Drafting Agile Software Development Agreements: Guidance for Corporate and Technology Counsel

Evaluating Agile vs. Waterfall Development, Structuring Key Provisions, Minimizing Contract Disputes

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New Developments in an Agile World: Drafting Software Development Agreements

By: Paul H. Arne\textsuperscript{1,2}

Software development agreements pose challenges to attorneys and clients alike. Having a robust development process is a key factor in the likelihood of success of any software development project. Project failure rates are high. Both of these factors place demands on those who provide or receive development services and those who memorialize the transaction and allocate risk. Companies are increasingly using a new development methodology, broadly known as "Agile." This relatively new way of developing software poses additional challenges to attorneys.

If you are an attorney who drafts, negotiates or reviews software development agreements, you need to know about Agile. If you haven’t already been brought into a development transaction involving Agile software development, you will. The use of Agile software development principles may change the way your software development agreements should be drafted.

Software Development Generally

Waterfall Approach

Generally

Traditional software development is often described as “waterfall” development. The basic components of waterfall development reflect a sequential approach to development. Generally speaking, they include the following processes, to be completed in order: conception, analysis (including requirements gathering), design, construction, testing, implementation, production use, and maintenance.\textsuperscript{3} Upon completion of each step, the process flows to the next one, hence the term “waterfall.” This process was derived from more traditional disciplines for making things, such as manufacturing or construction. Inherent in this approach is a substantial attempt to determine as fully as possible what will be built before construction commences. One can see how important this principle would be when constructing a building.

Under waterfall development, changes of plans are generally discouraged and should be given special and serious review and scoping before the change is actually implemented. This places a huge emphasis on getting the design process right.

\textsuperscript{1} Paul is the chair of the Technology Transactions Group of Morris, Manning & Martin, L.L.P. This article does not create an attorney/client relationship with you and does not provide specific legal advice to you or your company. Certain legal concepts have not been fully developed and certain legal issues have been stated as fact for which arguments can be made to the contrary, due to space constraints. It is provided for educational purposes only.

\textsuperscript{2} Copyright © Paul H. Arne, 2013. All rights reserved. The author wishes to thank Mike Cottmeyer for his insights into Agile development, especially for large organizations. Mr. Cottmeyer is the CEO of LeadingAgile, LLC, a company devoted to assisting large organizations transition to Agile development methodologies, including training, coaching and strategic consulting in portfolio management, project management, and transformation. Also, special thanks to Austin B. Mills for his assistance in preparing this article.

\textsuperscript{3} See Wikipedia, Waterfall model, \url{http://en.wikipedia.org/wiki/Waterfall_model} (as of October 12, 2013, 16:45 EST).
Very thoughtful and useful techniques have been developed to help organizations figure out what software features and functionality should be built, including stakeholder interviews, visioning, brainstorming, naturalistic observation, prototyping, focus groups, and storyboarding. However, requirements gathering and waterfall software development have at least two inherent problems.

- It is hard for human beings to describe what they need when they haven’t seen it before. Few people could have envisioned an iPod’s interface before actually seeing it.

- There is a lag between the time something is determined to be needed and the time it is delivered. Changing technologies or business circumstances arising between the completion of specifications and delivery of the completed software may result in changed needs.

*(Why this is important: Success Rates)*

Success rates for software development are somewhat difficult to come by. However, the most well-known keeper of these kinds of statistics is The Standish Group. On a regular basis, The Standish Group publishes its “Chaos Report,” which is a survey of the success, or not, of IT projects.

Historically, these reports are positively gloomy. For example, in 1995, The Standish Group received survey responses from 365 organizations, representing 8,380 projects. For example, in 1995, The Standish Group received survey responses from 365 organizations, representing 8,380 projects. Here are the success rates:

<table>
<thead>
<tr>
<th>Project Resolution</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Type 1: Project success</td>
<td>16.2%</td>
</tr>
<tr>
<td>Type 2: Project challenged: Project completed, but it was over budget, over time, or delivered less functionality than originally planned</td>
<td>52.7%</td>
</tr>
<tr>
<td>Type 3: Project cancelled</td>
<td>31.1%</td>
</tr>
</tbody>
</table>

These are scary statistics for IT organizations. As can be seen, cancelled projects were about twice the number of successful projects; over half missed deadlines, were over

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5 *Id.* at 3.
budget, or were delivered without requested functionality. While this author has no industry statistics on this issue, anecdotally — after discussions with the IT litigators in his firm — it should be of little surprise that some of the most frequent disputes in technology are those involving software development relationships.

Faced with these statistics, one can also see how important it is to have development agreements that help manage the development process — especially in times of trouble — and manage disputes.

The Standish Group also asked respondents to identify the factors that caused IT projects to be “challenged” (i.e., over time, over budget and/or missing functionality). Of the factors identified, 51.8% of respondents identified factors that relate to the difficulty of determining requirements or changing needs. Human nature and the inexorable pace of technology and business are at odds with some of the fundamental organizing principles of waterfall software development.

**The Case for Agile Development**

Before getting into what Agile software development is, let’s see why it is important.

**Success Rates**

The Chaos report for 2010 showed the following, based on projects examined from 1994 through 2008:


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6 These response categories were “lack of user input,” “incomplete requirements and specifications,” “changing requirements and specifications,” “unrealistic expectations,” “unclear objectives,” and “new technology.” Id. at 5.

One can see from the chart that the use of Agile development methodologies were considerably more successful on average than waterfall methodologies.

From July 22 until November 1, 2011, a different research group surveyed individuals from various competencies within the software development community. 6,042 individuals responded. The median size of respondent’s software organizations was 100 personnel. The respondents reported that 80% of their organizations had adopted Agile management techniques in their organization. Sixty percent indicated that over half of their companies’ software projects are Agile-based. Comparing Agile-based development projects with prior methodologies used by their companies, between 71% and 84% of respondents indicated that their Agile-based projects (i) increased their ability to manage changing priorities (84%), (ii) improved project visibility (77%), (iii) increased productivity (75%), (iv) improved team morale (72%), and (v) sped time to market (71%).

Not surprisingly, there is a lot of interest in Agile development.

**What Is Agile Software Development?**

The name, “Agile,” can be traced back to a single event, in February, 2001. While the name grew out of that particular event, programming styles that are consistent with the principles of Agile have been around for much longer. Examples include software development methodologies called “Crystal Clear,” “Extreme Programming (or “XP”),” “Rational Unified Process,” “Dynamic Systems Development Method” (or “DSDM”), “Scrum,” “Adaptive Software Development,” and “Feature-Driven Development.” Many of the listed programming techniques are now treated as subsets of Agile.

