

# **NHS Wales Conditions of Contract for the Purchase of Goods**

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## 1. Defined Terms and interpretation

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

1.1.1 “**Affected Party**” means, in the context of Clause 43, the Party whose obligations under the Contract are affected by the Force Majeure Event;

1.1.2 “**Welsh Ministers**” means Welsh Ministers appointed under section 48 of the Government of Wales Act 2006 and Deputy Welsh Ministers appointed under section 50 of that Act;

1.1.3 “**Authority**” means the Beneficiary placing the Order or, if a Third Party Beneficiary places the Order, the Beneficiary to which the Third Party Beneficiary supplies goods and/or services;

1.1.4 “**Beneficiary**” means any or all of:

- a) Welsh Ministers which, for the avoidance of doubt, includes staff of the Welsh Government who are exercising functions on behalf of the Welsh ministers;
- b) GPs;
- c) health service bodies referred to in Section 7 of the National Health Service (Wales) Act 2006;
- d) the Medical Research Council;
- e) any care Trust as defined in section 35 of the National Health Service (Wales) Act 2006;
- f) any body replacing or providing similar or equivalent services to the above;
- g) any statutory successor to any of the above;

1.1.5 and “**Beneficiaries**” shall be construed accordingly;

1.1.6 “**Change of Control**” means any sale or other disposal of any legal, beneficial or equitable interest in any or all of the equity share capital of a corporation (including the control over the exercise of voting rights conferred on that equity share capital or the control over the right to appoint or remove directors) provided that a “Change of Control” shall be deemed not to have occurred if after any such sale or disposal the same entities directly or indirectly exercise the same degree of control over the relevant corporation;

1.1.7 “**Commencement Date**” means the date agreed by the Parties in writing or detailed in the Specification, on which the Contract is to commence;

- 1.1.8 "**Confidential Information**" means information, data and material of any nature which either Party may receive or obtain in connection with the operation of the Contract and:
- (i) which comprises Personal Data (in the case of the Authority or any Beneficiary which relates to any patient or his or her treatment or medical history;
  - (ii) the release of which is likely to prejudice the commercial interests of the Authority or (as the case may be) any Beneficiary or the Contractor respectively; or
  - (iii) which is a trade secret;
- 1.1.9 "**Contract**" means the agreement between the Authority and the Contractor comprising the Order, these terms and conditions and schedules hereto, the Specification, and for the avoidance of doubt all other terms, conditions or warranties other than any terms, conditions or warranties implied by law in favour of the Authority or the Beneficiaries are excluded from the agreement between the Authority and the Contractor unless expressly accepted in writing by the Authority;
- 1.1.10 "**Contractor**" means the person who supplies the Goods to the Authority and any Beneficiary in accordance with the Contract;
- 1.1.11 "**Contract Period**" means (subject to earlier termination in accordance with its terms or by operation of law) the duration of the Contract, starting on the Commencement Date, as set out in the Order and/or the Specification (or if the Order and/or the Specification does not set out such a duration, the period from the date of the Order until the Authority terminates by giving not less than 1 month's notice in writing to the Contractor);
- 1.1.12 "**Contract Price**" means the monies payable by the Authority or any Beneficiaries to the Contractor for the performance by the Contractor of its obligations under the Contract and shall include all royalties, licence fees or similar expenses in respect of the making, use or exercise by the Contractor of any Intellectual Property or Intellectual Property Rights for the purpose of performing the Contract;
- 1.1.13 "**Contract Standard**" means such standard as complies in each and every respect with all relevant provisions of the Contract;
- 1.1.14 "**Costs**" includes costs, charges, outgoings and expenses of every description;
- 1.1.15 "**Electronic Trading System(s)**" means such electronic data interchange system and/or world wide web application and/or other application with such message standards and protocols as the Authority may specify from time to time;
- 1.1.16 "**Equality Impact Assessment**" means a published process for narrowing the inequalities that exist in Wales between people from

different ethnic backgrounds, people with disabilities, men and women (including trans-gendered people), people with different sexual orientations, people in different age groups, people with different religions or beliefs and people from different social and economic groups;

- 1.1.17 **"Force Majeure Event"** means one or more of the following to the extent that it is not attributable to the Contractor or the Contractor's staff: war, civil war (whether declared or undeclared), riot or armed conflict; radioactive, chemical or biological contamination; pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speed; acts of terrorism; explosion; fire; flood; extraordinarily severe weather conditions which are both unforeseen and for which precautions are not customarily taken by prudent business organisations so as to avoid or mitigate the impact thereof; industrial action which affects the supply of the Goods, but which is not confined to the workforce of the Contractor or is site specific; pestilence; the actions of governmental authorities to the extent that such actions are implemented either pursuant to emergency powers or otherwise outside the usual course of governmental business; or Act of God, or other event which is beyond the reasonable control of the Party in question and could not have been avoided or mitigated by the exercise of all reasonable care by that Party and further provided that such event materially affects the ability of the Party seeking to rely upon it to perform its obligations under the Contract;
- 1.1.18 **"Framework Agreement"** means any agreement which defines, in broad terms, the scope and terms and conditions under which contracts for the purchase of goods will be entered into should the need arise;
- 1.1.19 **"GPs"** means medical practitioners providing General Medical Services or Personal Medical Services under the National Health Service (Wales) Act 2006 (whether operating in partnership with others or not);
- 1.1.20 **"Goods"** means all goods, materials or articles that the Contractor is required to supply under the Contract;
- 1.1.21 **"Index"** means the Retail Price Index maintained by the Office of National Statistics or any replacement index;
- 1.1.22 **"Insolvent"** means:
- a) if the Contractor is an individual, that individual or where the Contractor is a partnership, any partner(s) in that firm becomes bankrupt or shall have a receiving order, administration order or interim order made against him, or shall make any composition or scheme of arrangement with or for the benefit of his creditors, or shall make any conveyance or assignment for the benefit of his creditors, or shall purport to do so, or any application shall be made for sequestration of his estate, or a trust deed shall be granted by him for the benefit of his creditors;
  - b) if the Contractor is a company, the passing by the Contractor of a resolution for its winding-up or the making by a court of competent jurisdiction of an order for the winding-up of the Contractor or the dissolution of the Contractor, or if an administrator is appointed, or

documents are filed with the court for the appointment of an administrator or notice of intention to appoint an administrator is given by the Contractor or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986), or the appointment of a receiver over, or the taking possession or sale by an encumbrancer of any of the Contractor's assets, or if the Contractor makes an arrangement with its creditors generally or makes an application to a court of competent jurisdiction for protection from its creditors generally; and

- c) any event in any jurisdiction other than England and Wales which is analogous to any of the above;

1.1.23 **"Intellectual Property"** means any and all patents, trade marks, service marks, domain names, registered designs, utility models, applications for and the right to make applications for any of such rights, inventions, Know-How (as defined below), unregistered trade marks and service marks, trade and business names, including rights in any get-up or trade dress, copyrights, (including rights in computer software and in websites) unregistered design rights and other rights in designs and rights in databases, subsisting anywhere in the world; the right for the maker of a database to prevent extraction or reutilisation or both of the whole or a substantial part of the content of that database, as described in Directive 96/9/EC on the legal protection of databases; rights under licences, consents, orders, statutes or otherwise in respect of any rights of the nature specified in this definition "Intellectual Property"; and rights of the same or similar effect or nature as or to those above in each case in any jurisdiction;

1.1.24 **"Intellectual Property Right"** includes the right to exploit any Intellectual Property or any right which is similar or analogous to any Intellectual Property; any moral right; any licence, right or interest of any kind arising out of or granted or created in respect of any Intellectual Property; any right to bring an action for passing off or any similar or analogous proceeding;

1.1.25 **"In writing"** shall be interpreted to include any document which is recorded in manuscript, typescript, any electronic communication as defined in Section 15 of the Electronic Communications Act 2000 but excluding mobile telephone text messages;

1.1.26 **"Know How"** means all information not publicly known which is used or required to be used in or in connection with the Goods existing in any form (including, but not limited to, that comprised in or derived from engineering, chemical and other data, specifications, formulae, experience, drawings, manuals, component lists, instructions, designs and circuit diagrams, brochures, catalogues and other descriptions) and relating to the design, development, manufacture or production of any products; the operation of any process; the provision of any services; the selection, procurement, construction, installation, maintenance or use of raw materials, plant, machinery or other equipment or processes; the rectification, repair or service or maintenance of products, plant, machinery or other equipment; the supply, storage, assembly or packing

of raw materials, components or partly manufactured or finished products;  
quality control, testing or certification of any person;

- 1.1.27 "**Location**" means the location for the delivery of the Goods as set out in the Contract or as otherwise agreed in writing between the Authority and the Contractor;
- 1.1.28 "**Loss**" includes losses, liabilities, claims, costs, charges and outgoings of every description (including legal expenses), compensation payable under contracts with suppliers and/or customers, loss of normal operating profits, loss of opportunity, loss of goodwill, loss of revenue from related contracts and pure economic loss;
- 1.1.29 "**Order**" means any order placed on the Contractor by an Authority or any Beneficiary for the supply of the Goods whether or not such order is placed pursuant to a Framework Agreement concluded between the Contractor and any Beneficiary or Beneficiaries as the case may be;
- 1.1.30 "**Party**" means any party to the Contract individually and "Parties" refers to all of the parties to the Contract collectively. A Party shall include all permitted assigns of the Party in question. All persons who are not a Party to the Contract are third parties;
- 1.1.31 "**Person**" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association and a reference to a person includes a reference to that person's successors and permitted assigns;
- 1.1.32 "**Personal Data**" means data as defined by the Data Protection Act 1998 which relates to a living individual who can be identified from such data, and/or from such data and other information which is in the possession of, or is likely to come into the possession of the Contractor and includes any expression of opinion about an individual and any indication of the intentions of the Contractor in respect of an individual;
- 1.1.33 "**Product Information**" means information concerning the Goods supplied by the Contractor to the Authority in accordance with Clause 27 for inclusion in the Authority's product catalogue and/or any Beneficiary's product catalogue from time to time;
- 1.1.34 "**Receipt of Order**" means, if personally delivered, at the time of delivery; if sent by facsimile, at the time of transmission; if posted, at the expiration of 48 hours or (in the case of airmail seven days) after the envelope containing the same was delivered into the custody of the postal authorities; and if sent by electronic mail, provided that a telephone call is made to the recipient warning the recipient that an electronic mail message has been sent to him (as evidenced by a contemporaneous note of the Party sending the notice) and a hard copy of such notice is also sent by first class recorded delivery post (airmail if overseas) on the same day as that on which the electronic mail is sent;
- 1.1.35 "**Specification**" means the description of the Goods as referred to, set out in or attached to the Order (or, if no such description is set out in or attached to the Order, as set out in or attached to any documentation



inviting the Contractor to tender for the appointment to provide the Goods, including any documentation issued, or made available, to the Contractor by any Beneficiary);

- 1.1.36 “**Third Party Beneficiary**” means each of the non-NHS bodies set out in the list attached at Schedule 1, as supplied from time to time by the Authority to the Contractor; and
- 1.1.37 “**Year**” means during the Contract Period, any 12 month period commencing on the Commencement Date or an anniversary thereof.
- 1.2 In these terms and conditions, all references to any statute or statutory provision shall be deemed to include references to any statute or statutory provision which amends, extends, consolidates or replaces the same and shall include any orders, regulations codes of practice, instruments or other subordinate legislation made thereunder and any conditions attaching thereto.
- 1.3 Any headings to Clauses, together with the front cover and the index are for convenience only and shall not affect the meaning of these terms and conditions. Unless the contrary is stated references to Clauses shall mean the Clauses of these terms and conditions.
- 1.4 Unless otherwise expressly defined in these terms and conditions, the words used in these terms and conditions shall bear their natural meaning. The Parties have had equal opportunity to take legal advice and the *contra proferentem* rule shall not apply to the interpretation of these terms and conditions.
- 1.5 Where a term of these terms and conditions provides for a list of items following the word "including" or "includes" then such list is not to be interpreted as being an exhaustive list. Any such list shall not be treated as excluding any item which might have been included in such list having regard to the context of the contractual term in question. The *ejusdem generis* principle is not to be applied when interpreting these terms and conditions. General words are not to be given a restrictive meaning where they are followed by examples intended to be included within the general words.
- 1.6 In these terms and conditions, words importing any particular gender include all other genders.
- 1.7 In these terms and conditions, words importing the singular only shall include the plural and vice versa.
- 1.8 Subject to the contrary being stated expressly or implied from the context in these terms and conditions, all communication between the Parties shall be in writing.
- 1.9 All monetary amounts are expressed in pounds sterling but in the event that pounds sterling is replaced as legal tender in the United Kingdom by a different currency then all monetary amounts shall be converted into such other currency at the rate prevailing on the date such other currency first became legal tender in the United Kingdom.
- 1.10 Except where an express provision of these terms and conditions states the contrary, each and every obligation of a Party under the terms and conditions is to be performed at that Party's cost.

- 1.11 Any reference to a Party "procuring" another person to act or omit to act in a certain manner shall mean that the Party so procuring shall be liable for any default on the part of the person acting or omitting to act in that manner.
- 1.12 All references to the Contract include (subject to all relevant approvals) a reference to the Contract as amended, supplemented, substituted, novated or assigned from time to time.

## **2. Delivery**

- 2.1 The Contractor shall deliver the Goods to the Location and in accordance with any delivery instructions in the Contract or as agreed by the Parties in writing.
- 2.2 Delivery shall be completed when the Goods have been unloaded at the Location and such delivery has been accepted by a duly authorised agent, employee or Location representative of the Authority or any Beneficiary. The Authority or any Beneficiary shall procure that such duly authorised agent, employee or Location representative of the Authority or any Beneficiary is at the delivery location in order to accept such delivery.
- 2.3 Unless agreed in advance with the Authority, if the Goods are delivered more than 5 days before the date specified in the Order (or such other date which the Authority or any Beneficiary has acknowledged in writing), the Authority or such Beneficiary shall be entitled at its sole discretion to refuse to take delivery or to charge for insurance and storage of the Goods until the contractual date for delivery.
- 2.4 In the event that the Authority or any Beneficiary require next day or short notice deliveries which are not provided for in the Specification, the Contractor may pass on any additional costs relating to the delivery of the Goods to the Authority or any Beneficiary placing the Order.
- 2.5 In the event that the Authority or any Beneficiary has specified a date in the Order but has not been ready to receive the Goods on that date, the Contractor may charge additional costs of return, storage and redelivery to the Authority or any Beneficiary, notwithstanding Clause 4.2.
- 2.6 Any carrier engaged in the carriage and/or delivery of the Goods shall be deemed to be an agent of the Contractor and not the Authority or any Beneficiary.
- 2.7 Part deliveries may be rejected unless the Authority or any Beneficiary has previously agreed in writing to accept such deliveries.
- 2.8 Unless otherwise stated in the Order, the Contractor is responsible for obtaining all export and import licences for the Goods and shall be responsible for any delays due to such licences not being available when required.
- 2.9 In the case of any Goods supplied from outside the United Kingdom, the Contractor shall ensure that accurate information is provided to the Authority or any Beneficiary as to the country of origin of the Goods and shall be liable to the Authority or any Beneficiary for any additional duties or taxes for which the Authority or such Beneficiary may be accountable should the country of origin prove to be different from that advised by the Contractor.

- 2.10 Where the Authority or, as the case may be, any Beneficiary agrees in writing to accept delivery by instalments the Contract will be construed as a single contract in respect of each instalment. Failure by the Contractor to deliver any one instalment may allow the Authority or such Beneficiary at its option to treat the whole Contract as repudiated depending upon the circumstances of the non-delivery, such option not to be unreasonably invoked.
- 2.11 Any arrangement to deliver the Goods where carriage is to be charged separately or any arrangement by which the Goods are collected by the Authority or any Beneficiary in return for a discount on the Contract Price shall be recorded in writing and signed by a duly authorised signatory on behalf of the Authority or Beneficiary. Where due to an emergency such arrangements cannot be committed to writing and signed off as aforesaid the Parties shall confirm such arrangements in writing as soon as possible thereafter.
- 2.12 The Contractor will ensure that its employees, sub-contractors or agents delivering Goods to the Location (or otherwise performing the terms of the Contract at the Location) shall not smoke whilst at the Location. The Contractor shall ensure they comply with The Smoke-free Premises etc. (Wales) Regulations.

### **3. Time**

- 3.1 The time of delivery shall be agreed on the face of the Order (or otherwise agreed in writing by the Parties) and if no time for delivery is expressly agreed then delivery shall be made within 14 days of receipt of the Order.
- 3.2 Where the time of delivery has been agreed by the Parties on the face of the Order or otherwise agreed in writing (and for the avoidance of doubt not where delivery is to be made within 14 days of receipt of the Order because no time for delivery has expressly been agreed) then time for delivery shall be of the essence and without prejudice to any other right or remedy of the Authority or any Beneficiary.
- 3.3 The Parties may alter an agreed time of delivery provided that a minimum of 3 days' notice is given to the other Party in writing.
- 3.4 Failure by the Contractor to deliver the Goods or any part of them within the time agreed in accordance with Clause 3.1 shall entitle the Authority to terminate the Order and purchase other goods of the same or similar description to make good such default and recover from the Contractor the amount by which the cost of purchasing other goods exceeds the amount that would have been payable to the Contractor in respect of the Goods replaced by such purchase provided that the Authority uses all reasonable endeavours to mitigate its losses in this respect. 3 consecutive failures to deliver within the time agreed in accordance with Clause 3.1 shall entitle the Authority to terminate the Contract, and recover costs in accordance with Clause 22.2.

### **4. Contract Price and Payment**

- 4.1 In consideration of the Contractor's due and proper performance of its obligations under the Contract, the Contractor may charge the Authority or, as the case may be, any Beneficiary the Contract Price in accordance with this Clause 4.

