

DATED

Framework Agreement for the Purchase of IT Services

between

Kerv Digital

and

[CUSTOMER]



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This agreement is dated [DATE]

Between

- (1) **Kerv Digital Limited** incorporated and registered in England and Wales with company number 7510381 whose registered office is at 1 Finsbury Avenue, London, EC2M 2PF (**Supplier**)
- (2) **[Name]** incorporated and registered in England and Wales with company number [number] whose registered office is at [address] (**Customer**)

BACKGROUND

- (A) The Supplier is in the business of providing IT Services.
- (B) The Customer wishes to obtain and the Supplier wishes to provide IT Services on the terms set out in this agreement.

Agreed terms

1. Interpretation

- 1.1 The following definitions and rules of interpretation apply in this agreement:

Affiliate: any entity that directly or indirectly controls, is controlled by, or is under common control with another entity.

Applicable Laws: all applicable laws, statutes, regulation [and codes] from time to time in force.

Background Intellectual Property: any Intellectual Property Rights, other than Intellectual Property Rights arising solely in respect of the provision of the Services.

Business Day: a day, other than a Saturday, Sunday or public holiday in England, when banks in London are open for business.

Business Hours: the period from 8.00 am to 5.00 pm on any Business Day.

Change Order: has the meaning given in clause 6.1.

Control: shall be as defined in section 1124 of the Corporation Tax Act 2010, and the expression **change of Control** shall be construed accordingly.

Customer's Equipment: the information technology and communication systems, including networks, hardware, software and interfaces owned by, or licensed to, the Customer, its affiliates, or any of its or their agents or contractors, and any other



equipment, including tools, systems, cabling or facilities, provided by the Customer, its agents, subcontractors or consultants which is used directly or indirectly in the supply of the Services including any such items specified in a Statement of Work.

Customer Materials: all documents, information, items and materials in any form, whether owned by the Customer or a third party, which are provided by the Customer to the Supplier in connection with the Services, including the items provided pursuant to clause 5.6(c).

Customer's Project Manager: the Customer's manager for the Services appointed in accordance with clause 5.6 from time to time.

Data Protection Legislation: the UK Data Protection Legislation and any other European Union legislation relating to personal data and all other legislation and regulatory requirements in force from time to time which apply to a party relating to the use of personal data (including, without limitation, the privacy of electronic communications).

Deliverables: any output of the Services to be provided by the Supplier to the Customer as specified in a Statement of Work and any other documents, products and materials provided by the Supplier to the Customer in relation to the Services including powerThings (excluding the Supplier's Equipment).

Intellectual Property Rights: patents, rights to inventions, copyright and related rights, moral rights, trade marks, business names and domain names, rights in get-up, goodwill and the right to sue for passing off or unfair competition, rights in designs, rights in computer software, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how) and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.

Open-Source Software: any software licensed under any form of open-source licence meeting the Open-Source Initiatives' Open-Source Definition or any libraries or code licence from time to time under the General Public Licence, or anything similar, included or used in, or in the development of, Software or with which Software is compiled or to which it is linked.

[powerThings: software components the ownership of which will be retained by the Supplier and which will be licensed by the Supplier to the Customer pursuant to a powerThing Licence and identified in a Statement of Work from time to time.]

[powerThing Licence: a licence in respect of the Customer's use of any powerThings in connection with the Deliverables on a free of charge basis and as set out in Schedule 3].

Relief Events: the following events:

- (a) any failure by the Customer to comply with its obligations under this agreement;
- (b) any error or malfunction in the Customer's Equipment or any other software, hardware or systems for which the Supplier is not responsible or any failure by the Customer, its agents or contractors (including any existing service provider) to obtain sufficient support and maintenance, as required, for any software, hardware or systems for which the Supplier is not responsible;
- (c) any failure by the Customer or its agents or contractors (including any existing service provider) to provide any information, co-operation or instruction to the Supplier which is reasonably required by the Supplier for the proper performance of its obligations under this agreement; or
- (d) any of the causes or events set out in clause 9.5.

Services: any services which are provided by the Supplier pursuant to the terms of this agreement under a Statement of Work including services which are incidental or ancillary to the Services.

Software: any software developed as a result of the provision of the Services.

SoW Charges: the sums payable for the Services as set out in a Statement of Work.

Statement of Work: a detailed plan, agreed between the parties, describing the Services to be provided by the Supplier pursuant to the terms of this agreement, the timetable for their performance and any related matters.

Supplier's Equipment: any equipment, including tools, systems, cabling or facilities, provided by the Supplier to the Customer and used directly or indirectly in the supply of the Services, including any such items specified in a Statement of Work but excluding any such items which are the subject of a separate agreement between the parties under which title passes to the Customer.

Supplier's Project Manager: the Supplier's manager for the Services appointed in accordance with clause 4.3 from time to time.

Third Party Intellectual Property Rights: any Intellectual Property Rights incorporated into the Software which are not the property of the Supplier including Open-Source Software.

UK Data Protection Legislation: all applicable data protection and privacy legislation in force from time to time in the UK including the General Data Protection Regulation ((EU) 2016/679); the Data Protection Act 2018; the Privacy and Electronic Communications Directive 2002/58/EC (as updated by Directive 2009/136/EC) and the Privacy and Electronic Communications Regulations 2003 (SI 2003/2426) as amended.

VAT: value added tax or any equivalent tax chargeable in the UK or elsewhere.

