



dated 2017

[ ] Council  
and  
[Publica Group (Support) Limited] Limited

## Agreement

in relation to the provision of [2020 Partnership] services

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# Agreement

dated 2017

## Parties

- (1) [ ] Council of [ ] (the Council); and
- (2) [Publica Group (Support) Limited] (registered number 10580349) whose registered office is at Cotswold District Council of Trinity Road, Cirencester, Gloucestershire, GL7 1PX (the Company).

## Introduction

- (A) The Council wishes to enter into a contractual arrangement for the Services (defined below) with the Company.
- (B) The principal purpose of this contractual arrangement is to establish a long term relationship between the Council and the Company to provide the Services to the Council.
- (C) The Council and the other Members have jointly set up the Company as a company limited by guarantee, a wholly owned company, operating with Mutual Trading Status to deliver the Services to the Council and services similar to the Services to other Members under contracts similar to this Agreement.
- (D) The Company is a Teckal company fulfilling the conditions set out in Regulation 12(4) of the Public Contracts Regulations 2015. The Company is subject to management supervision by the Members. As such, the Company is a body governed by public law as defined in the Public Contracts Regulations 2015.
- (E) The Members shall exercise decisive influence over both the strategic objectives and significant decisions of the Company pursuant to the arrangements that are set out in the Members' Agreement dated [25<sup>th</sup>] May 2017 as amended and restated on [date TBC].
- (F) This Agreement sets out the basis upon which the Company is to provide the Services to the Council, which together with similar agreements with the other Members, will form the basis for the Company developing a successful business.
- (G) The Council is a local authority which exercised its powers under section 1 Localism Act 2011 when it established the Company.

## Agreed terms

### 1 Definitions and Interpretation

#### 1.1 Definitions

In this Agreement unless the context otherwise requires the following terms shall have the meanings given to them below:

**Additional Services** means the additional services referred to in clause 7;

**Administering Authority** means (respectively) Gloucestershire County Council of [ ] and Oxfordshire County Council of [ ], each acting in its capacity as the administering authority of the Gloucestershire County Council Pension Fund and the Oxfordshire County Council Pension Fund respectively for the purposes of the LGPS Regulations;

**Admission Agreements** means the agreements to be entered into in accordance with the LGPS Regulations, by the Administering Authority, the Council and the Company, as appropriate in the form(s) set out in Schedule 9;

**Agreement** means this agreement between the Council and the Company consisting of these clauses and any attached Schedules;

**Annual Fee** means the fee payable by the Council to the Company for the Services as set out in this Agreement and as included in the Business Plan;

**Annual Review** means the review referred to in clause 41;

**Annual Service Plans** means the plans to be developed and updated in accordance with clause 41;

**Annual Service Report** means the report referred to in clause 41;

**Appropriate Pension Provision** means in respect of Council Transferring Employees, either:

- (a) membership, continued membership or continued eligibility for membership of the LGPS; or
- (b) membership or eligibility for membership of a pension scheme, which is certified by the Government Actuary's Department (GAD) as being broadly comparable to the terms of the LGPS;

**Approval and Approved** means the written consent of the Council;

**Assigned Supplier Contracts** means those supplier contracts listed in Part 2 (Assigned Supplier Contracts) of Schedule 6 which are subject to the provisions of clause 15.6.2;

**Assigned Supplier Contractors** means the counterparties to the Assigned Supplier Contracts;

**Bond** means the bond(s) (if any) to be executed in accordance with the Admission Agreements;

**Business Budget** means the budget for the Company in respect of the first and second Contract Years of this Agreement;

**Business Plan** means the operational business plan and budget of the Company approved by the Members each Financial Year in respect of all the activities of the Company;

**Change in Law** means the coming into effect or repeal (without re-enactment or consolidation) in England of any Law, or any amendment or variation to any Law or any

judgement of a relevant court of law which changes binding precedent in England in each case after the Commencement Date;

**Commencement Date** means [            ];

**Communications Protocol** means the protocol agreed between the Parties describing how the Company and the Council shall communicate on a day to day basis [and setting out detailed Customer Service Standards] a copy of which is set out in Schedule 2;

**Company Annual Fee** means the fees payable by the Company to the Council for [the use of the Council Assets and ICT System, provision of Council Services and the Premises Licence] as set out in this Agreement and as included in the Business Plan;

**Company Assets** means all assets and rights to enable the Council or a New Supplier to provide the Services in accordance with this Agreement including:

- (a) the Transferring Assets;
- (b) any equipment, including the Equipment provided pursuant to the terms of this Agreement as shown in the Company Assets Inventory;
- (c) any books and records (including operating, maintenance and M/E manuals, health and safety manuals and other know how) but expressly excluding the Company's internal operating manuals, the Company's HR manuals and the Company's management forecasts and modelling, supplier financial information and commercially sensitive financial information;
- (d) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);
- (e) any revenues and any other contractual rights; and
- (f) any Intellectual Property Rights subject to and in accordance with clause 25, [but expressly excluding the Company's corporate branding and logos not exclusively used in or developed for the delivery of the Services];

but excluding any assets and rights (including the Council Assets) in respect of which the Council is full legal and beneficial owner;

**Company Assets Inventory** means an inventory of the Equipment prepared in accordance with the requirements of clause 15.2.3;

**Company's Representative** means the individual from time-to-time authorised to act on behalf of the Company for the purposes of the Agreement;

**Confidential Information** means any information which has been designated as confidential by either Party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information which relates to the business, affairs, properties, assets, trading practices, Services, developments, trade secrets, Intellectual Property Rights, know-how, personnel, customers and suppliers of either Party, all personal data and sensitive personal data

within the meaning of the Data Protection Act 1998 and all information protected under the Government Security Classifications (**GSC**);

**Contract Year** means a period of twelve (12) Months commencing on 1 April in each Contract Year and expiring on 31 March in each subsequent Contract Year provided that:

- (a) the first Contract Year shall be the period commencing on the [*Commencement Date*] and ending on the immediately following 31 March; and
- (b) the final Contract Year shall be the period commencing on 1 April immediately preceding the last day of the Term to (as applicable) the Expiry Date or the date set out in the relevant termination notice served in accordance with clause 36;

**Council Assets** means the Council's existing assets as identified in Schedule 4 which are to be made available to the Company for the purposes of delivering the Services in connection with this Agreement on the terms set out in clause 15.4;

**Council's Corporate Strategy** means the Council's strategy or equivalent published from time to time on its website;

**Council's Medium Term Financial Strategy** means the financial strategy updated by the Council from time to time;

**Council Premises** means any premises owned or occupied by the Council where any of the Services are required to be carried out by the Company;

**Council Representative** means the individual from time-to-time authorised to act on behalf of the Council for the purposes of the Agreement;

**Council Services** means the services to be provided to the Company by the Council from time to time as the same (including the price to be paid by the Company) are more particularly detailed in the service level agreements set out in Schedule 10;

**Council Transferring Employees** means the Council employees occupying the posts listed under the heading "Council Transferring Employees" and "Joint Employees" in Schedule 8;

**Customer Service Standards** means the detailed service standards relating to the Services forming part of the Communications Protocol;

**Default** means any breach of the obligations of either Party (including but not limited to fundamental breach or breach of a fundamental term) or any default, act, omission, negligence or statement of either Party, its employees, agents or sub-contractors in connection with or in relation to the subject matter of the Agreement and in respect of which such Party is liable to the other;

**Direct Losses** means all damage, losses, liabilities, claims, actions, costs (including where applicable demobilisation costs), expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis),

proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses;

**Disclosure and Barring Service or DBS** means the bureau established pursuant to Part V of the Police Act 1997;

**Environmental Information Regulations** means the Environmental Information Regulations 2004;

**Equipment** means all vehicles, plant, machinery, tools and other equipment (including the Transferring Assets) provided by the Company to deliver the Services pursuant to the terms of this Agreement and included from time to time on the Company Assets Inventory;

**Expiry Date** means [ ] ( ) years from the Commencement Date or as extended by the parties in accordance with clause 30;

**Extension** means the extension of the duration of the Agreement agreed in accordance with clause 30;

**FOIA** means the Freedom of Information Act 2000 and any subordinate legislation made under this Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner 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 the Party concerned, including (but not limited to) governmental regulations, fire, flood, or any disaster. It does not include any industrial action occurring within the Company's organisation or within any sub-contractor's organisation;

**Financial Year** means the financial accounting period from 1 April to 31 March;

**Fund** means the Gloucestershire County Council Pension Fund or, as appropriate, the Oxfordshire County Council Pension Fund;

**Good Industry Practice** means the exercise of such degree of skill, diligence, care and foresight which would reasonably and ordinarily be expected from a skilled and experienced contractor engaged in the supply of service similar to the Services under the same or similar circumstances as those applicable to this Agreement;

**ICT System** means the ICT System described in Schedule 11 including software, hardware and any communication networks and all subsequent additions and replacements thereto;

**Indirect Losses** means loss of profits, loss of use, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature;

**Information** has the meaning given under section 84 of the Freedom of Information Act 2000;

**Initial Contribution Rate** means [sixteen point six] per cent ([16.6]%) of the Council Transferring Employees Pensionable Pay in respect of those Council employees who were previously employed by Cotswold District Council under the Admission Agreement



entered into with the Gloucestershire County Council Pension Fund and [seventeen point nine] per cent ([17.9%]) of the Council Transferring Employees Pensionable Pay in respect of those Council employees who were previously employed by Forest of Dean District Council under the Admission Agreement entered into with the Gloucestershire County Council Pension Fund and [fifteen point eight] per cent ([15.8%]) of the Council Transferring Employees Pensionable Pay under the Admission Agreement entered into with the Oxfordshire County Council Pension Fund. **[DN: Further discussion required as to how this will operate with Gloucestershire LGPS Fund and the rates applied]**

**Intellectual Property Rights** means patents, inventions, trade marks, service marks, logos, design rights (whether registrable 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 registrable or not in any country (including but not limited to the United Kingdom) and the right to sue for passing off;

**Joint Employees** means those Council Transferring Employees who are to be jointly employed by the Council and the Company as the same are listed under the heading "Joint Employees" in Schedule 8;

**Law** means any applicable Act of Parliament, sub-ordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, exercise of the Royal Prerogative, enforceable community right within the meaning of Section 2 of the European Communities Act 1972, bye-law, regulatory policy, guidance or industry code, judgment of a relevant court of law, or directives or requirements of any Regulatory Body of which the Company is bound to comply;

**LGPS** means Local Government Pension Scheme;

**LGPS Regulations** means the Local Government Pension Scheme Regulations 2013 (SI 2013/2356) as amended from time to time;

**Members** means Cotswold District Council, Forest of Dean District Council, West Oxfordshire District Council, Cheltenham Borough Council and any future members of the Company;

**Members' Agreement** means an agreement dated [25] May 2017 governing (among other things) the Members' ownership of and control over the Company as the same may be amended or restated from time to time;

**Month** means calendar month;

**Monthly Monitoring Reports** has the meaning given to it in Schedule 3;

**New Supplier** means any third party company appointed by the Council to provide any services which are substantially similar to any of the Services, and which the Council receives in substitution for any of the Services following the expiry, termination or partial termination of this Agreement, whether those services are provided by the Council internally and/or by any third Party;

**Party** means a party to this Agreement and **Parties** shall be construed accordingly;

**Pensionable Pay** shall have the same meaning as "Pensionable Pay" as defined in the LGPS Regulations;

**Performance Monitoring** has the meaning given to it in Schedule 3;

**Premises Licence** means the licence(s) of Council Premises in the form set out in Schedule 7;

**Quality Standards** means any quality standards relating to the Services published by the British Standards Institute, the International Organisation for Standardisation or any other equivalent body, with which a skilled and experienced operator engaged in the same type of industry or business as the Company would reasonably and ordinarily be expected to comply as supplemented by the Specification;

**Regulatory Bodies** means those government departments and regulatory, statutory and other entities, committees, ombudsmen and bodies which, whether under statute, rules, regulations, codes of practice or otherwise, are entitled to regulate, investigate, or influence the matters dealt with in the Agreement or any other affairs of the Council and **Regulatory Body** shall be construed accordingly;

