



NHS EDUCATION FOR SCOTLAND

CONDITIONS FOR THE PROVISION OF SERVICES

Reviewed September 2018

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1. DEFINED TERMS AND INTERPRETATION

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

“Authority”	Means NHS EDUCATION FOR SCOTLAND, established as a Special Health Board by the NHS Education for Scotland Order 2002, Scottish Statutory Instrument 2002, No 103, and having a place of business at 1 st , 2 nd and 3 rd Floors, Westport 102, Westport, Edinburgh, EH3 9DN (“NES”)
“Authority Manager”	means the individual named by the Authority in the Invitation to Tender as the “Manager of the Service”;
“Commencement Date”	means the date upon which the Contract shall come into effect,
“Community Benefits”	means any activity, obligations and/or undertakings identified as community benefits or their equivalent in the Specification or otherwise in the Contract;
“Confidential Information”	means (a) all information relating to the identity, condition or medical history of any person or other personal information where disclosure is prohibited in terms of the DPA; (b) all information the disclosure of which would or would be likely to prejudice substantially the commercial interests of any person;
“Contract”	means the agreement constituted between the Authority and the Contractor by virtue of and subject to the Contract Terms, the provisions of the Invitation to Tender, the tender and the Letter of Award where applicable;
“Contractor”	means the economic operator identified as such in the Letter of Award (where applicable), or as from the relevant Substitution Date, the Replacement Supplier;
“Contractor’s Personnel”	means all persons employed or engaged by the Contractor in the implementation of the Contract, including any permitted sub-contractor or agent of the Contractor;
“Contract Period”	means: - (i) (subject to earlier termination in accordance with its terms or by operation of law) the duration of the Contract (as extended pursuant to Clause 3.14), as set out in the Letter of Award or corresponding Purchase Order starting on the Commencement Date, or (ii) if the Commencement Date is not set out in a Letter of Award the period from the date the Purchase Order is submitted by the Authority to the Contractor until the Contract is terminated pursuant to Clauses 17.12, 23 or 29;

“Contract Price”	means the monies payable by the Authority to the Contractor for the Services as set out in the Contract;
“Contract Terms”	means: - <ul style="list-style-type: none"> (a) these NES Conditions for the Provision of Services; and (b) the NES Additional Conditions for the provision of Services where appropriate;
“Costs”	includes costs, charges, outgoings and expenses of every description;
“Data Subject”	means an individual who is the subject of Personal Data;
“Day”	means business day, which is defined as Monday to Friday inclusive and excluding Scottish Bank and Public holidays;
“Direct Losses”	means all damage, losses, indebtedness, claims, actions, cash, 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 excluding Indirect Losses;
“Directive”	means Directive 2014/24/EU of the European Parliament and of the Council on public procurement;
“Data Protection Legislation”	means the any legislation that applies from time to time to the Processing of Personal Data, including the Data Protection Act 2018, the EU Data Protection Directive 95/46/EC, the EU General Data Protection Regulations (as of 25 th May 2018), the EU Privacy & Electronic Communications Directive 2002/58/EC Regulation (EU) 2016/679 (if and from the date that it comes into force in the United Kingdom), and all national subordinate legislation in the United Kingdom and any applicable decisions and guidance made under any of them;
“ECJ”	means the Court of Justice of the European Union;
“Force Majeure Event”	means one or more of the following to the extent that it is not attributable to the Contractor or the Contractor’s staff: war, civil war (whether declared or undeclared), riot or armed conflict; radioactive, chemical or biological contamination; pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speed; acts of terrorism; explosion; fire; flood; extraordinarily severe weather conditions which are both unforeseen and for which precautions are not customarily taken by prudent business

organisations so as to avoid or mitigate the impact thereof; industrial action which affects the provision of the Services, but which is not confined to the workforce of the Contractor or is site specific; pestilence; the actions of governmental authorities to the extent that such actions are implemented either pursuant to emergency powers or otherwise outside the usual course of governmental business; or Act of God, or other event which is beyond the reasonable control of the Party in question and could not have been avoided or mitigated by the exercise of all reasonable care by that Party and further provided that such event materially affects the ability of the Party seeking to rely upon it to perform its obligations under the Contract;

- “Good Industry Practice”** means using standards, practices, methods and procedures conforming to the law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in providing services similar to the Services under the same or similar circumstances;
- “Goods”** means all goods ancillary or otherwise related to the Services that the Contractor is required to provide pursuant to the Contract, as set out in the Specification;
- “Head of Procurement”** means the person from time to time appointed by the Authority as head in charge of its procurement activities;
- “Indirect Losses”** means loss of profits, loss of business, loss of business opportunity, loss of business revenue, loss of goodwill or any consequential loss or indirect loss of any nature;
- “Insolvent”** means:
(a) if the Contractor is an individual, that individual, or where the Contractor is a partnership, any partner(s) in that firm, becomes bankrupt or shall have a receiving order, administration order or interim order made against him, or shall make any composition or scheme of arrangement with or for the benefit of his creditors, or shall make any conveyance or assignment for the benefit of his creditors, or shall purport to do or appears unable to pay or to have no reasonable prospect of being able to pay, a debt within the meaning of Section 268 of the Insolvency Act 1986 or he shall become apparently insolvent within the meaning of the Bankruptcy (Scotland) Act 1985 as amended, or any application shall be made under the Bankruptcy or Insolvency Act for the time being in place for sequestration of his estate, or a trust deed shall be granted by him for the benefit of his creditors;

(b) if the Contractor is a company, the passing by the Contractor of a resolution for its winding-up or the making by a court of competent jurisdiction of an order for the winding-up of the Contractor or the dissolution of the Contractor, or if a receiver, manager or administrator is appointed, or documents are filed with the court for the appointment of a receiver, manager or administrator or notice of intention to appoint a receiver, manager or administrator is given by the Contractor or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986), or circumstances arise which entitle the court or a creditor to appoint a receiver, manager or administrator or which entitle the court to make a winding-up order, or the Contractor is unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986, or if the Contractor makes an arrangement with its creditors generally or makes an application to a court of competent jurisdiction for protection from its creditors generally; and

(a) any event under the law of any other jurisdiction other than Scotland which is analogous to any of the above;

“Intellectual Property”

means any and all patents, registered and unregistered trademarks, trade and business names, domain names, registered designs, unregistered design rights and other rights in designs utility models, applications for and the right to make applications for any of such rights, know-how, Confidential Information, including rights in any get-up or trade dress, copyrights (including rights in computer software and in websites) and rights in databases, subsisting anywhere in the world, and “Intellectual Property Rights” shall be construed accordingly;;

“Invitation to Tender”

means the invitation to tender relating to the Services issued by the Authority to *inter alia* the Contractor;

“Legal Requirements”

means any legislation and/or common law insofar as applicable to the performance of the Contract or any part thereof including without limitation: -

(a) any subordinate legislation; and

(b) any legislative act of the European Union or the Commission of the European Community which, without further enactment, has legal effect within the United Kingdom;

“Letter of Award”

means the letter issued by the Authority to each successful economic operator who submitted a

	Tender accepting that economic operator's Tender for the Services, the signed duplicate copy of which is returned to the Authority;
"Location"	means the location or locations (as applicable) for the provision of the Services (and supply of any Goods) as set out in an Order;
"New Contractor"	means any entity which is awarded a contract by the Authority to provide services similar or identical to the Services in place of the Contractor (including that Authority in the event of the provision of the Services being undertaken in-house);
"NES Additional Conditions for the Provision of Services"	means the additional conditions for the provision of Services (if any) contained in Schedule Part 1;
"Order"	means each purchase order (in Writing) submitted by the Authority to the Contractor drawing down the quantity of Services specified therein as part of the Contract;
"Party"	means either party to the Contract individually and "Parties" refers to all of the parties to the Contract collectively. A Party shall include all permitted assignees of the Party in question. All persons who are not a Party to the Contract are third parties;
"Person"	includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of Persons or association and a reference to a Person includes a reference to that Person's successors and permitted assignees;
"Personal Data"	has the meaning set out in Section 1(1) of the DPA and relates only to personal data, or any part of such personal data, of which the Authority is the Data Controller and in relation to which the Contractor is providing Services or otherwise is in possession of or has access to;
"Point of Contact"	means the point of contact representing the Contractor identified as such in the Tender, or such alternative point of contact as notified to the Authority Manager (as representative of the Authority), from time to time, in Writing;
"Pre-Transfer Liabilities"	means (other than in respect of any claims in relation to pension entitlement under any pension scheme) (1) all claims, including but not limited to claims for redundancy payments, unlawful deduction of wages, unfair, wrongful or constructive dismissal compensation, compensation for sex, race or disability discrimination, claims for equal pay, compensation for less favourable treatment of part-time workers, and any claims whether in delict, contract or statute or otherwise, demands, actions,

proceedings and any award, compensation, damages, tribunal awards, fine, loss, order, penalty, disbursement, payment made by way of settlement and costs and expenses reasonably incurred in connection with a claim or investigation (including without limitation any investigation by the Equality and Human Rights Commission, or other enforcement, regulatory or supervisory body and of implementing any requirements which may arise from such investigation), and any expenses and legal costs on an indemnity basis and (2) all losses, costs, claims, demands, actions, fines, penalties, awards, liabilities and expenses incurred (either before, on or after the Service Transfer Date) in connection with or as a result of:-

