

CASE/217433

SERVICES CONTRACT

-between-

(1) **THE LOCAL AUTHORITY NAME** (THE “PURCHASER”)

-and-

(2) **CGI IT UK LIMITED** (THE “SERVICE PROVIDER”)

-relating to the supply of-

**SCOTTISH LOCAL GOVERNMENT ELECTIONS 2017: ELECTRONIC
COUNTING**

Guidance note:

*Please note that this model is an “entire agreement” document. As such, a number of **highlighted fields** will require to be populated, and content replicated from the ITT, tender and other correspondence, prior to the agreement being signed.*

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PREAMBLE:

- ONE The Purchaser requires the provision of services;
- TWO On «F10: date contract notice published» the Purchaser's contract notice relating to the Services was published in the Official Journal of the European Union with reference number «F11: OJEU reference number»;
- THREE Not used
- FOUR On **21 May 2015** the Purchaser issued its ITT to potential Service Providers (including the Service Provider) in respect of the provision of services;
- FIVE On **30 June 2015** the Service Provider submitted its Tender;
- SIX On the basis of the Tender, the Purchaser has selected the Service Provider to supply the Services under the Contract;
- SEVEN The Contract establishes standard terms of supply for the provision of services;
- EIGHT The Contract also includes:
- a Specification setting out the Services that the Service Provider has undertaken to provide including Service Levels setting out particular levels of service that the Service Provider has undertaken to meet.
 - a Pricing Schedule setting out details of the pricing of the Services
 - details of Key Individuals involved in the provision of the Services;
 - details of approved sub-contractors as at Contract award;
 - details of the Service Provider's information which is deemed to be Service Provider Sensitive Information;
 - Ordering Procedures prescribing the procedures for ordering particular Services; and
 - Management Arrangements for the strategic management of the relationship between the Parties.

SUBSTANTIVE PROVISIONS:

SECTION A: INTRODUCTORY PROVISIONS

1. Definitions and Interpretation

1.1. In the Contract, unless the context otherwise requires, the following terms have the meanings given to them below:

“Acceptance Criteria” means the criteria for acceptance as determined in accordance with the Acceptance Procedures;

“Acceptance” date means the day within the initial or any extended Acceptance Procedures Period for the relevant Deliverable when all the Acceptance Criteria for the relevant Deliverable are met and the Acceptance Procedures are recorded as successful for the relevant Deliverable;

“Acceptance Procedures Period” means the period specified in the Implementation Plan within which the Acceptance Procedures must be performed;

“Assignee” has the meaning given in clause 32.2 (Assignment).

“Baseline Personnel Security Standard” means the pre-employment controls for all civil servants, members of the Armed Forces, temporary staff and government contractors generally.

“Change Control Notices (CNN)” a written response or request by either the contractor or the authority in accordance with the change control procedure;

“Change Control Procedures” means the change control procedure specific in Schedule 4 – Management Procedures

“Commencement Date” has the meaning given in clause 4.1 (Period).

“Contract” means this Contract between the Parties consisting of clauses and 10 Schedules.

“Contracting Authority” has the meaning given in regulation 3 of the Public Contracts (Scotland) Regulations 2012;

“Contractor’s Personnel” any of the Contractor’s officers, directors, employees, consultants, agents and Sub-Contractors engaged by the Contractor in the provision of the provision of the Services;

“Contractor Software” means Software owned by or licensed to the Contractor and used in the provision of the Services but excluding any (i) Specially Written Software,(ii) Authority’s Software and (iii) User’s Software;

“Control” has the meaning given in section 450 of the Corporation Tax Act 2010.

“Default” means any breach of the obligations of a Party (including material breach) or any negligent act, omission or statement of a Party in connection with or in relation to the Contract.

“Deliverable” means anything to be delivered to by the Service Provider to the Purchaser and identified as a deliverable in accordance with the Ordering Procedures.

“Dispute Resolution Procedure” means the procedure set out in Part [] of the Schedule for resolving disputes between the parties relating to the Contract.

“Elections” the elections to Local Authorities in Scotland due to take place in 2017, (whether they take place in XX 2017 or at another time) and any Local Authority by-elections required during the period of the Framework Agreement.

“Environmental Information Regulations” means the Environmental Information (Scotland) Regulations 2004 (and any subordinate regulations made under them from time to time or any superseding or amending regulations) together with any guidance and/or codes or practice issued by the Information Commissioner, the Scottish Information Commissioner and/or any relevant government department in relation to such regulations.

“Equipment” means equipment, plant, tackle, materials and other items supplied and used by the Service Provider’s Representatives in the performance of the Service Provider’s obligations under the Contract.

“Exit Management” means the obligations and rights of the Parties to ensure a smooth transition of the Contract from the Service Provider to the Purchaser or any Replacement Service Provider as set out in Clause 59 (Exit Management) and Schedule 10 (Exit Management).

“Exit Plan” means the exit management plan developed by the Service Provider and approved by the Purchaser in accordance with Clause 59 (Exit Management).

“Exit Management Date” means each of the following:

- (a) the date of a Termination Notice; and
- (b) if no Termination Notice has been served in relation to this Contract except for any Partial Termination, the expiry of the later of the Initial Term and any extension of the Contract agreed in writing.

“FOISA” means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under this Act from time to time or any superseding or amending enactments or regulations, together with any guidance and/or codes of practice issued by the Information Commissioner, the Scottish Information Commissioner and/or any relevant government department in relation to such legislation.

“Force Majeure” means any event or occurrence which is outside the reasonable control of the Party concerned and which is not attributable to any act or failure to take preventative action by that Party, including industrial action, fire, flood, violent storm, pestilence, explosion, malicious damage, armed conflict, acts of terrorism, nuclear, biological or chemical warfare, or any other disaster, natural or man-made.

“Good Industry Practice” means standards, practices, methods and procedures conforming to legal and regulatory requirements 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 as the Service Provider under the same or similar circumstances.

“Implementation” the carrying out of works under the Implementation Plans;

“Implementation Plan(s)” means the Implementation Plan(s) detailed in Schedule 4 - Management Arrangements, or any Implementation Plans agreed between the Contractor and the Users.

“**Incoming Employees**” means individuals whose employment transfers to the Service Provider on the commencement of the provision of the Services by operation of TUPE.

“**Intellectual Property Rights**” means patents, inventions, trade marks, 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.

“**ITT**” means the Purchaser’s invitation to tender dated «F13: date ITT issued».

“**Judicial Order**” means an ineffectiveness order or an order shortening the duration of the contract made in relation to the Contract under Part 9 of the Public Contracts (Scotland) Regulations 2012.

“**Legislation**” (a) any Act of the UK or Scottish Parliaments;
(b) any subordinate legislation under any Act of the UK or Scottish Parliaments ;
(c) any exercise of the Royal Prerogative; and
(d) any enforceable community right within the meaning of Section 2 of the European Communities Act 1972 in each case that has effect in Scotland;

“**Key Individuals**” means the Service Provider Representatives identified as being key individuals for the provision of the Services as set out in Schedule 5.

“**Management Arrangements**” means the arrangements for the strategic management of the relationship between the Parties, including arrangements for monitoring of the Service Provider’s compliance with the Specification, the Ordering Procedures and the terms of the Contract, set out in Schedule 4.

“**Milestone**” means any event or task which must be completed by a particular date, such as the delivery of a Deliverable, identified as a milestone in accordance with the Ordering Procedures.

“**Order**” means an order for particular Services placed in accordance with the Ordering Procedures.

“**Ordering Procedures**” means the procedures for ordering particular Services set out at Schedule 3.

“**Outgoing Employees**” means individuals whose employment transfers from the Service Provider on the ceasing of the provision of the Services by the Service Provider by operation of TUPE.

“**Party**” means either of the Purchaser or the Service Provider.

“**Pricing Schedule**” means the details of the pricing of the Services set out in Schedule 2.

“**Purchaser**” means the Local Authority

“Purchaser Property” means any corporeal moveable property issued or made available to the Service Provider by the Purchaser in connection with the Contract.

“Purchaser Protected Information” means any information provided by the Purchaser to the Service Provider which:

- carries a protective marking such as “Official”, “Secret” or “Top Secret”; or
- is exempt information as set out in Part 2 of FOISA (disregarding for that purpose whether a provision of Part 2 does not confer absolute exemption within the meaning of section 2(2) of FOISA).

“Relevant Transfer” has the meaning given in regulation 2(1) of TUPE.

“Replacement Service Provider” means any third party service provider appointed to perform the Services by the Purchaser from time to time;

“Request for Information” means a request for information within the meaning of section 8 of FOISA or the Environmental Information Regulations and any attempted or apparent such request.

“Schedule” means a schedule annexed to, and forming part of, the Contract.

“Service Credits” means the service credits payable to the Purchaser by the Service Provider in the event that the Service Levels are not met and identified as service credits in the Pricing Schedule.

“Service Levels” means the Service Levels identified as such in the Specification.

“Service Provider” means **CGI IT UK Limited**, Service Provider legal name and details.

“Service Provider Representatives” means all persons engaged by the Service Provider in the performance of its obligations under the Contract including:

- its employees and workers (including persons employed by a third party but working for and under the control of the Service Provider);
- its agents, Service Providers and carriers; and
- any sub-contractors of the Service Provider (whether approved under clause 34 (Sub-contracting) or otherwise).

“Service Provider Sensitive Information” means any information provided by the Service Provider to the Purchaser (disregarding any protective marking or assertion of confidentiality) which:

- is exempt information pursuant to sections 33(1) or 36, 38 or 39 of FOISA (having regard for that purpose to the public interest there might be in disclosing such information as referred to in section 2(1)(b) of FOISA).

“Services” means the Services as are to be supplied by the Service Provider to the Purchaser as set out in the Specification and as may be ordered in accordance with the Ordering Procedures.

“Software” means any computer program or programme, code, object code, Source Code and executable code;

“**Source Code**” means software in eye-readable form and in such form that it can be compiled or interpreted into equivalent object code together with all technical information and documentation necessary for the Use, production, modification and enhancement of such software;

“**Specification**” means the Purchaser’s general requirements for the provision of services including Service Levels, set out in Schedule 1.

“**Specially Written Software**” means any Software, specially written by or on behalf of the Contractor for the Authority or any User which cannot be generated by the Contractor’s Software and which is supplied to the Authority or any User in terms of the Contract. For the avoidance of doubt any such Software will include: (i) any Software which is necessary to meet the Statement of Requirements and which cannot be generated by the Contractor’s Software, and (ii) any Software which cannot be generated by the Contractor’s Software and which is required by the Authority or any User under the Change Control Procedure;

“**Stage 3 Services**” the services outlined in Schedule 1;

“**Stage 4 Services**” the services outlined in Schedule 1

“**System**” means Information Technology equipment, materials and other items supplied and used by the Contractor’s Representatives in the performance of the Contractor’s obligations under the Contract.

“**Tender**” means the tender submitted by the Service Provider to the Purchaser in response to the ITT dated «F14: date Tender submitted».

“**TUPE**” means the Transfer of Undertakings (Protection of Employment) Regulations 2006.

“**User**” means the Contracting Authority.

“**User Software**” means software owned by or licenced to any Framework Public Body (other than Contractor Software or Specially Written Software’).

“**Working Day**” means a day other than a Saturday, Sunday or bank holiday in Scotland, within the meaning of the Banking and Financial Dealings Act 1971.

“**Working Hour**” means an hour between 0900 hours and 1700 hours on a Working Day.

- 1.2. The interpretation and construction of the Contract is subject to the following provisions:
- 1.2.1. words importing the singular meaning include, where the context so admits, the plural and vice versa;
 - 1.2.2. words importing the masculine include the feminine and neuter;
 - 1.2.3. reference to a clause is a reference to the whole of that clause unless stated otherwise;
 - 1.2.4. references to any statute, enactment, order, regulation or other similar instrument are construed as a reference to the instrument as amended by any subsequent instrument or re-enacted;
 - 1.2.5. references to any person 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 assignees or transferees;

- 1.2.6. reference to “expiry or termination” of the Contract includes the making of a Judicial Order;
- 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. headings are included in the Contract for ease of reference only and do not affect the interpretation or construction of the Contract.

2. Condition Precedent: Requirement for a Parent Company Guarantee

It shall be a condition of this Contract that, if required by the Purchaser, the Service Provider shall deliver a validly executed parent company guarantee in the form set out in Schedule 8 to this Contract. The rights and obligations of the Parties shall have no force or effect unless the parent company guarantee has been properly executed and delivered to the Purchaser. The parties acknowledge that if this condition has not been fulfilled any performance of this Contract by the Service Provider shall be at the risk of the Service Provider and the Purchaser shall not be liable for and the Service Provider irrevocably waives any entitlement to payment of any fees, expenses or other payments in relation to such performance. Where the Service Provider has failed to fulfil this condition within 14 days of the date of last subscription of the Contract the Purchaser shall have the right to terminate the Contract by notice in writing to the Service Provider.

3. Nature of the Contract

- 3.1. The Contract is a public services contract within the meaning of regulation 2(1) of the Public Contracts (Scotland) Regulations 2012.
- 3.2. The Service Provider acknowledges that it is not the exclusive Service Provider of the Services to the Purchaser and as such no guarantee of work or volume of work has been granted by the Purchaser.

4. Period

- 4.1. The period of the Contract is from and including **xx xxxx 20xx** (the “**Commencement Date**”) to and including **xx xxxx 20xx** unless it is terminated earlier or extended under clause 4.2.
- 4.2. The Purchaser may, by giving notice to the Service Provider, extend the period of the Contract to a date falling no later than **xx xxxx 20xx**. Subject to that constraint, the Purchaser may extend the period of the Contract on more than one occasion.

5. Break

The Purchaser may terminate the Contract at any time by giving not less than 3 months’ notice to the Service Provider.

6. Specification

The Service Provider must comply with the Specification for Stages 3 and 4 Services.

7. Pricing Schedule

- 7.1 The Pricing Schedule sets out details of the pricing of the Services.
- 7.2 The prices in the Pricing Schedule are not to be increased for the period of the Contract.

