

# G-Cloud Framework 14 - Terms and Conditions for SMART

May 2024



## NHS North of England Commissioning Support Unit (hosted by NHS Commissioning Board) GENERAL TERMS (SMART)

### 1 DEFINITIONS AND INTERPRETATION

1.1 In this Agreement, unless the context otherwise requires, the following words shall have the following meanings:

<b>Acceptable Use Policy</b>	the CSU's policy with regard to the acceptable use of the Services and any Deliverables from time to time applicable and made available through the CSU's website;
<b>Agreement</b>	the agreement formed between the CSU and the Customer consisting of these General Terms and the Specific Terms and any specifications, and other documents specifically referred to in either the General Terms or the Specific Terms;
<b>Business Day</b>	any day which is not a Saturday, Sunday or public holiday in England and Wales;
<b>Change</b>	a change to the Services or this Agreement;
<b>Charges</b>	the charges payable by the Customer to the CSU for the Services, as set out in the Specific Terms;
<b>Confidential Information</b>	all confidential information in whatever form (including without limitation, written, oral, visual or electronic form, or on tape or disk) disclosed by a party or its employees, officers, representatives or advisers (" <b>Disclosing Party</b> ") to the other party and that party's employees, officers, representatives or advisers (" <b>Receiving Party</b> ") whether before, on or after the date of this Agreement in connection with the existence and terms of this Agreement, including any information that would be regarded as confidential by a reasonable person relating to the business, affairs, customers, clients, or plans, of the Disclosing Party; and the operations, processes, product information, know-how, designs, trade secrets or software of the Disclosing Party;
<b>Contract Year</b>	the period of 12 calendar months commencing on the Effective Date and each 12-month period thereafter;
<b>Controller</b>	shall have the meaning given in the Data Protection Legislation;
<b>Criminal offence data</b>	Personal Data relating to criminal convictions and offences or related security measures;
<b>CSU</b>	NHS England Trading as North of England Commissioning Support Unit;
<b>CSU Personal Data</b>	means Personal Data of which the CSU is the Controller;
<b>CSU Personnel</b>	means any and all persons employed or engaged by the CSU from time to time in the provision of the Services and/or the processing of Customer Personal Data, whether employees, workers, consultants or agents of the CSU or any subcontractor or agent of the CSU;
<b>Customer</b>	the customer identified in the Specific Terms;
<b>Customer Data</b>	all data (including without limitation, Customer Personal Data) in any medium which the Customer permits or requests (whether expressly or by implication) the CSU to access, store, transmit,

	distribute or otherwise use or process as part of the Services;
<b>Customer Dependencies</b>	the Customer dependencies, responsibilities and obligations referred to in Clauses 3.1 to 3.4;
<b>Customer Materials</b>	all software and materials in any medium which the Customer permits or requests (whether expressly or by implication) the CSU to access, store, transmit, distribute or otherwise use or process as part of the Services;
<b>Customer Personal Data</b>	Personal Data of which the Customer is the Controller and which forms part of the Customer Data;
<b>Data Loss Event</b>	any event that results, or may result, in unauthorised access to Customer Personal Data held by the CSU under this Agreement, and/or actual or potential loss and/or destruction of Customer Personal Data in breach of this Agreement, including any relevant Personal Data Breach;
<b>Data Protection Legislation</b>	<ul style="list-style-type: none"> <li>(i) the GDPR, the LED and any applicable national Laws implementing them as amended from time to time;</li> <li>(ii) the DPA 2018; and</li> <li>(iii) all applicable Law concerning privacy, confidentiality or the processing of personal data including but not limited to the Human Rights Act 1998, the Health and Social Care (Safety and Quality) Act 2015, the common law duty of confidentiality and the Privacy and Electronic Communications (EC Directive) Regulations;</li> </ul>
<b>Data Processing Protocol</b>	the table set out in the Proposal, or as may be otherwise agreed in writing between the parties, which specifies the nature and scope of the Processing that the CSU may undertake of Customer Personal Data;
<b>Data Subject</b>	shall have the meaning given in the Data Protection Legislation;
<b>Deliverables</b>	any software, materials and other deliverables as the CSU provides to or makes available to the Customer through the Services or otherwise pursuant to this Agreement, including those identified in the Specific Terms;
<b>Dispute</b>	a dispute, conflict or other disagreement between the CSU and the Customer arising out of or in connection with this Agreement and whose resolution is governed in accordance with Clause 14;
<b>DPA 2018</b>	the Data Protection Act 2018;
<b>Effective Date</b>	the date referred to as such in the Specific Terms;
<b>Extended Term</b>	as defined in Clause 8.1;
<b>Fraud</b>	any offence under law creating offences in respect of fraudulent acts (including the Misrepresentation Act 1967) or at common law in respect of fraudulent acts in relation to this Agreement or defrauding or attempting to defraud or conspiring to defraud the Crown;
<b>GDPR</b>	the General Data Protection Regulation (Regulation (EU) 2016/679);
<b>General Terms</b>	these terms and conditions;

