Dated [ ]

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Agreement for the Provision of

Landscape and Architectural Design services

between

The Mayor and Burgesses of the London Borough of Merton

and

[ ]

London Borough of Merton

Civic Centre

London Road, Morden, SM4 5DX

Contents

Clause

1. Definitions and Interpretation 1

2. Term 9

3. Due Diligence and Consultant's Warranty 9

4. Supply of Services 10

5. Service Standards 11

6. Compliance 12

7. Development of the Project Programme 13

8. Council Premises, Council Assets and Tenants’ Property 14

9. Payment 15

10. Design Team 17

11. Consultant’s Personnel 18

12. Suspension by the Council 19

13. Termination for Breach 19

14. Force Majeure 21

15. Prevention of Bribery 22

16. Consequences of Termination 23

17. Indemnities 24

18. Limitation of Liability 24

19. Insurance 25

20. Reporting and Meetings 26

21. Monitoring 26

22. Variation 26

23. Dispute Resolution 27

24. Sub-Contracting and Assignment 27

25. Freedom of Information and Transparency 28

26. Data Protection 30

27. Confidentiality 31

28. Audit 32

29. Intellectual Property 34

30. Sustainability and the Environment 35

31. Non-Solicitation 35

32. Waiver 36

33. Rights and Remedies 36

34. Severability 36

35. Partnership or Agency 36

36. Third Party Rights 37

37. Publicity 37

38. Notices 37

39. Entire Agreement 38

40. Governing Law 38

41. Jurisdiction 38

Schedule

Schedule 1 Statement of Requirements 40

Schedule 2 Consultant's Tender 41

Schedule 3 Charges and Payment Plan 42

Schedule 4 Project Programme 43

Schedule 5 Design Team 44

Schedule 6 Form of Collateral Warranty 45

**THIS AGREEMENT** is dated [ ]

Parties

1. **THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF MERTON**, of Civic Centre, London Road, Morden, SM4 5DX (“**the Council**”); and
2. **[ ]** incorporated and registered in England and Wales with company number [ ] whose registered office is at [ ] (**“the Consultant”).**

Background

1. The Council requires certain landscape and architectural design services to be carried out and the Consultant has agreed to provide services on the terms set out in this Agreement.
2. The Council has selected the Consultant to provide the services and the Consultant is willing and able to provide the services in accordance with the terms and conditions of this Agreement.

Agreed terms

# Definitions and Interpretation

## The definitions and rules of interpretation in this clause apply in this Agreement.

Additional Services: means services which are additional to or represent an alteration in the Services as then specified.

Agreement: means this Agreement, including the Schedules.

Authorised Representatives**:** means the persons respectively designated as such by the Council and the Consultant from time to time.

Best Industry Practice**:** means the standards prevailing from time to time which fall within the upper quartile in the relevant industry, profession or trade for the provision of comparable services which are substantially similar to the Services or the relevant part of them, having regard to factors such as the nature and size of the Parties, the performance required, the term, the pricing structure and any other relevant factors.

Bribery Act**:** means the Bribery Act 2010 and any subordinate legislation made under that Act from time to time together with any guidance or codes of practice issued by the relevant government department concerning the legislation.

Business Plan: means the business produced by the Council and provided to the Consultant as described in Schedule 1.

CDM Regulations: means the Construction (Design and Management) Regulations 2015.

Charges**:** means the charges which shall become due and payable by the Council to the Consultant as such charges are set out in Schedule 3.

Collateral Warranty: means a collateral warranty substantially in the form set out at Schedule 6.

Commencement Date**:** means [the date of this Agreement] OR [INSERT DATE].

Confidential Information: means any information or data in whatever form disclosed, which by its nature is confidential or which the disclosing Party acting reasonably states in writing to the receiving Party is to be regarded as confidential, or which the disclosing Party acting reasonably has marked ‘confidential’ (including, without limitation, financial information, or marketing or development or work force plans and information, and information relating to services or products) but which is not Personal Data, pursuant to an FOIA request, or information which is published as a result of government policy in relation to transparency.

**Conservation Management Plan**: means the conservation management plan provided to the Consultant as described in Schedule 1.

Consultant’s Equipment: means any materials, plant or equipment to be supplied by the Consultant for use in providing the Services.

Consultant's Personnel**:** means all employees, staff, other workers, agents, representatives, consultants and Sub-Contractors of the Consultant and of any Sub-Contractors, including for the avoidance of doubt all members of the Design Team, who are engaged in or about the provision of the Services from time to time.

Consultant's Tender**:** means the tender submitted by the Consultant set out in Schedule 2.

Contract Price: means the price set out in the Consultant’s Tender for the provision of the Services.

Contract Year**:** means a period of 12 months, commencing on the Commencement Date.

Council Assets**:** means any materials, plant or equipment owned and/or kept at the Council Premises.

Council Premises**:** means The Canons, which shall include all of the buildings situate at The Cannons and any other buildings referred to in Schedule 1, including the Tenants’ Flats.

Council’s Data: any data (including any Personal Data relating to the staff, customers or suppliers of the Council or the Tenants), documents, text, drawings, diagrams, images or sounds (together with any database made up of any of those), embodied in any medium, that are supplied to the Consultant by or on behalf of the Council, or which the Consultant is required to generate, process, store, host or transmit pursuant to this Agreement.

Council’s Policies: means Council’s policies and procedures from time to time in force relating to:

* 1. health and safety;
	2. equality and diversity;
	3. sustainability and sustainable development and the environment;
	4. whistleblowing,

and “Council Policy” shall be construed accordingly.

Data Controller: shall have the meaning as set out in the DPA.

Data Processor**:** shall have the meaning as set out in the DPA.

Data Protection Legislation**:** means the DPA, the EU Data Protection Directive 95/46/EC, the Regulation of Investigatory Powers Act 2000, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, the Electronic Communications Data Protection Directive 2002/58/EC, the Privacy and Electronic Communications (EC Directive) Regulations 2003 and all applicable laws and regulations relating to processing of Personal Data and privacy, including where applicable the guidance and codes of practice issued by the Information Commissioner.

Data Subject: shall have the meaning set out in the DPA.

Default Notice**:** shall have the meaning set out in clause 4.8.

Design Information: means all designs, drawings, models, plans, specifications, calculations, programmes, schedules and other material whatsoever developed or produced by the Consultant or any member of the Consultant’s Personnel in the performance of the Services, whether in hard copy form or stored in any electronic or other medium.

Design Team**:** means those Consultant’s Personnel identified by name and/or experience and/or qualification in the [Consultant’s Tender] [Schedule 4] or the roles attributed to such Consultant’s Personnel, as modified pursuant to clause 10.6.

Detailed Project Programme**:** means the detailed programme for the delivery of the Services developed in accordance with clause 7.

Dispute Resolution Procedure**:** means the procedure set out in clause 22.

DPA: means the Data Protection Act 1998

EIRs**:** means the Environmental Information Regulations 2004 (SI 2004/3391) together with any guidance and/or codes of practice issued by the Information Commissioner or relevant government department in relation to such regulations.

Environmental Improvement Programme: means a simple programme of environmental improvement which the Consultant draws up with the help of the Council. This is an alternative to a formal Environment Management System.

Environmental Management System: means a formal, externally audited managed system such as the Eco-Management and Audit Scheme or ISO14001 which ensures the Consultant delivers continuous environmental improvement.

Expiry Date: [DATE]

FOIA**:** means the Freedom of Information Act 2000, and any subordinate legislation made under the Act from time to time, 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 Event**:** means any cause affecting the performance by a Party of its obligations under this Agreement arising from acts, events, omissions or non-events beyond its reasonable control, including acts of God, riots, war, acts of terrorism, fire, flood, storm or earthquake and any disaster, but excluding any industrial dispute relating to the Consultant, the Consultant's Personnel or any other failure in the Consultant's supply chain.

Information**:** has the meaning given under section 84 of the FOIA.

Insolvency Event**:** means where:

### the Consultant suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or [(being a company or limited liability partnership) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 OR (being an individual) is deemed either unable to pay his debts or as having no reasonable prospect of so doing, in either case, within the meaning of section 268 of the Insolvency Act 1986 OR (being a partnership) has any partner to whom any of the foregoing apply];

### the Consultant commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors;

### a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that other Party (being a company);

### an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over the Consultant (being a company);

### the holder of a qualifying floating charge over the assets of the Consultant (being a company) has become entitled to appoint or has appointed an administrative receiver;

### a person becomes entitled to appoint a receiver over the assets of the Consultant or a receiver is appointed over the assets of the Consultant;

### a creditor or encumbrancer of the Consultant attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the other Party's assets and such attachment or process is not discharged within 14 days;

### any event occurs, or proceeding is taken, with respect to the other Party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in (a) to (g) (inclusive);

### the Consultant suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business; or

### the Consultant is appointed an official receiver.

IPR: means any and all intellectual property rights of any nature anywhere in the world whether registered, registerable or otherwise, including patents, utility models, trade marks, registered designs and domain names, applications for any of the foregoing, trade or business names, goodwill, copyright and rights in the nature of copyright, design rights, rights in databases, moral rights, know-how and any other intellectual property rights which subsist in computer software, computer programs, websites, documents, information, techniques, business methods, drawings, logos, instruction manuals, lists and procedures and particulars of customers, marketing methods and procedures and advertising literature, including the "look and feel" of any websites.

Key Milestones: means those documents, reports, plans and other things identified at paragraph 7.13 of Schedule 1 and incorporated into the Project Programme.

Key Milestone Dates: means dates set out at paragraph 7.13 of Schedule 1 alongside each Key Milestone and incorporated into the Project Programme.

Law**:** means any law, statute, subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of section 2 of the European Communities Act 1972, regulation, order, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements of any regulatory body with which the Consultant is bound to comply as it is in force from time to time, taking account of any amendment, extension or re-enactment.

Management Reports**:** means the reports to be prepared and presented by the Consultant in accordance with clause 20.

Necessary Consents**:** means all approvals, certificates, authorisations, permissions, licences, permits, regulations and consents necessary from time to time for the performance of the Services.

Outline Project Programme**:** means the outline programme for the delivery of the Services set out at Schedule 4.

Party: means the Council and the Consultant (and “Parties” shall be construed accordingly).

Payment Plan**:** means the plan for payment of the Charges as set out in Schedule 3.

Personal Data**:** shall have the meaning set out in the Data Protection Act

Pre-existing IPR: means any and all IPR owned by or licenced to the Consultant and which has been developed independently of this Agreement.

Prohibited Act**:** the following constitute Prohibited Acts:

### to directly or indirectly offer, promise or give any person working for or engaged by the Council a financial or other advantage to:

#### induce that person to perform improperly a relevant function or activity; or

#### reward that person for improper performance of a relevant function or activity;

### to directly or indirectly request, agree to receive or accept any financial or other advantage as an inducement or a reward for improper performance of a relevant function or activity in connection with this Agreement;

### committing any offence:

#### under the Bribery Act;

#### under legislation or common law concerning fraudulent acts;

#### defrauding, attempting to defraud or conspiring to defraud the Council.

### any activity, practice or conduct which would constitute one of the offences listed under clause (c), if such activity, practice or conduct had been carried out in the UK.

Project: means the improvement and redevelopment of The Canons.

Project Programme**:** the Outline Project Programme unless and until it is superseded by the Detailed Project Programme.

Replacement Consultant**:** means any third party consultant of Replacement Services appointed by the Council from time to time.

Replacement Services**:** means any services that are identical or substantially similar to any of the Services and which the Council receives in substitution for any of the Services following the termination or expiry of this Agreement, whether those services are provided by the Council internally or by any Replacement Consultant.

Request for Information**:** means a request for information or an apparent request under the Code of Practice on Access to Government Information, FOIA or the EIRs.

Schedule: means a schedule attached to the main body of terms and conditions of this Agreement.

Seventh Data Protection Principle: means the Seventh Data Protection Principle as set out in schedule 1 to the DPA.

Services**:** means the services to be delivered by or on behalf of the Consultant under this Agreement, to meet the Council’s requirements as such requirements are more particularly described in Schedule 1.

**Specified RIBA Stages:** means the RIBA Basic Services stages 1 to 4 as more particularly set out at paragraph 7.2 (Canons House) of Schedule 1.

**Specified Landscape Institute Stages**: means the Landscape Institute Basic Services stages A to E as more particularly set out at paragraph 7.4 (The Canons grounds) of Schedule 1

Sub-Contract**:** any contract between the Consultant and a third Party pursuant to which the Consultant agrees to source the provision of any of the Services from that third Party.

Sub-Contractor**:** means the consultants, suppliers or contractors that enter into a Sub-Contract with the Consultant, including all members of the Design Team.

Tenants: means those persons occupying the Tenants’ Flats.

Tenants’ Flats: means the flats at The Cannons occupied by the Tenants.

Tenants’ Property: means all fixtures, fittings and personal property owned or held by the Tenants at the Tenants’ Flats.

Term: means the period from the Commencement Date until the Expiry Date.

The Canons: The Canons, Madeira Road, London, CR4 4HD

Working Day**:** means Monday to Friday, excluding any public and bank holidays in England and Wales.

## Clause, Schedule and paragraph headings shall not affect the interpretation of this Agreement.

## A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality) and that person’s permitted assigns.

## The Schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement and any reference to this Agreement includes the schedules.

## A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.

## Words in the singular shall include the plural and vice versa.

## A reference to one gender shall include a reference to the other genders.

## A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.

## A reference to **writing** or **written** includes e-mail and fax.

## Irrespective of whether or not it is stated as such in this Agreement, any obligation on a Party to do or to not do something is an obligation on that Party to also procure compliance with that obligation by any third party, which third party shall, in the case of the Consultant, include any member of the Design Team or any other Contractor’s Personnel.

## Any obligation in this Agreement on a person not to do something includes an obligation not to agree or allow that thing to be done.

## A reference to a document is a reference to that document as varied or novated (in each case, other than in breach of the provisions of this Agreement) at any time.

## Unless otherwise stated, references to clauses and Schedules are to the clauses and Schedules of this Agreement; references to paragraphs are to paragraphs of the relevant Schedule.

## Subject to clause 1.15, where there is any conflict or inconsistency between the provisions of this Agreement, such conflict or inconsistency shall be resolved according to the following order of priority:

### the clauses of this Agreement;

### Schedule 1 to this Agreement;

### Schedule 3;

### the remaining schedules to this Agreement other than Schedule 2;

### Schedule 2 to this Agreement.

## In the event of any inconsistency between Schedule 1 to this Agreement and Schedule 2 to this Agreement, Schedule 1 shall take precedence unless expressly stated to the contrary or unless any part of Schedule 2 provides for a higher level of service provision or a more extensive scope of service, in which case the higher level or more extensive provision shall apply.

Commencement and duration

# Term

## This Agreement shall take effect on the Commencement Date and unless it is terminated earlier in accordance with the provisions of this Agreement, shall continue for the Term.

# Due Diligence and Consultant's Warranty

## The Consultant acknowledges and confirms that:

### it has had an opportunity to carry out a thorough due diligence exercise in relation to the Services and has asked the Council all the questions it considers to be relevant for the purpose of establishing whether it is able to provide the Services in accordance with the terms of this Agreement;

### it has received all information requested by it from the Council pursuant to clause 3.1(a) to enable it to determine whether it is able to provide the Services in accordance with the terms of this Agreement;

### it has made and shall make its own enquiries to satisfy itself as to the accuracy and adequacy of any information supplied to it by or on behalf of the Council pursuant to clause 3.1(b);

### it has raised all relevant due diligence questions with the Council before the Commencement Date;

### notwithstanding anything stated in Schedule 1 and any surveys or other information provided by the Council or suggested by the Council to be carried out by the Consultant, the Consultant shall be responsible for determining and carrying out at its own expense all investigation, surveys and the like necessary for the provision of the Services;

### it has entered into this Agreement in reliance on its own due diligence.

## Save as provided in this Agreement, no representations, warranties or conditions are given or assumed by the Council in respect of any information which is provided to the Consultant by the Council and any such representations, warranties or conditions are excluded, save to the extent that such exclusion is prohibited by law.

##  The Consultant:

### as at the Commencement Date, warrants and represents that all information contained in the Consultant's Tender remains true, accurate and not misleading, save as may have been specifically disclosed in writing to the Council prior to execution of this Agreement; and

### shall promptly notify the Council in writing if it becomes aware during the performance of this Agreement of any inaccuracies in any information provided to it by the Council during such due diligence which materially and adversely affects its ability to perform the Services or meet any Key Milestone Date.

## The Consultant shall not be entitled to recover any additional costs from the Council which arise from, or be relieved from any of its obligations as a result of, any matters or inaccuracies notified to the Council by the Consultant in accordance with clause 3.3(b).

## Nothing in this clause 3 shall limit or exclude the liability of the Council for fraud or fraudulent misrepresentation.

The services

# Supply of Services

## The Consultant shall provide the Services to the Council with effect from the Commencement Date and for the duration of this Agreement in accordance with the provisions of this Agreement.

## **The Design Team**

## For the avoidance of doubt, the Consultant shall be responsible for the provision of the whole of the Services, whether directly itself or by entering into Sub-Contracts with members of the Design Team, provided that the provisions of clause 24.2 shall apply at all times.

## Accordingly, the Consultant shall, in addition to the Services which it performs under this Agreement, co-ordinate and integrate those aspects of the Services to be performed by any member of the Design Team (or other Contractor’s Personnel) so as to ensure the smooth delivery of the Services notwithstanding that some of the Services may be carried out by members of the Design Team. The provisions of clause 5.1(a) shall apply to the Consultant’s obligation to co-ordinate and integrate the Design Team.

## Without prejudice to the general provision at clause 4.1, the Contractor shall ensure that the Services are provided so as to:

### achieve the Specified RIBA Stages;

### achieve the Specified Landscape Institute Stages;

### comply with the Project Programme;

### be consistent with the Payment Plan;

### take into account the Business Plan;

### take into account the Conservation Management Plan; and

### comply with any listed building consent and any planning application consent relevant to The Cannons.

## Without prejudice to clause 4.4(a), the Consultant shall achieve the Key Milestones by the Key Milestone Dates.

## If, at any time, the Consultant becomes aware that it will not (or is unlikely to) successfully achieve any Key Milestone by the applicable Key Milestone Date, it shall immediately notify the Council of the fact of the delay, the reasons for the delay, the consequences of the delay for the rest of the Key Milestones and how the Consultant proposes to mitigate the delay.

## Irrespective of the reasons for the delay, the Consultant shall deploy all additional resources and efforts, and take all reasonable steps, to eliminate or mitigate the consequences of the delay.

## In the event that the Consultant does not comply with the provisions of clause 4.1 in any way, the Council may serve the Consultant with a notice in writing setting out the details of the Consultant's default (a Default Notice).

## Unless required by this Agreement or otherwise authorised in writing by the Council, the Consultant shall not in the performance of the Services specify, or permit the specification, of materials which by their nature or application contravene any British Standard or EU equivalent or which are considered to be deleterious in the UK building industry at the time of specification or which contravene the recommendations in the publication “Good Practice in Selection of Construction Materials” (2011: British Council for Offices)

# Service Standards

## The Consultant shall provide the Services, or procure that they are provided, in all respects:

### with reasonable skill and care and in accordance with Best Industry Practice;

### in accordance with the Council's Policies; and

### in accordance with all applicable Laws.

# Compliance

## This clause 6 is without prejudice to the general obligations in clause 5.

## The Consultant shall ensure that all Necessary Consents are obtained and at all times in place to provide the Services and shall at all times comply with all Necessary Consents. The Council shall not (unless otherwise agreed in writing) incur any additional costs associated with obtaining, maintaining or complying with all Necessary Consents.

## Where there is any conflict or inconsistency between the provisions of this Agreement and the requirements of a Necessary Consent, then the latter shall prevail, provided that the Consultant has made all reasonable attempts to obtain a Necessary Consent in line with the requirements of the Services.

## The Consultant shall perform its obligations under this Agreement (including those in relation to the Services) in accordance with:

### all applicable Law regarding health and safety, including without limitation the Health and Safety at Work etc. Act 1974; and

### the Council’s Policy relating to health and safety whilst at the Council Premises.

## Each Party shall notify the other as soon as practicable of any health and safety incidents or material health and safety hazards at the Council Premises of which it becomes aware and which relate to or arise in connection with the performance of this Agreement. The Consultant shall instruct the Consultant's Personnel to adopt any necessary associated safety measures in order to manage any such material health and safety hazards.

## The Consultant shall (and shall procure that the Consultant's Personnel shall):

### perform its obligations under this Agreement (including those in relation to the Services) in accordance with:

#### all applicable equality Law (whether in relation to race, sex, gender reassignment, age, disability, sexual orientation, religion or belief, pregnancy, maternity or otherwise), including without limitation the Equality Act 2010;

#### the Council’s equality and diversity policy as provided to the Consultant from time to time; and

#### any other requirements and instructions which the Council reasonably imposes in connection with any equality obligations imposed on the Council at any time under applicable equality law;

### take all necessary steps, and inform the Council of the steps taken, to prevent unlawful discrimination designated as such by any court or tribunal or the Equality and Human Rights Commission (or any successor organisation); and

### at all times comply with the provisions of the Human Rights Act 1998 in the performance of this Agreement. The Consultant shall also undertake, or refrain from undertaking, such acts as the Council requests so as to enable the Council to comply with its obligations under the Human Rights Act 1998.

# Development of the Project Programme

## The Project Programme is as set out in Schedule 4 and sets out all the Key Milestones and applicable dependencies.

## The Consultant shall prepare and deliver to the Council for the Council's approval a draft of the Detailed Project Programme within ten (10) Working Days of the Commencement Date. The Consultant shall not be entitled to propose any variations to the Key Milestone Dates in its Detailed Project Programme. The Council shall review and comment on the draft Detailed Project Programme as soon as reasonably practicable and in any event within two (2) Working Days of receipt of the draft Detailed Project Programme. Following such review and any consultation, the Council shall formally approve or reject the draft Detailed Project Programme no later than fifteen (15) Working Days after the date on which the draft Detailed Project Programme is first delivered to the Council. If the Council does not formally approve or reject the draft Detailed Project Programme, it shall be deemed to have rejected the draft Detailed Project Programme.

## Once the draft Detailed Project Programme is approved, it shall replace the Outline Project Programme.

## If the Council rejects the draft Detailed Project Programme, the Council shall inform the Consultant in writing of its reasons for its rejection. The Consultant shall then revise the draft Detailed Project Programme (taking reasonable account of the Council's comments) and shall re-submit a revised draft Detailed Project Programme to the Council for the Council's approval within two (2) Working Days of the date of the Council's notice of rejection. The provisions of clause 7.2 and this clause 7.4 shall apply again to any resubmitted draft Detailed Project Programme, provided that either Party may refer any disputed matters for resolution by the Dispute Resolution Procedure at any time.

## The Consultant shall perform each of the tasks identified in the Project Programme by the applicable Key Milestone Date assigned to the particular task in the Project Programme.

# Council Premises, Council Assets and Tenants’ Property

## The Council shall, subject to clause 6 and clause 11, provide the Consultant (and its Sub-Contractors) with access to such parts of the Council Premises as the Consultant reasonably requires for the purposes only of properly providing the Services.

## Subject to the requirements of clause 16, in the event of the expiry or termination of this Agreement, the Council shall, if required and on reasonable notice, provide the Consultant with such access as the Consultant reasonably requires to the Council Premises to remove any of the Consultant's Equipment. All such Consultant’s Equipment shall be promptly removed by the Consultant.

## The Consultant shall ensure that:

### where using the Council Premises, neither the Consultant nor any Consultant’s Personnel shall use, interfere with or damage any Council Assets or Tenants’ Property and shall at all times ensure that the Council Premises are (during and after access by the Consultant and/or the Consultant’s Personnel) kept and left properly secure and it shall comply and cooperate with the Council's Authorised Representative's reasonable directions regarding the security of the same;

### only those of the Consultant's Personnel that are duly authorised to enter upon the Council Premises for the purposes of providing the Services.

## The Consultant shall notify the Council immediately on becoming aware of any damage or loss caused by the Consultant or the Consultant’s Personnel to any Council Premises, Council Assets or Tenants’ Property in the course of providing the Services.

Charges and Payment

# Payment

## In consideration of the provision of the Services by the Consultant in accordance with the terms and conditions of this Agreement, the Council shall pay the Charges to the Consultant in accordance with the Payment Plan.

## The Consultant shall not be entitled to any additional payment above the Contract Price unless it has been agreed in advance in writing by the Council that the Consultant may incur additional Charges.

## The Consultant shall invoice the Council for payment of the Charges in accordance with the Payment Plan. All invoices shall be directed to the Council's Authorised Representative or such other person as advised by the Council to the Consultant.

## The Council shall pay the Charges which have become payable within thirty (30) days of receipt of an undisputed invoice from the Consultant.

## Where any Party disputes any sum to be paid by it then a payment equal to the sum not in dispute shall be paid and the dispute as to the sum that remains unpaid shall be determined in accordance with clause 22. Provided that the sum has been disputed in good faith, interest due on any sums in dispute shall not accrue until twenty one (21) days after resolution of the dispute between the Parties.

## Subject to clause 9.5, if the Council does not make payment within thirty (30) days of receipt of a valid invoice, and this is not subject to a dispute or ability to withhold payment as set out in this Agreement, the Consultant shall be entitled to charge interest on the late payment at 2% above the base rate of the Bank of England (for the avoidance of doubt the Parties hereby expressly exclude the provisions of the Late Payment of Commercial Debts (Interest) Act 1998). The Consultant shall not suspend the supply of the Services if any payment is overdue.

## The Charges are stated exclusive of VAT, which shall be added at the prevailing rate as applicable and paid by the Council following delivery of a valid VAT invoice. The Consultant shall indemnify the Council against any liability (including any interest, penalties or costs incurred) which is levied, demanded or assessed on the Council at any time in respect of the Consultant's failure to account for, or to pay, any VAT relating to payments made to the Consultant under this Agreement.

## The Consultant shall maintain complete and accurate records of, and supporting documentation for, all amounts which may be chargeable to the Council pursuant to this Agreement. Such records shall be retained for inspection by the Council for six (6) years from the end of this Contract Year to which the records relate.

## Where the Consultant enters into a Sub-Contract with a supplier or Consultant for the purpose of performing this Agreement, it shall:

### cause a term to be included in such a Sub-Contract that requires payment to be made of undisputed sums by the Consultant to the Sub-Contractor within a specified period not exceeding thirty (30) days from the receipt of a valid invoice, as defined by the Sub-Contract requirements; and

### impose a requirement for the Sub-Contractor to include in any Sub-Contract which it in turn awards suitable similar provisions between the parties to that Sub-Contract as set out at clause (a).

## The Council may retain or set off any sums owed to it by the Consultant which have fallen due and payable against any sums due to the Consultant under this Agreement or any other agreement pursuant to which the Consultant provides goods or services to the Council.

## If The Council wishes to set off any amount owed by the Consultant to the Council against any amount due to the Consultant pursuant to *clause 9.10* it shall give notice to the Consultant within thirty (30) days of receipt of the relevant invoice, setting out the Council's reasons for withholding or retaining the relevant Charges.

## The Consultant shall make any payments due to the Council without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise, unless the Consultant has a valid court order requiring an amount equal to such deduction to be paid by the Council to the Consultant.

## The Consultant shall perform such Additional Services as the Council may reasonably require in writing.

## Any Additional Services performed under this Agreement shall be remunerated at the rates set out in the Payment Plan or as the Parties may agree.

## The Consultant shall not be entitled to any fees for Additional Services if:

### such services have not been instructed in writing by the Council; and/or

### the need for such Additional Services arises due to any act, negligence, omission or default on the part of the Consultant or any Consultant’s Personnel.

Consultant’s Personnel

# Design Team

## The Consultant acknowledges that in evaluating the Consultant’s Tender, the Council took into account the Design Team and that such Design Team members are key to the successful provision of the Services.

## The Consultant shall provide or procure the provision of the Design Team to carry out the matters allocated to each member of the Design Team in the Consultant’s Tender.

## The Design Team shall be retained by the Consultant and employed in the provision of the Services for such time as each member of the Design Team is required to perform the role which has been allocated them.

## The Consultant shall not remove or replace any of the Design Team unless:

### requested to do so by the Council;

### the person is on long-term sick leave;

### the element of the Services in respect of which the individual was engaged has been completed to the Council's satisfaction;

### the person resigns from their employment with the Consultant; or

### the Consultant obtains the prior written consent of the Council.

## In the event that a member of the Design Team is not available to perform those aspects of the Services allocated to them, the Consultant shall identify a permanent or temporary replacement for that person with immediate effect.

## The Consultant shall inform the Council of the identity and background of any replacements for any of the Design Team as soon as a suitable replacement has been identified. The Council shall be entitled to interview any such person and may object to any such proposed appointment within three (3) Working Days of being informed of or meeting any such replacement if, in its reasonable opinion, it considers the proposed replacement to be unsuitable for any reason.

## Any replacement for a member of the Design Team shall be as, or more, qualified and experienced as the member of the Design Team s/he is replacing and fully competent to carry out the tasks assigned to the member of the Design Team s/he is replacing.

## The Council may require the Consultant to remove, or procure the removal of, any of its Design Team whom it considers, in its reasonable opinion, to be unsatisfactory for any reason which has a material impact on such person's responsibilities.

## If the Consultant replaces any member of the Design Team as a consequence of this clause 10, the cost of effecting such replacement shall be borne by the Consultant.

# Consultant’s Personnel

## This clause 11 shall apply to all Consultant’s Personnel, including the Design Team.

## At all times, the Consultant shall ensure that:

### each of the Consultant's Personnel is suitably qualified, adequately trained and supervised and capable of providing the applicable Services in respect of which they are engaged;

### there is an adequate number of Consultant's Personnel at appropriate levels of expertise and experience to provide the Services properly;

### only those people who are authorised by the Consultant (under the authorisation procedure to be agreed between the Parties) are involved in providing the Services;

### all of the Consultant's Personnel comply with all of the Council's policies including those that apply to persons who are allowed access to the Council Premises; and

### all Consultant’s Personnel are made aware of the Council’s policy relating to whistleblowing.

## The Consultant acknowledges that the Consultant’s Personnel will be required to entire onto the Council Premises and that the Council Premises contain Council Assets and Tenants’ Property. The Consultant shall use all reasonable endeavours to ensure that Consultant’s Personnel are honest and trustworthy.

## The Council may refuse to grant access to, and remove, any of the Consultant's Personnel who do not comply with the Council’s Policies, or if they otherwise present a security threat.

## The Consultant shall replace any of the Consultant's Personnel who the Council reasonably decides have failed to carry out their duties with reasonable skill and care. Following the removal of any of the Consultant's Personnel for any reason, the Consultant shall ensure such person is replaced promptly with another person with the necessary training and skills to meet the requirements of the Services.

## The Consultant shall maintain up-to-date personnel records on the Consultant's Personnel engaged in the provision of the Services and shall provide information to the Council as the Council reasonably requests on the Consultant's Personnel. The Consultant shall ensure at all times that it has the right to provide these records in compliance with the applicable Data Protection Legislation.

## The Consultant shall use its best endeavours to ensure continuity of the Consultant’s Personnel and to ensure that the turnover rate of the Consultant’s Personnel is at least as good at the prevailing industry norm for similar services, locations and environments.

# Suspension by the Council

## The Council may at any time on not less than ten (10) Business Days’ notice to the Consultant require the Consultant to suspend performance of the whole or any part of the Services. Following the issue of a notice under this clause 12.1, the Council shall pay the Consultant pursuant to 9 any accrued instalments of the Charges and any Additional Payment then unpaid.

## The Council may at any time within two (2) months following the notice pursuant to clause 12.1 instruct the Consultant to recommence the performance of the suspended Services. The Consultant shall comply with any such instruction as soon as reasonably practicable.

## In the case of a suspension by the Council of the whole or a substantial proportion of the Services pursuant to clause 12.1, where the Council has not within a period of two (2) months instructed the Consultant to recommence the performance of all or substantially all of the Services that remain to be performed, the Consultant or the Council may, after giving the other Party no less than ten (10) Working Days’ notice of its intention to do so, give notice to the other Party terminating the Consultant’s engagement.

Termination

# Termination for Breach

## The Council may terminate this Agreement with immediate effect by the service of written notice on the Consultant in the following circumstances:

### if the Consultant is in breach of any material obligation under this Agreement, (provided that if the breach is capable of remedy, the Council may only terminate this Agreement under this clause 13.1 if the Consultant has failed to remedy such breach within twenty (20) Working Days of receipt of notice from the Council to do so);

### if the Council serves three (3) Default Notices in any rolling six (6) month period;

### if the Consultant is does not achieve one or more Key Milestones by the relevant Key Milestone Date(s) and the Consultant is unable to demonstrate to the reasonable satisfaction of the Council that it will be able to achieve the final Key Milestone by the final Key Milestone Date;

### if there is an Insolvency Event;

### if there is a change of control of the Consultant within the meaning of section 1123 of the Corporation Tax Act 2010.

## The Council may terminate this Agreement in accordance with the provisions of clause 14 and clause 15.

## Without prejudice to clause 13.4, if the Council is entitled to terminate this Agreement pursuant to this clause 13, the Council may alternatively and without prejudice to its right at any point to terminate this Agreement, do any one or more of the matters set out below:

### suspend payment to the Consultant of any payments due under this Agreement;

### retain any amount due to the Consultant from the Council;

### require the Consultant to facilitate the Council in providing or procuring the provision from a third party of the Services or part thereof until such time as the Consultant shall demonstrate to the reasonable satisfaction of the Council that the Consultant will be able to resume performance of (or such part of) the Services to the standards set out in this Agreement and during such period, the Consultant’s performance of (or such part of) the Services and the Council’s payment to the Consultant for (or for such part of) the Services shall be suspended.

## If this Agreement is terminated (or suspended in whole or in part) by the Council for pursuant to clause 13.1 or clause 13.3 such termination or suspension shall be at no loss or cost to the Council and the Consultant hereby indemnifies the Council against any such losses or costs which the Council may suffer as a result of any such termination or suspension. For the avoidance of doubt, such losses or costs shall include without limitation losses or costs incurred by the Council in providing or procuring the provision of the Services (or any part of the Services) itself or by a third party to the extent that such losses or costs are in excess of the Charges that would otherwise have been payable to the Consultant had the Council not terminated or suspended this Agreement.

# Force Majeure

## Subject to the remaining provisions of this clause 14, neither Party to this Agreement shall be liable to the other for any delay or non-performance of its obligations under this Agreement to the extent that such non-performance is due to a Force Majeure Event.

## In the event that either Party is delayed or prevented from performing its obligations under this Agreement by a Force Majeure Event, such Party shall:

### give notice in writing of such delay or prevention to the other Party as soon as reasonably possible, stating the commencement date and extent of such delay or prevention, the cause thereof and its estimated duration;

### use all reasonable endeavours to mitigate the effects of such delay or prevention on the performance of its obligations under this Agreement; and

### resume performance of its obligations as soon as reasonably possible after the removal of the cause of the delay or prevention.

## A Party cannot claim relief if the Force Majeure Event is attributable to that Party's wilful act, neglect or failure to take reasonable precautions against the relevant Force Majeure Event.

## The Consultant cannot claim relief if the Force Majeure Event is one where a reasonable Consultant should have foreseen and provided for the cause in question.

## As soon as practicable following the affected Party's notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and to facilitate the continued performance of this Agreement. Where the Consultant is the affected Party, it shall take and/or procure the taking of all steps to overcome or minimise the consequences of the Force Majeure Event in accordance with Best Industry Practice.

## The affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the affected Party to be unable to comply with its obligations under this Agreement. Following such notification, this Agreement shall continue to be performed on the terms existing immediately before the occurrence of the Force Majeure Event unless agreed otherwise by the Parties.

## Subject to the provisions of clause 33.3, the Council may, during the continuance of any Force Majeure Event, terminate this Agreement by written notice to the Consultant if a Force Majeure Event occurs that affects all or a substantial part of the Services and which continues for more than [NUMBER] Working Days.

# Prevention of Bribery

## The Consultant represents and warrants that neither it, nor to the best of its knowledge any Consultant's Personnel, have at any time prior to the Commencement Date:

### committed a Prohibited Act or been formally notified that it is subject to an investigation or prosecution which relates to an alleged Prohibited Act; and/or

### been listed by any government department or agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in government procurement programmes or contracts on the grounds of a Prohibited Act.

## The Consultant shall not during the period of this Agreement:

### commit a Prohibited Act; and/or

### do or suffer anything to be done which would cause the Council or any of the Council's employees, agents, representatives, consultants, contractors or sub-contractors to contravene any of the provisions of the Bribery Act or otherwise incur any liability in relation to the Bribery Act.

## The Consultant shall during the period of this Agreement:

### establish, maintain and enforce, and require that its Sub-Contractors establish, maintain and enforce, policies and procedures which are adequate to ensure compliance with the Bribery Act and prevent the occurrence of a Prohibited Act; and

### keep appropriate records of its compliance with its obligations under *clause 15.3(a)* and make such records available to the Council on request.

## The Consultant shall immediately notify the Council in writing if it becomes aware of any breach of *clause 15.1* and/or *clause 15.2*, or has reason to believe that it has or any of the Consultant's Personnel have:

### been subject to an investigation or prosecution which relates to an alleged Prohibited Act;

### been listed by any government department or agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in government procurement programmes or contracts on the grounds of a Prohibited Act; and/or

### received a request or demand for any undue financial or other advantage of any kind in connection with the performance of this Agreement or otherwise suspects that any person or Party directly or indirectly connected with this Agreement has committed or attempted to commit a Prohibited Act.

## If the Consultant makes a notification to the Council pursuant to *clause 15.4*, the Consultant shall respond promptly to the Council's enquiries, co-operate with any investigation, and allow the Council to audit any books, records and/or any other relevant documentation in accordance with *clause 27*.

## If the Consultant is in breach of clause 15.1 and/or clause 15.2, the Council may by notice:

### require the Consultant to remove from performance of this Agreement any Consultant's Personnel whose acts or omissions have caused such breach; or

### immediately terminate this Agreement.

## Any notice served by the Council under clause 15.6 shall specify the nature of the Prohibited Act, the identity of the Party who the Council believes has committed the Prohibited Act and the action that the Council has elected to take (including, where relevant, the date on which this Agreement shall terminate).

# Consequences of Termination

## On the expiry of this Agreement or if this Agreement is terminated in whole or in part for any reason, the Consultant shall co-operate fully with the Council to ensure a smooth and orderly migration of the Design Information to the Council or, at the Council's request, a Replacement Consultant.

## On expiry or early termination of this Agreement and on satisfactory migration of the Design Information pursuant to clause 16.1, the Consultant shall:

### deliver and shall procure the delivery of all Council’s Data, Design Information and Key Milestones (including that prepared prior to the Expiry Date or the date of termination and not previously provided to the Council and whether or not completed) to the Council forthwith and the Consultant shall certify full compliance with this clause 15.2(a). Until such items have been delivered to the Council, the Consultant shall be responsible for their safe-keeping and shall not use them for any purpose not connected with this Contract;

### repay to the Council all Charges it has been paid in advance, if applicable, in respect of the Services not provided by the Contractor as at the date of expiry or termination; and

### immediately vacate the Council Premises.

## The provisions of clauses 1 (Definitions and Interpretation), 9 (Payment), 13 (Termination for Breach), 15 (Prevention of Bribery), 16 (Consequences of Termination), 17 (Indemnities), 18 (Limitation of Liability), 19 (Insurance), 25 (Freedom of Information and Transparency), 26 (Data Protection), 27 (Confidentiality), 28 (Audit), 29 (Intellectual Property), 31 (Non-Solicitation), 32 (Waiver), 33 (Rights and Remedies), 34 (Severability), 36 (Third Party Rights), 37 (Publicity), 39 (Entire Agreement), 40 (Governing Law) and 41 (Jurisdiction) and Schedule 3.

Liability

# Indemnities

The Consultant shall indemnify and keep indemnified the Council against all actions, proceedings, costs, claims, demands, liabilities, losses and expenses whatsoever whether arising in tort (including negligence), default or breach of contract, to the extent that the same is due to the breach of this Agreement, applicable Law or warranty, provision, failure or delay in providing the Services or negligence, wilful default or fraud of the Consultant or of any Consultant’s Personnel save to the extent that the same is directly caused by or directly arises from breach of this Agreement or applicable Law or negligence by the Council or its employees, agents, representatives, consultants or contractors (excluding any Consultant's Personnel).

# Limitation of Liability

## Subject to clause 18.3 neither Party shall be liable to the other Party (as far as permitted by law) for indirect special or consequential loss or damage in connection with this Agreement whatsoever and howsoever arising whether in contract, tort, (including negligence) breach of statutory duty or otherwise, nor for any loss of (or damage to) profit, revenue, contracts, anticipated savings, goodwill or business opportunities whether direct or indirect.

## Each Party shall at all times take all reasonable steps to minimise and mitigate any loss or damage for which the other Party is entitled to bring a claim against it pursuant to this Agreement.

## Notwithstanding any other provision of this Agreement neither Party limits or excludes its liability for:

### fraud or fraudulent misrepresentation;

### death or personal injury caused by its negligence;

### breach of any obligation as to title implied by statute; or

### any other act or omission, liability for which may not be limited under any applicable law.

# Insurance

## The Consultant shall, (and shall procure that its Sub-Contractors shall) at its (and their) own cost effect and maintain with a reputable insurance company a policy or policies of insurance providing as a minimum the following levels of cover:

### professional indemnity insurance for the amount of Five Million English Pounds Sterling (£5,000,000)

### public liability insurance of not less than Five Million English Pounds Sterling (£5,000,000) and;

### the statutory minimum for employer’s liability insurance for any one incident that may arise under or in connection with the Contract and shall, on the Council's request, produce the insurance certificate giving detail of cover and the receipt for the current year's premium in respect of the insurance.

 (the Required Insurances) in respect of all risks which may be incurred by the Consultant, arising out of the Consultant's performance of this Agreement, including death or personal injury, loss of or damage to property or any other loss. Such policies shall include cover in respect of any financial loss arising from any advice given or omitted to be given by the Consultant.

## All insurances taken out by the Consultant shall contain an industry standard “indemnity to principals” clause.

## The Consultant shall give the Council, on request, copies of all insurance policies referred to in this clause or a broker's verification of insurance to demonstrate that the Required Insurances are in place, together with receipts or other evidence of payment of the latest premiums due under those policies.

## If, for whatever reason, the Consultant fails to give effect to and maintain the Required Insurances, the Council may, (but is not obliged to, and without relieving the Consultant of its obligations herein), make alternative arrangements to protect its interests and may recover the costs of such arrangements from the Consultant.

## The terms of any insurance or the amount of cover shall not relieve the Consultant of any liabilities under this Agreement.

Contract management

# Reporting and Meetings

## The Consultant shall provide such progress and management reports as the Council may from time to time reasonably request in order to assist the Council to monitor the provision of the Services.

## The Consultant’s Authorised Representative and relevant members of the Design Team shall attend such meetings as required by the Council at the frequency and for such time as set out in paragraph 7.10 (Meetings) of Schedule 1.

# Monitoring

## The Council may at any time monitor and inspect the performance of the Services by the Consultant.

## The Consultant shall co-operate, and shall procure that its Sub-Contractors co-operate, with the Council in carrying out the monitoring referred to in clause 21.1 at no additional charge to the Council.

# Variation

## Any variation of this Agreement shall only be valid if agreed in writing between the Council and the Consultant and signed by or on behalf of an authorised representative of each of the Parties. The Council and the Consultant shall not unreasonably withhold consent to any proposed variation from the other Party, provided that the Council shall not be required to consent to any change to the Key Milestone Dates. Any proposed variation shall be made in writing to the other Party and the other Party shall respond constructively within a reasonable time.

# Dispute Resolution

## If a dispute arises out of or in connection with this Agreement or the performance, validity or enforceability of it (**Dispute**) then the Parties shall follow the procedure set out in this clause:

### either Party shall give to the other written notice of the Dispute, setting out its nature and full particulars (**Dispute Notice**), together with relevant supporting documents. On service of the Dispute Notice, the Authorised Representatives shall attempt in good faith to resolve the Dispute;

### if the Authorised Representatives are for any reason unable to resolve the Dispute within 30 days of service of the Dispute Notice, the Dispute shall be referred to the Council's Chief Officer and the Consultant's appropriate senior officer (for example, director or partner) who shall attempt in good faith to resolve it; and

### if the Council's Chief Officer and the Consultant's appropriate senior officer are for any reason unable to resolve the Dispute within thirty (30) days of it being referred to them, the Parties shall attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the Parties, the mediator shall be nominated by CEDR Solve. To initiate the mediation, a Party must serve notice in writing (ADR notice) to the other Party to the Dispute, requesting a mediation. A copy of the ADR notice should be sent to CEDR Solve. The mediation will start not later than twenty (20) days after the date of the ADR notice.

## The commencement of mediation shall not prevent the Parties commencing or continuing court proceedings as either Party may deem necessary or desirable to protect their respective positions in relation to the Dispute under clause 40, which clause shall apply at all times.

# Sub-Contracting and Assignment

## Subject to clause 24.4, neither Party shall assign, novate or otherwise dispose of any or all of its rights and obligations under this Agreement without the prior written consent of the other Party, neither may the Consultant sub-contract the whole or any part of its obligations under this Agreement except with the express prior written consent of the Council, such consent not to be unreasonably withheld.

## The Council acknowledges that the Consultant is responsible for appointing the Design Team and that this may require the Consultant to enter into Sub-Contracts with various members of the Design Team. The Council hereby consents to the entry by the Consultants into Sub-Contracts with the named members of the Design Team set out in the Consultant’s Tender.

## In the event that the Consultant enters into any Sub-Contract in connection with this Agreement it shall:

### remain responsible to the Council for the performance of its obligations under this Agreement notwithstanding the appointment of any Sub-Contractor and be responsible for the acts, omissions and neglects of its Sub-Contractors;

### impose obligations on its Sub-Contractor in the same terms as those imposed on it pursuant to this Agreement and shall procure that the Sub-Contractor complies with such terms;

### provide a copy, at no charge to the Council, of any such Sub-Contract on receipt of a request for the same from the Council; and

### if requested do so by the Council procure the entry into by each of the Sub-Contractors of a Collateral Warranty with the Council.

## The Council shall at any time to be entitled to assign, transfer, sub-contract, novate or otherwise dispose of this Agreement to any other body which substantially performs any of the functions that previously had been performed by the Council.

## Where any building contract entered into by the Council in relation to The Canons is a design and build contract, the Consultant shall and shall procure that the Design Team shall within twenty (20) Working Days of the Council’s request to do so, enter into a deed of novation with the relevant building contractor in a form advised by the Council.

Information

# Freedom of Information and Transparency

## The Consultant acknowledges that the Council is subject to the requirements of the FOIA and the EIR and shall assist and co-operate with the Consultant (at the Consultant’s expense) to enable the Council to comply with these information disclosure requirements.

## The Consultant shall and shall procure that the Consultant’s Personnel shall:

### transfer any Request for Information to the Council as soon as practicable after receipt and in any event within two (2) Working Days of receiving a Request for Information;

### provide the Council with a copy of all information in its possession or power in the form that the Council requires within the timescale referred to in clause 25.3 below; and

### provide all other necessary assistance as reasonably requested by the Council to enable the Council to respond to a Request for Information within the time for compliance set out in the FOIA or the EIR.

## Where the Council has notified the Consultant of information required pursuant to Request for Information;

### the Consultant shall at its own expense respond to the Council in full and in writing to all particulars described in the Request for Information (including if requested providing electronic copies of such information) within three (3) Working Days;

### if the Council serves any request for information that is supplemental to the Request for Information, the Consultant shall respond to the Council in full and in writing within ten (10) Working Days of a request for the same; and

### the Consultant shall ensure that all of the Consultant’s Personnel comply with the provisions of this clause 25.

## The Council shall be responsible for determining at its absolute discretion whether any information (including information which is provided by the Consultant to the Council in confidence):-

### is exempt from disclosure under the FOIA or the EIR;

### is to be disclosed in response to a Request for Information; and

### in no event shall the Consultant respond directly to a Request for Information unless expressly authorised to do so by the Council.

## The Consultant acknowledges that the Council may, acting in accordance with the FOIA or EIR, be obliged to disclose information:-

### without consulting with the Consultant, or

### following consultation with the Consultant and having taken its views into account.

## The Consultant shall nominate a responsible person for dealing with all FOIA/EIR requests it receives concerning the Council and for ensuring compliance with the obligations upon the Consultant contained in this clause 25.

## The Consultant shall provide a written description acceptable to the Council, acting reasonably, of the policies and procedures or organisational methods employed by the Consultant for processing FOIA/EIR requests concerning the Council.

## The Council shall not be liable for any disclosure of any information that is required pursuant to the FOIA Act.

## In the event that the Consultant fails to comply with this clause, the Council reserves the right to terminate this Agreement by notice in writing and with immediate effect.

## Notwithstanding any other provision of this Agreement, the Consultant hereby consents to the publication of this Agreement in its entirety including from time to time agreed changes to this Agreement subject to the redaction of information that is exempt from disclosure in accordance with the provisions of the FOIA.

## In preparing a copy of this Agreement for publication pursuant to clause 25.10 the Council may consult with the Consultant to inform its decision making regarding any redactions but the final decision in relation to the redaction of information shall be at the Council’s absolute discretion.

## The Consultant must assist and co-operate with the Council to enable the Council to publish this Agreement.

## In order to comply with the Government’s policy on transparency in the areas of contracts and procurement the Council will be disclosing information on its website in relation to monthly expenditure over £500 (five hundred pounds) in relation to this Agreement. The information will include the Consultant’s name and the monthly Charges paid. The Parties acknowledge that this information is not Confidential Information or commercially sensitive information.

# Data Protection

## The Consultant shall (and shall procure that all of the Consultant’s Personnel shall) comply with any notification requirements under the DPA and both Parties shall duly observe all their obligations under the DPA, which arise in connection with this Agreement. Furthermore, the Consultant shall adhere with all applicable provisions of the DPA.

## Notwithstanding the general obligation in clause 26.1, where the Consultant is processing Personal Data as a Data Processor for the Council, the Consultant shall ensure that it has in place appropriate technical and contractual measures to ensure the security of the Personal Data (and to guard against unauthorised or unlawful processing of the Personal Data and against accidental loss or destruction of, or damage to, the Personal Data), as required under the Seventh Data Protection Principle. This shall include (but not be limited to) maintaining secure and encrypted email facilities for the receipt and disclosure of Personal Data using methods or networks agreed with the Council.

## The Consultant shall:

### ensure that all of the Consultant’s Personnel who have access to Personal Data have completed information governance training agreed by the Data Controller;

### provide a written description of the technical and organisational methods employed by the Data Processor for processing Personal Data (within the timescales required by the Council as Data Controller);

### identify a responsible person for all information governance issues and the protection of all Personal Data that it processes;

### provide the Council with such information as the Council may reasonably require to satisfy itself that the Consultant is complying with its obligations under the DPA;

### notify the Council promptly (and in any event within 24 hours) of any breach of the security measures required to be put in place pursuant to clause 26.2;

### provide the Council with full co-operation and assistance in relation to any complaint or request made pursuant to this clause 26; and

### ensure it does not knowingly or negligently do or omit to do anything which places the Council in breach of the Council's obligations under the DPA.

## The Consultant shall notify the Council (as Data Controller) (within two Working Days), if it receives:

### A request from a Data Subject to have access to that person’s Personal Data; or

### A complaint or request relating to the Council’s (as Data Controller) obligations under the DPA.

## The provisions of this clause shall apply during the continuance of this Agreement and indefinitely after its expiry or termination or until all data is returned to the Council.

## The Consultant shall indemnify the Council against any failure to comply with the provisions of this clause 26 and furthermore shall indemnify the Council against any losses incurred as a result of its failure to comply with the provisions of this Clause and/or the DPA (such losses to include any fine levied by the Information Commissioner’s Office).

# Confidentiality

## Other than as permitted in the terms of clause 25, the Consultant shall keep confidential, and use its best endeavours to ensure that the Consultant’s Personnel confidential, any and all information (written, electronic, or oral) in relation to the Council, learnt or otherwise obtained by the Consultant and/or the Consultant’s Personnel in the provision of the Services either at any time during or after the duration of this Agreement and the Consultant shall not use any such information except as specifically required for the purposes of performing its obligations under this Agreement. The Consultant shall indemnify the Consultant against any loss suffered or claim made against it as a result of such unauthorised disclosure.

## The Consultant shall at all times ensure that all Consultant’s Personnel who have access to the same are trained to deal with confidential and personal data in accordance with clause 27.1 above. The obligations of confidentiality contained in this clause shall survive the termination of this Agreement.

## The Consultant shall ensure that information produced in the course of this Agreement or relating to this Agreement is retained for disclosure for six (6) years after expiry or earlier termination of this Agreement and shall permit the Council to inspect such records as requested from time to time.

## The Consultant shall ensure that Council information held in paper or electronic form, whether originally provided by the Council or printed/created by the Consultant, is destroyed securely, or sub-contracted to a confidential waste company that complies with European Standard EN15713 (or equivalent).

## In the event that electronic records or information cannot be overwritten, due to bad or unusable sectors, the Consultant shall ensure complete and irretrievable destruction of the media itself.

## The Consultant shall provide to the Council evidence of destruction (certifications or verification reports) if requested.

# Audit

## During the period of this Agreement and for a period of [ten (10)] years after the Expiry Date or the Termination Date, the Council may conduct or be subject to an audit for the following purposes:

### to verify the accuracy of Charges (and proposed or actual variations to them in accordance with this Agreement) and/or the costs of all Consultants (including Sub-Contractors) of the Services;

### to review the integrity, confidentiality and security of any data relating to the Council or any service users;

### to review the Consultant's compliance with the DPA, the FOIA, in accordance with clause 26 (Data Protection) and clause 25 (Freedom of Information) and any other legislation applicable to the Services;

### to review any records created during the provision of the Services;

### to review any books of account kept by the Consultant in connection with the provision of the Services;

###  to carry out the audit and certification of the Council's accounts;

###  to carry out an examination pursuant to section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Council has used its resources;

### to verify the accuracy and completeness of the Management Reports delivered or required by this Agreement.

## Except where an audit is imposed on the Council by a regulatory body, the Council may not conduct an audit under this clause 27 more than [twice] in any calendar year.

