

THE SKILLS DEVELOPMENT SCOTLAND CO. LIMITED

TERMS & CONDITIONS OF PURCHASE (Goods and Services) (Applicable for contracts tendered from and after 15 November 2016)

Note: These are SDS's standard terms and conditions where SDS considers expenditure is likely to exceed £50k. Where indicated in any invitation to tender, these terms and conditions will apply. Please note however, that SDS may consider it appropriate to modify certain terms and conditions to reflect specific risks and/or requirements for a particular procurement. Any such modifications will be reflected in the set of terms and conditions made available with the invitation to tender for each procurement.

SKILLS DEVELOPMENT SCOTLAND TERMS AND CONDITIONS FOR PURCHASING GOODS AND SERVICES

1. Interpretation

- 1.1 In these terms and conditions some words have particular meanings. These are set out in Condition 27 below.
- 1.2 These terms and conditions and the other Contract Documents make up the whole agreement between you and us and supersede any previous agreement between you and us relating to the same subject matter. No other term or condition submitted, proposed or stipulated by you will apply to the contract between you and us.
- 1.3 If there is any conflict or inconsistency among the Contract Documents the terms of some of the documents take priority over other documents. The descending order of importance is as follows: firstly the contract award letter; then these terms and conditions; then any clarifications to our invitation to tender and/or your response to our invitation to tender that are agreed in writing between you and us; then our invitation to tender; and then your tender response.
- 1.4 In these terms and conditions:
- 1.4.1 references to statutory provisions include those statutory provisions as amended, extended, consolidated or replaced;
 - 1.4.2 references to any gender include all genders;
 - 1.4.3 the words "include" and "including" shall each be construed without limitation to the words that appear before the words "include" and "including";
 - 1.4.4 the headings shall not affect the interpretation of these terms and conditions; and
 - 1.4.5 except where the context otherwise requires, references to Conditions are to conditions set out in these terms and conditions.

2. The Contract

- 2.1 You will provide the Goods and Services to our reasonable satisfaction and you will act at all times in a diligent and professional manner. The Goods and Services must conform fully to the requirements set out in the Contract Documents.
- 2.2 You will provide the Goods and perform the Services on and by the dates set out in the Contract Documents and, unless we specifically state differently in the Contract Documents, time of delivery or performance shall be of the essence of the Contract.
- 2.3 You are and must at all times act as an independent contractor. You are not our employee, agent or representative and you have no authority to act on our behalf. You will not act in any way which would give the impression that you are our employee, agent or representative.
- 2.4 As you are our independent contractor, we will not be liable for anything you do or fail to do including anything you do which causes any person to make a claim against you.
- 2.5 You will not incur any liability on our behalf nor enter into any contracts or agreements on our behalf without our prior approval in writing.
- 2.6 You acknowledge that we rely on your skill and judgment in the supply of the Goods and the performance of the Services and your obligations under the Contract.

3. Goods and Services

- 3.1 You will ensure that you make available adequate resources for the provision of the Goods and the performance of the Services.
- 3.2 You shall perform your obligations under the Contract:-
- 3.2.1 with appropriately experienced, qualified and trained personnel with all due skill, care and diligence; and
 - 3.2.2 in accordance with Good Industry Practice.
- 3.3 You will ensure that the Goods are fully compatible with any equipment, to the extent specified in the Contract Documents.
- 3.4 In providing the Goods and performing the Services, you will comply with all Rules and Regulations, including all environmental, packaging, labelling, health and safety and transportation Rules and Regulations.
- 3.5 If key personnel are specified in the Contract Documents, you will ensure that those key personnel perform the Services allocated to them in the Contract Documents. You will not make any change to such key personnel unless we have agreed (acting reasonably) to that change in writing.
- 3.6 If we ask, you will give us detailed programmes of the order in which you will provide the Services and/or Goods and how you will provide the Services and/or Goods. We may tell you in what order to provide the Services and/or Goods and you will comply with that request.
- 3.7 If all or part of the Services are to be provided at the Premises we will be entitled to assume that you will be able to carry out the Services at the Premises. You will not be able to use the Premises as a reason for a failure or delay on your part to supply the Services.
- 3.8 If we ask, you will give us access to your premises (and ensure that we have access to the premises of your sub-contractors) to inspect them, and to observe work being performed and/or goods being produced there under the Contract. We will give you reasonable notice before making any such request, and will only ask for access during normal working hours.
- 3.9 You will comply with, and will ensure that all Personnel comply with, our security policy and any instructions we issue to you relating to security, health, safety or access to the Premises (including security clearance and the carrying, display and return of security passes).
- 3.10 You shall continue to perform your obligations under the Contract to the extent possible, notwithstanding that we may have delayed in performing any obligation (express or implied) we have under the Contract. We will not be liable for any costs or additional costs which arise because of any such delay or failure by us.
- 3.11 If we ask, you will give us a list of the names and contact details of Personnel involved in providing the Goods and/or performing the Services and the tasks which each person will be carrying out together with any other information or documents we may ask to see.
- 3.12 You will ensure that any Personnel working at the Premises only access those parts of the Premises where it is necessary for them to do so to perform the Services and then only at times when they are actually performing the Services. Access to the Premises shall not be exclusive to you, and you shall co-operate with such others as we may require.

- 3.13 You must get our permission before delivering to the Premises any materials, plant and equipment you may wish to use to perform the Services and/or provide the Goods. You will follow any instructions we give you about how, when and where materials, plant and equipment are to be delivered.
- 3.14 You will be responsible for the security of all the materials, plant and equipment you use in performing the Services and/or providing the Goods. We will not be liable if any property belonging to you or Personnel is stolen, lost or damaged.
- 3.15 If we provide you with equipment or materials for you to perform the Services and/or provide the Goods, that equipment and/or those materials will still belong to us and you will keep such equipment and materials in good condition and use them only to provide the Goods and/or perform the Services and for no other purpose.
- 3.16 If we ask for any equipment or materials to be returned, you will return any such equipment and materials immediately in good working order, fair wear and tear excepted. You will bear any cost associated with returning such equipment or materials and/or returning them to good working order, fair wear and tear excepted. Such equipment and materials will be your responsibility and at your risk until we receive them.
- 3.17 If you have any equipment or materials belonging to us at the end of the Contract, you will return them to us immediately unless we tell you in writing to dispose of them in some other way in which case you will comply with our instructions.
- 3.18 We may at any time during the progress of the Services demand in writing that you:-
- 3.18.1 remove from the Premises any materials which are in our opinion, hazardous, noxious or not in accordance with the Contract, and/or
- 3.18.2 replace any materials which are in our opinion, hazardous, noxious or not in accordance with the Contract with proper and suitable materials; and/or
- 3.18.3 remove and properly re-execute any work, notwithstanding any previous test of such work, which, in respect of material or workmanship is not in our opinion in accordance with the Contract; and/or
- 3.18.4 remove and replace any personnel engaged in the performance of the Services or delivery of the Goods at the Premises (or any other premises authorised by us for the performance of the Services or delivery of the Goods) in the event that we have concerns as to the suitability of such personnel.
- You shall immediately comply with each such demand.
- 3.19 On completion of the Services you shall remove your plant, equipment and unused materials and shall clear away from the Premises all rubbish arising out of the Services, fully reinstate the Premises and leave it in a neat and tidy condition.
- 3.20 You shall perform the Services in such a manner as to be safe and without risk to the health and safety of persons in the vicinity of that place at the time when the Services are being performed (whether such persons are in the vicinity of the place at the time when the Services are being performed or otherwise).

