so by the Controller or as otherwise permitted by this Agreement; and
 - (D) have undergone adequate training in the use, care, protection and handling of Personal Data; and
- (d) not transfer Personal Data outside of the EU unless the prior written consent of the Controller has been obtained and the following conditions are fulfilled:
 - (i) the Controller or the Processor has provided appropriate safeguards in relation to the transfer (whether in accordance with GDPR Article 46 or LED Article 37) as determined by the Controller;
 - (ii) the Data Subject has enforceable rights and effective legal remedies;
 - (iii) the Processor complies with any reasonable instructions notified to it in advance by the Controller with respect to the processing of the Personal Data
 - (iv) the Processor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist the Controller in meeting its obligations); and
- (e) at the written direction of the Controller, delete or return Personal Data (and any copies of it) to the Controller on termination of the Agreement unless the Processor is required by Law to retain the Personal Data.

18.5 Subject to clause 18.6, the Processor shall notify the Controller immediately if:

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

18.6 The Processor's obligation to notify under clause 18.5 shall include the provision of further information to the Controller in phases, as details become available.

- 18.7 Taking into account the nature of the processing, the Processor shall provide the Controller with full assistance in relation to either Party's obligations under Data Protection Legislation and any complaint, communication or request made under clause 18.5 (and insofar as possible within the timescales reasonably required by the Controller) including by promptly providing:
- (a) the Controller with full details and copies of the complaint, communication or request;
 - (b) such assistance as is reasonably requested by the Controller to enable the Controller to comply with a Data Subject Request within the relevant timescales set out in the Data Protection Legislation;
 - (c) the Controller, at its request, with any Personal Data it holds in relation to a Data Subject;
 - (d) assistance as requested by the Controller following any Data Loss Event;
 - (e) assistance as requested by the Controller with respect to any request from the Information Commissioner's Office, or any consultation by the Controller with the Information Commissioner's Office.
- 18.8 The Processor shall maintain complete and accurate records and information to demonstrate its compliance with this clause. This requirement does not apply where the Processor employs fewer than 250 staff, unless:
- (a) the Controller determines that the processing is not occasional;
 - (b) the Controller determines the processing includes special categories of data as referred to in Article 9(1) of the GDPR or Personal Data relating to criminal convictions and offences referred to in Article 10 of the GDPR; and
 - (c) the Controller determines that the processing is likely to result in a risk to the rights and freedoms of Data Subjects.
- 18.9 The Processor shall allow for audits of its Data Processing activity by the Controller or the Controller's designated auditor.
- 18.10 Each Party shall designate a data protection officer if required by the Data Protection Legislation.
- 18.11 Before allowing any Sub-processor to process any Personal Data, the Processor must:
- (a) notify the Controller in writing of the intended Sub-processor and processing;
 - (b) obtain the written consent of the Controller;
 - (c) enter into a written agreement with the Sub-processor which give effect to the terms set out in this clause 18 such that they apply to the Sub-processor; and
 - (d) provide the Controller with such information regarding the Sub-processor as the Controller may reasonably require.
- 18.12 The Processor shall remain fully liable for all acts or omissions of any Sub-processors.
- 18.13 The Controller may, at any time on not less than 30 Working Days' notice, revise this clause by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when incorporated by attachment to this Agreement).
- 18.14 The Parties agree to take account of any guidance issued by the Information Commissioner's Office. The Council may on not less than 30 Working Days' notice to the Provider amend this agreement to ensure that it complies with any guidance issued by the Information Commissioner's Office.

- 18.15 Where the Parties include two or more Joint Controllers as identified in Appendix [1] of Schedule 1 in accordance with GDPR Article 26, the Parties shall enter into a Joint Controller Agreement on the terms provided by the Council in replacement of Clauses E1.1-E1.14 for the Personal Data under Joint Control.

