

# IT Contracts and Amendments



DATED

200[ ]

**THE MAYOR AND BURGESSES OF ROYAL BOROUGH  
OF KENSINGTON & CHELSEA**

**[CONTRACTOR]**

**SYSTEM SUPPLY AGREEMENT**

<b>Version</b>	<b>Date</b>	<b>Comments</b>
<b>1.0</b>	<b>16/11/04</b>	<b>BLP Initial Draft</b>
<b>2.0</b>	<b>02/12/04</b>	<b>Incorporating Some Council Drafting Notes</b>

**SYSTEM SUPPLY AGREEMENT**

**DATE:** 200[ ]

**PARTIES:**

- 1 Council **THE MAYOR AND BURGESSES OF THE ROYAL BOROUGH OF KENSINGTON & CHELSEA** of The Town Hall, Hornton Street, London W8 7NX
- 2 Contractor [ ] (registered number [ ] ) whose registered office is at [ ]

**1 Definitions**

1.1 In this agreement the following expressions have the meanings stated:

- Bespoke Software* any bespoke software developed by or on behalf of the Contractor under this agreement, including (without limitation) modifications to the Contractor's Software or Third Party Software to ensure that the System satisfies the provisions of clause 11 (*The Council's requirements*);
- Charges* the charges specified in schedule 9 (*Charges*) as amended by the parties under clause 28 (*Change control*);
- Commencement Date* [●];
- Consultant* an individual or company employed by the Contractor in the provision of the Contractor's obligations under this agreement, whether an employee of the Contractor or a contractor;
- Data* any data whether in electronic or paper form and whether provided by the Council or produced by the Contractor as a result of the processing of data provided by the Council;
- Defect* failure of the System to comply in all respects with the terms of this agreement or to otherwise function properly. Defects are divided into three categories :
- A. defects which make it impossible to test and/or use the System or which have an adverse effect on the System's performance such that its normal use is seriously disrupted;
  - B. defects which do not make it impossible to use the System as a whole or an essential function of it but which do have a materially adverse effect on the use of the System;
  - C. defects which have an adverse effect on the operation of the System, but for which a temporary remedy is found immediately and any other defects which are not category A or B defects.
- Development Services* the services specified in clause 12 (*Development Services*) and schedule 4 (*Specifications*);
- Documentation* the technical specifications, user manuals, training materials and other documentation relating to the

<i>Encumbrance</i>	Hardware, the Contractor's Software, the Third Party Software and the Bespoke Software, including (without limitation) any documentation written or prepared by or on behalf of the Contractor as part of the Services; any right or interest of any third party, including any mortgage, charge, lien, option, encumbrance, right of pre-emption or first refusal, or any agreement to create any such right or interest;
<i>Force Majeure</i>	<ul style="list-style-type: none"> <li>(i) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation, earthquakes, riot and civil commotion; or</li> <li>(ii) failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services; or</li> <li>(iii) any failure or shortage of fuel or transport;</li> <li>(iv) war, civil war, armed conflict or terrorism; or</li> <li>(v) nuclear, chemical or biological contamination; or</li> <li>(vi) pressure waves caused by devices travelling at supersonic speeds; or</li> <li>(vii) any blockade or embargo; or</li> <li>(viii) introduction of any previously unrecognised malicious code including virus, trojans and worms; unless the event arises (directly or indirectly) as a result of any wilful act or default of the Contractor.</li> </ul>
<i>Hardware Implementation Plan</i>	the hardware specified in schedule 1 ( <i>Hardware</i> ); the implementation plan in schedule 8 ( <i>Implementation plan</i> );
<i>Intellectual Property Rights (IPR)</i>	copyright, database rights, design right, patents, trade marks, moral rights, know-how, confidential information and any other intellectual property rights. Intellectual Property Rights includes registered and unregistered rights and applications for registration and covers all rights which exist in any part of the world and any related goodwill;
<i>Minimum Service Levels</i>	the minimum service levels in schedule 6 ( <i>Support Services</i> );
<i>New Release</i>	any modification to the Software which remedies defects in the Software including any PTFs (programme temporary fixes), bug fixes, patches and maintenance releases and including any modifications required to maintain compatibility with other software;
<i>New Versions</i>	include any modified versions of the Software including any replacement products for the Software generally made available or released by the Contractor from time to time. New Versions are of two types, New Releases and Upgrades;
<i>Premises Services</i>	[●]; any services to be provided by the Contractor under this agreement, including (without limitation) the

	Development Services, the Support Services and the Training Services.
<i>Service Credits Software</i>	the service credits in schedule 6 ( <i>Support Services</i> ); the Third Party Software, the Contractor's Software and the Bespoke Software;
<i>Contractor Failure</i>	(i) any failure of the System to satisfy clause 11 ( <i>The Council's requirements</i> ); (ii) any failure of the Contractor to provide the Services so that they meet the Minimum Service Levels or any deterioration or disruption in the provision of the Services; or (iii) any failure by the Contractor to comply with any other obligations under the agreement, except to the extent to which the failure, deterioration or disruption results from a Force Majeure.
<i>Contractor's Software</i>	the software specified in schedule 2 ( <i>Contractor's Software</i> ) and any updates issued to the Council under clause 7 ( <i>New versions</i> );
<i>Contractor's Software Materials</i>	the Contractor's Software and the Documentation relating to the Contractor's Software;
<i>Support Services System</i>	the services specified in schedule 6 ( <i>Support Services</i> ); the computer system comprising the Hardware and the Software together with the Documentation;
<i>Third Party Software</i>	the software specified in schedule 3 ( <i>Third Party Software</i> ) and any updates issued to the Council under clause 7 ( <i>New versions</i> );
<i>Training Services</i>	the training services specified in schedule 7 ( <i>Training Services</i> ); and
<i>Upgrades</i>	New Versions which provide enhanced functionality.

## 2 Interpretation

### 2.1 In this agreement:

- 2.1.1 words in the singular include the plural meaning and words in the plural include the singular meaning;
- 2.1.2 reference to days, months or years means calendar days, months or years unless stated to the contrary;
- 2.1.3 references to clauses or schedules mean clauses or schedules to this agreement;
- 2.1.4 headings are for reference only and do not affect the meaning of this agreement;

- 2.1.5 references to any act, regulation, code of practice or statutory order include any change, re-enactment or extension of the act, regulation, code of practice or statutory order;
- 2.1.6 the words include, includes, included or including wherever they are used shall be deemed to be followed by the words "without limitation" unless the context otherwise requires; and
- 2.1.7 if the description of a service in general terms is followed by the more specific description of certain elements of that service, the general description of the service will not be construed restrictively by reference to the elements more specifically described.

### 3 **Supply of the System and provision of the Services**

#### 3.1 The Contractor will:

- 3.1.1 supply the Hardware in accordance with clause 4 (*Hardware*);
- 3.1.2 licence the Software in accordance with clauses 5 (*Third Party Software*), 6 (*Contractor's Software*), 7 (*New Versions*) and 8 (*Bespoke Software*);
- 3.1.3 licence the Documentation in accordance with clause 9 (*Documentation*);
- 3.1.4 provide the Development Services in accordance with clause 12 (*Development Services*);
- 3.1.5 provide the Training Services in accordance with clause 13 (*Training Services*);
- 3.1.6 provide the Support Services in accordance with clause 14 (*Support Services*).

### 4 **Hardware**

- 4.1 The Contractor shall supply, install and commission the Hardware at the Premises in accordance with the Implementation Plan.
- 4.2 Title and risk in the Hardware shall vest in the Council upon acceptance of the System in accordance with clause 12 (*Development Services*).

## 5 **Third Party Software**

- 5.1 [From the Commencement Date, the Contractor grants to the Council a [sub] licence to use the Third Party Software in accordance with the [sub-]licence contained in schedule 3 (*Third Party Software*).]

OR

[The Contractor will ensure that the licensor of the Third Party Software grants to the Council a licence to use the Third Party Software from the Commencement Date in accordance with the licence contained in schedule 3 (*Third Party Software*).]

## 6 **Contractor's Software**

- 6.1 The Council shall acquire title to the media on which the Contractor's Software is supplied but not to the Intellectual Property Rights in the Contractor's Software.

- 6.2 From the Commencement Date, the Contractor grants to the Council a [perpetual,] worldwide, non-exclusive licence to:

6.2.1 use the Contractor's Software Materials and to use the Contractor's Software on any hardware and at any location;

6.2.2 make copies of the Contractor's Software and Documentation for backup purposes, provided that the copies reproduce the copyright notices and other proprietary notices included on the Contractor's Software or Documentation; and

6.2.3 [use and access the source code versions of the Contractor's Software so that the Council may carry out (either itself or by using a third party Contractor) modifications to the Contractor's Software, including supporting the Contractor's Software.]<sup>1</sup>

- 6.3 The Council shall not, except as permitted by this agreement or by law:

6.3.1 sub-licence, assign, transfer, loan, sell, lease, rent, charge or otherwise deal in or encumber the Contractor's Software Materials or use the Contractor's Software Materials on behalf of a third party or make them available to a third party; or

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<sup>1</sup> If no access to source code is granted an escrow arrangement will likely be required. See Clause 10.2.