**Requests for Information** shall have the meaning set out in FOIA or any apparent request for information under the FOIA or the Environmental Information Regulations;

**Required Insurances** means the insurances specified in clause 31;

**Retained Supplier Contracts** means those supplier contracts listed in Part 1 (Retained Supplier Contracts) of Schedule 6 which are to be made available to the Company on the terms set out in clause 15.6.1;

**Retained Supplier Contractors** means the counterparties to the Retained Supplier Contracts;

**RIDDOR** means Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013;

**Schedule** means a schedule attached to the Agreement;

**Senior Management Team** means any two of the Council's Head of Paid Service, Section 151 Officer or Monitoring Officer from time to time;

**Services** means the services to be provided by the Company as set out in the Specification;

**Specification** means the description of the Services to be provided under the Agreement set out in Schedule 1 as amended from time to time in accordance with clauses 7 and 24;

**Staff** means all persons employed by the Company including any Joint Employees to perform the Agreement together with the Company's servants, agents and sub-contractors used in the performance of the Agreement;

**Sub-Contractor** means any person engaged by the Company from time to time as may be permitted by this Agreement to procure the provision of the Services (or any of them);

**Tax** means Value Added Tax;

**Term** means the period of duration of the Agreement in accordance with clause 2.1;

**Termination Date** means the date of early termination of this Agreement in accordance with its terms;

**Termination Employees** means the Staff who it is determined in accordance with the procedure as set out in clause 34.1 will transfer to the Council or any New Supplier on the Termination Date;

**Third Party Contract(s)** means any contracts or arrangements listed in Part 3 (Third Party Contracts) of Schedule 6;

**Third Party Contractors** means the counterparties to the Third Party Contracts;

**Transferring Assets** means those assets listed in Schedule 5 which are to be purchased by the Company on the Commencement Date;

**TUPE Regulations** means the Transfer of Undertakings (Protection of Employment) Regulations 2006;

**Variation** has the meaning given to it in clause 24; and

**Working Day** means a day when the Council offices are open to the public.

## 1.2 Interpretation

1.2.1 Words importing the singular meaning include where the context so admits the plural meaning and vice versa.

1.2.2 Words importing the masculine include the feminine and the 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 shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended by any subsequent enactment, modification, order, regulation or instrument as subsequently amended or re-enacted.

1.2.5 References to any person shall include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assignees or transferees.

1.2.6 The words include, includes and including are to be construed as if they were immediately followed by the words without limitation.

1.2.7 Headings are included in this Agreement for ease of reference only and shall not affect the interpretation or construction of this Agreement.

## 2 Commencement and Term

2.1 This Agreement shall take effect on the Commencement Date and (subject to the provisions for early termination set out in this Agreement) shall continue until the Expiry Date provided that this Agreement may be terminated:

2.1.1 [by either Party serving not less than twelve (12) calendar Months' notice in writing upon the other expiring on the third anniversary of the Commencement Date]; or

2.1.2 in the event of a material breach of this Agreement in accordance with clause 36; or

2.1.3 in the circumstances set out in clauses 33 and 40.

2.2 The Council may seek to extend the duration of the Agreement in accordance with clause 30. During the Extension, the obligations under the Agreement shall continue (subject to any Variation) until the expiry of the period specified in accordance with clause 30.

## 3 Notices

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

3.2 Any notice or other communication which is to be given by either Party to the other shall be given by letter (sent by hand, post, registered post or by the recorded delivery service), or by facsimile transmission or electronic mail (if confirmed in either case by letter). Such letters shall be addressed to the other Party in the manner referred to in clause 3.3 Provided the relevant communication is not returned as undelivered, the notice or communication shall be deemed to have been given two (2) Working Days after the day on which the letter was posted or sooner where the other Party acknowledges receipt of such letters, facsimile transmission or item of electronic mail.

3.3 For the purposes of clause 3.2, the address of each Party shall be:

3.3.1 for the Council:

Head of Paid Service

[Address]

3.3.2 for the Company:

Managing Director

Cotswold District Council

Trinity Road, Cirencester

United Kingdom, GL7 1PX

3.4 Either Party may change its address for service by serving a notice in accordance with this clause.

#### 4 **Fraud**

The Company shall take all reasonable steps, in accordance with Good Industry Practice, to prevent any fraudulent or criminal activity including but not limited to corruption within the meaning of Section 1 or 6 of the Bribery Act, money laundering within the meaning of section 340(11) of the Proceeds of Crime Act 2002 and the commission of any offences under the Criminal Finances Act 2017, by the Staff, the Company (including its shareholders, members, directors) and/or any of the Company's suppliers, in connection with the receipt of monies from the Council. The Company shall notify the Council immediately if it has reason to suspect that any fraud has occurred or is occurring or is likely to occur.

#### 5 **The Specification**

5.1 The Services shall be provided during the Term in accordance with:

5.1.1 the Council's requirements as set out in Schedule 1;

5.1.2 the Communications Protocol and the Customer Service Standards;

5.1.3 the terms of this Agreement; and

5.1.4 the Law.

5.2 Timely provision of the Services shall be of the essence of the Agreement, including in relation to commencing the provision of the Services within the time agreed or on a specified date.

5.3 The Council shall have the power to inspect and examine the performance of the Services at any reasonable time.

#### 6 **Standard of Services**

6.1 The Company shall ensure that its obligations under this Agreement are discharged and that the Services are performed by appropriately experienced, qualified and trained Staff with all due skill, care and diligence including but not limited to Good Industry Practice and good health and safety practices.

6.2 The Company shall at all times comply with the Quality Standards, and where applicable shall maintain accreditation with the relevant Quality Standards authorisation body. To the extent the standard of Services has not been specified in the Agreement, the Company shall agree the relevant standard of Services with the Council prior to execution and then annually as part of the Annual Review in accordance with clause 41.

6.3 The introduction of new methods or systems which impinge on the provision of the Services shall be subject to the Variation procedures set out in clause 24.

6.4 Where any access to the Council's Premises is necessary in connection with the provision of the Services, the Company and the Company's sub-contractors or suppliers shall at all

times comply with the reasonable requirements of the Council's security procedures and health and safety policies.

## 7 Additional Services

The Parties may agree to add further services to the Specification by following the Variation procedures set out in clause 24.

## 8 Payment for Services, Annual Fee and Council Services

### 8.1 Payments by Council

8.1.1 In consideration of the performance of the Company's obligations under the Agreement by the Company, the Council shall pay the Annual Fee as follows:

- (a) The Annual Fee shall be computed by the Company reflecting arm's length principles in the annual budgeting process
- (b) the Annual Fee for the Services shall be deemed to include all reasonable costs incurred in delivering the Services including operational costs, management and support costs other overheads and an arm's length level of profit;
- (c) the Company will recharge all costs incurred in delivering the Services to the Council and apply an appropriate mark-up;
- (d) the Company can adjust the charges to each Member to take account of material changes to the expected budgeted costs or scope of Services to be provided, such that the Council will not subsidise the delivery of Services to other local authorities or third parties; and
- (e) the Company shall work with the Council to support the delivery of savings and additional income identified in the Council's Medium Term Financial Strategy.

8.1.2 Subject to clause 8.1.1 above the Annual Fee for the first Contract Year of this Agreement shall be [£ ] (which is the pro-rated sum for the first Contract Year) and an Annual Fee for the second Contract Year of this Agreement which shall be [£ ] in both cases as set out in the [Business Budget].

8.1.3 The Annual Fee for each subsequent year shall be reviewed and agreed between the Parties as part of the annual process to agree the Business Plan. The review will include (among other things) any requirement for a change to the Services or any part of the Services [and any change in the LGPS contribution rate(s)] which has an impact on the Annual Fee provided that in the event of the Parties failing to reach agreement not later than 30 days before the beginning of each Contract Year each year the matter shall be determined by the disputes resolution process set out in clause 42 and until the matter has been resolved the Annual Fee for the previous year shall apply and shall be paid by the Council in accordance with this clause 8.1. The review shall reflect arm's length principles.

- 8.1.4 The Company shall submit VAT invoice(s) to the Council on the first Working Day of each calendar Month detailing the Services to be provided during the following calendar Month and the amount payable. The sum shall be 1/12<sup>th</sup> of the Annual Fee and pro-rated for any Contract Year less than 12 (twelve) Months.
- 8.1.5 The Company shall submit a quarterly reconciliation invoice or credit note within ten (10) Working Days of the end of the respective quarter to reflect the actual cost of the Services incurred in the preceding quarter and a final annual reconciliation invoice or credit note by 30 April each year.
- 8.1.6 The Council shall pay the sums due to the Company in accordance with clauses 8.1.4 and 8.1.5 above in cleared funds within ten (10) Working Days of receipt of invoices submitted monthly in advance and in respect of the quarterly reconciliation invoice or credit note the Council shall pay sums due to the Company in cleared funds within ten (10) Working Days of invoices submitted quarterly in arrears or to make the necessary credit as appropriate.
- 8.1.7 The Company shall use its reasonable endeavours to ensure any unforeseen costs associated with delivery of the Services (including costs associated with accidents and claims made by Staff and Changes in Law) are itemised and invoiced as part of the monthly invoice referred to in clause 8.1.4 or as part of the quarterly reconciliation invoice referred to in clause 8.1.5. Where it is not possible to include unforeseen costs in invoices under clauses 8.1.4 and 8.1.5 separate invoices for unforeseen costs shall be provided to the Council by the Company as soon as details of the unforeseen costs are known.
- 8.1.8 Where unforeseen costs are disputed by the Council Representative and the dispute cannot be resolved the dispute shall be determined by the disputes resolution process set out in clause 42 provided that if such reference to the disputes resolution process puts the Company at risk of insolvency the Council shall indemnify the Company until the matter has been resolved without prejudice to the outcome of the disputes resolution process.
- 8.1.9 Unforeseen costs as mentioned in clause 8.1.7 above must be itemised and invoiced as part of the monthly invoice referred to in clause 8.1.4 or as part of the quarterly reconciliation invoice referred to in clause 8.1.5.
- 8.1.10 In the event that the cost to the Company of performing its obligations under the Agreement increases or decreases as a result of a Change of Law within the scope of clause 12, the provisions of clause 12 shall apply.

## 8.2 **Payments by Company**

- 8.2.1 In consideration of the provision by the Council of the Council Assets, ICT System, Council Services and the Premises Licence, the Company shall pay the Company Annual Fee.
- 8.2.2 The Company Annual Fee shall be computed by the Council reflecting arm's length principles, and include an appropriate level of profit.

- 8.2.3 The Company Annual Fee for the first Contract Year of this Agreement shall be [£ ] which is the pro-rated sum for the first Contract Year as set out in the [Business Budget].
- 8.2.4 The Company Annual Fee for each subsequent year shall be reviewed and agreed between the Parties as part of the annual process to agree the Business Plan. The review will include (among other things) any requirement for a change to the Council Services, Council Assets, ICT System and/or Premises Licence which has an impact on the Company Annual Fee provided that in the event of the Parties failing to reach agreement not later than 30 days before the beginning of each Contract Year each year the matter shall be determined by the disputes resolution process set out in clause 42 and until the matter has been resolved the Company Annual Fee for the previous year shall apply and shall be paid by the Company in accordance with this clause 8.2.
- 8.2.5 The Council shall submit VAT invoice(s) to the Company on the first Working Day of each calendar Month detailing the relevant assets and services to be provided by the Council during the following calendar Month and the amount payable. The sum shall be 1/12<sup>th</sup> of the Company Annual Fee and pro-rated for any Contract Year less than 12 (twelve) Months.
- 8.2.6 The Council shall submit a quarterly reconciliation invoice or credit note within ten (10) Working Days of the end of the respective quarter to reflect the actual cost of the relevant assets and services provided by the Council in the preceding quarter and a final annual reconciliation invoice or credit note by 15 April each year.
- 8.2.7 The Company shall pay the sums due to the Council in accordance with clauses 8.2.5 and 8.2.6 above in cleared funds within ten (10) Working Days of receipt of invoices submitted monthly in advance and in respect of the quarterly reconciliation invoice or credit note the Company shall pay sums due to the Council in cleared funds within ten (10) Working Days of invoices submitted quarterly in arrears or to make the necessary credit as appropriate.
- 8.2.8 The Council shall use its reasonable endeavours to ensure any unforeseen costs associated with delivery of the relevant assets and services to the Company are itemised and invoiced as part of the monthly invoice referred to in clause 8.2.5 or as part of the quarterly reconciliation invoice referred to in clause 8.2.6. Where it is not possible to include unforeseen costs in invoices under clauses 8.2.5 and 8.2.6 separate invoices for unforeseen costs shall be provided to the Company by the Council as soon as details of the unforeseen costs are known.