- 1.2 Clause, Schedule and paragraph headings shall not affect the interpretation of this agreement.
- 1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 1.4 The Schedules form part of this agreement and shall have effect as if set out in full in the body of this agreement. Any reference to this agreement includes the Schedules.
- 1.5 A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.6 Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular.
- 1.7 Unless the context otherwise requires, a reference to one gender shall include a reference to the other gender.
- 1.8 This agreement shall be binding on, and enure to the benefit of, the parties to this agreement and their respective personal representatives, successors and permitted assigns, and references to any party shall include that party's personal representatives, successors and permitted assigns.
- 1.9 A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.
- 1.10 A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.
- 1.11 Unless the context otherwise requires, any reference to European Union law that is directly applicable or directly effective in the UK at any time is a reference to it as it applies in England and Wales from time to time including as retained, amended, extended, re-enacted or otherwise given effect on or after 11pm on 31 January 2020.
- 1.12 A reference to **writing** or **written** includes email.
- 1.13 Any obligation on a party not to do something includes an obligation not to allow that thing to be done.
- 1.14 A reference to **this agreement** or to any other agreement or document referred to in this agreement is a reference of this agreement or such other agreement or document as varied or novated (in each case, other than in breach of the provisions of this agreement) from time to time.

- 1.15 References to clauses and Schedules are to the clauses and Schedules of this agreement and references to paragraphs are to paragraphs of the relevant Schedule.
- 1.16 Any words following the terms **including, include, in particular, for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

2. Commencement and duration

- 2.1 This agreement shall commence on [[DATE] **OR** the date when it has been signed by all the parties] and shall continue, unless terminated earlier in accordance with clause 16 (Termination), until terminated by either party giving not less than one month's notice in writing to the other.
- 2.2 If there are no uncompleted Statements of Work as at the date notice to terminate is served under clause 2.1 such notice shall terminate this agreement on its expiry.
- 2.3 If there are uncompleted Statements of Work as at the date the notice to terminate is served under clause 2.1, this agreement shall not terminate until such time as the Services being provided pursuant to those Statements of Work are completed.
- 2.4 The parties shall not enter into any further Statements of Work after the date on which notice to terminate is served under clause 2.1.
- 2.5 The Customer may procure any Services on the terms of this agreement by agreeing a Statement of Work with the Supplier pursuant to clause 3 (Statements of Work).
- 2.6 The Supplier shall provide the Services from the date specified in the relevant Statement of Work.

3. Statements of Work

- 3.1 From time to time the parties shall agree Statements of Work in respect of Services to be provided by the Supplier pursuant to the terms of this agreement. Both parties shall sign each Statement of Work to indicate their agreement to the same. The Supplier may charge for the preparation of Statements of Work on a time and materials basis in accordance with the Supplier's daily fee rates from time to time. The Supplier's daily fee rates in force at the date of this agreement are set out in Schedule 1.
- 3.2 Once a Statement of Work has been agreed and signed in accordance with clause 3.1, no amendment shall be made to it, including any purported termination of the Services to be provided pursuant to that Statement of Work, except in accordance with clause 6 (Change control) or clause 21 (Variation).

- 3.3 Each Statement of Work shall be part of this agreement and shall not form a separate contract to it.

4. Supplier's responsibilities

- 4.1 The Supplier shall carry out the Services and deliver the Deliverables pursuant to each Statement of Work from time to time in all material respects with their agreed specification or as otherwise agreed between the parties.
- 4.2 The Supplier shall use reasonable commercial endeavours to meet any date for completion of the Services agreed with the Customer or specified in a Statement of Work but any such dates shall be estimates only and time for performance by the Supplier shall not be of the essence of this agreement.
- 4.3 The Supplier shall appoint a manager in respect of the Services to be performed under each Statement of Work, such person as identified in the Statement of Work. That person shall have authority to commit the Supplier on all matters relating to the relevant Services (including by signing Change Orders).

5. Customer's obligations

- 5.1 If the Customer is procuring Microsoft licences or cloud services via the Supplier through the Microsoft Cloud Services Provider ("CSP") program, Microsoft requires all of its cloud service provider partners to confirm their customer's consent to the Microsoft Cloud Agreement ("MCA") prior to placing any order for Microsoft's products. Proper execution of the MCA protects Microsoft, its partners and customers by ensuring mutual alignment on many important topics such as security, privacy and data protection and allows Microsoft to better assist Customers who need to promptly respond to regulatory enquiries.
- 5.2 The Customer must therefore indicate its acceptance to the terms of the MCA, the latest version of which can be viewed at <https://www.microsoft.com/licensing/docs/customeragreement>.
- 5.3 In order that the Supplier can confirm to Microsoft the Customer's acceptance of the terms of the MCA, please confirm to the Supplier by email:
- (a) the first and last names of the Customer's representative;
 - (b) that such representative has the Customer's authority to give this confirmation of acceptance of the MCA;
 - (c) the Customer's email address; and
 - (d) the Customer's phone number.