18A.1 Council Data and Security Requirements

- 18A.1.1 The Provider shall not delete or remove any proprietary notices contained within or relating to the Council Data.
- 18A.1.2 The Provider shall not store, copy, disclose, or use the Council Data except as necessary for the performance by the Provider of its obligations under this Agreement or as otherwise expressly authorised in writing by the Council.
- 18A.1.3 To the extent that Council Data is held and/or processed by the Provider, the Provider shall supply that Council Data to the Council as requested by the Council in a format reasonably requested by the Council.
- 18A.1.4 The Provider shall preserve the integrity of Council Data and prevent the corruption or loss of Council Data at all times that the relevant Council Data is under its control or the control of any sub-contractor.
- 18A.1.5 The Provider shall perform secure back-ups of all Council Data and shall ensure that up-to-date back-ups are stored off-site. The Provider shall ensure that such back-ups are available to the Council (or to such other person as the Council may direct) at all times upon request and are delivered to the Council at no less than 6 monthly intervals (or such other intervals as may be agreed in writing between the Parties).
- 18A.1.6 The Provider shall ensure that any system on which the Provider holds any Council Data, including back-up data, is a secure system that complies with the reasonable security requirements of the Council.
- 18A.1.7 If the Council Data is corrupted, lost or sufficiently degraded as a result of the Provider's Default so as to be unusable, the Council may:
- (a) require the Provider (at the Provider's expense) to restore or procure the restoration of the Council Data as soon as practicable but not later than 5 Working Days from the date of receipt of the Council's notice; and/or
 - (b) itself restore or procure the restoration of the Council Data, and shall be repaid by the Provider any reasonable expenses incurred in doing so.
- 18A.1.8 If at any time the Provider suspects or has reason to believe that the Council Data has or may become corrupted, lost or sufficiently degraded in any way for any reason, then the Provider shall notify the Council immediately and inform the Council of the remedial action the Provider proposes to take.
- 18A.1.9 The Provider shall, as an enduring obligation throughout the Term, use the latest versions of anti-virus definitions and software available from an industry accepted anti-virus software vendor (unless otherwise agreed in writing between the Parties) to check for, contain the spread of, and minimise the impact of malicious software in the Council's ICT systems which interface with the Provider's ICT systems or which are necessary for the Council to receive the Services
- 18A.1.10 Notwithstanding Clause 18A.1.9, if malicious software is found, the Parties shall co-operate to reduce the effect of the malicious software and,

particularly if malicious software causes loss of operational efficiency or loss or corruption of Council Data, assist each other to mitigate any losses and to restore the Services to their desired operating efficiency.

18A.1.11 Any cost arising out of the actions of the Parties taken in compliance with the provisions of Clause 18A.1.10 shall be borne by the Parties as follows:

(a) by the Provider where the malicious software originates directly or indirectly from the Provider or from the Council Data (whilst the Council Data was under the control of the Provider) unless the Provider can demonstrate that such malicious software was present and not quarantined or otherwise identified by the Council when provided to the Provider; and

(b) otherwise by the Council.

18A.1.12 The provisions of Clauses 18 and 18A shall apply during the Term and indefinitely after its expiry.

19. FREEDOM OF INFORMATION

19.1 The Provider acknowledges that the Council is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and cooperate with the Council to enable it to comply with its Information disclosure obligations.

19.2 The Provider shall and shall procure that its Sub-contractors shall:

19.2.1 transfer to the Council all Requests for Information that it receives as soon as practicable and in any event within two Working Days of receiving a Request for Information;

19.2.2 provide the Council with a copy of all Information in its possession, or power in the form that the Council requires within five Working Days (or such other period as the Council may specify) of the Authorities' request; and

19.2.3 provide all necessary assistance as reasonably requested by the Council to enable it to respond to the Request for Information within the time for compliance set out in section 10 of the FOIA or regulation 5 of the Environmental Information Regulations.

19.3 The Council shall be responsible for determining in its absolute discretion and notwithstanding any other provision in this Agreement or any other agreement whether the Commercially Sensitive Information and/or any other Information is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations.