- (a) any claim or demand by or in respect of the Affected Employees or any of them or any former employee of the Contractor, arising either under statute, contract or at common law from any act, fault or omission of the Contractor in relation to the period prior to the Service Transfer Date; and
- (b) any claim or demand (either under statute or at common law) by any trade union or staff association or any other workers' representatives within the meaning of TUPE arising from or connected with any breach by the Contractor of its obligations to that trade union, staff association or other workers' representatives under TUPE to the extent that such claim or demand relates to the period before the Service Transfer Date, subject always to the Board and/or any New Contractor having complied with its obligations under Regulation 13 of the TUPE Regulations;

“Receipt of Order”

means, if personally delivered, at the time of delivery; if sent by facsimile, at the time of transmission; if posted, at the expiration of 48 hours or (in the case of airmail seven Days) after the envelope containing the same was delivered into the custody of the postal authorities; and if sent by electronic mail, at the time of the transmission;

“Relevant Person”

means any person who is a member of the administrative management or supervisor body of the Contractor or has powers of representation, decision or control in relation to the Contractor.

“Replacement Supplier”

means: -

(a) a supplier which, partially or wholly, takes over or acquires the business or assets of the Contractor or acquires ownership of the Contractor following: -

- (i) any corporate restructuring of or involving the

Contractor; or

(ii) the Contractor becoming insolvent; or

(b) any supplier identified in the Tender (and/ or) any clarifications thereto submitted by the Contractor to the Authority) to whom the Contractor anticipates it may wish to effect a Transfer during the Contract Period;

“Security Requirements”	means the requirements imposed by the Authority to ensure the security of Personal Data as notified to the Contractor;
“Sensitive Personal Data”	has the meaning set out in Section 1(1) of the DPA and relates only to sensitive personal data, or any part of such sensitive personal data of which the Authority is the Data Controller and in relation to which the Contractor is providing Services or otherwise is in possession of or has access to;
“Service Transfer Date”	means the date of any transfer of the activities carried out by the Contractor under the Contract (or any part of the activities), for whatever reason, from the Contractor to the Authority or a New Contractor;
“Services”	means all services (including Goods, if any) that the Contractor is required to perform pursuant to the Contract, as set out in the Specification;
“Specification”	means the specification of the Services and any Goods set out in the Invitation to Tender or as contained in any appendices to this agreement;
“Tender”	means the tender submitted to the Authority by Contractor in response to the Invitation to Tender;
“Transfer”	means novation or transfer of the Contract in whole or part;
“Treaty”	means the Treaty on the Functioning of the European Union;
“TUPE Regulations”	means the Transfer of Undertakings (Protection of Employment) Regulations 2006;
“Writing”	means any communication in writing including facsimile transmission, electronic means (excluding text messages) and “Written” shall be construed accordingly; and
“Year”	means during the Contract Period, any 12 - month period commencing on the Commencement Date or an anniversary thereof.

1.2 In the Contract Terms, all references to any statute or statutory provision shall be deemed to include references to any statute or statutory provision which amends, extends, consolidates or replaces the same and shall include any orders, regulations

codes of practice, instruments or other subordinate legislation made thereunder and any conditions attaching thereto. Moreover, where relevant, references to Scottish and United Kingdom statutes and statutory provisions shall be construed as references also to equivalent statutes, statutory provisions and rules of law in other jurisdictions.

- 1.3 Any headings to Clauses, together with the front cover and the Index are for convenience only and shall not affect the meaning of the Contract Terms. Unless the contrary is stated references to Clauses shall mean the Clauses of these terms and conditions.
- 1.4 Unless otherwise expressly defined in the Contract Terms, the words used in the Contract Terms shall bear their natural meaning. The Parties have had equal opportunity to take legal advice and the contra proferentem rule shall not apply to the interpretation of the Contract Terms.
- 1.5 Where a term of the Contract Terms provides for a list of items following the word "including" or "includes" then such list is not to be interpreted as being an exhaustive list. Any such list shall not be treated as excluding any item that might have been included in such list having regard to the context of the contractual term in question. The ejusdem generis principle is not to be applied when interpreting the Contract Terms. General words are not to be given a restrictive meaning where they are followed by examples intended to be included within the general words.
- 1.6 In the Contract Terms, words importing any particular gender include all other genders.
- 1.7 In the Contract Terms, words importing the singular only shall include the plural and vice versa.
- 1.8 Subject to the contrary being stated expressly or implied from the context in the Contract Terms, all communication between the Parties shall be in Writing.
- 1.9 All monetary amounts are expressed in pounds sterling but in the event that pounds sterling is replaced as legal tender in the United Kingdom by a different currency then all monetary amounts shall be converted into such other currency at the rate prevailing on the date such other currency first became legal tender in the United Kingdom.
- 1.10 Except where an express provision of the Contract Terms states the contrary, each and every obligation of a Party under the terms and conditions is to be performed at that Party's cost.
- 1.11 Any reference to a Party "procuring" another person to act or omit to act in a certain manner shall mean that the Party so procuring shall be liable for any default on the part of the person acting or omitting to act in that manner.
- 1.12 All references to the Contract Terms include (subject to all relevant approvals) a reference to the Contract Terms as amended, supplemented, substituted, novated or assigned from time to time.
- 1.13 For resolution of a conflict or inconsistency in the Contract, the documents shall rank in the following descending order of importance: -

the Letter of Award (if applicable)

NES Conditions for the Provision of Services

NES additional Conditions for the Provision of Services

the Purchase Order

the Invitation to Tender

Tender

2. DUE DILIGENCE

- 2.1 The Contractor hereby agrees and accepts that (i) it has received all information required by it in order to determine whether it is able to provide the Services to the Authority in accordance with the Contract Terms and (ii) it is deemed to have inspected all possible locations (if applicable) before submitting its Tender so as to have understood the nature and extent of the Services that may be required and satisfied itself in relation to all matters connected with the Services and the location and in regard to its ability to meet all requirements of the Contract.

3. ORDERING OF SERVICES AND PERFORMANCE

- 3.1 The Authority shall purchase and the Contractor shall perform the Services in accordance with the Contract and each Order which shall be in Writing, submitted by the Authority to the Point of Contact, and provision of the Services by the Contractor and acquisition of the Services by the Authority shall be subject to the Contract Terms which shall govern the Contract between the Authority and the Contractor to the exclusion of any other terms and conditions.
- 3.2 Orders shall be submitted by the Authority to the Contractor in Writing detailing the Services required, specifying the price of the Services ordered in accordance with and as part of the Contract Price, the location and the timescale for performance pursuant to Clause 5.1. The Contractor agrees that it will not in its dealings with the Authority seek to impose or rely on any other contractual terms that in any way contradict the Contract Terms, and, to avoid doubt, no terms and conditions shall be attached to any order or invoice by the Contractor.
- 3.3 In the absence of Written agreement between the Authority and the Contractor to the contrary, the Contractor shall commence and complete performance of the Services in accordance with the dates specified by the Authority in an Order, or as otherwise agreed by the parties in Writing.
- 3.4 The Contractor shall perform the Services at the location or such other location as agreed by the Parties in Writing.
- 3.5 The Authority may by written notice require the Contractor to execute the Services in such order as the Authority may decide. In the absence of such notice, the Contractor shall submit such detailed programmes of work and progress reports as the Authority may from time to time require.
- 3.6 Performance shall be completed when the Services referred to in an Order have been completed in accordance with the Specification at the location to the Authority's satisfaction.
- 3.7 Unless agreed in advance with the Authority, if the Services are performed before the date specified in the Order (or such other date which the Contractor and the Authority have agreed in Writing), the Authority shall be entitled at its sole discretion to refuse to accept the Services until the contractual date for performance.
- 3.8 In the event that the Authority specifies next day or short notice Services performance timescales in an Order, and where such timescales are not otherwise agreed within the terms of the Contract, the Contractor may charge any reasonable and properly incurred additional costs incurred by the Contractor in respect of the performance of the said Services to the Authority.
- 3.9 Any sub-contractor used in providing the Services (or any part of the Services) shall be deemed to be an agent of the Contractor and not the Authority.

- 3.10 Part performance of Services may be rejected unless the Authority has previously agreed in Writing to accept such part performance.
- 3.11 The Contractor is responsible for obtaining all licences for the provision of the Services and shall be responsible for any delays due to such licences not being available when required.
- 3.12 Any access to premises and any labour and equipment that may be provided by the Authority in connection with the performance of any Services shall be provided without acceptance by the Authority of any liability whatsoever and the Contractor shall indemnify the Authority in respect of any actions, suits, claims, demands, loss, charges, costs and expenses which the Authority may suffer or incur as a result of or in connection with any damage or injury (whether fatal or otherwise) occurring in the course of performance to the extent that any such damage or injury is attributable to any act or omission of the Contractor or any of his sub-contractors and/or agents.
- 3.13 Subject to earlier termination of the Contract pursuant to Clauses 17.12, 23 or 29, the Authority shall submit Orders during the Contract Period at such times and for such volume of Services as the Authority shall determine, provided the total quantity of Services to be provided pursuant to all Orders submitted by the Authority hereunder is no greater or no less than the volume of Services to be delivered by the Contractor to the Authority set out in the Contract.
- 3.14 The Authority may at its entire discretion extend the Contract Period at such times and by such period(s) as is set out in the Invitation to Tender by providing no less than 3 months' notice to the Contractor.

