

# BHIVE Dynamic Purchasing System

## Dynamic Purchasing System Agreement for Heat Investment Vehicle

between

- (1) The Secretary of State for Business,  
Energy and Industrial Strategy
- (2) [Name of Party]

Dated

2020



Department for  
Business, Energy  
& Industrial Strategy

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**Administering Authority:** BEIS      **Duration:** 24 months

**Managing Agent:**  
 Triple Point Investment  
 Management LLP

**Further information:**  
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1 King William Street,  
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This agreement is made the \_\_\_\_\_ day of \_\_\_\_\_ 202

**Between:**

- (1) **The Secretary of State for Business, Energy and Industrial Strategy** of 1 Victoria Street, London, SW1H 0ET, United Kingdom (the **Administering Authority**); and
- (2) **[Insert COMPANY'S NAME]** which is a company registered in **[England and Wales]** under company number **[insert company no.]** and whose registered office is at **[insert address]** (the **Provider**).

**Background:**

- (A) The Administering Authority has created the Heat Networks Investment Project with the objective of creating a self-sustaining heat network market that does not require direct Government subsidy.
- (B) On 19th April 2018 the Administering Authority advertised in the Official Journal of the European Union (reference 1232/11/2016), inviting prospective suppliers to submit proposals to provide certain services in relation to managing the delivery of Heat Network Investment Project. The Administering Authority appointed treatment Management LLP as its delivery partner (the **Delivery Partner**).
- (C) The Administering Authority placed a contract notice is 2020/S 240-594964 on 04/12/2020 (the **OJEU Notice**) in the Official Journal of the European Union seeking applications from providers of funding interested in participating in a Dynamic Purchasing System to provide certain services and related funding to Contracting Authorities seeking external funding in district heating projects (the **Purchasing System**). On 04/12/2020 the Administering Authority issued an invitation to tender (the **Invitation to Tender**) for the provision of Contract Services and/or Contract Supplies (as the case may be) and Funding through the Purchasing System.
- (D) In response to the Invitation to Tender, the Provider submitted an application to the Administering Authority on **[insert date dd/mm/yyyy]** (set out in Schedule 11 (DPS Application)) (the **Application**) through which the Provider represented to the Administering Authority that it is capable of delivering Contract Services and/or Contract Supplies (as the case may be) and Funding as described in Schedule 2 (Contract Services and Contract Supplies) in accordance with the Administering Authority's requirements as set out in the Invitation to Tender.
- (E) On the basis of the Application, the Administering Authority selected the Provider to participate in the Purchasing System in order to provide the Contracting Authority Requirements.
- (F) This DPS Agreement sets out the award and calling-off procedure for the provision of any Contracting Authority Requirement by a Contracting Authority, the template terms and conditions for any Contract and the obligations of the Provider during and after the Term.

**It is agreed as follows:**

**1 Definitions and Interpretation**

**1.1 Definitions**

- 1.1.1 In this DPS Agreement, unless the context otherwise requires, capitalised expressions shall have the meanings set out in Schedule 1 (Definitions) or the relevant Schedule in which that capitalised expression appears.

- 1.1.2 If a capitalised expression is not defined in Schedule 1 (Definitions) or the relevant Schedule, it shall have the meaning given to it in this DPS Agreement. If no meaning is given to it in this DPS Agreement, it shall in the first instance be interpreted in accordance with the common interpretation within the relevant market sector/industry where appropriate. Otherwise, it shall be interpreted in accordance with the dictionary meaning.

## 1.2 Interpretation

- 1.2.1 In this DPS Agreement, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) reference to a gender includes the other gender and the neuter;
- (c) references to a person include an individual, company, body corporate, corporation, unincorporated association, firm, partnership or other legal entity or Crown Body;
- (d) a reference to any Law includes a reference to that Law as amended, extended, consolidated or re-enacted from time to time;
- (e) the words including, other, in particular, for example and similar words shall not limit the generality of the preceding words and shall be construed as if they were immediately followed by the words without limitation;
- (f) references to writing include typing, printing, lithography, photography, display on a screen, electronic and facsimile transmission and other modes of representing or reproducing words in a visible form and expressions referring to writing shall be construed accordingly;
- (g) references to representations shall be construed as references to present facts; to warranties as references to present and future facts; and to undertakings as references to obligations under this DPS Agreement;
- (h) references to Clauses and Schedules are, unless otherwise provided, references to the clauses and schedules of this DPS Agreement and references in any Schedule to paragraphs, parts, annexes and tables are, unless otherwise provided, references to the paragraphs, parts, annexes and tables of the Schedule or the part of the Schedule in which the references appear;
- (i) any reference to this DPS Agreement includes the Schedules to this DPS Agreement; and
- (j) the headings in this DPS Agreement are for ease of reference only and shall not affect the interpretation or construction of this DPS Agreement.

## 1.3 Priority

- 1.3.1 Subject to Clause 1.2.1 (Interpretation) in the event and to the extent only of a conflict between any of the provisions of this DPS Agreement, the conflict shall be resolved in accordance with the following descending order of precedence:
- (a) the Clauses and Schedule 1 (Definitions);

- (b) the remaining Schedules of this DPS Agreement other than Schedule 12 (DPS Application); and
- (c) Schedule 12 (DPS Application).
- 1.4 The template documents set out in Schedule 3 (Template Call-Off Contract) are provided as templates only, and as such are not binding on the Parties in any way. If there is any conflict between the provisions of this DPS Agreement and the provisions of any Contract, the provisions of this DPS Agreement shall prevail over those of the Contract save that the Contract shall prevail over Schedule 12 (DPS Application).
- 2 Commencement and Duration**
- 2.1 This DPS Agreement shall take effect on the DPS Commencement Date and (subject to earlier termination and Clause 2.2 (Commencement and Duration)) shall expire on the Expiry Date.
- 2.2 The Administering Authority may extend the duration of the Purchasing System on not more than two (2) separate occasions as follows:
- 2.2.1 not less than three (3) months prior to the Expiry Date the Administering Authority may service notice to the Provider that the Expiry Date will be extended by a period of twelve (12) months commencing on the Expiry Date (the **First Extension Period**); and
- 2.2.2 not less than three (3) months prior to the end of the First Extension Period the Administering Authority may service notice to the Provider that the Expiry Date will be extended by a second and final period of twelve (12) months commencing at the end of the First Extension Period.
- 3 Due Diligence**
- 3.1 The Provider acknowledges that:
- 3.1.1 the Administering Authority has delivered or made available to the Provider all of the information and documents that the Provider considers necessary or relevant for the performance of its obligations under this DPS Agreement;
- 3.1.2 it shall not be excused from the performance of any of its obligations under this DPS Agreement on the grounds of, nor shall the Provider be entitled to recover any additional costs or expenses, arising as a result of any:
- (a) misinterpretation of the requirements of the Administering Authority in the Invitation to Tender or elsewhere; and/or
- (b) failure by the Provider to satisfy itself as to the accuracy and/or adequacy of the Due Diligence Information.
- 4 Provider's Appointment**
- 4.1 The Administering Authority hereby appoints the Provider as a potential provider of Contract Services and/or Contract Supplies (as the case may be) and Funding and the Provider shall be eligible to be considered for the award of Contracts by Contracting Authorities during the Term.

- 4.2 In consideration of the Provider agreeing to enter into this DPS Agreement and to perform its obligations under it the Administering Authority agrees to pay and the Provider agrees to accept on the signing of this DPS Agreement the sum of one pound (£1.00) sterling (receipt of which is hereby acknowledged by the Provider).

## 5 Scope of DPS Agreement

- 5.1 Without prejudice to Clause 37 (Third Party Rights), this DPS Agreement governs the relationship between the Administering Authority and the Provider in respect of the satisfaction of any Contracting Authority Requirement by the Provider.
- 5.2 The Provider acknowledges and agrees that:
- 5.2.1 there is no obligation whatsoever on the Administering Authority or on any Contracting Authority to invite or select the Provider to provide any Contract Services and/or Contract Supplies (as the case may be) and Funding under this DPS Agreement;
  - 5.2.2 in entering into this DPS Agreement no form of exclusivity has been conferred on the Provider nor volume or value guarantee granted by the Administering Authority and/or any Contracting Authority in relation to the provision of any Contracting Authority Requirements by the Provider;
  - 5.2.3 the Administering Authority and Contracting Authorities are at all times entitled to enter into other contracts and agreements with other providers of funding or services which are the same as or similar to the Contract Services and/or Contract Supplies (as the case may be) and Funding; and
  - 5.2.4 it shall not (and shall procure that its employees, agents and subcontractors shall not) advise, reward, cause or induce a Contracting Authority to procure the delivery of Contract Services and/or Contract Supplies (as the case may be) and Funding otherwise than through the Purchasing System and in the event that the Provider breaches its obligations under this Clause 5.2.4 (Scope of DPS Agreement), then (without prejudice to any other rights and remedies provided for in this DPS Agreement) the Administering Authority shall be entitled to terminate this DPS Agreement for material Default.
- 5.3 This DPS Agreement shall only apply to Contracting Authorities and heat network projects in England and Wales.
- 5.4 This DPS Agreement, any Call for Competition Tender Pack issued pursuant to the Call for Competition Procedure or any Contract shall only apply in respect of the provision of Contract Services and/or Contract Supplies (as the case may be) and Funding. A Contracting Authority may not use the Purchasing System to procure the delivery of Contract Services and/or Contract Supplies (as the case may be) only.

## 6 Call for Competition Procedure

- 6.1 If the Administering Authority or any Contracting Authority decides to source any Contracting Authority Requirement through this DPS Agreement, then it shall be entitled at any time in its absolute and sole discretion during the Term to call off such Contracting Authority Requirement from the Provider by entering into a Contract pursuant to Schedule 4 (Call for Competition Procedure).

- 6.2 The Provider shall comply with the relevant provisions in Schedule 4 (Call for Competition Procedure).

## 7 Representations and Warranties

- 7.1 The Administering Authority represents and warrants that it has full capacity and authority to enter into and to perform this DPS Agreement, and that;
- 7.1.1 this DPS Agreement is executed by its duly authorised representative;
- 7.1.2 there are no actions, suits or proceedings or regulatory investigations before any court or administrative body or arbitration tribunal pending or, to its knowledge, threatened against it that might affect its ability to perform its obligations under this DPS Agreement; and
- 7.1.3 its obligations under this DPS Agreement constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms subject to applicable (as the case may be for each Party) bankruptcy, reorganisation, insolvency, moratorium or similar Laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or law).
- 7.2 The Provider represents and warrants that:
- 7.2.1 it is validly incorporated, organised and subsisting in accordance with the Laws of its place of incorporation;
- 7.2.2 it has obtained and will maintain all licences, authorisations, permits, necessary consents and regulatory permissions to enter into and perform its obligations under this DPS Agreement;
- 7.2.3 it has not committed or agreed to commit a Prohibited Act and has no knowledge that an agreement has been reached involving the committal by it of a Prohibited Act, save where details of any such arrangement have been disclosed in writing to the Administering Authority before the DPS Commencement Date;
- 7.2.4 the execution, delivery and performance by the Provider of its obligations under this DPS Agreement does not and will not constitute a breach of any Law or obligation applicable to it and does not and will not cause or result in a breach of any agreement by which it is bound;
- 7.2.5 it will comply with all relevant regulatory and legal requirements, including compliance with requirements relating to investment funds and fund management, regarding the provision of Contract Services and/or Contract Supplies (as the case may be) and Funding and the performance of any other obligations under this DPS Agreement;
- 7.2.6 as at the DPS Commencement Date, it has notified the Administering Authority in writing of any Occasions of Tax Non-Compliance or any litigation in which it is involved in connection with any Occasions of Tax Non Compliance;
- 7.2.7 it has and shall continue to have all necessary Intellectual Property Rights including in and to any materials made available by the Provider to the

Administering Authority which are necessary for the performance of the Provider's obligations under this DPS Agreement;

7.2.8 it is not affected by an Insolvency Event and no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, have been or are threatened) for the winding up of the Provider or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, manager, administrator or similar officer in relation to any of the Provider's assets or revenue; and

7.3 Each of the representations and warranties set out in Clauses 7.1 and 7.2 (Representations and Warranties) shall be construed as a separate representation and warranty and shall not be limited or restricted by reference to, or inference from, the terms of any other representation or warranty in this DPS Agreement.

7.4 If at any time a Party becomes aware that a representation or warranty given by it under Clauses 7.1 or 7.2 (Representations and Warranties) has been breached, is untrue or is misleading, it shall immediately notify the other Party of the relevant occurrence in sufficient detail to enable that Party to understand such breach or inaccuracy and act accordingly.

7.5 For the avoidance of doubt, the fact that any provision of this DPS Agreement is expressed as a warranty shall not preclude any right of termination the Administering Authority may have in respect of the breach of that provision by the Provider which constitutes a material Default of this DPS Agreement.

7.6 Each time that a Contract is entered into, the warranties and representations in Clauses 6.1 and 6.2 (Call for Competition Procedure) shall be deemed to be repeated by the Provider with reference to the circumstances existing at that time.

## 8 DPS Agreement Performance

8.1 Without prejudice to Clause 1.3 (Priority), the Provider shall perform its obligations under this DPS Agreement in compliance with:

8.1.1 the requirements of this DPS Agreement, including Schedule 6 (Purchasing System Management) and Schedule 12 (DPS Application);

8.1.2 the terms and conditions of any relevant Contract;

8.1.3 Good Industry Practice;

8.1.4 all applicable Law.

8.2 The Provider shall bring to the attention of the Administering Authority any conflict between any of the requirements of Clause 8.1 (DPS Agreement Performance) and shall comply with the Administering Authority's decision on the resolution of any such conflict.

## 9 Performance under this DPS Agreement

9.1 The Provider shall, subject to Clause 1.3 (Priority), perform all of its obligations under any Contract entered into with any Contracting Authority:

9.1.1 in accordance with the requirements of this DPS Agreement; and

9.1.2 in accordance with the terms and conditions of each Contract.

9.2 The Provider shall notify the Administering Authority and any relevant Contracting Authority of any conflict between the requirements in Clauses 9.1.1 and 9.1.2 (Performance under this DPS Agreement), but shall apply Clause 1.3 (Priority) in resolving any such conflict.

9.3 If and to the extent the provision of any:

9.3.1 Contract Services;

9.3.2 Contract Supplies; and/or

9.3.3 Funding,

pursuant to a Contract requires the Provider to be authorised by a Regulator then the Provider hereby acknowledges and agrees that it shall not commence the provision of the relevant Contract Services and/or Contract Supply or provide Funding until it has the appropriate permissions to execute, deliver and perform its obligations under the relevant Contract and can comply with its obligations pursuant to Clause 9.4 (Performance under this DPS Agreement).

9.4 Where Clause 9.3 (Performance under this DPS Agreement) applies the Provider further acknowledges and agrees that:

9.4.1 in keeping with its obligations under Clause 33 (Conflicts of Interest), it shall apply the Regulator's rules on conflicts of interest (If any) in relation to the identification, types, management and disclosure of conflicts;

9.4.2 in addition to the requirements of Clause 33.1 of this DPS Agreement, it shall have in place, a conflicts policy that complies with the Regulator's rules on conflicts of interest; and

9.4.3 it shall put in place effective Information Barriers which comply (where applicable) with the Regulator's rules on such arrangements preventing the flow of Restricted Information between personnel.

## 10 DPS Agreement Management and DPS Charges

10.1 The Parties shall manage this DPS Agreement in accordance with Schedule 6 (Purchasing System Management).

10.2 The terms of Schedule 10 (DPS Charges) shall apply to the payment of DPS Charges by the Provider.

## 11 Records and Audit Access

11.1 Without prejudice to any other requirement of this DPS Agreement the Provider shall keep and maintain until the later of:

11.1.1 seven (7) years after the date of termination or expiry of this DPS Agreement; or

11.1.2 seven (7) years after the date of termination or expiry of the last Contract to expire or terminate; or

11.1.3 such other date as may be agreed in writing between the Parties,

full and accurate records and accounts of the operation of this DPS Agreement, including any completed Contract(s), the Contract Services and/or Contract Supplies (as the case may be) and Funding provided pursuant to the Contract(s), and the amounts paid by the relevant Contracting Authority under any Contract(s).

- 11.2 The Provider shall keep the records and accounts referred to in Clause 11.1 (Records and Audit Access) in accordance with Good Industry Practice and Law.
- 11.3 The Provider shall on request by the Administering Authority allow any Auditor to access the records and accounts referred to in Clause 11.1 (Records and Audit Access) at the Provider's premises and/or provide copies of the same in such format and manner as reasonably required by the Auditor, in order that the Auditor may carry out an inspection to assess compliance by the Provider with any of the Provider's obligations under this DPS Agreement, including (but not limited to) where the Auditor wishes to:
  - 11.3.1 verify the accuracy of the charges and any other amounts payable by a Contracting Authority under a Contract (including proposed or actual variations); and/or
  - 11.3.2 verify the costs of the Provider (including the costs of any subcontractors and/or third party providers) in connection with the provision of any Contracting Authority Requirement; and/or
  - 11.3.3 verify the Provider's compliance with Law; and/or
  - 11.3.4 identify or investigate actual or suspected Prohibited Acts, impropriety or accounting mistakes or any breach or threatened breach of security; and/or
  - 11.3.5 obtain such information as is necessary to fulfil the Administering Authority's obligations to supply information for parliamentary, ministerial, judicial or administrative purposes including the supply of information to the Comptroller and Auditor General; and/or
  - 11.3.6 carry out the Administering Authority's internal and statutory accounting processes and to prepare, examine and/or certify the Administering Authority's annual and interim reports and accounts; and/or
  - 11.3.7 enable the National Audit Office to carry out an examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Administering Authority has used its resources; and/or
  - 11.3.8 verify the accuracy and completeness of any Management Information delivered or required by this DPS Agreement; and/or
  - 11.3.9 review any records relating to the Provider's provision of Contract Services and/or Contract Supplies (as the case may be) and Funding and to verify that these reflect the Provider's own internal reports and records; and/or
  - 11.3.10 review the integrity, confidentiality and security of the Administering Authority Data; and/or
  - 11.3.11 review the Provider's quality management systems (including all relevant quality plans and any quality manuals and procedures).

- 11.4 The Provider agrees and acknowledges that the level of information to be provided to the Provider in respect of any Audit shall be a matter for the Auditor (in their complete discretion) and a lack of information regarding the purpose or objective of any Audit shall have no bearing on the requirement for the Provider to comply with any access request made pursuant to this Clause 11 (Records and Audit Access).
- 11.5 Except where an Audit is imposed on the Administering Authority by a regulatory body or where the Administering Authority has reasonable grounds for believing that the Provider has not complied with its obligations under this DPS Agreement, the Authority may not conduct an Audit of the Provider more than once during the Term.
- 11.6 Nothing in this DPS Agreement shall prevent or restrict the rights of the Comptroller and Auditor General and/or their representatives from carrying out an Audit, examination or investigation of the Provider.
- 11.7 The Administering Authority shall use reasonable endeavours to ensure that the conduct of any Audit does not unreasonably disrupt the Provider or obstruct the provision of any Funding pursuant to any Contract, save insofar as the Provider accepts and acknowledges that control over the conduct of Audits carried out by the Auditors is outside of the control of the Administering Authority.
- 11.8 Subject to the Administering Authority's obligations of confidentiality, the Provider shall on demand provide the Auditors with all reasonable co-operation and assistance in relation to each Audit, including by providing:
- 11.8.1 all information within the scope of the Audit requested by the Auditor; and
  - 11.8.2 access to the Provider Personnel.
- 12 Variations to this DPS Agreement**
- 12.1 This DPS Agreement can only be varied if the Administering Authority notifies the Provider in writing that it wishes to vary the terms of this DPS Agreement and provides the Provider with full written details of any such proposed change. If the Provider agrees to the terms of the variation proposed by the Administering Authority the Parties shall confirm in writing their agreement to the Administering Authority's variation.
- 12.2 If no variation agreement is reached within thirty (30) Working Days of the Administering Authority notifying the Provider that it wishes to vary the terms, the Administering Authority may give written notice to the Provider that either:
- 12.2.1 the Parties will continue to perform their obligations under this DPS Agreement without the variation; or
  - 12.2.2 the DPS Agreement will be terminated with immediate effect.
- 13 Change in Law**
- 13.1 The Provider shall not be relieved of its obligations under this DPS Agreement as the result of:
- 13.1.1 a General Change in Law, or
  - 13.1.2 a Specific Change in Law where the effect of that Specific Change in Law on this DPA Agreement is known at the date of this DPS Agreement.

- 13.2 If a Specific Change in Law occurs or will occur during the Term (other than those referred to in Clause 13.1.2 (Change in Law)), the Provider shall notify the Administering Authority and the Agent of the likely effects of that change including, whether any change is required to this DPS Agreement.
- 13.3 As soon as practicable after any notification in accordance with Clause 13.2 (Change in Law), the Parties will discuss and agree the matters referred to in that Clause and any ways in which the Provider can mitigate the effect of the Specific Change of Law and the Provider shall:
- 13.3.1 provide evidence that the Provider has minimised any increase in costs or maximised any reduction in costs;
- 13.3.2 give evidence about how the Specific Change in Law has affected the cost of providing the Contract Services and/or Contract Supplies (as the case may be), as appropriate).
- 13.4 Any changes to the Provider's obligations agreed by the Parties following discussions under 13.3 will be implemented by a written variation agreement signed by the Administering Authority and the Provider. The variation agreement will only apply to Contracts signed after the date of any variation executed by the Parties pursuant to this Clause 13.4 (Change in Law).
- 14 Promoting Tax Compliance**
- 14.1 If, at any point during the Term, an Occasion of Tax Non-Compliance occurs, the Provider shall:
- 14.1.1 notify the Administering Authority in writing of such fact within five (5) Working Days of its occurrence; and
- 14.1.2 promptly provide to the Administering Authority:
- (a) details of the steps that the Provider is taking to address the Occasion of Tax Non-Compliance, together with any mitigating factors that it considers relevant; and
- (b) such other information in relation to the Occasion of Tax Non-Compliance as the Administering Authority reasonably requests.
- 14.2 In the event that the Provider fails to comply with this Clause 14 (Promoting Tax Compliance) and/or does not provide details of proposed mitigating factors which in the reasonable opinion of the Administering Authority are acceptable, then the Administering Authority shall be entitled to terminate this DPS Agreement for material Default.

**15 Cyber Essentials Scheme**

- 15.1 The Provider shall provide the Administering Authority with a valid Cyber Essentials Scheme Basic Certificate, as a condition for the award of a contract(s) under this DPS Agreement.
- 15.2 Where the Provider continues to process Cyber Essentials Scheme Data during the Term or the contract period of any Contract the Provider shall deliver to the Administering Authority evidence of renewal of a valid Cyber Essentials Scheme Basic Certificate on each anniversary of the first applicable certificate obtained by the Provider under Clause 15.1 (Cyber Essential Scheme).

- 15.3 In the event that the Provider fails to comply with Clauses 15.1 or 15.2 (Cyber Essential Scheme), the Administering Authority reserves the right to terminate this DPS Agreement for material Default.

## **16 Intellectual Property Rights**

- 16.1 Save as expressly granted under this DPS Agreement or a Contract, neither the Administering Authority, the Provider or the Contracting Authority shall acquire any right, title or interest in or to the Intellectual Property Rights of the other Party.
- 16.2 Where either Party acquires, by operation of Law, title to any Intellectual Property Right that is inconsistent with the allocation of title set out in Clause 16.1 it shall assign in writing such Intellectual Property Right to the other Party on the request of the other Party (whenever made).
- 16.3 Neither Party shall have any right to use any of the other Party's names, logos or trademarks on any of its products or services without the other Party's prior written consent.
- 16.4 The Provider shall ensure and procure that the performance of the Provider's responsibilities and obligations hereunder shall not infringe any Intellectual Property Rights of any third party.
- 16.5 The Provider shall at all times during and after the Term indemnify the Administering Authority against all Losses incurred by, awarded against or agreed to be paid by the Administering Authority (whether before or after the making of the demand pursuant to the indemnity hereunder) arising from an IPR Claim.
- 16.6 If an IPR Claim is made, or the Provider anticipates that an IPR Claim might be made, the Provider may, at its own expense and sole option, either:
- 16.6.1 procure for the Administering Authority the right to continue using the relevant item which is subject to the IPR Claim; or
  - 16.6.2 replace or modify the relevant item with non-infringing substitutes provided that:
    - (a) the performance and functionality of the replaced or modified item is at least equivalent to the performance and functionality of the original item;
    - (b) the replaced or modified item does not have an adverse effect on the Providers performance of its obligations under this DPS Agreement;
    - (c) there is no additional cost to the Administering Authority; and
    - (d) the terms and conditions of this DPS Agreement shall apply to the substituted item.
- 16.7 If the Provider elects to procure a licence in accordance with Clause 16.6.1 or to modify or replace an item pursuant to Clause 16.6.2, but this has not avoided or resolved the IPR Claim, then:
- 16.7.1 the Administering Authority may terminate this DPS Agreement by written notice with immediate effect; and
  - 16.7.2 without prejudice to the indemnity set out in Clause 16.5, the Provider shall be liable for all reasonable and unavoidable costs of the substitute items and/or

services including the additional costs of procuring, implementing and maintaining the substitute items.

## 17 Confidentiality

- 17.1 For the purposes of this Clause 17 (Confidentiality), the term **Disclosing Party** shall mean a Party which discloses or makes available directly or indirectly its Confidential Information and **Recipient** shall mean the Party which receives or obtains Confidential Information.
- 17.2 Except to the extent set out in this Clause 17 (Confidentiality) or where disclosure is expressly required or permitted elsewhere in this DPS Agreement, the Recipient shall:
- 17.2.1 treat the Disclosing Party's Confidential Information as confidential and keep it in secure custody (such secure custody being appropriate to the form in which such materials are stored and the nature of the Confidential Information contained in those materials);
  - 17.2.2 not disclose the Disclosing Party's Confidential Information to any other person except as expressly set out in this DPS Agreement or with the Disclosing Party's prior written consent;
  - 17.2.3 not use or exploit the Disclosing Party's Confidential Information in any way except for the purposes anticipated under this DPS Agreement; and
  - 17.2.4 immediately notify the Disclosing Party if it suspects or becomes aware of any unauthorised access, copying, use or disclosure in any form of any of the Disclosing Party's Confidential Information.
- 17.3 Notwithstanding Clause 17.2 (Confidentiality), the Recipient shall be entitled to disclose Confidential Information where:
- 17.3.1 the Recipient is required to disclose the Confidential Information by Law, provided that Clause 19 (Freedom of Information) shall apply to disclosures required under the FOIA or the EIRs;
  - 17.3.2 the need for such disclosure arises out of or in connection with:
    - (a) any legal challenge or potential legal challenge against the Administering Authority arising out of or in connection with this DPS Agreement;
    - (b) the examination and certification of the Administering Authority's accounts (provided that the disclosure is made on a confidential basis) or for any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Administering Authority is making use of its resources; or
    - (c) the conduct of a Central Government Body review in respect of this DPS Agreement; or
    - (d) the Recipient has reasonable grounds to believe that the Disclosing Party is involved in activity that may constitute a criminal offence under the Bribery Act 2010 and the disclosure is being made to the Serious Fraud Office (or an equivalent competent authority).

- 17.4 If the Recipient is required by Law to make a disclosure of Confidential Information, the Recipient shall as soon as reasonably practicable and to the extent permitted by Law notify the Disclosing Party of the full circumstances of the required disclosure including the relevant Law and/or regulatory body requiring such disclosure and the Confidential Information to which such disclosure would apply.
- 17.5 Subject to Clauses 17.2 and 17.3 (Confidentiality) the Provider may disclose the Confidential Information of the Administering Authority on a confidential basis to:
- 17.5.1 Provider Personnel or Sub-Contractors who are directly involved in the Provider's participation in the Purchasing System or the provision of the Funding pursuant to any Contract and require the Confidential Information to enable the performance of the Provider's obligations;
  - 17.5.2 its professional advisers for the purposes of obtaining advice in relation to this DPS Agreement; and
  - 17.5.3 as required by any Regulator.
- 17.6 Where the Provider discloses the Confidential Information of the Administering Authority pursuant to Clause 17.4 (Confidentiality) it shall remain responsible at all times for compliance with the confidentiality obligations set out in this DPS Agreement by the persons to whom disclosure has been made.
- 17.7 The Administering Authority may disclose the Confidential Information of the Provider:
- 17.7.1 to any Central Government Body or Contracting Authority on the basis that the information is confidential and is not to be disclosed to any other party;
  - 17.7.2 to the British Parliament and any committees of the British Parliament or if required by any British Parliamentary reporting requirement;
  - 17.7.3 on a confidential basis to a professional adviser, consultant, provider or other person engaged by any of the entities described in Clause 17.7.1 (Confidentiality) for any purpose relating to or connected with this DPS Agreement;
  - 17.7.4 on a confidential basis for the purpose of the exercise of its rights under this DPS Agreement; or
  - 17.7.5 to a proposed transferee, assignee or novatee of, or successor in title to the Administering Authority,
- and for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on the Administering Authority under this DPS Agreement.
- 17.8 For the avoidance of doubt, the Confidential Information that the Administering Authority may disclose under Clause 17.5 (Confidentiality) includes information relating to Contracts, including service levels, terms and repayment information (which includes information on terms tendered in a Call for Competition Procedure, even where such a Call for Competition

Procedure does not result in the award of a Contract) and the terms of any Contract may be shared with any Central Government Body or Contracting Authority from time to time.

- 17.9 Nothing in this Clause 17 (Confidentiality) shall prevent a Recipient from using any techniques, ideas or Know-How which the Recipient has gained during the performance of this DPS Agreement in the course of its normal business to the extent that this use does not result in a disclosure of the Disclosing Party's Confidential Information or an infringement of Intellectual Property Rights.
- 17.10 In the event that the Provider fails to comply with this Clause 17 (Confidentiality), the Administering Authority reserves the right to terminate this DPS Agreement for material Default.

## **18 Transparency**

- 18.1 The Parties acknowledge that the content of this DPS Agreement is not Confidential Information. The Administering Authority shall determine whether any of the content of this DPS Agreement is exempt from disclosure in accordance with the provisions of the FOIA. The Administering Authority may consult with the Provider to inform its decision regarding any redactions but shall have the final decision in its absolute discretion.
- 18.2 Notwithstanding any other provision of this DPS Agreement, the Provider hereby gives its consent for the Administering Authority to publish this DPS Agreement in its entirety (redacted as necessary in accordance with the provisions of the FOIA), including any changes to this DPS Agreement agreed from time to time. The Provider shall assist and cooperate with the Administering Authority to enable the Administering Authority to publish this DPS Agreement.

## **19 Freedom of Information**

- 19.1 The Provider acknowledges and accepts that the Administering Authority is subject to the requirements of the FOIA and the EIRs. The Provider shall:
- 19.1.1 provide all necessary assistance and cooperation as reasonably requested by the Administering Authority to enable the Administering Authority to comply with its Information disclosure obligations under the FOIA and EIRs;
- 19.1.2 transfer to the Administering Authority all Requests for Information relating to this DPS Agreement that it receives as soon as practicable and in any event within two (2) Working Days of receipt;
- 19.1.3 provide the Administering Authority with a copy of all Information belonging to the Administering Authority which is in the Provider's possession or control and reasonably required pursuant to a Request for Information in the form that the Administering Authority requires within five (5) Working Days (or such other period as the Administering Authority may reasonably specify) of the Administering Authority's request for such Information; and
- 19.1.4 not respond directly to a Request for Information unless authorised in writing to do so by the Administering Authority.
- 19.2 The Provider acknowledges that the Administering Authority may be required under the FOIA and/or the EIRs to disclose Information without consulting or obtaining consent from the

Provider. The Administering Authority shall take reasonable steps to notify the Provider of any such Request for Information (in accordance with the Secretary of State's Section 45 Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the FOIA) to the extent that it is permissible and reasonably practical for it to do so but (notwithstanding any other provision in this DPS Agreement) for the purpose of this DPS Agreement, the Administering Authority shall be responsible for determining in its absolute discretion whether any information is exempt from disclosure in accordance with the FOIA and/or the EIRs.

- 19.3 In the event that the Provider fails to comply with this Clause 19 (Freedom of Information), the Administering Authority reserves the right to terminate this DPS Agreement for material Default.

## **20 Protection of Personal Data**

- 20.1 The Provider shall, where it receives any Personal Data as a consequence of the performance of its obligations under this DPS Agreement, notify the Administering Authority and the Agent and it shall not Process any such Personal Data except in accordance with the written instructions of the Administering Authority.
- 20.2 The Provider shall notify the Administering Authority and its Agent immediately if it considers that any of Administering Authority's (or the Agent's) instructions infringe the Data Protection Legislation or any other applicable Law.

## **21 Publicity and Branding**

- 21.1 Subject to Schedule 8 (Marketing), the Provider shall not:
- 21.1.1 make any press announcements or publicise this DPS Agreement in any way; or
  - 21.1.2 use the Administering Authority's name or brand in any promotion or marketing or announcement, without first obtaining the written consent of the Administering Authority.
- 21.2 Each Party acknowledges to the other that nothing in this DPS Agreement either expressly or by implication constitutes an approval and/or endorsement of any products or services of any other party and each Party agrees not to conduct itself in such a way as to imply or express any such Approval and/or endorsement.
- 21.3 The Administering Authority shall be entitled to publicise this DPS Agreement in accordance with any legal obligation upon the Administering Authority, including any examination of this DPS Agreement by the National Audit Office pursuant to the National Audit Act 1983 or otherwise.

## **22 Liability**

- 22.1 Neither Party excludes or limits its liability for:
- 22.1.1 death or personal injury caused by its negligence, or that of its Employees, agents or subcontractors (as applicable);
  - 22.1.2 bribery or Fraud by it or its Employees; or
  - 22.1.3 any liability to the extent it cannot be excluded or limited by Law.

- 22.2 Losses incurred under or in connection with this DPS Agreement as a result of Default(s) or Administering Authority Cause(s) (as the case may be) shall in no event exceed:
- 22.2.1 in relation to any Default or Administering Authority Cause (as the case may be) occurring from the DPS Commencement Date to the end of the first Contract Year, a sum equal to one hundred thousand pounds (£100,000);
  - 22.2.2 in relation to any Default or Administering Authority Cause (as the case may be) occurring in each subsequent Contract Year following the end of the first Contract Year, that commences during the remainder of the Term, a sum equal to one hundred thousand pounds (£100,000); and
  - 22.2.3 in relation to any Default or Administering Authority Cause (as the case may be) occurring in each Contract Year that commences after the end of the Term, a sum equal to one hundred thousand pounds (£100,000).
- 22.3 Subject to Clause 22.1 (Liability), neither Party shall be liable to the other Party for any:
- 22.3.1 indirect, special or consequential Loss; or
  - 22.3.2 loss of profits, turnover, savings, business opportunities or damage to goodwill (in each case whether direct or indirect).
- 22.4 Subject to Clause 22.2 (Liability), and notwithstanding Clause 22.3 (Liability), the Provider acknowledges that the Administering Authority may, amongst other things, recover from the Provider the following Losses incurred by the Administering Authority to the extent that they arise as a result of a Default by the Provider:
- 22.4.1 any operational and/or administrative costs and expenses incurred by the Administering Authority, including costs relating to time spent by or on behalf of the Administering Authority in dealing with the consequences of the Default;
  - 22.4.2 any wasted expenditure or charges;
  - 22.4.3 the additional cost of procuring, implementing or operating any alternative or replacement services;
  - 22.4.4 any compensation or interest paid to a third party by the Administering Authority;
  - 22.4.5 any fine, penalty, costs or losses (including, without limitation fines, penalties, costs or losses imposed by any regulator) incurred by the Administering Authority pursuant to Law.
- 22.5 Each Party shall use all reasonable endeavours to mitigate any loss or damage suffered, arising out of or in connection with this DPS Agreement.
- 22.6 For the avoidance of doubt, the Parties acknowledge and agree that this Clause 22 (Liability) shall not limit the Provider's liability to a Contracting Authority under any Contract and the Provider's liability under a Contract shall be as provided for in that Contract only.

## 23 Insurance

- 23.1 The Provider shall effect and maintain appropriate insurances in relation to the performance of its obligations under this DPS Agreement and any Contract in accordance with Schedule 8 (Insurance Requirements).

23.2 The terms of any insurance or the amount of cover shall not relieve the Provider of any liabilities arising under this DPS Agreement or any Contracts.

## 24 Improvement Plan

24.1 Without prejudice to any other rights or remedies arising under this DPS Agreement, including under Clause 25.1 (Termination on Material Default), if the Provider commits a material Default of this DPS Agreement (such that the Administering Authority has the right to issue a Termination Notice pursuant to Clause 25 (Administering Authority's Termination Rights) in respect of such Default) the Provider acknowledges and agrees that the Administering Authority shall have the right to exercise (in its absolute and sole discretion) all or any of the following remedial actions:

24.1.1 the Administering Authority shall be entitled to require the Provider to prepare and provide to the Administering Authority a draft Improvement Plan within ten (10) Working Days;

24.1.2 the Administering Authority shall be entitled to require the Provider to attend, within a reasonable time, one or more meeting(s) in order to resolve the issues raised by the Administering Authority in its notice to the Provider requesting such meetings;

24.1.3 the Administering Authority shall be entitled to serve an Improvement Notice on the Provider and the Provider shall implement such requirements for improvement as set out in the Improvement Notice.

24.2 Where the Administering Authority has instructed the Provider to prepare and provide a draft Improvement Plan pursuant to Clause 24.1.1 (Improvement Plan) the Provider shall ensure that the draft Improvement Plan sets out (as a minimum):

24.2.1 full details of the relevant Default(s) including a root cause analysis;

24.2.2 the actual or anticipated effect of the Default(s); and

24.2.3 the steps which the Provider proposes to take to rectify the Default(s) and (where applicable) to prevent such Default(s) from recurring, including timescales.

and the Provider shall promptly provide to the Administering Authority any further documentation that the Administering Authority requires to assess the Provider's draft Improvement Plan.

24.3 The Administering Authority shall consider the draft Improvement Plan and may reject the draft Improvement Plan by notice to the Provider if, acting reasonably, it considers that the draft Improvement Plan is:

24.3.1 insufficiently detailed to be capable of proper evaluation;

24.3.2 will take too long to complete;

24.3.3 will not prevent reoccurrence of the Default(s); or

24.3.4 will rectify the Default but in a manner which is unacceptable to the Administering Authority,

such notice giving reasons for the rejection, and the Provider shall take the reasons into account in the preparation of a revised Improvement Plan, which shall be submitted for further review within five (5) Working Days (or such other date as stated in the notice rejecting the initial draft).

- 24.4 If the Administering Authority Approves the draft or revised Improvement Plan that Improvement Plan the Provider shall immediately start work on the actions set out therein.
- 24.5 In the event that the Administering Authority has, in its absolute and sole discretion, invoked one or more of the remedies set out in Clause 24.1 (Improvement Plan) and the Provider either:
- 24.5.1 fails to implement such requirements for improvement as set out in the Improvement Notice; and/or
  - 24.5.2 fails to provide an Improvement Plan capable of Approval pursuant to Clause 24.3 (Improvement Plan); and/or
  - 24.5.3 fails to implement an Improvement Plan Approved by the Administering Authority, then (without prejudice to any other rights and/or remedies provided for in this DPS Agreement) the Administering Authority shall be entitled to terminate this DPS Agreement.

## **25 Administering Authority's Termination Rights**

### *Termination on Material Default*

- 25.1 The Administering Authority may terminate this DPS Agreement for material Default by issuing a Termination Notice to the Provider where:
- 25.1.1 a Contracting Authority terminates a Contract for the Provider's breach of that Contract;
  - 25.1.2 the Provider commits two (2) or more Defaults in any rolling period of three (3) months;
  - 25.1.3 the Provider commits a material Default of any of the following Clauses:
    - (a) 7 (Representations and Warranties);
    - (b) 8 (DPS Agreement Performance);
    - (c) 11 (Records and Audit Access);
    - (d) 14 (Promoting Tax Compliance);
    - (e) 19 (Freedom of Information);
    - (f) 20 (Protection of Personal Data); and
    - (g) 33 (Conflicts of interest).

- 25.1.4 the Provider commits any material Default which is not, in the reasonable opinion of the Administering Authority, capable of remedy; or
- 25.1.5 the Provider commits a Default which in the opinion of the Administering Authority is remediable but the Provider has not remedied such Default to the satisfaction of the Administering Authority within twenty (20) Working Days, or such other period as may be specified by the Administering Authority, after issue of a written notice from the Administering Authority to the Provider specifying the remediable Default and requesting it to be remedied in accordance with any instructions of the Administering Authority.

*Termination on express terms*

- 25.2 The Administering Authority expressly reserves the right to terminate this DPS Agreement for material Default where this is expressly stated in this DPS Agreement including (without limitation) pursuant to:
- (a) Clause 15 (Cyber Essentials Scheme);
  - (b) Clause 0 (Prevention of Fraud and Bribery);
  - (c) Clause 28 (Compliance);
  - (d) Clause 33 (Conflicts of Interest); and
  - (e) anywhere that is stated in this DPS Agreement that the Provider by its act or omission will have committed a material Default.

*Termination on Insolvency*

- 25.3 The Administering Authority may terminate this DPS Agreement by issuing a Termination Notice to the Provider where an Insolvency Event affecting the Provider occurs.

*Termination on Change of Control*

- 25.4 Without acting contrary to any Law the Provider shall notify the Administering Authority immediately if the Provider undergoes or is intending to undergo a Change of Control including any circumstances suggesting and/or explaining that a Change of Control is planned or is in contemplation or has taken place. The Administering Authority may terminate this DPS Agreement by issuing a Termination Notice to the Provider within six (6) Months of:
- (a) being notified in writing that a Change of Control is planned or is in contemplation or has occurred; or
  - (b) where no notification has been made, the date that the Administering Authority should reasonably have been aware that a Change of Control was planned or was in contemplation or occurred,

but shall not be permitted to terminate where an Approval was granted prior to the Change of Control.

*Termination in connection with the Regulations*

- 25.5 The Administering Authority may terminate this DPS Agreement by issuing a Termination Notice to the Provider where the Administering Authority reasonably concludes that:

25.5.1 this DPS Agreement should not have been entered into in view of an infringement of the Regulations; and/or

25.5.1 the Agreement has been substantially amended to the extent that the Regulations require a new procurement procedure,

#### *Partial Termination*

25.6 Where the Administering Authority has the right to terminate this DPS Agreement, the Administering Authority shall, in the alternative, be entitled to terminate part of this DPS Agreement pursuant to this Clause 25.6 (Partial Termination) provided always that if the Administering Authority elects to terminate this DPS Agreement in part the parts of this DPS Agreement not terminated or suspended can, in the Administering Authority's reasonable opinion, operate effectively to deliver the intended purpose of the surviving parts of this DPS Agreement.

25.7 The Parties shall use their reasonable endeavours to agree a variation to this DPS Agreement necessitated by a partial termination including the effect that the partial termination may have on the on the provision of any existing Contracting Authority Requirement.

### **26 Suspension of Provider's Appointment**

26.1 If the Administering Authority is entitled to terminate this DPS Agreement pursuant to Clause 22 (Administering Authority's Termination Rights) but excluding its termination rights under Clause 22.5 (Termination Without Cause), the Administering Authority may instead elect in its sole discretion to suspend the Provider's participation in the Purchasing System by giving notice in writing to the Provider, and the Provider agrees that it shall not be entitled to enter into any new Contract during the period for which it is so suspended, as specified in the Administering Authority's notice.

26.2 Any suspension under Clause 26.1 (Suspension of Provider's Appointment) shall be without prejudice to any right of termination which has already accrued, or subsequently accrues, to the Administering Authority.

26.3 The Parties acknowledge that suspension shall not affect the Provider's obligation to perform any existing Contracts concluded prior to the date of such suspension notice.

26.4 For the avoidance of doubt, no period of suspension under this Clause 26 (Suspension of Provider's Appointment) shall result in an extension of the Term.

### **27 Consequences of Expiry or Termination**

27.1 Notwithstanding the service of a notice to suspend or terminate this DPS Agreement, the Provider shall continue to fulfil its obligations under this DPS Agreement as required by the Administering Authority until the date of suspension, expiry or termination of this DPS Agreement (as applicable) or such other date as required under this Clause 27 (Consequences of Expiry or Termination).

27.2 Suspension, termination or expiry of this DPS Agreement shall not cause any Contracts to terminate automatically. For the avoidance of doubt, all Contracts shall remain in force unless and until they are terminated or expire in accordance with their terms notwithstanding the suspension, termination or expiry of this DPS Agreement.

27.3 Following termination or expiry of this DPS Agreement the Provider shall deal with the Administering Authority Confidential Information as follows:

27.3.1 where the Administering Authority notifies to the Provider that any item(s) of Administering Authority Confidential Information should be destroyed, the Provider shall destroy such items in accordance with Good Industry Practice; and

27.3.2 subject to Clause 27.3.1 (Consequences of Expiry or Termination), within ten (10) Working Days of the date of termination or expiry of this DPS Agreement the Provider shall return to the Administering Authority any and all of the Administering Authority's Confidential Information in the Provider's possession, power or control, either in its then current format or in a format specified by the Administering Authority, and any other information and all copies thereof owned by the Administering Authority,

save that it may keep one copy of any such data or information to the extent reasonably necessary to comply with its obligations under this DPS Agreement or under any Law, for a period of up to twelve (12) Months (or such other period as Approved by the Administering Authority).

27.4 Termination or expiry of this DPS Agreement shall be without prejudice to any rights, remedies or obligations of either Party accrued under this DPS Agreement prior to termination or expiry.

27.5 Termination or expiry of this DPS Agreement shall be without prejudice to the survival of any provision of this DPS Agreement which either expressly or by implication is to be performed or observed notwithstanding termination or expiry of this DPS Agreement, including the provisions of:

27.5.1 Clauses 1 (Definitions and Interpretation), 7 (Representations and Warranties), 8 (DPS Agreement Performance), 8.3 and 8.4 ((Performance under this DPS Agreement); 10.2 (DPS Agreement Management and DPS Charges), 11 (Records and Audit Access), 15 (Cyber Essentials Scheme), 17 (Confidentiality), 18 (Transparency), 19 (Freedom of Information), 20 (Protection of Personal Data), 22 (Liability), 23 (Insurance), 27 (Consequences of Expiry or Termination), 28 (Compliance), 30 (Waiver and Cumulative Remedies), 0 (Prevention of Fraud and Bribery), 34 (Severance), 36 (Entire Agreement), 37 (Third Party Rights), 38 (Notices), 39 (Complaints Handling), 40 (Dispute Resolution) and 41 (Governing Law and Jurisdiction); and

27.5.2 Schedule 6 (Purchasing System Management), Schedule 7 (Marketing), Schedule 8 (Insurance Requirements), Schedule 9 (Dispute Resolution Procedure) Schedule 10 (DPS Charges) and Schedule 11 (DPS Application).

## 28 Compliance

### *Compliance with Law*

28.1 The Provider shall comply with all applicable Law in connection with the performance of this DPS Agreement.

28.2 In the event that the Provider and/or any Provider Personnel fails to comply with Clause 28.1 (Compliance with Law), this shall be deemed to be a material Default, in which case the Administering Authority reserves the right to terminate this DPS Agreement by giving notice in writing to the Provider.

### *Equality and Diversity*

#### 28.3 The Provider shall:

- 28.3.1 perform its obligations under this DPS Agreement (including those in relation to the provision of Contract Services and/or Contract Supplies (as the case may be) and Funding) in accordance with:
- (a) all applicable equality Law (whether in relation to race, sex, gender reassignment, religion or belief, disability, sexual orientation, pregnancy, maternity, age or otherwise);
- (b) any other requirements and instructions which the Administering Authority reasonably imposes in connection with any equality obligations imposed on the Administering Authority at any time under applicable equality Law; and
- 28.3.2 take all necessary steps, and inform the Administering Authority of the steps taken, to prevent unlawful discrimination designated as such by any court or tribunal, or the Equality and Human Rights Commission or any successor organisation.

### *Official Secrets Act and Finance Act*

#### 28.4 The Provider shall comply with the provisions of:

- 28.4.1 the Official Secrets Acts 1911 to 1989; and
- 28.4.2 section 182 of the Finance Act 1989.

### *Financial Services and Markets Act 2000*

#### 28.5 The Provider shall comply with the provisions of the Financial Services and Markets Act 2000 (as amended from time to time) on matters including but not limited to:

- 28.5.1 disclosure of regulatory information (or subsequent applicable legislation);
- 28.5.2 statutory requirements on market abuse and insider dealings;
- 28.5.3 authorisation to carry on regulated activities in the United Kingdom;
- 28.5.4 permission to carry on regulated activities; and
- 28.5.5 misconduct of any Employees or directors of the Provider.

## **29 Assignment and Novation**

- 29.1 The Provider shall not assign, novate, or otherwise dispose of or create any trust in relation to any or all of its rights, obligations or liabilities under this DPS Agreement or any part of it without the prior Approval of the Administering Authority.
- 29.2 Subject always to Clause 29.5 (Assignment and Novation) the Administering Authority may assign, novate or otherwise dispose of any or all of its rights, liabilities and obligations under this DPS Agreement or any part thereof to:
- 29.2.1 any Contracting Authority; or

29.2.2 any Central Government Body; or

29.2.3 to a body other than a Contracting Authority or a Central Government Body (including any private sector body) which performs any of the functions that previously had been performed by the Contracting Authority,

and the Provider shall, at the Administering Authority's request, enter into a novation agreement in such form as the Administering Authority shall reasonably specify in order to enable the Administering Authority to exercise its rights pursuant to this Clause 29.2 (Assignment and Novation).

29.3 A change in the legal status of the Administering Authority such that it ceases to be a Contracting Authority shall not, subject to Clause 29.4 (Assignment and Novation), affect the validity of this DPS Agreement and this DPS Agreement shall be binding on any successor body to the Administering Authority.

29.4 Subject always to Clause 29.5 (Assignment and Novation) if the Administering Authority assigns, novates or otherwise disposes of any of its rights, obligations or liabilities under this DPS Agreement to a body which is not a Contracting Authority or a Central Government Body or if a body which is not a Contracting Authority or a Central Government Body succeeds the Administering Authority (any such body being a **Transferee** in the rest of this Clause) an equivalent right of termination to that granted to the Administering Authority pursuant to Clause 25.3 (Termination on Insolvency) shall be available to the Provider in the event of the insolvency of the Transferee (as if the references to Provider in Clause 25.3 (Termination on Insolvency) and in the definition of Insolvency Event were references to the Transferee).

29.5 Nothing in this DPS Agreement shall prevent or preclude the Administering Authority from sub-contracting any part or parts of its obligations or the exercise of its rights under this DPS Agreement to the Agent. The Administering Authority shall remain responsible for the acts of the Agent as if they were its own.

### **30 Waiver and Cumulative Remedies**

30.1 The rights and remedies under this DPS Agreement may be waived only by notice in accordance with Clause 38 (Notices) and in a manner that expressly states that a waiver is intended. A failure or delay by a Party in ascertaining or exercising a right or remedy provided under this DPS Agreement or by Law shall not constitute a waiver of that right or remedy, nor shall it prevent or restrict the further exercise thereof.

30.2 Unless otherwise provided in this DPS Agreement, rights and remedies under this DPS Agreement are cumulative and do not exclude any rights or remedies provided by Law, in equity or otherwise.

### **31 Relationship of the Parties**

31.1 Except as expressly provided otherwise in this DPS Agreement, nothing in this DPS Agreement, nor any actions taken by the Parties pursuant to this DPS Agreement, shall create a partnership, joint venture or relationship of employer and employee or principal and agent between the Parties, or authorise either Party to make representations or enter into any commitments for or on behalf of any other party.

## 32 Prevention of Fraud and Bribery

- 32.1 The Provider represents and warrants that neither it, nor to the best of its knowledge any Provider Personnel, have at any time prior to the DPS Commencement Date:
- 32.1.1 committed a Prohibited Act or been formally notified that it is subject to an investigation or prosecution which relates to an alleged Prohibited Act; and/or
  - 32.1.2 been listed by any Government department or agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in Government procurement programmes or contracts on the grounds of a Prohibited Act.
- 32.2 The Provider shall not during the Term:
- 32.2.1 commit a Prohibited Act; and/or
  - 32.2.2 do or suffer anything to be done which would cause the Administering Authority or any of the Administering Authority's employees, consultants, contractors, subcontractors or agents to contravene any of the Relevant Requirements or otherwise incur any liability in relation to the Relevant Requirements.
- 32.3 The Provider shall during the Term:
- 32.3.1 establish, maintain and enforce policies and procedures which are adequate to ensure compliance with the Relevant Requirements and prevent the occurrence of a Prohibited Act;
  - 32.3.2 keep appropriate records of its compliance with its obligations under Clause 32.1 (Prevention of Fraud and Bribery) and make such records available to the Administering Authority on request;
  - 32.3.3 if so required by the Administering Authority, within twenty (20) Working Days of the DPS Commencement Date, and annually thereafter, certify in writing to the Administering Authority its compliance with this Clause 32.3 (Prevention of Fraud and Bribery) and the compliance of all persons associated with the Provider who are responsible for or concerned with providing any element of Funding or any aspect of the Contract Services and/or Contract Supplies (as the case may be) in connection with this DPS Agreement. The Provider shall provide such supporting evidence of compliance as the Administering Authority may reasonably request; and
  - 32.3.4 have, maintain and where appropriate enforce an anti-bribery policy (which shall be disclosed to the Administering Authority on request) to prevent it and any Provider Personnel or any person acting on the Provider's behalf from committing a Prohibited Act.
- 32.4 The Provider shall immediately notify the Administering Authority in writing if it becomes aware of any breach of Clause 32.1 (Prevention of Fraud and Bribery), or has reason to believe that it has or any of the Provider Personnel has:
- 32.4.1 been subject to an investigation or prosecution which relates to an alleged Prohibited Act;

- 32.4.2 been listed by any Government department or agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in Government procurement programmes or contracts on the grounds of a Prohibited Act; and/or
- 32.4.3 received a request or demand for any undue financial or other advantage of any kind in connection with the performance of this DPS Agreement or otherwise suspects that any person or party directly or indirectly connected with this DPS Agreement has committed or attempted to commit a Prohibited Act.

### 33 Conflicts of Interest

- 33.1 The Provider shall take appropriate steps to ensure that neither the Provider nor the Provider Personnel are placed in a position where (in the reasonable opinion of the Provider, considering such conflict from the perspective of the Administering Authority) there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Provider or the Provider Personnel and the duties owed to the Administering Authority under the provisions of this DPS Agreement.
- 33.2 As soon as the Provider recognises there is a conflict or a potential conflict of interest, the Provider shall immediately inform:
- 33.2.1 the Administering Authority; and
- 33.2.2 any affected Contracting Authority,
- of the conflict of interest or potential conflict of interest (as the case may be) and the arrangements the Provider has made to manage the identified conflict of interest or potential conflict of interest as the case may be.
- 33.3 The Administering Authority reserves the right to terminate this DPS Agreement immediately by giving notice in writing to the Provider and/or to take such other steps as it deems necessary where, in the reasonable opinion of the Administering Authority, there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Provider and the duties owed to the Administering Authority under the provisions of this DPS Agreement. The actions of the Administering Authority pursuant to this Clause 33 (Conflicts of Interest) shall not prejudice or affect any right of action or remedy which has accrued or shall accrue to the Administering Authority.
- 33.4 As soon as the Provider recognises there is a risk of conflict or a potential conflict of interest, the Provider shall:
- 33.4.1 establish the necessary ethical wall arrangement(s) to eliminate it
- 33.4.2 inform the Customer of the risk of conflict, and the arrangements the Provider has made to eliminate it.

### 34 Severance

- 34.1 If any provision of this DPS Agreement is held to be void or otherwise unenforceable (in whole or in part) by any court of competent jurisdiction, such provision (or part) shall to the extent necessary to ensure that the remaining provisions of this DPS Agreement are not void or unenforceable be deemed to be deleted and the validity and/or enforceability of the remaining provisions of this DPS Agreement shall not be affected.

34.2 In the event that any deemed deletion under Clause 34.1 (Severance) is so fundamental as to prevent the accomplishment of the purpose of this DPS Agreement or materially alters the balance of risk and reward in this DPS Agreement, either Party may give notice requiring the other Party to commence good faith negotiations to amend this DPS Agreement so that, as amended, it is valid and enforceable, preserves the balance of risk and reward in this DPS Agreement and, to the extent that is reasonably practicable, achieves the Parties' original commercial intention.

34.3 If the Parties are unable to resolve any Dispute arising under this Clause 34 (Severance) within twenty (20) Working Days of the date of the notice given pursuant to Clause 34.2 (Severance), this DPS Agreement shall automatically terminate with immediate effect. The costs of termination incurred by the Parties shall lie where they fall if this DPS Agreement is terminated pursuant to this Clause 34 (Severance).

### 35 Further Assurances

35.1 Each Party undertakes, at the request of the other, and at the cost of the requesting Party, to do all acts and execute all documents which may be necessary to give effect to the meaning of this DPS Agreement.

### 36 Entire Agreement

36.1 This DPS Agreement constitutes the entire agreement between the Parties in respect of its subject matter and supersedes and extinguishes all prior negotiations, courses of dealings or agreements made between the Parties in relation to its subject matter, whether written or oral.

36.2 Neither Party has been given, nor entered into, this DPS Agreement in reliance on any warranty, statement, promise or representation other than those expressly set out in this DPS Agreement.

36.3 Nothing in this Clause 36 (Entire Agreement) shall exclude any liability in respect of misrepresentations made fraudulently.

### 37 Third Party Rights

37.1 The provisions of:

37.1.1 Clauses: 5 (Scope of DPS Agreement), 6 (Call for Competition Procedure), 7 (Representations and Warranties), 9 (Performance under DPS Agreement), 11 (Records and Audit Access), 20 (Protection of Personal Data), 23 (Insurance), 28.3 (Equality and Diversity) and 37 (Third Party Rights); and

37.1.2 Schedule 4 (Call for Competition Procedure), Schedule 5 (Call for Competition Award Criteria), 7 (Marketing), 8 (Insurance) Annex 1 and 11 (DPS Application).

(together the **Third Party Provisions**) confer benefits on persons named in such provisions other than the Parties (each such person a **Third Party Beneficiary**) and are intended to be enforceable by Third Parties Beneficiaries by virtue of the CRTPA.

37.2 Subject to Clause 37.1 (Third Party Rights), a person who is not party to this DPS Agreement has no right to enforce any term of this DPS Agreement under the CRTPA but this does not affect any right or remedy of any person which exists or is available otherwise than pursuant to the CRTPA.

- 37.3 No Third Party Beneficiary may enforce, or take any step to enforce, any Third Party Provision without Approval, which may, if given, be given on and subject to such terms as the Administering Authority may determine.
- 37.4 Any amendments or modifications to this DPS Agreement may be made, and any rights created under Clause 37.1 (Third Party Rights) may be altered or extinguished, by the Parties without the consent of any Third Party Beneficiary.
- 37.5 The Administering Authority may act as agent and trustee for each Third Party Beneficiary and/or enforce on behalf of that Third Party Beneficiary any Third Party Provision and/or recover any Loss suffered by that Third Party Beneficiary in connection with a breach of any Third Party Provision.

### 38 Notices

- 38.1 Except as otherwise expressly provided within this DPS Agreement, any notice issued under this DPS Agreement must be in writing. For the purpose of this Clause 38 (Notices), an e-mail is considered as being in writing.
- 38.2 Subject to Clause 38.3 (Notices), the following table sets out the method by which notices may be served under this DPS Agreement and the respective deemed time and proof of service:

Manner of Delivery	Deemed time of delivery	Proof of Service
<b>Email (Subject to Clause 38.3 (Notices))</b>	9.00am on the first Working Day after sending	Dispatched as a pdf attachment to an e-mail to the correct e-mail address without any error message
<b>Personal delivery</b>	On delivery, provided delivery is between 9.00am and 5.00pm on a Working Day. Otherwise, delivery will occur at 9.00am on the next Working Day	Properly addressed and delivered as evidenced by signature of a delivery receipt
<b>Royal Mail Signed For™ 1st Class or other prepaid, next Working Day service providing proof of delivery</b>	At the time recorded by the delivery service, provided that delivery is between 9.00am and 5.00pm on a Working Day. Otherwise, delivery will occur at 9.00am on the same Working Day (if delivery before 9.00am) or on the next Working Day (if after 5.00pm)	Properly addressed prepaid and delivered as evidenced by signature of a delivery receipt

- 38.3 The following notices may only be served as an attachment to an email if the original notice is then sent to the recipient by personal delivery or Royal Mail Signed For™ 1st Class or other prepaid service in the manner set out in the table in Clause 38.2 (Notices):
- 38.3.1 any Termination Notice under Clause 25 (Administering Authority's Termination Rights), including in respect of partial termination;
- 38.3.2 any notice in respect of:

- (a) Suspension of Provider's appointment (Clause 26 (Administering Authority's Termination Rights))
  - (b) Waiver (Clause 30 (Waiver and Cumulative Remedies));
  - (c) Default or Administering Authority Cause; and
- 38.3.3 any Dispute Notice.

38.4 Failure to send any original notice by personal delivery or recorded delivery in accordance with Clause 38.3 (Notices) shall invalidate the service of any related e-mail transmission. The deemed time of delivery of such notice shall be the deemed time of delivery of the original notice sent by personal delivery or Royal Mail Signed For™ 1st Class delivery (as set out in the table in Clause 38.2 (Notices)) or, if earlier, the time of response or acknowledgement by the receiving Party to the email attaching the notice.

38.5 This Clause 38 (Notices) does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution (other than the service of a Dispute Notice under Schedule 10 (Dispute Resolution Procedure)).

38.6 For the purposes of this Clause 38 (Notices), the address of each Party shall be:

38.6.1 Department of Business Energy and Industrial Strategy

Address: 1 Victoria Street, London, SW1H 0ET

For the attention of: Alia Campbell

Email: Alia.Campbell@beis.gov.uk

38.6.2 For the Provider:

[insert name of Provider]

Address: [insert address of Provider]

For the attention of: [insert Provider contact name]

Email: [insert contact email address]

38.7 Either Party may change its address for service by serving a notice in accordance with this Clause 38 (Notices).

38.8 This Clause 38 (Notices) does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of Dispute Resolution (other than the service of a Dispute Notice under the Dispute Resolution Procedure)

## 39 Complaints Handling

39.1 The Provider shall inform the Administering Authority of any Complaints made by Contracting Authorities which are not resolved by operation of the Provider's usual Complaints handling procedure within five (5) Working Days of becoming aware of that Complaint and such notice shall contain full details of the Provider's plans to resolve such Complaint.

- 39.2 Without prejudice to any rights and remedies that a complainant may have at Law (including under this DPS Agreement and/or any Contract), and without prejudice to any obligation of the Provider to take remedial action under the provisions of this DPS Agreement and/or any Contract, the Provider shall use its best endeavours to resolve the Complaint within ten (10) Working Days and in so doing, shall deal with the Complaint fully, expeditiously and fairly.
- 39.3 Within two (2) Working Days of a request by the Administering Authority, the Provider shall provide full details of the outcome of a Complaint to the Administering Authority, including details of steps taken to achieve its resolution.

#### **40 Dispute Resolution**

- 40.1 The Parties shall resolve Disputes arising out of or in connection with this DPS Agreement in accordance with the Dispute Resolution Procedure.
- 40.2 The Provider shall continue to provide any Contracting Authority Requirements in accordance with the terms of this DPS Agreement and the relevant Call-Off Contract until a Dispute has been resolved.

#### **41 Governing Law and Jurisdiction**

- 41.1 This DPS Agreement and any issues, disputes or claims (whether contractual or non-contractual) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the laws of England and Wales.
- 41.2 Subject to Clause 40 (Dispute Resolution) and Schedule 10 (Dispute Resolution Procedure) (including the Administering Authority's right to refer the Dispute to arbitration), the Parties agree that the courts of England and Wales shall have exclusive jurisdiction to settle any Dispute or claim (whether contractual or non-contractual) that arises out of or in connection with this DPS Agreement or its subject matter or formation.

**This agreement** has been signed on the date appearing at the top of page 1.

## Schedule 1

### Definitions and Interpretation

- 1 In accordance with Clause 1.1 (Definitions), in this DPS Agreement including its recitals the following expressions shall have the following meanings:

<b>Administering Authority Cause</b>	any breach of the obligations of the Administering Authority (including but not limited to any fundamental breach or breach of a fundamental term) or any other default, act, omission, misrepresentation, negligence or negligent statement of the Administering Authority in connection with or in relation to this DPS Agreement or the subject matter of this DPS Agreement and in respect of which the Administering Authority is liable to the Provider;
<b>Administering Authority Representative</b>	the representative appointed by the Administering Authority from time to time in relation to this DPS Agreement.
<b>Administering Authority's Confidential Information</b>	all and any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, Know How, personnel, and providers of the Administering Authority and/or Contracting Authorities, including all IPR, together with all information derived from any of the above, and any other information clearly designated as being confidential (whether or not it is marked confidential) or which ought reasonably to be considered to be confidential.
<b>Agent</b>	the Delivery Partner or such other party as may be notified in writing from time to time by the Administering Authority to the Provider.
<b>Application</b>	has the meaning given in Recital (D).
<b>Approval</b>	the prior written consent of the Administering Authority and <b>Approve</b> and <b>Approved</b> shall be construed accordingly.
<b>Asset Finance Lease</b>	the form of Contract executed by the Contracting Authority and the successful Potential Provider pursuant to paragraph 7 (Contract Award Procedure – Lot 2) of Schedule 4 (Call for Competition Procedure).
<b>Audit</b>	an audit carried out pursuant to Clause 11 (Records and Audit Access).
<b>Auditor</b>	the Administering Authority and/or Contracting Authority who is a party to a Contract, and/or the National Audit Office and/or any auditor appointed by the Audit Commission, and /or the representatives of any of them.
<b>Call for Competition Award Criteria</b>	the Call for Competition Award Criteria set out in Schedule 5 (Call for Competition Award Criteria).
<b>Call for Competition Bid Response</b>	the Potential Provider's response to a Call for Competition Tender Pack in the form required by the Call for Competition Tender Pack.

<b>Call for Competition Procedure</b>	the process for awarding a Contract pursuant to Clause 6 (Call for Competition Procedure) and Schedule 4 (Call for Competition Procedure).
<b>Call for Competition Tender Pack</b>	<p>the information and documents provided by the Contracting Authority to Potential Providers and relating to a Contracting Authority's Call for Competition Procedure and shall include (as a minimum):</p> <ul style="list-style-type: none"> <li>(a) the Project Specification;</li> <li>(b) any terms of participation and the guidance and requirements for the Call for Competition Bid Response including, without limitation, how to submit a Call for Competition Bid Response and details of how Potential Providers should provide details of any offer of Funding;</li> <li>(c) requirement for a conflicts of interest policy from each Potential Provider setting out how they will comply with Clause 33 (Conflicts of Interest) of this DPS Agreement and any specific requirements of the Contracting Authority;</li> <li>(d) the evaluation methodology and the Call for Competition Award Criteria;</li> <li>(e) the time period permitted for clarification questions and the process for responding to clarification questions; and</li> <li>(f) in relation to Lot 1 only, the project specific versions of the Template Call-Off Contract and the Shareholders' Agreement; and/or</li> <li>(g) in relation to Lot 2 only, the project specific requirements (in the form of a term sheet) to enable to Provider to prepare the Form of Asset Finance Lease to be submitted by the Provider.</li> </ul>
<b>Call for Competition Written Submission</b>	the process set out in paragraph 2.2.8 (Call for Competition for Competition Information Day (Required)) of Schedule 4 (Call for Competition Procedure).
<b>Call-Off Contract</b>	the form of Contract executed by the Contracting Authority and the successful Potential Provider pursuant to paragraph 6 (Contract Award Procedure – Lot 1) of Schedule 4 (Call for Competition Procedure).
<b>Call-Off Contract Due Diligence Period</b>	has the meaning give in paragraph 3.4 (The Provider's Further Obligations) of Schedule 4 (Call for Competition Procedure).
<b>CEDR</b>	the Centre for Effective Dispute Resolution of International Dispute Resolution Centre, 70 Fleet Street, London, EC4Y 1EU.
<b>Central Government Body</b>	a body listed in one of the following sub-categories of the Central Government classification of the Public Sector Classification Guide, as published and amended from time to time by the Office for National Statistics:

- (a) Government Department;
- (b) Non-Departmental Public Body or Assembly Sponsored Public Body (advisory, executive, or tribunal);
- (c) Non-Ministerial Department; or
- (d) Executive Agency.

<b>Change in Law</b>	any change in Law which impacts on the supply of funding and/or performance of any Contract which comes into force after the DPS Commencement Date.
<b>Change of Control</b>	a change of control within the meaning of Section 450 of the Corporation Tax Act 2010.
<b>Comparable Supply</b>	the supply of funding or related services to another customer of the Provider that is the same or similar to the Contract Services and/or Contract Supplies (as the case may be) and Funding.
<b>Complaint</b>	any formal written complaint raised by a Contracting Authority in relation to the performance of this DPS Agreement or any Contract in accordance with Clause 39 (Complaints Handling).
<b>Comptroller and Auditor General</b>	the government official of that name who is responsible for supervising the quality of public accounting and financial reporting.
<b>Confidential Information</b>	the Administering Authority's Confidential Information and/or the Provider's Confidential Information, as the context requires.
<b>Contract</b>	<p>a legally binding agreement (entered into pursuant to the provisions of this DPS Agreement) in the form of:</p> <ul style="list-style-type: none"> <li>(a) the Template Call-Off Contract in respect of Lot 1; and/or</li> <li>(b) the Form of Asset Finance Lease in respect of Lot 2,</li> </ul> <p>relating to the provision of Contract Services and/or Contract Supplies (as the case may be) and Funding in satisfaction of a Contracting Authority Requirement made between a Contracting Authority and the Provider pursuant to Schedule 4 (Call for Competition Procedure).</p>
<b>Contract Services</b>	the services identified by the relevant Contracting Authority in the Project Specification issued pursuant to a Call for Competition Procedure and included in the Call-Off Contract.
<b>Contract Supply</b>	a qualifying supply of assets forming part of a heat network by the Provider to a Contracting Authority pursuant to the terms of an Asset Finance Lease and references to <b>Contract Supplies</b> shall be construed accordingly.
<b>Contract Year</b>	a consecutive period of twelve (12) Months commencing on the DPS Commencement Date or each anniversary thereof.

<b>Contracting Authorities</b>	bodies listed in paragraph VI.3 of the OJEU Notice and <b>Contracting Authority</b> shall be construed accordingly.
<b>Contracting Authority Requirements</b>	means the: <ul style="list-style-type: none"> <li>(a) Contract Services and Lot 1 Funding;</li> <li>(b) Contract Supplies and Lot 2 Funding,</li> </ul> (as the case may be) as a Contracting Authority may from time to time require (each being a <b>Contracting Authority Requirement</b> ).
<b>Control</b>	control in either of the senses defined in sections 450 and 1124 of the Corporation Tax Act 2010 and <b>Controlled</b> shall be construed accordingly.
<b>Counter Notice</b>	has the meaning given to it in paragraph 4.2 (Arbitration) of Schedule 9 (Dispute Resolution Procedure).
<b>Crown Body</b>	any department, office or executive agency of the Crown or a Non-Departmental Public Body.
<b>CRTPA</b>	the Contracts (Rights of Third Parties) Act 1999.
<b>Cyber Essentials Scheme</b>	the Cyber Essentials Scheme developed by the British Government which provides a clear statement of the basic controls all organisations should implement to mitigate the risk from common internet based threats.
<b>Cyber Essentials Scheme Basic Certificate</b>	the certificate awarded on the basis of self-assessment, verified by an independent certification body, under the Cyber Essentials Scheme and is the basic level of assurance.
<b>Cyber Essentials Scheme Data</b>	sensitive and personal information and other relevant information as referred to in the Cyber Essentials Scheme.
<b>Default</b>	any breach of the obligations of the Provider (including but not limited to any fundamental breach or breach of a fundamental term) or any other default, act, omission, misrepresentation, negligence or negligent statement of the Provider or the Provider Personnel in connection with or in relation to this DPS Agreement or the subject matter of this DPS Agreement and in respect of which the Provider is liable to the Administering Authority.
<b>Delivery Partner</b>	has the meaning given to it in Recital (B).
<b>Disclosing Party</b>	has the meaning given in Clause 17 (Confidentiality).
<b>Dispute</b>	any dispute, difference or question of interpretation arising out of or in connection with this DPS Agreement, including any dispute, difference or question of interpretation relating to any Funding provided pursuant to any Contract, failure to agree in accordance with the procedure for

variations in Clause 12 (Variations this DPS Agreement) or any matter where this DPS Agreement directs the Parties to resolve an issue by reference to the Dispute Resolution Procedure.

<b>Dispute Notice</b>	a written notice served by one Party on the other stating that the Party serving the notice believes that there is a Dispute.
<b>Dispute Resolution Procedure</b>	the dispute resolution procedure set out in Schedule 9 (Dispute Resolution).
<b>DOTAS</b>	the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HMRC of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to national insurance contributions by the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 made under section 132A of the Social Security Administration Act 1992.
<b>DPS Initial Charge</b>	has the meaning given in paragraph 2.1 (DPS Initial Charge) in Schedule 10 (DPS Charges).
<b>DPS Agreement</b>	this agreement consisting of the Clauses together with the Schedules and any appendices and annexes to the same.
<b>DPS Charges</b>	the charging model which is applicable to each Lot as more particularly described in Schedule 10 (DPS Charges).
<b>DPS Commencement Date</b>	04/12/2020
<b>DPS Platform</b>	the online platform <a href="https://tp-heatnetworks.org/bhive/">https://tp-heatnetworks.org/bhive/</a> provided by the Administering Authority for the collection and receipt of the Management information.
<b>DPS Support Charge</b>	has the meaning given in paragraph 3.2 (DPS Support Charge) in Schedule 10 (DPS Charges).
<b>Due Diligence Information</b>	any information supplied to the Provider by or on behalf of the Administering Authority prior to the DPS Commencement Date.
<b>Employees</b>	has the meaning given in section 63E(9) of the Financial Services and Markets Act 2000.
<b>Environmental Information Regulations or EIRs</b>	the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or a relevant Government department in relation to such regulations.

<b>Expedited Dispute Timetable</b>	the accelerated timetable for the resolution of disputes as set out in paragraph 1.6 to Schedule 9 (Dispute Resolution Procedure).
<b>Expiry Date</b>	4 December 2022 unless extended in accordance Clause 2.2 (Commencement and Duration).
<b>Financial Close</b>	for the purposes of the DPS Charges only, in relation to: <ul style="list-style-type: none"> <li>(a) Lot 1, the later date of: <ul style="list-style-type: none"> <li>(i) the date on which the Provider first subscribes and pays for shares pursuant to the terms of the Shareholders' Agreement; or</li> <li>(ii) where the Provider has agreed to apply for, subscribe, accept and pay of any loan notes (or any similar or analogous instrument) in relation to a Project, the date on which the Provider applies for, subscribes accepts and pays for such loan notes (or any similar or analogous instrument); and</li> </ul> </li> <li>(b) Lot 2, the date of the Asset Finance Lease.</li> </ul>
<b>First Extension Period</b>	has the meaning given in Clause 2.2.1 (Commencement and Duration).
<b>FOIA</b>	the Freedom of Information Act 2000 as amended from time to time 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 or a relevant Government department in relation to such legislation.
<b>Form of Asset Finance Lease<sup>1</sup></b>	the form of asset finance lease submitted by the Provider in response to a Call for Competition Bid Response relating to Lot 2.
<b>Fraud</b>	any offence under Laws creating offences in respect of fraudulent acts (including the Misrepresentation Act 1967) or at common law in respect of fraudulent acts including acts of forgery.
<b>Funding</b>	means: <ul style="list-style-type: none"> <li>(a) in relation to Lot 1, the provision of Lot 1 Funding; and/or</li> <li>(b) in relation to Lot 2, the provision of asset finance on the terms set out in the Contract,</li> </ul> <p>in support of a project identified in a Project Specification issued by a Contracting Authority pursuant to a Call for Competition Procedure.</p>

<sup>1</sup> Drafting note: the Form of Asset Finance Lease will be submitted by the Lot 2 Provider in response to the Call for Competition Tender Pack. The Call for Competition Procedure is described in detail in Schedule 4 (Call for Competition Procedure) and operates as a Restricted Procedure.

<b>General Anti - Abuse Rule</b>	<p>means:</p> <p>(a) the legislation in Part 5 of the Finance Act 2013; and</p> <p>(b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions.</p>
<b>General Change in Law</b>	a Change in Law where the change is of a general legislative nature (including taxation or duties of any sort affecting the Provider) or which affects or relates to a Comparable Supply.
<b>Good Industry Practice</b>	the standards, practices, methods and procedures conforming to the Law and the exercise of the degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person or body engaged within the relevant industry or business sector.
<b>Government</b>	the government of the United Kingdom (including the Northern Ireland Assembly and Executive Committee, the Scottish Executive and the National Assembly for Wales), including government ministers and government departments and other bodies, persons, commissions or agencies from time to time carrying out functions on its behalf.
<b>Guidance</b>	has the meaning given to it in paragraph 1.1 (Overview) of Schedule 4 (Call for Competition Procedure).
<b>Halifax Abuse Principle</b>	the principle explained in the CJEU Case C-255/02 Halifax and others.
<b>Improvement Notice</b>	a notice issued by the Administering Authority to the Provider pursuant to Clause 24 (Improvement Plan) which will detail how the Provider shall improve the provision of Contract Services and/or Contract Supplies (as the case may be) and Funding.
<b>Improvement Plan</b>	the plan required by the Administering Authority from the Provider which shall detail how the Provider will improve the provision of Contract Services and/or Contract Supplies (as the case may be) and Funding pursuant to Clause 24 (Improvement Plan).
<b>Information</b>	has the meaning given under section 84 of the Freedom of Information Act 2000 as amended from time to time.
<b>Information Barriers</b>	arrangements put in place by the Provider to prevent Restricted Information being shared or accessed by personnel acting pursuant to this DPS Agreement.
<b>Information Day</b>	has the meaning given in paragraph 2.2.7 (Call for Competition for Competition Information Day (Required)) of Schedule 4 (Call for Competition Procedure).

<b>Information Day Pack</b>	has the meaning given in paragraph 2.2.7 (Call for Competition for Competition Information Day (Lot 1 – required Lot 2 - optional)) of Schedule 4 (Call for Competition Procedure).
<b>Insolvency Event</b>	<p>respect of the Provider:</p> <ul style="list-style-type: none"> <li>(a) a proposal is made for a voluntary arrangement within Part I of the Insolvency Act 1986 or of any other composition scheme or arrangement with, or assignment for the benefit of, its creditors; or</li> <li>(b) a shareholders' meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding-up is passed (other than as part of, and exclusively for the purpose of, a bona fide reconstruction or amalgamation); or</li> <li>(c) a petition is presented for its winding up (which is not dismissed within fourteen (14) Working Days of its service) or an application is made for the appointment of a provisional liquidator or a creditors' meeting is convened pursuant to section 98 of the Insolvency Act 1986; or</li> <li>(d) a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets; or</li> <li>(e) an application order is made either for the appointment of an administrator or for an administration order, an administrator is appointed, or notice of intention to appoint an administrator is given; or</li> <li>(f) it is or becomes insolvent within the meaning of section 123 of the Insolvency Act 1986; or</li> <li>(g) being a small company within the meaning of section 382(3) of the Companies Act 2006, a moratorium comes into force pursuant to Schedule A1 of the Insolvency Act 1986; or</li> <li>(h) where the Provider or Provider's Guarantor is an individual or partnership, any event analogous to those listed in limbs (a) to (g) (inclusive) occurs in relation to that individual or partnership; or</li> <li>(i) any event analogous to those listed in limbs (a) to (h) (inclusive) occurs under the law of any other jurisdiction.</li> </ul>
<b>Insurances</b>	has the meaning given to it in paragraph 3.2 of Schedule 8 (Insurance Requirements).
<b>Intellectual Property Rights or IPR</b>	<p>means:</p> <ul style="list-style-type: none"> <li>(a) copyright, rights related to or affording protection similar to copyright, rights in databases, patents and rights in inventions, semi-conductor topography rights, trade marks, rights in Internet domain names and website addresses and other rights in trade names, designs, Know-How, trade secrets and other rights in Confidential Information;</li> </ul>

- (b) applications for registration, and the right to apply for registration, for any of the rights listed at (a) that are capable of being registered in any country or jurisdiction; and
- (c) all other rights having equivalent or similar effect in any country or jurisdiction.

**Invitation to Tender or ITT** has the meaning given to it in Recital (C) to this DPS Agreement.

**IPR Claim** any claim of infringement or alleged infringement (including the defence of such infringement or alleged infringement) of any IPR used to provide the Contract Services and/or Contract Supplies (as the case may be) and Funding pursuant to any Contract or as otherwise provided and/or licensed by the Provider (or to which the Provider has provided access) to the Administering Authority in the fulfilment of its obligations under this DPS Agreement.

**Know-How** all ideas, concepts, schemes, information, knowledge, techniques, methodology, and anything else in the nature of know-how relating to the provision of Contract Services and/or Contract Supplies (as the case may be) and Funding but excluding Know-How already in the other Party's possession before the DPS Commencement Date.

**Law** any law, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of Section 2 of the European Communities Act 1972, regulation, order, regulatory policy, mandatory guidance or code of practice, judgment of a relevant court of law, or directives (including the Alternative Investment Fund Managers Directive) or requirements with which the Provider is bound to comply.

**LCIA** has the meaning given in paragraph 4.4.1 (Arbitration) of Schedule 9 (Dispute Resolution Procedure).

**Losses** all losses, liabilities, damages, costs, expenses (including legal fees), disbursements, costs of investigation, litigation, settlement, judgment, interest and penalties whether arising in contract, tort (including negligence), breach of statutory duty, misrepresentation or otherwise and **Loss** shall be interpreted accordingly.

**Lot** means:

- (a) Lot 1; and/or
- (b) Lot 2,

and references to **Lots** shall be construed accordingly.

**Lot 1** the provision of Contract Services and Lot 1 Funding as more particularly described in Schedule 2 (Contract Services and Contract Supplies).

**Lot 1 Funding** the subscription and purchase of shares and/or the application for, subscription, acceptance and payment of any loan notes (or any similar

or analogous instrument) in relation to a Project and/or the provision of subordinated debt by the Provider under or pursuant to the terms of the relevant Contract and/or the relevant Shareholders' Agreement and/or any loan note instrument and/or any ancillary document.

<b>Lot 2</b>	the provision of a Supply pursuant to the terms of the Form of Asset Finance Lease as more particularly described in Schedule 2 (Contract Services and Contract Supplies).
<b>Lot 2 Funding</b>	the provision of asset finance pursuant to the terms of the relevant Asset Finance Lease.
<b>Mediation Notice</b>	has the meaning given to it in paragraph 2.2 (Commercial Negotiations) of Schedule 9 (Dispute Resolution Procedure).
<b>Mediator</b>	the independent third party appointed in accordance with paragraph 3.1 of Schedule 9 (Dispute Resolution Procedure).
<b>Month</b>	a calendar month and references to <b>Monthly</b> shall be interpreted accordingly.
<b>Occasion of Tax Non-Compliance</b>	<p>where:</p> <ul style="list-style-type: none"> <li>(a) any tax return of the Provider submitted to a Relevant Tax Administering Authority on or after 1 October 2012 which is found on or after 1 April 2013 to be incorrect as a result of:</li> <li>(b) a Relevant Tax Administering Authority successfully challenging the Provider under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation in any jurisdiction that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle;</li> <li>(c) the failure of an avoidance scheme which the Provider was involved in, and which was, or should have been, notified to a Relevant Tax Administering Authority under the DOTAS or any equivalent or similar regime in any jurisdiction; and/or</li> <li>(d) any tax return of the Provider submitted to a Relevant Tax Administering Authority on or after 1 October 2012 which gives rise, on or after 1 April 2013, to a criminal conviction in any jurisdiction for tax related offences which is not spent at the DPS Commencement Date or to a civil penalty for fraud or evasion.</li> </ul>
<b>OJEU Notice</b>	has the meaning given to it in Recital (C) to this DPS Agreement.
<b>Party</b>	the Administering Authority or the Provider and <b>Parties</b> shall mean both of them.
<b>Personal Data</b>	has the meaning given to it in the Data Protection Act 2018 as amended from time to time.

<b>Potential Provider</b>	one or more of the providers (which may or may not include the Provider) appointed under this DPS Agreement or agreements on the same or similar terms to this DPS Agreement as part of the Purchasing System.
<b>Processing</b>	has the meaning given to it in the Data Protection Act 2018 but, for the purposes of this DPS Agreement, it shall include both manual and automatic processing and <b>Process</b> and <b>Processed</b> shall be interpreted accordingly.
<b>Prohibited Act</b>	<p>means:</p> <ul style="list-style-type: none"> <li>(a) to directly or indirectly offer, promise or give any person working for or engaged by a Contracting Authority and/or the Administering Authority a financial or other advantage to:</li> <li>(b) induce that person to perform improperly a relevant function or activity; or</li> <li>(c) reward that person for improper performance of a relevant function or activity; or <ul style="list-style-type: none"> <li>(i) committing any offence:</li> <li>(ii) under the Bribery Act 2010; or</li> <li>(iii) under legislation creating offences concerning Fraud; or</li> <li>(iv) at common law concerning Fraud; or</li> <li>(v) committing (or attempting or conspiring to commit) Fraud.</li> </ul> </li> </ul>
<b>Project Specification</b>	<p>the specification to be produced by a Contracting Authority pursuant to the Call for Competition Procedure setting out the:</p> <ul style="list-style-type: none"> <li>(a) specific Contract Services or the specific Contract Supply (as the case may be) required by the required by the Contracting Authority; and</li> <li>(b) requirement for Funding,</li> </ul> <p>and shall comply with paragraph 2.2.1 of Schedule 4 (Call for Competition Procedure).</p>
<b>Provider DPS Manager</b>	has the meaning given to it in paragraph 2.1.1 (Purchasing System Management) of Schedule 6 (Purchasing System Management).
<b>Provider Personnel</b>	all persons employed or engaged by the Provider together with the Provider's servants, agents, suppliers, consultants and subcontractors used in the performance of its obligations under this DPS Agreement or any Contracts.
<b>Provider Representative</b>	the representative appointed by the Provider from time to time in relation to this DPS Agreement.

<b>Provider Review Meetings</b>	has the meaning given to it in paragraph 2.1.1 (Purchasing System Management) of Schedule 6 (Purchasing System Management).
<b>Provider's Confidential Information</b>	any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, Know-How, personnel and Providers of the Provider, including IPRs, together with information derived from the above, and any other information clearly designated as being confidential (whether or not it is marked as confidential) or which ought reasonably to be considered to be confidential.
<b>Purchasing System</b>	has the meaning given in Recital (C).
<b>Quarter</b>	a consecutive period of three (3) Months in a Contract Year.
<b>Recipient</b>	the Party which receives or obtains Confidential Information.
<b>Regulations</b>	the Public Contracts Regulations 2015 ( <a href="http://www.legislation.gov.uk/uksi/2015/102/contents/made">http://www.legislation.gov.uk/uksi/2015/102/contents/made</a> ) as amended from time to time.
<b>Regulator</b>	the Financial Conduct Authority and/or the Prudential Regulation Authority, or any successor regulatory body or bodies.
<b>Relevant Person</b>	any employee, agent, servant, or representative of the Administering Authority, or of any Contracting Authority or other public body.
<b>Relevant Requirements</b>	all applicable Law relating to bribery, corruption and Fraud, including the Bribery Act 2010 and any guidance issued by the Secretary of State for Justice pursuant to section 9 of the Bribery Act 2010.
<b>Relevant Tax Administering Authority</b>	HMRC, or, if applicable, the tax authority in the jurisdiction in which the Provider is established.
<b>Reporting Date</b>	the seventh (7 <sup>th</sup> ) day of the Month following the relevant quarter to which the relevant Management Information relates, or such other date as may be agreed between the Parties.
<b>Requests for Information</b>	a request for information relating to this DPS Agreement or the provision of any Contracting Authority Requirement or an apparent request for such information under the Code of Practice on Access to Government Information, FOIA or the EIRs.
<b>Restricted Information</b>	all information held by personnel providing any services in connection with Contract Services and/or Contract Supplies (as the case may be) and Funding, including discussions and negotiations concerning the provision of Contract Services and/or Contract Supplies (as the case may be) and Funding and the findings, data or analysis derived from Restricted Information.
<b>Schedules</b>	the schedules to this DPS Agreement.

<b>Specific Change in Law</b>	a Change in Law that relates specifically to the business of the Administering Authority and which would not affect a Comparable Supply.
<b>Template Call-Off Contract</b>	in respect of Lot 1, the form of call-off contract set out in Schedule 3 (Template Call-Off Contract).
<b>Term</b>	the period commencing on the date of this agreement and expiring on the Expiry Date or, if earlier, the date of termination of this DPS Agreement.
<b>Termination Notice</b>	a written notice of termination given by one Party to the other, notifying the Party receiving the notice of the intention of the Party giving the notice to terminate this Agreement on a specified date and setting out the grounds for termination.
<b>Third Party Provisions</b>	has the meaning given in Clause 37.1 (Third Party Rights).
<b>Transferee</b>	has the meaning given in Clause 29.4 (Assignment and Novation).
<b>VAT</b>	value added tax in accordance with the provisions of the Value Added Tax Act 1994.
<b>Working Day</b>	any day other than a Saturday, Sunday or public holiday in England and Wales.

## Schedule 2

### Contract Services and Contract Supplies<sup>2</sup>

#### 1 Introduction and Background

- 1.1 The purpose of this Schedule 2 (Contract Services and Contract Supplies) is to set out the characteristics of the Contract Services and/or Contract Supplies (as the case may be) and Funding that the Provider will be required to make available to all Contracting Authorities in relation to Lot 1 and/or Lot 2 (as the case may be) and to provide a description of what the Contract Services and/or Contract Supplies (as the case may be) and Funding will entail.
- 1.2 A Contracting Authority shall be required to identify the specific services or supply (as the case may be) it requires from the Contract Services and/or the Contract Supply (as the case may be) during the relevant Call for Competition Procedure.
- 1.3 The Contract Services and/or Contract Supplies (as the case may be) and Funding may only be provided to Contracting Authorities and heat network projects located in England and Wales.

#### 2 Lot 1 – Equity Support

##### *Contract Services and Lot 1 Funding*

##### 2.1 Contract Services

- 2.1.1 The Contracting Authority shall specify in the Project Specification which of the following services the Provider is required to provide to the Contracting Authority in relation to a heat network project:
- (a) Account management: the Provider shall provide comprehensive account management services to the Contracting Authority. The Provider shall:
- (i) allocate a specific named account team for the Contracting Authority;
  - (ii) provide each Contracting Authority with an account manager;
  - (iii) follow the Call for Competition Procedure;
  - (iv) have a clear and simple complaints / issues escalation process for the Contracting Authority; and
  - (v) provide detailed, accurate and timely invoicing of all costs as outlined in any Contract.
- (b) Reporting and analysis: the Provider shall provide reporting and analysis on all aspects of the Contract Services being provided to the Contracting Authority, including:
- (i) provide such management information as required by the Contracting Authority pursuant to each Project Specification;

<sup>22</sup> **Drafting note: The Administering Authority and the Agent consider that the heat network projects most suitable for using this Purchasing System will be those heat network projects which have already undertaken significant amounts of commercialisation activity. Contracting Authorities that have heat network projects requiring significant commercialisation activity may still be able to use the Purchasing System but should discuss the appropriateness of this Purchasing System with their professional advisors and the Agent on a project specific basis.**

- (ii) related reporting as specified, to include measures on effectiveness and efficiency (as required in each Project Specification); and
  - (iii) reporting required in each Project Specification as defined by the Contracting Authority).
- (c) The Provider:
  - (i) shall work collaboratively with the Agent under this DPS Agreement; and
  - (ii) may be required to manage multiple relationships with the Contracting Authority to ensure greater value for the Contracting Authority (as required in each Project Specification).
- 2.1.2 The Provider shall provide the following services, as required by a Contracting Authority, in order to assist the Contracting Authority in achieving its stated aims and objectives in relation to the relevant heat network project:
  - (a) support and/or assistance in relation to financing a project, including the preparation of market facing documentation, testing market conditions, financial structuring, and negotiating and agreeing the terms of any other third party financing, including the relevant documentation. Providers may be asked to procure senior debt offers as part of their Call for Competition Bid Response;
  - (b) support and/or assistance in relation to the commercial structuring of heat network projects/transactions, including, *inter alia*:
    - (i) in finalising the allocation of risk between parties, including, *inter alia*, where relevant, one or more Contracting Authorities, sub-contractors/suppliers and customers;
    - (ii) consideration of different contract and commercial options; and
    - (iii) finalising an agreed commercial/contract structure;
  - (c) support and/or assistance in relation to the procurement of supply chain parties including, *inter alia*, for construction, operation, maintenance and customer management;
  - (d) support and/or assistance in appointing and managing third party advisers including legal and commercial advisers and due diligence advisers for any other third party funding;
  - (e) support and/or assistance in setting, negotiating and agreeing the commercial terms between the various project parties;
  - (f) assistance with obtaining any relevant authorisations, approvals or consents in relation to the relevant heat network project;
  - (g) assistance in the preparation of tender documentation financial modelling, bid evaluation and contract negotiation support (including, *inter alia*, with senior debt and mezzanine debt providers) and agreeing other ancillary documentation required for financial close;
  - (h) support and/or assistance in relation to managing any due diligence e.g. technical, legal, financial, tax or insurance;
  - (i) preparation of timetables of events, liaison with other parties and process management of the relevant heat network project;

- (j) support and/or assistance in project managing the commercialisation and financial close process;
- (k) support and/or assistance regarding the development, preparation and periodic update of a business plan for the special purpose vehicle;
- (l) provision of board directors and active participation in board meetings before, during and after financial close of the relevant project;
- (m) provision of SPV management services which may include management of insurance policies and ongoing credit monitoring of all material project counterparties until the SPV is self-sufficient in these activities; and
- (n) support and/or assistance on value enhancement including project expansion, refinancing and cost management.

## 2.2 Lot 1 Funding

2.2.1 In the Project Specification the Contracting Authority shall specify:

- (a) the Lot 1 Funding requirement; or
- (b) that the Lot 1 Funding is a bid back in the Call for Competition Bid Response for evaluation by the Contracting Authority.

## 3 Lot 2 – Asset Finance

*Contract Supply and Lot 2 Funding*

### 3.1 Contract Supply

3.1.1 The Contracting Authority shall specify in the Project Specification which of the following supplies the Provider is required by the Contracting Authority to supply in relation to a heat network project:

- (a) an arrangement whereby the Contracting Authority selects the equipment required and enters into an Asset Finance Lease for that equipment with the Provider. Under this option, the supplier of the equipment generally invoices the Provider and not the Contracting Authority save when the Contracting Authority is acting under a purchase agency arrangement with a Provider or intends to enter into a sale and lease back arrangement). Under this model the Provider will provide the operational and maintenance support;
- (b) an arrangement whereby the Contracting Authority selects the equipment required and enters into an Asset Finance Lease for that equipment with the Provider. Under this arrangement the supplier of the equipment generally invoices the Provider and not the Contracting Authority save when the Contracting Authority is acting under a purchase agency arrangement with the Provider or intends to enter into a sale and lease back arrangement. Under this model the Provider requires the Contracting Authority to ensure appropriate operational and maintenance support is put in place in relation to the equipment the subject of the Asset Finance Lease; and

3.1.2 In relation to paragraph 3.1.1(a) (Contract Supply and Lot 2 Funding), the Provider may provide the supply of the relevant equipment and the operational and maintenance services relating to the relevant equipment.

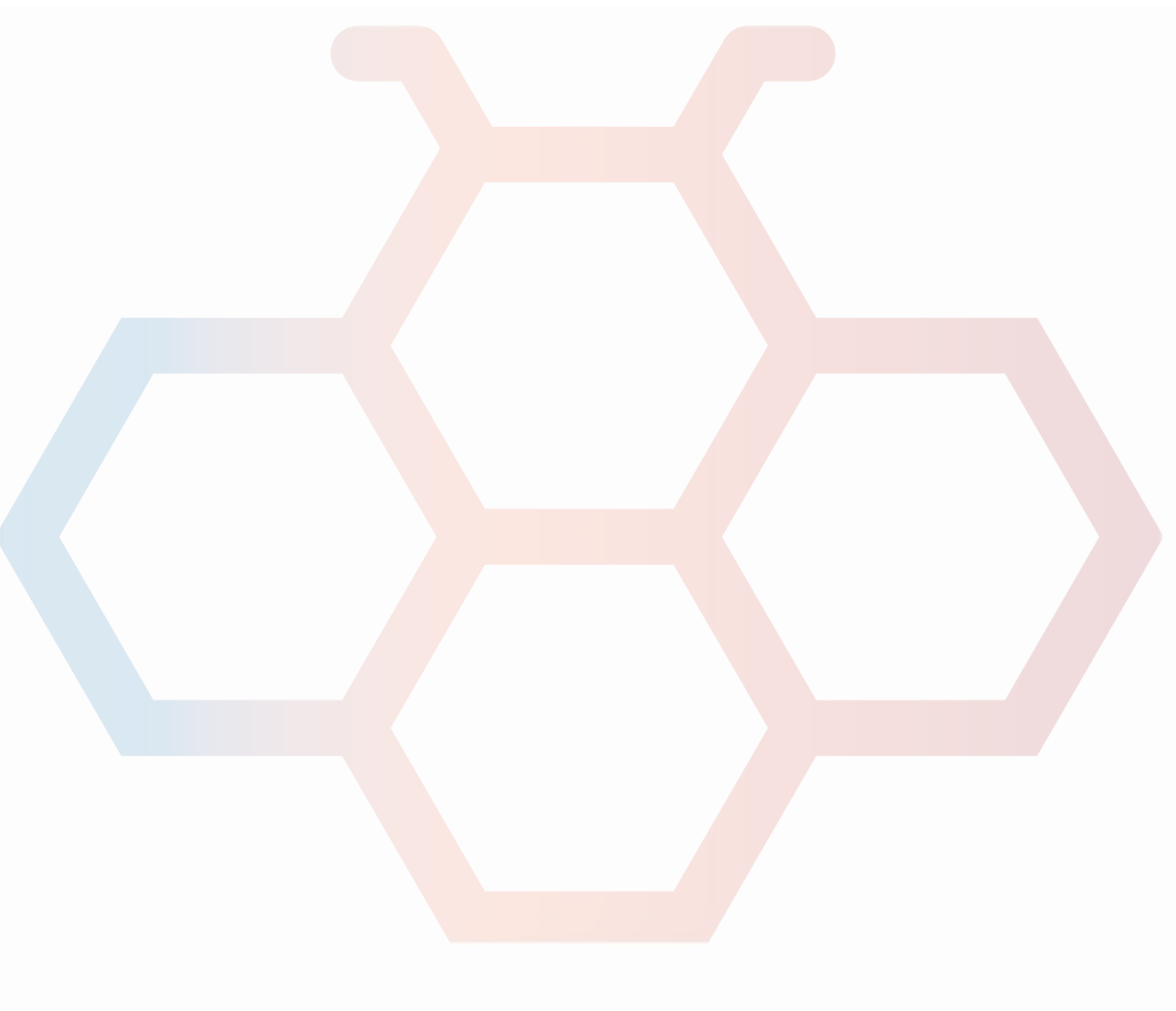
### 3.2 Lot 2 Funding

3.2.1 In the Project Specification the Contracting Authority shall specify the Lot 2 Funding requirement.

#### **4 Procurement specific standards**

The Provider shall at all times during the term of any Contract or, where applicable, the Shareholders' Agreement, comply with the following Cyber Essentials Scheme.



**Schedule 3****Template Call-Off Contract**

## Schedule 4

### Call for Competition Procedure

#### 1 Overview

- 1.1 For the purposes of this Schedule 4 (Call for Competition Procedure), **Guidance** shall mean any guidance issued or updated by the UK Government from time to time.
- 1.2 This Schedule 4 (Call for Competition Procedure) sets out the Call for Competition Procedure to be followed by Contracting Authorities and the Provider. All Contracting Authorities listed in the OJEU Notice may award a Contract in accordance with the terms of this DPS Agreement.
- 1.3 The Call for Competition Procedure only applies to Contracting Authorities and heat network projects located in England and Wales.
- 1.4 If the Administering Authority or any Contracting Authority decides to source:
- 1.4.1 Contract Services and Lot 1 Funding; and/or
  - 1.4.2 a Contract Supply and Lot 2 Funding,

through this DPS Agreement then it will appoint a Provider under Lot 1 or Lot 2 (as the case may be) in accordance with the procedure in this Schedule 4 (Call for Competition Procedure) and applicable Guidance.

#### 2 Call for Competition Procedure

##### *Contracting Authority's Obligations*

- 2.1 The Contracting Authority shall comply with the Public Contract Regulations 2015.
- 2.2 The Contracting Authority shall:
- 2.2.1 develop a Project Specification which:
    - (a) includes an outline of the heat network project and known issues and challenges;
    - (b) details of any mandatory Contracting Authority Requirements;
    - (c) set out its specific requirements for Contract Services and/or Contract Supplies (as the case may be) and Funding including (without limitation) any particular experience or specialism which relates to and is important for the provision of the Contract Services and/or Contract Supplies (as the case may be) and Funding and which the Potential Providers should be aware of; and
    - (d) set out the estimated value of the Funding sought and (where applicable) the risk profile that will be used for the purposes of determining the Call for Competition Procedure and, in relation to Lot 2 only, provide Potential Providers with a term sheet for the purposes of completing the Form of Asset Finance Lease to be submitted as part of the Call for Competition Bid Response;
  - 2.2.2 amend or refine the Template Call-Off Contract and the form of Shareholders' Agreement scheduled to the Call-Off Contract to reflect the Contracting Authority Requirements (but only to the extent permitted by and in accordance with the requirements of applicable Guidance and Law);
  - 2.2.3 develop and finalise the Call for Competition Tender Pack;

- 2.2.4 the Contracting Authority shall set out in the Call for Competition Tender Pack the Call for Competition Award Criteria and scoring system to be used for the Call for Competition Written Submission;
- 2.2.5 the Contracting Authority shall ensure that:
- (a) the Call for Competition Procedure used shall be proportionate to the complexity and value of the Contracting Authority Requirements and Project Specification and the Contracting Authority shall consider whether a period for completion of final due diligence by the successful Potential Provider prior to execution of the Call-Off Contract is appropriate having due regard to the nature of the Contracting Authority Requirements and Project Specification; and
  - (b) the time limit for the receipt by the Contracting Authority of the Call for Competition Bid Response takes into account factors such as the complexity of the Contracting Authority Requirements, the Project Specification and the terms of the proposed Contract and the time needed to submit tenders;

*Information Day (Lot 1 – required and Lot 2 – optional)*

- 2.2.6 each Contracting Authority shall, in compliance with its obligations under the Public Contracts Regulations 2015 issue a notification for an information day in relation to the proposed heat network project (the **Information Day**).
- 2.2.7 the Information Day shall include (as a minimum):
- (a) a presentation by the Contracting Authority providing information on the proposed heat network project; and
  - (b) an opportunity for attendees at the Information Day to raise questions and/or comment on the Contracting Authority's proposed heat network project and specification;
  - (c) all information presented by the Contracting Authority at the Information Day will be made available in electronic form to any party unable to attend the Information Day (the **Information Day Pack**). Where questions are asked by attendees at the Information Day, the questions asked and responses provided by the Contracting Authority shall form part of any Information Day Pack. Holding an Information Day shall not prevent the Contracting Authority from amending, varying or altering any part or parts of the Contracting Authority Requirements and/or any draft Project Specification;

*Call for Competition Written Submission (required)*

- 2.2.8 the Call for Competition Written Submission shall be conducted as follows:
- (a) the Contracting Authority shall send the Call for Competition Tender Pack to all Potential Providers;
  - (b) the Potential Provider:
    - (i) shall, subject to paragraph 3.1 (The Provider's Further Obligations) of Schedule 4 (Call for Competition Procedure), submit their Call for Competition Bid Response in accordance with the requirements in the Contracting Authority's Call for Competition Tender Pack including (without limitation) timeframe and format;
    - (ii) shall be required to demonstrate how they will deliver the Contracting Authority Requirements and the Project Specification and, in relation Lot 1

only, whether any part or parts of the Contracting Authority Requirements and the Project Specification will be delivered solely by their 'in-house' capability or whether they intend to sub-contract any element(s) of the Contracting Authority Requirements and the Project Specification. Where the Potential Provider declares that it intends to sub-contract any part or parts of Contracting Authority Requirements and the Project Specification, the Potential Supplier shall be required to clearly state in its Call for Competition Bid Response:

- (A) the full name of each proposed sub-contractor;
  - (B) the Companies House registration number of each proposed sub-contractor;
  - (C) the registered office address of each proposed sub-contractor and the address of the premises from where the relevant services will be delivered;
  - (D) sufficient information regarding what part or parts of the Contracting Authority Requirements and the Project Specification will be sub-contracted;
  - (E) the estimated value of each part of the Contracting Authority Requirements and the Project Specification to be sub-contracted;
- (c) the Contracting Authority shall be entitled to ask written clarification questions to clarify and confirm aspects of the Potential Provider's compliant Call for Competition Bid Response. The Potential Provider will provide a written response to each written clarification the Potential Provider receives from the Contracting Authority;
- (d) the Contracting Authority shall apply the Call for Competition Award Criteria and scoring system outlined in the Call for Competition Tender Pack to each Potential Provider's compliant Call for Competition Bid Response and any written responses to clarifications;
- 2.2.9 subject to paragraph 4 (No Award) of Schedule 4 (Call for Competition Procedure), the Contracting Authority shall award its Contract to the successful Potential Provider in accordance with paragraph 5 (The Administering Authority's Responsibility for Awards). The Contracting Authority shall provide unsuccessful Potential Providers with notice that their tenders were unsuccessful.

- 2.3 The Provider may ask clarification questions relating to the Project Specification or other requirements or documents provided by the Contracting Authority under or in connection with the Call for Competition Tender Pack. The Provider acknowledges and agrees that questions and responses may be anonymised by Contracting Authority and made available to all Potential Providers invited to participate in the relevant Call for Competition Procedure.

### 3 The Provider's Further Obligations

- 3.1 The Provider shall, in writing and by no later than the time and date specified by the Contracting Authority in its Call for Competition Tender Pack, provide the Contracting Authority with either:
- 3.1.1 a statement to the effect that it does not wish to tender in relation to provision of the relevant Contracting Authority Requirements; or
  - 3.1.2 a Call for Competition Bid Response and (where applicable, a written responses to written clarification questions issued by the Contracting Authority to the Provider).

3.2 The Provider confirms and agrees that each tender submitted by the Provider in relation to a Call for Competition Procedure:

- 3.2.1 shall remain open for acceptance by the relevant Contracting Authority for ninety (90) Working Days (or such other period specified in writing by the relevant Contracting Authority in accordance with the Call for Competition Tender Pack); and
- 3.2.2 is made in good faith and that the Potential Provider has not fixed or adjusted and will not fix or adjust the terms of the tender or its Call for Competition Bid Response by or in accordance with any agreement or arrangement with any other Potential Provider.

3.3 The Provider certifies that it has not and undertakes that it will not communicate to any person other than the relevant Contracting Authority inviting tenders the amount or terms of the Contracting Authority Requirements, the tender, response or submission except where the disclosure in confidence of the terms of the Contracting Authority Requirements, the tender, response or submission is necessary to obtain quotations required for the preparation of the tender.

3.4 Where the Provider is permitted by the Contracting Authority to undertake final due diligence pursuant to paragraph 2.2.5(a) (Contracting Authority's Obligations) before proceeding to complete the Call-Off Contract or the Form of Asset Finance Lease as the case may be (the **Call-Off Contract Due Diligence Period**) the Provider acknowledges and agrees that it shall not amend (or seek to amend) any part of its Call for Competition Bid Response during or following any Due Diligence Period. In the event that the Provider elects not to proceed to complete the Call-Off Contract then:

- 3.4.1 neither the Contracting Authority nor the Potential Providers shall be liable to each other for their costs incurred in preparing documentation as part of the Call for Competition Procedure; and
- 3.4.2 the Contracting Authority shall be entitled to issue a new Information Notice as part of a new Call for Competition Procedure for the relevant heat network project.

#### 4 No Award

4.1 Notwithstanding the fact that the Contracting Authority has conducted a Call for Competition Procedure the Contracting Authority shall be entitled at all times to decline to make any award in respect of:

4.1.1 Lot 1; and/or

4.1.2 Lot 2,

(as the case may be).

4.2 Nothing in this DPS Agreement shall oblige any Contracting Authority to award any Contract.

#### 5 The Administering Authority's Responsibility for Awards

5.1 The Provider acknowledges that each Contracting Authority is wholly and independently responsible for the conduct of its award of Call-Off Contracts or Asset Finance Leases under this DPS Agreement and the Administering Authority and its Agent shall not be responsible or accountable for and shall have no liability whatsoever in relation to:

- 5.1.1 the conduct of any Contracting Authority (or any sub-contractor or agent engaged by the Contracting Authority) in relation to this DPS Agreement; or

5.1.2 the performance or non-performance of:

- (a) any Call-Off Contract between the Provider and any Contracting Authority (or any sub-contractor or agent engaged by the relevant Contracting Authority); and/or
- (b) any Asset Finance Lease between the Provider and any Contracting Authority (or any sub-contractor or agent engaged by the relevant Contracting Authority),

entered into pursuant to this DPS Agreement.

## 6 Contract Award Procedure – Lot 1

6.1 Subject to paragraphs 1 (Overview) to 5 (The Administering Authority's Responsibility for Awards), a Contracting Authority may award a Call-Off Contract to the successful Potential Provider by sending (whether electronically or otherwise) a duly completed Template Call-Off Contract to the successful Potential Provider for execution.

6.2 The Parties agree that any document or communication (including any document or communication in the apparent form of a Call-Off Contract) which is not as described in this paragraph 6 (Contract Award Procedure – Lot 1) shall not constitute a Call-Off Contract under this DPS Agreement.

6.3 On receipt of a duly completed Template Call-Off Contract as described in paragraph 6.1 (Contract Award Procedure – Lot 1) of Schedule 4 (Call for Competition Procedure) from a Contracting Authority the Provider shall accept the form of Template Call-Off Contract by promptly signing and returning (whether by electronic means or otherwise) a copy of the Template Call-Off Contract to the Contracting Authority concerned.

6.4 On receipt of the signed Template Call-Off Contract from the successful Potential Provider the Contracting Authority shall also execute the Template Call-Off Contract (whether by electronic means or otherwise) within two (2) Working Days of receipt and the Call-Off Contract shall be effective on that date.

## 7 Contract Award Procedure – Lot 2

7.1 Subject to 1 (Overview) to 5 (The Administering Authority's Responsibility for Awards), a Contracting Authority may enter into the Form of Asset Finance Lease by sending to the relevant Asset Finance Provider a duly executed version of the Form of Asset Finance Lease submitted by the Asset Finance Party as part of their Call for Competition Bid Response.

7.2 The Parties agree that any document or communication (including any document or communication in the apparent form of the Form of Asset Finance Lease) which is not as described in this paragraph 7 (Contract Award Procedure – Lot 2) shall not constitute an Asset Finance Lease under this DPS Agreement.

7.3 The Contracting Authority shall execute two copies of the Form of Asset Finance Lease and send both copies the Form of Asset Finance Lease (whether by electronic means or otherwise) to the Asset Finance Provider. On receipt of the duplicate copies of the Form of Asset Finance Lease executed by the Contracting Authority the Provider shall accept the Form of Asset Finance Lease by promptly executing and dating both copies and returning (whether by electronic means or otherwise) one copy of the Asset Finance Lease to the Contracting Authority concerned within two (2) days of receipt of the Form of Asset Finance Lease duly executed by the Contracting Authority.

## Schedule 5

### Call for Competition Award Criteria

#### 1 General

1.1 This Schedule 5 (Call for Competition Award Criteria) is designed to assist Contracting Authorities seeking to award a Contract on a competitive basis under a Call for Competition Procedure in accordance with Schedule 4 (Call for Competition Procedure).

1.2 When awarding a Contract the Contracting Authority shall be required to evaluate submitted tenders to ensure the Contract is awarded on the basis of most economically advantageous tender (**MEAT**) from the point of view of the Contracting Authority. This Schedule 5 (Call for Competition Award Criteria) includes details of example evaluation criteria and a range of weightings that may be applied to those criteria.

2 The following criteria (as amended and/or refined to reflect the specific requirements of the relevant Contracting Authority) shall be applied to the Providers' compliant tenders submitted through the Call for Competition Procedure:

Criteria Reference	Criteria	Percentage Weightings - to be set by the Contracting Authority the Call for Competition Procedure <sup>3</sup>	
A	Quality Assessment	30 – 70%	
B	Financial Assessment	30 – 70%	
		<b>TOTAL</b>	<b>100%</b>

<sup>3</sup> Drafting note: to be decided by the Contracting Authority on a project specific basis

## Schedule 6

### Purchasing System Management

#### 1. Introduction

- 1.1 The successful delivery of this DPS Agreement will rely on the ability of the Provider and the Administering Authority in developing a strategic relationship immediately following the conclusion of this DPS Agreement with the Provider and maintaining this relationship throughout the Term.
- 1.2 To achieve this strategic relationship, there will be a requirement to adopt proactive Purchasing System management activities which will be informed by quality Management Information, and the sharing of information between the Provider and the Administering Authority.
- 1.3 This Schedule 6 (Purchasing System Management) outlines the general structures and management activities that the Parties shall follow during the Term.

#### 2 Purchasing System Management

##### 2.1 Purchasing System Management Structure

- 2.1.1 The Provider shall provide a suitably qualified nominated contact (the **Provider DPS Manager**) who will take overall responsibility for delivering funding and other services within this DPS Agreement, as well as a suitably qualified deputy to act in their absence.

##### 2.2 Provider Review Meetings

- 2.2.1 The Administering Authority and its Agent shall have the right (but not the obligation) to undertake performance review meetings at the Administering Authority's or the Agent's premises (as the case may be) throughout the Term and thereafter until the Expiry Date (**Provider Review Meetings**).
- 2.2.2 Subject to paragraph 2.2.1 (Purchasing System Management) above, the exact timings and frequencies of such Provider Review Meetings will be determined by the Administering Authority or the Agent (as the case may be) following entry into the DPS Agreement. The Parties shall be flexible about the timings of these meetings.
- 2.2.3 The purpose of the Provider Review Meetings will be to review the Provider's performance under this DPS Agreement. The agenda for each Provider Review Meeting shall be set by the Administering Authority or the Agent (as the case may be) and communicated to the Provider in advance of that meeting.
- 2.2.4 The Provider Review Meetings shall be attended, as a minimum, by the Administering Authority Representative(s) or representatives of the Agent and the Provider DPS Manager.

#### 3 Efficiency Tracking Performance Measures

- 3.1 The Provider shall cooperate in good faith with the Administering Authority and Agent to develop efficiency tracking performance measures for this DPS Agreement.

- 3.2 The metrics that are to be implemented to measure efficiency shall be developed and agreed between the Administering Authority, the Agent and the Provider.
- 3.3 The ongoing progress and development of the efficiency tracking performance measures shall be reported each Quarter at the Provider Review Meetings.



## Schedule 7

### Marketing

#### 1 Introduction

- 1.1 This Schedule 7 (Marketing) describes the activities that the Provider will carry out as part of its ongoing commitment to the marketing of the DPS to Contracting Authorities.

#### 2 Administering Authority Publications

- 2.1 The Administering Authority will periodically update and revise marketing materials. The Provider shall supply current information for inclusion in such marketing materials when required by the Administering Authority.
- 2.2 Such information shall be provided in the form of a completed template, supplied by the Administering Authority together with the instruction for completion and the date for its return.
- 2.3 Failure to comply with the provisions of paragraphs 2.1 and/or 2.2 (Administering Authority Publications) may result in the Provider's exclusion from the use of such marketing materials.

#### 3 Provider Publications

- 3.1 The Provider shall be responsible for keeping under review the content of any information which appears on the Provider's website and which relates to this DPS Agreement and ensuring that such information is kept up to date at all times.

**Schedule 8****Insurance Requirements****1. Obligation to Maintain Insurances**

- 3.2 Without prejudice to its obligations to the Administering Authority under this DPS Agreement, including its indemnity obligations, the Provider shall for the periods specified in this Schedule 8 (Insurance Requirements) take out and maintain, or procure the taking out and maintenance of the insurances as set out in Annex 1 (Required Insurances) and any other insurances as may be required by applicable Law (together the **Insurances**). The Provider shall ensure that each of the Insurances is effective no later than the DPS Commencement Date.
- 3.3 The Insurances shall be maintained in accordance with Good Industry Practice and (so far as is reasonably practicable) on terms no less favourable than those generally available to a prudent contractor in respect of risks insured in the international insurance market from time to time.
- 3.4 The Insurances shall be taken out and maintained with insurers who are of good financial standing and of good repute in the international insurance market.

**4 General Obligations**

- 4.1 Without limiting the other provisions of this DPS Agreement, the Provider shall:
- 4.1.1 take or procure the taking of all reasonable risk management and risk control measures in relation to its provision of funding as it would be reasonable to expect of a prudent funder acting in accordance with Good Industry Practice, including the investigation and reports of relevant claims to insurers;
  - 4.1.2 promptly notify the insurers in writing of any relevant material fact under any Insurances of which the Provider is or becomes aware; and
  - 4.1.3 hold all policies in respect of the Insurances and cause any insurance broker effecting the Insurances to hold any insurance slips and other evidence of placing cover representing any of the Insurances to which it is a party.

**5 Failure To Insure**

- 5.1 The Provider shall not take any action or fail to take any action or (insofar as is reasonably within its power) permit anything to occur in relation to it which would entitle any insurer to refuse to pay any claim under any of the Insurances.
- 5.2 Where the Provider has failed to purchase any of the Insurances or maintain any of the Insurances in full force and effect, the Administering Authority may elect (but shall not be obliged) following written notice to the Provider to purchase the relevant Insurances, and the Administering Authority shall be entitled to recover the reasonable premium and other reasonable costs incurred in connection therewith as a debt due from the Provider.

**6 Evidence Of Policies**

- 6.1 The Provider shall upon the DPS Commencement Date and within fifteen (15) Working Days after the renewal of each of the Insurances, provide evidence, in a form satisfactory to the Administering Authority, that the Insurances are in force and effect and meet in full the requirements of this Schedule 8 (Insurance Requirements). Receipt of such evidence by the Administering Authority shall not in itself constitute acceptance by the Administering Authority or relieve the Provider of any of its liabilities and obligations under this DPS Agreement.

## **7 Aggregate Limit Of Indemnity**

7.1 Where the minimum limit of indemnity required in relation to any of the Insurances is specified as being "in the aggregate":

7.1.1 if a claim or claims which do not relate to this DPS Agreement are notified to the insurers which, given the nature of the allegations and/or the quantum claimed by the third party (or parties) is likely to result in a claim or claims being paid by the insurers which could reduce the level of cover available below that minimum, the Provider shall immediately submit to the Administering Authority:

- (a) details of the policy concerned; and
- (b) its proposed solution for maintaining the minimum limit of indemnity specified; and

7.1.2 if and to the extent that the level of insurance cover available falls below that minimum because a claim or claims which do not relate to this DPS Agreement are paid by insurers, the Provider shall:

- (a) ensure that the insurance cover is reinstated to maintain at all times the minimum limit of indemnity specified for claims relating to this DPS Agreement; or
- (b) if the Provider is or has reason to believe that it will be unable to ensure that insurance cover is reinstated to maintain at all times the minimum limit of indemnity specified, immediately submit to the Administering Authority full details of the policy concerned and its proposed solution for maintaining the minimum limit of indemnity specified.

## **8 Cancellation**

8.1 The Provider shall notify the Administering Authority in writing at least five (5) Working Days prior to the cancellation, suspension, termination or non-renewal of any of the Insurances.

## **9 Insurance Claims**

9.1 The Provider shall promptly notify to insurers any matter arising from, or in relation to, this DPS Agreement or any funding provided under it, for which it may be entitled to claim under any of the Insurances. In the event that the Administering Authority receives a claim relating to or arising out of this DPS Agreement or any funding provided under it, the Provider shall co-operate with the Administering Authority and assist it in dealing with such claims including without limitation providing information and documentation in a timely manner.

9.2 Except where the Administering Authority is the claimant Party, the Provider shall give the Administering Authority notice within twenty (20) Working Days after any insurance claim in excess of £20,000 (twenty thousand pounds) relating to or arising out of the provision of the Services or this DPS Agreement on any of the Insurances or which, but for the application of the applicable policy excess, would be made on any of the Insurances and (if required by the Administering Authority) full details of the incident giving rise to the claim.

9.3 Where any Insurance requires payment of a premium, the Provider shall be liable for and shall promptly pay such premium.

9.4 Where any Insurance is subject to an excess or deductible below which the indemnity from insurers is excluded, the Provider shall be liable for such excess or deductible. The Provider shall not be entitled to recover from the Administering Authority any sum paid by way of excess or deductible under the Insurances whether under the terms of this DPS Agreement or otherwise.

## Annex 1: Required Insurances

### 1 General

- 1.1 The Provider shall meet its insurance obligations under applicable Law in full.
- 1.2 The Provider shall fully comply with the insurance requirements detailed in this DPS Agreement and shall hold the following in accordance with paragraph 2 (Period of Insurance) below:
- 1.2.1 Employers Liability Insurance in the sum of not less than £5m;
  - 1.2.2 Public Liability Insurance in the sum of not less than £1m; and
  - 1.2.3 Professional Indemnity Insurance in the sum of not less than £2m.

### 2 Period Of Insurance

- 2.1 From the date of this DPS Agreement and renewable on an annual basis unless agreed otherwise by the Administering Authority in writing (a) throughout the Term or until earlier termination of this DPS Agreement and (b) for a period of six (6) years thereafter.

**Schedule 9****Dispute Resolution Procedure****1. Introduction****1.1** If a Dispute arises then:

- 1.1.1 the Administering Authority Representative and the Provider Representative shall attempt in good faith to resolve the Dispute; and
- 1.1.2 if such attempts are not successful within a reasonable time either Party may give to the other a Dispute Notice.

**1.2** The Dispute Notice shall set out:

- 1.2.1 the material particulars of the Dispute;
- 1.2.2 the reasons why the Party serving the Dispute Notice believes that the Dispute has arisen; and
- 1.2.3 if the Party serving the Dispute Notice believes that the Dispute should be dealt with under the Expedited Dispute Timetable as set out in paragraph 1.6 (Introduction) of this Schedule 9 (Dispute Resolution Procedure), the reason why.

**1.3** Unless agreed otherwise in writing, the Parties shall continue to comply with their respective obligations under this DPS Agreement regardless of the nature of the Dispute and notwithstanding the referral of the Dispute to the Dispute Resolution Procedure set out in this Schedule 9 (Dispute Resolution Procedure).**1.4** Subject to paragraph 1.2 (Introduction) of this Schedule 9 (Dispute Resolution Procedure), the Parties shall seek to resolve Disputes:

- 1.4.1 first by commercial negotiation (as prescribed in paragraph 2 (Commercial Negotiation) of this Schedule 9 (Dispute Resolution Procedure));
- 1.4.2 then by mediation (as prescribed in paragraph 3 (Mediation) of this Schedule 9 (Dispute Resolution Procedure)); and
- 1.4.3 finally by recourse to arbitration (as prescribed in paragraph 4 (Arbitration) of this Schedule 9 (Dispute Resolution Procedure)) or litigation (in accordance with Clause 41 (Governing Law and Jurisdiction)).

**1.5** In exceptional circumstances where the use of the timings in this Schedule 9 (Dispute Resolution Procedure) would be unreasonable, including (by way of example) where one Party would be materially disadvantaged by a delay in resolving the Dispute, the Parties may agree to use the Expedited Dispute Timetable. If the Parties are unable to reach agreement on whether to use of the Expedited Dispute Timetable within five (5) Working Days of the issue of the Dispute Notice, the use of the Expedited Dispute Timetable shall be at the sole discretion of the Administering Authority.**1.6** If the use of the Expedited Dispute Timetable is determined in accordance with paragraph 1.5 (Introduction) of this Schedule 9 (Dispute Resolution Procedure) or is otherwise specified under the provisions of this DPS Agreement, then the following periods of time shall apply in lieu of the time periods specified in the applicable paragraphs of this Schedule 9 (Dispute Resolution Procedure):

1.6.1 in paragraph 2.2.3 (Commercial Negotiations), ten (10) Working Days;

1.6.2 in paragraph 3.2 (Mediation), ten (10) Working Days; and

1.6.3 in paragraph 4.2 (Arbitration), ten (10) Working Days.

1.7 If at any point it becomes clear that an applicable deadline cannot be met or has passed, the Parties may (but shall be under no obligation to) agree in writing to extend the deadline. Any agreed extension shall have the effect of delaying the start of the subsequent stages by the period agreed in the extension.

## **2 Commercial Negotiations**

2.1 Following the service of a Dispute Notice, the Administering Authority and the Provider shall use reasonable endeavours to resolve the Dispute as soon as possible, by discussion between the Administering Authority's Commercial Director (or equivalent) and the Provider's Commercial Director (or equivalent), such discussions being commercial negotiations.

2.2 If:

2.2.1 either Party is of the reasonable opinion that the resolution of a Dispute by commercial negotiation, or the continuance of commercial negotiations, will not result in an appropriate solution; or

2.2.2 the Parties have already held discussions of a nature and intent (or otherwise were conducted in the spirit) that would equate to the conduct of commercial negotiations in accordance with this paragraph 2 (Commercial Negotiations) of this Schedule 9 (Dispute Resolution Procedure); or

2.2.3 the Parties have not settled the Dispute in accordance with paragraph 2.1 (Commercial Negotiations) of this Schedule 9 (Dispute Resolution Procedure) within thirty (30) Working Days of service of the Dispute Notice,

either Party may serve a written notice to proceed to mediation (a **Mediation Notice**) in accordance with paragraph 3 (Mediation) of this Schedule 9 (Dispute Resolution Procedure).

## **3 Mediation**

3.1 If a Mediation Notice is served, the Parties shall attempt to resolve the dispute in accordance with CEDR's Model Mediation Agreement which shall be deemed to be incorporated by reference into this DPS Agreement. If the Parties are unable to agree on the joint appointment of a Mediator within thirty (30) Working Days from service of the Mediation Notice then either Party may apply to CEDR to nominate the Mediator.

3.2 If the Parties are unable to reach a settlement in the negotiations at the mediation, and only if the Parties so request and the Mediator agrees, the Mediator shall produce for the Parties a non-binding recommendation on terms of settlement. This shall not attempt to anticipate what a court might order but shall set out what the Mediator suggests are appropriate settlement terms in all of the circumstances.

3.3 Any settlement reached in the mediation shall not be legally binding until it has been reduced to writing and signed by, or on behalf of, the Parties (in accordance with the procedure for variations under Clause 12 (Variations to this DPS Agreement) where appropriate). The Mediator shall assist the Parties in recording the outcome of the mediation.

## **4 Arbitration**

- 4.1 The Administering Authority may at any time before court proceedings are commenced refer the Dispute to arbitration in accordance with the provisions of paragraph 4.4 (Arbitration) of this Schedule 9 (Dispute Resolution Procedure).
- 4.2 Before the Provider commences court proceedings or arbitration, it shall serve written notice on the Administering Authority of its intentions and the Administering Authority shall have fifteen (15) Working Days following receipt of such notice to serve a reply (a **Counter Notice**) on the Provider requiring the Dispute to be referred to and resolved by arbitration in accordance with paragraph 4.4 (Arbitration) of this Schedule 9 (Dispute Resolution Procedure) or be subject to the jurisdiction of the courts in accordance with Clause 41 (Governing Law and Jurisdiction). The Provider shall not commence any court proceedings or arbitration until the expiry of such fifteen (15) Working Day period.
- 4.3 If:
- 4.3.1 the Counter Notice requires the Dispute to be referred to arbitration, the provisions of paragraph 4.4 (Arbitration) of this Schedule 9 (Dispute Resolution Procedure) shall apply;
  - 4.3.2 the Counter Notice requires the Dispute to be subject to the exclusive jurisdiction of the courts in accordance with Clause 41 (Governing Law and Jurisdiction), the Dispute shall be so referred to the courts and the Provider shall not commence arbitration proceedings;
  - 4.3.3 the Administering Authority does not serve a Counter Notice within the fifteen (15) Working Day period referred to in paragraph 4.2 (Arbitration) of this Schedule 9 (Dispute Resolution Procedure), the Provider may either commence arbitration proceedings in accordance with paragraph 4.4 (Arbitration) of this Schedule 9 (Dispute Resolution Procedure) or commence court proceedings in the courts in accordance with Clause 41 (Governing Law and Jurisdiction) which shall (in those circumstances) have exclusive jurisdiction.
- 4.4 In the event that any arbitration proceedings are commenced pursuant to paragraphs 4.1 - 4.3 (Arbitration), the Parties hereby confirm that:
- 4.4.1 all disputes, issues or claims arising out of or in connection with this DPS Agreement (including as to its existence, validity or performance) shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration (**LCIA**) (subject to paragraphs 4.4.5 and 4.4.6 (Arbitration) of this Schedule 9 (Dispute Resolution Procedure));
  - 4.4.2 the arbitration shall be administered by the LCIA;
  - 4.4.3 the LCIA procedural rules in force at the date that the Dispute was referred to arbitration shall be applied and are deemed to be incorporated by reference into this DPS Agreement and the decision of the arbitrator shall be binding on the Parties in the absence of any material failure to comply with such rules;
  - 4.4.4 if the Parties fail to agree the appointment of the arbitrator within ten (10) days from the date on which arbitration proceedings are commenced or if the person appointed is unable or unwilling to act, the arbitrator shall be appointed by the LCIA;
  - 4.4.5 the arbitration proceedings shall take place in London and in the English language; and
  - 4.4.6 the seat of the arbitration shall be London.

**5 Urgent Relief**

- 5.1 Either Party may at any time take proceedings or seek remedies before any court or tribunal of competent jurisdiction:
- 5.1.1 for interim or interlocutory remedies in relation to this DPS Agreement or infringement by the other Party of that Party's Intellectual Property Rights; and/or
- 5.1.2 where compliance with paragraph 1.1 (introduction) of this Schedule 9 (Dispute Resolution Procedure) and/or referring the Dispute to mediation may leave insufficient time for that Party to commence proceedings before the expiry of the limitation period.

## Schedule 10

### DPS Charges

#### 1 Introduction

- 1.1 The Provider acknowledges and agrees to pay to the Agent the DPS Charges in accordance with the terms of this Schedule 10 (DPS Charges).
- 1.1 The DPS Charges comprise:
- 1.1.1 the DPS Initial Charge; and
  - 1.1.2 in relation to Lot 1 only, the DPS Support Charge.

#### 2 DPS Initial Charge

- 2.1 The Parties agrees as follows:
- 2.1.1 in respect of Lot 1 only, a charge of one percent (1%) of the aggregate total of Lot 1 Funding invested or committed by the Provider pursuant to the terms of the Call-Off Contract and/or the Shareholders' Agreement and/or any ancillary or related documents thereto for each heat network project; and/or
  - 2.1.2 in respect of Lot 2 only, a charge of one percent (1%) of the capital cost of the leased equipment (excluding VAT) calculated by reference to the terms of the Asset Finance Lease,
- (each a **DPS Initial Charge**).

#### 3 DPS Support Charge

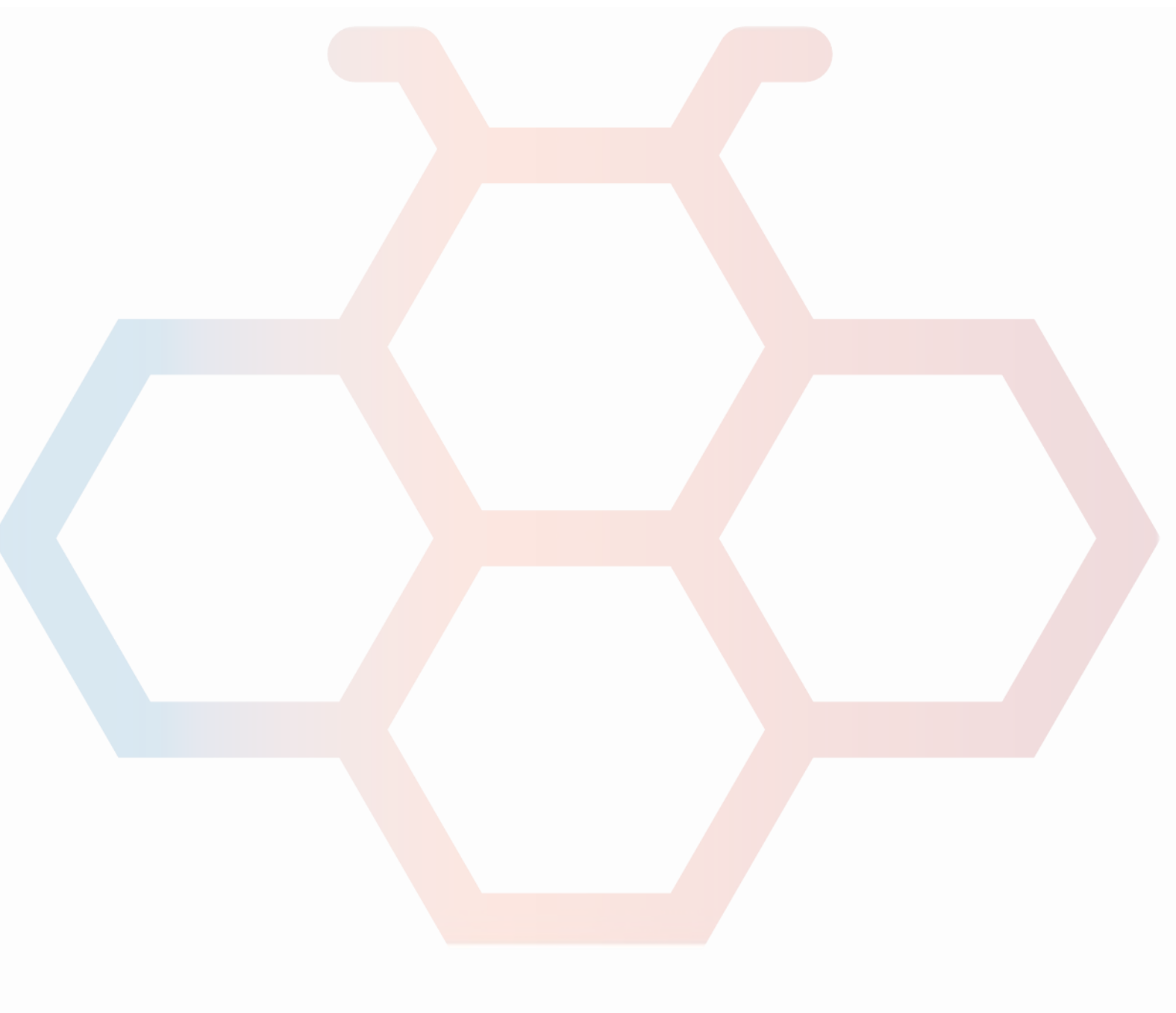
- 3.1 In relation to Lot 1 only, the Agent shall agree with the each Contracting Authority the nature and level of support to be provided by the Agent in respect of the Contracting Authority's heat network project.
- 3.2 The costs and expenses of the Agent providing the support referenced in paragraph 3.1 (DPS Support Charge) shall under no circumstances exceed more than two percent (2%) of the aggregate total of Lot 1 Funding invested or committed by the Provider pursuant to the terms of the Call-Off Contract and/or the Shareholders' Agreement and/or any ancillary or related documents thereto for each heat network project (the **DPS Support Charge**).
- 3.3 The Agent shall procure that the Contracting Authority confirms the level of the DPS Support Charge applicable to each Call for Competition Procedure in the relevant Call for Competition Tender Pack.

#### General Payment Provisions

- 4.1 The Agent shall invoice the Provider for the DPS Charges and the Provider shall pay to the Agent the DPS Charges within thirty (30) days of receipt by the Provider of a valid invoice. Payment of the DPS Charges by the Provider shall be in cleared funds and in accordance with the payment method and details set out in the Agent's invoice or in any supporting documents relating to the invoice.
- 4.2 The DPS Charges shall be exclusive of VAT.
- 4.3 The Provider shall not be entitled to retain or set off any amount due to the Authority or the Agent by the Provider.

Schedule 11<sup>4</sup>

## DPS Application



<sup>4</sup> **Provider's application for the DPS (including conflicts of interest policy) to be inserted here.**