19.4 In no event shall the Provider respond directly to a Request for Information unless expressly authorised to do so by the Council.

19.5 The Provider acknowledges that the Council may, acting in accordance with the Secretary of State for Constitutional Affairs Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 ("the Code"), be obliged under the FOIA, or the Environmental Information Regulations to disclose information concerning the Provider or the Services:

19.5.1 in certain circumstances without consulting the Provider; or

19.5.2 following consultation with the Provider and having taken their views into account;

- 19.5.3 provided always that where 19.2 applies the Council shall, in accordance with any recommendations of the Code, take reasonable steps, where appropriate, to give the Provider advanced notice, or failing that, to draw the disclosure to the Provider's attention after any such disclosure.
- 19.6 The Provider shall ensure that all information produced in the course of the Agreement or relating to the Agreement is retained for disclosure and shall permit the Council to inspect such records as requested from time to time.
- 19.7 The Provider acknowledges that any lists or schedules provided by it outlining Confidential Information are of indicative value only and that the Council may nevertheless be obliged to disclose Confidential Information in accordance with the Law.
- 20. PUBLICITY**
- 20.1 Unless otherwise directed by the Council, the Provider shall not make any press announcements or publicise this Agreement in any way without the Council's prior written consent.
- 20.2 The Council shall be entitled to publicise this Agreement in accordance with any legal obligation placed upon it, including any examination of this Agreement by the Auditor or otherwise.
- 20.3 The Provider shall not do anything which may damage the reputation of the Council or bring the Council into disrepute.

PART FOUR: TERMINATION AND SUSPENSION

21. TERMINATION

Termination on Default

- 21.1 The Council may terminate the Agreement by serving written notice on the Provider if the Provider commits a Default and if:-
- 21.1.1 the Provider has not remedied the Default to the satisfaction of the Council within ten (10) Working Days, or such other period as may be specified by the Council, after issue of a written notice specifying the Default and requesting it to be remedied; or
 - 21.1.2 the Default is not, in the opinion of the Council, capable of remedy; or
 - 21.1.3 the Default is a material breach of the Agreement; or
 - 21.1.4 the Council has terminated a Contract awarded by the Council under this Agreement as a consequence; or
 - 21.1.5 as a result of the Default, the Provider has brought the Council into disrepute.

Termination on Financial Standing

- 21.2 The Council may terminate the Agreement by serving notice on the Provider in writing with effect from the date specified in such notice where (in the reasonable opinion of the Council), there is a material detrimental change in the financial standing and/or the credit rating of the Provider which adversely impacts on the Provider's ability to supply Services under this Agreement.

Termination on Insolvency and Change of Control

- 21.3 The Council may terminate this Agreement with immediate effect by notice in writing where the Provider is a company and in respect of the Provider:-
- 21.3.1 a proposal is made for a voluntary arrangement within Part I of the Insolvency Act 1986 or of any other composition scheme or arrangement with, or assignment for the benefit of, its creditors; or
 - 21.3.2 a shareholders' meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding-up is passed (other than as part of, and exclusively for the purpose of, a bona fide reconstruction or amalgamation); or
 - 21.3.3 a petition is presented for its winding up (which is not dismissed within 14 days of its service) or an application is made for the appointment of a provisional liquidator or a creditors' meeting is convened pursuant to Section 98 of the Insolvency Act 1986; or
 - 21.3.4 a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets; or
 - 21.3.5 an application order is made either for the appointment of an administrator or for an administration order, an administrator is appointed, or notice of intention to appoint an administrator is given; or
 - 21.3.6 it is or becomes insolvent within the meaning of Section 123 of the Insolvency Act 1986; or
 - 21.3.7 being a "small company" within the meaning of Section 247(3) of the Companies Act 1985, a moratorium comes into force pursuant to Schedule A1 of the Insolvency Act 1986; or
 - 21.3.8 any event similar to those listed in Clause 21.3.1 to Clause 21.3.7 occurs under the law of any other jurisdiction.
- 21.4 The Provider shall notify the Council immediately if the Provider undergoes a change of control within the meaning of Section 1124 of the Corporation Tax Act 2010 ("**Change of Control**"). The Council may terminate the Agreement by giving notice in writing to the Provider with immediate effect within six (6) Months of:-
- 21.4.1 being notified that a Change of Control has occurred; or
 - 21.4.2 where no notification has been made, the date that the Council becomes aware of the Change of Control;

but shall not be permitted to terminate where an Approval was granted prior to the Change of Control.

