

## Fujitsu Purchasing Terms and Conditions (August 2012 Edition)

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The contract between Fujitsu Services Limited (“**Fujitsu**”) and the Supplier (“**Agreement**”) consists of the following:

- (a) one or more Orders and any schedule(s) to an Order;
- (b) these Purchasing Terms and Conditions; and
- (c) any documents expressly incorporated into this contract or expressly referred to in an Order.

If there is any conflict or inconsistency between any of the above, they shall have the following order of precedence: first, these Purchasing Terms and Conditions, second, the Order and its schedules and third, any documents as set out in paragraph (c) above.

The terms of this Agreement supersede all prior drafts, agreements, arrangements, understandings and discussions between the parties or their advisors and all statements, representations, terms and conditions, warranties, guarantees, proposals, communications and understandings whenever given and whether orally or in writing. Each party acknowledges that in entering into this Agreement it does not rely on, and shall have no remedies in respect of, any such statements, representations, terms and conditions, warranties, guarantees, proposals, communications and understandings that are not set out in this Agreement. Nothing in this clause shall limit or exclude any liability for fraud.

### 1. Definitions

1.1 In this Agreement unless the context otherwise requires:

“**Charges**” means the charges for the Supplies.

“**CITC**” means Communications and Information Technology Commission.

“**Confidential Information**” means the terms of this Agreement and information disclosed by one party (“**Disclosing Party**”) to the other (“**Receiving Party**”) to the extent that such information is designated as such by the Disclosing Party in writing or relates to the business affairs, developments, trade secrets, know-how, personnel, customers or suppliers of the Disclosing Party or that such information may reasonably be regarded as the confidential information of the Disclosing Party.

“**Delivery Date**” means the date for delivery of the Supplies as set out in the Order or agreed between the parties in writing.

“**Diagnostic Materials**” means any materials and items including diagnostic and test routines, programs, manuals, documentation and data that Fujitsu makes available to the Supplier to facilitate the provision of the Services.

“**ECCN**” means export control classification number.

“**Export Control Laws**” means trade, export control and import control laws of the EU, the UK, Japan, the United States of America and any other jurisdiction in which Products are manufactured or through which they are transported and any final destination to which products may be exported by Fujitsu.

“**Intellectual Property Rights**” means any patents, trade marks, service marks, registered designs, applications for any of the foregoing, copyright, design rights, database rights, know-how, confidential information, trade and business and/or domain names and any other similar protected rights (whether registered or unregistered) in any country.

“**ITAR**” means US International Traffic in Arms Regulations from time to time in force.

“**Order**” means Fujitsu’s purchase order document that states (i) the Supplies to be provided by the Supplier; (ii) Fujitsu’s purchase order number; and (iii) it is subject to these Purchasing Terms and Conditions.

“**Products**” means any equipment and/or Programs and/or Services set out in the Order.

“**Product Description**” means the description of the Supplies set out in the applicable Order and in the product, software and/or service description published (including electronically) by the Supplier or manufacturer at the time that the Order is placed.

“**Programs**” means any items referred to as programs or software in the Order (including any associated documentation which may be supplied with them).

“**REACH**” means the Registration Evaluation and Authorisation of Chemicals Regulation (EC 1907/ 2006).

“**Services**” means any services described in the Order.

“**Supplier**” means the person to whom the Order is addressed and “person” includes partnerships, bodies corporate, corporations, associations, and government bodies and/or departments.

“**Supplies**” means the Products and/or Services described in the Order.

“**Warranty Period**” means in respect of Products twelve (12) months after the Delivery Date, and in relation to Services, ninety (90) days after the date of completion of the Services.

“**WEEE Regulations**” means the Waste Electrical and Electronic Equipment Directive 2002 as implemented by EU Member States including the UK Waste Electrical and Electronic Regulations 2006.

