

**TERMS AND CONDITIONS**  
**OF**  
**FRAMEWORK AGREEMENT**  
**FOR SERVICES**

**Last reviewed by CLO: December 2018**

## INDEX

1.	INTERPRETATION .....	1
2.	DURATION AND SCOPE .....	10
3.	DUE DILIGENCE.....	11
4.	CALL OFF FRAMEWORK AGREEMENT .....	11
5.	OBLIGATIONS OF THE CONTRACTOR.....	12
6.	THE POSITION OF PARTICIPATING AUTHORITIES.....	13
7.	CONTRACT PRICING.....	14
8.	PERFORMANCE MEASUREMENT .....	15
9.	VARIATIONS TO THE FRAMEWORK AGREEMENT .....	17
10.	SERVICES INFORMATION .....	19
11.	SALES STATEMENTS .....	21
12.	PROPOSED TERMINATION OF SERVICES PROVISION.....	22
13.	SERVICE ASSURANCE .....	22
14.	THE POSITION OF THE AUTHORITY .....	23
15.	ASSIGNATION .....	24
16.	PRE-CONTRACTUAL STATEMENTS .....	24
17.	DISPUTE RESOLUTION PROCEDURE.....	25
18.	PROHIBITED ACT .....	26
19.	TERMINATION .....	29
20.	CONFIDENTIALITY.....	31
21.	FREEDOM OF INFORMATION .....	35
22.	NOTICES.....	36
23.	PUBLICITY .....	37
24.	EXECUTION OF ADDITIONAL DOCUMENTS .....	37
25.	INVALIDITY .....	37
26.	REPRESENTATIONS .....	37
27.	NO WAIVER .....	38
28.	LOSS OF PARTICIPATING AUTHORITIES .....	38
29.	HUMAN TRAFFICKING ETC.....	39
30.	GOVERNING LAW AND JURISDICTION .....	40
	<b>SCHEDULE: PART 1 .....</b>	<b>41</b>
	MINI TENDER PROCESS .....	41
	<b>SCHEDULE: PART 2.....</b>	<b>42</b>
	NHSS CONDITIONS FOR THE PROVISION OF SERVICES .....	42
	<b>SCHEDULE: PART 3 .....</b>	<b>121</b>
	PROCESSING INFORMATION.....	121
	<b>SCHEDULE: PART 4.....</b>	<b>123</b>
	NHSS ADDITIONAL CONDITIONS FOR THE PROVISION OF SERVICES .....	123

## 1. INTERPRETATION

1.1 In this Agreement the following words and phrases shall have the following meanings:

- “Authority”** means the Common Services Agency, a statutory body constituted pursuant to the National Health Service (Scotland) Act 1978, as amended, acting through its strategic business unit PCF whose regional offices are at Canderside, 2 Swinhill Avenue, Larkhall ML9 2QX;
- “Authority Manager”** means the individual named by the Authority in the Invitation to Tender as the **“Manager of the Commodity”**;
- “Community Benefits”** means any activity, obligations and/or undertakings identified as community benefits or their equivalent in the Invitation to Tender, the Tender, any document issued by a Participating Authority pursuant to a Mini Tender Process or the Contractor’s response thereto or otherwise in this Framework Agreement;
- “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 Data Protection Legislation; and (b) all information the disclosure of which would or would be likely to prejudice substantially the commercial interests of any person;
- “Contract”** means a contract between a Participating Authority and the Contractor constituted pursuant to an Order which shall be subject to the Contractor Terms, the provisions of the Invitation to Tender, the Tender, the Letter of Award and in respect of an Order submitted pursuant to a Mini Tender Process, the Invitation to Tender, Tender and Letter of Award applicable to such process;
- “Contractor”** means the Framework Participant to whom an Order has been submitted by a Participating Authority pursuant to the Framework Agreement;
- “Contractor Terms”** means:-

(a) the NHSS Conditions for the Provision of Services;

(b) the NHSS Additional Conditions for the Provision of Services;

(in each case as varied by the Letter of Award); and

(c) any special terms agreed in Writing between a Participating Authority and the Contractor pursuant to a Mini Tender Process;

**“Contract Pricing”**

means the Contractor’s price for, or related to, the Services set out in the Tender, subject to any specific provision in the Letter of Award, as detailed pursuant to a Mini Tender Process, or as amended pursuant to Clause 7.1;

**“CPI”**

means the Consumer Prices Index for all items published from time to time by the Central Statistics Office of the Chancellor of the Exchequer or by the Office of National Statistics or, if the said Index ceases to be published, such index or other means of assessment of inflation as is deemed equivalent and most appropriate by the Authority acting reasonably;

**“Data Protection Legislation”**

has the meaning ascribed to it in the NHSS Conditions for the Provision of Services;

**“Day”**

means, unless otherwise specified in the Invitation to Tender, a day that does not fall on any of the following days:-

- Saturday;
- Sunday;
- the Friday immediately preceding the Sunday on which Easter falls;
- the Monday immediately following the Sunday on which Easter falls;
- 25<sup>th</sup> December, or when 25<sup>th</sup> December falls on a Saturday or a Sunday, 27<sup>th</sup> December;
- 26<sup>th</sup> December, or when 26<sup>th</sup> December falls on a Saturday or a Sunday, 28<sup>th</sup> December;

**“Different Cost”**

means any price, cost or rate charged by the Contractor to a Participating Authority for the supply of Services by the Contractor which is

	higher or lower than the cost set out in the Contract Pricing payable for such Services in accordance with the terms of the Framework Agreement (other than any lower price, cost or rate proposed by the Contractor in a Mini Tender Process);
<b>“Directive”</b>	means Directive 2014/24/EU of the European Parliament and of the Council on public procurement;
<b>“ECJ”</b>	means the Court of Justice of the European Union;
<b>“Effective Date”</b>	means the date upon which the Framework Agreement shall come into effect, such date being set out in the Letter of Award;
<b>“Framework Agreement”</b>	means the framework agreement constituted between the Authority and each Framework Participant on the basis of the Letter of Award, the Framework Principal Conditions, the NHSS Conditions for the Provision of Services and the NHSS Additional Conditions for the Provision of Services (if any), the Invitation to Tender, the Tender and any clarifications thereto expressly referred to in the Letter of Award;
<b>“Framework Agreement Period”</b>	means the Initial Framework Agreement Period, and where extended pursuant to Clause 2.2 the Initial Framework Agreement Period as extended;
<b>“Framework Participant”</b>	means:- <ul style="list-style-type: none"> <li>(a) each supplier which returns a signed duplicate copy of the Letter of Award to the Authority;</li> <li>(b) as from the relevant Substitution Date, any Replacement Supplier approved by the Authority pursuant to Clause 9.5</li> </ul>
<b>“Framework Principal Conditions”</b>	means these terms and conditions, and not for the avoidance of doubt, the provisions contained in any part or parts of the Schedule to the Framework Agreement;
<b>“Goods”</b>	means all goods, materials or articles ancillary to or otherwise related to the Services that each Framework Participant is required to supply pursuant to each Contract under the Framework Agreement, as set out in the Specification;

<b>“Index”</b>	means the index specified in the Invitation to Tender or if none, the CPI;
<b>“Initial Framework Agreement Period”</b>	means the initial period during which the Framework Agreement shall subsist being such period as is detailed in the Invitation to Tender issued by the Authority, but excluding any extensions to such period (if any) agreed pursuant to Clause 2.2;
<b>“Insolvent”</b>	<p>means:-</p> <p>(a) if the Framework Participant is an individual, that individual, or where the Framework Participant 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;</p> <p>(b) if the Framework Participant is a company, the passing by the Framework Participant 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 Framework Participant or the dissolution of the Framework Participant, 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 Framework Participant 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</p>

court or a creditor to appoint a receiver, manager or administrator or which entitle the court to make a winding-up order, or the Framework Participant is unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986, or if the Framework Participant makes an arrangement with its creditors generally or makes an application to a court of competent jurisdiction for protection from its creditors generally; and

- (c) 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 trade marks, 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 Framework Participants;

**“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;

**“Mini Tender Process”**

means a competitive tendering process conducted by a Participating Authority in relation to specific Services in accordance with principles detailed in Schedule Part 1 (Mini Tender Process);

<b>“Month”</b>	means each calendar month during the Framework Agreement Period, and in the event that the Framework Agreement is concluded on any day other than the first day of a calendar month, the first Month shall commence on the date of conclusion of the Framework Agreement and end on the last day of the next occurring full calendar month, and in the event that the Framework Agreement ends on any day other than the last day of a calendar month, the last Month shall commence on the first day of the last month of the Framework Agreement and end on the actual date of termination or expiry (as applicable);
<b>“New Contractor”</b>	means any entity which is awarded a contract by a Participating Authority to provide services similar or identical to the Services in place of the Contractor (including the Participating Authority in the event of the provision of the Services being undertaken in-house);
<b>“NHSS Additional Conditions for the Provision of Services”</b>	means the terms and conditions (if any) to apply to the provision of Services hereunder, in addition to the NHSS Conditions for the Provision of Services contained in Schedule Part 4;
<b>“NHSS Conditions for the Provision of Services”</b>	means the NHSS conditions of contract for the purchase of services contained in Schedule Part 2;
<b>“Order”</b>	means (as applicable) (i) each order (if any) placed on the Framework Participant during the Framework Agreement Period by the Authority or any Participating Authority for the provision of Services pursuant to the Framework Agreement and not rejected pursuant to Clause 4.2 of the Framework Principal Conditions; or (ii) each order (if any) comprised in a letter of award submitted by a Participating Authority to a Framework Participant for the provision of Services pursuant to a Mini Tender Process;
<b>“Participating Authority”</b>	means each body constituted pursuant to the 1978 Act, together with any other entity identified or described in, the Invitation to Tender as entitled to purchase Services pursuant to the Framework Agreement, including each such body’s statutory successors, and <b>“Participating Authorities”</b> shall be construed accordingly;



<b>“PCF”</b>	means procurement, commissioning and facilities, a strategic business unit of the Authority;
<b>“Point of Contact”</b>	means the point of contact representing the Framework Participant/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;
<b>“Prohibited Act”</b>	shall have the meaning ascribed to it in Clause 18.1;
<b>“Relevant Person”</b>	means any person who is a member of the administrative, management or supervisory body of a Framework Participant or has powers of representation, decision or control in relation to a Framework Participant;
<b>“Replacement Supplier”</b>	means:- <ul style="list-style-type: none"> <li>(a) a supplier which, partially or wholly, takes over or acquires the business or assets of any Framework Participant or acquires ownership of any Framework Participant following:- <ul style="list-style-type: none"> <li>(i) any corporate restructuring of or involving any Framework Participant; or</li> <li>(ii) any Framework Participant becoming Insolvent; or</li> </ul> </li> <li>(b) any supplier identified in the Tender (and/or any clarifications thereto submitted by the Framework Participant to the Authority) to whom the Framework Participant anticipates it may wish to effect a Transfer of the Framework Agreement during the Framework Agreement Period;</li> </ul>
<b>“Schedule”</b>	means the schedule in four (4) parts annexed hereto;
<b>“Services”</b>	means the services (including Goods (if any)) that each Framework Participant is required to provide pursuant to each Contract under the Framework Agreement, as set out in the Specification;

<b>“Services Information”</b>	means information concerning the Services supplied by the Participating Authority to the Authority in accordance with Clause 10 for inclusion in the Authority’s services product catalogue from time to time and containing all details which may be required by the Authority;
<b>“Specification”</b>	means the specification of the Services and any Goods set out in the Invitation to Tender and the Tender subject to any specific provision in the Letter of Award and any specification agreed, by a Participating Authority and the Contractor pursuant to a Mini Tender Process;
<b>“Substitution Date”</b>	shall have the meaning ascribed to it in Clause 9.5;
<b>“Tender”</b>	means the tender submitted to the Authority by the Framework Participant in response to the Invitation to Tender;
<b>“Terms”</b>	means:- <ul style="list-style-type: none"> <li>(a) the Framework Principal Conditions;</li> <li>(b) the NHSS Additional Conditions for the Provision of Services (if any); and</li> <li>(c) any special terms agreed in Writing between the Participating Authority and the Contractor pursuant to a Mini Tender Process;</li> </ul> <p>in each case as varied by the Letter of Award;</p>
<b>“the 1978 Act”</b>	means the National Health Service (Scotland) Act 1978, as amended;
<b>“Transfer”</b>	means novation or transfer in whole or in part;
<b>“Transferee”</b>	means any party to whom a Transfer is made;
<b>“Treaty”</b>	means the Treaty on the Functioning of the European Union;
<b>“Upgrades”</b>	means any products supplied by any Framework Participant which constitutes an updated, modified or new version of any Goods supplied by the Framework Participant;

**“Writing”**

means any communication in writing including facsimile transmission, electronic means (excluding text messages) and **“Written”** shall be construed accordingly;

- 1.2 In the Framework Agreement unless the context otherwise requires it:-
- 1.2.1 the Clause headings are for reference only and shall not affect the construction or interpretation of the Framework Agreement and references to sub-clauses, clauses and to the Schedule are to sub-clauses, Clauses and the Schedule to the Framework Agreement;
  - 1.2.2 the singular includes the plural and vice versa;
  - 1.2.3 references to gender include references to all genders;
  - 1.2.4 reference to a “person” includes any individual, partnership, firm, company, corporation, joint venture, trust, association, organisation or other entity, in each case whether or not having a separate legal personality;
  - 1.2.5 references to statutes, any statutory instrument, regulation or order shall be construed as a reference to such statute, statutory instrument, regulation or order as amended, consolidated, replaced or re-enacted from time to time; and
  - 1.2.6 the words “include” or “including” are to be construed as meaning without limitation.
- 1.3 For resolution of a conflict or inconsistency in the Framework Agreement, the documents shall rank in the following descending order of importance:-
- Letter of Award

- NHSS Additional Conditions for the Provision of Services
- Processing Information set out in Part 3 of the Schedule;
- NHSS Conditions for the Provision of Services
- Framework Principal Conditions
- Conditions for Mini Tender Process set out in Part 1 of the Schedule
- Invitation to Tender
- Tender.

