

# ***Bury Council's Standard Conditions of Purchase of Goods***

## **1 DEFINITIONS**

In these Conditions, the following expressions shall have the following meanings:

**"Arbitrator"** means an independent third party appointed in accordance with Clause 15.5 to determine a dispute;

**"Best Industry Practice"** means the exercise of that degree of skill, diligence and foresight which would reasonably and ordinarily be expected from a skilled and experienced contractor engaged in the provision of goods similar to the Goods under the same or similar circumstances;

**"Best Value Duty"** means the duty imposed by Part 1 of the Local Government Act 1999 requiring Bury Council to secure continuous improvement in the exercise of all functions, undertaken by Bury Council, having regard to a combination of economy, efficiency and effectiveness;

**"Bury Council"** means Bury Metropolitan Borough Council whose principal place of business is at the Town Hall, Knowsley Street, Bury, BL9 0SW;

**"Bury Council Information"** means all proprietary records, documentation, software, technical information, business information or other information disclosed by Bury Council to the Contractor in relation to or created pursuant to the Contract (including the Contract);

**"CEDR"** means the Centre for Effective Dispute Resolution;

**"Charges"** means the charge, charges or rate(s) of charge that Bury Council shall pay the Contractor for the Goods as specified in the Contract;

**"Conditions"** means these general contractual provisions;

**"Confidential Information"** means any non-public Bury Council Information or Contractor Information which is commercially sensitive, a trade secret or confidential and is subject to a legally enforceable duty of confidence and which is exempt from disclosure by virtue of Section 41 of FOIA;

**"Contract"** means, in descending order of precedence, these Conditions, the Purchase Order or alternative execution document (if the Parties agree to use an alternative execution document to form a legally binding contract) and, where applicable, any other document referenced as forming part of the contract on the Purchase Order (or alternative execution document) and any other document that Bury Council and the Contractor agree in writing shall form part of the contract;

**"Contractor"** means the company, person or organisation, identified as such in the Contract, who is to supply the Goods;

**"Contractor Information"** means all proprietary records, documentation, software, technical information, business information or other information disclosed by the Contractor to Bury Council in relation to or created pursuant to the Contract;

**"Contractor Sub-processor"** means any Sub-processor other than the Contractor appointed by the Contractor to process Personal Data on behalf of Bury Council;

**"Data Controller"** shall have the meaning given in the GDPR;

**"Data Loss Event"** means any event that results, or may result, in unauthorised access to Personal Data held by the Contractor, and/or actual or potential loss and/or destruction of Personal Data in breach of this Contract, including any Personal Data Breach;

**"Data Processor"** shall have the meaning given in the GDPR;

**"Data Protection Act" ("DPA")** means legislation in force in the United Kingdom entitled Data Protection Act;

**"Data Protection Impact Assessment"** means an assessment of the impact of the envisaged processing on the protection of Personal Data;

**"Data Protection Legislation"** means legislation relating to data protection comprising (i) the GDPR, the LED and any applicable national implementing laws as amended from time to time (ii) the DPA to the extent that it relates to processing of Personal Data and privacy; (iii) all applicable laws about the processing of Personal Data and privacy;

**"Data Protection Officer"** shall have the meaning detailed in Article 37 of the GDPR;

**"Data Subject"** shall have the meaning given in the GDPR;

**"Data Subject Access Request"** means a request made by, or on behalf of, a Data Subject in accordance with rights granted pursuant to the Data Protection Legislation to access their Personal Data;

**"Defect(s)"** means any failure(s) of the Goods to substantially conform to the Specification and/or operate and function in accordance with the Specification;

**"Developed Software"** means Goods which are computer systems, software applications or programs, or any software applications or programs incorporated in Goods to enable the use, operation or application of such Goods,

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which the Contractor is to develop for Bury MBC which shall be the property of Bury MBC and the Intellectual Property Rights shall be owned by Bury MBC;

**"Developed Software Documentation"** means operating manuals, user instructions, technical literature and all other related materials in eye-readable form to be supplied by the Contractor to Bury Council, that are required in order to enable the use, operation and application of the Developed Software by Bury Council;

**"Documentation"** means operating manuals, user instructions, technical literature and all other related materials in eye-readable form to be supplied by the Contractor to Bury Council, that are required in order to enable the use, operation and application of the Goods by Bury Council;

**"FOIA"** means the Freedom of Information Act 2000 and any subordinate legislation made under such Act together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such legislation;

**"Force Majeure"** means fire, flood, lightning, severe weather, explosion, sabotage, accident, embargo, riot, civil commotion, war, industrial dispute (except where the dispute involves Contractor's personnel), government regulation or any disaster that affects either Party's, or any of its sub-contractors' or suppliers', ability to fulfil its responsibilities under the Contract;

**"GDPR"** means the General Data Protection Regulation (*Regulation (EU) 2016/679*);

**"Goods"** means goods, an item(s) of equipment, materials, Software, video, digital versatile disc, book, manual or other similar publication, directory or other listing publication or other similar object, whether inanimate or electronic, to be supplied or delivered by the Contractor and procured by Bury Council and includes any Documentation and/or Developed Software Documentation;

**"Information"** means Contractor Information and Bury Council Information;

**"Intellectual Property Rights"** means copyrights (including rights in computer software), trade marks, trade names, business names (including internet domain names), service marks, design rights (whether registered or unregistered), patents, know-how, trade secrets, inventions, database rights and all other intellectual property or similar proprietary rights and any applications for the protection or registration of these rights and all renewals and extensions thereof existing in any part of the world whether now known or in the future created;

**"LED"** means Law Enforcement Directive (*Directive (EU) 2016/680*);

**"Licence"** means a licence granted by the Contractor to Bury Council pursuant to Clause 4.2 to Use The Software;

**"Media"** means the media on which Software or Developed Software is recorded or printed;

**"Mediator"** means an independent third party appointed in accordance with Clause 15.3 to facilitate negotiations between the Parties in relation to a dispute and assist the Parties to endeavour to settle such dispute;