4. MANNER OF CARRYING OUT THE SERVICES

- 4.1 The Contractor shall make no delivery of materials, plant or other things nor commence any work at the location without obtaining the Authority's prior Written consent.
- 4.2 Access to the location shall not be exclusive to the Contractor, and only such as shall enable it to carry out the Services concurrently with the execution of work by others. The Contractor shall co-operate with such others as the Authority may reasonably require.
- 4.3 The Authority shall have power at any time during the progress of the Services to order:
the removal from the location of any materials which in the opinion of the Authority are either hazardous, noxious or not in accordance with the Contract, and/or

the substitution of proper and suitable materials, and/or

the removal and proper re-execution, notwithstanding any previous test thereof or interim payment therefore, of any work which, in respect of material or workmanship, is not in the opinion of the Authority in accordance with the Contract.

- 4.4 On completion of the Services (or expiry or sooner termination of the Contract), the Contractor shall (unless otherwise agreed by the Authority in Writing) remove its plant, equipment and unused materials and shall clear away from the location all rubbish arising out of the performance of the Services and leave the location in a neat and tidy condition.

5. TIME

- 5.1 The time for performance of the Services shall be stated in the Order or, in the absence of any such statement, shall conform to the Specification (or other agreement in Writing between the Parties) and if no time for performance is expressly agreed then

performance shall be made within fourteen (14) Days of Receipt of Order.

- 5.2 Where the time of performance of the Services has been agreed by the Parties and stated in the Order or otherwise agreed in Writing (and for the avoidance of doubt, not where performance is to be made within fourteen (14) Days of Receipt of Order because no time for performance has expressly been agreed), then time for performance shall be of the essence and without prejudice to any other right or remedy of the Authority.
- 5.3 The Authority may at its sole discretion, delay for a reasonable period, an agreed time of performance of the Services provided that a minimum of 3 Days' Written notice is given to the Contractor.
- 5.4 Subject always to Clause 5.3.1 (Force Majeure) failure by the Contractor to perform the Services or any part of them within the time agreed in accordance with Clause 5.1 shall without prejudice to the Authority's other rights and remedies, entitle the Authority (at its option):

to withdraw such Services from the Order provided confirmation is given to the Point of Contact in Writing to this effect;

to release itself from any obligations to accept and pay for such Services provided confirmation is given to the Point of Contact in Writing to this effect;

to purchase other services of the same or similar description from the Contractor or any third party;

to recover from the Contractor the amount by which the cost of purchasing other services exceeds the amount that would have been payable to the Contractor in respect of the Services replaced by such purchase and all costs incurred by the Authority in purchasing such alternative services, provided that the Authority uses all reasonable endeavours to mitigate its losses in this respect.

6. CONTRACT PRICE AND PAYMENT

- 6.1 In consideration of the Contractor's due and proper performance of its obligations under the Contract, the Contractor may charge the Authority the Contract Price in accordance with this Clause 6.
- 6.2 Invoices shall not be rendered by the Contractor until all Services to be performed pursuant to the Contract have been performed to the Authority's reasonable satisfaction.
- 6.3 The Authority shall pay the Contract Price to the Contractor (by BACS (Bank Automated Clearing System) if the Authority so chooses), within 30 Days of receipt of the Contractor's valid invoice (rendered in accordance with this Clause 6 and Clause 7.1).
- 6.4 Except where otherwise stated in the Order, the Contract Price is exclusive of VAT that shall be payable, if applicable, by the Authority in addition to such Contract Price at the rate prevailing as at the tax invoice date. All invoices provided to the Authority by the Contractor shall show the VAT calculations separately.
- 6.5 The Authority shall not be responsible for the payment of any charges for Services supplied in excess of the Services required by the Order or any variation of it, unless the requirement for such additional Services has been authorised in Writing by a duly authorised representative of the Authority by a further Order.
- 6.6 No payment of or on account of the Contract Price shall constitute any admission by

the Authority as to proper performance by the Contractor of its obligations.

- 6.7 In the event of the Authority breaching Clause 6.3, the Contractor's sole remedy shall be to charge interest on the outstanding amount owed by the Authority in accordance with the Late Payment of Commercial Debts (Interest) Act 1998.
- 6.8 Invoices covering payment in respect of materials purchased by, or services provided to, the Contractor, or for reimbursement of expenses, shall be payable by the Authority to the extent expressly permitted in the Contract, only if accompanied by relevant receipts.
- 6.9 The Contractor shall maintain complete and accurate records of the time spent and materials used by the Contractor in providing the Services in such form as the Authority shall approve. The Contractor shall allow the Authority to inspect such records at all reasonable times on request.

7. FORMS

- 7.1 Unless otherwise agreed in Writing by the Authority and the Contractor:

an invoice shall be rendered on the Contractor's own invoice form;

all delivery notes (if any) and invoices shall be clearly marked with the Authority's Order number, the name and address of the Authority and the full and accurate description and scope of the Services (or quantity of Goods, as applicable), date of performance (and delivery of any Goods).

- 7.2 Subject to the prior written agreement of the Parties, the arrangements set out in Clause 7.1 may be suspended in favour of alternative arrangements (including electronic trading and new logistics processes) at the option of the Authority.

8. CONTRACTOR'S RESPONSIBILITIES

- 8.1 The Contractor shall provide the Services, and deliver the Deliverables to the Authority, in accordance with the Specification and shall allocate sufficient resources to the Services to enable it to comply with its obligations.

- 8.2 The Contractor shall (at its cost): -

co-operate with the Authority in all matters relating to the Services;

employ and procure in and about the provision of the Services only such persons as (i) are careful, skilled and experienced in their occupation, (ii) have all specified and otherwise reasonably required qualifications to provide the Services and have the additional training (if any) specified in the Specification and (iii) are legally entitled to work in the United Kingdom (where such persons shall perform any of the Services within the United Kingdom), and where applicable, satisfy all requirements which the Authority imposes on the employment by the Authority of persons who did not obtain their qualifications in the United Kingdom. The Contractor shall exhibit to the Authority, satisfactory evidence of all relevant qualifications;

ensure that (where applicable): -

- (a) all Contractor's Personnel are informed and aware of the standards of performance that they are required to provide and are able to meet that standard;
- (b) adherence of the Contractor's Personnel to such standards of performance is routinely monitored and that remedial action is taken promptly where such standards are not attained;

- (c) quality is improved through the development and implementation of appropriate procedures, policies and standards and systematic monitoring;
- (d) a sufficient number and standard of Contractor's Personnel is available to meet the requirements of the Contract during holidays or absences;

take the steps reasonably required by the Authority to prevent unauthorised persons being admitted to the location. If the Authority gives the Contractor notice that any person is not to be admitted to or is to be removed from the location or is not to become involved in or is to be removed from involvement in the performance of the Contract, the Contractor shall take all reasonable steps to comply with such notice and if required by the Authority, the Contractor shall replace any person removed under this condition with another suitably qualified person and procure that any pass issued to the person removed is surrendered;

if and when instructed by the Authority, give to the Authority a list of names and addresses of all persons who are or may be at any time concerned with the Services or any part of them, specifying the capacities in which they are so concerned, and giving such other particulars and evidence of identity and other supporting evidence as the Authority may reasonably require;

accept any decision of the Authority as to whether any person is to be admitted to or is to be removed from the location or is to become involved in or is to be removed from involvement in the performance of the Contract;

ensure that all employees and agents used to perform the Services or any part thereof, use reasonable skill and care in the performance of the Services; and

perform the Services in accordance with Good Industry Practice.

8.3 The Contractor shall: -

observe and ensure that all employees and agents appointed by the Contractor to perform the Services observe all health and safety rules and regulations and any other security requirements that apply at each location and that have been communicated to it by or on behalf of the Contractor, or about which such personnel ought reasonably to be aware. The Authority reserves the right to refuse any employee and/or agent appointed by the Contractor in relation to the Services, access to the location, which shall only be given to the extent necessary for the performance of the Services;

notify the Authority as soon as it becomes aware of any health and safety hazards or issues which arise in relation to the Services; and

before the date on which the Services are to start, obtain, and at all times maintain, all necessary licences and consents and comply with all relevant legislation in relation to:

- (a) the Services;
- (b) the installation of the Contractor's equipment;
- (c) the use of all documents, information and materials provided by the Contractor or its agents, sub-contractors, consultants or employees relating to the Services; and
- (d) the use of the Authority's equipment (if any) in relation to the Contractor's equipment.