Termination by the Council

- 21.5 The Council shall have the right to terminate this Agreement and/or the Dynamic Purchasing System, or to terminate the provision of any part of the Agreement at any time by giving three Months' written notice to the Provider and all other Providers. The Parties acknowledge that if the Council exercises its rights under this Clause 21.5 it shall exercise its equivalent rights under all agreements with the Providers admitted to the Dynamic Purchasing System.

Termination for failure to comply with the minimum requirements of the DPS

- 21.6 The Council may terminate the Agreement at any time by serving written notice on the Provider if the Provider has failed to maintain the minimum standards of the Dynamic Purchasing System as set out (without limitation) in the Accreditation and Enrolment process, the Request to Participate, the Selection Questionnaire, the DPS Application Guide or the DPS Operational Guide.

Further Grounds for Termination

- 21.7 The Council may terminate the Agreement with immediate effect at any time by written notice to the Provider where any of the grounds listed below apply:
- (a) the Agreement 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;
 - (b) the Provider has, at the time of contract award, been in one of the situations referred to in regulation 57(1), including as a result of the application of regulation 57(2), of the Public Contracts Regulations 2015 and should therefore have been excluded from the procurement procedure; or
 - (c) the Agreement should not have been awarded to the Provider in view of a serious infringement under the Treaty on European Union and the Public Contracts Directive (Directive 2014/24/EU) that has been declared by the CJEU in a procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU).

22. SUSPENSION OF PROVIDER'S APPOINTMENT

Without prejudice to the Council's rights to terminate the Agreement in Clause 21 above, if a right to terminate this Agreement arises in accordance with Clause 21, the Council may suspend the Provider's appointment in any or all Contracts by giving notice in writing to the Provider and no further Orders shall be placed with the Provider during the period of suspension. If the Council notifies the Provider in accordance with this Clause 22, the Provider's appointment shall be suspended for the period set out in the notice or such other period notified to the Provider by the Council in writing from time to time.

23. CONSEQUENCES OF TERMINATION AND EXPIRY

- 23.1 Notwithstanding the service of a notice to terminate the Agreement, the Provider shall continue to fulfil its obligations under the Agreement until the date of expiry or termination of the Agreement or such other date as required under this Clause 23.
- 23.2 Unless expressly stated to the contrary, the service of a notice to terminate the Agreement shall not operate as a notice to terminate any Contract made under the Agreement. Termination or expiry of the Agreement shall not cause any Contracts to terminate automatically. For the avoidance of doubt, all Contracts shall remain in force unless and until they are terminated or expire in accordance with their own terms.
- 23.3 Immediately following the date of termination or expiry of the Agreement, the Provider shall return to the Council or destroy at the Council's request any data and Confidential Information belonging to the Council in the Provider's possession, power

or control, together with all training manuals and other related documentation, and any other information and all copies thereof owned by the Council, save that it may keep one copy of any such data or information for a period of up to twelve (12) years to comply with its obligations under the Agreement, or such period as is necessary for such compliance.

- 23.4 The Council shall be entitled to require access to data or information arising from the provision of the Services from the Provider until the latest of:-
- 23.4.1 the expiry of a period of twelve (12) years following termination or expiry of the Agreement; or
 - 23.4.2 the expiry of a period of twelve (12) years – or such other period as specified in any Contract terms and conditions following the date on which the Provider ceases to provide Services under any Contract.
- 23.5 Termination or expiry of this Agreement shall be without prejudice to any rights, remedies or obligations of any Party accrued under this Agreement prior to termination or expiry.
- 23.6 The provisions of Clauses 8, 9, 10, 11, 16, 17, 18, 20, 24, 25 and 36 shall survive the termination or expiry of the Agreement, together with any other provision which is either expressed to or by implication is intended to survive termination.