7.3 Accordingly, the Service Provider may not unilaterally increase the prices in the Pricing Schedule. But nothing in the Contract prevents the Service Provider from improving on the prices in the Pricing Schedule for the purposes of a particular Order.

8. Ordering Procedures and Management Arrangements

8.1. The Ordering Procedures may be invoked by the Purchaser at any time during the period of the Contract.

8.2. The Parties must comply with the Ordering Procedures.

8.3. The Service Provider must maintain the capacity to supply the Services throughout the period of the Contract.

8.4. The Parties must comply with the Management Arrangements.

SECTION B: MISCELLANEOUS PROVISIONS INCLUDING THOSE RELATING TO PRICE, PAYMENT AND INFORMATION

9. Service Provider's Status

At all times during the period the Service Provider is an independent service provider and nothing in the Contract establishes a contract of employment, a relationship of agency or partnership or a joint venture between the Parties or between the Purchaser and any Service Provider Representative. Accordingly, neither Party is authorised to act in the name of, or on behalf of, or otherwise bind the other Party save as expressly permitted by the terms of the Contract.

10. Notices

10.1. Any notice or other communication which is to be given by a Party to the other under the Contract must be:

10.1.1. given in writing;

10.1.2. addressed in accordance with clause 10.3; and

10.1.3. sent by letter (delivered by hand, first class post or by recorded delivery or special delivery), fax or e-mail.

10.2. Provided the relevant communication is not returned or rejected as undelivered, the notice or communication is deemed to have been given:

10.2.1. 2 Working Days after the day on which the letter was posted; or

10.2.2. 4 Working Hours after the communication was sent, in the case of fax or email.

10.3. For the purposes of this clause, the address of each Party is:

10.3.1. For the Purchaser:

«F38: Purchaser address for notices»

For the attention of: «F39: Purchaser individual contact for notices»

Tel: «F40: Purchaser phone number»

E-mail: «F42: Purchaser e-mail address for notices»

10.3.2. For the Service Provider: CGI IT UK Limited
11 Wallace House, 1 Lochside Avenue, Edinburgh Park, Edinburgh, EH12 9DJ
For the attention of: Julian Dignall
Tel: [REDACTED]
E-mail: [REDACTED]@cgi.com

10.4. Either Party may change its address details by serving a notice in accordance with this clause.

10.5. Notices under clause 0 (Termination on Insolvency and Change of Control) may be sent to the Purchaser's trustee, receiver, liquidator or administrator, as appropriate.

11. Price

11.1. In consideration of the Service Provider's performance of its obligations relating to an Order, the Purchaser must pay:

11.1.1. the price due in accordance with the Pricing Schedule and the Ordering Procedures; and

11.1.2. a sum equal to the value added tax chargeable at the prevailing rate.

11.2. «F34 The Service Provider must automatically credit the Purchaser with Service Credits in accordance with the Pricing Schedule.»

11.3. The Service Provider may not suspend the provision of services if it considers that the Purchaser has failed to pay the price due.

12. Payment and Invoicing

12.1. The Purchaser must pay all sums due to the Service Provider within 30 days of receipt of a valid invoice.

12.2. The Service Provider must render invoices monthly in arrears.

12.3. The Service Provider must ensure that each invoice contains appropriate Contract and Order references «F49: , details of any Service Credits applied» and a detailed breakdown of the Services provided. The Service Provider must supply such other documentation reasonably required by the Purchaser to substantiate any invoice.

12.4. Value added tax, where applicable, must be shown separately on all invoices as a strictly net extra charge.

12.5. «F50: Where any Service Credits have been credited to the Purchaser they must be applied against the next invoice rendered by the Service Provider. Where no invoice is due or likely to be rendered for a period exceeding 2 months, the Service Provider must promptly issue a credit note and pay the credited sum to the Purchaser within 30 days of issue.»

12.6. Interest is payable on the late payment of any undisputed sums of money in accordance with the Late Payment of Commercial Debts (Interest) Act 1998. In the case of sums due by the Purchaser, the sums referred to in this clause must be properly invoiced by the Service Provider.

13. Recovery of Sums Due

- 13.1. Wherever under the Contract any sum of money is recoverable from or payable by the Service Provider to the Purchaser, the Purchaser may deduct that sum from any sum due to the Service Provider whether under the Contract or otherwise.
- 13.2. The Service Provider must make any payments due to the Purchaser without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise unless the Service Provider has a valid court order requiring an amount equal to such deduction to be paid by the Purchaser to the Service Provider.

14. Data Protection Act

- 14.1. For the purposes of this clause, the terms “Data Controller”, “Data Processor”, “Data Subject”, “Personal Data” and “Processing” have the meanings given in section 1(1) of the Data Protection Act 1998.
- 14.2. Where the Service Provider Processes Personal Data as a Data Processor for the Purchaser the Service Provider must:
- 14.2.1. enter into a data processing agreement in the form set out in Schedule 9 annexed hereto, and process the Personal Data in accordance with any instructions as may be given by the Purchaser (which may be specific or of a general nature);
 - 14.2.2. process the Personal Data only to the extent, and in such manner as is necessary for the performance of the Service Provider’s obligations under the Contract or as is required by the law;
 - 14.2.3. implement appropriate technical and organisational measures to protect Personal Data against unauthorised or unlawful Processing and against accidental loss, destruction, damage, alteration or disclosure, such measures being appropriate to the harm which might result from any unauthorised or unlawful Processing, accidental loss, destruction or damage to the Personal Data and having regard to the nature of the Personal Data which is to be protected;
 - 14.2.4. obtain approval before transferring the Personal Data to any sub-contractor;
 - 14.2.5. not cause or permit the Personal Data to be transferred outside of the European Economic Area without approval;
 - 14.2.6. ensure that all Service Provider Representatives accessing the Personal Data are aware of and comply with the obligations set out in this clause; and
 - 14.2.7. not disclose or divulge any of the Personal Data to any third parties unless directed in writing to do so by the Purchaser.
- 14.3. The Service Provider must notify the Purchaser promptly, and in any event within 5 Working Days, if it receives:
- 14.3.1. a request from a Data Subject to have access to their Personal Data;
 - 14.3.2. a complaint or request relating to the Purchaser’s obligations under the Data Protection Act 1998.
- 14.4. Where the Service Provider is collecting data the Service Provider must comply with all the fair processing provisions under the Data Protection Act 1998, including notification to Data Subjects that the information may be shared with the Purchaser.

- 14.5 To comply with section 31(3) of the Public Services Reform (Scotland) Act 2010, the Purchaser publishes an annual statement of all payments over £25,000. In addition, in line with openness and transparency, the Scottish Government publishes a monthly report of all payments over £25,000. The Service Provider should note that where a payment is made in excess of £25,000 there will be disclosure (in the form of the name of the payee, the date of the payment, the subject matter and the amount of payment) in the both the monthly report and the annual Public Services Reform (Scotland) Act 2010 statement.

15. Freedom of Information

- 15.1. The Service Provider acknowledges that the Purchaser is subject to the requirements of FOISA and the Environmental Information Regulations and undertakes to assist and cooperate with the Purchaser to enable the Purchaser to comply with FOISA and the Environmental Information Regulations.
- 15.2. If the Service Provider receives a Request for Information the Service Provider must promptly respond to the applicant. Where the Request for Information appears to be directed to information held by the Purchaser, the Service Provider must promptly inform the applicant in writing that the Request for Information can be directed to the Purchaser.
- 15.3. Where the Purchaser receives a Request for Information concerning the Contract, the Purchaser is responsible for determining at its absolute discretion whether information requested is to be disclosed to the applicant or whether the information requested is exempt from disclosure in accordance with FOISA or the Environmental Information Regulations.
- 15.4. The Service Provider acknowledges that the Purchaser may, acting in accordance with the Purchaser's Code of Practice on the Discharge of Functions of Public Authorities issued under section 60 of FOISA (as may be issued and revised from time to time), be obliged under FOISA or the Environmental Information Regulations to disclose information requested concerning the Service Provider or the Contract:
- 15.4.1. in certain circumstances without consulting the Service Provider, or
 - 15.4.2. following consultation with the Service Provider and having taken its views into account.
- 15.5. Where clause 15.4.1 applies the Purchaser must take reasonable steps, where practicable, to give the Service Provider advance notice of the fact of disclosure or, failing that, draw the fact of disclosure to the attention of the Service Provider after such disclosure.
- 15.6. Where a Request for Information concerns Service Provider Sensitive Information specified in Schedule 7 (having regard to the justifications and durations set out there), the Purchaser must take reasonable steps, where practicable, to consult with the Service Provider before disclosing it pursuant to a Request for Information.

16. Purchaser Protected Information

- 16.1. The Service Provider must:
- 16.1.1. treat all Purchaser Protected Information as confidential and safeguard it accordingly, implementing appropriate technical and organisational measures to protect Purchaser Protected Information against disclosure;

- 16.1.2. only use the Purchaser Protected Information for the purposes of performing its obligations under the Contract;
 - 16.1.3. only disclose the Purchaser Protected Information to such Service Provider Representatives that are directly involved in the performance of the Contract and need to know the information; and
 - 16.1.4. not disclose any Purchaser Protected Information without the prior written consent of the Purchaser.
- 16.2. The Service Provider must immediately notify the Purchaser of any breach of security concerning the Purchaser Protected Information. The Service Provider must fully cooperate with the Purchaser in any investigation that the Purchaser considers necessary to undertake as a result of any such breach of security.
- 16.3. Clause 16.1 does not apply to the extent that:
- 16.3.1. disclosure is required by law or by order of any competent court or tribunal;
 - 16.3.2. information is in the possession of the Service Provider without restriction as to its disclosure prior to its disclosure by the Purchaser;
 - 16.3.3. information is obtained from a third party (who lawfully acquired it) without restriction as to its disclosure;
 - 16.3.4. information is already in the public domain at the time of disclosure otherwise than by a breach of the Contract; or
 - 16.3.5. information is independently developed without access to the Purchaser Protected Information.
- 16.4. Breach of this clause or the Official Secrets Acts 1911 to 1989 by the Service Provider is a material breach for the purposes of clause 0 (Termination on Default).

17. Service Provider Sensitive Information

- 17.1. The Purchaser must:
- 17.1.1. treat all Service Provider Sensitive Information as confidential and safeguard it accordingly; and
 - 17.1.2. not disclose any Service Provider Sensitive Information to any other person without the prior written consent of the Service Provider.
- 17.2. Clause 17.1 does not apply to the extent that:
- 17.2.1. disclosure is required by law or by order of any competent court or tribunal;
 - 17.2.2. information is in the possession of the Purchaser without restriction as to its disclosure prior to its disclosure by the Service Provider;
 - 17.2.3. information is obtained from a third party (who lawfully acquired it) without restriction as to its disclosure;
 - 17.2.4. information is already in the public domain at the time of disclosure otherwise than by a breach of the Contract; or

- 17.2.5. information is independently developed without access to the Service Provider Sensitive Information.
- 17.3. Nothing in this Contract prevents the Purchaser from disclosing any Service Provider Sensitive Information or any other information concerning the Service Provider or the Contract:
- 17.3.1. pursuant to a Request for Information concerning the information (see clause 15 (Freedom of Information));
 - 17.3.2. in accordance with the Purchaser's publication scheme (within the meaning of section 23 of FOISA) as reviewed from time to time;
 - 17.3.3. in accordance with the requirements of Part 3 of the Public Services Reform (Scotland) Act 2010;
 - 17.3.4. in accordance with any future policies of the Purchaser concerning the routine disclosure of government information in the interests of transparency;
 - 17.3.5. to any consultant, Service Provider or other person engaged by the Purchaser, for example to conduct a gateway review;
 - 17.3.6. in response to a Parliamentary Question from a Member of the Scottish Parliament, a member of the United Kingdom Parliament, or any other department, office or agency of Her Majesty's Government in Scotland or the United Kingdom, and their servants or agents, and when disclosing such information to either the Scottish Parliament or the United Kingdom Parliament it is recognised and agreed by both parties that the Purchaser shall if the Purchaser sees fit disclose such information but is unable to impose any restrictions upon the information that the Purchaser provides to Members of the Scottish Parliament or Members of the United Kingdom Parliament;
 - 17.3.7. in response to any inquiry of the European Commission concerning the Contract;
or
 - 17.3.8. for the purpose of any examination by any auditors of the Purchaser (including Audit Scotland, the Auditor General for Scotland and the Scottish Parliament) of the economy, efficiency and effectiveness with which the Purchaser has used its resources.
- 17.4. The Service Provider consents to the publication of the Contract by the Purchaser, subject to such redactions as the Purchaser may decide to make. The Purchaser may consult with the Service Provider to inform its decisions concerning redaction (for example to exclude any Service Provider Sensitive Information) but any decisions taken by the Purchaser are final and conclusive.

18. Audit and Records Management

- 18.1 In this Clause 18, the following terms have the following meanings:-

The 'Act' means the Public Records (Scotland) Act 2011;

'Records Management Plan' means the plan prepared by the Purchaser and approved by the Keeper of the Records of Scotland under section 1 of the Act;

- 18.2 The Service Provider must retain and maintain until 5 years after the end of the Contract period full and accurate records of the Contract including the Orders placed, the Services provided and payments made and reimbursed under it.