8.4 The Contractor acknowledges and agrees that:

the Authority is entering into this Contract on the basis of the Specification. The Specification is accurate and complete in all material respects, and is not misleading; and

if it considers that the Authority is not, or may not, be complying with any of the Authority's obligations, it shall only be entitled to rely on this as relieving the Contractor's performance under this Contract: -

- (a) to the extent that it restricts or precludes performance of the Services by the Contractor; and
- (b) if the Contractor, promptly after the actual or potential non-compliance has come to its attention, has notified details to the Authority in writing.

9. AUTHORITY'S OBLIGATIONS

9.1 The Authority shall: -

provide such access to the locations and data, and such office accommodation and other facilities as may reasonably be requested by the Contractor and agreed with the Authority in Writing in advance, for the purposes of the Services;

inform the Contractor of all health and safety rules and regulations and any other reasonable security requirements that apply at any of the locations.

10. CHANGE CONTROL

10.1 If requested by the Authority the Contractor and the Contractor shall each appoint a representative, duly authorised to discuss matters relating to the Services, who shall meet at such times as the Parties agree (acting reasonably) to discuss matters relating to the Services. If either Party wishes to change the scope or execution of the Services in the Contract, it shall submit details of the requested change to the other in Writing.

10.2 If the Authority requests a change to the scope or execution of the Services in the Contract, the Contractor shall, within a reasonable time (and in event not more than five (5) Days after receipt of the Authority's request provide a written estimate to the Contractor of: -

the likely time required to implement the change;

any necessary variations to the Contract Price arising from the change;

the likely effect of the change on the Specification; and

any other impact of the change on the Contract.

10.3 The Contractor shall not unreasonably withhold its consent to any requested change.

10.4 If both Parties consent to the proposed change, the change shall be made, only after agreement of the necessary variations to the Contract Price, the Services, the Specification and any other relevant terms of the Contract to take account of the change that has been reached.

11. VARIATION OF THE CONTRACT

11.1 Any variation of the terms and conditions of the Contract (including the Contract Terms) shall only be effective if agreed between the Authority and the Contractor in Writing executed by duly authorised representatives of such signatories and once such variations are agreed between the said parties, the Authority hereby agrees that such

variations shall automatically apply to any Orders submitted by the Authority to the Contractor, to the extent only that Services have not yet been delivered pursuant to such Order.

- 11.2 In the event that the Invitation to Tender details any changes which the Authority wishes to implement during the Contract Period, the Authority and the Contractor shall act reasonably to give effect to such changes.
- 11.3 Notwithstanding the foregoing the Contractor shall not unreasonably withhold consent to a proposed variation to the Contract made by the Authority.
- 11.4 The Contractor hereby undertakes to the Authority to work continuously with the Authority to improve and develop the Contractor's performance under the Contract to reflect changing needs and new developments within the National Health Service in Scotland and to deliver proactive cost reductions to the National Health Service in Scotland during the Contract Period.

12. PROPERTY AND RISK

- 12.1 Risk in any Goods shall pass to the Authority immediately following delivery of the Goods in accordance with the Order.
- 12.2 Notwithstanding delivery, title in the Goods shall pass from the Contractor to the Authority at the date of payment of the full Contract Price for all Services performed (including the Goods) pursuant to an Order under the Contract.
- 12.3 All tools, equipment and materials of the Contractor used in the performance of the Contractor's obligations under the Contract shall be provided and used at the sole risk of the Contractor whether or not they are situated at the location.

13. TOOLS

Any tools, patterns, materials, drawings, specifications and/or other data provided by the Authority to the Contractor in connection with the Contract will at all times be at the Contractor's risk and remain the property of the Authority and shall be delivered up to the Authority immediately on request and are to be used by the Contractor solely for the purpose of completing the Contract.

14. ACCEPTANCE

- 14.1 The Authority shall have a continued right to reject Services irrespective of whether the Authority has in law accepted the Services. In particular, taking delivery, inspection, or use of or making payment for the Services (or part of them) by the Authority shall not constitute acceptance, waiver or approval and shall be without prejudice to any right or remedy that the Authority may have against the Contractor, provided that the right of rejection shall cease within a reasonable time from the date on which the Authority discovers or might reasonably be expected to discover the failure in performance of the Services or other relevant breach of contract.
- 14.2 If the Authority so elects, and without prejudice to the Authority's other rights and remedies, the Contractor shall free of charge and as quickly as possible re-perform the Services so rejected provided the Authority has first confirmed its rejection of the Services in Writing.

15. QUALITY

- 15.1 The Contractor warrants to the Authority that: -

the Contractor will perform the Services with reasonable care and skill and in accordance with generally recognised commercial practices and standards in the industry for similar services; and

the Services will conform with all descriptions and specifications provided to the Authority by the Contractor, including the Specification;

15.2 The provisions of this Clause 15 shall survive any performance, acceptance or payment pursuant to the contract or remedial services provided by the Contractor.

15.3 The Contractor warrants that all statements and representations made in the Contractor's Tender response for the provision of the Services and any response to any Pre-Qualification Questionnaire submitted by or on behalf of the Contractor in respect of the provision of the Services, in each case as clarified and/or amended in any subsequent submissions and accepted by the Authority relating to such submissions are true and accurate in all material respects.

15.4 The Authority relies on the skill and judgement of the Contractor in performing the Services and the execution of the Contract.

15.5 The Services and all Deliverables shall conform in all respects with all Legal Requirements.

16. HEALTH AND SAFETY

16.1 The Contractor represents and warrants to the Authority that the Contractor has satisfied itself that all necessary tests and examinations have been made or will be made (including all tests and examinations of all applicable locations) prior to performance of the Services to ensure that the Services are designed and performed so as to be safe and without risk to the health and safety of persons using the same and that it has made available to the Authority adequate information about the use for which the Services have been designed and have been tested and about any conditions necessary to ensure that when put to use the Services will be safe and without risk to health.

16.2 In the event that the Contractor is in breach of Clause 16.1 then without prejudice to any other right or remedy of the Authority, the Authority shall be entitled to reject the Services and the Contractor shall, subject to Clause 18, indemnify the Authority against all Direct Losses incurred by the Authority as a result of such breach by the Contractor, including the cost of purchasing alternative services and all administrative costs incurred by the Authority in inviting and awarding tenders for the provision of such alternative services.

17. TRANSFER AND SUB-CONTRACTING

17.1 The Contractor shall not assign the whole or any part of the Contract without the prior Written consent of the Authority, the Contractor shall not sub-contract the provision of any of the Services without the prior Written consent of the Authority.

17.2 The Authority may agree to Transfer to a Replacement Supplier provided always that:

the Authority may request such information relating to the proposed Replacement Supplier as it considers necessary to allow the Authority to consider any request for such Transfer:

the Replacement Supplier shall require to satisfy any qualitative criteria applied by the Authority in connection with award of the Contract to the Contractor; and

no substantial or material amendments shall be made to the Contract as a consequence of such Transfer.

17.3 In the event that the Authority agrees to such Transfer, it shall notify the Contractor in Writing and such notification shall specify the date from which such Transfer shall take effect (the “**Substitution Date**”). As from the Substitution Date: -

the Replacement Supplier shall assume all responsibilities, obligations and rights of the Contractor under the Contract; and

all references to “**Contractor**” shall be deemed to be to the Replacement Supplier.

17.4 Without prejudice to Clause 17.1, in the event that the Contractor sub-contracts the provision of any of the Services, every act or omission of the sub-contractor shall for the purposes of the Contract be deemed to be the act or omission of the Contractor and the Contractor shall be liable to the Authority as if such act or omission had been committed or omitted by the Contractor itself.

17.5 The Authority shall be entitled to assign, novate, contract or otherwise dispose of its rights and obligations under the Contract or any part thereof to any other body (including but not limited to any private sector body) which substantially performs any of the functions that previously had been performed by the Authority.

17.6 Without prejudice to Clause 17.5 the Contract between the Contractor and the Authority shall automatically devolve to any statutory successor of the said Authority.

17.7 Any change in the legal status of the Authority shall not affect the validity of the Contract. In such circumstances the Contract shall bind and inure to the benefit of any successor body of the Authority.

17.8 The Authority shall be entitled to disclose to any body to whom the Contract may be transferred pursuant to the foregoing provisions any Confidential Information of the Contractor which relates to the performance of the Contract by the Contractor. In such circumstances the Authority shall authorise the said transferee to use such Confidential Information only for the purpose relating to the performance of the Contract and for no other purpose and shall take all reasonable steps to ensure that such body accepts an obligation of confidence in terms similar to Clause 29.

17.9 The Contractor shall not make any change in the sub-contractors for the Services identified in the Tender (if any) until it has received written approval from the Authority. The Contractor shall notify the Authority Manager in Writing immediately in the event that it proposes to make any change in its sub-contractors and shall supply the Authority with all necessary information regarding the proposed change in order for the Authority to determine whether or not it is willing to grant approval for such change.

