

TERMS AND CONDITIONS OF CONTRACT

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1. Definitions

In these Terms and Conditions of Contract:

- 1.1 **“Alternative Form of Monitoring”** means supervision carried out temporarily by the Contractor when it is not possible to enforce an RLO through electronic monitoring.
- 1.2 **“Breach Action”** means in relation to the Contractor the action set out in the Contract where an Offender has breached the terms of a Restriction of Liberty Order.
- 1.3 **“Central Control ”** means a centralised computer system, programmed with Offender specific data, capable of receiving, storing and disseminating information generated by Monitoring Units.
- 1.4 **“Communication Link”** means the link between the home Monitoring Unit and the Central Control, assumed for the purposes of this document to be a telephone.
- 1.5 **“Consortium”** means the Contractor where this consists of more than one legal person.
- 1.6 **“Continuous Signalling System”** means a method of electronic monitoring normally consisting of a radio frequency transmitter affixed to an Offender ’s ankle or wrist, which regularly emits an encoded signal, and a radio receiver located in the Offender ’s home, which detects the signals emitted by the transmitter and reports periodically to a central computer via telephone (and sometimes referred to as an active system).
- 1.7 **“Contractor”** means the provider of the Service and, where the context so permits, all agents, employees, representatives and Sub-Contractors of the Contractor and all other persons who may be involved in the provision of the Service (in any capacity) by or on behalf of the Contractor.
- 1.8 **“Contract”** means the contract to which these terms and conditions are annexed.
- 1.9 **“Contract Price”** means the price exclusive of Value Added Tax calculated in accordance with Document N, payable in accordance with the provisions of Contract.
- 1.10 **“Data”** means all data, information, text, drawings, diagrams, images or sound embodied in any electronic or tangible medium supplied, or in respect of which access is granted , to the Contractor by the Scottish Ministers or which the Contractor is required to accumulate, compile, create, generate or produce for the Scottish Ministers under the Contract or in order to comply with the provisions of the Contract.
- 1.11 **“Demonstrated Equipment”** means Equipment of the exact kind, model, type or variety which is demonstrated to the Scottish Executive during the Demonstration and Equipment of the exact kind, model, type or variety and which will be subject to a System Trial during the Lead-In Period and or which consent for use will be required from the Service Commencement Date.

- 1.12 “Demonstration”** means all demonstrations of the Equipment to be carried out by or on behalf of the Contractor for the Scottish Ministers in accordance with Document D (Statement of Service Requirements) during the Tender evaluation process.
- 1.13 “Electronic Monitoring”** means the monitoring, through electronic devices, of the presence of an Offender at a place specified in a Restriction of Liberty Order.
- 1.14 “Equipment”** means all electronic tagging devices, monitoring units, Central Controls used in conjunction with the foregoing, software, and all other equipment and materials (whether ancillary or supplementary to such electronic tagging devices, monitoring units and Central Control or otherwise, and including all software for such equipment and materials) which is used by or on behalf of the Contractor from time to time for monitoring Offenders’ compliance with Restriction of Liberty Orders and the performance of the rest of the Service, provided always that in **Clauses 4 and 5** all references to Equipment shall be construed as references to all Equipment which the Contractor proposes to use for such purposes; and all references to the Equipment shall be deemed to be references to the Equipment or any part thereof.
- 1.15 “Euro”** means any common currency adopted by one or more members of the European Union.
- 1.16 “Euro Compliant”** means that any software, within any information technology systems supporting the performance of the Service:
- (a) is capable of performing its functions for more than one currency and for Euro, including during any transition period prior to implementation of the Euro, and performing all such functions for more than one currency and for the Euro;
 - (b) will comply with all legal requirements applicable to the Euro in any jurisdiction, including, but without limitation, the rules on conversion and rounding set out in the EC Regulation number 1103/97;
 - (c) is capable of displaying and printing, and will incorporate in all relevant screen layouts, all symbols and codes adopted by any government or any other European Union body in relation to the Euro and any other currency.
- 1.17 “Events”** means any action by, or change in status of, the Monitoring Unit (including possible infringements).
- 1.18 “False Negative”** means where a Monitoring Unit reports that an Offender is absent during a restriction period to a place to which they are restricted when they are actually adhering to the Restriction of Liberty Order, or conversely where the unit reports the Offender is present at a specified place from which he is restricted when he is in fact absent.
- 1.19 “False Positive”** means where a home Monitoring Unit reports that an Offender is adhering to their RLO when they are actually absent from the specified place; and conversely that they are absent from a place from which he is excluded when he is actually present during a restriction period.
- 1.20 “Force Majeure”** means any cause affecting the performance by a party of its obligations arising from acts, events, omissions, happenings or non-happenings beyond its reasonable control including (but without limiting the generality thereof) governmental regulations, fire, flood, or any disaster or

an industrial dispute affecting a third party for which a substitute third party is not reasonably available. Any act, event, omission, happening or non-happening will only be considered Force Majeure if it is not attributable to the wilful act, neglect or failure to take reasonable precautions of the affected party, its servants, agents or employees.

- 1.21 “Lead-In Period”** means the period between the award of this Contract and the Service Commencement Date.
- 1.22 “Monitoring Unit”** means an integrated unit, installed in a specific place, capable of communicating with a Central Control in the event of a possible infringement of a RLO, and for checking its operation.
- 1.23 “Month”** means calendar month unless otherwise defined.
- 1.24 “Offender ”** means a convicted person who, after giving his consent, has had a Restriction of Liberty Order imposed under Section 245 of the Criminal Procedure (Scotland) Act 1995 as amended by the Crime and Punishment (Scotland) Act 1997.
- 1.25 ”Records”** means full and accurate records of the Service performed in connection with this Contract, whether in writing or on magnetic or other media, together with all materials and sites used in connection therewith.
- 1.26 “Response Times”** means the time or times allowed for the Contractor to complete a specified task which, unless otherwise stated, is in terms of the actual time elapsed inclusive of non-working hours, weekends and public/privilege holidays.
- 1.27 “Responsible Officer”** means the employee of the Contractor who is nominated as the person who is to be responsible for monitoring the Offender ’s compliance with the Order for that area in terms of the Criminal Procedure (Scotland) Act 1995 as amended by the Crime and Punishment (Scotland) Act 1997.
- 1.28 “Restriction Area”** means the area within which a Monitoring Unit can detect the presence of an Offender (as distinct from the “Specified Place”, that is, the area specified by the court in a Restriction of Liberty Order).
- 1.29 “Restriction of Liberty Order”** (or “RLO” or “Order”) means an order of the court under the Criminal Procedure (Scotland) Act 1995 as amended by section 5 of the Crime and Punishment (Scotland) Act 1997 requiring a convicted Offender to remain, for periods specified in the order, at or away from a Specified Place.
- 1.30 “Scottish Executive”** means The Scottish Administration as constituted by section 44 of the Scotland Act 1998.
- 1.31 “Scottish Ministers”** means the Scottish Ministers (acting through the Community Justice Services Division of The Scottish Executive Justice Department) and being the members of the Scottish Executive referred to in section 44(1) of The Scotland Act 1998 and their assignees or other successors to their rights under the Contract.
- 1.32 “The Service”** means the provision of the requirements detailed in Document D (Statement of

Service Requirements) and Document G (Monitoring and Evaluation Schedule) or, where the context so requires, any part of such requirements.

- 1.33 “Service Commencement Date”** means 1 May 2002 or such other date as the Scottish Ministers, after consultation with the Contractor, may notify in writing to the Contractor.
- 1.34 “Specified Place”** means the place or places, specified by the court in a Restriction of Liberty Order, at or away from which an Offender is to remain during the restriction period (and which will often be an Offender’s normal place of residence).
- 1.35 “Sub-Contractor”** means any person, firm or company under contract to the Contractor to perform work or provide Service and/or supply goods in relation to the performance of the Service.
- 1.36 “System Trials”** means the system trials and other systems and Equipment testing to be carried out by or on behalf of the Contractor in accordance with the requirements of Document D.
- 1.37 “Tamper”** means an interface, whether intentional or not, with the operation of the Monitoring Unit, (being for example, the removal of the PID, movement of the Monitoring Unit, duplication or copying of signals, gaining access to internal mechanisms, engaging or disconnection of the telephone, or disconnection of AC Power).
- 1.38 “Telephone Account Holder”** means the person who is responsible for meeting the costs of a telephone at a Specified Place.
- 1.39 “Variation of Order”** means where a Restriction of Liberty Order may, on application of an Offender or the responsible officer of a court, be amended by altering the requirements of the Order (for example, by a change in the restriction period, the length of the restriction period, or the Specified Place).
- 1.40 “Violation”** means a failure or series of failures to comply with the provisions of a Restriction of Liberty Order, which reaches the levels specified in Document D of the Contract, under explanation that one or a number of violations may lead to Breach Action.
- 1.41.1 “Visits to a Specified Place”** means, unless otherwise specified, that all visits by the Contractor to a Specified Place shall take place at times when an Offender is permitted or obliged to be in the Specified Place and should, wherever possible, take place between the hours of 8.00 am and 8.00pm.
- 1.42 “Year 2000 Compliant”** means that neither the performance nor the functionality of any software, within any information technology systems supporting the performance of the Service, will be adversely effected by any changes to the Date Format caused by the advent of Year 2000, and that the Service shall be capable of accurately processing all date data which fall within the period from 1 January 1999 up to and including 31 December 2099 (Dates within this period are referred to in the remainder of this definition as a “valid date”.) In particular:
- 1.42.1 no current value of a valid date will cause any interruption of the software;
- 1.42.2 all processing of date related data will produce the correct results for all valid date values;

1.42.3 if the date elements in interfaces and data storage permit the century to be specified, they will for all valid dates specify the correct century to eliminate date ambiguity; and

1.42.4 where any valid date element is represented without a century, the correct century shall be unambiguous for all processing involving that element.

(“Date Format” means the field configuration which contains the date information within any part of the information technology systems).

1.43 The masculine includes the feminine, the singular includes the plural and vice versa.

1.44 Any reference to any U.K. Act of Parliament and/or Act of the Scottish Parliament shall be construed as a reference to the Act of Parliament as from time to time amended, extended or re-enacted and to include any bylaws, statutory instruments, rules, regulations, orders, notices, directions, consents or permissions made thereunder. Any reference to any statutory instrument, regulation or order shall be construed as a reference to that instrument, regulation or order (as the case may be) as from time to time amended, extended or re-enacted.

