

CONDITIONS OF CONTRACT

EAST LoTHIAN COUNCIL CONDITIONS OF CONTRACT FOR THE PURCHASE OF GOODS AND ASSOCIATED SERVICES

These Conditions may only be varied with the written agreement of the Council. No terms or conditions put forward at any time by the Supplier shall form any part of the Contract unless specifically agreed in writing by the Council.

1. CONDITIONS

In these Conditions:

'*Council*' means East Lothian Council;

'*Supplier*' means the person, firm or company with whom the Council has contracted for the supply of the Goods;

'*Goods*' means all goods as are to be supplied to the Council by the Supplier (or by any of the Supplier's sub-contracted suppliers) pursuant to or in connection with this Contract together with any associated or ancillary services relative thereto;

'*Contract*' means the contract between the Council and Supplier consisting of the Council's Invitation to Tender, the Supplier's Tender, any clarifications agreed in writing between the parties and the Council's letter of acceptance thereof together with any documents referred to in them, including the Specification and these conditions and any Schedules annexed;

'*Contract Period*' means the period specified in the Invitation to Tender, subject to early termination in terms hereof or any extension in terms of Condition 2.4, below;

'*Purchase Order*' means instruction from the Council to the Supplier for the supply of Goods;

'*Premises*' means the location where the Goods are to be delivered.

2. THE GOODS

- 2.1 The Goods shall conform in all respects with the particulars specified in the Contract and shall be to the reasonable satisfaction of the Council.
- 2.2 The Goods shall conform in all respects with the requirements of any relevant statutes, orders, regulations or bye-laws currently in force.
- 2.3 The Goods shall be fit and sufficient for the purpose for which such goods are ordinarily used and for any particular purpose made known to the Supplier by the Council in the Invitation to Tender or otherwise and the Council relies on the skill and judgement of the Supplier in the supply of the Goods and the execution of the Contract.

2.4 The Supplier shall supply the Goods for the Contract Period unless this Contract is terminated earlier in accordance with any of its terms. In the event that the Council elects to extend the Contract Period, it may do so by serving written notice to that effect upon the Service Provider no less than three months prior to the expiry of the initial Contract Period. The Council may extend the Contract Period on no more than two occasions.

3. THE PRICE

3.1 The price of the Goods shall be as stated in the Contract and no increase will be accepted by the Council unless agreed in writing. In the event that the Supplier considers an increase in price is appropriate, he shall provide written explanation of the reasons for such an increase and the Council shall, at its sole discretion, advise whether or not it is prepared to agree to such an increase. Unless and until the Council agrees to an increase in writing, the Supplier shall continue to provide the Goods at the price originally agreed in terms of this Contract.

3.2 Unless otherwise agreed in writing by the Council, the Supplier shall render invoices only on receipt of all Goods received as detailed on individual purchase orders. Payment shall be due 30 days after receipt of the Goods or the correct invoice, whichever is the later.

3.3 Value Added Tax, where applicable, shall be shown separately on all invoices as a strictly net extra charge.

4. CHANGE TO CONTRACT REQUIREMENTS

4.1 The Council may order any variation to any quantity or specification of Goods that for any other reason shall in its opinion be desirable. Any such variation may include (but shall not be restricted to) additions, omissions, alterations, substitutions to the Goods and changes in quality, form, character, kind, timing, method or sequence of the delivery of Goods.

4.2 Save as otherwise provided herein, no variation of the specification of Goods as provided for in Condition 4.1 hereof shall be valid unless given or confirmed in the form of an order given by the Council. All such orders shall be given in writing provided that if for any reason the Council shall find it necessary to give any such order orally in the first instance the Supplier shall comply with such oral order which must be confirmed in writing by the Council within 2 working days of the giving of such oral order by the Council, failing which the variation made by such oral order shall cease to have effect on the expiry of the said 2 working day period.

4.3 Where any such change in quality or specifications of Goods made in accordance with Conditions 4.1 and 4.2 has affected or may affect the costs incurred by the Supplier delivering the Goods, the Supplier will notify the Council in writing of the effect which it has had or may have on the said costs and such notification shall be considered by the Council, who shall take all of the facts into account (including such information as may be provided by the Supplier in respect of the effect which such variation has had or may have on the costs incurred by the Supplier in providing the Goods) and may authorise such alteration to the sums to be paid to the Supplier in accordance with the provisions of the Contract as are, in its opinion, appropriate and reasonable in the circumstances.

4.4 The Public Contracts (Scotland) Regulations 2015 make provision in Regulation 72 for the modification of contracts or frameworks during their term, and Suppliers should be aware that the Council has recourse to this legislation.

5. INSPECTION OF PREMISES

5.1 The Supplier is deemed to have inspected the Premises before tendering and satisfied himself in relation to all matters connected with the supply of the Goods.

5.2 The Council shall, at the request of the Supplier, grant such access as may be reasonable for this purpose.

5.3 Unless otherwise specified, the Supplier shall provide all plant, tools, material, labour, haulage and any other things necessary to complete the Contract.

6. SUPPLIER'S STATUS

In carrying out the Contract the Supplier shall be acting as principal and not as the agent of the Council. Accordingly:

- (a) the Supplier shall not (and shall procure that his agents, employees and sub-contractors do not) say or do anything that might lead any other person to believe that the Supplier 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 Supplier to any other person but this shall not be taken to exclude or limit any liability of the Council to the Supplier that may arise by virtue of either a breach of this Contract or any negligence on the part of the Council, its agents or employees.

7. SUPPLIER'S PERSONNEL

7.1 The Supplier shall take the steps reasonably required by the Council to prevent unauthorised persons being admitted to the Premises. If the Council gives the Supplier notice that any person is not to be admitted to or is to be removed from the Premises or is not to become involved in or is to be removed from involvement in the performance of the Contract, the Supplier shall take all necessary steps to comply with such notice and, if required by the Council, the Supplier shall replace any person removed under this Condition with another suitably qualified person and procure that any security pass issued to the person removed is surrendered. The giving of such notice by the Council to the Supplier as aforesaid shall not entitle the Supplier to delay, suspend, terminate or withhold the performance of any of its obligation in terms of the Contract and it shall remain bound to timeously implement its obligations in full, whether or not it complies with the terms of the said notice or otherwise.

7.2 If and when instructed by the Council, the Supplier shall give to the Council a list of names and addresses of all persons who are or may be at any time concerned with the Contract specifying the capacities in which they are so concerned, and giving such other particulars and evidence of identity and other supporting evidence as the Council may reasonably require.

7.3 The decision of the Council as to whether any person is to be admitted to or is to be removed from the 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 Supplier has furnished the information or taken the steps required of him by this Condition shall be final and conclusive.

7.4 The Supplier shall bear the cost of implementing any notice, instruction or decision of the Council under this Condition 7.

8. DELIVERY

8.1 The Supplier shall make no delivery of Goods, materials, or other things, nor commence any work on the Premises without obtaining the Council's prior consent. The Supplier shall make delivery at a time agreed between the Supplier and Council.

8.2 The Goods shall be delivered to the place named in the Contract. Any access to premises and any labour and equipment that may be provided by the Council in connection with delivery shall be provided without acceptance by the Council of any liability whatsoever and the Supplier shall **indemnify** the Council in respect of any 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 or injury (whether fatal or otherwise) occurring in the course of delivery to the extent that any such damage or injury is attributable to any act, omission or negligence of the Supplier or any of his employees, agents or sub-contractors.

8.3 The time of delivery shall be of the essence and failure to deliver within the time promised or specified shall enable the Council (at its option) to release itself from any obligation to accept and pay for the Goods and/or to cancel all or part of this Contract, in either case without prejudice to its other rights and remedies.

9. ACCESS

9.1 Where any access to the Premises is necessary in connection with delivery of the Goods, the Supplier shall at all times comply with the reasonable requirements of the Council.

9.2 Access to the Premises shall not be exclusive to the Supplier but only such as shall enable him to carry out the Contract. The Supplier shall co-operate with such other parties as the Council may reasonably require.

9.3 The Council shall have the power at any time to order in writing:

(a) the removal from the Premises of any Goods and/or materials which in the opinion of the Council are either hazardous, noxious or not in accordance with the Contract;

(b) the substitution of proper and suitable Goods and/or materials.

The Supplier shall comply forthwith with the terms of any such order.

10. PROPERTY AND RISK

Property and risk in the Goods shall, without prejudice to any of the rights or remedies of the Council (including the Council's rights and remedies under Condition 12 hereof), pass to the Council at the time of delivery.

11. DAMAGE IN TRANSIT

On dispatch of any consignment of the Goods the Supplier shall send to the Council at the address for delivery an advice note specifying the means of transport, the place and date of dispatch, the number of packages and their weight and volume. The Supplier shall, free of charge and as quickly as possible, either repair or replace (as the Council shall elect) such of the Goods as may either be damaged in transit or, having been placed in transit, have failed to be delivered to the Council provided that:

- (a) in the case of damage to such Goods in transit the Council shall, within thirty days of delivery, give notice to the Supplier that the Goods have been damaged;
- (b) in the case of non-delivery the Council shall, (provided that the Council has been advised of the dispatch of the Goods) within 10 days of the notified date of delivery, give notice to the Supplier that the Goods have not been delivered.

12. INSPECTION, REJECTION AND GUARANTEE

- 12.1 The Supplier shall permit the Council or his authorised representatives to make any inspections or tests of the Goods he may reasonably require and the Supplier shall afford all reasonable facilities and assistance free of charge at his premises. No failure to make complaint at the time of such inspection or tests and no approval given during or after such tests or inspections shall constitute a waiver by the Council of any rights or remedies in respect of the Goods.
- 12.2 The Council may by written notice to the Supplier reject any of the Goods which fail to meet the requirements specified in the contract. Such notice shall be given within a reasonable time after delivery to the Council of Goods concerned. If the Council shall reject any of the Goods pursuant to this Condition the Council shall be entitled (without prejudice to his other rights and remedies) either:
- (a) as quickly as possible to either (as the Council shall elect) have the Goods concerned repaired by the Supplier or replaced by the Supplier with Goods which comply in all respects with the requirements specified herein; or
 - (b) to obtain a refund from the Supplier in respect of the Goods concerned.
- 12.3 The guarantee period applicable to the Goods shall be 12 months. If the Council shall, within such guarantee period or within 30 days thereafter, give notice in writing to the Supplier of any defect in any of the Goods as may have arisen during such guarantee period under proper and normal use the Supplier shall (without prejudice to any other rights and remedies which the Council may have) as quickly as possible remedy such defects (whether by repair or replacement as the Council shall elect) without cost to the Council.

12.4 Any Goods rejected or returned by the Council as described in Conditions 12.2 or 12.3 shall be returned to the Supplier at the Supplier's risk and expense.

13. LABELLING AND PACKAGING

- 13.1 The Goods shall be packed and marked in a proper manner and in accordance with the Council's instructions and any statutory requirements and any requirements of the carriers. In particular the Goods shall be marked with the number of the Purchase Order (if any), the net, gross and tare weights, the name of the contents shall be clearly marked on each container and all containers of hazardous goods (and all documents relating thereto) shall bear prominent and adequate warnings. The Supplier 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 Condition.
- 13.2 All packaging materials will be considered non-returnable and will be destroyed unless the Supplier's advice note states that such materials will be charged for unless returned. The Council accepts no liability in respect of the non-arrival at the Supplier's Premises of empty packages returned by the Council unless the Supplier shall within ten days of receiving notice from the Council that the packages have been dispatched notify the Council of such non-arrival.
- 13.3 The Supplier represents and warrants that the maximum use has been made of recycled materials in the manufacture of crates, pallets, boxes, cartons, cushioning and other forms of packing, where these fulfil other packing specifications.

14. AUDIT

The Supplier shall keep and maintain records to the satisfaction of the Council of all expenditures which are reimbursable by the Council and of the hours worked and costs incurred in connection with any employees of the Supplier paid for by the Council on a time charge basis. Such records shall be maintained until 2 years after the Contract has been completed. The Supplier shall on request afford the Council or its representatives such access to those records as may reasonably be required by the Council.

15. CORRUPT GIFTS OR PAYMENTS

The Supplier shall not offer or give, or agree to give, to any employee or representative of the Council any gift or consideration of any kind as an inducement or reward for doing or refraining from doing or for having done or refrained from doing, any act in relation to the obtaining or execution of this or any other contract with the Council or for showing or refraining from showing favour or disfavour to any person in relation to this or any such Contract. The attention of the Supplier is drawn to the criminal offences created by the Bribery Act 2010.

16. PATENTS, INFORMATION AND COPYRIGHT

- 16.1 It shall be a condition of the Contract, except to the extent that the Goods incorporate designs furnished by the Council, that nothing done by the Supplier in the provision of the Goods shall infringe any patent, trade mark, registered design, copyright or other right in the nature of intellectual property of any third party and the Supplier shall **indemnify** the Council against all actions, claims, demands, costs and expenses which the Council may suffer or incur as a result of or in connection with any breach of this Condition.
- 16.2 All rights (including ownership and copyright) in any reports, documents, specifications, instructions, plans, drawings, patents, models or designs whether in writing or on magnetic or other media:
- (a) furnished to or made available to the Supplier by the Council shall remain vested in the Council absolutely;
 - (b) prepared by or for the Supplier for use, or intended use, in relation to the performance of this Contract are hereby assigned to and shall vest in the Council absolutely, and (without prejudice to Condition 20.2) the Supplier shall not and shall procure that his servants and agents shall not (except to the extent necessary for the implementation of this Contract) without the prior written consent of the Council use or disclose any such reports, documents, specifications, instructions, plans, drawings, patents, models, designs or other material as aforesaid or any other information (whether or not relevant to this Contract) which the Supplier may obtain pursuant to or by reason of this Contract, except information which is in the public domain otherwise than by reason of a breach of this provision, and in particular (but without prejudice to the generality of the foregoing) the Supplier shall not refer to the Council or the contract in any advertisement without the Council's prior written consent.
- 16.3 The provisions of this Condition 16 shall apply during the continuance of this Contract and after its termination howsoever arising.

17. HEALTH AND SAFETY

- 17.1 The Supplier represents and warrants to the Council that the Supplier has satisfied himself that all necessary tests and examinations have been made or will be made prior to delivery of the Goods to ensure that the Goods are designed and constructed so as to be safe and without risk to the health or safety of persons using the same, and that the Supplier has made available to the Council adequate information about the use for which the Goods have been designed and have been tested and about any conditions necessary to ensure that when put to use the goods will be safe and without risk to health.
- 17.2 With prejudice to the generality of Condition 17.1 hereof, the Supplier 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 Condition 17.1.

18. INDEMNITY AND INSURANCE

- 18.1 Without prejudice to any rights or remedies of the Council (including the Council's rights and remedies under Condition 12 hereof) the Supplier 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 damage to property or in respect of any injury (whether fatal or otherwise) to any person which may result directly or indirectly from any defect in the Goods or the negligent or wrongful act or omission of the Supplier, his employees, agents or sub-contractors.

18.2 The Supplier shall have in force and shall require any sub-contractor to have in force:

(a) Employer's liability insurance in the sum of not less than £10 million and all in accordance with any legal requirements for the time being in force; and

(b) Public liability insurance for such sum and range of cover as the Supplier deems to be appropriate but covering at least all matters which are the subject of indemnities or compensation obligations under these Conditions in the sum of not less than £5 million for any one incident and unlimited in total, unless otherwise agreed by the Council in writing.

18.3 The policy or policies of insurance referred to in Condition 18.2 shall be shown to the Council on request, together with satisfactory evidence of payment of premiums and annual renewals.

19. DISCRIMINATION

The Supplier shall not unlawfully discriminate within the meaning and scope of the provisions of the Equality Act 2010 or any statutory modification or re-enactment thereof relating to discrimination in employment. The Supplier shall take all reasonable steps to secure the observance of these provisions by all servants, employees or agents of the Supplier and all sub-contractors employed in the execution of the Contract.

20. CONFIDENTIALITY AND FREEDOM OF INFORMATION

20.1 The Supplier shall keep secret and not disclose and shall procure that his employees, agents and sub-contractors keep secret and do not disclose any information of a confidential nature obtained by him by reason of the Contract except information which is in the public domain otherwise than by reason of a breach of this provision. The Service Provider shall comply with the Data Protection Act 2018 at all times and shall enter into a data processing agreement with the Council on request.

20.2 The Supplier acknowledges that the Council is subject to the terms of the Freedom of Information (Scotland) Act 2002 and The Environmental Information (Scotland) Regulations 2004 (together the 'Information Legislation') and accordingly agreed that any information related to the Contract with the Supplier may be disclosed by the Council in fulfilment of its statutory obligations in terms of the Information Legislation or otherwise, except that, where the Supplier has indicated in its Tender that it considers certain information should be treated as commercially confidential, the Council shall not release such information other than where a valid request is received in terms of the Information Legislation for such information and the Council shall have regard to the Supplier's view when considering any request to release the information in terms of the Information Legislation. Notwithstanding any view taken by the Supplier, the parties

acknowledge that the Council may still require to disclose such information and the Supplier hereby waives any rights it may have against the Council in respect of such disclosure.

20.3 The parties agree that, without prejudice to the terms of 20.2, disclosure may be made by the Council of such information relating to the outcome of the procurement process as may be required to be published in the Official Journal of the European Communities or elsewhere in accordance with EC Directives or UK Government policy on the disclosure of information regarding local government contracts. This disclosure may include the number of tenders received, the identity of the successful Supplier, the winning contract price, the specification of goods to be supplied, terms and conditions of contract, quality and performance standards, and subsequent performance against those quality and performance standards.

20.4 The provisions of this condition 20 shall apply during the continuance of the Contract and after its termination howsoever arising.

21. RECORDS MANAGEMENT

The Service Provider shall provide the Council with all assistance reasonably requested by the Council to assist the Council in complying with its obligations under the Public Records (Scotland) Act 2011 and with the Council's records management plan where such compliance is in respect of records created or to be created by the Service Provider on behalf of the Council in terms of this Contract. This assistance shall be at no cost to the Council. The provisions of this Condition 21 shall apply during the continuance of this Contract and after its termination howsoever arising.

22. TERMINATION

22.1 The Supplier shall notify the Council in writing immediately upon the occurrence of any of the following events:

- (a) where the Supplier is an individual and if a petition is presented for the Supplier's bankruptcy or the sequestration of his estate or a criminal bankruptcy order is made against the Supplier, or he is apparently insolvent, or he makes any composition or arrangement with or for the benefit of creditors, or makes any conveyance or assignation for the benefit of creditors, or if an administrator or trustee is appointed to manage his affairs; or
- (b) where the Supplier 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 Supplier to be wound up as an unregistered company; or
- (c) where the Supplier is a company, if the company passes a resolution for winding-up of dissolution (otherwise than for the purposes of and followed by an 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;

and in the event of any of the foregoing occurrences, the Council shall be entitled to terminate the Contract with immediate effect without any payment due to the Supplier in compensation therefore.

22.2 In addition to its rights of termination under Condition 22.1, the Council shall be entitled to terminate this Contract without penalty by giving to the Supplier not less than 30 days' notice to that effect.

22.3 Termination under Conditions 22.1 or 22.2 shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereupon accrue to the Council and shall not affect the continued operation of Conditions 16 and 20.

22.4 The Public Contracts (Scotland) Regulations 2015 make provision in Regulation 73 for the termination of contracts or frameworks during their term, and Suppliers should be aware that the Council has recourse to this legislation.

23. RECOVERY OF SUMS DUE

Wherever under the Contract any sum of money is recoverable from or payable by the Supplier, that sum may be deducted from any sum then due, or which at any later time may become due, to the Supplier under this Contract or under any other agreement or contract with the Council.

24. ASSIGNATION AND SUB-CONTRACTING

24.1 The Supplier shall not, without the written consent of the Council, assign the benefit or burden of the Contract or any part thereof.

24.2 No sub-contracting by the Supplier shall in any way relieve the Supplier of any of his responsibilities under the Contract.

24.3 Where the Supplier enters a sub-contract with a supplier for the purpose of performing the Contract, he shall cause a term to be included in such sub-contract which requires payment to be made to the supplier within a specified period not exceeding 30 days from receipt of a valid invoice as defined by the sub-contract requirements.

25. 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 service or transmitted by facsimile transmission or other means of telecommunication resulting in the receipt of a written communication in permanent form and if so sent or transmitted 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 therefore, 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.

26. DISPUTE RESOLUTION

All disputes, differences or questions between the Council and the Supplier with respect to any matter or thing arising out of or relating to the Contract or the Goods may be referred for decision to a single arbiter to be mutually agreed and chosen by the Council and the Seller for that purpose, or, if they are unable to agree as to the appointment of an arbiter, chosen by the President of the Law Society of Scotland for the time being on the application of either party. The decision of the arbiter shall be binding on the parties as to the matter in dispute.

27. HEADINGS

The headings to Conditions shall not affect their interpretation.

28. GOVERNING LAW

These Conditions shall be governed by and construed in accordance with Scottish law and the Supplier hereby irrevocably submits to the jurisdiction of the Scottish courts. The submission to such jurisdiction shall not (and shall not be construed so as to) limit the right of the Council to take proceedings against the Supplier in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdiction, whether concurrently or not.

SUPPLEMENTARY NOTICE

1. PROTECTING THE ENVIRONMENT

Suppliers to the East Lothian Council are requested to satisfy themselves that no product will be supplied or used in the Supply of Goods to the Council which will endanger the health of the consumers or others, will cause significant damage to the environment during manufacture, use, or disposal, which consumes a disproportionate amount of energy during manufacture, use, or disposal, which causes unnecessary waste because of over-packaging or because of an unusually short shelf life, or which contains materials derived from threatened species or threatened environments.

2. LATE PAYMENT OF INVOICES

Suppliers to the East Lothian Council are requested to address complaints regarding late payment of invoices to, in the first instance, the addressee of the invoice and, in the second instance to the Director of Scottish Procurement Directorate, 3rd Floor Meridian Court, Glasgow, G2 6AT. Telephone 0131-244-3878. This procedure is suggested as the best practical way of ensuring problems of late payment are resolved, and is not intended to interfere with Suppliers' legal rights.

THIS NOTICE DOES NOT FORM PART OF THE CONDITIONS OF CONTRACT