<b>Health Service Body</b>	has the meaning given to it in section 9 of the NHS Act 2006 (as amended or replaced from time to time);
<b>Initial Term</b>	the term referred to as such in the Specific Terms;
<b>IPR</b>	all intellectual and industrial property rights of any kind whatsoever including patents, supplementary protection certificates, rights in know-how, registered trademarks, registered designs, models, unregistered design rights, unregistered trade marks, rights to prevent passing off or unfair competition and copyright (whether in drawings, plans, specifications, designs and computer software or otherwise), database rights, topography rights, any rights in any invention, discovery or process, and applications for and rights to apply for any of the foregoing, in each case in the United Kingdom and all other countries in the world and together with all renewals, extensions, continuations, divisions, reissues, re-examinations and substitutions;
<b>Law</b>	any law or subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of Section 2 of the European Communities Act 1972, regulation, order, regulatory policy, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements with which the CSU is bound to comply;
<b>LED</b>	the Law Enforcement Directive (Directive (EU) 2016/680);
<b>NHS Contract</b>	has the meaning given to it in section 9 of the NHS Act 2006 (as amended or replaced from time to time);
<b>Personal Data</b>	has the meaning given to it in the Data Protection Legislation;
<b>Personal Data Breach</b>	shall have the meaning set out in the Data Protection Legislation;
<b>Processor</b>	shall have the meaning given in the Data Protection Legislation;
<b>Processing, Process and similar terms</b>	shall have the meanings given in the Data Protection Legislation;
<b>Prohibited Act</b>	<p>to directly or indirectly offer, promise or give any person working for or engaged by the other party a financial or other advantage to:</p> <ul style="list-style-type: none"> <li>(a) induce that person to perform improperly a relevant function or activity; or</li> <li>(b) reward that person for improper performance of a relevant function or activity;</li> <li>(c) commit any offence: <ul style="list-style-type: none"> <li>a. under the Bribery Act 2010;</li> <li>b. under legislation creating offences concerning Fraud;</li> <li>c. at common law concerning Fraud; or</li> <li>d. defrauding, attempting to defraud or conspiring to defraud the other party;</li> </ul> </li> </ul>

<b>Proposal</b>	the written offer made by the CSU to the Customer for the provision of the Services;
<b>Services</b>	the services to be provided by the CSU to the Customer as set out in the Specific Terms, including provision of the Deliverables, and such other services agreed to be provided by the CSU to the Customer from time to time; and
<b>Special Categories of Personal Data</b>	shall have the meaning given in the Data Protection Legislation;
<b>Specific Terms</b>	the specific terms agreed between the parties set out in the Proposal or this Agreement;
<b>Sub-processor</b>	means any third party appointed to process Customer Personal Data on behalf of the CSU related to this Agreement;
<b>Term</b>	the period of this Agreement which commences on the Effective Date and continues in full force and effect until terminated in accordance with Clause 8.

- 1.2 A person includes an individual, corporate or unincorporated body (whether or not having separate legal personality) and that person's legal and personal representatives, successors or permitted assigns.
- 1.3 A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.4 Words in the singular shall include the plural and vice versa.
- 1.5 A reference to one gender shall include a reference to the other gender.
- 1.6 A reference to writing or written includes faxes and e-mail, but subject in both cases to formal acknowledgement of receipt of the communication being received (excluding any automatic electronic notification).
- 1.7 A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.
- 1.8 A "party" or the "parties" refer to the parties to this Agreement.
- 1.9 Any words following the words "include", "includes", "including", "in particular" or any similar words or expressions will be construed without limitation and accordingly will not limit the meaning of the words preceding them.

## 2 SUPPLY OF THE SERVICES

- 2.1 In consideration of the Customer paying the Charges to the CSU and subject to the terms and conditions of this Agreement, the CSU hereby agrees to provide the Services to the Customer throughout the Term.
- 2.2 The CSU shall:
  - 2.2.1 use reasonable skill and care in providing the Services;
  - 2.2.2 allocate sufficient resources to provide the Services in accordance with the terms of this Agreement including providing sufficiently trained, qualified and experienced staff appropriate to the provision of the Services;
  - 2.2.3 perform the Services in compliance with all applicable laws, enactments, orders, regulations, standards and other similar instruments and all applicable provisions of this Agreement.
- 2.3 The Services shall be provided at such premises and locations as agreed by the parties from time to time in writing.
- 2.4 The CSU does not warrant that the Customer's use of the Deliverables or the Services will be uninterrupted or error-free.
- 2.5 This Agreement shall not prevent the CSU from entering into similar agreements with third parties, or from independently developing, using, selling or licensing materials, products or services which are similar to those provided under this Agreement.