1.45 The headings are for convenience only, and shall not be construed as forming part of the Contract or be taken into account in the interpretation hereof.

2. The Contract

2.1 The Contractor shall, during the period of the Contract specified in **Clause 3**, provide the Service in accordance with the Contract. The Scottish Ministers shall in respect of the actual provision by the Contractor of the Service in accordance with the Contract, and subject always to the other provisions of the Contract pay the Contractor the Contract Price in accordance with these Terms and Conditions of Contract.

3. Period of Contract

3.1 The Contract shall commence and be effective from the date of execution hereof and shall endure for the duration of the Lead-In Period until 30 April 2002 and thereafter from the Service Commencement date of 1 May 2002 until 31 March 2005. However, notwithstanding the foregoing, the Scottish Ministers shall have the option to extend the date of the expiry of the Contract to 31 March 2006 and thereafter (at the discretion again of the Scottish Ministers) to 31 March 2007, such options to be exercised by the Scottish Ministers giving 90 days prior written notice to the Contractor of its desire to extend the Contract period. If said options are exercised by the Scottish Ministers, the Contract shall continue until the date specified in the notice given by the Scottish Ministers and the provisions of the Contract shall continue to apply during such extended periods. The Contract Price payable to the Contractor in respect of either of the extension periods as aforesaid shall be agreed between the parties. Failure to agree the Contract Price prior to the start of either extension period shall be subject to the dispute resolution process specified in Clause 36.

3.2 The Service shall commence on, and the Contractor shall supply the Service in terms thereof from the Service Commencement date until the expiry or earlier termination of the Contract.

4. Demonstration

- 4.1 During the tender evaluation period conducted by the Scottish Ministers prior to award of Contract and at the times specified in point 9 of Document A, the Contractor shall, at its own expense, conduct the Demonstration in the presence of, and in accordance with, any directions which the Scottish Ministers may give in relation to demonstrating the suitability for use of the proposed Equipment to representatives of the Scottish Ministers during normal business hours at a location to be specified by the Scottish Ministers. The Contractor shall supply all the Equipment that may be required for the Demonstration and provide the necessary personnel.

5. Lead-In Period

- 5.1 During the Lead In Period, the Contractor shall ensure that he acquires the capacity to deliver the Service to begin on the Service Commencement Date.
- 5.2 The Contractor shall ensure that, during the Lead In Period, its staff and any other individuals for whom the Contractor is responsible have received all training necessary to allow them to provide the Service on the Service Commencement Date. In the event that any such staff or other individuals are employed or used by the Contractor in the provision of the Service at or subsequent to the Service Commencement Date the Contractor shall ensure that the same training is given to such staff or individuals within one month of their involvement with the provision of the Service.
- 5.3 During the Lead In Period the Contractor shall prepare procedural instructions for all staff involved in the provision of the Service. Copies of procedural instructions shall be provided to the Scottish Ministers for prior approval. The procedural instructions shall be issued to the Contractor's staff prior to the Service Commencement Date.
- 5.4 During the Lead in Period the Scottish Ministers shall provide such assistance as the Contractor may reasonably require for the Contractor's preparation for the commencement of the Service under this Contract..
- 5.5 During the Lead-In Period, the Contractor shall, at its own expense, conduct the System Trials in the presence of, and in accordance with any directions which the Scottish Ministers may give in relation to the trials and testing of the Contractor's systems and Equipment to representatives of the Scottish Ministers during normal business hours at location/s to be specified by the Scottish Ministers. The Contractor shall supply all the Equipment that may be required for the System Trials and provide the necessary personnel.
- 5.6 For the avoidance of doubt, it is hereby expressly declared that in the event that the Contractor conducts the System Trials in accordance with this **Clause 5** and the Contractor's systems and/or the Equipment fails to meet the criteria required by the Scottish Ministers in accordance with the requirements of Document D, the Contractor may carry out the System Trials again on any number of occasions prior to 31 March 2002 in accordance with the provisions of this **Clause 5**.
- 5.7 If following the conducting of the System Trials, the Scottish Ministers are satisfied that the Contractor's systems and the Equipment meet the criteria required by the Scottish Ministers in accordance with the requirements of Document D, the System Trials will be deemed to have been successful and the Scottish Ministers shall notify the Contractor in writing that the System Trials have been satisfied by 1 April 2002. The decision of the Scottish Ministers as to whether the System Trials are satisfactory in accordance with the foregoing shall be final and conclusive

and shall not be subject to challenge or questioned in or otherwise made the subject of any arbitration or court or legal proceedings of whatever nature.

- 5.8 If the Scottish Ministers are not satisfied that the results of the System Trials meet the criteria required by the Scottish Ministers in accordance with the requirements of Document D by 31 March 2002 for any reason whatsoever, then the Scottish Ministers may, without prejudice to any other right or remedy which it may have:
- 5.8.1 vary the date by which it must be satisfied that the System Trials meet the said criteria to such later date as it may specify by written notice to the Contractor, in which event the Contractor shall remedy any fault(s) which caused the Contractor's systems and/or the Equipment to fail to meet the said criteria and re-conduct the System Trials (or, in the event that it has not already conducted the System Trials, conduct it for the first time) in accordance with **Clause 5.5, 5.6 and 5.7** which shall apply to such re-conducting (or conducting) of the System Trials, as if in all cases the references to 31 March 2002 were a reference to such later date as the Scottish Ministers has specified in accordance with this Clause 5.8.1. ; or
- 5.8.2 terminate the Contract with immediate effect by giving written notice of termination to the Contractor.
- 5.9 Without prejudice to the foregoing, during the Lead-In Period, the Contractor shall comply with Section A, paragraph 6 of Document D and Section B, paragraph 6.13 of Document D and the Contractor shall undertake any further duties identified by the Contractor in his Transition Plan submitted with his tender in response to point 5.1 of Document J which and have been subject to the prior agreement of the Scottish Ministers.
- 5.10 For the avoidance of doubt, it is hereby expressly declared that in the event that the Scottish Ministers terminate the Contract during the Lead-In Period, the Scottish Ministers shall have no liability in respect of any costs or expenses incurred by the Contractor arising out of or in connection with the Contract, the performance of the Service or the System Trials, or any Demonstration.
- 5.11 Neither notification that the Equipment meets the System Trials given by the Scottish Ministers in accordance with this **Clause 5** or any consent given by the Scottish Ministers in accordance with **Clause 6** constitute an acceptance or acknowledgment by the Scottish Ministers that the Equipment is fit for use in the performance of the Service, and the Contractor warrants and undertakes to the Scottish Ministers that the Equipment shall be fit for the purpose of providing the Service in all respects and shall be a reasonable and appropriate way of meeting the needs of the Scottish Ministers as set out in the Document D. Accordingly, the Contractor shall not be relieved of any liability which it may have under the Contract or of its duty to ensure the proper performance of the Service, and the Contractor shall at all times remain bound to implement fully and timeously the terms of the Contract notwithstanding the giving of such notification or comment by the Scottish Ministers and notwithstanding any defect, fault or failing (whether inherent or latent or otherwise) in the Equipment.

6. Approvals by The Scottish Ministers

- 6.1 The Contractor shall not use any Equipment in the performance of the Service other than the Demonstrated Equipment, and shall not remove any part of the Demonstrated Equipment from such use or replace any part of the Demonstrated Equipment, without the prior written consent of the Scottish Ministers. In the event that the Contractor proposes to use other Equipment for any purpose connected with the performance of the Service, or to remove any Demonstrated Equipment from use in the performance of the Service, it shall make a written proposal and application for such consent, which proposal application shall state (where applicable) the reasons why the Contractor wishes to use the proposed Equipment, the technical details and specifications of the proposed Equipment and the part of the Demonstrated Equipment to be removed from use, and the date of the proposed introduction. The Contractor shall thereafter provide such further information in writing as the Scottish Ministers may reasonably require in connection with the proposed Equipment or the Demonstrated Equipment being removed from use (including, for the avoidance of doubt, the effect which the use of such proposed Equipment or the removal or replacement of the Demonstrated Equipment would have on the costs incurred by the Contractor in providing the Service).
- 6.2 Prior to granting or withholding its consent to any application and proposal made under Clause 6.1, the Scottish Ministers may require the Contractor to provide a demonstration of the proposed Equipment or, where applicable, the Equipment with the part of the Demonstrated Equipment which it is proposed to remove or replace. If so required by the Scottish Ministers, the Contractor shall carry out such a demonstration at its own expense in the presence of representatives of the Scottish Ministers and in accordance with any directions which the Scottish Ministers may give in relation to demonstrating the suitability for use of the proposed Equipment or the suitability for use of the Equipment with the part of the Demonstrated Equipment which it is proposed to remove or replace. The Contractor shall supply all the Equipment that may be required for such demonstration and provide the necessary personnel and shall provide to the Scottish Ministers, within 7 days of receipt of a written request in respect of same, such information or data concerning the carrying out of the Demonstration or its results as the Scottish Ministers may reasonably require.
- 6.3 In the event that the Scottish Ministers gives consent in accordance with this **Clause 6** to the use of any Equipment in the performance of the Service other than the Demonstrated Equipment, or the removal or replacement of any part of the Demonstrated Equipment from such use, and the Contractor implements the proposal to which the Scottish Ministers has given consent, **Clauses 22.3 to 22.5** shall apply as if the implementation of the proposal was a variation to the Service made under **Clause 22**, but a variation to the Contract Price shall only be made in accordance with such clauses only if the implementation of the proposal results in a decrease in the costs incurred by the Contractor in providing the Service. No variation of the Contract Price shall be made on account of any increase in the costs incurred by the Contractor in providing the Service as a result of the implementation of any proposal given to the Scottish Ministers in accordance with Clause 6.1.

7. **Provision of Personnel**

- 7.1 The Contractor shall engage, employ, and train experienced and qualified staff for carrying out the Contractor's duties and obligations under the Contract and shall at all times comply with

Section B, paragraph 7.2 of Document D regarding individuals with convictions and security checks.