- 18.3 The Service Provider must on request, and without any charge to the Purchaser, afford the Purchaser, or the Purchaser's representatives, such access to those records as may reasonably be requested by the Purchaser in connection with the Contract.
- 18.4 The Service Provider shall, for the duration of the Contract, provide the Purchaser with all assistance requested by the Purchaser acting reasonably to assist the Purchaser in complying with its obligations under the Act and with the Purchaser's Records Management Plan where such compliance is in respect of records created or to be created by the Service Provider on behalf of the Purchaser in terms of this Contract. This assistance will be at no cost to the Purchaser.
- 18.5 At the end of the Contract, the Service Provider shall transfer the records in question to the Purchaser, such transfer to include full ownership of the records including all Intellectual Property Rights in relation thereto. The transfer shall be at no cost to the Purchaser. The Service Provider shall ensure that all relevant information reasonably required to locate individual items within the records, including metadata and database schema, are also offered to the Purchaser on the same terms.
- 18.6 If the Service Provider shall become bankrupt (whether voluntarily or compulsorily), unable to pay its debts, insolvent or make arrangements with its creditors or if any resolution is adopted for the winding up of any party, or if a receiver, administrator or administrative receiver is appointed over the whole or any part of its assets or if either party goes into liquidation (whether voluntarily or compulsorily), otherwise than for the purposes of amalgamation or reconstruction or any form of execution levied upon its assets, then immediately upon the occurrence of any of these events, the records which would, in terms of clause 18.5 fall to be offered to the Purchaser shall be deemed to be held on trust by the Service Provider on behalf of the Purchaser. The Service Provider shall thereafter, if and when so required by the Purchaser, transfer the records in question to the Purchaser, such transfer to be on the same terms as would apply to a transfer made in terms of clause 18.5.

19. Publicity

The Service Provider must not make any press announcement or otherwise publicise the Contract in any way, except with the written consent of the Purchaser.

SECTION C: PROVISION OF SERVICES

20. Provision of the Services

- 20.1. The Service Provider must provide the Services:
- 20.1.1. in accordance with the Specification the Service Levels and the Ordering Procedures;
 - 20.1.2. in accordance with the particular requirements of each Order; and
 - 20.1.3. to the satisfaction of the Purchaser acting reasonably.
- 20.2. The Service Provider acknowledges that the Purchaser relies on the skill, care, diligence and judgment of the Service Provider in the supply of the Services and the performance of its obligations under the Contract.
- 20.3. For each Order for the provision of services, subject to any contrary requirements of the Purchaser communicated in accordance with the Ordering Procedures, the provisions of this Section C apply.

20.4. The period for any Order agreed in accordance with the Ordering Procedures may be brought to an earlier end upon 3 months' notice by the Purchaser.

21. Deliverables and Milestones

21.1. The Service Provider must provide the Services, including any Deliverables:

21.1.1. at the date(s), time(s) and location(s) required by the Purchaser; and

21.1.2. in good time to meet any Milestones required by the Purchaser.

21.2. When the Service Provider believes acting reasonably that it has provided any Deliverable or completed any Milestone in accordance with the Contract it must notify the Purchaser.

21.3. The Purchaser may thereafter by notice to the Service Provider:

21.3.1. accept the provision of the Deliverable or the completion of the Milestone (as appropriate), having regard to any acceptance criteria communicated in accordance with the Ordering Procedures; or

21.3.2. providing reasons, reject the provision of the Deliverable or the completion of the Milestone.

21.4. Where the Purchaser rejects the completion of a Milestone or provision of a Service or Deliverable in accordance with clause 21.3.2, the Service Provider must at its expense immediately rectify or remedy any defects and/or delays.

21.5. Risk and ownership in any Deliverables that are corporeal moveables and in any physical media in which any Deliverables are delivered vests in the Purchaser upon acceptance in accordance with this clause.

21.6. Whether the defect or delay is due to the Purchaser or not, the Service Provider shall deploy all additional resources to address the consequences of the default or delay. Where such default or delay is solely due to the Purchaser, any additional costs in respect of the said additional resources shall be agreed between the parties both acting reasonably.

SECTION D: STAFF INVOLVED IN THE PROVISION OF SERVICES

22. Key Individuals

22.1. The Service Provider acknowledges that the Key Individuals are essential to the proper provision of the Services to the Purchaser.

22.2. The Key Individuals must not be released from providing the Services without the approval of the Purchaser, except by reason of long-term sickness, maternity, paternity, adoption or parental leave, termination of employment or equivalent extenuating circumstances. Where such extenuating circumstances arise or are foreseeable, the Service Provider must immediately give notice of that fact to the Purchaser.

22.3. The Service Provider may propose a replacement to a Key Individual (and must do so when a Key Individual is to be released from providing the Services), in which case:

22.3.1. appropriate arrangements must be made to minimise any adverse impact on the Contract which could be caused by the change in Key Individuals (including, wherever possible, a transfer period of sufficient duration to allow for the transfer of know-how and skills); and

- 22.3.2. the replacement must be of at least equal status and of equivalent qualifications, experience, training and skills to the Key Individual being replaced and must be fully competent to carry out the responsibilities of that person in relation to the Services.
- 22.4. Any proposed replacement to a Key Individual is subject to the approval of the Purchaser. Subject to the Service Provider's compliance with this clause, the Purchaser must not unreasonably withhold such approval.

23. Offers of Employment

- 23.1. For the duration of the Contract and for a period of 12 months thereafter the Service Provider must not employ or offer employment to any of the Purchaser's employees who have been associated with the Contract and/or the contract management of the Contract without the Purchaser's prior approval.
- 23.2. This clause does not prevent the Service Provider from employing or offering employment to any person who has applied for employment in response to an advertisement placed in the normal course of business and not placed with the objective of soliciting the Purchaser's employees.

24. Staff transfer at commencement

- 24.1. The Parties agree that the commencement of the provision of the Services by the Service Provider does not involve a Relevant Transfer.
- 24.2. The Service Provider is responsible for all emoluments and outgoings in respect of the Incoming Employees (including, without limitation, all wages, bonuses, commission, premiums, subscriptions, pay as you earn and national insurance contributions and pension contributions) which are attributable in whole or in part to the period from the date of the Relevant Transfer, including bonuses or commission which are payable on or before the date of the Relevant Transfer but attributable in whole or in part to the period from the date of the Relevant Transfer.
- 24.3. The Service Provider indemnifies the transferor against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and any other liabilities which the transferor may incur in respect of the emoluments and outgoings referred to in clause 24.2.

25. Information about Service Provider Employees

- 25.1. The Purchaser may by notice require the Service Provider to disclose such information as the Purchaser may require relating to those of the Service Provider's employees carrying out activities under or connected with the Contract.
- 25.2. The Service Provider must disclose by notice all such information as is required by the Purchaser under clause 25.1, within such reasonable period specified by the Purchaser. The Service Provider acknowledges that the Data Protection Act 1998 does not prevent the disclosure of anonymised data that is not personal data within the meaning of that Act.
- 25.3. The Service Provider consents to the disclosure by the Purchaser of all information provided by the Service Provider under this clause to other service providers that the Purchaser may invite to tender or appoint for services to be provided in substitution for the Services.

26. Staff transfer on expiry or termination

- 26.1. The Parties agree that the ceasing of the provision of the Services by the Service Provider does not involve a Relevant Transfer.
- 26.2. The Service Provider indemnifies the Purchaser and any replacement service provider against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and other liabilities which the Purchaser or any replacement service provider may suffer as a result of or in connection with:
- 26.2.1. the provision of information pursuant to clause 25;
 - 26.2.2. any claim or demand by any Outgoing Employee (whether in contract, delict, under statute or otherwise) arising directly or indirectly from any act, fault or omission of the Service Provider in respect of any Outgoing Employee on or before the date of the Relevant Transfer;
 - 26.2.3. any failure by the Service Provider to comply with its obligations under regulations 13 or 14 of TUPE or any award of compensation under regulation 15 of TUPE save where such failure arises from the failure of the Purchaser or any replacement service provider to comply with its obligations under regulation 13 of TUPE; and
 - 26.2.4. any claim (including any individual employee entitlement under or consequent on such a claim) by any trade union or other body or person representing any Outgoing Employees arising from or connected with any failure by the Purchaser to comply with any legal obligation to such trade union, body or person.
- 26.3. The Service Provider is responsible for all emoluments and outgoings in respect of the Outgoing Employees (including, without limitation, all wages, bonuses, commission, premiums, subscriptions, pay as you earn and national insurance contributions and pension contributions) which are attributable in whole or in part to the period up to and including the date of the Relevant Transfer (including bonuses or commission which are payable after the date of the Relevant Transfer but attributable in whole or in part to the period on or before the date of the Relevant Transfer).
- 26.4. The Service Provider indemnifies the Purchaser and any replacement service provider against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and any other liabilities which the Purchaser or replacement service provider may incur in respect of the emoluments and outgoings referred to in clause 26.3.

27. Security

- 27.1 The Service Provider must comply with the Purchaser's policies concerning Baseline Personnel Security Standard clearance and such modifications to those policies or replacement policies as are notified to the Service Provider from time to time.
- 27.2 The Service Provider must notify the Purchaser of any matter or other change in circumstances which might adversely affect future Baseline Personnel Security Standard clearance.

SECTION E: PROVISIONS RELATING TO INTELLECTUAL PROPERTY AND GOVERNANCE

28. Parties' pre-existing Intellectual Property Rights

Except as expressly provided for in the Contract, neither Party acquires any interest in or license to use the other Party's Intellectual Property Rights as they subsist at the Commencement Date or as developed independently of the Contract.

29. Specially Created Intellectual Property Rights

- 29.1. All Intellectual Property Rights in Deliverables and any reports, guidance, specification, instructions, toolkits, plans, data, drawings, databases, patents, patterns, models, designs or other material prepared by or for the Service Provider on behalf of the Purchaser for use, or intended use, in relation to the performance by the Service Provider of its obligations under the Contract belong to the Purchaser.
- 29.2. The Service Provider assigns to the Purchaser, with full title guarantee, all Intellectual Property Rights which may subsist in the materials referred to in clause 29.1. This assignment takes effect on the Commencement Date or as an assignment of future rights that will take effect immediately on the coming into existence of the Intellectual Property Rights produced by the Service Provider. The Service Provider must execute all documentation necessary to effect this assignment.

30. Licences of Intellectual Property Rights

- 30.1. The Service Provider grants to the Purchaser a royalty-free, irrevocable and non-exclusive licence (with a right to sub-licence) to use any Intellectual Property Rights owned or developed prior to the Commencement Date and which the Purchaser reasonably requires in order to enjoy the benefit of the Services.
- 30.2. The Service Provider must ensure that the third party owner of any Intellectual Property Rights that are or which may be used to perform the Contract grants to the Purchaser a royalty-free, irrevocable and non-exclusive licence or, if itself a licensee of those rights, grants to the Purchaser an authorised and equivalently wide sub-licence, to use, reproduce, modify, develop and maintain the Intellectual Property Rights. Such licence or sub-licence must be non-exclusive, perpetual, royalty free and irrevocable

30.A Ownership of rights in the Deliverables and Software Licences

- 30.A 1 The Service Provider and the Purchaser shall each take all appropriate precautions (having regard to the nature of their other respective obligations under the Contract) to preserve the integrity of the Purchaser's Data and to prevent corruption or loss of the Purchaser's Data.

- 30.A.2 For the term of the Contract the Purchaser grants to the Service Provider and Sub-contractors a non-exclusive non-transferable limited licence to reproduce the Purchaser's Data solely for the purposes of supplying the Services to the Purchaser and any Users in accordance with the Contract.
- 30.A.3 The Purchaser acknowledges that the Service Provider's Software is the property of the Service Provider and any third-party licensors of the Service Provider. The Purchaser shall neither delete nor amend any copyright or other proprietary notices contained within or relating to the Service Provider's Software.
- 30.A.4 By signature of the Contract the Service Provider grants to the Purchaser a royalty-free, non-exclusive, non-transferable (other than as set out below) licence to Use the Service Provider's Software for any purpose associated with the administration of any elections which are the responsibility of the Purchaser or the Users, which licence shall subsist in perpetuity notwithstanding the expiry or termination of the Contract. The Purchaser shall be permitted to transfer the Service Provider's Software to any replacement contractor at any time. In the event that the Service Provider's Software requires to be released to the Purchaser in terms of an **Escrow** Agreement as referred below, the foregoing licence shall include the right of the Purchaser to alter, modify and maintain the Service Provider's Software for the said purposes.
- 30.A.5 The pricing of the Services includes of all licence fees relating to the Service Provider's Software and documents used by the Service Provider in the provision of the Services.
- 30.A.6 The Service Provider will support, and provide updates for, the Contractor's Software until **28 February 2021**.
- 30.A.7 All right, title and interest of whatever nature (including but not limited to copyright and patent application rights and all other Intellectual Property Rights) to any Specially Written Software and related documentation shall vest in and belong to the Purchaser on behalf of the Crown, together with the design documentation of any Specially Written Software and a licence to Use any proprietary tools and methodologies used in its development free from any interest of the Service Provider or any third-party, upon Acceptance thereof.
- 30.A.8 The Service Provider will do anything which the Purchaser may reasonably require in order effectively to vest such rights in the Purchaser on behalf of the Crown whether before or after the termination of the Contract. The Purchaser will be entitled to make such use of any Specially Written Software as it chooses including making any Specially Written Software available for use by Users and other third-parties for any purpose.
- 30.A.9 The Service Provider shall supply the Purchaser with a copy of the Source Code of any Specially Written Software together with the design documentation of any Specially Written Software and a licence to use any proprietary tools and methodologies used in its development upon acceptance of the relevant element of any Specially Written Software.
- 30.A.10 The Service Provider will place the Service Provider's Software (other than Third Party Software) in **Escrow** as it is written with a reputable Escrow Agent approved by the Purchaser, in terms of an Escrow Agreement to be approved by the Purchaser and to be entered into within sixty (60) days of Acceptance of the relevant Service Provider's Software provided that the Escrow Agreement shall be on such agent's standard terms for a simple deposit only and not for any integrity testing or validity testing
- 30.A.11 The Service Provider shall be responsible for maintaining the Escrow Agreement in force until at least **28 February 2021** and shall pay all fees and charges in that respect.