### **3 CUSTOMER'S OBLIGATIONS**

- 3.1 The Customer shall promptly provide the CSU with:
  - 3.1.1 all necessary co-operation and assistance in relation to this Agreement;
  - 3.1.2 all necessary access to or copies of such information as may be required by the CSU in order to provide the Services and ensure that all information which it provides to the CSU is accurate, adequate and complete; and
  - 3.1.3 copies of all of its relevant policies, rules, procedures and quality standards (and shall inform the CSU of any amendments to such documents) to enable the CSU to comply with its obligations under this Agreement.
- 3.2 The Customer shall promptly:
  - 3.2.1 allow the CSU, its agents and subcontractors access to the Customer's premises, office accommodation, and other facilities as reasonably required by the CSU to provide the Services (so long as prior written consent has been sought from the Customer);
  - 3.2.2 provide such access to the Customer's personnel as may be reasonably requested by the CSU from time to time;
  - 3.2.3 provide all necessary or reasonably requested sign-offs, approvals and instructions required by the CSU in connection with the performance Services;
  - 3.2.4 comply with all applicable laws and regulations with respect to its activities under this Agreement;
  - 3.2.5 ensure that the CSU has all necessary access to and all necessary licences, rights and consents to use all Customer Data and all Customer Materials;
  - 3.2.6 maintain complete, up to date, reproducible and accurate backup copies of all data, programs and electronic records held by the Customer including Customer Data; and
  - 3.2.7 carry out all other responsibilities set out in this Agreement in a timely and efficient manner.
- 3.3 When allowing the CSU to access its premises for the purposes of providing the Services, the Customer will inform the CSU of all health and safety rules and regulations and any other reasonable security requirements that apply at any of the premises to which the CSU requires access. The Customer shall take all necessary precautions to protect the health and safety and security of the CSU's personnel whilst they are at the Customer's premises.
- 3.4 The Customer shall comply with:
  - 3.4.1 any specific obligations set out in the Specific Terms; and
  - 3.4.2 the Acceptable Use Policy.
- 3.5 The Customer shall use all due and proper care to ensure that the manner in which it discharges its obligations under this Agreement does not have any adverse effect on the name, reputation, image or business of the CSU.
- 3.6 In the event of any failure or delays in the Customer's performance of the Customer Dependencies in accordance with this Clause 3, the CSU:
  - 3.6.1 may, where the failure relates to the Acceptable Use Policy, suspend provision of the Services and/or performance of any of its other obligations under this Agreement until the Customer has remedied such failure (including taking action to prevent a repeat of it) to the reasonable satisfaction of the CSU;
  - 3.6.2 may adjust any timetable or delivery schedule set out in this Agreement as reasonably necessary; and
  - 3.6.3 shall be relieved from any liability for any failure to perform any obligation under this Agreement to the extent caused or contributed to the failure or delay of the Customer.

### **4 CHARGES**

- 4.1 The CSU shall be entitled to invoice the Customer for the Charges at the times or intervals or upon the milestones set out in the Specific Terms or, if not otherwise stated in the Specific Terms, as set out in Clause 4.5 or 4.6, as applicable,

- 4.2 The Customer shall pay all invoices to the CSU (without any deduction or set-off) to such bank account of the CSU notified to the Customer in writing from time to time and within such period as is set out in Clause 4.5 or 4.6, as applicable.
- 4.3 The Charges are exclusive of value added tax, which shall be added to the CSU's invoice(s) at the appropriate rate.
- 4.4 The CSU shall be entitled to increase the Charges from the start of the second Contract Year and annually thereafter in accordance with the mechanism set out in the Specific Terms and shall notify the Customer in writing of the applicable revised Charges.

**For Customers who are Health Service Bodies**

- 4.5 The CSU shall invoice the Customer for 1/12<sup>th</sup> of the total of the annual Charges on the 1st Business Day of each calendar month. Each invoice is due and payable 15 days after the invoice date. If the CSU has not received payment within 5 Business Days after the due date, then without prejudice to any other rights and remedies of the CSU:
  - 4.5.1 the CSU shall be entitled to suspend provision of any or all of the Services while the invoice(s) concerned remain unpaid; and/or
  - 4.5.2 the CSU may claim interest under the Late Payment of Commercial Debts (Interest) Act 1998 from the due date for payment, accruing on a daily basis until the date on which payment is made in full.

**For all other Customers**

- 4.6 The CSU shall invoice the Customer for 1/12<sup>th</sup> of the total of the Charges on the 1st Business Day of each calendar month. Each invoice is due and payable 30 days after the invoice date. If the CSU has not received payment within 5 Business Days after the due date, then without prejudice to any other rights and remedies of the CSU:
  - 4.6.1 the CSU shall be entitled to suspend provision of any or all of the Services while the invoice(s) concerned remain unpaid; and/or
  - 4.6.2 the CSU may claim interest under the Late Payment of Commercial Debts (Interest) Act 1998 from the due date for payment, accruing on a daily basis until the date on which payment is made in full.
- 4.7 Time for payment shall be the essence of this Agreement.