**"Party"** means Bury Council or the Contractor and **Parties** means both Bury Council and the Contractor;

**"Personal Data"** shall have the meaning given in the GDPR;

**"Purchase Order"** means Bury Council's completed standard order form of that name specifying the Goods to be provided by the Contractor;

**"Request For Information"** means a request for information as described in Section 8 of FOIA;

**"Required By Date(s)"** means any date(s) that Bury Council requires the Goods to be supplied or delivered on or by, as applicable, as specified in the Contract;

**"Service Level(s)"** means any standard for or measure of the performance or supply of the Goods, including the time of provision and qualitative measures of the Goods (including reliability, speed or availability), including measures of time, amounts or in percentages terms, that the Goods shall comply with as specified in the Contract;

**"Site(s)"** means a location(s) or place(s) occupied by Bury Council's employees or used by Bury Council where the Goods are to be supplied or delivered;

**"Software"** means Goods which are computer systems, software applications or programs, or any software applications or programs incorporated in Goods to enable the use, operation or application of such Goods, which the Contractor has developed and owns or has licensed from third parties;

**"Specification(s)"** means the description and specification of the Goods (including drawings) in the Contract including quantities, their facilities, functions, deliverables, Service Levels, quality standards, performance levels and the descriptions and specifications in Documentation and/or Developed Software Documentation;

**"Use The Software"** means loading, executing, storing, transmitting, displaying, copying (for the purposes of loading, executing, storing, transmitting, or displaying) or otherwise using any Software and associated Documentation supplied as part of the Goods and possessing the Media upon which such Software is provided; and

**"VAT"** means value added tax chargeable under the Value Added Tax Act 1994.

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## **2 EFFECTIVE DATE**

The Contract shall be effective upon the date when the Purchase Order or, where applicable, an alternative execution document, has been signed by both Parties.

## **3 SUPPLY AND DELIVERY**

3.1 The Contractor shall supply or deliver the Goods to the Site(s) in accordance with the Specification and in such quantities and in such manner and at such times as specified in the Contract.

3.2 Where the Goods are to be delivered:

- a) all Goods supplied shall be delivered at the Contractor's risk;
- b) the Goods shall be marked in accordance with any requirements in the Specification and any relevant legislation and shall be properly packed and secured for delivery to Bury Council in an undamaged condition. Where the Goods supplied are of a hazardous, dangerous or noxious nature, such Goods or the receptacle or container in which the Goods are stored or transported shall be clearly marked so as to identify the nature of the Goods (if not apparent on inspection), any particular hazards associated with the Goods, any particular precautions required to be taken in handling the Goods and any measures to be taken in case of an accident (peculiar to the nature of the Goods);
- c) the Contractor shall, or shall procure that the Contractor's agent shall, at the time of delivery of the Goods, provide Bury Council with a delivery note detailing the quantities and descriptions of the Goods delivered;
- d) the Contractor shall, or shall procure that its sub-contractors or agent shall, at the specified delivery point, ascertain, upon delivery of the Goods, that the person to whom the Goods are being delivered is duly authorised to accept receipt of the Goods;
- e) unless specified otherwise in the Contract, title in the Goods (excluding any Software) and risk in the Goods shall pass when the Goods have been supplied or delivered to Bury Council at the delivery point specified in the Contract and Bury Council has accepted delivery, however Bury Council shall not be liable for any loss of or damage to or, in the case of Software or Developed Software, corruption, destruction or introduction of a computer virus, in respect of the delivered Goods, due to the Contractor's negligence or non-performance of the Contract;
- f) acceptance of delivery by Bury Council shall only constitute confirmation by Bury Council of receipt of a delivery of Goods and shall not constitute confirmation that the Contractor has provided the Goods in accordance with the Contract; and
- g) the Contractor shall not deliver any Goods outside normal working hours without prior written approval by Bury Council.

3.3 Where the Goods are to be supplied by means other than delivery (e.g. transmitted electronically):

- a) the Contractor shall notify Bury Council in writing when the Goods have been supplied detailing the quantities and descriptions of the Goods supplied; and
- b) unless specified otherwise in the Contract, title in the Goods (excluding any Software) and risk in the Goods shall pass when the Goods have been supplied to Bury Council at the point of supply specified in the Contract and Bury Council has accepted delivery, however Bury Council shall not be liable for any loss of or damage to or, in the case of Software or Developed Software, corruption, destruction or introduction of a computer virus, in respect of the delivered Goods, due to the Contractor's negligence or non-performance of the Contract; and
- c) acceptance of delivery by Bury Council shall only constitute confirmation by Bury Council of receipt of a delivery of Goods and shall not constitute confirmation that the Contractor has provided the Goods in accordance with the Contract.

3.4 If Bury Council becomes aware that any Goods, which have been delivered or supplied, are not in accordance with the Contract, including where Goods are missing, incomplete or damaged, or, in the case of Software or Developed Software, corrupted, destroyed or affected by a computer virus, Bury Council may reject such Goods, notwithstanding that Bury Council may have accepted receipt of the Goods, by notifying the Contractor as soon as is reasonably practicable. Upon receiving such notice, the Contractor shall supply any missing Goods or replace, repair or rectify any incorrect or faulty Goods, as applicable, at no additional Charges, and without undue delay, and due delivery and acceptance of receipt of such Goods shall not be deemed to have taken place until the Contractor has supplied any missing Goods and/or replaced, repaired or rectified any incorrect or faulty Goods, as applicable, in accordance with the Contract.

3.5 Bury Council reserves the right to hold rejected, damaged, incorrect or incomplete Goods at the Contractor's risk. Except where the Contractor collects such rejected Goods within a reasonable time of receipt of notice of

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rejection, Bury Council may cause such Goods to be removed and charge the Contractor with the expenses incurred in such removal.