- 4.2 The Contract Price shall be net i.e. after the deduction of all agreed discounts. In the absence of written agreement by the Parties to the contrary, the Contract Price shall include the cost of packaging, packing materials, addressing, labelling, loading and delivery to the Location, and all appropriate tax (excluding VAT) and duty. The amount of any duty additional to the Contract Price and any early settlement discounts shall be shown separately in the Contract.
- 4.3 Invoices shall not be rendered by the Contractor until completion of delivery of all of the Goods which are the subject of the Order unless otherwise agreed in writing. Where the Parties agree delivery by instalments, the Contractor may render an invoice for each delivered instalment.
- 4.4 The Authority or, as the case may be, any Beneficiary shall pay the Contract Price to the Contractor, by BACS (Bank Automated Clearing System) if the Authority or such Beneficiary so chooses, within 30 days of the receipt of the Goods or a valid invoice (rendered in accordance with Clauses 4.3 and 6.1), whichever is later.
- 4.5 The Authority or, as the case may be, any Beneficiary shall be entitled to deduct from any monies due or to become due to the Contractor any monies owing to the Authority or such Beneficiary from the Contractor.
- 4.6 Except where otherwise stated in the Order, the Contract Price is exclusive of VAT which shall be payable, if applicable, by the Authority or any Beneficiary in addition to such Contract Price at the rate prevailing as at the tax invoice date. The invoice provided to the Authority or any Beneficiary by the Contractor in accordance with Clause 6.1 shall show the VAT calculations separately.
- 4.7 The Authority or any Beneficiary shall not be responsible for the payment of any charges for Goods supplied in excess of the Goods required by the Order or any variation of it unless authorised in writing by a further Order.
- 4.8 No payment of or on account of the Contract Price shall constitute any admission by the Authority or any Beneficiary as to proper performance by the Contractor of its obligations.
- 4.9 In the event of the Authority or any Beneficiary breaching Clause 4.4, the Contractor shall be entitled to charge interest on the outstanding amount owed by the Authority or any Beneficiary in accordance with the Late Payment of Commercial Debts (Interest) Act 1998.
- 4.10 Subject to Clause 4.11, Clause 4.12 and Clause 5.7, the Contract Price shall not change during the Contract Period.
- 4.11 The Contractor may apply to the Authority in writing once in any Year (other than the first Year) to increase the Contract Price by such percentage as is equivalent to any percentage increase in the Index during the previous Year. The Authority may in its absolute discretion agree to such an increase. If the Authority agrees to an increase it will apply from the date of the notice sent by the Authority to the Contractor informing them of its decision.
- 4.12 If a proposed variation to the Specification under Clause 21 also involves a proposed variation to the Contract Price and the Parties cannot reach agreement on the adjustment to the Contract Price within the 90 day period specified in Clause 21

both Parties shall jointly and immediately refer the matter as a dispute to mediation by issuing a Mediation Notice as required by Clause 22.2.

## 5. Value For Money And Benchmarking

- 5.1 The Contractor has an obligation throughout the Contract Period to identify (and notify the Authority) of potential costs savings and improved value for money for the Authority. The Authority may make a written request each Year to the Contractor requesting details of how the Contractor is identifying and (where agreed with the Authority) delivering improved value for money.
- 5.2 The Contractor shall ensure that the information that it provides to the Authority in accordance with clause 5.1 shall be sufficient for the Authority to determine that the Contractor is complying with the obligation in Clause 5.1. The Contractor shall provide such further information that the Authority reasonably requests in connection with clause 5.1.
- 5.3 The Authority shall regularly benchmark the Contract Price and performance of the Contract by the Contractor. Any benchmarking will be against third party suppliers ("**Benchmark Contractors**") providing goods and/or services substantially the same as the Contractor to organisations that are similar to the Authority (or have similar requirements for the purchase of goods similar to the Goods) during the Contract Period. This benchmarking will compare the Contract Price and level of performance of the Contract with the prices being charged and goods and/or service offered by the Benchmark Contractors at that time. The aim is to provide the Authority with reasonably detailed information for comparison purposes.
- 5.4 The Authority shall be entitled to use any model to determine the achievement of improved value for money and cost savings and to carry out the benchmarking evaluation referred to in Clause 5.3.
- 5.5 The Authority shall be entitled to disclose the results of any benchmarking of the Contract Price and performance of the Contract to any Beneficiary or Beneficiaries as the case may be.
- 5.6 The Contractor shall use its best endeavours and act in good faith to supply information required by the Authority in order to undertake the benchmarking referred to in this Clause 5, such information required to be at the discretion of the Authority acting reasonably.

- 5.7 The Parties agree this is an important term of the Contract. If the results of a benchmarking exercise demonstrates that the Contract Price is too high because it does not reflect the market price then the Contract Price shall be reduced as soon as reasonably practicable (and the Contract varied in accordance with Clause 20 (Variation of the Contract)) to reflect the outcome of the benchmarking exercise.
- 5.8 For the avoidance of doubt, the results of any benchmark reviews shall not result in any increase to the Contract Price or any decrease in the performance of the Contract.

## **6. Electronic Trading System and Forms**

- 6.1 Unless the Authority confirms otherwise in writing the Contractor shall use the Electronic Trading System (and comply with its requirements) throughout the Contract Period. The Contractor shall be deemed to have satisfied itself prior to the Commencement Date that it is able and will continue to be able for the duration of the Contract Period to comply with the Electronic Trading System.
- 6.2 Subject to Clause 6.1 the Contractor shall use the Electronic Trading System to facilitate, amongst other things the following: Order placement, the provision of sales information, invoicing, creation of credit notes and the exchange of such other information relating to this Contract as the Authority may reasonably require from time to time.
- 6.3 In the event the Contractor fails to comply with either Clause 6.1 or Clause 6.2, the Authority shall be entitled to reduce (and the Contractor agrees to such reduction) the amount payable on any invoice issued pursuant to clause 4 (Contract Price and Payment) by 1% of the amount invoiced by the Contractor from the time of the failure to comply until the Contractor remedies that failure. The Parties agree the level of the reduction is a reasonable pre-estimate of the cost to the Authority of having to deal with the non compliance.
- 6.4 If there are persistent breaches of either Clause 6.1 or Clause 6.2 (or both) by the Contractor this will amount to a "material failure" for the purposes of Clause 24.1.1 (Termination).
- 6.5 The Contractor shall ensure that when Clause 6.2 applies:
- 6.5.1 a delivery note shall accompany each delivery of the Goods;
  - 6.5.2 an invoice shall be rendered on the Contractor's own invoice form;
  - 6.5.3 all delivery notes and invoices shall be clearly marked with the Authority's or any Beneficiary's order number, the name and address of the Authority or the Beneficiary and the description and quantity of the Goods, and shall show separately any additional charge for containers and/or any other item not included in the Contract Price or, where no charge is made, whether the containers are required to be returned

and the Contractor shall further ensure that its compliance with this Clause 6.5 is compatible in all respects with the other requirements of the Contract.

## **7. Packaging**

- 7.1 Where the Goods are imported into the United Kingdom then for the purposes of the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (as amended) the Contractor shall assume the rolled-up obligations for all the activities performed outside the United Kingdom in relation to the Goods and the packaging which is used for the containment, protection, handling, delivery and presentation of the Goods in addition to any other obligations the Contractor may have pursuant to the said Regulations.
- 7.2 The Goods shall be securely packed in trade packages of a type normally used by the Contractor for commercial deliveries of the same or similar goods either in retail or in bulk quantities within the United Kingdom.
- 7.3 The following details shall be shown on the outside of every package unless otherwise specified in the Order:
- 7.3.1 a description of the Goods which shall include, without limitation, the weight of the Goods where available and the Authority's or any Beneficiary's order number;
  - 7.3.2 the quantity in the package where available;
  - 7.3.3 any special directions for storage;
  - 7.3.4 the expiry date of the contents where available;
  - 7.3.5 the batch number; and
  - 7.3.6 the name of the manufacturer of the Goods and the Contractor.

## **8. Identification of Goods**

- 8.1 All Goods that customarily bear any mark, tab, brand, label or other device indicating place of origin, inspection by any government or other body or standard of quality must be delivered with all the said marks, tabs, brands, labels, serial numbers or other devices intact.

## **9. Containers and Pallets**

- 9.1 The Contractor shall collect without charge any returnable containers (including pallets) within 21 days of the date of the relevant delivery note unless otherwise instructed by the Authority or any Beneficiary. Empty containers not so removed may be returned by the Authority or such Beneficiary at the Contractor's expense or otherwise disposed of at the Authority's or such Beneficiary's discretion. The Contractor shall credit in full any charged containers upon collection or return.

## **10. Property and Risk**

- 10.1 Risk in the Goods shall pass to the Authority or any Beneficiary when the Goods have been delivered in accordance with Clause 2.2.

- 10.2 Notwithstanding delivery, property in the Goods shall not have passed from the Contractor until the full Contract Price of such Goods has been paid.
- 10.3 All tools, equipment and materials of the Contractor required in the performance of the Contractor's obligations under the Contract shall be and remain at the sole risk of the Contractor whether or not they are situated at the Location.

## **11. Tools etc**

- 11.1 Any tools, patterns, materials, drawings, specifications and/or other data provided by the Authority or any Beneficiary to the Contractor in connection with the Order will at all times be at the Contractor's risk and remain the property of the Authority or any Beneficiary and shall be delivered up to the Authority or the Beneficiary immediately on request and are to be used by the Contractor solely for the purpose of completing the Order.
- 11.2 Any tools (such as jigs, dies etc) which the Contractor may construct or acquire specifically in connection with the Goods will remain the property of the Contractor unless it is agreed in writing that the property of the tools will be transferred to the Authority or any Beneficiary upon payment by the Authority or Beneficiary of a charge.

## **12. Rejection Of Goods**

- 12.1 Without prejudice to the operation of Clause 12.4, the Goods shall be inspected on behalf of the Authority or any Beneficiary within a reasonable time after delivery under Clause 2 of the Contract and may be rejected if found to be defective or inferior in quality to or differing in form or material from the requirements of the Contract, or if they do not comply with any term, whether expressed or implied, of the Contract.
- 12.2 Without prejudice to the operation of Clause 12.4, the Authority or any Beneficiary shall notify the Contractor of:
- 12.2.1 the discovery of any defect within a reasonable time of its discovery and shall give the Contractor all reasonable opportunities to investigate such defect; and
  - 12.2.2 any shortage or damage caused in transit and found on delivery within 14 days of delivery or such time as agreed by the Parties.
- 12.3 The whole of any delivery may be rejected if a reasonable sample of the Goods taken indiscriminately from that delivery is found not to conform in every material respect to the requirements of the Contract.
- 12.4 The Authority's or any Beneficiary's right of rejection shall continue irrespective of whether the Authority or the Beneficiary has in law accepted the Goods. In particular, taking delivery, inspection, use or payment by the Authority or any Beneficiary of the Goods or part of them shall not constitute acceptance, waiver or approval and shall be without prejudice to any right or remedy that the Authority or any Beneficiary may have against the Contractor provided that the right of rejection shall cease within a reasonable time from the date on which the Authority or the



Beneficiary discovers or might reasonably be expected to discover the latent defect or other relevant breach of contract.