- 7.2 The Contractor shall ensure continuity in post, as far as lies within its control, of skilled and supervisory staff engaged in performing any of the Contractor's duties and obligations under the Contract. Without prejudice to the generality of the foregoing, during the period commencing from the start of the Lead-In Period (or such later date as the Scottish Ministers may from time to time intimate to the Contractor in writing) and ending on the date on which the duration of the Contract expires, or, in the event that the Contract is earlier terminated, the date on which the Contract is so terminated, the Contractor shall not in any way alter the terms of employment or transfer or re-deploy to other work or another location or dismiss or otherwise remove or withdraw from, or prevent or prohibit, the employment, engagement or involvement in the performance of the Service of any of its employees employed, engaged or otherwise involved in any manner whatsoever in providing or performing the Service without the prior written consent of the Scottish Ministers. In addition, the Contractor shall not increase the number of employees employed, engaged or otherwise involved in any manner whatsoever in providing or performing the Service during the aforementioned period without the written consent of the Scottish Ministers.
- 7.3 The Scottish Ministers may require the Contractor to produce such documentary or other evidence as may be required to establish that management, supervisory and other staff employed by the Contractor are qualified and fully competent to perform duties under the Contract.
- 7.4 The Contractor shall appoint a Project Manager to be the authorised representative of the Contractor for all purposes connected with the Contract.
- 7.5 The Contractor shall maintain accurate records of the employees engaged to provide the Service. These records shall include employee attendances and shall differentiate between those engaged as operatives and those exercising supervision. These records shall be open for inspection by the Scottish Ministers at all reasonable times.
- 7.6 The Contractor agrees and undertakes at the expiry or earlier termination of this Contract that notwithstanding the terms of any contract between the Contractor and any of its permitted sub-contractors relevant to this Contract that the Contractor shall not prevent or take any steps to prevent either by enforcement of such contract or otherwise any of its sub-contractors from entering into any contract with any third party in respect of the services covered by this Contract.

8. Contractor's Personnel

- 8.1 The Contractor shall not employ, engage or use any person, whether as agent, employee, representative or in any other capacity whatsoever, for any purpose connected in any manner whatsoever with the Contract or the provision of the Service unless and until it has obtained the approval of the Scottish Ministers to the employment, engagement or use of such person for such purposes.
- 8.2 The Contractor shall make a written request for such approval as is referred to in **Clause 8.1** to the Scottish Ministers as soon as reasonably practicable prior to the date on which the

Contractor proposes to first employ, engage or use the person in respect of whom such approval is being requested for any purpose whatsoever connected with the Contract or the provision of the Service, which written request shall contain a statement of:

- 8.2.1 that person's full name and address;
 - 8.2.2 the date and place of birth of that person; and
 - 8.2.3 the National Insurance Number of that person.
- 8.3 The Contractor shall provide to the Scottish Ministers such further information as the Scottish Ministers may require in respect of any person in respect of whom the Contractor has requested approval for employment, engagement or use for purposes connected with the Contract or the provision of the Service from the Scottish Ministers within 7 days of being given a request for such information by the Scottish Ministers, and shall provide such assistance as the Scottish Ministers may reasonably require to further such investigations into the suitability of such person as are hereafter mentioned.
- 8.4 The Scottish Ministers may, at any time and whether before or after giving or refusing its approval to a request given by the Contractor in accordance with the provisions of **Clause 8.2**, carry out such investigations concerning the suitability or otherwise of any person in respect of whom the Contractor has sought approval to employ, engage or use for any purpose connected with the Contract or the provision of the Service as the Scottish Ministers considers necessary.
- 8.5 If the Scottish Ministers refuses approval for the employment, engagement or use of any person for any purpose connected with the Contract for the provision of the Service, the Contractor, immediately on being given notice that such approval as is required in terms of **Clause 8.1** has been refused, shall nominate another person for approval by the Scottish Ministers in accordance with the provisions of this **Clause 8**.
- 8.6 Notwithstanding that the Scottish Ministers has refused approval for any person to be employed, engaged or used by the Contractor for any purpose connected with the Contract or the provision of the Service, or has not granted or refused such approval by the date on which the Contractor intends to first use any such person as aforesaid, the Contractor shall not be entitled to delay, suspend, terminate or withhold the performance of any of its obligations in terms of the Contract and shall remain bound to implement such obligations in full.
- 8.7 The Scottish Ministers may, at any time, require the Contractor to stop employing, engaging or using any person for any purpose connected with the Contract or the provision of the Service. The Contractor shall comply forthwith with any such requirement and shall ensure that such person is not thereafter employed, engaged or used by the Contractor in any capacity or manner whatsoever in connection with the Contract or the provision of the Service after such notice is given.
- 8.8 For the avoidance of doubt, it is hereby declared that the Scottish Ministers shall not be liable to reimburse the Contractor for any costs or expenses of whatsoever nature incurred or any payments, whether by way of compensation, damages or otherwise, made by the Contractor arising out of or in connection with any requirement given by the Scottish Ministers to the

Contractor in terms of **Clause 8.7**.

- 8.9 The decision of the Scottish Ministers in connection with any matter arising out of or in connection with or under any of the foregoing provisions of this **Clause 8** shall be final and conclusive, and shall not be subject to challenge or be questioned in or otherwise made the subject of any arbitration or in any other legal proceedings whatsoever.

9. **Contractor's Status**

- 9.1 Nothing in this Contract shall have the effect of making the Contractor, or any of the Contractor's agents, employees or representatives whomsoever, a servant of the Crown.
- 9.2 In carrying out the Service, the Contractor shall be principal and shall not be the agent of the Scottish Ministers.
- 9.3 The Contractor shall not, and shall procure that its agents, employees and representatives whomsoever do not, say or do anything which might lead any other person to believe that the Contractor or any agent, employee or representative whomsoever of the Contractor, is a servant of the Crown or agent of the Scottish Ministers.

10. **Industrial Action**

- 10.1 In the event of industrial action by the Contractor's employees it remains the Contractor's responsibility to fully and timeously implement all duties, functions, liabilities, obligations and responsibilities incumbent upon it in terms of the Contract. The Contractor shall inform the Scottish Ministers' Contract Manager immediately of impending or actual disputes which may affect the Contractor's ability to provide the Service as soon as reasonably practicable.
- 10.2 In the event of industrial disputes by staff employed by the Scottish Ministers or any other person affecting the Service provided by the Contractor, the Contractor shall co-operate with the Scottish Ministers or its duly authorised representative in order to ensure the continued provision of the Service as far as reasonably practicable during the continuance of any such industrial dispute.
- 10.3 If the standard of Service provided is substantially affected by any industrial action or industrial dispute of the kind referred to in **Clause 10.1 or 10.2** above payment for the Service provided during the continuance of any such industrial action or industrial dispute will be agreed between the Contractor and the Scottish Ministers.

11. **Discrimination**

- 11.1 The Contractor shall not unlawfully discriminate within the meaning and scope of the provisions of the Race Relations Act 1976, the Sex Discrimination Acts 1975 and 1986, and the Disability Discrimination Act 1995. The Contractor shall take all reasonable steps to secure the observance of these provisions by all servants, employees or agents of the Contractor and all Sub-Contractors employed in the execution of the Contract.

12. **The Contractor's Property**

- 12.1 All property of the Contractor shall be at the risk of the Contractor, and the Scottish Ministers has and shall have no liability for any loss or damage howsoever caused or occurring thereto or caused thereby except where any such loss or damage was caused or contributed to by any act, neglect or default of any servant of the Crown acting in the course of his employment. The Scottish Ministers accepts and shall accept liability to the extent to which such loss or damage is so caused or contributed to as aforesaid. Subject to the foregoing, the cost of all repairs to, and replacement, maintenance, development and upgrading of such property shall be met by the Contractor

13. Security, Publicity and Confidentiality

- 13.1 The Contractor shall keep secret and confidential, and shall not at any time (other than for the purposes of performing the Contract) for any reason disclose or permit to be disclosed to any person, or otherwise make use of or permit to be made use of:-
- 13.1.1 any Data, information or material of whatsoever nature which is given to the Contractor, whether by or on behalf of the Scottish Ministers, employees of the Scottish Ministers or otherwise, to enable the Contractor to discharge its duties in terms of the Contract or to perform the Service or for any other purpose arising from or connected with the Contract in any way whatsoever;
 - 13.1.2 any Data, information or material of whatsoever nature which otherwise comes into the possession of the Contractor by reason of or in connection with its entering into the Contract or performing the Service;
 - 13.1.3 any Data, information or material of whatsoever nature relating to the performance of the Contract or the Service by the Contractor or to any activity or business of the Scottish Ministers; and
 - 13.1.4 any Data, information and material of whatsoever nature which is derived or generated from the Data, information and material referred to in **Clauses 13.1.1 to 13.1.3** (the Data, information and material referred to in this **Clause 13.1.4** and in **Clauses 13.1.1 to 13.1.3**, or any part thereof, being collectively hereinafter referred to as the “Information”).
- 13.2 Forthwith upon termination of the Contract (howsoever arising), all copies of all working papers and other materials of whatsoever nature (and in whatever form and on whatever storage media) prepared by the Contractor using the Information and all copies of the Information (in whatever form and on whatever storage media) shall, at the Scottish Ministers’s discretion, be delivered by the Contractor to the Scottish Ministers within 5 working days following receipt of request or disposed of by the Contractor in accordance with such instructions as the Scottish Ministers may give in respect of same.
- 13.3 Without prejudice to the foregoing **Clauses 13.1 and 13.2**, the Contractor shall:-
- 13.3.1 keep the Information secure and safeguarded and in its possession (except in so far as it is required to give or disclose the Information to the Scottish Ministers in the due performance of the Service) at all times;
 - 13.3.2 not exploit or manipulate the information in any manner whatsoever.
- 13.4 The Contractor shall comply with and procure that its employees comply with the provisions of the Official Secrets Act 1911 to 1989.
- 13.5 The Contractor undertakes to make no reference in any advertising or other promotional material to this Contract without the prior written consent of the Scottish Ministers.