- 5.4 The Supplier will pass this information to Microsoft who will process Personal Data only on the data subject's documented instructions.
- 5.5 If the Customer does not agree to the terms of the MCA then the Supplier will be obliged to cancel the Customer's Microsoft subscription.
- 5.6 The Customer shall:
- (a) co-operate with the Supplier in all matters relating to the Services and appoint a Project Manager in respect of the Services to be performed under each Statement of Work, such person as identified in the Statement of Work. That person shall have authority to commit the Customer on all matters relating to the relevant Services (including by signing Change Orders);
 - (b) provide, for the Supplier, its agents, subcontractors, consultants and employees, in a timely manner and at no charge, access to the Customer's premises, office accommodation, data and other facilities as requested by the Supplier including any such access as is specified in a Statement of Work, for the purposes of providing the Services;
 - (c) provide to the Supplier in a timely manner all documents, information, items and materials in any form (whether owned by the Customer or a third party) required under a Statement of Work or otherwise reasonably required by the Supplier in connection with the Services and ensure that they are accurate and complete in all material respects;
 - (d) inform the Supplier of all health and safety and security requirements that apply at any of the Customer's premises;
 - (e) ensure that all the Customer's Equipment and all network connections and telecommunications links from the Customer's Equipment to the Supplier's systems and/or data centres comply with the relevant specifications provided by the Supplier from time to time and are available to the Supplier free of charge as is necessary to enable the Supplier to carry out its obligations pursuant to this agreement;
 - (f) make available to the Supplier any resources to be contributed to the Services by the Customer to utilise as required by the Supplier in connection with the provision of any Services; and
 - (g) ensure that its employees and other independent contractors co-operate reasonably with the Supplier and its employees in delivering the Services.
- 5.7 If the Supplier's performance of its obligations under this agreement is prevented or delayed by any act or omission of the Customer, its agents, subcontractors, consultants or employees then the Customer shall in all circumstances be liable to pay to the Supplier on demand all reasonable costs, charges or losses sustained or incurred by it (including,

without limitation, any direct or indirect consequential losses, loss of profit and loss of reputation, loss or damage to property, injury to or death of any person and loss of opportunity to deploy resources elsewhere), subject to the Supplier confirming such costs, charges and losses to the Customer in writing.

- 5.8 The Customer shall not, without the prior written consent of the Supplier, at any time from the date of this agreement to the expiry of 12 months after the completion of any Services pursuant to a Statement of Work, solicit or entice away from the Supplier or employ or attempt to employ any person who is, or has been, engaged as an employee or sub-contractor of the Supplier, except that the Customer shall not be in breach of this clause 5.8 if it hires an employee or sub-contractor of the Supplier as a result of a recruitment campaign not specifically targeted to any employees or sub-contractors of the Supplier.
- 5.9 Any consent given by the Supplier in accordance with clause 5.8 shall be subject to the Customer paying to the Supplier on demand a sum equivalent to 20% of the then current annual remuneration of the Supplier's employee or sub-contractor, or if higher, 20% of the annual remuneration to be paid by the Customer to such employee or sub-contractor.

6. Change control

- 6.1 Either party may propose changes to the scope or execution of the Services but no proposed changes shall come into effect until a relevant **Change Order** has been signed by both parties. A Change Order shall be a document setting out the proposed changes and the effect that those changes will have on:
- (a) the Services;
 - (b) the likely time required to implement the change;
 - (c) any variations to the SoW Charges arising from the change;
 - (d) any timetable for the Services; and
 - (e) any of the other terms of the relevant Statement of Work.
- 6.2 If the Supplier wishes to make a change to the Services it shall provide a draft Change Order to the Customer.
- 6.3 If the Customer wishes to make a change to the Services:
- (a) it shall notify the Supplier and provide as much detail as the Supplier reasonably requires of the proposed changes, including the timing of the proposed change; and
 - (b) the Supplier shall, as soon as reasonably practicable after receiving the information at clause 6.3(a), provide a draft Change Order to the Customer.

- 6.4 If after receipt of the draft Change Order the Customer does not wish to proceed, there shall be no change to the Services or this agreement.
- 6.5 If the Customer wishes the Supplier to proceed with the change, the Supplier has no obligation to do so unless and until the parties have agreed in writing on the necessary variations to the SoW Charges, the Services, the timetable for the works and any other relevant terms of this agreement to take account of the change.
- 6.6 The Supplier may charge for the time it spends on preparing and negotiating Change Orders which implement changes proposed by the Customer pursuant to clause 6.3 on a time and materials basis at the Supplier's daily rates from time to time.

7. Charges and payment

- 7.1 In consideration of the provision of the Services by the Supplier, the Customer shall pay the SoW Charges.
- 7.2 Where the SoW Charges are calculated on a time and materials basis:
 - (a) the Supplier's daily fee rates for each individual person as set out in Schedule 1 as amended from time to time, are calculated on the basis of an eight-hour day, worked during Business Hours;
 - (b) the Supplier shall be entitled to charge an overtime rate of 150% of the daily fee rates from time to time on a pro rata basis for any time worked by individuals whom it engages on the Services outside Business Hours; and
 - (c) the Supplier shall ensure that every individual whom it engages on the Services completes time sheets to record time spent on the Services, and the Supplier shall indicate the time spent per individual in its invoices.
- 7.3 The SoW Charges exclude the following, which shall be payable by the Customer monthly in arrears, following submission of an appropriate invoice:
 - (a) the cost of hotel, subsistence, travelling and any other ancillary expenses reasonably incurred by the individuals whom the Supplier engages in connection with the Services; and
 - (b) the cost to the Supplier of any materials or services reasonably and properly provided by third parties and required by the Supplier for the provision of the Services.
- 7.4 The Supplier shall invoice the Customer for the SoW Charges at the intervals specified in the Statement of Work. If no intervals are so specified, the Supplier shall invoice the Customer at the end of each month for Services performed during that month.