4. Goods, Packaging and Safety

- 4.1 You warrant and undertake to us that the Goods will be of good construction, sound materials, satisfactory quality and free from defects in design, materials and workmanship, and will conform in all respects with any description contained in the Contract Documents and with any sample approved by us.
- 4.2 You must pack and mark the Goods in a suitable manner and must avoid unnecessary packaging. You will mark the package with the number of the relevant purchase order and the name of the contents.
- 4.3 You will mark each package in a consignment with the total number of packages in the consignment, and the number of that package, e.g. 3 of 7. You will do this even if there is only one package in a consignment.
- 4.4 You will make sure that all containers of hazardous goods (and any documents that relate to hazardous goods) have prominent and suitable warnings.
- 4.5 You will ensure that the Goods are suitable for the purpose to which they would normally be put and for any particular purpose mentioned in the Contract Documents.
- 4.6 In providing the Goods you will use reasonable endeavours to ensure where possible that all materials and processes used in the production and supply and delivery of the Goods and Services will minimise the impact on the environment.
- 4.7 Prior to delivery, if you think that a change to the Contract or to the specification of the Goods or Services would reduce the overall environmental impact of the Contract or the Goods or Services then you will provide details of the proposed change including any resultant affect on the price of the Contract. We will consider the proposed change and may ask for a change on the basis set out in Condition 7.
- 4.8 You will carry out appropriate tests and checks before the Goods are delivered to us to make sure that the Goods are safe, that they meet all relevant health and safety Rules and Regulations, and that they will not put the health or safety of people who will be using them at risk.
- 4.9 You will tell us everything we need to do to make sure that when the Goods are being used, they can be used correctly and in a safe manner and will not put the health and safety of the people who will be using them at risk.
- 4.10 If we ask, you will give us progress reports on the manufacture of the Goods and provision of Services within the timescales specified by us (acting reasonably) and you will meet us to discuss and review the Goods and Services provided.

5. Delivery, Title and Risk

- 5.1 You will deliver the Goods to the location and at the time specified in the Contract Documents unless we have agreed in writing a change to our delivery requirements.
- 5.2 You must tell us in advance if you need to enter our premises to deliver the Goods or provide the Services.
- 5.3 You will ensure that each delivery is accompanied by a delivery note which shows at least the relevant purchase order number given to you by us, date of delivery and details of the number of packages and contents.
- 5.4 If we sign a delivery note for the Goods, this does not mean that we accept the Goods or that all of the correct Goods have been delivered.
- 5.5 Where a date and/or time of delivery has been specified in the Contract Documents and you fail to deliver on that date and/or time, we may refuse to accept the Goods. If we do so, we will not have to pay you and we will also be able to cancel all or any part of the Contract and/or any further deliveries. If you still deliver the Goods after you have been told by us that we will refuse to accept them, you must remove them within any timescale that we set you, and if you do not we will be entitled to dispose of them or destroy them and we will not be liable to pay for them. Even if we do any of these things, any other rights we have to take action against you for failure to deliver on time will not be affected.

- 5.6 If for any reason we cannot take delivery of the Goods on the date and/or at the time of delivery, you must keep the Goods safely and in environmentally appropriate conditions to prevent deterioration until we can take delivery of them, and have told you to deliver them to us. We will pay you for the amount you have had to pay to store them, provided this is a reasonable amount. We may require evidence of the amount you have paid to store the Goods, and if you do not have this evidence, we may not pay you these storage costs.
- 5.7 If we have to return any goods to you, you will pay us the delivery costs. We will not be responsible if the Goods are damaged or destroyed in transit to you.
- 5.8 Following delivery we will inspect the Goods within a reasonable time and notify you of any Goods that are dangerous or unsafe and/or any defective or missing items.
- 5.9 If we find that Goods you have delivered to us are dangerous and/or unsafe, we will tell you and you must immediately do everything you can at your expense to make the Goods as safe as possible or, if we ask, remove the Goods from the premises where they are located. If we ask you to remove dangerous and/or unsafe products from such location you will do so at your expense. You will pay us a full refund of the price we paid for those Goods.
- 5.10 If in our reasonable opinion there are defective or missing Goods or Services then we may, at our option, (i) permit you at your cost to repair or deliver the missing or defective Goods or re-perform the Services within a specified time; (ii) require you at your cost to replace such defective Goods within a specified time; or (iii) refuse to pay for such defective or missing Goods or Services. You will uplift defective Goods at your expense at such times as we shall specify.
- 5.11 If Goods are delivered in excess of the quantity ordered, we will not be bound to pay for such excess and you will promptly uplift such excess Goods at your expense.
- 5.12 Ownership of the Goods and risk in the Goods will transfer to us when the Goods are delivered (and off-loaded) in accordance with the Contract Documents and we have signed a delivery note acknowledging safe receipt of them.
- 5.13 You guarantee that the Goods will continue to be free from defects for a minimum period of 12 months (or such longer period, if specified within the Contract Documents) from delivery and you will (at our option) fix the defect or replace the defective Goods at your expense within seven days of being notified of the defect.

6. Price and Payment

- 6.1 The price for the Goods and/or Services shall be as stated in the Contract Documents and shall be deemed to be inclusive of all expenses and charges.
- 6.2 No increase to the price may be made without our prior written consent.
- 6.3 When you have supplied the Goods and Services to our reasonable satisfaction, you may invoice us for the applicable price in accordance with the invoicing terms set out in the Invitation to Tender (subject to any qualifications in the Award Letter), and we will pay valid, undisputed invoices within 30 days from receipt.
- 6.4 We may set off any amount owing at any time by you to us (whether under the Contract or otherwise) against the price of the Goods and/or Services payable by us to you.
- 6.5 We will pay interest on any amount properly due at 4 percent per annum above the base lending rate of the Royal Bank of Scotland plc from time to time.
- 6.6 Invoices must be sent to the address specified for that purpose in the Contract Documents (or in the absence of such specification to our registered office). Each invoice must clearly identify the purchase order. If the purchase order is not clearly identifiable on the invoice the invoice may be returned to you without payment.
- 6.7 If there is more than one delivery of Goods under a purchase order, unless otherwise specified in the Contract Documents you must send a separate invoice for each delivery, and each invoice must identify the items to which that invoice relates. The last invoice in respect of a purchase order must be clearly marked to show that it is the last.
- 6.8 If any Value Added Tax is to be paid, you will show this separately within each invoice, which invoice shall be a valid VAT invoice.
- 6.9 You will maintain and you will ensure that your sub-contractors maintain complete and accurate records of the Goods and Services provided by you to us under the Contract including all payments made by us to you and by you to your sub-contractors for a minimum period of three years from the date of the last payment made by us to you. If we ask, you will give and you will ensure that your sub-contractors give us or our auditors access to and copies of your and your sub-contractors' records.
- 6.10 Unless otherwise specified within the Contract Documents, you shall submit each invoice to us for payment no later than the date occurring 6 months after the last date on which the Goods and Services for which payment is being claimed, are delivered to us (or performed, as appropriate) all in accordance with the Contract. We shall not require to pay any invoice submitted later than this date.

7. Change control

[SDS shall insert either]

- 7.1 [We may order any variation to any part of the Goods and/or Services that for any reason shall in our opinion be desirable. Any such variation may include additions, omissions, alterations, substitutions to the Goods and/or Services, and changes in quality, form, character, kind, timing, method or sequence of the delivery of the Goods and/or performance of the Services. For the avoidance of doubt, we shall not require any variation under this Condition 7.1 other than where it is permitted by Regulation 72 of The Public Contracts (Scotland) Regulations 2015. In particular, no variation shall be required that would alter the overall nature of the Contract, which is [●] .
- 7.2 No variation of the Goods and/or Services as provided for in Condition 7.1 shall be valid unless given or confirmed in the form of an order given by us, except under the conditions we have set out in this Condition 7. All such orders shall be given in writing provided that if for any reason we shall find it necessary to give any such order orally in the first instance you shall comply with such oral order given by us, which must be confirmed in writing by us within 2 working days of the date when we gave you the oral order, failing which the variation made by such oral order shall cease to have effect on the expiry of the said 2 working day period.
- 7.3 Where any such variation of the Goods and/or Services made in accordance with Condition 7.1 and 7.2 has affected or may affect the costs incurred by you in providing the Goods and/or Services, you will notify us in writing of the effect which it has had or may have on the said costs and such notification shall be considered by us, taking all of the facts into account (including such information as may be provided by you in respect of the effect which such variation has had or may have on the costs incurred by you in providing the Goods and/or Services) and we may authorise such alteration to the sums to be paid to you in accordance with the provisions of the Contract as are, in our opinion, appropriate and reasonable in the circumstances. Where the Contract Documents include price rates, nothing in this condition 7.3 shall permit you to increase those rates.]

7.4 In accordance with Regulation 72(1)(a) of The Public Contracts (Scotland) Regulations 2015, the scope and nature of possible variations are as follows: [●]

[or]

7.1 [Any requirement for a Change shall be subject to the Change Control Procedure.]

7A Change of Law

7A.1 You shall neither be relieved of your obligations to provide the Goods and/or perform the Services under the terms of the Contract nor be entitled to an increase in the price as the result of:

7A.1.1 a General Change in Law; or

7A.1.2 a Specific Change in Law where the effect of that Specific Change in Law on the Services is known at the date of this Contract whether by publication of a Bill, as part of a Government Departmental Consultation paper, a draft Statutory Instrument, a proposal in the Official Journal of the European Union or otherwise.

7A.2 If a Specific Change in Law occurs or will occur during the term of the Contract (as set out in the Contract Documents) (other than those referred to in Condition 7A.1.2), you shall notify us of the likely effects of that change, including:

7A.2.1 whether any change is required to the Goods and/or Services, the price, or the Contract; and

7A.2.2 whether any relief from compliance with your obligations is required.

7A.3 As soon as practicable after any notification in accordance with Condition 7A.2 we shall discuss with you and agree the matters referred to in that Condition and any ways in which you can mitigate the effect of the Specific Change of Law, including:

7A.3.1 providing evidence that you have minimised any increase in costs or maximised any reduction in costs, including in respect of the costs of subcontractors;

7A.3.2 demonstrating that a foreseeable Specific Change in Law had been taken into account before it occurred;

7A.3.3 giving evidence as to how the Specific Change in Law has affected the cost of providing the Goods and/or Services; and

7A.3.4 demonstrating that any expenditure that has been avoided has been taken into account in amending the price.

7A.4 Any increase in the price or relief from your obligations agreed pursuant to this Condition 7A shall be implemented in accordance with Condition 7.

8. Continuous Improvement

8.1

8.2 You shall have an ongoing obligation throughout the period of the Contract to identify new or potential improvements to the Goods and Services. As part of this obligation you shall identify and report to your designated relationship manager at SDS [quarterly] in the first year of the Contract and once every [six] months for the remainder of the period of the Contract on:-

8.2.1 the emergence of new and evolving relevant technologies which could improve the Goods and the Services;

8.2.2 new or potential improvements to the Goods and Services including the [quality, responsiveness, procedures, benchmarking methods, performance mechanisms and customer support services] in relation to the Goods and Services;

8.2.3 new or potential improvements to the interfaces or integration of the Goods and Services with other services provided by third parties for us which might result in efficiency or productivity gains or in reduction of operational risk;

8.2.4 changes in ways of working that would enable the Goods and the Services to be delivered at lower costs and/or bring greater benefits to us; and

8.2.5 any proposal of which you ought reasonably to be aware, to reduce available support services to owners/users of any of the Goods and/or Services, or to replace or render obsolete any of the Goods and/or Services.

8.3 Any potential Changes highlighted as a result of your reporting in accordance with Condition 8.2 shall be addressed using the Change Control Procedure.

9. Benchmarking

9.1 The parties shall agree to the provisions of Appendix [1][2] (Benchmarking).

10. Intellectual Property

10.1 You hereby grant us a perpetual, irrevocable, worldwide, royalty free, non-exclusive licence (with the right to grant sub-licences) to use the Contractor Background IP for the purpose of using and receiving the Goods, Services and Foreground IP.

- 10.2 By signing any of the Contract Documents (including the confirmation of acceptance of these terms and conditions as part of your response to our invitation to tender) you hereby assign to us all right, title and interest in the Foreground IP with effect from their creation.
- 10.3 You will, if we ask and at no additional charge to us, sign any document and do anything that we require to transfer ownership of the Foreground IP to us.
- 10.4 You may make a written request to us to use the Foreground IP. We will respond in writing within 30 days, and if we agree to your request, you will be granted a non-exclusive, worldwide, personal, non-sublicensable, royalty free licence of the Foreground IP from the date of our agreement. We may amend or withdraw this licence at our discretion.
- 10.5 You warrant to us that neither the Contractor Background IP, nor the Foreground IP, nor any use of any of them will infringe the Intellectual Property Rights of any third party.
- 10.6 Unless the Contract Documents state that you can use the SDS Background IP, you shall not be permitted to use it for any purpose. If the Contract Documents state that you can use the SDS Background IP, your use shall be solely on the basis that we are granting to you a revocable, non-exclusive licence to use the SDS Background IP on such terms (if any) set out in the Contract Document, and for the purposes and extent only, required by you to provide the Goods and perform the Services. You shall not permit any sub-contractors to use the SDS Background IP without our prior written consent.

11. Corrupt Gifts and Payments

- 11.1 You must not do anything that gives or offers any kind of inducement or reward to any of our employees or contractors in relation to the Contract including, offering any kind of corporate hospitality. Doing so may be a criminal offence.
- 11.2 Without prejudice to Condition 11.1 above, you will and will procure that all your Personnel, sub-contractors, agents, directors, and representatives will:-
- 11.2.1 comply with all Rules and Regulations relating to anti-bribery and anti-corruption including the Bribery Act 2010; and
- 11.2.2 not engage in any practice, activity or conduct which is an offence under the Bribery Act 2010 or which would constitute such an offence if such practice, activity or conduct had been carried out in the UK.
- 11.3 Breach of this Condition 11 shall be deemed a material breach which is not capable of being remedied.
- 11.4 In the event that we terminate this Contract due to your breach of this Condition 11, we may also terminate any other contract we have with you, immediately and without incurring any liability.

12. Equal Opportunities

- 12.1 You must ensure that in providing the Goods and Services no person unlawfully receives less favourable treatment on the grounds of any of the protected characteristics specified in Section 4 of the Equality Act 2010 or is unlawfully discriminated against or disadvantaged by any provision, criterion or practice which you apply which cannot be shown to be objectively justified. You will also make sure that anyone acting on your behalf and your employees and sub-contractors involved in the Contract do not do so either, and that those involved in the management or operation of the Contract have at all times received appropriate training on equal opportunities legislation and associated good practice.
- 12.2 You must carry out appropriate monitoring of your equal opportunities policies and employment practices and provide us with evidence of this, if we ask.
- 12.3 You will take all reasonable steps to ensure that all Goods and Services supplied under this Contract are produced and/or performed in accordance with all employment Rules and Regulations, and all International Labour Organisation conventions that have been ratified by the country of their origin, in particular (but without limitation) in relation to working conditions and the use of child labour.
- 12.4 Should part or all of the Services be performed at your premises, you will ensure that your premises comply fully with the requirements of the Equality Act 2010.

13. Termination

- 13.1 We may tell you if we think you have breached any of your obligations or warranties under this Contract. If such a breach of contract is capable of remedy, we will give you an opportunity to remedy it to our satisfaction within 20 days.
- 13.2 If the breach cannot be remedied or if you fail to do so within the 20 days, we may terminate the Contract in whole or in part, at any time by written notice.
- 13.3 If you believe that we have failed to pay a valid, undisputed invoice for sums properly due under the Contract, you should notify us in writing. We will have 30 days from receiving such notification to assess your claim and make payment if appropriate. If we have not paid your valid, undisputed invoice for sums properly due within 30 days of when we receive your written notification asking us to do so, you may terminate the Contract by written notice to us.
- 13.4 If any court proceeding is raised against you, or (where applicable) you make any resolution, in respect of: bankruptcy, sequestration, administration, winding up, insolvency, dissolution or the composition or arrangement with or for the benefit of creditors, or any arrangement similar to any of the above, you must notify us in writing immediately.
- 13.5 On the occurrence of any of the events described in Condition 13.4, or if we believe that you are unable to pay, or if you cease to pay, your debts as they fall due, or where you are an individual, if you shall die or be adjudged incapable of managing your affairs within the meaning of applicable legislation, we may terminate the Contract, in whole or in part, at any time by written notice.
- 13.6 The term of the Contract shall be the term set out in the Contract Documents but, in addition to our rights of termination under Conditions 13.2, 13.5 and 13.7, we may terminate the Contract, in whole or in part, at any time by giving you at least 30 days' notice in writing.
- 13.7 We may terminate the Contract with immediate effect at any time by written notice if:
- 13.7.1 we reasonably consider that the Contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9) of The Public Contracts (Scotland) Regulations 2015;
- 13.7.2 you fail to comply in the performance of the Contract with legal obligations in the fields of environmental, social and employment law;
- 13.7.3 any other agreement between us for goods and/or services which are similar to the Goods and/or Services supplied under this Contract is terminated prior to the expiry of its term by either party for any reason;

- 13.7.4 we have reasonable cause to believe that at the time of contract award, you were in one of the situations referred to in regulation 58(1) of The Public Contracts (Scotland) Regulations 2015, including as a result of the application of regulation 58(2) of those regulations, and should therefore have been excluded from the procurement procedure; or
- 13.7.5 we have reasonable cause to believe that you have committed an act or engaged in an activity listed in regulation 58(8) of The Public Contracts (Scotland) Regulations 2015, as read with regulation 58 paragraphs (13) – (17), in which case we shall also consider and apply any relevant guidelines or policy notes which may be issued by the Scottish Government from time to time (which shall include, but not be limited to, any guidelines or policy notes relating to blacklisting practices); or
- 13.7.6 we have reasonable cause to believe that the Contract should not have been awarded to you in view of a serious infringement of the obligations under the Treaties and the Directive 2014/24/EU that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of the Treaty on the Functioning of the European Union.

14. Consequences of Termination

- 14.1 On termination or expiry of the Contract you will provide us with a report on the work you have carried out under the Contract. We will pay you on a pro rata basis for work that you have completed in accordance with the Contract unless we have terminated the Contract (in part or in whole) under Conditions 13.2, 13.5 or 13.7 above, and we will have no further loss or liability to you.
- 14.2 On termination or expiry of the Contract you will stop using and, at our option, deliver to us or destroy any confidential information of ours which you hold whether in paper or electronic form.
- 14.3 On termination or expiry of the Contract (in part or in whole) you will assist us with any handover to another supplier and/or us if we so request (acting reasonably) and at no extra charge to us.
- 14.4 If we terminate the Contract (in part or in whole) under Conditions 13.2, 13.5 or 13.7 or if you fail to provide the Goods or Services to our reasonable satisfaction, we may instruct somebody else to complete the Contract.
- 14.5 If we do instruct somebody else to complete the Contract, we will not pay you any money until the Contract has been completed. We will be entitled to deduct sums that we have had to pay to somebody else to complete the Contract from the money we are due to pay to you under the Contract or otherwise. If we pay somebody else more to complete the Contract than we would have paid to you under the Contract, we will not pay you anything further and you will pay us the difference on demand.
- 14.6 Any provisions which expressly or by implication are intended to survive termination of this Contract will continue in force beyond termination or expiry.

15. Loss and Insurance

- 15.1 You will pay to us on demand the amount of any Losses which we incur as a result of your negligence, any breach by you of the Contract, any infringement of a third party's Intellectual Property Rights, or any damage to property or injury or death caused by you in the supply of the Goods and/or Services.
- 15.2 You will have in place at all times during the term of the Contract and for a period of 5 years after the end of the Contract, insurance with a reputable insurance company. Liability for this Contract is capped at £1m per claim, and at a cumulative total of £5m. The cap on liability will not apply in the event of personal injury, death, or your breach of Conditions 10.5 or 16.7. Such insurance must include cover in respect of any financial loss arising from any advice given or omitted to be given by you. You will show us evidence of such insurance when we request it.
- 15.3 If you are an individual you will, if we ask, provide us with evidence of your self-employed status. We are entitled to assume that you are self-employed, and you will make sure that we do not have to bear the cost of paying the Her Majesty's Revenue and Customs, Revenue Scotland or any other Government Department any tax, national insurance or similar payments on the basis that you are not self-employed.

16. Confidential Information, Freedom of Information, Data Protection and Data Security

Confidential Information

- 16.1 Subject to any information specifically stated to be confidential information by us, the Contract and the Contract Documents will not be treated as confidential information and may be disclosed without restriction.
- 16.2 Unless we agree otherwise, all information which you obtain from us or which becomes known to you in connection with the Contract must be kept secret and only used by you to perform your obligations under the Contract. This does not apply to information which is already known to the public.
- 16.3 We do not expect that you will have to disclose your confidential information to us, however if there is specific information which you consider to be confidential, please notify us in writing and mark it as confidential. Subject to Conditions 16.4, 16.5 and 16.6, we will not use or disclose such information that we accept (acting reasonably) is confidential. This does not apply to information which is already known to the public.
- 16.4 Notwithstanding any other provision of the Contract, we may disclose all information submitted to us to our auditors, the Scottish Government, any other public sector body, or any agency acting on behalf of any of these organisations. Such disclosure shall not be a breach of the Contract. The purposes of such disclosure may include the prevention or detection of crime (including fraud), and any statutory purpose.
- 16.5 We may wish to disclose your confidential information to third parties as part of a competitive tender process for the future provision of all or part of the Goods and/or Services covered by the Contract. You hereby acknowledge and agree that we are entitled to disclose such information provided that such third parties sign up to confidentiality obligations no less onerous than we are subject to under this Condition 16.

Freedom of Information

- 16.6 You acknowledge and agree that we may disclose information held by us in compliance with the Freedom of Information (Scotland) Act 2002 (the "FOI Act") or any other legislation or as otherwise required by law. Such information may include information in relation to your response to our invitation to tender or the Contract. Information held by us may only be withheld as a result of the exemptions in the FOI Act. Information held cannot automatically be classified as "confidential" or "commercial in confidence" to enable it to be protected from disclosure, regardless of the basis on which it was provided.

Data Protection

- 16.7 You will comply with the provisions of the Data Protection Act 1998 (the "DP Act") in connection with the Contract. In addition, where you are processing personal data for us as a data processor (as defined in the DP Act), you will comply with and act only on our instructions and ensure that there are appropriate technical and organisational measures in place to ensure the security of the personal data in accordance with the Seventh Data Protection Principle as set out in the DP Act. You will not transfer any personal data you obtain from us or process under this Contract to any country or territory outside the European Economic Area unless we consent in writing. If you misplace or lose any personal data and/or commit a breach of this Condition 16.7 that will be deemed to be a breach that cannot be remedied for the purposes of Condition 13.2.

Data Security

- 16.8 You will comply with our procedures and policies for the vetting of all Personnel whose role may involve the handling of information of a sensitive or confidential nature or the handling of information which is subject to any relevant security measures. You confirm that all Personnel employed or engaged by you at the start of the Contract were vetted and recruited on a basis that is equivalent to and no less strict than those procedures and policies.
- 16.9 You will not delete or remove any proprietary notices contained within or relating to our data.
- 16.10 You will ensure that any system on which you hold any of our data is a secure system that complies with our security policy. To the extent that our data is held and/or processed by you, you shall supply that data to us as requested by us and in the format specified by us. If we ask, you will perform secure back-ups of our data and shall ensure that up-to-date back-ups are stored securely off-site. You will ensure that such back-ups are available to us at all times and are delivered to us on request.
- 16.11 You will preserve the integrity of our data and prevent the corruption or loss of our data. If at any time you suspect or have reason to believe that our data has or may become corrupted, lost or degraded in any way, then you shall notify us immediately.
- 16.12 If our data is corrupted, lost or degraded as a result of any act or omission by you or any Personnel, (i) we may require you, at your expense, to restore or procure the restoration of our data and you shall do so as soon as practicable; and/or (ii) we may restore or procure the restoration of our data ourselves, and you will repay us any reasonable expenses incurred in doing so.
- 16.13 You will on an ongoing basis use the latest versions of anti-virus software available from an industry accepted anti-virus software vendor to check for and delete malicious software from your systems. If malicious software is found on any systems, you will co-operate with us to reduce the effect of the malicious software and assist us to mitigate any losses and to restore our data and systems and the Services to their desired operating efficiency. If the malicious software originates from your or your Personnel's systems or operated on your or your Personnel's systems as a result of your failure to comply with the terms of this Condition 16.13, then you will repay us all costs incurred by us in taking the aforementioned action.

17. Employment Liabilities during the Contract

- 17.1 You shall indemnify us and keep us indemnified on demand from and against any Losses arising out of or in connection with (i) the employment or engagement or the claimed employment or engagement and (ii) the termination of employment or engagement or the claimed termination of the employment or engagement, by you or any of your sub-contractors of any Personnel. This includes any Losses suffered by us in connection with or arising out of any claim made at any time by any Personnel that he/she is, or was during the term of the Contract, employed by us or is, or was during the term of the Contract, a Worker (as defined by section 230(3) of the Employment Rights Act 1996) engaged by us and/or any claim arising from or connected to such actual or alleged employment status or Worker status. The indemnity in this Condition 17 shall not apply to any claim by any Personnel to transfer to the employment of Skills Development Scotland or any New Supplier as contemplated by Condition 18.

18. TUPE

- 18.1 If, on the whole or partial cessation or reduction of the Services or the expiry or termination of the Contract, any contract of employment or engagement of any current or former Personnel has effect, or is claimed by such Personnel to have effect, as if originally made between (i) Skills Development Scotland and such person; and/or (ii) any New Supplier and such person by operation of TUPE or otherwise, then you shall pay us and any New Supplier the amount of Losses (whenever they are incurred, and whether or not such Losses are erroneous or unsuccessful) arising out of:
- 18.1.1 the employment or engagement; and/or
 - 18.1.2 the claimed employment or engagement; and/or
 - 18.1.3 the termination of the employment or engagement; and/or
 - 18.1.4 the claimed termination of employment or engagement
- of any such Personnel prior to the date of a relevant transfer for the purposes of TUPE.
- 18.2 If we ask, you shall promptly enter into an appropriate agreement with any New Supplier on the same terms as those in Condition 18.1 in order to give effect to Condition 18.1 and you shall pay us the amount of any Losses which arise from a failure to do so, including any Losses which may arise under any agreement with or undertaking we give to any New Supplier which would give the New Supplier the benefit of Condition 18.1.

19. Transfer Assistance

- 19.1 During any Transfer Assistance Period, you shall not and you shall make sure that your sub-contractors do not, in each case without obtaining our written agreement in advance:-
- 19.1.1 materially change the rate of remuneration, hours to be worked or any other terms and conditions of employment or engagement of any Personnel;
 - 19.1.2 replace or re-deploy any Personnel; or
 - 19.1.3 materially increase the number of Personnel.
- 19.2 During any Transfer Assistance Period, you shall and you shall make sure that your sub-contractors shall: -
- 19.2.1 allow us (or such other person as we may specify) access to the Personnel for training or for any other purpose that we specify, within 7 days of our request for such access; and
 - 19.2.2 do all such things as we may reasonably require to facilitate such access as intended under Condition 19.2.1 above; and

- 19.2.3 provide within 7 days of any request by us, details of the terms and conditions of employment of the Personnel and any other information which we may reasonably specify relating to the employment or engagement of the Personnel.
- 19.3 You shall and you shall ensure that your subcontractors shall, employ each member of Personnel on terms which permit disclosure of the information disclosable under Condition 19.2.3: -
- (i) to us; and/or
 - (ii) by us to any New Supplier; and/or
 - (iii) by us in any future invitation to tender in respect of the Services;
- in each case without having to obtain any further consent.

20. Business Continuity

- 20.1 You will ensure that you and your sub-contractors have in place, maintain and, if required, implement plans and procedures to ensure business continuity, and no disruption to the provision of the Goods or Services, both in relation to general day-to-day disruptions and disaster recovery.

21. Blacklisting

- 21.1 You must not commit any breach of the Employment Relations 1999 Act (Blacklists) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, or commit any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities.
- 21.2 Breach of this Condition 21 shall be deemed a material breach which is not capable of being remedied.
- 21.3 In the event that we terminate this Contract due to your breach of this Condition 21, we may also terminate any other contract we have with you, immediately and without incurring any liability.

22. General

- 22.1 No failure or delay by you or us to exercise any right or remedy provided under the Contract or by law shall constitute a waiver of that, or of any other right or remedy.
- 22.2 Unless otherwise provided in the Contract, no variation of the Contract will be effective unless it is in writing and signed by both your and our authorised representatives.
- 22.3 If any provision of the Contract is found by any court or other authority of competent jurisdiction to be invalid, illegal or unenforceable, that provision or part-provision shall, to the extent required, be deemed not to form part of the Contract and you and we shall each use reasonable endeavours in good faith to modify the Contract so that the intent of the Contract can be legally carried out.
- 22.4 Any rights and remedies provided under the Contract are in addition to, and not instead of, any other rights or remedies provided under the Contract or provided by law.

23. Publicity

- 23.1 You must agree with us in writing and in advance, any press release or public intimation about the Contract and/or the Goods and/or Services that you make. We may make reference publicly to the Contract and to your provision of Goods and/or Services.
- 23.2 SDS shall be entitled to publicise details of the Contract.
- 23.3 You (including your, sub-contractors, agents, directors, Personnel and representatives) shall not do anything which may damage the reputation of SDS or any Scottish Minister, or bring SDS, the Scottish Ministers or any Scottish Minister into disrepute. Without limitation, in the event that any of you, your directors, Personnel, sub-contractors and/or representatives is charged with any criminal offence which offence we consider in our entire discretion to be a serious criminal offence, such event shall constitute an irredeemable material breach of this Condition 23.3.
- 23.4 In the event that we terminate this Contract due to your breach of Condition 23.3, we may also terminate any other contract we have with you, immediately and without incurring any liability.

24. Notices

- 24.1 Any notice given under the Contract shall be sufficiently served if delivered by hand or sent by first class recorded delivery post. Notices shall be sent to the addresses shown in the Contract Documents. Either party can change its address for notices by telling the other in writing.
- 24.2 If sent to the correct address, notices shall be deemed given two business days after the date of posting. A business day is a day when our registered office is open for business.

25. Assignment and Sub-contracting

- 25.1 You may sub-contract to those sub-contractors named in the Contract Documents but you are not allowed to sub-contract to anyone else or to transfer or assign the Contract or any of your rights or obligations under the Contract or any part of it without our prior written consent. We will not unreasonably withhold such consent. We may assign or novate the Contract in whole or in part.
- 25.2 If you sub-contract any work under the Contract, you will still be responsible to us for carrying out the Contract. We can take action against you if your subcontractor does not do what it is meant to do.
- 25.3 Where you sub-contract any work under the Contract, that sub-contract must:
- 25.3.1 contain a clause requiring you to pay your sub-contractor within 30 days of you receiving a valid invoice from your sub-contractor;
 - 25.3.2 permit you to terminate that sub-contract if the relevant sub-contractor fails to comply in the performance of its contract with legal obligations in the fields of environmental, social or employment law or if any of the termination events specified in Condition 13.7 occur; and

25.3.3 require that the sub-contractor includes a provision having the same effect as Condition 25.3.2 in any sub-contract which it awards.

25.4 You shall promptly make available to us a copy of any sub-contract we request.

26. Governing Law

26.1 The Contract shall be governed by and construed in accordance with Scots law and you and we agree that any court action relating to the Contract will take place exclusively in the courts in Scotland.

27. Definitions

27.1 In these terms and conditions certain words and phrases have defined meanings as set out below:

"Change"	If this term is used, means any variation to any part of the Goods and/or Services agreed in accordance with the Change Control Procedure;
"Change Control Procedure"	If this term is used, means the procedure for changing the Contract, as set out in Appendix 1. If it is not used, the procedure set out in Condition 7 shall apply;
"Contract"	means the contract for the supply of the Goods and/or Services made up of the Contract Documents and concluded between you and us;
"Contract Documents"	means any contract award letter issued by us in relation to the Goods or Services, these terms and conditions, our invitation to tender referred to in the contract award letter, your response to our invitation to tender and any clarifications to our invitation to tender and/or your response to our invitation to tender that are agreed in writing between you and us and referenced in the contract award letter;
"Contractor Background IP"	means all Intellectual Property Rights owned by and/or licensed to you and in existence prior to you first providing the Goods or Services (as applicable) to us;
"Foreground IP"	means all Intellectual Property Rights arising as a result of your provision of the Goods or Services (as applicable) to us;
"General Change in Law"	means a change in law which comes into effect after the commencement of the Contract, where the change is of a general legislative nature (including, for the avoidance of doubt, a change arising as a result of the UK leaving the EU or otherwise, or Scotland leaving the UK or otherwise) or which would affect or relate to a comparable supply of goods or services of the same or a similar nature to the supply of the Goods and/or Services;
"Good Industry Practice"	means standards, practices, methods and procedures conforming to law and applicable regulation and the degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person or body engaged in a similar type of undertaking under the same or similar circumstances;
"Goods"	means the goods detailed in the Contract Documents which are to be supplied to us under the Contract;
"Intellectual Property Rights"	means any patent, trade mark (registered or unregistered), registered design, unregistered design right, copyright, database right, domain name, invention, know how or other similar right or any application for any of the foregoing;
"Losses"	means all costs, liabilities, losses, damages, claims, demands or expenses (including all legal and other professional fees and expenses) on a full indemnity basis;
"New Supplier"	means any person, firm, company or other entity which may on or following the whole or partial cessation or reduction of the Services or the expiry or termination of the Contract, be engaged by us to provide all or any part of the Services or all or any part of services which formerly comprised the Services;
"Personnel"	means any individual who is employed or engaged by you or a sub-contractor to provide all or part of the Goods or Services to us, including any key personnel, permanent or temporary employee, officer, agency worker, temporary worker, sub-contractor or any personnel of a sub-contractor;
"Premises"	means the premises as set out in the Contract Documents and any other buildings or premises notified by us to you in writing from time to time;
"Rules and Regulations"	means all applicable legislation and regulations and standards and requirements set down under such legislation and regulations;
"SDS Background IP"	means all Intellectual Property Rights (if any) owned by and/or licensed to us and identified as such in the Contract Documents, which are required by you in order to provide the Goods and/or perform any of the Services;
"Skills Development Scotland", "SDS", "Buyer", "we", "us" or "our"	means The Skills Development Scotland Co. Limited, a company incorporated in Scotland (Registered Number SC2026589) and having its registered office at Floor 1, Monteith House, 11 George Square, Glasgow G2 1DY;
"Services"	means the services detailed in the Contract Documents which are to be supplied to us under the Contract;
"Specific Change in Law"	means a change in law which comes into effect after the commencement of the Contract that relates specifically to our business, and which would not affect a comparable supply of goods or services of the same or a similar nature to the supply of the Goods and/or Services;
"sub-contract"	means a contract between two or more suppliers or service providers, at any stage of remoteness from us in a sub-contracting chain, made wholly or substantially for the purpose of performing (or contributing to the performance of) the whole or any part of this Contract;

"Supplier" or "you"	means you, the party to whom the relevant contract award letter from Skills Development Scotland is addressed;
"Transfer Assistance Period"	means the period beginning on the earliest of: - (i) the date that you or any of your sub-contractors become aware of the whole or partial cessation or reduction of the Services or the expiry or termination of the Contract; or (ii) the date of us informing you of a re-tender in respect of the Services or any part of the Services; or (iii) the date we give or receive notice of the whole or partial cessation or reduction of the Services or the expiry or termination of the Contract; or (iv) the date 6 months prior to expiry of the Contract; and expiring on the date of the whole or partial cessation or reduction of the Services or the expiry or termination of the Contract;
"Treaties"	has the meaning given in the European Communities Act 1972;
"TUPE"	means The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 and/or the Acquired Rights Directive 77/187, as the context dictates, both as amended, re-enacted or extended from time to time.

[Appendix [1]]

[Change Control Procedure]

1. General Principles

- 1.1 Where we see a need to change the Contract, we may at any time request, and you may at any time recommend, such Change only in accordance with the Change Control Procedure set out in paragraph 2 of this Appendix 1.
- 1.2 Until such time as a Change is made in accordance with the Change Control Procedure, you and we shall, unless otherwise agreed in writing, continue to perform the Contract in compliance with its terms before such Change.
- 1.3 Any discussions which may take place between you and us in connection with a request or recommendation before the authorisation of a resultant Change shall not affect your or our rights.
- 1.4 Any work undertaken by you and your personnel and representatives which has not been authorised in advance by a Change, and which has not been otherwise agreed in accordance with the provisions of this Appendix 1 shall be undertaken entirely at your expense and liability.
- 1.5 Where the Contract Documents include pricing (including rates), nothing in this Change Control Procedure shall permit you to increase that pricing.
- 1.6 For the avoidance of doubt, we shall not require any Change other than where it is permitted by Regulation 72 of The Public Contracts (Scotland) Regulations 2015. In particular, no Change shall be required that would alter the overall nature of the Contract, which is [●] .
- 1.7 In accordance with Regulation 72(1)(a) of The Public Contracts (Scotland) Regulations 2015, the scope and nature of possible Changes are as follows: [●]

2. Procedure

- 2.1 Discussion between you and us concerning a Change shall result in any one of the following:-
- (a) no further action being taken; or
 - (b) a request to change the Contract by us; or
 - (c) a recommendation to change the Contract by you.
- 2.2 Where a written request for an amendment is received from us you shall, unless otherwise agreed, submit two copies of a Change Control Note signed by you to us within three weeks of the date of the request.
- 2.3 A recommendation to amend the Contract by you shall be submitted directly to us in the form of two copies of a Change Control Note signed by you at the time of such recommendation. We shall give our response to the Change Control Note within three weeks.
- 2.4 Each Change Control Note shall contain:-
- 2.4.1 the title of the Change;
 - 2.4.2 the originator and date of the request or recommendation for the Change;
 - 2.4.3 the reason for the Change;
 - 2.4.4 the details of the Change, including any specifications;
 - 2.4.5 the price, if any, of the Change;
 - 2.4.6 a timetable for implementation, together with any proposals for acceptance of the Change;
 - 2.4.7 a schedule of payments if appropriate;
 - 2.4.8 details of the likely impact, if any, of the Change on other aspects of the Contract including:
 - (i) the timetable for the provision of the Change;
 - (ii) the personnel to be provided;
 - (iii) the charges;
 - (iv) the documentation to be provided;
 - (v) the training to be provided;
 - (vi) working arrangements;
 - (vii) other contractual issues;
 - 2.4.9 the date of expiry of validity of the Change Control Note; and
 - 2.4.10 provision for signature by you and us.
- 2.5 For each Change Control Note submitted by you we shall, within the period of the validity of the Change Control Note:
- 2.5.1 allocate a sequential number to the Change Control Note; and
 - 2.5.2 evaluate the Change Control Note and, as appropriate:

- (i) request further information;
- (ii) accept the Change Control Note by arranging for two copies of the Change Control Note to be signed by or on behalf of us and return one of the copies to you; or
- (iii) notify you of the rejection of the Change Control Note.

A Change Control Note signed by you and by us shall constitute an amendment to the Contract. You shall not unreasonably refuse or condition any request for a Change submitted by us.

[Appendix [2]]

[Benchmarking]

1. Interpretation

The additional definitions in this paragraph apply in this appendix.

Authorised Representative:	means for you [insert name of role for supplier], and for SDS [insert name of role for SDS];
Benchmark Review:	shall have the meaning in paragraph 2.
Benchmarked Services:	the Services taken as a whole.
Benchmarker:	the independent third party appointed by us following discussions with you under paragraph 4 of this Appendix [2].
Benchmarking Report:	the report produced by the Benchmarker following a Benchmark Review.
Charges	the charges which shall become due and payable by you to us in respect of the Services in accordance with the provisions of the Contract, as such charges are set out in the Contract Documents.
Comparison Sample:	a sample of organisations providing Equivalent Services identified in accordance with paragraph 5.1.4 of this Appendix [2].
Senior Representative:	means for you [insert name of role for supplier], and for SDS [insert name of role for SDS];
Equivalent Services:	services that are identical, or similar in all material respects, to the Services (including in terms of scope, specification, volume and quality of performance) that are generally available within the UK and are supplied to a customer similar in size and nature to SDS over a similar period.
Median Price:	in relation to the Equivalent Services provided by a Comparison Sample, the median price of the relevant services over the previous 12-month period. In the event that there is an even number of organisations in the Comparison Sample then the Median Price will be the arithmetic mean of the middle two prices.
Final Representative:	means for you [insert name of role for supplier], and for SDS [insert name of role for SDS];