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- 1.2 References to any statute or statutory provision shall, unless the context otherwise requires, be construed as a reference to that statute or provision as from time to time amended, consolidated, modified, extended, re-enacted, replaced and all statutory instruments or orders made pursuant to it.
- 1.3 Any phrase introduced by the word “including”, “include” or any similar expression shall be construed as illustrative and the words following any such word shall not limit the sense of the words preceding such words. References to the singular shall include the plural and vice versa. The headings in this Agreement are inserted for convenience only and shall not constitute a part of or be referred to in interpreting the Agreement.
- 2. Supplier’s Obligations and Warranties**
- 2.1 The Supplier shall provide the Supplies in accordance with the terms and conditions of this Agreement. An Order will be deemed accepted upon receipt by the Supplier unless the Supplier otherwise notifies Fujitsu within twenty-four (24) hours of receipt of such Order.
- 2.2 The Supplier warrants, represents and undertakes that:
- (a) the Supplies will comply with all applicable legislation from time to time in force, statutory requirements and all relevant standards issued from time to time by the International Organization for Standardization (ISO), and the Supplier will inform Fujitsu as soon as it becomes aware of any changes in that legislation and/or other statutory requirements;
- (b) the Supplies will meet any performance criteria and conform in all respects with any Product Description or sample;
- (c) it owns, and is able to provide good title to Fujitsu, or in the case of Programs is otherwise licensed to provide, the Products which it supplies pursuant to this Agreement;
- (d) all Products will be new, of satisfactory quality, and fit for their intended purpose;
- (e) all Products supplied are fully compliant with The Restriction on the use of Certain Hazardous Substances in Electrical and Electronic Equipment Directive 2002 (“**RoHS**”) as implemented by EU Member States except for relevant exemptions where they apply and which shall be notified in writing to Fujitsu by the Supplier. Subject to this, any non-compliant Products may be rejected by Fujitsu and returned to the Supplier at the Supplier’s cost. The Supplier shall make available to Fujitsu records of its compliance with RoHS on Fujitsu’s request;
- (f) all Products supplied are fully compliant with REACH. Subject to this, any non-compliant Products may be rejected by Fujitsu and returned to the Supplier at the Supplier’s cost. The Supplier shall provide Fujitsu with details of any “Chemical Abstracts Services Registry Numbers” (or CAS numbers) or “European Inventory of Existing Commercial Chemical Substances” numbers (or EINECS numbers) and shall at Fujitsu’s request provide confirmation of compliance with REACH;
- (g) it shall comply with the WEEE Regulations and, in particular, (i) register as the “producer” of applicable Products with the relevant environmental regulator by joining a Producer Compliance Scheme (unless otherwise agreed in writing with Fujitsu and noting the exception claimed by the Supplier); (ii) provide Fujitsu annually with its current EEE Producer Registration Number; and (iii) where required to do so by Fujitsu, collect applicable Products at their end of life from Fujitsu’s or its customer’s site and arrange for the treatment, recycling and environmentally sound disposal of the Products in accordance with the WEEE Regulations and the relevant treatment protocols;
- (h) all Services will be performed diligently, with all reasonable skill and care to at least industry standard by appropriately trained experienced and qualified personnel and, where applicable, will meet the agreed service levels;
- (i) it will ensure that the Services conform with the service description set out in the Order and shall allocate sufficient resources to the performance of the Services as are necessary to enable it to comply with its obligations under this Agreement;
- (j) it will co-operate fully with Fujitsu, its customers, agents and sub-contractors;
- (k) in the case of Programs, the media on which the Programs are delivered will be free of defects in materials and workmanship under normal use during the Warranty Period;
- (l) it has used its best endeavours to detect and remove computer viruses in any Programs and that the Programs as delivered to the best of the Supplier’s knowledge do not contain any computer viruses or software routines designed to disable, damage, impair or erase the Programs; and
- (m) it will comply with Fujitsu’s standards and policies for suppliers as detailed in the Supplier Standards Manual (as may be updated from time to time by Fujitsu). A copy of the Supplier Standards Manual can be found at <http://www.fujitsu.com/uk/about/local/purchasing>.

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- 2.3 **Health and Safety** The Supplier shall comply with all relevant health and safety legislation. It will ensure Supplies that are potentially dangerous to health or safety, are delivered in suitable protective packing and that the external surface of such packing is clearly labelled to indicate any such hazards involved in handling and using the Supplies and the method of safe handling. A copy of any information relating to the safety aspects or proper use of the Supplies should be sent to Fujitsu under separate cover, on or prior to delivery. The Supplier shall be responsible for ensuring that any of its employees or other persons fulfilling the Order who enter Fujitsu's or its customers' premises are suitably clothed, issued with appropriate protective equipment, duly warned of hazards which they may encounter on Fujitsu's premises and that they adhere to all health and safety at work rules and regulations and any other reasonable security or other requirements that apply at any of Fujitsu's or its customers' premises from time to time.
- 2.4 **Security and Immigration Checks**
- (a) The Supplier shall comply with all security and related policies notified by Fujitsu and shall promptly provide such information regarding its compliance as may be reasonably required by Fujitsu.
- (b) The Supplier shall only use employees, agents or contractors ("**Personnel**") who are authorised to work for the duration of this Agreement or any Order in the country where the Supplies are being provided. The Supplier shall provide information evidencing such approvals, clearances and right to work at any time on request by Fujitsu and/or Fujitsu's customers.
- (c) Where Fujitsu and/or Fujitsu's customers carries out security, immigration and/or work permit checks directly on the Personnel, the Supplier shall obtain demonstrable consent from such Personnel permitting release of their personal data for such purpose.
- 2.5 **Data Protection** The parties agree that Fujitsu is the Data Controller and the Supplier is the Data Processor as defined in the Data Protection Act 1998 (the "DPA"). The Supplier shall comply with the DPA (or equivalent legislation in the country where the Supplies are being provided) and, where processing Personal Data (as defined in the DPA) on Fujitsu's behalf, shall process such data strictly in accordance with Fujitsu's instructions and put such operational and technological processes in place to safeguard against any unauthorised access, loss, destruction, theft, use or disclosure of the data. The Supplier shall not delegate or sub-contract any of its data processing obligations to any third party or transfer Personal Data outside the EEA without the prior written consent of Fujitsu, such consent not to be unreasonably withheld. Where consent is given and the Supplier transfers Personal Data outside the EEA pursuant to this Clause, such transfer shall be subject to contractual clauses determined by the European Commission. In addition, notwithstanding Clause 15.2, the Supplier shall indemnify Fujitsu against any and all claims, losses, liabilities, damages, costs (including legal fees) and expenses incurred by Fujitsu (including those specified in Clause 15.3) as a result of the Supplier's breach of this Clause 2.5.
- 2.6 **Business Continuity** The Supplier shall ensure that it has adequate security, business continuity and disaster recovery procedures in place to cope with the risk of major operational disruptions.
- 2.7 **Anti-Bribery Compliance**
- (a) The Supplier shall:
- (i) comply with all applicable laws, statutes, regulations, and codes relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010;
- (ii) comply with Fujitsu's ethics, anti-bribery and anti-corruption policies (as communicated and updated from time to time by Fujitsu);
- (iii) have and shall maintain in place throughout the term of this Agreement its own policies and procedures, including but not limited to adequate procedures under the Bribery Act 2010, to ensure compliance with Clauses 2.7(a)(i) and 2.7(a)(ii) above, and will enforce them where appropriate;
- (iv) promptly report to Fujitsu any request or demand for any undue financial or other advantage of any kind received by the Supplier in connection with the performance of this Agreement;
- (v) immediately notify Fujitsu (in writing) if a foreign public official becomes an officer of the Supplier or acquires a controlling interest in the Supplier (and the Supplier warrants that it has no foreign public officials as officers, and that no foreign public official has a controlling interest in the Supplier at the date of this Agreement and each Order);
- (vi) on request certify to Fujitsu in writing signed by an officer of the Supplier, compliance with this Clause 2.7(a) by the Supplier and all persons associated with it under Clause 2.7(b). The Supplier shall provide such supporting evidence of compliance as Fujitsu may reasonably request.
- (b) The Supplier shall ensure that any person associated with the Supplier who is performing services or providing goods in connection with this Agreement does so only on the basis of a written contract

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which imposes on and secures from such person terms equivalent to those imposed on the Supplier in this Clause 2.7.

- (c) For the purpose of this Clause 2.7:
  - (i) the meaning of adequate procedures and foreign public official and whether a person is associated with another person shall be determined in accordance with section 7(2) of the Bribery Act 2010 (and any guidance issued under section 9 of that Act), sections 6(5) and 6(6) of that Act and section 8 of that Act respectively; and
  - (ii) a person associated with the Supplier includes but is not limited to any sub-contractor of the Supplier.

### 3. Delivery

- 3.1 The Supplier shall, at its own expense and during normal business hours (unless Fujitsu otherwise directs), deliver the Supplies, properly packed and secured (in the case of Products), on the Delivery Date to the place specified in the Order or such other location as may be subsequently agreed in writing. Each package should be clearly marked with the Supplier's name and the delivery address stated on the relevant Order.
  - 3.2 The Supplier shall ensure that one copy of an advice note stating the Order number, the number of packages and the method and route of transport accompanies the Supplies and that a further copy is given to any third party carrier.
  - 3.3 For Supplies delivered in instalments, the Order shall be construed as a single contract in respect of each instalment. However, where Fujitsu has a right to reject any particular instalment, it may at its option reject the entire Order or the instalment.
  - 3.4 Upon request and reasonable notice from Fujitsu, Fujitsu and its customers (or their representatives) may verify at source that the Supplies conform to the requirements of the Order. Such verification shall not absolve the Supplier from any of its responsibilities under this Agreement nor affect Fujitsu's right to reject the Supplies nor shall it constitute evidence of effective quality control.
- ### 4. Time for Delivery and Performance of the Supplies
- 4.1 The Supplies may not be delivered or performed earlier or later than the Delivery Date without Fujitsu's permission, otherwise Fujitsu may reject them. Time shall be of the essence of this Agreement and of each Order in relation to delivery of the Supplies.
  - 4.2 If the Supplies or any part thereof are not delivered or performed by the required date Fujitsu shall be entitled to terminate this Agreement and/or cancel the Order, in each case without cost or liability, in respect of the Products undelivered or the Services not performed.

Where other Supplies (“**Associated Supplies**”) have previously been delivered to or performed for or on behalf of Fujitsu by the Supplier and, in the reasonable opinion of Fujitsu, the Associated Supplies cannot be effectively and commercially used by reason of such non-delivery or non-performance of the Supplies then, without prejudice to Clause 7, Fujitsu shall be entitled to reject the Associated Supplies in writing and claim a full refund in respect of any Associated Supplies which have been paid for and no payment shall be due in relation to any Associated Supplies which have not been paid for. Where Fujitsu exercises its option to reject any Associated Supplies, Fujitsu agrees to return to the Supplier, at the Supplier's expense, any Products or other materials which comprise Associated Supplies as soon as reasonably practicable after it has received a full refund in respect thereof.

### 5. Title and Risk

- 5.1 Title and risk in the Products shall pass to Fujitsu on delivery, following off-loading and stacking, except that if the Products are paid for before delivery ownership shall pass to Fujitsu once payment has been made.
- 5.2 Where Fujitsu exercises its right to reject Associated Supplies pursuant to Clause 4.2, risk and title therein shall revert to the Supplier upon Fujitsu notifying the Supplier in writing that it wishes to exercise its right to reject the Associated Supplies.

### 6. Programs

- 6.1 Where the Supplies include Programs, which shall include all or any embedded software, and/or where and to the extent that any Intellectual Property Rights subsist in the Supplies, then, subject always to Clause 10.2, the Supplier hereby grants Fujitsu an irrevocable, non-exclusive licence, with authority to sell or grant sub-licences directly or indirectly to Fujitsu's end-customers, to use and/or to permit third parties to use each copy of such Programs and to make such other copies as are reasonably necessary to support such licensed use.
- 6.2 Where the Supplies are created or modified for Fujitsu, the Supplier hereby grants Fujitsu a licence in the terms of Clause 6.1 above (save that such licence shall be exclusive) for the period commencing immediately upon their creation until such time as all Intellectual Property Rights are fully and completely vested in Fujitsu pursuant to Clause 10.2.
- 6.3 Where the Supplier grants Fujitsu a periodic licence and the fees are payable on a recurring basis, Fujitsu shall have the right to terminate

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- the licence in writing on not less than thirty (30) days' notice, such notice to take effect at the end of the then current period.
- 7. Remedies**
- 7.1 In relation to the Supplies, the Supplier undertakes that:
- (a) in the case of Products, if within the Warranty Period or a reasonable time thereafter, Fujitsu notifies the Supplier that the Products are in breach of warranty or the provisions of this Agreement then, at Fujitsu's option, (i) the Supplier will promptly repair or, at Fujitsu's option, replace, the Products so as to remedy the matter constituting the breach without cost (including transportation costs) to Fujitsu; or (ii) the Supplier will accept rejection and return of the Supplies by Fujitsu, whether or not any of the Supplies have been accepted, and the Supplier shall immediately upon receipt return any payments made by Fujitsu in respect of those Supplies. For the avoidance of doubt, risk and title in rejected Products shall immediately on rejection revert to the Supplier; and
- (b) in the case of Services, if within the Warranty Period or a reasonable time thereafter, Fujitsu gives written notice that the Services are in breach of warranty or the provisions of this Agreement, the Supplier shall promptly re-perform the Services at no cost to Fujitsu. Where the Supplier fails to provide such remedy, Fujitsu may remedy or have remedied the matter constituting the breach at the cost of the Supplier; and
- (c) in any case, if during the Warranty Period the Supplies are in breach of warranty or otherwise in breach of this Agreement, Fujitsu may, at its option, cancel the Order, at no cost or liability to Fujitsu, and/or refuse to accept any further deliveries and/or performance of Supplies. The Supplier shall immediately refund any charges paid in advance by Fujitsu in respect of the Supplies.
- 7.2 Without prejudice to Fujitsu's rights under Clause 7.1, if during the Warranty Period or within two (2) years of its expiry, the Products develop any persistent defects, failures or non-conformities, the Supplier will, on Fujitsu's request, review such defects, failures or non-conformities with Fujitsu and indicate steps or recommendations which in the Supplier's reasonable judgement would remedy the same. Subject to an agreed action plan, the Supplier shall at its own cost remedy the defects, failures and non-conformities. Where the Supplier fails to provide such remedy, Fujitsu may remedy or have remedied the failure, defect or non-conformity at the Supplier's cost and reject deliveries of Supplies until the source of failures, defects and non-conformities has been cured.
- 7.3 Fujitsu's rights and remedies under Clause 7 are in addition to its other rights and remedies under this Agreement or at law.
- 8. Payment Terms**
- 8.1 The Charges shall be stated in the Order and shall be exclusive of VAT or similar duty but inclusive of all other charges. Unless otherwise agreed in writing, Fujitsu shall not be liable to make any payments to the Supplier other than the Charges.
- 8.2 Subject to Clauses 8.3, 8.4 and 8.5, Fujitsu shall pay each undisputed invoice properly due, issued and submitted to it by the Supplier ninety (90) days after the date of receipt.
- 8.3 The Supplier must be in possession of an approved Order before commencing any supply under this Agreement. The Supplier shall ensure that Fujitsu's Order number is referenced on any invoice sent to Fujitsu and acknowledges that without an approved Order number, the invoice will be rejected.
- 8.4 All invoices must be submitted within three (3) months of delivery or performance of the Supplies or expenses being incurred. Unless previously agreed in writing by Fujitsu, invoices submitted more than three (3) months after the period to which they refer will be rejected and not considered for payment.
- 8.5 All invoices must be sent to:  
Fujitsu Services Limited  
Central Financial Services  
Trafalgar House  
Temple Court  
Risley  
Warrington  
WA3 6GD
- 8.6 Where all or part of an invoice is disputed:
- (a) the Supplier shall issue Fujitsu with a credit note as soon as reasonably practicable and reissue an invoice in respect of the undisputed amount, which will be paid in accordance with Clause 8.2; and
- (b) upon resolution of the dispute, the Supplier may issue an invoice in respect of the amount that has been resolved that Fujitsu should pay, which Fujitsu shall pay within twenty-eight (28) days of receipt of the new invoice or the date on which the payment would otherwise have fallen due under Clause 8.2, whichever is later.
- 8.7 Fujitsu may set off sums due from Fujitsu to the Supplier under any Order (without prejudice to any other rights or remedies) against sums

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- due from the Supplier to Fujitsu under such Order or any other agreement.
- 9. Taxes and Export**
- 9.1 The Supplier is responsible for all taxes and duties that are due in the country of origin of the Supplies and for obtaining at its expense any import or export licence or government consents necessary for the provision of the Supplies including those required under any Export Control Laws.
- 9.2 The Supplier shall comply with the Export Control Laws in respect of the Products supplied under this Agreement.
- 9.3 Neither party shall export, directly or indirectly, any technical data acquired from the other party under this Agreement (or any products, including software, incorporating any such data) in breach of any Export Control Laws to any country for which the government or any agency thereof at the time of export requires an export licence or other governmental approval without first obtaining such licence or approval
- 9.4 The Supplier shall on the date of dispatch of any Products to Fujitsu or, at Fujitsu's direction, provide Fujitsu or Fujitsu's designated consignee with:
- (a) certificates of origin and invoices in duplicate in respect of the Products dispatched;
  - (b) notify Fujitsu of any ECCN or ITAR coded products and provide Fujitsu with details of relevant ECCN and ITAR codes for such Products;
  - (c) provide Fujitsu with confirmation of Product conformity with international standards for Electrical Safety Testing, EMC Testing, telecommunications conformance and recognition by local telecommunications authorities ( where relevant) including but not limited to confirmation that the Product:
    - (i) is CE marked and a Declaration of Conformity is available;
    - (ii) conforms with the Low Voltage Directive regarding electrical safety (73/23/EEC & 93/68/EEC);
    - (iii) conforms with the EMC Directive regarding electromagnetic compatibility (89/336/EEC / 2004/108/EEC);
    - (iv) conforms with the Radio and Terminal Telecommunications Directive (1999/5/EC); and
    - (v) conforms with CITC requirements.
- 9.5 The Supplier shall, within five (5) days, satisfy any reasonable request by Fujitsu for assistance in connection with any requirement by any competent government or agency in any relevant jurisdiction for the purpose of compliance with any Export Control Law.
- 9.6 Unless otherwise agreed in writing, the Supplier shall at its own expense deliver the Products, suitably packed and marked with any hazard warnings appropriate to the contents, FCA INCOTERMS 2010. All packages must be marked with the final destination address shown in the Order and the number of separate packages identified.
- 10. Intellectual Property Rights and Indemnity**
- 10.1 The Supplier shall indemnify and hold harmless Fujitsu, its affiliates and its customers against any and all claims, liabilities, direct, indirect or consequential losses (including loss of profits, loss of business, depletion of goodwill and similar losses whether of a direct, indirect or consequential nature), costs and expenses (including legal fees) howsoever arising which Fujitsu, its affiliates or its customers may incur or suffer as a result of a claim by a third party arising from any infringement, actual or alleged, whether or not under English law, of any Intellectual Property Rights resulting from the possession, use, licensing, sale or other exploitation of the Supplies.
- 10.2 Where the Supplier generates any Intellectual Property Rights in performing Services, or creating or customising Products to Fujitsu's specification (including without limitation by the creation or customisation of a Program or marketing, technical or training material or the internal or external design of an article), all such Intellectual Property Rights shall, on their creation, vest in Fujitsu exclusively and in consideration of the Charges the Supplier hereby, by way of future assignment with full title guarantee, assigns all such rights to Fujitsu.
- 10.3 The Supplier shall, promptly at Fujitsu's request, do or procure to be done all such further acts and things and the execution of all such other documents as Fujitsu may from time to time require for the purpose of securing for Fujitsu the full benefit of this Agreement, including all right, title and interest in and to the Intellectual Property Rights assigned to Fujitsu in accordance with Clause 10.2.
- 11. Dispute Resolution Procedure**
- 11.1 Any question, difference or dispute which may arise out of or in connection with this Agreement shall in the first instance be referred to the representatives of Fujitsu and the Supplier nominated for discussion and resolution. If the matter is not resolved within twenty one (21) days of such referral, the escalation will continue through two (2) more levels of management. If the unresolved matter is having a serious effect on the performance of this Agreement, the parties will

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- use best endeavours to minimise the escalation time. Neither party may initiate any legal action until the process has been completed, unless such party has reasonable cause to do so to avoid damage to its business or to protect or preserve any right of action it may have, including without limitation to seek injunctive relief in respect of any breach of its Intellectual Property Rights or similar rights.
- 11.2 If the dispute is not resolved by escalation in accordance with Clause 11.1 above, the parties may seek to resolve disputes between them by an alternative dispute resolution technique recommended by the Centre for Dispute Resolution in the UK.
- 12. Diagnostic Materials**
- 12.1 Fujitsu may at its option make available items owned by Fujitsu ("**Fujitsu Property**") and/or Diagnostic Materials specified in the Order. The Diagnostic Materials and Fujitsu Property shall be provided by Fujitsu solely to assist the Supplier in the provision of Services.
- 12.2 The Supplier will use the Diagnostic Materials and Fujitsu Property solely in the manner and for purpose specified by Fujitsu and will follow Fujitsu's instructions concerning their use. Risk in the Diagnostic Materials and Fujitsu Property will pass to the Supplier whilst they are in the Supplier's possession or control during which time the Supplier will at its own expense keep the Diagnostic Materials and Fujitsu Property safe and in good order and insure them against fire, theft and other risks up to the full replacement value. Title in the Diagnostic Materials and Fujitsu Property shall at all times remain with Fujitsu. The Supplier will compensate Fujitsu for the Supplier's failure to use, or for its incorrect use of, the Diagnostic Materials and Fujitsu Property.
- 12.3 The Diagnostic Materials, including results obtained by their use, shall be included in Fujitsu's Confidential Information for the purposes of Clause 14. The Supplier will permit Fujitsu at all reasonable times to audit the use of Diagnostic Materials, and to remove them whenever Fujitsu so requires.
- 13. Termination**
- 13.1 If either party: (a) being a company, has a petition presented for its liquidation or calls a meeting to propose a resolution for its liquidation (other than solely for solvent amalgamation or reconstruction) or has a petition presented for the appointment of an administrator or has a receiver or administrative receiver appointed over it or any of its assets or makes any voluntary arrangement with its creditors; or (b) being an individual (or if a firm or partnership, any of its partners or members), has a petition presented for his bankruptcy, or has a receiver appointed over his affairs, or makes any voluntary arrangement with his creditors or (in the case of a firm or partnership) proposes or has presented against it a petition for its dissolution; or (c) in either case undergoes any analogous event in any jurisdiction where it is domiciled, then the other party may terminate this Agreement and/or any Order by written notice to the other taking immediate effect.
- 13.2 Fujitsu reserves the right to cancel the Agreement or any Order for any reason and without cost or liability (save for any Supplies already delivered or performed) by giving the Supplier written notice at least thirty (30) days prior to the agreed time for delivery or performance.
- 13.3 Upon termination of this Agreement or, where relevant, an Order for whatever reason:
- (a) the Supplier shall reimburse any sums paid in advance by Fujitsu for Supplies ordered but not yet received as at the date of termination;
  - (b) the parties will return Confidential Information of the other party and the Supplier shall at its cost forthwith return all Diagnostic Materials and any Fujitsu Property and Fujitsu may enter any premises to recover such items at the Supplier's cost;
  - (c) the Supplier shall give Fujitsu all reasonable assistance necessary to facilitate the orderly transfer of the Supplies to an alternative service provider.
- 13.4 The exercise of rights of termination by either Party shall be without prejudice to any other rights or remedies available to it under this Agreement.
- 14. Confidentiality**
- 14.1 The Receiving Party undertakes that it will take all necessary precautions to ensure that all Confidential Information is treated as confidential and that it (and any person employed or engaged by it in connection with the Supplies) uses Confidential Information of the Disclosing Party only for the purposes of this Agreement and shall not disclose any such Confidential Information to any third party without the prior written consent of the Disclosing Party or as set out herein.
- 14.2 The Receiving Party may disclose Confidential Information:
- (a) pursuant to a duty imposed by law or the requirements of a regulatory authority but only to the extent so required;
  - (b) to give proper instructions to any professional adviser under an obligation to keep such Confidential Information confidential;
  - (c) where the Receiving Party is Fujitsu, pursuant to a request made under the Freedom of Information Act 2000.

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- 14.3 Confidential Information shall not include, and the obligations contained in this Clause 14 shall not apply, in respect of information:
- (a) which was in the public domain at the time of disclosure;
  - (b) which, though originally Confidential Information, subsequently falls into the public domain through no fault of the Receiving Party;
  - (c) independently developed by the Receiving Party or its employees or agents where such party can show it has no access to that information as Confidential Information of the Disclosing Party received under this Agreement; or
  - (d) lawfully in the possession of the Receiving Party at the time of receipt which is subsequently lawfully received from a third party not under an obligation of confidentiality to the Disclosing Party in respect of that information.
- 14.4 Without prejudice to the generality of Clauses 14.3 (a) – (d) above, information shall not be deemed to be in the public domain by reason only that it is known to only a few of those people to whom it might be of commercial interest and a combination of one or more items of Confidential Information with information in the public domain shall not cause such Confidential Information to be deemed to be in the public domain.
- 14.5 Each party undertakes to the other to take all such steps as shall from time to time be necessary to ensure compliance with the provisions of Clauses 14.1 and 14.2 by its employees, agents, consultants and sub-contractors. For the avoidance of doubt, the Supplier acknowledges that Fujitsu may require and the Supplier shall procure undertakings as to confidentiality directly from its employees in terms no less onerous than the terms contained in this Clause 14.
- 14.6 Neither the Supplier nor any person engaged by it whether as an employee, servant, agent or sub-contractor shall use the Confidential Information for the solicitation of business from Fujitsu.
- 14.7 The Supplier shall not advertise or publicly announce its involvement in the Agreement without the prior written consent of Fujitsu.
- 15. Limitation of Liability and Insurance**
- 15.1 Notwithstanding anything to the contrary in this Agreement, Fujitsu's liability to the Supplier for any loss, damage, costs, claims or expenses suffered by the Supplier under or in connection with this Agreement, whether arising from a breach of contract, negligence or howsoever, shall be limited as follows:
- (a) in the case of liability arising from death or injury to persons as a result of any act or omission of Fujitsu which is negligent (as defined by the Unfair Contract Terms Act 1977 section 1) or of any fraud on the part of Fujitsu or of the acts, omissions or frauds of others for whom Fujitsu is at law responsible, there shall be no limit;
  - (b) in respect of any other liability Fujitsu's aggregate liability shall in no circumstances exceed the Charges for the Supplies in respect of which the claim arises; provided always that Fujitsu's total aggregate liability for all such claims arising in connection with this Agreement whether in contract, tort (including negligence) or otherwise shall be limited to and in no circumstances exceed £1,000,000.
- 15.2 The Supplier's liability to Fujitsu for any loss, damage, costs, claims or expenses suffered by Fujitsu under or in connection with this Agreement, whether arising from a breach of contract, negligence or howsoever, shall be limited as follows:
- (a) in the case of breach of Clause 2.5 (Data Protection), Clause 2.7 (Anti-Bribery Compliance), Clause 10 (Intellectual Property Rights and Indemnity) and Clause 14 (Confidentiality) or any indemnity set out in this Agreement or liability arising from death or injury to persons as a result of any act or omission of the Supplier, which is negligent (as defined by the Unfair Contract Terms Act 1977 section 1) or of any fraud on the part of the Supplier or of the acts, omissions or frauds of others for whom the Supplier is at law responsible, there shall be no limit;
  - (b) in respect of any other liability the Supplier's aggregate liability shall in no circumstances exceed three (3) times the Charges paid or payable under the Agreement or £1,000,000, whichever is greater.
- 15.3 Notwithstanding any other provision of this Clause 15, for the purposes of this Agreement, losses for which the Supplier assumes responsibility and which shall be recoverable by the Fujitsu, shall include, but not be limited to, the following:
- (a) monies paid by Fujitsu to the Supplier pursuant to this Agreement, in respect of any Supplies not provided in accordance with the terms of this Agreement;
  - (b) the costs and expenses reasonably incurred by Fujitsu in procuring and implementing alternative or replacement equipment and/or services including consultancy costs, the additional costs of management time and other personnel costs and costs of hardware, software and other equipment and materials;
  - (c) the costs and expenses reasonably incurred by Fujitsu in contemplation of and pursuant to this Agreement to the extent that such costs and expenses are wasted if alternative or replacement services are procured;



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- (d) the costs and expenses of reconstituting or reloading lost or corrupted data;
- (e) the costs and expenses of implementing and performing workarounds following a failure in the Supplies or to achieve any service levels;
- (f) losses incurred by Fujitsu arising out of or in connection with any claim, demand, fine, penalty, action, investigation or proceeding by any third party (including any customer, sub-contractor, Supplier personnel, regulator of Fujitsu) against Fujitsu caused by the act or omission of the Supplier, any sub-contractor of the Supplier or any Supplier personnel.
- 15.4 Except for breach of Clause 2.7 (Anti-Bribery Compliance) or Clause 14 (Confidentiality) and subject to Clauses 15.1(a), 15.2(a) and 15.3, in no event will either party be liable to the other for any special, indirect or consequential damage including loss of profit, loss of revenue, loss of anticipated savings, loss of goodwill or injury to reputation or loss of business or opportunity arising out of or in connection with this Agreement.
- 15.5 Where the Supplier send its employees to Fujitsu's and/or Fujitsu's customers' premises in connection with this Agreement then, notwithstanding any technical supervision exercised by Fujitsu or any instructions issued by Fujitsu, such employees shall remain the Supplier's employees alone. It is an express condition of this Agreement and each Order that the Supplier effects and maintains in force for the benefit of the Supplier and Fujitsu employer's liability insurance in respect of such employees. Further the Supplier shall effect and maintain for the duration of this Agreement, or if any Order survives its termination, for the duration of that Order, such other insurance as is appropriate in the circumstances taking into account industry practice, the availability of insurance in the market place and the risks and liabilities which it is accepting under this Agreement. The Supplier shall provide Fujitsu with reasonable evidence of its compliance with this obligation when requested by Fujitsu to do so..
- 15.5 The Supplier shall indemnify and hold harmless Fujitsu against any loss of or damage to Fujitsu Property and/or Fujitsu's customers' property caused by the Supplies or by the act or default of the Supplier or its employees, agents or sub-contractors. All risk of loss or theft of or damage to any property of the Supplier or belonging to the Supplier's personnel while at Fujitsu's premises and/or Fujitsu's customers' premises for any reason whatsoever shall be and remain the sole risk and responsibility of the Supplier.
- 16. General**
- 16.1 **Force Majeure** Neither party will be liable for delay in or for failure to perform obligations if that delay or failure is caused by circumstances beyond the reasonable control of the party affected including, but not limited to any of the following: act of God, governmental act, war, fire, flood, explosion or civil commotion (a "Force Majeure Event") provided that:
- (a) a claim for relief by the Supplier shall not be valid to the extent that a prudent supplier of supplies similar to the Supplies could have foreseen and/or prevented or avoided the Force Majeure Event;
- (b) the affected party's obligation to perform the relevant obligations under this Agreement shall (during the continuation of the Force Majeure Event) be read and construed as an obligation to perform such obligations to the best level reasonably achievable in the circumstances;
- (c) an inability to obtain sub-contracted services or supplies shall not constitute a Force Majeure Event except where no substitute is available;
- (d) industrial action, strikes and lock-outs by employees of the Supplier shall not constitute a Force Majeure Event unless affecting the relevant industry on a national basis; and
- (e) if the Supplier is prevented from performing its obligations under an Order by a Force Majeure Event which continues for more than thirty (30) days, Fujitsu may at its option terminate any affected Order without liability to the Supplier forthwith by giving written notice.
- 16.2 **Assignment** The Supplier may not assign, transfer or sub-contract any of its rights or obligations under this Agreement in whole or in part without the prior written consent of Fujitsu and any purported assignment or transfer shall be null and void and all acts and omissions by the assignee or transferee are deemed to be those of the Supplier. Delegation, whether authorised or not, shall not relieve the Supplier of any of its liability or obligations under this Agreement.
- 16.3 **Notices** All notices hereunder shall be in writing addressed to the parties at their respective addresses set forth in the Order or such other address as may be notified from time to time by either party to the other.
- 16.4 **Waiver** No terms or conditions hereof shall be deemed waived and no breach or default excused unless such waiver or excuse shall be in writing and signed by the party issuing the same.
- 16.5 **Variations** No variation of this Agreement or of any of the documents referred to in it shall be valid unless it is in writing and signed by or on behalf of both parties.