**5 PROPRIETARY RIGHTS**

- 5.1 The Customer acknowledges and agrees that the CSU and/or its licensors own all IPR in the Services and Deliverables and that this Agreement does not transfer or grant to the Customer any interest in IPR or rights of ownership in the Services, Deliverables or any related documentation. For the avoidance of any doubt, this includes any IPR created by the CSU or licensed to it by third parties in relation to the Services or Deliverables or in respect of any other goods or services provided or supplied by the CSU to the Customer, before, during or after the Term.
- 5.2 With effect from the date on which the relevant Deliverable is delivered to or made available to the Customer, the CSU grants to the Customer a non-exclusive, non-transferrable and revocable licence for the Term to use the IPR in that Deliverable solely to the extent necessary to use that Deliverable for its intended purpose. Unless otherwise agreed in writing with the CSU, the Customer agrees that all Deliverables will be made available through and only accessed and used as part of the Services. The Customer may not assign or sub-licence the licence granted by the CSU under this Clause 5.2. Without prejudice to the generality of the foregoing, the Customer shall not permit any third parties to access any Deliverable or part of the Services without the prior written consent of the CSU.
- 5.3 The Customer grants to the CSU a non-exclusive, royalty-free licence for the Term to use the Customer's IPR (including in the Customer Data and Customer Materials) to the extent required for the purpose of the supply of the Services and the performance of the CSU's other obligations under this Agreement. The CSU may grant a sub-licence of this licence to any sub-contractor appointed by the CSU in connection with this Agreement.
- 5.4 Each party will indemnify the other party against all losses, liabilities, costs, damages and expenses that the other party does or will incur or suffer as a result of defending or settling any such actual or threatened claim or proceeding, in each case arising out of or in connection with the actual or alleged infringement of the third party's IPR by the other party as a result of:
  - 5.4.1 where the Customer is the indemnified party, use of the Deliverables or Services by the Customer for the purpose for which they were supplied; and



- 5.4.2 where the CSU is the indemnified party, the exercise of the CSU's rights under clause 5.3. ("Relevant Claim").
- 5.5 If the indemnified party becomes aware of a Relevant Claim or any matter that might give rise to a Relevant Claim:
- 5.5.1 it will immediately give written notice to the indemnifying party of that fact (stating in reasonable detail the nature of the Relevant Claim or matter and, if practicable, the amount claimed) and consult with the indemnifying party in respect of that Relevant Claim or matter that may give rise to a Relevant Claim;
  - 5.5.2 the indemnified party will at all times disclose in writing to the indemnifying party all information and documents relating to the Relevant Claim or the matter that might give rise to a Relevant Claim, and provide to the indemnifying party all reasonable cooperation and assistance in respect of the Relevant Claim;
  - 5.5.3 the indemnified party will not settle or compromise or make any admission of liability, agreement or compromise in relation to any Relevant Claim or matter that may give rise to a Relevant Claim without the prior written consent of the indemnifying party, such consent not to be unreasonably withheld or delayed; and
  - 5.5.4 if so, requested by the indemnifying party, the indemnified party will allow the indemnifying party exclusive conduct of all proceedings in relation to the Relevant Claim in the name of and on behalf of the indemnified party, at the cost of the indemnifying party.
- 5.6 If a Relevant Claim is made or brought against the Customer, the CSU may (but shall not be obliged), at the CSU's option and expense, either:
- 5.6.1 obtain for the Customer the right to continue using the Deliverables or Services for the purpose for which they were supplied free from any liability for such infringement; or
  - 5.6.2 modify, substitute or replace any Deliverables or Services so as to avoid the infringement, without adversely affecting or limiting the specification or functionality of the Deliverables or Services.
- 5.7 The CSU will have no liability to the Customer under Clause 5.4 for any loss, liability, cost, damage, expense, claim or proceeding to the extent that:
- 5.7.1 it would not have been incurred or suffered but for any modification to the Deliverables or Services made by any person other than the CSU; or
  - 5.7.2 it would not have been incurred or suffered but for any breach of this Agreement by the Customer.

## 6 CONFIDENTIALITY

- 6.1 Each party may be given access to Confidential Information from the other party in order to perform, or in the course of performing, its obligations under this Agreement. A party's Confidential Information shall not be deemed to include information that:
- 6.1.1 is or becomes publicly known other than through any act or omission of the Receiving Party; or
  - 6.1.2 was in the Receiving Party's lawful possession before the disclosure; or
  - 6.1.3 is lawfully disclosed to the Receiving Party by a third party without restriction on disclosure; or
  - 6.1.4 is independently developed by the Receiving Party, which independent development can be shown by written evidence; or
  - 6.1.5 is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory, governmental or administrative body or securities exchange.
- 6.2 Each party shall hold the other's Confidential Information in confidence and, unless required by law, not disclose or make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this Agreement.
- 6.3 This Clause 6 shall survive termination of this Agreement, however arising.