- 7.5 The Customer shall pay each invoice submitted to it by the Supplier within 30 days of receipt to a bank account nominated in writing by the Supplier from time to time.
- 7.6 Without prejudice to any other right or remedy that it may have, if the Customer fails to pay the Supplier any sum due under this agreement on the due date:
- (a) the Customer shall pay interest on the overdue sum from the due date until payment of the overdue sum, whether before or after judgment. Interest under this clause will accrue each day at 8% a year above the Bank of England's base rate from time to time, but at 8% a year for any period when that base rate is below 0%; and
 - (b) the Supplier may, without liability to the Customer, suspend the provision of the Services, and the Supplier shall be under no obligation to provide any of the Services while the invoice(s) concerned remain unpaid. The time, if any, specified for the completion of any Services shall automatically be extended by the period during which Services are suspended pursuant to this clause.
- 7.7 All sums payable to the Supplier under this agreement:
- (a) are exclusive of VAT, and the Customer shall in addition pay an amount equal to any VAT chargeable on those sums on delivery of a VAT invoice; and
 - (b) shall be paid in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law).

8. Intellectual property rights

- 8.1 As between the parties, all Background Intellectual Property is and shall remain the exclusive property of the Supplier.
- 8.2 Subject to payment in full by the Customer of all sums payable to the Supplier pursuant to this agreement and any Statement of Work, the Intellectual Property Rights arising solely in respect of the provision of Services (other than Third Party Intellectual Property Rights and Background Intellectual Property Rights) shall vest in and be owned absolutely by the Customer.
- 8.3 The Customer grants the Supplier the non-exclusive right to use the Intellectual Property Rights arising solely in respect of the provision of the Services (other than Third Party Intellectual Property Rights and Background Intellectual Property Rights) for the purpose of:
- (a) exercising the Supplier's rights or performing its roles, responsibilities, duties and obligations under this agreement;



- (b) providing support and maintenance services and any further development in relation to the Software.
- 8.4 The Supplier grants to the Customer an irrevocable, royalty-free, non-exclusive, worldwide licence of its Background Intellectual Property Rights to the extent necessary to use the Software and the Deliverables for its own internal purposes.
- 8.5 To the extent that the Deliverables comprise any powerThings, the Supplier grants to the customer the powerThing Licence.
- 8.6 The Customer:
 - (a) may not use the Background Intellectual Property other than as specified in clause 8.4;
 - (b) may not use any powerThing other than as specified in the powerThing Licence;
 - (c) has no right (and shall not permit any third party) to copy, adapt, reverse engineer, decompile, disassemble, modify, adapt or make error corrections to the Background Intellectual Property in whole or in part.
- 8.7 The Supplier may make such copies of the Software and Deliverables as are reasonably necessary for use in accordance with this agreement and for the purposes of backup and security.

9. Indemnity

- 9.1 In this clause, a reference to the Software is a reference to the Software in its current state of development at the time when any relevant claim is made.
- 9.2 The Supplier shall indemnify the Customer on demand against all liabilities, costs, expenses, damages and losses suffered or incurred by the Customer arising out of or in connection with any claim made against the Customer for infringement of Intellectual Property Rights arising out of or in connection with the use of those parts of the Software other than Open Source Software or any Intellectual Property Rights developed by a party other than the Supplier.
- 9.3 This indemnity shall not cover the Customer if a claim under it results from:
 - (a) the Customer's negligence or wilful misconduct; or
 - (b) the Customer's breach of its responsibilities pursuant to clause 9.4.
- 9.4 If the Software and the Deliverables comprise material (in any medium) owned by third parties, the Supplier shall provide the Customer with a copy of such written assignments, releases, waivers, permissions and licences as necessary to permit use of such material

provided that the Customer shall be responsible for ensuring that its use of any such rights shall not be in breach of any such assignments, releases, waivers, permissions and licences.

- 9.5 Liability under this indemnity is conditional on the Customer discharging the following obligations. If any third party makes a claim, or notifies an intention to make a claim, against the Customer which may reasonably be considered likely to give rise to a liability under this indemnity (a **Claim**), the Customer shall:
- (a) as soon as reasonably practicable, give written notice of the Claim to the Supplier, specifying the nature of the Claim in reasonable detail;
 - (b) not make any admission of liability, agreement or compromise in relation to the Claim without the prior written consent of the Supplier;
 - (c) give the Supplier and its professional advisers access at reasonable times (on reasonable prior notice) to its premises and its officers, directors, employees, agents, representatives or advisers, and to any relevant assets, accounts, documents and records within the power or control of the Customer, so as to enable the Supplier and its professional advisers to examine them and to take copies (at the Supplier's expense) for the purpose of assessing the Claim; and
 - (d) be deemed to have given to the Supplier sole authority to avoid, dispute, compromise or defend the Claim.
- 9.6 The Supplier shall not in any circumstances have any liability for any claim of infringement of Intellectual Property Rights caused or contributed to by:
- (a) the Customer's use of the Software in combination with software not supplied or approved in writing by the Supplier (other than the operating system of the Customer's Equipment, provided that the Supplier was notified in writing of the identity of such operating system before this agreement was entered into);
 - (b) any unauthorised modification of the Software made by, or on behalf of, the Customer;
 - (c) the Customer's use of any version of the Software other than the latest version supplied by the Supplier, if such claim could have been avoided by the use of such supplied version;
 - (d) the Supplier's incorporation into the Software of a feature expressly requested by the Customer against the advice of the Supplier; or
 - (e) the Supplier's use in connection with the provision of the Services, any software, material, information, data, know-how, instructions or scripts provided by the Customer or any of its affiliates.