6.3.2 remove or alter any copyright or other proprietary notice on any of the Contractor's Software Materials.

7 **New versions<sup>2</sup>**

7.1 The Contractor shall make available to the Council any New Versions of the Software.

7.2 The Council shall be entitled to refuse to implement New Versions of the Software, where the Council has reasonable grounds for its decision.

7.3 The Contractor will make New Releases available to the Council at no additional charge.

7.4 Subject always to clause 7.6, to the extent to which the New Version incorporates enhancements to the Software, the parties shall agree a reasonable additional charge to be paid by the Council. If a New Version both remedies defects in the Software and enhances the Software, the Council shall be entitled to use the corrections at no cost and shall not be liable to pay any charges for the enhancements unless it intends to use them;

7.5 The Council will be entitled to receive and use at no additional cost any New Versions that contain enhancements relating to:

7.5.1 providing compatibility or interoperability with a new version of any Third Party Software or new versions of the Hardware which are generally made available by the Contractor to the Contractor's user base; or

7.5.2 compliance with new or amended legal or regulatory requirements applicable to the System; or

7.5.3 [●].<sup>3</sup>

7.6 If the Contractor develops New Versions of the Software, it shall promptly:

7.6.1 make available to the Council documentation for the New Version which complies with clause 9 (*Documentation*); and

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<sup>2</sup> Amend to apply to Third Party Software as well where relevant. This will depend on the exact licensing matrix for Third Party Software as per Clause 5.

<sup>3</sup> Insert any other scenarios as required.



7.6.2 ensure that the New Version is deposited in escrow in accordance with clause 10 (*Licence of Software and Documentation*).

## 8 **Bespoke Software**

8.1 The Contractor assigns by present assignment of future rights the Intellectual Property Rights in the Bespoke Software to the Council with full title guarantee.

8.2 Whilst it is carrying out the Development Services, the Contractor shall maintain up to date versions of the source code of the Bespoke Software and shall make these available promptly to the Council.

## 9 **Documentation**

9.1 From the Commencement Date, the Contractor grants to the Council a perpetual, non-exclusive licence to use the technical specifications and user manuals ("*System Documentation*") and make copies of the System Documentation, provided that the copies reproduce the copyright notices and other proprietary notices included on the System Documentation.

9.2 The Contractor shall ensure that the System Documentation shall be such:

9.2.1 that it contains an accurate, full and detailed description of the System and its functions;

9.2.2 that users can easily use all functions of the System; and

9.2.3 that maintenance of the System can be provided by others.

9.3 [The Contractor will make the Documentation available online or downloadable via the Internet, in an easy to follow format.] The Documentation for the Hardware will be provided on or before delivery of the Hardware. The Documentation for the Software will be provided on or before completion of the Development Services.

9.4 Except as specified in clause 9.1 (*Documentation*), the Contractor assigns by present assignment of future rights the Intellectual Property Rights in the Documentation to the Council with full title guarantee.

## 10 **Licence of Software and Documentation**

10.1 Notwithstanding any provisions in the agreement:

- 10.1.1 the software licence granted under clauses 5 (*Third Party Software*), 6 (*Contractor's Software*) and 9 (*Documentation*) will cover employees and agents of the Council (including professional advisers, contractors, subcontractors and Contractors when acting as agents of the Council);
  - 10.1.2 if the Council instructs a third party Contractor to support the Software or outsources the provision of all or part of its information technology services to a third party Contractor, the third party Contractor shall be entitled to use the Software and Documentation on the Council's behalf in accordance with the terms of this agreement and solely to provide information technology services to the Council;
  - 10.1.3 the parties agree that the Software will not contain any disabling programme or device.
- 10.2 [The Contractor will promptly place the source code of the Software, along with any documentation reasonably necessary to allow a trained programmer to maintain that source code, in escrow with the National Computing Centre ("NCC") on the terms of its standard tripartite agreement. The Contractor will promptly provide the NCC with any update it produces of the source code of the Software and any such documentation. The Contractor will pay the costs of the NCC and any other costs of complying with this clause 10.2.]

## 11 **The Council's requirements**

- 11.1 The Contractor will ensure that:
  - 11.1.1 the System will, at the date of delivery and for a period of ● years from the date of delivery, meet and satisfy the Council's requirements as specified in schedules 4 (*Specification*) and 8 (*Implementation Plan*) and be suitable for the purposes specified in schedule 4 (*Specification*);
  - 11.1.2 the System will be free from defects in design, materials and workmanship and will function properly;
  - 11.1.3 the Services and the System will be delivered in accordance with schedule 8 (*Implementation Plan*) and the Contractor will notify the

Council promptly if it is, for any reason, unable to meet the key dates referred to in schedule 8 (*Implementation Plan*);

11.1.4 it will perform its obligations under the agreement with the skill, care and diligence to be expected of an expert Contractor of software, hardware and information technology services.

## 12 Development Services

12.1 The Contractor shall develop the Bespoke Software and customise the Third Party Software and the Contractor's Software and implement the resulting software on the Hardware as specified in schedule 4 (*Specification*) in accordance with the timescale specified in schedule 8 (*Implementation Plan*).

12.2 The Contractor is responsible for project managing the development of the Bespoke Software and the customisation and implementation of the Third Party Software and the Contractor's Software.

12.3 So that the Council may monitor progress, the Contractor shall provide weekly progress reports in such form as may be agreed between the parties.

12.4 The parties shall agree:

12.4.1 acceptance tests which demonstrate that the System complies in all respects with the terms of this agreement and functions properly (*the Acceptance Tests*); and

12.4.2 procedures for carrying out the Acceptance Tests.

12.5 The Acceptance Tests shall be designed by the Council and carried out by the Council and the Contractor. The Council may take advice from a third party before deciding to accept the System. The Contractor shall co-operate with the third party. The third party shall sign a confidentiality undertaking in accordance with clause 27.3.1.

12.6 Immediately after the Acceptance Tests have been carried out, the parties shall draw up and sign a report. The report shall record the Defects, (divided into categories A, B and C) in the System and also whether or not the System has been accepted by the Council.

- 12.7 If the Acceptance Tests have revealed category A Defects, the Contractor shall remedy the Defects and submit the System to the Council for re-testing within [five] working days.
- 12.8 If the Acceptance Tests have revealed category B Defects, the Contractor shall remedy the Defects and submit the System to the Council for re-testing within [ten] working days.
- 12.9 Category C Defects shall not constitute a reason not to accept the System. The Contractor shall remedy category C Defects as soon as possible but no later than within one month.
- 12.10 If the Acceptance Tests have not been successfully completed by [DATE] ("*Acceptance Date*"), the Council may, at its option and without prejudice to its other rights and remedies:
- 12.10.1 require the Contractor to commit maximum resources, at no charge to the Council, to make sure that by a reasonable date specified by the Council the Acceptance Tests have been successfully completed; and
  - 12.10.2 claim liquidated damages from the Contractor at the rate of [●] per day for each day from the Acceptance Date until the expiry of [30] days or until the Acceptance Tests have been successfully completed, whichever is earlier. The parties agree that these amounts are a genuine pre-estimate of the loss which would be suffered by the Council during the 30 day period but are without prejudice to any rights or remedies that the Council may have relating to losses suffered after the [30] day period; and
  - 12.10.3 accept part of the System specified by the Council and pay a pro rated Charge for it. If it is not possible to calculate a pro rated Charge for the part of the System, then the charge will be agreed between the parties.
- 12.11 If the Acceptance Tests have not been successfully completed by [●], the Council may, at any time after [●], at its option and without prejudice to its other rights and remedies, terminate this agreement and receive an immediate refund from the Contractor of all sums paid to it under this agreement. The Contractor shall indemnify the Council against all claims, demands, actions, costs and expenses

(including legal costs and disbursements) that the Council suffers as a result of the termination.

12.12 Both parties will pay their own costs in respect of the acceptance testing procedure, except where the tests need to be carried out more than once as a result of a Contractor Failure, when the costs of both parties will be the responsibility of the Contractor.

12.13 If the System is being tested in parts or on a modular basis and a material part or module of the System fails to pass the Acceptance Tests the Council may (in its sole discretion) reject all (or some) of the other parts or modules of the System even if such other parts or modules have been previously delivered to and/or accepted by and/or used by the Council prior to the date of the failure of such material part or module of the System to pass the Acceptance Tests.

### 13 **Training Services**

13.1 The Contractor shall provide the training services specified in schedule 7 (*Training Services*).

### 14 **Support Services**

14.1 The Contractor shall at all times:

14.1.1 provide the Support Services in accordance with schedule 6 (*Support Services*) and meet the Minimum Service Levels;

14.1.2 notify the Council immediately if it is, for any reason, unable to meet the Minimum Service Levels.

14.2 If the Contractor fails to meet the Minimum Service Levels, it shall incur Service Credits under schedule 6 (*Support Services*).

14.3 The Contractor will provide the Council with a monthly report within seven days of the end of each month showing whether it is meeting the minimum service levels specified in schedule 6 (*Support Services*).

14.4 A failure by the Contractor to monitor the service levels it is achieving and to provide the Council with the monthly report in accordance with clause 14.3 showing that it is meeting the Minimum Service Levels will be regarded as a failure to meet the relevant Minimum Service Levels.

14.5 Payment of the Service Credits shall be without prejudice to the Council's other rights or remedies under this agreement or at common law.

## 15 **Consultants**

15.1 Subject to clauses 15.2 to 15.6, the Contractor reserves the right to determine which personnel shall be assigned to perform the [Development] Services.

15.2 The Contractor shall not engage agents or sub-contractors to provide the [Development] Services or any material part of the [Development] Services without the Council's prior written consent. The Council's consent shall not be unreasonably withheld or delayed.

15.3 The Contractor shall remain responsible for obligations that are performed by agents, employees or sub-contractors and for the acts or omissions of agents, employees and sub-contractors as if they were acts or omissions of the Contractor.

15.4 The Council shall be entitled at any time to instruct the Contractor not to engage an employee, agent or a sub-contractor in the provision of the [Development] Services. The Council shall act reasonably in relying upon this clause. The Contractor will promptly remove the employee, agent or sub-contractor from the provision of the [Development] Services and will provide a satisfactory replacement.

15.5 The Contractor shall use reasonable endeavours to ensure continuity in the provision of the [Development] Services and shall not replace or re-assign Consultants during the term of the contract without the prior consent in writing of the Council (such consent not to be unreasonably withheld or delayed).

15.6 The Council shall be entitled upon reasonable notice to request that the [Development] Services are provided by a particular Consultant. In such cases the Contractor shall use all reasonable endeavours to make the Consultant available as soon as reasonably practical.

## 16 **Amount of the Charges**

16.1 Subject to the Contractor performing its obligations under this agreement, the Council shall pay the Contractor the Charges.

16.2 The Charges do not include value added tax which shall be payable by the Council to the Contractor at the then prevailing rate and in the manner prescribed by law.

- 16.3 Unless specified to the contrary in schedule 9 (*Charges*) or agreed by the parties in accordance with clause 28 (*Change control procedure*):
- 16.3.1 the Charges are the only amounts payable by the Council under this agreement. All other costs, charges and expenses which relate to the Contractor's performance of its obligations under this agreement and the provision of the Services shall, except where something different is stated in this agreement, be borne by the Contractor. The fact that a provision does not state that the Contractor must perform the obligations "at no additional charge" shall not be taken as implying that the Contractor may charge extra for complying with the obligation;
- 16.3.2 the Charges are fixed and are not subject to any increase and the Contractor shall be deemed to have satisfied itself before the date of signature of this agreement as to the accuracy and sufficiency of the rates and prices in schedule 9 (*Charges*).
- 16.4 The Contractor will be deemed, before the date of signature of the agreement, to have:
- 16.4.1 verified the accuracy of any information supplied to it by the Council;
- 16.4.2 satisfied itself as to the nature and extent of the risks assumed by it under the agreement and the accuracy and sufficiency of the rates and prices in schedule 9; and
- 16.4.3 gathered all information necessary to perform its obligations under the agreement.
- 16.5 If the Council has provided the Contractor with incorrect or insufficient information, the Contractor will not be relieved from any obligations under the agreement or be entitled to claim against the Council except where the information was fraudulently misrepresented by the Council.
- 16.6 The Council gives no guarantee and accepts no liability for the volume of the Services which may be ordered by the Council from the Contractor. Any indication of likely volumes is given as a guide only.
- 16.7 [If the Contractor enters into a supply or sub-contract agreement in connection with this agreement, it will make sure that a term is included in that agreement requiring

the Contractor to pay the charges of the Contractor or sub-contractor within no more than 30 days of receipt of invoice.]<sup>4</sup>

**17 Payment of the Charges**

17.1 All sums due under this agreement shall, unless the subject of a bona fide dispute, be paid by the Council within 30 calendar days of receipt by the Council of a proper invoice or by the due date, whichever is later. If a bona fide dispute exists in relation to part only of an invoice, the Council will pay the undisputed amount.

17.2 If the Contractor owes the Council money under this agreement or another agreement, the Council may deduct this from money that the Council owes to the Contractor.

17.3 If either party fails to make any payment on the due date (or, where later, in accordance with clause 17.2, if relevant) and that payment is not the subject of a bona fide dispute between the parties, then, without prejudice to any rights or remedies available to the other party, the other party may charge that party interest on the amount unpaid, at the rate of two per cent per annum above Barclays Bank plc base rate from time to time until payment in full is made. It is agreed between the parties that the rate of interest described herein provides the Contractor with a substantial remedy pursuant to sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

17.4 [The Council shall only be obliged to make payments:

17.4.1 which are supported by accurate invoices including details of the authorised hours worked by the Contractor in providing the Support Services as certified by the Council on time sheets on the Council's Council time recording system; and

17.4.2 where the Council is satisfied that the work has been performed in accordance with this agreement.]

**18 [Audit**

18.1 The Contractor will keep records detailing all actions taken in connection with the performance of its obligations under this agreement.

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<sup>4</sup> If required.



- 18.2 In order that the Council may audit the Contractor's compliance with the terms of this agreement and the Charges payable by the Council under this agreement, the Contractor will provide the Council, on request, at no additional charge, with:
- 18.2.1 reasonable access to and copies of the records referred to in clause 18.1;
  - 18.2.2 reasonable access to all relevant information, premises, data, employees, agents, sub-contractors, software, hardware and other assets at all locations from which obligations of the Contractor are being carried out;
  - 18.2.3 all reasonable assistance in carrying out the audit.
- 18.3 At the Council's request the Contractor will make all reasonable changes required by, and take any other action necessitated by, any audit or inspection. If the action comprises the correction of a defect in the Services or the manner in which the Services are provided, the Contractor shall implement the action at no additional charge to the Council. Otherwise the parties will agree the charge for the change under schedule 10 (*Change control procedure*).
- 18.4 A failure by the Contractor to comply fully with any audit, including any failure to comply fully with clauses 18.1, 18.2 or 18.2.3 will be regarded as a remediable breach of this agreement entitling the Council to terminate this agreement under clause 32.2 (*Termination*).
- 18.5 Any inspection or audit, or failure to inspect or audit, will not in any way relieve the Contractor from its obligations under this agreement.]

## 19 **The Council's service related obligations**

- 19.1 The Council shall comply with the obligations specified in schedule 5 (*The Council's obligations*) so that the Contractor can provide the Services.
- 19.2 If the Council shall fail to comply with any of its obligations specified in schedule 5 (*The Council's obligations*) or shall fail to comply with such obligation by an agreed deadline (the failure or delay being referred to as a "*Council Default*") subject to the Contractor complying with clause 19.3:
- 19.2.1 the Contractor will not be responsible for failure to carry out or delay in carrying out any of its obligations under this agreement to the extent to which this is directly caused by the Council Default;

- 19.2.2 the Council will reimburse the Contractor for any reasonable additional costs incurred by the Contractor in providing the Services as a direct result of the Council Default. The parties will agree the amount of the costs in accordance with the schedule 10 (*Change control procedure*).
- 19.3 In the event of a Council Default the Contractor will:
  - 19.3.1 notify the Council promptly if it has reasonable grounds for believing that an act or omission of the Council including a failure by the Council to perform its obligations under this agreement might have a detrimental effect on the System or Services or the System or Contractor's ability to deliver the Services.
  - 19.3.2 carry out its duties to the best level reasonably achievable in the circumstances of the Council Default;
  - 19.3.3 take all reasonable steps to overcome and mitigate the effects of the Council Default as soon as reasonably practical, including actively managing any problems caused or contributed to by third parties and liaising with them.
- 19.4 Clause 19.2 is the full extent of the Council's liability for any the Council Default. The Council Default will not constitute a material breach of this agreement and the Contractor will not be entitled to terminate this agreement under clause 32 (*Termination*).

## 20 **Force majeure**

- 20.1 Neither party shall be responsible for failure to carry out any of its duties under this agreement to the extent to which the failure is directly caused by Force Majeure, provided that, if the affected party is the Contractor, it:
  - 20.1.1 has taken all reasonable steps to prevent and avoid the Force Majeure;
  - 20.1.2 carries out its duties to the best level reasonably achievable in the circumstances of the Force Majeure;
  - 20.1.3 takes all reasonable steps to overcome and mitigate the effects of the Force Majeure as soon as reasonably practicable, including actively

managing any problems caused or contributed to by third parties and liaising with them;

20.1.4 [if the Force Majeure constitutes a disaster (as defined in the disaster recovery plan agreed between the parties), complies with every obligation set out in the disaster recovery plan in relation to the disaster];

20.1.5 on becoming aware of the Force Majeure promptly informs the Council in writing that something has happened which is a Force Majeure, giving details of the Force Majeure, which Services have been affected, together with a reasonable estimate of the period during which the Force Majeure will continue;

20.1.6 within seven calendar days of becoming aware of the Force Majeure provides written confirmation and reasonable evidence of the Force Majeure; and

20.1.7 tells the Council when the Force Majeure has stopped.

20.2 The Charges for the Services affected by a Force Majeure shall be reduced or waived by a reasonable amount to be agreed between the parties to reflect the extent and standard to which the affected Services are being provided. If a Force Majeure results in suspension of part or all of the Services or in the Services being provided to a level of negligible value to the Council, the Council shall not be liable to pay for the Services.

20.3 If the Force Majeure continues for more than 30 calendar days, the Council may terminate this agreement by giving 30 days' written notice.

## 21 **Warranties**

21.1 The Contractor warrants and represents to the Council that:

21.1.1 it has full right, power and authority to enter into this agreement and supply the System in accordance with this agreement;

21.1.2 all information (including information relating to the performance of the Bespoke Software) given to the Council during the negotiations leading up to the entering into of this agreement was when given and remains, to the best of the Contractor's knowledge, accurate and comprehensive in all respects;

- 21.1.3 it will make sure that, when complying with its obligations under this agreement, it does not interfere with the activities of the Council, its employees, agents or customers;
- 21.1.4 it will consult with the Council as often as may be necessary for the purposes of the performance of its obligations under this agreement;
- 21.1.5 the Council will acquire title to the Hardware free from all Encumbrances and shall have the right to quiet possession of the System;
- 21.1.6 provided the Council operates the System on the Hardware for the duration of the contract, the System will operate efficiently and effectively and deliver the System response times set out in the Specification for the duration of this Agreement;
- 21.1.7 provided the Council operates the System on the Hardware, the Hardware will have the capacity to deliver the System performance required for a minimum period of 4 years and that any new replacement hardware recommended by the Contractor and operated by the Council after this period will also deliver the System performance required for a minimum period of 4 years. This requirement excludes any performance problems caused by failure of hardware where that failure is covered under a manufacturer's guarantee or a hardware support service agreement, or by problems caused by the Council's network.
- 21.1.8 the Contractor guarantees a minimum data conversion accuracy of 99% provided that the following errors are excluded from the calculation of the data conversion accuracy percentage:
- 21.1.8.1 inaccuracy caused by corrupt data in the existing Council systems;
  - 21.1.8.2 the Council's failure to follow the Contractor's advice regarding data cleansing, data creation or data conversion;
  - 21.1.8.3 data errors – where the Contractor has previously given advice on how to correct them and the Council has failed to do so;

- 21.1.8.4 rounding errors, where the figures calculated by the System are correct, and with the proviso that the Contractor alert the Council to these errors and work with the Council to minimise the problems they could cause; and
- 21.1.8.5 incorrect parameter settings in the existing systems with the proviso that the Contractor alerts the Council to these errors and works with the Council to minimise the problems they could cause.
- 21.1.9 it has sized the Hardware and warrants that the Hardware will have sufficient capacity and be suitable for the running of the Software;
- 21.1.10 each individual element of the System will be compatible with all other elements of it and will work properly in combination with each other as an integrated system;
- 21.1.11 it will keep records detailing visits to the Premises and all action taken in connection with the performance of its obligations under this agreement;
- 21.1.12 it will give written details to the Council of the name of any Consultant who is to perform any services under this agreement;
- 21.1.13 the System will meet all applicable international technical standards;
- 21.1.14 the structure of the Bespoke Software will be such that, if the Third Party Software or the Contractor's Software is changed, the Bespoke Software can be easily modified at no cost to the Council;
- 21.1.15 the source code of the Third Party Software, the Contractor's Software and the Bespoke Software shall contain sufficient information in human readable form to enable a trained programmer to understand, maintain or correct the Bespoke Software;
- 21.1.16 the System will be interoperable and compatible with all new versions of the Third Party Software as may be commercially released by the vendors of the Third Party Software;

- 21.1.17 the System will comply, and will continue to comply, with all applicable [UK] legal and regulatory requirements from time to time; and
  - 21.1.18 the Services, Hardware and Software will be Date Compliant and Euro Compliant, as defined in clauses 21.2 and 21.3
- 21.2 "*Date Compliant*" means that neither performance nor functionality shall be affected by dates prior to, during and after the year 2000. In particular:
- 21.2.1 no value for current date will cause any interruption in operation;
  - 21.2.2 date-based functionality must behave consistently for dates prior to, during and after the year 2000;
  - 21.2.3 in all interfaces and data storage, the century in any date must be set out either explicitly or by unambiguous algorithms or inferencing rules.
- 21.3 "*Euro-ready*" means that neither performance nor functionality will be affected by Economic and Monetary Union or the introduction of a single or common European currency. In particular, the Software shall be able to:
- 21.3.1 perform all of its monetary functions in euros;
  - 21.3.2 correctly implement the conversion and rounding requirements required by European law including the ability to handle the triangulation method of currency conversion;
  - 21.3.3 operate in both sterling and euros both during and after the transition period leading up to Economic and Monetary Union;
  - 21.3.4 handle any European legal, regulatory or market practice changes which are identified in the leading up to, or after, the introduction of the euro.
- 21.4 The Contractor will, without prejudice to the Council's rights under this agreement, pass onto the Council the benefit of any manufacturers' warranties relating to the System.

## 22 Indemnities and limitations of liability

22.1 The Contractor shall indemnify the Council, its employees, and agents against all claims, demands, actions, costs and expenses (including legal costs and disbursements) which the Council incurs, directly or indirectly, as a result of any act, omission or default of the Contractor, its employees, agents, sub-contractors, Contractors and invitees in respect of:

22.1.1 breach of the warranties in clause 21 (*Warranties*);

22.1.2 damage to real or personal property;

22.1.3 injury to persons, including injury resulting in death;

except insofar as, and to the extent that, the damage or injury is caused by any act or omission of the Council, its employees, agents, sub-contractors and Contractors.

22.2 Notwithstanding anything else in this agreement, the liability of each party under or in connection with this agreement, whether arising from contract, negligence or otherwise, shall be limited as follows:

22.2.1 for loss of or damage to physical property, the limit for any one or series of connected events will be £[●] million;

22.2.2 for any other liability, the aggregate liability shall be the greater of £[●] million or 300% of the Charges payable during the term of this agreement.

22.3 [The amounts referred to in clause 22.2 (*Indemnities and limitations of liability*) will be adjusted in line with the changes in the retail prices index published by the Office for National Statistics or any other index substituted from time to time by the Office for National Statistics or its successors.]

22.4 Neither party shall be liable for any indirect or consequential loss or loss of profits.

22.5 The following losses shall not be treated as indirect or consequential losses or loss of profits for the purposes of clause 22.4:

22.5.1 bank charges, interest and reasonable operational and administrative costs and expenses necessarily incurred by the Council or third parties as a result of a breach of this agreement or a negligent act or omission of Contractor, its agents, employees or sub-contractors; and

- 22.5.2 the cost of idle time of staff, goods and facilities of the Council and any third parties engaged by the Council, insofar as such costs cannot reasonably be avoided;
  - 22.5.3 the Council's reasonable and documented costs of internal and external staff (including associated expenses reasonably incurred by such staff) necessitated as a direct result of the Contractor's negligence or default (including, but not limited to, costs of staff providing or re-providing the Services which, in accordance with the agreement, should have been provided by the Contractor);
  - 22.5.4 the Council's reasonable costs of selecting and negotiating with a contractor or contractors to replace the Contractor in connection with the provision of the Services and the difference in cost between what the Council would have paid to the Contractor for the Services that the Contractor should have delivered under the agreement and what the Council reasonably contracts to pay a replacement contractor to provide services which are materially similar to the Services;
  - 22.5.5 the cost of taking emergency measures, including changing over to other computer systems or engaging third parties.
- 22.6 The exclusions and limitation of liability set out in clause 22 (*Indemnities and limitations of liability*) do not apply to:
- 22.6.1 liability arising from death or injury to persons;
  - 22.6.2 [the Council's obligation to pay the Charges;]
  - 22.6.3 the Contractor's liability under clauses 26 (*IPR indemnity*) or 24 (*Council's data and computer systems*); and
  - 22.6.4 either party's liability arising as a result of fraud or gross negligence;
- to which no limit applies.
- 22.7 The parties do not intend any third party to have the right to enforce any provision of this agreement under the Contracts (Rights of Third Parties) Act 1999 or otherwise.
- 22.8 Notwithstanding that any term of this agreement may be or become enforceable by a person who is not a party to it, the terms of this agreement or any of them may



be varied, amended or modified or this agreement may be suspended, cancelled or terminated by agreement in writing between the parties or this agreement may be rescinded (in each case) without the consent of the third party.

## 23 Insurance

23.1 Without prejudice to clause 21 (*Warranties*), the Contractor shall maintain in force (at its own expense) for the term of this agreement and for six years after its termination:

23.1.1 employer's liability insurance for the minimum amount of £10 million to cover loss and damage relating to the provision of the Services to the Council;

23.1.2 comprehensive general liability insurance, including professional indemnity, public liability and product liability insurance, for the minimum amount of £5 million to cover loss and damage relating to the provision of the Services to the Council; and

23.1.3 other similar insurances in accordance with all laws which may be applicable to employees, agents or sub-contractors engaged directly or indirectly by the Contractor in the performance of the Services.

23.2 The Contractor will be responsible for insuring:

23.2.1 the Hardware, until it is accepted by the Council;

23.2.2 any equipment which it brings onto the Premises.

the Council shall have no responsibility for any loss of or damage to this equipment except for loss or damage caused by the wilful or negligent acts of the Council.

23.3 The insurance policies referred to in clause 23.1 shall be with a reputable insurer and shall not include unreasonable excesses which are unusual for this type of insurance.

23.4 Within 14 calendar days of a request by the Council, the Contractor shall provide evidence of the insurances which it is obliged to maintain under clause 23.1.

## 24 The Council's data and computer systems

24.1 The Council authorises the Contractor to have access to the Council's computer systems but only to the extent necessary for the performance of the Services.

- 24.2 [Without prejudice to the Contractor's obligations under the remainder of this agreement, the Contractor will comply with the Council's security policy [notified to the Contractor from time to time/attached in schedule [●] (*Standards, guidelines and policies*)].
- 24.3 The Contractor will use all reasonable endeavours in accordance with best IT industry practice to make sure:
- 24.3.1 that nothing is done by its consultants, employees, agents or invitees which contaminates, corrupts, impairs or adversely affects any of the Council's computer systems and computer data; and
- 24.3.2 that no invasive programs, "computer viruses" or "logic bombs" are introduced onto the Council's computers, computer systems, computer software or data.
- 24.4 If the Council's data is corrupted or lost as a result of any default by the Contractor, the Council shall have the option without prejudice to its other remedies to:
- 24.4.1 require the Contractor at its own expense to restore or procure the restoration of the Council's data, or
- 24.4.2 itself restore or procure the restoration of its data and recover the reasonable costs of doing so from the Contractor.
- 24.5 The following apply to data, material or information supplied by the Council to the Contractor ("Items"):
- 24.5.1 Intellectual Property Rights in the Items shall be vested in, and remain the property of, the Council or its licensors. If the Item is the Council's Data then the Council will own the Intellectual Property Rights in the data and any databases in which the Council's data is held, whether the databases were created before or after commencement of the agreement and irrespective of any change of format that may have occurred during the course of the agreement;
- 24.5.2 the Contractor may use the Items solely to the extent necessary for the provision of the Services;
- 24.5.3 the Contractor may not modify the Items without the prior written consent of the Council except to the extent reasonably necessary for the provision of the Services;

- 24.5.4 the Contractor may not copy or disclose the Items to third parties except to the extent necessary for the provision of the Services;
- 24.5.5 the Contractor shall comply with any reasonable directions made by the Council from time to time relating to use of the items;
- 24.5.6 the Contractor will grant the Council access to and will provide the Council with copies of any Items; and
- 24.5.7 the Contractor will surrender the Items to the Council at any time at the request of the Council.

## 25 **Legislation**

- 25.1 The Contractor shall perform the Services in accordance with all Acts of Parliament, statutory instructions, regulations, orders and other legislative provisions.
- 25.2 Without prejudice to clause 25.1 the Contractor will only process any personal data (as defined by the Data Protection Act 1998) available to the Contractor as a result of, or in connection with, the provision of the Services ("Data") strictly in accordance with the data protection laws applicable in the UK and the terms of this agreement and for the purposes of performing its obligations and exercising its rights under this agreement.
- 25.3 The Contractor will have in place throughout the term of this agreement, appropriate technical and organisational measures against accidental or unauthorised destruction, loss, alteration or disclosure of the Data, and adequate security programs and procedures to ensure that unauthorised persons will not have access to any equipment used to process the Data.
- 25.4 If the Contractor cannot comply with clause 25.2 or 25.3, for whatever reasons, it agrees to inform the Council, in which case the Council is entitled to suspend the transfer of Data and/or terminate this agreement.
- 25.5 The Contractor has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the Council and its obligations under this agreement and that in the event of a change in this legislation which is likely to have a substantial adverse effect on its obligations under this clause, it will notify the change to the Council as soon as it is aware, in which case the Council is entitled to suspend the transfer of the Data and/or terminate this agreement.

- 25.6 The Contractor will not disclose the Data to third parties unless the Council has given prior written authorisation and the third party has entered into the same obligations as the Contractor.
- 25.7 The Contractor will immediately notify the Council about any request for disclosure of the Data from a public body that could eventually force it to disclose the Data, unless such notification is forbidden by law as well as any disclosure or accidental or unauthorised access made by an employee, subcontractor or any other identified person as well as the known facts as regards the above mentioned disclosure or use.
- 25.8 The Contractor will immediately notify the Council about any requests received directly from the individuals to whom the Data relates acknowledging that it is not authorised to respond unless the Council has explicitly authorised that action or a competent authority has declared that the Council is unable to respond requests from those individuals.
- 25.9 The Contractor will deal promptly and properly with all enquiries from the Council relating to processing of the Data and will co-operate with the Information Commissioner in the course of all its enquiries and abide by the advice of the Information Commissioner with regard to the processing of the Data.
- 25.10 At the request of the Council, the Contractor will submit its data processing facilities for audit which will be carried out by the Council or an inspection body composed of independent members and in possession of the required professional qualifications bound by a duty of confidentiality, selected by the Council, where applicable, in agreement with the Information Commissioner.

## 26 **IPR indemnity**

- 26.1 The Contractor shall indemnify and hold harmless the Council from and against all and any claims, demands, costs, expenses, liabilities, damages and losses including without limitation consequential losses, loss of profit, business and/or reputation, and all interest, penalties and legal and other professional costs and expenses incurred or suffered by the Council (including legal expenses reasonably and properly incurred) arising directly or indirectly as a result of or in connection with any claim that the System or Services infringe any Intellectual Property Rights of any third party. The Council shall notify the Contractor promptly in writing of any claim under clause of which it is aware.

- 26.2 The Contractor shall not use the Council's name in any action or claim without the Council's prior written consent.
- 26.3 If the System or Services (or any part of them) is held to constitute an infringement, the Contractor may at its option and expense:
- 26.3.1 procure for the Council, with the Council's agreement, the right to continue using the System and receive the Services;
  - 26.3.2 modify the System so that the System and the Services are non-infringing without materially detracting from its overall performance;  
or
  - 26.3.3 replace the infringing System or Services with another non-infringing system or non-infringing Services having a capability materially equivalent to the infringing System.
- 26.4 The Contractor shall indemnify the Council against all claims, demands, actions, costs and expenses (including legal costs and disbursements) which the Council incurs as a result of any loss of ownership of the System or loss or ability to receive the Services and of any loss of use during modification or replacement.

## 27 Confidentiality

### 27.1 In this agreement:

27.1.1 "*Confidential Information*" means written, electronic or oral information relating to the business of the Council or the Contractor which is received as a result of this agreement and the discussions leading up to it.

27.1.2 "*Representative*" means directors, officers, employees, agents, auditors, professional advisers and sub-contractors.

### 27.2 Each party shall keep the other's Confidential Information confidential unless:

27.2.1 the Confidential Information was already lawfully known, or became lawfully known to that party independently;

- 27.2.2 the Confidential Information is in, or comes into, the public domain other than due to wrongful use or disclosure by the Council or Contractor;
  - 27.2.3 disclosure or use of the Confidential Information is necessary to carry out this agreement;
  - 27.2.4 disclosure is required by law to any court, government, government department, agency, regulatory or fiscal body or authority and their authorised agents and professional advisers.
- 27.3 Each party shall:
- 27.3.1 make sure that its directors, officers, employees, agents, auditors, professional advisers and sub-contractors comply with this clause. If asked for, the Council and the Contractor shall make sure that their employees, agents and sub-contractors sign a reasonable direct confidentiality undertaking in a form approved by the other.
  - 27.3.2 use the same standard of care in dealing with the other's Confidential Information as if it were Confidential Information of its own and in any event with no less than a reasonable standard of care;
  - 27.3.3 tell the other immediately if it discovers that this clause has been breached and shall give the other all reasonable assistance in connection with any proceedings;
  - 27.3.4 use the Confidential Information received by it from the other party, its employees, agents or advisors only for the purpose of the agreement;
  - 27.3.5 not, without the prior written consent of the other party, disclose the Confidential Information received by it from the other party, its employees, agents or advisors to any person other than its Representatives who are required in the course of their duties to receive and consider it for the purpose of the agreement;
  - 27.3.6 return to the other on request all of the Confidential Information (whether held by it or its Representatives) which is in a physical form (including all copies) and shall, on request, destroy any other records

(including, without limitation, those in machine-readable form) containing Confidential Information.

27.4 In the event that a party, its Representatives or anyone to whom it transmits any Confidential Information becomes (or it is reasonably likely that it or they shall become) legally compelled to disclose any Confidential Information, it prompt notice of such fact shall be given to the other party prior to any disclosure so that the other party may seek an appropriate remedy to prevent the disclosure or waive compliance with the provisions of this agreement preventing the disclosure. The party required to disclose the Confidential Information shall fully co-operate with the other in the event that the other elects to challenge the validity of the requirement.

27.5 The obligations in clause 27 will continue without limit in time.

27.6 Neither party shall make any press announcement or publicise this agreement in any way, without the prior written consent of the other.

**28 Change control procedure**

Any changes to this agreement or the schedules shall be agreed by the parties in accordance with schedule 10 (*Change control procedure*).

**29 Escalation procedure**

29.1 If there is a dispute, the Council and the Contractor shall use their reasonable endeavours to negotiate and settle the dispute. If this is not possible, the Council and the Contractor shall escalate the dispute to senior representatives of the parties in accordance with an agreed escalation procedure.

29.2 Work and activity to be carried out under this agreement shall not cease or be delayed by this escalation.

**30 Dispute resolution procedure**

30.1 If the dispute is not resolved by the parties' senior representatives nominated under clause 29 (*Escalation procedure*) within a maximum of 14 days of the dispute being referred to them, the dispute may, by agreement between the parties, be referred to the Centre for Effective Dispute Resolution ("*CEDR*") for mediation in accordance with the CEDR Model Mediation Procedure.

30.2 Work and activity to be carried out under this agreement shall not cease or be delayed by this dispute resolution procedure.

30.3 The Contractor will procure that any of its sub-contractors or suppliers that are involved in any dispute participate in any dispute resolution and/or escalation procedures relating to such dispute to the extent reasonably required by the Council.

## 31 **Term**

31.1 [The licence of the Contractor's Software and the Third Party Software shall commence on the Commencement Date and continue for an initial period of [●] years from the Actual Acceptance Date. the Council shall have the right to extend the term of the licence for up to [●] periods of 12 months by giving the Contractor at least three months prior written notice.]<sup>5</sup>

31.2 The Contractor shall provide the Support Services for an initial period of [●] year from the Acceptance Date. The Council shall have the right to extend the term of the Support Services for up to [●] periods of 12 months by giving the Contractor at least three months' written notice.

31.3 This agreement starts on the date of signature and expires on the date that the Contractor ceases to have an obligation to [licence the Software under clause 31.1 (*Term*) or ] support the Software under clause 31.2.

## 32 **Termination**

32.1 The Council may terminate this agreement by writing to the Contractor if:

32.1.1 the Contractor becomes insolvent within the meaning of section 123 of the Insolvency Act 1986;

32.1.2 the Contractor ceases or threatens to cease to carry on the whole or a substantial part of its business;

32.1.3 the Contractor compounds or makes any voluntary arrangement with its creditors;

32.1.4 a resolution is passed (otherwise than for the purpose of solvent amalgamation or reconstruction) or an order is made for the winding up of the Contractor;

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<sup>5</sup> Delete if the licences are perpetual.



- 32.1.5 the Contractor is the subject of a notice of intention to appoint an administrator or liquidator, is the subject of a notice of appointment of an administrator, is the subject of an administration application, becomes subject to an administration order or has an administrator appointed over it;
- 32.1.6 a receiver is appointed over all or any of the Contractor's assets or undertaking;
- 32.1.7 an encumbrancer takes possession of any of the Contractor's property;
- 32.1.8 the Contractor suffers any similar action due to debt, including any distraint over any of its assets;
- 32.1.9 the Contractor is dissolved;

or if the equivalent of any of the events described at clauses 32.1.1 to 32.1.9 inclusive occurs in relation to the Contractor under the laws of any jurisdiction.

- 32.2 The Council may terminate this agreement if the Contractor breaches this agreement, the breach can be remedied but the Contractor does not remedy the breach within 30 days of written notice of the breach being given by the Council. In its notice the Council shall provide specific details of the breach and include a warning that it may terminate this agreement unless the breach is remedied.
- 32.3 The Council may terminate this agreement with immediate effect if the Contractor breaches this agreement and the breach cannot be remedied.
- 32.4 The Council may terminate this agreement if the Contractor commits persistent breaches of its obligations under this agreement.
- 32.5 The Council may terminate this agreement by giving at least 30 days' notice in writing by writing to the Contractor if:
  - 32.5.1 there is a change of control, as defined by Section 416 of the Income and Corporation Taxes Act 1988, in the Contractor, which could have an adverse affect upon the Services;
  - 32.5.2 the Council discovers a material misrepresentation in writing by the Contractor;

- 32.5.3 the Contractor does anything harmful to the reputation of the Council; or
- 32.5.4 the Contractor does or omits to do anything which may damage or impair the business of the Council or prejudice the security of its premises, computers or software.
- 32.6 The Council may terminate this agreement in accordance with the provisions of clauses 12 (*Development services*) or 20 (*Force Majeure*).
- 32.7 [Instead of terminating the entire agreement under clauses 32.1, 32.2, 32.3, 32.4, 32.5 or 32.6 (*Termination*), the Council may terminate the part of the Services affected by the breach, provided that the part is severable. The Services comprise the severable parts as defined in schedule 4 (*Specification*).]
- 32.8 [The Council may terminate this agreement on [12] months' notice expiring on or after the [●] anniversary of this agreement.]
- 32.9 If the charges for the Third Party Software or the Contractor's Software are periodic, the Council may terminate the licence at any time by giving [●] months' notice in writing.

### 33 **Survival of clauses**

Termination of this agreement (howsoever occurring) shall not affect either of the parties' accrued rights or liabilities or affect the coming into force or the continuance in force of any provision which is expressly or by implication intended to come into or continue in force on or after termination, including clauses 26 (*IPR indemnity*), 27 (*Confidentiality*), 22 (*Indemnities and Limitations of liability*), 23 (*Insurance*), 39 (*Waiver*), 40 (*Invalidity and severability*), 45 (*Notices*), and 46 (*Guarantee*).

### 34 **Premises**

- 34.1 The Contractor confirms that it has had the opportunity to inspect the Premises and that it has satisfied itself that the Premises are suitable for the installation and operation of the System [and the supply of the Development Services]. The Contractor acknowledges that it will not be entitled to recover any additional costs from the Council on the basis that the Premises are not suitable for the installation and operation of the System [and the supply of the Development Services]. This does not apply to the extent to which:

- 34.1.1 there are latent structural defects in the Premises of which the Council has not notified the Contractor prior to the signature of this agreement; or
- 34.1.2 [schedule 5 (*the Council's obligations*) expressly imposes upon the Council obligations which it must perform to prepare the Premises for the installation or operation of the System [and the supply of the Development Services].
- 34.2 After installation of the System, the Contractor shall reinstate the Premises to the condition prevailing prior to installation, subject to any changes agreed by the parties in writing. The Contractor shall be liable for any damage caused to the Premises by its employees, agents, sub-contractors and invitees.
- 34.3 The Council shall allow the Contractor and its Consultants reasonable non-exclusive access during normal working hours to the Premises to the extent necessary for the Contractor to carry out its obligations under this agreement.
- 34.4 The Contractor shall make sure that all of its Consultants attending the Premises:
  - 34.4.1 carry and keep visible suitable means of identification;
  - 34.4.2 comply with reasonable regulations applying to conduct at the Premises;
  - 34.4.3 comply with lawful directions given by authorised personnel of the Council relating to conduct on the Premises; and
  - 34.4.4 do not interfere with the carrying out by the Council of its duties.
- 34.5 The Contractor shall be liable for any damage caused to the Premises by its Consultants.
- 34.6 The Council reserves the right to refuse to admit to the Premises any Consultant employed or engaged by the Contractor, whose admission would be, in the reasonable opinion of the Council, undesirable.
- 34.7 Unless otherwise agreed, and subject to clause 4 (*Hardware*) the Contractor shall be responsible for property which it brings onto the Premises and shall remove it from the Premises on request.

35      **Health and safety**

35.1      The Contractor shall notify the Council of any health and safety hazards which may arise in connection with the performance of this agreement.

35.2      The Council shall notify the Contractor of any health and safety hazards which may exist or arise at the Premises and which may affect the Contractor. The Contractor will draw the hazards to the attention of any of its employees, agents and sub-contractors who are engaged by the Contractor in the performance of this agreement at the Premises and shall ensure that they comply with relevant safety measures.

35.3      The Contractor shall comply with the requirements of the Health & Safety at Work etc. Act 1974, the Electricity at Work Act 1989 and other relevant health and safety legislation, regulations, codes of practice and guidance notes at its premises.

36      **Co-operation with other Contractors**

The Council has contracted and will contract with other Contractors of products and services that may need to interface with, or be used in conjunction with, the Services. The Contractor shall co-operate to a reasonable extent with the other Contractors.

37      **Transfer**

37.1      Except where something else is specified in this clause, neither party may assign this agreement or any of its rights and obligations under this agreement, without written consent from the other.

37.2      The Council shall be entitled to novate or assign the benefit and delegate the burden of all or part of this agreement to a third party unless the novation or assignment increases the burden of the Contractor's obligations under this agreement. The Council shall give reasonable notice of its intentions in this regard to the Contractor. The Contractor agrees that it shall execute any documents that the Council requires to effect the novation.

37.3      The Council reserves the right to impose such conditions as it sees fit in giving any consent pursuant to this clause 37. Such conditions may include payment to the Council of such reasonable administrative and legal costs as may be incurred.

37.4      This agreement is binding on the Council and its successors and assignees and on the Contractor and its successors and permitted assignees.

38      **Entire agreement**

This agreement replaces all previous agreements between the Council and the Contractor and is the entire agreement between the Council and the Contractor for the provision of the System.

39      **Waiver**

No failure or delay by either party to exercise any right or remedy under this agreement shall be construed as a waiver of that right or remedy nor shall any single or partial exercise of any right or remedy preclude the further exercise of that right or remedy. No waiver by either party of any breach of this agreement shall be considered as a waiver of a preceding or subsequent breach. The rights and remedies provided in this agreement are cumulative and are not exclusive of any rights or remedies provided by law.

40      **Invalidity and severability**

If a court or administrative organisation with competent jurisdiction decides that a clause in this agreement is not valid this will not affect the rest of this agreement. The Council and the Contractor shall try to agree on a suitable clause to replace the one which is not valid. The new clause should, as far as possible, achieve the same economic, legal and commercial aims of the invalid one.

41      **Legal status and TUPE**

41.1      The Contractor is an independent contractor and nothing in this agreement shall be deemed to constitute a partnership or any employment relationship between the parties nor shall anything in this agreement be deemed to constitute one party the agent of the other for any purpose.

41.2      The Contractor shall indemnify the Council and/or any successor Contractor against all costs, expenses and liabilities arising from any claim by the Contractor's employees or ex employees, (and any claim by any employees or ex employees of Contractors of the Contractor) for breach of contract, unfair or wrongful dismissal, redundancy or any other claim whether statutory or contractual or otherwise, incurred by virtue of the application of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) or any subsequent or related legislation.

42        **Corruption**

42.1        The Council may terminate this agreement by notice in writing if the Contractor or any person employed by the Contractor or acting on its behalf (whether with or without the knowledge of the Contractor);

42.1.1        has offered or given or agreed to give to any person any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any action in relation to the obtaining or execution of this or any other agreement with the Council;

42.1.2        has committed any offence under the Prevention of Corruption Acts 1889 to 1916.

42.2        The Council will be entitled to recover from the Contractor the amount of any loss resulting from such termination.

43        **Equal Opportunities**

43.1        The Contractor shall comply with and not unlawfully discriminate within the meaning and scope of all legislation which may be in force from time to time relating to gender, race, religion, marital status, sexual orientation, age and disability.

43.2        The Contractor shall do all such things as from time to time may be reasonably required by the Council from time to time to facilitate compliance by the Council with section 71 of the Race Relations Act 1976 and the Race Relations (Amendment) Act 2000 having regard to the need to eliminate unlawful, racial discrimination and positively to promote equality of opportunity and good relations between persons of different racial groups.

43.3        The Contractor shall take all reasonable steps to secure that its staff, agents and all sub-contractors employed in connection with the Service do not unlawfully discriminate as set out in this Clause.

44        **Freedom of information**

44.1        The parties confirm that disclosures required by the Freedom of Information Act 2000, shall be classes as a disclosure required by law under Clause 26 so that the obligations of confidentiality do not apply.

44.2 The Contractor shall co-operate and assist the Council with disclosures under the Freedom of Information Act 2000 as if it were under identical duties and the Council shall have the right to determine the manner, timing and terms under which such disclosure shall be made, save that nothing in this Clause shall impose an obligation on either party to disclose information which it would be precluded from providing under the said Act.

45 **Notices**

To give notice under this agreement, a letter must be delivered personally or sent by pre-paid first class post to the address below or to any other address given in writing. A notice delivered by hand is served when delivered and a notice sent by first class post is served 48 hours after posting.

***Council***

Address: [ ]

***Contractor***

Address: [ ]

46 **Parent company guarantee and performance bond**

46.1 The Contractor shall, before the Commencement Date, provide:

46.1.1 a guarantee in the form set out in schedule 12 from [●], to guarantee the performance of the Contractor's obligation under this agreement; [and/or]

46.1.2 at the Contractor's own expense, a bond from a reputable bank or insurance company, for ten percent of the total Charges, in the form set out in schedule 12.

47 **Jurisdiction**

47.1 The law of England and Wales shall govern this agreement and each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales.

47.2 Nothing in clause 47.1 (*Jurisdiction*) shall prevent either party applying to the courts of any other country for injunctive or other interim relief.

47.3 The Contractor nominates [●] of [●] to accept service of proceedings in the English courts on its behalf.

47.4 The parties irrevocably waive any claim that any proceedings in the English courts under clause 47.1 (*Jurisdiction*) have been brought in an inappropriate forum.

47.5 Despite anything to the contrary in this agreement, this clause 47 (*Jurisdiction*) shall be irrevocable.

Signed as a deed by the Council and the Contractor on the date set out at the beginning.

**THE COMMON SEAL OF THE )  
MAYOR AND BURGESSES OF )  
THE ROYAL BOROUGH OF )  
KENSINGTON & CHELSEA )  
was hereunto affixed in the )  
presence of:**

**EXECUTED AS A DEED )  
by [CONTRACTOR] )  
LIMITED by affixing its )  
common seal in the presence )  
of:**

Director

Director/Company Secretary



## Schedule 1 – Hardware<sup>6</sup>

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<sup>6</sup> Insert details of the hardware to be supplied and installed by the Contractor.

## Schedule 2 – Contractor’s Software<sup>7</sup>

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<sup>7</sup> Insert details of software to be licensed to the Council by the Contractor, but ownership of which will stay with the Contractor.

### Schedule 3 – Third party Software<sup>8</sup>

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<sup>8</sup> Insert details of third party-owned software which is to be licensed to the Council either directly from the third party, or sub-licensed from the Contractor; to include details of the terms of the licences.

## Schedule 4 – Specification<sup>9</sup>

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<sup>9</sup> Insert details of the specification of the System to be supplied to the Council by the Contractor.

## Schedule 5 – The Council’s obligations<sup>10</sup>

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<sup>10</sup> Insert details of the Council’s obligations, if any, in relation to the carrying out the project to supply the System.

## Schedule 6 – Support Services<sup>11</sup>

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<sup>11</sup> Insert details of the Support Services to be provided by the Contractor or reference an Agreed Form Support Services Agreement.

## Schedule 7 – Training services<sup>12</sup>

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<sup>12</sup> Insert details of the training to be given by the Contractor on the System; to include details of the amount of training, where given, subjects covered etc.

## Schedule 8 – Implementation plan<sup>13</sup>

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<sup>13</sup> Insert details of the plan for implementing the System; to include milestones, deliverables, timescales, personnel and other resources required etc.



## Schedule 9 – Charges<sup>14</sup>

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<sup>14</sup> Insert details of charges to be paid by the Council, including amount, timescales, any linkage to project milestones, etc.

## Schedule 10 - Change Control Procedure

- 1.1 It is a fundamental requirement of the Council that the Services and System will change during the term of the Agreement and that the Contractor will act reasonably in agreeing changes to the Services and System. At any time, the Council may request changes to any part or parts of the [Development] Services or System.
- 1.2 The request may be given verbally and confirmed in writing.
- 1.3 The Contractor shall submit to the Council as soon as reasonably practicable after receipt of a proposed change to the [Development] Services or System (and in any event within [●] calendar days) a written estimate for the change specifying:
  - 1.3.1 the impact of implementing the proposed change on the [Development] Services and/or System;
  - 1.3.2 a timetable for implementing the proposed change;
  - 1.3.3 material changes which will be required to the agreement; and
  - 1.3.4 the charges for implementing the change, calculated in accordance with schedule 8.
- 1.4 The Contractor shall investigate the impact of implementing the proposed change and prepare the written estimate at no additional charge to the Council. The Contractor will when evaluating the proposed change and preparing the estimate will:
  - 1.4.1 use reasonable efforts to identify means of carrying out the proposed change with a view to cost savings or at no additional cost to the Council or of minimising any additional costs; and
  - 1.4.2 otherwise use reasonable efforts to secure that the proposed variation is costed at the best value for money reasonably obtainable.
- 1.5 After receipt of the estimate the proposed change shall be considered by the Council, who shall decide in its absolute discretion whether:
  - 1.5.1 to accept the Contractor's estimate in which case the agreement and the Charges shall be amended in accordance with the Contractor's estimate; or

1.5.2 to withdraw the proposed change and instruct a third party Contractor to implement the change.

1.6 Until a change is formally agreed in writing between the parties in accordance with this schedule, the Contractor shall continue to perform its obligations under the agreement as if the change had not been proposed. If the Contractor implements any changes to the Services or System before they have been agreed under this schedule, then, it will do so at its own expense.

**Schedule 11 – Standards, Guidelines and Policies**

[Insert Council standards, guidelines and policies as are relevant here]

## Schedule 12 – Performance Bond and Guarantee

### FORM OF PERFORMANCE BOND

**BY THIS BOND** we [λ] PLC/Limited whose principal place of business (registered office) is at [λ] (hereinafter called “the Contractor”) and [λ] PLC/Limited whose principal place of business (registered office) is at [λ] (hereinafter called “the Sureties”) are held and firmly bound unto the Royal Council of Kensington & Chelsea (hereinafter called “the Council”) in the sum of £[λ] for the payment of which sum the Contractor and the Sureties bind themselves and their assigns jointly and severally by these presents.

Executed by the parties as a deed and delivered this [ ] day of [ ] 200[•]

**WHEREAS** the Contractor by an Agreement made between the Council of the one part and the Contractor of the other part has entered into a contract (hereinafter called “the Contract”) to design, manufacture, deliver, erect and test certain Works and correct defects therein as mentioned in and conformity with the provisions of the Contract.

**NOW THE CONDITIONS OF THE ABOVE WRITTEN** bond is such that if the Contractor will duly perform and observe all the terms, provisions, conditions and stipulations of the Contract on the Contractor’s part to be performed and observed according to the true purport, intent and meaning thereof or if on default by the Contractor the Sureties will satisfy and discharge the damages sustained by the Council thereby up to the amount of the above written bond then this obligation will be null and void but otherwise will be and remain in full force and effect but no alteration in terms of the Contract or in the extent or nature of the Works to be designed, manufactured, delivered, erected and tested thereunder or in respect of the obligations to correct defects thereunder and no allowance of time by the Council or the Engineer under the Contract nor any forbearance or forgiveness in or in respect of any matter or thing concerning the Contract on the part of the Council or the said Engineer will in any way release the Sureties from liability under the above written bond.

**PROVIDED ALWAYS** that the above obligations of the Sureties to satisfy and discharge the damages sustained by the Council will arise only if a claim by the Council is accompanied by either:

- (a) a written notice from the Council and the Contractor that the Council and the Contractor have mutually agreed that the amount of damages concerned is payable to the Council; or
- (b) a legally certified copy of a judgement of a court having jurisdiction or of an award issued in arbitration proceedings carried out in conformity with the terms of the said Contract under which damages are payable by the Contractor to the Council, together with a statement by the Council showing the amount of the damages which remain unsatisfied at the date of the claim;

and the claim is made within one month after the issue of the final certificate of payment under the Contract unless prior to the expiry of such period either party will have commenced proceedings arising out of the Contract in which event any such claim will be made not later than three months after such proceedings have been finally concluded.

Signed and delivered as a deed by the Council and the Contractor on the date set out at the beginning.

THE COMMON SEAL OF THE )  
MAYOR AND BURGESSES OF )  
THE ROYAL BOROUGH OF )  
KENSINGTON & CHELSEA )  
was hereunto affixed in the )  
presence of:

**EXECUTED AS A DEED** )  
by [**CONTRACTOR**] )  
**LIMITED** by affixing its )  
common seal in the presence )  
of:

Director

Director/Company Secretary

**Form of Parent company guarantee**

**DEED OF GUARANTEE**

**DATED** 200[ ]

**PARTIES**

- 1 The Council
- 2 The Guarantor
- 3 The Contractor

**RECITALS**

- A The Contractor will provide services to the Council under the Services Agreement (as defined).
- B The Contractor is a wholly owned subsidiary of the Guarantor. The Guarantor has agreed to guarantee the Contractor's obligations under the Services Agreement and to indemnify the Council on the terms of this deed.

**OPERATIVE PROVISIONS**

**1 Definitions and interpretation**

1.1 In this deed the following terms have the meanings stated:

- Commencement Date* the date of this deed;
- Services Agreement* the agreement of today's date between the Council and the Contractor under which the Council appointed the Contractor to provide IT services.

1.2 In this deed:

- 1.2.1 words in the singular include the plural meaning and words in the plural include the singular meaning;
- 1.2.2 references to clauses mean clauses to this deed;
- 1.2.3 references to days, months or years mean calendar days, months or years unless stated to the contrary;
- 1.2.4 headings are for reference only and do not affect the meaning of this deed; and
- 1.2.5 references to any act, regulation, code of practice or statutory order include any change, re-enactment or extension of the act, regulation, code of practice or statutory order.

- 2           **Guarantee and indemnity**
- 2.1        In consideration of the Council agreeing to enter into the Services Agreement, the Guarantor, from the Commencement Date:
- 2.1.1       unconditionally guarantees to the Council the due and punctual performance of each obligation of the Contractor contained in the Services Agreement; and
- 2.1.2       will indemnify the Council and hold it harmless from and against all liability, loss, damage, costs and expenses (including legal and other expenses) which the Council suffers in connection with any acts or omissions of the Contractor under the Services Agreement provided however that nothing in this Deed of Guarantee will require the Guarantor to make any payment or provide any other remedy to the Council in excess of that which the Contractor was liable for under the Services Agreement.
- 2.2        Notwithstanding anything else in this agreement, the liability of each party to the other under or in connection with this agreement, whether arising from contract, negligence or otherwise, will be limited as follows:
- 2.2.1       for liability arising from death or injury to persons there will be no limit;
- 2.2.2       for loss of or damage to physical property, the limit for any one or series of connected events will be £λ million pounds);
- 2.2.3       for any other liability, the aggregate liability in any year of this agreement will be limited to λ% of the Charges payable in the year in question.
- 2.3        The amount referred to in clause 28.1.2.2 will be adjusted in line with the changes in the Retail Prices Index.
- 2.4        The limitation of liability set out in clause 2.3 does not apply to the Guarantor's liability arising as a result of fraud or gross negligence, to which no limit applies.
- 2.5        Neither party will be liable to the other for any indirect or consequential loss or loss of profits.



2.6 The following losses will not be treated as indirect or consequential losses for the purposes of clause 2.5:

2.6.1 bank charges, interest and reasonable operational and administrative costs and expenses necessarily incurred by the Council, its invitees or third parties as a result of a breach of this agreement or a negligent act or omission of the Contractor, its agents, employees or sub-contractors;

2.6.2 the cost of idle time of staff, goods and facilities of the Council and any third parties engaged by the Council, insofar as such costs cannot reasonable be avoided; and

2.6.3 the cost of taking emergency measures, including changing over to other computer systems or engaging third parties.

2.7 The Guarantor's obligations under clause 2.1 are primary obligations and not those of mere sureties. The provisions of clause 2.1 may be enforced by the Council against the Guarantor without first having recourse to any of its rights against the Contractor or any other person.

2.8 The Guarantor's obligations under clause 2.1 are continuing obligations and are not satisfied, discharged or affected by an intermediate payment or settlement of account by the Contractor.

2.9 The Council will not be required to advise the Guarantor of its dealings, arrangements or communications with the Contractor or any other person or of any default by the Contractor of which the Council may have knowledge.

### 3 **Waiver of defences**

3.1 The Guarantor's liabilities under clause 2.1 will not be affected by any act, omission, matter or thing which, but for this clause 3, might operate to affect, diminish or discharge their liabilities or otherwise provide a defence to a surety.

3.2 The acts, omissions, matters or things referred to in clause 3.1 above include (without limitation):

3.2.1 a change in the constitution or control of the Contractor;

3.2.2 the insolvency, liquidation (or analogous proceedings) or dissolution of the Contractor;

- 3.2.3 any variation of or amendment to the Service Agreement;
- 3.2.4 any agreement which the Council may make with the Contractor;
- 3.2.5 the fact that an obligation of the Contractor is void, voidable or unenforceable for any reason;
- 3.2.6 the fact that the Council may give up, deal with, vary, exchange or abstain from perfecting or enforcing other securities or guarantees held by it; and
- 3.2.7 the granting by the Council of time for payment or other indulgence or agreeing to an amendment, variation, waiver or release in respect of obligations of the Contractor under the Services Agreement.

**4 Payment**

- 4.1 All payments required to be made under this deed will be made without set-off, counterclaim or other deductions.

**5 Miscellaneous**

- 5.1 The Guarantor’s obligations under this deed will be irrevocable and unconditional but will expire six years after the termination or expiry of the Services Agreement.
- 5.2 The Council may, on prior written notification, assign the benefit of this deed.

**6 Governing law**

- 6.1 This deed will be governed and construed in accordance with the law of England and Wales and subject to the exclusive jurisdiction of the English courts.

Signed and delivered as a Deed by the Council, the Contractor and the Guarantor on the date set out at the beginning.

THE COMMON SEAL OF THE )  
MAYOR AND BURGESSES OF )  
THE ROYAL BOROUGH OF )  
KENSINGTON & CHELSEA )  
was hereunto affixed in the )  
presence of:

**EXECUTED AS A DEED** )  
by [**CONTRACTOR**] )  
**LIMITED** by affixing its )  
common seal in the presence )  
of:

Director

Director/Company Secretary

**Executed** as a deed by )  
**THE GUARANTOR** )

Director

Director/Company Secretary

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