## 7 LIMITATION OF LIABILITY

- 7.1 This Clause 7 sets out the entire financial liability of the CSU (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer in respect of:
- 7.1.1 any breach of this Agreement;
  - 7.1.2 any use made by the Customer of the Services or Deliverables or any part of them; and
  - 7.1.3 any representation, statement or tortious act or omission (including negligence) arising under or in connection with this Agreement.
- 7.2 Except as expressly and specifically provided in this Agreement all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from this Agreement.
- 7.3 Nothing in this Agreement excludes or limits the liability of the CSU:
- 7.3.1 for death or personal injury caused by the CSU's negligence; or
  - 7.3.2 for fraud or fraudulent misrepresentation; or
  - 7.3.3 for any other matter liability for which may not by law be excluded or limited.
- 7.4 The Customer accepts that in providing the Services, the CSU may be reliant upon the provision of certain goods, materials and services from third parties in order to provide the Services to the Customer. The parties therefore agree that the CSU will not be responsible or liable to the Customer for any failure to provide the Services if such failure is directly or indirectly attributable to the failure of any third parties to provide any goods or services to the CSU and further, the CSU will not be responsible or liable for any costs, expenses, claims, demands, losses, actions, proceedings, fines, penalties or any other liabilities incurred or sustained by the Customer in connection with the same.
- 7.5 Subject to Clauses 7.3 and 7.4:
- 7.5.1 the CSU shall not be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss costs, damages, charges or expenses however arising in connection with this Agreement; and
  - 7.5.2 the CSU's aggregate liability in each Contract Year, in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with this Agreement shall be limited to the total amount of the Charges actually invoiced by the CSU to the Customer in the relevant Contract Year.
- 7.6 In no event shall the CSU be liable for any failure or delay attributable to the Customer's hardware or software or any network necessary or internet connection to enable the Customer to connect or access the Services or for any access gained to the Customer's area of the Services where the Customer's access passwords and/or codes are used to gain such access or use.

## 8 TERM AND TERMINATION

- 8.1 Subject always to Clauses 8.2 and 8.3, the Term shall commence on the Effective Date and shall continue for the Initial Term. The Term shall automatically be extended at the end of the Initial Term for 6 months and thereafter on a 6-month rolling basis (the "**Extended Term**"), unless a party gives written notice to the other party, not later than 3 months before the end of the Initial Term or any Extended Term, to terminate this Agreement.
- 8.2 Without prejudice to any other rights or remedies to which the parties may be entitled, either party may terminate this Agreement immediately without liability to the other by notice in writing if:
- 8.2.1 the other party commits a material breach of any of the terms of this Agreement (including in the case of the Customer non-payment of any invoice, which shall be deemed to be a material breach) and (if such a breach is remediable) fails to remedy that breach within 30 days of that party being notified in writing of the breach; or
  - 8.2.2 the other party:
    - 8.2.2.1 has a winding up petition presented against it;
    - 8.2.2.2 has a winding-up order made or a notice of striking off filed in respect of it;
    - 8.2.2.3 takes or any other person takes any steps or actions in connection with the appointment of an administrator in respect of it;

- 8.2.2.4 has an administration order or an application for an administration order made in respect of it;
- 8.2.2.5 has a notice of appointment of an administrator or a notice of intention to appoint an administrator filed in respect of it at any court;
- 8.2.2.6 makes or is subject to:
  - 8.2.2.6.1 a company voluntary arrangement;
  - 8.2.2.6.2 a composition with its creditors generally;
  - 8.2.2.6.3 an application to a court of competent jurisdiction for protection from its creditors generally; or
  - 8.2.2.6.4 a scheme of arrangement under Part 26 Companies Act 2006 (save for the purpose of a solvent reconstruction or amalgamation previously approved in writing by the other party);
- 8.2.2.7 has a receiver or a provisional liquidator appointed over any of its assets, undertaking or income;
- 8.2.2.8 ceases to trade or appears, in the reasonable opinion of the terminating party, to be likely to cease to trade;
- 8.2.2.9 is unable to pay its debts as they fall due; or
- 8.2.2.10 is the subject of anything analogous to the foregoing under the laws of any applicable jurisdiction.
- 8.3 Without prejudice to any other rights or remedies to which the CSU may be entitled, the CSU may terminate this Agreement for convenience at any time by not less than 30 days' notice in writing to the Customer.
- 8.4 On termination of this Agreement for any reason:
  - 8.4.1 all licences granted under this Agreement shall immediately terminate;
  - 8.4.2 the Customer shall immediately pay to the CSU all outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has been submitted, the CSU may submit an invoice, which shall be payable immediately on receipt;
  - 8.4.3 the CSU shall not be obliged to refund any Charges already paid by the Customer prior to termination;
  - 8.4.4 each party shall return and make no further use of any equipment, property, materials and other items (and all copies of them) belonging to the other party;
  - 8.4.5 to the extent that the Customer requires any assistance from the CSU in respect of transition of provision of the Services or services similar to the Services to another provider, or to itself, the CSU shall use reasonable endeavours to assist with such transition wherever reasonably practicable, provided that the Customer shall pay all costs and charges of the CSU in respect thereof; and
  - 8.4.6 the accrued rights of the parties as at termination, or the continuation after termination of any provision expressly stated to survive or implicitly surviving termination, shall not be affected or prejudiced.
- 9 MONITORING**
  - 9.1 The Customer may monitor the performance of the Services by the CSU, so long as the monitoring methods implemented by the Customer pursuant to Clause 9.1 are deemed reasonable and necessary by the CSU and are agreed in advance by the CSU, the CSU shall co-operate, with the Customer in carrying out the monitoring referred to in Clause 9.1 at no additional charge to the Customer.
  - 9.2 The CSU may implement such monitoring methods as it deems to be reasonable in all the circumstances in order to monitor the Customer's satisfaction in relation to the performance of the Services by the CSU. The Customer shall co-operate with the reasonable instructions of the CSU in relation to such monitoring.