### 8.3 Transferring Assets

- 8.3.1 The Authority shall transfer the Transferring Assets to the Company for use in the provision of the Services on the following terms:
- (a) the price payable by the Company for the Transferring Assets shall be [two hundred and fifty thousand pounds (£250,000)]. Within five (5) Business Days of receipt by the Company of a VAT invoice, the



Company shall pay the Council the sum payable for the Transferring Assets; and

- (b) the Council shall forthwith transfer to the Company legal and beneficial title to all Transferring Assets and shall forthwith release to the Company the control of all such Transferring Assets.

8.3.2 Neither the Council, its agents nor employees shall be liable to the Company in contract, tort (including negligence or breach of statutory duty), statute or otherwise as a result of any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever of the Transferring Assets.

## 9 Tax

Tax, where applicable, shall be charged at the appropriate rate and shown separately on a valid Tax invoice.

## 10 Recovery of sums due

Any overpayment by the Council to the Company (or the Company to the Council), whether of (as applicable) the Annual Fee, the Company Annual Fee or of Tax, shall be a sum of money recoverable by Party which has overpaid from the other Party.

## 11 Annual Fee adjustment on extension

11.1 In the event of an extension of the Term being considered by the Council pursuant to clause 30, the Council will (as part of such consideration) review the Annual Fee and the Company Annual Fee with the Company in the twelve (12) Month period prior to the expiry of the Agreement.

11.2 Any review of the Annual Fee and/or Company Annual Fee shall reflect arm's length principles.

11.3 If an Annual Fee and/or Company Annual Fee variation is agreed with the Council as part of its consideration relating to an extension of the Term, the revised Annual Fee and (as applicable) Company Annual Fee will take effect from the first Working Day of any extension of the Term pursuant to clause 30 for the period of the extension of the Term.

## 12 Changes in Law

12.1 The Company shall neither be relieved of its obligations to provide the Services in accordance with the terms of this Agreement nor be automatically entitled to an increase in the Annual Fee as result of a Change in the Law.

12.2 If a Change in Law occurs or will occur during the Term or extended period, the Company shall amend and adapt the Services within the Annual Fee. Where this is not possible the Company shall notify the Council of the likely effects of that change, including:

- 12.2.1 whether any change is required to the Services, the Annual Fee or this Agreement; and

- 12.2.2 whether any relief from compliance with the Company's obligations is required, including any obligation to achieve any milestones or to meet any service level requirements at any time.
- 12.3 As soon as practicable after any notification in accordance with clause 12.2 the Parties shall discuss and agree the matters referred to in that clause and any ways in which the Company can mitigate the effect of the Change of Law, including:
- 12.3.1 providing evidence that the Company has minimised any increase in costs or maximised any reduction in costs, including in respect of the costs of its sub-contractors;
- 12.3.2 demonstrating that a foreseeable Change in Law had been taken into account by the Company before it occurred;
- 12.3.3 giving evidence as to how the Change in Law has affected the Annual Fee; and
- 12.3.4 demonstrating that any expenditure that has been avoided has been taken into account in amending the Annual Fee.
- 12.4 Any agreed additional sums payable as a result of the operation of the preceding clause shall be treated as unforeseen costs as set out in clause 8.1.7 and the provisions of clauses 8.1.8 and 8.1.9 shall apply accordingly. In the event of a reduction in the Annual Fee an adjustment shall be made as part of the quarterly reconciliation process set out in clause 8.1.5.
- 13 Statutory obligations and regulations**
- 13.1 The Company shall comply with all appropriate statutory duties and obligations in respect of the Services including (without limitation) the Equality Act 2010, the Bribery Act 2010 and the Human Rights Act 1998.
- 13.2 The Company shall comply with the following Council policies and rules (which shall be provided to the Company prior to the Commencement Date) or shall adopt equivalent policies and rules and such other policies as agreed between the Parties:
- 13.2.1 equality and diversity policies;
- 13.2.2 information security rules;
- 13.2.3 whistleblowing and/or confidential reporting policies; and
- 13.2.4 all site rules relevant to the fulfilment of the Company's obligations in the performance of the Services.
- 13.3 The Company shall assist and support the Council to deliver the Council's Corporate Strategy and Customer Service Standards.
- 13.4 The Company shall not unlawfully discriminate within the meaning and scope of any law, enactment, order, or regulation relating to discrimination (whether age, race, gender, religion, disability, sexual orientation or otherwise) in employment or the delivery of the Services.

- 13.5 The Company shall comply with all relevant legislation relating to its Staff however employed including (but not limited to) the compliance in law of the ability of the Staff to work in the United Kingdom.
- 13.6 If the Company has a finding against it relating to its obligations under clause 13.4 above it will provide the Council with details of the finding and the steps the Company has taken to remedy the situation.
- 13.7 The Company shall take all reasonable steps to secure the observance of this clause 13 by all servants, employees or agents of the Company and all suppliers and sub-contractors employed in the execution of the Contract.

13.8 **Audit**

The Company shall keep and maintain until six years after the Agreement has been completed, or as long a period as may be agreed between the Parties, full and accurate records of the Agreement including the Services provided under it, all expenditure reimbursed by the Council, and all payments made by the Council. The Company shall on request afford the Council, the Council's representatives or such other external auditor appointed by the Council such access to those records as may be required in connection with the Agreement.

14 **Not used**

15 **Company obligations**

15.1 The Company shall be responsible for the following:

15.2 **Company Assets and Equipment**

15.2.1 The Company shall be required to provide any Equipment required (in addition to the Council Assets and the Transferring Assets) to deliver the Services in accordance with the Specification and this Agreement generally.

15.2.2 The Company shall be responsible for the insurance, maintenance, repair and replacement of the Company Assets and the Equipment throughout the Term in accordance with the approved Business Plan.

15.2.3 The Company shall maintain and regularly update an inventory of all Company Assets and Equipment used in the delivery of the Services and make this available for inspection by the Council at all times during the Term upon reasonable notice. The Company Assets Inventory shall identify the items of Equipment subject to hire purchase, leasing, finance or other credit arrangements and the value of the Equipment.

15.2.4 The Company shall not without the Council's prior written consent enter into any payment arrangements relating to the Equipment with a third party supplier which exceed the Term and shall write down the book value of the Equipment within a period expiring not later than the Expiry Date. The Company shall use all reasonable endeavours to permit any of the hire purchase or leasing arrangements in relation to the Equipment to be assignable to the Council (if required by the Council) in the event of early termination of this Agreement.

15.2.5 Where this Agreement has terminated early, the Company Assets and Equipment shall be transferred to the Council at market value or on the terms of any finance agreement then outstanding for the remainder of the term of any such agreement. Where this Agreement has expired, the Company Assets and Equipment shall be transferred at no cost to the Council. If the Parties cannot agree the market value for any Company Assets and Equipment, the matter shall be referred to dispute resolution process as set out in clause 42

**15.3 ICT System [DN: to be confirmed once ICT arrangements including any software licence issues have been reviewed]**

15.3.1 In consideration of the payment by the Company of the Company Annual Fee, the Company shall utilise the Council's ICT System. The Council shall provide the Company with access to the necessary ICT hardware for the Company to use the ICT Systems in the provision of the Services.

15.3.2 The Council shall at its own cost replace and update the ICT System as required to enable the Company to provide the Services in accordance with the Specification.

15.3.3 The Company shall permit the Council to have remote access to the ICT System for monitoring purposes to ensure compliance in the terms of this Agreement.

15.3.4 The Company shall transfer all rights, title and interest in any database maintained in relation to the Services to the Council at nil cost at the expiry or early termination of this Agreement.

**15.4 Council Assets**

15.4.1 In consideration of the payment by the Company of the Company Annual Fee, the Council hereby grants to the Company a licence to use the Council Assets for the purposes of delivering the Services during the Term in accordance with the Specification and this Agreement generally.

15.4.2 The Company shall not without the Council's prior written permission:

- (a) do or permit or cause to be done any matter which may prejudice the Council's rights or title in relation to the Council Assets;
- (b) sell, offer to sell, assign, mortgage, pledge or otherwise dispose of or part with possession of any of the Council Assets;
- (c) modify and/or replace any Council Assets other than in the normal course of routine maintenance or fair wear and tear; or
- (d) use or allow any of the Council Assets to be used other than in the delivery of the Services.

15.4.3 The Council shall be responsible for the insurance, maintenance, repair and replacement of the Council Assets throughout the Term.

15.4.4 The Company shall from time to time notify the Council of any Council Assets which require replacement or maintenance, in particular where the replacement or maintenance cost is likely to exceed the Council's budgetary provision. The Council will give formal and reasonable consideration to making budgetary provision for replacement or repair of the relevant Council Assets.

## 15.5 Complaints procedure and quality control

15.5.1 The Company shall deal with any complaints received whether orally or in writing in a prompt, courteous and efficient manner in accordance with the Company's customer complaints policy as approved from time to time by the Council.

15.5.2 The Company shall fully co-operate with the Council in relation to any unresolved complaint or a complaint referred to the Council to be resolved in accordance with the Council's own complaints procedure.

15.5.3 The Company shall throughout the Term institute and maintain a properly documented system of quality control designed to ensure that the Services generally are provided at all times in all respects in accordance with the Specification, Good Industry Practice and with this Agreement.

15.5.4 The Company shall designate as soon as reasonably practicable following the [Commencement Date] a manager who deals with quality issues, who may be directly involved in the day-to-day performance of the Services and a manager who is responsible for ensuring compliance with all relevant data protection matters.

15.5.5 The Council may carry out periodic audits of the aforementioned quality assurance systems at approximate intervals of three (3) Months and may carry out such other periodic monitoring, spot checks and auditing of the Company's quality management systems as reasonably required.

## 15.6 Contract Management

### 15.6.1 Retained Supplier Contracts

(a) The Council shall retain (and where applicable renew or replace) the Retained Supplier Contracts relevant to the performance by the Company of the Services and [warrants that it has obtained] all necessary consents from the Retained Supplier Contractors to the provision of the relevant services comprised in such contracts directly to the Company.

(b) The Council shall remain responsible for all payments due under any Retained Supplier Contracts to the relevant Retained Supplier Contractors and shall recover a due proportion of any costs for services provided to the Company under such Retained Supplier Contracts through [an adjustment to the Annual Fee].

(c) [The Council shall appoint the Company as its agent for the purposes of managing the Retained Supplier Contracts and shall notify all relevant

third parties of its appointment of the Company as its agent for the purposes of the Retained Supplier Contracts.]

- (d) Where the Council has breached or failed to perform its obligations pursuant to any Retained Supplier Contracts prior to the [Commencement Date] the Council shall indemnify the Company for any Direct Losses that arise under the circumstances.
- (e) In managing any Retained Supplier Contract, the Company shall be responsible for the performance of the Council's obligations (other than payment obligations) under each such contract and shall use reasonable endeavours to ensure that the Retained Supplier Contractors are complying with the terms of their contracts.
- (f) Whilst managing any Retained Supplier Contract, the Company shall do nothing which would put the Council in breach of its obligations under such contracts. The Company shall indemnify the Council against all Direct Losses suffered or incurred as a result of the non-performance or defective or negligent performance by it of its management obligations under this clause 15.6.1.
- (g) Whilst managing a Retained Supplier Contract, the Company shall not terminate, extend or vary the Retained Supplier Contract (or purport to do so) without the prior written Approval of the Council (such approval not to be unreasonably withheld or delayed).

#### **15.6.2 Assigned Supplier Contracts and Third Party Contracts**

- (a) Assisted by the Company, the Council shall use reasonable endeavours to arrange the novation of each Assigned Supplier Contract effective from the [Commencement Date]. Such novation shall be subject to the Council, the Company and the Assigned Supplier Contractors agreeing the form of a novation agreement. The Company shall assist the Council to obtain all requisite consents and approvals and reasonable co-operation from all applicable third parties to the Assigned Supplier Contracts. All third party costs relating to obtaining such consents shall be met by the Council.
- (b) If any novation referred to in clause 15.6.2(a) does not occur for any reason (until it occurs and subject to any requisite consents of third parties) the Council will hold the benefit of the same as trustee for the Company and:
  - i In relation to any relevant Assigned Supplier Contract (to the extent not prohibited by the relevant Assigned Supplier Contract) the Council shall appoint the Company as its agent for the purposes of managing the Assigned Supplier Contract in question; and
  - ii In relation to any Third Party Contract, the Company shall provide the relevant services comprised in the Third Party Contract to the Council and any fee payable by the Third Party Contractor in relation to such

services shall be added to the fees payable by the Council in accordance with clause 8.1.

The Council shall notify all relevant third parties of its appointment of the Company as its agent for the purposes of the Assigned Supplier Contracts. For the avoidance of doubt, Third Party Contracts shall not be assigned or novated and the Third Party Contractors shall continue to make payments for services directly to the Council.

- (c) Where the Council has breached or failed to perform its obligations pursuant to any Assigned Supplier Contracts prior to the date on which such contracts have been either novated to the Company in accordance with clause 15.6.2(a) or the Company being appointed to manage such contracts in accordance with clause 15.6.2(b), the Council shall indemnify the Company for any Direct Losses that arise under the circumstances.
- (d) In managing any Assigned Supplier Contract (to the extent that the Company is able to do so pursuant to clauses 15.6.2(a) and 15.6.2(c) inclusive), the Company shall be responsible for the performance of the Council's obligations under each such contract and shall use reasonable endeavours to ensure that the Assigned Supplier Contractors are complying with the terms of their contracts. The Company shall be responsible for paying the Assigned Supplier Contractor in accordance with the terms of the relevant Assigned Supplier Contract.
- (e) Whilst managing any Assigned Supplier Contract or providing services for the benefit of a Third Party Contractor, the Company shall do nothing which would put the Council in breach of its obligations under such contracts. After the novation of an Assigned Supplier Contract, the Council shall do nothing which would put the Company in breach of its obligations under such contracts. The Company shall indemnify the Council against all Direct Losses suffered or incurred as a result of the non-performance or defective or negligent performance by it of the obligations under this clause 15.6.2(e) on or after the [Commencement Date].
- (f) Whilst managing any Assigned Supplier Contract, the Company shall not terminate, extend or vary the Assigned Supplier Contract (or purport to do so) without the prior written approval of the Council (such approval not to be unreasonably withheld or delayed).
- (g) Upon the termination or expiry of an Assigned Supplier Contract and for the remainder of the Term, the Company shall have responsibility for performing and delivering the services that were comprised within the Assigned Supplier Contract and such services shall form part of the Services save that where the relevant service can only be provided by a third party and the Council has refused consent to a renewal or extension of the relevant Assigned Supplier Contract, the relevant services shall be deemed to be deleted from the Services.

### 15.6.3 **Apportionment of Charges and Reconciliation**

The Council and the Company will apportion liability for charges and costs under the Assigned Supplier Contracts such that the Council is responsible for all charges, costs and (as applicable) income which arise prior to the [Commencement Date] and the Company shall be responsible for all charges, costs and (as applicable) income arising after the [Commencement Date].

### 15.6.4 **Contracts upon Expiry/Termination**

- (a) The Company shall:
- i ensure that any contracts entered into by the Company or any Sub-Contractors in relation to the provision of the Services (save for any Assigned Supplier Contracts transferred at the [Commencement Date] (but excluding any replacements of the same)) are capable of being assigned/novated to the Council or New Supplier upon request of the Council without restriction and at no cost to the Council or New Supplier (unless otherwise agreed by the Council in writing in advance of such contract being entered into);
  - ii maintain a current register of all contracts used to deliver the Services during the Term, with such register being submitted to the Council on an annual basis as part of the Annual Service Report;
  - iii ensure the register of contracts established pursuant to clause 15.6.4(a) as a minimum contains the information contained within Schedule 6 (Contracts).
- (b) Six (6) Months (or such other period agreed to by the parties acting reasonably) prior to the Termination Date or Expiry Date (as applicable) the parties shall agree:
- i which of the contracts used in the provision of the Services shall transfer (either by novation or other mechanism) to the Council or New Supplier (the **Transferring Contracts**);
  - ii the costs and a reconciliation of any payments made in advance or arrears in respect of the Transferring Contracts on the basis that the Company shall be responsible for all costs and charges which arise prior to the Termination Date and/or Expiry Date (as applicable) and the Council shall be responsible for all costs and charges which arise after the Termination Date and/or Expiry Date (as applicable).
  - iii the process and timetable for transfer and handover of management responsibilities in respect of the Transferring Contracts together with the provision of relevant documentation and information in respect of issues such as performance and payments to date.
- (c) The Company shall indemnify the Council in respect of all Direct Losses suffered or incurred as a result of non-performance or defective performance by it of its obligations under any Transferring Contract



which occurs prior to the date on which such Transferring Contract has been novated to the Council or the benefit of such Transferring Contract has transferred to the Council.

- (d) The Council shall indemnify the Company in respect of all Direct Losses suffered or incurred as a result of non-performance or defective performance by it of its obligations under any Transferring Contract on or following the date on which such Transferring Contract has been novated to the Council or the benefit of such Transferring Contract has transferred to the Council.

## 16 Council Obligations

16.1 It is agreed that this Agreement is conditional upon the Council providing suitable Council Premises (including a lease or other rights of occupation) to enable the Company to undertake its obligations under this Agreement.

16.2 The Council agrees to:

16.2.1 provide the Council Assets for the provision of the Services on the terms set out in clause 15.4;

16.2.2 transfer to the Company the Transferring Assets set out in Schedule 5 on the terms set out in clause 8.3;

16.2.3 transfer to the Company any Assigned Supplier Contracts in accordance with the provisions of clause 15.6;

16.2.4 provide the Council Services from the Commencement Date in accordance with the service level agreements set out in Schedule 10; and

16.2.5 Permit the Company to use the Council's ICT System on the terms set out in clause 15.3; and

16.2.6 enter into the Premises Licence(s) on or before the Commencement Date.

16.3 The Council shall be responsible for the following:

16.3.1 policy and strategy development for the Services;

16.3.2 strategic planning of Variations in the Services;

16.3.3 with the assistance of the Company to identify changes in statute and Government Guidance which require strategic change to policy and procedure;

16.3.4 enforcement policy, investigation and action;

16.3.5 [setting Council tax and business rates;]

16.3.6 taking and administering of customer payments for chargeable Council services;

16.3.7 setting charges for chargeable Council services; and

16.3.8 with the assistance of the Company, debt recovery for non-payment for Council services provided to third parties.

## 17 Performance Monitoring and Reporting Arrangements

### 17.1 Company Monitoring

The Company shall monitor its performance in the delivery of the Services in accordance with the provisions of Schedule 3.

### 17.2 Council Monitoring

17.2.1 The Council may elect, at its own cost, to undertake its own performance monitoring at any stage during the Term for any purpose, including in order to ensure that the Services are being provided in accordance with the Specification and this Agreement generally. The Company shall assist the Council in such an exercise. The Council shall be entitled to notify the Company of the outcome of the performance monitoring exercise, and the Company shall have due regard to the Council's comments in relation to the future provision of the Services.

17.2.2 Without prejudice to the Council's rights under clause 35.1 and to any other express rights under this Agreement, where the Company has been found to:

- (a) be fraudulent in the submission of monitoring reports or claims for payment under Schedule 3; or
- (b) have submitted at least two materially inaccurate monitoring reports, within a calendar year,

the Council may by notice to the Company increase the level of its monitoring of the Company, and/or (at the Council's option), of the Company's monitoring of its own performance of its obligations under this Agreement in respect of the relevant Service or Services the subject of such fraudulent or materially inaccurate reporting until such time as the Company shall have demonstrated to the reasonable satisfaction of the Council that it will perform (and is capable of performing) its obligations under this Agreement.

17.2.3 For the purposes of clause 17.2, the Council acknowledges that if the Company has otherwise failed to have demonstrated to the reasonable satisfaction of the Council as required by clause 17.2 but:

- (a) if the Company has removed the person or persons responsible for the fraudulent reporting; or
- (b) (under clause 17.2.2), if in the following two calendar years period following the Council notice (if it has not already been established) there have been no further materially inaccurate reports of any kind;
- (c) this shall be regarded as sufficient demonstration that the Company will perform and is capable of performing its obligations.

17.2.4 If the Council issues a notice under clause 17.2, the Company shall bear its own costs and indemnify and keep the Council indemnified at all times from and against all reasonable costs and expenses incurred by or on behalf of the Council in relation to such increased level of monitoring arising due to circumstances under clause 17.2.

### 17.3 Additional reporting requirements

17.3.1 The Company acknowledges the Council's duty to be accountable for the level and quality of Services provided by the Company pursuant to the terms of this Agreement and agrees that, in addition to the provision of information provided pursuant to clause 17.1, that throughout the Term it shall:

- (a) ensure attendance of the Company's Representative at regular (not less than monthly) review meetings with the Council's Representative;
- (b) ensure attendance of a senior executive of the Company at regular (not less than quarterly) review meetings with the Council's Senior Management Team; and
- (c) ensure attendance of the Company's Representative and such other representatives of the Company as appropriate at such meetings of the elected members of the Council as the Council may from time to time reasonably require.

17.3.2 The Company shall provide such financial and performance information as reasonably requested by the Council prior to each review meeting referred to in clause 17.3.1 in addition to the information set out in the Specification at the intervals specified.

### 18 Health and Safety

18.1 The Company shall comply with the requirements of the Health and Safety at Work Act 1974 and any other acts, orders, regulations and codes of practice relating to health and safety, which may apply to Staff and other persons working or visiting the Company in the performance of the Agreement. The Company shall deliver the Services in accordance with all appropriate statutory responsibilities and is responsible at all times for safe working and compliance with employers' responsibilities under the Health and Safety at Work etc. Act 1974 and all relevant regulations and statutory guidance. The Company shall ensure that its staff and plant (including vehicles) do not endanger members of the public or unnecessarily interrupt the free passage of vehicles and pedestrians.

18.2 The Company shall promptly notify the Council of any health and safety hazards which may exist or arise in delivering the Services and which may affect the Company in the performance of the Agreement.

18.3 The Company shall notify the Council immediately in the event of any incident occurring in the performance of the Agreement where that incident causes any personal injury or damage to property which could give rise to personal injury. Any reportable incidences or injuries under the RIDDOR reporting requirements will be reported to the Council Representative not less frequently than quarterly.

18.4 The Company shall not employ methods of service delivery that impair safe working practices, cause damage to private property or inconvenience to residents.

18.5 The Company shall ensure that its health and safety policy statement (as required by the Health and Safety at Work etc. Act 1974) is made available to the Council on request.

## 19 **Disclosure and Barring Service (DBS)**

19.1 The Company shall decide whether a post requires a DBS check and if so shall ensure that before a member of staff is appointed into the post that he or she:

19.1.1 is questioned as to whether he or she has any convictions;

19.1.2 the Company will carry out the most suitable check for the role being carried out; and

19.1.3 a note of the results of such check shall be retained by the Company.

19.2 The Company shall procure that no person who discloses any convictions, or who is found to have any convictions following the results of a DBS check, is employed or engaged by the Company or on the Company's behalf without the Council's Approval (such consent not to be unreasonably withheld or delayed).