17.10 The Contractor shall operate and apply ethical standards (which the Authority acting reasonably considers to be appropriate) to its own operations and ensures these are applied by all sub-contractors of the Contractor, involved in the performance of the Services.

17.11 The Authority shall be entitled at any time to audit the Contractor’s sub-contractors and to inspect any premises at which the Services are performed in whole or in part to establish compliance with this Clause 17 and the Contractor shall procure all necessary access rights from service providers for the purposes of this Clause 17.

17.12 In the event that the Authority does not consider the Contractor is operating and applying appropriate ethical standards in accordance with Clause 17.10 it shall serve Written notice upon the Contractor to that effect. If the Contractor fails to satisfy the Authority, acting reasonably, within sixty (60) days of such notice that it has taken steps necessary to operate and apply appropriate ethical standards in its own operations and ensure that these are applied by all sub-contractors involved in the performance of the Services, the Authority may forthwith terminate the Contract.

17.13 Where the Contractor enters into a sub-contract for the purpose of performing the Contract, the Contractor shall cause a term to be included in such sub-contract: -

which requires payment to be made to the sub-contractor within a specified period not exceeding 30 days from receipt of a valid invoice as defined by the sub-contract requirements and provides that, for the purpose of payment alone, where the Authority has made payment to the Contractor and the sub-contractor's invoice includes Services in relation to which payment has been made by the then, to the extent that it relates to such Services, the invoice shall be treated as valid and payment shall be made to the sub-contractor without deduction.

which notifies the sub-contractor that the contract forms part of a larger contract for the benefit of the Authority and that should the sub-contractor have any difficulty in securing the timely payment of an invoice that matter may be referred by the sub-contractor to the Authority Manager; and

in the same terms as set out in this Clause 17.13 (including for the avoidance of doubt this clause 17.13.3) subject only to modification to refer to the correct designation of the equivalent party as the Contractor and sub-contractor as the case may be.

18. LIABILITY AND INDEMNITY

18.1 The Contractor shall indemnify and hold harmless the Authority against all Direct Losses which the Authority may suffer or incur to the extent such Direct Losses are incurred by the Authority as a result of or in connection with: -

any alleged or actual infringement, whether or not under Scots law, of any third party's intellectual property rights or other rights arising out of the use or supply of the products of the Services (including the Deliverables); or

the provision of the Services or the Deliverables as a consequence of a breach or a negligent performance or failure or delay in performance of the Contract by the Contractor.

18.2 Except in the case of death or personal injury caused by negligence, and fraudulent misrepresentation or in other circumstances where liability may not be so limited under any applicable law, the liability of either Party in each Year under or in connection with each Contract, whether arising in contract, delict, negligence, breach of statutory duty or otherwise shall not exceed the greater of TWO MILLION POUNDS STERLING (£2,000,000) or 200% of the total Contract Price paid and payable by the Authority to the Contractor in respect of Services performed or to be performed under the Contract in that Year.

18.3 The Contract Price of the Services has been negotiated and agreed on the basis that the Parties may limit their liability to each other as set out in the Contract Terms.

18.4 The provisions of this Clause 18 shall survive termination of this Contract, however arising.

19. INSURANCE

The Contractor shall effect with a reputable insurance company a policy or policies of insurance covering all the matters which are the subject of indemnities under the Contract with a minimum limit of indemnity of FIVE MILLION POUNDS STERLING (£5,000,000) per annum for any one incident in any one Year, unless an alternative figure has been specified in the Invitation to Tender, or such other sum as may be agreed between the Authority and the Contractor in Writing. The Contractor shall at the request of the Authority produce the relevant policy or policies together with the receipts or other evidence of payment of the latest premium due thereunder.

20. DISPUTE RESOLUTION PROCEDURE

- 20.1 During any dispute, including a dispute as to the validity of the Contract, the Contractor shall continue its performance of the provisions of the Contract (unless and to the extent only that, the relevant Authority requests in Writing to the Point of Contact that the Contractor does not do so).
- 20.2 The Parties will use all of their respective reasonable endeavours to resolve such dispute by negotiation. If negotiations fail to resolve such dispute either party may refer the matter to an independent assessor chosen by mutual agreement, or, failing agreement appointed on the application of either party by the President of the Law Society of Scotland. The Parties will co-operate with any person appointed as an independent assessor providing him with such information and other assistance as he shall require and will pay his costs, as he shall determine or in the absence of such determination such costs will be shared equally. Neither Party will commence legal proceedings against the other until thirty (30) Days after the independent assessor's intervention in the dispute in question has failed to resolve the dispute.

21. ENVIRONMENTAL CONSIDERATIONS

- 21.1 The Contractor shall comply in all material respects with applicable environmental laws and regulations in force from time to time in relation to the Services or any other matter which is the subject of the Contract. Where the provisions of any such legislation are implemented by the use of voluntary agreements or codes of practice (as amended from time to time), the Contractor shall comply with such agreements or codes of practice as if they were incorporated into Scots law. Without prejudice to the generality of the foregoing, the Contractor shall promptly provide all such information regarding the environmental impact of any Services supplied or used under the Contract as may reasonably be required by the relevant Authority to permit informed choices by end users;
- 21.2 The Contractor shall meet all reasonable requests by the Authority for information evidencing the Contractor's compliance with the provisions of this Clause 21.

22. CANCELLATION OF ORDERS

Orders may be cancelled without penalty by the Authority provided such notice as is referred to in the Invitation to Tender is provided by the Authority, (or in the absence of any reference therein to such notice period, at any time up to one (1) calendar month) prior to the commencement date for the relevant Services as described in Clause 5.1, (as amended by Clause 5.3) and such cancellation shall have immediate effect as from the date of Written notice of cancellation issued by the Authority to the Contractor.

23. TERMINATION OF CONTRACT

- 23.1 In addition to the Authority's other rights of termination set out in the Contract Terms, and without prejudice to its other rights and remedies, the Authority may, without penalty to the Authority, terminate the Contract in whole or in part by giving fourteen (14) Days Written notice to that effect to the Contractor in the event that:-

the Contractor has failed to perform any material obligation under the Contract provided that (if capable of remedy) such failure has not been remedied to the Authority's reasonable satisfaction within a period of 30 Days following Written notice demanding remedy of the failure in question being served by the Authority on the Contractor; or

the Contractor has failed (in whole or in part) to perform any obligation of the Contractor owed to the Authority on more than 3 occasions; or

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

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

there is a change of ownership or control of the Contractor which, in the reasonable opinion of the Authority will have a material adverse impact on the provision of the Services or the image or reputation of the Authority; or

the Contractor, sub-contracts or purports to assign the Contract or any part of the Contract in breach of Clause 17;

the Authority considers that procurement of a new contract is required as a result of a substantial modification, or a series of modifications which, taken together, constitute a substantial modification, being, or have been, effected to the Contract;

the Authority become aware that the Contractor and/ or any Relevant Person has been convicted of any of the offences listed in Regulation 58(1) of the Public Contracts (Scotland) Regulations 2015;

in the event that the ECJ makes a declaration that the Contract should not have been awarded to the Contractor in view of a serious infringement of the obligations under the Treaty and Directive; or

proceedings are served on the Authority in connection with or related to:
-

(a) any Transfer effected pursuant to Clause 17; and/or

(b) the Contract between the Authority and the Replacement Supplier.

- 23.2 The Authority shall be entitled to recover from the Contractor the amount of any Direct Losses resulting from termination under Clause 23.1. For the purpose of this Clause 23.2, loss shall include reasonable cost to the Authority of the time spent by its officers and agents terminating the Contract and in making alternative arrangements for the provision of the Services.
- 23.3 The Contractor may terminate the Contract by giving one (1) month's Written notice to the Head of Procurement on behalf of the Authority, if the Authority has committed a material breach of the Contract and the Contractor has served Written notice on the Authority giving details of the breach and giving the Authority twenty-eight (28) days to correct the breach but the Authority has failed to do so.
- 23.4 Either Party may terminate the Contract without penalty (save in respect of antecedent breach) in the event that a Force Majeure Event prevails beyond such period as the terminating Party considers reasonable, (such Party acting reasonably), by giving such Written notice to the other Party as is reasonable. On the expiry of this notice period, the Contract shall terminate. Such termination shall be without prejudice to the rights of the Parties in respect of any breach of the Contract occurring prior to such termination.
- 23.5 Termination (in whole or in part) or expiry of the Contract shall not affect either Party's rights or obligations under that Contract which shall survive the termination or expiry of the Contract or the continuance of the part or parts not terminated where the Contract is terminated in part only.

23.6 Any termination (in whole or in part) of the Contract will not prejudice the rights, obligations and duties of each Party arising prior to such termination taking effect.

