



**Clackmannanshire  
Council**

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**Version 4 - October 2019**

**Clackmannanshire Council  
Standard Terms and Conditions  
Supply of Consultancy Services (Non Construction)**

## **Guidance Note to Users**

These terms and conditions should be selected where the purchasing officer is seeking offers for the supply of consultancy services (excluding construction). These terms and conditions should be used in un-amended form, unless otherwise approved by Legal Services and the Procurement Manager.

These conditions are not suitable for use for:

1. The purchase of other services;
2. The purchase of services where registration with the Care Inspectorate is required;
3. The purchase of IT services;
4. The supply and fit of goods in respect of or ancillary to a public works contract;
5. Any public works contract; or
6. Any services contract that would fall within the meaning of construction operations in terms of section 104 and 105 of the Housing Grants, Construction and Regeneration Act 1996.

In order to assist purchasing officers, a consultancy service is provided in relation to a specific piece of work or project which it is expected to have a defined completion date, whereas other services relate to services of an ongoing nature which are required as a result of the Council's statutory duties as a local authority. Should further guidance be required, the purchasing officer should contact Legal Services or the Procurement Manager in the first instance for further guidance.

This guidance note is for internal use by Clackmannanshire Council employees and does not form part of the Contract between the Consultant and the Council.

**Clackmannanshire Council  
Standard Terms and Conditions  
Supply of Consultancy Services**

These terms and conditions shall govern the relationship between the Council and the Consultant, and no other terms and conditions shall be accepted.

The selected terms and conditions will form the basis of any written signed contract between us, and will take precedence over any other conditions that you may propose.

No variation, replacement, alternative or substitute terms and conditions shall apply to the contract unless such terms are subscribed by the Clackmannanshire Council Procurement Manager.

This will be in accordance with section 3 of the Requirements of Writing (Scotland) Act 1995 and any attempt by the supplier to impose any alternative conditions (including the imposition of any clause superseding or constituting an entire agreement clause) shall be null and void and shall not be binding on the Council.

## **1. Definitions**

In these terms and conditions, unless otherwise stated, the following terms shall have the following meanings:

**"Award Letter"** means the formal acceptance letter signed by the proper officer of the Council accepting the Tender by the Consultant;

**"Commencement Date"** means the date specified in the Award Letter, failing which, the date falling 2 weeks after the Date of the Award letter issued by the Council to the Consultant, or such other date as the Council and the Consultant may agree in writing;

**"Community Benefit Provision"** means, without prejudice to the generality, the provision of paid or unpaid work placements, modern or vocational apprenticeships or training and educational training to persons within the local government area of the Council;

**"Completion Date"** means the date for completion of the Project by the Consultant, which date shall be set out in the Specification and/or Invitation to Tender, or failing which, set out in the Award Letter (which date may be extended by the agreement of the Council and the Consultant);

**"Consultant"** means the consultant selected by the Council following a response to the Invitation to Tender advertised by a Contract Notice in the Public Contracts Scotland Portal and being the entity set out in the Invitation to Tender and as identified in the Award Letter;

**"Contract"** means these terms and conditions and any supplementary conditions set out in the Invitation to Tender;

**"Contract Notice"** means the contract notice in respect of the proposed works published by the Council on the Public Contracts Scotland Portal;

**"Council"** means Clackmannanshire Council, a local authority constituted under section 2 of the Local Government etc (Scotland) Act 1994 and having its principal offices at Council Offices, Kilncraigs, Greenside Street, Alloa, FK10 1EB;

**"Disclosure"** means a criminal record certificate or enhanced criminal record certificate issued by Disclosure Scotland under Part V of the Police Act 1997

**"Disclosure Scotland"** means the agency of the Scottish Government that discharges the functions of Scottish Ministers under the Police Act 1997 and in particular provides Disclosures and manages the issue of information under the PVG Act

**"Interest Rate"** means a rate of 2% above the official dealing rate of the Bank of England current at the date that a payment due under this Contract becomes overdue;

**"Invitation to Tender"** means the invitation to tender either (i) sent out by the Council to the Consultant (and such other candidates) or (ii) downloaded from the Public Contracts Scotland Portal and completed by the Consultant, and in each case such invitation which includes the Specification;

**"Procurement Regulations"** means the Public Contracts (Scotland) Regulations 2015 - applied to Council contracts whose value is equal to or above the EC Procurement Threshold, Procurement Reform (Scotland) Act 2014 and the Procurement (Scotland) Regulations 2016 and any other legislation governing or regulating the purchase of goods, supplies and services by local authorities constituted under the Local Government etc (Scotland) Act 1994;

**"Public Contracts Scotland Portal"** means the national advertising portal maintained by the Scottish Government on behalf of (amongst others) the Council;