## 10 FORCE MAJEURE

The CSU shall have no liability to the Customer under this Agreement if it is prevented from or delayed in performing its obligations under this Agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes (whether involving the workforce of the CSU or any other party), failure of a utility service or transport or telecommunications network, act of God, war, riot, terrorism, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm, volcanic ash-cloud or default of the CSU's sub-contractors, provided that the Customer is notified of such an event and its expected duration.

## 11 VARIATION AND CHANGE CONTROL PROCEDURE

- 11.1 No variation of this Agreement (including Changes) shall be valid unless it is in writing and signed by or on behalf of each of the parties by an authorised officer of both parties.
- 11.2 If a party wishes to request a Change, it will give written notice of the requested Change to the other party.
- 11.3 If either party requests a Change in accordance with Clause 11.2, the CSU will prepare within 20 Business Days of the request two copies of a Change Control notice ("**CCN**"). Each CCN will contain:
  - 11.3.1 the title of the Change;
  - 11.3.2 the originator and date of the request for the Change;
  - 11.3.3 the reason for the Change;
  - 11.3.4 full details of the Change including any specifications;
  - 11.3.5 the price, if any, of the Change;
  - 11.3.6 a timetable for implementation of the Change;
  - 11.3.7 a schedule of payments if appropriate;
  - 11.3.8 details of the impact, if any, of the Change on other aspects of this Agreement and the Services including:
    - 11.3.9 the Service Levels;
    - 11.3.10 the Charges; and
    - 11.3.11 any other contract terms;
  - 11.3.12 the date of expiry of validity of the CCN; and
  - 11.3.13 provision for signature by the CSU and by the Customer.
- 11.4 Following receipt by the Customer of the CCN the parties will discuss the CCN. Neither party will unreasonably withhold its agreement to any Change. No Change will be effective unless and until the relevant CCN is signed by or on behalf of each party. If a CCN is not signed by or on behalf of each party on or before the date of expiry of validity of that CCN then it will automatically expire.
- 11.5 If a CCN is signed by or on behalf of each party on or before the date of expiry of validity of that CCN then the CSU will implement the Change in accordance with the terms of the CCN and the Customer will perform any obligations imposed on it in the CCN in accordance with the terms of the CCN or (if applicable) the relevant provisions of this Agreement, including the payment of any charges and/or any increase to the Charges.
- 11.6 Until such time as a Change is agreed in accordance with this procedure, each party will continue to perform its obligations under this Agreement in compliance with the terms and conditions of this Agreement without taking account of the requested Change.

## 12 ASSIGNMENT

- 12.1 The Customer shall not, without the prior written consent of the CSU, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.
- 12.2 The CSU may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.
- 12.3 There is an expectation that the CSU will be incorporated as one more separate entities to NHS England through the process of autonomy. Where this occurs:
  - 12.3.1 the CSU may at its discretion novate any or all of its rights, obligations and liabilities under this Agreement and/or any associated licences to anybody or legal entity which performs any of

the functions that previously had been performed by the CSU and the Customer shall, at the CSU's request, enter into a novation agreement in such form as the CSU shall reasonably specify in order to enable the CSU to exercise its rights pursuant to this Clause 12.3.1; and

- 12.3.2 any change in the legal status of the CSU such that it ceases to be a Health Service Body shall not affect the validity of this Agreement and this Agreement shall be binding on any successor body to the CSU.

