

**MODEL AGREEMENT FOR SERVICES SCHEDULES**

**SCHEDULE 12**

**EXIT MANAGEMENT & ETHICAL WALLS**

**1 DEFINITIONS**

1.1 In this Schedule, the following definition shall apply:

**“Ethical Wall Agreement”**

an ethical wall agreement in a form similar to the draft ethical wall agreement set out at Annex 1;

**2 OBLIGATION TO ENTER INTO AN ETHICAL WALL AGREEMENT ON RE-TENDERING OF SERVICES**

- 2.1 The Authority may require the Contractor to enter into the Ethical Wall Agreement at any point during a re-tendering or contemplated re-tendering of the Services or any part of the Services.
- 2.2 If required to enter into the Ethical Wall Agreement, the Contractor will return a signed copy of the Ethical Wall Agreement within 10 Working Days of receipt. The Contractor's costs of entering into the Ethical Wall Agreement will be borne solely by the Contractor.
- 2.3 The Parties acknowledge that the migration of the Services from the Contractor to the Authority and/or its Replacement Contractor may be phased, such that certain of the Services are handed over before others.

**ANNEX 1: DRAFT ETHICAL WALL AGREEMENT**

**[THE AUTHORITY]**

**and**

**[THE COUNTERPARTY]**

**ETHICAL WALL AGREEMENT**

This Agreement is dated [ ] 20[ ]

**Between**

- (1) [INSERT NAME OF AUTHORITY] (the "**Authority**") [acting on behalf of the Crown] of [insert Authority's address]; and
- (2) [NAME OF COUNTERPARTY] a [company]/[limited liability partnership] registered in England and Wales under registered number [insert registered number] whose registered office is at [insert Counterparty's registered address] (the "**Counterparty**").

**BACKGROUND**

- (A) The Authority is obliged to ensure transparency, fairness, non-discrimination and equal treatment in relation to its procurement process pursuant to the Procurement Act 2023. (PA23). The purpose of this document ("**Agreement**") is to define the protocols to be followed to prevent, identify and remedy any conflict of interest (whether actual, potential or perceived) in the context of the Procurement.
- (A) The Authority is conducting a procurement exercise for the [supply/purchase] of [insert details of project/goods/services] (the "**Purpose**").
- (B) The Authority has an obligation to deal with conflicts of interest as set out in the Procurement Act 2023. (PA23). The main provisions on conflicts of interest are set out in Sections 81-83 of the Act. The Act retains the basic nature of the obligations from the previous legislation, (regulations 24 and 84 of the Public Contracts Regulation (PCR) 2015. The Act retains an approach based on principles rather than prescriptive rules. The Act requires contracting authorities to have regard to a number of objectives, which include acting, or being seen to act, with integrity. (section 12(1)(d) of the Act). The integrity of a procurement may be compromised if it is influenced by external or private interests. Alongside the procurement objectives, the Act includes specific provisions dealing with conflicts of interest when carrying out a covered procurement (Part 5 of the Act). Under PA23 a conflict of interest arises in a procurement context where there is conflict between the interests of a person acting in relation to procurement and those of the procurement itself. Conflicts of Interest need to be managed effectively to ensure that the public can trust contracting authorities to carry out public procurement responsibly and impartially. The Act requires contracting authorities to identify and keep under review actual and potential conflicts of interest. They must also mitigate conflicts of interest and address circumstances which the contracting authority considers are likely to cause a reasonable person to wrongly believe there to be a conflict or potential conflict of interest ('perceived conflict of interest'). The Act provides that contractors may be required to take certain steps to mitigate a conflict of interest and will be excluded if they refuse to do so. This is because contractors are expected to meet the highest standards of integrity in the supply and delivery of goods, services and works and to operate with openness and transparency. The Act makes it clear that managing conflicts of interest is required throughout the procurement lifecycle. A 'conflict of interest' arises where there is an actual conflict of interest. For example, where a

person assessing tenders in a procurement owns shares in a contractor that has submitted a tender. A 'potential conflict of interest' exists where a conflict of interest will arise in future if certain circumstances occur. For example, the spouse of someone who will be assessing tenders is the CEO of a business that is in the process of acquiring ownership of another company, and that company has recently submitted a tender. Section 81(4) defines an 'interest' as including a personal, professional or financial interest that may be direct or indirect.

- (C) Section 82 of the Act provides that contracting authorities must take all reasonable steps to ensure that a conflict of interest does not put a contractor at an unfair advantage or disadvantage in relation to a procurement. If a conflict of interest puts a contractor at an unfair advantage and this cannot be avoided, or the contractor refuses to take the steps required by the contracting authority to avoid it, the supplier must, in relation to the procurement: be treated as an excluded contractor for the purpose of assessing tenders under section 19. Contracting authorities will need to consider what steps are reasonable to take under section 82(1) on a case by case basis, taking into account the nature of the conflict of interest, how it could impact an individual's duties and how it might impact the procurement.
- (D) The parties wish to enter into this Agreement to ensure that a set of management processes, barriers and disciplines are put in place to ensure that conflicts of interest do not arise, and that the Counterparty does not obtain an unfair competitive advantage over Other Bidders.

**IT IS AGREED:****1. DEFINITIONS AND INTERPRETATION**

1.1 The following words and expressions shall have the following meanings in this agreement and its recitals:

**"Affiliate"** means in relation to a body corporate, any other entity which directly or indirectly Controls, is Controlled by, or is under direct or indirect common Control of that body corporate from time to time;

**"Agreement"** means this ethical walls agreement duly executed by the Parties;

**"Bid Team"** means any Counterparty, Affiliate, connected to the preparation of an ITT Response;

**"Central Government Body"** means 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;

**"Conflicted Personnel"** means any Counterparty, Affiliate, staff or agents of the Counterparty or an Affiliate who, because of the Counterparty's relationship with the Authority under any Contract have or have had access to information which creates or may create a conflict of interest;

**"Contract"** means the [contract for [ ] ] dated [ ] between the Authority and the Counterparty and/or an Affiliate;

**"Control"** means the beneficial ownership of more than 50% of the issued share capital of a company or the legal power to direct or cause the direction of the management of the company and **"Controls"** and **"Controlled"** shall be interpreted accordingly;

**"Effective Date"** means the date of this Agreement as set out above;

**"Invitation to Tender"** or **"ITT"** means an invitation to submit tenders issued by the Authority as part of an ITT Process;

**"ITT Process"** means, with regard to the Purpose, the relevant procedure provided for in PA23 which the Authority has elected to use to select a contractor, together with all relevant information, correspondence and/or documents issued by the Authority as part of that procurement exercise, all information, correspondence and/or documents issued by the bidders in response together with any resulting contract;

**“ITT Response”** means the tender submitted or to be submitted by the Counterparty or an Affiliate [(or, where relevant, by an Other Bidder)] in response to an ITT;

**“Other Affiliate”** any person who is a subsidiary, subsidiary undertaking or holding company of any Other Bidder;

**“Other Bidder”** means any other bidder or potential bidder that is not the Counterparty or any Affiliate that has or is taking part in the ITT Process;

**“Parties”** means the Authority and the Counterparty;

**“Professional Advisor”** means a Contractor, subcontractor, advisor or consultant engaged by the Counterparty under the auspices of compiling its ITT Response;

**“Purpose”** has the meaning given to it in recital (A) to this Agreement;

**“Representative”** refers to a person's officers, directors, employees, advisers and agents and, where the context admits, providers or potential providers of finance to the Counterparty or any Affiliate in connection with the ITT Process and the representatives of such providers or potential providers of finance; and

**“Third Party”** means any person who is not a Party and includes Other Affiliates and Other Bidders.

- 1.2 Reference to the disclosure of information includes any communication or making available information and includes both direct and indirect disclosure.
- 1.3 Reference to the disclosure of information, or provision of access, by or to the Authority or the Counterparty includes disclosure, or provision of access, by or to the representatives of the Authority or Representatives of the Counterparty (as the case may be).
- 1.4 Reference to persons includes legal and natural persons.
- 1.5 Reference to any enactment is to that enactment as amended, supplemented, re-enacted or replaced from time to time.
- 1.6 Reference to clauses and recitals is to clauses of and recitals to this Agreement.
- 1.7 Reference to any gender includes any other.
- 1.8 Reference to writing includes email.
- 1.9 The terms “associate”, “holding company”, “subsidiary”, “subsidiary undertaking” and “wholly owned subsidiary” have the meanings attributed to them in the Companies Act 2006, except that for the purposes of section 1159(1)(a) of that Act, the words ‘holds a majority of the voting rights’ shall be changed to ‘holds 30% or more of the voting rights’, and other expressions shall be construed accordingly.
- 1.10 The words “include” and “including” are to be construed without limitation.

- 1.11 The singular includes the plural and vice versa.
- 1.12 The headings contained in this Agreement shall not affect its construction or interpretation.

## **1. ETHICAL WALLS**

- 1.1 In consideration of the sum of £1 payable by the Authority to the Counterparty, receipt of which is hereby acknowledged, the Counterparty:

- (a) shall take all appropriate steps to ensure that neither the Counterparty nor its Affiliates and/or Representatives are in a position where, in the reasonable opinion of the Authority, there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Counterparty or its Affiliates or Representatives and the duties owed to the Authority under the Contract or pursuant to an open and transparent ITT Process;
- (b) acknowledges and agrees that a conflict of interest may arise in situations where the Counterparty or an Affiliate intends to take part in the ITT Process and, because of the Counterparty's relationship with the Authority under any Contract, the Counterparty, its Affiliates and/or Representatives have or have had access to information which could provide the Counterparty and/or its Affiliates with an advantage and render unfair an otherwise genuine and open competitive ITT Process; and
- (c) where there is or is likely to be a conflict of interest or the perception of a conflict of interest of any kind in relation to the ITT Process, shall comply with Clause .2.

- 1.2 The Counterparty shall:

- (a) Not assign any of the Conflicted Personnel to the Bid Team at any time;
- (b) Provide to the Authority a complete and up to date list of the Conflicted Personnel and the Bid Team and reissue such list upon any change to it;
- (c) Ensure that by no act or omission by itself, its staff, agents and/or Affiliates results in information of any kind or in any format and however so stored:
  - (i) about the Contract, its performance, operation and all matters connected or ancillary to it becoming available to the Bid Team; and/or
  - (ii) which would or could in the opinion of the Authority confer an unfair advantage on the Counterparty in relation to its participation in the ITT Process becoming available to the Bid Team;



- (d) Ensure that by no act or omission by itself, its staff, agents and/or Affiliates and in particular the Bid Team results in information of any kind or in any format and however so stored about the ITT Process, its operation and all matters connected or ancillary to it becoming available to the Conflicted Personnel;
- (e) Ensure that confidentiality agreements which flow down the Counterparty's obligations in this Agreement are entered into as necessary between the Authority and the Counterparty, its Affiliates, its staff, agents, any Conflicted Personnel, and between any other parties necessary in a form to be prescribed by the Authority;
- (f) physically separate the Conflicted Personnel and the Bid Team, either in separate buildings or in areas with restricted access;
- (g) provide regular training to its staff, agents and its Affiliates to ensure it is complying with this Agreement;
- (h) monitor Conflicted Personnel movements within restricted areas (both physical and electronic online areas) to ensure it is complying with this Agreement ensure adherence to the ethical wall arrangements;
- (i) ensure that the Conflicted Personnel and the Bid Team are line managed and report independently of each other; and
- (j) comply with any other action as the Authority, acting reasonably, may direct.

1.3 In addition to the obligations set out in Clause ..1(a) and ..1(c), the Counterparty shall:

- (a) notify the Authority immediately of all perceived, potential and/or actual conflicts of interest that arise;
- (b) submit in writing to the Authority full details of the nature of the conflict including (without limitation) full details of the risk assessments undertaken, the impact or potential impact of the conflict, the measures and arrangements that have been established and/or are due to be established to eliminate the conflict and the Counterparty's plans to prevent future conflicts of interests from arising; and
- (c) seek the Authority's approval thereto,

which the Authority shall have the right to grant, grant conditionally or deny (if the Authority denies its approval the Counterparty shall repeat the process set out in clause .3 until such time as the Authority grants approval or the Counterparty withdraws from the ITT Process).

1.4 Any breach of Clause .1, Clause .2 or Clause .3 shall entitle the Authority to exclude the Counterparty or any Affiliate or Representative from the ITT Process, and the Authority may, in addition to the right to exclude, take such

other steps as it deems necessary where, in the reasonable opinion of the Authority there has been a breach of Clause .1, Clause .2 or Clause .3.

- 1.5 The Counterparty will provide, on demand, any and all information in relation to its adherence with its obligations set out under Clauses .1 and .2 as reasonably requested by the Authority.
- 1.6 The Authority reserves the right to require the Counterparty to demonstrate the measures put in place by the Counterparty under Clauses ..1(c) and .2.
- 1.7 The Counterparty acknowledges that any provision of information or demonstration of measures, in accordance with Clauses .5 and .6, does not constitute acceptance by the Authority of the adequacy of such measures and does not discharge the Counterparty of its obligations or liability under this Agreement.
- 1.8 The actions of the Authority pursuant to Clause .4 shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to the Authority.
- 1.9 In no event shall the Authority be liable for any bid costs incurred by:
  - (a) the Counterparty or any Affiliate or Representative; or
  - (b) any Other Bidder, Other Affiliate or Other Representative,as a result of any breach by the Counterparty, Affiliate or Representative of this Agreement, including, without limitation, where the Counterparty or any Affiliate or Representative, or any Other Bidder, Other Affiliate or Other Representative are excluded from the ITT Process.
- 1.10 The Counterparty acknowledges and agrees that:
  - (a) neither damages nor specific performance are adequate remedies in the event of its breach of the obligations in clause 0; and
  - (b) in the event of such breach by the Counterparty of any of its obligations in clause 0 which cannot be effectively remedied the Authority shall have the right to terminate this Agreement and the Counterparty's participation in the ITT Process.

## **1. SOLE RESPONSIBILITY**

- 1.1 It is the sole responsibility of the Counterparty to comply with the terms of this Agreement. No approval by the Authority of any procedures, agreements or arrangements provided by the Counterparty or any Affiliate or Representative to the Authority shall discharge the Counterparty's obligations.

## **1. WAIVER AND INVALIDITY**

- 1.1 No failure or delay by any Party in exercising any right, power or privilege under this Agreement or by law shall constitute a waiver of that or any other right, power or privilege, nor shall it restrict the further exercise of that or any other right, power or privilege. No single or partial exercise of such right,

power or privilege shall prevent or restrict the further exercise of that or any other right, power or privilege.

- 1.2 If any provision of this Agreement is prohibited or unenforceable in any jurisdiction in relation to any Party, such prohibition or unenforceability will not invalidate the remaining provisions of this Agreement or affect the validity or enforceability of the provisions of this Agreement in relation to any other Party or any other jurisdiction.

## **1. ASSIGNMENT AND NOVATION**

- 1.1 Subject to clause 1.2 the Parties 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 Agreement without the prior written consent of the Authority.
- 1.2 The Authority may assign, novate or otherwise dispose of any or all of its rights, obligations and liabilities under this Agreement and/or any associated licences to:
  - (a) any Central Government Body; or
  - (b) to a body other than a Central Government Body (including any private sector body) which performs any of the functions that previously had been performed by the Authority; and
  - (c) the Counterparty shall, at the Authority's request, enter into a novation agreement in such form as the Authority may reasonably specify in order to enable the Authority to exercise its rights pursuant to this Clause 0.
- 1.3 A change in the legal status of the Authority such that it ceases to be a Central Government Body shall not affect the validity of this Agreement and this Agreement shall be binding on any successor body to the Authority.

## **1. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

- 1.1 A person who is not a Party to this Agreement has no right under the Contract (Rights of Third Parties) Act 1999 (as amended, updated or replaced from time to time) to enforce any term of this Agreement but this does not affect any right remedy of any person which exists or is available otherwise than pursuant to that Act.

## **1. TRANSPARENCY**

- 1.1 The parties acknowledge and agree that the Authority is under a legal duty pursuant to the PCR to run transparent and fair procurement processes. Accordingly, the Authority may disclose the contents of this Agreement to potential bidders in the ITT Process, for the purposes of transparency and in order to evidence that a fair procurement process has been followed.

## **1. NOTICES**

- 1.1 Any notices sent under this Agreement must be in writing.

- 1.2 The following table sets out the method by which notices may be served under this Agreement and the respective deemed time and proof of service:

<b>Manner of Delivery</b>	<b>Deemed time of service</b>	<b>Proof of service</b>
Email	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.
Personal delivery	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.
Prepaid, Royal Mail Signed For™ 1 <sup>st</sup> Class or other prepaid, next working day service providing proof of delivery.	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.

- 1.3 Notices shall be sent to the addresses set out below or at such other address as the relevant party may give notice to the other party for the purpose of service of notices under this Agreement:

	<b>Counterparty</b>	<b>Authority</b>
<b>Contact</b>		
<b>Address</b>		
<b>Email</b>		

- 1.4 This Clause 0 does not apply to the service of any proceedings or other documents in any legal action or other method of dispute resolution.

**1. WAIVER AND CUMULATIVE REMEDIES**

- 1.1 The rights and remedies under this Agreement may be waived only by notice 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 Agreement or by law shall not constitute a waiver of that right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.
- 1.2 Unless otherwise provided in this Agreement, rights and remedies under this Agreement are cumulative and do not exclude any rights or remedies provided by law, in equity or otherwise.

**1. TERM**

- 1.1 Each party's obligations under this Agreement shall continue in full force and effect for period of [ ] years from the Effective Date.

**1. GOVERNING LAW AND JURISDICTION**

- 1.1 This 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.
- 1.2 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 Agreement or its subject matter or formation.

Signed by the Authority

Name:

Signature:

Position in Authority:

Counterparty Signed by the

Name:

Signature:

Position in Counterparty:

