

**MINOR WORKS DYNAMIC PURCHASING SYSTEM AGREEMENT**

**CORE TERMS**

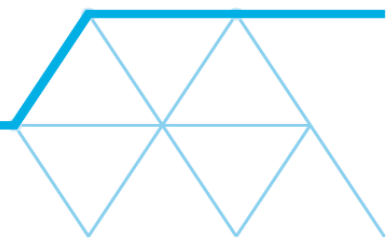
**THE SECRETARY OF STATE FOR JUSTICE**

**AND**

**THE CONTRACTOR**

**FIND A TENDER SERVICE REFERENCE 2021/S 000-022472**

**V1. September 2021**



**1. Definitions used in the Agreement**

- 1.1 This Agreement shall be interpreted using Schedule C1 (Definitions).

**2. Duration and How the Agreement works**

- 2.1 This Contractor Agreement shall commence on the DPS Start Date and shall expire at the end of the initial four (4) year term unless:
- 2.1.1 earlier termination occurs of this Contractor Agreement; or
  - 2.1.2 it is extended by the Authority giving not less than three (3) months' written notice prior to the expiry of the Initial Term in which case the Contractor Agreement (subject to termination in accordance with Clause 15, of this Agreement) continue thereafter for up to two periods of two (2) years (each a "Renewal Period") up to a total of eight (8) years; or
  - 2.1.3 if extended in accordance with Clause 2.1.2 above, it is further extended by the Authority for any time period at the Authority's discretion (an "Extension Period") on not less than three (3) months' written notice to the Contractor prior to the expiry of the second Renewal Period or then in force Extension Period.
- 2.2 If the Authority elects to extend the duration of the Contractor Agreement beyond the Initial Term, in accordance with Clause 2.1.2, then, following the expiry of the Initial Term, the Authority may terminate this Contractor by giving not less than three (3) months' written notice prior to any subsequent anniversary of the Start Date.
- 2.3 For the avoidance of doubt, the termination of this Agreement shall not by itself terminate any Call Off Contract.
- 2.4 The Contractor is eligible for the award of Call Off Contracts during the DPS Contract Period.
- 2.5 The Ministry of Justice (the "Authority") does not guarantee the Contractor any exclusivity, quantity or value of work under the DPS Contract.
- 2.6 The Authority has paid one penny to the Contractor legally to form this DPS Agreement. The Contractor acknowledges receipt and sufficiency of this payment.
- 2.7 **Not used**
- 2.8 Each Call Off Contract:
- 2.8.1 is a separate contract from the DPS Agreement;
  - 2.8.2 is between a Contractor and a Buyer;
  - 2.8.3 includes the Core Terms, the Schedules and the information in the completed Contract Data Form; and
  - 2.8.4 survives the termination of the DPS Agreement.
- 2.9 Where the Contractor is approached by a Buyer requesting Works or substantially similar Works, the Contractor must tell them about this DPS Agreement in writing before considering accepting their order. The Contractor will promptly notify the Authority if the Buyer won't use this DPS Agreement.
- 2.10 The Contractor acknowledges it has all the information required to perform its obligations under each Contract before entering into a Contract. When information is provided by a Relevant Authority no warranty of its accuracy is given to the Contractor.
- 2.11 The Contractor will not be excused from any obligation, or be entitled to additional costs or Charges because it failed to either:
- 2.11.1 verify the accuracy of the Due Diligence Information; and/or
  - 2.11.2 properly perform its own adequate checks.
- 2.12 The Authority and the Buyer will not be liable for errors, omissions or misrepresentation of any information.
- 2.13 The Contractor warrants and represents that all statements made and documents submitted as part of the procurement of Works are and will remain true, accurate and up to date. The Contractor shall promptly provide all information required when accreditations expire.
- 2.14 A Call Off Contract can only be created using an electronic procedure as required by the Regulations.

- 2.15 The Contractor may only participate in Call Off Contracts under the DPS Agreement while it meets the basic access requirements for the DPS stated in the Part B of the DPS Tender Documentation. The Authority can audit whether a Contractor meets the basic access requirements at any point during the DPS Contract Period.

### **3. What needs to be delivered**

- 3.1 The Contractor must undertake Works:
- 3.1.1 that comply with the Scope, any technical standards and, in relation to a Call Off Contract, the Call Off Tender;
  - 3.1.2 to a professional standard;
  - 3.1.3 using reasonable skill and care;
  - 3.1.4 using Good Industry Practice;
  - 3.1.5 using its own policies, processes and internal quality control measures as long as they do not conflict with the Contract;
  - 3.1.6 on the dates agreed;
  - 3.1.7 that comply with Law;
  - 3.1.8 in compliance with the Official Secrets Act 1911 to 1989;
  - 3.1.9 in co-operation with the Buyer and third party Contractors on all aspects connected to the Works and ensure that Contractor Personnel comply with any reasonable instructions;
  - 3.1.10 with all up to date, sufficient and necessary equipment, tools and materials required to deliver the Works; and
  - 3.1.11 with sufficient allocation of resources and appropriate expertise to each Contract
  - 3.1.12 ensuring all Works, and anything used in providing the Works are of good quality and are free from defects.
- 3.2 The late Delivery of Works, without prior agreement, will be a Default of a Call Off Contract.
- 3.3 The Buyer is entitled to withhold payment for partially or undelivered Works, but doing so does not stop it from using its other rights under the Contract.
- 3.4 In undertaking the Works:
- 3.4.1 all Goods delivered must be new( or as new if recycled), unused and of recent origin;
  - 3.4.2 all manufacturer warranties covering the Goods must be assignable to the Buyer upon completion of the works free of charge;
  - 3.4.3 the Contractor transfers ownership of the Goods on Delivery or payment for those Goods, whichever is earlier;
  - 3.4.4 risk in the Goods transfers to the Buyer on Delivery of the Goods, but remains with the Contractor if the Buyer notices damage following Delivery and lets the Contractor know within five (5) Working Days of Delivery;
  - 3.4.5 The Contractor must provide sufficient packaging for the Goods to reach the point of Delivery safely and undamaged;
  - 3.4.6 the Contractor warrants that it has full and unrestricted ownership of the Goods at the time of transfer of ownership;
  - 3.4.7 the Contractor must deliver the Goods on the date and to the specified location during the Buyer's working hours;
  - 3.4.8 The Contractor must provide all tools, information and instructions the Buyer needs to make use of the Goods;
  - 3.4.9 The Contractor must indemnify the Buyer against the costs of any recall of the Goods and give notice of actual or anticipated action about the recall of the Goods;
  - 3.4.10 The Buyer can cancel any order or part order of Goods which has not been Delivered. If the Buyer gives less than 14 days notice then it will pay the Contractor reasonable and proven costs already incurred on the cancelled order as long as the Contractor takes all reasonable steps to minimise these costs; and
  - 3.4.11 The Contractor must at its own cost repair, replace, refund or substitute (at the Buyer's option and request) any Goods that the Buyer rejects because they don't conform with Clause 3.4.1. If the Contractor doesn't do this it will pay the Buyer's costs including repair or re-supply by a third party.

#### **4. Collaboration**

- 4.1 The Contractor agrees that it will collaborate with Other Contractors in relation to the provision of the Works and performance of its obligations under the Call Off Contract including:
- 4.1.1 the use, reuse and purchase of assets which are used in connection with the Works
  - 4.1.2 sharing information and problem solving
  - 4.1.3 adoption of consistent working practices, terminology, standards and technology and resourcing
  - 4.1.4 proactive and transparent communication
  - 4.1.5 considering the Buyer's overall objectives, performance improvement and innovation and the Contractor shall comply with such further detailed guidelines and processes as may be notified to it from time to time by the Buyer.
- 4.2 The Contractor acknowledges and agrees that it may be required by the Buyer to share data generated in the delivery of the Works with such third parties as the Buyer may notify to the Contractor from time to time.
- 4.3 Where specified in the Contract Data Form and its Appendices, the Contractor shall use local data recording systems to collate and share information across the Establishment where it is undertaking the Works and its staff, across multiple Establishments and with Other Contractors and third parties notified to the Contractor by the Buyer from time to time.

#### **5. Disruption**

- 5.1 The Contractor shall take reasonable care to ensure that in the performance of its obligations under the Call Off Contract it does not disrupt the operations of the Buyer, its employees or any Other Contractor.
- 5.2 The Contractor shall immediately inform the Buyer of any actual or potential industrial action, whether such action be by its own employees or others, which affects or might affect its ability at any time to perform its obligations under the Call Off Contract.
- 5.3 If there is industrial action by the Contractor Personnel, the Contractor shall seek Approval to its proposals to continue to perform its obligations under the Call Off Contract.
- 5.4 If the Contractor's proposals referred to in Clause 5.3 are considered insufficient or unacceptable by the Buyer acting reasonably, then the Call Off Contract may be terminated with immediate effect by the Buyer by notice due to material Default by the Contractor.
- 5.5 If the Contractor is unable to deliver the Works owing to disruption of the Buyer's normal business (not including a planned full or partial Lockdown or Standstill), the Contractor may request a reasonable allowance of time, and, in addition, the Buyer will reimburse any reasonable and proven additional expense in accordance with NEC4 Engineering and Construction Short Contract Data Form.
- 5.6 If the Contractor or Buyer reasonably believes that the Contractor will be unable to fulfil the requirements of the Call Off Contract owing to a planned full or partial Lockdown or Standstill, the Contractor shall, in consultation with the Buyer revise its plans for delivering the Works during the period of the planned Lockdown or Standstill to avoid loss for the Contractor and additional expense for the Buyer.