- 3.6 The Contractor shall ensure that supply and delivery, including supply and delivery as described in this Clause 3, of the Goods is undertaken in accordance with Best Industry Practice.
- 3.7 Any Required By Date shall, unless specified otherwise in the Contract, be of the essence of the Contract.

## **4 SOFTWARE AND DEVELOPED SOFTWARE**

- 4.1 The Contractor shall take all reasonable precautions to ensure that no known viruses for which detection and antidote software is generally available are coded or introduced into Software or Developed Software.

### **Software**

- 4.2 Unless specified otherwise in the Contract, the Contractor grants Bury Council a non-exclusive, royalty free and perpetual Licence to Use The Software (including using the Documentation) including making copies of the Software and Documentation for operational security purposes and to incidentally decompile the Software if it is necessary to do so in order to achieve interoperability of the Software with another software program or hardware.

### **Developed Software**

- 4.3 Unless specified otherwise in the Contract, any Developed Software and the Media (of the Developed Software), including the Intellectual Property Rights in such Developed Software and Media, shall be the property of Bury Council.

## **5 WARRANTIES**

- 5.1 The Contractor warrants that the Goods shall:
- a) conform with their Specifications;
  - b) be provided in accordance with and comply with the Service Levels;
  - c) be the best of their kind and free from all Defects; and
  - d) be of a design, construction and quality which comply with all relevant requirements of any applicable Statute, Regulation, Order or Directive in force when the Goods are supplied.
- 5.2 The Contractor warrants that it shall exercise all reasonable skill and care in performing its obligations under the Contract and that all Contractor's, its sub-contractors' and agents' personnel shall have the required qualifications and experience to undertake such obligations including any requirements detailed in the Specification.
- 5.3 The Contractor warrants that:
- a) the Contractor has full capacity and authority and all necessary consents (including, if required, the consent of its parent company) to enter into and to perform this Contract and that the Contract is executed by a duly authorised representative of the Contractor;
  - b) the Contractor owns or has licensed the Software and Documentation and has full power and authority to grant the Licence to Bury Council under the terms of the Contract;
  - c) the use of Software, Developed Software, Documentation or Developed Software Documentation, in accordance with the Contract, shall not infringe the Intellectual Property Rights of any third party; and
  - d) the Documentation or Developed Software Documentation, as applicable, shall provide adequate instructions to enable Bury Council to make proper use of the Goods.
- 5.4 The Contractor warrants that if the United Kingdom becomes a participating country in the process commonly known as European Monetary Union, the Contractor shall make any necessary modifications and provide the required updates to the Software or Developed Software, as applicable, free of any Charges, so that the Software or Developed Software, as applicable, remains capable of performing all functions set out in the Specification in respect of the Euro and complies with all legal requirements now and hereafter applicable to the Euro in any jurisdiction including but not limited to the rules on conversion, triangulation and rounding set out in EU Regulation 1103/97 and any subsequent or similar regulation or law.

## **6 DEFECTS**

Without prejudice to Clauses 3, 4 and 5 and the Specification and unless specified otherwise in the Contract, in the event of a Defect due to faulty design, manufacture or materials, the Contractor shall replace or repair the Goods without delay and without any additional Charges applying.

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## **7 STANDARDS**

- 7.1 Without prejudice to the Specification, Service Levels or other standards specified in the Contract, where an appropriate standard, code of practice or similar instrument has been issued by the British Standards Institution or the International Standards Organisation, and is current at the date of execution of the Contract, all Goods shall be supplied in compliance with such standard, code of practice or similar instrument.
- 7.2 The Contractor shall and, where applicable, shall procure that its sub-contractors and agents shall, upon request, provide Bury Council with reasonably sufficient evidence of compliance with the Specification, Service Levels or other standards specified in the Contract or relevant standard, code of practice or similar instrument issued by the British Standards Institution or the International Standards Organisation.

## **8 CHARGES AND PAYMENT**

- 8.1 Unless specified otherwise in the Contract:
- a) the Charges shall be fixed;
  - b) no additional Charges shall apply for delivery or for any other activity associated with the supply of the Goods (including those detailed in Clauses 7.2, 8.3 and 17);
  - c) the Charges shall not include VAT;
  - d) where the Goods have been Supplied in accordance with their Specification, the Contractor may submit an invoice for the Charges;
  - e) the Contractor shall, where applicable, add VAT to the Charges and include on all invoices; and
  - f) subject to 8.1 d) above, Bury Council shall pay all proper, valid and undisputed invoices (which shall include the Order Number or reference of Bury Council's Purchase Order or alternative execution document) within thirty (30) days from the date on which an invoice is regarded as valid and undisputed. The Contractor may charge daily interest on late payments at a rate equal to 4% per annum above the base lending rate of Barclays Bank PLC which shall be the Contractor's sole remedy in full and final settlement for the failure of the Council to make such payments on the due dates.
- 8.2 The Contractor shall keep secure and maintain until two (2) years after the final payment of all Charges due under the Contract, or such longer period as may be agreed between the Parties, full and accurate records of the performance of the Contract, including all payments made by Bury Council and all expenditure reimbursed by Bury Council, and grant to Bury Council, or its authorised agents and any auditors (including any auditor carrying out functions under the Audit Commission Act 1998 or Local Government Act 1999), such access to those records as they may reasonably require.
- 8.3 The Contractor shall use all reasonable endeavours to ensure measurable and continuous improvement in the supply of the Goods and ensure that the Goods provide best value for money. The Contractor acknowledges that Bury Council is subject to a Best Value Duty and the Contractor agrees to support and co-operate with Bury Council in fulfilling its Best Value Duty and agrees to comply with all reasonable requests of Bury Council in respect of fulfilling its Best Value Duty. The Contractor shall provide any information reasonably requested by Bury Council, relating to the performance of the Contract, to ensure that Bury Council meets its obligations in respect of Best Value Duty.
- 8.4 Whenever under the Contract any sum of money is recoverable from or payable by the Contractor (including any sum which the Contractor is liable to pay to Bury Council in respect of any breach of the Contract), Bury Council may deduct that sum from any sum then due or which at any later time becomes due to the Contractor under the Contract or under any other contract with Bury Council.
- 8.5 Subject to Clause 13, in the event that the Contractor sub-contracts the provision of the Goods, in part or whole, the Contractor shall include in the terms of any such sub-contract, an obligation upon the Contractor to make payment within thirty (30) days from the date on which an invoice is regarded as valid and undisputed and include provisions to procure that similar provisions are included in any subordinate contract.