31. Claims relating to Intellectual Property Rights

- 31.1. The Service Provider must not infringe any Intellectual Property Rights of any third party in providing the Services or otherwise performing its obligations under the Contract and must ensure that the provision of the Services and the use or possession of the Deliverables does not infringe such Intellectual Property Rights.
- 31.2. The Service Provider must promptly notify the Purchaser if any claim or demand is made or action brought against the Service Provider for infringement or alleged infringement of any Intellectual Property Right which may affect the use or possession of the Deliverables or which may affect the provision of the Services.
- 31.3. Where a claim to which this clause applies is made, the Service Provider must, at its expense, use its best endeavours to:
- 31.3.1. modify the Services or Deliverables or substitute alternative Services or Deliverables (in any case without reducing performance or functionality) so as to avoid the infringement or alleged infringement of the Intellectual Property Rights; or
 - 31.3.2. procure the grant of a licence or licences from the pursuer, claimant or complainer, on terms acceptable to the Purchaser, so as to avoid the infringement or alleged infringement of the Intellectual Property Rights of the pursuer, claimant or complainer.
- 31.4. The Service Provider must not without the consent of the Purchaser make any admissions which may be prejudicial to the defence or settlement of any claim to which this clause applies.

31.A. Infringement of Third Party Intellectual Property Rights

- 31.A.1 The Contractor shall ensure that the Use of the Contractor's Software and any Specially Written Software, the receipt of the Services, and/or the use of the System, by or on behalf of the Authority or any User shall not infringe any Intellectual Property Rights of any third party.
- 31.A.2 Notwithstanding the provisions of Clause 51, the Contractor shall indemnify the Authority and all Users against all claims, demands, actions, costs, expenses, losses and damages (including but not limited to legal costs and disbursements on a solicitor and client basis) arising from or incurred by reason of any infringement or alleged infringement (including but not limited to the defence of such alleged infringement) in the United Kingdom of any Intellectual Property Rights by the Use of any Deliverable and the receipt of the Services and/or the use of the System by or on behalf of the Authority and all Users.
- 31.A.3 The Contractor shall promptly notify the Authority if any claim or demand is made or action brought against the Contractor for infringement or alleged infringement of any Intellectual Property Rights which may affect the Use of the Deliverables or possession of any Deliverable and/or the receipt of the Services and/or the use of the System by or on behalf of the Authority or any User.
- 31.A.4 The Authority shall promptly notify the Contractor if any claim or demand is made or action brought against the Authority to which Clause 31.A.2 or 31.A.3 may apply.
- 31.A.5 Not Used.

31.A.6 If a claim or demand is made or action brought to which Clause 31.A.2 may apply or in the reasonable opinion of the Contractor is likely to be made or brought, the Contractor may at its own expense and within a reasonable time either:

31.A.6.1 modify any or all of the Deliverables or the Services without reducing the performance and functionality of the same, or substitute alternative Deliverables or Services of equivalent performance and functionality for any or all of the Deliverables or the Services, so as to avoid the infringement or the alleged infringement, provided that the terms herein shall apply mutatis mutandis to such modified or substituted items or services and such modified or substituted items shall be acceptable to the Authority; or

31.A.6.2 procure a licence to Use the Deliverables on terms which are acceptable to the Authority.

31.A.7 The foregoing provisions of this Clause 31A shall not apply insofar as any such claim or demand or action is in respect of:

31.A.7.1 any use by or on behalf of the Authority or any User of the Deliverables or Services in combination with any item not supplied by the Contractor where such use of the Deliverables or Services has not been approved by the Contractor and directly gives rise to the claim, demand or action; or

31.A.7.2 any modification carried out by or on behalf of the Authority or any User to any item supplied by the Contractor under the Contract if such modification is not authorised by the Contractor in writing; or

31.A.7.3 any use by the Authority or any User of a Deliverable or Services in a manner not permitted in terms of the Contract.

31.A.8 If the Contractor has availed itself of its rights to modify the Deliverables or the Services or to supply substitute Deliverables or Services pursuant to Clause 31.A.6.1 or to procure a licence under Clause 31.A.6.2 and such exercise of the said rights has avoided any claim, demand or action for infringement or alleged infringement, then the Contractor shall have no further liability thereafter under this Clause 31A in respect of the said claim, demand or action.

31.A.9 If a modification or substitution in accordance with Clause 31.A.6.1 above is not possible so as to avoid the infringement or the Contractor has been unable to procure a licence in accordance with Clause 31.A.6.2 then the Authority shall, at its option, be entitled to terminate the Contract pursuant to Clause 57.1 and the Contractor shall be liable to compensate the Authority for all loss and/or damage suffered by the Authority as a consequence of such termination.

32. Assignment

32.1. The Service Provider may not assign its interest in the Contract or any part of it without the prior written consent of the Purchaser.

32.2. Notwithstanding clause 32.1, the Service Provider may assign to another person (an "**Assignee**") the right to receive the price due to the Service Provider under the Contract subject to:

32.2.1. deduction of sums in respect of which the Purchaser exercises its right of recovery under clause 13 (Recovery of Sums Due); and

32.2.2. all the related rights of the Purchaser under the Contract in relation to the recovery of sums due but unpaid.

32.3. The Service Provider must notify or ensure that any Assignee notifies the Purchaser of any variations to the arrangements for making payments or for handling invoices, in each case in good time to enable the Purchaser to redirect payments or invoices accordingly. In the absence of such notification the Purchaser is under no obligation to vary its arrangements for making payments or for handling invoices.

32.4. Subject to clause 32.6, the Purchaser may assign, novate or otherwise dispose of its rights and obligations under the Contract or any part thereof to:

- (a) any Contracting Authority; or
- (b) any other body established by the Crown or under statute in order substantially to perform any of the functions that had previously been performed by the Purchaser; or
- (c) any private sector body which substantially performs the functions of the Purchaser,

provided that any such assignment, novation or other disposal shall not increase the burden of the Service Provider's obligations under the Contract.

32.5 Any change in the legal status of the Purchaser such that it ceases to be a Contracting Authority shall not, subject to clause 32.6, affect the validity of the Contract. In such circumstances, the Contract shall bind and inure to the benefit of any successor body to the Purchaser.

32.6 If the rights and obligations under the Contract are assigned, novated or otherwise disposed of pursuant to clause 32.4 to a body which is not a Contracting Authority or if there is a change in the legal status of the Purchaser such that it ceases to be a Contracting Authority (in the remainder of this clause both such bodies being referred to as the "**Transferee**"):

- (a) the rights of termination of the Purchaser in clauses 57 (Termination on Default) and 58 (Termination on Insolvency and Change of Control) shall be available to the Service Provider in the event of respectively, the bankruptcy or insolvency, or Default of the Transferee; and
- (b) the Transferee shall only be able to assign, novate or otherwise dispose of its rights and obligations under the Contract or any part thereof with the prior consent in writing of the Service Provider.

32.7 The Purchaser may disclose to any Transferee any Confidential Information of the Service Provider which relates to the performance of the Service Provider's obligations under the Contract. In such circumstances the Purchaser shall authorise the Transferee to use such Confidential Information only for purposes relating to the performance of the Service Provider's obligations under the Contract and for no other purpose and shall take all reasonable steps to ensure that the Transferee gives a confidentiality undertaking in relation to such Confidential Information.

33. Change of Control

The Service Provider must notify the Purchaser:

- 33.1. whenever it proposes to undergo a change of Control, or a change of control is likely to occur; and

33.2. immediately following a change of Control that has occurred.

34. Sub-Contracting

34.1. The Purchaser approves the appointment of the sub-contractors specified in Schedule 6 (Approved Sub-contractors) in respect of the obligations specified in that Schedule.

34.2. The Service Provider may not sub-contract its obligations under the Contract to other sub-Service Providers without the prior written consent of the Purchaser. Sub-contracting of any part of the Contract shall not relieve the Service Provider of any obligation or duty attributable to the Service Provider under the Contract. The Service Provider shall be responsible for the acts and omissions of its sub-Service Providers as though they are its own.

34.3. Where the Service Provider enters into a sub-contract the Service Provider must ensure that a provision is included which:

34.3.1. requires payment to be made of all sums due by the Service Provider 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 Purchaser has made payment to the Service Provider in respect of Services and the sub-contractor's invoice relates to such Services then, to that extent, the invoice must be treated as valid and, provided the Service Provider is not exercising a right of retention or set-off in respect of a breach of contract by the sub-contractor or in respect of a sum otherwise due by the sub-contractor to the Service Provider, payment must be made to the sub-contractor without deduction;

34.3.2. notifies the sub-contractor that the sub-contract forms part of a larger contract for the benefit of the Purchaser 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 Purchaser;

34.3.3. requires that all contracts with subcontractors and suppliers which the subcontractor intends to procure, and which the subcontractor has not before the date of this Contract, already planned to award to a particular supplier are advertised through the Public Contracts Scotland procurement portal (www.publiccontractsscotland.gov.uk) and awarded following a fair, open, transparent and competitive process proportionate to the nature and value of the contract; and

34.3.4. is in the same terms as that set out in this clause 34.3 (including for the avoidance of doubt this clause 34.3.4) subject only to modification to refer to the correct designation of the equivalent party as the Service Provider and sub-contractor as the case may be.

34.4. Where requested by the Purchaser, copies of any sub-contract must be sent by the Service Provider to the Purchaser as soon as reasonably practicable.

34.5. Where the Service Provider proposes to enter into a sub-contract it must:

34.5.1 advertise its intension to do so in at least one trade journal, [at least one newspaper circulating in [*refer to locality*]] and the Public Contracts Scotland Portal; and

34.5.2 follow a procedure leading to the selection of the sub-contractor which ensures

Reasonable competition following principles of equal treatment, non-discrimination and transparency and which ensures that such procedure is accessible by small and medium enterprises.

35. Amendment

35.1. The Contract may be amended only by the written agreement of both Parties. Accordingly, the Service Provider may not unilaterally amend the Contract.

35.2. «F53: Clause 7 (Pricing Schedule) makes special provision for the variation of the Pricing Schedule.»

SECTION F SERVICE PROVIDER CONDUCT REQUIREMENTS

36. Compliance with the Law etc.

In providing the Services and otherwise when performing the Contract, the Service Provider must comply in all respects with:

- 36.1. all applicable law;
- 36.2. any applicable requirements of regulatory bodies; and
- 36.3. Good Industry Practice.

37. Official Secrets Acts

The Service Provider undertakes to abide and procure that the Service Provider's employees abide by the provisions of the Official Secrets Acts 1911 to 1989.

38. Service Provider's responsibility for staff etc.

38.1. The Service Provider is responsible for the acts and omissions of all Service Provider Representatives relating to the Contract as though such acts and omissions are the Service Provider's own.

38.2. The Service Provider must ensure that all Service Provider Representatives:

- 38.2.1. are appropriately experienced, skilled, qualified and trained;
- 38.2.2. carry out their activities connected with the Contract faithfully and diligently and with all with due skill, care and diligence; and
- 38.2.3. obey all lawful and reasonable directions of the Purchaser when carrying out activities under the Contract.

39. Access to the Purchaser's premises

- 39.1. Any access to, or occupation of, the Purchaser's premises which the Purchaser may grant the Service Provider from time to time is on a non-exclusive licence basis free of charge. The Service Provider must use the Purchaser's premises solely for the purpose of performing its obligations under the Contract and must limit access to the Purchaser's premises to such individuals as are necessary for that purpose.
- 39.2. The Service Provider must comply with the Purchaser's policies concerning Baseline Personnel Security Standard clearance and such modifications to those policies or replacement policies as are notified to the Service Provider from time to time.
- 39.3. At the Purchaser's written request, the Service Provider must provide a list of the names and addresses of all persons who may require admission to the Purchaser's premises in connection with the Contract, specifying the capacities in which they are concerned with the Contract and giving such other particulars as the Purchaser may reasonably request.
- 39.4. The Service Provider must ensure that any individual Service Provider Representative entering the Purchaser's premises has completed the process for obtaining Baseline Personnel Security Standard clearance. The Service Provider acknowledges that the Purchaser has the right to deny entry to any individual that has not completed the process for obtaining Baseline Personnel Security Standard clearance.
- 39.5. In accordance with the Purchaser's policies concerning visitor access, entry to the Purchaser's premises may be granted to individual Service Provider Representatives for the purposes of meetings, notwithstanding that the process for obtaining Baseline Personnel Security Standard clearance has not commenced or completed.
- 39.6. The Purchaser may, by notice to the Service Provider, refuse to admit onto, or withdraw permission to remain on, the Purchaser's premises any Service Provider Representative whose admission or continued presence would, in the opinion of the Purchaser acting reasonably, be undesirable.
- 39.7. The Purchaser must provide advice and assistance acting reasonably to the Service Provider to facilitate the Service Provider's compliance with this clause.
- 39.8. All decisions of the Purchaser under this clause are final and conclusive.

40. Service Provider's Equipment

- 40.1. The Service Provider must provide all Equipment necessary to perform any required activities on the Purchaser's premises or otherwise necessary for the provision of Services.
- 40.2. But the Service Provider must not, without the Purchaser's approval:
- 40.2.1. bring Equipment onto the Purchaser's premises; or
- 40.2.2. leave Equipment on the premises.
- 40.3. Any Equipment brought onto the Purchaser's premises:
- 40.3.1. remains the property of the Service Provider; and
- 40.3.2. is at the Service Provider's own risk and the Purchaser has no liability for any loss of or damage to the Equipment unless the Service Provider is able to demonstrate that such loss or damage was caused or contributed to by the Purchaser's Default.

- 40.4. The Service Provider must keep all Equipment brought onto the Purchaser's premises in a safe, serviceable and clean condition. The Purchaser may at any time require the Service Provider to remove from the Purchaser's premises any Equipment which in the opinion of the Purchaser acting reasonably is either hazardous, noxious or not in accordance with the Contract and substitute proper and suitable Equipment at the Service Provider's expense as soon as reasonably practicable.
- 40.5. On completion of any required activities on the Purchaser's premises or at the end of a Working Day (as appropriate), the Service Provider must at its own expense:
- 40.5.1. remove all Equipment; and
 - 40.5.2. leave the premises in a clean, safe and tidy condition, clearing away all rubbish arising out of the Service Provider's activities.
- 40.6. The Service Provider is solely responsible for making good any damage to the Purchaser's premises or any objects contained therein, other than wear and tear, which is caused by the Service Provider.

41. Purchaser Property

- 41.1. Where the Purchaser issues Purchaser Property to the Service Provider, the Purchaser Property remains at all times the property of the Purchaser.
- 41.2. The Service Provider undertakes the safe custody of the Purchaser Property and to that end must:
- 41.2.1. keep the Purchaser Property in good order and condition (excluding wear and tear);
 - 41.2.2. comply with any particular security requirements communicated to the Purchaser in relation to the Purchaser Property;
 - 41.2.3. use any Purchaser Property solely in connection with the Contract and for no other purpose; and
 - 41.2.4. store the Purchaser Property separately and ensure that it is clearly identifiable as belonging to the Purchaser.
- 41.3. The Purchaser Property is deemed for the purposes of clause 41.2.1 to be in good order and condition when received by the Service Provider unless the Service Provider notifies the Purchaser otherwise within 5 Working Days of receipt.
- 41.4. The Service Provider must not:
- 41.4.1. modify or replace the Purchaser Property;
 - 41.4.2. use the Purchaser Property as security for a loan or other obligation;
 - 41.4.3. sell, or attempt to sell or part with possession of the Purchaser Property; or
 - 41.4.4. allow anyone to obtain a lien over, or right to retain, the Purchaser Property.
- 41.5. The Service Provider licences the Purchaser to enter any premises of the Service Provider during Working Hours on reasonable notice to recover any Purchaser Property.

41.6. The Service Provider undertakes the due return of the Purchaser Property and as such is liable for all loss of, or damage to, the Purchaser Property (excluding wear and tear), unless such loss or damage was caused or contributed to by the Purchaser's Default. The Service Provider must notify the Purchaser promptly and, in any event within 2 Working Days, upon becoming aware of any defects appearing in or losses or damage occurring to the Purchaser Property.

41.A Damage to Service Provider's Plant and Tools

41.A.1 All plant, tools, computer equipment and peripheral devices brought to the premises occupied by the Purchaser by or on behalf of the Service Provider or any of its Sub-contractor or any of their respective employees, whether owned by the Service Provider or any of its Sub-contractors or any of their respective employees or otherwise, shall be at the sole risk of and be in the sole charge of the Service Provider who shall be responsible for their protection and preservation. The Purchaser shall have no liability for any loss or damage to any such thing except only that where the loss or damage is wholly caused by the negligence of any employee of the Purchaser acting in the course of his employment with the Purchaser.

41.A.2 The Service Provider shall be required at the expiry or earlier termination of the Contract to remove all such plant and tools which it brings to the any premises occupied by or on behalf of the Purchaser.

41.A.3 The Service Provider shall ensure that all such plant and tools meet minimum safety standards required by law.

42. Health and Safety etc.

42.1. While on the Purchaser's premises, the Service Provider must comply with the Purchaser's policies concerning health and safety and fire and such modifications to those policies or replacement policies as are notified to the Service Provider from time to time.

42.2. The Service Provider must immediately inform the Purchaser in the event of any incident occurring in the performance of its obligations under the Contract on the Purchaser's premises where that incident causes any personal injury or damage to property which could give rise to personal injury. The Service Provider must then promptly notify the Purchaser of that fact.

42.3. The Purchaser must promptly notify the Service Provider of any health and safety hazards which may exist or arise at the Purchaser's premises and which may affect the Service Provider in the performance of its obligations under the Contract.

42.4. The Service Provider must promptly make available its statutory health and safety policy statement to the Purchaser on request.

43. Offences

43.1. The Service Provider must not commit or attempt to commit any offence:

43.1.1. under the Bribery Act 2010;

43.1.2. of fraud, uttering, or embezzlement at common law; or

43.1.3. of any other kind referred to in regulation 23(1) of the Public Contracts (Scotland) Regulations 2012.

43.2. Breach of clause 43.1 is a material breach for the purposes of clause 0 (Termination on Default).

44. Tax Arrangements

44.1 Where the Service Provider is liable to be taxed in the UK in respect of consideration received under this contract, it shall at all times comply with the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) and all other statutes and regulations relating to income tax in respect of that consideration.

44.2 Where the Service Provider is liable to National Insurance Contributions (NICs) in respect of consideration received under this contract, it shall at all times comply with the Social Security Contributions and Benefits Act 1992 (SSCBA) and all other statutes and regulations relating to NICs in respect of that consideration.

44.3 The Purchaser may, at any time during the term of this contract, request the Service Provider to provide information which demonstrates how the Service Provider complies with sub-clauses 44.1 and 44.2 above or why those clauses do not apply to it.

44.4 A request under sub-clause 44.3 above may specify the information which the Service Provider must provide and the period within which that information must be provided.

44.5 The Purchaser may supply any information which it receives under clause 44 to the Commissioners of Her Majesty's Revenue and Customs for the purpose of the collection and management of revenue for which they are responsible.

44.6 The Service Provider shall take all reasonable steps to ensure the observance of the provisions of this clause 44 by all of their servants, employees, agents, consultants and sub-contractors.

44.7 Where the Service Provider enters into any contract with any of its servants, employees, agents, consultants and/or sub-contractors, the Service Provider must ensure that a provision is included which is in the same terms as this clause 44 subject only to modification to refer to the correct designation of the equivalent party as the Service Provider.

45. Discrimination

The Service Provider must not unlawfully discriminate against any person within the meaning of the Equality Act 2010 in its activities relating to the Contract or any other contract with the Purchaser.

46. Blacklisting

The Service Provider must not commit any breach of the Employment Relations Act 1999 (Blacklists) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, or commit any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities. Breach of this clause is a material default which shall entitle the Purchaser to terminate the Contract.

47. Sustainability etc.

47.1 The Service Provider must ensure that the Services are performed in accordance with the Purchaser's environmental policy, which is to conserve energy, water, wood, paper and other resources, reduce waste and phase out the use of ozone-depleting substances and minimise the release of greenhouse gases, volatile organic compounds and other substances damaging to health and the environment.

- 47.2 The Service Provider must comply in all material respects with all applicable environmental laws and regulations in force from time to time in relation to the Works. Without prejudice to the generality of the foregoing, the Service Provider must promptly provide all such information regarding the environmental impact of the Contract as may reasonably be requested by the Purchaser.
- 47.3 The Service Provider shall meet all requirements of the Purchaser's sustainability policies, details of which are attached below and which the Service Provider shall be deemed to be aware of:

<http://www.scotland.gov.uk/Topics/Environment/SustainableDevelopment>

<http://www.scotland.gov.uk/Topics/Government/Procurement/policy/corporate-responsibility/csr>

48. Conflicts of interest

- 48.1 The Service Provider must take appropriate steps to ensure that the Purchaser is not placed in a position where, in the reasonable opinion of the Purchaser, there is an actual or potential conflict between the interests of the Service Provider and the duties owed to the Purchaser under the Contract.
- 48.2 The Service Provider must disclose by notice to the Purchaser full particulars of any actual or potential conflict of interest which may arise and must take such steps as are necessary to avoid or remove the conflict of interest.
- 48.3 Breach of this clause by the Service Provider is a material breach for the purposes of clause 0 (Termination on Default).

SECTION G FINAL PROVISIONS

49. Warranties and Representations

The Service Provider warrants and represents that:

- 49.1 it has full capacity and Purchaser and all necessary consents (including where its procedures so require, the consent of its parent company) to enter into and perform its obligations under the Contract and that the Contract is executed by a duly authorised individual;
- 49.2 in entering the Contract it has not committed any offence under the Bribery Act 2010 or of fraud or uttering at common law or any other kind referred to in the Public Contracts (Scotland) Regulations 2012;
- 49.3 it has not committed any breach of the Employment Relations 1999 Act (Blacklists) Regulations 2010 or or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, or committed any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities;
- 49.4 as at the Commencement Date, all information contained in the PQQ and Tender remains true, accurate and not misleading, save as may have been specifically disclosed in writing to the Purchaser prior to execution of the Contract;
- 49.5 no claim is being asserted and no litigation, alternative dispute resolution procedure 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

- have a material adverse effect on its ability to perform its obligations under the Contract;
- 49.6 it is not subject to any contractual obligation, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under the Contract;
- 49.7 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 Service 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 Service Provider's assets or revenue;
- 49.8 it owns, has obtained or is able to obtain, valid licences for all Intellectual Property Rights that are necessary for the performance of its obligations under the Contract;
- 49.9 in the 3 years prior to the Commencement Date:
- 49.9.1 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;
- 49.9.2 it has been in full compliance with all applicable securities and tax laws and regulations in the jurisdiction in which it is established;
- 49.10. it has not done or omitted to do anything which could have a material adverse effect on its assets, financial condition or position as an on-going business concern or its ability to fulfil its obligations under the Contract;
- 49.11. it has made appropriate inquiries (for example as regards the Purchaser's premises) so as to be satisfied in relation to all matters connected with the performance of its obligations under the Contract;
- 49.12. it is familiar with the Purchaser's policies concerning Baseline Personnel Security Standard clearance and health and safety and fire as they apply at the Commencement Date;
- 49.13. it has in place appropriate technical and organisational measures to safeguard any Purchaser Protected Information provided by the Purchaser;
- 49.14. there are no actual or potential conflicts between the interests of the Service Provider and the duties owed to the Purchaser under the Contract, save as may have been specifically disclosed in writing to the Purchaser prior to execution of the Contract; and
- 49.15. it is deemed to have inspected any premises at which the services are to be performed as set out in the Specification (the 'Premises') before tendering so as to have understood the nature and extent of the Services to be carried out and is deemed to be satisfied in relation to all matters connected with the Services and the Premises.

50. General Indemnity

The Service Provider shall indemnify the Purchaser against all claims, proceedings, actions, damages, costs, charges, expenses and any other liabilities which may arise out of, or in consequence of, any Default of the Service Provider.

51. Limitation of Liability

51.1. Neither Party is liable to the other Party under the Contract for any:

51.1.1. loss of profits, business, revenue or goodwill; or

51.1.2. indirect or consequential loss or damage.

51.2. But clause 0 does not exclude any liability of the Service Provider for additional operational, administrative costs or expenses or wasted expenditure resulting from the direct Default of the Service Provider.

51.3. The liability of either Party under the Contract for Defaults is limited to **£ 1 million**.

51.4. But neither Party excludes or limits liability to the other Party for:

51.4.1. death or personal injury caused by its negligence;

51.4.2. misrepresentation; or

51.4.3 any breach of any obligations implied by section 12 of the Sale of Goods Act 1979 or sections 2 or 11B of the Supply of Goods and Services Act 1982.

52. Insurances

52.1 The Service Provider must effect and maintain with a reputable insurance company:

52.1.1. public liability insurance for such sum and range of cover covering at least all matters which are the subject of indemnities or compensation obligations under this Contract in the sum of not less than:-

(a) £10,000,000 for all incidents which result in property damage;

(b) £10,000,000 in the aggregate for all incidents which result from a failure by an employee of the Contractor any Sub-Contractor or agent of the Contractor or any other person under the Contractor's control, to meet the professional standards which are ordinarily expected in relation to any function carried out with the Contractor in terms of the Contract;

52.1.2. professional indemnity insurance in the sum of not less than **£ 2,000,000** for one incident and unlimited in total.

52.1.3. Employer's Liability insurance in accordance with any legal obligation for the time being in force.

52.2. Such insurance must be maintained for the duration of the Contract and for a minimum of 5 years following the expiry or termination of the Contract.

52.3. The Service Provider must give the Purchaser, 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.

53. Force Majeure

- 53.1. Neither Party is liable to the other Party for any delay in performing, or other failure to perform, its obligations under the Contract to the extent that such delay or failure is a result of Force Majeure. Nonetheless, each Party must use all reasonable endeavours to continue to perform its obligations under the Contract for the duration of such Force Majeure. However, if Force Majeure prevents either Party from performing its material obligations under the Contract for a period in excess of «F66: Force Majeure longstop», either Party may terminate the Contract with immediate effect by notice.
- 53.2. Any delay or other failure by the Service Provider in performing its obligations under the Contract which results from any failure or delay by a Service Provider Representative is only to be regarded as due to Force Majeure if that Service Provider Representative is itself impeded by Force Majeure from complying with an obligation to the Service Provider.
- 53.3. If either Party becomes aware of Force Majeure which gives rise to, or is likely to give rise to, any delay or failure on its part as described in clause 0, it must immediately notify the other Party of the Force Majeure and the estimated period for which the failure or delay is to continue.
- 53.4. The only events that afford relief from liability for failure or delay under the Contract are Force Majeure events.
- 53.5. If either of the parties is prevented from performance of its obligations under the Contract by reason of Force Majeure for a continuous period such that a Deliverable will not be achieved, which could result in the Services not being delivered successfully in time for the Elections, the other party may terminate the Contract immediately on service of written notice upon the party so prevented, in which case neither party shall have any liability to the other except that the rights and liabilities which accrued prior to termination of the Contract shall continue to subsist and Clause 60 (Consequences of Termination) shall apply. It is expressly agreed that any failure by the Service Provider to perform or any delay by the Service Provider in performing its obligations under the Contract which results from any failure or delay in the performance of its obligations by any person, firm or company with which the Service Provider shall have entered into any contract, supply arrangement or Sub-contract or otherwise shall be regarded as a failure or delay due to Force Majeure only in the event that such person firm or company shall itself be prevented from or delayed in complying with its obligations under such contract, supply arrangement or Sub-contract or otherwise as a result of circumstances of Force Majeure.
- 53.6. For the avoidance of doubt, both parties agree that (i) any acts, events, omissions, happenings or non-happenings resulting from the adoption of the euro by the United Kingdom government, (ii) any circumstances relating to the financial position, or management of the Service Provider, or (iii) any industrial dispute affecting the Service Provider's employees, shall not be considered to constitute Force Majeure under the Contract.