## **2. DURATION AND SCOPE**

- 2.1 The Framework Agreement shall commence on the Effective Date and shall continue in force throughout the Initial Framework Agreement Period unless earlier terminated in accordance with the further provisions hereof.
- 2.2 The Authority may at its sole discretion extend the Initial Framework Agreement Period for the period(s) specified in the Invitation to Tender subject to giving the Point of Contact no less than one (1) month's notice in Writing such notice being served by the Director of PCF. In the event that the Authority elects to exercise such option the Contract Pricing shall not be subject to adjustment other than as provided in Clause 7.3 of the Framework Agreement.
- 2.3 Without prejudice to either party's other rights and remedies pursuant to the Contract, each Contract concluded in accordance with Clause 5.3 prior to the date of expiry or sooner termination of the Framework Agreement shall remain in force, notwithstanding the expiry or sooner termination of the Framework Agreement. Any order submitted by a

Participating Authority after the date of expiry or sooner termination of the Framework Agreement shall not constitute an Order and shall not be processed by any Framework Participant.

### **3. DUE DILIGENCE**

The Framework Participant 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 all Participating Authorities in accordance with the terms of the Framework Agreement, and (ii) it is deemed to have inspected all possible Locations 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 any and all Orders properly submitted by any and all Participating Authorities.

### **4. CALL OFF FRAMEWORK AGREEMENT**

4.1 Each Participating Authority may at its option call off the Framework Agreement:-

4.1.1 subject to Clause 4.2 by submission of an order to the Contractor for Services in accordance with the terms of the Framework Agreement without undertaking a Mini Tender Process; or

4.1.2 where appropriate, by submission of an Order to the Contractor in accordance with the terms of the Framework Agreement following completion of a mini competition undertaken in accordance with the Mini Tender Process.

4.2 The Framework Participant shall be entitled to reject an order for Services submitted pursuant to Clause 4.1.1 on giving the Participating

Authority Written notice no later than the date occurring three (3) Days after the date of submission by the Participating Authority to the Framework Participant of the said order. The Framework Participant shall not be entitled to reject any such order unreasonably.

## **5. OBLIGATIONS OF THE CONTRACTOR**

- 5.1 In respect of each Contract, the Contractor undertakes to perform the Services in strict accordance with the Order, the Specification and the Contract Pricing, and in accordance with the terms of the Invitation to Tender and the Tender as amended (if at all) by the Letter of Award or pursuant to a Mini Tender Process (if any) to such extent and at such times and locations as may be ordered by any Participating Authority and/or in circumstances where any Participating Authority shall have notified the Framework Participant that it has appointed an agent to purchase Services on its behalf, as may be ordered by the agent. Where an Order has been placed by an agent in accordance with this Clause, invoices for Services supplied to the agent shall be issued by the Contractor to, and in the name of, the agent and the agent shall be responsible for settlement thereof on behalf of a Participating Authority.
- 5.2 The Contractor will accept Orders pursuant to Clause 4.1 of the Framework Principal Conditions from any Participating Authority.
- 5.3 Each Contract shall be deemed to be concluded between a Participating Authority and the Contractor:-
- 5.3.1 in respect of orders submitted pursuant to Clause 4.1.1, where no Written notice of rejection is received by the Participating Authority in accordance with Clause 4.2, as at the expiry of the relevant three Day period referred to in

Clause 4.2;

5.3.2 immediately on the submission of an Order by a Participating Authority pursuant to a Mini Tender Process.

5.4 The Contractor agrees that it will not in its dealings with Participating Authorities seek to impose or rely on any other contractual terms that in any way vary or contradict the Contractor Terms and, to avoid doubt, no terms and conditions shall be attached to any Order or invoice by the Contractor and, if they are, they shall be of no effect.

5.5 Notwithstanding any other provision of the Framework Agreement, to the extent only that the Framework Participant is unable to comply with its obligations under the Framework Agreement as a direct result of the negligent act or omission of the Authority or the relevant Participating Authority (as applicable), it shall be relieved from such performance under the Framework Agreement and, for the avoidance of doubt, shall not incur any liability for any loss or damages thereby incurred by the Authority or Participating Authority (as the case may be), provided the Framework Participant provides Written notice to the Authority as soon as it ought reasonably to be aware of its inability to comply with its obligations.

## **6. THE POSITION OF PARTICIPATING AUTHORITIES**

Nothing within this Framework Agreement shall preclude the Authority from procuring services similar or identical to the Services from service providers not party to the Framework Agreement. The Framework Participant acknowledges that Participating Authorities are under no obligation to place any, or any particular level or volume of Orders for Services with the Framework Participant under or pursuant to the Framework Agreement. The

Framework Participant accepts that the Authority shall have no liability to it in respect of or arising out of the volume of Orders for Services (if any) received by the Framework Participant during the continuance of the Framework Agreement.

## **7. CONTRACT PRICING**

- 7.1 The Authority may, at its discretion, at the intervals (if any) detailed in the Invitation to Tender or on an ad hoc basis invite all Framework Participants to propose reductions to the Contract Pricing. If such proposals are accepted by the Authority the Contract Pricing shall be adjusted accordingly from such date as is specified by notice in Writing issued by the Authority (which date shall be no earlier than the date of such notice).
- 7.2 If the Authority becomes aware at any time during the Framework Agreement Period that the Contractor has provided Services to any Participating Authority pursuant to a Contract at a Different Cost it may serve Written notice on the Contractor to that effect. If, within the period of twenty (20) Days from receipt of such Written notice, the Contractor cannot provide satisfactory evidence to the Authority that it has not so provided Services at a Different Cost, the Authority may, by Written notice to the Contractor, terminate the Framework Agreement between the said Contractor and the Authority.
- 7.3 Other than as adjusted pursuant to Clause 7.1 Contract Pricing shall not be subject to adjustment for the period specified in the Invitation to Tender for which prices are to be held by Framework Participants as fixed. In the event that the Authority elects to extend the Initial Framework Agreement Period in accordance with Clause 2.2 the Contractor may request an increase to the Contract Pricing with



appropriate detailed justification documentation and evidence. If this is approved, then it will come in to effect from the commencement of the period of extension (and each subsequent extension commencement date, (if any) provided the previous extension period was for a minimum of twelve (12) months) by a maximum of the total percentage increase (if any) as shall have occurred in the Index over the last twelve (12) month period occurring immediately before such extension commencement date or subsequent extension date (as applicable) for which figures are published, provided a minimum of two (2) months' notice is given to the Authority Manager such notice to expire no later than the said extension commencement date.

## **8. PERFORMANCE MEASUREMENT**

- 8.1 The Framework Participant acknowledges that the Authority is aiming to establish national standards and national pricing and that it may continuously monitor the performance of the Contractor in the Contracts between Participating Authorities and the Contractor under the Framework Agreement. The Authority may ascertain whether the Contractor's performance of such Contracts meets the performance criteria specified in the Specification or, where not so specified, meets the standards of a professional provider of such services in the opinion of the Authority acting reasonably.
- 8.2 On or before the fifteenth (15<sup>th</sup>) Day of each calendar month from the commencement of the Framework Agreement and within ten (10) Days following the termination of the Framework Agreement for any reason the Authority on behalf of the Participating Authorities may in respect of the provision of the Services during the preceding calendar month provide to the Contractor a notice (each called "**a Performance**

**Notice”)** which shall set out a statement of the Authority’s dissatisfaction with the Contractor’s performance and provision of the Services.

- 8.3 Each Performance Notice shall include proposed rebates of the prices payable under any Contracts entered into under the Framework Agreement commensurate to the underperformance of the Contractor as recorded in the Performance Notice and the rebates referred to therein shall become immediately due and payable to the Authority on behalf of the respective Participating Authorities or (at the option of the Authority to each Participating Authority in respect of the portion of the said rebate due to that Participating Authority in respect of their Contract with the Contractor), on the expiry of five (5) Days from the Contractor’s receipt of the Performance Notice.
- 8.4 If the Contractor disputes any matter referred to in any Performance Notice and/or the proposed rebate of the price under any such Contracts, the Contractor may raise this objection with the Authority within five (5) Days of receipt of the Performance Notice and if this matter is not resolved within five (5) Days following receipt by the Authority of such objection the matter shall be referred to the Dispute Resolution Procedure provided in Clause 17.
- 8.5 If the Contractor has not raised any objection to any matter referred to in the Performance Notice and or/any proposed rebate of the price within five (5) Days of receipt of the Performance Notice (or such other period as may be agreed between the parties) then that Performance Notice shall be deemed to have been accepted by the Contractor.
- 8.6 If required by the Authority the Contractor and the Authority shall co-operate in sharing information and developing performance

measurement criteria to be used in such monitoring and performance measurement in terms of this Clause 8 with the object of improving the efficiency of the Contractor.

## **9. VARIATIONS TO THE FRAMEWORK AGREEMENT**

- 9.1 Any variation of the terms and conditions of the Framework Agreement (including the NHSS Conditions for the Provision of Services (but excluding any amendments agreed in terms of Clause 31.4 thereof) and the NHSS Additional Conditions for the Provision of Services) shall only be effective if agreed between the Authority on behalf of the Participating Authority and the Framework Participant in Writing executed by duly authorised representatives of such signatories. Once such variations are agreed between the said parties, the Authority, as agent for the Participating Authorities, hereby agrees that such variations shall automatically apply to any Contracts entered into between the Contractor and any Participating Authorities to the extent only that Services have not yet been provided pursuant to such Contract.
- 9.2 In the event that the Invitation to Tender details any changes which the Authority wishes to implement during the Framework Agreement Period, the Authority and the Framework Participant shall act reasonably to give effect to such changes.
- 9.3 Notwithstanding the foregoing the Framework Participant shall not unreasonably withhold consent to a proposed variation to the Framework Agreement made by the Authority on behalf of Participating Authorities.

9.4 The Contractor hereby undertakes to the Authority to work continuously with the Authority to improve and develop the Contractor's performance under the Framework Agreement 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 period of the Framework Agreement.

9.5 The Authority may agree to substitution of a Framework Participant with a Replacement Supplier as a party to the Framework Agreement. The Authority may request such information relating to the Framework Participant and/or the proposed Replacement Supplier as it considers necessary to allow the Authority to consider any request from the Framework Participant and/or a Replacement Supplier for such a substitution. In the event that the Authority agrees to such substitution, it shall notify the Framework Participant and/or the Replacement Supplier in Writing and such notification shall specify the date from which such substitution shall take effect (the "**Substitution Date**"). As from the Substitution Date:-

9.5.1 the Replacement Supplier shall assume all responsibilities, obligations and rights of the Framework Participant under the Framework Agreement;

9.5.2 no substantial or material amendments shall be made to the Framework Agreement and/or any Contract as a consequence of such substitution;

9.5.3 all references to "Framework Participant" shall be deemed to be to the Replacement Supplier; and

9.5.4 any Contract concluded and continuing in force as at the

Substitution Date shall be deemed to be between the Participating Authority and the Replacement Supplier.

## **10. SERVICES INFORMATION**

- 10.1 Within five (5) Days following a reasonable request from the Authority the Framework Participant shall provide the Authority with the Services Information. The Services Information will be provided by the Framework Participant in such manner and upon such media as is specified by the Authority from time to time.
- 10.2 The Framework Participant warrants that the Services Information shall be complete and accurate as at the date upon which it is delivered to the Authority and that the Services Information does not contain any data or statement which gives rise to any liability on the part of the Authority or, as the case may be, any Participating Authority following publication of the same in accordance with this Clause 10.
- 10.3 Without prejudice to the provisions of Clause 10.2 in the event that the Services Information ceases to be complete and accurate, the Framework Participant shall promptly notify the Authority in Writing of any modification or addition to or any inaccuracy or omission in the Services Information.
- 10.4 The Framework Participant grants to the Authority and to each Participating Authority a non-exclusive, royalty-free licence for the duration of the Framework Agreement Period to use the Services Information and any Intellectual Property therein for the purpose of illustrating the range of the Services available under the Framework Agreement.

- 10.5 The Authority may reproduce the Services Information provided by the Framework Participant in the Authority's services products catalogue from time to time, which may be made available on the National Health Service in Scotland's internal communications network in electronic format or other format made available on the Authority's external website or any other electronic media of the Authority from time to time.
- 10.6 The Framework Participant agrees to indemnify and keep indemnified the Authority and any Participating Authority against any liability, loss, costs and expenses, incurred by the Authority and/or Participating Authority (as appropriate) and any claims or proceedings against the Authority and/or any Participating Authority whatsoever arising out of or in connection with any Services Information provided by or on behalf of the Framework Participant which is included in the Authority's and/or Participating Authority's services products catalogue from time to time (as the case may be) or any associated material produced by the Authority and/or the Participating Authority (as appropriate) for the purpose of illustrating the range of Services available under the Framework Agreement.
- 10.7 The Framework Participant shall not be required to indemnify or keep indemnified the Authority and/or any Participating Authority (as appropriate) against any liability, loss, costs, expenses, claims or proceedings whatsoever arising under Clause 10.6 as a result of (as appropriate) the Authority's and/or the Participating Authority's negligent act or error in reproducing the Services Information provided by or on behalf of the Framework Participant which is included in the Authority's and/or the relevant Participating Authority's services products catalogue or other literature from time to time or any

associated material produced by the Authority and/or the Participating Authority for the purpose of illustrating the range of Services available under the Framework Agreement.