#### **6. Business Continuity**

Where specified by the Buyer in the Contract Data Form and its Appendices then the Contractor shall provide a business continuity plan which is compliant to ISO22301 prior to the Start Date. Where such a plan is required then the Contractor shall:

- 6.1 not start the works until the plan is agreed with the Buyer;
- 6.2 test the plan at regular intervals and provide written reports to the Buyer on the outcome of each test and update the plan as necessary (and agreed with the Buyer) to remedy any issues highlighted by the test; and
- 6.3 implement the plan as necessary to ensure continuity of the Works.

## **7. Assets**

- 7.1 Subject to Clause 7.2, the Contractor shall provide all materials, assets and equipment which are reasonably necessary in connection with the provision of the Works. The Contractor shall be responsible for all costs associated with the provision and/or use of assets in connection with the delivery the Works as such will have been accounted for within any Tender sums. It will not receive any additional funds from the Buyer in relation to the purchase and /or provision of such assets.
- 7.2 Where indicated in the Contract Data Form and its Appendices, that Buyer Assets (and, where applicable, utilities) are available then the Contractor will:
- 7.2.1 be permitted (but not obliged) to use such assets (and, where applicable, utilities) (on a non exclusive basis unless stated otherwise in the Contract Data Form and its Appendices) and any such use shall be on and subject to the terms of this Agreement including those in the Contract Data Form and its Appendices;
  - 7.2.2 only use such assets (and, where applicable, utilities) in connection with the delivery the Works; and
  - 7.2.3 at its own cost keep such assets in good condition and if they are damaged repair them or replace them, at its own cost, if they cannot be repaired.
- 7.3 The Contractor acknowledges and agrees that all Buyer Assets are provided on an "as is" basis and all warranties and implied terms relating are excluded to the maximum extent permitted by Law.
- 7.4 The Contractor may be required to make assets used by it in connection with the delivery of Works available to other persons (nominated by the Buyer from time to time) who deliver construction, maintenance and repair works to the Buyer to use in connection with such Works. Such use may be provided on reasonable commercial terms as notified by the Contractor from time to time.
- 7.5 The Contractor shall keep an accurate and up to date register of all assets used by it in connection with the delivery the Works and will provide a copy of such register to the Buyer on request.

## **8. Buyer Obligations**

Save as otherwise expressly provided, the obligations of the Buyer under the Call Off Contract are obligations of the Buyer in its capacity as a contracting counterparty and nothing in the Call Off Contract shall operate as an obligation upon, or in any other way fetter or constrain the Buyer in any other capacity, and the exercise by the Buyer of its duties and powers in any other capacity shall not lead to any liability (howsoever arising) on the part of the Buyer to the Contractor.

## **9. Pricing and payments**

- 9.1 In exchange for the Works, the Contractor must invoice the Buyer for the cost of Works as set out in the accepted Tender Response subject to any agreed variations.
- 9.2 All Charges:
- 9.2.1 exclude VAT, which is payable on provision of a valid VAT invoice
  - 9.2.2 include all costs connected with the completion of the Works
- 9.3 The Buyer must pay the Contractor within thirty (30) days of receipt by the Buyer of a valid, undisputed invoice, in cleared funds to the Contractor's account as set out in the accepted Tender Response subject to any agreed variations.
- 9.4 A Contractor invoice is only valid if it includes:
- 9.4.1 the Contractor's full name, address and title of the Contract;
  - 9.4.2 all appropriate references including the Contract reference number and other details reasonably requested by the Buyer;
  - 9.4.3 the correct purchase order number which has been allocated by the Buyer to the Contract;
  - 9.4.4 a detailed breakdown of the work delivered and (if relevant) Goods; and
  - 9.4.5 such other details as the Buyer may request.
- 9.5 The Buyer may at its discretion retain or set-off payment of any amount owed to it by the Contractor.

- 9.6 The Contractor must ensure that all Sub-Contractors are paid, in full, within thirty (30) days of receipt of a valid, undisputed invoice. If this doesn't happen, the Authority or the Buyer can publish the details of the late payment or non-payment.
- 9.7 If any overpayment has been made or the payment of any part is not supported by a valid invoice then the Buyer may recover this payment against future invoices raised or directly from the Contractor. All payments made by the Buyer to the Contractor are on an interim basis pending final resolution of an account with the Contractor.
- 9.8 Any overpayment by either Party, whether of the Charges or of VAT or otherwise, is a sum of money recoverable by the Party who made the overpayment from the Party in receipt of the overpayment.
- 9.9 If the Authority or the Buyer fails to pay any undisputed Costs properly invoiced under this Contract, the Contractor shall have the right to charge interest on the overdue amount at the applicable rate under the Late Payment of Commercial Debts (Interest) Act 1998.

## **10. The Buyer's obligations to the Contractor**

- 10.1 If Contractor Non-Performance arises from an Authority Cause:
  - 10.1.1 neither the Authority or the Buyer can treat the Contractor Non-Performance as a Default or terminate a Contract under Clause 15.4;
  - 10.1.2 the Contractor may be entitled to reasonable and proven additional expenses and to relief for the delay in accordance with the terms of the relevant Call Off terms and condition; and
  - 10.1.3 the Contractor is entitled to additional time needed to deliver the Works.
- 10.2 Clause 10.1 only applies if the Contractor:
  - 10.2.1 gives notice to the Party responsible for the Authority Cause as soon as reasonably practicable and in any event within five (5) Working Days of becoming aware of the Authority Cause;
  - 10.2.2 demonstrates that the Contractor Non-Performance only happened because of the Authority Cause; and
  - 10.2.3 mitigated the impact of the Authority Cause.

## **11. Record keeping and reporting**

- 11.1 The Contractor shall:
  - 11.1.1 attend progress meetings with the Buyer and provide progress reports when required by the Buyer;
  - 11.1.2 keep and maintain full and accurate records and accounts on everything to do with the Agreement for 7 years after the End Date;
  - 11.1.3 allow any Auditor access to their premises to verify all contract accounts and records of everything to do with the Agreement and provide copies for an Audit;
  - 11.1.4 provide information to the Auditor and reasonable co-operation at their request;
  - 11.1.5 supply a Relevant Authority with any information or data on an ad hoc basis as may be required by the Relevant Authority for use in response to parliamentary questions or other Government business;
  - 11.1.6 notify the Buyer if it is unable to undertake the agreed works, providing:
    - 11.1.6.1 the reason;
    - 11.1.6.2 proposed corrective action; and
    - 11.1.6.3 a deadline for completing the corrective action.

## **12. Contractor Personnel**

- 12.1 The Contractor Personnel involved in the performance of each Call Off Contract must:
  - 12.1.1 have the right to work in the UK;
  - 12.1.2 be appropriately trained and qualified;
  - 12.1.3 act in a responsible and professional manner;
  - 12.1.4 deliver the Works with the due care and diligence expected of a skilled professional

- 12.1.5 be vetted using Good Industry Practice and the Security Policy; and
- 12.1.6 comply with all conduct requirements and policies when on the Buyer's Premises.
- 12.2 Where a Buyer decides one of the Contractor's Personnel isn't suitable to work on a contract, the Contractor must replace them with a suitably qualified alternative.
- 12.3 If requested, the Contractor must replace any person whose acts or omissions have caused the Contractor to breach Clause 35.
- 12.4 The Contractor must provide a list of Contractor Personnel needing to access the Buyer's Premises and say why access is required.
- 12.5 The Contractor indemnifies the Authority and each Buyer against all claims brought by any person employed by the Contractor caused by an act or omission of the Contractor or any Contractor Personnel.
- 12.6 The Contractor shall ensure that Contractor Personnel respond flexibly and within agreed timescales set by the Authority and/or Buyer in response to requests, including changes to planned Works or cancellations.
- 12.7 The Contractor shall indemnify both the Authority and the Buyer against all claims brought by any person arising from any breach of the Contract by the Contractor and/or any negligent act or omission of the Contractor or any Contractor Personnel in connection with the provision of the Works.