PART FIVE: INSURANCE AND LIABILITY

24. LIABILITY

- 24.1 Nothing in this Agreement shall be construed to limit or exclude either Party's liability for:-
- 24.1.1 death or personal injury caused by its negligence;
 - 24.1.2 fraud or fraudulent misrepresentation; or
 - 24.1.3 breach of any obligations as to title implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982;
 - 24.1.4 breach of Clauses 17 (Confidentiality), 18 (Data Protection), 19 (Freedom of Information); or breach of the Council's or third party Intellectual Property Rights relevant to the Agreement.
- 24.2 The Provider shall indemnify and keep indemnified the Council in full from and against all claims, proceedings, actions, damages, losses, costs (including all interest, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses) and any other liabilities which may arise out of, or in consequence of, the performance or non-performance of its obligations under the Agreement, including in respect of any death or personal injury, loss of or damage to property, financial loss arising from any advice given or omitted to be given by the Provider, or the enforcement of the Agreement, or any other loss which is caused directly or indirectly by any act or omission of the Provider. The Provider shall not be responsible for any injury, loss, damage, cost or expense if and to the extent that it is caused by the negligence or wilful misconduct of the Council or by breach by the Council of its obligations under the Agreement.

25. INSURANCE

- 25.1 The Provider shall effect and maintain with a reputable insurance company a policy or policies of insurance providing an adequate level of cover in respect of all risks which may be incurred by the Provider, arising out of the Provider's performance of its obligations under the Agreement, including death or personal injury, loss of or damage to property or any other loss. Such policies shall include cover in respect of any financial loss arising from any advice given or omitted to be given by the Provider. Such insurance shall be maintained for the duration of the Term and for a minimum of 12 (twelve) years following the expiration or earlier termination of the Agreement.
- 25.2 The Provider shall during the Term have in force the following policies of insurance from an insurer of good repute:
- a) Employer's Liability insurance for a sum not less than £10 million in respect of any one incident; and
 - b) Public Liability insurance for a sum not less than £10 million in respect of any one incident; and
 - c) (if required by the nature of the Services) Professional Indemnity insurance for a sum not less than £2 million in respect of any one incident
 - d) Appropriate and adequate vehicle and passenger cover
- 25.3 Any excess or deductibles under such insurance (referred to in Clause 25.2) shall be the sole and exclusive responsibility of the Provider.
- 25.4 The Provider shall give the Council, on request, copies of all insurance policies referred to in this clause or a broker's verification of insurance to demonstrate that the appropriate cover is in place, together with receipts or other evidence of payment of the latest premiums due under those policies.
- 25.5 If, for whatever reason, the Provider fails to give effect to and maintain the insurances required by the provisions of the Agreement, the Council may make alternative arrangements to protect its interests and may recover the costs of such arrangements from the Provider.
- 25.6 The provisions of any insurance or the amount of cover shall not relieve the Provider of any liabilities under the Agreement. It shall be the responsibility of the Provider to determine the amount of insurance cover that will be adequate to enable the Provider to satisfy any liability referred to in Clause 24.2.
- 25.7 The Provider shall give immediate notice to the Council in the event of any accident or damage likely to form the subject of a claim against it and shall provide all information and assistance that the Council may require. The Provider shall not negotiate, pay, settle, admit or repudiate any claim without the Council's written consent, and shall permit the Council's insurers to take proceedings in the name of the Provider to recover compensation or secure any indemnity from any third party in respect of any of the matters covered by the Council's insurance.