19.3 The Company shall procure that the Council is kept advised at all times of any member of Staff who, subsequent to his/her commencement of employment as a member of Staff, receives a conviction or whose previous convictions become known to the Company (or any employee of a sub-contractor involved in the provision of the Services).

## 20 **Data Protection Act**

20.1 The Company shall (and shall procure that any of its Staff involved in the provision of this Agreement) comply with any notification requirements under the Data Protection Act 1998 (DPA) and both Parties will duly observe all their obligations under the DPA which arise in connection with the Agreement.

20.2 Notwithstanding the general obligation in clause 20.1, where the Company is processing personal data (as defined by the DPA) as a data processor for the Council (as defined by the DPA) the Company shall comply with the provisions of Schedule 12 and shall ensure that it has in place appropriate technical and organisational measures to ensure the security of the personal data (and to guard against unauthorised or unlawful processing of the personal data and against accidental loss or destruction of, or damage to, the personal data), as required under the Seventh Data Protection Principle in Schedule 1 to the DPA and shall:

20.2.1 provide the Council with such information as the Council may reasonably require to satisfy itself that the Company is complying with its obligations under the DPA;

20.2.2 ensure that it does not knowingly or negligently do or omit to do anything which places the Council in breach of the Council's obligations under the DPA, and

20.2.3 promptly notify the Council of any breach of the security measures required to be put in place pursuant to clause 20.2.

- 20.3 The provisions of this clause shall apply during the continuance of this Agreement and indefinitely after its expiry or termination.
- 21 **Confidentiality**
- 21.1 Each Party:
- 21.1.1 shall treat all Confidential Information belonging to the other Party as confidential and safeguard it accordingly; and
- 21.1.2 shall not disclose any Confidential Information belonging to the other Party to any other person without the prior written consent of the other Party, except to such persons and to such extent as may be necessary for the performance of the Agreement or except where disclosure is otherwise expressly permitted by the provisions of this Agreement.
- 21.2 The Company shall take all necessary precautions to ensure that all Confidential Information obtained from the Council under or in connection with the Agreement:
- 21.2.1 is given only to such of the Staff and professional advisors or consultants engaged to advise it in connection with the Agreement as is strictly necessary for the performance of the Agreement and only to the extent necessary for the performance of the Agreement;
- 21.2.2 is treated as confidential and not disclosed (without prior Approval) or used by any Staff or such professional advisors or consultants otherwise than for the purposes of the Agreement.
- 21.3 The Company shall ensure that Staff or its professional advisors or consultants are aware of the Company's confidentiality obligations under this Agreement.
- 21.4 The Company shall not use any Confidential Information it receives from the Council other than for the purposes of the Agreement.
- 21.5 The provisions of clauses 21.1 to 21.4 shall not apply to any Confidential Information received by one Party from the other:
- 21.5.1 which is or becomes public knowledge (otherwise than by breach of this clause);
- 21.5.2 which was in the possession of the receiving Party, without restriction as to its disclosure, before receiving it from the disclosing Party;
- 21.5.3 which is received from a third Party who lawfully acquired it and who is under no obligation restricting its disclosure;
- 21.5.4 is independently developed without access to the Confidential Information; or
- 21.5.5 which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the Party making the disclosure, including any requirements for disclosure under the FOIA or the Environmental Information Regulations pursuant to clause 22.

21.6 Nothing in this clause shall prevent the Council:

21.6.1 disclosing any Confidential Information for the purpose of:

- (a) the examination and certification of the Council's accounts; or
- (b) any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Council has used its resources; or

21.6.2 disclosing any Confidential Information obtained from the Company:

- (a) to any government department or any other public body; or
- (b) to any person engaged in providing any services to the Council for any purpose relating to or ancillary to the Agreement,

provided that in disclosing information under clause 21.6.2 the Council discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.

21.7 Nothing in this clause shall prevent either Party from using any techniques, ideas or know-how gained during the performance of the Agreement in the course of its normal business, to the extent that this does not result in a disclosure of Confidential Information or an infringement of Intellectual Property Rights.

21.8 In order to ensure that no unauthorised person gains access to any Confidential Information or any data obtained in the performance of the Agreement, the Company undertakes to maintain security systems approved by the Council. Where necessary to prevent such access, the Council may require the Company to alter any security systems at any time during the Term at the Company's expense.

21.9 The Company will immediately notify the Council of any breach of security in relation to Confidential Information and all data obtained in the performance of the Agreement and will keep a record of such breaches. The Company will use its best endeavours to recover such Confidential Information or data however it may be recorded. The Company will cooperate with the Council in any investigation that the Council considers necessary to undertake as a result of any breach of security in relation to Confidential Information or data.

## 22 **Freedom of Information**

22.1 The Company acknowledges that the Council is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and cooperate with the Council (at the Company's expense) to enable the Council to comply with these Information disclosure requirements.

22.2 The Company shall and shall procure that its sub-contractors shall:

22.2.1 transfer the Request for Information to the Council as soon as practicable after receipt and in any event within two (2) Working Days of receiving a Request for Information;

22.2.2 provide the Council with a copy of all Information in its possession or power in the form that the Council requires within five (5) Working Days (or such other period as the Council may specify) of the Council requesting that Information; and

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

22.3 The Company acknowledges that the Council may, acting in accordance with the Department for Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000, be obliged under the FOIA or the Environmental Information Regulations to disclose Information:

22.3.1 without consulting with the Company, or

22.3.2 following consultation with the Company and having taken its views into account.

22.4 The Company shall ensure that all Information produced in the course of the Agreement or relating to the Agreement is retained for disclosure and shall permit the Council to inspect such records as requested from time to time.

## 23 **Publicity, media and official enquiries**

23.1 Without prejudice to the Council's obligations under the FOIA, neither Party shall make any press announcements or publicise the Agreement or any part thereof in any way, except with the written consent of the other Party.

23.2 Both Parties shall take all reasonable steps to ensure the observance of the provisions of clause 23.1 by all their servants, employees, agents, professional advisors and consultants. The Company shall take all reasonable steps to ensure the observance of the provisions of clause 23.1 by its sub-contractors.

23.3 The provisions of this clause shall apply during the continuance of this Agreement and indefinitely after its expiry or termination.

## 24 **Variation**

24.1 Either Party may as part of the Annual Review or in the event of an urgent matter on giving reasonable written notice to the other Party require changes to the Services (whether by way of the removal of Services, the addition of new Services, or increasing or decreasing the Services or specifying the order in which the Services are to be performed or the locations where the Services are to be provided) for any reasons whatsoever. Such a change is hereinafter called a Variation.

24.2 In the event that the relevant Party is unable within the timescale reasonably directed by the Party to carry out the Variation in accordance with clause 24.1 above, the Parties shall refer the matter to the dispute resolution process as set out in clause 42.

- 24.3 In the event of any Variation of the Specification in accordance with clause 24.1 which would occasion an amendment to the Annual Fee, such amendment to the Annual Fee shall be agreed in writing with the Council and shall be such amount as properly and fairly reflects the nature and extent of the Variation in all the circumstances, and the Variation shall not take effect until the revised Annual Fee is agreed. Failing agreement the matter shall be determined by the disputes resolution process set out in clause 42.
- 24.4 Each party shall provide such information as may be reasonably required to enable such varied Annual Fee to be calculated.
- 24.5 No Variation shall be effective unless it is in writing and signed by the Council and the Company.
- 24.6 Until such time as any Variation is approved by both Parties or determined by the disputes resolution process, the Company shall, unless otherwise agreed in writing, continue to provide the Services as if the request or recommendation for that Variation had not been made.

## 25 Intellectual Property Rights

- 25.1 The Council (for itself and the Members) and the Company acknowledge that:
- 25.1.1 any and all Intellectual Property Rights created wholly by the Company in connection with the provision of the Services (the **Company IPRs**) shall automatically belong to the Company.
- 25.1.2 any and all Intellectual Property Rights created or otherwise owned by or licenced to the Council or other Members in connection with the Business (the **Member IPRs**) shall belong to the Member who created them.
- 25.2 The Company hereby grants to each Member for the time being and for the duration of their Membership of the Company a non-transferable royalty-free licence to use the Company IPRs (as they may be constituted from time to time) to the extent necessary for the purposes of the Services. The Council (for itself and the Members) hereby grants to the Company a non-transferable royalty-free licence (without the right to grant sub-licences) to use the Member IPRs (as they may be constituted from time to time) solely to the extent necessary for the purposes of providing the Services.
- 25.3 All use of the Company IPRs by the Members pursuant to this Deed, including all goodwill arising from such use, shall accrue solely to the benefit of the Company. All use of Member IPRs by the Company pursuant to this Deed, including all goodwill arising from such use, shall accrue solely to the benefit of the respective Member.
- 25.4 The Company and each Member agree that they shall not, without the prior written consent of the other parties to this Deed, assign, transfer, mortgage, charge or deal in any other manner with any of their rights under this clause 25.
- 25.5 The Council shall notify the Company in writing of any claim or demand brought against the Council for infringement or alleged infringement of any Intellectual Property Right in respect of Company IPRs.



- 25.6 The Company shall at its own expense conduct all negotiations and any litigation arising in connection with any claim for breach of Intellectual Property Right in respect of Company IPRs, provided always that the Company:
- 25.6.1 shall consult the Council on all substantive issues which arise during the conduct of such litigation and negotiations;
  - 25.6.2 shall take due and proper account of the interests of the Council; and
  - 25.6.3 shall not settle or compromise any claim without the Council's prior written consent (not to be unreasonably withheld or delayed).
- 25.7 The Council shall at the request of the Company afford to the Company all reasonable assistance for the purpose of contesting any claim or demand made or action brought against the Council or the Company for infringement or alleged infringement of any Intellectual Property Right in connection with the performance of the Agreement and shall be repaid all costs and expenses (including, but not limited to, legal costs and disbursements) incurred in doing so.
- 25.8 The Council shall not make any admissions which may be prejudicial to the defence or settlement of any claim, demand or action for infringement or alleged infringement of any Intellectual Property Right by the Council or the Company in connection with the performance of the Agreement.
- 25.9 If a claim, demand or action for infringement or alleged infringement of any Intellectual Property Right is made in connection with the Agreement or in the reasonable opinion of the Company is likely to be made, the Company may at its own expense and subject to the consent of the Council (not to be unreasonably withheld or delayed) either:
- 25.9.1 modify any or all of the Services without reducing the performance or functionality of the same, or substitute alternative Services of equivalent performance and functionality, so as to avoid the infringement or the alleged infringement, provided that the terms herein shall apply mutatis mutandis to such modified Services or to the substitute Services; or
  - 25.9.2 procure a licence to use and provide the Services, which are the subject of the alleged infringement, on terms which are acceptable to the Council.
- 25.10 The provisions of this clause shall apply during the continuance of this Agreement and indefinitely after its expiry or termination.
- 26 Company assignment and sub-contracting**
- 26.1 The Company shall not assign, novate, sub-contract or in any other way dispose of the Agreement or any part of it without prior Approval. Sub-contracting any part of the Agreement shall not relieve the Company of any obligation or duty attributable to the Company under the Agreement.
- 26.2 The Company shall be responsible for the acts and omissions of its sub-contractors as though they are its own.

26.3 Where the Council has consented to the placing of sub-contracts, copies of each sub-contract shall be sent by the Company to the Council within two (2) Working Days of issue.

27 **Council assignment and novation**

The Council shall be entitled to assign, novate or dispose of its rights and obligations under this Agreement either in whole or part to any contracting authority (as defined in The Public Contracts Regulations 2015) or transfer, assign or novate its rights and obligations where required by Law.

28 **Waiver**

28.1 The failure of either Party to insist upon strict performance of any provision of the Agreement or the failure of either Party to exercise any right or remedy shall not constitute a waiver of that right or remedy and shall not cause a diminution of the obligations established by this Agreement.

28.2 No waiver shall be effective unless it is expressly stated to be a waiver and communicated to the other Party in writing in accordance with the provisions of clause 3.

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

29 **Severability**

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

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

30 **Possible extension of Term**

Subject to satisfactory performance by the Company during the Term, the Council shall be entitled by written notice to the Company given not less than twelve (12) Months prior to the last day of the Term to extend the Agreement for a further period(s) of up to five (5) year(s). The provisions in this Agreement will apply throughout any such extended period.

31 **Indemnity and Required Insurance**

31.1 Neither Party excludes or limits liability to the other Party for death or personal injury caused by its negligence.

31.2 In addition to any other insurances as may be required by law, the Company shall ensure that the following insurance cover is effected and maintained for at least the sums specified and notified annually to the Council in respect of:

31.2.1 any property held by it for the purposes of the agreement;

- 31.2.2 employer's liability minimum £[                    ];
- 31.2.3 Fiduciary insurance minimum £[                    ];
- 31.2.4 [professional indemnity insurance minimum £[                    ];] and
- 31.2.5 public liability minimum £[                    ].
- 31.3 The Company shall maintain insurance in the sum of [£25 million] in respect of personal injury to or the death of any person under a contract of service with the Company and arising out of an incident occurring during the course of such person's employment.
- 31.4 The Company shall produce to the Council, on request, copies of all insurance policies referred to in this clause 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.
- 31.5 If, for whatever reason, the Company fails to give effect to and maintain the insurances required by this Agreement the Council may make alternative arrangements to protect its interests and may recover the costs of such arrangements from the Company.
- 31.6 The Company shall ensure that all relevant insurance policies shall have the interest of the Council endorsed upon them or shall otherwise expressly by their terms confer their benefits upon the Council.
- 31.7 The Company shall use its reasonable endeavours to undertake the Services in such a way as to minimise third party claims for compensation damages or otherwise or any legal liability arising in connection with or incidental to the carrying out of the Services through the negligence default or neglect of the Company.
- 31.8 Subject to clauses 31.9 and 31.10 the Company shall indemnify the Council in respect of any losses, costs, claims, proceedings, damages and other liabilities incurred by the Council and directly arising from the performance of the Services and from actions or omissions of the Company in relation to the terms of this agreement and to the performance of the Services.
- 31.9 The Company is not responsible for and shall not indemnify the Council for any losses to the extent that such losses are caused by any material breach by the Council of any of its obligations under this Agreement.
- 31.10 Subject always to clause 31.1, the Company's liability to the Council under clause 31.8 shall not exceed the level of any insurance payment received by the Company in respect of the losses incurred by the Council under clause 31.8.

## 32 Warranties and representations

- 32.1 Each Party warrants and represents that they have full capacity and all necessary consents to enter into this Agreement and that this Agreement is executed by a duly authorised representative of that Party.
- 32.2 The Company warrants and represents that it is not in default in the payment of any due and payable taxes or in the filing, registration or recording of any document or under any legal or statutory obligation or requirement which default might have a material adverse

effect on its business, assets or financial clause or its ability to observe or perform its obligations under this Agreement.

### 33 **TUPE provisions on commencement of Agreement**

33.1 The Parties acknowledge that delivery of the Services by the Company from the Commencement Date shall with respect to each of the Council Transferring Employees be a relevant transfer for the purposes of the TUPE Regulations and the Parties agree that as a consequence of that relevant transfer the contracts of employment made between Council and the Council Transferring Employees (save insofar as such contracts relate to benefits for old age, invalidity or survivors under occupational pension scheme) shall have effect from and after the Commencement Date as if originally made between Company and the Council Transferring Employees.

33.2 Upon the transfer of the Council Transferring Employees to the employment of the Company, it is agreed that the Council will employ those employees identified under the heading "Joint Employees" in Schedule 8 together with such employees recruited pursuant to the provisions of clause 34.10.2 (Joint Employment) jointly with the Company for all purposes save for the performance of those elements of their role (including through a delegation under Section 101 of the Local Government Act 1972) in respect of which they are obliged by legislation to be employed by the Council (the **Statutory Functions**), in relation to which the Council will be the sole employer of the Joint Employees.

33.3 For all purposes save for the performance of the Statutory Functions and as expressly referred to in clause 34.10 (Joint Employment) below the Council appoints the Company and the Company will act as agent for the Council.

33.4 The Council warrants that the information in respect of the Council Transferring Employees as set out (under the heading **Council Transferring Employees**) in Schedule 8 and all other information relating to the Council Transferring Employees disclosed to the Company pursuant to regulation 11 of the TUPE Regulations is accurate and complete.

33.5 The Council shall indemnify the Company from and against each and every cost claim, liability expense or demand which is properly and reasonably incurred by the Company in connection with and as a result of any action or omission by the Council prior to the Commencement Date in connection with any matter relating to or arising out of:

33.5.1 the Council's breach of its obligations under clauses 33.4;

33.5.2 anything done or omitted to be done by or on behalf of the Council in respect of any Council Transferring Employee up to the Commencement Date which is deemed to have been done or omitted to be done by or on behalf of the Company in accordance with the TUPE Regulations;

33.5.3 any claim by or on behalf of all or any of the Council Transferring Employees arising out of any failure by the Council to comply with its legal obligations in relation to information and consultation pursuant to regulations 13 and 14 of the TUPE Regulations save insofar as any such failure results from any failure by the Company to comply with its obligations pursuant to regulation 13 (4) of the TUPE Regulations; and

33.5.4 any claim or demand by any Joint Employee arising out of any such employee's performance of the Statutory Functions whilst employed by the Council (save where such claim or demand arises out of any acts, fault or omission of the Company).

33.6 The Council shall indemnify the Company against all claims, liabilities, costs, demands (including all expenses associated therewith) made within twelve (12) Months of the Commencement Date by or in relation to each and every employee or former employee of the Council who was prior to the Commencement Date employed by the Council in the delivery of the Services who is not a Council Transferring Employee in respect of whom it is alleged their employment or any liabilities have transferred to the Company pursuant to the TUPE Regulations being any claim, liability, cost and demand arising out of:

33.6.1 the employment or termination of employment of such a person prior to the Commencement Date; or

33.6.2 the employment or any termination of employment of such a person after the Commencement Date (excluding claims for discrimination) by the Company provided always that the Company terminates the employment of such person within twenty (20) Working Days of first becoming aware of such an allegation, and subject always to the Company using its reasonable endeavours to identify and offer any suitable alternative employment for such person; or

33.6.3 any claim by or on behalf of any such person arising out of any failure to comply with regulations 13 and 14 of the TUPE Regulations,

provided that in the event of any such claim being made the Company shall forthwith notify the Council and no agreement or settlement shall be reached or entered into by the Company without the prior written consent of the Council such consent not to be unreasonably withheld or delayed.

33.7 The Company shall indemnify and keep the Council indemnified from and against each and every cost, claim, liability, expense or demand which is properly and reasonably incurred by the Council in connection with or as the result of any act or omission by the Company on or after the Commencement Date and up to and including the Termination Date in connection with any matter relating to the Council Transferring Employees as follows:

33.7.1 any claim by or on behalf of all or any of the Council Transferring Employee that the transfer involves or would involve a substantial change in working conditions to the material detriment of such a person;

33.7.2 the employment or termination of employment of any Council Transferring Employee by the Company up to and including the Termination Date;

33.7.3 anything done or omitted to be done by or on behalf of the Company in respect of any Council Transferring Employee up to and including the Termination Date which is deemed to have been done or omitted to be done by or on behalf of the Council or any New Supplier in accordance with the TUPE Regulations;

- 33.7.4 any failure by the Company to pay any of the Council Transferring Employees any remuneration due or provide any benefits in respect of the period prior to Termination Date arising out of his employment by the Company;
- 33.7.5 any claim by or on behalf of all or any of the Council Transferring Employees arising out of the Company's failure to comply with its legal obligations in relation to information and consultation pursuant to regulations 13(4).
- 33.8 The Company shall ensure that all Council Transferring Employees are offered Appropriate Pension Provision with effect from the Commencement Date.
- 33.9 The Company and the Council shall comply with the Best Value Authorities Staff Transfers (Pensions) Direction 2007 (the **Direction**) in respect of Council Transferring Employees and to the extent necessary to give effect to the Council Transferring Employees to enforce their rights under this clause 33 in accordance with this Direction.
- 33.10 **Employer Status under the Local Government Pension Scheme**
- The Company shall enter into the Admission Agreements to have effect from and including the Commencement Date.
- 33.11 The Company shall indemnify and keep indemnified the Council from and against all Direct Losses suffered or incurred by it or them, which arise from any breach by the Company of the terms of the Admission Agreements, to the extent that such liability arises before or as a result of the termination or expiry of this Agreement.
- 33.12 **Bond [ Drafting will be considered when the position in relation to Gloucestershire is known]**
- 33.13 **Surpluses and liabilities accrued after the Commencement Date**
- 33.13.1 The Company and the Council shall use best endeavours to procure that the Administering Authority instructs the Fund's actuary to confirm (and where necessary certify) that:
- (a) from the Commencement Date the Company employer contribution rate payable to the appropriate Fund shall be the Initial Contribution Rate;
  - (b) at each subsequent triennial valuation of the Fund by the Fund's actuary (or any interim valuation and/or revision of the rates and adjustments certificate applying to the Company in relation to the Admission Agreement) the employer contribution rate payable to the appropriate Fund by the Company (as identified by reference to the employer contribution rates expressed to be payable in respect of the Council Transferring Employees in the definition of Initial Contribution Rate) shall be assessed on the assumption that any individual adjustment specified in respect of the relevant Member in a rates and adjustment certificate issued by the Fund's actuary in accordance with the LGPS Regulations will also apply to the Company. Where the employer contribution rate payable by the Company changes as a result of that valuation of the Fund, the Company shall inform the Council and the



Council shall adjust the Annual Fee by an amount equal to the change in the employer contributions payable.

- 33.13.2 If notice is given by the Company or the Council to the other party that it is no longer content for the arrangement described in clause 33.13.1 to continue to apply or in circumstances where the Administering Authority determines that the arrangement in clause 33.11.1 shall no longer continue, then it shall cease to apply with effect from such future date as may be agreed between the Company and the Council, or as determined by the Administering Authority, and the Company and the Council shall work together, in good faith, to agree a replacement mechanism to allocate responsibility for variance in the employer contribution rate payable by the Company between the Council and the Company.
- 33.13.3 Except where the Council has given its written consent in relation to the proposed Company's actions falling within (a) to (g) below (such consent not to be unreasonably withheld or delayed) and the Company has provided the Council with a sustainable business case which justifies and supports the planned course of action, whether that case is presented as a one-off request or forms part of the Company's annual budget setting, the Company is responsible for and is not reimbursed under clause 33.13.5 for any contributions, payments or sums reasonably and properly payable in respect of the Council Transferring Employees during the term of this Agreement or on termination of the relevant Admission Agreement and/or this Agreement relating to the following:
- (a) any employer contributions or payments relating to the costs of early retirement benefits arising on redundancy or as a result of business efficiency under Regulation 30(7) of the LGPS Regulations or otherwise other than where the Council has entered into a contractual commitment to make the individual Transferring Council Employee redundant before the Commencement Date or on termination or expiry of this Agreement;
  - (b) the costs of early retirement benefits made with the Company's consent;
  - (c) any contributions or payment to the Fund in respect of benefits on grounds of ill-health or infirmity of mind or body and any associated costs save where the Council Transferring Employee is certified on long term sickness absence on the date of the Commencement Date, where the cost of those benefits is apportioned by reference to the Council Transferring Employees' length of pensionable service and the Council is responsible for the proportion of the cost relating to the period of pensionable service prior to the date of the Commencement Date and the Company is responsible for the proportion relating to the period of pensionable service after the Commencement Date. The Company uses reasonable endeavours to mitigate such costs including taking all reasonable measures to ensure that employees on long term sick leave return to the work place where reasonably practicable;
  - (d) the payments or costs of enhanced or unreduced benefits arising as a consequence of the exercise of a discretion or the grant of any consent

by the Company under the LGPS Regulations including without limitation under Regulation 31 of the LGPS Regulations or otherwise;

- (e) increases in the Council Transferring Employees' Pensionable Pay which exceed the greater of:
  - i the salary increases allowed for in the actuarial assumptions by the Fund's actuary in the most recent on-going funding valuation of the Fund;
  - ii in respect of any Council Transferring Employees to whom such increase applies, the pay scale and allowance rate prescribed from time to time by the National Joint Council for Local Government Services; or
- (f) any employer contributions or payments relating to the costs of flexible retirement where the actuarial reduction is waived in whole or in part or a cost neutral reduction is not applied with the consent of the Company;
- (g) to the extent not covered above, any other costs or payments arising out of or in connection with the exercise of any discretion or the grant of any consent under the LGPS Regulations by the Company where a member does not have an absolute entitlement to that benefit under the LGPS.

