

BHIVE Dynamic Purchasing System

**BHIVE Access
Agreement v1.0**

December 2020



Department for
Business, Energy
& Industrial Strategy

This **Access Agreement** is made on [●]

202[●]

BETWEEN:

- (1) The Secretary of State for Business, Energy and Industrial Strategy (the **Administering Authority**);
- (2) Triple Point Investment Management LLP (the **Agent**); and
- (3) [Contracting Authority] of [●] (*insert address details*) which is a contracting authority as defined in the Regulations (the **Contracting Authority**).

BACKGROUND

- (A) The Administering Authority has established a dynamic purchasing system for providers of Contract Services, Contract Supplies and Funding to Contracting Authorities.
- (B) The Administering Authority and the Agent requires that any Contracting Authorities who wish to procure Contract Services, Contract Supplies and Funding through the Purchasing System enter into this Access Agreement with the Administering Authority and the Agent to regulate the use and operation of the Purchasing System.
- (C) Under this Access Agreement, the Contracting Authority may enter into a Template Call-Off Contract in relation to Contract Services and Funding or a Form of Asset Finance Lease in respect of Contract Supplies and Funding (as the case may be) in accordance with the provisions of this Access Agreement and the relevant Dynamic Purchasing System Agreement.

IT IS AGREED as follows:

1 Definitions and Interpretation

1.1 The following terms and expressions shall have the meanings ascribed to them:

Access Agreement	this access agreement.
Call for Competition Bid Response	has the meaning given in the Dynamic Purchasing System Agreements.
Call for Competition Procedure	has the meaning given in the Dynamic Purchasing System Agreements.
Call for Competition Tender Pack	has the meaning given in the Dynamic Purchasing System Agreements.
Confidential Information	all commercial or strategic planning, intentions, modus operandi, finances, proposals, projects, plans and specifications, confidential designs, data, specifications, processes, and all other technical business and similar information relating to the Administering Authority's, the Agent's the Contracting Authority's or a Potential Provider's business and affairs, its customers, employees and subcontractors or otherwise relating to this Access Agreement, a Dynamic Purchasing System

Contract	<p>Agreement, Template Call-Off Contract (or Contract Services) or Form of Asset Finance Lease (or Contract Supplies) and Funding and the Template Shareholders' Agreement including all readable data, logic, logic designs, flowcharts, source or object codes, listings, test data, test routines, diagnostic programs, software programs or other material.</p> <p>means the:</p> <ul style="list-style-type: none"> (a) Form of Asset Finance Lease; and (b) Template Call-Off Contract and the Template Shareholders' Agreement.
Contract Services	has the meaning given in the Dynamic Purchasing Agreement.
Contract Supplies	has the meaning given in the Dynamic Purchasing Agreement.
Contracting Authorities	the public sector bodies listed in Annex 1 to this Access Agreement.
Direct Losses	all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses save where such Indirect Losses form part of the liability, action, proceedings and/or demand asserted against a person and references to Direct Loss shall be construed accordingly.
DPS Support Charge	has the meaning given in clause 7.1 (DPS Charges).
Dynamic Purchasing System Agreements	means the agreement entered into between the Administering Authority and each of the Providers in relation to the Purchasing System and references to Dynamic Purchasing System Agreement shall be construed accordingly.
EIR	the Environmental Information Regulations 2004, and any subordinate legislation made under that Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such legislation.
EIR Exception	any applicable exemption to EIR.
Exempted Information	any Information that is designated as falling or potentially falling within the FOIA Exemptions or the EIR Exceptions.
FOIA	the Freedom of Information Act 2000, and any subordinate legislation made under that Act from

time to time together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such legislation.

FOIA Authority

a public authority as defined by FOIA and/or EIR.

Form of Asset Finance Lease

has the meaning given in a Dynamic Purchasing System Agreement.

Funding

has the meaning given in a Dynamic Purchasing System Agreement.

Indirect Losses

means loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or any indirect loss of any nature and reference to **Indirect Loss** shall be construed accordingly;

Information

means in relation to:

- (a) FOIA, the meaning given under section 84 of the FOIA and which is held by the Administering Authority or a FOIA Authority at the time of receipt of an RFI; or
- (b) EIR, has the meaning given under the definition of “environmental information” in section 2 of EIR and which is held by the Administering Authority or a FOIA Authority at the time of receipt of an RFI.

Intellectual Property Rights

shall include without limitation all rights to, and any interests in, any patents, designs, trademarks, copyright, know-how, trade secrets and any other proprietary rights or forms of intellectual property (protectable by registration or not) in respect of any technology, concept, idea, data, program or other software (including source and object codes), specification, plan, drawing, schedule, minutes, correspondence, scheme, formula, programme, design, system, process logo, mark, style, or other matter or thing, existing or conceived, used, developed or produced by any person.

Losses

means any Direct Loss and/or Indirect Loss suffered or incurred that arise out of or in connection with any or all of the following:

- (a) any delay in the procurement of the Contracting Authority’s project under the Purchasing System;
- (b) any finding that the Purchasing System or any Contract has not been procured in compliance with the Regulations;

- (c) any declaration that the award of the Purchasing System or any Contract is ineffective;
- (d) any claim brought by a Provider against a person under a Dynamic Purchasing System Agreement or any Call-off Contract;
- (e) any failure, act or omission in relation to the procurement of the Purchasing System, the operation of the Call for Competition Procedure or any Contract; and/or
- (f) subject always to clause 12.1(b) (Liability), any misrepresentation, misstatement, negligent or other tortious act or omission arising under or in connection with the procurement of the Purchasing System or any Call for Competition Procedure.

Panel Information

any information provided by the Administering Authority and/or the Agent to Contacting Authorities under or in connection with the Purchasing System and/or this Access Agreement, including the list of Providers, Provider contact details, and copies of the relevant Dynamic Purchasing System Agreements.

Providers

the organisations appointed to the Purchasing System by the Administering Authority and reference to **Provider** shall be construed accordingly.

Purchasing System

has the meaning given in recital (C) of a Dynamic Purchasing System Agreement.

Regulations

the Public Contract Regulations 2015 as amended or updated from time to time.

Request for Information

shall have the meaning set out in FOIA or any request for information under EIR which may relate to this Access Agreement, a Contract or Contract Services, Contract Supplies or Funding or any activities or business of the Administering Authority or FOIA Authority and references to RFI shall be construed accordingly.

Support Services

the services identified in Annex 2 to this Access Agreement.

Template Call-Off Contract

has the meaning given in a Dynamic Purchasing System Agreement.

Template Shareholders' Agreement

the form of shareholders' agreement attached at schedule 4 (Shareholders' Agreement) to the Template Call-Off Contract.

2 Consideration

In consideration of the warranties, acknowledgement and covenants on the part of the Contracting Authority contained in this Access Agreement, the Administering Authority and the Agent grants the Contracting Authority access to use the Purchasing System in accordance with the provisions of this Access Agreement.

3 Approval to use the Purchasing System

The Contracting Authority shall not do anything to prejudice the Purchasing System or the Administering Authority's or the Agent's use of the Purchasing System or the integrity of the Call for Competition Procedure.

4 Warranties, acknowledgements and covenants by the Contracting Authority

4.1 The Contracting Authority warrants to the Administering Authority and the Agent that it is a body listed in the list of Contracting Authorities set out in Annex 1 to this Access Agreement.

4.2 The Contracting Authority acknowledges that the Administering Authority and the Agent:

4.2.1 gives no warranty, undertaking or guarantee in respect of the ability of the Contracting Authority to use the Purchasing System or in respect of any Call for Competition Procedure for awarding Contracts;

4.2.2 gives no warranty, undertaking, or guarantee in relation to the performance of Providers;

4.2.3 gives no warranty, undertaking, or guarantee in respect of the Panel Information, or in relation to the suitability, validity, compliance with laws or regulations or otherwise of the Purchasing System or any Dynamic Purchasing System Agreement or any Contract; and

4.2.4 reserves the right to determine or change any panel appointments pursuant to the terms of a Dynamic Purchasing System Agreement, and to suspend the use of the Purchasing System by the Contracting Authority on written notice having immediate effect.

4.3 The Contracting Authority acknowledges that all of the individual Dynamic Purchasing System Agreements for the Purchasing System collectively constitute one multi-supplier dynamic purchasing system under the Regulations and that a single Dynamic Purchasing System Agreement alone may not be used to make a direct award.

4.4 The Contracting Authority covenants with the Administering Authority and the Agent:

4.4.1 that the Contracting Authority shall be the principal contracting authority under any Contract;

4.4.2 to comply with and be bound by the terms of the Dynamic Purchasing System Agreements and any guidance or instructions issued by the Administering Authority and/or the Agent (from time to time) in the use and operation of the Purchasing System, the Dynamic Purchasing System Agreements and the Contracts;

4.4.3 to use the evaluation criteria set out in the Dynamic Purchasing System Agreements for Call for Competition Procedure;

4.4.4 that it shall not (and shall procure that its employees, agents and subcontractors shall not) advise, reward, cause or induce a Provider to deliver the Contract

Services and/or Contract Supplies (as the case may be) and Funding otherwise than pursuant to the terms of the relevant Contract;

4.4.5 that the Contracting Authority shall comply with its obligations in relation to award of contracts pursuant to Regulation 50(5) of the Regulations; and

4.4.6 that the Contracting Authority will report the award of any Contract under the Purchasing System and the Call for Competition Procedure to the Agent and the Administering Authority.

5 Confidentiality

5.1 Each party recognises that under this Access Agreement it may receive Confidential Information belonging to the other and to Providers.

5.2 Each party agrees to treat all Confidential Information belonging to the other or to Providers as confidential and not to disclose such Confidential Information or any other confidential information relating to the Administering Authority and the Agent, the Contracting Authority, the Dynamic Purchasing System Agreements, any Contract or Contract Services, Contract Supplies or Funding to any third party without the prior written consent of the other parties (or the relevant Provider if applicable) and agrees not to use such Confidential Information for any purpose other than that for which it is supplied under this Access Agreement or a Call for Competition Procedure.

5.3 The obligations of confidence referred to in clause 5.2 (Confidentiality) shall not apply to any Confidential Information which:

5.3.1 is in, or which comes into, the public domain otherwise than by reason of a breach of this Access Agreement or of any other duty of confidentiality relating to that information; or

5.3.2 is obtained from a third party without that third party being under an obligation (express or implied) to keep the information confidential; or

5.3.3 is lawfully in the possession of another party before the date of this Access Agreement and in respect of which that party is not under an existing obligation of confidentiality; or

5.3.4 is independently developed without access to the Confidential Information of another party.

5.4 Each party will be permitted to disclose Confidential Information to the extent that they are required to do so:

5.4.1 to enable the disclosing party to perform its obligations under this Access Agreement; or

5.4.2 by any applicable law or by a court, arbitral or administrative tribunal in the course of proceedings before it including without limitation any requirement for

disclosure under FOIA, EIR or the Code of Practice on Access to Government Information; or

- 5.4.3 by any regulatory body (including any investment exchange) acting in the course of proceedings before it or acting in the course of its duties; or
- 5.4.4 in order to give proper instructions to any professional adviser of that Party who also has an obligation to keep any such Confidential Information confidential.
- 5.5 The Contracting Authority shall ensure that all Confidential Information obtained from the Administering Authority and/or the Agent or a Provider under or in connection with this Access Agreement:
 - 5.5.1 is given only to such of its employees or professional advisors engaged to advise it in connection with this Access Agreement or a Call for Competition Procedure as is strictly necessary for the performance of this Access Agreement and only to the extent necessary for the performance of this Access Agreement or the Call for Competition Procedure;
 - 5.5.2 is treated as confidential and not disclosed (without the Administering Authority's or the Agent's (as the case may be) prior written approval) or used by any such staff or professional advisors otherwise than for the purposes of this Access Agreement;
 - 5.5.3 where it is considered necessary in the opinion of the Administering Authority and the Agent, the Contracting Authority shall ensure that such staff or professional advisors sign a confidentiality undertaking before commencing work in connection with a Call Off Contract.
- 5.6 Nothing in this clause 5 (Confidentiality) shall:
 - 5.6.1 prevent the Administering Authority disclosing any Confidential Information for the purpose of:
 - (a) the examination and certification of the Administering Authority's accounts; or
 - (b) any examination by the National Audit Office; or
 - 5.6.2 prevent the Administering Authority disclosing any Confidential Information:
 - (a) to any other department, office or agency of the Crown;
 - (b) to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
 - (c) on a confidential basis to a proposed successor body in connection with any assignment, novation or disposal of any rights, obligations or any liabilities under this Access Agreement; or
 - (d) to any person (including, without limitation, the Agent) engaged in providing any services to the Administering Authority for any purpose relating to or ancillary to this Access Agreement;
 - 5.6.3 provided that in disclosing information under clauses 5.6.1 or 5.6.2 (Confidentiality) the Administering Authority discloses only the information which is necessary for the purpose concerned and requires that the information is

treated in confidence and that a confidentiality undertaking is given where appropriate.

- 5.7 Nothing in this clause 5 (Confidentiality) shall prevent a party from using any techniques, ideas or know-how gained during the performance of the Access Agreement in the course of its normal business, to the extent that this does not result in a disclosure of Confidential Information or an infringement of Intellectual Property Rights.
- 5.8 The obligations in this clause 5 (Confidentiality) will survive the expiry or termination of this Access Agreement for a period of seven (7) years or, in respect of any particular item of Confidential Information, until such earlier time as that item of Confidential Information reaches the public domain otherwise than by reason of a breach of this Access Agreement or of any other duty of confidentiality relating to that information.

6 Freedom of Information

- 6.1 The Parties to this Access Agreement are FOIA Authorities and are subject to legal duties which may require the release of information under FOIA and / or EIR and that the FOIA Authorities may be under an obligation to provide Information subject to a Request for Information.
- 6.2 The FOIA Authority in receipt of or to receive the RFI (**Relevant FOIA Authority**) shall be responsible for determining in its absolute discretion whether:
- 6.2.1 any Information is Exempted Information or remains Exempted Information;
and/or
- 6.2.2 any Information is to be disclosed in response to a Request for Information;
- and in no event shall any party, other than the Relevant FOIA Authority, respond directly to a RFI except to confirm receipt of the RFI and that the RFI has been passed to the Relevant FOIA Authority.
- 6.3 Subject to clause 6.4 (Freedom of Information) below, all parties acknowledge that the Relevant FOIA Authority may disclose Information:
- 6.3.1 without consulting the other; or
- 6.3.2 following consultation with the other party and having taken (or not taken, as the case may be) its views into account.
- 6.4 Without in any way limiting clauses 6.2 and 6.3 (Freedom of Information), in the event that the Relevant FOIA Authority receives a RFI, the Relevant FOIA Authority will, where appropriate, as soon as reasonably practicable notify the other parties.
- 6.5 The Parties will assist and co-operate with one another as requested by the Relevant FOIA Authority to enable the Relevant FOIA Authority to comply with its obligations to disclose Information under FOIA and EIR within the prescribed periods for compliance and in particular

without limitation will (and shall procure that its agents and sub-contractors will), at their own cost:

6.5.1 transfer any RFI received to the Relevant FOIA Authority as soon as practicable after receipt and in any event within two Working Days of receiving a request for information; and

6.5.2 provide all such assistance as may be required from time to time by the Relevant FOIA Authority to enable the Relevant FOIA Authority to comply with its obligations to disclose Information;

6.6 Nothing in this Access Agreement will prevent the Relevant FOIA Authority from complying with any valid order, decision, enforcement or practice recommendation notice issued to it by the Information Commissioner under FOIA and / or EIR in relation to any Exempted Information.

7 DPS Charges

7.1 The Contracting Authority hereby acknowledges and agrees to the following DPS Charges:
[insert information on the agreed level of DPS Charges].

7.2 The Contracting Authority further acknowledges and agrees that it shall include the DPS Charges set out in clause 7.1 (DPS Charges) (as the same may be varied by agreement between the Agent and the Contracting Authority) in the Call for Competition Tender Pack to enable Providers to include the DPS Charges in the Call for Competition Bid Response.

8 Agreement to other terms

8.1 The Contracting Authority acknowledges and agrees:

8.1.1 to the conditions contained in the BHIVE Privacy Policy which can be accessed by visiting the BHIVE webpage (<https://tp-heatnetworks.org/bhive>).

8.1.2 to the ProContract Terms and Conditions to use BHIVE¹.

9 Costs and Expenses

Each party shall be responsible for paying its own costs and expenses incurred in connection with the preparation and execution of this Access Agreement.

10 No partnership or agency

10.1 Nothing in this Access Agreement shall be construed as creating a partnership.

10.2 The Contracting Authority shall not be deemed to be an agent of the Administering Authority or the Agent and the Contracting Authority shall not hold itself out as having authority or power to bind the Administering Authority or the Agent in any way.

11 Termination

11.1 This Access Agreement shall take full force and effect on the date of signature by the parties to this Access Agreement and shall continue in respect of the Purchasing System until the expiry or earlier termination of the relevant Dynamic Purchasing System Agreement to which

¹ Drafting note: ProContract Terms and Conditions to be provided to the Contracting Authority prior to execution of the Access Agreement.

this Access Agreement relates or until the earlier termination of this Access Agreement under clause 11.2 (Termination).

- 11.2 This Access Agreement may be terminated by either the Administering Authority or the Contracting Authority with immediate effect upon serving written notice on the other parties.
- 11.3 Any Call for Competition Procedure and/or Contract made with a Provider after termination of this Access Agreement or the Purchasing System, will not be made pursuant to the terms of the Purchasing System and it will be the responsibility of the Contracting Authority and the Provider to agree the terms of contract between them and to comply with any applicable laws or regulations.

12 Liabilities

- 12.1 No party to this Access Agreement excludes or restricts its liability:
- (a) for death or personal injury resulting from its negligence;
 - (b) for any damage or liability incurred as a result of fraud or fraudulent misrepresentation by the Administering Authority;
 - (c) arising from that party's wilful misconduct; or
 - (d) for any other liability which may not by virtue of law be capped or otherwise limited.
- 12.2 Subject to clause 12.1 (Liability):
- 12.2.1 the Administering Authority shall have no liability to the Contracting Authority in respect of any Losses incurred under or in connection with the Purchasing System, the Call for Competition Procedure or any Contract or this Access Agreement;
 - 12.2.2 the aggregate liability of the Agent to the Contracting Authority in relation to the provision of any Support Services (whether in contract or tort or otherwise) shall in no circumstances exceed the DPS Support Charge and the Contracting Authority shall not bring any claim against the Agent's employees, agents or sub-contractors in respect of the same; and
 - 12.2.3 subject to clause 12.2.2, neither the Agent nor any employee, agent or sub-contractor shall have any liability to the Contracting Authority in respect of any Losses incurred under or in connection with the Purchasing System, the Call for Competition Procedure or any Contract or this Access Agreement
- 12.3 In the event that the Administering Authority or the Agent incurs any Losses arising pursuant to the Contracting Authority's use of the Purchasing System, the Contracting Authority shall indemnify and keep indemnified the Administering Authority and/or the Agent (as the case may be) in respect of all such Losses that would not otherwise have arisen but for Contracting Authority's use of the Purchasing System.

13 Governing Law

This Access Agreement shall be considered as a contract made in England and Wales and shall be subject to the laws of England and Wales.

The parties have signed this Access Agreement on the date written on page 1 above.

[EXECUTION BLOCKS]



ANNEX 1 – LIST OF CONTRACTING AUTHORITIES

The Purchasing System will be open to all public sector in England and Wales only as listed below:

- (1) Those listed and maintained by the Government on their website at <https://www.gov.uk/government/organisations> or any replacement or updated web-link - England and Wales only;
- (2) Those listed and maintained by the Office of National Statistics (ONS) at <https://www.ons.gov.uk/methodology/classificationsandstandards/economicstatisticsclassification/introductiontoeconomicstatisticsclassifications> or any replacement or updated web-link. – in England and Wales only; and
- (3) Those bodies in England and Wales which are within the scope of the definition of "Contracting Authority" in regulation 2(1) of the Regulations and/or Schedule 1 to the Regulations.

ANNEX 2 – THE SUPPORT SERVICES²



² Drafting note: to be agreed with each Contracting Authority prior to completion of this Access Agreement. Parties to note that the Support Services shall apply only to Lot 1 under the Dynamic Purchasing System Agreements.