PART SIX: OTHER PROVISIONS

26. TRANSFER AND SUB-CONTRACTING

26.1 The Agreement is personal to the Provider and the Provider shall not assign, novate, sub-contract or otherwise dispose of the Agreement or any part thereof without the previous consent in writing of the Council.

26.2 The Council shall be entitled to:-

26.2.1 assign, novate or otherwise dispose of its rights and obligations under the Agreement or any part thereof to any other public body; or

26.2.2 novate the Agreement to any other body (including any private sector body) which substantially performs any of the functions that previously had been performed by the Council;

provided that such assignment, novation or disposals shall not increase the burden of the Provider's obligations under the Agreement.

27. VARIATIONS TO THE AGREEMENT

Any variations to the Agreement must be made only in accordance with the Variation Procedure set out in Schedule 7.

28. RIGHTS OF THIRD PARTIES

Save as provided in Clauses 4, 7 and 8.2, a person who is not party to this Agreement ("**Third Party**") has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement but this does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act. If the Parties rescind this Agreement or vary any of its terms in accordance with the relevant provisions of this Agreement, such rescission or variation will not require the consent of any Third Party.

29. SEVERABILITY

29.1 If any provision of the Agreement is held invalid, illegal or unenforceable for any reason, such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if the Agreement had been executed with the invalid provision eliminated.

29.2 In the event of a holding of invalidity so fundamental as to prevent the accomplishment of the purpose of the Agreement, the Council and the Provider shall immediately commence good faith negotiations to remedy such invalidity.

30. CUMULATIVE REMEDIES

Except as otherwise expressly provided by the Agreement, all remedies available to either Party for breach of the Agreement are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.

31. WAIVER

31.1 The failure of either Party to insist upon strict performance of any provision of the Agreement, or the failure of any Party to exercise, or any delay in exercising, any right

or remedy shall not constitute a waiver of that right or remedy and shall not cause a diminution of the obligations established by the Agreement.

31.2 No waiver shall be effective unless it is expressly stated to be a waiver and communicated to the other Party in writing in accordance with Clause 33.

31.3 A waiver of any right or remedy arising from a breach of the Agreement shall not constitute a waiver of any right or remedy arising from any other or subsequent breach of the Agreement.

32. ENTIRE AGREEMENT

32.1 This Agreement, the schedules and any documents annexed to it or otherwise referred to in it constitutes the entire agreement and understanding between the Parties in respect of the matters dealt with in it and supersedes, cancels or nullifies any previous agreement between the Parties in relation to such matters.

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

32.3 Nothing in this Clause 32 shall operate to exclude Fraud or fraudulent misrepresentation.

33. NOTICES

33.1 Except as otherwise expressly provided within this Agreement, no notice or other communication from one Party to the other shall have any validity under the Agreement unless made in writing by or on behalf of the Party sending the communication.

33.2 Any notice or other communication which is to be given by any Party to the other shall be given by electronic mail via the Technology or by or by letter (sent by hand, post, registered post or by the recorded delivery service). Letters shall be addressed to the other Party in the manner referred to in Clause 33.3. Provided the relevant communication is not returned as undelivered, the notice or communication shall be deemed to have been given two (2) Working Days after the day on which the letter was posted, or four (4) hours, in the case of electronic mail or sooner where the other Party acknowledges receipt of such letters or item of electronic mail. It is anticipated that the primary means of communication between the Parties shall be electronic mail via the Technology.

33.3 For the purposes of Clause 33.2, the address of each Party shall be:

33.3.1 For the Council:-

The London Borough of Bexley
Civic Offices
Address: 2 Watling Street, Bexleyheath, Kent DA6 7AT
For the attention of: Bexley Integrated Transport Unit Manager
Tel: 020 3045 4431

33.3.2 For the Provider:-

Address: []
For the attention of:[]

Tel: []

33.4 A Party may change its address for service by serving a notice in accordance with this Clause.

34. COMPLAINTS HANDLING AND RESOLUTION

34.1 The Provider shall notify the Council of any Complaint made by any person in relation to the Agreement within two (2) Working Days of becoming aware of that Complaint and such notice shall contain full details of the Provider's plans to resolve such Complaint.