### **13. Rights and protection**

- 13.1 The Contractor warrants and represents that:
  - 13.1.1 it has full capacity and authority to enter into and to perform each Contract;
  - 13.1.2 each Contract is executed by its authorised representative;
  - 13.1.3 it is a legally valid and existing organisation incorporated (where it is a limited company) or established (where it is not a limited company) in the place it was formed;
  - 13.1.4 there are no known legal or regulatory actions or investigations before any court, administrative body or arbitration tribunal pending or threatened against it or its Affiliates that might affect its ability to perform each Contract;
  - 13.1.5 it maintains all necessary rights, authorisations, licences and consents to perform its obligations under each Contract;
  - 13.1.6 it does not have any contractual obligations which are likely to have a material adverse effect on its ability to perform each Contract when a Call Off is entered into;
  - 13.1.7 it is not impacted by an Insolvency Event;
  - 13.1.8 in entering into each Contract it has not committed any fraud;
  - 13.1.9 it will immediately inform the Relevant Authority if any of the Works are not being or are unable to be delivered, the reasons for non-performance, any corrective action and the date by which that action will be completed; and
  - 13.1.10 it will comply with each Call Off Contract.
- 13.2 The warranties and representations in Clauses 2.13 and 13.1 are repeated each time the Contractor delivers Works under the Contract.
- 13.3 The Contractor indemnifies both the Authority and every Buyer against each of the following:
  - 13.3.1 wilful misconduct of the Contractor, any Sub-Contractor and Contractor Personnel that impacts the Contract; and
  - 13.3.2 non-payment by the Contractor of any tax or National Insurance.
- 13.4 The Authority or a Buyer can terminate the Contract for breach of any warranty or indemnity where they are entitled to do so.
- 13.5 If the Contractor becomes aware of a representation or warranty that becomes untrue or misleading, it must immediately notify the Authority and every Buyer.
- 13.6 All third party warranties and indemnities covering the Works must be assigned for the Buyer's benefit by the Contractor.

**14. Intellectual Property Rights (IPRs)**

- 14.1 Each Party keeps ownership of its own Existing IPRs. The Contractor gives the Buyer a non-exclusive, perpetual, royalty-free, irrevocable, transferable worldwide licence to use, change and sub-license the Contractor's Existing IPR used in connection with the works to enable it to:
- 14.1.1 receive and use the deliverables; and
  - 14.1.2 make use of the deliverables provided by a Replacement Contractor to enable a smooth transfer of Works to the Replacement Contractor.
- 14.2 Any New IPR created under a Contract is owned by the Buyer. The Buyer gives the Contractor a licence to use any Buyer Existing IPRs and New IPRs for the purpose of fulfilling its obligations during the Contract Period.
- 14.3 Where a Party acquires ownership of IPRs incorrectly (including by operation of law in conflict with the terms of this Agreement) under this Agreement it must do everything reasonably necessary to complete a transfer assigning them in writing to the other Party on request and at its own cost.
- 14.4 Neither Party has the right to use the other Party's IPRs, including any use of the other Party's names, logos or trademarks, except as provided in Clause 14 or otherwise agreed in writing.
- 14.5 If there is an IPR Claim, the Contractor indemnifies the Authority and each Buyer from and against all losses, damages, costs or expenses (including professional fees and fines) incurred by them as a result.
- 14.6 If an IPR Claim is made or anticipated the Contractor must at its own expense and the Buyer's sole option, either:
- 14.6.1 obtain for the Authority and the Buyer the rights in Clause 14.1 and 14.2 without infringing any third party IPR
  - 14.6.2 replace or modify the relevant item with substitutes that don't infringe IPR without adversely affecting the delivery of the Works

**15. Ending the Agreement**

- 15.1 The Agreement takes effect on the Start Date and ends on the End Date or earlier if required by Law.

**Ending the Agreement without a reason**

- 15.2 The Authority has the right to terminate the DPS Agreement at any time without reason or liability by giving the Contractor at least sixty (60) Working Days' notice and if this Agreement is terminated Clauses 15.10.1 to 15.10.6 shall apply.
- 15.3 Each Buyer has the right to terminate their Call Off Contract (or part of it) at any time without reason and without cost by giving the Contractor written notice, which will vary depending on the length of the Contract Period of the Call Off Contract:
- 15.3.1 if it is six (6) Months or less then at least thirty (30) Days' notice will be provided; and
  - 15.3.2 if it is more than six (6) Months then at least Sixty (60) Days' notice will be provided, and
- and if the Agreement is terminated then Clauses 15.10.1 to 15.10.6 shall apply.

**When the Authority or the Buyer can end an Agreement**

- 15.4 If any of the following events happen, the Relevant Authority has the right to immediately terminate its Agreement by issuing a Termination Notice to the Contractor:
- 15.4.1 the updated information provided by the Contractor in response to a request under Clause 2.13 would not be sufficient to allow the Contractor to join the DPS;
  - 15.4.2 there's a Contractor Insolvency Event;
  - 15.4.3 there's a Contract Default that is not corrected in line with an accepted Rectification Plan;
  - 15.4.4 the Relevant Authority rejects a Rectification Plan or the Contractor does not provide it within ten (10) days of the request;
  - 15.4.5 there's any material default of the Contract;
  - 15.4.6 there's a Default of Clauses 2.13, 14, 19, 30, 35, 40 or Paragraphs 18-20 (inclusive) (Security) (where applicable) relating to any Contract;



- 15.4.7 there's a consistent repeated failure to meet the Key Performance Indicators (where applicable);
  - 15.4.8 there's a Change of Control of the Contractor which isn't pre-approved by the Relevant Authority in writing;
  - 15.4.9 there's a variation to a Contract which cannot be agreed using Clause 33 (Changing the contract) or resolved using Clause 42 (Resolving Disputes);
  - 15.4.10 if the Relevant Authority discovers that the Contractor was in one of the situations in 57 (1) or 57(2) of the Regulations at the time the Contract was awarded;
  - 15.4.11 the Contractor has not, in delivering the Works, complied with its legal obligations in respect of environmental, social or labour law;
  - 15.4.12 a competent English court declares that the Contract should not have been awarded to the Contractor because of a serious breach of the Regulations;
  - 15.4.13 the Contractor or its Affiliates embarrass or bring the Authority or the Buyer into disrepute or diminish the public trust in them (in the Authority and/or Buyer's sole opinion); and/or
  - 15.4.14 any breach by the Contractor or any of its Affiliates of any Call Off Contract made under the DPS Agreement or of any other contract with the Authority or Buyer (whichever is Party to this Contract) giving rise to a right for the Authority or Buyer under such contract to terminate it.
- 15.5 The Authority may terminate the DPS Agreement if a Buyer terminates a Call Off Contract for any of the reasons listed in Clause 15.4.
- 15.6 If there is a Default, the Relevant Authority can, without limiting its other rights, request that the Contractor provide a Rectification Plan.
- 15.7 When the Relevant Authority receives a requested Rectification Plan it can either:
- 15.7.1 reject the Rectification Plan or revised Rectification Plan, giving reasons; or
  - 15.7.2 accept the Rectification Plan or revised Rectification Plan (without limiting its rights) and the Contractor must immediately start work on the actions in the Rectification Plan at its own cost, unless agreed otherwise by the Parties.
- 15.8 Where the Rectification Plan or revised Rectification Plan is rejected, the Relevant Authority:
- 15.8.1 must give reasonable grounds for its decision; and
  - 15.8.2 may request that the Contractor provides a revised Rectification Plan within five (5) Working Days.
- 15.9 If any of the events in 73 (1) (a) to (c) of the Regulations happen, the Relevant Authority has the right to immediately terminate the Agreement and Clauses 15.10.1 to 15.10.6 applies.

**What happens if the Agreement ends**

- 15.10 Where a Contract expires or the Relevant Authority terminates a Contract under Clause 15.4 or this Clause is specifically invoked:
- 15.10.1 the Buyer's payment obligations under the terminated Contract stop. Works delivered and signed off as complete may be paid;
  - 15.10.2 accumulated rights of the Parties are not affected;
  - 15.10.3 the Contractor must promptly delete or return the Government Data except where required to retain copies by law;
  - 15.10.4 the Contractor must promptly return any of the Authority or the Buyer's property provided under the terminated Contract (including the Buyer Assets);
  - 15.10.5 the Contractor must, at no cost to the Authority or the Buyer, co-operate fully in the handover and re-procurement (including to a Replacement Contractor); and
  - 15.10.6 the following Clauses survive the termination of each Contract: 11 (Record keeping and reporting), 12.5 (Personnel Indemnity), 14 (IPRs), 15.10 (What happens if the Agreement ends), 16 (How much the Parties can be held responsible for), 19 (Data Processing), 20 (What must be kept confidential), 23 (Sharing information), 26 (Invalid parts of the Contract), 27 (No other terms apply), 42 (Resolving Disputes), 43 (Which law applies) and any Clauses and Schedules which are expressly or by implication intended to continue.

- 15.11 In addition to Clause 15.10, where Relevant Authority terminates a Contract under Clause 15.4, the Contractor shall bear the Relevant Authority's reasonable costs of re-procurement of Replacement Works for the remainder of the Contract Period of the terminated Contract, including any incremental increase in the costs of procuring works to replace the Works.
- 15.12 Upon termination or expiry of the Contract, the Contractor shall:
- 15.12.1 give all reasonable assistance to the Buyer and any incoming Contractor of the Works to ensure an orderly transition of the Works to such incoming Contractor
  - 15.12.2 return all requested documents, information, assets and data to the Buyer as soon as reasonably practicable; and
  - 15.12.3 assign licences and contracts (at no additional cost as had been charged to the Contractor) as reasonably requested by the Buyer to the Buyer to enable continued delivery the Works.