## **9 LIMITATION OF LIABILITY**

- 9.1 The Contractor's and Bury Council's liability for personal injury to or death of any persons, arising out of or in connection with the Contract, due to its negligence, shall be unlimited. Clauses 9.3 and 9.4 shall not apply to such liability.
- 9.2 The Contractor's liability for any breach of any obligations implied by Section 12 of the Sale of Goods Act 1979 or Section 2 of the Supply of Goods and Services Act 1982 shall be unlimited. Clauses 9.3 and 9.4 shall not apply to such liability.
- 9.3 Subject to Clauses 9.1, 9.2 and 9.5 and to the extent permitted by law, neither the Contractor nor Bury Council shall be liable to the other Party, either in contract, tort, under statute or otherwise, for any indirect, consequential or punitive losses or damages including indirect losses or damages for loss of business, revenues or profits arising out of or in connection with the Contract.

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- 9.4 Subject to Clauses 9.1, 9.2 and 9.5 and to the extent permitted by law, the Contractor's and Bury Council's liability to the other Party, either in contract, tort, under statute or otherwise, arising out of or in connection with the Contract shall be limited to an aggregated amount of £5,000,000.
- 9.5 This Clause 9 shall not exclude or limit the liabilities of either Party for fraud or misrepresentation.

## **10 INSURANCE**

- 10.1 The Contractor shall maintain insurance cover, at all times that this Contract is in force, in respect of its liabilities arising out of or in connection with the Contract including insurance for employer's liability and public liability and, where appropriate, professional indemnity, with a reputable insurance company. The Contractor shall maintain employer's liability insurance in compliance with statutory requirements (which at the date of issue of these Conditions is a minimum of £5,000,000) and all other insurances to a minimum of £5,000,000.
- 10.2 The Contractor shall, on request from Bury Council, supply copies of certificates of insurance to Bury Council as evidence that the Contractor has in force the relevant insurance policies, as required under Clause 10.1.

## **11 INTELLECTUAL PROPERTY RIGHTS**

- 11.1 The Contractor shall indemnify and hold Bury Council harmless against all claims and proceedings arising from infringement or alleged infringement of any Intellectual Property Rights of any third party by reason of use, operation or application of the Goods.
- 11.2 The Contractor shall defend, at its own expense, any claim brought against Bury Council alleging an infringement of the Intellectual Property Rights of a third party, by reason of use, operation or application of the Goods, and the Contractor shall pay all costs and damages awarded or agreed to in settlement of any such claim provided that, where the claim is made against Bury Council, Bury Council shall:
- 11.2.1 furnish the Contractor with prompt written notice of any such claim;
  - 11.2.2 provide the Contractor with reasonable assistance in respect of any such claim; and
  - 11.2.3 allow the Contractor to defend or settle any such claim.
- 11.3 If, in the Contractor's reasonable opinion, the use of the Goods becomes or may become the subject of an allegation of an infringement of the Intellectual Property Rights of a third party, then the Contractor shall either:
- 11.3.1 obtain the right to continue using the Goods; or
  - 11.3.2 replace or, with the written consent of Bury Council, modify the Goods so they become non-infringing provided such replacement or modification does not result in the Goods failing to comply with the Specification, unless agreed otherwise.
- 11.4 If the remedies set out in Clause 11.3 above are not, in the Contractor's reasonable opinion, available, then Bury Council may, without prejudice to any of Bury Council's other rights or remedies under the Contract, immediately terminate the Contract in whole or part, and shall, to the extent that it is reasonably practicable to do so, return the Goods, which are the subject of the claim, or may become the subject of a claim, and the Contractor shall, if instructed to do so by Bury Council, refund the Charges for such Goods to Bury Council.
- 11.5 Where any specifications or designs have been provided by Bury Council, the Intellectual Property Rights in such specifications or designs shall remain the property of Bury Council.

## **12 TERMINATION**

- 12.1 Bury Council may, without prejudice to any other rights or remedies that Bury Council might have, terminate the Contract in whole or part, immediately on notice, if the Contractor:
- a) commits a material breach of the Contract that cannot be remedied; or
  - b) commits a material breach of the Contract that can be remedied but fails to remedy such breach within the time specified on a written notice to do so or, where no such time is specified, within a reasonable time; or
  - c) is persistently in breach of the Contract; or
  - d) makes a composition or arrangement with or for the benefit of its creditors; or
  - e) becomes bankrupt or, being a company, makes a proposal for a voluntary arrangement for a composition of debts or scheme of arrangement to be approved in accordance with the Companies Act 1985 or the Insolvency Act 1986 as the case may be or any amendment or re-enactment thereof, or
  - f) has a provisional liquidator appointed, or has a winding-up order made, or passes a resolution for voluntary winding-up (except for the purposes of amalgamation or reconstruction), or, under the

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Insolvency Act 1986 or any amendment or re-enactment thereof, has an administrator or an administrative receiver appointed.