9.7 If use of Software or receipt of the benefit of the Services becomes or, in the opinion of qualified legal counsel, is likely to become, the subject of any such claim, the Supplier may:

- (a) replace all or part of the Software with functionally equivalent software or documents without any charge to the Customer;
- (b) modify the Software as necessary to avoid such claim, provided that the Software (as amended) functions in substantially the same way as the Software before modification; and
- (c) procure for the Customer a licence from the relevant claimant to continue using the Software.

9.8 If:

- (a) the Software is determined in a court of law to be infringing;
- (b) the Supplier is advised by a barrister of at least ten years' call that use or possession by the Customer of the Software in accordance with this agreement is likely to constitute infringement of a third party's rights; or
- (c) if an injunction or similar order is granted in connection with any claim within the scope of clause 9.2 which prevents or restricts the use or possession by the Customer of the Software in accordance with this agreement;

and the Supplier is unable, after reasonable endeavours, to procure for the Customer the right to continue using the Software, or to provide the Customer with functionally equivalent non-infringing software, this agreement shall be terminated.

9.9 Nothing in this clause shall restrict or limit the Customer's general obligation at law to mitigate a loss it may suffer or incur as a result of an event that may give rise to a claim under this indemnity.

10. Supplier's Warranties

10.1 The Supplier warrants that:

- (a) the Software and any powerThing will for 90 days after its delivery and acceptance by the Customer, perform as specified; and
- (b) it will carry out the Services using reasonable skill and care.

10.2 The warranties set out in clause 10.1 are in lieu of all other express or implied warranties or conditions, including implied warranties or conditions of satisfactory quality and fitness for a particular purpose, in relation to this agreement.

- 10.3 The Supplier does not warrant that the Software or any powerThing will operate uninterrupted or error-free.
- 10.4 The Supplier shall not in any circumstances be liable under the warranties in clause 10.1(a) if it can demonstrate that any failure of the Software or any powerThing to comply with such warranties was caused or contributed to by any Relief Event.

11. Customer's Warranties

- 11.1 The Customer warrants and represents that it will:
- (a) perform the role, responsibilities, obligations and duties expressed to be on the Customer's part in this agreement within the relevant specified timescales or, if none, as soon as reasonably possible; and
 - (b) use the Software and Deliverables in a manner which shall not cause it to be in breach of any of the assignments, releases, waivers, permissions and licences in respect of third party materials notified to it by the Supplier pursuant to clause 9.4; and
 - (c) provide adequate and appropriately skilled and qualified resources to facilitate the testing of the Software.
- 11.2 The Customer shall indemnify the Supplier against all liabilities, costs, expenses, damages and losses suffered or incurred by the Supplier arising out of or in connection with any claim made against the Supplier for breach by the Customer of its obligations pursuant to clause 9.5.
- 11.3 Breach of clause 11.1 shall be deemed material breach of this agreement by the Customer for the purpose of clause 17.1(a).

12. IR35

- 12.1 In this clause 12 the following words shall have the following meanings:

Client: a client within the meaning of s61M(1) of ITEPA;

Deemed Employee: an employee or office-holder for tax purposes;

IR35: the off-payroll working rules contained in Part 2 of Chapter 10 of ITEPA.

IR35 Status: the employment tax status of a PSC Contractor for the purposes of IR35.

ITEPA: the Income Tax (Earnings and Pensions) Act 2003.

PSC Contractor: an individual engaged through a limited company or partnership which meets the conditions specified in s61O or 61P of ITEPA.

- 12.2 The Supplier will comply with its obligations under ITEPA.
- 12.3 The Customer acknowledges that the Supplier may engage PSC Contractors in the provision of the Services.
- 12.4 The Supplier and Customer agree that the Supplier is the Client for the purposes of IR35 and shall be responsible for issuing Status Determination Statements to any PSC Contractors engaged by the Supplier in the provision of the Services (whether engaged directly by the Supplier or indirectly through an Intermediary).
- 12.5 If a Status Determination Statement provides that a PSC Contractor is a Deemed Employee in respect of the provision of the Services, the Supplier will (or will procure that any other Intermediary will) make such deductions of income tax, national insurance contributions and any other applicable levy from any payment made to the PSC Contractor in connection with the provision of the Services, and will make such payment of employer national insurance contributions, apprenticeship levy and any other applicable levy in respect of such payment, as is required by law.
- 12.6 The Supplier warrants that it will not engage a Managed Service Company (within the meaning of s61B ITEPA) to provide the Services under this Agreement.