54. Dispute Resolution

- 54.1. The Parties must attempt in good faith to resolve any dispute between them arising out of or in connection with the Contract «F67: in accordance with the Management Arrangements».
- 54.2. Any dispute or difference arising out of or in connection with the Contract, including any question regarding its existence, validity or termination, which cannot be resolved in accordance with the Management Arrangements, shall be determined by the

appointment of a single arbitrator to be agreed between the Parties, and failing agreement within 14 days after either Party has given to the other a written request to concur in the appointment of an arbitrator, by an arbitrator to be appointed by the Scottish Arbitration Centre on the written application of either Party. The seat of the arbitration shall be in Scotland. The language used in the arbitral proceedings shall be English.

54.3. Any arbitration under clause 54.2 is subject to the Arbitration (Scotland) Act 2010.

55. Severability

If any provision of the Contract is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision is severed and the remainder of the provisions of the Contract continue in full force and effect as if the Contract had been executed with the invalid, illegal or unenforceable provision eliminated.

56. Waiver and Cumulative Remedies

56.1. Any failure of either Party to insist upon strict performance of any provision of the Contract, or the failure of either Party to exercise, or any delay in exercising, any right or remedy does not constitute a waiver of that right or remedy and does not cause a diminution of the obligations established by the Contract.

56.2. Accordingly, no waiver is effective unless it is expressly stated to be a waiver and communicated to the other Party in writing in accordance with clause 10 (notices).

56.3. A waiver of any Default is not a waiver of any subsequent Default.

56.4. The rights and remedies provided by the Contract are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy is not to be deemed an election of such remedy to the exclusion of other remedies.

57. Termination on Default

57.1. The Purchaser may terminate the Contract by notice to the Service Provider with immediate effect if the Service Provider commits a Default and:

57.1.1. the Service Provider has not remedied the Default to the satisfaction of the Purchaser within 20 Working Days, or such other period as may be specified by the Purchaser, after issue of a notice specifying the Default and requesting it to be remedied;

57.1.2. the Default is not in the opinion of the Purchaser, capable of remedy; or

57.1.3. the Default is a material breach of the Contract.

57.2. The Purchaser may also terminate the Contract in accordance with any provisions of the Schedules.

58. Termination on Insolvency and Change of Control

58.1 The Service Provider shall notify in writing immediately, and the Purchaser may terminate the Contract with immediate effect by notice, where in respect of the Service Provider:

- 58.1.1. 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 assignation for the benefit of, its creditors;
- 58.1.2. 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);
- 58.1.3. 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;
- 58.1.4. a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets;
- 58.1.5. 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;
- 58.1.6. it is or becomes insolvent within the meaning of section 123 of the Insolvency Act 1986;
- 58.1.7. being a "small company" within the meaning of section 382 of the Companies Act 2006, a moratorium comes into force pursuant to schedule A1 to the Insolvency Act 1986;
- 58.1.8. a debt relief order is entered into; or
- 58.1.9. any event similar to those listed above occurs under the law of any other jurisdiction.

58.2. The Purchaser may terminate the Contract by notice with immediate effect within 6 months of:

- 58.2.1. being notified that a change of Control has occurred in accordance with clause 33.2 (Change of Control); or
- 58.2.2. where no such notification has been given, the date that the Purchaser becomes aware of the change of control.

58.3. But the Purchaser may not terminate the Contract under clause 58.2 where approval of the change of control has been granted by notice by the Purchaser.

59. Exit Management

The Service Provider shall perform its relevant Exit Management obligations as part of the Framework whether applicable on either the expiry or early termination of this Contract.

59.1 The Service Provider agrees that if it breaches (or attempts or threatens to breach) its obligation to provide Exit Management, the Purchaser and their respective customers and stakeholders shall be irreparably harmed. In such circumstance, the Service Provider agrees that the Purchaser may proceed directly to court notwithstanding anything to the contrary in the dispute resolution procedure outlined in Clause 54 (Dispute Resolution). If a court of competent jurisdiction finds that the Service Provider has breached (or attempted or threatened to breach) any such obligation, the Service Provider agrees that without any additional findings of irreparable injury, or other conditions to interdict, the Service Provider shall not oppose the entry of an appropriate order compelling performance by the Service Provider and restraining the Service Provider from any further breaches or attempted or threatened breaches of its obligations in relation to Exit Management.

59.2 A draft of the Exit Plan shall be produced by the Service Provider and supplied to the Purchaser within [three (3) months] after the Commencement Date and shall include or address the matters specified in Clause 59.3. The Purchaser shall provide to the Service Provider the Purchaser's comments on the plan within one (1) month of the Purchaser's receipt of the plan. The Service Provider shall take into account the comments and suggestions of the Purchaser and shall issue the final version of the Exit Plan to the Purchaser within ten (10) Working Days of receipt of the Purchaser's comments.

59.3 The Service Provider shall throughout the period of the Contract review, maintain and continuously update the Exit Plan which shall include:

59.3.1 the activities required to enable the Purchaser to re-tender the Purchaser Requirements and/or the provision of the Services;

59.3.2 the activities necessary to support any Replacement Service Provider or the Purchaser in carrying out any necessary due diligence relating to all or part of the Services;

59.3.3 details of the Exit Management to be provided by the Service Provider prior to the Exit Management Date;

59.3.4 support for the Replacement Service Provider or the Purchaser during their preparation of any relevant plan for the transition of the System to the Replacement Service Provider or Purchaser, including prior to and during such transition period;

59.3.5 the maintenance of a 'business as usual' environment for the Purchaser during the period when Exit Management obligations are applicable; and

59.3.6 all other necessary activities to support the preparation for, and execution of, a smooth and orderly Exit Management and transfer of all or part of the Services to either a Replacement Service Provider or the Purchaser.

59.4 No amendment of the Exit Plan shall be made without prior written consent of the Purchaser.

60. Consequences of Expiry or Termination

60.1. Where the Purchaser terminates the Contract under clause 0 (Termination on Default) and makes other arrangements for the provision of services, the Service Provider indemnifies the Purchaser against all costs incurred in making those arrangements.

60.2. Where the Purchaser terminates the Contract under clause 5 (Break), the Purchaser indemnifies the Service Provider against any unavoidable losses directly resulting from the termination of the Contract (excluding loss of profit).

60.3. Any indemnity given by the Purchaser under clause 0 is subject to the Service Provider:

60.3.1. taking all reasonable steps to mitigate its loss;

60.3.2. taking all reasonable steps to recover its losses under any insurance policies held by it; and

60.3.3. submitting a fully itemised and costed list of losses which it seeks to recover from the Purchaser together with supporting evidence.

60.4. Except as provided for in clauses 0 (General Indemnity), 0 and 0, no indemnity is given or special payment is to be made by either Party to the other Party on expiry or termination of the Contract.

60.5. On expiry or termination of the Contract the Service Provider must:

60.5.1. immediately return to the Purchaser all Purchaser Property and Purchaser Protected Information in its possession; and

60.5.2. destroy or delete any copies of Purchaser Protected Information (whether physical or electronic) in its possession.

60.6. The following provisions survive the expiry or termination of the Contract:

60.6.1. clause 1 (Definitions and Interpretation);

60.6.2. clause 13 (Recovery of Sums Due);

60.6.3. clause 14 (Data Protection Act);

60.6.4. clause 15 (Freedom of Information);

60.6.5. clause 16 (Purchaser Protected Information);

60.6.6. clause 17 (Service Provider Sensitive Information);

60.6.7. clause **Error! Reference source not found.** (Audit [and Records Management]);

60.6.8. clause 19 (Publicity);

60.6.9. clause 23 (Offers of Employment);

60.6.10. clause 25 (Information about Service Provider Employees);

60.6.11. clause 26 (Staff transfer on expiry or termination);

60.6.12. clause 28 (Parties' pre-existing Intellectual Property Rights);

60.6.13. clause 29 (Specially Created Intellectual Property Rights);

60.6.14. clause 30 (Licences of Intellectual Property Rights);

60.6.15. clause 30.A (Ownership of rights in the Deliverables and Software Licences)

60.6.16. clause 31 (Claims relating to Intellectual Property Rights);

60.6.17. clause 37 (Official Secrets Acts);

60.6.18. clause 40 (Service Provider's Equipment);

60.6.19. clause 41 (Purchaser Property);

60.6.20. clause 44 (Tax arrangements);

60.6.21. clause 47 (Sustainability);

- 60.6.22. clause 49 (Warranties and Representations);
- 60.6.23. clause 50 (General Indemnity);
- 60.6.24. clause 51 (Limitation of Liability);
- 60.6.25. clause 52 (Insurances);
- 60.6.26. clause 54 (Dispute Resolution);
- 60.6.27. clause 56 (Waiver and Cumulative Remedies);
- 60.6.28. this clause 60; and
- 60.6.29. clause 0 (Governing Law and Jurisdiction).

60.7. «F70: If a Judicial Order is made, the provisions of the Management Arrangements referring to that possibility apply.»

60.8. Immediately upon termination of the Contract for any reason whatsoever the Service Provider shall render such reasonable assistance to the Purchaser or third party nominated by the Purchaser, if requested, as may be necessary to effect an orderly assumption by a replacement Service Provider of the Services previously performed by the Service Provider under the Contract. The Service Provider shall be entitled to charge for such termination services in accordance with [DN: *ref some sort of method of calculating the price*].

61. Entire Agreement

61.1. The Contract constitutes the entire agreement between the Parties in respect of the matters dealt with herein. The Contract supersedes all prior negotiations between the Parties and all representations and undertakings made by one Party to the other, whether written or oral, except that this clause does not exclude liability in respect of any misrepresentation (whether in the PQQ or Tender or otherwise).

61.2. In the event of, and only to the extent of, any conflict between the clauses of the Contract, the Schedules and any document referred to in the Contract, the following order of precedence applies:

61.2.1. the clauses of the Contract;

61.2.2. the Schedules; an

61.2.3. any other document referred to in the Contract.

62. Governing Law and Jurisdiction

The Contract is governed by and interpreted in accordance with Scots law and, subject to clause 0 (Dispute Resolution), the Parties submit to the exclusive jurisdiction of the Scottish courts.

IN WITNESS WHEREOF these presents typewritten on this and the **number of pages before this page»** preceding pages together with the **number of Schedules»** Schedules annexed are executed as follows:

SIGNED for and on behalf of the Purchaser

SIGNED for and on behalf of

CGI IT UK Limited

At.....
On.....
Signature.....
Full name

Position

Address.....
.....
.....

At.....
On.....
Signature.....
Full name.....
Position.....
Address.....
.....
.....

In the presence of

In the presence of

Signature.....
Full name

Address.....
.....
.....

Signature.....
Full name.....
Address.....
.....
.....

This is and the following [] pages comprise Schedule 5.1 to the foregoing Contract between the **[Purchaser to insert name of Organisation]** and **CGI IT UK Limited**

SCHEDULE 1 – SPECIFICATION

PURCHASER (LOCAL AUTHORITY) TO DETAIL

This is and the following [] pages comprise Schedule 5.2 to the foregoing Contract between the **[Purchaser to insert name of Organisation]** and **CGI IT UK Limited**

SCHEDULE 5.2 - PRICING SCHEDULE

Purchaser should complete based upon Schedule 2 of the Framework.

Guidance notes: Pricing arrangements for contracts may vary subject to Purchaser Organisation's requirement but **all relevant information must be included here** . This includes the agreed prices themselves, mechanisms for price variation (if any) specifying any indexation allowed and the consequences of failing to agree price variations (dispute resolution procedure or termination), benchmarking provisions (if any) **and any Service Credits regime**.

Provisions relating to **invoicing/payment procedure, payment of sub-contractors and debt factoring** should not be included – these are already dealt with by the clauses.

Commercially sensitive aspects of the pricing should be cross referenced in Schedule 5.7.

SCHEDULE 5.3 – ORDERING PROCEDURES (EXAMPLE TEMPLATE FOR INFO ONLY)

This is and the following [] pages comprise Schedule 5.3 to the foregoing Contract between the **[Purchaser to insert name of Organisation]** and **CGI IT UK Limited**

This Schedule concerns the procedure for ordering particular Services under a continuing contract.

An Order Form approach is highly recommended to ensure simplicity and consistency and to ensure that all necessary details are provided to the Service Provider and are recorded in some form in case of dispute.

This Schedule should make it clear how Orders are to be communicated to the Service Provider, to what extent it may reject/modify Orders (e.g. if the delivery required is impossible to meet or requires more than the Specification), how Orders are to be numbered, documented and confirmed.

The **minimum content** for an Order tying in with the clauses is:

- specification of particular Services ordered;
- date(s), time(s) and location(s) for delivery
- Deliverables
- Milestones
- any particular acceptance criteria
- payment schedule (sensible to link to acceptance of Deliverables/Milestones)

On completion of the Ordering Procedures the full pricing for the Order should be determined and agreed.

Example of Call off order form



Electronic Counting -
Example of Order For

SCHEDULE 5.4 – MANAGEMENT ARRANGEMENTS

This is and the following [] pages comprise Schedule 5.4 to the foregoing Contract between the **[Purchaser to insert name of Organisation]** and **CGI IT UK Limited**

Purchaser should update Schedule 5.4 detailing specific Management Arrangements requirements based upon Schedule 4 of the Framework.

SCHEDULE 5.5 – KEY INDIVIDUALS

This is and the following [] pages comprise Schedule 5.5 to the foregoing Contract between the **[Purchaser to insert name of Organisation]** and **CGI IT UK Limited**

SCHEDULE 5.5 – KEY INDIVIDUALS

1. e.g. Joe Bloggs, Contract Manager
2. e.g. Jane Doe, Software Specialist

SCHEDULE 5.6 – APPROVED SUB-CONTRACTORS

This is and the following [2] pages comprise Schedule 5.6 to the foregoing Contract between the **[Purchaser to insert name of Organisation]** and **CGI IT UK Limited**

Details of

approved Sub-Service Provider(s)	Relevant obligations
1. Idox	<p>Services</p> <ul style="list-style-type: none"> ○ Print Management including design, production, print and delivery of station ballots, post ballots and postal packs ○ Management Support ○ Software including provision, development and support of main e-count software <p>Software</p> <ul style="list-style-type: none"> ○ Workflow Reporting ○ EMS and PVMS Integration ○ Ballot Design and Software ○ Ballot Design Software – EasyPrint ○ Character Recognition Engine ○ Electronic Count Software <p>Print Count and Facilities</p> <ul style="list-style-type: none"> ○ Postal Ballots and Packs ○ Station Ballots
2. Dacoll	<p>responsible for the provision of IT Equipment and Services for Stages 1 – 4 and during election week at each of the 32 Local Authority venue's.</p> <ul style="list-style-type: none"> ● Transportation and Storage ● PCs, Server and Networking ● Scanners ● 1st Line Support for Hardware, including provision of engineer cover for key point during Stages 1 – 4 and during election week at each of the 32 Local Authority counts ● 2nd Line Scanner Support
3. Rathmhor	<p>responsible for:</p> <ul style="list-style-type: none"> ● Training Development and Delivery, including provision of the Senior Trainers.