24. REMEDIES

24.1 If any Services are not supplied in accordance with, or the Contractor fails to comply with, any terms of the Contract, the Authority shall be entitled (without prejudice to any other right or remedy) to exercise any one or more of the following rights or remedies:

-

to terminate the Contract in accordance with Clauses 17.12, 23 and 29 of the NES Conditions for the Provision of Services; or

to refuse to accept the provision of any further services by the Contractor and to require the immediate repayment by the Contractor of all sums previously paid by the Authority to the Contractor under the Contract; or

to require the Contractor, without charge to the Authority, to carry out such additional work as is necessary to correct the Contractor's failure; and

in any case, to be paid on demand all Costs and losses incurred by the Authority in connection with the Contractor's breach (or breaches) of the Contract (including without limitation all reasonable Costs incurred by the Authority in respect of the time spent by its officers and agents in terminating the Contract and/or in making alternative arrangements for the provision of the Services).

25. CONSEQUENCES OF TERMINATION

25.1 To the extent requested by the Authority, the Contractor will positively assist the Authority in ensuring a smooth, timely, risk-reduced transition of the activities carried out under this Contract to a New Contractor at the end of the Contract Period, at the Contractor's cost.

25.2 Any termination (in whole or in part) of the Contract will not prejudice the rights, obligations and duties of each Party arising prior to such termination taking effect.

25.3 The Authority agrees that termination (in whole or in part) or expiry of the Contract shall not affect either Party's obligations which the Contract Terms provides shall survive the termination or expiry or the continuance of the part or parts not terminated where the Contract is terminated in part only.

25.4 In anticipation of termination of the Contract (either at natural expiry or earlier termination in accordance with its terms) the Authority may require the Contractor to deliver up to the Authority any data (including Confidential Information) relevant to the provision of the Services on an appropriate media.

25.5 Clauses 3.12, 5.4, 16.2, 18, 20, 24, 25, 27, 28, 29, 30, 31, 32.3, 47.3, 50 and 54 and all other clauses which expressly or by implication survive termination of the Contract shall continue in full force and effect after the expiry or termination of the Contract.

26. COMMUNICATIONS

26.1 All written and oral communications, all documents and the labelling and marking of all packages shall be in English.

27. INTELLECTUAL PROPERTY

- 27.1 The Contractor assigns to the Authority, with full title guarantee and free from all third party rights, the Intellectual Property Rights and all other rights in the product of the Services (including the Deliverables).
- 27.2 The Contractor shall, promptly at the Authority's request, do (or procure to be done) all such further acts and things and the execution of all such other documents as the Authority may from time to time require for the purposes of securing for the Authority the full benefit of the Contract (including all rights, title and interest in and to the Intellectual Property Rights and all other rights assigned to the Authority in accordance with Clause 27.1).
- 27.3 The Contractor warrants that, except to the extent that the Services incorporate designs furnished by the Authority, nothing done by the Contractor in the provision of the Services or performance of the Contract, or use by the Authority of the Services shall infringe any Person's Intellectual Property Right.

28. AUDIT AND ACCOUNTS

- 28.1 The Contractor shall keep proper records in respect of the Contract Price due to it under the Contract for the Contract Period and a minimum of 3 years thereafter.
- 28.2 For the purpose of the examination and certification of the Authority's accounts or any examination pursuant to section 6(1) of the National Audit Act 1983 or any re-enactment thereof of the economy, efficiency and effectiveness with which the Authority has used its resources, Audit Scotland, the Accounts Commission, the Auditor General and the Authority or its auditors may examine such documents, information, reports, records and data, whether in human or machine – readable form as it may reasonably require which are owned, held or are otherwise within the control of the Contractor and may require the Contractor to produce such oral or written explanation as they consider necessary. The Contractor acknowledges that it will fully cooperate with any counter fraud policy or investigation, whether carried out by the Counter Fraud and Security Management Service, or any equivalent body, successor or function, at any time. For the avoidance of doubt it is hereby declared that the carrying out of an examination under Section 6(3)(d) of the National Audit Act 1983 or any re-enactment thereof in relation to the Contractor is not a function exercisable under the Contract.
- 28.3 The Contractor shall take all reasonable steps to place similar obligations on its sub-contractors in all sub-contracts entered into in relation to the Contract to ensure access by the Authority and its duly authorised representatives, where appropriate, to the relevant information of such sub-contractors.

29. CONFIDENTIALITY

- 29.1 In respect of all Confidential Information provided by, or on behalf of either Party ("the Discloser") to the other Party ("the Recipient"), and subject to the terms of the Contract, the Recipient undertakes to the Discloser that it will:
- keep that Confidential Information completely and strictly confidential and keep in safe custody all documentation and media recording of the same;
- save as expressly permitted in the Contract Terms, not disclose, copy, reproduce, publish or distribute the whole or any part of that Confidential Information to any person unless authorised in Writing by a duly authorised representative of the Discloser;
- use that Confidential Information only for the performance of the Contract and will not use that Confidential Information for its own benefit or for the benefit of anyone other than the Discloser; and

maintain that Confidential Information as the Discloser's property,

- 29.2 The obligation to maintain the confidentiality of, and the prohibitions and restrictions on use of, the Confidential Information shall not apply to information:

which the Discloser confirms in Writing is not required to be treated as Confidential Information;

which is or comes into the public domain otherwise than through any disclosure prohibited by the Contract;

which is received from a third party who lawfully acquired or developed it and who is under no obligation of confidence in relation to its disclosure; or

disclosed pursuant to Clause 29.7 (Scottish Government Health Directorate disclosure and disclosure to other Government departments and agencies).

- 29.3 For the purpose of this Clause 29, no Confidential Information shall be deemed to be in the public domain merely because such information is embraced by more general information or in the case of a complex body of information, because one or more elements of it are separately available in the public domain.

- 29.4 Where the Authority receives Confidential Information from the Contractor, the Authority may disclose such Confidential Information to, and permit its use by, any third party for any purpose provided for or contemplated by the Contract.

- 29.5 The Authority shall be entitled to disclose any Confidential Information received from the Contractor to its professional advisors to the extent that the Authority considers that they have a reasonable need to receive and consider the same.

- 29.6 Save as otherwise expressly permitted in the Contract Terms, the Contractor shall be permitted to disclose the Confidential Information to its directors, officers, employees, agents and professional advisors who need to see and know it in connection with provision of the Goods (who are hereafter called the "Permitted Persons") subject to obtaining confidentiality restrictions no less stringent than those set out in this Clause and if required by the Authority, shall procure that such Permitted Persons enter into a confidentiality undertaking in a form approved by the Authority.

- 29.7 The Authority shall be free to disclose the terms of the Contract and any documents connected with provision of the Services to and within the Scottish Government Health Directorates and to other Government departments, agencies and non-departmental public bodies and the Parties agree that the Authority shall be free to use and disclose such information on such terms and in such manner as the Authority sees fit.

- 29.8 The Parties acknowledge that damages may not be an adequate remedy for any breach of this Clause 29 by either Party or any of the Contractor's Permitted Persons and the Parties may be entitled to obtain any legal and/or equitable relief, including interdict, in the event of any breach of this Clause 29.

- 29.9 Without prejudice to the Parties' other obligations under the Contract, if directed to do so by the Discloser at any time and in any event promptly following termination or expiry, the Recipient shall return to the Discloser or destroy all Confidential Information of the Discloser and shall certify that it does not retain any such Confidential Information, save to the extent that any Confidential Information needs to be retained:

by the Contractor for the purposes of the supply or receipt of the Services;

in cases where there is a partial termination for the purposes of the performance of the remainder of the Contract;

in order to enforce any of its rights or remedies under the Contract; or

in order to maintain a record of the Confidential Information of the Discloser to enable the Recipient to establish its continuing obligations under this Clause 29.

29.10 In the event that either Party fails to comply with this Clause 29 (Confidentiality), the other Party reserves the right to terminate the Contract by notice in writing with immediate effect.

29.11 This Clause 29 shall remain in force during the Contract Period and for a period of 10 years thereafter.

30. FREEDOM OF INFORMATION

30.1 Nothing whether expressly provided in the Contract Terms, or otherwise implied, shall preclude the Authority from making public under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 and/or any codes or regulations applicable from time to time relating to access to public authorities' information ("FOI"), details of all matters relating to the Contract and the Contract unless (i) such details constitute a trade secret; (ii) the disclosure of such details would or would be likely to prejudice substantially the commercial interests of any person (including but not limited to the Contractor or the Authority); or (iii) such details fall within any other exemption under FOI provided always that application of any such exemption shall be at the sole discretion of the Authority. The Authority will take all reasonable steps to provide the Contractor with notice of any intended disclosures under FOI prior to making such information public.

30.2 The Contractor shall: -

transfer any request for information, to the Authority as soon as practicable after receipt and in any event within five (5) Days of receiving a request for information;

comply within five (5) Days with any request by the Authority; and

provide all such assistance as may be required by the Authority;

to enable the Authority to comply with its obligations under FOI.

31. DATA PROTECTION

31.1 For the purpose of this Clause 31, the terms "Processing", "Process", "Data Processor", and "Data Controller" shall have the meanings given to them in the Data Protection Legislation.

31.2 The Contractor warrants that it will Process the Personal Data in compliance with the Data Protection Legislation and all other applicable laws, enactments, regulations, orders, standards and other similar instruments.

31.3 The Contractor shall promptly comply with any request from the Authority requiring the Contractor to amend, transfer or delete the Personal Data.

31.4 At the Authority's request, the Contractor shall provide to the Authority a copy of all Personal Data held by it in the format and on the media reasonably specified by the Authority.

31.5 The Contractor shall Process the Personal Data only to the extent, and in such manner as is necessary for the purposes of the Contract and/or the Contract and in accordance

with the Authority's instructions from time to time and shall not Process the Personal Data for any other purpose, and shall keep a record of any Processing of Personal Data it carries out.

31.6 To the extent that the Contractor acts as a Data Processor of the Authority's Personal Data or as Data Controller in respect of Personal Data to which the Contractor has access in connection with the performance of the Contract, the Contractor:

warrants that it has and undertakes that it will at all times have in place appropriate technical and organisational measures sufficient to comply at least with the obligations imposed on the Authority by the relevant Data Protection Legislation;

shall provide the Authority within twenty (20) Days of request a written description of the technical and organisational measures referred to in the relevant Data Protection Legislation in sufficient detail to enable the Authority to determine whether such measures are sufficient to ensure compliance with the DPA and with the Contract Terms;

shall ensure that the Contractor's technical and organisational measures and their programmes and procedures described in the Data Protection Legislation:-

- (a) reflect the level of damage that might reasonably be expected to be suffered by a Data Subject as a result of any unauthorised access or disclosure;
- (b) at all times specifically address the nature of Sensitive Personal Data within such programmes and procedures;
- (c) prevent unauthorised or unlawful processing of the Personal Data and protect against accidental loss or destruction of, or damage to, the Personal Data; and
- (d) comply as a minimum with any Security Requirements;

shall ensure that its confidentiality and security policies are consistent with HDL (2006) 41, NHS CEL 25(2011) and NHS Scotland Code of Practice on Protecting Patient Confidentiality and Disclosure of Information issued by the Scottish Executive 20012 or any update thereof and afford an equivalent level of protection in respect of Sensitive Personal Data;

31.7 The Contractor shall ensure that access to the Personal Data is limited to:

those employees who need access to the Personal Data to meet the Contractor's obligations under the Contract and/or the Contract; and

in the case of any access by any employee, such part or parts of the Personal Data as is strictly necessary for performance of that employee's duties.

31.8 The Contractor shall ensure that all employees who have or could have access to any Personal Data:

are informed of the confidential nature of the Personal Data;

have undertaken training in the laws relating to handling personal data;

are aware both of the Contractor's duties and their personal duties and obligations under such laws, the Contract and the Contract;

if required by the Authority in writing, sign a statement in which they undertake to keep all such information confidential. The Contractor shall take reasonable steps to ensure the reliability of any of the Contractor's employees who have access to the Personal Data.

- 31.9 The Contractor shall notify the Authority within 3 Days if it receives a request from a Data Subject for access to that person's Personal Data. The Contractor shall provide the Authority with full co-operation and assistance in relation to any request made by a Data Subject to have access to that person's Personal Data whether such request is addressed to the Contractor, the Authority or otherwise. The Contractor shall not disclose the Personal Data to any Data Subject or to a third party other than at the request of the Authority or as provided for in the Contract Terms.
- 31.10 The Contractor shall not transfer the Personal Data outside the European Economic Area without the prior written consent of the Authority.
- 31.11 The Contractor shall notify the Authority immediately if it becomes aware of any breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or other processed. Where any Personal Data is lost, destroyed or becomes damaged, corrupted or unusable, the Contractor shall restore such Personal Data at its own expense. The Contractor shall provide all reasonable assistance required by the Authority in connection with any legal or other proceedings which the Authority may make against any person for breach of confidence relating to Personal Data held in connection with the Contract.
- 31.12 The Contractor shall provide access upon reasonable notice to its data processing facilities, data files and documentation needed for Processing of Personal Data and to permit auditing and / or certification by the Authority (or any other duly qualified auditors or inspection authorities) in order to ascertain compliance with this Clause 31; and
- 31.13 The Contractor agrees to indemnify and keep indemnified and defend at its own expense the Authority against all Direct Losses incurred by the Authority or for which the Authority may become liable due to any failure by the Contractor or its employees or agents to comply with any of its obligations under this Clause 31.

32. THE HUMAN RIGHTS ACT 1998 AND THE ASYLUM AND IMMIGRATION ACT 1996

- 32.1 The Contractor shall, and shall use reasonable endeavours to procure that its employees or agents and/or sub-contractors shall, at all times, act in a way which is compatible with the Convention rights within the meaning of Section 1 of the Human Rights Act 1998 in the United Kingdom and in any other country from which any part of the Services shall be provided.
- 32.2 The Contractor shall not and shall procure that its employees, agents and sub-contractors shall not be in breach of the Asylum and Immigration Act 1996.
- 32.3 Subject to Clause 18, the Contractor agrees to indemnify and keep indemnified the Authority against all Direct Losses to the extent arising out of or in connection with any breach by the Contractor of its obligations under Clauses 32.1 and 32.2.

33. POWER TO AGREE

- 33.1 The Contractor warrants to the Authority that it has all necessary power, corporate

standing and authorisation to enter into and be bound by the terms of the Contract. At all times in connection with the Contract, the Contractor shall be an independent contractor and nothing in the Contract shall create a relationship of agency or partnership or a joint venture as between the Contractor and the Authority and accordingly the Contractor shall not be authorised to bind the Authority.

33.2 The Contractor warrants that it currently has and shall maintain for the Contract Period all and any agreements (including licences) as may be required with any third parties to perform the obligations incumbent upon it under the Contract.

34. RELATIONSHIP OF THE PARTIES

The Contractor shall not incur any liabilities on behalf of the Authority or, make any representations or give any warranty on behalf of the Authority or, enter into any contract or obligation on behalf of the Authority.

35. INDUCEMENTS TO PURCHASE AND PROHIBITED ACTS

35.1 "Prohibited Act" means:

offering, giving or agreeing to give to the Authority, or any other public body or to any person employed by or on behalf of the Authority, or any other public body any gift or consideration of any kind as an inducement or reward:

- (a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Contract or any other agreement with the Authority or any other public body; or
- (b) for showing or not showing favour or disfavour to any person in relation to this Contract or any other agreement with the Authority or any other public body;

entering into this Contract or any other agreement with the Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by the Contractor or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Authority;

committing any offence:

- (a) under the Bribery Act 2010;
- (b) under any Law creating offences in respect of fraudulent acts; or
- (c) at common law, in respect of fraudulent acts in relation to this Contract or any other agreement with the Authority or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body.

35.2 The Contractor warrants that in entering into this Contract it has not committed any Prohibited Act.

- 35.3 If the Contractor (or anyone employed by or acting on behalf of it) commits any Prohibited Act, then the Authority shall be entitled to act in accordance with paragraphs 35.4 to 35.6 below.
- 35.4 If a Prohibited Act is committed by the Contractor or by an employee not acting independently of the Contractor, then the Authority may terminate the Contract with immediate effect by giving Written notice to the Contractor, and no compensation or payment shall be due to the Contractor in respect of such termination.
- 35.5 If the Prohibited Act is committed by an employee of the Contractor or a sub-contractor acting independently of the Contractor, then the Authority may give Written notice to the Contractor of termination and the Contract will terminate unless, within twenty (20) Working Days of receipt of such notice, the Contractor terminates the employee's employment or the sub-subcontract (as the case may be) and (if necessary) procures an alternative sub-contractor acceptable to the Authority.
- 35.6 Any notice of termination under this Clause 35 shall specify:
- the nature of the Prohibited Act;
 - the identity of the party whom the Authority believes has committed the Prohibited Act; and
 - the date on which the Contract will terminate in accordance with the applicable provisions of this Clause 35.
- 35.7 Without prejudice to its other rights or remedies under this Clause 35, the Authority shall be entitled to recover from the Contractor:
- the amount or value of any such gift, consideration or commission; and
 - any other loss sustained in consequence of any breach of this Clause 35.
- 35.8 Nothing contained in this Clause 35 shall prevent the Contractor from paying any proper commission or bonus to its employees within the agreed terms of their employment.
- 35.9 The Contractor shall notify the Authority on the occurrence (giving details) of any Prohibited Act promptly on the Contractor becoming aware of its occurrence.

36. NO PUBLICITY

Save as required by law and/or the requirements of any relevant stock exchange, no publicity shall be made by either Party relating to any matter in connection with the Contract without the prior written consent of the other Party.

37. AUTHORITY TO ACT

Any decision, act or thing that the Authority is required or authorised to take or do under the Contract (including submission of Orders) may be taken or done by any person authorised, either generally or specifically, by the Authority to take or do that decision, act or thing, provided that upon receipt of a Written request the Authority shall inform the Contractor of the name of any person so authorised.

38. EXECUTION OF ADDITIONAL DOCUMENTS

The Contractor shall from time to time upon the request of the Authority, execute any additional documents and do any other acts or things which may reasonably be required to implement the provisions of the Contract.

39. INVALIDITY

Any provision of the Contract that is held to be invalid, illegal or unenforceable in any jurisdiction shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining provisions hereof and any such invalidity or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in any other jurisdiction. In the event of a holding of invalidity so fundamental as to prevent the accomplishment of the purposes of the Contract, the Parties shall commence good faith negotiations to remedy such invalidity.

40. NO REPRESENTATION

The Contractor acknowledges and agrees that it has not relied on any representation, warranty or undertaking (whether written or oral) in relation to the Services and therefore irrevocably and unconditionally waives any rights it may have to claim damages against the Authority for any misrepresentation (whether made carelessly or not) or for breach of any warranty unless the representation relied upon is set out in the Contract or the Contract or unless such representation was made fraudulently.

41. NO WAIVER

The failure by the Authority or the Contractor to insist upon the strict performance of any provision, term or condition of the Contract or to exercise any right or remedy consequent upon the breach thereof shall not constitute a waiver of that Party's rights or remedies in respect of any such breach by the other Party or any subsequent breach of such provision, term or condition;

No waiver of any of the provisions of the Contract shall be effective unless it is expressly stated to be a waiver and notified to the other party in Writing in accordance with the provisions of Clause 48.

42. EXPENSES

Each Party shall bear its own expenses in relation to the preparation, execution and implementation of the Contract including all costs, legal fees and other expenses so incurred.

43. CONTRACTOR WARRANTY RE NO PENDING ACTION

43.1 The Contractor warrants represents and undertakes to the Authority that there are no pending or threatened actions or proceedings before any court or administrative agency which would materially adversely affect the financial condition, business or operations of the Contractor and that there are no material contracts existing to which the Contractor is a party which prevent it from entering into and performing the Contract; and that the Contractor has satisfied itself as to the nature and extent of the risks assumed by it under the Contract and gathered all information necessary to perform its obligations under the Contract and all other obligations assumed by it.

44. SET OFF

Wherever under the Contract any sum of money is recoverable from or payable by the Contractor, that sum may be deducted from any sum then due, or which at any later time may become due, to the Contractor under the Contract or under any other agreement or contract with the Authority.

45. WAIVER OF CLAIMS AGAINST AUTHORITY

(Save in the case of fraud) no statements made by or on behalf of the Authority at any time before, during or after the competition leading to conclusion of the Contract shall add to or vary the Contract or be of any force or effect unless any such pre-contractual statements are expressly set out in the Contract. The Contractor waives any right it may have to make any claim whatsoever in connection with any non-fraudulent pre-contractual statements made by or on behalf of the Authority. This waiver shall be unconditional and irrevocable, but it is expressly agreed that it shall not exclude any liability of the Authority for pre-contractual statements made fraudulently.

46. OBLIGATION TO MITIGATE

All Parties shall, at all times, take reasonable steps to minimise and mitigate any loss for which the relevant Party is entitled to bring a claim against any other pursuant to the Contract.

47. DIVERSITY

47.1 The Contractor shall not discriminate unlawfully within the meaning and scope of any Legal Requirement relating to discrimination (whether in relation to race, gender, disability, religion or otherwise) in employment or performance of the Contract. The Contractor shall take all reasonable steps to ensure the observance of this clause by all staff and by all contractors and sub-contractors of the Contractor and the Contractor shall ensure that its policies and practices comply with the requirements of such Legal Requirements, including without limitation, the National Minimum Wage Act 1998, the Equality Act 2006, the Equality Act 2010 and the Pensions Act 1995 (“the Anti-Discrimination Legislation”).

47.2 The Contractor shall notify the Authority immediately of any investigation of or proceedings against the Contractor under the Anti-Discrimination Legislation and shall cooperate fully and promptly with any requests of the person or body conducting such investigation or proceedings, including allowing access to any documents or data required, attending any meetings and providing any information requested.

47.3 The Contractor shall indemnify the Authority against all costs, claims, charges, demands, liabilities, damages, losses and expenses incurred or suffered by the Authority arising out of or in connection with any investigation conducted or any proceedings brought under the Anti-Discrimination Legislation due directly or indirectly to any act or omission by the Contractor, its agents, employees or sub-contractors.

47.4 The Contractor shall impose on any sub-contractor obligations substantially similar to those imposed on the Contractor by this Clause 47.

48. NOTICES

48.1 Any notice to be given under the Contract shall, either, be delivered personally, sent by facsimile or sent by first class recorded delivery post (airmail if overseas) or electronic mail. Except as otherwise provided in the Contract Terms, the address for service shall be the registered or principal office of the recipient or such other address for receipt of notices as either Party may previously have notified to the other Party in Writing. A notice shall be deemed to have been served:

if personally delivered, at the time of delivery;

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

if sent by electronic mail, at the time of the transmission.

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

48.3 All notices deliverable to the Contractor/Contractor shall be addressed to the Point of Contact.

49. COMMUNITY BENEFITS

The Contractor shall implement and perform any Community Benefits to the extent set out in the Specification or otherwise detailed in the Contract.

50. TUPE

50.1 Where there is a transfer pursuant to the TUPE Regulations of the contracts of employment of any of the Contractor's staff (such Contractor's staff being referred to herein as "Affected Employees") to the Authority or a New Contractor then the following provisions of this Clause 50 shall apply.

50.2 The Contractor shall comply with the TUPE Regulations, provided always that notwithstanding the TUPE Regulations, the Contractor shall provide all the information which it is required to disclose in terms of Regulation 11 of the TUPE Regulations to the Authority no later than two (2) months before the Service Transfer Date.

50.3 The Contractor shall advise the Authority in Writing prior to the Service Transfer Date of any updates to the information referred to at Clause 50.1.

50.4 The Contractor warrants that the information to be provided by the Contractor in terms of Regulation 11 of the TUPE Regulations will be true, accurate and complete in all material respects.

50.5 The Contractor shall and does hereby indemnify the Authority and any New Contractor from and against all Pre – Transfer Liabilities relative to the period up to and including the Service Transfer Date.

50.6 The provisions of this Clause 49 shall survive following termination of the Contract for any reason whatsoever and without limit in time.

51. TAX ARRANGEMENTS

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

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

51.3 NES may, at any time during the term of this Agreement, request the Contractor to provide information which demonstrates how the Contractor complies with sub-clauses 51.1 and 51.2 above or why those clauses do not apply to it.

- 51.4 A request under sub-clause 51.3 above may specify the information which the Contractor must provide and the period within which that information must be provided
- 51.5 NES may supply any information which it receives under clause 51 to the Commissioners of Her Majesty's Revenue and Customs for the purpose of the collection and management of revenue for which they are responsible.
- 51.6 The Contractor shall take all reasonable steps to ensure the observance of the provisions of this clause 51 by all of their servants, employees, agents, consultants and sub-contractors.

Where the Contractor enters into any contract with any of its servants, employees, agents, consultants and/or sub-contractors, the Contractor must ensure that a provision is included which is in the same terms as this clause 51 subject only to modification to refer to the correct designation of the equivalent party as the Contractor.

52. SPECIFIC IMPLEMENT

The Parties acknowledge and agree that in the event of a material failure on the part of the Contractor in performance of its obligations under the Contract, the loss or damage incurred by the Authority by reason of such material failure will be such that damages may not be an adequate remedy. Accordingly, the Authority shall have the right to specific performance of the Contractor's obligations under the Contract. Such remedy shall be in addition to and not in lieu or limitation of other remedies provided to the Authority hereunder or otherwise at law or in equity.

53. FORCE MAJEURE

- 53.1 Provided that it has complied with the provisions of Clause 53.3 neither Party shall be in breach of the Contract, or liable for any failure or delay and performance of any obligations under the Contract arising from a Force Majeure Event.

- 53.2 The corresponding obligations of the other Party will be suspended to the same extent as those of the first Party first affected by the Force Majeure Event.

- 53.3 Whichever Party is subject to a Force Majeure Event shall not be in breach of the Contract provided that: -

It promptly notifies the other Party in Writing of the nature and extent of the Force Majeure Event causing its failure or delay in performance such notice to include details of the Force Majeure Event, including evidence of its effect on the obligations of the Party affected by the Force Majeure Event and any action proposed to mitigate its effect;

It could not have avoided the effect of the Force Majeure Event by taking precautions which, having regard to all the matters known to it before the Force Majeure Event, it ought reasonably to have taken, but did not; and

It has used all reasonable endeavours to mitigate the effect of the Force Majeure Event, to carry out its obligations under the Contract in any way that is reasonably practicable and to resume the performance of its obligations as soon as reasonably possible.

- 53.4 Failure by the Contractor to perform any of the obligations under the Contract by virtue of a Force Majeure Event shall, without prejudice to the Authority's other rights and remedies, entitle the Authority (at its option):-

to withdraw such Services from the Order provided confirmation is given in Writing to

this effect;

to release itself from any obligations to and to accept and pay for any Services performed late, as a direct result of a Force Majeure Event, provided confirmation is given in Writing to this effect; and

to purchase other services of the same or similar description from any other Contractor or any third party.

54. LAW

The Contract shall be governed and construed in accordance with Scots law and both parties hereby irrevocably submit to the exclusive jurisdiction of the Scottish Courts.