34.2 Without prejudice to any rights and remedies that a complainant may have at Law, including under the Agreement or a Contract, and without prejudice to any obligation of the Provider to take remedial action under the provisions of the Agreement or a Contract, the Provider shall use its best endeavours to resolve the Complaint within ten (10) Working Days and in so doing, shall deal with the Complaint fully, expeditiously and fairly.

34.3 Within two (2) Working Days of a request by the Council, the Provider shall provide full details of a Complaint to the Council, including details of steps taken to its resolution.

35. DISPUTE RESOLUTION

35.1 The Parties shall attempt in good faith to negotiate a settlement to any dispute between them arising out of or in connection with the Agreement within twenty (20) Working Days of any Party notifying the others of the dispute and such efforts shall involve the escalation of the dispute to those persons identified in Clause 33 above.

35.2 Nothing in this dispute resolution procedure shall prevent the Parties from seeking from any court of competent jurisdiction an interim order restraining the other Party from doing any act or compelling the other Party to do any act.

35.3 If the dispute cannot be resolved by the Parties pursuant to Clause 35.1 the Parties shall refer it to mediation pursuant to the procedure set out in Clause 35.5 unless:-

35.3.1 the Council considers that the dispute is not suitable for resolution by mediation; or

35.3.2 the Provider does not agree to mediation.

35.4 The obligations of the Parties under the Agreement shall not be suspended, cease or be delayed by the reference of a dispute to mediation and the Provider and its Staff and associates shall comply fully with the requirements of the Agreement at all times.

35.5 The procedure for mediation and consequential provisions relating to mediation are as follows:-

35.5.1 a neutral adviser or mediator ("**the Mediator**") shall be chosen by agreement between the Parties or, if they are unable to agree upon a Mediator within ten (10) Working Days after a request by one Party to the other to appoint a Mediator or if the Mediator agreed upon is unable or unwilling to act, any Party shall within ten (10) Working Days from the date of the proposal to appoint a Mediator or within ten (10) Working Days of notice to the Parties that he is unable or unwilling to act, apply to the Centre for Effective Dispute Resolution (CEDR) to appoint a Mediator;

- 35.5.2 the Parties shall within ten (10) Working Days of the appointment of the Mediator meet with him in order to agree a programme for the exchange of all relevant information and the structure to be adopted for negotiations to be held. If considered appropriate, the Parties may at any stage seek assistance from CEDR to provide guidance on a suitable procedure;
- 35.5.3 unless otherwise agreed, all negotiations connected with the dispute and any settlement agreement relating to it shall be conducted in confidence and without prejudice to the rights of the Parties in any future proceedings;
- 35.5.4 if the Parties reach agreement on the resolution of the dispute, the agreement shall be reduced to writing and shall be binding on the Parties once it is signed by their duly authorised representatives;
- 35.5.5 failing agreement, either of the Parties may invite the Mediator to provide a non-binding but informative opinion in writing. Such an opinion shall be provided on a without prejudice basis and shall not be used in evidence in any proceedings relating to this Agreement without the prior written consent of both Parties; and
- 35.5.6 if the Parties fail to reach agreement in the structured negotiations within sixty (60) Working Days of the Mediator being appointed, or such longer period as may be agreed by the Parties, then any dispute or difference between them may be referred to the courts.

36. LAW AND JURISDICTION

- 36.1 The Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.
- 36.2 Each Party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

IN WITNESS whereof this document has been sealed by the Council and executed by the Provider as a Deed the day and year first before written.

The COMMON SEAL OF)

THE MAYOR AND BURGESSES OF)

THE LONDON BOROUGH OF BEXLEY)

was hereunto affixed in the presence of:

Deputy Director

Deputy Director

SIGNED for and on behalf of

THE PROVIDER

(Director)

In the presence of:

(Director/Company Secretary)