## The Council shall use its reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt the Consultant or delay the provision of the Services.

## Subject to the Council's obligations of confidentiality, the Consultant shall on demand provide the Council and any relevant regulatory body (and/or their agents or representatives) with all reasonable co-operation and assistance in relation to each audit, including:

### all information requested by the above persons within the permitted scope of the audit;

### reasonable access to any sites controlled by the Consultant and to any Consultant’s Equipment used (whether exclusively or non-exclusively) in the performance of the Services; and

### access to the Consultant's Personnel.

## The Council shall endeavour to (but is not obliged to) provide at least 15 days notice of its or, where possible, a regulatory body's, intention to conduct an audit.

## The Parties agree that they shall bear their own respective costs and expenses incurred in respect of compliance with their obligations under this clause, unless the audit identifies a material failure to perform its obligations under this Agreement in any material manner by the Consultant in which case the Consultant shall reimburse the Council for all the Council's reasonable costs incurred in the course of the audit.

##  If an audit identifies that:

### the Consultant has failed to perform its obligations under this Agreement in any material manner, the Parties shall agree and implement a remedial plan. If the Consultant's failure relates to a failure to provide any information to the Council about the Charges, proposed Charges or the Consultant's costs, then the remedial plan shall include a requirement for the provision of all such information;

### the Council has overpaid any Charges, the Consultant shall pay to the Council the amount overpaid within 20 days. The Council may deduct the relevant amount from the Charges if the Consultant fails to make this payment; and

### the Council has underpaid any Charges, the Council shall pay to the Consultant the amount of the under-payment less the cost of audit incurred by the Council if this was due to a default by the Consultant in relation to invoicing within 20 days.

# Intellectual Property

## IPR in all Council Data is the exclusive property of the Council.

## All IPR in the Design Information shall vest in the Council. The Consultant shall and shall procure that all of the Consultant’s Personnel shall, without charge to the Council, execute all such documents and do all such acts as the Council may require to ensure that the IPR in the Design Information properly vests in the Council.

## The Consultant hereby grants to the Council an irrevocable, perpetual, royalty-free, non-exclusive licence to copy and use the Pre-existing IPR and to reproduce the designs contained in them for any purpose whatsoever relating to the Project. This licence shall be transferable to third parties and the Council shall be entitled to grant sub-licences, in each case without the consent of the Consultant.

## To the extent that the IPR in any of the Pre-existing IPR is not vested in the Consultant, it shall procure in favour of the Council a licence in terms equivalent to clause 29.3 from the owner of such IPR.

## The Consultant warrants that the use and reproduction of the Pre-existing IPR will not infringe the rights of any third party. The Consultant will indemnify and keep indemnified the Council for any and all costs, claims, proceedings, expenses and losses whatsoever that the Council may suffer as a result of the Consultant’s breach of its obligations under this clause.

## The Consultant hereby waives its rights (including any moral right to be identified as the author of the Design Information) under the Copyright, Designs and Patents Act 1988 or any similar provisions of law in any jurisdiction and agrees to hold on trust for the Council any of the rights referred to in this clause in which the legal title has not passed (or will not pass) to the Council.

## The Consultant hereby warrants to the Council that it has obtained from each of the Consultant’s Personnel a written irrevocable waiver of their rights to the fullest extent permissible by law (including any moral right to be identified as the author of the Design Information) under the Copyright, Designs and Patents Act 1988 or any similar provisions of law in any jurisdiction and that each of the Consultant’s Personnel has agreed to hold on trust for the Council any of the rights referred to in this clause in which the legal title has not passed (or will not pass) to the Council.

General Provisions

# Sustainability and the Environment

## The Consultant shall in its performance of the Services use all reasonable endeavours to ensure it uses working methods, equipment, materials and consumables which minimise environmental damage. In particular, the Consultant shall ensure that it fully complies with the obligations laid down in the Council’s policies relating to sustainability and sustainable development and the environment, that it is familiar with the relevant policies of the Council and that it will support and assist the Council in meeting the aims laid down in those policies.

## The Consultant must have either a registered Environmental Management System or be willing to work with the Council to develop an Environmental Improvement Programme.

# Non-Solicitation

Neither Party shall (except with the prior written consent of the other) during the period of this Agreement solicit the services of any senior staff of the other Party who have been engaged in the provision of the Services or the management of this Agreement or any significant part thereof either as principal, agent, employee, independent contractor, consultant or in any other form of employment or engagement other than by means of an open national advertising campaign and not specifically targeted at such staff of the other Party.

# Waiver

No failure or delay by a Party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

# Rights and Remedies

The rights and remedies provided under this Agreement are in addition to, and not exclusive of, any rights or remedies provided by law.

# Severability

## If any provision or part-provision of this Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of this Agreement.

## If one Party gives notice to the other of the possibility that or if any provision or part-provision of this Agreement is invalid, illegal or unenforceable, the Parties shall negotiate in good faith to amend such provision so that, as amended, it is legal, valid and enforceable, and, to the greatest extent possible, achieves the intended commercial result of the original provision.

# Partnership or Agency

## Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the Parties, constitute any Party the agent of the other Party, or authorise any Party to make or enter into any commitments for or on behalf of the other Party.

## Each Party confirms it is acting on its own behalf and not for the benefit of any other person.

# Third Party Rights

## No one other than a Party to this Agreement, their successors and permitted assignees shall have any right to enforce any of its terms.

# Publicity

The Consultant shall not:

### make any press announcements or publicise this Agreement or its contents in any way; or

### use the Council's name or logo in any promotion or marketing or announcement of orders,

except as required by law, any government or regulatory authority, any court or other authority of competent jurisdiction, without the prior written consent of the Council, which shall not be unreasonably withheld or delayed.

# Notices

## Any notice given to a Party under or in connection with this Agreement shall be in writing marked for the attention of the Party's Authorised Representative and shall be:

### delivered by hand or by pre-paid first-class post or other next working day delivery service at its registered office (if a company) or its principal place of business (in any other case); or

### sent by fax to [ ], or such other number notified to the relevant Party;

### sent by email to the Authorised Representative.

## Any notice shall be deemed to have been received:

### if delivered by hand, on signature of a delivery receipt;

### if sent by pre-paid first-class post or other next working day delivery service, at 9.00 am on the second Working Day after posting.

### if sent by fax, at 9.00am on the next Working Day after receipt of a transmission report confirming successful transmission;

### if sent by email, at 9.00 am on the next Working Day after transmission.

## This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution. For the purposes of this clause, "writing" shall include e-mail and fax.

# Entire Agreement

## This Agreement and any documents annexed to it or otherwise referred to in it constitutes the entire agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

## Each Party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement or any document referred to in clause 39.1. Each Party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Agreement or any such documents.

# Governing Law

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

# Jurisdiction

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

**IN WITNESS** whereof the Parties have executed this Agreement as a deed the day and year first before written:

IN WITNESS WHEREOF the Council and the Consultant have hereunto caused their respective common seals to be affixed or executed this Agreement by authorised officer and this deed is delivered the day and year first before written.

**THE COMMON SEAL of the MAYOR AND )**

**BURGESSES OF THE LONDON BOROUGH )**

**OF MERTON was hereunto affixed in the )**

**presence of: )**

Authorised Officer ………………………………………………………………….

**Executed as a deed by [ ] LIMITED acting by**

**[*NAME OF FIRST DIRECTOR*], a director and *[NAME OF SECOND DIRECTOR/SECRETARY*], [a director** OR **its secretary]**

* + - 1. ...........................................................................

[SIGNATURE OF DIRECTOR]

Director

* + - 1. ...........................................................................

[SIGNATURE OF DIRECTOR/SECRETARY]

[Director OR Secretary]

1. Statement of Requirements
2. Consultant's Tender
3. Charges and Payment Plan
4. Project Programme
5. Design Team

[*INSERT IF NOT LISTED IN CONSULTANT’S TENDER]*

1. Form of Collateral Warranty