Outline of Proposed Workshare Model of Contractor and Sub-Contractor service provision



SCHEDULE 5.7 – SERVICE PROVIDER SENSITIVE INFORMATION

This is and the following [1] pages comprise Schedule 5.7 to the foregoing Contract between the **[Purchaser to insert name of Organisation]** and **CGI IT UK Limited**

NOT APPLICABLE

This is and the following [1] pages comprise Schedule 5.8 to the foregoing Contract between the [Purchaser to insert name of Organisation] and CGI IT UK Limited

SCHEDULE 5.8 – PARENT COMPANY GUARANTEE

Not Applicable

This is and the following [12] pages comprise Schedule 9 to the foregoing Contract between the [Purchaser to insert name of Organisation] and CGI IT UK Limited

SCHEDULE 5.9 – MODEL CONTRACT REGARDING DATA PROTECTION DIRECTIVE 95/46/EC

Model Contract

STANDARD FORM CONTRACT TO ASSIST COMPLIANCE WITH OBLIGATIONS IMPOSED BY ARTICLE 17 OF THE DATA PROTECTION DIRECTIVE 95/46/EC

(FOR USE BY DATA CONTROLLERS AND DATA PROCESSORS LOCATED WITHIN THE EUROPEAN ECONOMIC AREA WHERE THE PARTIES HAVE ENTERED INTO A SEPARATE DATA PROCESSING AGREEMENT)

THIS AGREEMENT is made onand20[].

BETWEEN:

(1) THE SCOTTISH MINISTERS (the “Controller”); and

(2) CGI IT UK Limited (incorporated in, or existing and established under the laws of England, company registered number 947968 whose registered office is at 250 Brook Drive, Green Park , Reading RG2 6UA (the “Processor”).

BACKGROUND

(A) The Controller processes Personal Data in connection with its business activities;

(B) The Processor processes Personal Data on behalf of other businesses and organisations;

(C) The Controller wishes to engage the services of the Processor to process personal data on its behalf in relation to [*drafting note: insert scheme name*];

(D) Article 17(2) of the Data Protection Directive 95/46/EC (as hereinafter defined) provides that, where processing of personal data is carried out by a processor on behalf of a data controller the controller must choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out, and must ensure compliance with those measures;

(E) Articles 17(3) and 17(4) of the Data Protection Directive require that where processing is carried out by a processor on behalf of a controller such processing shall be governed by a contract or legal act binding the processor to the controller stipulating, in particular, that the processor shall act only on instructions from the controller and shall comply with the technical and organisational measures required under the appropriate national law to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access and against all other unlawful forms of processing;

(F) In compliance with the above-mentioned provisions of Article 17 of the Data Protection Directive the Controller and Processor wish to enter into this processing security Agreement.

THE PARTIES HEREBY MUTUALLY AGREE AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement the following words and phrases shall have the following meanings, unless inconsistent with the context or as otherwise specified:

“**Data Protection Directive**” shall mean Directive 95/46/EC of the European Parliament and Council of 24th October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;

“**national law**” shall mean the law of the Member State in which the Processor is established;

“**personal data**” shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic cultural or social identity;

“**processing of personal data**” shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alternation, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

“**sub-contract**” and “**sub-contracting**” shall mean the process by which either party arranges for a third party to carry out its obligations under this Agreement and “Sub Contractor” shall mean the party to whom the obligations are subcontracted; and

“**Technical and organisational security measures**” shall mean measures to protect personal data against accidental or unlawful destruction or accidental loss, alternation, unauthorised disclosure or access and against all other unlawful forms of processing.

2. CONSIDERATION

2.1 In consideration of the Controller engaging the services of the processor to process personal data on its behalf the Processor shall comply with the security, confidentiality and other obligations imposed on it under this Agreement.

3. SECURITY OBLIGATIONS OF THE PROCESSOR

3.1 The Processor shall only carry out those actions in respect of the personal data processed on behalf of the Controller as are expressly authorised by the Controller.

3.2 The Processor shall take such Technical and Organisational Security Measures as are required under its own national law to protect personal data processed by the Processor on behalf of the Controller against unlawful forms of processing. Such Technical and Organisational measures shall include, as a minimum standard of protection, compliance with the legal and practical security requirements set out in Appendix 1 of this Agreement.

4. CONFIDENTIALITY

4.1 The Processor agrees that it shall maintain the personal data processed by the Processor on behalf of the Controller in confidence. In particular, the Processor agrees that, save with the prior written consent of the Controller, it shall not disclose any personal data supplied to the Processor by, for, or on behalf of, the Controller to any third party.

4.2 The Processor shall not make any use of any personal data supplied to it by the Controller otherwise than in connection with the provision of services to the Controller.

4.3 The obligations in clauses 4.1 and 4.2 above shall continue for a period of five years after the cessation of the provision of services by the Processor to the Controller.

4.4 Nothing in this agreement shall prevent either party from complying with any legal obligation imposed by a regulator or court. Both parties shall however, where possible, discuss together the appropriate response to any request from a regulator or court for disclosure of information.

5. SUB-CONTRACTING

5.1 The Processor shall not sub-contract any of its rights or obligations under this Agreement without the prior written consent of the Controller.

5.2 Where the Processor, with the consent of the Controller, sub-contracts its obligations under this agreement it shall do so only by way of a written agreement with the Sub-Contractor which imposes the same obligations in relation to the security of the processing on the Sub-Contractor as are imposed on the Processor under this Agreement.

5.3 For the avoidance of doubt, where the Sub-Contractor fails to fulfil its obligations under any sub-processing agreement, the Processor shall remain fully liable to the Controller for the fulfilment of its obligations under this Agreement

6. TERM AND TERMINATION

6.1 This Agreement shall continue in full force and effect for so long as the Processor is processing personal data on behalf of the Controller.

6.2 Within [*drafting note: insert the number of days agreed by the parties*] days following termination of this Agreement the Processor shall, at the direction of the Controller, (a) comply with any other agreement made between the parties concerning the return or destruction of data, or (b) return all personal data passed to the Processor by the Controller for processing, or (c) on receipt of instructions from the Controller, destroy all such data unless prohibited from doing so by any applicable law.

7. GOVERNING LAW

7.1 This Agreement shall be governed by and construed in accordance with the national law of the Member state in which the Controller is established.

AS WITNESS this Agreement has been signed on behalf of each of the parties by its duly authorised representative on the day and year first above written.

SIGNED on behalf of [CONTROLLER]

(Authorised signatory)

(Print name and title)

SIGNED on behalf of [PROCESSOR]

(Authorised signatory)

(Print name and title)

APPENDIX 1¹**1. Legal requirements**

1.1 The Processor shall, in respect of the processing of personal data on behalf of the Controller, identify and comply with any specific security provisions imposed by its national law.

2. Practical security measures

2.1 In compliance with its obligations under clause 3.2 with regard to the processing of personal data on behalf of the Controller, the Processor, as a minimum requirement, shall give due consideration to the following types of security measures:

- 2.1.1 Information Security Management Systems;
- 2.1.2 Physical Security;
- 2.1.3 Access Control;
- 2.1.4 Security and Privacy Enhancing Technologies;
- 2.1.5 Awareness, training and security checks in relation to personnel;
- 2.1.6 Incident/Response Management/Business Continuity; and
- 2.1.7 Audit Controls/Due Diligence;

¹ The Practical Security Measures outlined in Schedule 1 are taken from the OECD Working Party on Information Security and Privacy's draft paper of 30-31 March 2004 entitled "Information Security Issues and Resources for Small and Entrepreneurial Companies – A business companion to the 2002 OECD Guidelines for the Security of Networks and Information systems: Towards a Culture of Security"

Annex A (normative): **Article 17 Security Contract - Implementation Guide**

AA.1 Scope

The Article 17 Security Contract has been prepared to assist businesses wishing to use the services of another company to process personal data on their behalf. The Article 17 Security Contract is appropriate for use where the company which is to provide the data processing service is located either in the same Member State as the business wishing to use its services or, is located another Member State of the European Union.

Article 17 of the Directive sets out the security requirements in relation to the processing of personal data where a party that controls the content and use of personal data (the Data Controller) wishes to use the services of a third party (the Data Processor) for the processing of such data. Article 17 addresses processing arrangements where both the Data Controller and the Data Processor are established within one of the member states of the European Economic Area.

Where the Data Processor is located outside the European Economic Area consideration will need to be given to the provisions of Articles 25 and 26 of the Directive (Transfer of Personal Data to Third Countries) and the possible use of the Standard Contractual Clauses for the transfer of personal data to third countries under the Directive approved by the European Commission.

The Article 17 Security Contract has been prepared with the needs of Small and Medium-sized Enterprises in mind, however, it may in addition provide a useful starting point for larger organisations wishing to ensure that they are satisfying their obligations as to security of processing where they sub-contract data processing to another company.

The Article 17 Security Contract has been drafted to satisfy the requirements of Article 17 and is unlikely to require amendment in the absence of any changes to that Article. The contractual provisions set out in the Security Contract ensure the basic minimum level of protection for personal data and do not preclude the inclusion of more detailed provisions in the light of the legal and factual circumstances of each particular case.

However, the practical security measures suggested in this Implementation Guide are likely to require amendment in the light of physical and technological security developments and the adoption of enhanced management functions in relation to information security. This Implementation Guide, therefore, sets out the current practical security measures identified at the time of drafting, taking into account the most common technical security measures currently available, but may subsequently require updating to incorporate future developments.

The Article 17 Security Contract is designed to accompany a service agreement detailing the non-security related processing arrangements between the Data Controller and the Data Processor. The Contract may be used in its entirety or the operative clauses may be extracted and incorporated into the processing service agreement.

Before entering in an Article 17 Security Contract, or the data processing services agreement into which the operative of the Security Contract have been incorporated, the parties should obtain the assistance of professional legal advisers (in-house or external lawyers) for advice on the requirements of the national law (including any sector specific regulatory arrangements) to which the contract and the associated processing will be subject.

This guide provides assistance with regard to the use of the Article 17 Security Contract between Data Controller and Data Processor.

AA.2 Background

The Initiative for Privacy Standardisation in Europe (IPSE) was launched to analyse the current status of privacy protection arrangements and to determine whether standardisation of actions could assist business in implementing the European Data Protection Directive 95/46/EC (the Directive). The report, approved by the IPSE steering group, concluded that specific standardisation initiatives would aid implementation of the Directive. Seven standardisation initiatives were proposed, one of which was the development of a generic set of contract clauses and terms for use within the EEA to assist business in complying with Article 17 of the Directive.

The work on the standardisation initiatives identified by IPSE was taken on by the CEN/ISSS Work Shop on Data Protection and Privacy (CEN/ISSS WS-DPP) which has produced the Article 17 Security Contract between Data Controller and Data Processor.

AA.3 Applicable Laws

Clause 6 of the Security Contract provides that the Agreement is to be governed by the national law of the Member State in which the Data Controller is located.

Where the Data Processor is located in a different Member State from the Data Controller the Controller should note that the security of the processing may be governed by the laws of a different Member State. This situation arises as (in accordance with the provisions of Article 17) the security of the processing must be conducted in accordance with the national law of the Member State in which the Data Processor is located.

Where the Data Processor is located in a Member State other than that of the Data Controller, prior to entering into contractual relations with the Data Processor, the Data Controller may need to obtain legal advice as to the specific foreign law data protection obligations imposed on the Data Processor under Clause 3 of the Model Contract. Where the Data Controller fails to obtain foreign legal advice the Data Controller may struggle to assess the Data Processor's compliance with its Clause 3 obligations. While the obligations of the Data Processor, in each Member State, derive from Article 17 of the Directive, Member States have each implemented these obligations slightly differently. For example, in many Member States (such as Austria, Belgium, Ireland, Italy, Luxembourg and Spain) the security provisions under the national law are more detailed than in the Data Protection Directive. The Data Processor will, therefore, need ensure that it complies with the provisions under the applicable national law.

In certain Member States there are regulations detailing mandatory security measures which identify three differing levels of security determined by the nature of the data being processed.

High level security measures required in Spain include, amongst other requirements, strict obligations regarding the encryption of personal data in specified circumstances as well as the maintenance of an exhaustive access registry. The Spanish access register requires a Controller to specify the data accessed by any user and the date and time of such access so as to enable the reconstruction of an audit trail in relation to access to sensitive personal data.

In Belgium, national data protection legislation stipulates and number of issues that must be covered in any sub-contracting agreement between Data Controller and Data Processor. Such issues include a requirement that the agreement shall explicitly include details of the processors liability under the agreement. The Belgium law also provides that a Royal Decree may be enacted to establish standards for information security for specified categories of data processing.

In Greece the national data protection law requires the Data Controller to check the professional credentials, qualifications and personal ethics with regard to confidentiality of persons entrusted with data processing duties or functions.

In addition to these specific national legal requirements some national data protection authorities (for example Greece and Denmark) have established rules, instructions and guidelines translating into more practical terms some of the requirements of Article 17.

AA.4 Clause by clause explanatory notes/analysis of the Article 17 Security Contract

As with any arrangement having binding legal effect, users of the Article 17 Security Contract are advised to seek professional legal advice with regard to their rights and obligations under the Security Contract and its inter-relationship with any associated data processing service agreement.

