

CONDITIONS OF CONTRACT

EAST LoTHIAN COUNCIL CONDITIONS OF CONTRACT FOR THE PROVISION OF 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 Service Provider shall form any part of the Contract unless specifically agreed in writing by the Council.

1. DEFINITIONS

In these Conditions:

'*Council*' means East Lothian Council;

'*Service Provider*' means the person, firm or company with whom the Council has contracted for the provision of the Services;

'*Services*' means all services as are to be provided to the Council by the Service Provider (or by any of the Service Provider's sub-contractors) pursuant to or in connection with this Contract;

'*Service Levels*' means the standard, specification and level to which the Services are to be provided, as specified in the Council's Invitation to Tender, the Service Provider's Tender and any clarifications agreed in writing between the parties;

'*Contract*' means the contract between the Council and Service Provider consisting of the Council's Invitation to Tender, the Service Provider'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;

'*Premises*' means the location where the Services are to be provided.

2. THE SERVICES

2.1 The Services shall conform in all respects with the Service Levels and any particulars specified in the Contract and shall be performed to the reasonable satisfaction of the Council.

2.2 Provision of the Services shall conform in all respects with the requirements of any relevant statutes, orders, regulations or bye-laws currently in force.

2.3 The Council relies on the skill and judgement of the Service Provider in the provision of the Services and the execution of the Contract.

2.4 The Service Provider shall provide the Services 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 Services 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 Service Provider 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 Service Provider shall continue to provide the Services at the price originally agreed in terms of this Contract.

3.2 Unless otherwise agreed in writing by the Council, the Service Provider shall render invoices only on completion of provision of all Services. Payment shall be due 30 days after provision of the Services or receipt of 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 the scope or specification of the Services 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 Services and changes in quality, form, character, kind, timing, method or sequence of the delivery of Services.

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

4.3 Where any such change in scope or specifications of the Services made in accordance with Conditions 4.1 and 4.2 has affected or may affect the costs incurred by the Service Provider in delivering the Services, the Service Provider 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 Service Provider in respect of the effect which such variation has had or may have on the costs incurred by the Service Provider in providing the Services) and may authorise such alteration to the sums to be paid to the Service Provider in accordance with the provisions of the Contract as are, in its opinion, appropriate and reasonable in the circumstances.

5. INSPECTION OF PREMISES

5.1 The Service Provider is deemed to have inspected the Premises before tendering and satisfied himself in relation to all matters connected with the provision of the Services at the Premises.

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

5.3 The Services shall be provided at the place(s) specified in the Contract. Any access to premises and any labour and equipment that may be provided by the Council in connection with provision of the Services shall be provided without acceptance by the Council of any liability whatsoever and the Service Provider 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 provision of the Services to the extent that any such damage or injury is attributable to any act, omission or negligence of the Service Provider or any of his employees, agents or sub-contractors.

5.4 Unless otherwise specified, the Service Provider shall provide all equipment, material and any other things necessary to provide the Services.

6. SUPPLIER'S STATUS

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

(a) the Service Provider 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 Service Provider 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 Service Provider to any other person but this shall not be taken to exclude or limit any liability of the Council to the Service Provider 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 Service Provider shall take the steps reasonably required by the Council to prevent unauthorised persons being admitted to the Premises. If the Council gives the Service Provider 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 Service Provider shall take all necessary steps to comply with such notice and, if required by the Council, the Service Provider 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 Service Provider as aforesaid shall not entitle the Service Provider 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 Service Provider 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 Service Provider has furnished the information or taken the steps required of him by this Condition shall be final and conclusive.

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

8. SERVICE LEVELS

8.1 In the event that the Service Provider fails to provide the Services or any part thereof to the Service Level, the Council shall, at its sole option, exercise the following remedies:

- (a) The Service Provider shall be required to re-perform the Services or the part thereof that did not meet the Service Level, at no additional charge to the Council;
- (b) The Council may elect to have the Services or the part thereof that did not meet the Service Level performed by another provider and there shall be deducted from the Contract Price the whole cost to the Council of engaging such other provider;
- (c) The Council may deduct from the Contract Price an amount reflecting the failure to meet the Service Level;
- (d) In the event that the failure is, in the reasonable opinion of the Council, significant or substantial, the Council may terminate the Contract with no penalty due to the Service Provider as a consequence of such termination.

8.2 The time of provision of the Services shall be of the essence and failure to perform the Services 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 Services 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 provision of the Services, the Service Provider shall at all times comply with the reasonable requirements of the Council.

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

10. AUDIT

The Service Provider 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 Service Provider paid for by the Council on a time charge basis. Such records shall be maintained until two years after the Contract has been completed. The Service Provider shall on request afford the Council or its representatives such access to those records as may reasonably be required by the Council.

11. CORRUPT GIFTS OR PAYMENTS

The Service Provider 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 Service Provider is drawn to the criminal offences created by the Bribery Act 2010.

12. PATENTS, INFORMATION AND COPYRIGHT

12.1 It shall be a condition of the Contract, except to the extent that the Services incorporate designs furnished by the Council, that nothing done by the Service Provider in the provision of the Services shall infringe any patent, trade mark, registered design, copyright or other right in the nature of intellectual property of any third party and the Service Provider 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.

12.2 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 Service Provider by the Council shall remain vested in the Council absolutely;

(b) prepared by or for the Service Provider 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 Service Provider 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 Service Provider 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 Service Provider shall not refer to the Council or the contract in any advertisement without the Council's prior written consent.

12.3 The provisions of this Condition 12 shall apply during the continuance of this Contract and after its termination howsoever arising.

13. HEALTH AND SAFETY

13.1 The Service Provider represents and warrants to the Council that the Service Provider has satisfied himself that all necessary tests and examinations have been made or will be made prior to provision of the Services to ensure that the Services are performed so as to be safe and without risk to the health or safety of persons accessing the same.

13.2 With prejudice to the generality of Condition 13.1 hereof, the Service Provider 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 13.1.

14. INDEMNITY AND INSURANCE

14.1 Without prejudice to any rights or remedies of the Council, the Service Provider 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 failure in the provision of the Services or the negligent or wrongful act or omission of the Service Provider, his employees, agents or sub-contractors.

14.2 The Service Provider 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 Service Provider 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.

14.3 The policy or policies of insurance referred to in Condition 14.2 shall be shown to the Council on request, together with satisfactory evidence of payment of premiums and annual renewals.

15. DISCRIMINATION

The Service Provider 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 Service Provider shall take all reasonable steps to secure the observance of these provisions by all servants, employees or agents of the Service Provider and all sub-contractors employed in the execution of the Contract.

16. CONFIDENTIALITY AND FREEDOM OF INFORMATION

16.1 The Service Provider 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.

16.2 The Service Provider 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 Service Provider may be disclosed by the Council in fulfilment of its statutory obligations in terms of the Information Legislation or otherwise, except that, where the Service Provider 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 Service Provider's view when considering any request to release the information in terms of the Information Legislation. Notwithstanding any view taken by the Service Provider, the parties acknowledge that the Council may still require to disclose such information and the Service Provider hereby waives any rights it may have against the Council in respect of such disclosure.

16.3 The parties agree that, without prejudice to the terms of 16.2, 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 Service Provider, the winning contract price, the specification of goods to be provided, terms and conditions of contract, quality and performance standards, and subsequent performance against those quality and performance standards.

16.4 The provisions of this condition 16 shall apply during the continuance of the Contract and after its termination howsoever arising.

17. 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 17 shall apply during the continuance of this Contract and after its termination howsoever arising.

18. TERMINATION

18.1 The Service Provider shall notify the Council in writing immediately upon the occurrence of any of the following events:

a) where the Service Provider is an individual and if a petition is presented for the Service Provider's bankruptcy or the sequestration of his estate or a criminal bankruptcy

order is made against the Service Provider, 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 Service Provider 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 Service Provider to be wound up as an unregistered company; or

c) where the Service Provider is a company, if the company passes a resolution for winding-up or 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;

18.2 In the event of any of the foregoing occurrences set out in Condition 18.1, the Council may terminate the Contract with immediate effect by giving written notice to the other party and without any payment due to the Service Provider in compensation therefore.

18.3 In addition to its rights of termination under Conditions 8.1 and 18.2, the Council shall be entitled to terminate this Contract:

a) in the event that the Service Provider fails to notify the Council of an occurrence of an event specified in Conditions 18.1 and such shall be in accordance with Condition 18.2;

b) in the event the Council becomes aware that the information provided by the Service Provider in relation to the exclusion grounds as detailed in the Public Contracts (Scotland) 2015 Regulations is incorrect;

c) without penalty by giving to the Service Provider not less than 30 days' notice to that effect.

18.4 Termination under Conditions 8.1, 18.1, 18.2 or 18.3 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 12 and 16.

19. RECOVERY OF SUMS DUE

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

20. ASSIGNATION AND SUB-CONTRACTING

20.1 The Service Provider shall not, without the written consent of the Council, assign the benefit or burden of the Contract or any part thereof.

20.2 No sub-contracting by the Service Provider shall in any way relieve the Service Provider of any of his responsibilities under the Contract.

20.3 Where the Service Provider 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.

21. 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.

22. DISPUTE RESOLUTION

All disputes, differences or questions between the Council and the Service Provider with respect to any matter or thing arising out of or relating to the Contract or the Services 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.

23. HEADINGS

The headings to Conditions shall not affect their interpretation.

24. GOVERNING LAW

These Conditions shall be governed by and construed in accordance with Scottish law and the Service Provider 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 Service Provider 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

Service Providers to the East Lothian Council are requested to satisfy themselves that no product will be provided or used in the Provision of Services 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

Contractors 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 Contractor's legal rights.

THIS NOTICE DOES NOT FORM PART OF THE CONDITIONS OF CONTRACT