**"Public Holiday"** means Christmas Day, Good Friday, a day which under the Banking and Financial Dealings Act 1971 is a Bank Holiday in Scotland and any week day being a local holiday which the principal offices of the Council are closed for business to the public;

**"Purchase Order"** means the purchase order referred to and enclosed with the Award Letter (which sum specified therein represents the Council's maximum expenditure under the Contract and is not a guarantee of any orders for the Services);

**"Project"** means the project set out in the Specification and/or Invitation to Tender for which the Council has sought offers for the Services;

**"PVG Act"** means the Protection of Vulnerable Groups (Scotland) Act 2007

**"Regulated Work"** means regulated work as defined in Section 91 of the PVG Act

**"Services"** means the consultancy services set out in the Specification and the Invitation to Tender in respect of the Project;

**"Specification"** means the written description of the services to be supplied by the Consultant under the Contract as set out in the Invitation to Tender;

**"Tender"** means the formal offer to carry out the services by the Consultant to the Council in accordance with the requirements set out in the Invitation to Tender (and including any derogations as approved in accordance with clause 7.2);

## **2. The Services**

- 2.1 From the Commencement Date, the Consultant shall supply the Services to the Council. The Services shall be performed to the requirements set out in the Specification and shall be performed with the reasonable skill and care that would be expected of a competent professional professing to have knowledge in the area of expertise to which the Services relate., The Consultant shall perform the Services by the Completion Date.
- 2.2 The Council has made the Consultant aware of the Council's requirements in the Invitation to Tender, and the Council is relying on the skill, care and judgement of the Consultant in supplying the Services.
- 2.3 Notwithstanding the terms of clauses 2.1 and 2.2, the Consultant in supplying the Services shall comply with:
  - (a) all relevant Legislation;
  - (b) all applicable statutory consents;
  - (c) the applicable provisions of this Contract; and
  - (d) Good Industry Practice

## **3. The Price**

- 3.1 The price payable by the Council shall be the price set out in the Consultants Tender, as adjusted where necessary by the Award Letter (and where applicable the Purchase Order) and shall be payable in accordance with clauses 3.2 and 3.2A below. No increases in the price shall be permissible except in accordance with this Contract. The price submitted by the Consultant shall include all fees

costs and expenses (including travel) and no additional allowance shall be payable by the Council in this respect (except where otherwise specified in the Invitation to Tender).

3.2 The Consultant shall invoice the Council on or after the Services have been delivered to the Council in accordance with clause 4.1 (subject to the provisions of clause 4.2), setting out the price for the Services as set out in the Tender. All invoices must quote the Purchase Order number. The Council reserves the right to reject or withhold payment where the Consultant fails to comply with the terms of this clause (without any compensation being payable to the Consultant).

3.2A Where the Project is likely to exceed two calendar months from the Commencement Date until Completion Date, the Council may authorise the payment of the Consultant in stage payments or on an interim basis. The Consultant and the Council shall agree any stage payment schedule prior to commencement of any work on the Project, save where such a proposal is made by the Consultant in their Tender and subsequently accepted by the Council in the Award Letter. Where this occurs, the Council shall make payment in accordance with those arrangements, subject to satisfactory performance by the Consultants of their obligations under this Contract. At no time shall the Consultant be entitled to payment in advance under this Contract.

3.3 Where the Consultant is VAT registered, the invoice must comply with the requirements of the Value Added Tax Act 1994 (as amended or as may be replaced with such similar tax).

3.4 The Contractor shall be required to provide a minimum of twenty eight (28) days written notice of any proposed increase in price and shall be required to submit documentary evidence to support any proposed increase to the satisfaction of the Council's Procurement Manager.

–The proposed increase shall not be applied until the Council is satisfied as to the validity of such increase and the Council shall have the right to call for any further information required to enable substantiation of such increase. The Council shall only be obliged to consider any proposed increase if it arises from a general rise in the market in the cost of raw materials or the cost of delivery due to circumstances outwith the contractor's control and which were not reasonably foreseeable at the time of the Tender Response.

If the proposed increase is deemed by the Council to be uncompetitive/unacceptable the Council may remove the Article, Goods, Material or related Service to which the increase is to be applied from the Contract and source such Article, Goods, Material or related Service from another supplier/contractor.

#### **4. Delivery and Performance**

- 4.1 The Services shall be delivered to or performed at the place specified within the Specification, or failing which the Award Letter. If neither is specified, the Services shall be delivered to or performed at such address and at such intervals as is specified in writing by the Council to the Consultant.
- 4.2 If requested by the Council, or required by the terms of the Invitation to Tender, the Consultant shall be entitled to attend and inspect the premises where the Services are to be delivered at. The Consultant shall be deemed to have satisfied in relation to all matters regarding the delivery of the Service at the premises and in accordance with the Specification.
- 4.3 The time of performance of the Services shall be of the essence and failure to perform the Services by the Completion Date, or any milestone dates set out in this Contract shall amount to a material breach of contract. Such failure shall entitle the Council to terminate the contract without compensation (or payment or acceptance of the Services being required) being payable to the Consultant, and such right is without prejudice to any other such remedy as the Council may have under this Contract.
- 4.4 Subject always to the terms of clause 5, the Consultant may not subcontract its interests and/or obligations under the Contract to any other person without the prior consent in writing of the Council which consent shall not be unreasonably withheld. Such consent shall not be required where the Consultant has stated their intention to subcontract part or all of the Contract in the Tender.
- 4.5 Where there is agreement to sub-contract any part of the performance of the Consultants obligations, the Consultant shall be responsible for the acts and/or omissions of their sub-contractors as though they were their own and shall ensure that the terms of the Contract are reflected mutatis mutandis to any sub contractor.
- 4.6 Subject to the provisions of clause 4.7, neither party may assign its interests and/or obligations under the Contract to any other person without the prior consent in writing of the other party, which consent shall not be unreasonably withheld.
- 4.7 The Council shall be free to assign its interests and/or obligations under the Contract without the consent of the Consultant to any other local authority constituted in terms of the Local Government etc (Scotland) Act 1994, providing that the Council gives the Consultant not less than 7 days written notice of its intention to do so.
- 4.8 The Consultant represents and warrants to the Council that the Consultant has satisfied himself that all necessary tests, inspections

and examinations have been made or will be made prior to performance of the Services to ensure that the Services are so as to be performed safely and without risk to the health or safety of persons using or receiving the same, and that the Consultant has made available to the Council adequate information about the use for which the Services have been designed (or will be performed) and have been tested and about any conditions necessary to ensure that when put to use the Services will be safe and without risk to health.

- 4.9 With prejudice to the generality of clause 4.8 hereof, the Consultant shall indemnify the Council against all actions, suits, claims, demands, losses, charges, costs and expenses which the Council may suffer or incur as a result of or in connection with any breach of this clause 4.8.

#### **4A. Health & Safety**

- 4A.1 The Consultant operates appropriate health and safety policies and must perform the contract in accordance with all current health and safety legislation. If requested by the Council, the Consultant provides the Council with a copy of his current health and safety policy statement.
- 4A.2 The Council must be notified immediately by the Consultant of any risks to health or safety which are identified or arise during the performance of the Contract.
- 4A.3 While on the Council's premises, the Consultant shall comply at all times with any health and safety measures implemented by the Council in respect of the premises and notifies the Council immediately of any incident occurring while the Consultant is on the premises which causes or is likely to cause any personal injury or damage to property.
- 4A.4 If work is to be carried out at the Council's premises, the Council will notify the Consultant of any health and safety hazards which may exist or arise at the premises and which may affect the Consultant in the performance of his duties under this contract.

#### **5. Consultants Personnel**

- 5.1 Where it stated within the Specification and/or Invitation to Tender, or the Consultant has stated within their Tender that a particular individual or individuals will perform the Services, the Consultant shall be expressly prohibited from delivering the Services utilising any other individual, save with the consent of the Council (such consent which the Council may give at its absolute discretion).



- 5.2 Failure to make available the personnel in accordance with clause 5.1 shall constitute a material breach of the Contract and shall entitle the Council to terminate the Contract on giving immediate written notice to the Supplier. Notwithstanding this clause 5.2, the Consultant may propose another suitably qualified person or persons to deliver the Service, although acceptance of such proposed alternate is entirely at the discretion of the Council.
- 5.3 Prior to commencement of the Project and if and when instructed by the Council, the Consultant shall give to the Council a list of names and contact details of all persons who are or may be at any time concerned with the Services or any part of them, specifying the capacities in which they are so concerned with the Project, and giving such other particulars and evidence of identity and other supporting evidence as the Council may reasonably require.
- 5.4 The decision of the Council as to whether any person is to be admitted to or is to be removed from the any premises or is not to become involved in or is to be removed from involvement in the performance of the Contract and as to whether the Consultant has furnished the information or taken the steps required of him by this clause shall be final and conclusive.
- 5.5 The Supplier shall bear the cost of any notice, instruction or decision of the Council under this Clause, with such cost being a debt payable on immediate written demand by the Council to the Supplier.