12.2 Bury Council may, without prejudice to any other rights or remedies that Bury Council might have, terminate the Contract immediately if the Contractor or any person on its behalf whether employed by the Contractor or not and whether acting with or without the knowledge of the Contractor shall:

- a) have made any arrangement or agreement with any third party which required either the Contractor to fix or adjust the Charges or any other charges or terms submitted to Bury Council; any third party to fix or adjust any charges or terms submitted to Bury Council or the Contractor, or any third party to refrain from submitting quotations to Bury Council; or
- b) have communicated to any person, except Bury Council, the amount or approximate amount of the Charges or any other charges or terms submitted to Bury Council, otherwise than in confidence to obtain premium quotations for insurances; or
- c) have given, agreed to give, offered to give or promised any person (directly or indirectly for the benefit of that person or any other) any gift, loan, fee, reward or other consideration or conferred any advantage as an inducement to, reward for, or otherwise on account of such person having done, agreed or forborne to do, anything in relation to any quotation, tender, invitation to tender or request for quotation, relating to Bury Council; or
- d) have directly or indirectly canvassed any Member or Officer of Bury Council in order to obtain or attempt to obtain entry to any lists of persons approved by Bury Council to provide goods or services to or undertake works for Bury Council; information concerning any other supplier or potential supplier or any other quotation, or any advantage or benefit to the disadvantage of other suppliers or potential suppliers to Bury Council; or
- e) show favour or disfavour to any person in relation to any contract with Bury Council; or
- f) otherwise have committed any offence under the Prevention of Corruption Acts 1889 to 1916 or shall have given any fee or reward the receipt of which is an offence under Section 117(2) and (3) of the Local Government Act 1972.

12.3 Bury Council may terminate the Contract in whole or part, by written notice, provided such notice is received by the Contractor not less than fourteen (14) days prior to the Required By Date or, where a Required By Date has not been specified, the Contractor's scheduled date for supply or delivery, without liability including without liability for Charges for termination or any other Charges.

12.4 If the Contractor fails to supply or deliver some or all of the Goods in accordance with the Contract, Bury Council shall, without prejudice to any other rights or remedies which Bury Council might have, have the right to:

- a) terminate the Contract, either in whole or in part, at Bury Council's discretion, and purchase goods of the same or similar description to make good the default; and
- b) recover from the Contractor the amount (including the amount of any expenses properly incurred by Bury Council and of any direct losses or damages incurred by Bury Council as a result of the determination) by which the cost of purchasing other goods exceeds the amount which would have been payable to the Contractor in respect of the Goods if they had been delivered in accordance with the Contract.

Bury Council may exercise these rights upon seven (7) days written notice to the Contractor.

12.5 Where the Contract is terminated in whole or part in accordance with Clause 12.4, the Contractor shall, unless agreed otherwise, promptly collect all Goods which are the subject of such termination.

### **13 ASSIGNMENT AND SUB-CONTRACTING**

The Contractor shall not transfer, sub-contract, delegate or assign, directly or indirectly, any of its rights or obligations under the Contract, except with the written consent of Bury Council and subject to any terms and conditions that Bury Council may specify. Where Bury Council agrees to the Contractor sub-contracting the performance of any of its obligations, this shall not relieve the Contractor from any of its obligations to Bury Council.

### **14 FORCE MAJEURE**

14.1 In the event of Force Majeure, the Party affected by Force Majeure shall have no liability to the other Party for any failure to perform, arising from Force Majeure, subject to that Party:

- a) giving the other Party written notice that Force Majeure has occurred, the nature of Force Majeure, the anticipated duration of Force Majeure and the steps it proposes to take to minimise the effects of Force Majeure; and
- b) taking all reasonable steps to minimise the effects of Force Majeure.

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14.2 If Force Majeure continues for a period in excess of thirty (30) days, the other Party may terminate that part of the Contract affected by Force Majeure, or the whole of the Contract if the whole of the Contract is affected by Force Majeure, by giving written notice to the Party affected by Force Majeure, without liability in respect of that part of the Contract terminated or, where applicable, the whole of the Contract.

### **15 GOOD FAITH AND DISPUTE RESOLUTION**

15.1 The Contractor and Bury Council shall act in good faith with one another in relation to the application of the provisions of this Contract and, while this Contract remains in force, conduct all dealings, between the Contractor and Bury Council, in good faith. The Parties shall attempt in good faith to negotiate a settlement to any dispute between them arising out of or in connection with the Contract.

15.2 If a dispute cannot be resolved by the Parties pursuant to Clause 15.1, the dispute may, by agreement between the Parties, be referred to mediation in accordance with Clause 15.3.

15.3 The procedure for mediation is as follows:

- a) a Mediator shall be chosen by agreement between the Parties or, if the Parties are unable to agree upon the identity of a Mediator within fourteen (14) days, the Parties shall apply to the CEDR to appoint a Mediator;
- b) the Parties shall, within fourteen (14) days of the appointment of the Mediator, meet with the Mediator in order to agree a programme for the exchange of all relevant information and to agree the negotiation process;
- c) unless otherwise agreed, all negotiations connected with the dispute and any settlement agreement relating to it shall be conducted in confidence and without prejudice to the rights of the Parties in any future proceedings and the Mediator shall not be called as a witness by the Parties, or anyone claiming through one of the Parties, in any future proceedings arising out of or connected with any matter so referred to the Mediator;
- d) if the Parties reach agreement on the resolution of the dispute, the agreement shall be reduced to writing and shall be binding on the Parties once it is signed by both Bury Council and the Contractor;
- e) failing agreement, either of the Parties may invite the Mediator to provide a non-binding but informative opinion in writing which opinion shall be provided on a without prejudice basis and shall not be used in evidence in any proceedings relating to the Contract without the prior written consent of both Parties;
- f) either Party may give notice to the other Party at any time that it is withdrawing from the mediation process; and
- g) each Party shall bear its own expenses and the Parties shall share equally the charges for the mediation services of CEDR and associated costs of the mediation procedure.

15.4 If the Parties fail to reach agreement as provided for in Clause 15.3 above, within sixty (60) days of the Mediator being appointed, or such longer period as may be agreed by the Parties, then any dispute or difference between them may, by agreement between the Parties, be finally determined by reference to arbitration in accordance with Clause 15.5.

15.5 The procedure for arbitration is as follows:

- a) an Arbitrator shall be chosen by agreement between the Parties or, if the Parties are unable to agree upon the identity of an Arbitrator within fourteen (14) days, the Parties shall apply to the President for the time being of the Law Society of England and Wales to appoint an Arbitrator;
- b) if an Arbitrator declines the appointment or after appointment is removed by order of a competent court or is incapable of acting or dies and the Parties do not within one (1) month of the vacancy arising fill the vacancy, the Parties shall apply to the President for the time being of the Law Society of England and Wales to appoint another Arbitrator to fill the vacancy;
- c) in any case where the President for the time being of the Law Society of England and Wales is not able to exercise the functions detailed in this Clause 15.5, the said functions shall be exercised on his behalf by a Vice-President of said Law Society;
- d) any reference to arbitration under this Clause 15.5 shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment or amendment thereof for the time being in force;
- e) neither Party shall be limited in the arbitration to the evidence nor arguments put to the Mediator pursuant to Clause 15.3;
- f) the award of the Arbitrator shall be binding on the Parties;



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- g) the Arbitrator shall not be empowered to award any damages that exceed the limits of or disregard any exclusions of liability in the Contract; and
  - h) each Party shall bear its own expenses and the Parties shall share equally the charges for the arbitration services provided by the Arbitrator and associated costs of the arbitration procedure.
- 15.6 If the Parties fail to agree to a dispute being referred to a Mediator and/or an Arbitrator or where the Parties have agreed to refer a dispute to a Mediator but fail to reach an agreement in accordance with Clause 15.3 d), within sixty (60) days of the Mediator being appointed (and fail to agree thereafter to refer the dispute to an Arbitrator), either Party may exercise any remedy that it has under the Contract.

### **16 CONFIDENTIALITY AND FREEDOM OF INFORMATION**

- 16.1 The Contractor agrees to assist and co-operate with Bury Council in order to enable Bury Council to comply with its obligations to disclose information under FOIA.
- 16.2 The Contractor acknowledges that Bury Council may be obliged under FOIA to disclose Contractor Information without consulting or obtaining consent from the Contractor.
- 16.3 The Contractor may identify, in writing, Contractor Information which it considers to be Confidential Information, in which case Bury Council may consult with the Contractor before releasing the Contractor Information and give due consideration to the Contractor's comments or any objections to its disclosure.
- 16.4 Notwithstanding Clause 16.3 above, Bury Council shall determine whether Contractor Information is exempt from disclosure under FOIA and for determining, in its absolute discretion, the Contractor Information to be disclosed in response to a Request For Information.
- 16.5 Bury Council may, pursuant to a Request For Information, disclose any Contractor Information except Confidential Information, in whatever form, as necessary to respond to such Request For Information.
- 16.6 Bury Council and the Contractor shall bear their own respective costs in relation to any disclosure under FOIA.
- 16.7 Subject to Clauses 16.1 to 16.6 inclusive, the Contractor shall keep secret and not disclose, and shall procure that its employees, servants and agents keep secret and do not disclose, any Bury Council Information and Bury Council shall keep secret and not disclose, and shall procure that its employees, servants and agents keep secret and do not disclose, any Contractor Information without the prior written consent of the other Party, except to such persons and to such extent as may be necessary for the performance of the Contract. This duty of confidentiality shall not apply to any information that:
- a) is in the possession of the Party concerned, without restriction as to its disclosure, before receiving it from the disclosing Party; or
  - b) is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure; or
  - c) which is or becomes public knowledge (otherwise than by breach of this Clause 16.7); or
  - d) is liable to disclosure by statute or an order of a court of law; or
  - e) relates to the outcome of the procurement process for the Contract and is required to be published in the Supplement to the Official Journal of the European Communities in accordance with EU directives or elsewhere in accordance with requirements of United Kingdom government policy on the disclosure of information relating to government contracts; or
  - f) is disclosed by Bury Council to any person engaged in providing any services to Bury Council for any purpose relating to or ancillary to the Contract, provided that Bury Council discloses only Confidential Information which is necessary for the purpose concerned and Bury Council requires that the Confidential Information is treated in confidence and that a confidentiality undertaking is given where appropriate; or
  - g) is disclosed by Bury Council to any other department, office or agency of the Crown or voluntary organisation for the purposes of ensuring that people receive the best and most appropriate services possible, from Bury Council or any other department, office or agency of the Crown or voluntary organisation, including services to keep children or vulnerable persons safe and to protect them from harm and to prevent crime, provided that such disclosure is reasonably necessary and such Information is disclosed lawfully and provided Bury Council requires that the Confidential Information is treated in confidence and is only used for the purpose(s) specified at the time of disclosure and that a confidentiality undertaking is given.
- 16.8 The Contractor shall notify any sub-contractor of the provisions of this Clause 16 and any sub-contract, between the Contractor and its sub-contractors relating to this Contract, shall contain materially similar terms to this Clause 16.
- 16.9 The obligations imposed by this Clause 16 shall continue to apply after the expiry or termination of the Contract.

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## **17 LEGISLATION AND CONSENTS**

17.1 The Contractor shall, and, where applicable, shall procure that its sub-contractors and agents shall, obtain any licences, consents, permits or registrations, required for or in connection with the supply of the Goods, and shall comply with all current and future legislation (including legislation relating to charges, invoicing, payment, HMRC requirements and employees), which is relevant to the design, manufacture and/or construction, quality and supply of the Goods, and shall:

- a) not unlawfully discriminate on the basis of age, race, religion, gender, sexual orientation or disability;
- b) abide by good health and safety practice based on its responsibilities under any applicable health and safety at work legislation;
- c) comply with all relevant employment legislation; and
- d) process all Personal Data in accordance with the Data Protection Legislation.

The Contractor shall indemnify and hold Bury Council harmless against all claims and proceedings that any third party threatens or makes against Bury Council arising from any act or omission by the Contractor, its sub-contractors or agents, to comply with this Clause 17.1.

17.2 The Contractor shall and, where applicable, shall procure that its sub-contractors and agents shall, abide by any of Bury Council's codes of practice, site regulations, rules and procedures that are incorporated in the Contract or notified to the Contractor during the term of the Contract.

17.3 The Contractor shall and, where applicable, shall procure that its sub-contractors and agents shall, upon request, provide Bury Council with reasonably sufficient evidence of compliance with Clauses 17.1 and 17.2.

## **18 CHANGES**

This Contract may not be released, discharged, supplemented, interpreted, amended, varied, changed or modified in any manner unless agreed in writing and signed by both Parties.

## **19 NOTICES**

Any notice required to be given under the Contract may be given by sending the same by actual delivery, special delivery or recorded delivery at the address of the Party concerned given in the Contract. If sent by special delivery or recorded delivery, the notice shall, subject to proof to the contrary, be deemed to have been received forty-eight (48) hours after the date of posting (excluding Saturday and Sunday and Public Holidays in England and Wales).

## **20 WAIVER**

No failure or delay on the part of Bury Council to enforce any provision of the Contract shall result in Bury Council being taken to have waived or being precluded permanently or temporarily from enforcing or relying on any provision of the Contract. No right, power or remedy in this Contract conferred upon or reserved for Bury Council is exclusive of any other right, power or remedy available to Bury Council.

## **21 CONFLICT OF INTEREST**

The Contractor shall, and where applicable, shall procure that its employees, subcontractors and agents shall, take appropriate steps to ensure that there is no conflict of interest between its interests and its responsibilities under the Contract.

## **22 RELATIONSHIP BETWEEN THE PARTIES**

This Contract shall not constitute or imply any partnership, joint venture, agency, fiduciary relationship, a contract of employment, a relationship of principal and agent or other relationship between the Parties other than the contractual relationship expressly provided for in this Contract. Nothing in this Contract shall be construed as an appointment of the Contractor as the exclusive provider of goods or services to Bury Council.

## **23 ENTIRE AGREEMENT**

This Contract supersedes all prior agreements, arrangements, negotiations, representations and undertakings, whether written or oral, between the Parties and constitutes the entire agreement between the Parties relating to the subject matter of this Contract and, unless agreed otherwise in writing, any terms and conditions specified, stipulated or referred to by the Contractor shall not be incorporated in the Contract, except that this Clause 23 shall not exclude liability in respect of any fraudulent misrepresentation.

## **24 GOVERNING LAW**

The Contract shall be governed by the laws of England and Wales and the Parties submit to the exclusive jurisdiction of the courts of England.

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## **25 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

No third party has any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Contract, but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

## **26 SEVERABILITY**

If any provision of this Contract is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of its provisions shall continue in full force and effect as if this Contract had been executed with the invalid, illegal or unenforceable provision omitted.

## **27 REMEDIES CUMULATIVE**

Except where expressly specified otherwise in this Contract, all remedies available to either Party for breach of the Contract are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.

## **28 PUBLIC SERVICES (SOCIAL VALUE) ACT 2012**

The Contractor shall use reasonable endeavours to ensure that, in providing the Goods, the Contractor improves the economic, social and environmental well-being of the Borough of Bury. The Contractor acknowledges that, under the Public Services (Social Value) Act 2012, Bury Council is required to consider how services (including services with an element of goods or works), that Bury Council procures, improve the economic, social and environmental well-being of the Borough of Bury and furthermore, that as a matter of procurement policy and practice, Bury Council requires contractors providing goods to Bury Council to use reasonable endeavours to improve the economic, social and environmental well-being of the Borough of Bury.

## **29 DUTY OF CONTRACTOR TO PAY MANDATORY NATIONAL MINIMUM WAGE AND NATIONAL LIVING WAGE**

29.1 The Contractor shall comply with any National Minimum Wage Regulations introduced as a consequence of the National Minimum Wages Act 1998. It is a fundamental term of the Contract that the Contractor pays the National Minimum Wage and National Minimum Living Wage, where applicable, under the National Minimum Wage Act 1998 to all eligible employees and ensures that its sub-contractors pay the National Minimum Wage and National Minimum Living Wage, where applicable, under the National Minimum Wage Act 1998 to all their eligible employees.

29.2 Failure by the Contractor to comply with its obligations under this Clause may be regarded as a material breach of this Contract.

## **30 DISCRETIONARY LIVING WAGE**

30.1 Where the Contractor has indicated in its proposal, quotation, tender or other similar document that the Contractor shall voluntarily pay the Living Wage recommended by organisations independent of the Government (such as the Living Wage Foundation) and calculated independently from Government, by reference to the cost of living in the United Kingdom ("Discretionary Living Wage"), the Contractor shall pay at least the relevant hourly rate(s) of such Discretionary Living Wage to every employee involved in the provision of Goods under this Contract.

30.2 Where Clause 30.1 applies, the Contractor shall procure that contracts they enter into with any sub-contractors have a Clause obligating the sub-contractors also to pay at least the relevant hourly rate of the Discretionary Living Wage to every employee involved in the provision of the Goods under this Contract.

30.3 Failure by the Contractor to comply with its obligations under this Clause may be regarded as a material breach of this Contract.