### 13 DATA PROTECTION

- 13.1 As between the Customer and the CSU, the Customer owns and is responsible for the content of the Customer Data.
- 13.2 The parties agree that the Customer is the Controller and the CSU is the Processor in respect of any Customer Personal Data forming part of the Customer Data.
- 13.3 The CSU shall, in relation to any Customer Personal Data Processed in connection with its obligations under this Agreement, Process that Personal Data only in accordance with the instructions set out in the Data Processing Protocol, unless the CSU is required to do otherwise by Law. If it is so required, the CSU shall promptly notify the Customer before so Processing the Customer Personal Data, unless prohibited by Law.
- 13.4 The CSU shall, in relation to any Customer Personal Data Processed in connection with its obligations under this Agreement, ensure that it takes all reasonable steps to ensure that CSU Personnel are subject to appropriate confidentiality undertakings with the CSU that are in writing and are legally enforceable.
- 13.5 Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of Processing of the Customer Personal Data, as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the CSU shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including, but not limited to, as appropriate:
- 13.5.1 the pseudonymisation and encryption of the Customer Personal Data;
  - 13.5.2 the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
  - 13.5.3 the ability to restore the availability and access to Customer Personal Data in a timely manner in the event of a physical or technical incident; and
  - 13.5.4 a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of Processing.
- 13.6 Before allowing any Sub-processor to Process any Customer Personal Data related to this Agreement, the CSU must:
- 13.6.1 notify the Customer in writing of the intended Sub-processor and processing;
  - 13.6.2 obtain the written consent of Customer;
  - 13.6.3 enter into a written agreement with the Sub-processor which gives effect to the terms set out in this Agreement such that they apply to the Sub-processor; and
  - 13.6.4 provide the Customer with such information regarding the Sub-processor as the Customer may reasonably require.
- 13.7 The CSU shall remain fully liable for all acts or omissions of any Sub-processor it allows to process any Customer Personal Data.
- 13.8 The CSU must assist the Customer by taking appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the Customer's obligation to respond to requests for exercising rights granted to individuals by the Data Protection Legislation.
- 13.9 The CSU must assist the Customer in ensuring compliance with the obligations set out at Article 32 to 36 of the GDPR and equivalent provisions implemented into Law, taking into account the nature of processing and the information available to the CSU.
- 13.10 The CSU shall, in relation to any Customer Personal Data Processed in connection with its obligations under this Agreement at the written direction of the Customer, delete or return the Customer Personal Data (and any copies of it) to the Customer on termination of the Agreement unless the CSU is required by Law to retain the Customer Personal Data. If the CSU is asked to delete the Customer Personal Data the CSU shall provide the Customer with evidence that the Customer Personal Data has been securely deleted in accordance with the Data Protection Legislation within a reasonable period agreed within the written direction of the Customer.

- 13.11 The CSU shall allow for audits of its Processing of the Customer Personal Data by the Customer or its designated auditor. The Customer shall provide the CSU with reasonable written notice of its intention to hold such an audit, which shall take place at such reasonable time as may be agreed between the parties.
- 13.12 The CSU shall provide the Customer with evidence necessary to demonstrate compliance with all of its obligations concerning its Processing of Customer Personal Data under this Agreement and the relevant Data Protection Legislation.
- 13.13 The CSU shall notify the Customer promptly if it considers that any of Customer's instructions concerning the Customer Personal Data infringe the Data Protection Legislation.
- 13.14 This Agreement does not relieve either party from any obligations conferred upon them by the Data Protection Legislation and both Parties shall duly observe all their obligations under the Data Protection Legislation, which arise in connection with Personal Data and this Agreement. The Customer warrants, represents and undertakes to the CSU that its use of the Services shall comply with the Data Protection Legislation.
- 13.15 Where the Customer Processes CSU Personal Data as a Processor:
  - 13.15.1 the CSU shall prepare a copy of the Data Processing Protocol which shall set out the scope and nature of the Processing that the Customer may make of CSU Personal Data, a copy of which shall be appended to and become part of this Agreement;
  - 13.15.2 the Customer shall not Process any CSU Personal Data unless and until the CSU has provided the Customer with a copy of the Data Processing Protocol prepared by the CSU pursuant to Clause 13.15.1 and then only in compliance with such Data Processing Protocol;
  - 13.15.3 the Customer shall comply with the CSU's obligations (*mutatis mutandis*) set out in Clauses 13.1 to 13.14 (inclusive); and
  - 13.15.4 in respect of the Customer's compliance with Clauses 13.1 to 13.14 (inclusive), references to the Customer Personal Data shall be construed as references to the CSU Personal Data.
- 13.16 Each Party warrants and represents to the other that it has the authority to lawfully transfer any data, including without limitation, any Personal Data which it transfers to the other pursuant to this Agreement and that it has obtained all necessary third-party licences and consents required in order to do so.

## 14 DISPUTE RESOLUTION

- 14.1 Clauses 14.2 – 14.6 below shall only apply if the Customer is a Health Service Body. Clauses 14.7 – 14.10 below shall apply if the Customer is not a Health Service Body.

### Where the Customer is a Health Service Body

- 14.2 If any Dispute arises out of or in connection with this Agreement, either party may give notice to the other party in writing ("**Dispute Notice**") that a Dispute has arisen. The Parties shall first attempt to settle the Dispute in good faith without referring the Dispute to any external third parties.
- 14.3 If the Dispute cannot be resolved pursuant to Clause 14.2 within 30 Business Days, the Parties shall resolve the Dispute by mediation in accordance with Clause 14.4.
- 14.4 The following provisions shall apply to any such reference to mediation:
  - 14.4.1 the mediator shall be NHS England (specifically, NHS England's Commissioning Development Directorate);
  - 14.4.2 both Parties shall, immediately on such referral, co-operate fully, promptly and in good faith with the agreed mediator and shall do all such acts and sign all such documents as the agreed mediator may reasonably require to give effect to such mediation;
  - 14.4.3 such mediation shall be conducted in accordance with good mediation practice, shall commence by either party serving on the other written notice setting out, in summary form, the issues in dispute and shall take place within 10 Business Days of such notice being served;
  - 14.4.4 if the parties fail to reach agreement within 10 Business Days of the mediation commencing, then any Dispute will be referred to arbitration pursuant to the procedures set out in Clause 14.5.
- 14.5 Following the Dispute being referred to arbitration, such arbitration shall:
  - 14.5.1 be conducted by NHS England;
  - 14.5.2 take place within 10 Business Days of such arbitration commencing;
  - 14.5.3 be binding on the parties.