**When the Contractor can end the Contract**

- 15.13 The Contractor can issue a reminder notice if the Buyer does not pay an undisputed invoice on time. The Contractor can terminate a Call Off Contract if the Buyer fails to pay two (2) successive undisputed invoices within thirty (30) days of the date of the reminder notice which was sent in respect of the second invoice.
- 15.14 The Contractor shall not be entitled to suspend performance under a Contract unless the Contractor is entitled to terminate the Contract pursuant to Clause 15.13 above.
- 15.15 If a Contractor terminates a Call Off Contract under Clause 15.13:
- 15.15.1 the Buyer must promptly pay all outstanding Charges incurred to the Contractor;
  - 15.15.2 the Buyer must pay the Contractor reasonable committed and unavoidable Losses as long as the Contractor provides a fully itemised and costed schedule with evidence - the maximum value of this payment is limited to the total sum payable to the Contractor if the Contract had not been terminated; and
  - 15.15.3 Clauses 15.10.3 to 15.10.6 apply.

**When Sub-Contracts can be ended**

- 15.16 At the Buyer's request, the Contractor must terminate any Sub-Contracts in any of the following events:
- 15.16.1 there is a Change of Control of a Sub-Contractor which isn't pre-approved by the Relevant Authority in writing;
  - 15.16.2 the acts or omissions of the Sub-Contractor have caused or materially contributed to a right of termination under Clause 15.4; and/or
  - 15.16.3 a Sub-Contractor or its Affiliates embarrasses or brings into disrepute or diminishes the public trust in the Relevant Authority.

**Partially ending and suspending the Agreement**

- 15.17 Where the Authority has the right to terminate the DPS Agreement it shall be entitled to suspend the Contractor's ability to enter into any new Call Off Contracts during this period. If these circumstances occur, the Contractor must continue to meet its obligations under any existing Call Off Contracts that have been signed.
- 15.18 Where the Authority has the right to terminate a DPS Agreement it is entitled to terminate all or part of it.
- 15.19 Where the Buyer has the right to terminate a Call Off Contract it can terminate or suspend (for any period), all or part of it. If the Buyer suspends a Contract it can deliver the Works itself or buy them from a third party.
- 15.20 The Relevant Authority can only partially terminate or suspend a Contract if the remaining parts of that Contract can still be used to effectively deliver the intended purpose.
- 15.21 The Parties must agree any necessary variation required by Clause 15.20 using the Variation Procedure, but the Contractor may not either:
- 15.21.1 reject the variation; and/or
  - 15.21.2 increase the Cost, except where the right to partial termination is under Clause 15.2 or 15.3.

- 15.22 The Buyer can still use other rights available, or subsequently available to it if it acts on its rights under Clauses 15.17 to 15.21.

**16. How much the Parties can be held responsible for**

- 16.1 Subject to Clauses 16.2, 16.3, 16.5 and 16.7, the Contractor shall indemnify the Authority and Buyer and keep them indemnified fully against all claims, proceedings, demands, charges, actions, damages, costs, breach of statutory duty, expenses and any other liabilities which may arise out of the delivery, or the late or purported delivery, of the Works or the performance or non-performance by the Contractor of its obligations under the Contract or the presence of the Contractor or any Contractor Personnel on the Buyer Premises, including in respect of any death or personal injury, loss of or damage to property, financial loss arising from any advice given or omitted to be given by the Contractor, or any other loss which is caused directly by any act or omission of the Contractor.
- 16.2 Each Party's total aggregate liability under this DPS Agreement (whether in tort, contract or otherwise) is no more than £100,000.
- 16.3 The aggregate liability of the Contractor under or in connection with each Call Off Contract (whether in contract, tort or otherwise) shall be as set out in the applicable Call Off Contract.
- 16.4 Note used .
- 16.5 The Contractor shall not be responsible for any injury, loss, damage, cost or expense if and to the extent that it is caused by the negligence or wilful misconduct of the Authority or Buyer or by breach by the Authority or Buyer of its obligations under the each Contract.
- 16.6 The Authority and Buyer may recover from the Contractor the following losses incurred by them to the extent they arise as a result of a Default by the Contractor:
- 16.6.1 any additional operational and/or administrative costs and expenses incurred by the Authority or Buyer, including costs relating to time spent by or on behalf of the Authority or Buyer in dealing with the consequences of the Default;
  - 16.6.2 any wasted expenditure or charges;
  - 16.6.3 the additional costs of procuring a Replacement Contractor for the remainder of the Contract Period and or Replacement Works which shall include any incremental costs associated with the Replacement Contractor and/or replacement Works above those which would have been payable under the Contract;
  - 16.6.4 any compensation or interest paid to a third party by the Authority and or Buyer;
  - 16.6.5 any fine or penalty incurred by the Authority and or Buyer pursuant to Law and any costs incurred by them in defending any proceedings which result in such fine or penalty; and/or
  - 16.6.6 the costs of replacing locks and lost keys (including key cards).
- 16.7 No Party is liable to the other for:
- 16.7.1 any indirect Losses
  - 16.7.2 Loss of profits, turnover, business opportunities or damage to goodwill (in each case whether direct or indirect)
- 16.8 Nothing in this Agreement limits or excludes the liability of either Party for of the following:
- 16.8.1 its liability for death or personal injury caused by its negligence, or that of its employees, agents or Sub-Contractors;
  - 16.8.2 its liability for bribery or fraud or fraudulent misrepresentation by it or its employees; and/or
  - 16.8.3 any liability that cannot be excluded or limited by Law.
- 16.9 In spite of Clauses 16.2, 16.3 and 16.7, the Contractor does not limit or exclude its liability for any indemnity given under Clauses 12.5, 13.3, 14.5, 17 and/or 20.7 of the Agreement.
- 16.10 Each Party must use all reasonable endeavours to mitigate any Loss or damage which it suffers under or in connection with each Contract, including any indemnities.
- 16.11 When calculating the Contractor's liability under Clause 16.2 or 16.3 the following items will not be taken into consideration:

16.11.1 any liability that is covered by insurance that the Contractor is obliged to hold under Clause 18.1

16.11.2 any items specified in Clause 16.9

## **17. Obeying the Law**

The Contractor indemnifies the Authority and every Buyer against any costs resulting from any Default by the Contractor relating to any Law which is applicable to a Contract and/or the Contractor and/or its performance.

## **18. Insurance**

18.1 The Contractor shall take out and maintain with a reputable insurance company a policy or policies of insurance providing a minimum level of cover in respect of all risks which may be incurred by the Contractor, arising out of the Contractor's performance of its obligations under the Contract including:

18.1.1 Employer's Liability – minimum £5,000,000 (five million pounds) for any one occurrence or series of occurrence's arising out of any one event and which complies with the Employers Liability (compulsory Insurance) Act 1969 and the Road Traffic Act 1988;

18.1.2 Public Liability - cover for death or personal injury, loss of or damage to property or any other loss – minimum £5,000,000 (five million pounds) for any one occurrence or series of occurrence's arising out of any one event;

18.1.3 Professional Indemnity insurance (where applicable), which covers the risk of professional negligence on the part of the contractor and persons engaged by it – minimum £1,000,000 (one million pounds) for any one occurrence or series of occurrence's arising out of any one event;

18.1.4 Contractor All Risk cover; and

18.1.5 all insurances required by applicable Law.

The required Insurance levels shall be set out at the point of each Call Off and such insurance policies shall be maintained for the duration of the Contract and for a minimum of one year following the completion or termination of the Contract.

18.2 The Contractor shall make available, on request, copies of all insurance policies referred to in this Clause or a broker's verification of insurance to demonstrate that the appropriate cover is in place, together with receipts or other evidence of payment of the latest premiums due under those policies.

18.3 If the Contractor does not have and maintain the insurances required by the Contract, the Buyer may make alternative arrangements to protect its interests and may recover the costs of such arrangements from the Contractor.

18.4 The provisions of any insurance or the amount of cover shall not relieve the Contractor of any liabilities under the Contract.

18.5 The Contractor shall not take any action or fail to take any reasonable action, or (to the extent that it is reasonably within its power) permit anything to occur in relation to the Contractor, which would entitle any insurer to refuse to pay any claim under any insurance policy in which the Contractor is an insured, a co-insured or additional insured person.

## **19. Data Processing**

19.1 The Parties anticipate a limited transfer of Personal Data under this Agreement however the Parties acknowledge that there may be additional Personal Data transferred to the Contractor by a Buyer under a Contract. The Contractor must process, and must ensure that Contractor Personnel process, Personal Data transferred to it under this Agreement only in accordance with this Clause 19.

19.2 Only the Relevant Authority may decide what processing of Personal Data the Contractor may do under a Contract and the Contract terms shall specify the Contractor's obligations in respect of any Personal Data transferred to the Contractor under a Contract to the extent they differ from the terms of this cause 19.

- 19.3 The Contractor must only process Personal Data if authorised to do so in the Contract Data Form and its Appendices (for the Authority) and Contract Data Form and its Appendices (for the Buyer) (the "**Authorised Processing List**"). Any further written instructions given by the Relevant Authority relating to the processing of Personal Data shall be deemed to be incorporated into the Authorised Processing List.
- 19.4 The Contractor must give all reasonable assistance to the Relevant Authority in the preparation of any Data Protection Impact Assessment before starting any processing, including:
  - 19.4.1 a systematic description of the expected processing and its purpose;
  - 19.4.2 the necessity and proportionality of the processing operations;
  - 19.4.3 the risks to the rights and freedoms of Data Subjects; and
  - 19.4.4 the intended measures to address the risks, including safeguards, security measures and mechanisms to protect Personal Data.
- 19.5 The Contractor must notify the Relevant Authority immediately if it thinks the Relevant Authority's instructions breach the Data Protection Laws.
- 19.6 The Contractor must put in place appropriate Protective Measures to protect against a Data Loss Event which must be approved by the Relevant Authority.
- 19.7 If lawful to notify the Relevant Authority, the Contractor must notify it if the Contractor is required to process Personal Data by Law promptly and before processing it.
- 19.8 The Contractor must take all reasonable steps to ensure the reliability and integrity of any Contractor Personnel who have access to the Personal Data and ensure that they:
  - 19.8.1 are aware of and comply with the Contractor's duties under this Clause;
  - 19.8.2 are subject to appropriate confidentiality undertakings with the Contractor or any Subprocessor;
  - 19.8.3 are informed of the confidential nature of the Personal Data and do not provide any of the Personal Data to any third party unless directed in writing to do so by the Relevant Authority or as otherwise allowed by the Contract; and
  - 19.8.4 have undergone adequate training in the use, care, protection and handling of Personal Data.
- 19.9 The Contractor must not transfer Personal Data outside of the European Economic Area unless all of the following are true:
  - 19.9.1 it has obtained prior written consent of the Relevant Authority;
  - 19.9.2 the Relevant Authority has decided that there are appropriate safeguards;
  - 19.9.3 the Data Subject has enforceable rights and effective legal remedies when transferred
  - 19.9.4 the Contractor meets its obligations under the Data Protection Laws by providing an adequate level of protection to any Personal Data that is transferred;
  - 19.9.5 where the Contractor is not bound by Data Protection Laws it must use its best endeavours to help the Relevant Authority meet its own obligations under Data Protection Laws; and
  - 19.9.6 the Contractor complies with the Relevant Authority's reasonable prior instructions about the processing of the Personal Data (including, where required by the Relevant Authority, by entering into terms with any Subprocessor which are in the Relevant Authority's opinion, sufficient to protect the integrity of the Personal Data.
- 19.10 The Contractor must notify the Relevant Authority immediately if it:
  - 19.10.1 receives a Data Subject Access Request (or purported Data Subject Access Request);
  - 19.10.2 receives a request to rectify, block or erase any Personal Data;
  - 19.10.3 receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Laws;
  - 19.10.4 receives any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data processed under this Agreement;
  - 19.10.5 receives a request from any third Party for disclosure of Personal Data where compliance with the request is required or claims to be required by Law; and
  - 19.10.6 becomes aware of a Data Loss Event.

- 19.11 Any requirement to notify under Clause 19.10 includes the provision of further information to the Relevant Authority in stages as details become available.
- 19.12 The Contractor must promptly provide the Relevant Authority with full assistance in relation to any Party's obligations under Data Protection Laws and any complaint, communication or request made under Clause 19.10. This includes giving the Relevant Authority:
  - 19.12.1 full details and copies of the complaint, communication or request;
  - 19.12.2 reasonably requested assistance so that it can comply with a Data Subject Access Request within the relevant timescales in the Data Protection Laws;
  - 19.12.3 any Personal Data it holds in relation to a Data Subject on request;
  - 19.12.4 assistance that it requests following any Data Loss Event; and
  - 19.12.5 assistance that it requests relating to a consultation with, or request from, the Information Commissioner.
- 19.13 The Contractor must maintain full, accurate records and information to show it complies with this Clause. This requirement does not apply where the Contractor employs fewer than 250 staff, unless either the Relevant Authority determines that the processing:
  - 19.13.1 is not occasional;
  - 19.13.2 includes special categories of data as referred to in Article 9(1) of the UK GDPR or Personal Data relating to criminal convictions and offences referred to in Article 10 of the UK GDPR or;
  - 19.13.3 is likely to result in a risk to the rights and freedoms of Data Subjects.
- 19.14 The Contractor must appoint a Data Compliance Officer responsible for observing its obligations in this Clause 19 and give the Relevant Authority their contact details promptly on demand.
- 19.15 Before allowing any Subprocessor to process any Personal Data, the Contractor must:
  - 19.15.1 notify the Relevant Authority in writing of the intended Subprocessor and processing
  - 19.15.2 obtain the written consent of the Relevant Authority;
  - 19.15.3 enter into a written contract with the Subprocessor so that this Clause applies to the Subprocessor; and
  - 19.15.4 provide the Relevant Authority with any information about the Subprocessor that the Relevant Authority reasonably requires.
- 19.16 The Contractor remains fully liable for all acts or omissions of any Subprocessor.
- 19.17 At any time the Relevant Authority can, with at least thirty (30) Working Days' notice to the Contractor, change this Clause to:
  - 19.17.1 replace it with any applicable standard clauses (between the controller and processor) or similar terms forming part of an applicable certification scheme under UK GDPR Article 42;
  - 19.17.2 ensure it complies with guidance issued by the Information Commissioner.
- 19.18 The Parties agree to take account of any non-mandatory guidance issued by the Information Commissioner.

## **20. Data**

- 20.1 The Contractor must not remove any ownership or security notices in or relating to the Government Data.
- 20.2 The Contractor must make accessible back-ups of all Government Data and copies shall be provided to the Buyer within five (5) Working Days of request.
- 20.3 The Contractor must ensure that any Contractor system holding any Government Data, including back-up data, is a secure system that complies with the Security Policy and any applicable security plan operated by the Contractor.
- 20.4 If at any time the Contractor suspects or has reason to believe that the Government Data provided under a Contract is corrupted, lost or sufficiently degraded, then the Contractor must notify the Relevant Authority and immediately suggest remedial action.
- 20.5 If the Government Data is corrupted, lost or sufficiently degraded so as to be unusable the Relevant Authority may either or both:

- 20.5.1 tell the Contractor to restore or get restored Government Data as soon as practical but no later than five (5) Working Days from the date that the Relevant Authority receives notice, or the Contractor finds out about the issue, whichever is earlier; and/or
- 20.5.2 restore the Government Data itself or using a third party.
- 20.6 The Contractor must pay each Party's reasonable costs of complying with Clause 20.5 unless the Authority or the Buyer is at fault.
- 20.7 The Contractor:
  - 20.7.1 must provide the Relevant Authority with all Government Data in an agreed open format within ten (10) Working Days of a written request;
  - 20.7.2 must have documented processes to guarantee prompt availability of Government Data if the Contractor stops trading;
  - 20.7.3 must securely destroy all devices that are capable of storing and retrieving data that has held Government Data at the end of life of that media using Good Industry Practice;
  - 20.7.4 securely erase all Government Data and any copies it holds when asked to do so by the Authority or the Buyer unless required by Law to retain it; and
  - 20.7.5 indemnifies the Authority and each Buyer against any and all Losses incurred if the Contractor breaches Clause 19 (Data Processing), this Clause 20 and/or any Data Protection Laws.

## **21. ICT**

- 21.1 Where the Contractor intends to use ICT equipment to process Government Data in connection with fulfilling the obligations under any Call Off Contract then it shall ensure that it holds a valid Cyber Essentials Certificate, where required to do so and instructed as such at the point of Call Off, from the commencement of the Works under such Call Off Contract and throughout its Term.
- 21.2 The Contractor shall not commence or continue to provide Works under any Contract unless it holds a valid Cyber Essential Certificate. The Contractor shall, on demand provide evidence to the Buyer and the Authority of its compliance with this Clause and Clause 21.1. Any breach this Clause or Clause 21.1 shall entitle the Authority to terminate the Call Off contract and consider termination of this Agreement for material Default.
- 21.3 The Contractor shall ensure that all Sub-Contracts with Sub-Contractors who use ICT to process Government Data contain provisions no less onerous on the Sub-Contractors than those imposed on the Contractor under this Agreement in respect of the Cyber Essentials Scheme under this Clause 21.
- 21.4 Where the Contractor uses ICT services that will hold or process data, or interface with the Buyer's ICT then the Contractor shall, throughout the Contract Period, use the latest versions of anti-virus definitions and software available from an industry accepted anti-virus software vendor to check for, contain the spread of, and minimise the impact of Malicious Software. For the avoidance of doubt the equipment referred to in this Clause does not provide authority to connect to network infrastructure. If Malicious Software is found, the Parties shall co-operate to reduce the effect of the Malicious Software and, particularly if Malicious Software causes loss of operational efficiency or loss or corruption of Government Data, assist each other to mitigate any losses and to restore the delivery the Works to its desired operating efficiency.
- 21.5 Any cost arising out of the actions of the Parties taken in compliance with the provisions of Clause 21.4 shall be borne by the Parties as follows:
  - 21.5.1 by the Contractor, where the Malicious Software originates from the Contractor Software, Third Party Software used by the Contractor or the Government Data (whilst the Government Data was under the control of the Contractor) unless the Contractor can demonstrate that such Malicious Software was present and not quarantined or otherwise identified by the Buyer when provided to the Contractor; and
  - 21.5.2 by the Buyer, if the Malicious Software originates from the Buyer Software or the Government Data (whilst the Government Data was under the control of the Buyer).

**22. What must be kept confidential**

- 22.1 Each Party must:
- 22.1.1 keep all Confidential Information it receives confidential and secure;
  - 22.1.2 not disclose, use or exploit the Disclosing Party's Confidential Information without the Disclosing Party's prior written consent, except for the purposes anticipated under the Contract; and
  - 22.1.3 immediately notify the Disclosing Party if it suspects unauthorised access, copying, use or disclosure of the Confidential Information.
- 22.2 In spite of Clause 22.1, a Party may disclose Confidential Information which it receives from the Disclosing Party in any of the following instances:
- 22.2.1 where disclosure is required by applicable Law or by a court with the relevant jurisdiction if the Recipient Party notifies the Disclosing Party of the full circumstances, the affected Confidential Information and extent of the disclosure;
  - 22.2.2 if the Recipient Party already had the information without obligation of confidentiality before it was disclosed by the Disclosing Party;
  - 22.2.3 if the information was given to it by a third party without obligation of confidentiality
  - 22.2.4 if the information was in the public domain at the time of the disclosure;
  - 22.2.5 if the information was independently developed without access to the Disclosing Party's Confidential Information;
  - 22.2.6 to its auditors or for the purposes of regulatory requirements;
  - 22.2.7 on a confidential basis, to its professional advisers on a need-to-know basis; and/or
  - 22.2.8 to the Serious Fraud Office where the Recipient Party has reasonable grounds to believe that the Disclosing Party is involved in activity that may be a criminal offence under the Bribery Act 2010,
- 22.3 The Contractor may disclose Confidential Information on a confidential basis to Contractor Personnel on a need-to-know basis to allow the Contractor to meet its obligations under the Contract. The Contractor Personnel must enter into a direct confidentiality agreement with the Relevant Authority at its request.
- 22.4 The Authority or the Buyer may disclose Confidential Information in any of the following cases:
- 22.4.1 on a confidential basis to the employees, agents, consultants and contractors of the Authority or the Buyer;
  - 22.4.2 on a confidential basis to any other Central Government Body, any successor body to a Central Government Body or any company that the Authority or the Buyer transfers or proposes to transfer all or any part of its business to;
  - 22.4.3 if the Authority or the Buyer (acting reasonably) considers disclosure necessary or appropriate to carry out its public functions;
  - 22.4.4 where requested by Parliament; and/or
  - 22.4.5 under Clauses 9.6 and 23.
- 22.5 For the purposes of Clauses 22.2 to 22.4 references to disclosure on a confidential basis means disclosure under a confidentiality agreement or arrangement including terms as strict as those required in this Clause 0.
- 22.6 Transparency Information and any Information which is exempt from disclosure by Clause 23 is not Confidential Information.
- 22.7 The Contractor must not make any press announcement or publicise the Contracts or any part of them in any way, without the prior written consent of the Relevant Authority and must take all reasonable steps to ensure that Contractor Personnel do not either.

**23. Sharing information**

- 23.1 The Contractor must tell the Relevant Authority within 48 hours if it receives a Request For Information.
- 23.2 Within the required timescales the Contractor must give the Authority and each Buyer full co-operation and information needed so the Buyer can:
- 23.2.1 publish the Transparency Information;



- 23.2.2 comply with any Freedom of Information Act (FOIA) request; and/or
- 23.2.3 comply with any Environmental Information Regulations (EIR) request;
- 23.3 The Relevant Authority may talk to the Contractor to help it decide whether to publish information under Clause 23 and may consider the Commercially Sensitive Information. However, the extent, content and format of the disclosure is the Relevant Authority's decision, which does not need to be reasonable.
- 23.4 Where the Contractor is subject to the requirements of the FOIA and/or the EIR:
  - 23.4.1 the Relevant Authority shall notify the Contractor within forty eight (48) hours if it receives a Request For Information in relation to the Contractor's activities in connection with this Agreement;
  - 23.4.2 the Relevant Authority shall provide the Contractor full co-operation, assistance and all information necessary for it to comply with any FOIA and/or EIR request; and
  - 23.4.3 the Contractor may consult with the Relevant Authority to inform its decision to publish information disclosable the FOIA and EOI however it shall retain absolute discretion regarding the extent, content and format of the disclosure.
- 23.5 The Contractor recognises that the Buyer is subject to PPN 01/17 (Updates to transparency principles v1.1 (<https://www.gov.uk/government/publications/procurement-policy-note-0117-update-to-transparency-principles>)). The Contractor shall, in order to assist the Buyer with its compliance with its obligations under that PPN:
  - 23.5.1 without prejudice to the Contractor's reporting obligations set out elsewhere in this Agreement, where requested by the Buyer as soon as reasonably practicable and in any event within one (1) Month of the date of such request submit to the Buyer for Approval (such Approval not to be unreasonably withheld or delayed) draft transparency reports consistent with the content requirements and format as notified by the Buyer to the Contractor from time to time; and
  - 23.5.2 if the Buyer rejects any proposed Transparency Report submitted by the Contractor, the Contractor shall submit a revised version of the relevant report for further Approval within five (5) Working Days of receipt of any notice of rejection, taking account of any recommendations for revision and improvement to the report provided by the Buyer. If the Parties fail to agree on a draft Transparency Report the Buyer shall determine what should be included. Any other disagreement in connection with Transparency Reports shall be referred to the Dispute Resolution Procedure.

## **24. Establishments**

### **24.1 Access to Establishments**

- 24.1.1 If Contractor Personnel are required to have a pass for admission to an Establishment the Buyer shall, subject to satisfactory completion of approval procedures (including, as required, vetting), arrange for passes to be issued. Any member of the Contractor Personnel who cannot produce a proper pass when required to do so by any member of the Authority's or the Buyer's personnel (as the case may be), or who contravenes any conditions on the basis of which a pass was issued, may be refused admission to an Establishment or be required to leave an Establishment if already admitted.
- 24.1.2 Contractor Personnel shall promptly return any pass if at any time the Buyer so requires and where any person to whom a pass was issued ceases to be involved in the delivery of the Works. The Contractor shall promptly return all passes on expiry or termination of the Contract.
- 24.1.3 Contractor Personnel attending an Establishment may be subject to search at any time. Strip searches shall be carried out only on the specific authority of the Buyer under the same rules and conditions applying to the Buyer's personnel. The Contractor is referred to Rule 71 of Part IV of the Prison Rules 1999 as amended by the Prison (Amendment) Rules 2005 and Rule 75 of Part IV of the Young Offender Institution Rules 2000 as amended by the Young Offender Institution (Amendment) Rules 2005.
- 24.1.4 Searches shall be conducted only on the specific authority of the Buyer under the same rules and conditions applying to the Buyer's personnel and/or visitors. The Contractor

is referred to Section 8 of the Prison Act 1952, Rule 64 of the Prison Rules 1999 and PSI 67/2011.

## **24.2 Security**

- 24.2.1 Whilst at Establishments, the Contractor shall ensure that all Contractor Personnel comply with all security measures implemented by the Buyer in respect of staff and other persons attending Establishments. The Buyer shall provide copies of its written security procedures to Contractor Personnel on request. The Contractor and all Contractor Personnel are prohibited from taking any photographs at Establishments unless they have Approval and the Buyer's representative is present so as to have full control over the subject matter of each photograph to be taken. No such photograph shall be published or otherwise circulated without Approval.
- 24.2.2 The Buyer may search vehicles used by the Contractor or Contractor Personnel and which are located at Establishments.
- 24.2.3 The Contractor shall ensure that all Personnel co-operate with any investigation relating to security which is carried out by the Buyer or by any person who is responsible for security matters on the Buyer's behalf, and when required by the Buyer they shall:
  - 24.2.3.1 take all reasonable measures to make available for interview by the Buyer any members of Contractor Personnel identified by the Buyer, or by a person who is responsible for security matters, for the purposes of the investigation. Contractor Personnel may be accompanied by and be advised or represented by another person whose attendance at the interview is acceptable to the Buyer; and
  - 24.2.3.2 subject to any legal restriction on their disclosure, provide all documents, records or other material of any kind and in whatever form which may be reasonably required by the Buyer, or by a person who is responsible for security matters on the Buyer's behalf, for the purposes of investigation as long as the provision of that material does not prevent the Contractor from delivering the Works. The Buyer may retain any such material for use in connection with the investigation and, as far as possible, may provide the Contractor with a copy of any material retained.

## **24.3 Offences and authorisation**

- 24.3.1 In carrying out obligations the Contractor shall comply with PSI 10/2012 (Conveyance and Possession of Prohibited Items and Other Related Offences) and other applicable provisions relating to security as published by the Authority and/or the Buyer from time to time.
- 24.3.2 Nothing in a Contract is deemed to provide any "authorisation" to the Contractor in respect of any provision of the Prison Act 1952, Offender Management Act 2007, Crime and Security Act 2010, Serious Crime Act 2015 or other relevant legislation.

## **25. Licence to Occupy**

- 25.1 Any land or Buyer Premises made available from time to time by a Buyer to the Contractor in connection with a Call Off Contract are on a non-exclusive licence basis free of charge and are to be used by the Contractor exclusively for the purpose of performing its obligations under the Call Off Contract. The Contractor shall have use of such land or Buyer Premises as licensee and shall vacate the same immediately upon termination or expiry (as the case may be) of the Contract.
- 25.2 The Contractor shall limit access to the land or Buyer Premises to such Contractor Personnel as is necessary for it to perform its obligations under the Contract and the Contractor shall co-operate (and ensure that the Contractor Personnel co-operate) with any other persons working concurrently on such land or Buyer Premises as the Buyer may request.
- 25.3 If the Contractor requests modifications to the land or Buyer Premises such modifications are subject to Approval and shall be carried out by the Buyer at the Contractor's cost. The Buyer shall undertake Approved modification work without undue delay.
- 25.4 The Contractor shall (and shall procure that the Contractor Personnel at the Buyer Premises shall) observe and comply with such rules, regulations and requirements (including those relating to

security arrangements) as may be in force from time to time for the conduct of personnel when on the Buyer's Premises as determined by the Buyer.

25.5 The Contract shall not create a tenancy of any nature in favour of the Contractor or the Contractor Personnel and no such tenancy has or shall come into being and, notwithstanding any rights granted pursuant to the Contract, the Buyer may use the land and/or Buyer Premises owned or occupied by it in any manner it sees fit.

25.6 If keys (to include key cards) to any part of the Buyer Premises are issued to the Contractor, the Contractor shall be deemed by this Contract to have given an undertaking that the keys will not be copied, lent or used by any person other than a person authorised in writing by the Contractor and the Contractor shall supply to the Buyer the names and addresses of such authorised persons. It shall be the responsibility of the Contractor to ensure that the windows, doors or other access points opened or unsecured by the Contractor Personnel be firmly closed and secured where necessary, both while the Works are being undertaken, and after any part of the Works have been delivered, and that in the event that any failure to do so results in losses or other costs falling upon the Buyer, such losses and costs shall be recoverable from the Contractor by the Buyer. If any keys are lost by the Contractor, or Contractor Personnel, then the Contractor shall immediately notify the Buyer. The Contractor shall be liable for all losses, or other costs falling upon the Buyer as a result of the loss of such keys including the loss or damage to property and the costs of replacing locks and lost keys.

**26. Invalid parts of the Contract**

If any part of a Contract is prohibited by Law or judged by a court to be unlawful, void or unenforceable, it must be read as if it was removed from that Contract as much as required and rendered ineffective as far as possible without affecting the rest of the Contract, whether it's valid or enforceable.

**27. No other terms apply**

The provisions incorporated into each Contract represent the entire understanding between the Parties in respect of such Contract and supersede and replace all and any prior representations and/or agreement between the Parties (whether written or oral) provided always that nothing in this Clause shall exclude liability for fraud or fraudulent mis-representation.

**28. Other people's rights in a Contract**

No third parties may use the Contracts (Rights of Third Parties) Act (CRTPA) to enforce any term of the Contract unless stated (referring to CRTPA) in the Contract. This does not affect third party rights and remedies that exist independently from CRTPA. Where a third party is given rights to enforce any term then it can only enforce or take any steps to enforce it with the prior written consent of the Relevant Authority (which consent, if given, may be on such terms as the Relevant Authority may decide). The Contract can be varied or terminated by the Parties without the consent of any third party.

**29. Circumstances beyond control of the Parties**

29.1 Any Party affected by a Force Majeure Event is excused from performing its obligations under a Contract while the inability to perform continues, if it both:

29.1.1 provides a Force Majeure Notice to the other Party; and

29.1.2 uses all reasonable measures practical to reduce the impact of the Force Majeure Event.

29.2 Either party can partially or fully terminate the affected Contract if the delivery the Works is materially affected by a Force Majeure Event which lasts for thirty (30) days continuously.

29.3 Where a Party terminates under Clause 29.2:

29.3.1 each party must cover its own Losses; and

29.3.2 Clauses 15.10.1 to 15.10.6 applies.

**30. Relationships created by the Agreement**

No Agreement creates a partnership, joint venture or employment relationship. The Contractor must represent themselves accordingly and ensure others do so.

**31. Giving up contract rights**

A partial or full waiver or relaxation of the terms of a Contract is only valid if it is stated to be a waiver in writing to the other Party.

**32. Transferring responsibilities**

- 32.1 The Contractor cannot assign the Agreement or a Call Off Contract without the Relevant Authority's prior written consent.
- 32.2 The Relevant Authority can at any time assign, novate or transfer its Agreement or any part of it to any Crown Body, public or private sector body which performs the functions of the Relevant Authority.
- 32.3 When the Authority or the Buyer uses its rights under Clause 32.2 the Contractor must enter into a novation agreement in the form that the Authority or the Buyer specifies.
- 32.4 The Contractor can terminate a Contract novated under Clause 32.2 to a private sector body that is experiencing an Insolvency Event.
- 32.5 The Contractor remains responsible for all acts and omissions of the Contractor Personnel as if they were its own.
- 32.6 If the Authority or the Buyer asks the Contractor for details about Sub-Contractors, the Contractor must provide details of Sub-Contractors at all levels of the supply chain including:
  - 32.6.1 their name;
  - 32.6.2 the scope of their appointment; and
  - 32.6.3 the duration of their appointment.
- 32.7 The Contractor shall provide the Authority or the Buyer with a copy of any Sub-Contract at the Authority or the Buyer's reasonable request.
- 32.8 If the Relevant Authority believes there are:
  - 32.8.1 compulsory grounds for excluding a Sub-Contractor pursuant to regulation 57 of the Regulations, the Contractor shall replace or not appoint the Sub-Contractor; or
  - 32.8.2 non-compulsory grounds for excluding a Sub-Contractor pursuant to regulation 57 of the Regulations, the Authority may require the Contractor to replace or not appoint the Sub-Contractor and the Contractor shall comply with such requirement.
- 32.9 The Contractor shall ensure that Key Sub-Contracts include:
  - 32.9.1 a right under CRTPA for the Buyer to enforce any provisions under the Key Sub-Contract which confer a benefit upon the Buyer;
  - 32.9.2 a provision enabling the Buyer to enforce the Key Sub-Contract as if it were the Contractor;
  - 32.9.3 a provision enabling the Contractor to assign, novate or otherwise transfer any of its rights and/or obligations under the Key Sub-Contract to the Buyer;
  - 32.9.4 a provision requiring the Key Sub-Contractor not to embarrass the Authority and/or the Buyer or otherwise bring the Authority and/or the Buyer into disrepute;
  - 32.9.5 a provision restricting the ability of the Key Sub-Contractor to sub-contract all or any part of the delivery the Works provided to the Contractor under the Key Sub-Contract without first seeking the written consent of the Buyer; and
  - 32.9.6 provisions which have the same effect as the following clauses of the Contract: 11.1.3, 11.1.4 (Audit), 19 (Data Processing), and 23 (Sharing information).

**33. Changing the Agreement and Call Off Contracts**

- 33.1 In the first instance, minor changes to the provision of the Works should, so far as possible, be agreed between the Parties as operational changes to the Works and managed as agreed between the Parties from time to time.
- 33.2 Subject to Clause 33.6 below, the Agreement cannot be varied except in writing signed by a duly authorised representative of all Parties and in the case of the Authority and where the Buyer is the Ministry of Justice, without a signature from MOJ Commercial or such other person as notified by the Authority acting through MOJ Commercial. From time to time the Authority may refresh the terms of this Agreement at its discretion and will notify the Contractor of the new terms and

provide instructions for completion of the new agreement. If the Contractor wishes to remain a contractor on the MWDPS it shall promptly agree to such terms according to the Authority's instructions.

- 33.3 Unless otherwise stipulated in the relevant Call Off Contract, either Party can request a variation to a Call Off Contract which is only effective if agreed in writing and signed by both Parties.
- 33.4 The Contractor must provide an impact assessment either:
- 33.4.1 with the variation request, where the Contractor requests the variation; or
  - 33.4.2 within the time limits stated by the Authority or the Buyer where they have requested the variation (or within a reasonable period if no time limits are stated).
- 33.5 If a variation cannot be agreed or resolved by the Parties, the Authority or the Buyer can either:
- 33.5.1 agree that the Contract continues without the variation;
  - 33.5.2 terminate the affected Contract, unless in the case of a Call Off Contract, the Contractor has already provided part or all of the delivery the Works, or where the Contractor can show evidence of substantial work being carried out to provide them; or
  - 33.5.3 refer the Dispute to be resolved using Clause 42 (Resolving Disputes) .
- 33.6 The Authority shall be entitled from time to time, by notice in writing to the Contractor, to vary the terms which will be applicable to future call off contracts. Submission by the Contractor of a tender for a call off contract where its terms have been varied shall be deemed to be acceptance by the Contractor of the terms as varied. Any changes notified by the Authority in accordance with this Clause shall not have any effect on call off contracts which have been agreed between a Buyer and the Contractor.