13. Data protection

- 13.1 Both parties will comply with all applicable requirements of the Data Protection Legislation. This clause 13 is in addition to, and does not relieve, remove or replace, a party's obligations or rights under the Data Protection Legislation.
- 13.2 The parties acknowledge that for the purposes of the Data Protection Legislation, the customer is the controller and the Supplier is the processor. Schedule 2 sets out the scope, nature and purpose of processing by the Supplier, the duration of the processing and the types of personal data and categories of data subject.
- 13.3 Without prejudice to the generality of clause 13.1, the Customer will ensure that it has all necessary appropriate consents and notices in place to enable lawful transfer of the personal data to the Supplier for the duration and purposes of this agreement.
- 13.4 Without prejudice to the generality of clause 13.1, the Supplier shall, in relation to any personal data processed in connection with the performance by the Supplier of its obligations under this agreement:

- (a) process that personal data only on the documented written instructions of the Customer unless the Supplier is required by Applicable Laws to otherwise process that personal data;
- (b) ensure that it has in place appropriate technical and organisational measures, reviewed and approved by the Customer, to protect against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting personal data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to personal data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it);
- (c) ensure that all personnel who have access to and/or process personal data are obliged to keep the personal data confidential; and
- (d) not transfer any personal data outside of the European Economic Area unless the prior written consent of the Customer has been obtained and the following conditions are fulfilled:
 - (i) the Customer or the Supplier has provided appropriate safeguards in relation to the transfer;
 - (ii) the data subject has enforceable rights and effective legal remedies;
 - (iii) the Supplier complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any personal data that is transferred; and
 - (iv) the Supplier complies with reasonable instructions notified to it in advance by the Customer with respect to the processing of the personal data;
- (e) assist the Customer, at the Customer's cost, in responding to any request from a data subject and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;
- (f) notify the Customer without undue delay on becoming aware of a personal data breach;
- (g) at the written direction of the Customer, delete or return personal data and copies thereof to the Customer on termination of the agreement unless required by Applicable Law to store the personal data; and

- (h) maintain complete and accurate records and information to demonstrate its compliance with this clause 13 and immediately inform the Customer if, in the opinion of the Supplier, an instruction infringes the Data Protection Legislation.

13.5 The Customer consents to the Supplier appointing CloudThing India Ltd as a third party processor of personal data under this agreement. The Supplier confirms that it has entered with the third party processor into a written agreement incorporating terms which are substantially similar to those set out in this clause 13 and in either case which the Supplier confirms reflect and will continue to reflect the requirements of the Data Protection Legislation. As between the Customer and the Supplier, the Supplier shall remain fully liable for all acts or omissions of any third party processor appointed by it pursuant to this clause 13.

13.6 Either party may, at any time on not less than 30 days' notice, revise this clause 13 by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when replaced by attachment to this agreement).

14. Confidentiality

14.1 The Customer shall keep in strict confidence all technical or commercial know-how, specifications, inventions, processes or initiatives which are of a confidential nature and have been disclosed to the Customer by the Supplier or its agents, and any other confidential information concerning the Supplier's business or its products which the Customer may obtain. The Customer shall restrict disclosure of such confidential material to such of its employees as need to know the same for the purpose of discharging the Customer's obligations to the Supplier, and shall ensure that such employees are subject to obligations of confidentiality corresponding to those which bind the Customer.

14.2 Each party may be given access to Confidential Information from the other party in order to perform its obligations under this agreement. A party's Confidential Information shall not be deemed to include information that:

- (a) is or becomes publicly known other than through any act or omission of the receiving party;
- (b) was in the other party's lawful possession before the disclosure;
- (c) is lawfully disclosed to the receiving party by a third party without restriction on disclosure;
- (d) is independently developed by the receiving party, which independent development can be shown by written evidence.

- 14.3 Subject to condition 14.5, each party shall hold the other's Confidential Information in confidence and not 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.
- 14.4 Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of this agreement.
- 14.5 A party may disclose Confidential Information to the extent such Confidential Information is required to be disclosed by law, by any governmental or other regulatory authority or by a court or other authority of competent jurisdiction, provided that, to the extent it is legally permitted to do so, it gives the other party as much notice of such disclosure as possible and, where notice of disclosure is not prohibited and is given in accordance with this condition 14.5, it takes into account the reasonable requests of the other party in relation to the content of such disclosure.
- 14.6 The above provision of this condition 14 shall survive termination of this agreement, however arising.

15. Limitation of liability

- 15.1 The Customer acknowledges and agrees that, except as expressly provided in this agreement, the Customer assumes sole responsibility for:
- (a) results obtained from the use of the Software and the Deliverables by the Customer, and for conclusions drawn from such use;
 - (b) procuring and maintaining the Customer's Equipment, and all network connections and telecommunications links from the Customer's Equipment to the Supplier's systems and data centres;
 - (c) all problems, conditions, delays, delivery failures (including any of those concerning transfer of data) and all other loss or damage arising from or relating to the Customer's or its agents' or contractors' (including any existing service provider's) network connections, telecommunications links or facilities, including the internet and acknowledges that the Services and the Deliverables may be subject to limitations, delays and other problems inherent in the use of such connections, links or facilities; and
 - (d) loss or damage arising from or relating to any Relief Event.
- 15.2 The following provisions set out the entire financial liability of the Supplier (including without limitation any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer in respect of:

- (a) any breach of this agreement howsoever arising;
 - (b) any use made by the Customer of the Services, the Deliverables or any part of them; and
 - (c) any representation, misrepresentation (whether innocent or negligent), statement or tortious act or omission (including without limitation negligence) arising under or in connection with this agreement.
- 15.3 All warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from this agreement.
- 15.4 Neither party excludes or limits liability to the other party for:
 - (a) fraud or fraudulent misrepresentation;
 - (b) death or personal injury caused by negligence;
 - (c) a breach of any obligations implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982; or
 - (d) any matter for which it would be unlawful for the parties to exclude liability.
- 15.5 Subject to conditions 15.1 and 15.4 the Supplier shall not in any circumstances be liable, whether in tort (including without limitation for negligence or breach of statutory duty howsoever arising), contract, misrepresentation (whether innocent or negligent) or otherwise for:
 - (a) loss of profits; or
 - (b) loss of business; or
 - (c) depletion of goodwill or similar losses; or
 - (d) loss of anticipated savings; or
 - (e) loss or corruption of data or information; or
 - (f) any special, indirect, consequential or pure economic loss, costs, damages, charges or expenses.
- 15.6 Subject to clauses 15.1 and 15.4, the Supplier's total aggregate liability in contract, tort (including negligence and breach of statutory duty howsoever arising), misrepresentation (whether innocent or negligent), restitution or otherwise, arising in connection with the performance or contemplated performance of any Services pursuant to any Statement of Work or any collateral contract shall be limited to the higher of:
 - (a) the amount of the SoW Charges actually paid by the Customer in the 12 month period prior to the date of the claim in relation to the Statement of Work pursuant to which the claim arises; and

- (b) in respect of an insured loss, the amount actually received by the Supplier in respect of a claim made pursuant to its insurance.

16. Relief Events

Subject to clause 15.4 and notwithstanding any other provision of this agreement, the Supplier shall have no liability for failure to perform any Services or any of its other obligations under this agreement if it is prevented, hindered or delayed in doing so as a result of any Relief Event.

17. Termination

- 17.1 Without affecting any other right or remedy available to it, either party may terminate this agreement with immediate effect by giving written notice to the other party if:
- (a) the other party commits a material breach of any term of this agreement and such breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 60 days after being notified in writing to do so;
 - (b) the other party repeatedly breaches any of the terms of this agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of this agreement;
 - (c) the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or (being a company or limited liability partnership) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 (**IA 1986**) as if the words "it is proved to the satisfaction of the court" did not appear in sections 123(1)(e) or 123(2) of the IA 1986;
 - (d) the other party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with any of its creditors other than (being a company) for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
 - (e) a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of the other party (being a company, limited liability partnership or partnership) other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
 - (f) an application is made to court, or an order is made, for the appointment of an administrator, or a notice of intention to appoint an administrator is given or an administrator is appointed, over the other party (being a company);

- (g) the holder of a qualifying floating charge over the assets of that other party (being a company) has become entitled to appoint or has appointed an administrative receiver;
 - (h) a person becomes entitled to appoint a receiver over all or any of the assets of the other party or a receiver is appointed over all or any of the assets of the other party;
 - (i) a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the other party's assets and such attachment or process is not discharged within 14 days;
 - (j) any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 17.1(c) to clause 17.1(i) (inclusive); or
 - (k) the other party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.
- 17.2 For the purposes of clause 17.1(a) **material breach** means a breach (including an anticipatory breach) that is serious in the widest sense of having a serious effect on the benefit which the terminating party would otherwise derive from:
- (a) a substantial portion of this agreement; or
 - (b) any of the obligations set out in clause 5.6,
- over the term of any Statement of Work. In deciding whether any breach is material no regard shall be had to whether it occurs by some accident, mishap, mistake or misunderstanding.
- 17.3 Without affecting any other right or remedy available to it, the Supplier may terminate this agreement with immediate effect by giving written notice to the Customer if:
- (a) the Customer fails to pay any amount due under this agreement on the due date for payment and remains in default not less than 30 days after being notified in writing to make such payment; or
 - (b) there is a change of Control of the Customer.

18. Consequences of termination

- 18.1 On termination or expiry of this agreement:
- (a) no new Statements at Work shall be entered into

- (b) termination or expiry of this agreement shall not operate to terminate any Statement of Work where Services remain to be completed pursuant to such Statement of Work;
 - (c) the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest and, in respect of the Services supplied but for which no invoice has been submitted, the Supplier may submit an invoice, which shall be payable immediately on receipt;
 - (d) the Customer shall return all of the Supplier's Equipment. If the Customer fails to do so, then the Supplier may enter the Customer's premises and take possession of the Supplier's Equipment. Until the Supplier's Equipment has been returned or repossessed, the Customer shall be solely responsible for its safe keeping; and
 - (e) the Supplier shall on request return any of the Customer Materials not used up in the provision of the Services.
- 18.2 Any provision of this agreement that expressly or by implication is intended to come into or continue in force on or after termination or expiry of this agreement shall remain in full force and effect.
- 18.3 Termination or expiry of this agreement shall not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination or expiry, including the right to claim damages in respect of any breach of the agreement which existed at or before the date of termination or expiry.

19. Force majeure

The Supplier shall not in any circumstances have any 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 Supplier or any other party), failure of a utility service or transport network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors.

20. Assignment and other dealings

The Customer shall not assign, transfer, mortgage, charge, sub-contract, delegate, declare a trust over or deal in any other manner with any or all of its rights and obligations under this agreement without the prior written consent of the Supplier. The Supplier may at any time assign, mortgage, charge, sub-contract, delegate, declare a trust over or deal in any other manner with any or all of its rights and obligations under this agreement.

21. Variation

Subject to clause 6 (Change control), no variation of this agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

22. Waiver

22.1 A waiver of any right or remedy under this agreement or by law is only effective if given in writing and shall not be deemed a waiver of any subsequent right or remedy.