- 12.5 Goods so rejected after delivery shall be removed by the Contractor at its own expense within 14 days from the date of notification of rejection. If the Contractor fails to remove them within such period the Authority or any Beneficiary may return the rejected Goods at the Contractor's risk and expense and charge the Contractor for the cost of storage from the date of rejection.

### **13. Quality**

- 13.1 The Goods shall be of first class quality, new, and shall be supplied strictly in accordance with the Specification and/or any sample previously provided to the Authority or any Beneficiary and, unless otherwise agreed in writing, shall conform to all relevant standards, specifications and conditions and all work performed by the Contractor shall be in accordance with best practice. For the avoidance of doubt, the Contractor warrants that the Goods are not scrap goods.
- 13.2 The Contractor warrants its expertise and confirms the accuracy of all statements and representations made in respect of the Goods prior to and subsequent to, the Order.
- 13.3 The Contractor agrees to assign to the Authority or any Beneficiary upon request the benefit of any warranty, guarantee or similar right which it has against any third party manufacturer or supplier of the Goods or any part thereof.

### **14. Safety, Quality and Efficacy of Medicinal Products**

- 14.1 The sale, supply, importation, manufacture or assembly of such of the Goods as are either medicinal products within the meaning of the Medicines Act 1968 or medical devices within the meaning of the Medical Devices Regulations 2002 shall comply respectively with the provisions of the Medicines Acts 1968 and 1971 as from time to time amended or with the provisions of the Medical Devices Regulations SI 2002/618 from time to time amended, and the provisions of any relevant regulations made under these respective pieces of legislation.
- 14.2 In the event that the Contractor is in breach of Clause 14.1 then without prejudice to any other right or remedy of the Authority or any Beneficiary, the Authority or any Beneficiary shall be entitled to reject the Goods and the Contractor shall, subject to Clause 16, indemnify the Authority or the Beneficiary against all costs, claims or liabilities made against or incurred by the Authority or the Beneficiary as a result of such breach, including the cost of purchasing alternative goods and all administrative costs incurred by the Authority or the Beneficiary in inviting and awarding tenders for the supply of such alternative goods.

### **15. Performance Measurement**

- 15.1 The Authority or any Beneficiary shall ascertain whether the Contractor's provision of the Goods in question meets any performance criteria as specified in the Specification or, if the criteria are not so specified, meets the standards of a professional supplier of the Goods. On or before the fifteenth working day of each calendar month during the Contract Period and within 14 days after termination of the Contract, the Authority or any Beneficiary may:

- 15.1.1 in respect of the supply of the Goods during the preceding calendar month, provide to the Contractor a notice (each called a "**Performance Notice**") which shall set out a statement of the Authority's or any Beneficiary's dissatisfaction with the Contractor's performance and supply of the Goods;
  - 15.1.2 each Performance Notice issued by the Authority or any Beneficiary shall include a proposed rebate of the Contract Price commensurate to the under-performance of the Contractor as recorded in the Performance Notice;
  - 15.1.3 if the Contractor disputes any matter referred to in any Performance Notice and/or the proposed rebate of the Contract Price, the Contractor may raise this objection with the Authority or any Beneficiary and if this matter is not resolved within 7 days the matter shall be referred to the Dispute Resolution Procedure; and
  - 15.1.4 if the Contractor has not raised any objection to the Performance Notice within 7 days of receipt (or such other period as agreed between the Parties) then that Performance Notice shall be deemed to have been accepted by the Contractor and the rebate on the Contract Price referred to therein shall become immediately effective.
- 15.2 The Authority and any Beneficiary's rights under Clause 15.1 are without prejudice to any other rights or remedies the Authority or any Beneficiary may be entitled to.
- 15.3 If required by the Authority or any Beneficiary, the Parties shall co-operate in sharing information and developing performance measurement criteria with the object of improving the Parties' efficiency. Any such agreements shall be fully recorded in writing by the Authority or Beneficiary as the case may be.

## 16. **Business Continuity Plan**

- 16.1 The Contractor shall have robust contingency plans in place, agreed with the Authority within thirty (30) days of the Commencement Date, to ensure that Contractor's performance of the Contract to the Authority will be maintained in the event of disruption (including, but not limited to, disruption to information technology systems or Supply Chain to the Contractor's operations, and those of sub-contractors to the Contractor, however caused ("**Business Continuity Plan**").
- 16.2 The Contractor shall ensure that the Business Continuity Plan aligns and continues to be aligned with good industry practice and the relevant provisions of ISO/IEC17799:2000, BS15000 (as amended) and all other industry standards from time to time in force.
- 16.3 The Contractor shall make the Business Continuity Plan available for the Authority to inspect and to practically test at any reasonable time, and the Contractor shall promptly act upon and incorporate the Authority's reasonable comments upon the Business Continuity Plan.
- 16.4 The Contractor shall regularly review, test and update the Business Continuity Plan in accordance with good industry practice, and it shall also do this in the following instances:

- 16.4.1 in the event of a material change to the Contractor's business operations; and/or
  - 16.4.2 in the event of a change to the Specification in accordance with Clause 21 (Variation to Specification); and/or
  - 16.4.3 on the occurrence of any event which may increase the likelihood of the need to implement the Business Continuity Plan (including the identification of any threat to the Contractor, the Authority or performance of the Contract).
- 16.5 The Authority may request (such request to be made reasonably) any additional reviews by notifying the Contractor to such effect in writing, whereupon the Contractor shall conduct such reviews in accordance with the Authority's written requirements.
- 16.6 If an event occurs which materially and adversely affects the business operations of the Contractor and this causes a material failure in the performance of the Contract by the Contractor then the Contractor shall immediately implement the Business Continuity Plan (and shall inform the Authority promptly of this). In all other instances the Contractor shall only implement or test the Business Continuity Plan either where it will have no impact on the performance of the Contract or with the prior written consent of the Authority (which shall not be unreasonably withheld or delayed).

## **17. Assignment**

- 17.1 The Contractor shall not assign the whole or any part of the Contract. With the exception of the carriage of Goods to the Location, the Contractor shall not sub-contract the production or supply of any Goods without the previous consent in writing of the Authority or any Beneficiary, such consent not to be unreasonably withheld or delayed.
- 17.2 The Contractor acknowledges and agrees that by way of illustration only and without restricting or fettering the Authority's or any Beneficiary's right to withhold its consent on reasonable grounds it shall be reasonable for the Authority or any Beneficiary to withhold its consent where the sub-contracting of the production or supply of Goods would be contrary to law or contrary to public or government policy or contrary to public morality and decency or which is not in the national interest. If with the Authority's or any Beneficiary's consent the Contractor sub-contracts the production or supply of any Goods, every act or omission of the sub-contractor shall for the purposes of the Contract be deemed to be the act or omission of the Contractor and the Contractor shall be liable to the Authority or any Beneficiary thereafter as if such act or omission had been committed or omitted by the Contractor itself.

## **18. Limitation of liability**

- 18.1 Neither Party shall be liable to the other Party for any loss or damage, costs or expenses incurred or suffered by the other Party as a result of any breach of the terms of the Contract, unless the same were in the reasonable contemplation of the Parties at the time when they entered into the Contract.

- 18.2 Except in the case of death or personal injury caused by negligence, and fraudulent misrepresentation or in other circumstances where liability may not be so limited under any applicable law, the liability of either Party under or in connection with the Contract, whether arising in contract, tort, negligence, breach of statutory duty or otherwise shall not exceed the sum of £5 Million in any one Year.
- 18.3 The Contract Price has been negotiated and agreed on the basis that the Parties may limit their liability to each other as set out in the Contract and the Parties each confirm that they will themselves bear or insure against any loss for which the other Party has limited its liability under the Contract.

## **19. Insurance**

- 19.1 The Contractor shall insure against its liability under Clause 18.2 with a minimum limit of indemnity of £5 Million per annum or such other sum as may be agreed between the Authority and the Contractor in writing.
- 19.2 The Contractor shall hold employer's liability insurance in respect of the Contractor's staff in accordance with any legal requirement for the time being in force.

## **20. Variation of the Contract**

- 20.1 Any variation to the terms of the Contract must be recorded in writing and executed by a director (if the Contractor is a company) or an authorised signatory of the Contractor (if the Contractor is not a company) and the Authorised Officer. Such record of the variation in question must address all consequential amendments required to be made to the Contract as a result of such variation, including adjustment to the Contract Price.
- 20.2 Variations will take effect as from the date specified in the signed record of variation and shall not have retrospective effect unless expressly provided for in such record.
- 20.3 Each record of variation must be dated and sequentially numbered. Each of the Authority and the Contractor will be entitled to an original executed counterpart of the record of variation.
- 20.4 Save as provided in any such record of variation, the Contract will continue in full force and effect.

## **21. Variation of the Specification**

- 21.1 The Authority may at any time propose to the Contractor any reasonable variation or addition to the Specification (and any consequential variation to the Contract Price) and the Contractor shall not unreasonably withhold or delay its consent to such variation.
- 21.2 The Contractor may at any time propose in writing to the Authority (with supporting information) any reasonable variation to the Specification (and any consequential variation to the Contract Price) where the Contractor is able to demonstrate to the Authority that such variation would improve value for money to the Authority (including the quality of the Goods or the way they are delivered pursuant to the Contract.)

- 21.3 The Contractor shall ensure that the information it provides to the Authority in accordance with Clause 21.2 shall be sufficient for the Authority to decide whether any improvement should be implemented.
- 21.4 The Parties shall use their reasonable efforts to reach agreement on any variation proposed by the Contractor within 90 days of receipt by the Authority of written notification of the proposed variation.
- 21.5 Where the Authority is required to undertake any testing following the Contractor's proposal pursuant to Clause 21.2 the costs of such testing shall be met by the Contractor.
- 21.6 Subject to:
- 21.6.1 the Authority being satisfied (in its sole discretion) that the improvement proposed by the Contractor should be implemented; and
- 21.6.2 the Contractor meeting the costs of any testing pursuant to Clause 21.4;
- the Contractor's request for a variation shall be made to the Contract in accordance with Clause 20 (Variation of the Contract).
- 21.7 No such variation or addition shall affect the continuation of this Contract.

## 22. Dispute Resolution Procedure

- 22.1 During any dispute, including a dispute as to the validity of the Contract, it is mutually agreed that the Contractor shall continue its performance of the provisions of the Contract (unless the Authority or any Beneficiary requests in writing that the Contractor does not do so).
- 22.2 If any dispute arises out of the Contract (other than in relation to any matter in which the Authority has a discretion which is exercised in accordance with the terms of the Contract and which shall be final and conclusive) the Parties will use all of their respective reasonable endeavours to resolve it by negotiation. If negotiations fail to resolve such dispute the Parties will attempt to settle it by mediation in accordance with the Centre for Effective Dispute Resolution ("**CEDR**") Model Mediation Procedure or any other model mediation procedure as agreed by the Parties. To initiate mediation a Party shall give notice in writing (a "**Mediation Notice**") to the other Party requesting mediation of the dispute and shall send a copy thereof to CEDR or an equivalent mediation organisation as agreed by the Parties asking them to nominate a mediator in the event that the Parties shall not be able to agree such appointment by negotiation. The mediation shall commence within 28 days of the Mediation Notice being served. Neither party will terminate such mediation until each Party has made its opening presentation and the mediator has met each Party separately for at least one hour. Thereafter paragraph 14 of the CEDR Model Mediation Procedure (or the equivalent paragraph of any other model mediation procedure agreed by the Parties) will apply. Neither Party will commence legal proceedings against the other until 30 days after such mediation of the dispute in question has failed to resolve the dispute. The Authority and the Contractor will co-operate with any person appointed as mediator providing him with such information and other assistance as he shall require and will pay his costs, as he shall determine or in the absence of such determination such costs will be shared equally.

## 23. Environmental considerations

23.1 The Contractor shall comply in all material respects with applicable environmental laws and regulations in force from time to time in relation to the products/services the subject of the Contract. Where the provisions of any such legislation are implemented by the use of voluntary agreements or codes of practice, the Contractor shall comply with such agreements or codes of practice as if they were incorporated into English law subject to those voluntary agreements being cited in the tender documentation. Without prejudice to the generality of the foregoing, the Contractor shall:-

- 23.1.1 comply with all reasonable stipulations of the Authority or any Beneficiary aimed at minimising the packaging in which the products the subject of the Contract, or any products supplied by the Contractor to the Authority or any Beneficiary as part of performance of the services, are supplied;
- 23.1.2 promptly provide such data as may reasonably be requested by the Authority from time to time regarding the weight and type of packaging according to material type used in relation to all products supplied to the Authority or any Beneficiary under or pursuant to the Contract;
- 23.1.3 comply with all obligations imposed on it in relation to the products/services the subject of the Contract by the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (as amended) (or any other equivalent legislation giving effect in any part of the European Economic Area to the Packaging and Packaging Waste Directive 94/62/EC);
- 23.1.4 label all products supplied to the Authority or any Beneficiary under the Contract, and the packaging of those products, to highlight environmental and safety information as required by applicable UK and EU legislation;
- 23.1.5 unless otherwise agreed with the Authority or any Beneficiary, insofar as any products supplied under the Contract comprise or include electrical or electronic equipment, manage the said equipment and associated consumables at end of life to facilitate recovery, treatment and recycling and provide any information which the Authority or any Beneficiary may reasonably require from time to time regarding the costs of such activity;
- 23.1.6 promptly provide all such information regarding the environmental impact of any products supplied or used under the Contract as may reasonably be required by the Authority or any Beneficiary to permit informed choices by end users;
- 23.1.7 where goods are imported into the United Kingdom then for the purposes of the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (as amended) the Contractor shall assume the rolled-up obligations for all the activities performed outside the United Kingdom in relation to the goods and the packaging which is used for the containment, protection, handling, delivery and presentation of the goods in addition to any other obligations he may have pursuant to the said Regulations.

23.2 The Contractor shall meet all reasonable requests by the Authority or any Beneficiary for information evidencing the Contractor's compliance with the provisions of this Clause.

## **24. Termination**

24.1 The Authority may terminate the Contract (in whole or in part) immediately by serving written notice on the Contractor in any of the following circumstances:-

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

24.1.2 the Contractor fails (in whole or in part) to perform any material obligation of the Contractor owed to the Authority or any Beneficiary on more than 3 occasions; or

24.1.3 the Contractor becomes Insolvent or otherwise ceases to be capable of supplying the Goods; or

24.1.4 the Contractor is in default of any duty of care or any fiduciary or statutory duty owed to the Authority and/or any Beneficiary and/or any patient, employee or agent of the Authority or, as the case may be, any Beneficiary; or

24.1.5 If the Contractor is a corporation there is a Change of Control of the Contractor during the Contract Period which, in the reasonable opinion of the Authority will have a material impact on the supply of the Goods or the image of the Authority; or

24.1.6 the Contractor purports to assign the Contract in breach of Clause 17 (Assignment); or

24.1.7 the Contractor shall have offered or given or agreed to give to any person any gift or consideration of any kind as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any action in relation to the obtaining or execution of the Contract or any other contract with the Authority or, as the case may be, any Beneficiary, or for showing or forbearing to show favour or disfavour to any person in relation to the Contract or any other contract with the Authority or, as the case may be, any Beneficiary; or similar acts have been done by any person employed by it or acting on its behalf (whether with or without the knowledge of the Contractor); or

24.1.8 if the Contractor is in breach of either Clause 36 (Inducements to Purchase) or Clause 37 (Prevention of Corruption and Bribery) (or both).

24.2 The Authority and any Beneficiary shall be entitled to recover from the Contractor the amount of any Loss resulting from termination under Clause 24.1. For the purpose of this Clause, Loss shall include reasonable cost to the Authority and any

Beneficiary of the time spent by its officers (and employees) in terminating the Contract and in making alternative arrangements for the provision of the Goods.

- 24.3 The Contractor may terminate the Contract in the following circumstance, by giving 30 days written notice:
- 24.3.1 if the Authority or any Beneficiary has committed a material breach of the Contract; and
  - 24.3.2 the Contractor has brought the breach of Contract to the attention of the Authority or such Beneficiary; and
  - 24.3.3 the Authority or such Beneficiary has not corrected the said breach of Contract within a reasonable period of time.
- 24.4 The Contractor agrees that upon termination for any reason (under Clause 24.1 or otherwise) or expiry of the Contract it shall not be entitled to make a claim against the Authority or any Beneficiary in relation to costs incurred by the Contractor in providing the Goods or costs incurred in acquiring equipment and/or materials used in the provision of the Goods or in engaging third parties in connection with the Goods whether or not such costs were amortised in the calculation of the Contract Price payable by the Authority or any Beneficiary under the Contract. For the avoidance of doubt, the Contractor will not be restricted from making any claim in respect of the Contract Price to the extent the Contract Price is outstanding and due and payable.
- 24.5 The Authority and the Contractor agree that termination (in whole or in part) or expiry of the Contract shall not affect either Party's obligations which the Contract provides shall survive the termination or expiry of the Contract or the continuance of the part or parts not terminated where the Contract is terminated in part only.
- 24.6 Any termination (in whole or in part) of the Contract will not prejudice the rights, obligations and duties of each Party arising prior to such termination taking effect.

## **25. Communications**

Subject to Clause 44 all written and oral communications, all documents and the labelling and marking of all packages shall be in English.

## **26. Intellectual Property**

- 26.1 Subject to Clause 16, the Contractor agrees to indemnify and keep indemnified the Authority and any Beneficiary against any costs, claims, proceedings, expenses and demands arising from the use, application, supply or delivery of any process, article, matter or thing supplied under the Contract that would constitute or is alleged to constitute any infringement of any person's Intellectual Property Rights.

## **27. Electronic Product information**

- 27.1 The Contractor shall provide the Authority or, as the case may be, any Beneficiary the Product Information in such manner and upon such media as agreed between the Contractor and the Authority or, as the case may be, any Beneficiary from time to time for the sole use by the Authority and any Beneficiary.