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- 16.6 **Non-solicitation** During the Agreement and for a period of six (6) months after either its termination or the end of the provision of the Supplies (whichever is later), the Supplier shall not solicit the employment or services of any Fujitsu personnel who has been engaged in connection with the Supplies.
- 16.7 **Severance** If any provision of this Agreement is found by a court of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect the other provisions of this Agreement, which shall remain in full force and effect.
- 16.8 **Survival** The following clauses shall survive termination of this Agreement: Clauses 10 (Intellectual Property Rights and Indemnity), 14 (Confidentiality), 15 (Limitation of Liability and Insurance), 16.12 (Governing Law and Jurisdiction).
- 16.9 **Right to Audit:** During the course of this Agreement and for a period of three (3) years thereafter, Fujitsu (or its third party appointee) reserves the right after giving reasonable prior written notice (which notice shall include timescales and location) to the Supplier to undertake a review and audit of all or any of the Supplies and all records, operational controls and processes relating thereto (including, without limitation, the Supplier's procedures and safeguards to prevent bribery and corruption). The Supplier shall co-operate fully and shall provide any information or other facility reasonably required by Fujitsu for the purpose of undertaking such review or audit. Where following such audit Fujitsu establishes reasonable grounds that the Supplier has received Charges and/or other payments from Fujitsu in excess of the payments to which it is entitled under this Agreement, the Supplier shall (without prejudice to Fujitsu's rights arising under this Agreement or generally) forthwith pay to Fujitsu the full amount of such excess receipts (including interest at a rate of 2% per annum above the Barclays Bank plc sterling base rate in force from time to time) plus Fujitsu's reasonable costs of carrying out the audit.
- 16.10 **Relationship of Parties** Nothing in this Agreement shall create a partnership or a fiduciary relationship or the relationship of employment between Fujitsu and the Supplier. The Supplier shall not make any direct or indirect approach to Fujitsu's customer without Fujitsu's prior written consent.
- 16.11 **Cumulative Remedies** The rights and remedies of the parties under this Agreement are cumulative and without prejudice and in addition to any rights or remedies at law or in equity.
- 16.12 **Rights of Third Parties** A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement but this does not affect any right or remedy of a third party which exists or is available apart from that Act.
- 16.13 **Entire Agreement** The terms of this Agreement contain the entire agreement between the Parties unless otherwise agreed in writing. The terms of this Agreement supersede all prior drafts, agreements, arrangements, understandings and discussions between the Parties or their advisors and all statements, representations, terms and conditions, warranties, guarantees, proposals, communications and understandings whenever given and whether orally or in writing. Each Party acknowledges that in entering into this Agreement it does not rely on, and shall have no remedies in respect of, any such statements, representations, terms and conditions, warranties, guarantees, proposals, communications and understandings that are not set out in this Agreement. Nothing in this clause shall limit or exclude any liability for fraud.
- 16.14 **Governing Law and Jurisdiction** The construction, validity and performance of this Agreement and all non-contractual obligations arising from or connected with this Agreement shall be governed by the laws of England and, without prejudice to Clause 11 (Dispute Resolution Procedure), the parties submit to the exclusive jurisdiction of the English courts. Notwithstanding the other provisions of this Agreement, Fujitsu shall be entitled to bring an action in any jurisdiction where this relates to the protection of its Intellectual Property Rights or other rights, or those of its licensors.