- 13.6 The Contractor shall not, and shall ensure and procure that its agents, employees, representatives and sub-contractors do not, make any announcements or statements, issue any publications (of whatsoever nature) or communicate with, or make any statements to, representatives of the press, television, radio or other communications media on, or which deal with, the existence or content of this Contract or any matter concerning, or arising out of or in connection with, this Contract or the Service, without the prior written consent of the Scottish Ministers, whether the announcements, statements, publications or communications deal with or contain confidential Information or otherwise, except to the extent that such matters are or become public knowledge other than by breach of any provision of this Contract. It is also agreed that in the event of the circumstance arising as specified in Section B, paragraph 16 of Document D, the prior consent of the Offender shall be required to the release of information.
- 13.7 The Contractor shall ensure and procure that all its employees, agents, representatives and subcontractors comply with the provisions of this **Clause 13**.
- 13.8 The provisions of this **Clause 13** shall apply during the existence of this Contract and after its termination (howsoever arising).

14 Intellectual Property Rights

- 14.1 All Intellectual Property Rights in, and ownership of, all data, designs, drawings, inventions, photographs, reports, specifications or any other materials or works of whatsoever nature conceived, developed, made or otherwise produced in the course of, or otherwise related to or arising out of or in connection with, the performance or provision of the Service by the Contractor (all of which data, designs, drawings, inventions, photographs, reports, specifications and other materials or works are hereinafter referred to as the “Works”) shall vest in and be the property of the Scottish Ministers. By entering into the Contract the Contractor, assigns, makes over the transfers all right, title and interest, present and future, to the Works and the Intellectual Property Rights therein to the Scottish Ministers, and shall execute, or procure the execution of, any deed or document, and do all other things necessary, to ensure that all right, title and interest, present and future, in and to the Works and the Intellectual Property Rights therein vest in the Scottish Ministers as aforesaid. For the avoidance of doubt, the provisions of this **Clause 14.1** shall not apply in respect of:
- 14.1.1 any Data, designs, drawings, inventions, photographs, reports, specifications or any other materials or works already in existence at the date on which the Contract is entered into;
- 14.1.2 any Data, designs, drawings, inventions, photographs, reports, specifications or any other materials or works the Intellectual Property Rights in which are vested in a third party; or
- 14.1.3 any Data, designs, drawings, inventions, photographs, reports, specifications or any other materials or works which are conceived, developed, made or otherwise produced by the Contractor other than specifically for use in connection with the performance of the Service but which are subsequently used in the performance of the

Service.

- 14.2 The Contractor shall assist the Scottish Ministers in connection with any application to record or register any Intellectual Property rights in respect of any of the Works, and shall do all such acts and things as the Scottish Ministers may require in writing in connection with any such assistance. The Contractor irrevocably appoints the Scottish Ministers to be its agent in its name and on its behalf to do all such acts and things and to sign all such deeds and documents as may be necessary in order to give the Scottish Ministers the full benefit of the provisions of this Scottish Ministers, and in particular, but without limiting the generality of the foregoing, the Contractor agrees that with respect to any third party, a certificate signed by any duly authorised officer of the Scottish Ministers that any act or thing or deed or document falls within the Scottish Ministers hereby conferred shall be conclusive evidence that this is the case.
- 14.3 The Contractor warrants that the Contractor will be the sole beneficial owner of the entire right, title and interest, present and future in and to any of the Works or any Intellectual Property Rights therein, and that the Contractor will be free to assign all right, title and interest, present and future, in and to such Works and Intellectual Property Rights to the Scottish Ministers pursuant hereto without any third party claims, liens, charges or encumbrances of any kind, and that the Contractor is free of any duties or obligations to third parties which may conflict with the terms of this Clause.
- 14.4 The Contractor warrants that the Works will not infringe any Intellectual Property Rights of which a third party is the proprietor.
- 14.5 Notwithstanding, and without prejudice to, any other provision of the Contract the Contractor shall keep, and shall ensure that its agents, employees and representatives keep, the Works secret and confidential and shall not at any time for any reason whatsoever disclose them to any third party or use them, or permit them to be so disclosed or used, except as permitted in the terms of the Contract to enable the Contractor to carry out its duties and obligations.
- 14.6 Notwithstanding, and without prejudice to, the provisions of **Clause 18** hereof, the Contractor shall fully indemnify and keep indemnified the Scottish Ministers, its agents, employees and representatives, against all actions, charges, claims, costs, demands, expenses, losses or suits incurred by or brought against the Scottish Ministers, its agents, employees and representatives, arising from or in connection with, or incurred by reason of, any infringement or alleged infringement of any Intellectual Property Rights by reason of the use or possession of the Works or any part thereof by the Scottish Ministers, its agents, employees and representatives, including, without prejudice to the generality of the foregoing:
- 14.6.1 any legal expenses incurred by the Scottish Ministers or its agents, employees or representatives;
- 14.6.2 any sums paid to any third party by way of damages, or in settlement of any claim by a third party, in respect of any such infringement or alleged infringement; and

14.6.3 the full costs and expenses incurred by the Scottish Ministers, or its agents, employees or representatives in obtaining an appropriate substitute or replacement for any item which it is unable to use in consequence of any judgement given in any action, claim or suit, in respect of any such infringement or any alleged infringement, and the actual cost of any such substitute or replacement.

- 14.7 The Scottish Ministers shall permit the Contractor to use all Data, reports, drawings, specifications, designs, photographs, inventions or any other materials or works in respect of which the Intellectual Property Rights are vested in it, but only for the purposes of, and to the extent necessary for, the proper provision of the Service by the Contractor in terms of the Contract and for no other purpose whatsoever.
- 14.8 The Contractor shall not, and shall ensure and procure that its agents, employees, representatives and sub-contractors do not, make any announcements or statements, issue any publications (of whatsoever nature) or communicate with, or make any statements to, representatives of the press, television, radio or other communications media on, or which deal with, the existence or content of this Contract or any matter concerning, or arising out of or in connection with, this Contract or the Service, without the prior written consent of the Scottish Ministers, whether the announcements, statements, publications or communications deal with or contain confidential Information or otherwise, except to the extent that such matters are or become public knowledge other than by breach of any provision of this Contract.
- 14.9 In this Clause, “Intellectual Property Rights” means patents, trademarks, design rights, copyright, applications for any of the foregoing, know-how, trade or business names and other similar rights and obligations whether registrable or not in any country, including, but not limited to, the United Kingdom.
- 14.10 The rights and obligations of the parties under this Clause shall survive the expiry or the termination of the Contract howsoever arising.

15. Protection of Personal Data

- 15.1 The Contractor shall obtain and thereafter maintain all requisite registrations under the Data Protection Act 1998 in accordance with the provisions of that Act or any variations thereof and will comply with the provisions of that Act and regulations thereunder.
- 15.2 The Contractor shall obtain the prior agreement of the Scottish Ministers to store or process such personal data at sites outside the United Kingdom.
- 15.3 Without prejudice to the provisions of **Clause 18**, the Contractor shall indemnify and hold harmless the Scottish Ministers against all actions, claims, demands and proceedings and all damages, costs and expenses incurred by, or made or brought against, the Scottish Ministers by any person in respect of any loss, damage or distress to that person by the loss, unauthorised destruction or disclosure of any personal data by the Contractor, any Sub-Contractor, any servant or agent of either of them, or any other person within the control of the Contractor.

16. Safety

- 16.1 The Contractor shall be responsible for the observance by itself, its employees and Sub-contractors of all safety precautions necessary for the protection of itself, its employees, Sub-contractors and any other persons including all precautions required to be taken by or under any U.K Act of Parliament or Act of the Scottish Parliament including any regulations or bye-law of any local or other authority, the Health and Safety at Work Act 1974 and The Management of Health and Safety at Work Regulations 1999. The Contractor shall cooperate fully with the Scottish Ministers to ensure the proper discharge of these duties.

17. Special Health and Safety Issues

- 17.1 The Contractor shall throughout the life of the Contract notify the Scottish Ministers of any hazards arising out of or in connection with the performance of the Service, or any materials of whatsoever nature used in the performance of the Service (including, without prejudice to the generality of the foregoing, the Equipment), of which it is or may become aware which may affect the Scottish Ministers, any of the Scottish Ministers's staff or other representatives, any Offenders subject to Electronic Monitoring or any other person.

18. Indemnity and Insurance

- 18.1 Notwithstanding any other term of the Contract, and without prejudice to any other right or remedy which the Scottish Ministers may have, the Contractor shall indemnify the Scottish Ministers, the Crown, its servants and agents against all actions, claims, demands, costs, expenses (including but not restricted to such expenses as are referred to in **Clauses 14.6.1 to 14.6.3**) and losses incurred by or made against the Scottish Ministers, the Crown, its servants or agents in respect of any loss or damage or personal injury (including disease, illness and death, whether death arises by virtue of disease, illness, injury or otherwise) which arises out of or in connection with, or is caused, whether directly or indirectly, by the negligence, breach or negligent performance or failure in performance of any obligation imposed by or any term of the Contract, breach of duty (whether statutory, contractual or otherwise) or other wrongful act or omission, in all cases of or by the Contractor or any of the Contractor's agents, employees or representatives whomsoever.
- 18.2 The indemnity contained in **Clause 18.1** shall not apply to the extent that the loss, damage or injury is caused by the negligent or wilful act or omission of the Scottish Ministers, the Crown or any servant or agent of the Crown.
- 18.3 The Contractor shall have in force, and shall require any sub-contractor to have in force:
- 18.3.1 employer's liability insurance in accordance with any legal requirements for the time being in force, and
 - 18.3.2 public liability insurance for such sum and range of cover as the Contractor deems to be appropriate but covering at least all matters which are the subject of indemnities or compensation obligations under these conditions in the sum of not less than £5 Million for any one incident and unlimited in total, unless otherwise agreed by the Scottish Ministers in writing.

- 18.4 The policy or policies of insurance referred to in **Clause 18.3** shall be exhibited to the Scottish Ministers, together with satisfactory evidence of payment of premiums, forthwith upon receipt of a written request in respect of same from the Scottish Ministers.