33.13.4 Where the Administering Authority obtains an actuarial valuation under Regulation 64(1) of the LGPS Regulations or on the Company ceasing to be an Admission Body and the Company is required to pay any revised contribution or payment by the Administering Authority in respect of any funding deficit which relates to the Council Transferring Employees then to the extent that such funding deficit is not attributable to any of the matters set out in clause 33.13.3 or any failure or delay in the payment of employer's contributions by the Company or failure or neglect or delay by the Company to ensure payment of employees' contributions (the **Exit Contribution**) such contribution or payment paid by the Company is reimbursed under clause 33.13.5. **[DN: Is the Council satisfied with the conditions in which exit liability will remain with the Company, i.e. its failure or default or does the Council want to see similar provision as that provided under the revised clause 33.13.2.]**

**[DN: The Council may wish to explore alternative means of recharging or retaining any Exit Contribution e.g. subsuming any payment into the calculation of each respective Council's notional fund of the LGPS. Will Members be responsible for any share of exit contribution where it relates to their historic staff?]**

33.13.5 Where an Exit Contribution is paid by the Company, the Company shall immediately invoice the Council and the Council shall adjust the Annual Fee by an amount equal to the Exit Contribution.

33.13.6 For the purposes of calculating the Exit Contribution, any part of an Exit Contribution which is attributable to any matters for which the Company is responsible for under clause 33.13.3 shall be disregarded.



33.14 The Company shall award benefits (where permitted) to the Council Transferring Employees under the LGPS Regulations in circumstances where the Council Transferring Employees would have received such benefits had they still been employed by the Council.

33.15 The Council shall have a right to set off against any payments due to the Company an amount equal to any overdue employer and employee contributions and other payments (and interest payable under the LGPS Regulations) due from the Company (as applicable) under the relevant Admission Agreement. Where the Council exercises any right of set off under this clause 33.15, it shall make the relevant payment direct to the applicable Administering Authority.

**33.16 Company Pension Scheme**

Where the Company is prevented from offering all or some of the Council Transferring Employees membership or continued membership of the LGPS, the Company shall offer the Council Transferring Employees membership of an occupational pension scheme with effect from the Commencement Date, or as appropriate, the date on which LGPS admission ceases. Such an occupational pension scheme must be certified by the GAD as providing benefits that are broadly comparable to those provided by the LGPS, and the Company shall produce evidence of compliance to the Council prior to the date of the Commencement Date.

33.17 The Council shall liaise with the Fund's actuary to determine the terms for bulk transfers from the LGPS to the Company's scheme following the Commencement Date, or as appropriate when the relevant Admission Agreement ceases, and any subsequent bulk transfers on termination or expiry of this Agreement.

33.18 The Company shall:

33.18.1 maintain such documents and information as will be reasonably required to manage the pension rights of and aspects of any onward transfer of any person engaged or employed by the Company in the provision of the Services on the expiry or termination of this Agreement (including without limitation identification of the Council Transferring Employees);

33.18.2 promptly provide to the Council such documents and information mentioned in clause 33.18.1 which the Council may reasonably request in advance of the expiry or termination of this Agreement; and

33.18.3 fully cooperate (and procure that the trustees of the Company's scheme shall fully cooperate) with the reasonable requests of the Council relating to any administrative tasks necessary to deal with the pension rights of and aspects of any onward transfer of any person engaged or employed by the Company in the provision of the Services on expiry or termination of the Agreement.

**33.19 Transfer to another Employer**

Save on expiry or termination of this Agreement, if the employment of any Transferring Council Employee transfers to another employer (by way of a transfer under TUPE) the Company shall:

- 33.19.1 consult with and inform those Council Transferring Employees of the pension provisions relating to that transfer; and
- 33.19.2 procure that the employer to which the Council Transferring Employees are transferred (the **New Employer**) complies with the provisions of clause 33 and references to Commencement Date will become references to the date of the transfer to the New Employer and references to Council Transferring Employees will become references to the Council Transferring Employees so transferred to the New Employer.

### **33.20 Pension Issues on Expiry or Termination**

The Company shall:

- 33.20.1 maintain such documents and information as will be reasonably required to manage the pension rights of and aspects of any onward transfer of any person engaged or employed by the Company in the provision of the Services on the expiry or termination of this Agreement (including without limitation identification of the Council Transferring Employees);
- 33.20.2 promptly provide to the Council such documents and information mentioned in clause 33.20.1 which the Council or the Administering Authority may reasonably request in advance of the expiry or termination of this Agreement; and
- 33.20.3 fully co-operate (and procure that the trustees of the Company Scheme shall fully co-operate) with the reasonable requests of the Council or the Administering Authority relating to any administrative tasks necessary to deal with the pension rights of and aspects of any onward transfer of any person engaged or employed by the Company in the provision of the Services on the expiry or termination of this Agreement.

### **33.21 Compliance with Part 1 Pensions Act 2008**

The Company shall comply with its employer duties and requirements from time to time under the Pensions Act 2008 and associated regulations.

### **34 TUPE provisions on cessation of Agreement**

- 34.1 Both of the Parties acknowledge that it is their intention, subject to the Law at the date of cessation of the Services, that on the cessation of the delivery of the Services and the commencement of the Services which are the same or similar to the Services (or any part of them) by the Council or any New Supplier shall with respect to each of the Termination Employees be treated as a relevant transfer for the purposes of the TUPE Regulations and the Parties agree that as a consequence of that relevant transfer the contracts of employment made between the Company (or the Council and the Company jointly, as applicable) and the Termination Employees (save insofar as such contracts relate to benefits for old age, invalidity or survivors under occupational pension scheme) shall have effect from and after the Commencement Date as if originally made between the Council/New Supplier and the Termination Employees.
- 34.2 The Parties will, in good faith and following consultation with Staff and any appropriate representatives within the meaning of TUPE, attempt to agree which of the Staff will be

deemed to transfer to the Council or any New Supplier in accordance with clause 34.1 based on the disaggregation criteria defined in clause 34.3 (**Disaggregation Criteria**) who shall be, for the purposes of this Agreement, the Termination Employees, with the remainder of such employees remaining with the Company. If the Parties have not agreed the identity of the Termination Employees at least three (3) Months prior to the Termination Date then the Parties will resolve the matter in accordance with the dispute resolution procedure set out in clause 42.

34.3 The Disaggregation Criteria used to determine who shall be the Termination Employees shall be:

34.3.1 the relative proportion of work undertaken for the Company and the Council in the twelve (12) Month period immediately prior to the Termination Date;

34.3.2 any preference stated by the Staff;

34.3.3 the relative costs involved in terminating and/or transferring the Staff, so as to ensure a fair sharing of the costs between the Parties; and

34.3.4 the skills of the Staff and requirements after the Termination Date of the Council, the Company and/or any New Supplier, so as to ensure a balance of skills and continuity of service for both Parties after the Termination Date.

34.4 The Company shall indemnify the Council or any New Supplier from and against each and every cost claim, liability expense or demand which is properly and reasonably incurred by the Council or any New Supplier in connection with and as a result of any action or omission by the Company up to and including the Termination Date in connection with any matter relating to or arising out of:

34.4.1 arising from the Company's breach of its obligations under clause 34.2 or a failure to provide accurate information to the Council in the course of that process and for the purposes of the application of the Disaggregation Criteria;

34.4.2 the employment or termination of employment of any Termination Employee by the Company up to and including the Termination Date;

34.4.3 anything done or omitted to be done by or on behalf of the Company in respect of any Termination Employee up to and including the Termination Date which is deemed to have been done or omitted to be done by or on behalf of the Council or any New Supplier in accordance with the TUPE Regulations;

34.4.4 any failure by the Company to pay any of the Termination Employees any remuneration due or provide any benefits in respect of the period prior to Termination Date;

34.4.5 any claim by or on behalf of all or any of the Termination Employees arising out of any failure by the Company to comply with its legal obligations in relation to information and consultation pursuant to regulations 13 and 14 of the TUPE Regulations save insofar as any such failure results from any failure by the Council or any New Supplier to comply with its obligations pursuant to regulation 13 (4) of the TUPE Regulations.

- 34.5 The Company shall indemnify the Council or any New Supplier from and against all claims, liabilities, costs, demands (including all expenses associated therewith) made within twelve (12) Months of the Termination Date by or in relation to each and every employee or former employee of the Company who is not a Termination Employee and who was prior to the Termination Date employed by the Company in the provision of the Services in respect of whom it is alleged their employment or any liabilities have transferred to the Council or any New Supplier pursuant to the TUPE Regulations being any claim, liability, cost and demand arising out of:
- 34.5.1 the employment or termination of employment of such a person up to and including the Termination Date; or
  - 34.5.2 the employment or any termination of employment of such a person after the Termination Date (excluding claims for discrimination by The Council) by the Council or any New Supplier provided always that the Council or any New Supplier terminates the employment of such person within twenty Working Days (20) Working Days of first becoming aware of such an allegation, and subject always to the Council or any New Supplier using its reasonable endeavours to identify and offer any suitable alternative employment for such person; or
  - 34.5.3 any claim by or on behalf of any such person arising out of any failure to comply with regulations 13 and 14 of the TUPE Regulations,
- provided that in the event of any such claim being made the Council or any New Supplier shall forthwith notify the Company and no agreement or settlement shall be reached or entered into by the Council or any New Supplier without the prior written consent of the Company such consent not to be unreasonably withheld or delayed.
- 34.6 The Council shall indemnify the Company from and against each and every cost, claim, liability, expense or demand which is properly and reasonably incurred by the Company in connection with or as the result of any act or omission by the Council or the New Supplier after the Termination Date in connection with any matter relating to the Termination Employees as follows:
- 34.6.1 the employment or termination of employment of any Termination Employee by the Council or any New Supplier after the Termination Date;
  - 34.6.2 any claim by or on behalf of all or any of the Termination Staff that the transfer involves or would involve a substantial change in working conditions to the material detriment of such a person;
  - 34.6.3 any claim by or on behalf of all or any of the Termination Employees arising out of the Council's or any New Supplier's failure to comply with its legal obligations in relation to information and consultation pursuant to regulations 13(4).
- 34.7 On the Termination Date, the Parties shall co-operate to manage the pension aspects of any onward transfer of any Termination Employees to The Council or any New Supplier.
- 34.8 The Company shall promptly provide to the respective Funds and to the Council or any New Supplier such documents and information as may reasonably be required in advance of the Termination Date and shall fully co-operate with the reasonable requests of the respective Funds and the Council or any New Supplier relating to any administrative tasks

necessary to deal with the pension rights of and aspects of any onward transfer of any Termination Employees who are members of the respective Funds on the Termination Date.

34.9 The Parties agree to use all reasonable endeavours to ensure that the relevant Administering Authority instructs the actuary appointed to the respective Fund to certify that any payments payable to the respective Funds by the Council or any New Supplier in respect of the Termination Employees who are members of the respective Fund shall be calculated on the assumption that as at the Termination Date an actuarial valuation of the assets and liabilities under the respective Fund relating to the Termination Employees' membership prior to the Termination Date are determined in accordance with the most recent actuarial valuation of the respective Funds before the Termination Date (updated to the Termination Date as necessary in the opinion of the actuary).

#### 34.10 Joint Employment

**[DN: Include drafting to deal with the payment mechanism. Consider the payment to be paid to the Joint Employees for performing their Statutory Functions versus the payment for performing the rest of their duties under their JE contract. Consider how each Council will contribute .]**

34.10.1 The Parties agree that in relation to the Joint Employees, the Council will have sole responsibility for the management, direction, instruction and appraisal of the performance of the Statutory Functions and will, in good faith, cooperate and assist the Company in the handling of any disciplinary or grievance matters arising therefrom.

34.10.2 Neither the Company nor the Council will dismiss any Joint Employee or recruit a replacement for any Joint Employee whose employment terminates for any reason or recruit any additional employee who is to be employed jointly by the Council and the Company without the agreement of the other (such agreement not to be unreasonably withheld or delayed).

34.10.3 The Company agrees that the Joint Employees will be permitted to perform the Statutory Functions at all times required by the Council.

34.10.4 In circumstances where the termination by the Council of the Joint Employee's obligation to perform the Statutory Functions gives rise to the redundancy of the Joint Employee (within the definition set out in section 139 of the Employment Rights Act 1996) the Council will indemnify the Company for any statutory and contractual redundancy costs payable to the Joint Employee, subject to the Company having used all reasonable endeavours to redeploy the Joint Employee. The Parties will co-operate in order that the obligations on both employers with respect to any potential redundancy process are met fully, including, for the avoidance of doubt, where Joint Employees are pooled with Company employees giving rise to a potential right to seek alternative employment or a re-deployment opportunities in the Council as well as the Company's Organisation.

34.10.5 In circumstances where the Council ceases to be required to be an employer of the Joint Employees, the Parties agree and acknowledge that the Joint Employee will continue in the sole employment of the Company. For the

avoidance of doubt, where such cessation of requirement implies the activities delivered by the Joint Employees are subsequently carried out by the Company there may be a Relevant Transfer in relation to the Council's employment of the Joint Employee.

**35 Termination on change of control and insolvency**

35.1 The Council may terminate the Agreement by notice in writing with immediate effect where:

35.1.1 the Company undergoes a change of control, within the meaning of section 1124 of the Corporation Taxes Act 2010, which impacts adversely and materially on the performance of the Agreement; or

35.1.2 if the Company passes a resolution for winding up or dissolution (otherwise than for the purposes of and followed by an amalgamation or reconstruction) or an application is made for, or any meeting of its directors or members resolves to make an application for an administration order in relation to it or any Party gives or files notice of intention to appoint an administrator of it or such an administrator is appointed, or the court makes a winding-up order, or the company makes a composition or arrangement with its creditors, or an administrative receiver, receiver, manager or supervisor is appointed by a creditor or by the court, or possession is taken of any of its property under the terms of a fixed or floating charge; or

35.1.3 the Company is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986, or;

35.1.4 any similar event occurs under the law of any other jurisdiction within the United Kingdom.

35.2 The Council may only exercise its right under clause 35.1.1 within six (6) Months after a change of control occurs and shall not be permitted to do so where it has agreed in advance to the particular change of control that occurs. The Company shall notify the Council immediately when any change of control occurs.

**36 Termination on default**

36.1 The Parties may terminate the Agreement, or terminate the provision of any part of the Services by written notice to the Company or the Company's Representative or the Council or Council Representative with immediate effect if the Company or Council as appropriate commits a Default and if:

36.1.1 the Company or Council as relevant has not remedied the Default to the satisfaction of the other Party within twenty five (25) Working Days, or such other period as may be specified by the non-defaulting Party, after issue of a written notice specifying the Default and requesting it to be remedied; or

36.1.2 the Default is not capable of remedy; or

36.1.3 the Default is a fundamental breach of the Agreement.

36.2 In the event that through any Default of a Party, data transmitted or processed in connection with the Agreement is either lost or sufficiently degraded as to be unusable, the defaulting Party shall be liable for the cost of reconstitution of that data and shall provide a full credit in respect of any charge levied for its transmission and shall reimburse the non-defaulting Party for any costs charged in connection with such Default.

36.3 The Company may terminate this Agreement if the Council is in material breach of its obligations to pay undisputed charges by giving the Council sixty (60) Working Days' notice specifying the breach and requiring its remedy.

### 37 **Consequences of termination**

37.1 Upon termination of this Agreement whether at the expiration of the Term or otherwise the Company and the Council shall:

37.1.1 develop and agree a mutually beneficial exit strategy to enable the Council to continue to meet its obligation to provide the Services with minimum disruption to its customers;

37.1.2 agree how the Company Assets and Council Assets used by the Company in the provision of the Services shall be disaggregated or divided between the Council and the Company;

37.1.3 co-operate in preparing a schedule of all Company Assets and agreeing how such Company Assets shall be divided between the Company and the Council or in the event of sale or disposal how any proceeds shall be divided between the Company and the Council in a fair and equitable manner;

37.1.4 co-operate in terminating, modifying, restructuring, assigning or novating contractual arrangements entered in to and properly execute any documents necessary in a timely manner.

37.2 Upon termination of this Agreement whether at the expiration of the Term or otherwise the Company shall:

37.2.1 ensure that any information reasonably requested by the Council concerning the provision of the Services is provided promptly within timescales to be agreed between the Parties;

37.2.2 provide all reasonable assistance to the Council to enable the Council (or, as applicable, a New Supplier) to be in a position to continue to provide the Services; and

37.2.3 deliver to the Council within timescales to be agreed between the Parties any data held by the Company which relates to the provision of the Services.

### 38 **Disruption**

38.1 The Company shall take reasonable care to ensure that in the execution of the Agreement it does not disrupt the operations of the Council, its employees or any other Company employed by the Council.

- 38.2 The Company shall immediately inform the Council of any actual or potential industrial action, whether such action be by their own employees or others, which affects or might affect its ability at any time to perform its obligations under the Agreement.
- 38.3 In the event of industrial action by the Staff or the Company's suppliers the Company shall seek the Council's Approval to its proposals for the continuance of the Company's performance of the Services in accordance with its obligations under the Agreement.
- 38.4 If the Company's proposals referred to in clause 38.3 are considered insufficient or unacceptable by the Council, then the Agreement may be terminated by the Council by notice in writing with immediate effect.
- 38.5 If the Company is temporarily unable to fulfil the requirements of the Agreement owing to disruption of normal business by direction of the Council, an appropriate allowance by way of extension of time will be approved by the Council. In addition, the Council will reimburse any additional expense incurred by the Company in fulfilling the provisions of the Agreement as a result of such disruption.

### 39 **Recovery upon termination**

- 39.1 Termination or expiry of the Agreement shall be without prejudice to any rights and remedies of the Company and the Council accrued before such termination or expiration and nothing in the Agreement shall prejudice the right of either Party to recover any amount outstanding at such termination or expiry.
- 39.2 At the end of the Term (and howsoever arising) the Company shall forthwith deliver to the Council upon request all the Council Assets (including but not limited to materials, documents, information, access keys) relating to the Agreement in its possession or under its control or in the possession or under the control of any permitted suppliers or sub-contractors and in default of compliance with this clause the Council may recover possession thereof and the Company grants a licence to the Council or its appointed agents to enter (for the purposes of such recovery) any premises of the Company or its permitted suppliers or sub-contractors where any such items may be held.
- 39.3 At the end of the Term (howsoever arising) and/or after the Term the Company provide assistance to the Council and any New Supplier appointed by the Council to continue or take over the performance of the Agreement in order to ensure an effective handover of all work then in progress. Where the end of Term arises due to the Company's default, the Company shall provide such assistance free of charge. Otherwise the Council shall pay the Company's reasonable costs of providing the assistance and the Company shall take all reasonable steps to mitigate such costs.
- 39.4 The provisions of this clause shall apply during the continuance of this Agreement and indefinitely after its termination.

### 40 **Force Majeure**

- 40.1 Neither Party shall be liable to the other Party for any delay in or failure to perform its obligations under the Agreement (other than a payment of money) if such delay or failure results from a Force Majeure event. Notwithstanding the foregoing, each Party shall use all reasonable endeavours to continue to perform its obligations hereunder for the duration of such Force Majeure event. However, if any such event prevents either Party from



performing all of its obligations under the Agreement for a period in excess of six (6) Months, either Party may terminate the Agreement by notice in writing with immediate effect.

- 40.2 Any failure or delay by the Company in performing its obligations under the Agreement which results from any failure or delay by an agent, sub-contractor or supplier shall be regarded as due to Force Majeure only if that agent, sub-contractor or supplier is itself impeded by Force Majeure from complying with an obligation to the Company.
- 40.3 Clause 40 does not affect the Council's rights under clause 39.4.
- 40.4 If either of the Parties becomes aware of circumstances of Force Majeure which give rise to or which are likely to give rise to any such failure or delay on its part as described in clause 40.3 it shall forthwith notify the other by the most expeditious method then available and shall inform the other of the period which it is estimated that such failure or delay shall continue.
- 40.5 For the avoidance of doubt it is hereby expressly declared that the only events which shall afford relief from liability for failure or delay of performance of the Agreement shall be any event qualifying for Force Majeure hereunder.

#### 41 **Annual Service Report and review**

- 41.1 This Agreement shall be reviewed annually in [October in each Contract Year] in order that any Variations to the Services or any part of the Services required by the Council or recommended by the Company can be adequately planned and budgeted in time for the Council's budget setting process and the beginning of the next Financial Year.
- 41.2 Without prejudice to any other provision in the Agreement the Company shall at its own cost, provide to the Council an annual written report (the Annual Service Report) to the reasonable satisfaction of the Council. The Annual Service Report (which may be incorporated into the Business Plan) shall include:
- 41.2.1 key business activities for the year;
  - 41.2.2 performance targets for the year [as set out in Schedule 1 [OR 2?]];
  - 41.2.3 [Updated Annual Service Plan, the first plan to be produced and agreed between the Parties on or before the end of the first Contract Year;]
  - 41.2.4 performance targets for the year as set out in the Communications Protocol;
  - 41.2.5 register of all contracts used to deliver the Services;
  - 41.2.6 a report on how the Service has contributed to the Council's wider corporate objectives.
- 41.3 The Company shall upon a written request from the Council promptly provide such written evidence or other supporting information as the Council may reasonably require to verify and audit the information and other material contained in the Annual Service Report.

**42 Dispute Resolution**

42.1 In the event of a dispute between the Council in relation to the Parties:

42.1.1 firstly, the Parties shall use all reasonable endeavours to attempt to settle the issue for a period of two weeks from the date on which the matter giving rise to the dispute was first discussed; and if the matter is still unresolved;

42.1.2 secondly, each Party shall nominate a representative to decide the matter on its behalf and these representatives shall use all reasonable endeavours to attempt to settle the issue for a period of two weeks.

42.2 If at the end of such process the dispute is still unresolved either Party may:

42.2.1 propose that the matter be resolved before a single arbitrator, and if both Parties so agree, an independent single arbitrator (whose costs shall be shared equally by the Parties) will be appointed to deliver a definitive resolution which will bind the parties; and/or

42.2.2 either Party may commence proceedings in the court.

**43 Contracts (Rights of Third Parties) Act 1999**

Notwithstanding any other provisions of this Agreement nothing in this Agreement confers or purports to confer any right to enforce any of its terms on any person who is not a party to it.

**44 Governing Law**

This Agreement shall be governed by and interpreted in accordance with English law and the Parties submit to the jurisdiction of the courts of England.

**45 Variation**

No amendment or variation to this Agreement will be effective unless it is in writing and signed by or on behalf each of the Parties.

**46 Further Assurance**

Each Party agrees that it will from time to time execute and deliver such further instruments and take such further action as may be reasonably required to accomplish the purpose of this Agreement.

**47 Entire Agreement**

47.1 This Agreement constitutes the entire agreement between the Parties relating to the provision of the Services by the Company to the Council and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the Parties and there are no warranties, representations or other agreements between the Parties in connection with such provision except as specifically set forth in this Agreement.

47.2 Each of the Parties hereby acknowledges that in entering into this Agreement it has not relied on any representation or warranty save as expressly set out in this Agreement or in any document referred to in this Agreement.

48 **No Partnership**

This Agreement shall not constitute a partnership between the Parties.

This Agreement has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.