#### **5A. No Agency**

- 5A.1 In carrying out the Services the Consultant shall be acting as a principal on their own account and at no times as the agent of the Council. Accordingly:
- (a) Except where as expressly authorised in writing by the Council's proper officer set out in clause 7, the Consultant shall not (and shall procure that any person to whom they are legally responsible for) say or do anything that might lead any third party to believe that the Consultant is acting as the agent of the Council, and
  - (b) Nothing in this Contract shall impose any liability on the Council in respect of any liability incurred by the Consultant to any other person but this shall not be taken to exclude or limit any liability of the Council to the Consultant that may arise by virtue of either a breach of this Contract or any negligence on the part of the Council or any person that the Council is legally responsible for.

#### **5B. Free Issue Materials**

- 5B. Where the Council for the purpose of the Contract issues materials free of charge to the Consultant such materials shall be and remain the property of the Council. The Consultant shall maintain all such materials in good order and condition and shall use such materials solely in connection with the Contract. The Consultant shall notify the Council of any surplus materials remaining after completion of the Services and shall dispose of them as the Council may direct. Waste of such materials arising from bad workmanship or negligence of the Consultant or any person whom the Consultant is legally responsible for shall be made good at the Consultant's expense. Without prejudice to any other of the rights of the Council, the Consultant shall deliver up such materials whether processed or not to the Council on demand.

## **6. Licences and Copyright**

- 6.1 The copyright in all drawings, reports, specifications, bills of quantities, calculations and other documents, data and information prepared or used by or on behalf of the Consultant in connection with the Contract for delivery to the Council of the Services remains vested in the Consultant, but the Council shall have an irrevocable, perpetual, royalty free, non-exclusive licence to copy and use such drawings and other documents, data and information for any purpose related to the Services, including without prejudice to the foregoing generality, contract administration and the supervision, maintenance, repair, renewal or alteration of any parts of the Services. This clause shall survive the completion or termination of the Contract.
- 6.2 The Consultant agrees to waive any right to be identified as author of material provided by the Consultant in accordance with Section 77 of the Copyright Designs and Patent Acts 1988 and any right not to have material provided by the Consultant subjected to derogatory treatment in accordance with Section 80 of that Act as against the Council or any licensee or assignee of the Council.

## **7. Variations - Contract Terms**

- 7.1 No variations to these contract terms shall be accepted by the Council except where the variation procedure detailed in this clause 7 has been complied with.
- 7.2 Any request for variations or alterations to these terms and conditions must be sent in writing to (i) the Governance Manager, Council Offices, Kilncraigs, Greenside Street, Alloa, FK10 1EB; (ii) by enclosing a Schedule of Derogations with the Tender; or (iii) by email to: [procurement@clacks.gov.uk](mailto:procurement@clacks.gov.uk). Providing that the Consultant provides a

copy of the proposed variation(s) or replacement terms, the Governance Manager will consider any such request and will advise the Consultant accordingly.

- 7.3 No variation, replacement, alternative or substitute terms and conditions shall apply to the contract unless such terms are subscribed by the Governance Manager and in accordance with section 3 of the Requirements of Writing (Scotland) Act 1995 and any attempt by the Consultant to impose any alternative conditions (including the imposition of any clause superseding or constituting an entire agreement clause) shall be null and void and shall not be binding on the Council.

## **8. Variations - Specification**

- 8.1 The Council shall be entitled to add or remove additional Services from the scope of the Contract.
- 8.2 The Services are priced within the Tender and are a fixed price in respect of the Project. Where the Council requires any additional Services, these shall be delivered at no greater cost than is specified for such item(s) in the Consultants Tender. Where the Services to be supplied are reduced in number or duration then the applicable deduction shall be made from the final price payable (either by agreement or failing which on a pro-rata basis), and with no additional or other compensation being payable by the Council.
- 8.3 Where the additional Services requested by the Council be are not described in the Specification, but are ancillary to the requirements of the Specification, the Council may issue a request for quotation for such additional Services to the Consultant.
- 8.4 The Consultant shall within 14 days (or such other period as may be agreed) provide the quotation for the additional Services. The Council may either accept the quotation or determine not to proceed with the order for the additional Services.
- 8.5 Where the Council accepts the quotation, the additional Services shall be provided to the Council by the Consultant in accordance with the Contract. If the Council rejects the quotation, no compensation shall be payable to the Consultant.
- 8.6 The Council shall not be required to make payment for any additional Services supplied in accordance with clauses 8.3 to clauses 8.5, except where (i) this clause has been complied with by the Consultant; or (ii) the Council and the Consultant have complied with the terms of clause 8.7 and 8.8 below.
- 8.7 If it is agreed in writing between the parties, or exceptional and unforeseen circumstances require additional Services to be purchased

on a Time Charge basis, then payment is made based on the actual staff time spent rounded to the nearest 0.25 hours. The Time Charge does not include normal travel time to and from the place where the Consultant's staff are based for the contract. If travel time to and from the place where the Consultant's staff are to be based for the contract is exceptional, the Consultant and the Council agree in advance whether any exceptional travel time is included in the Time Charge. It is the Consultant's responsibility to identify and raise any exceptional travel time and expenses in advance with the Council, failing which the Council is not liable to reimburse any additional time .

8.8 The Consultant must provide a detailed breakdown for any staff doing work on a Time Charge basis on a weekly basis. Each timesheet must include as a minimum:

- staff name and designation;
- task or project, and associated activities worked on,
- date(s) on which the work was undertaken,
- number of hours spent on the task or project, to the nearest 0.25 of an hour, and
- details of travel time and expenses for authorised journeys (subject to the terms of clause 8.7).

## **9. Termination of the Contract**

9.1 Without prejudice to any other rights or remedies of the Council under the Contract the Council shall have the right forthwith to terminate the Contract by written notice to the Consultant or the appropriate trustee in bankruptcy or sequestration, receiver, liquidator or administrator:

- (a) where the Consultant is an individual and if a petition is presented for the Consultant's bankruptcy or the sequestration of his estate or a criminal bankruptcy order is made against the Consultant, or he is apparently insolvent, or he makes any composition or arrangement with or for the benefit of creditors, or makes any conveyance or assignment for the benefit of creditors, or if an administrator or trustee is appointed to manage his affairs; or
- (b) where the Consultant is not an individual but is a firm or a number of persons acting together in any capacity, if any event in (a) or (c) of this Condition occurs in respect of the firm or any partner in the firm or any of those persons or a petition is presented for the Consultant to be wound up as an unregistered company; or

- (c) where the Consultant is a company, if the company passes a resolution for winding-up or dissolution (otherwise than for the purposes of and followed by a solvent amalgamation or reconstruction) or the court makes an administration order or a winding-up order, or the company makes a composition or arrangement with its creditors, or an administrator, administrative receiver, receiver or manager is appointed by a creditor or by the court, or possession is taken of any of its property under the terms of a floating charge.
- 9.2 The Council may terminate the Contract where the Consultant is in material breach of any of the terms of this Contract. Where such a term is not specified as such, the Council may by immediate written notice notify the Consultant that they are in material breach of Contract, and give the Consultant a period of not less than 14 days (or such longer period as the Council may determine) to rectify the material breaches set out in the notice.
- 9.2A The Council shall be entitled to terminate the Contract on giving the Consultant not less than 14 days written notice to this effect. In the event of such termination, the Consultant shall, if required to do so by the Council, prepare and submit to the Council a report on the work done prior to the termination and making such recommendations as may be based on the work done prior to termination.
- 9.3 The Council shall be entitled by notice to the Consultant to terminate the Contract, any other contract with the Council if, in relation to this or any other such contract, the Consultant or any person employed by him, or acting on his behalf shall have:
- (i) Committed an offence under the Bribery Act 2010; or
  - (ii) Shall have given any fee or reward the receipt of which is an offence under section 66 of the Local Government (Scotland) Act 1973 or any re-enactment thereof; or
  - (iii) Committed any breach of the Employment Relations 1999 Act (Blacklists Regulations) 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992; or
  - (iv) Committed any breach of the Data Protection Act 2018 by unlawful processing of personal data in connection with any blacklisting activities described at (iii) above.
- 9.4 In the event that the Council receives notification by an economic operator (within the meaning of the Procurement Regulations) that they intend to challenge the award of this Contract by the Council to the Consultant, the Council may on giving immediate written notice to the Consultant, either (i) suspend the operation of the Contract; or (ii) terminate the Contract in its entirety.

- 9.5 In the event of termination or suspension pursuant to this section 9.4, no compensation, damages or other monetary payment shall be due by the Council to the Consultant.
- 9.6 The right of the Council to terminate or suspend the Contract in accordance with sections 9.4 and 9.5 shall expire on the date occurring 4 months from the publication by the Council of a contract award notice in the Public Contracts Scotland Portal.
- 9.7 In the event that the Council does not exercise its rights under clauses 9.1 to 9.6, this Contract (subject to the any of the parties accrued rights herein) shall terminate on the Completion Date.
- 9.8 The Consultant will return to the Council promptly upon the termination of the Contract any document, paper, material or information supplied by or obtained from the Council (or where applicable any Government Department) in connection with the Contract, or extracted from such documents, papers, materials or information.
- 9.9 Where the Contract has been terminated pursuant to clause 9.2A, the Consultant may retain any documents papers, materials or information which shall be required by him to prepare any report required to comply with the Consultants obligations under this Contract. Promptly upon submission of the report to the Client, the Consultant will return any documents, papers, materials or information which he may have retained in terms of this clause 9.9.

## **9A. Insurance and Indemnity**

- 9A.1 Without prejudice to any rights or remedies of the Council under the Contract, the Consultant shall indemnify the Council, its officers, employees, agents and other contractors against all actions, suits, claims, demands, losses, charges, costs and expenses which the Council may suffer or incur as a result of or in connection with any damage to property or in respect of any injury (whether fatal or otherwise) to any person which may result directly or indirectly from any negligent or wrongful act or omission of the Consultant.
- 9A.2 Except in the case of loss, damage or personal injury (including death) suffered by an employee of the Consultant (in respect of which the indemnity in clause 9A.1 shall apply whether or not the loss, damage or personal injury was caused by the negligent or wilful act or omission of the Council, its officers, employees, agents and other contractors.) the indemnity contained in clause 9A.1 shall not apply to the extent that the loss, damage or injury is caused by the negligent or wilful act or omission of the Council or any person for whom the Council is legally responsible for.
- 9A.3 The Consultant shall have in force and shall require any sub-contractor to have in force:
- (a) Employer's liability insurance in accordance with any legal requirements for the time being in force;
  - (b) Public liability insurance for such sum and range of cover as the Consultant deems to be appropriate but covering at least all matters which are the subject of indemnities or compensation obligations under this Contract in the sum of not less than £5 million for any one incident and unlimited in total, unless otherwise agreed by the Council in writing; and
  - (c) where stated in the Invitation to Tender, the Specification or by the Council, the requisite level of professional indemnity insurance and/or medical malpractice insurance as may be required by the Council.
- 9A.4 The policy or policies of insurance referred to in clause 9A.3 shall be shown to the Council whenever he requests, together with satisfactory evidence of payment of premiums.

## **10. Governing Law and Jurisdiction**

- 10.1 This Contract shall be considered as a contract made in Scotland and shall be subject to the Laws of Scotland.

- 10.2 The Consultant and the Council agree that the courts of Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Contract and irrevocably submit to the jurisdiction of those courts.

## **11. Notices**

Any notice given under or pursuant to the Contract may be sent by hand or by post or by registered post or by the recorded delivery and if so sent to the address of the party shown on the Purchase Order, or to such other address as the party may by notice to the other have substituted therefor, shall be deemed effectively given on the day when in the ordinary course of the means of transmission it would first be received by the addressee in normal business hours, or in the case of the Council, in accordance with the relevant provisions of the Local Government (Scotland) Act 1973. All notices to be served on the Council must be served on the Governance Manager, Clackmannanshire Council, Kilncraigs, Greenside Street, Alloa, FK10 1EB

## **12. Severability**

If any provision of this Contract shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Contract.

## **13. Third Party Rights**

Save to the extent expressly provided in this Contract and, to avoid doubt, without prejudice to the rights of any permitted successor to the rights of the Supplier or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Contract upon any person other than the Council and the Consultant and without prejudice to the generality of the foregoing, there shall not be created by this Contract a *jus quaesitum tertio* in favour of any person whatsoever.

## **14. Limitation of Liability**

- 14.1 Nothing in this Contract shall exclude or limit liability of the Council or the Consultant in respect of any death or personal injury to any party caused by the negligence of that party.
- 14.2 in respect of any sanctions or fines imposed due to the breach or breaches of the Data Protection Act 2018 by the Information Commissioners Office (including those set out in clause 9(3)(iv)), £500,000 on an each and every occurrence basis;
- 14.3 in respect of any losses, damage or destruction caused by the default of the Consultant under this Agreement (including for the avoidance of



any doubt, professional negligence or medical malpractice) for which there is a requirement to have such a policy of insurance in place, the sum specified in clause 9A.3(a), (b) or (c), the Specification, Invitation to Tender or such other document which states the requisite insurance level; or

- 14.4 in respect of any losses, damage or destruction caused by the default of the Council under this Agreement for which the Council is required by law to have in place a policy of insurance, the sum of £1million pounds sterling (or such higher sum that (i) the Council may notify in writing to the Consultant, or (ii) is required to hold by law); or
- 14.5 Except in respect of any claims under the indemnities set out in clause 18 of the Contract, in respect of any other losses howsoever arising as a result of that party's breach of contract, the total amount payable under the Contract (as set out in clause 3.1 above)
- 14.6 Notwithstanding the above provisions, nothing in this clause shall allow for the Consultant to claim for any special or indirect, consequential or indirect losses, loss of profit, turnover, additional business or damage to goodwill.
- 14.7 Nothing in this clause 14 shall affect the parties general duty to mitigate any losses incurred.

#### **14A. Protection of Vulnerable Groups**

- 14A.1 The Consultant ensures throughout the duration of the contract that any person employed by him or acting on his behalf is suitable to provide the Services given the nature of any third parties with whom there may be some contact in the normal performance of the contract. The Council may instruct the Consultant to remove from premises any individual employed by the Consultant or acting on his behalf where the Council deems the individual not to be suitable and on receipt of such instruction the Consultant will remove such individual from premises forthwith.
- 14A.2 Where services are Regulated Work the Consultant and any person employed by him or acting on his behalf ensures compliance with all of the relevant requirements of the PVG Act, including the establishment of and adherence to effective procedures in respect of the Consultant and any person employed by him or acting on his behalf.
- 14A.3 Where services require the Consultant or any person employed by him or acting on his behalf to have been Disclosure checked then the Consultant shall, obtain the appropriate level of Disclosure directly from Disclosure Scotland.

## **14B. Audit**

The Consultant keeps and maintains until seven (7) years after the Completion Date or earlier termination, or as long a period of retention as may be set out in the Specification, full and accurate records of the contract including the services supplied under it, all expenditure reimbursed by the Council and all payments made by the Council. The Consultant, on request, affords the Council or the Council's representatives such access to those records as may be requested by the Council in connection with the contract.

## **15. Freedom of Information & Data Protection**

- 15.1 Where the Consultant processes (or will process) or controls (or will control) personal data it hereby confirms that it has (or will acquire) a valid notification with the Information Commissioner as defined by section 6 of the Data Protection Act 2018 covering its processing of personal data, including in that notification the disclosure of personal data to the Council. This requirement shall not apply if the Consultant is, by virtue of the Data Protection (Notification and Notification Fees) Regulations 2000, exempt from the requirement to notify.
- 15.2 The Consultant hereby warrants:
- (i) that the processing and/or controlling of any information will be subject to technical and organisational security measures of a sort, which if the Consultant were the data controller in respect of the Resident Information, would satisfy the Seventh Data Protection Principle;
  - (ii) that it will take reasonable steps to ensure compliance with the measures described in Clause 15.2(i) above;
  - (iii) that it will process the Resident Information only in accordance with instructions from the Council and the terms of the Contract; and
  - (iv) that it will comply with all obligations imposed by the Seventh Data Protection Principle as though the Consultant were the data controller in respect of the Resident Information.
- 15.3 In the Contract the expressions "personal data", "data controller", "data processor", "processing" and "process" shall have the meanings assigned to them by the Data Protection Act 2018, and the "Seventh Data Protection Principle" shall mean the Seventh Principle set out in Part 1 of Schedule 1 to that Act.
- 15.4 The Consultant shall not be required to pass any information to the Council if in doing so would cause the Consultant to breach the terms of the Data Protection Act 2018. The Consultant must supply detailed reasons in terms of the said Act in support of such an assertion within a reasonable timescale specified by the Council.
- 15.5 the Consultant shall be prohibited from undertaking any secondary

processing or from passing to any third party or utilising any storage medium or processing outside the bounds of the United Kingdom, without the express written consent of the Council.

- 15.6 At the end of the Contract, the obligations contained in this clause 15 shall continue in full force and effect (notwithstanding the event of earlier termination of the Contract in accordance with its terms) until all personal data that has been passed to the Consultant by the Council as part of the Contract has been destroyed.
- 15.7 The Consultant shall indemnify the Council in respect of any claims, losses, fines, damages or other such liability howsoever arising in respect of the Consultants breach of this clause 15.
- 15.8 The Consultant acknowledges the Council's obligations under the Freedom of Information (Scotland) Act 2002 ("the 2002 Act") and acknowledges in particular that the Council may be required to provide information relating to the Contract or the Consultant to any person on request in order to comply with the 2002 Act. The Council will presume the information submitted by the Consultant to the Council is not commercially sensitive unless specifically drawn to the Council's attention. The Council must act in accordance with the 2002 Act but in deciding whether to release any information in response to a request for information shall where practicable take into account any opinion of the Consultant as regards commercial confidentiality and, in particular, any reasons given to support such exemption
- 15.9 Where the Council seeks to consult the Consultant in connection with a request for information made under the 2002 Act the Consultant will facilitate the Council's compliance with the 2002 Act by consulting timeously with the Council.
- 15.10 The Consultant shall keep secret and not disclose (and shall procure that his employees, agents, sub-contractors or any party that the Consultant is legally responsible for, keep secret and not disclose) any information of a confidential nature obtained by the Consultant by reason of the Contract, except information which is in the public domain otherwise than by reason of a breach of this Clause.

## **16. Unlawful Discrimination**

- 16.1 The Consultant shall not discriminate directly or indirectly, or by way of victimisation or harassment, against any person on grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation contrary to the Equality Act 2010 (the "Act").
- 16.2 The Consultant shall monitor its own staff and sub-contractors and provide such information on request to the Council. The Consultant shall provide such information as the Council requires about its policies

and practices concerning the prevention of unlawful discrimination and the promotion of equality and diversity and equality both in terms of employment and customer service. The Council and the Consultant shall continue to monitor the performance and objectives of the Contract throughout the duration of the Contract and to make any amendments or changes necessary to the Contract or its performance or objectives in order further to promote equality.

16.3 The Consultant shall notify the Council immediately in writing as soon as it becomes aware of any investigation or proceedings brought against the Consultant under the Act.

16.4 Where any investigation is undertaken by a person or body empowered to conduct such an investigation and/or proceedings are instituted following such an investigation against the Consultant or against the Council either in connection with the performance of the Contract or otherwise, the Consultant shall at its own expense:

- i) provide any information requested in the timescale allotted;
- ii) attend any meetings as required and permit its staff and sub-contractors to attend any meetings as required;
- iii) promptly allow access to and investigation of any documents or data deemed to be relevant to the investigation;
- iv) allow itself and any of its Staff and sub-contractors to appear as witnesses in any proceedings; and
- v) co-operate fully and promptly with the person or body conducting the investigation during the course of the investigation.

16.5 Where any investigation is conducted, or proceedings are brought which arise directly or indirectly out of any act or omission of the Consultant, its Staff or sub-contractors and where there is a finding against the Consultant in any such investigation or proceedings, the Consultant shall, without prejudice to indemnify the Council with respect proceedings, costs, expenses (including legal and administrative expenses), liabilities, injury, loss or damages arising from or incurred by the Council during or in connection with any such investigation or proceedings and further indemnify the Council for any compensation, loss or damages, costs, expenses (including legal and administrative expenses) or other award the Council may be ordered or required to pay to a third party.

16.6 If a finding of unlawful discrimination or breach of equality and diversity legislation is made against the Consultant or against the Council arising from the conduct of the Consultant, the Consultant shall take such immediate remedial steps, as the Council may reasonably require, to prevent any further unlawful discrimination or breaches of equality and diversity legislation.

16.7 If the Consultant enters into any sub-contract in connection with this Contract, the Consultant shall impose obligations on its sub-contractors

terms which are identical to those imposed on it in this clause 16. The Council expects that the Consultant will not subcontract to any business, service or group which has a poor history of discrimination in employment or service delivery.

- 16.8 In recognition of the Council's legal obligation to tackle discrimination and promote equalities and diversity in all its functions and policies under the Act, the Council may from time to time require the Consultant complete a questionnaire and/or provide information to the Council on the extent and quality of the Consultant's equalities and diversity policies and practice.

### **17. Entire Agreement**

Except where expressly provided otherwise in this Contract, this Contract constitutes the entire agreement between the Council and the Consultant in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

### **18. Waiver**

- 18.1 Any relaxation, forbearance, indulgence or delay (together "indulgence") of any party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right (whether against that party or any other person).
- 18.2 Notwithstanding any breach of this Contract by either party, and without prejudice to any other rights which the party may have in relation to it, the other party may elect to continue to treat this Contract as being in full force and effect and to enforce its rights under this Contract. The failure of any party to exercise any right under this Contract, including any right to terminate this Contract and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

### **19. Set Off and Retention of Sums Due**

- 19.1 Wherever under the Contract any sum of money is recoverable from or payable by the Consultant, that sum may be deducted from any sum then due, or which at any later time may become due, to the Consultant under the Contract or under any other agreement or contract with the Council or with any department, agency or authority of the Council.
- 19.2 Without prejudice to the terms of clause 19.1 above, where the Consultant has offered within the Tender to provide Community Benefit Provision to the Council (pursuant to the Council's statutory powers under the Local Government in Scotland Act 2003), the

Consultant shall be obliged to deliver the Community Benefit Provision in accordance with the Tender and any further requirements of the Council and at no cost to the Council as more particularly specified in the Specification and Invitation to Tender.

- 19.3 In the event that the Consultant fails to provide the Community Benefit Provision in accordance with clause 19, the Council reserves the right, on giving the Consultant not less than 7 days written notice, to either (i) provide the Community Benefit Provision directly; or (ii) employ others to carry out the Community Benefit Provision.
- 19.4 The Consultant shall be liable for all additional costs incurred by the Council in connection with such employment and such costs may be withheld or deducted by the Council from any monies due or to become due to the Consultant under this Contract or shall be recoverable from the Consultant as a debt.

## **20. Payment**

- 20.1 Unless otherwise stated in the Contract, payment will be made within 30 days of receipt of and agreement of invoices, submitted monthly in arrears, for work completed to the satisfaction of the Purchaser.
- 20.2 Value Added Tax, where applicable, shall be shown separately on all invoices as a strictly net extra charge