19. Corrupt Gifts or Payments

- 19.1 The Contractor shall not and shall ensure and procure that the employees, agents, representatives and sub-contractors of the Contractor shall not,:

19.1.1 offer or give or agree to give any person in Her Majesty's Service any gift or consideration of any kind as an inducement or reward for doing or refraining from doing or for having done or refrained from doing any act in relation to the obtaining or performance of this Contract or any other agreement with Her Majesty's Service or for showing or refraining from showing favour or disfavour to any person in relation to this Contract;

19.1.2 enter into this Contract if in connection with it commission has been paid or agreed to be paid to any person on Her Majesty's Service by the Contractor or on the Contractor's behalf or to the Contractor's knowledge, unless before this Contract is made particulars of any such commission and of the terms and conditions of any agreement for the payment thereof have been disclosed in writing to the Scottish Ministers.

- 19.2 In the event of any breach of this **Clause 19** by the Contractor or any employee, agent, representative or sub-contractor of the Contractor (whether with or without the knowledge of the Contractor) or the commission of any offence by the Contractor by anyone employed by the Contractor or any employee, agent, representative or sub-contractor of the Contractor under the Prevention of Corruption Acts 1889 to 1916 in relation to this or any other contract for Her Majesty's Service, the Scottish Ministers may summarily terminate this Contract by notice in writing to the Contractor. Provided always that such termination shall not prejudice or affect any right of action or remedy which shall have accrued or shall accrue thereafter to the Scottish Ministers and provided always that the Scottish Ministers may recover from the Contractor the amount or value of any such gift, consideration or commission.

- 19.3 The decision of the Scottish Ministers shall be final and conclusive in any dispute, difference or question arising in respect of:

19.3.1 the interpretation of this Clause (except so far as the same may relate to the amount recoverable from the Contractor under **Clause 19.2** in respect of any loss resulting from such termination of this contract); or

19.3.2 the right of the Scottish Ministers under this **Clause 19** to terminate this contract; or

19.3.3 the amount or value of any such gift, consideration or commission.

- 19.4 In exercising its rights or remedies under this Clause, the Scottish Ministers shall:

19.4.1 act in a reasonable and proportionate manner having regard to such matters as the gravity of, and the identity of the person performing the prohibited act;

- 19.4.2 give all due consideration, where appropriate, to action other than termination of the contract, including (without limitation);
- (a) requiring the Contractor to procure the termination of a sub-contract where the prohibited act is that of a sub-contractor;
 - (b) requiring the Contractor to procure the dismissal of an employee (whether his own or that of a sub-contractor) where the prohibited act is that of such employee.

20. Collusive Tendering

- 20.1 In the event that, after the commencement or execution of the Contract, it is established to the reasonable satisfaction of the Scottish Ministers that the Declaration that the Tender is a Bona Fide Competitive Tender submitted by the Contractor along with its Tenders in respect of the Contract is erroneous, false, misleading or untrue in any respect, or that any other communication, document or other information in whatever form provided to the Scottish Ministers by the Contractor prior to the entering into of the Contract is erroneous; false, incomplete, misleading or untrue in any respect, the Scottish Ministers may terminate the Contract forthwith and with immediate effect by written notice to the Contractor and that wholly without penalty to the Scottish Ministers.

21. Statutory Requirements and Permissions of Regulatory Authorities

- 21.1 The Contractor shall, in performing the Service and all other obligations incumbent upon it in terms of the Contract, comply in all respects with, and shall ensure that the Contractor's agents, employees and representatives whomsoever comply with all relevant legislation (including statutory instruments, orders, rules and regulations) and all relevant bylaws, regulations, rules or orders made by any appropriate local or regulatory authority or body.
- 21.2 The Contractor shall obtain and comply with, and shall ensure and procure that the Contractor's agents, employees and representatives whomsoever comply with, the terms of all consents, licences, and permissions from any appropriate local or regulatory authority (including, but not restricted to, any Government agency, branch or department) which are necessary for the provision of the Service or the performance of any other obligation under the Contract. Without prejudice to the generality of the foregoing, the Contractor shall at its own cost obtain and comply with, and shall ensure and procure that the Contractor's agents, employees and representatives whomsoever comply with, the terms of all consents, licences and permissions from any appropriate local or regulatory authority in relation to the operation of the Equipment and the provision of the Service for the whole period of the Contract, including in relation to any radio or telecommunications apparatus.

22. Change to Contract Requirements

- 22.1 The Scottish Ministers may by notice (which may be given orally in the first instance by the

Scottish Ministers in accordance with **Clause 22.2**) order any variation to any part of the Service that for any other reason shall in its opinion be desirable. Any such variation may include (but shall not be restricted to) additions, omissions, alterations, substitutions to the Service and changes in quality, form, character, kind, timing, method or sequence of the Service. Such variation shall come into effect on the date specified by the Scottish Ministers in the notice given by it to the Contractor specifying the variation. For the avoidance of doubt, it is hereby expressly declared that any such variation may come into effect prior to the agreement of whether any adjustment to the Contract Price is required in consequence of such variation and, if so, what adjustment, in accordance with **Clause 22.3**. Subject to **Clause 22.2**, the Contract shall be deemed to be amended to the extent specified in the said notice with effect from the date specified therein as the date on which the said variation comes into effect.

- 22.2 Save as otherwise provided herein, no variation of the Service as provided for in **Clause 22.1** hereof shall be valid unless given or confirmed in the form of a notice given by the Scottish Ministers. All such notices shall be given in writing provided that if for any reason the Scottish Ministers shall find it necessary to give any such notice orally in the first instance the Contractor shall comply with such oral notice which must be confirmed in writing by the Scottish Ministers within 48 hours of the giving of such oral notice by the Scottish Ministers, failing which the variation made by such oral notice shall cease to have effect on the expiry of the said 48 hour period.
- 22.3 Where any such variation of the Service made in accordance with **Clauses 22.1 and 22.2** has affected or may affect the costs incurred by the Contractor in providing the Service (whether by increasing or decreasing such costs), the Contractor will as soon as reasonably practicable, and in any event within 7 days of being called upon to do so by the Scottish Ministers, notify the Scottish Ministers in writing of the effect which it has had or may have on the said costs, and shall at the same time submit such accounting and financial information as may be available from the Contractor's normal accounting procedures to support such notice. In addition, the Contractor shall provide such further particulars of those costs and such other information as the Scottish Ministers may from time to time reasonably require as being necessary for the purpose of determining such costs and the effect of the variation on them with reasonable accuracy and when required by the Scottish Ministers the Contractor shall afford such facilities to the Scottish Ministers to visit the Contractor's premises and examine the appropriate records of the Contractor as the Scottish Ministers may reasonably require. The Scottish Ministers and the Contractor shall thereafter agree whether an appropriate adjustment to the Contract Price to take into account the said variation of the Service and the consequential effect on the Contractor's costs in providing the Service is required and if so, what that adjustment should be. If they are unable to so agree within 28 days of the Contractor being called upon to enter into negotiations to agree an appropriate adjustment to the Contract Price by the Scottish Ministers, then either side may refer the matter to an expert for determination (the provisions of **Clause 36** applying mutatis mutandis to the appointment of the expert as they do to the arbiter under that Clause), and the expert shall determine whether an adjustment to the Contract Price is required, and if so what that adjustment should be, on the principles that:

22.3.1 subject to **Clause 22.3.2**, the Contractor shall be entitled to a level of profit as a part

of the Contract Price after the variation to the Service comes into effect which, when expressed as a percentage of costs incurred in providing the Service after such variation has come into effect, is equal to (but no greater than) the level of profit (when so expressed) that which it enjoyed prior to the coming into effect of such variation:

- 22.3.2 the Contractor shall be bound to implement any variation to the Service in a manner which maximises any savings in cost produced by reason of the variation and minimises any increase in costs produced by reason of such variation. To the extent that it has not done so, the amount of any savings which have not been made in effecting the variation, or any costs over and above those which would have been strictly and necessarily incurred for the purposes of making the variation, shall be borne by the Contractor. Accordingly, for the purposes of determining whether any adjustment to the Contract Price is appropriate, and if so what, the costs incurred by the Contractor after such variation has come into effect shall be assumed to be those which it would have incurred had it so maximised any savings or minimised any increases rather than those which it actually incurs.
- 22.4 The costs incurred by any expert appointed to determine whether a variation to the Contract Price is required and if so what it should be, in accordance with **Clause 22.3** shall be borne equally by the parties. Further, any decision of any such expert shall be final and conclusive and shall not be subject to challenge or questioned in or otherwise made the subject of any arbitration of court or legal proceedings of whatever nature.
- 22.5 In the event that following any variation to the Service made in accordance with this **Clause 22**, the parties agree that an adjustment to the Contract Price is required, or an expert appointed in accordance with **Clause 22.3** determines that there should be such an adjustment, then such adjustment shall come into effect, and the Contract Price shall be amended accordingly on the date agreed or determined by the expert and:
- 22.5.1 in the event that the Contract Price is increased with effect from a date earlier than the date of such agreement or determination, an adjusting payment shall be made by the Scottish Ministers to the Contractor in the amount of the difference between the amount actually paid by the Scottish Ministers to the Contractor in the period from the date when the Contract Price increase came into effect until the date of such agreement or determination and the amount which would have been paid in that period had the increase in the Contract Price been agreed on the date on which the increase in the Contract Price became effective within 30 days of receipt of an invoice in respect of such payment; and
- 22.5.2 in the event that the Contract Price is decreased with effect from a date earlier than the date of such agreement or determination, an adjusting payment shall be made by the Contractor to the Scottish Ministers in the amount of the difference between the amount actually paid by the Scottish Ministers to the Contractor in the period from the date when the Contract Price decrease came into effect until the date of such agreement or determination and the amount which would have been paid in that period had the decrease in the Contract Price been agreed on the date on which

the decrease in the Contract Price became effective within 30 days of receipt of an invoice in respect of such payment.

- 22.6 Notwithstanding and without prejudice to the generality of the foregoing parts of this clause, the Contractor shall be bound to implement any variations of the Service where such variations are required to comply with all relevant legislation (including statutes, statutory instruments, orders, rules and regulations) and all relevant bylaws, regulations, rules or orders made by any appropriate local or regulatory authority or body.
- 22.7 Notwithstanding and without prejudice to the generality of the foregoing parts of this clause, the Contractor shall be bound to implement when required to do so by the Scottish Ministers any variation of the Service which extends the geographical area of the Service within Scotland in accordance with the requirements specified in Section A, paragraph 5 of Document D and as detailed in Document E.