Professional legal input is particularly important where the Data Controller is uncertain of the obligations imposed on the Data Processor under the Processor's national law.

The following notes are intended as basic guidance on the nature and purpose of the individual clauses of the Security Contract and are intended to inform business managers understanding of the Security Contract prior to obtaining detailed legal advice.

Contract Clauses

Date of Agreement

The date of the agreement will be the date on which the last party executes the document. This date should not be inserted until the last party has signed and dated the Contract.

Identification of Parties

The full name of the legal entities entering into the agreement should be inserted together with any national company registration number, details of the country in which each legal entity is established and details of the registered office of each entity. It is important to note that address must be the registered office address of each business. Trading addresses, or local office addresses should not be used.

Background

The six paragraphs listed under this heading set out the reasons why the agreement is required. They identify the activities of the parties, the processing of personal data, the parties who wish to enter into contractual relations with one another, and the requirements of Article 17 of the Directive.

Mutual Agreement

The Contract then states that the parties agree to comply the provisions of the Contract.

Clause 1 – Definitions and Interpretation

This clause explains the meaning of those terms used in the agreement which have meaning over and above, or different from, the meaning which may normally be understood by the use of the term. For example, the words "personal data" are to have the specific meaning ascribed to them by the Directive.

Clause 2 – Consideration

Broadly speaking this clause is required to set out the reasons why each party is prepared to enter into the agreement. The Contract arrangement needs to be of benefit to (or, in legal terms, provide valid consideration) each party.

Clause 3 – Security Obligations of the Processor

As the title of this clause would suggest, it sets out the security obligations of the Data Processor with regard to the processing of personal data on behalf of the Data Controller.

Important points to note are:

- the Processor may only process personal data in accordance with instructions from the Data Controller. It may not process the data for its own purposes;

- the Processor is required to take “such Technical and Organisation Security Measures as are required under **its own National Law** to protect personal data processed on behalf of the Data Controller against unlawful forms of processing”. As mentioned above, legal advice should be obtained as to the detailed requirements of the relevant national law; and

- Appendix 1 of the Contract sets out the minimum requirements for compliance with these obligations. Appendix 1 is discussed further below.

Clause 4 – Confidentiality

This clause ensures that the Processor must treat all personal data processed on behalf of the Data Controller as confidential and provides that the obligation of confidentiality is continue for 5 years after the date on which the Processor ceases processing personal data for the Controller. This time limit is without prejudice to any longer time-limits that may be provided by national law or sector specific regulation. The parties may wish to amend this provision to reflect such additional obligations.

Clause 5 – Sub-contracting

This clause prevents the Processor from instructing a third party to carry out the processing it has agreed to carry out for the Controller unless the Controller gives its prior written consent.

Where the Controller consents to the sub-contracting, the sub-contractor must be contractually bound to observe the same security requirements as are imposed on the Processor under the Security Contract.

This clause ensures that the security arrangements are not watered-down by any transfer of obligations. The clause also provides that the Processor remains liable to the Controller for any breach of the Security Contract whether caused by any fault of its own or by the fault of its sub-contractor.

Clause 6 – Term and termination

This clause provides that the Security Contract will continue for as long as the Processor continues to process personal data on behalf of the Controller. The Security Contract cannot terminate before the data processing service agreement as any subsequent processing would not comply with Article 17.

Where the Security Contract and the data processing agreement are terminated, clause 5.2 provides that the Processor shall return or destroy all personal data received from the Controller as instructed by the Controller. It is for the parties to agree the appropriate number of days to insert in the clause.

This arrangement is fallback position to specify arrangements for the handling of the personal data on termination where there are no other arrangements in place. It is highly likely that the termination arrangements will be addressed in the data processing service agreement but clause 5.2 is available as backup if such arrangements have been overlooked in the drafting of the service agreement.

Clause 7 – Governing law

The Security Contract provides that the contract is to be governed by the National Law of the Data Controller.

Care must be taken when considering the choice of governing law in circumstances where the data processing service agreement specifies a law other than that of the Member State of the Controller as its governing law. In such circumstances professional legal advice may be required.

The Security Contract does not address dispute resolution. It is advisable, before the Contract is signed, for the parties to agree an appropriate forum to hear any disputes that may arise between them under the Contract. Many parties may favour mediation with recourse to specified national courts if matters cannot be resolved. Others may wish to specify arbitration as the preferred dispute resolution process. Where mediation or arbitration are to be used it is advisable to identify the chosen mediator (or mediation body) or arbitration procedure in writing so as to avoid a dispute about the Contract becoming a dispute about the resolution procedure.

As the Security Contract is to be used in association with a data processing service agreement it may be appropriate to deal with dispute resolution arrangements in relation to security obligations under the service agreement or to mirror the dispute resolution arrangements under the service agreement in the Security Contract. Where mediation or arbitration is not specified, as a minimum, the parties should agree to submit to the exclusive jurisdiction of specified national courts to avoid any further discussion as to where disputes should be heard. It is usual for parties to agree to submit to the exclusive jurisdiction of the courts appropriate to the governing law of the contract.

Signature

Both parties should ensure that the Contract is executed on their behalf by a 'duly authorised representative'. That is to say the parties should ensure that the signatories have the power to bind the organisation they represent. In many jurisdictions, in the absence of any other arrangements being made, the only individuals authorised to bind a company will be the directors and company secretary. These individuals may of course give written authority to other employees to bind the company for specified purposes. The identity and the authority of the proposed signatory should always be confirmed before attempting to enter into contractual relations.

Appendix 1

This appendix sets out the minimum technical and organisational measures to be observed by the Processor in accordance with clause 3. The appendix is divided into Legal Requirements and Practical Security Measures.

The Legal Requirements

These relate to the need for the Data Processor to identify and observe any specific security measures in relation to personal data required under its national law. The requirement is not a one-off requirement to be observed at the start of the processing service, but is an on-going obligation to ensure that the security arrangements are in compliance with national law as it may be amended or supplemented from time to time throughout the duration of the processing service.

Practical Security Measures

While the Contract imposes the obligation on the Processor to take "such Technical and Organisation Security Measures as are required under its own National Law to protect personal data processed on behalf of the Data Controller against unlawful forms of processing" many businesses may find it difficult to ascertain what this obligation means in practice.

The obligation is a broad one and businesses will need to break this down into the classes of security measures identified in the appendix. These classes will require further practical consideration. Many international IT groups and standards bodies have looked at the area of information security and guidance of general application is available from many of the bodies referred to below (see Sources).

An example of appropriate basic information security measures are set out in Annex 1 of this Implementation Guide.

AA.5 Extra Clauses

The Security Contract (whether used as an separate agreement or with extracted clauses used to supplement a data processing agreement) is intended to satisfy the requirements of Article 17.

From a business perspective, however, where such matters have not been otherwise covered in the data processing agreement or related contract, parties may wish to include additional clauses regarding, for example:

- Arbitration or mediation arrangements (as discussed above);
- Selection of jurisdiction (as discussed above);
- Limitations of liability.

Where more detailed arrangements have not been dealt with in other agreements, parties may wish to include more detailed provisions in relation to some of the matters addressed in the Security Contract, for example:

- Arrangements for the treatment of personal data on termination of the processing arrangements.

AA.6 Sources

The following bodies provide helpful guidance and information on information security, privacy enhancing technologies and data protection and privacy considerations which may serve as useful additional reading material for organisations seeking to use the Article 17 Security Contract for the first time:

- OECD/EU
- National Bodies
- BCS, ITIL
- ICC (International Chamber of Commerce)
- ISO 17799
- Common Criteria
- PETTEP

IMPLEMENTATION GUIDE

ANNEX 1 - BASIC INFORMATION SECURITY MEASURES

Basic information security measures (here extracted from work of the OECD) will include consideration of the following:

2.1 Information Security Management System/Privacy and Data Protection Management System

- Policy
- Governance
- Process/procedures
- Roles/responsibilities
- Assurance process
- Risk Assessment
- Improvement plan.

2.2 Physical Security

- Fit appropriate locks or other physical controls to the doors and windows of rooms where computers are kept.
- Physically secure unattended lap tops (for example, by locking them in a secure drawer or cupboard).
- Ensure you control and secure all removable media, such as removable hard-drives, CDs, floppy disks and USB drives, attached to business-critical assets.
- Destroy or remove all business-critical information from media such as CDs, and floppy disks before disposing of them.
- Ensure that all business-critical information is removed from the hard drives of any used computers before disposing of them.
- Store back-ups of business-critical information either off-site or in a fire and water-proof container.

2.3 Access Controls

- Use unique passwords, that are not obvious (*Note: not birth dates or easily found or guessed information*) and change them regularly (*Note: preferably at least every three months*).
- Use passwords that contain letters in both upper and lower cases, numbers and special keys, and are six or more characters in length. (*Note: Passwords remembered as a memorable sentence, rather than a single word, are helpful. For example, the sentence: "at forty-two I'm a star!" can translate into this eight-character password : @42Ima*!*)
- Ensure that employees don't write down or share passwords. (*Note: If an employee finds that they need, on occasion, to share a password they must be required to change it as soon as possible – no matter how well they trust the person they shared it with!*)

2.4 Security and Privacy Technologies

- Ensure that all computers used have anti-virus software installed, and the virus definitions must be updated at least once a week (*Note: many providers have a one-click update*). All incoming and outgoing traffic must be

scanned for viruses, as should any disk or CD that is used, even if it is from a ‘trusted’ source. At least once a month, computers must be scanned for viruses.

Where computers are connected to the Internet (especially if you use a broadband connection) deploy a software firewall. *(Note: This helps to prevent malicious code from entering computers and potentially compromising the confidentiality, integrity and availability of a network. It also helps to stop a system being used to attack other systems without the system owner’s knowledge. Software firewalls for use by non-professionals are readily available at a reasonable cost. Operating system virus control software or ISPs may also offer firewalls. Consumer and popular trade magazines compare firewall functions and features of well known products, and are a good source of information. Free shareware firewalls are available, but these usually require expert knowledge for correct use).*

Where a business has a small network that is connected to the Internet, it should consider deploying an ‘all-in-one’ hardware box that contains a firewall, anti-virus program and an intrusion detection system. *(Note: This will greatly simplify the use and maintenance of essential Internet security technology).*

2.5 Awareness, training and security checks in relation to personnel

Perform integrity checks on all new employees to ensure that they have not lied about their background, experience or qualifications.

Give all new employees a simple introduction to information security, and ensure that they read and understand your information security policy. Ensure employees know where to find details of the information security standards and procedures relevant to their role and responsibilities.

Ensure that employees have access only to the information assets they need to do their jobs. If employees change jobs, you must ensure that they do not retain access to the assets they needed for their old job. When dismissing employees, ensure that they do not take with them any business-critical information.

Ensure that no ex-employees have access rights to your systems.

Ensure employees know about the common methods that can be used to compromise your system. *(Note: These include e-mail messages that contain viruses and ‘social engineering’ ploys used by hackers to exploit employees’ helpfulness to gain information that will give them access to a system. Examples of ‘social engineering’ include a hacker using the telephone to pose as a systems maintenance engineer or pretending to be a new employee).*

2.6 Incident/Response Management/Business Continuity

Ensure that employees understand what is meant by a Security Incident. A security incident is any event that can damage or compromise the confidentiality, integrity or availability of your business-critical information or systems.

Ensure that employees are trained to recognise the signs of Security Incidents. *(Note: These could include:*

☺ *strange phone requests, especially for information*

☺ *unusual visitors*

☺ *strange patterns of computer activity*

☺ *unusual appearance of computer screens*

☺ *computers taking longer than usual to perform routine tasks)*

Ensure that employees receive training on the need to notify anything which may be a sign of a Security Incident and are kept informed as to the identity of the person to whom such notifications should be made.

Ensure that if a Security Incident occurs, employees know who to contact and how.

Have in place a plan to assure business continuity in the event of a serious Security Incident (a “Business Recovery Plan”). The plan should specify:

☺ Designated people involved in the response;

☺ External contacts, including law enforcement, fire and possibly technical experts;

☺ Contingency plans for foreseeable incidents such as:

○ Power loss;

○ Natural disasters and serious accidents;

○ Data compromise;

○ No access to premises;

○ Loss of essential employees;

○ Equipment failure;

-
- Ensure that your Business Recovery Plan is issued to all employees and is tested at least once a year, regardless of whether there has been a Security Incident.
 - After every incident when the plan is used, and after every test, re-examine and update the Business Recovery Plan as necessary using the lessons learned.

2.7 Audit Controls/Due Diligence

Ensure that you have in place appropriate security audit arrangements including:

- Auditing of who has access to its system (in general and in relation to particular types of information) (*Note: The ability to audit and evaluate information security compliance is essential – you can't manage what you don't measure!*);
- Logging of such access to the system; and
- Auditing of compliance with security procedures. (*Note: A record should be maintained for each security procedure. For example, if a procedure requires that you test your system's back-up generator once a week, an employee should be identified to sign a record to show that this has been done. Keeping good records is essential to audit control.*)

Some audit controls may be necessary for legal or regulatory purposes. Good record keeping will clearly demonstrate compliance with obligations.

An audit should ensure that the procedures in place are effective and relevant. A security audit is a trigger to re-assess and re-evaluate the effectiveness of information security standards and procedures.

Audits are only effective if action is taken to address their findings and identify and implement the steps that need to be taken. A good audit trail is not just a paper exercise. If something goes wrong, the trail should identify what happened and why. This will help to keep improving the security of the business systems.

This is and the following [] pages comprise Schedule 5.10 to the foregoing Contract between the **[Purchaser to insert name of Organisation]** and **CGI IT UK Limited**

SCHEDULE 5.10 – EXIT MANAGEMENT

Purchaser to update Schedule 5.10 detailing applicable Exit Management process.

This is and the following [] pages comprise Schedule 5.10 to the foregoing Contract between the **[Purchaser to insert name of Organisation]** and **CGI IT UK Limited**

SCHEDULE 5.11 – PROJECT PLAN

Purchaser to update Schedule 5.11 detailing applicable Project Plan, specific to their requirement.