## **31 INFORMATION GOVERNANCE**

31.1 The Parties acknowledge that if, in supplying the Goods, the Contractor is required to process Personal Data, for the purposes of the Data Protection Legislation, Bury Council shall, unless agreed otherwise, be the Data Controller and the Contractor shall be a Data Processor and, where the Contractor or a Contractor Sub-contractor is required to process Personal Data, the following shall apply:

31.1.1 the only processing that the Contractor, or a Contractor Sub-processor, shall be authorised to do shall be specified by Bury Council and may not be determined by the Contractor;

31.1.2 the Contractor shall notify Bury Council immediately if it considers that any of Bury Council's instructions infringe the Data Protection Legislation;

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- 31.1.3 the Contractor shall provide all reasonable assistance to Bury Council in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of Bury Council, include:
- a) a systematic description of the envisaged processing operations and the purpose of the processing;
  - b) an assessment of the necessity and proportionality of the processing operations in relation to the Services;
  - c) an assessment of the risks to the rights and freedoms of Data Subjects; and
  - d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal Data;
- 31.1.4 the Contractor shall, in relation to any Personal Data processed in connection with its obligations:
- a) process that Personal Data only as specified by Bury Council, in accordance with Clause 31.1.1, unless the Contractor is required to do otherwise by law. If it is so required, the Contractor shall promptly notify Bury Council before processing the Personal Data unless prohibited by law;
  - b) ensure that it has in place Protective Measures, which have been reviewed and approved by Bury Council as appropriate to protect against a Data Loss Event having taken account of the:
    - (i) nature of the data to be protected;
    - (ii) harm that might result from a Data Loss Event;
    - (iii) state of technological development; and
    - (iv) cost of implementing any measures;
  - c) ensure that :
    - (i) its employees, its Sub-processors and agents do not process Personal Data except in accordance with this Clause 31;
    - (ii) it takes all reasonable steps to ensure the reliability and integrity of any Contractor Sub-processor personnel who have access to the Personal Data and ensure that they:
      - (A) are aware of and comply with the Contractor's duties under this Clause 31;
      - (B) are subject to appropriate confidentiality undertakings with the Contractor or, in the case of Contractor Sub-processor personnel, the relevant Contractor Sub-processor;
      - (C) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by Bury Council or as otherwise permitted by this Clause 31; and
      - (D) have undergone adequate training in the use, care, protection and handling of Personal Data;
  - d) not transfer Personal Data outside of the EU unless the prior written consent of Bury Council has been obtained and the following conditions are fulfilled:
    - (i) Bury Council or the Contractor has provided appropriate safeguards in relation to the transfer (whether in accordance with GDPR Article 46 or LED Article 37) as determined by Bury Council;
    - (ii) the Data Subject has enforceable rights and effective legal remedies;
    - (iii) the Contractor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses all reasonable endeavours to assist Bury Council in meeting its obligations); and
    - (iv) the Contractor complies with any reasonable instructions notified to it in advance by Bury Council with respect to the processing of the Personal Data;

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- e) at the written direction of Bury Council, delete or return Personal Data (and any copies of it) to Bury Council on termination of the Contract unless the Contractor is required by law to retain the Personal Data, and
  - f) ensure that records are created, managed, used, retained and/or destroyed in such a manner so as to maintain their confidentiality, integrity and availability in accordance with relevant laws;
- 31.1.5 Subject to clause 31.1.6, the Contractor shall notify Bury Council immediately if it:
- a) receives a Data Subject Access Request (or purported Data Subject Access Request);
  - b) receives a request to rectify, block or erase any Personal Data;
  - c) receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Legislation;
  - d) receives any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data processed under this Contract;
  - e) receives a request from any third party for disclosure of Personal Data where compliance with such request is required or purported to be required by law; or
  - f) becomes aware of a Data Loss Event;
- 31.1.6 The Contractor's obligation to notify under Clause 31.1.5 shall include the provision of further information to Bury Council in phases, as details become available.
- 31.1.7 Taking into account the nature of the processing, the Contractor shall provide Bury Council with full assistance in relation to either Party's obligations under Data Protection Legislation and any complaint, communication or request made under Clause 31.1.5 (and insofar as possible within the timescales reasonably required by Bury Council) including by promptly providing:
- a) Bury Council with full details and copies of the complaint, communication or request;
  - b) such assistance as is reasonably requested by Bury Council to enable Bury Council to comply with a Data Subject Access Request within the relevant timescales set out in the Data Protection Legislation;
  - c) Bury Council, at its request, with any Personal Data it holds in relation to a Data Subject;
  - d) assistance as requested by Bury Council following any Data Loss Event; or
  - e) assistance as requested by Bury Council with respect to any request from the Information Commissioner's Office, or any consultation by Bury Council with the Information Commissioner's Office;
- 31.1.8 The Contractor shall maintain complete and accurate records and information to demonstrate its compliance with this Clause 31.
- 31.1.9 The Contractor shall allow for audits of its data processing activity by Bury Council or Bury Council's designated auditor.
- 31.1.10 The Contractor shall designate a Data Protection Officer if required by the Data Protection Legislation.
- 31.1.11 Before allowing any of its Sub-processors to process any Personal Data related to this Contract, the Contractor must:
- a) notify Bury Council in writing of the intended Sub-processor and processing;
  - b) obtain the written consent of Bury Council;
  - c) enter into a written agreement with the Sub-processor which gives effect to the terms set out in this Clause 31 such that they apply to the Contractor Sub-processor; and
  - d) provide Bury Council with such information regarding the Contractor Sub-processor as Bury Council may reasonably require;

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- 31.1.12 The Contractor shall remain fully liable for all acts or omissions of any of its Sub-processors.
- 31.2 The Contractor shall comply, and ensure that any of its sub-contractors comply, with Bury Council's "Data Protection Policy" or any replacement document, a copy of which is available on Bury Council's internet homepage at <https://www.bury.gov.uk> or upon request.