## **11. SALES STATEMENTS**

11.1 Within ten (10) Days of request if requested by the Authority, or as required in the Invitation to Tender, the Contractor shall provide the Authority with a statement giving accurate and complete details of the scope and value of the Services provided by the Contractor pursuant to the Framework Agreement during the period(s) specified in the Invitation to Tender, or where no period is specified, the preceding Month. The statement shall include accurate details of the identity of the Participating Authorities to which such Services were provided pursuant to the Framework Agreement, a detailed description of the Services, and the invoice price (exclusive of VAT) in respect of the Services. The format and level of detail of the statement shall be agreed between the Authority and the Contractor in Writing.

11.2 The Contractor shall keep at its normal place of business detailed, accurate and up to date records of the scope and value of the Services provided by it to each Participating Authority on or after the date of commencement of the Framework Agreement. Subject to any other auditing process being agreed between the Authority and the Contractor in Writing, the Authority or the Authority's Representative shall be entitled by prior appointment to enter the Contractor's normal place of business during normal office hours and to inspect such records in order to verify whether any statement supplied by the Contractor to the Authority pursuant to Clause 11.1 is accurate and complete.

## **12. PROPOSED TERMINATION OF SERVICES PROVISION**

It is an essential condition of the Framework Agreement that the Framework Participant will not terminate the availability of any of the Services to the Participating Authorities without the Authority's Written consent. In the event that the Framework Participant wishes to terminate the availability of any Services under the Framework Agreement it may only do so with the Written consent of the Authority granted at the Authority's sole discretion. In determining whether or not to grant such consent the Authority may require the Contractor to work with the Authority to assess the needs of the Authority or Participating Authority to determine whether the Contractor shall make available, within timescales agreed between the parties, alternative services acceptable to the Authority.

## **13. SERVICE ASSURANCE**

- 13.1 The Framework Participant shall not make any change in the sub-contractors for the Services identified in the Framework Agreement (if any) until it has received written approval from the Authority. The Framework Participant 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 (or where the Authority so elects, the Participating Authority) with all necessary information regarding the proposed change in order for the Authority (or where the Authority so elects, the Participating Authority) to determine whether or not it is willing to grant approval for such change, such approval not to be unreasonably withheld or delayed.
- 13.2 An essential condition of appointment to the Framework Agreement shall be that the Framework Participant operates and applies 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 Framework Participant, involved in the performance of the Services.

13.3 The Authority shall be entitled at any time to audit the Framework Participant'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 13 and the Framework Participant shall procure all necessary access rights from service providers for the purposes of this Clause 13.

13.4 In the event that the Authority does not consider the Framework Participant is operating and applying appropriate ethical standards in accordance with Clause 13.2 it shall serve Written notice upon the Framework Participant to that effect. If the Framework Participant 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 Framework Agreement, by Written notice.

#### **14. THE POSITION OF THE AUTHORITY**

The Authority has established the Framework Agreement as agent for and on behalf of each such Participating Authority. Each Contract concluded pursuant to Clause 5.3 above will be between the Contractor and the Participating Authority concerned and the Authority shall not be a party thereto nor shall the Authority have any liability arising out of the acts or

omissions of any Participating Authority in connection with any such Contract.

## **15. ASSIGNATION**

15.1 The Framework Agreement is personal to the Framework Participant. The Framework Participant shall not effect a Transfer, assign sub-contract or otherwise dispose of the Framework Agreement or any part of it or the benefit or advantage of the Framework Agreement or any part of it without the prior Written consent of the Authority, provided always that if the Authority grants consent to a Transfer of the Framework Agreement:-

15.1.1 the Transferee shall require to satisfy any qualitative criteria applied by the Authority in connection with award of the Framework Agreement to the Framework Participant;

15.1.2 no substantial or material modification shall be made to the terms of the Framework Agreement as a consequence of the Transfer; and

15.1.3 the Framework Participant shall provide such information and/or documentation relating to it and any proposed Transferee as the Authority shall require.

## **16. PRE-CONTRACTUAL STATEMENTS**

16.1 (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 Framework Agreement shall add to or vary the Framework Agreement or be of any force or effect unless any such pre-contractual statements are expressly set out in the Framework Agreement. 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.

- 16.2 Without prejudice to the generality of Clause 16.1 the Framework Participant acknowledges that it has not been induced to enter into the Framework Agreement by any indication as to the volume or content of Orders that might be placed by Participating Authorities.

## **17. DISPUTE RESOLUTION PROCEDURE**

- 17.1 During any dispute, including a dispute as to the validity of the Framework Agreement and any Contracts entered into under the Framework Agreement, it is mutually agreed that the Framework Participant/Contractor shall continue its performance of the provisions of the Framework Agreement and any such Contracts (unless the Authority requests in Writing that the Contractor does not do so).
- 17.2 If any dispute arises out of the Framework Agreement (other than in relation to any matter in which the Authority has a discretion which is exercised in accordance with the terms of the Framework Agreement and which shall be final and conclusive) the parties will use all of their respective reasonable endeavours to resolve it by negotiation. If negotiations fail to resolve such dispute either party may refer the matter to an arbiter chosen by mutual agreement, or, failing agreement appointed on the application of either party by the President of the Law Society of Scotland. The Authority and the Framework Participant will co-operate with any person appointed as arbiter 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 such arbitration of the dispute in question has failed to resolve the dispute.

## 18. **PROHIBITED ACT**

18.1 “Prohibited Act” means:

18.1.1 offering, giving or agreeing to give to the Authority, any Participating Authority or any other public body or to any person employed by or on behalf of the Authority, any Participating 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 Framework Agreement or any other agreement with the Authority, any Participating Authority or any other public body; or

(b) for showing or not showing favour or disfavour to any person in relation to this Framework Agreement or any other agreement with the Authority, any Participating Authority or any other public body;

18.1.2 entering into this Framework Agreement or any other agreement with the Authority, any Participating Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by the Framework Participant 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;

18.1.3 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 Framework Agreement or any other agreement with the Authority, any Participating Authority or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Authority, any Participating Authority or any other public body.

18.2 The Contractor warrants that in entering into this Framework Agreement it has not committed any Prohibited Act.

18.3 If the Framework Participant (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 18.4 to 18.6 below.

18.4 If a Prohibited Act is committed by the Framework Participant or by an employee not acting independently of the Framework Participant, then the Authority may terminate the Framework Agreement with immediate effect by giving Written notice to the Framework Participant, and no compensation or payment shall be due to the Framework Participant in respect of such termination.

- 18.5 If the Prohibited Act is committed by an employee of the Framework Participant or a sub-contractor acting independently of the Framework Participant, then the Authority may give Written notice to the Framework Participant of termination and the Framework Agreement will terminate unless, within twenty (20) Working Days of receipt of such notice, the Framework Participant 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.
- 18.6 Any notice of termination under this Clause 18 shall specify:
- 18.6.1 the nature of the Prohibited Act;
  - 18.6.2 the identity of the party whom the Authority believes has committed the Prohibited Act; and
  - 18.6.3 the date on which the Framework Agreement will terminate in accordance with the applicable provisions of this Clause 18.
- 18.7 Without prejudice to its other rights or remedies under this Clause 18, the Authority shall be entitled to recover from the Framework Participant:
- 18.7.1 the amount or value of any such gift, consideration or commission; and
  - 18.7.2 any other loss sustained in consequence of any breach of this Clause 18.
- 18.8 Nothing contained in this Clause 18 shall prevent the Framework Participant from paying any proper commission or bonus to its employees within the agreed terms of their employment.

18.9 The Framework Participant shall notify the Authority on the occurrence (giving details) of any Prohibited Act promptly on the Framework Participant becoming aware of its occurrence.

## **19. TERMINATION**

19.1 In addition to the Authority's termination rights pursuant to Clauses 7.2, 13.4, 20.10 and 29.2 and any other termination provisions within the Terms, the Authority may without penalty to the Authority terminate the Framework Agreement:-

19.1.1 notwithstanding Clause 9.4, immediately on notice, in the event that the Framework Participant becomes Insolvent or otherwise ceases to be capable of providing the Services;

19.1.2 on giving fourteen (14) days' Written notice, in the event that (i) the Framework Participant has committed a material breach of the Framework Agreement and the Framework Participant has not corrected the said breach within a reasonable period of time of receipt of such notification from the Authority of such breach, or (ii) the Framework Participant is in persistent breach of any of the conditions of any Contract or Contracts and either the persistent breach is incapable of remedy or the Framework Participant shall have failed to remedy the persistent breach within thirty (30) days after receiving written notice requiring it to remedy that breach;

19.1.3 on giving fourteen (14) days' Written notice in the event that at any time during the Framework Agreement Period:-

(a) the Authority considers that procurement of a new

framework agreement 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 Framework Agreement;

- (b) the Authority become aware that the Framework Participant 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;
- (c) in the event that the ECJ makes a declaration that the Framework Agreement should not have been awarded to the Framework Participant in view of a serious infringement of the obligations under the Treaty and Directive; or
- (d) proceedings are served on the Authority in connection with or related to:-
  - (i) any substitution of the Framework Participant pursuant to Clause 9.5 or any Transfer of the Framework Agreement in whole or in part approved by the Authority pursuant to Clause 15; and/or
  - (ii) the Framework Agreement between the Authority and the Replacement Supplier or the Transferee.



- 19.2 To be effective notice served by the Authority in terms of Clause 19.1 must be served by the Director of PCF.
- 19.3 The Framework Participant will reasonably assist the Authority and/or relevant Participating Authority in ensuring a smooth, timely, risk-reduced transition of the activities carried out under any Contract to a New Contractor at the expiry or earlier termination (for any reason) of such Contract, and shall return to such party as the Participating Authority may nominate, such items relating to the Contract as may have been supplied by or on behalf of the Participating Authority.
- 19.4 Clauses which expressly or by implication survive termination of the Framework Agreement shall continue in full force and effect after the expiry or termination of the Framework Agreement.

## **20. CONFIDENTIALITY**

- 20.1 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 this Framework Agreement, the Recipient undertakes to the Discloser that it will:
- 20.1.1 keep that Confidential Information completely and strictly confidential and keep in safe custody all documentation and media recording of the same;
- 20.1.2 save as expressly permitted in the Framework Principal Conditions, 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;
- 20.1.3 use that Confidential Information only for the performance

of the Framework Agreement and will not use that Confidential Information for its own benefit or for the benefit of anyone other than the Discloser; and

20.1.4 maintain that Confidential Information as the Discloser's property.

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

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

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

20.2.3 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

20.2.4 disclosed pursuant to Clause 20.7 (Scottish Government Health Directorate disclosure and disclosure to other Government departments and agencies).

20.3 For the purpose of this Clause 20, 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 (1) or more elements of it are separately available in the public domain.

20.4 Where the Authority receives Confidential Information from the Framework Participant, the Authority may disclose such Confidential Information to, and permit its use by its staff, agents and any third party

for any purpose provided for or contemplated by the Framework Agreement.

- 20.5 The Authority shall be entitled to disclose any Confidential Information received from the Framework Participant to its professional advisors to the extent that the Authority considers that they have a reasonable need to receive and consider the same.
- 20.6 The Framework Participant shall be permitted to disclose the Confidential Information only to its directors, officers, employees, agents and professional advisors who need to see and know it in connection with provision of the Services (who are hereafter called the **“Permitted Persons”**) subject to obtaining appropriate confidentiality restrictions no less stringent than this Clause 20.
- 20.7 The Authority shall be free to disclose the terms of this Framework Agreement and any documents connected with provision of the Services to and within the Scottish Government Health Directorate 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.
- 20.8 The Parties acknowledge that damages may not be an adequate remedy for any breach of this Clause 20 by either party or any of the Framework Participant’s Permitted Persons and the Parties may be entitled to obtain any legal relief, including interdict, in the event of any breach of this Clause 20.
- 20.9 Without prejudice to the Parties' other obligations under the Framework Agreement, if directed to do so by the Discloser at any time and in any

event promptly following termination for any reason 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:

20.9.1 for the purposes of the performance or receipt of the Services;

20.9.2 in cases where there is a partial termination for the purposes of the performance of the remainder of the Framework Agreement or a Contract thereunder;

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

20.9.4 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 20.

20.10 In the event that the Framework Participant fails to comply with this Clause 20 (Confidentiality), the Authority reserves the right to terminate the Framework Agreement by notice in writing with immediate effect.

20.11 All obligations set out in this Clause 20 to keep confidential all Confidential Information as defined in:-

20.11.1 part (a) of the definition of 'Confidential Information' shall remain in force in perpetuity notwithstanding the expiry or termination (for any reason) of the Framework Agreement; and

20.11.2 part (b) of the definition of 'Confidential Information' shall remain in force during the Framework Agreement Period

and for a period of 5 years thereafter.

## **21. FREEDOM OF INFORMATION**

21.1 Nothing whether expressly provided in the Framework Agreement, 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 Framework Agreement and any Contract(s) 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 Framework Participant or any Authority); or (iii) such details fall within any other exemption under FOI provided always that application of any such exemption referred to at (i), (ii) or (iii) above shall be at the sole discretion of the Authority. The Authority will take all reasonable steps to provide the Framework Participant with notice of any intended disclosures under FOI prior to making such information public.

21.2 The Framework Participant shall:-

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

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

21.2.3 provide all such assistance as may be required by the

Authority; and

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

## **22. NOTICES**

22.1 Any notice to be given under the Framework Agreement shall either be delivered personally, sent by facsimile or sent by first class recorded delivery post or by electronic mail. Except as otherwise provided in the 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:

22.1.1 if personally delivered, at the time of delivery;

22.1.2 if sent by facsimile at the time of transmission;

22.1.3 if posted, at the expiration of forty eight (48) hours or (in the case of air-mail seven (7) Days) after the envelope containing the same was delivered into the custody of the postal authorities; or

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

22.2 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 authorities as prepaid first class, recorded delivery or air-mail 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.

22.3 Except to the extent otherwise agreed in Writing between the parties, notices deliverable to the Framework Participant/Contractor, shall be addressed to the Point of Contact.

### **23. PUBLICITY**

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

### **24. EXECUTION OF ADDITIONAL DOCUMENTS**

The Framework Participant 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 Framework Agreement.

### **25. INVALIDITY**

Any provision of the Framework Agreement 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 Framework Agreement, the parties shall commence good faith negotiations to remedy such invalidity.

### **26. REPRESENTATIONS**

The Framework Participant acknowledges and agrees that it has not relied on any representation, warranty or undertaking (whether written or oral) in relation to the subject matter of the Framework Agreement 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 Framework Agreement or unless such representation was made fraudulently.

## **27. NO WAIVER**

- 27.1 The failure by the Authority, or the Framework Participant or, as the case may be, any Participating Authority to insist upon the strict performance of any provision, term or condition of the Framework Agreement or to exercise any right or remedy consequent upon the breach thereof shall not constitute a waiver of any Authority's rights and/or remedies in respect of such breach or any subsequent breach of such provision, term or condition.
- 27.2 No waiver of any of the provisions of the Framework Agreement shall be effective unless it is expressly stated to be a waiver and communicated to the other party in Writing in accordance with the provisions of Clause 22.1.
- 27.3 Subject always to Clause 2.2, no amendment of the Framework Agreement shall be valid unless agreed in Writing by the Point of Contact (on behalf of the Framework Participant) and the Authority Manager.

## **28. LOSS OF PARTICIPATING AUTHORITIES**



The Framework Participant warrants that (i) any warranty, representation, undertaking or indemnity given or made to the Authority by the Framework Participant in terms of this Framework Agreement shall be deemed for the purpose of this Framework Agreement to have been made to each Participating Authority, and (ii) for the purpose of calculating any loss, injury, damages, costs or expenses due from the Framework Participant arising out of or in connection with a Contract awarded pursuant to this Framework Agreement, or the termination of such Contract for any reason, or in respect of any indemnity, warranty, representation or undertaking in terms of this Framework Agreement, there shall be deemed to be included by way of addition within such loss, injury, damages, costs or expenses any or all loss, injury, damages, costs or expenses suffered or incurred by the Participating Authorities and as if the Participating Authorities were a party to this Framework Agreement instead of the Authority and such obligations were due directly to the Participating Authorities.

## **29. HUMAN TRAFFICKING ETC**

29.1 The Contractor shall, and shall ensure that its officers, employees, agents, subcontractors and any other persons who perform the obligations on behalf of the Contractor or in connection with this Framework Agreement and any Contract concluded hereunder shall:

29.1.1 not commit any act or omission which causes or could cause it to breach, or commit an offence under, any laws relating to anti human trafficking, child labour and modern slavery;

29.1.2 keep accurate and up to date records showing all suppliers engaged in connection with this Contract and the steps the Contractor has taken to comply with this Clause 29, and

permit the Authority to inspect those records as required;

29.1.3 warrant that neither the Contractor, nor any of its officers, employees or other persons associated with it, having made reasonable enquiries, has been or is the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence or alleged offence of or in connection with slavery and human trafficking;

29.1.4 implement due diligence procedures for its own suppliers, subcontractors and other participants in its supply chains, to ensure that there is no slavery or human trafficking in its supply chains; and

29.1.5 promptly notify the Authority of any breach of this Clause 29.

29.2 The Authority may terminate this Framework Agreement immediately by giving written notice to that effect to the Contractor if the Contractor is in breach of this Clause 29.

### **30. GOVERNING LAW AND JURISDICTION**

The parties accept the exclusive jurisdiction of the Scottish courts and agree that the Framework Agreement is to be governed by and construed in accordance with Scots law.

## SCHEDULE: PART 1

### MINI TENDER PROCESS

1. Where the Invitation to Tender provides for Participating Authorities calling off the Framework Agreement by mini competition the provisions of this Schedule Part 1 will apply.
2. Any Participating Authority shall be entitled to conduct a Mini Tender Process in respect of the requirements for a provision of Services by the Contractor and in such circumstances shall invite all Framework Participants capable of performing the relevant Services to submit tenders for the provision of such Services. All such tenders shall be submitted and evaluated in accordance with the provisions of this Schedule Part 1.
3. When undertaking a Mini Tender Process the Participating Authority shall issue a mini tender pack to each of the Framework Participants.
4. The mini tender pack shall reference the Framework Agreement and shall *inter alia* provide the following information to Framework Participants:
  - (a) The scope and extent of the Services to be provided, including timescales;
  - (b) Details of how the Participating Authority wishes pricing for the provision of such Services to be presented;
  - (c) Timescales for submission of mini tenders;
  - (d) The mechanism and evaluation approach which will be applied by the Participating Authority to select the winning mini tender. This shall be based on the evaluation criteria and weightings for mini tenders specified in the Invitation to Tender.

Those matters which will be considered by each Participating Authority to demonstrate such criteria in each Mini Tender Process and the weighting of these criteria will be determined as appropriate for each Mini Tender Process by the relevant Participating Authority and advised to each Framework Participant.
5. The Participating Authority shall in Writing advise each Framework Participant that submitted a tender in response to the issue of the mini tender pack, of the outcome of the Mini Tender Process, as soon as reasonably practicable after a decision in relation thereto has been made.

**SCHEDULE: PART 2**

**NHSS CONDITIONS FOR THE PROVISION OF SERVICES**



1.	DEFINED TERMS AND INTERPRETATION .....	
2.	POSITION OF THE AUTHORITY .....	
3.	ORDERING OF SERVICES AND PERFORMANCE .....	
4.	MANNER OF CARRYING OUT THE SERVICES.....	
5.	TIME .....	
6.	CONTRACT PRICE AND PAYMENT .....	
7.	FORMS .....	
8.	FRAMEWORK PARTICIPANT’S RESPONSIBILITIES .....	
9.	PARTICIPATING AUTHORITY’S OBLIGATIONS .....	
10.	CHANGE CONTROL.....	
11.	VARIATION OF THE CONTRACT.....	
12.	PROPERTY AND RISK.....	
13.	TOOLS.....	
14.	ACCEPTANCE .....	
15.	QUALITY .....	
16.	HEALTH AND SAFETY .....	
17.	TRANSFER AND SUB-CONTRACTING .....	
18.	LIABILITY AND INDEMNITY .....	
19.	INSURANCE.....	
20.	DISPUTE RESOLUTION PROCEDURE.....	
21.	ENVIRONMENTAL CONSIDERATIONS.....	
22.	CANCELLATION OF ORDERS .....	
23.	TERMINATION OF CONTRACT.....	
24.	REMEDIES .....	
25.	CONSEQUENCES OF TERMINATION .....	
26.	COMMUNICATIONS .....	
27.	INTELLECTUAL PROPERTY.....	
28.	AUDIT AND ACCOUNTS.....	
29.	CONFIDENTIALITY.....	
30.	FREEDOM OF INFORMATION .....	
31.	DATA PROTECTION .....	
32.	THE HUMAN RIGHTS ACT 1998 AND THE ASYLUM AND IMMIGRATION ACT 1996....	
33.	POWER TO AGREE.....	
34.	RELATIONSHIP OF THE PARTIES .....	
35.	INDUCEMENTS TO PURCHASE AND PROHIBITED ACTS .....	
36.	GENERAL .....	
37.	DIVERSITY .....	
38.	NOTICES .....	



- 39. TUPE .....
- 40. SPECIFIC IMPLEMENT .....
- 41. COMMUNITY BENEFITS.....
- 42. PROHIBITED ACT .....
- 43. FORCE MAJEURE.....
- 44. LAW.....

## 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:-

<b>“Additional Permitted Purpose”</b>	means, if any, such other permitted purpose for the Processing of the Personal Data which, although relating to the Purpose, is in addition to the Purpose and which is a purpose which the Contractor must implement by Law, as described in Schedule Part 3 (Processing Information);
<b>“Affected Employee”</b>	has the meaning ascribed to it in Clause 39;
<b>“Appropriate Safeguards”</b>	means a legally compliant mechanism(s) for the transfer of Personal Data to a country outside the EEA in respect of which no adequacy decision has been made by the European Commission, as such mechanism(s) may be permitted under the Data Protection Legislation from time to time;
<b>“Authority”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Commencement Date”</b>	means the date upon which the Contract shall come into effect, such date being set out in the relevant Order issued by the Participating Authority;
<b>“Community Benefits”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Confidential Information”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Contract”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Contractor”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Contractor Personnel”</b>	means any and all directors, officers, employees, agents, consultants and contractors of the Contractor, of any permitted sub-contractor and/or of any Sub-processor engaged in the performance of the obligations imposed on the Contractor pursuant to or under the Contract, including but not limited to the performance of the Services;
<b>“Contractor Terms”</b>	has the meaning ascribed to it in the definitions

in the Framework Principal Conditions;

**“Contract Period”**

means:-

- (a) (subject to earlier termination in accordance with its terms or by operation of law) the duration of the Contract, as set out in the Order starting on the Commencement Date, or
- (b) if the Commencement Date is not set out in the Order the period from the date the Order is submitted by the Participating Authority to the Framework Participant until the Contract is terminated in accordance with its terms;

**“Contract Price”**

means the monies payable by a Participating Authority to a Contractor for the Services pursuant to a Contract in strict accordance with the Contract Pricing;

**“Contract Pricing”**

has the meaning ascribed to it in the definitions in the Framework Principal Conditions;

**“Controller”**

shall have the meaning given in the GDPR;

**“Costs”**

includes costs, charges, outgoings and expenses of every description;

**“Data Loss Event”**

means any event that results, or may result, in unauthorised access to Personal Data held by the Contractor or any Sub-processor under or in connection with the Contract, and/or actual or potential loss and/or destruction and/or corruption of Personal Data in breach of the Contract, including but not limited to any Personal Data Breach;

**“Data Protection Impact Assessment”**

means an assessment by the Controller of the impact of the envisaged Processing on the protection of Personal Data;

**“Data Protection Legislation”**

means (i) the GDPR and any applicable national implementing Laws as amended from time to time; (ii) the DPA 2018 to the extent that it relates to the Processing of Personal Data and privacy; and (iii) any other Law in force from time to time with regards to the Processing of Personal Data and privacy, which may apply to either Party in respect of its activities under the Contract;

**“Data Protection Officer”**

shall have the meaning given in the GDPR;



<b>“Data Subject”</b>	shall have the meaning given in the GDPR;
<b>“Data Subject Request”</b>	means a request made by, or on behalf of, a Data Subject in accordance with access and other rights granted to the Data Subject pursuant to the Data Protection Legislation in respect of their Personal Data;
<b>“Day”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>Deliverables</b>	means all documents, products and materials developed by the Framework Participant or its agents, sub-contractors, consultants and employees pursuant to a Contract in any form;
<b>“Direct Losses”</b>	means all damage, losses, indebtedness, claims, actions, cash, expenses (including the cost of legal or professional services and all legal costs), proceedings, demands and charges whether arising under statute, contract or at common law excluding Indirect Losses;
<b>“DPA 2018”</b>	means the Data Protection Act 2018;
<b>“DP Losses”</b>	means all liabilities and amounts, including all: <ul style="list-style-type: none"> <li>a) Direct Losses;</li> <li>b) costs and expenses relating to reconstitution and/or correction of the Personal Data and any and all records comprising the same; and</li> <li>c) to the extent permitted by applicable Law: <ul style="list-style-type: none"> <li>(i) administrative fines, penalties, sanctions, liabilities or other remedies imposed by a Supervisory Authority; and</li> <li>(ii) compensation to a Data Subject ordered by a Supervisory Authority;</li> </ul> </li> </ul>
<b>“EEA”</b>	means the European Economic Area;
<b>“Force Majeure Event”</b>	means one (1) 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;

**“Framework Agreement”** has the meaning ascribed to it in the definitions in the Framework Principal Conditions;

**“Framework Participant”** has the meaning ascribed to it in the definitions in the Framework Principal Conditions;

**“Framework Principal Conditions”** means the terms and conditions contained in the Framework Agreement under exception of the terms and conditions contained in any part or parts of the Schedule thereto;

**“GDPR”** means the General Data Protection Regulation (Regulation (EU) 2016/679);

**“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”** has the meaning ascribed to it in the definitions in the Framework Principal Conditions;

**“Head of Procurement”** means the person from time to time appointed by the Participating Authority as head in charge of its procurement activities;

**“Indirect Losses”** means loss of profits, loss of business, loss of business opportunity, loss of goodwill or any consequential loss or indirect loss of any nature;

**“Information Commissioner’s Office”** means the United Kingdom’s Supervisory Authority;

**“Insolvent”** means:  
  
(a) if the Framework Participant is an

individual, that individual, or where the Framework Participant 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 Framework Participant is a company, the passing by the Framework Participant 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 Framework Participant or the dissolution of the Framework Participant, 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 Framework Participant 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 Framework Participant is unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986, or if the Framework Participant makes an arrangement with its creditors generally or makes an application to a court of competent jurisdiction for protection from its creditors generally; and

	(c) any event under the law of any other jurisdiction other than Scotland which is analogous to any of the above;
<b>“Intellectual Property”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Invitation to Tender”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Joint Controller”</b>	shall have the meaning given in Article 26 of the GDPR;
<b>“Law”</b>	means any legislation and/or common law insofar as applicable to the performance of the Contract or any part thereof including without limitation:-  <ul style="list-style-type: none"> <li>(a) any subordinate legislation;</li> <li>(b) any enforceable EU right within the meaning of Section 2 of the European Communities Act 1972; and</li> <li>(c) any regulation, order, regulatory policy, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements with which the Participating Authority and/or the Contractor is bound to comply;</li> </ul>
<b>“Location”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Minimum Requirements”</b>	means those requirements identified as such in Schedule Part 3 (Processing Information);
<b>“Mini Tender Process”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“New Contractor”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“NHSS Additional Conditions for the Provision of Services”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Order”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Participating Authority”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Party”</b>	means any party to a Contract individually and

	<p><b>“Parties”</b> refers to all of the parties to a Contract collectively. A Party shall include all permitted assignees of the Party in question. All persons who are not a Party to a Contract are third parties;</p>
<b>“Person”</b>	<p>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;</p>
<b>“Personal Data”</b>	<p>shall have the meaning given in the GDPR;</p>
<b>“Personal Data Breach”</b>	<p>shall have the meaning given in the GDPR;</p>
<b>“Point of Contact”</b>	<p>has the meaning ascribed to it in the definitions in the Framework Principal Conditions;</p>
<b>“Pre-Transfer Liabilities”</b>	<p>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:-</p> <p>(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</p>

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;

<b>“Processing”</b>	shall have the meaning given in the GDPR and the terms <b>“Process”</b> and <b>“Processed”</b> shall be construed accordingly;
<b>“Processing Instructions”</b>	shall have the meaning given in Clause 31.4;
<b>“Processor”</b>	shall have the meaning given in the GDPR;
<b>“Prohibited Act”</b>	shall have the meaning ascribed to it in Clause 42;
<b>“Protective Measures”</b>	means appropriate technical and organisational measures which must include the Minimum Requirements and may also include, without limitation: pseudonymising and encrypting Personal Data; ensuring confidentiality, integrity, availability and resilience of systems and services used by the Contractor and, where relevant, by any Sub-processor in connection with the performance of the obligations imposed on the Contractor pursuant to or under the Contract, including but not limited to the performance of the Services; ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident; and regularly assessing and evaluating the effectiveness of such technical and organisational measures adopted from time to time by the Contractor and, where relevant, by any Sub-processor;
<b>“Purpose”</b>	has the meaning given in Clause 31.4;
<b>“Receipt of Order”</b>	means, if personally delivered, at the time of delivery; if sent by facsimile, at the time of

transmission; if posted, at the expiration of forty eight (48) hours or (in the case of air-mail seven (7) 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 transmission;

<b>“Replacement Supplier”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Representative”</b>	shall have the meaning given in the GDPR;
<b>“Services”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Service Transfer Date”</b>	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 a Participating Authority or a New Contractor;
<b>“Specification”</b>	has the meaning set out in the definitions contained in the Framework Agreement;
<b>“Sub-processor”</b>	means any third party appointed to process Personal Data on behalf of the Contractor in connection with the Contract;
<b>“Supervisory Authority”</b>	shall have the meaning given in the GDPR;
<b>“the 1978 Act”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“Tender”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions;
<b>“TUPE Regulations”</b>	means the Transfer of Undertakings (Protection of Employment) Regulations 2006;
<b>“Writing”</b>	has the meaning ascribed to it in the definitions in the Framework Principal Conditions; and
<b>“Year”</b>	means during the Contract Period, any twelve (12) month period commencing on the Commencement Date or an anniversary thereof.

1.2 In the Contractor 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 Contractor 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 Contractor Terms, the words used in the Contractor 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 Contractor Terms.
- 1.5 Where a term of the Contractor 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 Contractor 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 Contractor Terms, words importing any particular gender include all other genders.



- 1.7 In the Contractor 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 Contractor 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 Contractor 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 Contractor Terms include (subject to all relevant approvals) a reference to the Contractor Terms as amended, supplemented, substituted, novated or assigned from time to time.
- 1.13 For resolution of a conflict or inconsistency in a Contract, the documents shall rank in the following descending order of importance:-
- the Order;
  - any special terms agreed in Writing between a Participating Authority and the Contractor pursuant to a Mini Tender Process;

- Invitation to Tender pursuant to a Mini Competition Process (if any);
- Tender pursuant to a Mini Competition Process (if any);
- Letter of Award;
- NHSS Additional Conditions for the Provision of Services;
- Processing Information set out in Part 3 of the Schedule;
- NHSS Conditions for the Provision of Services;
- Framework Principal Conditions;
- Conditions for Mini Tender Process set out in Part 1 of the Schedule;
- Invitation to Tender;
- Tender.

## **2. POSITION OF THE AUTHORITY**

Each Contract for provision of the Services shall be between the Contractor and the Participating Authority and the Authority is not a party thereto.

## **3. ORDERING OF SERVICES AND PERFORMANCE**

3.1 A Participating Authority shall purchase and the Contractor shall perform the Services in accordance with the Order which shall be in Writing, submitted by the Participating Authority to the Point of Contact, and provision of the Services by the Contractor and receipt thereof by the Participating Authority shall be subject to the Contractor Terms which shall govern the Contract between the Participating Authority and the Contractor to the exclusion of any other terms and conditions.

- 3.2 Orders shall be submitted in Writing by the Participating Authority to the Framework Participant in Writing detailing the Services required, specifying the Contract Price, the Location, the timescale for performance pursuant to Clause 5.1, and the Contract Period.
- 3.3 In the absence of Written agreement between the Participating 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 Participating Authority in the relevant 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 Participating Authority may by written notice require the Contractor to execute the Services in such order as the Participating Authority may decide. In the absence of such notice, the Contractor shall submit such detailed programmes of work and progress reports as the Participating Authority may from time to time require.
- 3.6 Performance shall be completed when the Services referred to in the relevant Order have been completed in accordance with the Specification at the Location to the Participating Authority's satisfaction.
- 3.7 Unless agreed in advance with the Participating Authority, if the Services are performed before the date specified in the relevant Order (or such other date which the Contractor and the Participating Authority have agreed in Writing), the Participating 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 Participating Authority specifies next day or short notice Services performance timescales in the relevant Order, and where such timescales are not otherwise agreed within the terms of the Framework Agreement, 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 Participating 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 Participating Authority.
- 3.10 Part performance of Services may be rejected unless the Participating 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 Participating Authority in connection with the performance of any Services shall be provided without acceptance by the Participating Authority of any liability whatsoever and the Contractor shall indemnify the Participating Authority in respect of any actions, suits, claims, demands, loss, charges, costs and expenses which the Participating 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.

#### **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 Participating 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 Participating Authority may reasonably require.
- 4.3 The Participating Authority shall have power at any time during the progress of the Services to order:
- 4.3.1 the removal from the Location of any materials which in the opinion of the Participating Authority are either hazardous, noxious or not in accordance with the Contract, and/or
  - 4.3.2 the substitution of proper and suitable materials, and/or
  - 4.3.3 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 Participating 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 Participating 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(s) 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).
- 5.2 Where the time(s) of performance of the Services has been agreed by the Parties and stated in the Order or otherwise agreed in Writing then time for performance shall be of the essence and without prejudice to any other right or remedy of the Participating Authority.
- 5.3 The Participating Authority may at its sole discretion, delay for a reasonable period, an agreed time of performance of the Services provided that a minimum of three (3) Days' Written notice is given to the Point of Contact.
- 5.4 Subject always to Clause 43 (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 Participating Authority's other rights and remedies, entitle the Participating Authority (at its option):
- 5.4.1 to withdraw all Services or such part thereof from the Contract provided confirmation is given to the Point of Contact in Writing to this effect;
  - 5.4.2 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;
  - 5.4.3 to purchase other services of the same or similar description from the Contractor or any third party;
  - 5.4.4 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 Participating Authority in purchasing such alternative services, provided that the Participating 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 Participating 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 a Contract have been performed to the Participating Authority's reasonable satisfaction.
- 6.3 The Participating Authority shall pay the Contract Price to the Contractor (by BACS (Bank Automated Clearing System) if the Participating Authority so chooses), within thirty (30) Days of completion to the Participating Authority's satisfaction in accordance with the Contract, of the Services, or receipt of the Contractor's valid invoice (rendered in accordance with Clause 5.1 of the Framework Principal Conditions, this Clause 6 and Clause 7.1) whichever is the later.
- 6.4 Except where otherwise stated in the Order, the Contract Price is exclusive of VAT that shall be payable, if applicable, by the Participating Authority in addition to such Contract Price at the rate prevailing as at the tax invoice date. All invoices provided to the

Participating Authority by the Contractor shall show the VAT calculations separately.

- 6.5 The Participating 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.
- 6.6 No payment of or on account of the Contract Price shall constitute any admission by the Participating Authority as to proper performance by the Contractor of its obligations.
- 6.7 In the event of the Participating Authority breaching Clause 6.3, the Contractor's sole remedy shall be to charge interest on the outstanding amount owed by the Participating 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 Participating 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 Participating Authority shall approve. The Contractor shall allow the Participating Authority to inspect such records at all reasonable times on request.

## **7. FORMS**

- 7.1 Unless otherwise agreed in Writing by the Participating Authority and the Contractor:
  - 7.1.1 an invoice shall be rendered on the Contractor's own invoice form;



7.1.2 all delivery notes (if any) and invoices shall be clearly marked with the Participating Authority's Order number, the name and address of the Participating 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 Participating Authority.

## **8. FRAMEWORK PARTICIPANT'S RESPONSIBILITIES**

8.1 The Contractor shall provide the Services, and deliver the Deliverables to the Participating 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):-

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

8.2.2 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 Participating Authorities impose on the employment by the Participating Authority of persons who did not obtain their qualifications in the United Kingdom. The Contractor shall exhibit to the Participating Authority, satisfactory evidence of all relevant qualifications;

8.2.3 ensure that :-

- (a) all Contractor 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 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 Personnel is available to meet the requirements of the Contracts during holidays or absences;

8.2.4 take the steps reasonably required by the Participating Authority to prevent unauthorised persons being admitted to the Location. If the Participating 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 Participating 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;

8.2.5 if and when instructed by the Participating Authority, give to the Participating 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 Participating Authority may reasonably require;

8.2.6 accept any decision of the Participating 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;

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

8.2.8 perform the Services in accordance with Good Industry Practice.

8.3 The Contractor shall:-

- 8.3.1 observe and ensure that all Contractor Personnel 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 Framework Participant, or about which such Contractor Personnel ought reasonably to be aware. The Participating Authority reserves the right to refuse any Contractor Personnel appointed by the Framework Participant in relation to the Services, in breach of such health and safety rules and regulations and other security requirements access to the Location or any part thereof;
- 8.3.2 notify the Participating Authority as soon as it becomes aware of any health and safety hazards or issues which arise in relation to the Services; and
- 8.3.3 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 Participating Authority's equipment (if any) in relation to the Contractor's equipment.

8.4 The Contractor acknowledges and agrees that:

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

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

- (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 Participating Authority in Writing.

## **9. PARTICIPATING AUTHORITY'S OBLIGATIONS**

9.1 The Participating Authority shall:-

9.1.1 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 Participating Authority in Writing in advance, for the purposes of the Services;

9.1.2 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 Participating Authority the Framework Participant 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 a Contract, it shall submit details of the requested change to the other in Writing.
- 10.2 If the Participating Authority requests a change to the scope or execution of the Services in a Contract, the Contractor shall, within a reasonable time (and in event not more than five (5) days after receipt of the Participating Authority's request provide a written estimate to the Framework Participant of:-
- 10.2.1 the likely time required to implement the change;
  - 10.2.2 any necessary variations to the Contract Price arising from the change;
  - 10.2.3 the likely effect of the change on the Specification; and
  - 10.2.4 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

Pricing, 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**

The Contractor Terms may not be varied otherwise than in accordance with the Framework Principal Conditions.

## **12. PROPERTY AND RISK**

12.1 Without prejudice to each of the party's other rights and obligations, title and risk in any Goods shall pass to the Participating Authority immediately following acceptance of the delivery of the Goods in accordance with Clause 5.

12.2 All tools, equipment and materials of the Contractor used in the performance of the Contractor's obligations under a 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 Participating Authority to the Contractor in connection with a Contract will at all times be at the Contractor's risk and remain the property of the Participating Authority and shall be delivered up to the Participating Authority immediately on request and are to be used by the Contractor solely for the purpose of completing a Contract.

## **14. ACCEPTANCE**

14.1 The Participating Authority shall have a continued right to reject Services irrespective of whether the Participating 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 Participating Authority shall not constitute acceptance, waiver or approval and shall be without prejudice to any right or remedy that the Participating Authority may have against the Contractor, provided that the right of rejection shall cease within a reasonable time from the date on which the Participating 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 Participating Authority so elects, and without prejudice to the Participating Authority's other rights and remedies, the Contractor shall free of charge and as quickly as possible reperform the Services so rejected provided the Participating Authority has first confirmed its rejection of the Services in Writing.

## **15. QUALITY**

- 15.1 The Contractor warrants to the Participating Authority that:-
- 15.1.1 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
  - 15.1.2 the Services will conform with all descriptions and specifications provided to the Participating 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 (including any response submitted by or on behalf of the Contractor pursuant to any Mini Tender Process) 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/Participating Authority (as appropriate) relating to such submissions are true and accurate in all material respects.
- 15.4 The Participating 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 Laws.

## **16. HEALTH AND SAFETY**

- 16.1 The Contractor represents and warrants to the Participating 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 Participating 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 Participating Authority, the Participating Authority shall be entitled to reject the Services and the Contractor shall, subject to Clause 18, indemnify the Participating Authority against all Direct Losses incurred by the Participating Authority as a result of such breach by the Contractor its servants or agents, including the cost of purchasing alternative services and all administrative costs incurred by the Participating Authority in inviting and awarding tenders for the provision of such alternative services.

## **17. TRANSFER AND SUB-CONTRACTING**

17.1 The Contractor shall not Transfer the whole or any part of a Contract without the prior Written consent of the Participating Authority, provided always that the Contract shall Transfer automatically to any Replacement Supplier approved by the Authority pursuant to Clause 9.5 of the Framework Agreement Principal Conditions or any Transferee approved by the Authority in terms of Clause 15 of the Framework Agreement Principal Conditions.

17.2 The Contractor shall not sub-contract the provision of any of the Services without the prior Written consent of the Participating Authority without prejudice to the foregoing 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 Participating Authority as if such act or omission had been committed or omitted by the Contractor itself.

- 17.3 Any Participating Authority shall be entitled to assign, novate, contract or otherwise dispose of its rights and obligations under any Contract or any part thereof to:-
- 17.3.1 any other Participating Authority, or
  - 17.3.2 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 Participating Authority.
- 17.4 Without prejudice to Clause 17.3 all Contracts between a Contractor and a Participating Authority shall automatically devolve to any statutory successor of the said Participating Authority.
- 17.5 Any change in the legal status of any Participating Authority shall not affect the validity of any Contract. In such circumstances Contracts shall bind and inure to the benefit of any successor body of any Participating Authority.
- 17.6 Participating Authorities shall be entitled to disclose to any body to whom Contracts may be transferred pursuant to the foregoing provisions any Confidential Information of the Contractor which relates to the performance of Contracts by the Contractor. In such circumstances the Participating 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.

17.7 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:-

17.7.1 which requires payment to be made to the sub-contractor within a specified period not exceeding thirty (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 Participating 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 Participating Authority 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.

17.7.2 which notifies the sub-contractor that the contract forms part of a larger contract for the benefit of the Participating 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; and

17.7.3 in the same terms as set out in this Clause 17.7 (including for the avoidance of doubt this Clause 17.7.3) 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:-

18.1.1 indemnify and hold the Participating Authority harmless from all claims and all direct, indirect or consequential liabilities (including loss of profits (whether direct or indirect), loss of business, depletion of goodwill and similar losses), loss of anticipated savings, Costs, proceedings, damages and expenses (including legal and other professional fees and expenses) awarded against, or incurred or paid by the Participating 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 Services; and

18.1.2 indemnify the Participating Authority against all Direct Losses which the Participating Authority may suffer or incur to the extent such Direct Losses are incurred by the Participating Authority as a result of or in connection with the supply 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, its servants and/or agents.

18.2 Under exception of:-

18.2.1 the indemnity provided by the Contractor under Clause 18.1.1;

18.2.2 the indemnity provided by the Contractor under Clause 31.29; and

18.2.3 liability for 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;

in respect of which liability shall be unlimited, 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 Participating Authority to the Contractor in respect of Services supplied or to be supplied under the Contract in that Year, or where an alternative sum is specified in the Invitation to Tender, Mini Tender Process or Letter of Award, the sum so specified.

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 Contractor Terms.

18.4 The Contractor acknowledges and agrees that:

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

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

- (a) to the extent that it restricts or precludes provision 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 Participating Authority in Writing.

## **19. INSURANCE**

The Contractor shall for the Contract Period effect and maintain with a reputable insurance company a policy or policies of insurance covering all the matters for which it is liable, including matters which are the subject of indemnities under the Contract with a minimum limit of indemnity of in respect of public liability FIVE MILLION POUNDS STERLING (£5,000,000) and in respect of professional indemnity, TWO MILLION POUNDS STERLING (£2,000,000) *per annum* for any one (1) incident in any one (1) Year, unless an alternative figure has been specified in the Invitation to Tender and/or Letter of Award, and/or Mini Tender Process or such other sum as may be agreed between the Participating Authority and the Contractor in Writing. The Contractor shall at the request of the Participating 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 a Contract, the Contractor shall continue its performance of the provisions of all Contracts (unless and to the extent only that, the relevant Participating Authority requests in Writing to the Point of Contact that the Contractor does not do so).

20.2 The Parties to the Contract 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 a Contract. Where the provisions of any such legislation are implemented by the use of voluntary agreements to which they have subscribed 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 Participating Authority to permit informed choices by end users;



21.2 The Contractor shall meet all reasonable requests by the Participating Authority for information evidencing the Contractor's compliance with the provisions of this Clause 21.

## **22. CANCELLATION OF ORDERS**

The Contract, or part thereof Orders may be cancelled without penalty by any Participating Authority provided such notice as is referred to in the Invitation to Tender is provided by the Participating 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 a Participating Authority to the Contractor.

## **23. TERMINATION OF CONTRACT**

23.1 In addition to the Participating Authority's other rights of termination set out in the Contract Terms, and without prejudice to its other rights and remedies, a Participating Authority may, without penalty to the Participating Authority, terminate a Contract in whole or in part:-

23.1.1 immediately on notice to the Contractor in the event that:-

- (a) the Contractor becomes Insolvent provided always that no Replacement Supplier has been approved by the Authority pursuant to Clause 9.5 of the Framework Principal Conditions in which event the Participating Authority shall not be entitled to terminate a Contract on the grounds of the Contractor's Insolvency;
- (b) the Contractor is in default of any duty of care or any

fiduciary or statutory duty owed to any patient, employee or agent of the Participating Authority; or

- (c) the Contractor is in default of Clause 29 of the Framework Agreement Principal Conditions;

23.1.2 by giving fourteen (14) days' Written notice to that effect to the Contractor in the event that:-

- (a) the Framework Agreement to which the Contractor is appointed has terminated; or

- (b) 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 Participating Authority's reasonable satisfaction within a period of thirty (30) days following Written notice demanding remedy of the failure in question being served by the Participating Authority on the Contractor.;  
or

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

- (d) there is a change of ownership or control of the Contractor which, in the reasonable opinion of the Participating Authority, will have a material adverse impact on the provision of the Services or the image or reputation of the Participating Authority, provided always that no Replacement Supplier has been approved by the

Authority pursuant to Clause 9.5 of the Framework Principal Conditions in which event the Participating Authority shall not be entitled to terminate the Contract on the grounds of a change of ownership or control of the Contractor;

- (e) the Contractor, sub-contracts or purports to assign the Contract or any part of the Contract in breach of Clause 17.

23.2 On giving fourteen (14) days' Written notice in the event that at any time during the Contract Period:

- (a) the Participating 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 having been, effected to the Contract;
- (b) the Participating Authority becomes aware that the Contractor or any Relevant Person has been convicted of any of the offences listed in Regulation 58(1) of the Public Contracts (Scotland) Regulations 2015;
- (c) 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
- (d) proceedings are served on the Participating Authority in connection with or related to any Transfer and/or any

Contract between the Participating Authority and any Transferee;

provided always that the Contractor shall be entitled to payment of such proportion of the Contract Price as is due and payable in terms of the Contract up to the date of termination on any of the grounds set out in this Clause 23.2.

- 23.3 The Participating Authority shall be entitled to recover from the Contractor the amount of any Direct Losses resulting from termination by the Participating Authority under Clause 23.1. For the avoidance of doubt, Direct Losses shall, for the purposes of this Clause 23.3, include reasonable cost to the Participating Authority of the time spent by its officers and agents in terminating the Contract and in making alternative arrangements for the provision of the Services.
- 23.4 The Contractor may terminate the Contract by giving one (1) month's Written notice of termination to the Head of Procurement on behalf of the Participating Authority, if the Participating Authority has committed a material breach of the Contract and the Participating Authority has not corrected the said breach of Contract within a reasonable period of time of receipt of such Written notification from the Contractor of such breach.
- 23.5 In the event that a Force Majeure Event prevails beyond such period as the Party not in default of its obligations by virtue of the Force Majeure Event considers reasonable, (acting reasonably), such non-defaulting Party may, without penalty due to or by either party, terminate the Contract 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.

23.6 Termination (in whole or in part) or expiry of a Contract shall not affect either Party's rights or obligations under that Contract which in terms hereof 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.

23.7 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 Participating Authority shall be entitled (without prejudice to any other right or remedy) to exercise any one (1) or more of the following rights or remedies:-

24.1.1 to terminate the Contract in accordance with Clauses 23 and 29 of the NHSS Conditions for the Provision of Services; or

24.1.2 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 Participating Authority to the Contractor under the Contract; or

24.1.3 to require the Contractor, without charge to the Participating

Authority, to carry out such additional work as is necessary to correct the Contractor's failure.

24.2 Without prejudice to any other rights and remedies provided in the Contractor Terms, if any Services are not supplied in accordance with the terms of the Contract, the Participating Authority shall be entitled to be paid on demand all Direct Losses incurred by the Participating Authority in connection with the Contractor's breach (or breaches) of the Contract. For the avoidance of doubt, the term "**Direct Losses**" shall for the purposes of this Clause 24.2 include all reasonable Costs incurred by the Participating Authority in respect of the time spent by its officers and agents in making alternative arrangements for the provision of the Services.

## **25. CONSEQUENCES OF TERMINATION**

25.1 To the extent requested by the Participating Authority, the Contractor will reasonably assist the Participating Authority in ensuring a smooth, timely, risk-reduced transition of the activities carried out under any Contract to a New Contractor at the expiry or earlier termination (for any reason) of such Contract, at the Contractor's cost, and shall return to such party as the Participating Authority may nominate, such items relating to the Contractor as may have been supplied by or on behalf of the Participating Authority.

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

25.3 The Participating Authority agrees that termination (in whole or in part) for any reason or expiry of the Contract shall not affect either Party's

obligations which the Contractor 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 expiry or termination of the Contract (for any reason) the Participating Authority may require the Contractor to deliver up to the Participating Authority any data (including Confidential Information) relevant to the provision of the Services on an appropriate media.

25.5 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**

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 warrants that, except to the extent that the Services incorporate designs furnished by the Participating Authority, nothing done by the Contractor in the provision of the Services or performance of the Contract, or use by the Participating Authority of the Services shall infringe any Person's Intellectual Property Rights.

## **28. AUDIT AND ACCOUNTS**

28.1 The Contractor shall keep proper records in respect of the Contract Price due to it under a Contract for the Contract Period and a minimum of three (3) years thereafter.

28.2 For the purpose of the examination and certification of any Participating Authorities' 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 Participating Authority has used their resources, Audit Scotland, the Accounts Commission, the Auditor General and the Participating Authority or its auditors may examine such documents, information, reports, records and data, whether in human or machine-readable form as they 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 any 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 Participating 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:

29.1.1 keep that Confidential Information completely and strictly



confidential and keep in safe custody all documentation and media recording of the same;

29.1.2 save as expressly permitted in the Contractor 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;

29.1.3 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

29.1.4 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:

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

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

29.2.3 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

29.2.4 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 (1) or more elements of it are separately available in the public domain.
- 29.4 Where the Participating Authority receives Confidential Information from the Contractor, the Participating Authority may disclose such Confidential Information to, and permit its use by its staff, agents and any third party for any purpose provided for or contemplated by the Contract.
- 29.5 The Participating Authority shall be entitled to disclose any Confidential Information received from the Contractor to its professional advisors to the extent that the Participating Authority considers that they have a reasonable need to receive and consider the same.
- 29.6 Save as otherwise expressly permitted in the Contractor 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 Services (who are hereafter called the “**Permitted Persons**”) subject to obtaining confidentiality restrictions no less stringent than those set out in this Clause 29.
- 29.7 The Participating Authority shall be free to disclose the terms of a 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 Participating Authority shall be

free to use and disclose such information on such terms and in such manner as the Participating 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 relief, including interdict, in the event of any breach of this Clause 29.

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

29.9.1 for the purposes of the supply or receipt of Services;

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

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

29.9.4 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 the Framework Participant fails to comply with this Clause 29, the Participating Authority reserves the right to terminate the Contract by notice in writing with immediate effect.

29.11 All obligations set out in this Clause 29 to keep confidential all Confidential Information as defined in:-

29.11.1 part (a) of the definition of “**Confidential Information**” shall remain in force in perpetuity notwithstanding the expiry or termination (for any reason) of the Contract; and

29.11.2 part (b) of the definition of “**Confidential Information**” shall remain in force during the Contract Period and for a period of five (5) years thereafter.

### **30. FREEDOM OF INFORMATION**

30.1 Nothing whether expressly provided in the Contractor Terms, or otherwise implied, shall preclude the Participating 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 Framework Agreement 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 any Participating Authority); or (iii) such details fall within any other exemption under FOI provided always that application of any such exemption referred to at (i), (ii) or (iii) above shall be at the sole discretion of the Participating Authority. The Participating 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 Framework Participant shall:-

- 30.2.1 transfer any request for information relating to the Contractor Terms, to the Participating Authority as soon as practicable after receipt and in any event within five (5) Days of receiving a request for information;
- 30.2.2 comply within five (5) Days with any request by the Participating Authority; and
- 30.2.3 provide all such assistance as may be required by the Participating Authority;
- 30.2.4 to enable the Participating Authority to comply with its obligations under FOI.

## **31. DATA PROTECTION**

### ***Controller/Processor and Personal Data***

31.1 Where for the purposes of the Data Protection Legislation:-

31.1.1 the Participating Authority is the Controller and the Contractor is the Processor, to the extent that the Parties have these roles in terms of the Data Protection Legislation, this Clause 31 shall apply with the exception of Clauses 31.27 and 31.28, and Schedule Part 3 (Processing Information) shall only apply in so far as it relates to the Purpose;

31.1.2 the Participating Authority and the Contractor are Joint Controllers, to the extent that the Parties have these roles in terms of the Data Protection Legislation, this Clause 31 shall apply with the exception of Clauses 31.5, 31.26 and 31.28, and Schedule Part 3 (Processing Information) shall only apply in so far as it relates to the Purpose;

31.1.3 the Contractor is a Controller because it requires to Process Personal Data for the Additional Permitted Purpose, to the extent that in terms of the Data Protection Legislation, the Contractor is a Controller for the Additional Permitted Purpose, this Clause 31 shall apply, subject to the amendments set out in Clause 31.28 and Schedule Part 3 (Processing Information) shall only apply in so far as it relates to the Additional Permitted Purpose,

and the Parties acknowledge that in connection with the Contractor's performance of its obligations pursuant to or under the Contract, including but not limited the performance of the Services, the Contractor may, in terms of the Data Protection Legislation, have more than one of the roles described in this Clause 31.1. This Clause 31.1 describes what provisions of this Clause 31 and Schedule Part 3 (Processing Information) apply in relation to each role.

31.2 For the avoidance of doubt, references in this Clause 31 to the term "Personal Data" shall only apply to Personal Data Processed in the course of the performance of the obligations imposed on the Contractor pursuant to or under the Contract, including but not limited to the performance of the Services and where, and to the extent that, the Contractor is a Controller as described in Clause 31.1.3 above, shall only apply to such of this Personal Data which the Contractor Processes for the Additional Permitted Purpose.

***Compliance with Data Protection Legislation***

31.3 The Contractor warrants that it will, and will procure that any and all Sub-processors will, at all times throughout the Contract Period,

Process Personal Data in compliance with the Data Protection Legislation.

***Processing Instructions***

- 31.4 The only Processing of Personal Data that the Contractor is authorised to undertake in connection with the performance of the obligations imposed on the Contractor pursuant to or under the Contract, including but not limited to the performance of the Services, is listed in this Clause 31 and in Schedule Part 3 (Processing Information), as the same may be amended from time to time by written agreement between the Parties (together, the “**Processing Instructions**”). In addition, the Contractor warrants that it will, and will procure that any and all Sub-processors will, at all times throughout the Contract Period, Process the Personal Data in accordance with Clause 8.1 and only Process the Personal Data for the purposes of the performance of the obligations imposed on the Contractor pursuant to or under the Contract, including but not limited to the performance of the Services (the “**Purpose**”).
- 31.5 The Contractor shall promptly comply with any Written request from the Participating Authority requiring the Contractor to amend, transfer or delete the Personal Data.
- 31.6 The Contractor shall notify the Participating Authority immediately if it considers that any of the Participating Authority’s instructions infringe the Data Protection Legislation and will provide the Participating Authority with a Written explanation of the reasons why it considers any of the Participating Authority’s instructions to be so infringing.

***Assistance to the Participating Authority***

31.7 The Contractor shall, as part of the Services and at no additional cost or expense to the Participating Authority, provide all reasonable assistance to the Participating Authority in ensuring compliance with the Participating Authority's obligations under the Data Protection Legislation in relation to:

31.7.1 ensuring the security of the Personal Data;

31.7.2 any notifications, communications and remedial action that may be required to be made or taken following any Data Loss Event, including notifications to the relevant Supervisory Authority following a Data Loss Event and communications to affected or potentially affected Data Subjects;

31.7.3 responding to Data Subject Requests within the timescale set out in the Data Protection Legislation;

31.7.4 responding to any other requests, complaints or communications relating to either Party's obligations under the Data Protection Legislation;

31.7.5 responding to any request from any third party for disclosure of Personal Data;

31.7.6 any communication from a Supervisory Authority or any other regulatory authority or any consultation by the Participating Authority with a Supervisory Authority or any other regulatory authority, to the extent that such communication or consultation relates to or involves the Processing undertaken by the Contractor and/or any Sub-processor under or in connection with the Contract; and



31.7.7 the preparation of any Data Protection Impact Assessment prior to commencing any new Processing that has been agreed between the Parties pursuant to Clause 31.4. Such assistance may, at the discretion of the Participating Authority, include:

- (a) a systematic description of the envisaged Processing operations and the purpose of the Processing;
- (b) an assessment of the necessity and proportionality of the Processing operations in relation to the performance of the obligations imposed on the Contractor pursuant to or under the Contract, including but not limited to the performance of the Services;
- (c) an assessment of the risks to the rights and freedoms of Data Subjects; and
- (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal Data.

31.8 At any time throughout the Contract Period, or following the date of termination, at the request of the Participating Authority, the Contractor shall provide to the Participating Authority a copy of all Personal Data held by the Contractor in the format and on the media reasonably specified by the Participating Authority. If the Contractor fails to provide the Participating Authority with a copy of such requested Personal Data the Participating Authority may, without limiting its other

rights or remedies, enter the Contractor's premises and take a copy of such Personal Data.

***Technical and Organisational Measures***

31.9 The Contractor shall:

31.9.1 Process the Personal Data only in accordance with the Processing Instructions, unless the Contractor is required to do otherwise by Law, in which case the provisions of Clause 31.6 shall apply;

31.9.2 ensure that it has in place Protective Measures, which the Contractor shall maintain throughout the Contract Period at its cost and expense, and which are appropriate to protect against a Data Loss Event, having taken account of:

- (a) the nature of the Personal Data to be protected;
- (b) the harm that might result from a Data Loss Event;
- (c) the state of technological development; and
- (d) the cost of implementing any measures.

***Contractor Personnel***

31.10 The Contractor shall ensure that it takes all reasonable steps to ensure the reliability and integrity of any Contractor Personnel who have access to the Personal Data and ensure that they:

31.10.1 are aware of and comply with the Contractor's duties under the Contract, in particular those obligations set out in this Clause 31;

31.10.2 are subject to appropriate confidentiality undertakings with the Contractor or any Sub-processor, as the case may be,

which confidentiality undertakings require the Contractor Personnel to keep the Personal Data confidential and to only Process the Personal Data for the Purpose;

31.10.3 are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third party unless directed in Writing to do so by the Participating Authority or as otherwise permitted by the Contract; and

31.10.4 have undergone adequate training in the use, care, protection and handling of Personal Data and on the Data Protection Legislation insofar as it relates to Processing.

***International Transfers of Personal Data***

31.11 The Contractor shall not transfer Personal Data outside of the United Kingdom without the prior Written consent of the Participating Authority.

31.12 Where the Contractor wishes to transfer Personal Data to a country within the EEA, the Participating Authority's consent shall not be unreasonably withheld or delayed.

31.13 If the Participating Authority gives its Written consent to a transfer of Personal Data outside of the EEA, the Contractor shall ensure that:

31.13.1 the Contractor has Appropriate Safeguards in place in respect of such transfer and, where practicable, the particular Appropriate Safeguards to be used by the Contractor for such transfer shall be subject to the Participating Authority's prior Written approval, which approval shall not be unreasonably withheld or delayed;

31.13.2 the transfer and any Processing of Personal Data following

such transfer complies at all times with the Processing Instructions; and

31.13.3 the transfer otherwise complies with Data Protection Legislation.

***Notifications required to be given by the Contractor to the Participating Authority***

31.14 The Contractor shall, at its own cost and expense, notify the Participating Authority immediately (and within three (3) Days of receipt of the relevant communication at the latest) if it:

31.14.1 receives a Data Subject Request (or purported Data Subject Request);

31.14.2 receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Legislation;

31.14.3 receives any communication from any Supervisory Authority, including from the Information Commissioner's Office, or any other regulatory authority in connection with Personal Data Processed under or in connection with the Contract; or

31.14.4 receives a request from any third party for disclosure of Personal Data where compliance with such request is required or permitted by Law,

and the Contractor will provide the Participating Authority with a copy of the relevant Data Subject Request, request, complaint or communication, as the case may be and such further information regarding the same as the Participating Authority may request from time to time.

31.15 Taking into account the nature of the Processing, the Contractor shall provide the Participating Authority with all reasonable assistance in relation to any complaint, communication or request notified to the Participating Authority pursuant to Clause 31.14 (and insofar as possible within the timescales reasonably required by the Participating Authority).

31.16 The Contractor shall, at its own cost and expense:

31.16.1 notify the Participating Authority of any Data Loss Event of which it becomes aware within twenty four (24) hours of becoming aware of such Data Loss Event; and

31.16.2 provide the Participating Authority, as soon as practicable and wherever possible within twenty four (24) hours of becoming aware of such Data Loss Event, with such information regarding the Data Loss Event as the Participating Authority may reasonably require, including but not limited to:

(a) the nature of the Data Loss Event, including, where possible the categories and approximate number of Data Subjects and Personal Data records affected by the Data Loss Event;

(b) the likely consequences of the Data Loss Event; and

(c) where the Data Loss Event involves the Contractor and/or any Sub-processor, the measures taken or proposed to be taken by the Contractor and/or any Sub-processor to address the Data Loss Event, including

those to mitigate the possible adverse effects of the Data Loss Event.

- 31.17 If the Contractor cannot provide all of the information set out in Clause 31.16 within the timescale specified, the Contractor shall, within such timescale advise the Participating Authority of the delay and of the reasons for the same and advise the Participating Authority when the Contractor expects to be able to provide the relevant outstanding information, which information may be provided in phases without undue delay, as details become available.

**Records**

- 31.18 The Contractor shall maintain complete, accurate and up-to-date written records of all Processing carried out under or in connection with the Contract. Such records shall contain the following information:
- 31.18.1 the name and contact details of the Contractor's Representative (if any) and of the Contractor's Data Protection Officer (if any);
  - 31.18.2 the categories of Processing carried out in connection with the Purpose;
  - 31.18.3 where applicable, details of any transfers of Personal Data pursuant to Clause 31.13, including the identity of the recipient of such transferred Personal Data and the countries to which such Personal Data is transferred, together with details of the Appropriate Safeguards used; and
  - 31.18.4 a general description of the Protective Measures implemented by the Contractor pursuant to Clause 31.9.

### ***Use of Sub-processors***

31.19 The Contractor shall not allow any Sub-processor to Process any Personal Data unless the Contractor has:

31.19.1 notified the Participating Authority in Writing of the intended Sub-processor and the Processing activity that the Contractor wishes the Sub-processor to undertake on the Contractor's behalf;

31.19.2 obtained the prior Written consent of the Participating Authority in respect of the use of such Sub-processor in connection with the Processing undertaken pursuant to the Contract;

31.19.3 entered into a binding written agreement with the Sub-processor, which agreement sets out enforceable data protection obligations on the same or similar terms as set out in this Clause 31 such that they apply to the Sub-processor, in particular such binding written agreement must provide:

(a) sufficient guarantees that the Sub-processor will adopt Protective Measures such that the Processing undertaken by the Sub-processor will meet the requirements of the Data Protection Legislation; and

(b) details of the Processing that is to be undertaken by the Sub-processor, which Processing shall only involve activity that is set out in Schedule Part 3 (Processing Information); and

31.19.4 provided the Participating Authority with such other

information regarding the Sub-processor as the Participating Authority may reasonably require from time to time.

31.20 The Contractor shall cease using a Sub-processor to undertake any Processing of Personal Data pursuant to or in connection with the Contract immediately upon receipt of a Written request from the Participating Authority requesting that such Sub-processor ceases Processing the Personal Data, in circumstances where the Participating Authority has reasonable grounds for concern about the Sub-processor's ability to carry out the Processing in accordance with the Data Protection Legislation.

31.21 The Contractor shall remain fully liable for all acts or omissions of any Sub-processor.

***Audit Right***

31.22 The Contractor shall, and shall procure that any and all Sub-processors shall, make available to the Participating Authority, at no cost or expense to the Participating Authority, all information necessary to demonstrate the Contractor's compliance with its obligations under this Clause 31 and the Data Protection Legislation.

31.23 The Contractor shall, and shall procure that any and all Sub-processors shall, allow for and contribute to audits, including inspections, conducted by the Participating Authority or by another auditor mandated by the Participating Authority, for the purpose of reviewing and assessing the Contractor's compliance with its obligations under this Clause 31 and the Data Protection Legislation, provided that the Participating Authority shall, where possible:

31.23.1 provide the Contractor with reasonable prior notice of such



audit or inspection;

31.23.2 ensure that such audit is carried out during normal business hours; and

31.23.3 ensure that each such audit and inspection is carried out so as to cause minimal disruption to the Contractor's business and other customers.