23. Upgrading of the Equipment, Technology Refresh and Obsolescence

- 23.1 Without prejudice to the generality of the preceding clause, and for the avoidance of doubt, the Contractor shall at no additional cost to the Scottish Ministers, and with the prior approval of the Scottish Ministers, perform its obligations under Section B, paragraph 20 of Document D concerning the upgrading, development, modification and replacement of the Equipment, technology refresh, market changes and obsolescence.
- 23.2 The Contractor shall provide the required upgrading, development, modification, replacement and technology refresh of the Equipment but only with the prior approval of the Scottish Ministers for the duration of the Contract at no additional cost to the Scottish Ministers. Such obligation shall include the procurement of all required consents, licences and permissions from any appropriate local or regulatory authority (including but not restricted to any Government agency, branch or department), and including, without prejudice to the foregoing generality, in relation to any radio or telecommunications apparatus.
- 23.3 The Contractor shall at the monitoring meetings detailed in Document G review and discuss with the Scottish Ministers the effects of market changes, technology refresh and obsolescence with regard to the technical infrastructure utilised in delivering the Service. The Contractor shall monitor, review and analyse the ways in which technology and business process changes are taking place or are forecast to take place within the same or similar services to be provided under this Contract.
- 23.4 The Contractor shall be responsible for maintaining the technology deployed for the provision of the Service to a suitable level of currency to ensure that efficiency and value for money is being achieved by the Scottish Ministers.
- 23.5 The Scottish Ministers shall use its reasonable endeavours to inform the Contractor in due time of any changes to its technology or business processes that may impact on the Contractor's ability to deliver the Service.

23.6 The Contractor shall be responsible for ensuring that the availability of spares and suitable replacements for technology deployed shall be available to meet the Performance Standards as provided for in **Clause 28**.

23.7 The Contractor shall use all reasonable endeavours to inform the Scottish Ministers in due time if any of the technology used in the provision of the Service is in danger of becoming obsolete.

24. Materiality of Performance

24.1 Notwithstanding and without prejudice to, any other provision of the Contract, any stipulation in the Contract relating to the time of performance of any part of the Service, or the time within which performance of any part of the Service is to be made is of the essence of the Contract.

25. Audit Access

25.1 While the Contract remains in force, and for a period of 5 years after its expiry or earlier termination, the Contractor shall keep or cause to be kept the Records.

25.2.1 The Contractor shall grant free of charge to the Scottish Ministers, and any statutory auditors of the Scottish Ministers (including Audit Scotland) and their respective authorised agents the right of reasonable access to the Records and/or any sites and/or materials and shall provide all reasonable assistance at all reasonable times during the currency of this Contract for the purposes of carrying out an audit of the Contractor's compliance with this Contract including all activities, charges, performance, security and integrity in connection therewith.

25.2.2 Without prejudice to the foregoing, in the event of an investigation into suspected fraudulent activity or other impropriety by the Contractor or its agents the Scottish Ministers reserves for itself, and any statutory auditors of the Scottish Ministers and their respective authorised agents or any Crown Body the right of immediate access to the Records and/or any sites and/or materials described in Clause 25.1 and Clause 25.2 above and the Contractor agrees to render all necessary assistance to the conduct of such investigation at all times during the currency of the Contract or at any time thereafter.

26. Contract Price

26.1 Unless otherwise stated in the Contract, the Contract Price shall be the total price for the Service including the cost of all labour, materials, equipment, overheads, all royalties, licence fees or similar expenses for the supply or use of any invention, process, model, or information and all other costs of the Contractor in connection with the Contract for full and proper performance of the Contract.

27. Payments

27.1 The Contract Price shall be paid to the Contractor (or the nominated lead organisation if the Contractor is a Consortium) by the Scottish Ministers in monthly instalments. Each such

instalment shall be claimed by the Contractor by the submission of a valid invoice to the Scottish Ministers in respect of same monthly in arrears.

- 27.2 The Contractor shall ensure that each such invoice separately identifies the amount claimed in respect of each of the elements of the Service in respect of which payment is being claimed, and contains such other information and in the format as may be required by the Scottish Ministers from time to time.
- 27.3 Subject always to the terms of **Clause 27.5**, the Scottish Ministers shall pay to the Contractor the sums payable to it in terms of the Contract within 30 days of receipt and agreement of the invoices referred to in the foregoing paragraphs of this Clause.
- 27.4 The Contractor shall for a period commencing on the date of execution hereof and ending on the date falling 5 years after the expiry or termination of the Contract (howsoever arising), keep and maintain records to the satisfaction of the Scottish Ministers of all expenditures incurred in respect of the Contract or the performance of the Service of which are reimbursable by the Scottish Ministers, and of the hours worked by and costs incurred in respect of any employees of the Contractor whose duties include the performance of any part of the Service.
- 27.5 All payments made in terms of this Contract, whether by the Scottish Ministers or by the Contractor, shall be made in Pounds Sterling.

28. Performance Measurement

- 28.1 The Contractor shall comply with the provisions of Section 19 of Document D in relation to Performance Levels. Any amendments to the Performance Levels agreed shall be applied with effect from such date as the Scottish Ministers and the Contractor may agree. If no amendment is agreed, the Performance Levels as set out in Section 19 of Document D or as last amended shall continue to apply.
- 28.2 Performance Points shall be awarded against the Contractor where its performance of the Service fails to meet the Performance Levels, except to the extent such failure was caused by any wrongful or negligent act or omission of the Scottish Ministers or by Force Majeure. The number of Performance Points to be awarded in respect of any one failure or number or combination of failures shall be as set out in Section 19 of Document D.
- 28.3 The Contractor's provision of the Service shall be measured against the Performance Levels as set out in Section 19 of Document D. If the Contractor reasonably objects to the award of Performance Points on any occasion it shall be entitled to invoke the arbitration provisions in **Clause 36**.
- 28.4 In the event that the Contractor fails to provide the Service in accordance with the Performance Levels and without prejudice to the award of the Performance Points the Contractor shall (as soon as reasonably practicable in the circumstances) arrange all such additional resources as are reasonably necessary to perform the Service in accordance with all Performance Levels as early as practicable thereafter and at no additional charge to the Scottish Ministers.
- 28.5 The Contractor shall submit to the Scottish Ministers monthly Performance Reports in the form approved by the Scottish Ministers and within the timescales as detailed in paragraph 4

of Document G.

29. Value Added Tax

The Scottish Ministers shall pay to the Contractor such Value Added Tax as may be properly chargeable by the Contractor in connection with the provision of the Service provided that the Contractor has issued a tax invoice in respect thereof.

30. Transfer or Assignment

- 30.1 The Contractor shall not assign, subcontract, sub-let or transfer by any other means whatsoever the responsibility for or the obligation to perform any duty, function, liability, obligation or responsibility (or any part thereof) incumbent upon the Contractor in terms of the Contract without the prior written consent of the Scottish Ministers.
- 30.2 No assignment, subcontracting, subletting or other transfer of any duty, function, liability, obligation or responsibility (or any part thereof) incumbent upon the Contractor in terms of the Contract to any third party by the Contractor shall have the effect of relieving it of any such duty, function, liability, obligation or responsibility (or any part thereof) owed to the Scottish Ministers in terms of the Contract, notwithstanding that the Scottish Ministers has consented to such assignment, subcontracting, subletting or other transfer, and the Contractor shall at all times be bound to fully implement the Contract.
- 30.3 The Contractor shall provide the Scottish Ministers with a copy of the deed formally recording any assignment, subcontracting, subletting or other transfer of any duty, function, liability, obligation or responsibility (or any part thereof) incumbent upon the Contractor in terms of the Contract if requested to do so in writing within 7 working days following receipt of request.
- 30.4 Where the Contractor enters into any subcontract in respect of the performance of any duty, function, liability, obligation or responsibility (or any part thereof) incumbent upon the Contractor in terms of the Contract, it shall cause a term to be included in such subcontract which requires payment to be made to the subcontractor, by the Contractor of any sums due by the Contractor in terms of such subcontract, within a specified period not exceeding 30 days from receipt by the Contractor of a valid invoice in respect thereof from the subcontractor.
- 30.5 If called upon to do so by the Scottish Ministers in writing, the Contractor shall forthwith assign and transfer to the Scottish Ministers, on such terms and conditions as are acceptable to the Scottish Ministers, the Contractor's whole right, title and interest in any agreement or contract of whatsoever nature entered into by the Contractor with any third party which assigns, sub-contracts, sub-lets or transfers by any other means whatsoever the responsibility for or the obligation to perform any duty, function, liability, obligation or responsibility (or any part thereof) owed to the Scottish Ministers in terms of the Contract, and all rights, duties, liabilities, obligations or responsibilities pertaining thereto. The Contractor shall ensure that any such agreement or contract entered into between the Contractor and any

third party contains a provision which entitles and enables the Contractor to comply with the provisions of this clause.

31 Continuation of Conditions

31. These Conditions shall continue to apply for a period of 5 years after the end of the Year in which the final payment due under the Contract was paid, and that notwithstanding the termination of the Contract.

32. Warranties and Representations

- 32.1 The Contractor warrants and represents that:

32.1.1 the Service shall be supplied and rendered by appropriately experienced, qualified and trained personnel with all due skill, care and diligence;

32.1.2 the Contractor shall discharge its obligations hereunder with all due skill, care and diligence including but not limited to Good Industry Practice and (without limiting the generality of this Clause) in accordance with its own established internal procedures;

32.1.3 all statements and representations made to the Scottish Ministers in the tender response are, to the best of its knowledge, information and belief, true and accurate and that it will advise the Scottish Ministers of any fact, matter or circumstance of which it may become aware which would render any such statement or representation to be false or misleading.

33. Force Majeure

- 33.1 Neither party shall in any circumstances be liable to the other for any loss of any kind whatsoever including but not limited to any damages or abatement of sums whether directly or indirectly caused to or incurred by the other party by reason of any failure or delay in the performance of its obligations hereunder which is due to Force Majeure. Notwithstanding the foregoing, each party shall use all reasonable endeavours to continue to perform, or resume performance of, such obligations hereunder for the duration of such Force Majeure event.

- 33.2 If either of the parties shall become aware of circumstances of Force Majeure which give rise to or which are likely to give rise to any such failure or delay on its part it shall forthwith notify the other by the most expeditious method then available and shall inform the other of the period which it is estimated that such failure or delay shall continue.

- 33.3 If any event of Force Majeure continues for a period of 3 months or more, the party unaffected by the event may terminate this Contract by notice in writing to the other.

- 33.4 It is expressly agreed that any failure by the Contractor to perform or any delay by the Contractor in performing its obligations under this Contract which results from any failure or delay in the performance of its obligations by any person, firm or company with which the Contractor shall have entered into any sub-contract shall be regarded as a failure or delay due to Force Majeure only in the event that such person, firm or company shall itself be prevented from or delayed in complying with its obligations under such sub-contract as a result of circumstances of Force Majeure.

- 33.5 For the avoidance of doubt it is hereby expressly declared that the only events which shall afford relief from liability for failure or delay shall be any event qualifying for Force Majeure hereunder.

34. Year 2000 Compliance and Euro Compliance

- 34.1 The Contractor shall provide the Service such that the Service shall be Year 2000 Compliant and Euro Compliant.
- 34.2 The Scottish Ministers acknowledge that where the Service interface with computer systems and software which are outside the scope of the Contractor's obligations under this Contract, the Contractor shall not be liable pursuant to **Clause 34.1**, to the extent that any failure to comply with **Clause 34.1** shall be caused by the exchange of date data from or to such computer systems or software which has a Date Format which is not compatible with the Date Format of the software used by the Contractor in the provision of the Service.
- 34.3 The Contractor shall promptly at the request of the Scottish Ministers provide information to the Scottish Ministers setting out details of the applicable Date Format requirements of the software used by the Contractor in the provision of the Service. In the circumstances specified in **Clause 34.2**, the Contractor shall also, upon request by the Scottish Ministers provide reasonable assistance to the Scottish Ministers in connection with the resolution of such Date Format incompatibility difficulties in accordance with the Contractor's then current charges and applicable terms and conditions for such services.
- 34.4 The Contractor shall, at no additional cost to the Scottish Ministers demonstrate to the Scottish Ministers' reasonable satisfaction prior to the Service Commencement Date that the Service is Year 2000 Compliant and Euro Compliant.

35. English Language

- 35.1 All documents, Data and Records relating to the Contract shall be in English language.

36. Disputes and Arbitration

- 36.1 All disputes, differences or questions between the parties to the Contract with respect to any matter or thing arising out of or connected with the Contract shall be agreed between the Scottish Ministers' Contract Manager and the Contractor's Project Manager. If the matter cannot be resolved within 30 working days, the matter shall be referred to progressive levels of management in the Scottish Executive and the Contractor's organisations. If agreement cannot be reached, the matter shall be referred for decision to a single arbiter to be mutually agreed and chosen by the said parties for that purpose or, if the parties are unable to agree as to the appointment of an arbiter, chosen by the President of the Law Society of Scotland for the time being on the application of either party. It shall be a condition of the appointment of any arbiter in accordance with the provisions of this Clause that the said arbiter shall provide each party with a draft of his proposed decision in connection with the dispute, difference or question between the parties referred to him no less than 21 calendar days prior to the issue of his final decision. Without prejudice to any powers which he may have under statute or at common law, the arbiter shall have power:-

- 36.1.1 to order the performance of any works or Service and the implementation of any provision of the Contract; and
- 36.1.2 to award damages, and interest thereon, to or against any of the parties.

37. Severability

- 37.1 If any provision of the Contract is declared by any judicial or other competent authority to be invalid, void, illegal, or otherwise unenforceable then such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if the Contract had been executed with the invalid provision omitted unless, in the Scottish Ministers's opinion, the effect of such declaration is to defeat the original intentions of the parties in which event the Scottish Ministers and the Contractor shall immediately commence good faith negotiations to remedy such invalidity. In the event that the said negotiations have not been concluded within 28 days of the Scottish Ministers giving the Contractor written notice that such negotiations are required, the Scottish Ministers may terminate the Contract with immediate effect by written notice to the Contractor.

38. Waiver

- 38.1 The failure of the Scottish Ministers to insist upon strict performance of any term of the Contract, or the failure of the Scottish Ministers to exercise any right or remedy to which it is entitled in terms of or in respect of any term of the Contract, shall not prejudice or restrict any right of the Scottish Ministers and shall not constitute a waiver of any obligation incumbent upon, or breach of Contract or default by, the Contractor.
- 38.2 No waiver of any term of the Contract, or any breach of Contract or default by the Scottish Ministers shall be effective unless made in a written notice which expressly states that it constitutes a waiver of the said term, breach or default.
- 38.3 No waiver of any right, remedy or obligation given by the Scottish Ministers in accordance with **Clause 38.2** hereof shall operate as a waiver of any other term of the Contract, breach of contract default, right, remedy or obligation other than that to which its terms expressly refer.

39. Termination

- 39.1 The Scottish Ministers may at any time, by notice in writing to the Contractor, terminate the Contract with immediate effect in the event that:
 - 39.1.1 there is a change of control (as defined by section 416 of The Income and Corporation Taxes Act 1988) of the Contractor;
 - 39.1.2 the Contractor passes a resolution that it be wound-up, or a Court makes an order that the Contractor be wound-up, in either case otherwise than for the purposes of

reconstruction or amalgamation, or circumstances arise which would enable a Court to make such an order;

- 39.1.3 an administrator, manager, administrative receiver or receiver is appointed to the Contractor, or over all or any part of the property which may from time to time be comprised in the property and undertaking of it, or circumstances arise which would entitle a Court to appoint such an administrator, manager, administrative receiver or receiver;
 - 39.1.4 the Contractor is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;
 - 39.1.5 the Contractor makes a voluntary arrangement for a composition in satisfaction of its debts or a scheme of arrangement of its affairs; or
 - 39.1.6 any events similar to those described in **Clauses 39.1.1 to 39.1.5** above occurs under the law of any other jurisdiction to which the Contractor is subject.
- 39.2 Notwithstanding any other provision of the Contract, and without prejudice to any other right or remedy which the Scottish Ministers may have, the Scottish Ministers may at any time by notice in writing terminate the Contract with immediate effect in the event that
- 39.2.1 The Contractor has failed to comply with or discharge any obligation incumbent upon it in terms of the Contract, or commits or permits (knowingly or otherwise) a breach of any term of the Contract. For the avoidance of doubt, a breach by the Contractor in accordance with the provisions of paragraph 19.5, Section B of Document D shall be deemed to be a breach which is not capable of remedy. However, where such failure or breach is capable of remedy, the Scottish Ministers shall not exercise its rights under this **Clause 39.2** unless and until the Contractor has failed to comply with or discharge the said obligation or to remedy the said breach within such reasonable period as may be specified in a written notice to the Contractor by the Scottish Ministers, which written notice shall specify the obligation which the Contractor has failed to comply with, or discharge and requiring compliance therewith, or the discharge of same, or the term of the Contract which has been breached and requiring the remedying of the said breach, as the case may be; or
 - 39.2.2 the Contractor, any Sub-Contractor, or any agent, employee or representative of the Contractor or any Sub-Contractor is found guilty of any criminal offence arising out of or in connection with the performance of the Service.
- 39.3 In addition to any other right or power to terminate the Contract which the Scottish Ministers may have, whether in terms of any other clause of the Contract or otherwise, the Scottish Ministers may terminate the Contract with effect from the date stated in a written notice of termination given by the Scottish Ministers to the Contractor, which date shall be not less than 6 months after the date on which the notice is given.
- 39.4 Nothing in **Clauses 39.1 to 39.3** hereof shall affect or prejudice in any way any right to terminate the Contract which the Scottish Ministers may have by virtue of statute, common law, or any other term

of the Contract.

39.5 In the event that the Scottish Ministers terminates the Contract in accordance with the foregoing **Clauses 39.1 to 39.3** hereof, or any other term of the Contract, or exercises any right to terminate the Contract conferred by statute or common law, then, without prejudice to any other right or remedy which the Scottish Ministers may have, the Scottish Ministers may:-

39.5.1 retain any sums of whatsoever nature due to the Contractor by the Scottish Ministers (which sums are hereinafter referred to as “the Sums”) whether in terms of the Contract or otherwise. When the amount of the costs, damage and loss incurred or suffered by the Scottish Ministers as a result of such termination of the Contract have been calculated (which amount is hereinafter referred to as “the Amount”) then:

39.5.1.1 in the event that the Amount is less than the Sums, the Amount shall be deducted from the Sums, and the balance of the Sums paid over to the Contractor by the Scottish Ministers in full and final satisfaction of all debts owed by the Scottish Ministers to the Contractor;

and

39.5.1.2 in the event that the Amount exceeds the Sums, the Scottish Ministers may retain and keep the Sums and recover from the Contractor the amount by which the Amount exceeds the Sums as a debt owed by the Contractor to the Scottish Ministers;

39.5.2 take possession of any materials, clothing, equipment, vehicles, accommodation or other goods loaned or hired to the Contractor, or of which the Contractor was given use by the Scottish Ministers for the purposes of providing the Service; and

39.5.3 exercise a lien over any materials, clothing, equipment, vehicles or other goods belonging to the Contractor until such sums as are owed to the Scottish Ministers by the Contractor in terms of **Clause 39.5.1.2** hereof have been paid in full by the Contractor to the Scottish Ministers.

39.6 For the avoidance of doubt, it is hereby expressly declared that the amount of costs, damage and loss incurred or suffered by the Scottish Ministers as a result of the termination of the Contract which may be recovered by the Scottish Ministers from the Contractor in accordance with the provisions of **Clause 39.5** hereof or which may be recovered from the Contractor by the Scottish Ministers in the event of any breach of the contract by the Contractor shall include (but not be restricted to):-

39.6.1 any additional operational and administrative costs and expenses incurred by the Scottish Ministers by virtue of such termination of the Contract;

39.6.2 the costs and expenses incurred by the Scottish Ministers in providing, or procuring that another party provide, the Service on a temporary basis until the completion of the tendering process performed by or on behalf of the Scottish Ministers to find a successor to the Contractor; and

39.6.3 the costs and expenses incurred by or on behalf of the Scottish Ministers in performing the tendering process referred to in Clause 39.6.2 hereof.

39.6.4 the costs and expenses incurred by or on behalf of the Scottish Ministers in relation to Demonstrations, the Systems Trials and the Lead-In Period.

39.7 It is provided for the avoidance of doubt for the purposes of this Clause **39** that a failure by the Contractor to comply with the requirements detailed in Section A, paragraph 3.4 of Document D shall be a breach of Contract by the Contractor which is not capable of remedy.

40. Recovery of Sums Due

40.1 Wherever under the Contract any sum of money is recoverable from or payable by the Contractor, that sum may be deducted from any sum then due, or which at any later time may become due, to the Contractor under this Contract or under any other agreement or contract with the Scottish Ministers or with any department, agency or Scottish Ministers of the Crown.

41. Transfer of Responsibility

41.1 Upon the expiry or termination of the Contract, for any reason whatsoever, the Contractor shall cooperate with the Scottish Ministers to such extent as the Scottish Ministers may require for a period of up to 6 months after the date of such expiry or termination (the duration of such period to be determined solely by the Scottish Ministers) to ensure an orderly and efficient transition, with minimum disruption both to the provision of the Service and to the Scottish Ministers, from the provision of the Service by the Contractor to the provision of the Service (or any part of them), or any alternatives to the Service which may be instigated by the Scottish Ministers, by a different organisation. The Contractor shall use its best endeavours to ensure that any Sub-Contractor engaged by the Contractor to perform any part of the Service complies with this Clause. The Scottish Ministers shall re-imburse to the Contractor all reasonable costs and expenses incurred in satisfying the provisions of this **Clause 41.1**, such amount of reimbursement being subject to reduction in respect of any amounts outstanding from the Contractor to the Scottish Ministers from time to time.

41.2 Without prejudice to the generality of **Clause 41.1**, upon the expiry or termination of the Contract, for any reason whatsoever, the Contractor shall, for a period of up to 6 months after the date of such expiry or termination (the duration of such period to be determined solely by the Scottish Ministers):

41.2.1 if so required by the Scottish Ministers by notice in writing prior to such expiry or termination make available to the Scottish Ministers, or any organisation appointed by the Scottish Ministers to provide the Service or any part of them, the Equipment, together with all relevant instruction and operating manuals. If required by the Scottish Ministers, the Contractor shall provide instruction to the Scottish Ministers or such organisation instruction in the use of the Equipment;

41.2.2 if so required by the Scottish Ministers by notice in writing prior to such expiry or termination continue to provide the Service, or any part of them, for such period; and /or

41.2.3 provide such evidence as may be required by the appropriate authorities in relation to any court or other legal proceedings.

41.3 The Contractor shall use its best endeavours to ensure that any Sub-Contractor engaged by the

Contractor to perform any part of the Service complies with **Clause 41.2**.

- 41.4 The Scottish Ministers shall re-imburse to the Contractor all reasonable costs and expenses incurred in satisfying the provisions of this **Clause 41.4**, such amount of reimbursement being subject to reduction in respect of any amounts outstanding from the Contractor to the Scottish Ministers from time to time.

42. The Environment

- 42.1 The Contractor is required to satisfy itself that no product will be supplied or used in the provision of the Service which will endanger the health of any persons, will cause significant damage to the environment during manufacture, use, or disposal, which consumes a disproportionate amount of energy during manufacture, use, or disposal, which causes unnecessary waste because of over-packaging or because of an unusually short shelf life, or which contains materials derived from threatened species or threatened environments.

43. Substituted Performance

- 43.1. If the Contractor materially fails to perform the Service such that the provision of the Service is significantly and adversely affected by such failure (except to the extent that this is wholly or mainly due to the Scottish Ministers's Default in accordance with the Contract, then without prejudice to any other remedy available to the Scottish Ministers under the Contract, the Scottish Ministers may:

43.1.1 require the Contractor within fourteen (14) days of the Scottish Ministers's written request to produce a remedial plan to remedy such failure and, with the prior approval of the Scottish Ministers such approval not to be unreasonably withheld or delayed), to implement the remedial plan subject to any amendments to the remedial plan reasonably required by the Scottish Ministers. The Scottish Ministers may re-apply the provisions of this paragraph 43.1.1 if the circumstances require;

43.1.2 should the circumstances referred to in sub-paragraph 43.1.1 occur, and the Scottish Ministers is dissatisfied with the Contractor's performance of the Service or the implementation and outcome of the remedial plan, in the interests of ensuring continuity in the provision of the Service the Scottish Ministers may serve a Notice declaring its dissatisfaction and containing the following details;

- (a) whether the Scottish Ministers, or an alternate Contractor will provide the Service;
- (b) the period during which the Scottish Ministers (or an alternate Contractor) reasonably expects to provide the Service;
- (c) the role and responsibilities of the Contractor and the Scottish Ministers during the period in which the Scottish Ministers or an alternative Contractor is providing the Service; and
- (d) its intention to provide and perform, by its own employees or those of an alternate Contractor as detailed in the Scottish Ministers's Notice, the Service which the Contractor has failed to perform or performs deficiently in accordance with Clause 43.1.

43.1.3 alternatively or in addition to the arrangements set out at Clause 43.1.2, where the failure

to provide and perform the Service is, in the opinion of the Scottish Ministers, due to failure of the Contractor's management or supervisory staff to perform their work adequately or at all, or is due to the absence or insufficiency of such staff, the Scottish Ministers may in the interests of ensuring continuity in the provision of the Service, serve a Notice and direct for that part of the Service to be managed and supervised by an alternate Contractor, and the Contractor shall provide the Scottish Ministers, its staff and any alternate Contractor's, as appropriate, with such access and assistance as is necessary to comply with this Clause 43.1.

- 43.2 The Scottish Ministers shall provide full and comprehensive written evidence of all losses, damages, costs and expenses, including VAT which have been reasonably incurred by the Scottish Ministers (including internal administrative costs and overheads) in remedying any failure by the Contractor to provide or perform the Service in the circumstances outlined in the above provisions and the Contractor agrees to pay forthwith any such losses, damages, costs and expenses to the Scottish Ministers.
- 43.3 Upon the Scottish Ministers serving a Notice in accordance with Clause 43.1, until such time as the Scottish Ministers shall in respect of the relevant Service have served a further Notice, the obligations of the Contractor to provide the Service described in the Scottish Ministers's Notice shall cease.
- 43.4.1 Where the Scottish Ministers serves a Notice in relation to part only of the Service, the operation of this Clause 43 shall neither relieve the Contractor of any obligations under the Contract in respect of the Service that it is continuing to perform, nor restrict the Scottish Ministers's right to terminate the Contract.

44. Unsatisfactory Performance- Reduction or Withholding of Sums Payable

- 44.1. In the event that the Scottish Ministers deems the performance of the Service by the Contractor to have been unsatisfactory in any respect (including but not restricted to the Contractor failing to meet any of the service levels specified in Document D or performing the Service otherwise than in accordance with the Contract or in a manner otherwise unacceptable to the Scottish Ministers), without prejudice to any other right or remedy which it may have, and notwithstanding any other provision of the Contract, the Scottish Ministers may:-
- 44.1.1 withhold any sum which is payable to the Contractor by it in terms of the Contract (whether in respect of the actual performance of the Service by the Contractor or otherwise) until such times as the Service have been performed to the complete satisfaction of the Scottish Ministers; and
- 44.1.2 by written notice to the Contractor specify that any sum which is payable to the Contractor by it in terms of the Contract (whether in respect of the actual performance of the Service by the Contractor or otherwise) shall be reduced by such amount or such fraction as may be specified in such notice. In the event that the Scottish Ministers specifies that any such sum which is payable to the Contractor shall be reduced in accordance with the provisions of this clause, then payment by the Scottish Ministers to the Contractor of such sum as reduced by the amount or fraction specified in the said written notice shall be deemed to be full payment of such sum and in full and final settlement and discharge of all liability of the Scottish Ministers in respect of such sum.
- 44.1.3 in determining the amount to be withheld from any sum payable to the Contractor in accordance with this clause 44 or the amount of any reduction to be made in respect of any such sum in accordance with this clause 44, the Scottish Ministers shall take into account:

- 44.1.4 the extent and nature of the unsatisfactory performance of the Service by the Contractor;
and
- 44.1.5 in the case of any reduction to be made from any sum payable to the Contractor, the amount of any loss or any additional costs which the Scottish Ministers has incurred or may incur in consequence of the unsatisfactory performance of the Service by the Contractor, including, but not restricted to, the costs of having the Service performed satisfactorily by a third party.
- 44.1.6 Any decision by the Scottish Ministers to reduce or withhold any of the sums payable to the Contractor by the Scottish Ministers, any actual withholding or reducing of the said sums by the Scottish Ministers, in both cases pursuant to clause 44, or any written notice given by the Scottish Ministers to the Contractor pursuant to clause 44.1.2 shall be final and conclusive and shall not be subject to challenge or be questioned in or otherwise be made subject of any arbitration or other legal proceedings whatsoever.

45. Notices

- 45.1 Any document, instruction, notice or other communication required or permitted to be given or served in terms of the Contract may be given or served personally or by leaving the same or sending the same by first class recorded delivery post at or to, in the case of the Scottish Ministers, Mrs Sharon Grant, The Scottish Executive, Criminal Justice Services Department, F Spur, Saughton House, Edinburgh, or, in the case of the Contractor, its principal or registered office, or, in both cases, at or to such other address as shall have been last notified in writing to the other party for the purposes of this Clause. Any document, instruction, notice or other communication given or served by post in accordance with the provisions of this Clause 45 shall be deemed to be given or served on the second business day after the letter containing the same was posted and to prove that any document, instruction, notice or other communication was so given or served, it shall be necessary only to prove that the same was properly addressed and posted as aforesaid.

46. Law and Jurisdiction

- 46.1 These conditions shall be governed by and construed in accordance with Scottish law (except where the Contract makes provision otherwise) and the Contractor hereby irrevocably submits to the jurisdiction of the Scottish courts. The submission to such jurisdiction shall not (and shall not be construed so as to) limit the right of the Scottish Ministers to take proceedings against the Contractor in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdiction preclude the taking of proceedings in any other jurisdiction, whether concurrently or not.