22.2 A failure or delay by a party to exercise any right or remedy provided under this agreement or by law shall not constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict any further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy provided under this agreement or by law shall prevent or restrict the further exercise of that or any other right or remedy.

23. Severance

23.1 If any provision or part-provision of this agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this agreement.

23.2 If any provision or part-provision of this agreement is deemed deleted under clause 23.1 the parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

24. Entire agreement

24.1 This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

24.2 Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this agreement.

25. Conflict

If there is an inconsistency between any of the provisions of this agreement and the provisions of the Schedules, the provisions of this agreement shall prevail.

26. No partnership or agency

- 26.1 Nothing in this agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties, constitute any party the agent of another party, or authorise any party to make or enter into any commitments for or on behalf of any other party.
- 26.2 Each party confirms it is acting on its own behalf and not for the benefit of any other person.

27. Third party rights

- 27.1 Unless it expressly states otherwise,] this agreement does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement.

28. Notices

- 28.1 Any notice given to a party under or in connection with this agreement shall be in writing and shall be:
- (a) delivered by hand or by pre-paid first-class post or other next Business Day delivery service at its registered office (if a company) or its principal place of business (in any other case); or
 - (b) sent by email to the following addresses:

Customer:

Supplier:
- 28.2 Any notice shall be deemed to have been received:
- (a) if delivered by hand, on signature of a delivery receipt or at the time the notice is left at the proper address;
 - (b) if sent by pre-paid first-class post or other next Business Day delivery services, at 1.00 pm on the second Business Day after posting or at the time recorded by the delivery service; and
 - (c) if sent if sent by email, at the time of transmission, or, if this time falls outside business hours in the place of receipt, when business hours resume. In this clause 28.2(c), business hours means 9.00am to 5.00pm Monday to Friday on a day that is not a public holiday in the place of receipt.

- 28.3 This clause does not apply to the service of any proceedings or any documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

29. Counterparts

- 29.1 This agreement may be executed in any number of counterparts, each of which when executed shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.
- 29.2 Transmission of an executed counterpart of this agreement (but for the avoidance of doubt not just a signature page) shall take effect as delivery of an executed counterpart of this agreement. If either method of delivery is adopted, without prejudice to the validity of the agreement thus made, each party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.
- 29.3 No counterpart shall be effective until each party has executed at least one counterpart.

30. Multi-tiered dispute resolution procedure

- 30.1 If a dispute arises out of or in connection with this agreement or the performance, validity or enforceability of it (**Dispute**) then except as expressly provided in this agreement, the parties shall follow the procedure set out in this clause:
- (a) either party shall give to the other written notice of the Dispute, setting out its nature and full particulars (**Dispute Notice**), together with relevant supporting documents. On service of the Dispute Notice, the Customer's Project Manager and Supplier's Project Manager shall attempt in good faith to resolve the Dispute;
 - (b) if the Customer's Project Manager and Supplier's Project Manager are for any reason unable to resolve the Dispute within 14 days of service of the Dispute Notice, the Dispute shall be referred to the Chief Executive Officer of the Customer and Chief Executive Officer of the Supplier who shall attempt in good faith to resolve it; and
 - (c) if the Chief Executive Officer of the Customer and Chief Executive Officer of the Supplier are for any reason unable to resolve the Dispute within 30 days of it being referred to them, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties, the mediator shall be nominated by CEDR. To initiate the mediation, a party must serve notice in writing (**ADR notice**) to the other party to the Dispute, requesting a mediation. A copy of the ADR notice should be sent to CEDR. The mediation will start not later than 30 days after the date of the ADR notice.

- 30.2 The commencement of mediation shall not prevent the parties commencing or continuing court proceedings in relation to the Dispute under clause 32 which clause shall apply at all times.
- 30.3 If the Dispute is not resolved within 30 days after service of the ADR notice, or either party fails to participate or to continue to participate in the mediation before the expiration of the said period of 30 days, or the mediation terminates before the expiration of the said period of 30 days, the Dispute shall be finally resolved by the courts of England and Wales in accordance with clause 32.

31. Governing law

This agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.

32. Jurisdiction

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this agreement or its subject matter or formation.

This agreement has been entered into on the date stated at the beginning of it.



Schedule 1 Reference Charges and payment terms

Time and materials:

- Daily rates: [DAILY RATES FOR MEMBERS OF THE SUPPLIER'S TEAM]
- Weekend/overtime rates: [WEEKEND/OVERTIME RATES OF MEMBERS OF THE SUPPLIER'S TEAM]

Additional charges: The following materials and services procured from third parties shall be invoiced to the Customer in addition to the Charges: [DETAILS OF THIRD PARTY MATERIALS AND SERVICES TO BE CHARGED IN ADDITION TO THE CHARGES]

Payment terms: [PAYMENT TERMS FOR PARTICULAR SERVICES]

Schedule 2 Processing, personal data and data subjects

- [Processing by the Supplier]
- [Scope]
- [Nature]
- [Purpose of processing]
- [Duration of the processing]
- [Types of personal data]
- [Categories of data subject]



Schedule 3 powerThing Licence

Signed by Stuart Harper for
and on behalf of KERV
DIGITAL LIMITED

.....

Director

Signed by [NAME OF
DIRECTOR] for and on behalf
of [Customer]

.....

Director