- 27.2 The Contractor warrants that the Product Information is complete and accurate as at the date upon which it is delivered to the Authority or, as the case may be, any Beneficiary and that the Product Information does not contain any data or statement which gives rise to any liability on the part of the Authority or, as the case may be, any Beneficiary following publication of the same in accordance with this Clause 27.
- 27.3 In the event the Product Information ceases to be complete and accurate, the Contractor shall promptly notify the Authority or, as the case may be, any Beneficiary in writing of any modification or addition to or any inaccuracy or omission in the Product Information.
- 27.4 The Contractor grants the Authority or, as the case may be, any Beneficiary a non-exclusive royalty free licence in perpetuity to use and exploit the Product Information and any Intellectual Property therein for the purpose of illustrating the range of goods and services (including, without limitation, the Goods) available pursuant to the Authority or any Beneficiary contracts from time to time. No right to illustrate or advertise the Product Information is granted to the Contractor by the Authority or any Beneficiary as a consequence of the licence conferred by this clause 25.4 or otherwise under the terms of this Contract.
- 27.5 The Authority or, as the case may be, any Beneficiary may reproduce for its sole use the Product Information provided by the Contractor in the Authority's product catalogue and/or any Beneficiary's product catalogue from time to time which shall be made available on the National Health Service internal communications network in electronic format or made available on the Authority's external website and/or any Beneficiary's external website or any other electronic media of the Authority or any Beneficiary (as the case may be) from time to time.
- 27.6 Before any publication of the Product Information (electronic or otherwise) is made by the Authority or, as the case may be, any Beneficiary, the Authority or, as the case may be, any Beneficiary will submit a copy of the relevant sections of the Authority's product catalogue or any Beneficiary's product catalogue (as the case may be) to the Contractor for approval, such approval not to be unreasonably withheld or delayed. For the avoidance of doubt the Contractor shall have no right to compel the Authority or any Beneficiary to exhibit the Product Information in any product catalogue as a result of the approval given by it pursuant to this clause 25.6 or otherwise under the terms of this Contract.
- 27.7 If requested in writing by the Authority or, as the case may be any Beneficiary, the Contractor and the Authority or, as the case may be, any Beneficiary shall forthwith negotiate in good faith an agreement to use the Electronic Trading System.
- 27.8 Subject to Clauses 16 and 27.9, the Contractor agrees to indemnify and keep indemnified the Authority and/or any Beneficiary against any liability, loss, costs, expenses, claims or proceedings whatsoever arising out of or in connection with any statement relating to the goods and services (including, without limitation, the Goods) or information or material on or description of the goods and services (including, without limitation, the Goods) provided by or on behalf of the Contractor which is included in the Authority's product catalogue or any Beneficiary's product catalogue from time to time (as the case may be) or any associated material produced by the Authority or any Beneficiary (as the case may be) for the purpose of illustrating the range of goods and services (including, without limitation, the Goods) available pursuant to the Authority or Beneficiary contracts from time to time.

- 27.9 The Contractor shall not be required to indemnify or keep indemnified the Authority and/or any Beneficiary against any liability, loss, costs, expenses, claims or proceedings whatsoever arising under Clause 27.8 as a result of the Authority or Beneficiary's wilful or negligent misrepresentation of any statement relating to the goods and services (including, without limitation, the Goods) or information or material on or description of the goods and services (including, without limitation, the Goods) provided by or on behalf of the Contractor which is included in the Authority's product catalogue or any Beneficiary's product catalogue from time to time (as the case may be) or any associated material produced by the Authority or any Beneficiary (as the case may be) for the purpose of illustrating the range of goods and services (including, without limitation, the Goods) available pursuant to the Authority or Beneficiary contracts from time to time.

## **28. Sales Information**

- 28.1 If requested by the Authority or any Beneficiary, the Contractor shall provide the Authority or, as the case may be, any Beneficiary with statements giving accurate and complete details of the quantity and value of the Goods supplied by the Contractor to the Authority pursuant to the Contract. The frequency, format and level of detail to be included in such statements shall be as specified by the Authority in the Order (or, if no such description is set out in or attached to the Order, as set out in or attached to any documentation inviting the Contractor to tender for the appointment to supply the Goods, including any documentation issued, or made available, to the Contractor by any Beneficiary).
- 28.2 The Contractor shall keep at its normal place of business detailed, accurate and up to date records of the quantity and value of the Goods sold by it to any Authority or, as the case may be, any Beneficiary, on or after the date of the Contract and pursuant to the Contract together with accurate details of the identity of the Authority or, as the case may be, any Beneficiary to which such Goods were sold. Subject to any other auditing process being agreed between the Authority or, as the case may be, any Beneficiary and the Contractor in writing, the Authority or, as the case may be, any Beneficiary shall be entitled by prior appointment to enter the Contractor's normal place of business during normal office hours and to inspect such records in order to verify whether any statement supplied by the Contractor to the Authority or, as the case may be, any Beneficiary pursuant to Clause 28.1 is accurate and complete.

## **29. Audit and Accounts**

- 29.1 For the purpose of:
- 29.1.1 the examination and certification of the Beneficiary's accounts; or
  - 29.1.2 any examination pursuant to section 6(1) of the National Audit Act 1983 or any re-enactment thereof of the economy, efficiency and effectiveness with which the Beneficiary has used its resources,
- 29.2 the Comptroller and Auditor General and the Beneficiary or its auditors may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Contractor and may require the Contractor to produce such oral or written explanation as he considers necessary. The

Contractor acknowledges that it will fully cooperate with any counter fraud policy or investigation, whether carried out by the Counter Fraud and Security Management Service, or any equivalent body, successor or function, at any time. For the avoidance of doubt it is hereby declared that the carrying out of an examination under Section 6(3) (d) of the National Audit Act 1983 or any re-enactment thereof in relation to the Contractor is not a function exercisable under this contract.

### 30. Confidentiality

30.1 In respect of any Confidential Information it may receive from the other party (the “**Discloser**”) and subject always to the remainder of this Clause 30, each party (the “**Recipient**”) undertakes to keep secret and strictly confidential and shall not disclose any such Confidential Information to any third party, without the Discloser’s prior written consent provided that:

30.1.1 the Recipient shall not be prevented from using any general knowledge, experience or skills which were in its possession prior to the commencement of the Contract;

30.1.2 the provisions of this Clause 30 shall not apply to any Confidential Information which:-

- a) is in or enters the public domain other than by breach of the Contract or other act or omissions of the Recipient;
- b) is obtained by a third party who is lawfully authorised to disclose such information; or
- c) is authorised for release by the prior written consent of the Discloser; or
- d) the disclosure of which is required to ensure the compliance of the Authority or (as the case may be) any Beneficiary with the Freedom of Information Act 2000 (the “**FOIA**”).

30.2 Nothing in this Clause 30 shall prevent the Recipient from disclosing Confidential Information where it is required to do so by judicial, administrative, governmental or regulatory process in connection with any action, suit, proceedings or claim or otherwise by applicable law or, where the Contractor is the Recipient, to the Contractor’s immediate or ultimate holding company provided that the Contractor procures that such holding company complies with this Clause 30 as if any reference to the Contractor in this Clause 28 were a reference to such holding company.

30.3 The Contractor authorises the Authority and any Beneficiary to disclose the Confidential Information to such person(s) as may be notified to the Contractor in writing by the Authority from time to time to the extent only as is necessary for the purposes of auditing and collating information so as to ascertain a realistic market price for the Goods supplied in accordance with the Contract, such exercise being commonly referred to as "benchmarking". The Authority and any Beneficiary shall use all reasonable endeavours to ensure that such person(s) keeps the Confidential Information confidential and does not make use of the Confidential Information except for the purpose for which the disclosure is made. The Authority and any

Beneficiary shall not without good reason claim that the lowest price available in the market is the realistic market price.

- 30.4 The Contractor acknowledges that the Authority and Beneficiaries are or may be subject to the FOIA. The Contractor notes and acknowledges the FOIA and both the respective Codes of Practice on the Discharge of Public Authorities' Functions and on the Management of Records (which are issued under section 45 and 46 of the FOIA respectively) and the Environmental Information Regulations 2004 as may be amended, updated or replaced from time to time. The Contractor will act in accordance with the FOIA, these Codes of Practice and these Regulations (and any other applicable codes of practice or guidance notified to the Contractor from time to time) to the extent that they apply to the Contractor's performance under the Contract.
- 30.5 The Contractor agrees that:
- 30.5.1 without prejudice to the generality of Clause 30.2, the provisions of this Clause 30 are subject to the respective obligations and commitments of the Authority and any Beneficiary (as the case may be) under the FOIA and both the respective Codes of Practice on the Discharge of Public Authorities' Functions and on the Management of Records (which are issued under section 45 and 46 of the FOIA respectively) and the Environmental Information Regulations 2004;
  - 30.5.2 subject to Clause 30.5.3, the decision on whether any exemption applies to a request for disclosure of recorded information is a decision solely for the Authority or a Beneficiary (as the case may be);
  - 30.5.3 where the Authority or a Beneficiary is managing a request as referred to in Clause 30.5.2, the Contractor shall co-operate with the Authority or Beneficiary making the request and shall respond within five (5) working days of any request by it for assistance in determining how to respond to a request for disclosure.
- 30.6 The Contractor shall and shall procure that its sub-contractors shall:
- 30.6.1 transfer any request for information, as defined under section 8 of the FOIA, to the Authority or a Beneficiary as soon as practicable after receipt and in any event within five (5) working days of receiving a request for information;
  - 30.6.2 provide the Authority or a Beneficiary with a copy of all information in its possession or power in the form that the Authority or a Beneficiary requires within five (5) working days (or such other period as the Authority or a Beneficiary may specify) of the Authority or a Beneficiary requesting that Information; and
  - 30.6.3 provide all necessary assistance as reasonably requested by the Authority or a Beneficiary to enable the Authority or a Beneficiary to respond to a request for information within the time for compliance set out in section 10 of the FOIA.

- 30.7 The Authority or Beneficiary (as the case may be) may consult the Contractor in relation to any request for disclosure of the Contractor's Confidential Information in accordance with all applicable guidance.
- 30.8 The Parties, including any Beneficiary, acknowledge that, the content of this Contract is not Confidential Information. The Authority or (as the case may be) any Beneficiary shall be responsible for determining in its absolute discretion whether any of the content of the Contract is exempt from disclosure in accordance with the provisions of the FOIA.
- 30.9 Notwithstanding any other term of the Contract, the Contractor hereby gives his consent for the Authority or for any Beneficiary to publish in the public domain the Contract in its entirety including any changes to the Contract that may from time to time be agreed (subject to the redaction of any information which is exempt from disclosure in accordance with the provisions of either the FOIA or the EIR as the case may be),
- 30.10 If the Authority or any of the Beneficiaries elects to publish the Contract:
- 30.10.1 the Authority or any of the Beneficiaries (as the case may be) may consult with the Contractor in order to determine whether any information contained in the Contract should be redacted prior to publication;
  - 30.10.2 any final decision in relation to the redaction of information shall be a matter for the Authority or the Beneficiary (as the case may be) in their absolute discretion.
  - 30.10.3 the Contractor shall give such assistance and co-operation to the Authority or the Beneficiary (as the case may be) as they shall reasonably require in order to publish the Contract.
- 30.11 This Clause 30 shall remain in force without limit in time in respect of Confidential Information which comprises Personal Data or which relates to a patient, his or her treatment and/or medical records. Save as aforesaid and unless otherwise expressly set out in the Contract, this Clause 28 shall remain in force for a period of 3 years after the termination or expiry of this Contract.
- 30.12 In the event that the Contractor fails to comply with this Clause 28, the Authority reserves the right to terminate the Contract by notice in writing with immediate effect.

## 31. Data Protection

- 31.1 The Contractor shall comply with the Data Protection Act 1998 ("**the 1998 Act**") and any other applicable data protection legislation. In particular the Contractor agrees to comply with the obligations placed on the Authority and any Beneficiary by the seventh data protection principle ("**the Seventh Principle**") set out in the 1998 Act, namely:
- 31.1.1 to maintain technical and organisational security measures sufficient to comply at least with the obligations imposed on the Authority and any Beneficiary by the Seventh Principle;

- 31.1.2 only to process Personal Data for and on behalf of the Authority and any Beneficiary, in accordance with the instructions of the Authority or such Beneficiary and for the purpose of performing its obligations under the Contract and to ensure compliance with the 1998 Act;
- 31.1.3 to allow the Authority to audit the Contractor's compliance with the requirements of this Clause 31 on reasonable notice and/or to provide the Authority with evidence of its compliance with the obligations set out in this Clause 31.
- 31.2 Subject to Clause 18, the Contractor agrees to indemnify and keep indemnified the Authority and any Beneficiary against all claims and proceedings and all liability, loss, costs and expenses incurred in connection therewith by the Authority and any Beneficiary as a result of any claim made or brought by any individual or other legal person in respect of any loss, damage or distress caused to that individual or other legal person as a result of the Contractor's unauthorised processing, unlawful processing, destruction of and/or damage to any Personal Data processed by the Contractor, its employees or agents in the Contractor's performance of the Contract or as otherwise agreed between the Parties.
- 31.3 Both Parties agree to use all reasonable efforts to assist each other to comply with the 1998 Act. For the avoidance of doubt, this includes the Contractor providing the Authority and any Beneficiary with reasonable assistance in complying with subject access requests served on the Authority and any Beneficiary under Section 7 of the 1998 Act and the Contractor consulting with the Authority and any Beneficiary prior to the disclosure by the Contractor of any Personal Data in relation to such requests.

## **32. The Human Rights Act 1998**

- 32.1 The Contractor shall, and shall use reasonable endeavours to ensure that its employees or agents and/or sub-contractors shall, at all times, act in a way which is compatible with the Convention rights within the meaning of Section 1 of the Human Rights Act 1998.
- 32.2 Subject to Clause 18, the Contractor agrees to indemnify and keep indemnified the Authority and any Beneficiary against all loss, costs, proceedings or damages whatsoever arising out of or in connection with any breach by the Contractor of its obligations under Clause 32.1.

## **33. Warranty**

- 33.1 The Contractor warrants to the Authority that it has all necessary corporate standing and authorisation to enter into and be bound by the terms of the Contract. At all times in connection with the Contract, the Contractor shall be an independent contractor and nothing in the Contract shall create a relationship of agency or partnership or a joint venture as between the Contractor and the Authority or, as the case may be, any Beneficiary and accordingly the Contractor shall not be authorised to bind the Authority or, as the case may be, any Beneficiary.

## 34. Relationship of the Parties

- 34.1 The Contractor shall not incur any liabilities on behalf of the Authority or, as the case may be, any Beneficiary; or, make any representations or give any warranty on behalf of the Authority or, as the case may be, any Beneficiary; or, enter into any contract or obligation on behalf of the Authority or, as the case may be, any Beneficiary.

## 35. Agency

- 35.1 The Contractor acknowledges that the Authority may have placed the Order pursuant to a framework agreement established by a Beneficiary for the Authority.
- 35.2 In such cases, the Beneficiary or, as the case may be, Beneficiaries which established the Framework Agreement shall only be liable for any Order placed under such Framework Agreement if the Order was placed on the Contractor by the Beneficiary or, as the case may be, Beneficiaries.
- 35.3 In all other instances, the Authority has placed the Order on the Contractor as principal and the Beneficiary or, as the case may be, Beneficiaries which established the Framework Agreement as agent for the Authority shall have no liability in respect thereof.

## 36. Inducements to Purchase

- 36.1 The Contractor shall not offer to the Authority or any of its employees or agents or, as the case may be, any Beneficiary or any of its employees or agents as a variation of the Contract, or as an agreement collateral to it, any advantage other than a cash discount against the Contract Price or training of the employees of the Authority or, as the case may be, any Beneficiary.

## 37. Prevention of Corruption and Bribery

- 37.1 **General:** The Contractor must:
- 37.1.1 not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;
  - 37.1.2 comply with the Authority's or any Beneficiary's Ethics, Anti-bribery and Anti-corruption Policies (as the Authority or any Beneficiary may update them from time to time) (the "**Relevant Policies**");
  - 37.1.3 have and must maintain in place throughout the term of this Contract its own policies and procedures, including but not limited to adequate procedures under the Bribery Act 2010, to ensure compliance with the Relevant Policies and Clause 37.1.1, and will enforce them where appropriate;
  - 37.1.4 promptly report to the Authority or any Beneficiary any request or demand for any undue financial or other advantage of any kind received by the Contractor in connection with the performance of this Contract;

- 37.1.5 immediately notify the Authority or any Beneficiary if a foreign public official becomes an officer or employee of the Contractor or acquires a direct or indirect interest in the Contractor (and the Contractor warrants that it has no foreign public officials as officers, employees or direct or indirect owners at the Commencement Date); and
- 37.1.6 within three (3) months of the date of this Contract, and annually thereafter, certify to the Authority or any Beneficiary in writing signed by an officer of the Contractor, compliance with this Clause 37 by the Contractor and all persons associated with it and all Subcontractors. The Contractor shall provide such supporting evidence of compliance as the Authority or any Beneficiary may reasonably request.
- 37.2 **Associated Persons:** The Contractor shall ensure that any person associated with the Contractor who is performing services or providing goods in connection with this Contract does so only on the basis of a written contract which imposes on and secures from such person terms equivalent to those imposed on the Contractor in this Clause 35 (“**Relevant Terms**”). The Contractor shall be responsible for the observance and performance by such persons of the Relevant Terms, and shall be directly liable to the Authority or any Beneficiary for any breach by such persons of any of the Relevant Terms.
- 37.3 **Breach:** Breach of this Clause 37 shall be deemed a material breach of this Contract which is not capable of remedy.
- 37.4 **Adequate Procedures:** For the purpose of this Clause 37, the meaning of adequate procedures and foreign public official and whether a person is associated with another person shall be determined in accordance with section 7(2) of the Bribery Act 2010 (and any guidance issued under section 9 of that Act), sections 6(5) and 6(6) of that Act and section 8 of that Act respectively. For the purposes of this Clause 35 a person associated with the Contractor includes any subcontractor of the Contractor.

## 38. General

- 38.1 Save as required by law and/or the requirements of any relevant stock exchange and Clause 30, no publicity shall be made by any of the Parties relating to any matter in connection with the Contract without the prior written consent of the other Party.
- 38.2 Any decision, act or thing that the Authority or any Beneficiary is required or authorised to take or do under the Contract may be taken or done by any person authorised, either generally or specifically, by the Authority or any Beneficiary to take or do that decision, act or thing, provided that upon receipt of a written request the Authority or any Beneficiary shall inform the Contractor of the name of any person so authorised.
- 38.3 The Contractor shall from time to time upon the request of the Authority, execute any additional documents and do any other acts or things which may reasonably be required to implement the provisions of the Contract.
- 38.4 Any provision of the Contract which is held to be invalid or unenforceable in any jurisdiction shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining provisions hereof and



any such invalidity or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in any other jurisdiction.

- 38.5 The Contractor acknowledges and agrees that it has not relied on any representation, warranty or undertaking (whether written or oral) in relation to the subject matter of the Contract and therefore irrevocably and unconditionally waives any rights it may have to claim damages against the Authority for any misrepresentation (whether made carelessly or not) or for breach of any warranty unless the representation relied upon is set out in the Contract or unless such representation was made fraudulently.
- 38.6 The failure by the Authority, the Contractor or, as the case may be, any Beneficiary to insist upon the strict performance of any provision, term or condition of the Contract or to exercise any right or remedy consequent upon the breach thereof shall not constitute a waiver of any such breach or any subsequent breach of such provision, term or condition.
- 38.7 Each Party shall bear its own expenses in relation to the preparation, execution and implementation of the Contract including all costs legal fees and other expenses so incurred.
- 38.8 The Contractor warrants represents and undertakes to the Authority that there are no pending or threatened actions or proceedings before any court or administrative agency which would materially adversely affect the financial condition, business or operations of the Contractor and that there are no material contracts existing to which the Contractor is a party which prevent it from entering into the Contract; and that the Contractor has satisfied itself as to the nature and extent of the risks assumed by it under the Contract and gathered all information necessary to perform its obligations under the Contract and all other obligations assumed by it.
- 38.9 The rights and remedies provided in the Contract are cumulative and not exclusive of any rights or remedies provided by the general law, or by any other contract or document. In this provision "general law" includes the law of a country other than England, and "right" includes any power, privilege, remedy, or proprietary or security interest.

## **39. Third Party Rights**

- 39.1 The Authority and the Contractor acknowledge that they have entered into the Contract for the benefit of each of the Beneficiaries and each of the Third Party Beneficiaries. Accordingly, the Authority and the Contractor agree that (in addition to the Authority's right to enforce the Contract) each of the Beneficiaries and each of the Third Party Beneficiaries may enforce any term of the Contract.
- 39.2 Save as provided in Clause 39.1 of the Contract, a person who is not a Party to the Contract shall have no rights pursuant to the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Contract.
- 39.3 All or any of the provisions of the Contract may be rescinded or varied by the Parties in their entirety or in part without the consent of or the need to give any notice to any person not a Party to it.
- 39.4 The Contractor agrees that it will not raise as a defence or set off against any claim brought against it by any Beneficiary or any Third Party Beneficiary any matter

which would have been available to the Contractor by way of defence or set off if proceedings had been brought against the Contractor by the Authority or by way of counterclaim against such of the Beneficiaries or Third Party Beneficiaries if such Beneficiary or Third Party Beneficiary had been a Party to the Contract.

#### **40. Third Party Beneficiaries**

40.1 In the event that any Third Party Beneficiary wishes to enforce its rights under Clause 39.1 the following provisions shall apply:

40.1.1 the Third Party Beneficiaries shall have the same rights as the Beneficiaries under the Contract and shall comply with all the terms of the Contract which apply to the Beneficiaries;

40.1.2 the Third Party Beneficiaries acknowledge that the Contract is for use within the NHS and accordingly agree to exercise their rights under the Contract only in relation to the provision of goods and/or services to the Authority or any of the Beneficiaries and not for any other purpose whatsoever. In exercising their rights under the Contract the Third Party Beneficiaries shall at all times treat all information concerning the Contract with the strictest confidence and in accordance with Clause 30;

40.1.3 the Third Party Beneficiaries shall not enter into any obligations in the name of the Authority or any Beneficiary and shall not make any representations or give any warranties on behalf of the Authority or any Beneficiary;

40.1.4 where goods are ordered by any Third Party Beneficiary the Contractor agrees that it shall supply such Goods to such Third Party Beneficiary and invoices for the Goods supplied to such Third Party Beneficiary shall be issued by the Contractor to, and in the name of, such Third Party Beneficiary and such Third Party Beneficiary shall be liable for settlement thereof;

40.1.5 the Authority shall not be liable to any Third Party Beneficiary for any acts or omissions of the Contractor or for any loss, damage or other expenses incurred or suffered by any Third Party Beneficiary as a result of such Third Party Beneficiary exercising its rights under the Contract;

40.1.6 each Third Party Beneficiary undertakes to indemnify and keep indemnified the Authority and any Beneficiary from and against all costs, claims, demands, liabilities, damages, losses and expenses (including all legal expenses) incurred or suffered by the Authority or any Beneficiary:

a) arising out of or in connection with any act or omission of the Third Party Beneficiary or any breach of any term of the Contract by the Third Party Beneficiary;

b) as a result of any claim, loss, injury, damage, expense or delay suffered or incurred by the Contractor or any third party arising directly or indirectly from or in any way connected with the acts or omissions of the Third Party Beneficiary in enforcing its rights under the Contract, whether wilful, reckless, fraudulent, negligent, dishonest or otherwise;

and the Third Party Beneficiary shall at its own expense take out and maintain adequate insurance in respect of such liabilities and provide evidence of such insurance as the Authority may reasonably request from time to time;

- 40.1.7 in the event of any dispute:
- a) between the Contractor and any Third Party Beneficiary relating to any act or omission of such Third Party Beneficiary or any breach of any term of the Contract by such Third Party Beneficiary;
  - b) between the Authority and any Third Party Beneficiary relating to the supply of goods and/or services by the Third Party Beneficiary to the Authority or any Beneficiary;

the Authority reserves the right to suspend such Third Party Beneficiary's rights under the Contract until such dispute has been resolved;

- 40.1.8 if the Contractor makes a claim against any Third Party Beneficiary for any act or omission of such Third Party Beneficiary or any breach of the Contract by such Third Party Beneficiary the Contractor agrees that it shall not include the Authority or any Beneficiary as a party to any proceedings against such Third Party Beneficiary;

- 40.1.9 the Authority shall notify any Third Party Beneficiary which is removed from the list set out in Schedule 1 and such Third Party Beneficiary shall immediately cease to place Orders under the Contract.

## **41. Equality and Non-Discrimination**

- 41.1 The Contractor shall comply with the Equality Act 2010 ("**2010 Act**") and any other applicable equality legislation.

- 41.2 The Contractor acknowledges and agrees that the Authority and any Beneficiary is subject to the public sector equality duty set out in section 149 of the 2010 Act.

- 41.3 The Contractor must, in respect of its performance of this Contract, comply with section 149 of the 2010 Act and warrants and undertakes to have due regard in its performance of this Contract to:

- 41.3.1 eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the 2010 Act;

- 41.3.2 advance equality of opportunity between persons who share a relevant protected characteristic (as defined in the 2010 Act) and persons who do not share it;

- 41.3.3 foster good relations between persons who share a relevant protected characteristic (as defined in the 2010 Act) and persons who do not share it;

and for the avoidance of doubt this obligation shall apply irrespective of whether the Contractor is a public authority for the purposes of such section.

- 41.4 Without prejudice to Clause 41.5 the Contractor shall:
- 41.4.1 comply with the Authority's or any Beneficiary's instructions and directions and any policies and codes of practice issued by it from time to time in relation to the 2010 Act; and
  - 41.4.2 promptly notify and keep the Authority or any Beneficiary informed (with full supporting details if requested) of all complaints and investigations in relation to the 2010 Act.
- 41.5 The Contractor shall provide to the Authority or any Beneficiary such information as the Authority or any Beneficiary may reasonably require to:
- 41.5.1 monitor the equity of access to the services; and
  - 41.5.2 fulfil its obligations under legislation (including any sub-ordinate legislation); and
  - 41.5.3 monitor equality of opportunity in employment.
- 41.6 the Authority or any Beneficiary and the Contractor shall each undertake Equality Impact Assessments in accordance with the legislation (including any sub-ordinate legislation).
- 41.7 The Contractor shall notify the Authority immediately of any investigation of or proceedings against the Contractor under the 2010 Act and shall cooperate fully and promptly with any requests of the person or body conducting such investigation or proceedings, including allowing access to any documents or data required, attending any meetings and providing any information requested.
- 41.8 The Contractor shall indemnify the Authority against all costs, claims, charges, demands, liabilities, damages, losses and expenses incurred or suffered by the Authority arising out of or in connection with any investigation conducted or any proceedings brought under the 2010 Act due directly or indirectly to any act or omission by the Contractor, its agents, employees or sub-contractors.
- 41.9 The Contractor shall impose on any sub-contractor obligations substantially similar to those imposed on the Contractor by this Clause 41.

## **42. Notices**

- 42.1 Any notice to be given under the Contract shall either be delivered personally, sent by facsimile or sent by first class recorded delivery post (airmail if overseas) or electronic mail. The address for service of each Party shall be its registered office or such other address as either Party may previously have notified to the other Party in writing. A notice shall be deemed to have been served:
- 42.1.1 if personally delivered, at the time of delivery;
  - 42.1.2 if sent by facsimile at the time of transmission;
  - 42.1.3 If posted, at the expiration of 48 hours or (in the case of airmail seven days) after the envelope containing the same was delivered into the custody of the postal authorities; and

42.1.4 if sent by electronic mail, a telephone call is made to the recipient warning the recipient that an electronic mail message has been sent to him (as evidenced by a contemporaneous note of the Party sending the notice) and a hard copy of such notice is also sent by first class recorded delivery post (airmail if overseas) on the same day as that on which the electronic mail is sent.

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

### **43. Force Majeure**

43.1 No Party shall be entitled to bring a claim for a breach of obligations under the Contract by the other Party or incur any liability to the other Party for any Loss or damages incurred by that party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that event of force majeure.

43.2 In the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

43.3 As soon as practicable, following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the Contract.

### **44. Welsh Language Obligations**

44.1 The Contractor warrants and undertakes that it will not perform this Contract in such a way as to render the Authority or any Beneficiary in breach of its obligations in respect of the Welsh language including but not limited to its obligations under the Government of Wales Act 2006, the Welsh Language Act 1993 or the Welsh Language (Wales) Measure 2011.

### **45. Law**

45.1 This Contract shall be deemed to be a contract made in Wales and shall be governed by and interpreted in accordance with the law of England and Wales, as it applies in Wales. All disputes arising under or in connection with it shall (subject to Clause 22) be submitted in the first instance to the non-exclusive jurisdiction of the Courts in Cardiff.

**Schedule 1**

**Third Party Beneficiaries**