#### **34. How to communicate about the Agreement**

- 34.1 All notices under the Agreement must be in writing and are considered effective on the Working Day of delivery as long as they're delivered before 5:00pm on a Working Day. Otherwise the notice is effective on the next Working Day. An email is effective when sent unless an error message is received.
- 34.2 Notices to the Parties must be sent to the address or email address set out in the Signatory Sheet (for the Authority and Contractor) or in the Contract Data Form and its Appendices (for the Buyer).
- 34.3 This Clause does not apply to the service of legal proceedings or any documents in any legal action, arbitration or dispute resolution.

#### **35. Preventing fraud, bribery and corruption**

- 35.1 The Contractor must not during any Contract Period:
- 35.1.1 commit a Prohibited Act or any other criminal offence in the Regulations 57(1) and 57(2);
  - 35.1.2 do or allow anything which would cause the Authority or the Buyer, including any of their employees, consultants, contractors, Sub-Contractors or agents to breach any of the Relevant Requirements or incur any liability under them.
- 35.2 The Contractor shall, during the Contract Period:
- 35.2.1 establish, maintain and enforce, and require that its Sub-Contractors establish, maintain and enforce, policies and procedures which are adequate to ensure compliance with the Relevant Requirements and prevent the occurrence of a Prohibited Act;
  - 35.2.2 keep appropriate records of its compliance with its obligations under Clause 35.2.1 and make such records available to the Relevant Authority on request.
- 35.3 The Contractor must immediately notify the Authority and the Buyer if it becomes aware of any breach of Clauses 35.1 or 35.2 or has any reason to think that it, or any of the Contractor Personnel, has either:
- 35.3.1 been investigated or prosecuted for an alleged Prohibited Act;

- 35.3.2 been debarred, suspended, proposed for suspension or debarment, or is otherwise ineligible to take part in procurement programmes or contracts because of a Prohibited Act by any government department or agency;
  - 35.3.3 received a request or demand for any undue financial or other advantage of any kind related to a Contract; and/or
  - 35.3.4 suspected that any person or Party directly or indirectly related to a Contract has committed or attempted to commit a Prohibited Act.
- 35.4 If the Contractor notifies the Authority or the Buyer as required by Clause 35.3, the Contractor must respond promptly to their further enquiries, co-operate with any investigation and allow the Audit of any books, records and relevant documentation.
- 35.5 In any notice the Contractor gives under Clause 35.4 it must specify the:
- 35.5.1 Prohibited Act;
  - 35.5.2 identity of the Party who it thinks has committed the Prohibited Act; and
  - 35.5.3 action it has decided to take.

**36. Equality, diversity and human rights**

- 36.1 The Contractor must follow all applicable equality Law when they perform their obligations under the Agreement, including:
- 36.1.1 protections against discrimination on the grounds of race, sex, gender reassignment, religion or belief, disability, sexual orientation, pregnancy, maternity, age or otherwise; and
  - 36.1.2 any other requirements and instructions which the Authority or the Buyer reasonably imposes related to equality Law.
- 36.2 The Contractor must take all necessary steps, and inform the Authority or the Buyer of the steps taken, to prevent anything that is considered to be unlawful discrimination by any court or tribunal, or the Equality and Human Rights Commission (or any successor organisation) when working on a Contract.

**37. Health and safety**

- 37.1 The Contractor must perform its obligations meeting the requirements of:
- 37.1.1 the Health and Safety at Work Act, the Management of Health and Safety at Work Regulations and all applicable Law and approved codes of practice regarding health and safety;
  - 37.1.2 the Buyer's current health and safety policy while at the Buyer's Premises, as provided to the Contractor;
  - 37.1.3 any immunisation requirements in respect of Contractor Personnel.
- 37.2 The Contractor and the Buyer must as soon as possible notify the other of any health and safety incidents or material hazards they're aware of at the Buyer Premises that relate to the performance of a Contract.

**38. Environment**

- 38.1 When working on the Buyer Premises, the Contractor must perform its obligations under the Buyer's current Environmental Policy, which the Buyer must provide.
- 38.2 The Contractor must ensure that Contractor Personnel are aware of the Buyer's Environmental Policy.

**39. Tax**

- 39.1 The Contractor must not breach any tax or social security obligations and must enter into a binding agreement to pay any late contributions due, including where applicable, any interest or any fines. The Authority and the Buyer cannot terminate the Agreement where the Contractor has not paid a minor tax or social security contribution.

- 39.2 Where the Contractor or any Contractor Personnel are liable to be taxed or to pay National Insurance contributions in the UK relating to payment received under a Call Off Contract, the Contractor must both:
- 39.2.1 comply with the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax, the Social Security Contributions and Benefits Act 1992 (including IR35) and National Insurance contributions; and
  - 39.2.2 indemnify the Buyer against any Income Tax, National Insurance and social security contributions and any other liability, deduction, contribution, assessment or claim arising from or made during or after the Contract Period in connection with the delivery of the Works by the Contractor or any of the Contractor Personnel.
- 39.3 If any of the Contractor Personnel are Workers who receive payment relating to the Works, then the Contractor must ensure that its contract with the Worker contains the following requirements:
- 39.3.1 the Buyer may, at any time during the Contract Period, request that the Worker provides information which demonstrates they comply with Clause 39.2, or why those requirements do not apply, the Buyer can specify the information the Worker must provide and the deadline for responding;
  - 39.3.2 the Worker's contract may be terminated at the Buyer's request if the Worker fails to provide the information requested by the Buyer within the time specified by the Buyer;
  - 39.3.3 the Worker's contract may be terminated at the Buyer's request if the Worker provides information which the Buyer considers isn't good enough to demonstrate how it complies with Clause 39.2 or confirms that the Worker is not complying with those requirements; and
  - 39.3.4 the Buyer may supply any information they receive from the Worker to HMRC for revenue collection and management.

#### **40. Conflict of interest**

- 40.1 The Contractor must take action to ensure that neither the Contractor nor the Contractor Personnel are placed in the position of an actual or potential Conflict of Interest.
- 40.2 The Contractor must promptly notify and provide details to the Authority and each Buyer if a Conflict of Interest happens or is expected to happen.
- 40.3 The Authority and each Buyer can terminate its Contract immediately by giving notice in writing to the Contractor or take any steps it thinks are necessary where there is or may be an actual or potential Conflict of Interest.

#### **41. Reporting a breach of the Contract**

- 41.1 As soon as it is aware of it the Contractor and Contractor Personnel must report to the Authority or the Buyer any actual or suspected breach of:
  - 41.1.1 Law;
  - 41.1.2 NEC4 Engineering and Construction Short Contract;
  - 41.1.3 NEC4 Term Services Contract; and/or
  - 41.1.4 Clauses 35 to 40.
- 41.2 The Contractor must not retaliate against any of the Contractor Personnel who in good faith reports a breach listed in Clause 41.1 to the Buyer or a Prescribed Person.

#### **42. Resolving Disputes**

- 42.1 If there is a Dispute in respect of a Call Off Contract, it shall be managed as set out in that Call Off Contract. If there is a Dispute in respect of this Agreement the Parties will, within five (5) Working Days of a written request from one Party, meet in good faith to resolve the Dispute.
- 42.2 If it is not resolved in such five (5) Working Day period then the senior representatives of the Parties who have authority to settle the Dispute will, within five (5) Working Days of the end of such period, meet in good faith to resolve the Dispute.
- 42.3 If the Dispute cannot be resolved by the Parties within one (1) Month of that meeting, the Dispute may by agreement between the Parties be referred to a neutral adviser or mediator chosen by

agreement between the Parties. All negotiations connected with the Dispute shall be conducted in confidence and without prejudice to the rights of the Parties in any further proceedings.

42.4 The Parties irrevocably agree that the courts of England and Wales have the exclusive jurisdiction to determine Disputes, grant interim remedies and any other provisional or protective relief

42.5 The Contractor cannot suspend the performance of a Contract during any Dispute.

**43. Which law applies**

This DPS Agreement and any issues arising out of, or connected to it, are governed by English law.

**44. Contract execution cost**

Each party to this agreement or subsequent Call Off Contracts shall bear its own costs of and incidentals in the preparation and execution.

**45. TUPE**

45.1 It is not anticipated by either party that TUPE will apply on the termination of this Agreement howsoever caused. The Contractor represents, warrants and undertakes to the Authority that no Contractor Employee will transfer to the Authority or a New Contractor under TUPE as a consequence of the termination of this Agreement.

45.2 The Contractor shall be responsible for and shall indemnify any Authority and/or any New Contractor, as the case may be, in respect of any Employment Liabilities the Authority and/or any New Contractor may incur in relation to any Contractor Employee arising from the transfer or alleged transfer of their employment (or any employment liabilities in respect of their employment) to an Authority or a New Contractor pursuant to TUPE including, without limitation, any Employment Liabilities relating to the dismissal of a Contractor Employee by the Contractor, a Sub-contractor, the Authority or a New Contractor, as the case may be.

45.3 Any New Contractor is entitled to enforce the provisions of this Clause 45 pursuant to section 1 of the Contracts (Rights of Third Parties) Act 1999 provided that the parties to this Agreement may vary or terminate this Agreement by agreement between them without requiring the consent of any such third party and need not comply with section 2 (1) of the Contracts (Rights of Third Parties) Act 1999.

**46. Counterparts**

The Contract may be executed in counterparts, each of which when executed and delivered constitute an original but all counterparts together constitute one and the same instrument.