31.24 The Parties agree that they shall bear their own respective costs and expenses incurred in respect of compliance with their obligations under Clause 31.23, unless the audit identifies a breach of the Contractor's obligations under this Clause 31 and/or the Data Protection Legislation, in which case the Contractor shall reimburse the Participating Authority for all of the Participating Authority's reasonable costs incurred in the course of the audit.

31.25 If an audit identifies that the Contractor has failed to perform its obligations under the Contract in any material manner, the Participating Authority may, at its sole discretion:

31.25.1 treat such failure as a material breach of the Contract; or

31.25.2 agree with the Contractor a remedial plan to resolve such failure, which remedial plan the Contractor shall implement at its sole cost and expense.

***Deletion or Return of Personal Data***

31.26 Within one (1) month following the date of termination of the Contract, or if earlier, the date of the cessation of those Services pursuant to or in connection with which the Processing of Personal Data by the Contractor on behalf of the Participating Authority was undertaken, the Contractor shall, at the Written direction of the Participating Authority,

securely delete or securely return to the Participating Authority all affected Personal Data (and any copies of it) and the Contractor shall certify in Writing to the Participating Authority that to the best of the Contractor's knowledge and belief all Personal Data (and any copies of it) have been securely deleted or securely returned to the Participating Authority, unless the Contractor is required by Law to retain the Personal Data. If the Contractor is required by Law to retain the Personal Data, the Contractor shall advise the Participating Authority of such requirement in Writing.

***Additional Considerations for Joint Controllers***

31.27 Where the Parties are Joint Controllers:

31.27.1 Without prejudice to Clauses 31.7 and 31.14:

- (a) the Parties agree that the Participating Authority shall handle all Data Subject Requests and all requests from third parties for disclosure of Personal Data;
- (b) the Parties agree that the Participating Authority shall be responsible for co-ordinating the notifications, communications and remedial action that may be required to be made or taken following any Data Loss Event;
- (c) each Party shall be responsible for responding to communications addressed to that Party from any Supervisory Authority or other regulatory authority and for participating in consultations with any Supervisory Authority or other regulatory authority at their instance

relating to the Processing of any Personal Data but that Party shall keep the other Party informed in relation to same; and

- (d) any Processing Instructions which, in terms of the Data Protection Legislation, are inconsistent with the Contractor's role as Joint Controller with the Participating Authority, shall not apply to the Contractor.

***Controller for Additional Permitted Purposes***

31.28 Where and to the extent that, the Contractor is a Controller pursuant to Clause 31.1.3:

31.28.1 Clauses 31.5, 31.7, 31.8, 31.15, 31.18 - 31.27 inclusive shall not apply;

31.28.2 Clause 31.4 shall apply but shall be amended such that all words in Clause 31.4 following "for the purposes of the" where they appear in the last sentence shall be deleted and replaced with the words "Additional Permitted Purpose";

31.28.3 in Clause 31.9.2, the words "Protective Measures" shall be deleted and replaced with the words "appropriate technical and organisational measures";

31.28.4 Clause 31.10 shall apply but shall be amended such that:

- (a) in Clause 31.10.2 the words "Additional Permitted" shall be inserted prior to the word "Purpose"; and
- (b) in Clause 31.10.3, the words "directed in Writing to do so by the Participating Authority" shall be deleted and replaced with the words "required or permitted by Law in

connection with the Additional Permitted Purpose”;

31.28.5 and the Contractor requires to transfer Personal Data outside of the UK, the Contractor shall advise the Participating Authority in writing and shall ensure that the transfer complies with the Data Protection Legislation;

31.28.6 and the Contractor receives a Data Subject Request, the Contractor shall action the same.

***Liability***

31.29 Whether the Contractor is a Processor, Joint Controller and/or Controller, the Contractor shall indemnify and keep indemnified and defend at its own expense the Participating Authority from and against any and all DP Losses incurred by the Participating Authority or for which the Participating Authority may become liable arising from or in connection with any failure by the Contractor or any Sub-processor or any of their employees or agents to comply with any of the Contractor’s obligations under this Clause 31. The indemnity set out in this Clause 31.29 shall not be subject to any limit of liability in terms of Clause 18 (Liability and Indemnity).

31.30 The Participating Authority shall indemnify and keep indemnified and defend at its own expense the Contractor from and against any and all DP Losses incurred by the Contractor or for which the Contractor may become liable whether the Contractor is a Processor, Joint Controller and/or Controller arising solely from or in connection with any failure by the Participating Authority or its employees or agents to comply with any of the Participating Authority’s obligations under this Clause 31. The aggregate liability of the Participating Authority in respect of the

indemnity set out in this Clause 31.30 shall be subject to the limits of liability in terms of Clause 18 (Liability and Indemnity).

31.31 The provisions of Clauses 31.29 and 31.30 shall not affect the liability of either Party to any Data Subject.

31.32 The provisions of this Clause 31 shall survive following termination of the Contract for any reason whatsoever.

## **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 Participating Authority against all costs, claims, damages or expenses to the extent incurred by the Participating Authority or for which the Participating Authority may become liable due to any failure by the Contractor or its employees or agents to comply with any of its obligations under Clauses 32.1 and 32.2.

### **33. POWER TO AGREE**

33.1 The Contractor warrants to the Participating 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 Participating Authority and accordingly the Contractor shall not be authorised to bind the Participating 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 Participating Authority or, make any representations or give any warranty on behalf of the Participating Authority or, enter into any contract or obligation on behalf of the Participating Authority.

### **35. INDUCEMENTS TO PURCHASE AND PROHIBITED ACTS**

35.1 The Contractor shall not offer to the Participating Authority or any of its employees or agents as an agreement collateral to the Contract, any inappropriate advantage. For the avoidance of doubt, the Contractor shall not breach this Clause 35.1 by virtue only of the application of a cash discount strictly in accordance with the Contract Pricing, or the institution of training of the Participating Authority's employees in accordance with the Specification.

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

## **36. GENERAL**

36.1 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.

36.2 Any decision, act or thing that the Participating 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 Participating Authority to take or do that decision, act or thing, provided that upon receipt of a Written request the Participating Authority shall inform the Contractor of the name of any person so authorised.

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

36.4 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.

- 36.5 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 Participating 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 Framework Agreement or the Contract or unless such representation was made fraudulently.
- 36.6 The failure by the Participating 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;
- 36.7 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 38.
- 36.8 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.
- 36.9 The Contractor warrants represents and undertakes to the Participating 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.

36.10 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 Participating Authority.

36.11 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 Framework Agreement.

## **37. DIVERSITY**

37.1 The Contractor shall not discriminate unlawfully within the meaning and scope of any Law 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 Laws, including without limitation, the Equality Act 2010, the Disability Discrimination Act 1995 and the Disability Discrimination Act 2005, the National Minimum Wage Act 1998, and the Pensions Act 1995 (“**the Anti-Discrimination Legislation**”).

- 37.2 The Contractor shall notify the Participating 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.
- 37.3 The Contractor shall indemnify the Participating Authority against all costs, claims, charges, demands, liabilities, damages, losses and expenses incurred or suffered by the Participating 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.
- 37.4 The Contractor shall impose on any sub-contractor obligations substantially similar to those imposed on the Contractor by this Clause 37.

## **38. NOTICES**

- 38.1 Any notice to be given under the Contract shall either be delivered personally, sent by first class recorded delivery post (air-mail if overseas) or electronic mail. Except as otherwise provided in the Contractor 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:

- 38.1.1 if personally delivered, at the time of delivery;

38.1.2 if posted, at the expiration of forty eight (48) hours or (in the case of air-mail seven (7) Days) after the envelope containing the same was delivered into the custody of the postal authorities; and

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

38.2 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 Participating Authority as prepaid first class, recorded delivery or air-mail 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.

38.3 All notices deliverable to the Framework Participant/Contractor shall be addressed to the Point of Contact.

### **39. TUPE**

39.1 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 Participating Authority or a New Contractor then the following provisions of this Clause 39 shall apply.

39.2 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 Participating Authority no later than two (2) months before the Service Transfer Date.

- 39.3 The Contractor shall advise the Participating Authority in Writing prior to the Service Transfer Date of any updates to the information referred to at Clause 39.1.
- 39.4 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.
- 39.5 The Contractor shall and does hereby indemnify the Participating Authority and any New Contractor from and against all Pre-Transfer Liabilities relative to the period up to and including the Service Transfer Date.
- 39.6 The provisions of this Clause 39 shall survive following termination of the Contract for any reason whatsoever and without limit in time.

#### **40. 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 Participating Authority by reason of such material failure will be such that damages may not be an adequate remedy. Accordingly, the Participating 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 Participating Authority hereunder or otherwise at law or in equity.

#### **41. COMMUNITY BENEFITS**

In addition to its obligations under Clause 5.5 of the Framework Principal

Conditions (if any), the Contractor shall implement and perform any Community Benefits to the extent set out in the Order or any document issued by the Participating Authority pursuant to a Mini Tender Process and the Contractor's response thereto.

## **42. PROHIBITED ACT**

42.1 "Prohibited Act" means:-

42.1.1 offering, giving or agreeing to give to the Participating Authority or any other public body or to any person employed by or on behalf of the Participating 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 Participating 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 Participating Authority or any other public body;

42.1.2 entering into this Contract or any other agreement with the Participating 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 Participating Authority;

42.1.3 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 Agreement or any other agreement with the Participating Authority or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Participating Authority or any other public body.

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

42.3 If the Contractor (or anyone employed by or acting on behalf of it) commits any Prohibited Act, then the Participating Authority shall be entitled to act in accordance with 42.3.1 to 42.3.3 below:

42.3.1 if a Prohibited Act is committed by the Contractor or by an employee not acting independently of the Contractor, then the Participating 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;

42.3.2 if the Prohibited Act is committed by an employee of the Contractor or a sub-contractor acting independently of the Contractor, then the Participating 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 sub-subcontract (as the case may be) and (if necessary) procures an alternative sub-contractor acceptable to the Participating Authority;

42.3.3 any notice of termination under this Clause 42 shall specify:

- (a) the nature of the Prohibited Act;
- (b) the identity of the party whom the Participating Authority believes has committed the Prohibited Act; and
- (c) the date on which the Contract will terminate in accordance with the applicable provisions of this Clause 42.

42.4 Without prejudice to its other rights or remedies under this Clause 42, the Participating Authority shall be entitled to recover from the Contractor:

42.4.1 the amount or value of any such gift, consideration or commission; and

42.4.2 any other loss sustained in consequence of any breach of this Clause 42.

42.5 Nothing contained in this Clause 42 shall prevent the Contractor from paying any proper commission or bonus to its employees within the agreed terms of their employment.

42.6 The Contractor shall notify the Participating Authority on the occurrence (and details) of any Prohibited Act promptly on the Contractor becoming aware of its occurrence.

## **43. FORCE MAJEURE**

- 43.1 A Party, provided that it has complied with the provisions of Clause 43.3, shall not be in breach of a Contract, nor liable for any failure or delay and performance of any obligations under the Contract arising from a Force Majeure Event.
- 43.2 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.
- 43.3 Any Party that is subject to a Force Majeure Event shall not be in breach of the Contract provided that:-
- 43.3.1 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;
  - 43.3.2 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
  - 43.3.3 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.



43.4 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 Participating Authority's other rights and remedies, entitle the Participating Authority (at its option):-

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

43.4.2 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

43.4.3 to purchase other services of the same or similar description from any other Framework Participant or any third party.

#### **44. 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.

## SCHEDULE: PART 3

### PROCESSING INFORMATION

1. In this Schedule Part 3, expressions defined in the Framework Principal Conditions or in the NHSS Conditions for the Provision of Services and used in this Schedule Part 3 shall have the meaning set out in the Framework Principal Conditions or in the NHSS Conditions for the Provision of Services, whichever is applicable.
2. The Contractor shall comply with any further Written instructions with respect to Processing issued by the Participating Authority.
3. Any such further instructions shall be incorporated into this Schedule Part 3.
4. This Schedule Part 3 must be read in conjunction with Clause 31.27.1(d).

Description	Details relevant to the Purpose	Details relevant to the Additional Permitted Purpose
Subject matter of the Processing	The subject matter of the Processing is as detailed in the Specification.	The subject matter of the Processing is compliance with the Law.
Duration of the Processing	The Processing activities will be undertaken throughout the entire Contract Period.	The Processing activities will be undertaken as long as required for compliance with the Law.
Nature and purpose of the Processing	The Purpose of the Processing is the performance of the obligations imposed on the Contractor pursuant to or under the Contract, including, but not limited to, performance of the Services, as detailed in the Specification.	As per definition of "Additional Permitted Purpose".
Type of Personal Data	The types of Personal Data Processed under or in connection with the Contract are as detailed in the Specification.	The types of Personal Data Processed will be as required for compliance with the Law.
Categories of Data Subject	The categories of Personal Data Processed under or in connection with the Contract are as detailed in the Specification.	The categories of Personal Data Processed will be as required for compliance with the Law.
Plan for return and destruction of the data once the	The plan for the return and destruction of the Personal Data once the Processing is complete is	N/A

Processing is complete UNLESS requirement under union or member state law to preserve that type of data	as detailed in Clause 31.26.	
Minimum Requirements	All technical and organisation measures with which the Contractor must comply are as detailed in the Specification.	N/A
Additional Information	No Sub-processors have been approved in connection with the Contract.  No transfers outside the EEA have been approved in connection with the Contract.	N/A

**SCHEDULE: PART 4**

**NHSS ADDITIONAL CONDITIONS FOR THE PROVISION OF SERVICES**