- 14.6 The costs of any mediation or arbitration under the provisions of this Clause 14 shall be shared equally by the parties.

**Where the Customer is not a Health Service Body**

- 14.7 If any Dispute arises out of or in connection with this Agreement, either party may give notice to the other party in writing ("**Dispute Notice**") that a Dispute has arisen. The Parties shall first attempt to settle the Dispute in good faith without referring the Dispute to any external third parties.
- 14.8 If the Dispute cannot be resolved pursuant to Clause 14.7 within 30 Business Days, the Parties shall resolve the Dispute by mediation in accordance with Clause 14.9.
- 14.9 Unless otherwise agreed between the parties:
- 14.9.1 the mediator shall be nominated by CEDR Solve;
  - 14.9.2 to initiate the mediation, a party must serve notice in writing ("**Mediation Notice**") to the other party requesting a mediation. A copy of the Mediation Notice should be sent to CEDR Solve;
  - 14.9.3 the mediation will start not later than 30 days after the date of the Mediation Notice;
  - 14.9.4 the place of mediation shall be nominated by the mediator.
- 14.10 If the matter has not been resolved by the mediation procedure within 30 days of the initiation of such procedure, the parties shall have the right to refer the dispute to arbitration. The arbitrator shall be appointed by agreement of the parties or (in default of agreement within 21 days of the service upon one party of a written request to concur in such appointment) by the President for the time being of the Chartered Institute of Arbitrators. The arbitrator's decision shall be final and binding on the parties.
- 14.11 The parties acknowledge that, notwithstanding the provisions of this Clause 14, nothing in this Agreement shall prevent any party from bringing proceedings in any court of competent jurisdiction for any interim or interlocutory relief.

**15 PREVENTION OF BRIBERY**

- 15.1 Neither party shall, and shall procure that all of its staff shall not, in connection with this Agreement commit a Prohibited Act.
- 15.2 Each party shall have an anti-bribery policy (which shall be disclosed to the other upon request) to prevent any of its employees from committing a Prohibited Act and shall enforce it where appropriate.

**16 NOTICES**

- 16.1 Any notice required to be given under this Agreement shall be in writing and shall be:
- 16.1.1 delivered by hand or sent by pre-paid first-class post or recorded delivery post to the other party at its address set out in this Agreement or such other address as may have been notified by that party for such purposes; or
  - 16.1.2 sent by fax or by e-mail to the other party to the fax or e-mail address identified for such purpose in the Specific Terms, but subject in both cases to formal acknowledgement of receipt of the communication being received (excluding any automatic electronic notification).
- 16.2 A notice delivered by hand shall be deemed to have been received when delivered (or if delivery is not in business hours, at 9 am on the first Business Day following delivery). A correctly addressed notice sent by pre-paid first-class post or recorded delivery post shall be deemed to have been received at the time at which it would have been delivered in the normal course of post. A notice sent by fax or e-mail shall be deemed to have been received at the time of formal acknowledgement of receipt as referred to in Clause 16.1.2.

**17 GENERAL**

- 17.1 A delay in exercising or failure to exercise a right or remedy under or in connection with this Agreement will not constitute a waiver of, or prevent or restrict future exercise of, that or any other right or remedy, nor will the single or partial exercise of a right or remedy prevent or restrict the further exercise of that or any other right or remedy. A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the party to whom the waiver is addressed and to the circumstances for which it is given.
- 17.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.



- 17.3 This Agreement, and any documents referred to in it, constitute the whole agreement between the parties and supersede any previous arrangement, understanding or Agreement between them relating to the subject matter they cover.
- 17.4 Nothing in this Agreement is intended to or shall operate to create a partnership between the parties, or authorise either party to act as agent for the other, and neither party shall have the authority to act in the name or on behalf of or otherwise to bind the other in any way.
- 17.5 This Agreement shall be binding on each party's successors in title and permitted assigns.
- 17.6 This Agreement does not confer any rights on any person or party (other than the parties to this Agreement and (where applicable) their successors and permitted assigns) pursuant to the Contracts (Rights of Third Parties) Act 1999.
- 17.7 Where both the parties to this Agreement are Health Service Bodies, this Agreement shall be an NHS Contract and shall not be legally binding. Nevertheless, in such circumstances, each party shall comply with its respective rights and obligations under this Agreement as if it were legally binding. Should either party to this Agreement cease to be a Health Service Body during the Term, this Agreement shall become legally binding and shall remain legally binding for the remainder of the Term.

## **18 GOVERNING LAW AND JURISDICTION**

- 18.1 Subject to Clauses 14 and 17.7, this Agreement and any disputes or claims arising out of or in connection with it or its subject matter or formation are to be governed by, and construed in accordance with, the laws of England and Wales.
- 18.2 Subject to Clauses 14 and 17.7, the parties irrevocably agree that the courts of England and Wales have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation.