

«F1: CONTRACT REFERENCE NUMBER (IF ANY)»

SERVICES CONTRACT

-between-

(1) THE SCOTTISH MINISTERS «F2: ACTING THROUGH...» (THE “PURCHASER”)

-and-

(2) «F3: SERVICE PROVIDER NAME...» (THE “SERVICE PROVIDER”)

-relating to the supply of-

«F4: COMMODITY»

«F5: SUB-CATEGORY / LOT (IF APPLICABLE)»

Guidance notes: There are three conceivable types of SG services contracts:

1. continuing requirement contract where multiple orders are placed under a single continuing contract
2. call-off contract under a framework agreement where the contract concerns a single order
3. ad hoc requirement not under a framework agreement where the contract concerns a single order

For consultation purposes, this model is for type 1 requirements only. It will not be difficult to modify the model for type 2 arrangements under the SG Model Framework agreement but for consultation purposes it would clutter the draft to have to have either/or provisions throughout. Type 3 requirements range from low value, straightforward purchases - currently catered for by SGTC2 – to extremely complex special project contracts e.g. census or election contracts, high value ICT contracts. This model has not been drafted with a view to being used for “special projects” or the outsourcing of Government functions, nor has it been drafted for collaborative arrangements, so SGLD advice should be sought for these. This model is also not suitable for works contracts or other construction contracts to which the Housing Grants, Construction and Regeneration Act 1996 applies.

This SG Model Services Contract is influenced by a multiplicity of Government styles – [SGTC2](#), the [OGC Model Services Contract \(2009 revision\)](#) and the older “S-CAT” (this is not online but SGLD can provide a copy on request), which provides different clauses for different types of services contracts.

Please note that this model is an “entire agreement” document and as such content from the ITT/tender will have to be replicated in the Schedules. Post-tender discussions that previously might have been narrated in an award letter should be directly incorporated into the Schedules.

Since this is a generic model contract, **buyers must consider which bespoke conditions they may require** (perhaps having regard to previous bespoke contracts) and instruct SGLD accordingly.

How to use the SG Model Contract: The model uses Microsoft Word fields to indicate key provisions that must be completed or deleted. Fields are indicated by double arrows and a “F” number and are highlighted in grey when clicked in Microsoft Word. With the Word cursor at the very top of the document the function key F11 should be used to move through all fields. **Please see the very guidance note on the last page if you are unsure what to do with a particular Field.** Guidance notes are included in text boxes which should be deleted. For dynamic numbering fields (cross-references) use F9 to autocorrect the numbering if necessary. Please note that Schedule references do not auto-update. **To the extent that modification of terms of this Model Contract is required beyond that, SGLD advice should be taken.**

Comment: This model does not anticipate that the Service Provider is an individual so if trimming this down to be a replacement for SGTC2 for type 2 or 3 requirements there will be a need to consider that.

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PREAMBLE:

- ONE The Purchaser requires the provision of services;
- TWO On «F10: date contract notice published» the Purchaser's contract notice relating to the Services was published in the Official Journal of the European Union with reference number «F11: OJEU reference number»;
- THREE On «F12: date PQQ completed» the Service Provider completed its PQQ;
- FOUR On «F13: date ITT issued» the Purchaser issued its ITT to potential Service Providers (including the Service Provider) in respect of the provision of services;
- FIVE On «F14: date Tender submitted» the Service Provider submitted its Tender;
- SIX On the basis of the Tender, the Purchaser has selected the Service Provider to supply the Services under the Contract;
- SEVEN The Contract establishes standard terms of supply for the provision of services;
- EIGHT The Contract also includes:
- a Specification setting out the Services that the Service Provider has undertaken to provide «F15: , including Service Levels setting out particular levels of service that the Service Provider has undertaken to meet»;
 - a Pricing Schedule setting out details of the pricing of the Services«F16: , including provision for Service Credits»;
 - «F17: details of Key Individuals involved in the provision of the Services»;
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 - «F19: details of the Service Provider's information which is deemed to be Service Provider Sensitive Information»;
 - Ordering Procedures prescribing the procedures for ordering particular Services; and
 - Management Arrangements for the strategic management of the relationship between the Parties.

Guidance notes: Please ensure that the preamble reflects the history to the award of the contract – it might be more extensive e.g. if the competitive dialogue procedure has been followed. This is a helpful reference for users of the contract and advisers that might not have been involved in the procurement process.

SUBSTANTIVE PROVISIONS:

SECTION A: INTRODUCTORY PROVISIONS

1. Definitions and Interpretation

1.1. In the Contract, unless the context otherwise requires, the following terms have the meanings given to them below:

“**Assignee**” has the meaning given in clause 32.2 (Assignment).

“**Baseline Personnel Security Standard**” means the pre-employment controls for all civil servants, members of the Armed Forces, temporary staff and government contractors generally.

“**Commencement Date**” has the meaning given in clause 4.1 (Period).

“**Contract**” means this Contract between the Parties consisting of clauses and «F20: number of Schedules» Schedules.

“**Contracting Authority**” has the meaning given in regulation 3 of the Public Contracts (Scotland) Regulations 2012;

“**Control**” has the meaning given in section 450 of the Corporation Tax Act 2010.

“**Default**” means any breach of the obligations of a Party (including material breach) or any negligent act, omission or statement of a Party in connection with or in relation to the Contract.

“**Deliverable**” means any thing to be delivered to by the Service Provider to the Purchaser and identified as a deliverable in accordance with the Ordering Procedures.

“**Environmental Information Regulations**” means the Environmental Information (Scotland) Regulations 2004 (and any subordinate regulations made under them from time to time or any superseding or amending regulations) together with any guidance and/or codes or practice issued by the Information Commissioner, the Scottish Information Commissioner and/or any relevant government department in relation to such regulations.

“**Equipment**” means equipment, plant, tackle, materials and other items supplied and used by the Service Provider’s Representatives in the performance of the Service Provider’s obligations under the Contract.

“**Exit Management**” means the obligations and rights of the Parties to ensure a smooth transition of the Contract from the Service Provider to the Purchaser or any Replacement Service Provider as set out in Clause 59 (Exit Management) and Schedule 10 (Exit Management).

“**Exit Plan**” means the exit management plan developed by the Service Provider and approved by the Purchaser in accordance with Clause 59 (Exit Management).

“**Exit Management Date**” means each of the following:

(a) the date of a Termination Notice; and

(b) if no Termination Notice has been served in relation to this Contract except for any Partial Termination, the expiry of the later of the Initial Term and any extension of the Contract agreed in writing.

“**FOISA**” means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under this Act from time to time or any superseding or amending enactments or regulations, together with any guidance and/or codes of practice issued by the Information Commissioner, the Scottish Information Commissioner and/or any relevant government department in relation to such legislation.

“**Force Majeure**” means any event or occurrence which is outside the reasonable control of the Party concerned and which is not attributable to any act or failure to take preventative action by that Party, including industrial action, fire, flood, violent storm, pestilence, explosion, malicious damage, armed conflict, acts of terrorism, nuclear, biological or chemical warfare, or any other disaster, natural or man-made.

“**Good Industry Practice**” means standards, practices, methods and procedures conforming to legal and regulatory requirements and the degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person or body engaged in a similar type of undertaking as the Service Provider under the same or similar circumstances.

«F21: “**Incoming Employees**” means individuals whose employment transfers to the Service Provider on the commencement of the provision of the Services by operation of TUPE.»

“**Intellectual Property Rights**” means patents, inventions, trade marks, service marks, logos, design rights (whether registerable or otherwise), applications for any of the foregoing, copyright, database rights, domain names, trade or business names, moral rights and other similar rights or obligations whether registerable or not in any country (including but not limited to the United Kingdom) and the right to sue for passing off.

“**ITT**” means the Purchaser’s invitation to tender dated «F13: date ITT issued».

“**Judicial Order**” means an ineffectiveness order or an order shortening the duration of the contract made in relation to the Contract under Part 9 of the Public Contracts (Scotland) Regulations 2012.

«F22: “**Key Individuals**” means the Service Provider Representatives identified as being key individuals for the provision of the Services as set out in Schedule 5.»

“**Management Arrangements**” means the arrangements for the strategic management of the relationship between the Parties, including arrangements for monitoring of the Service Provider’s compliance with the Specification, «F23: the Service Levels», the Ordering Procedures and the terms of the Contract, set out in Schedule 4.

“**Milestone**” means any event or task which must be completed by a particular date, such as the delivery of a Deliverable, identified as a milestone in accordance with the Ordering Procedures.

“**Order**” means an order for particular Services placed in accordance with the Ordering Procedures.

“**Ordering Procedures**” means the procedures for ordering particular Services set out at Schedule 3.

«F24: “**Outgoing Employees**” means individuals whose employment transfers from the Service Provider on the ceasing of the provision of the Services by the Service Provider by operation of TUPE.»

“**Party**” means either of the Purchaser or the Service Provider.

“**PQQ**” means the pre qualification questionnaire completed by the Service Provider and sent to the Purchaser on «F12: date PQQ completed».

“**Pricing Schedule**” means the details of the pricing of the Services «F23:, including provision for Service Credits,» set out in Schedule 2.

“**Purchaser**” means the Scottish Ministers «F2: acting through...».

“**Purchaser Property**” means any corporeal moveable property issued or made available to the Service Provider by the Purchaser in connection with the Contract.

“**Purchaser Protected Information**” means any information provided by the Purchaser to the Service Provider which:

- carries a protective marking such as “Official”, “Secret” or “Top Secret”; or
- is exempt information as set out in Part 2 of FOISA (disregarding for that purpose whether a provision of Part 2 does not confer absolute exemption within the meaning of section 2(2) of FOISA).

“**Relevant Transfer**” has the meaning given in regulation 2(1) of TUPE.

“**Replacement Service Provider**” means any third party service provider appointed to perform the Services by the Purchaser from time to time;

“**Request for Information**” means a request for information within the meaning of section 8 of FOISA or the Environmental Information Regulations and any attempted or apparent such request.

“**Schedule**” means a schedule annexed to, and forming part of, the Contract.

«F24A: “**Service Credits**” means the service credits payable to the Purchaser by the Service Provider in the event that the Service Levels are not met and identified as service credits in the Pricing Schedule.»

«F25: “**Service Levels**” means the Service Levels identified as such in the Specification.»

“**Service Provider**” means «F26: Service Provider legal name and details».

Guidance notes: It is critical that this definition is filled out properly and completely. Major Service Providers will have various group companies so the correct company should be identified with the correct legal name and company number – see <http://wck2.companieshouse.gov.uk/bed55236e32f6d2a68ae3efd4a3e95c3/wcframe?name=accessCompanyInfo>.

“**Service Provider Representatives**” means all persons engaged by the Service Provider in the performance of its obligations under the Contract including:

- its employees and workers (including persons employed by a third party but working for and under the control of the Service Provider);
- its agents, Service Providers and carriers; and
- any sub-contractors of the Service Provider (whether approved under clause 34 (Sub-contracting) or otherwise).

“**Service Provider Sensitive Information**” means any information provided by the Service Provider to the Purchaser (disregarding any protective marking or assertion of confidentiality) which:

- «F27: is specified as Service Provider Sensitive Information in Schedule 7 and has not lost its sensitivity according to the justifications and durations set out in that Schedule; or»
- is exempt information pursuant to sections 33(1) or 36, 38 or 39 of FOISA (having regard for that purpose to the public interest there might be in disclosing such information as referred to in section 2(1)(b) of FOISA).

“**Services**” means the Services as are to be supplied by the Service Provider to the Purchaser as set out in the Specification and as may be ordered in accordance with the Ordering Procedures.

“**Specification**” means the Purchaser’s general requirements for the provision of services «F28: , including Service Levels,» set out in Schedule 1.

“**Tender**” means the tender submitted by the Service Provider to the Purchaser in response to the ITT dated «F14: date Tender submitted».

“**TUPE**” means the Transfer of Undertakings (Protection of Employment) Regulations 2006.

“**Working Day**” means a day other than a Saturday, Sunday or bank holiday in Scotland, within the meaning of the Banking and Financial Dealings Act 1971.

“**Working Hour**” means an hour between 0900 hours and 1700 hours on a Working Day.

- 1.2. The interpretation and construction of the Contract is subject to the following provisions:
- 1.2.1. words importing the singular meaning include, where the context so admits, the plural and vice versa;
 - 1.2.2. words importing the masculine include the feminine and neuter;
 - 1.2.3. reference to a clause is a reference to the whole of that clause unless stated otherwise;
 - 1.2.4. references to any statute, enactment, order, regulation or other similar instrument are construed as a reference to the instrument as amended by any subsequent instrument or re-enacted;
 - 1.2.5. references to any person include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assignees or transferees;
 - 1.2.6. reference to “expiry or termination” of the Contract includes the making of a Judicial Order;
 - 1.2.7. the words “include”, “includes” and “including” are to be construed as if they were immediately followed by the words “without limitation”; and
 - 1.2.8. headings are included in the Contract for ease of reference only and do not affect the interpretation or construction of the Contract.

Guidance notes: If words and phrases are capitalised they are likely to be defined terms defined in clause 1.1. The interpretative provisions in clause 1.2 are fairly standard for Government contracts.

2. Condition Precedent: Requirement for a Parent Company Guarantee

It shall be a condition of this Contract that, if required by the Purchaser, the Service Provider shall deliver a validly executed parent company guarantee in the form set out in Schedule 8 to this Contract. The rights and obligations of the Parties shall have no force or effect unless the parent company guarantee has been properly executed and delivered to the Purchaser. The parties acknowledge that if this condition has not been fulfilled any performance of this Contract by the Service Provider shall be at the risk of the Service Provider and the Purchaser shall not be liable for and the Service Provider irrevocably waives any entitlement to payment of any fees, expenses or other payments in relation to such performance. Where the Service Provider has failed to fulfil this condition within 14 days of the date of last subscription of the Contract the Purchaser shall have the right to terminate the Contract by notice in writing to the Service Provider.

3. Nature of the Contract

- 3.1. The Contract is a public services contract within the meaning of regulation 2(1) of the Public Contracts (Scotland) Regulations 2012.
- 3.2. The Service Provider acknowledges that it is not the exclusive Service Provider of the Services to the Purchaser and as such no guarantee of work or volume of work has been granted by the Purchaser.

Guidance notes: This clause is to make it clear that the Contract is neither a framework agreement nor a “commitment” contract where a volume of work has been guaranteed.

4. Period

- 4.1. The period of the Contract is from and including «F29 commencement date» (the “**Commencement Date**”) to and including «F30 initial expiry date», unless it is terminated earlier or extended under clause 4.2.
- 4.2. The Purchaser may, by giving notice to the Service Provider, extend the period of the Contract to a date falling no later than «F31 insert longstop expiry date». Subject to that constraint, the Purchaser may extend the period of the Contract on more than one occasion.

Guidance notes: If the contract is to have a simple single term without the possibility of extension, this clause can be simplified by shortening clause 4.1 and removing clause 4.2. Please note that there is no need to duplicate period/extension provisions in the Specification or Management Arrangements.

The “logstop expiry date” referred to in clause 4.2 will be the end of the advertised contract term (e.g. if a contract is advertised with a 3+2 term and commences on 1 May 2011, the longstop expiry date will be 1 May 2016). If buyers absolutely must extend the Period further, they will be aware that they are doing so beyond the advertised scope and that **permission from SPD policy must be sought**.

Please note that the period of the Contract may be shortened by a Judicial Order. It is therefore important to comply with the procurement rules at all times.

5. Break

The Purchaser may terminate the Contract at any time by giving not less than 3 months’ notice to the Service Provider.

Guidance notes: The break clause is understandably unpopular with Service Providers but is a standard Government clause. Ministers change, policies change and Ministers may therefore wish established arrangements to come to an end, notwithstanding that there is no fault or insolvency basis for termination. There might also be a circumstance where the Service Provider is involved in a public controversy – in its activities unconnected to the contract (clause 36 would not apply) – and Ministers wish to disassociate the SG from the Service Provider. 3 months is considered to strike a reasonable balance taking into account the Service Provider's interests.

6. Specification «F6: and Service Levels»

The Service Provider must comply with the Specification. «F32: In particular, the Service Provider must meet or exceed the Service Levels.»

Guidance notes: This clause is to introduce Schedule 1 which **must be completed** – see the guidance notes there. If there are to be no Service Levels please delete all the optional provisions relating to Service Levels. Service Levels are sometimes known as Key Performance Indicators (KPIs).

7. Pricing Schedule

7.1. The Pricing Schedule sets out details of the pricing of the Services «F23:, including provision for Service Credits».

7.2. «F33: The prices in the Pricing Schedule are not to be increased for the period of the Contract. **or** The prices in the Pricing Schedule may be varied in accordance with the arrangements set out in the Pricing Schedule.»

7.3. Accordingly, the Service Provider may not unilaterally increase the prices in the Pricing Schedule. But nothing in the Contract prevents the Service Provider from improving on the prices in the Pricing Schedule for the purposes of a particular Order.

Guidance notes: This clause introduces Schedule 2 which **must be completed** – see the guidance notes there. The drafting approach here is not to be prescriptive in the clauses about pricing arrangements, since these will vary from contract to contract. Payment provisions are contained in clause 11 and invoicing provisions are contained in clause 12.

8. Ordering Procedures and Management Arrangements

8.1. The Ordering Procedures may be invoked by the Purchaser at any time during the period of the Contract.

8.2. The Parties must comply with the Ordering Procedures.

8.3. The Service Provider must maintain the capacity to supply the Services throughout the period of the Contract.

8.4. The Parties must comply with the Management Arrangements.

Guidance notes: Schedule 3 **must be completed** to prescribe the Ordering Procedures – see the guidance notes there. The drafting approach here is not to be prescriptive in the clauses about Ordering Procedures, since these will vary from contract to contract. This also clause introduces Schedule 4 which **must be completed** – see the guidance notes there. The drafting approach here is not to be prescriptive in the clauses about management arrangements, since these will vary from contract to contract.

SECTION B: MISCELLANEOUS PROVISIONS INCLUDING THOSE RELATING TO PRICE, PAYMENT AND INFORMATION

9. Service Provider's Status

At all times during the period the Service Provider is an independent service provider and nothing in the Contract establishes a contract of employment, a relationship of agency or partnership or a joint venture between the Parties or between the Purchaser and any

Service Provider Representative. Accordingly, neither Party is authorised to act in the name of, or on behalf of, or otherwise bind the other Party save as expressly permitted by the terms of the Contract.

Guidance notes: This is a clause to exclude any implication that the Service Provider has any special authority beyond that of an external Service Provider performing Services under the Contract.

10. Notices

10.1. Any notice or other communication which is to be given by a Party to the other under the Contract must be:

10.1.1. given in writing;

10.1.2. addressed in accordance with clause 10.3; and

10.1.3. sent by letter (delivered by hand, first class post or by recorded delivery or special delivery), fax or e-mail.

10.2. Provided the relevant communication is not returned or rejected as undelivered, the notice or communication is deemed to have been given:

10.2.1. 2 Working Days after the day on which the letter was posted; or

10.2.2. 4 Working Hours after the communication was sent, in the case of fax or email.

10.3. For the purposes of this clause, the address of each Party is:

10.3.1. For the Purchaser:

«F38: Purchaser address for notices»

For the attention of: «F39: Purchaser individual contact for notices»

Tel: «F40: Purchaser phone number»

Fax: «F41: Purchaser fax number for notices»

E-mail: «F42: Purchaser e-mail address for notices»

10.3.2. For the Service Provider:

«F43: Service Provider address for notices»

For the attention of: «F44: Service Provider individual contact for notices»

Tel: «F45: Service Provider phone number»

Fax: «F46: Service Provider fax number for notices»

E-mail: «F47: Service Provider e-mail address for notices»

10.4. Either Party may change its address details by serving a notice in accordance with this clause.

10.5. Notices under clause 58.1 (Termination on Insolvency and Change of Control) may be sent to the Purchaser's trustee, receiver, liquidator or administrator, as appropriate.

Guidance notes: This is a clause making it clear what is and is not a valid written notice under the contract (e.g. a termination notice) and when a notice is and is not deemed to be received. This avoids having to consider the rules for notices that would be implied at common law.

It should be ensured that notices sent to the SG will be picked up at the given address – the e-mail address used might therefore be a specific commodity e-mail address rather than any individual's e-mail address. Please note that there is no need to duplicate notice provisions in the Specification or Management Arrangements.

11. Price

- 11.1. In consideration of the Service Provider's performance of its obligations relating to an Order, the Purchaser must pay:
- 11.1.1. the price due in accordance with the Pricing Schedule and the Ordering Procedures; and
 - 11.1.2. a sum equal to the value added tax chargeable at the prevailing rate.
- 11.2. «F34 The Service Provider must automatically credit the Purchaser with Service Credits in accordance with the Pricing Schedule.»
- 11.3. The Service Provider may not suspend the provision of services if it considers that the Purchaser has failed to pay the price due.

Guidance notes: This clause requires the Purchaser to pay for acceptably provided Services, subject to any Service Credits. Standard invoicing and payment provisions are found in clause 12.

12. Payment and Invoicing

- 12.1. The Purchaser must pay all sums due to the Service Provider within 30 days of receipt of a valid invoice.
- 12.2. The Service Provider must render invoices «F48: insert invoicing frequency».
- 12.3. The Service Provider must ensure that each invoice contains appropriate Contract and Order references «F49: , details of any Service Credits applied» and a detailed breakdown of the Services provided. The Service Provider must supply such other documentation reasonably required by the Purchaser to substantiate any invoice.
- 12.4. Value added tax, where applicable, must be shown separately on all invoices as a strictly net extra charge.
- 12.5. «F50: Where any Service Credits have been credited to the Purchaser they must be applied against the next invoice rendered by the Service Provider. Where no invoice is due or likely to be rendered for a period exceeding 2 months, the Service Provider must promptly issue a credit note and pay the credited sum to the Purchaser within 30 days of issue.»
- 12.6. Interest is payable on the late payment of any undisputed sums of money in accordance with the Late Payment of Commercial Debts (Interest) Act 1998. In the case of sums due by the Purchaser, the sums referred to in this clause must be properly invoiced by the Service Provider.

Guidance notes: These are standard SG payment terms. Payment terms in sub-contracts are addressed in clause 34 (Sub-Contracting).

13. Recovery of Sums Due

- 13.1. Wherever under the Contract any sum of money is recoverable from or payable by the Service Provider to the Purchaser, the Purchaser may deduct that sum from any sum due to the Service Provider whether under the Contract or otherwise.
- 13.2. The Service Provider must make any payments due to the Purchaser without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise unless the Service Provider has a valid court order requiring an amount equal to such deduction to be paid by the Purchaser to the Service Provider.

Guidance notes: There are only limited circumstances under which the Service Provider will be due to pay monies to the SG

under the contract – see e.g. the indemnity in clause 60.1 - however it is appropriate in those cases that the SG can set-off such sums against any sums it might be due to pay to the Service Provider under the Contract or otherwise. The opposite is provided for the Service Provider i.e. no set-off.

14. Data Protection Act

- 14.1. For the purposes of this clause, the terms “Data Controller”, “Data Processor”, “Data Subject”, “Personal Data” and “Processing” have the meanings given in section 1(1) of the Data Protection Act 1998.
- 14.2. Where the Service Provider Processes Personal Data as a Data Processor for the Purchaser the Service Provider must:
 - 14.2.1. enter into a data processing agreement in the form set out in Schedule 9 annexed hereto, and process the Personal Data in accordance with any instructions as may be given by the Purchaser (which may be specific or of a general nature);
 - 14.2.2. process the Personal Data only to the extent, and in such manner as is necessary for the performance of the Service Provider’s obligations under the Contract or as is required by the law;
 - 14.2.3. implement appropriate technical and organisational measures to protect Personal Data against unauthorised or unlawful Processing and against accidental loss, destruction, damage, alteration or disclosure, such measures being appropriate to the harm which might result from any unauthorised or unlawful Processing, accidental loss, destruction or damage to the Personal Data and having regard to the nature of the Personal Data which is to be protected;
 - 14.2.4. obtain approval before transferring the Personal Data to any sub-contractor;
 - 14.2.5. not cause or permit the Personal Data to be transferred outside of the European Economic Area without approval;
 - 14.2.6. ensure that all Service Provider Representatives accessing the Personal Data are aware of and comply with the obligations set out in this clause; and
 - 14.2.7. not disclose or divulge any of the Personal Data to any third parties unless directed in writing to do so by the Purchaser.
- 14.3. The Service Provider must notify the Purchaser promptly, and in any event within 5 Working Days, if it receives:
 - 14.3.1. a request from a Data Subject to have access to their Personal Data;
 - 14.3.2. a complaint or request relating to the Purchaser’s obligations under the Data Protection Act 1998.
- 14.4. Where the Service Provider is collecting data the Service Provider must comply with all the fair processing provisions under the Data Protection Act 1998, including notification to Data Subjects that the information may be shared with the Purchaser.
- 14.5. To comply with section 31(3) of the Public Services Reform (Scotland) Act 2010, the Purchaser publishes an annual statement of all payments over £25,000. In addition, in line with openness and transparency, the Scottish Government publishes a monthly report of all payments over £25,000. The Service Provider should note that where a payment is made in excess of £25,000 there will be disclosure (in the form of the name of the payee, the date of the payment, the subject matter and the amount of payment) in the both the monthly report and the annual Public Services Reform (Scotland) Act 2010 statement.

Guidance notes: Some services contracts will involve the transfer of personal data to the Service Provider, so this clause is included so that any access by the Service Provider to SG personal data is given in accordance with the seventh data protection principle. **All dealings in SG personal data must nonetheless be otherwise in accordance with all other requirements of the Data Protection Act 1998 e.g. fair and lawful.**

Please note that personal data for which the SG is the data controller will be caught within the wider concept of "Purchaser Protected Information". Clause 60.5 requires the return/destruction of all such information at the end of the Contract period.

15. Freedom of Information

- 15.1. The Service Provider acknowledges that the Purchaser is subject to the requirements of FOISA and the Environmental Information Regulations and undertakes to assist and cooperate with the Purchaser to enable the Purchaser to comply with FOISA and the Environmental Information Regulations.
- 15.2. If the Service Provider receives a Request for Information the Service Provider must promptly respond to the applicant. Where the Request for Information appears to be directed to information held by the Purchaser, the Service Provider must promptly inform the applicant in writing that the Request for Information can be directed to the Purchaser.
- 15.3. Where the Purchaser receives a Request for Information concerning the Contract, the Purchaser is responsible for determining at its absolute discretion whether information requested is to be disclosed to the applicant or whether the information requested is exempt from disclosure in accordance with FOISA or the Environmental Information Regulations.
- 15.4. The Service Provider acknowledges that the Purchaser may, acting in accordance with the Purchaser's Code of Practice on the Discharge of Functions of Public Authorities issued under section 60 of FOISA (as may be issued and revised from time to time), be obliged under FOISA or the Environmental Information Regulations to disclose information requested concerning the Service Provider or the Contract:
- 15.4.1. in certain circumstances without consulting the Service Provider, or
 - 15.4.2. following consultation with the Service Provider and having taken its views into account.
- 15.5. Where clause 15.4.1 applies the Purchaser must take reasonable steps, where practicable, to give the Service Provider advance notice of the fact of disclosure or, failing that, draw the fact of disclosure to the attention of the Service Provider after such disclosure.
- 15.6. «F54: Where a Request for Information concerns Service Provider Sensitive Information specified in Schedule 7 (having regard to the justifications and durations set out there), the Purchaser must take reasonable steps, where practicable, to consult with the Service Provider before disclosing it pursuant to a Request for Information.»

Guidance notes: FOI provisions in Government contracts vary. This clause aims to meet SG practices and policies as they currently stand, having particular regard to the revised section 60 code that is being consulted on.

16. Purchaser Protected Information

- 16.1. The Service Provider must:
- 16.1.1. treat all Purchaser Protected Information as confidential and safeguard it accordingly, implementing appropriate technical and organisational measures to protect Purchaser Protected Information against disclosure;

- 16.1.2. only use the Purchaser Protected Information for the purposes of performing its obligations under the Contract;
 - 16.1.3. only disclose the Purchaser Protected Information to such Service Provider Representatives that are directly involved in the performance of the Contract and need to know the information; and
 - 16.1.4. not disclose any Purchaser Protected Information without the prior written consent of the Purchaser.
- 16.2. The Service Provider must immediately notify the Purchaser of any breach of security concerning the Purchaser Protected Information. The Service Provider must fully cooperate with the Purchaser in any investigation that the Purchaser considers necessary to undertake as a result of any such breach of security.
- 16.3. Clause 16.1 does not apply to the extent that:
- 16.3.1. disclosure is required by law or by order of any competent court or tribunal;
 - 16.3.2. information is in the possession of the Service Provider without restriction as to its disclosure prior to its disclosure by the Purchaser;
 - 16.3.3. information is obtained from a third party (who lawfully acquired it) without restriction as to its disclosure;
 - 16.3.4. information is already in the public domain at the time of disclosure otherwise than by a breach of the Contract; or
 - 16.3.5. information is independently developed without access to the Purchaser Protected Information.
- 16.4. Breach of this clause or the Official Secrets Acts 1911 to 1989 by the Service Provider is a material breach for the purposes of clause 57.1.3 (Termination on Default).

Guidance notes: Conventionally, a single “confidential information” clause covers both Parties. Policy and practice (particularly concerning proactive disclosure of information by public bodies) has however moved to a degree that it is appropriate to distinguish the non-disclosure obligations of both parties. The non-disclosure requirements on the Service Provider are stricter than those applicable to the Purchaser but if the Service Provider wishes to make a disclosure prohibited by this clause it can always seek the approval of the Purchaser. Please note that clause 60.5 requires the return/destruction of all Purchaser Protected Information at the end of the Contract period.

17. Service Provider Sensitive Information

- 17.1. The Purchaser must:
- 17.1.1. treat all Service Provider Sensitive Information as confidential and safeguard it accordingly; and
 - 17.1.2. not disclose any Service Provider Sensitive Information to any other person without the prior written consent of the Service Provider.
- 17.2. Clause 17.1 does not apply to the extent that:
- 17.2.1. disclosure is required by law or by order of any competent court or tribunal;
 - 17.2.2. information is in the possession of the Purchaser without restriction as to its disclosure prior to its disclosure by the Service Provider;
 - 17.2.3. information is obtained from a third party (who lawfully acquired it) without restriction as to its disclosure;

- 17.2.4. information is already in the public domain at the time of disclosure otherwise than by a breach of the Contract; or
 - 17.2.5. information is independently developed without access to the Service Provider Sensitive Information.
- 17.3. Nothing in this Contract prevents the Purchaser from disclosing any Service Provider Sensitive Information or any other information concerning the Service Provider or the Contract:
- 17.3.1. pursuant to a Request for Information concerning the information (see clause 15 (Freedom of Information));
 - 17.3.2. in accordance with the Purchaser's publication scheme (within the meaning of section 23 of FOISA) as reviewed from time to time;
 - 17.3.3. in accordance with the requirements of Part 3 of the Public Services Reform (Scotland) Act 2010;
 - 17.3.4. in accordance with any future policies of the Purchaser concerning the routine disclosure of government information in the interests of transparency;
 - 17.3.5. to any consultant, Service Provider or other person engaged by the Purchaser, for example to conduct a gateway review;
 - 17.3.6. in response to a Parliamentary Question from a Member of the Scottish Parliament , a member of the United Kingdom Parliament, or any other department, office or agency of Her Majesty's Government in Scotland or the United Kingdom, and their servants or agents, and when disclosing such information to either the Scottish Parliament or the United Kingdom Parliament it is recognised and agreed by both parties that the Purchaser shall if the Purchaser sees fit disclose such information but is unable to impose any restrictions upon the information that the Purchaser provides to Members of the Scottish Parliament or Members of the United Kingdom Parliament;
 - 17.3.7. in response to any inquiry of the European Commission concerning the Contract; or
 - 17.3.8. for the purpose of any examination by any auditors of the Purchaser (including Audit Scotland, the Auditor General for Scotland and the Scottish Parliament) of the economy, efficiency and effectiveness with which the Purchaser has used its resources.
- 17.4. The Service Provider consents to the publication of the Contract by the Purchaser, subject to such redactions as the Purchaser may decide to make. The Purchaser may consult with the Service Provider to inform its decisions concerning redaction (for example to exclude any Service Provider Sensitive Information) but any decisions taken by the Purchaser are final and conclusive.

Guidance notes: Given FOI and transparency considerations, the non-disclosure requirements on the Purchaser are much less extensive than those applicable to the Service Provider. Nothing that the SG has to proactively publish will breach this clause. Previously used clauses tend to include a tension between "all Purchaser information is confidential" and "everything can nonetheless be disclosed" so this clause attempts to set a fair balance taking into account transparency requirements.

18. [Audit

- 18.1. The Service Provider must retain and maintain until 5 years after the end of the Contract period full and accurate records of the Contract including the Orders placed, the Services provided and payments made and reimbursed under it.
- 18.2. The Service Provider must on request, and without any charge to the Purchaser, afford the Purchaser, or the Purchaser's representatives, such access to those records as may reasonably be requested by the Purchaser in connection with the Contract.]

OR

18. [Audit and Records Management

- 18.1 In this Clause 18, the following terms have the following meanings:-

The 'Act' means the Public Records (Scotland) Act 2011;

'Records Management Plan' means the plan prepared by the Purchaser and approved by the Keeper of the Records of Scotland under section 1 of the Act;

- 18.2 The Service Provider must retain and maintain until 5 years after the end of the Contract period full and accurate records of the Contract including the Orders placed, the Services provided and payments made and reimbursed under it.
- 18.3 The Service Provider must on request, and without any charge to the Purchaser, afford the Purchaser, or the Purchaser's representatives, such access to those records as may reasonably be requested by the Purchaser in connection with the Contract.
- 18.4 The Service Provider shall, for the duration of the Contract, provide the Purchaser with all assistance requested by the Purchaser acting reasonably to assist the Purchaser in complying with its obligations under the Act and with the Purchaser's Records Management Plan where such compliance is in respect of records created or to be created by the Service Provider on behalf of the Purchaser in terms of this Contract. This assistance will be at no cost to the Purchaser.
- 18.5 At the end of the Contract, the Service Provider shall transfer the records in question to the Purchaser, such transfer to include full ownership of the records including all Intellectual Property Rights in relation thereto. The transfer shall be at no cost to the Purchaser. The Service Provider shall ensure that all relevant information reasonably required to locate individual items within the records, including metadata and database schema, are also offered to the Purchaser on the same terms.
- 18.6 If the Service Provider shall become bankrupt (whether voluntarily or compulsorily), unable to pay its debts, insolvent or make arrangements with its creditors or if any resolution is adopted for the winding up of any party, or if a receiver, administrator or administrative receiver is appointed over the whole or any part of its assets or if either party goes into liquidation (whether voluntarily or compulsorily), otherwise than for the purposes of amalgamation or reconstruction or any form of execution levied upon its assets, then immediately upon the occurrence of any of these events, the records which would, in terms of clause 18.5 fall to be offered to the Purchaser shall be deemed to be held on trust by the Service Provider on behalf of the Purchaser. The Service Provider shall thereafter, if and when so required by the Purchaser, transfer the records in question to the Purchaser, such transfer to be on the same terms as would apply to a transfer made in terms of clause 18.5.]

Guidance notes: This clause ensures that the Service Provider retains records that the SG may need to see to comply with its audit obligations. The first Clause 18.2 sometimes presents concerns to Service Providers such as consultants, but it should be retained.
There are 2 options for the Audit/Audit and Records Management clause. You need to delete one. The first is for contracts where records management is not an integral part of the service. The second option is where this is a key element, such as contracts for administration of loans or grants.
Regarding the first 18.1 and the second 18.2, you will need to consider whether 5 years is long enough each time regarding EU funded contracts.

19. Publicity

The Service Provider must not make any press announcement or otherwise publicise the Contract in any way, except with the written consent of the Purchaser.

Guidance notes: This clause ensures that the Purchaser can control press releases etc from the Service Provider. This clause is often made mutual but the SG might innocently forget to get the Service Provider's consent to press releases so it is appropriate to apply this clause to the Service Provider only.

SECTION C: PROVISION OF SERVICES

20. Provision of the Services

20.1. The Service Provider must provide the Services:

20.1.1. in accordance with the Specification «F6: the Service Levels» and the Ordering Procedures;

20.1.2. in accordance with the particular requirements of each Order; and

20.1.3. to the satisfaction of the Purchaser acting reasonably.

20.2. The Service Provider acknowledges that the Purchaser relies on the skill, care, diligence and judgment of the Service Provider in the supply of the Services and the performance of its obligations under the Contract.

20.3. For each Order for the provision of services, subject to any contrary requirements of the Purchaser communicated in accordance with the Ordering Procedures, the provisions of this Section C apply.

20.4. The period for any Order agreed in accordance with the Ordering Procedures may be brought to an earlier end upon 3 months' notice by the Purchaser.

Guidance notes: These are general requirements for the provision of services. Clause 20.3 avoids the need to say throughout Section C "unless the Purchaser requires otherwise". Any of the requirements in section C can be modified for a particular Order but in such case the SG must make its modified requirements clear through the Ordering Procedures.

21. Deliverables and Milestones

21.1. The Service Provider must provide the Services, including any Deliverables:

21.1.1. at the date(s), time(s) and location(s) required by the Purchaser; and

21.1.2. in good time to meet any Milestones required by the Purchaser.

- 21.2. When the Service Provider believes acting reasonably that it has provided any Deliverable or completed any Milestone in accordance with the Contract it must notify the Purchaser.
- 21.3. The Purchaser may thereafter by notice to the Service Provider:
- 21.3.1. accept the provision of the Deliverable or the completion of the Milestone (as appropriate), having regard to any acceptance criteria communicated in accordance with the Ordering Procedures; or
- 21.3.2. providing reasons, reject the provision of the Deliverable or the completion of the Milestone.
- 21.4. Where the Purchaser rejects the completion of a Milestone or provision of a Deliverable Services in accordance with clause 21.3.2, the Service Provider must at its expense immediately rectify or remedy any defects and/or delays.
- 21.5. Risk and ownership in any Deliverables that are corporeal moveables and in any physical media in which any Deliverables are delivered vests in the Purchaser upon acceptance in accordance with this clause.
- 21.6. Whether the defect or delay is due to the Purchaser or not, the Service Provider shall deploy all additional resources to address the consequences of the default or delay. Where such default or delay is solely due to the Purchaser, any additional costs in respect of the said additional resources shall be agreed between the parties both acting reasonably.

Guidance notes: This clause provides for the timely provision of the Services and the completion of Milestones and Deliverables as required by the Purchaser. There is no time of the essence clause allowing termination of the whole contract if there is lateness under a single order. Therefore the Specification and Service Levels should make clear the levels of failure that are deemed to be intolerable and justifying termination. Clauses 39 (Access to the Purchaser's Premises) and 40 (Service Provider's Equipment) regulate the Purchaser's conduct when carrying out Services or other activities on the Purchaser's premises.

Regarding milestones, part of the pricing should be performance based, which is then forfeited in the event of failure to meet a milestone.

SECTION D: STAFF INVOLVED IN THE PROVISION OF SERVICES

22. Key Individuals

- 22.1. The Service Provider acknowledges that the Key Individuals are essential to the proper provision of the Services to the Purchaser.
- 22.2. The Key Individuals must not be released from providing the Services without the approval of the Purchaser, except by reason of long-term sickness, maternity, paternity, adoption or parental leave, termination of employment or equivalent extenuating circumstances. Where such extenuating circumstances arise or are foreseeable, the Service Provider must immediately give notice of that fact to the Purchaser.
- 22.3. The Service Provider may propose a replacement to a Key Individual (and must do so when a Key Individual is to be released from providing the Services), in which case:
- 22.3.1. appropriate arrangements must be made to minimise any adverse impact on the Contract which could be caused by the change in Key Individuals (including, wherever possible, a transfer period of sufficient duration to allow for the transfer of know-how and skills); and
- 22.3.2. the replacement must be of at least equal status and of equivalent qualifications, experience, training and skills to the Key Individual being replaced and must be

fully competent to carry out the responsibilities of that person in relation to the Services.

- 22.4. Any proposed replacement to a Key Individual is subject to the approval of the Purchaser. Subject to the Service Provider's compliance with this clause, the Purchaser must not unreasonably withhold such approval.

Guidance notes: This clause is an optional clause where Key Individuals can be identified before contract award. If deleting this clause, delete the Key Individuals Schedule and all fields relating to Key Individuals.

23. Offers of Employment

- 23.1. For the duration of the Contract and for a period of 12 months thereafter the Service Provider must not employ or offer employment to any of the Purchaser's employees who have been associated with the Contract and/or the contract management of the Contract without the Purchaser's prior approval.
- 23.2. This clause does not prevent the Service Provider from employing or offering employment to any person who has applied for employment in response to an advertisement placed in the normal course of business and not placed with the objective of soliciting the Purchaser's employees.

Guidance notes: This is a non-solicitation clause to prevent the Service Provider from "poaching" Purchaser employees. It does not prevent recruitment following an advertisement in the normal course.

24. Staff transfer at commencement

- 24.1. «F36 The Parties agree that the commencement of the provision of the Services by the Service Provider does not involve a Relevant Transfer.»
- 24.2. The Parties agree that the commencement of the provision of the Services by the Service Provider may constitute a Relevant Transfer in respect of the Incoming Employees.
- 24.3. The Service Provider is responsible for all emoluments and outgoings in respect of the Incoming Employees (including, without limitation, all wages, bonuses, commission, premiums, subscriptions, pay as you earn and national insurance contributions and pension contributions) which are attributable in whole or in part to the period from the date of the Relevant Transfer, including bonuses or commission which are payable on or before the date of the Relevant Transfer but attributable in whole or in part to the period from the date of the Relevant Transfer.
- 24.4. The Service Provider indemnifies the transferor against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and any other liabilities which the transferor may incur in respect of the emoluments and outgoings referred to in clause 24.3.

Guidance notes: Please include optional clause 24.1 (and delete the other clauses) if it is clear that there will be no TUPE transfer of staff from the Purchaser or from a previous service provider on commencement of the provision of the Services. **Seek SGLD Employment advice if there is any doubt as to the position.**

"Incoming Employees" who become Service Provider employees are likely to be the employees of a previous service provider who is ceasing to carry out work for the Purchaser. The old service provider enjoys rights under this clause, but their obligations (if any) will be determined by the older contract that they are party to. Where two contracts based on the model contract follow each other, the obligations of the two service providers join up.

If there is any prospect that the "Incoming Employees" are SG employees (i.e. that SG employees might transfer to the private sector) then SGLD Employment advice and assistance must be sought. It is noted in the principal guidance note that this model is not suitable for "outsourcing" contracts where it might be appropriate for the SG to give indemnities.

25. Information about Service Provider Employees

- 25.1. The Purchaser may by notice require the Service Provider to disclose such information as the Purchaser may require relating to those of the Service Provider's employees carrying out activities under or connected with the Contract.
- 25.2. The Service Provider must disclose by notice all such information as is required by the Purchaser under clause 25.1, within such reasonable period specified by the Purchaser. The Service Provider acknowledges that the Data Protection Act 1998 does not prevent the disclosure of anonymised data that is not personal data within the meaning of that Act.
- 25.3. The Service Provider consents to the disclosure by the Purchaser of all information provided by the Service Provider under this clause to other service providers that the Purchaser may invite to tender or appoint for services to be provided in substitution for the Services.

Guidance notes: Irrespective of whether a TUPE transfer on expiry or termination is likely, it is desirable for the SG to be able to pull together employee liability information for inclusion in future ITTs.

To the extent that it is desirable to include a requirement that the Service Provider provides information about other matters, this can be included in the Management Arrangements.

26. Staff transfer on expiry or termination

- 26.1. «F37 The Parties agree that the ceasing of the provision of the Services by the Service Provider does not involve a Relevant Transfer.»
- 26.2. The Parties agree that the ceasing of the provision of the Services by the Service Provider may constitute a Relevant Transfer in respect of the Outgoing Employees.
- 26.3. The Service Provider indemnifies the Purchaser and any replacement service provider against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and other liabilities which the Purchaser or any replacement service provider may suffer as a result of or in connection with:
 - 26.3.1. the provision of information pursuant to clause 25;
 - 26.3.2. any claim or demand by any Outgoing Employee (whether in contract, delict, under statute or otherwise) arising directly or indirectly from any act, fault or omission of the Service Provider in respect of any Outgoing Employee on or before the date of the Relevant Transfer;
 - 26.3.3. any failure by the Service Provider to comply with its obligations under regulations 13 or 14 of TUPE or any award of compensation under regulation 15 of TUPE save where such failure arises from the failure of the Purchaser or any replacement service provider to comply with its obligations under regulation 13 of TUPE; and
 - 26.3.4. any claim (including any individual employee entitlement under or consequent on such a claim) by any trade union or other body or person representing any Outgoing Employees arising from or connected with any failure by the Purchaser to comply with any legal obligation to such trade union, body or person.
- 26.4. The Service Provider is responsible for all emoluments and outgoings in respect of the Outgoing Employees (including, without limitation, all wages, bonuses, commission, premiums, subscriptions, pay as you earn and national insurance contributions and pension contributions) which are attributable in whole or in part to the period up to and including the date of the Relevant Transfer (including bonuses or commission which are payable after the date of the Relevant Transfer but attributable in whole or in part to the period on or before the date of the Relevant Transfer).

- 26.5. The Service Provider indemnifies the Purchaser and any replacement service provider against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and any other liabilities which the Purchaser or replacement service provider may incur in respect of the emoluments and outgoings referred to in clause 26.4.

Guidance notes: Please include optional clause 26.1 (and delete the other clauses) if it is clear that there will be no TUPE transfer of staff to the Purchaser or to a replacement service provider on expiry or termination of the Contract. **Seek SGLD Employment advice if there is any doubt as to the position.**

“Outgoing Employees” are those that transfer from the Service Provider’s employment on expiry or termination of the Contract (they could include “Incoming Employees” transferred at the commencement of the Contract). A replacement service provider enjoys rights under this clause but their obligations (if any) will be determined by the older contract that they are party to. Where two contracts based on the model contract follow each other, the obligations of the two service providers join up.

If there is any prospect that the “Outgoing Employees” become SG employees then SGLD Employment advice and assistance must be sought. It is noted in the principal guidance note that this model is not suitable for “outsourcing” contracts where it might be appropriate for the SG to give indemnities.

27. Security

- 27.1 The Service Provider must comply with the Purchaser’s policies concerning Baseline Personnel Security Standard clearance and such modifications to those policies or replacement policies as are notified to the Service Provider from time to time.
- 27.2 The Service Provider must notify the Purchaser of any matter or other change in circumstances which might adversely affect future Baseline Personnel Security Standard clearance.

SECTION E: PROVISIONS RELATING TO INTELLECTUAL PROPERTY AND GOVERNANCE

28. Parties’ pre-existing Intellectual Property Rights

Except as expressly provided for in the Contract, neither Party acquires any interest in or license to use the other Party’s Intellectual Property Rights as they subsist at the Commencement Date or as developed independently of the Contract.

Guidance notes: An express provision along these lines is not always included but Service Providers often request it and it is appropriate to include it. This clause avoids the need to say “the Purchaser does not have rights in this or that” – the default position is no rights unless expressly given.

29. Specially Created Intellectual Property Rights

- 29.1. All Intellectual Property Rights «F56: in Deliverables and» and any reports, guidance, specification, instructions, toolkits, plans, data, drawings, databases, patents, patterns, models, designs or other material prepared by or for the Service Provider on behalf of the Purchaser for use, or intended use, in relation to the performance by the Service Provider of its obligations under the Contract belong to the Purchaser.
- 29.2. The Service Provider assigns to the Purchaser, with full title guarantee, all Intellectual Property Rights which may subsist in the materials referred to in clause 29.1. This assignation takes effect on the Commencement Date or as an assignation of future rights that will take effect immediately on the coming into existence of the Intellectual Property Rights produced by the Service Provider. The Service Provider must execute all documentation necessary to effect this assignation.

Guidance notes: This clause gives IPR in specially created Contract materials to the Purchaser. IPR in Deliverables can either be in Crown ownership, or a sufficiently wide license under clause 30 may be more appropriate – these clauses

should be tailored accordingly. If a license is expressed to be given in clause 30, then there will be no transfer of ownership under this clause.

30. Licences of Intellectual Property Rights

- 30.1. The Service Provider grants to the Purchaser a royalty-free, irrevocable and non-exclusive licence (with a right to sub-licence) to use any Intellectual Property Rights owned or developed prior to the Commencement Date and which the Purchaser reasonably requires in order to enjoy the benefit of the Services.
- 30.2. «F57: The Service Provider grants to the Purchaser a perpetual, royalty-free, irrevocable and exclusive license to use any Intellectual Property Rights in the Deliverables.»
- 30.3. The Service Provider must ensure that the third party owner of any Intellectual Property Rights that are or which may be used to perform the Contract grants to the Purchaser a royalty-free, irrevocable and non-exclusive licence or, if itself a licensee of those rights, grants to the Purchaser an authorised and equivalently wide sub-licence, to use, reproduce, modify, develop and maintain the Intellectual Property Rights. Such licence or sub-licence must be non-exclusive, perpetual, royalty free and irrevocable.

Guidance notes: This clause gives the Purchaser licenses to use Purchaser and third party IPR as may be required to enjoy the benefit of the Services. Optional clause 30.2 should be deleted if IPR in Deliverables are to be owned by the Purchaser rather than licensed.

If there is a need for more detailed IPR provisions e.g. where multiple different types of IPR or software are involved, **SGLD advice should be taken.**

31. Claims relating to Intellectual Property Rights

- 31.1. The Service Provider must not infringe any Intellectual Property Rights of any third party in providing the Services or otherwise performing its obligations under the Contract and must ensure that the provision of the Services and the use or possession of the Deliverables does not infringe such Intellectual Property Rights.
- 31.2. The Service Provider must promptly notify the Purchaser if any claim or demand is made or action brought against the Service Provider for infringement or alleged infringement of any Intellectual Property Right which may affect the use or possession of the Deliverables or which may affect the provision of the Services.
- 31.3. Where a claim to which this clause applies is made, the Service Provider must, at its expense, use its best endeavours to:
- 31.3.1. modify the Services or Deliverables or substitute alternative Services or Deliverables (in any case without reducing performance or functionality) so as to avoid the infringement or alleged infringement of the Intellectual Property Rights; or
 - 31.3.2. procure the grant of a licence or licences from the pursuer, claimant or complainer, on terms acceptable to the Purchaser, so as to avoid the infringement or alleged infringement of the Intellectual Property Rights of the pursuer, claimant or complainer.
- 31.4. The Service Provider must not without the consent of the Purchaser make any admissions which may be prejudicial to the defence or settlement of any claim to which this clause applies.

Guidance notes: The SG should have comfort that no third party IPRs are infringed in the Services and Deliverables provided by the Service Provider. This clause seeks to ensure that.

32. Assignment

32.1. The Service Provider may not assign its interest in the Contract or any part of it without the prior written consent of the Purchaser.

32.2. Notwithstanding clause 32.1, the Service Provider may assign to another person (an "**Assignee**") the right to receive the price due to the Service Provider under the Contract subject to:

32.2.1. deduction of sums in respect of which the Purchaser exercises its right of recovery under clause 13 (Recovery of Sums Due); and

32.2.2. all the related rights of the Purchaser under the Contract in relation to the recovery of sums due but unpaid.

32.3. The Service Provider must notify or ensure that any Assignee notifies the Purchaser of any variations to the arrangements for making payments or for handling invoices, in each case in good time to enable the Purchaser to redirect payments or invoices accordingly. In the absence of such notification the Purchaser is under no obligation to vary its arrangements for making payments or for handling invoices.

32.4. Subject to clause 32.6, the Purchaser may assign, novate or otherwise dispose of its rights and obligations under the Contract or any part thereof to:

(a) any Contracting Authority; or

(b) any other body established by the Crown or under statute in order substantially to perform any of the functions that had previously been performed by the Purchaser; or

(c) any private sector body which substantially performs the functions of the Purchaser,

provided that any such assignment, novation or other disposal shall not increase the burden of the Service Provider's obligations under the Contract.

32.5 Any change in the legal status of the Purchaser such that it ceases to be a Contracting Authority shall not, subject to clause 32.6, affect the validity of the Contract. In such circumstances, the Contract shall bind and inure to the benefit of any successor body to the Purchaser.

32.6 If the rights and obligations under the Contract are assigned, novated or otherwise disposed of pursuant to clause 32.4 to a body which is not a Contracting Authority or if there is a change in the legal status of the Purchaser such that it ceases to be a Contracting Authority (in the remainder of this clause both such bodies being referred to as the "**Transferee**");

(a) the rights of termination of the Purchaser in clauses 57 (Termination on Default) and 58 (Termination on Insolvency and Change of Control) shall be available to the Service Provider in the event of respectively, the bankruptcy or insolvency, or Default of the Transferee; and

(b) the Transferee shall only be able to assign, novate or otherwise dispose of its rights and obligations under the Contract or any part thereof with the prior consent in writing of the Service Provider.

32.7 The Purchaser may disclose to any Transferee any Confidential Information of the Service Provider which relates to the performance of the Service Provider's obligations under the Contract. In such circumstances the Purchaser shall authorise the Transferee to use such Confidential

Information only for purposes relating to the performance of the Service Provider's obligations under the Contract and for no other purpose and shall take all reasonable steps to ensure that the Transferee gives a confidentiality undertaking in relation to such Confidential Information.

Guidance notes: A change of Service Provider is in principle a material and impermissible amendment to a public Contract so it is important that the Purchaser should be able to control assignation or novation (i.e. transfer). **Legal advice should be taken before approving assignation or novation** – EU law might require the request to be rejected and require the contract to be terminated if the change goes ahead (see clause 58.2). Clauses 32.2 and 32.3 are standard SG clauses required by [SPPN 7/2007](#).

The position of the Purchaser is not expressly addressed but it is unlikely to be able to assign its interest at common law.

33. Change of Control

The Service Provider must notify the Purchaser:

- 33.1. whenever it proposes to undergo a change of Control, or a change of control is likely to occur; and
- 33.2. immediately following a change of Control that has occurred.

Guidance notes: Change of Control provisions are not conventionally grouped in with the standard "Transfer and Sub Contracting" Government provisions, but all provisions are covering essentially the same issue. **A change of control is in principle a material and impermissible amendment to a public contract** so it is important that the Purchaser should be able to control change of Control. **Legal advice should be taken before approving change of Control** – EU law might require the request to be rejected and require the contract to be terminated if the change goes ahead (see clause 59.2).

34. Sub-Contracting

- 34.1. «F51: The Purchaser approves the appointment of the sub-contractors specified in Schedule 6 (Approved Sub-contractors) in respect of the obligations specified in that Schedule.»
- 34.2. The Service Provider may not sub-contract its obligations under the Contract «F52: to other sub-Service Providers» without the prior written consent of the Purchaser. Sub-contracting of any part of the Contract shall not relieve the Service Provider of any obligation or duty attributable to the Service Provider under the Contract. The Service Provider shall be responsible for the acts and omissions of its sub-Service Providers as though they are its own.
- 34.3. Where the Service Provider enters into a sub-contract the Service Provider must ensure that a provision is included which:
 - 34.3.1. requires payment to be made of all sums due by the Service Provider to the sub-contractor within a specified period not exceeding 30 days from the receipt of a valid invoice as defined by the sub-contract requirements and provides that, where the Purchaser has made payment to the Service Provider in respect of Services and the sub-contractor's invoice relates to such Services then, to that extent, the invoice must be treated as valid and, provided the Service Provider is not exercising a right of retention or set-off in respect of a breach of contract by the sub-contractor or in respect of a sum otherwise due by the sub-contractor to the Service Provider, payment must be made to the sub-contractor without deduction;
 - 34.3.2. notifies the sub-contractor that the sub-contract forms part of a larger contract for the benefit of the Purchaser and that should the sub-contractor have any difficulty in securing the timely payment of an invoice, that matter may be referred by the sub-contractor to the Purchaser;

- 34.3.3. requires that all contracts with subcontractors and suppliers which the subcontractor intends to procure, and which the subcontractor has not before the date of this Contract, already planned to award to a particular supplier are advertised through the Public Contracts Scotland procurement portal (www.publiccontractsscotland.gov.uk) and awarded following a fair, open, transparent and competitive process proportionate to the nature and value of the contract; and
- 34.3.4. is in the same terms as that set out in this clause 34.3 (including for the avoidance of doubt this clause 34.3.4) subject only to modification to refer to the correct designation of the equivalent party as the Service Provider and subcontractor as the case may be.
- 34.4. Where requested by the Purchaser, copies of any sub-contract must be sent by the Service Provider to the Purchaser as soon as reasonably practicable.
- 34.5. Where the Service Provider proposes to enter into a sub-contract it must:
- 34.5.1 advertise its intention to do so in at least one trade journal, [at least one newspaper circulating in [*refer to locality*]] and the Public Contracts Scotland Portal; and
- 34.5.2 follow a procedure leading to the selection of the sub-contractor which ensures Reasonable competition following principles of equal treatment, non-discrimination and transparency and which ensures that such procedure is accessible by small and medium enterprises.

Guidance notes: Please delete clause 34.1 and Schedule 6 (Approved Sub-contractors) if there are no pre-approved sub-contractors as at contract award. **A change to the sub-contractor position might be a material and impermissible amendment to a public contract** so it is important that the Purchaser should be able to control sub-contracting. **Legal advice should be taken before approving changes to the sub-contracting position** – EU law might require a request to be rejected and require the contract to be terminated if the change goes ahead (see clause 58.2). Clause 34.3 is required by [SPPN 8/2009](#) "Payment of Invoices in Public Contract Supply Chains Within 30 Days". See also clause 34.2 on responsibility for the acts and omissions of sub-contractors. The wording the square brackets in clause 34.5.1 is optional.

35. Amendment

- 35.1. The Contract may be amended only by the written agreement of both Parties. Accordingly, the Service Provider may not unilaterally amend the Contract.
- 35.2. «F53: Clause 7 (Pricing Schedule) makes special provision for the variation of the Pricing Schedule.»

Guidance notes: It is deliberate that no "change control procedure" has been included. Contract terms should be fixed and special provision can be made for variations in price – see clause 7. If however the list of Services and pricing provisions are to be fixed, delete clause 35.2.

SECTION F SERVICE PROVIDER CONDUCT REQUIREMENTS

36. Compliance with the Law etc.

In providing the Services and otherwise when performing the Contract, the Service Provider must comply in all respects with:

- 36.1. all applicable law;
- 36.2. any applicable requirements of regulatory bodies; and

36.3. Good Industry Practice.

Guidance notes: A Service Provider could conceivably discharge its primary contractual obligations by breaching the law e.g. by paying its staff less than the statutory minimum wage or by entering into anti-competitive arrangements. There is a general Government policy to recognise the public interest in upholding and complying with the law and as such this clause makes it a breach of contract for the Service Provider to breach any applicable law or regulatory requirement when performing its obligations under the Contract.

If a Service Provider is involved in a public controversy it may be that the Purchaser can rely on this clause to hold the Service Provider to be in breach of contract. But please note that this clause only relates to the Service Provider's activities under the Contract.

In particular, consider whether special provision needs to be made regarding compliance with tax obligations and tax avoidance. This could be included as an obligation on the Service Provider or as a warranty by the Service Provider.

37. Official Secrets Acts

The Service Provider undertakes to abide and procure that the Service Provider's employees abide by the provisions of the Official Secrets Acts 1911 to 1989.

38. Service Provider's responsibility for staff etc.

38.1. The Service Provider is responsible for the acts and omissions of all Service Provider Representatives relating to the Contract as though such acts and omissions are the Service Provider's own.

38.2. The Service Provider must ensure that all Service Provider Representatives:

38.2.1. are appropriately experienced, skilled, qualified and trained;

38.2.2. carry out their activities connected with the Contract faithfully and diligently and with all with due skill, care and diligence; and

38.2.3. obey all lawful and reasonable directions of the Purchaser when carrying out activities under the Contract.

Guidance notes: Similar provisions appear in most Government contracts in various forms. There tends to be a bad practice of placing obligations on the Service Provider but in some cases adding "including staff" or "including agents", so the approach taken here means that **any** time an obligation is placed on "the Service Provider" it includes staff, agents, sub-contractors etc.

Please note the use of the words "relating to the Contract" which ensures that strict vicarious liability does not apply to activities of staff or sub-contractors that are unconnected with the Contract.

Directions under clause 38.2.3 could for example be directions to comply with certain SG policies during Services e.g. dignity at work policy.

39. Access to the Purchaser's premises

39.1. Any access to, or occupation of, the Purchaser's premises which the Purchaser may grant the Service Provider from time to time is on a non-exclusive licence basis free of charge. The Service Provider must use the Purchaser's premises solely for the purpose of performing its obligations under the Contract and must limit access to the Purchaser's premises to such individuals as are necessary for that purpose.

39.2. The Service Provider must comply with the Purchaser's policies concerning Baseline Personnel Security Standard clearance and such modifications to those policies or replacement policies as are notified to the Service Provider from time to time.

39.3. At the Purchaser's written request, the Service Provider must provide a list of the names and addresses of all persons who may require admission to the Purchaser's premises in connection with the Contract, specifying the capacities in which they are concerned with the Contract and giving such other particulars as the Purchaser may reasonably request.

39.4. The Service Provider must ensure that any individual Service Provider Representative entering the Purchaser's premises has completed the process for obtaining Baseline

Personnel Security Standard clearance. The Service Provider acknowledges that the Purchaser has the right to deny entry to any individual that has not completed the process for obtaining Baseline Personnel Security Standard clearance.

- 39.5. In accordance with the Purchaser's policies concerning visitor access, entry to the Purchaser's premises may be granted to individual Service Provider Representatives for the purposes of meetings, notwithstanding that the process for obtaining Baseline Personnel Security Standard clearance has not commenced or completed.
- 39.6. The Purchaser may, by notice to the Service Provider, refuse to admit onto, or withdraw permission to remain on, the Purchaser's premises any Service Provider Representative whose admission or continued presence would, in the opinion of the Purchaser acting reasonably, be undesirable.
- 39.7. The Purchaser must provide advice and assistance acting reasonably to the Service Provider to facilitate the Service Provider's compliance with this clause.
- 39.8. All decisions of the Purchaser under this clause are final and conclusive.

Guidance notes: This clause sets out the basis on which the Service Provider has access to SG premises and is also the "Disclosure Scotland" clause. This clause has been modified to match the SG security policies as they currently stand. Disclosure Scotland provisions that require a basic disclosure certificate before entering SG premises are overextensive – in that genuine visitors do not require disclosure – and underextensive – in that disclosure is only one part of the baseline security clearance process. Clause 39.8 is included so that if SG security staff refuse access according to their policies (even if SPD have invited Service Provider Representatives!) there can be no contractual claim by the Service Provider.

40. Service Provider's Equipment

- 40.1. The Service Provider must provide all Equipment necessary to perform any required activities on the Purchaser's premises or otherwise necessary for the provision of Services.
- 40.2. But the Service Provider must not, without the Purchaser's approval:
 - 40.2.1. bring Equipment onto the Purchaser's premises; or
 - 40.2.2. leave Equipment on the premises.
- 40.3. Any Equipment brought onto the Purchaser's premises:
 - 40.3.1. remains the property of the Service Provider; and
 - 40.3.2. is at the Service Provider's own risk and the Purchaser has no liability for any loss of or damage to the Equipment unless the Service Provider is able to demonstrate that such loss or damage was caused or contributed to by the Purchaser's Default.
- 40.4. The Service Provider must keep all Equipment brought onto the Purchaser's premises in a safe, serviceable and clean condition. The Purchaser may at any time require the Service Provider to remove from the Purchaser's premises any Equipment which in the opinion of the Purchaser acting reasonably is either hazardous, noxious or not in accordance with the Contract and substitute proper and suitable Equipment at the Service Provider's expense as soon as reasonably practicable.
- 40.5. On completion of any required activities on the Purchaser's premises or at the end of a Working Day (as appropriate), the Service Provider must at its own expense:
 - 40.5.1. remove all Equipment; and
 - 40.5.2. leave the premises in a clean, safe and tidy condition, clearing away all rubbish arising out of the Service Provider's activities.

- 40.6. The Service Provider is solely responsible for making good any damage to the Purchaser's premises or any objects contained therein, other than wear and tear, which is caused by the Service Provider.

Drafting note: This clause deals with Service Provider property brought onto SG premises. It is deliberate that "activities" are referred to rather than "Services" because this clause might have application in other contexts e.g. the Service Provider is bringing Equipment to meetings or for the purposes of training.

41. Purchaser Property

- 41.1. Where the Purchaser issues Purchaser Property to the Service Provider, the Purchaser Property remains at all times the property of the Purchaser.
- 41.2. The Service Provider undertakes the safe custody of the Purchaser Property and to that end must:
- 41.2.1. keep the Purchaser Property in good order and condition (excluding wear and tear);
 - 41.2.2. comply with any particular security requirements communicated to the Purchaser in relation to the Purchaser Property;
 - 41.2.3. use any Purchaser Property solely in connection with the Contract and for no other purpose; and
 - 41.2.4. store the Purchaser Property separately and ensure that it is clearly identifiable as belonging to the Purchaser.
- 41.3. The Purchaser Property is deemed for the purposes of clause 41.2.1 to be in good order and condition when received by the Service Provider unless the Service Provider notifies the Purchaser otherwise within 5 Working Days of receipt.
- 41.4. The Service Provider must not:
- 41.4.1. modify or replace the Purchaser Property;
 - 41.4.2. use the Purchaser Property as security for a loan or other obligation;
 - 41.4.3. sell, or attempt to sell or part with possession of the Purchaser Property; or
 - 41.4.4. allow anyone to obtain a lien over, or right to retain, the Purchaser Property.
- 41.5. The Service Provider licences the Purchaser to enter any premises of the Service Provider during Working Hours on reasonable notice to recover any Purchaser Property.
- 41.6. The Service Provider undertakes the due return of the Purchaser Property and as such is liable for all loss of, or damage to, the Purchaser Property (excluding wear and tear), unless such loss or damage was caused or contributed to by the Purchaser's Default. The Service Provider must notify the Purchaser promptly and, in any event within 2 Working Days, upon becoming aware of any defects appearing in or losses or damage occurring to the Purchaser Property.

Guidance notes: This clause is sometimes known as "free issue materials". It ensures that the Service Provider takes good care of any Purchaser Property given to it by the Purchaser. Clause 60.5.1 (Consequences of Expiry or Termination) requires the Service Provider to return any Purchaser Property on expiry or termination of the Contract.

42. Health and Safety etc.

- 42.1. While on the Purchaser's premises, the Service Provider must comply with the Purchaser's policies concerning health and safety and fire and such modifications to

those policies or replacement policies as are notified to the Service Provider from time to time.

- 42.2. The Service Provider must immediately inform the Purchaser in the event of any incident occurring in the performance of its obligations under the Contract on the Purchaser's premises where that incident causes any personal injury or damage to property which could give rise to personal injury. The Service Provider must then promptly notify the Purchaser of that fact.
- 42.3. The Purchaser must promptly notify the Service Provider of any health and safety hazards which may exist or arise at the Purchaser's premises and which may affect the Service Provider in the performance of its obligations under the Contract.
- 42.4. The Service Provider must promptly make available its statutory health and safety policy statement to the Purchaser on request.

Guidance notes: These are provisions concerning health and safety on Government premises. There is no need for this clause to require the Purchaser to comply with the Health and Safety at Work etc Act 1974 and associated legislation because that is already covered by the compliance with the law clause 36.

43. Offences

- 43.1. The Service Provider must not commit or attempt to commit any offence:
 - 43.1.1. under the Bribery Act 2010;
 - 43.1.2. of fraud, uttering, or embezzlement at common law; or
 - 43.1.3. of any other kind referred to in regulation 23(1) of the Public Contracts (Scotland) Regulations 2012.
- 43.2. Breach of clause 43.1 is a material breach for the purposes of clause 57.1.3 (Termination on Default).

Guidance notes: This clause is an amalgamation of various Government clauses on the prevention of fraud and corruption. The [Bribery Act 2010](#) (which replaces amongst other laws the Prevention of Corruption Acts 1889 to 1916) includes at section 7 an offence where commercial organisations fail to prevent bribery so there is no need to place a contractual obligation on the Service Provider to take steps to prevent bribery. Summary termination is available if the Service Provider breaches this clause – any costs suffered by the Purchaser will be caught by the general indemnity clause 50.

44. Tax Arrangements

- 44.1 Where the Service Provider is liable to be taxed in the UK in respect of consideration received under this contract, it shall at all times comply with the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) and all other statutes and regulations relating to income tax in respect of that consideration.
- 44.2 Where the Service Provider is liable to National Insurance Contributions (NICs) in respect of consideration received under this contract, it shall at all times comply with the Social Security Contributions and Benefits Act 1992 (SSCBA) and all other statutes and regulations relating to NICs in respect of that consideration.
- 44.3 The Purchaser may, at any time during the term of this contract, request the Service Provider to provide information which demonstrates how the Service Provider complies with sub-clauses 44.1 and 44.2 above or why those clauses do not apply to it.
- 44.4 A request under sub-clause 44.3 above may specify the information which the Service Provider must provide and the period within which that information must be provided.
- 44.5 The Purchaser may supply any information which it receives under clause 44 to the Commissioners of Her Majesty's Revenue and Customs for the purpose of the collection and management of revenue for which they are responsible.
- 44.6 The Service Provider shall take all reasonable steps to ensure the observance of the provisions of this clause 44 by all of their servants, employees, agents, consultants and sub-contractors.
- 44.7 Where the Service Provider enters into any contract with any of its servants, employees, agents, consultants and/or sub-contractors, the Service Provider must ensure that a provision is included which is in the same terms as this clause 44 subject only to modification to refer to the correct designation of the equivalent party as the Service Provider.

Guidance notes: This clause is the result of SPPN 6/2012 (Tax arrangements of Scottish public sector workers).

Where there is no 'direct' contract between the worker and the Contracting Scottish public body it is necessary to ensure that these provisions are contained in the Framework Agreement and that the service provider is legally obliged to flow these terms down to the worker with whom it contracts, and confirm that it must be included in any terms between the 'supplier' and the worker.

45. Discrimination

The Service Provider must not unlawfully discriminate against any person within the meaning of the Equality Act 2010 in its activities relating to the Contract or any other contract with the Purchaser.

Guidance notes: This clause is a shorter version of standard Government clauses on discrimination. Because the [Equality Act 2010](#) is a single code for equality law, it is not necessary to refer to a great number of statutes as was the case in the past, nor is it necessary to spell out that sex, race, disability, sexual orientation etc discrimination is covered. That is clear from the 2010 Act.

46. Blacklisting

The Service Provider must not commit any breach of the Employment Relations Act 1999 (Blacklists) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, or commit any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities. Breach of this clause is a material default which shall entitle the Purchaser to terminate the Contract.

47. Sustainability etc.

TO BE INSTRUCTED BY SPD POLICY

Guidance notes: There is mixed practice in Government contracts as to whether to include "environmental" or "ethical" clauses. This clause is intended to match and support the Government's policies concerning sustainable procurement (which includes "ethical" considerations), "Zero Waste" and strict carbon reduction targets. This clause is considered to be proportionate and relevant to the subject matter of all Services contracts.

48. Conflicts of interest

- 48.1. The Service Provider must take appropriate steps to ensure that the Purchaser is not placed in a position where, in the reasonable opinion of the Purchaser, there is an actual or potential conflict between the interests of the Service Provider and the duties owed to the Purchaser under the Contract.
- 48.2. The Service Provider must disclose by notice to the Purchaser full particulars of any actual or potential conflict of interest which may arise and must take such steps as are necessary to avoid or remove the conflict of interest.
- 48.3. Breach of this clause by the Service Provider is a material breach for the purposes of clause 57.1.3 (Termination on Default).

Guidance notes: Service Providers may have many "clients" and it is critical that the Service Provider focuses on the Purchaser's interests when performing the Contract. Similarly, a Service Provider may have a bias to use a third party's goods or services that might not be the cheapest/best for the Purchaser. Actual or potential conflicts of interest must therefore be avoided and disclosed.

SECTION G FINAL PROVISIONS

49. Warranties and Representations

The Service Provider warrants and represents that:

- 49.1. it has full capacity and authority and all necessary consents (including where its procedures so require, the consent of its parent company) to enter into and perform its obligations under the Contract and that the Contract is executed by a duly authorised individual;
- 49.2. in entering the Contract it has not committed any offence under the Bribery Act 2010 or of fraud or uttering at common law or any other kind referred to in the Public Contracts (Scotland) Regulations 2012;
- 49.3. it has not committed any breach of the Employment Relations 1999 Act (Blacklists) Regulations 2010 or or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, or committed any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities;
- 49.4. as at the Commencement Date, all information contained in the PQQ and Tender remains true, accurate and not misleading, save as may have been specifically disclosed in writing to the Purchaser prior to execution of the Contract;
- 49.5. no claim is being asserted and no litigation, alternative dispute resolution procedure or administrative proceeding is presently in progress or, to the best of its knowledge and belief, pending or threatened against it or any of its assets which will or might have a material adverse effect on its ability to perform its obligations under the Contract;

- 49.6. it is not subject to any contractual obligation, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under the Contract;
- 49.7. no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, are threatened) for the winding up of the Service Provider or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, manager, administrator or similar officer in relation to any of the Service Provider's assets or revenue;
- 49.8. it owns, has obtained or is able to obtain, valid licences for all Intellectual Property Rights that are necessary for the performance of its obligations under the Contract;
- 49.9. in the 3 years prior to the Commencement Date:
 - 49.9.1. it has conducted all financial accounting and reporting activities in compliance in all material respects with the generally accepted accounting principles that apply to it in any country where it files accounts;
 - 49.9.2. it has been in full compliance with all applicable securities and tax laws and regulations in the jurisdiction in which it is established;
- 49.10. it has not done or omitted to do anything which could have a material adverse effect on its assets, financial condition or position as an ongoing business concern or its ability to fulfil its obligations under the Contract;
- 49.11. it has made appropriate inquiries (for example as regards the Purchaser's premises) so as to be satisfied in relation to all matters connected with the performance of its obligations under the Contract;
- 49.12. it is familiar with the Purchaser's policies concerning Baseline Personnel Security Standard clearance and health and safety and fire as they apply at the Commencement Date;
- 49.13. it has in place appropriate technical and organisational measures to safeguard any Purchaser Protected Information provided by the Purchaser;
- 49.14. there are no actual or potential conflicts between the interests of the Service Provider and the duties owed to the Purchaser under the Contract, save as may have been specifically disclosed in writing to the Purchaser prior to execution of the Contract; and
- 49.15. it is deemed to have inspected any premises at which the services are to be performed as set out in the Specification (the 'Premises') before tendering so as to have understood the nature and extent of the Services to be carried out and is deemed to be satisfied in relation to all matters connected with the Services and the Premises.

Guidance notes: These warranties are important contractual promises that the Service Provider must make, covering key areas where the SG requires comfort. If the Service Provider is unable to give any of the warranties it raises the question of whether they should be awarded the Contract.

50. General Indemnity

The Service Provider shall indemnify the Purchaser against all claims, proceedings, actions, damages, costs, charges, expenses and any other liabilities which may arise out of, or in consequence of, any Default of the Service Provider.

Guidance notes: General indemnities of this nature are sometimes included in Government contracts. This allows the SG to recover on a "pound for pound" basis any costs it may incur caused by the Service Provider breaching the contract. For example, if it breached clause 8.3 or refused to accept Orders and the SG had to put in place alternative arrangements on

an emergency basis.

The alternative is to leave the recovery position to common law damages, where there is a duty on the SG to demonstrate loss, establish that the loss is not too remote from the act of the Service Provider and mitigate its loss. This clause avoids disputes as to whether there is a recoverable loss at all, whether the loss is too remote and whether the SG has sufficiently mitigated its loss.

51. Limitation of Liability

51.1. Neither Party is liable to the other Party under the Contract for any:

51.1.1. loss of profits, business, revenue or goodwill; or

51.1.2. indirect or consequential loss or damage.

51.2. But clause 51.1 does not exclude any liability of the Service Provider for additional operational, administrative costs or expenses or wasted expenditure resulting from the direct Default of the Service Provider.

51.3. The «F58: limiter (if required)» liability of either Party under the Contract for Defaults «F59: limiter (if required)» is limited to «F60: liability cap» «F61: limiter (if required)».

51.4. But neither Party excludes or limits liability to the other Party for:

51.4.1. death or personal injury caused by its negligence;

51.4.2. misrepresentation; or

51.4.3. any breach of any obligations implied by section 12 of the Sale of Goods Act 1979 or sections 2 or 11B of the Supply of Goods and Services Act 1982.

Guidance notes: If clause 51.3 requires to be more flexible e.g. split out a number of different liability caps, **please consult SGLD who can redraft.**

52. Insurances

52.1. The Service Provider must effect and maintain with a reputable insurance company:

52.1.1. public liability insurance in the sum of not less than «F62: PLI insurance sum» «F63: limiter»;

52.1.2. professional indemnity insurance in the sum of not less than «F64: PLI insurance sum» «F65: limiter»; and

52.1.3. employer's liability insurance in the sum of not less than *[DN: insert sum]*.

52.2. Such insurance must be maintained for the duration of the Contract and for a minimum of 5 years following the expiry or termination of the Contract.

52.3. The Service Provider must give the Purchaser, on request, copies of all insurance policies referred to in this clause or a broker's verification of insurance to demonstrate that the appropriate cover is in place, together with receipts or other evidence of payment of the latest premiums due under those policies.

Guidance notes: The types of insurances set out in clause 51.1 can be varied. But please note that there is no express requirement here to hold any insurances "in accordance with legal requirements" i.e. employers' liability insurance, motor vehicle insurance, products liability, because that is already covered by the compliance with the law clause 36. However, express requirements should be included if the Service Provider is asked to go further than the general law.

53. Force Majeure

- 53.1. Neither Party is liable to the other Party for any delay in performing, or other failure to perform, its obligations under the Contract to the extent that such delay or failure is a result of Force Majeure. Nonetheless, each Party must use all reasonable endeavours to continue to perform its obligations under the Contract for the duration of such Force Majeure. However, if Force Majeure prevents either Party from performing its material obligations under the Contract for a period in excess of «F66: Force Majeure longstop», either Party may terminate the Contract with immediate effect by notice.
- 53.2. Any delay or other failure by the Service Provider in performing its obligations under the Contract which results from any failure or delay by a Service Provider Representative is only to be regarded as due to Force Majeure if that Service Provider Representative is itself impeded by Force Majeure from complying with an obligation to the Service Provider.
- 53.3. If either Party becomes aware of Force Majeure which gives rise to, or is likely to give rise to, any delay or failure on its part as described in clause 53.1, it must immediately notify the other Party of the Force Majeure and the estimated period for which the failure or delay is to continue.
- 53.4. The only events that afford relief from liability for failure or delay under the Contract are Force Majeure events.

Guidance notes: Force majeure clauses anticipate certain “acts of God” and provide contractually for what is to happen. This is a fairly standard provision requiring notice to be given of Force Majeure events and preventing an innocent Party that is unable to perform its obligations from being in breach of contract. The common law doctrine of “frustration” is disapplied and the clause expressly provides a longstop period (which must be filled in) after which the Contract may be terminated.

54. Dispute Resolution

- 54.1. The Parties must attempt in good faith to resolve any dispute between them arising out of or in connection with the Contract «F67: in accordance with the Management Arrangements».
- 54.2. Any dispute or difference arising out of or in connection with the Contract, including any question regarding its existence, validity or termination, which cannot be resolved in accordance with the Management Arrangements, shall be determined by the appointment of a single arbitrator to be agreed between the Parties, and failing agreement within 14 days after either Party has given to the other a written request to concur in the appointment of an arbitrator, by an arbitrator to be appointed by the Scottish Arbitration Centre on the written application of either Party. The seat of the arbitration shall be in Scotland. The language used in the arbitral proceedings shall be English.
- 54.3. Any arbitration under clause 54.2 is subject to the Arbitration (Scotland) Act 2010.

Guidance notes: Informal dispute resolution mechanisms – discussions, management escalation – should be included in the Management Arrangements. In line with SPD policy, any contractual disputes that cannot be resolved informally are generally referred to arbitration under the [Arbitration \(Scotland\) Act 2010](#). The statutory object of arbitration under the 2010 Act is to resolve disputes fairly, impartially and without unnecessary delay or expense – arbitration is therefore likely to be considerably quicker and cheaper than going to court. The courts will however have jurisdiction to intervene in the limited circumstances contemplated by the 2010 Act.

Please note however that there will be circumstances where other forms of alternative dispute resolution may be appropriate – [refer here to policy position when it is clearer and the other model clauses to be drafted]

55. Severability

If any provision of the Contract is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision is severed and the remainder of the

provisions of the Contract continue in full force and effect as if the Contract had been executed with the invalid, illegal or unenforceable provision eliminated.

Guidance notes: The function of this clause is to prevent any part of the contract that is held to be illegal from “infecting” the rest of the contract. Case law on the extent to which an illegal provision is severable or “infecting” is unclear, so it is better to make express contractual provision.

56. Waiver and Cumulative Remedies

- 56.1. Any failure of either Party to insist upon strict performance of any provision of the Contract, or the failure of either Party to exercise, or any delay in exercising, any right or remedy does not constitute a waiver of that right or remedy and does not cause a diminution of the obligations established by the Contract.
- 56.2. Accordingly, no waiver is effective unless it is expressly stated to be a waiver and communicated to the other Party in writing in accordance with clause 10 (notices).
- 56.3. A waiver of any Default is not a waiver of any subsequent Default.
- 56.4. The rights and remedies provided by the Contract are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy is not to be deemed an election of such remedy to the exclusion of other remedies.

Guidance notes: Clause 56.1 is a standard Government clause to ensure that there is no implication that the strict requirements of the Contract have been waived by the Purchaser e.g. if officials overlook non-compliance but later wish to hold the Service Provider to the terms. A particular breach may give the SG various remedies, in which case clause 56.4 allows any or all of them to be exercised cumulatively. It avoids the need to constantly say “without prejudice to other remedies”.

57. Termination on Default

- 57.1. The Purchaser may terminate the Contract by notice to the Service Provider with immediate effect if the Service Provider commits a Default and:
- 57.1.1. the Service Provider has not remedied the Default to the satisfaction of the Purchaser within 20 Working Days, or such other period as may be specified by the Purchaser, after issue of a notice specifying the Default and requesting it to be remedied;
- 57.1.2. the Default is not in the opinion of the Purchaser, capable of remedy; or
- 57.1.3. the Default is a material breach of the Contract.
- 57.2. «F68: The Purchaser may also terminate the Contract in accordance with any provisions of the Schedules.»

Guidance notes: In line with usual practice, this clause offers the potential for fault-based termination of the Contract. The clause anticipates the Service Provider being given the option of remedying non-material Defaults in the first instance. A material Default – justifying summary termination without a remedial period – might be a wholesale failure of the Service Provider to accept Orders or a repudiation of its obligations under the Contract. Certain clauses expressly state that particular breaches are material breaches.

Clause 57.2 is included as an optional in anticipation that the Specification, Pricing Schedule or Management Arrangements might prescribe particular circumstances where termination is appropriate e.g. inability to agree on price variation, a Service Level threshold has been hit or where failure to follow a remedial plan has occurred.

See also clause 53 which provides for termination where there is Force Majeure and clause 60.2 which may require the Service Provider to make compensatory payments to the SG.

58. Termination on Insolvency and Change of Control

- 58.1. The Service Provider shall notify in writing immediately, and the Purchaser may terminate the Contract with immediate effect by notice, where in respect of the Service Provider:
- 58.1.1. a proposal is made for a voluntary arrangement within Part I of the Insolvency Act 1986 or of any other composition scheme or arrangement with, or assignment for the benefit of, its creditors;
 - 58.1.2. a shareholders' meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding-up is passed (other than as part of, and exclusively for the purpose of, a bona fide reconstruction or amalgamation);
 - 58.1.3. a petition is presented for its winding up (which is not dismissed within 14 days of its service) or an application is made for the appointment of a provisional liquidator or a creditors' meeting is convened pursuant to section 98 of the Insolvency Act 1986;
 - 58.1.4. a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets;
 - 58.1.5. an application order is made either for the appointment of an administrator or for an administration order, an administrator is appointed, or notice of intention to appoint an administrator is given;
 - 58.1.6. it is or becomes insolvent within the meaning of section 123 of the Insolvency Act 1986;
 - 58.1.7. being a "small company" within the meaning of section 382 of the Companies Act 2006, a moratorium comes into force pursuant to schedule A1 to the Insolvency Act 1986;
 - 58.1.8. a debt relief order is entered into; or
 - 58.1.9. any event similar to those listed above occurs under the law of any other jurisdiction.
- 58.2. The Purchaser may terminate the Contract by notice with immediate effect within 6 months of:
- 58.2.1. being notified that a change of Control has occurred in accordance with clause 33.2 (Change of Control); or
 - 58.2.2. where no such notification has been given, the date that the Purchaser becomes aware of the change of control.
- 58.3. But the Purchaser may not terminate the Contract under clause 58.2 where approval of the change of control has been granted by notice by the Purchaser.

Guidance notes: In line with usual practice, clause 58.1 empowers the SG to terminate the Contract where the Service Provider is insolvent and clause 58.2 empowers the SG to terminate the Contract where it is not content with a change of Control that has taken place. The SG might actually be duty bound to terminate under EU law where there is a change of control. Earlier clause 33 requires the Service Provider to notify changes of Control for approval by the SG in advance of the change.

As noted above in relation to clause 33, **legal advice should be taken before approving change of Control.**

59. Exit Management

The Service Provider shall perform its relevant Exit Management obligations as part of the Contract whether applicable on either the expiry or early termination of this Contract.

59.1 The Service Provider agrees that if it breaches (or attempts or threatens to breach) its obligation to provide Exit Management, the Purchaser and their respective customers and stakeholders shall be irreparably harmed. In such circumstance, the Service Provider agrees that the Purchaser may proceed directly to court notwithstanding anything to the contrary in the dispute resolution procedure outlined in Clause 54 (Dispute Resolution). If a court of competent jurisdiction finds that the Service Provider has breached (or attempted or threatened to breach) any such obligation, the Service Provider agrees that without any additional findings of irreparable injury, or other conditions to interdict, the Service Provider shall not oppose the entry of an appropriate order compelling performance by the Service Provider and restraining the Service Provider from any further breaches or attempted or threatened breaches of its obligations in relation to Exit Management.

59.2 A draft of the Exit Plan shall be produced by the Service Provider and supplied to the Purchaser within [three (3) months] after the Commencement Date and shall include or address the matters specified in Clause 59.3. The Purchaser shall provide to the Service Provider the Purchaser's comments on the plan within one (1) month of the Purchaser's receipt of the plan. The Service Provider shall take into account the comments and suggestions of the Purchaser and shall issue the final version of the Exit Plan to the Purchaser within ten (10) Working Days of receipt of the Purchaser's comments.

59.3 The Service Provider shall throughout the period of the Contract review, maintain and continuously update the Exit Plan which shall include:

59.3.1 the activities required to enable the Purchaser to re-tender the Purchaser Requirements and/or the provision of the Services;

59.3.2 the activities necessary to support any Replacement Service Provider or the Purchaser in carrying out any necessary due diligence relating to all or part of the Services;

59.3.3 details of the Exit Management to be provided by the Service Provider prior to the Exit Management Date;

59.3.4 support for the Replacement Service Provider or the Purchaser during their preparation of any relevant plan for the transition of the System to the Replacement Service Provider or Purchaser, including prior to and during such transition period;

59.3.5 the maintenance of a 'business as usual' environment for the Purchaser during the period when Exit Management obligations are applicable; and

59.3.6 all other necessary activities to support the preparation for, and execution of, a smooth and orderly Exit Management and transfer of all or part of the Services to either a Replacement Service Provider or the Purchaser.

59.4 No amendment of the Exit Plan shall be made without prior written consent of the Purchaser.

Guidance Notes: The Exit Management Plan needs to be approved at the start of the contract ideally. It certainly needs to be agreed before any reprocurement is started because the Exit Plan may influence the procurement.

60. Consequences of Expiry or Termination

- 60.1. Where the Purchaser terminates the Contract under clause 57 (Termination on Default) and makes other arrangements for the provision of services, the Service Provider indemnifies the Purchaser against all costs incurred in making those arrangements.
- 60.2. Where the Purchaser terminates the Contract under clause 5 (Break), the Purchaser indemnifies the Service Provider against any unavoidable losses directly resulting from the termination of the Contract (excluding loss of profit).
- 60.3. Any indemnity given by the Purchaser under clause 60.2 is subject to the Service Provider:
 - 60.3.1. taking all reasonable steps to mitigate its loss;
 - 60.3.2. taking all reasonable steps to recover its losses under any insurance policies held by it; and
 - 60.3.3. submitting a fully itemised and costed list of losses which it seeks to recover from the Purchaser together with supporting evidence.
- 60.4. Except as provided for in clauses 50 (General Indemnity), 60.1 and 60.2 «F69: and the Management Arrangements», no indemnity is given or special payment is to be made by either Party to the other Party on expiry or termination of the Contract.
- 60.5. On expiry or termination of the Contract the Service Provider must:
 - 60.5.1. immediately return to the Purchaser all Purchaser Property and Purchaser Protected Information in its possession; and
 - 60.5.2. destroy or delete any copies of Purchaser Protected Information (whether physical or electronic) in its possession.
- 60.6. The following provisions survive the expiry or termination of the Contract:
 - 60.6.1. clause 1 (Definitions and Interpretation);
 - 60.6.2. clause 13 (Recovery of Sums Due);
 - 60.6.3. clause 14 (Data Protection Act);
 - 60.6.4. clause 15 (Freedom of Information);
 - 60.6.5. clause 16 (Purchaser Protected Information);
 - 60.6.6. clause 17 (Service Provider Sensitive Information);
 - 60.6.7. clause 18 (Audit [and Records Management]);
 - 60.6.8. clause 19 (Publicity);
 - 60.6.9. clause 23 (Offers of Employment);
 - 60.6.10. clause 25 (Information about Service Provider Employees);
 - 60.6.11. clause 26 (Staff transfer on expiry or termination);
 - 60.6.12. clause 28 (Parties' pre-existing Intellectual Property Rights);
 - 60.6.13. clause 29 (Specially Created Intellectual Property Rights);
 - 60.6.14. clause 30 (Licences of Intellectual Property Rights);
 - 60.6.15. clause 31 (Claims relating to Intellectual Property Rights);
 - 60.6.16. clause 37 (Official Secrets Acts);
 - 60.6.17. clause 40 (Service Provider's Equipment);
 - 60.6.18. clause 41 (Purchaser Property);
 - 60.6.19. clause 44 (Tax arrangements);
 - 60.6.20. [clause 47 (Sustainability)];
 - 60.6.21. clause 49 (Warranties and Representations);

- 60.6.22. clause 50 (General Indemnity);
- 60.6.23. clause 51 (Limitation of Liability);
- 60.6.24. clause 52 (Insurances);
- 60.6.25. clause 54 (Dispute Resolution);
- 60.6.26. clause 56 (Waiver and Cumulative Remedies);
- 60.6.27. this clause 60; and
- 60.6.28. clause 62 (Governing Law and Jurisdiction).

60.7. «F70: If a Judicial Order is made, the provisions of the Management Arrangements referring to that possibility apply.»

60.8. Immediately upon termination of the Contract for any reason whatsoever the Service Provider shall render such reasonable assistance to the Purchaser or third party nominated by the Purchaser, if requested, as may be necessary to effect an orderly assumption by a replacement Service Provider of the Services previously performed by the Service Provider under the Contract. The Service Provider shall be entitled to charge for such termination services in accordance with [DN: *ref some sort of method of calculating the price*].

Guidance notes: Clause 60.1 allows the SG to recover retendering costs after having to terminate the contract for Default. See also clause 13 which will allow the SG to set-off sums due to the Service Provider under the Contract or otherwise.

Clause 60.2 mitigates the potential unfairness of the break clause by allowing the Service Provider – in more limited circumstances – to recover losses from the SG. Clause 60.3 restricts the scope of the indemnity in clause 60.2.

Please note that “expiry or termination” includes the making of a Judicial Order. Clause 60.4 is intended to make it clear that no compensatory payments are to be made to the Service Provider on expiry/termination/Judicial Order except as specifically provided elsewhere. **If there are to be specific compensatory arrangements (e.g. on ineffectiveness) these must be set out in the Management Arrangements** – see in this regard optional clause 60.7.

Other consequences of termination or expiry e.g. exit plan, handover assistance can be included in the Management Arrangements. Clause 60.7 is included as an optional to make it absolutely clear that any special “ineffectiveness terms” set out in the Management Arrangements are had regard to by the courts. In principle, ineffectiveness provisions should be the same as expiry/termination obligations provisions – no need to include specific ineffectiveness provisions if there was no intention to include expiry/termination obligations provisions. **This clause therefore simply refers to the Management arrangements where bespoke ineffectiveness provisions (e.g. exit plans, handover of materials, compensatory provisions) should be set out.**

61. Entire Agreement

61.1. The Contract constitutes the entire agreement between the Parties in respect of the matters dealt with herein. The Contract supersedes all prior negotiations between the Parties and all representations and undertakings made by one Party to the other, whether written or oral, except that this clause does not exclude liability in respect of any misrepresentation (whether in the PQQ or Tender or otherwise).

61.2. In the event of, and only to the extent of, any conflict between the clauses of the Contract, the Schedules and any document referred to in the Contract, the following order of precedence applies:

61.2.1. the clauses of the Contract;

61.2.2. the Schedules; and

61.2.3. any other document referred to in the Contract.

Guidance notes: This clause means what it says – provisions in the ITT and post-tender correspondence will all fall away and the completed contract document with Schedules comprises the entire agreement. It is therefore incumbent on buyers to copy the relevant provisions of the ITT and incorporate the relevant provisions of post-tender correspondence in the Schedules (see the guidance notes to each Schedule). The entire agreement approach avoids the need to refer back to the ITT and other extraneous documents and also has the advantage of allowing all relevant material to be incorporated together in one agreement signed under the Requirements of Writing (Scotland) Act 1995. When advisers come to look at the contract in future they can be certain that they are seeing the full picture in one document.

The entire agreement document should be complete and ready to be signed **before commencing the standstill period** – if it cannot be pulled together then it is difficult to see how the contract is ready to be awarded.

62. Governing Law and Jurisdiction

The Contract is governed by and interpreted in accordance with Scots law and, subject to clause 54 (Dispute Resolution), the Parties submit to the exclusive jurisdiction of the Scottish courts.

Guidance notes: This is a standard clause – the general SG policy is that SG contracts are subject to Scots law and Scots jurisdiction. There are only limited circumstances however in which the Scottish courts will be able to hear a dispute because clause 54 provides for formal dispute resolution by way of arbitration under the [Arbitration \(Scotland\) Act 2010](#). One of the founding principles of the Act is that that the courts should not intervene in an arbitration except as provided by the Act. Conventionally, this is the last clause in a Scottish contract.

IN WITNESS WHEREOF these presents typewritten on this and the «F71: number of pages before this page» preceding pages together with the «F20: number of Schedules» Schedules annexed are executed as follows:

SIGNED for and on behalf of the Scottish Ministers **SIGNED** for and on behalf of «F3: Service Provider name...»

At.....	At.....
On.....	On.....
Signature.....	Signature.....
Full name	Full name.....
Position	Position.....
Address.....	Address.....

In the presence of

Signature.....
Full name

Address.....

In the presence of

Signature.....
Full name.....
Address.....

Guidance notes: The Contract provisions and Schedules should be completed such that the full entire agreement document can be printed in Word. That means that “to be agreed” statements and embedded documents are not appropriate (all that will be printed is the symbol). Remember of course to take out all drafting notes and tidy up all field text. This document should be signed in accordance with the Requirements of Writing (Scotland) Act 1995 with all the lines above completed by hand – **please refer any questions to SGLD**. Having everything in a single Word document will also help SPD and SGLD when reviewing the contract in future – one eRDM document will contain the full picture.

Please note that “At” refers to the town or city of signing – e.g. Edinburgh, Glasgow – and not the exact postal address.

This and the following [] pages comprise Schedule 1 to the foregoing Contract between the Scottish Ministers and «F3: Service Provider name»

SCHEDULE 1 – SPECIFICATION «F6: AND SERVICE LEVELS»

Guidance notes: This Schedule is for the Specification. Where Service Levels are included these must be included here and clearly identified as Service Levels. There is mixed practice as to incorporation of the Service Provider's response to the Specification, but this is perhaps advisable.

Please include bespoke conditions here that realistically can never be included in model terms ("The Service Provider must include on the website copyright and disclaimer notices in a form acceptable to the Purchaser." – "The Service provider must use the latest versions of anti-virus definitions available from an industry accepted software vendor to check for and delete malicious software..."). Any quality standards should go here.

All pricing information should go in Schedule 2, everything to do with Ordering Procedures should go in Schedule 3 and all Management Arrangements should go in Schedule 4. Duplication or using the wrong Schedule should be avoided. Baseline Security requirements are already addressed in the Contract clauses.

Where the terminology "Specification" / "Service Levels" is absolutely not appropriate, find/replace can be used. Please note that if there is a desire to have Annexes to Schedules it is better to divide the Schedules into Parts e.g. Part 3 of Schedule 1.

This and the following [] pages comprise Schedule 2 to the foregoing Contract between the Scottish Ministers and «F3: Service Provider name»

SCHEDULE 2 - PRICING SCHEDULE

Guidance notes: Pricing arrangements for contracts will vary considerably but **all relevant information must be included here** e.g. discounts, rebates. This includes the agreed prices themselves, mechanisms for price variation (if any) specifying any indexation allowed and the consequences of failing to agree price variations (dispute resolution procedure or termination), benchmarking provisions (if any) **and any Service Credits regime**.

Provisions relating to **invoicing/payment procedure, payment of sub-contractors and debt factoring** should not be included – these are already dealt with by the clauses.

Commercially sensitive aspects of the pricing should be cross referenced in Schedule 7.

This and the following [] pages comprise Schedule 3 to the foregoing Contract between the Scottish Ministers and «F3: Service Provider name»

SCHEDULE 3 – ORDERING PROCEDURES

Guidance notes: Please note that while there are similarities here to calling-off from a framework agreement, this Schedule concerns the procedure for ordering particular Services under a continuing contract.

An Order Form approach is highly recommended to ensure simplicity and consistency and to ensure that all necessary details are provided to the Service Provider and are recorded in some form in case of dispute.

This Schedule should make it clear how Orders are to be communicated to the Service Provider, to what extent it may reject/modify Orders (e.g. if the delivery required is impossible to meet or requires more than the Specification), how Orders are to be numbered, documented and confirmed.

The **minimum content** for an Order tying in with the clauses is:

- specification of particular Services ordered;
- date(s), time(s) and location(s) for delivery
- Deliverables
- Milestones
- any particular acceptance criteria
- payment schedule (sensible to link to acceptance of Deliverables/Milestones)

On completion of the Ordering Procedures the full pricing for the Order should be determined and agreed.

This and the following [] pages comprise Schedule 4 to the foregoing Contract between the Scottish Ministers and «F3: Service Provider name»

SCHEDULE 4 – MANAGEMENT ARRANGEMENTS

Guidance notes: Arrangements for contract management will vary – they should be set out in full here e.g. outline implementation plan, complaints handling, quality management system. Provisions should be included for the informal resolution of disputes (after which the formal procedures in clause 54 will kick in). Common provisions also include a duty on the Service Provider to keep and provide certain information, draw up and comply with plans (e.g. detailed implementation plan, register of assets, progress reports, corrective/remedial plans, disaster recovery, exit arrangements/handover/“reasonable assistance” requirements) and attend meetings (e.g. routine meetings or meetings required by the Purchaser). Any right to terminate the contract due to strategic failures should be set out here (or with the Service Levels if linked to the Service Levels).

The Management arrangements can include provisions that might appear in a “Purchaser’s Responsibilities/Obligations” Schedule.

Any bespoke “ineffectiveness clauses” should be included here. There is already a basic ineffectiveness clause 60.6 dealing with clauses that survive a Judicial Order. Any **special compensatory provisions on ineffectiveness** or exit/handover provisions should be included here. Courts must “have regard” to these but will not be bound to follow them if they are unfair, absurd, unreasonable or disproportionate (e.g. pay the Service Provider £10 million for anticipated loss of profit) **or** if they seek to continue the contract. Ineffectiveness provisions must therefore be geared solely to an orderly end of the contractual arrangement as soon as possible. **In legal terms it is preferable to establish an emergency replacement arrangement rather than attempt to continue the contract – seek SGLD advice in any case.**

This and the following [] pages comprise Schedule 5 to the foregoing Contract between the Scottish Ministers and «F3: Service Provider name»

SCHEDULE 5 – KEY INDIVIDUALS

1. e.g. Joe Bloggs, Contract Manager
2. e.g. Jane Doe, Software Specialist

Guidance notes: Please delete this Schedule if there are no identified Key Individuals as at contract award.

This and the following [] pages comprise Schedule 6 to the foregoing Contract between the Scottish Ministers and «F3: Service Provider name»

SCHEDULE 6 – APPROVED SUB-CONTRACTORS

approved Sub-Service Provider(s)	Relevant obligations
1. e.g. Subco Limited (SC123456)	e.g. high risk consultancy services
2.	

Guidance notes: Please delete this Schedule if there are no approved sub-contractors as at contract award.

This and the following [] pages comprise Schedule 7 to the foregoing Contract between the Scottish Ministers and «F3: Service Provider name»

SCHEDULE 7 – SERVICE PROVIDER SENSITIVE INFORMATION

Type of information specified as Service Provider Sensitive Information	Reason why information is sensitive	Duration of sensitivity

Guidance notes: Since the introduction of the FOI regime it has been recommended practice to ask Service Providers to be clear as to which of their information is sensitive and should not be disclosed under FOISA. Please delete this Schedule if it is not possible to identify this information. **Buyers should nonetheless make active efforts for this Schedule to be completed.**

This and the following [] pages comprise Schedule 8 to the foregoing Contract between the Scottish Ministers and «F3: Service Provider name»

SCHEDULE 8 – PARENT COMPANY GUARANTEE

1. We [here insert the full name of the parent company], a company incorporated under the Companies Acts (Company number []) and having our Registered Office at [] refer to the Contract dated [] and [] between the Scottish Ministers and [insert name of contractor], a company incorporated under the Companies Acts (Company number [] and having its Registered Office at []) (“the Company”) of which we are the ultimate holding company, for the provision [specify nature of the services] (“the Contract”) and in security of the Company's obligations thereunder guarantee the same in the following manner:-

1.1 We guarantee that the Company shall perform all its obligations contained in the Contract.

1.2 If the Company shall in any respect fail to perform its obligations under the Contract or shall commit any breach thereof, we undertake, forthwith on first demand by the Scottish Ministers, to perform or to take whatever steps may be necessary to achieve performance of said obligations under the Contract and shall indemnify and keep indemnified the Scottish Ministers against any loss, damages, claims, costs and expenses which may be incurred by them by reason of any such failure or breach on the part of the Company.

1.3 Our guarantee and undertakings hereunder shall be unconditional and irrevocable, and without prejudice to the foregoing generality we shall not be released or discharged from our liability hereunder by:

1.3.1 any waiver or forbearance by the Scottish Ministers of or in respect of any of the Company's obligations under the Contract whether as to payment, time, performance or otherwise howsoever, or by any failure by the Scottish Ministers to enforce the Contract or this instrument, or

1.3.2 any alteration to, addition to or deletion from the Contract or the scope of the work to be performed under the Contract, or

1.3.3 any change in the relationship between ourselves and the Company; or

1.3.4 the bankruptcy, insolvency, liquidation, amalgamation, reconstruction, reorganisation, administrative or other receivership or dissolution of the Company, and any equivalent or analogous proceeding by whatever name known and in whatever jurisdiction,

and our guarantee and undertakings shall continue in force until all the Company's obligations under the Contract and all our obligations hereunder have been duly performed.

2. This Guarantee shall be construed and take effect in accordance with Scots Law.

3. Our obligations under this Guarantee may be enforced by the Scottish Ministers at their discretion without first having taken any steps or proceedings against the Company or any other person.

4. We shall, on demand by the Scottish Ministers, execute such documents or take such action as the Scottish Ministers may require, for protecting the Scottish Ministers rights under this Guarantee.

5. If at any time any provision of this Guarantee is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, the legality, validity or enforceability of the other provisions of this Guarantee shall not be affected or impaired.

6. No single or partial exercise by the Scottish Ministers of any right, power or remedy provided by law or under this Guarantee shall preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

7. The rights, powers and remedies provided in this Guarantee are cumulative with, and not exclusive of, any rights, powers and remedies provided by law.

8. All notices and other communications required or permitted to be given in terms of this Contract, or any proceedings relating to it, shall be in writing and will be sufficiently served:

8.2 if delivered by hand; or

8.2 if sent by fax; or

8.3 if sent by prepaid recorded or special delivery post; or

8.4 if sent by email

to the address specified below or to such other address as is from time to time notified to the other party in accordance with the provisions of this Clause 8:

Scottish Ministers:

[to be completed]

[Guarantor]

[to be completed]

9. Any such notice or communication shall be deemed to have been served,

9.1 if delivered by hand, on the date of delivery;

9.2 if sent by fax, 4 working hours after the time at which the fax was sent;

9.3 if sent by pre-paid recorded or special delivery post, on the date of delivery; or

9.4 if sent by electronic mail, 4 working hours after the time at which the email was sent,

9.5 provided that, if in accordance with the above provisions, any such notice or communication is delivered or received outside working hours on any working day, such notice or communications shall be deemed to have been served at the start of the working hour on the next working day thereafter.

9.6 For the purposes of this Clause 9:

‘working day’ means a day other than a Saturday, Sunday or bank holiday in Scotland, within the meaning of the Banking and Financial Dealings Act 1971; and

‘working hour’ means an hour between 0900 hours and 1700 hours on a working day.

10. Each person giving a notice or making a communication hereunder by fax or email shall promptly confirm such notice or communication by post to the person to whom such notice

or communication was addressed but the absence of any such confirmation shall not affect the validity of any such notice or communication or time upon which it is deemed to have been served: IN WITNESS WHEREOF these presents typewritten on this and the [2] preceding pages are executed as follows:

SIGNED for and on behalf of [DN: insert name of the Company]

At.....

On.....

Signature.....

Full name

Position

Address.....

.....

In the presence of

Signature.....

Full name

Address.....

.....

This and the following [] pages comprise Schedule 9 to the foregoing Contract between the Scottish Ministers and «F3: Service Provider name»

SCHEDULE 9 – MODEL CONTRACT REGARDING DATA PROTECTION DIRECTIVE 95/46/EC

Model Contract

STANDARD FORM CONTRACT TO ASSIST COMPLIANCE WITH OBLIGATIONS IMPOSED BY ARTICLE 17 OF THE DATA PROTECTION DIRECTIVE 95/46/EC

(FOR USE BY DATA CONTROLLERS AND DATA PROCESSORS LOCATED WITHIN THE EUROPEAN ECONOMIC AREA WHERE THE PARTIES HAVE ENTERED INTO A SEPARATE DATA PROCESSING AGREEMENT)

THIS AGREEMENT is made on.....and20[].

BETWEEN:

(1) THE SCOTTISH MINISTERS (the “Controller”); and

(2) [drafting note: insert name] (incorporated in, or existing and established under the laws of, [COUNTRY WITHIN THE EEA] [drafting note: if the Processor is a company insert the registered number given at Companies House] whose registered office is at [drafting note: insert registered office address] (the “Processor”).

BACKGROUND

(A) The Controller processes Personal Data in connection with its business activities;

(B) The Processor processes Personal Data on behalf of other businesses and organisations;

(C) The Controller wishes to engage the services of the Processor to process personal data on its behalf in relation to [drafting note: insert scheme name];

(D) Article 17(2) of the Data Protection Directive 95/46/EC (as hereinafter defined) provides that, where processing of personal data is carried out by a processor on behalf of a data controller the controller must choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out, and must ensure compliance with those measures;

(E) Articles 17(3) and 17(4) of the Data Protection Directive require that where processing is carried out by a processor on behalf of a controller such processing shall be governed by a contract or legal act binding the processor to the controller stipulating, in particular, that the processor shall act only on instructions from the controller and shall comply with the technical and organisational measures required under the appropriate national law to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access and against all other unlawful forms of processing;

(F) In compliance with the above-mentioned provisions of Article 17 of the Data Protection Directive the Controller and Processor wish to enter into this processing security Agreement.

THE PARTIES HEREBY MUTUALLY AGREE AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement the following words and phrases shall have the following meanings, unless inconsistent with the context or as otherwise specified:

“**Data Protection Directive**” shall mean Directive 95/46/EC of the European Parliament and Council of 24th October 1995 on the protection of individuals with regard to the processing of personal data

and on the free movement of such data;

“**national law**” shall mean the law of the Member State in which the Processor is established;

“**personal data**” shall mean any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic cultural or social identity;

“**processing of personal data**” shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alternation, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

“**sub-contract**” and “**sub-contracting**” shall mean the process by which either party arranges for a third party to carry out its obligations under this Agreement and “**Sub Contractor**” shall mean the party to whom the obligations are subcontracted; and

“**Technical and organisational security measures**” shall mean measures to protect personal data against accidental or unlawful destruction or accidental loss, alternation, unauthorised disclosure or access and against all other unlawful forms of processing.

2. CONSIDERATION

2.1 In consideration of the Controller engaging the services of the processor to process personal data on its behalf the Processor shall comply with the security, confidentiality and other obligations imposed on it under this Agreement.

3. SECURITY OBLIGATIONS OF THE PROCESSOR

3.1 The Processor shall only carry out those actions in respect of the personal data processed on behalf of the Controller as are expressly authorised by the Controller.

3.2 The Processor shall take such Technical and Organisational Security Measures as are required under its own national law to protect personal data processed by the Processor on behalf of the Controller against unlawful forms of processing. Such Technical and Organisational measures shall include, as a minimum standard of protection, compliance with the legal and practical security requirements set out in Appendix 1 of this Agreement.

4. CONFIDENTIALITY

4.1 The Processor agrees that it shall maintain the personal data processed by the Processor on behalf of the Controller in confidence. In particular, the Processor agrees that, save with the prior written consent of the Controller, it shall not disclose any personal data supplied to the Processor by, for, or on behalf of, the Controller to any third party.

4.2 The Processor shall not make any use of any personal data supplied to it by the Controller otherwise than in connection with the provision of services to the Controller.

4.3 The obligations in clauses 4.1 and 4.2 above shall continue for a period of five years after the cessation of the provision of services by the Processor to the Controller.

4.4 Nothing in this agreement shall prevent either party from complying with any legal obligation imposed by a regulator or court. Both parties shall however, where possible, discuss together the appropriate response to any request from a regulator or court for disclosure of information.

5. SUB-CONTRACTING

5.1 The Processor shall not sub-contract any of its rights or obligations under this Agreement without the prior written consent of the Controller.

5.2 Where the Processor, with the consent of the Controller, sub-contracts its obligations under this

agreement it shall do so only by way of a written agreement with the Sub-Contractor which imposes the same obligations in relation to the security of the processing on the Sub-Contractor as are imposed on the Processor under this Agreement.

5.3 For the avoidance of doubt, where the Sub-Contractor fails to fulfil its obligations under any sub-processing agreement, the Processor shall remain fully liable to the Controller for the fulfilment of its obligations under this Agreement

6. TERM AND TERMINATION

6.1 This Agreement shall continue in full force and effect for so long as the Processor is processing personal data on behalf of the Controller.

6.2 Within [drafting note: insert the number of days agreed by the parties] days following termination of this Agreement the Processor shall, at the direction of the Controller, (a) comply with any other agreement made between the parties concerning the return or destruction of data, or (b) return all personal data passed to the Processor by the Controller for processing, or (c) on receipt of instructions from the Controller, destroy all such data unless prohibited from doing so by any applicable law.

7. GOVERNING LAW

7.1 This Agreement shall be governed by and construed in accordance with the national law of the Member state in which the Controller is established.

AS WITNESS this Agreement has been signed on behalf of each of the parties by its duly authorised representative on the day and year first above written.

SIGNED on behalf of [CONTROLLER]

(Authorised signatory)

(Print name and title)

SIGNED on behalf of [PROCESSOR]

(Authorised signatory)

(Print name and title)

APPENDIX 1¹

1. Legal requirements

1.1 The Processor shall, in respect of the processing of personal data on behalf of the Controller, identify and comply with any specific security provisions imposed by its national law.

2. Practical security measures

2.1 In compliance with its obligations under clause 3.2 with regard to the processing of personal data on behalf of the Controller, the Processor, as a minimum requirement, shall give due consideration to the following types of security measures:

2.1.1 Information Security Management Systems;

2.1.2 Physical Security;

2.1.3 Access Control;

2.1.4 Security and Privacy Enhancing Technologies;

2.1.5 Awareness, training and security checks in relation to personnel;

2.1.6 Incident/Response Management/Business Continuity; and

2.1.7 Audit Controls/Due Diligence;

¹ The Practical Security Measures outlined in Schedule 1 are taken from the OECD Working Party on Information Security and Privacy's draft paper of 30-31 March 2004 entitled "Information Security Issues and Resources for Small and Entrepreneurial Companies – A business companion to the 2002 OECD Guidelines for the Security of Networks and Information systems: Towards a Culture of Security"

Annex A (normative):

Article 17 Security Contract - Implementation Guide

AA.1 Scope

The Article 17 Security Contract has been prepared to assist businesses wishing to use the services of another company to process personal data on their behalf. The Article 17 Security Contract is appropriate for use where the company which is to provide the data processing service is located either in the same Member State as the business wishing to use its services or, is located another Member State of the European Union.

Article 17 of the Directive sets out the security requirements in relation to the processing of personal data where a party that controls the content and use of personal data (the Data Controller) wishes to use the services of a third party (the Data Processor) for the processing of such data. Article 17 addresses processing arrangements where both the Data Controller and the Data Processor are established within one of the member states of the European Economic Area.

Where the Data Processor is located outside the European Economic Area consideration will need to be given to the provisions of Articles 25 and 26 of the Directive (Transfer of Personal Data to Third Countries) and the possible use of the Standard Contractual Clauses for the transfer of personal data to third countries under the Directive approved by the European Commission.

The Article 17 Security Contract has been prepared with the needs of Small and Medium-sized Enterprises in mind, however, it may in addition provide a useful starting point for larger organisations wishing to ensure that they are satisfying their obligations as to security of processing where they sub-contract data processing to another company.

The Article 17 Security Contract has been drafted to satisfy the requirements of Article 17 and is unlikely to require amendment in the absence of any changes to that Article. The contractual provisions set out in the Security Contract ensure the basic minimum level of protection for personal data and do not preclude the inclusion of more detailed provisions in the light of the legal and factual circumstances of each particular case.

However, the practical security measures suggested in this Implementation Guide are likely to require amendment in the light of physical and technological security developments and the adoption of enhanced management functions in relation to information security. This Implementation Guide, therefore, sets out the current practical security measures identified at the time of drafting, taking into account the most common technical security measures currently available, but may subsequently require updating to incorporate future developments.

The Article 17 Security Contract is designed to accompany a service agreement detailing the non-security related processing arrangements between the Data Controller and the Data Processor. The Contract may be used in its entirety or the operative clauses may be extracted and incorporated into the processing service agreement.

Before entering in an Article 17 Security Contract, or the data processing services agreement into which the operative of the Security Contract have been incorporated, the parties should obtain the assistance of professional legal advisers (in-house or external lawyers) for advice on the requirements of the national law (including any sector specific regulatory arrangements) to which the contract and the associated processing will be subject.

This guide provides assistance with regard to the use of the Article 17 Security Contract between Data Controller and Data Processor.

AA.2 Background

The Initiative for Privacy Standardisation in Europe (IPSE) was launched to analyse the current status of

privacy protection arrangements and to determine whether standardisation of actions could assist business in implementing the European Data Protection Directive 95/46/EC (the Directive). The report, approved by the IPSE steering group, concluded that specific standardisation initiatives would aid implementation of the Directive. Seven standardisation initiatives were proposed, one of which was the development of a generic set of contract clauses and terms for use within the EEA to assist business in complying with Article 17 of the Directive.

The work on the standardisation initiatives identified by IPSE was taken on by the CEN/ISSS Work Shop on Data Protection and Privacy (CEN/ISSS WS-DPP) which has produced the Article 17 Security Contract between Data Controller and Data Processor.

AA.3 Applicable Laws

Clause 6 of the Security Contract provides that the Agreement is to be governed by the national law of the Member State in which the Data Controller is located.

Where the Data Processor is located in a different Member State from the Data Controller the Controller should note that the security of the processing may be governed by the laws of a different Member State. This situation arises as (in accordance with the provisions of Article 17) the security of the processing must be conducted in accordance with the national law of the Member State in which the Data Processor is located.

Where the Data Processor is located in a Member State other than that of the Data Controller, prior to entering into contractual relations with the Data Processor, the Data Controller may need to obtain legal advice as to the specific foreign law data protection obligations imposed on the Data Processor under Clause 3 of the Model Contract. Where the Data Controller fails to obtain foreign legal advice the Data Controller may struggle to assess the Data Processor's compliance with its Clause 3 obligations. While the obligations of the Data Processor, in each Member State, derive from Article 17 of the Directive, Member States have each implemented these obligations slightly differently. For example, in many Member States (such as Austria, Belgium, Ireland, Italy, Luxembourg and Spain) the security provisions under the national law are more detailed than in the Data Protection Directive. The Data Processor will, therefore, need ensure that it complies with the provisions under the applicable national law.

In certain Member States there are regulations detailing mandatory security measures which identify three differing levels of security determined by the nature of the data being processed.

High level security measures required in Spain include, amongst other requirements, strict obligations regarding the encryption of personal data in specified circumstances as well as the maintenance of an exhaustive access registry. The Spanish access register requires a Controller to specify the data accessed by any user and the date and time of such access so as to enable the reconstruction of an audit trail in relation to access to sensitive personal data.

In Belgium, national data protection legislation stipulates and number of issues that must be covered in any sub-contracting agreement between Data Controller and Data Processor. Such issues include a requirement that the agreement shall explicitly include details of the processors liability under the agreement. The Belgium law also provides that a Royal Decree may be enacted to establish standards for information security for specified categories of data processing.

In Greece the national data protection law requires the Data Controller to check the professional credentials, qualifications and personal ethics with regard to confidentiality of persons entrusted with data processing duties or functions.

In addition to these specific national legal requirements some national data protection authorities (for example Greece and Denmark) have established rules, instructions and guidelines translating into more practical terms some of the requirements of Article 17.

AA.4 Clause by clause explanatory notes/analysis of the Article 17 Security Contract

As with any arrangement having binding legal effect, users of the Article 17 Security Contract are advised to seek professional legal advice with regard to their rights and obligations under the Security Contract and its inter-relationship with any associated data processing service agreement.

Professional legal input is particularly important where the Data Controller is uncertain of the obligations imposed on the Data Processor under the Processor's national law.

The following notes are intended as basic guidance on the nature and purpose of the individual clauses of the Security Contract and are intended to inform business managers understanding of the Security Contract prior to obtaining detailed legal advice.

Contract Clauses

Date of Agreement

The date of the agreement will be the date on which the last party executes the document. This date should not be inserted until the last party has signed and dated the Contract.

Identification of Parties

The full name of the legal entities entering into the agreement should be inserted together with any national company registration number, details of the country in which each legal entity is established and details of the registered office of each entity. It is important to note that address must be the registered office address of each business. Trading addresses, or local office addresses should not be used.

Background

The six paragraphs listed under this heading set out the reasons why the agreement is required. They identify the activities of the parties, the processing of personal data, the parties who wish to enter into contractual relations with one another, and the requirements of Article 17 of the Directive.

Mutual Agreement

The Contract then states that the parties agree to comply the provisions of the Contract.

Clause 1 – Definitions and Interpretation

This clause explains the meaning of those terms used in the agreement which have meaning over and above, or different from, the meaning which may normally be understood by the use of the term. For example, the words "personal data" are to have the specific meaning ascribed to them by the Directive.

Clause 2 – Consideration

Broadly speaking this clause is required to set out the reasons why each party is prepared to enter into the agreement. The Contract arrangement needs to be of benefit to (or, in legal terms, provide valid consideration) each party.

Clause 3 – Security Obligations of the Processor

As the title of this clause would suggest, it sets out the security obligations of the Data Processor with regard to the processing of personal data on behalf of the Data Controller.

Important points to note are:

- the Processor may only process personal data in accordance with instructions from the Data Controller. It may not process the data for its own purposes;
- the Processor is required to take “such Technical and Organisation Security Measures as are required under **its own National Law** to protect personal data processed on behalf of the Data Controller against unlawful forms of processing”. As mentioned above, legal advice should be obtained as to the detailed requirements of the relevant national law; and
- Appendix 1 of the Contract sets out the minimum requirements for compliance with these obligations. Appendix 1 is discussed further below.

Clause 4 – Confidentiality

This clause ensures that the Processor must treat all personal data processed on behalf of the Data Controller as confidential and provides that the obligation of confidentiality is continue for 5 years after the date on which the Processor ceases processing personal data for the Controller. This time limit is without prejudice to any longer time-limits that may be provided by national law or sector specific regulation. The parties may wish to amend this provision to reflect such additional obligations.

Clause 5 – Sub-contracting

This clause prevents the Processor from instructing a third party to carry out the processing it has agreed to carry out for the Controller unless the Controller gives its prior written consent.

Where the Controller consents to the sub-contracting, the sub-contractor must be contractually bound to observe the same security requirements as are imposed on the Processor under the Security Contract.

This clause ensures that the security arrangements are not watered-down by any transfer of obligations. The clause also provides that the Processor remains liable to the Controller for any breach of the Security Contract whether caused by any fault of its own or by the fault of its sub-contractor.

Clause 6 – Term and termination

This clause provides that the Security Contract will continue for as long as the Processor continues to process personal data on behalf of the Controller. The Security Contract cannot terminate before the data processing service agreement as any subsequent processing would not comply with Article 17.

Where the Security Contract and the data processing agreement are terminated, clause 5.2 provides that the Processor shall return or destroy all personal data received from the Controller as instructed by the Controller. It is for the parties to agree the appropriate number of days to insert in the clause.

This arrangement is fallback position to specify arrangements for the handling of the personal data on termination where there are no other arrangements in place. It is highly likely that the termination arrangements will be addressed in the data processing service agreement but clause 5.2 is available as backup if such arrangements have been overlooked in the drafting of the service agreement.

Clause 7 – Governing law

The Security Contract provides that the contract is to be governed by the National Law of the Data Controller.

Care must be taken when considering the choice of governing law in circumstances where the data processing service agreement specifies a law other than that of the Member State of the Controller as its

governing law. In such circumstances professional legal advice may be required.

The Security Contract does not address dispute resolution. It is advisable, before the Contract is signed, for the parties to agree an appropriate forum to hear any disputes that may arise between them under the Contract. Many parties may favour mediation with recourse to specified national courts if matters cannot be resolved. Others may wish to specify arbitration as the preferred dispute resolution process. Where mediation or arbitration are to be used it is advisable to identify the chosen mediator (or mediation body) or arbitration procedure in writing so as to avoid a dispute about the Contract becoming a dispute about the resolution procedure.

As the Security Contract is to be used in association with a data processing service agreement it may be appropriate to deal with dispute resolution arrangements in relation to security obligations under the service agreement or to mirror the dispute resolution arrangements under the service agreement in the Security Contract.

Where mediation or arbitration is not specified, as a minimum, the parties should agree to submit to the exclusive jurisdiction of specified national courts to avoid any further discussion as to where disputes should be heard. It is usual for parties to agree to submit to the exclusive jurisdiction of the courts appropriate to the governing law of the contract.

Signature

Both parties should ensure that the Contract is executed on their behalf by a 'duly authorised representative'. That is to say the parties should ensure that the signatories have the power to bind the organisation they represent. In many jurisdictions, in the absence of any other arrangements being made, the only individuals authorised to bind a company will be the directors and company secretary. These individuals may of course give written authority to other employees to bind the company for specified purposes. The identity and the authority of the proposed signatory should always be confirmed before attempting to enter into contractual relations.

Appendix 1

This appendix sets out the minimum technical and organisational measures to be observed by the Processor in accordance with clause 3. The appendix is divided into Legal Requirements and Practical Security Measures.

The Legal Requirements

These relate to the need for the Data Processor to identify and observe any specific security measures in relation to personal data required under its national law. The requirement is not a one-off requirement to be observed at the start of the processing service, but is an on-going obligation to ensure that the security arrangements are in compliance with national law as it may be amended or supplemented from time to time throughout the duration of the processing service.

Practical Security Measures

While the Contract imposes the obligation on the Processor to take "such Technical and Organisation Security Measures as are required under its own National Law to protect personal data processed on behalf of the Data Controller against unlawful forms of processing" many businesses may find it difficult to ascertain what this obligation means in practice.

The obligation is a broad one and businesses will need to break this down into the classes of security measures identified in the appendix. These classes will require further practical consideration. Many international IT groups and standards bodies have looked at the area of information security and guidance of general application is available from many of the bodies referred to below (see Sources).

An example of appropriate basic information security measures are set out in Annex 1 of this Implementation Guide.

AA.5 Extra Clauses

The Security Contract (whether used as a separate agreement or with extracted clauses used to supplement a data processing agreement) is intended to satisfy the requirements of Article 17.

From a business perspective, however, where such matters have not been otherwise covered in the data processing agreement or related contract, parties may wish to include additional clauses regarding, for example:

- Arbitration or mediation arrangements (as discussed above);
- Selection of jurisdiction (as discussed above);
- Limitations of liability.

Where more detailed arrangements have not been dealt with in other agreements, parties may wish to include more detailed provisions in relation to some of the matters addressed in the Security Contract, for example:

- Arrangements for the treatment of personal data on termination of the processing arrangements.

AA.6 Sources

The following bodies provide helpful guidance and information on information security, privacy enhancing technologies and data protection and privacy considerations which may serve as useful additional reading material for organisations seeking to use the Article 17 Security Contract for the first time:

- OECD/EU
- National Bodies
- BCS, ITIL
- ICC (International Chamber of Commerce)
- ISO 17799
- Common Criteria
- PETTEP

IMPLEMENTATION GUIDE

ANNEX 1 - BASIC INFORMATION SECURITY MEASURES

Basic information security measures (here extracted from work of the OECD) will include consideration of the following:

2.1 Information Security Management System/Privacy and Data Protection Management System

- Policy
- Governance
- Process/procedures
- Roles/responsibilities
- Assurance process
- Risk Assessment
- Improvement plan.

2.2 Physical Security

- Fit appropriate locks or other physical controls to the doors and windows of rooms where computers are kept.
- Physically secure unattended lap tops (for example, by locking them in a secure drawer or cupboard).
- Ensure you control and secure all removable media, such as removable hard-drives, CDs, floppy disks and USB drives, attached to business-critical assets.

- Destroy or remove all business-critical information from media such as CDs, and floppy disks before disposing of them.
- Ensure that all business-critical information is removed from the hard drives of any used computers before disposing of them.
- Store back-ups of business-critical information either off-site or in a fire and water-proof container.

2.3 Access Controls

- Use unique passwords, that are not obvious (Note: not birth dates or easily found or guessed information) and change them regularly (Note: preferably at least every three months).
- Use passwords that contain letters in both upper and lower cases, numbers and special keys, and are six or more characters in length. (Note: Passwords remembered as a memorable sentence, rather than a single word, are helpful. For example, the sentence: "at forty-two I'm a star!" can translate into this eight-character password : @42Ima*!)
- Ensure that employees don't write down or share passwords. (Note: If an employee finds that they need, on occasion, to share a password they must be required to change it as soon as possible – no matter how well they trust the person they shared it with!)

2.4 Security and Privacy Technologies

- Ensure that all computers used have anti-virus software installed, and the virus definitions must be updated at least once a week (Note: many providers have a one-click update). All incoming and outgoing traffic must be scanned for viruses, as should any disk or CD that is used, even if it is from a 'trusted' source. At least once a month, computers must be scanned for viruses.
- Where computers are connected to the Internet (especially if you use a broadband connection) deploy a software firewall. (Note: This helps to prevent malicious code from entering computers and potentially compromising the confidentiality, integrity and availability of a network. It also helps to stop a system being used to attack other systems without the system owner's knowledge. Software firewalls for use by non-professionals are readily available at a reasonable cost. Operating system virus control software or ISPs may also offer firewalls. Consumer and popular trade magazines compare firewall functions and features of well known products, and are a good source of information. Free shareware firewalls are available, but these usually require expert knowledge for correct use).
- Where a business has a small network that is connected to the Internet, it should consider deploying an 'all-in-one' hardware box that contains a firewall, anti-virus program and an intrusion detection system. (Note: This will greatly simplify the use and maintenance of essential Internet security technology).

2.5 Awareness, training and security checks in relation to personnel

- Perform integrity checks on all new employees to ensure that they have not lied about their background, experience or qualifications.
- Give all new employees a simple introduction to information security, and ensure that they read and understand your information security policy. Ensure employees know where to find details of the information security standards and procedures relevant to their role and responsibilities.
- Ensure that employees have access only to the information assets they need to do their jobs. If employees change jobs, you must ensure that they do not retain access to the assets they needed for their old job. When dismissing employees, ensure that they do not take with them any business-critical information.
- Ensure that no ex-employees have access rights to your systems.
- Ensure employees know about the common methods that can be used to compromise your system. (Note: These include e-mail messages that contain viruses and 'social engineering' ploys used by hackers to exploit employees' helpfulness to gain information that will give them access to a system. Examples of 'social engineering' include a hacker using the telephone to pose as a systems maintenance engineer or pretending to be a new employee).

2.6 Incident/Response Management/Business Continuity

- Ensure that employees understand what is meant by a Security Incident. A security incident is any event that can damage or compromise the confidentiality, integrity or availability of your business—critical information or systems.
- Ensure that employees are trained to recognise the signs of Security Incidents. (*Note: These could include:*
 - strange phone requests, especially for information
 - unusual visitors
 - strange patterns of computer activity
 - unusual appearance of computer screens
 - computers taking longer than usual to perform routine tasks)
- Ensure that employees receive training on the need to notify anything which may be a sign of a Security Incident and are kept informed as to the identity of the person to whom such notifications should be made.
- Ensure that if a Security Incident occurs, employees know who to contact and how.
- Have in place a plan to assure business continuity in the event of a serious Security Incident (a “Business Recovery Plan”). The plan should specify:
 - Designated people involved in the response;
 - External contacts, including law enforcement, fire and possibly technical experts;
 - Contingency plans for foreseeable incidents such as:
 - Power loss;
 - Natural disasters and serious accidents;
 - Data compromise;
 - No access to premises;
 - Loss of essential employees;
 - Equipment failure;
- Ensure that your Business Recovery Plan is issued to all employees and is tested at least once a year, regardless of whether there has been a Security Incident.
- After every incident when the plan is used, and after every test, re-examine and update the Business Recovery Plan as necessary using the lessons learned.

2.7 Audit Controls/Due Diligence

Ensure that you have in place appropriate security audit arrangements including:

- Auditing of who has access to its system (in general and in relation to particular types of information) (*Note: The ability to audit and evaluate information security compliance is essential – you can’t manage what you don’t measure!;*)
- Logging of such access to the system; and
- Auditing of compliance with security procedures. (*Note: A record should be maintained for each security procedure. For example, if a procedure requires that you test your system’s back-up generator once a week, an employee should be identified to sign a record to show that this has been done. Keeping good records is essential to audit control.*)

Some audit controls may be necessary for legal or regulatory purposes. Good record keeping will clearly demonstrate compliance with obligations.

An audit should ensure that the procedures in place are effective and relevant. A security audit is a trigger to re-assess and re-evaluate the effectiveness of information security standards and procedures.

Audits are only effective if action is taken to address their findings and identify and implement the steps that need to be taken. A good audit trail is not just a paper exercise. If something goes wrong, the trail should identify what happened and why. This will help to keep improving the security of the business systems.

This and the following [] pages comprise Schedule 10 to the foregoing Contract between the Scottish Ministers and «F3: Service Provider name»

SCHEDULE 10 – EXIT MANAGEMENT

[]

Guidance note on Fields:

Fields that appear more than once in different places in the Contract have the same F number – the same guidance note applies.

- F1:** Insert contract reference number or delete field if inapplicable.
- F2:** Delete “acting through” unless a Directorate or Agency has a distinct brand in which case insert it after “acting through” e.g. “Marine Scotland”, “the Scottish Prison Service”. Brand logos may be included on the cover page if that is desirable.
- F3:** Insert the Service Provider’s legal name. See the guidance note to the defined term “Service Provider”.
- F4:** Insert a title for the commodity e.g. “website design services”, “professional services”.
- F5:** Insert name of sub-category if there is a subset of the wider commodity title e.g. “interim managers” within “professional services”. Insert a description of the lot/lot number if there are lotted of contracts under the wider commodity title e.g. “Lot 1 of 3, North of Scotland”. Delete field if not required.
- F6:** Delete if there are no particular Service Levels to be identified in the Specification.
- F7:** Delete if Key Individuals are not being identified before contract award i.e. if there is not to be a Schedule 5 Key Individuals. Also delete Schedule 5.
- F8:** Delete if sub-contractors are not being identified and approved before contract award i.e. if there is not to be a Schedule 6 Approved Sub-contractors. Also delete Schedule 6.
- F9:** Delete if it is absolutely not possible to identify Service Provider Sensitive Information before contract award i.e. if there is not to be a Schedule 7 Service Provider Sensitive Information. Also delete Schedule 7.
- F10:** Insert the date the contract notice was published in the OJEU – this will be a later date than the date of despatch and may be a different date from the publication on Public Contracts Scotland.
- F11:** Insert the OJEU publication reference number – this appears at the top of the contract notice and is along the lines of “2010/S 125-191831”.
- F12:** Insert the date of the Service Provider’s pre qualification questionnaire.
- F13:** Insert the date that the invitation to tender was issued.
- F14:** Insert the date of the Service Providers’ tender.
- F15:** Delete if there are no particular Service Levels to be identified in the Specification.
- F16:** Delete if the Pricing Schedule does not include provision for Service Credits.
- F17:** Delete if there is not to be a Schedule 5 Key Individuals.
- F18:** Delete if there is not to be a Schedule 6 Approved Sub-contractors.
- F19:** Delete if there is not to be a Schedule 7 Service Provider Sensitive Information.
- F20:** Insert the number of Schedules – should be between 4 and 6.
- F21:** Delete if it is clear that TUPE will not apply on the commencement of the provision of the Services.
- F22:** Delete if there is not to be a Schedule 5 Key Individuals.
- F23:** Delete if there are no particular Service Levels to be identified in the Specification.
- F24:** Delete if it is clear that TUPE will not apply on the ceasing of the provision of the Services.
- F24A:** Delete if the Pricing Schedule does not include provision for Service Credits.
- F25:** Delete if there are no particular Service Levels to be identified in the Specification.
- F26:** Insert Service Provider’s legal name and details – see the Guidance note underneath the defined term “Service Provider”.
- F27:** Delete if there is not to be a Schedule 7 Service Provider Sensitive Information.
- F28:** Delete if there are no particular Service Levels to be identified in the Specification.
- F29:** Insert the date on which the contract is to go live. This might be a later date than the date of signing the contract.
- F30:** Insert the initial date on which the contract is to expire e.g. for a 2+1+1 year contract the initial expiry date will be the date falling 2 years from the commencement date.
- F31:** Insert the last date that the contract could terminate taking the advertised contract term and counting from the Commencement Date.
- F32:** Delete if there are no particular Service Levels to be identified in the Specification.
- F33:** Choose one or other of the sentences depending on whether the prices are fixed.
- F34:** Delete if the Pricing Schedule does not include provision for Service Credits.
- F36:** Delete unless it is clear that TUPE will not apply on the commencement of the provision of the Services. If retaining, the other clauses should be deleted.
- F37:** Delete unless it is clear that TUPE will not apply on the ceasing of the provision of the Services. If retaining, the other clauses should be deleted.
- F38:** Insert a postal address for the Scottish Government where formal notices under the contract will be received and read by the procurement team managing the contract.
- F39:** Insert the name of the individual to which such notices should be referred.
- F40:** Insert a particular phone number for the procurement team managing the contract for the SG i.e. not the public phone number for the SG.
- F41:** Insert a fax number where formal notices under the contract will be received and read by the procurement team managing the contract for the SG.
- F42:** Insert an e-mail address where formal notices under the contract will be received and read by the procurement team managing the contract for the SG.
- F43:** Insert a postal address for the Service Provider where formal notices under the contract will be received and read by the team managing the contract.
- F44:** Insert the name of the individual to which such notices should be referred.
- F45:** Insert a particular phone number for the team managing the contract for the Service Provider i.e. not the public phone number for the Service Provider.
- F46:** Insert a fax number where formal notices under the contract will be received and read by the team managing the contract for the Service Provider.
- F47:** Insert an e-mail address where formal notices under the contract will be received and read by the procurement team managing the contract for the Service Provider.
- F48:** Insert the invoicing frequency e.g. monthly, separately in respect of each Order or perhaps on acceptance of each Deliverable/Milestone.

F49: Delete if the Pricing Schedule does not include provision for Service Credits.
F50: Delete if the Pricing Schedule does not include provision for Service Credits.
F51: Delete if there is not to be a Schedule 6 Approved Sub-contractors.
F52: Delete if there is not to be a Schedule 6 Approved Sub-contractors.
F53: Delete if the Pricing Schedule is fixed i.e. clause 5 does not include provision for variation.
F54: Delete if there is not to be a Schedule 7 Service Provider Sensitive Information.
F56: Delete if IPR in Deliverables is to be in Crown ownership and not licensed by the Service Provider.
F57: Delete if IPR in Deliverables is to be in Crown ownership and not licensed by the Service Provider.
F58: Include a limiter such as annual and/or aggregate, or delete the field.
F59: Include a limiter if the cap is only for particular types of loss or damage, or delete the field.
F60: Include a figure for the liability cap.
F61: Include a further limiter if the cap is e.g. per incident, or delete.
F62: Include a figure for public liability insurance requirement.
F63: Include any conditions e.g. for one incident and unlimited in total, or delete.
F64: Include a figure for professional indemnity insurance requirement.
F65: Include any conditions e.g. for one incident and unlimited in total, or delete.
F66: Include the period after which non-performance due to Force Majeure cannot be tolerated and the Contract should be terminated.
F67: Delete if the Management Arrangements do not include provisions for the informal resolution of disputes e.g. management escalation.
F68: Delete if the Schedules do not include a special termination right going beyond the clauses e.g. Service failure threshold.
F69: Delete if the Management Arrangements do not include special provisions for payments on expiry or termination or Judicial Order i.e. ineffectiveness.:
F70: Delete if the Management Arrangements do not include any special ineffectiveness provisions.
F71: Insert the number of pages prior to the signing page (i.e. take the number at the bottom of the signing page and subtract 1).

Once all text fields have been removed (check by cycling through with F11), all number fields can be auto-updated/corrected by using "Select All" then F9.