2. Benchmark Review

- 2.1. We may, by written notice, require a Benchmark Review of the Services in accordance with the provisions of this Appendix [2]. The first Benchmark Review may not take place until at least [18] months after the date on which the Services commence under the Contract and each subsequent Benchmark Review must be at least [12] months after the previous one.
- 2.2. Subject to paragraph 2.4 if any Benchmark Review determines that the Charges do not represent Good Value (as defined in paragraph 3.2), then you shall, in accordance with Condition 7 (Change Control) and within [two calendar months] of completion of the Benchmark Review, make a proposal for a change to the Services, with Charges representing Good Value in accordance with the recommendations of the Benchmarker under paragraph 6.1.3, under which modifications may be made to the Services.
- 2.3. On receipt of the proposal from you under paragraph 2.2 we shall have the option to:
 - 2.3.1. accept the new proposal in which case the parties shall record the change in accordance with the Change Control Procedure;
 - 2.3.2. reject the proposal and elect to continue to receive the Services on the existing basis; or
 - 2.3.3. reject the proposal and terminate the Contract on [one month's] notice in writing to you without cost other than the Charges up to the date of such termination.
- 2.4. If you reasonably believe the Benchmarker has not complied with the provisions of this paragraph 2 in any material respects, or that the Benchmarker has made a manifest error in determining the results of the Benchmark Review, you may dispute the Benchmark Report and the matter shall be dealt with in accordance with the following procedure:-
 - 2.4.1. either you or we shall give to the other written notice of the benchmark dispute (Dispute) setting out its nature and full particulars (Dispute Notice), together with relevant supporting documents. On service of the Dispute Notice, your and our Authorised Representatives shall attempt in good faith to resolve the Dispute;
 - 2.4.2. if the Authorised Representatives are for any reason unable to resolve the Dispute within [30] days of service of the Dispute Notice, the Dispute shall be referred to the Senior Representatives who shall attempt in good faith to resolve it; and
 - 2.4.3. if the Senior Representatives are for any reason unable to resolve the Dispute within [30] days of it being referred to them, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties, the mediator shall be nominated by [CEDR Solve]. To initiate the mediation, a party must serve notice in writing (ADR notice) to the other party to the Dispute, requesting a mediation. A copy of the ADR notice should be sent to CEDR Solve. The mediation will start not later than 21 days after the date of the ADR notice.
- 2.5. The commencement of mediation shall not prevent you or us commencing or continuing court proceedings in relation to the Dispute.

3. Purpose and Scope of Benchmark Review

- 3.1. The purpose of the Benchmark Review shall be to establish whether the Services as a whole are Good Value.
- 3.2. The Benchmarked Services as a whole shall be Good Value if the Charges attributable to the Services are, [having regard to the KPIs], less than or equal to [10]% more than the Median Price for Equivalent Services provided by a Comparison Sample.

4. Appointment of Benchmarker

- 4.1. Each Benchmark Review shall be performed by an independent third party appointed by agreement between you and us. If you and we cannot agree on the independent third party within [NUMBER] days of receipt by you of our written request, then the Benchmarker shall be [INSERT CONSULTANTS RELEVANT TO THE SERVICE AREA].
- 4.2. We have the right at any time to require the Benchmarker to enter into an appropriate and reasonable confidentiality undertaking directly with us.
- 4.3. You and we shall each bear our own respective costs relating to a Benchmark Review, except that the costs and expenses of the Benchmarker shall be shared equally between you and us.
- 4.4. The Benchmarker shall conduct the Benchmark Review by applying the following general principles and criteria:
 - 4.4.1. benchmarking shall be carried out in an independent and objective manner;
 - 4.4.2. the Benchmarker shall be jointly instructed by you and us;
 - 4.4.3. benchmarking shall be truly comparative in respect of the technology [and,] services[,] and KPIs];
 - 4.4.4. benchmarking shall be structured and undertaken in a way that causes the minimum disruption possible; and
 - 4.4.5. immediately following selection of the Benchmarker, you, we and the Benchmarker shall agree the general principles and method of benchmarking.
- 4.5. You shall not be deemed to be in breach for any failure to perform any obligation under the Contract [(nor will you be liable for Service Credits)] where such failure results from any disruption to your performance as a result of disruption caused by the Benchmarker.

5. Benchmarking Process

- 5.1. Our instructions to the Benchmarker shall require the Benchmarker to produce, and to send to you and us for approval, a draft plan for the Benchmark Review within [14] days after the date of appointment of the Benchmarker. The plan shall include:
 - 5.1.1. a proposed timetable for the Benchmark Review (including for delivery of the Benchmarking Report):
 - 5.1.2. a description of the information that the Benchmarker requires you and us to provide:
 - 5.1.3. a description of the benchmarking methodology to be used; and
 - 5.1.4. details of any organisations providing Equivalent Services which we propose, having consulted with you (and including any organisations providing Equivalent Services reasonably proposed by you), are included within the Comparison Sample.
- 5.2. In carrying out the benchmarking analysis, the Benchmarker shall have regard to the following matters when performing a comparative assessment of the Benchmarked Services:
 - 5.2.1. the contractual and business environment under which the Equivalent Services are being provided;
 - 5.2.2. any front-end investment and development costs;
 - 5.2.3. your risk profile, including the financial, performance or liability risk (including any limitation or exclusion or limitation of your liability under the Contract) associated with the provision of the Equivalent Services as a whole; and
 - 5.2.4. any other factors reasonably identified by you which, if not taken into consideration, could unfairly cause your pricing to appear non-competitive.
- 5.3. You and we shall each give notice in writing to the Benchmarker and to each other within [14] days after receiving the draft plan. On receipt of such notice, you or we (as appropriate) shall advise whether you or we (as appropriate) approve the draft plan or not. If giving a notice disapproving the plan, the notice must include suggested amendments to that plan. Neither you nor we may unreasonably withhold approval of the draft plan and any suggested amendments shall be reasonable.
- 5.4. Where you or we suggest amendments to the draft plan under paragraph 5.3, the Benchmarker shall, if it believes the amendments are reasonable, produce an amended draft plan. Paragraph 5.2 shall apply to any amended draft plan. If the Benchmarker believes that the suggested amendments are not reasonable then the Benchmarker shall discuss the amendments with you and us to reach a resolution. If you and we are unable to agree a resolution within [14] days of the matter first being referred to each of you and us by the Benchmarker for discussion, then such matter shall be resolved in accordance with the dispute resolution procedure set out in paragraphs 2.4 and 2.5 above.
- 5.5. Failure by you or us to give notice under paragraph 5.3 shall be treated as approval of the draft plan by that party.
- 5.6. Once the plan is approved by you and us, the Benchmarker shall carry out the Benchmark Review in accordance with it. You and we shall, provide the information described in the plan, together with any additional information reasonably required by the Benchmarker. In the event that you or we are prevented from providing any of the information as a result of confidentiality obligations owed to any other person or organisation, that excepted information does not require to be provided. Requested information that can be disclosed without breaking such a confidentiality obligation shall require to be provided.

- 5.7. The Benchmarker shall share with you and us, in an even-handed manner, all data relating to the Benchmarking and the Benchmarking Report to the extent that it is lawfully able to do so.
- 5.8. In conducting the Benchmark Review, the Benchmarker shall apply correction factors to the information to take account of reasons for difference in accordance with his or her professional judgement. Such normalisation information shall be available for approval by each of you and us before the production of the Benchmarking Report.
- 5.9. The Benchmarker shall perform the Benchmark Review in a fully transparent and open manner, and shall promptly provide us and you with full details of all data and methodologies employed at all stages of the Benchmark Review.

6. Benchmark Report

- 6.1. The Benchmarker shall prepare a Benchmark Report setting out its findings. Those findings shall:
 - 6.1.1. include a finding as to whether or not the Benchmarked Services as a whole are Good Value;
 - 6.1.2. include other findings regarding the quality and competitiveness or otherwise of the Services; and
 - 6.1.3. if the Benchmarked Services as a whole are not Good Value, specify the changes that would be required to the Services, and in particular to the Charges, that would be required to make the Benchmarked Services Good Value.
- 6.2. If the Benchmark Report states that the Services, Charges [or KPIs] (or any part of them) that are benchmarked are not Good Value then paragraph 2.2 shall apply.