Out of that event came the “Manifesto for Agile Software Development,” set forth below in its entirety.

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9 Id.
10 Id. at 1.
11 Id. at 2.
12 Id.
13 Id. at 7.
15 Id.
We are uncovering better ways of developing software by doing it and helping others do it. Through this work we have come to value:

**Individuals and interactions** over processes and tools
**Working software** over comprehensive documentation
**Customer collaboration** over contract negotiation
**Responding to change** over following a plan

That is, while there is value in the items on the right, we value the items on the left more.

Another result of this meeting was a statement of principles\(^\text{17}\), which is set forth in this article as Exhibit A.

Note the distinct lack of the following as objectives of Agile: predictability of timing, predictability of cost, and clear advance determination of what functionality is to be developed.

Generally, Agile methodologies results in the delivery of working software at relatively short intervals — as often as two weeks. These intervals are frequently called “sprints.” Teams of developers must therefore contain all disciplines necessary to deliver working code. Agile teams will normally be staffed with architects/designers, programmers, and testers.

**Industry Trends Point to Agile**

Another force that moves software development towards Agile methodologies is the changing method of how software is being delivered — specifically, software as a service.

Traditionally, software was delivered and operated on computers owned or controlled by the licensee. This means that delivery of significant upgrades to software tend to be major events. Each new upgrade carries a significant cost to both the licensor and licensee. On the licensor side, software must be tested against multiple hardware configurations. Interfaces may also need to be tested. Maintenance and support personnel must have the capability to support multiple versions of the software simultaneously, because not all customers will migrate to the new version at the same time. On the licensee side, new versions of software can require extensive testing before introduction into a production environment, as well as potentially user training. Because of these costs, based on the author’s experience, major new versions of software tend to be delivered no more than about twice a year.

When software functionality is delivered as a service over the Internet, these dynamics can change. First, software has to be tested against only one hardware environment. Second,

\(^{17}\) Principles behind the Agile Manifesto, [http://agilemanifesto.org/principles.html](http://agilemanifesto.org/principles.html) (last visited October 12, 2013).
there is no compelling reason to not introduce new functionality on an incremental basis as it is completed. With incremental change, training can occur more as an ongoing process rather than being driven by major releases. Support and maintenance personnel frequently only have to deal with one version of the software for all customers.

Because of the above, release cycles for new functionality can be greatly shortened, allowing for new releases as often as a few times a month. New software functionality no longer has to be such a major event. This new and growing model for the delivery of software functionality lends itself to a more iterative software development process. Therefore, certain industry trends favor the adoption of Agile methodologies, at least for some kinds of software.

**Software Development Agreements**

*Purpose of Agreements*

It goes without saying that software development agreements serve the same functions as other contracts. Normal contract functions generally include the following:

- **Certainty.** Identifying clearly what the various parties are getting, when, and at what price.

- **Roles.** Establishing which party is responsible for what activities.

- **Allocation of Risk.** If things go badly, then the contract should state the responsibilities of the parties and which party is responsible for the consequences of the problem.

- **Help in times of trouble.** When problems or disputes arise, it can be very helpful to have a process in the contract that enables dispute resolution short of contract termination or litigation.

*Development Agreements*

Software development relationships usually involve, or should involve, significant interactions between the parties. As a result of these interactions, there are some other objectives in software development agreements that are not as necessary in other contractual relationships. For example, guidance in the agreement about how the parties will interact with each other during the project can be helpful to set expectations and define responsibilities, and thereby reduce uncertainty and risk. Putting processes into these agreements can help manage risk. The

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18 The author recently attended a speech given by the CIO of a very large technology provider that delivers technology on a SaaS basis. He indicated that his company frequently upgrades its software twice a day.
following terms, among others, can be used in software development agreements to guide the parties, catch and address problems early, assign responsibilities, and manage risk.

- **Development of Specifications.** Because software development agreements are routinely entered into before the parties know specifically what is being created, processes are often built into the agreement related to determining requirements, setting timeframes, and providing for the review and approval of the specifications.

- **Establishment of Price.** At times, the cost will not be known, either, so there may be a need to provide for a mechanism to determine how much the developer will be paid and when.

- **Management and Decisions Making.** Contracts for large scale development projects often define the organizational structures for managing projects as well as identifying who makes what decisions during the course of the project.

- **Milestones.** Software development agreements frequently call for the development and identification of various milestones, and the responsibilities of the parties if these development milestones are missed.

- **Progress Reporting.** Catching problems early can be very important to the ultimate success of a project. Provisions related to what is reported and when, as well as the obligations of the parties based on the substance of the reports, are often found in software development agreements.

- **Acceptance.** The acceptance process normally provides for (i) how completed work is reviewed and confirmed to be in order, (ii) what the responsibilities of the parties are if the completed work is found to be inadequate, and (iii) what the responsibilities of the parties are if the completed work complies with the requirements of the contract.

- **Personnel.** Frequently, software development agreements will provide for how and under what circumstances developer personnel may be added to or eliminated from the development team. For example, it is not unusual to have provisions that prevent key personnel from being removed from the project absent unusual circumstances.

- **Changing Plans.** The process of requesting, scoping and introducing change into a project is normally addressed.
Describing these processes in software development agreements can help manage the risks.

**Using Agile Development Features to Manage the Risk**

Some features of Agile development are problematic to attorneys who rightfully seek certainty and allocation of risk. When faced with the need to prepare a software development agreement — a kind of agreement that is already known to be fraught with risk — image your client not being able to tell you (i) what is to be developed, (ii) how much it will cost, and (iii) how long it will take. On top of that, note in the Agile Manifesto a natural bias against contracts generally (“Customer collaboration over contract negotiation”). As an attorney, you may get business pushback as a matter of principle.¹⁹

However, there are some key features of Agile that help reduce the risk of development projects. These features may be useful to consider when drafting a corresponding software development agreement.

*Agile embraces changes in scope.* This uncertainty, however, suggests that an ongoing process will exist for evaluating and determining the scope. Therefore, consider identifying what that process is and build into the agreement the requirement of significant participation in scope decisions by both parties.

Also, some kind of scope, anticipated resources, number of sprints, and rough timeline still should exist at the beginning of a project. Therefore, consider making sure that at least what is known about scope, timing and cost are made a part of the agreement.

It goes without saying that one should contemplate in the agreement how changes to scope are handled in terms of development, time and money.

It is also important for the attorney to put Agile development in context. Admittedly, in Agile projects it may be less easy to state in a contract specifically what is being developed, at what cost, and how long it will take. However, if over 50% of the time the reasons cited for projects being over time, over budget or missing functionality relate to the difficulty of determining requirements or changing needs, how much risk are you reducing by insisting on certainty of scope at the beginning of a project? Also, if statistically software development using Agile methodologies is more likely to be successful, why would an attorney resist it just because it is less “certain”?

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¹⁹ However, Mr. Cottmeyer, who knows some of the people who attended the meeting where the Manifesto for Agile Software Development was developed, indicated that those in attendance were focusing on “contracts” that occur between IT staff and business units within companies and not relationships with outside software developers.
Agile encourages close collaboration between the business unit and the software developer. This means that there will be one or more processes — structured, informal or both — that are going to be a part of an Agile development project, relating to business and developer collaboration. Therefore, consider building at least some of these processes into the agreement.

Agile emphasizes the delivery of working software at relatively short intervals throughout the project. If the developer is to provide working software at regular and relatively short intervals during the project, doesn’t this reduce the overall risk of the project? There are at least two important features of the regular delivery of working code.

- First, as long as a business can keep what has been built even upon an early termination, then the business may have less risk of having to start all over again.

- Second, the failure to deliver working code regularly can be a key way to determine whether something is going wrong in the development process. If the code doesn’t work, doesn’t have the agreed features, or is buggy, then maybe rights should be triggered to get out of the relationship.

Therefore, consider building into the development agreement the testing and evaluation of software by both parties as a part of each sprint. Also, consider whether there should be a right to terminate at the end of a sprint if the code isn’t up to snuff or for convenience.

One More Complication

Unfortunately, everyone seems to have their own interpretation of what “Agile” development really means. Some developers are more pure in their approach to Agile, while others are clearly not. In the author’s practice, he has yet to see two “Agile” development projects that actually used the same development processes. Therefore, it is important to recognize that the “Agile” methodologies used by one company will not necessarily match another. Due diligence into specifically what is done is an important part of getting the contract right.

Conclusions

Agile development can be uncomfortable to attorneys because of a lack of certainty. However, given success rates of Agile projects compared with other methodologies, the use of Agile seems to be growing. Fortunately, some features of traditional development projects (such as controls related to personnel) are still available to assist with helping to improve the chances for success. Coupled with a sensitivity to features of Agile that are also useful in connection with writing a development contract, lawyers are still in a position to provide value by drafting a
document that reduces risk and provides a guide to the parties that may increase the chances for success.
Exhibit A
Principles Behind the Agile Manifesto

We follow these principles:

Our highest priority is to satisfy the customer through early and continuous delivery of valuable software.

Welcome changing requirements, even late in development. Agile processes harness change for the customer's competitive advantage.

Deliver working software frequently, from a couple of weeks to a couple of months, with a preference to the shorter timescale.

Business people and developers must work together daily throughout the project.

Build projects around motivated individuals. Give them the environment and support they need, and trust them to get the job done.

The most efficient and effective method of conveying information to and within a development team is face-to-face conversation.

Working software is the primary measure of progress.

Agile processes promote sustainable development. The sponsors, developers, and users should be able to maintain a constant pace indefinitely.

Continuous attention to technical excellence and good design enhances agility.

Simplicity--the art of maximizing the amount of work not done--is essential.

The best architectures, requirements, and designs emerge from self-organizing teams.

At regular intervals, the team reflects on how to become more effective, then tunes and adjusts its behavior accordingly.
DATED 2014

(1) [CUSTOMER]

- and -

(2) [SUPPLIER]

AGILE SOFTWARE
DEVELOPMENT AGREEMENT
relating to
[◆ ◆ ◆ ◆ ]
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THIS AGREEMENT is made on 2014

BETWEEN:

(1) [CUSTOMER] a company incorporated and registered in [England and Wales] (company number [ ],) which has its [registered office at][principal place of business at] [ ], ("Customer"); and

(2) [SUPPLIER] a company incorporated and registered in [England and Wales] (company number [ ],) which has its [registered office at][principal place of business at] [ ], ("Supplier").

BACKGROUND:

A The Supplier has specialist skill and expertise in providing agile software development services using the [ ] methodology.

B The Customer wishes to retain a company to undertake software development work. The Supplier has represented to the Customer that it is experienced in the development and implementation of [ ] systems and the provision of technology to customers in the [ ] industry.

C Based upon the Supplier's representations, as detailed above, the Customer has agreed to retain the Supplier and the Supplier has agreed to provide the Services and the Solution (as defined below) to the Customer on the terms and conditions of this Agreement.

IT IS AGREED:

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement:

"Acceptance Criteria" means criteria for acceptance of a particular Customer Requirement as set out against the relevant Customer Requirement in appendix 3 to schedule 3;

"Acceptance Tests" means the tests to ensure compliance of a particular Increment with its Acceptance Criteria to be run by the Customer under part 7 of schedule 3;

"Agile Period(s)" has the meaning given in part 1 of schedule 3;

"Agile Process" means the process described in schedule 3;

"Agile Team" has the meaning given in part 1 of schedule 3;

"Anti-Corruption Laws" means:

(a) the Bribery Act 2010; and

(b) any anti-bribery or anti-corruption related provisions in criminal and anti-competition laws and/or anti-bribery or anti-corruption laws of the jurisdiction in which the Supplier provides the Services, together with any amending, consolidating or successor legislation or case law which has effect from time to time in the relevant jurisdiction;
"Bespoke Software" means the new software developed by the Supplier under this Agreement to form part of the Solution and all Modifications and/or Enhancements of the same but excluding the Supplier Software and the Third Party Software;

"Business Day" means a day (other than a Saturday or Sunday) on which the banks are ordinarily open for business in the City of London;

"Charges" means the charges set out in schedule 5;

"Claim" has the meaning given in clause 17.4;

"Commencement Date" means [ ];

"Confidential Information" means all information which is disclosed by one party to the other however conveyed whether before or after the date of this Agreement and would appear to a reasonable person to be confidential and which relates to the business affairs of the party disclosing it (or other companies within that party's Group) including products, operations, processes, plans or intentions, developments, trade secrets, know-how, design rights, market opportunities, personnel, customers and suppliers of the party disclosing it and all information derived from the above;

"Control" has the meaning given by section 1124 of the Corporation Tax Act 2010;

"Customer Environment" means any of the Customer's computing environment (consisting of hardware or software) set out at part 2 of schedule 2 or on which the Customer notifies the Supplier that the Solution is to be installed for the purposes of productive use;

"Customer Requirements" has the meaning given in part 1 of schedule 3;

"Customer Representative" has the meaning given in part 1 of schedule 3;

"Customer Responsibilities" has the meaning given in clause 6;

"Customer Sites" means the sites listed in part 1 of schedule 2 [and/or such other sites as the Customer shall from time to time notify to the Supplier];

"Default" means:

(a) any breach of the obligations of either party (including a fundamental breach or breach of a fundamental term); or

(b) any default, act, omission, negligence or statement of either party, its employees, agents or sub-contractors,

in connection with or in relation to the subject matter of this Agreement;

"Defect" means:

(a) any error or failure of code within an Increment and/or the Solution which causes an Increment and/or the Solution to produce unintelligible or incorrect results; or

(b) any failure of an Increment and/or the Solution to provide the performance, features and functionality specified in the Customer Requirements or the
Documentation (including any adverse effect on response times or other performance attributes of the Increment and/or the Solution), regardless of whether or not the same prevents acceptance of the Increment and/or the Solution or payment by the Customer;

"Definition of Done" means the definition set out in appendix 5 to schedule 3;

"Deliverables" means the following deliverables:

(a) Object Code and, in the case of Bespoke Software, Source Code versions of all Increments;

(b) Object Code and, in the case of Bespoke Software, Source Code versions of the Solution as described in the Software Description;

(c) the Documentation; and

(d) the Standard Documentation;

"Delivery" or "Deliver" means the physical delivery of the Increments and the Documentation to the Customer;

"Delivery Date" means the date or dates specified in the Release Plan for Delivery;

"Disclosing Party" shall have the meaning given in clause 13.1;

"Dispute" means any dispute, difference or question of interpretation arising out of or in connection with this Agreement, (including any dispute regarding pre-contractual negotiations, the existence, validity or termination of this Agreement or the consequences of non-existence or invalidity of this Agreement) whether contractual or non-contractual;

"Dispute Resolution Procedure" means the process set out in schedule 6;

"Documentation" means:

(a) the Software Description;

(b) the User Guides;

(c) the Project Tools; and

all Modifications and Enhancements of the same[, and any other documentation that is not Standard Documentation];

"Due Date" shall have the meaning given in clause 11.2;

"Enhancements" means changes or additions, other than New Versions or Modifications, to Solution (or any constituent parts thereof) and the Documentation that improve or add new functions or, in the case of the Documentation reflect improvements or additions to the Solution;

"Force Majeure Event" means an event which is beyond the reasonable control of the Supplier including an event which falls into one or more of the following categories: strike,
lockout or labour dispute (excluding, in all cases, by the employees of the party liable to
effect performance or its sub-contractors or suppliers); act of God, fire, flood and storm; war,
military action, riot, civil commotion, terrorism; explosion or malicious damage; and
provided that the mere shortage of material, equipment, labour or supplies shall not constitute
a Force Majeure Event;

"Good Industry Practice" means the exercise of the highest degree of skill, care, diligence,
prudence and foresight which would reasonably be expected from a leading software
development company that uses an agile methodology or a similar process to develop
software;

"Group" means in relation to any company that company and every other company which is
from time to time a subsidiary or holding company of that company or a subsidiary of any
such holding company (and the terms "subsidiary" and "holding company" shall have the
meanings given to them by sections 1159 and Schedule 6 of the Companies Act 2006 but for
the purposes of section 1159(1) a company shall be treated as a member of another company
if any shares in that other company are registered in the name of:

(a) a person by way of security (where the company has provided the security); or
(b) a person as nominee for the company);

"Increment(s)" means the item(s) of operational Software designed, created, developed,
configured, customised and integrated to implement a Customer Requirement or a number of
grouped Customer Requirements;

"Installation" or "Install" means installing and commissioning the Increments on the
Customer Environment at the Customer Site(s);

"Installation Date" means the date or dates specified in the Release Plan for Installation of
the Increments;

"Intellectual Property Rights" means:

(a) patents, utility models, supplementary protection certificates, petty patents,
inventions (whether patentable or not), registered designs, rights in copyright,
database rights, design rights, semiconductor topography rights, mask work
rights, trade marks and service marks;
(b) all registrations or applications to register any of the items referred to in
paragraph (a); and
(c) all rights in the nature of any of the items referred to in paragraphs (a) or (b)
including continuations, continuations in part and divisional applications,
reputation, personality or image, trade names, business names, brand names, get-
up, logos, domain names and URLs, rights in unfair competition and, without
prejudice to anything set out elsewhere in this definition, rights to sue for passing
off and all rights having equivalent or similar effect to, and the right to apply for
any of, the rights referred to in this definition in any jurisdiction;

"Key Personnel" means the Supplier personnel set out in Appendix 2 to Schedule 3;
"Laws" means any applicable law, statute, bye-law, regulation, order, regulatory policy (including any requirement or notice of any regulatory body), guidance or industry code of practice, rule of court or directives, delegated or subordinate legislation;

"Modifications" means any maintenance releases, modifications or revisions other than Enhancements or New Versions to the Solution (or constituent parts thereof) or reflections of the same in the Documentation that correct Defects, support new releases of the operation system on which the Solution operates, support new input/output devices or provide other incidental updates and corrections;

"New Version" means any new version of the Supplier Software or the Third Party Software (or its constituent parts) which from time to time is publicly marketed and made available for purchase by the Supplier in the course of its normal business where the purchase or operation of the new version does not require the purchaser already to possess a version of the Software;

"Object Code" means the machine-readable version of the relevant software;

"Open-Source Software" means any software licensed under any form of open-source licence meeting the Open Source Initiative's Open Source Definition or any libraries or code licensed from time to time under the General Public Licence, or anything similar;

"Permitted Purpose" has the meaning given in clause 13.1.1;

"Product Vision" has the meaning set out in part 1 of schedule 3;

"Project" means the software development project to be carried out in accordance with the terms of this Agreement to meet the Product Vision and the Customer Requirements;

"Project Completion" has the meaning set out in part 1 of schedule 3;

"Project Term" means the term of the Project, commencing on the Commencement Date and ending on Project Completion or earlier termination of this Agreement under clause 22;

"Recipient Party" has the meaning given in clause 13.1;

"Release" means a number of Increments grouped together for Installation as a package on the Customer Environment to meet the Customer Requirements determined by the Customer Representative in accordance with the process set out in Part 8 of Schedule 3;

"Release Plan" means the plan setting out the proposed dates for Installation on the Customer Environment of each Release;

"Services" means the services to be provided by or on behalf of the Supplier under this Agreement;

"Software" means the Bespoke Software, the Supplier's Software and the Third Party Software;

"Software Description" means a comprehensive description of the Software updated continually throughout the Project so as to be up to date at all times, including the following details:

(a) [design];
(b) [functions]; and

(c) [Drafting Note: insert other details];

"Software Maintenance Agreement" means the Customer's standard software maintenance services agreement for commissioned software set out at schedule [◆];

"Solution" means collectively:

(a) an integrated operable version of the Software designed, created, developed, configured, customised and integrated by the Key Personnel to implement the Customer Requirements and meet the Product Vision, comprising all Increments Delivered and Installed at Project Completion; and

(b) where the context requires, all Modifications and Enhancements made to or New Versions of the element of the Solution described in paragraph (a) pursuant to either this Agreement or the Software Maintenance Agreement;

"Source Code" means program source code, notes, specifications and all other materials and documents necessary to enable a reasonably skilled programmer to understand, maintain, amend and enhance the Solution, whether in eye-readable or machine-readable form;

"Standard Documentation" means documentation relating to the Supplier Software or Third Party Software which is made generally available to all purchasers of Supplier Software or Third Party Software;

"Supplier's Personnel" shall have the meaning set out in clause 5.1.1;

"Supplier Software" means the Supplier's proprietary software supplied by the Supplier under this Agreement, including the software described in part 1 of schedule 1, and all Modifications, Enhancements and/or New Versions of the same;

"Test Issue" means any variance or non-conformity of a Deliverable from its Acceptance Criteria;

"Test Plan" means the test plan set out in appendix 5 to schedule 3;

"Tests" and "Testing" means any tests required to be carried out under this Agreement and "Tested" shall be construed accordingly;

"Test Witness" means any person appointed by the Customer to witness a Test;

"Third Party Software" means the third party proprietary software supplied by the Supplier under this Agreement, including the software listed in part 2 of schedule 1, and any other third party software required in connection with the Solution and all Modifications, Enhancements and/or New Versions of the same;

"Training Plan" means the training plan set out in appendix 1 to schedule 4;

"Training Services" means the tasks and activities to be performed by the Supplier as set out in schedule 4;
"User Guides" means the user guides for the Solution written by the Key Personnel or otherwise supplied by the Supplier for the users of the Solution including technical, administrative and non-technical users of the Solution;

"Viruses" means any thing or device (including any software, code, file or programme) which may prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, any telecommunications service, equipment or network or any other service or device; prevent, impair or otherwise adversely affect access to or the operation of any programme or data, including the reliability of any programme or data (whether by re-arranging, altering or erasing the programme or data in whole or part or otherwise); or adversely affect the user experience, including worms, Trojan horses, viruses and other similar things or devices;

"Warranty Period" means the period from Installation of each Increment until the date [insert number] months after Project Completion or termination of this Agreement pursuant to clause 22, as applicable.

1.2 In this Agreement (unless the context requires otherwise):

1.2.1 the words "including", "include", "for example", "in particular" and words of similar effect shall not limit the general effect of the words which precede them;

1.2.2 reference to any agreement, contract, document or deed shall include that document as varied, supplemented or novated from time to time;

1.2.3 reference to a party shall, upon any assignment or other transfer that is permitted under this Agreement, be construed to include those successors and permitted assignees or transferees;

1.2.4 words importing persons shall include natural persons, bodies corporate, unincorporated associations and partnerships (whether or not any of them have separate legal personality);

1.2.5 the headings, index and front sheet are all for reference only and shall be ignored when construing this Agreement;

1.2.6 references to a clause, schedule, paragraph or appendix are references to the clause, schedule, paragraph or appendix of, or to, this Agreement;

1.2.7 reference to any legislative provision shall be deemed to include any statutory instrument, bye-law, regulation, rule, subordinate or delegated legislation or order and any rules and regulations which are made under it, and any subsequent re-enactment or amendment of the same; and

1.2.8 if there is any conflict, ambiguity or inconsistency between parts of this Agreement then the following order of precedence shall apply:

1.2.8.1 the clauses;

1.2.8.2 schedule 3;

1.2.8.3 the remaining schedules; and

1.2.8.4 the appendices.
2. COMMENCEMENT AND TERM

This Agreement shall commence on the Commencement Date and shall continue, unless terminated earlier in accordance with clause 22, until Project Completion when it shall terminate automatically without further notice.

3. SERVICES

3.1 From the Commencement Date, the Supplier shall provide the Services, including the following:

3.1.1 the design, creation, development, configuration, customisation and integration of the Software to implement the Customer Requirements and deliver the Product Vision;

3.1.2 the writing of the Documentation in a form that is readily understandable to non-technically astute readers;

3.1.3 the Delivery and Installation of the Increments and Delivery of the Documentation for such Increments in accordance with the Release Plan;

3.1.4 the provision to the Customer of such assistance as the Customer may reasonably require to carry out the Acceptance Tests (including providing all necessary documentation) in accordance with clause 7;

3.1.5 the provision to the Customer of the Training Services in accordance with the Training Plan;

all in accordance with Good Industry Practice, all applicable Laws, and pursuant to the terms and conditions more particularly set out in this Agreement.

4. THE AGILE PROCESS

The parties shall comply with the Agile Process in the performance, delivery and receipt of the Services.

5. ACCESS AND PERSONNEL

5.1 The Supplier shall:

5.1.1 ensure that its employees, agents or sub-contractors ("Supplier's Personnel") comply with all reasonable requirements of the Customer concerning conduct at the Customer Sites (including security and health and safety requirements);

5.1.2 not remove or replace any Key Personnel from the provision of the Services unless that individual is incapable of performing his or her duties through illness or incapacity or leaves the Supplier's employment or his or her skills are no longer required in the provision of the Services;

5.1.3 bear the project familiarisation and other costs associated with any replacement of any of the Supplier's Personnel;

5.1.4 provide a list of the names of all the Supplier's Personnel requiring admission to Customer Sites, specifying the capacities in which they require admission and
giving such other particulars as the Customer may reasonably require. Failure by the Supplier to provide any name a reasonable time before access is required shall entitle the Customer to refuse admission to that individual; and

5.1.5 cause minimum disruption to the Customer when providing the Services.

5.2 If the Customer notifies the Supplier that it requires the replacement of any Key Personnel because:

5.2.1 he or she has become incapable of performing his or her duties through illness or incapacity; or

5.2.2 his or her performance is, in the Customer's reasonable opinion, unsatisfactory or prejudicial to the working relationship between the Customer and the Supplier,

the Supplier shall replace that individual within a reasonable time not to exceed [10] Business Days.

6. CUSTOMER RESPONSIBILITIES

6.1 The Customer shall be responsible for:

6.1.1 the general responsibilities of the Customer identified in part 3 of schedule 2;

6.1.2 any additional Customer responsibilities identified and agreed by the Customer Representative through the Agile Process; and,

6.1.3 any other responsibilities expressly identified in a provision of this Agreement as being a Customer responsibility,

(together "Customer Responsibilities").

6.2 Any failure or delay by the Customer in performing a Customer Responsibility will be addressed by the parties through the Agile Process.

7. TESTING AND ACCEPTANCE

7.1 The Supplier shall manage the progress of Testing in accordance with the Test Plan. Tests may be witnessed by Test Witnesses if required by the Customer.

7.2 The Supplier shall give the Test Witnesses access to any documentation and Testing environments reasonably necessary and requested by the Test Witnesses to perform their role as a Test Witness in respect of the relevant Tests.

7.3 The Customer may raise and close Test Issues during the Test witnessing process.

8. DELIVERY AND INSTALLATION

8.1 The Supplier will Deliver and Install Increments in accordance with the Release Plan.

8.2 Before Delivery and Installation, the Supplier shall, using the most up-to-date software available, test for and delete from the Increments any Viruses that would adversely affect the operation of the Increments.
8.3 On or before the relevant Delivery Date, the Supplier shall deliver to the Customer at the Customer Site(s), copies of the Documentation and the Increments. The Supplier shall provide an Object Code version of the Increments and, in addition, a Source Code version of the Bespoke Software.

8.4 On or before the relevant Installation Date, and with the Customer's prior written consent, the Supplier shall Install the Increments.

8.5 Delivery and Installation shall be effected in accordance with the access requirements of clause 12.

9. ESCROW

9.1 If required by the Customer, promptly following each Delivery Date the Supplier shall deposit into escrow such elements of the Source Code of Supplier Software and the Third Party Software as the Customer shall require.

9.2 The escrow agreements shall be in a form substantially the same as the National Computer Centre standard agreement. The Customer shall pay the escrow Charges which shall be notified by the Supplier to the Customer in writing prior to entering into the escrow agreements.

10. SOFTWARE MAINTENANCE AGREEMENT

If requested by the Customer, the parties shall enter into, and comply with the terms of, the Software Maintenance Agreement.

11. CHARGES

11.1 In consideration of the Supplier performing its obligations under this Agreement, the Customer shall pay the Supplier the Charges in accordance with the terms of this clause 11 and schedule 5.

11.2 The Supplier shall invoice the Customer for payment of the Charges in accordance with the provisions of schedule 5. Upon receipt of a valid VAT invoice and provided the Customer does not dispute, in good faith, the invoice, the Customer shall pay the relevant element of the Charges within [30] days of receipt of the invoice (such date being the "Due Date"). [All Charges shall be calculated and payments made in [pounds sterling][euros][US dollars].]

11.3 The Customer may withhold payment against any invoice not submitted in accordance with this Agreement and shall immediately notify the Supplier in writing of its reason for so doing. If the invoice is disputed in part only, the Supplier shall issue a credit note in respect of the original invoice and issue an invoice for the part not in dispute. On receipt of such an invoice the Customer shall pay that part of the original invoice which it accepts, while any query concerning a disputed sum is resolved in accordance with the Dispute Resolution Procedure.

11.4 The Charges represent the entire amount payable by the Customer to the Supplier for the provision of the Services.

11.5 All Charges and other sums payable under this Agreement are exclusive of VAT or equivalent sales taxes (unless the contrary is expressly stated) which shall be payable at the applicable rate subject to the Supplier providing the Customer with such valid tax invoices or other documentation as may be required by any relevant Laws.
11.6 Except as otherwise expressly stated, the Charges shall be deemed inclusive of all telephone, postage, courier, storage, copying and printing charges and accommodation, subsistence, travel and other costs and expenses associated with the performance by the Supplier of its obligations.

11.7 Payment by the Customer shall be without prejudice to any claims or rights which the Customer may have against the Supplier and shall not constitute any acknowledgment by the Customer as to the proper performance by the Supplier of its obligations under this Agreement.

11.8 Where the payment of any invoice or any part of an invoice is not made in accordance with this clause 11 other than because the Customer raises a good faith Dispute in respect of the invoice or part of it, the Supplier, without prejudice to its other rights under this Agreement or in law, shall be entitled to charge interest on the outstanding amount at the rate of two per cent per annum above [the Bank of England] base rate in force for the time from the Due Date until the outstanding amount is paid. All Disputes relating to invoices shall be resolved in accordance with the Dispute Resolution Procedure.

11.9 The Customer will not be liable to pay any sums except those expressly set out as being its obligation to pay pursuant to the terms of this Agreement.

12. ACCESS AND SECURITY

12.1 The Customer may refuse access to, or remove from, the Customer Sites any Supplier's Personnel who the Customer believes represents a threat to confidentiality or security, is in breach of any Customer rules and regulations, is undesirable or is incompatible with the success of this Agreement or good staff relations with the Customer.

12.2 Where the Customer allows the Supplier to have access to Customer computing systems, the Supplier will access them only for purposes expressly authorised by the Customer in writing (whether in this Agreement or otherwise) and will ensure that such access is granted only to authorised Supplier's Personnel.

12.3 The Supplier will implement and operate appropriate security measures to ensure that only its authorised personnel can have access to the Customer systems described in clause 12.2. The Supplier will implement and operate up to date anti-virus software on all of its computing systems which may be linked, directly or indirectly, to the computing systems of the Customer.

13. CONFIDENTIALITY AND ANNOUNCEMENTS

13.1 During the term of this Agreement and for a period of [three] years after its termination or expiry, each party receiving Confidential Information ("Recipient Party") from the other ("Disclosing Party") shall keep that information confidential and comply with this clause 13. In particular the Recipient Party shall:

13.1.1 use the Disclosing Party's Confidential Information solely for the purposes of fulfilling its obligations under this Agreement ("Permitted Purpose");

13.1.2 keep the Disclosing Party's Confidential Information secure and take no lesser security measures and degree of care to protect the Disclosing Party's Confidential Information than the Recipient Party applies to its own confidential or proprietary information;
13.1.3 not disclose to any third party any of the Disclosing Party’s Confidential Information except with the prior written consent of the Disclosing Party or in accordance with this clause 13.

13.2 Notwithstanding clause 13.1, the Recipient Party may disclose the Disclosing Party’s Confidential Information to its directors, officers, employees and any Authorised Sub-Contractor or other third party who are directly involved in, and need to know such Confidential Information for the purpose of, the provision or receipt of the Services [including its professional advisors, auditors and funders].

13.3 The Recipient Party shall ensure that the directors, officers, employees and any Authorised Sub-Contractor or other third party referred to in clause 13.2 are aware of the confidential nature of the information and shall instruct them:

13.3.1 to keep it confidential;
13.3.2 not to disclose it to any third party (other than those persons to whom it has already been disclosed in accordance with the terms of this Agreement); and
13.3.3 in relation to any sub-contractor [and any other third party engaged by the Supplier in respect of the delivery of the Services], to enter into a confidentiality undertaking containing obligations equivalent to those set out in this Agreement and only to use the Confidential Information to the extent necessary for the performance of the Supplier's obligations. [In the case of disclosure to advisors, auditors or funders the Supplier shall ensure that they are made aware of, and undertake to comply with, the Supplier's obligations of confidentiality under this Agreement as if they were a party to this Agreement.]

13.4 The obligations of confidentiality set out in this clause 13 shall not apply to:

13.4.1 information which is or becomes within the public domain other than as a result of a breach of this clause 13;
13.4.2 information which the Recipient Party can show to have been known by it before disclosure to it by the Disclosing Party;
13.4.3 information which is or becomes available to a party otherwise than pursuant to this Agreement and free of any restrictions as to its use or disclosure from a third party who is free to divulge it; and
13.4.4 the disclosure of information required to be disclosed by Laws.

13.5 Disclosure pursuant to clause 13.4.4 shall (unless such notice or consultation is prohibited) only be made:

13.5.1 after prior consultation with the Customer or the Supplier, as the case may be, as to the terms, content or timing of such disclosure; and
13.5.2 only to the person or persons and in the manner required by Law or as otherwise agreed between the parties.

13.6 To the extent that the Confidential Information of either the Customer (or any member of the Customer's Group) or the Supplier is no longer required by the other party to enable it to perform its obligations or exercise its rights hereunder, such other party shall (and shall
procure that its directors, officers, employees, and any sub-contractors or third parties shall) either return such Confidential Information together with any copies, notes, transcriptions or records thereof in its control, power or possession to the Disclosing Party forthwith upon demand or at the Disclosing Party's option, destroy it and, if requested by the Disclosing Party, confirm in writing that it has returned or destroyed it.

13.7 The Supplier shall not (except as permitted under this Agreement):

13.7.1 disclose or permit disclosure of any details (including the existence) of this Agreement to any third party;

13.7.2 disclose that the Customer is its client to any third party; or

13.7.3 use the Customer's name and/or brand in any promotion or marketing or announcement of orders,

without the prior written consent of the Customer.

13.8 The parties acknowledge that damages may not be an adequate remedy for any breach of this clause 13 or the confidentiality undertakings entered into by their directors, employees, sub-contractors and other third parties pursuant to clause 13.3.3. Each party shall be entitled to obtain any legal or equitable relief, including injunction, upon the breach (or reasonably anticipated breach) of any part of this clause 13.

14. DATA PROTECTION

14.1 Within this clause 14, "Data Protection Act" means the Data Protection Act 1998 and "Data Controller", "Data Processor", "Data Subject", "Personal Data" and "Processing" have the same meanings as in that Act.

14.2 With respect to the parties' rights and obligations under this Agreement, the Customer is the Data Controller and the Supplier is the Data Processor.

14.3 The Supplier shall:

14.3.1 only process Personal Data in accordance with instructions from the Customer (which may be specific instructions or instructions of a general nature as set out in this Agreement or as otherwise notified by the Customer to the Supplier during the life of this Agreement);

14.3.2 only process Personal Data to the extent, and in such manner, as is necessary for the provision of the Services or as is required by law or any regulatory body;

14.3.3 implement appropriate technical and organisational measures to protect Personal Data against unauthorised or unlawful processing and against accidental loss, destruction, damage, alteration or disclosure. These measures shall be appropriate to the harm which might result from unauthorised or unlawful processing or accidental loss, destruction or damage to Personal Data and to the nature of the Personal Data which is to be protected;

14.3.4 not perform its obligations under this Agreement in such a way as to cause the Customer to breach any of its applicable obligations under the Data Protection Act; and
14.3.5 cooperate as requested by the Customer to enable the Customer to comply with any exercise of rights by a Data Subject under the Data Protection Act in respect of Personal Data Processing by the Supplier under this Agreement or comply with any assessment, enquiry, notice or investigation under the Data Protection Act which shall include the provision of all data requested by the Customer within the timescale specified by the Customer in each case.

15. INTELLECTUAL PROPERTY RIGHTS

15.1 The Intellectual Property Rights in the Bespoke Software and the Documentation shall, at the Commencement Date or (if later) on creation of the rights from time to time, vest in the Customer. The Supplier hereby assigns (by way of present and, where appropriate, future assignment) all such Intellectual Property Rights with full title guarantee to the Customer.

15.2 The Supplier shall:

15.2.1 procure the irrevocable waiver of all moral rights in the Bespoke Software and the Documentation, to the extent permitted by law;

15.2.2 ensure that records are maintained that are sufficient to provide evidence of the process of independent creation of the Bespoke Software and the Documentation; and

15.2.3 be responsible for ensuring that written agreements are, subject to clause 30, entered into with, and adhered to by, employees and subcontractors engaged in the performance of this Agreement and that, unless otherwise agreed with the Customer in writing in advance, the terms of engagement of such employees and subcontractors are consistent with, and enable the Supplier fully to comply with, the provisions as to the Bespoke Software and the Documentation set out in this Agreement, including this clause 15.

15.3 The Customer grants to the Supplier, subject to the terms of this Agreement, the non-exclusive right to use the Bespoke Software and the Documentation for the purpose of exercising the Supplier's rights or performing its roles, responsibilities, duties and obligations under this Agreement during the Project Term.

15.4 At the request and expense of the Customer, the Supplier will execute promptly all such documents and do promptly all such things as the Customer may deem necessary or desirable to give effect to the Customer's rights in this clause 15. The Supplier hereby irrevocably appoints the Customer to be the Supplier's attorney in the Supplier's name and on the Supplier's behalf to execute such instruments or do such things and generally to use the Supplier's name for the purpose of giving to the Customer the full benefit of this clause 15. The Supplier agrees that with respect to any third party, a certificate signed by any Director of the Customer that any instrument or act falls within the authority hereby conferred shall be conclusive evidence that this is the case.

16. LICENCE OF SUPPLIER SOFTWARE AND THIRD PARTY SOFTWARE

16.1 The Supplier grants to the Customer (and each member of the Customer Group) a royalty-free, perpetual, non-exclusive, [non-transferable,] [worldwide] licence to use the Supplier Software and the Third Party Software and the Standard Documentation for the Customer's business purposes.

16.2 The licence granted at clause 16.1 includes the right for the Customer to:
16.2.1 copy the Supplier Software and/or Third Party Software for backup and disaster recovery purposes;

16.2.2 merge the whole or any part of the Supplier Software and/or Third Party Software with any other computer program;

16.2.3 decompile the Supplier Software and/or Third Party Software for interfacing and interoperability purposes, to the extent permitted by Law;

16.2.4 maintain or procure maintenance of the Supplier Software and the Third Party Software; and

16.2.5 allow any third party to use the Supplier Software and/or Third Party Software for the purposes of providing services (including the services of consultant programmers, system maintainers, outsourcing or disaster recovery or other service suppliers) to the Customer for the Customer's business purposes.

17. INTELLECTUAL PROPERTY RIGHTS INDEMNITY

17.1 In this clause, a reference to:

17.1.1 the Customer shall include members of the Customer's Group, and the provisions of this clause shall be for the benefit of the Customer and each such member, and shall be enforceable by each such member, in addition to the Customer; and

17.1.2 the Software is a reference to the Software in its current state of development at the time when any relevant Claim is made.

17.2 The Supplier shall indemnify the Customer against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses) suffered or incurred by the Customer arising out of or in connection with any claim made against the Customer for actual or alleged infringement of a third party's Intellectual Property Rights arising out of or in connection with the use of any Software or receipt of the benefit of any of the Services.

17.3 This indemnity shall apply whether or not the Customer has been negligent or at fault.

17.4 If any third party makes a claim, or notifies an intention to make a claim, against the Customer which may reasonably be considered likely to give rise to a liability under this indemnity ("Claim"), the Customer shall:

17.4.1 as soon as reasonably practicable, give written notice of the Claim to the Supplier, specifying the nature of the Claim in reasonable detail;

17.4.2 not make any admission of liability, agreement or compromise in relation to the Claim without the prior written consent of the Supplier (such consent not to be unreasonably conditioned, withheld or delayed), provided that the Customer may settle the Claim (after giving prior written notice of the terms of settlement (to the extent legally possible) to the Supplier, but without obtaining the Supplier's consent) if the Customer reasonably believes that failure to settle the Claim would be prejudicial to it in any material respect;
17.4.3 give the Supplier access at reasonable times (on reasonable prior notice) to its premises and its officers, directors, employees, agents, representatives or advisers, and to any relevant assets, accounts, documents and records within the power or control of the Customer, so as to enable the Supplier and its professional advisers to examine them and to take copies (at the Supplier's expense) for the purpose of assessing the Claim; and

17.4.4 subject to the Supplier providing security to the Customer to the Customer's reasonable satisfaction against any claim, liability, costs, expenses, damages or losses which may be incurred, take such action as the Supplier may reasonably request to avoid, dispute, compromise or defend the Claim.

17.5 The Supplier shall not in any circumstances have any liability for any claim of infringement of Intellectual Property Rights caused by:

17.5.1 the Customer's use of the Software in combination with software not supplied or approved in writing by the Supplier (other than the operating system of the Customer Environment, provided that the Supplier was notified in writing of the identity of such operating system before this Agreement was entered into);

17.5.2 any unauthorised modification of the Software made by, or on behalf of, the Customer;

17.5.3 the Customer's use of any version of the Software other than the latest version supplied by the Supplier, if such claim could have been avoided by the use of such supplied version;

17.5.4 the Supplier's incorporation into the Software of a feature expressly requested by the Customer and not in accordance with the Agile Process; or

17.5.5 the Supplier's use in connection with the Project of any software, material, information, data, know-how, instructions or scripts provided by the Customer or any of its Affiliates that contain any errors or omissions.

17.6 If use of the Supplier Software or receipt of the benefit of the Services becomes or, in the opinion of qualified legal counsel, is likely to become, the subject of any such claim, the Supplier may:

17.6.1 replace all or part of the Software with functionally equivalent software or documents without any charge to the Customer;

17.6.2 modify the Software as necessary to avoid such claim, provided that the Software (as amended) functions in substantially the same way as the Software before modification; and

17.6.3 procure for the Customer a licence from the relevant claimant to continue using the Software,

and in the case of clause 17.6.1 or clause 17.6.2 only, the Supplier shall reimburse the Customer all reasonable additional costs and expenses that they are required to incur in order to obtain software and hardware required to interact with such modified or replaced software and documents, and additional services from third parties, all of which would not have been incurred if the Software had been non-infringing.
17.7 If:

17.7.1 the Software is determined in a court of law to be infringing;

17.7.2 the Supplier is advised by a barrister of at least 10 years’ call that use or possession by the Customer of the Software in accordance with this Agreement is likely to constitute infringement of a third party's rights; or

17.7.3 if an injunction or similar order is granted in connection with any claim within the scope of clause 17.2 which prevents or restricts the use or possession by the Customer of the Software in accordance with this Agreement,

and the Supplier is unable, after its best endeavours, to procure for the Customer the right to continue using the Software, or to provide the Customer with functionally equivalent non-infringing software, this Agreement shall be terminated, without prejudice to the Customer's right to seek further remedies, including damages, for any loss or damage arising out of such termination.

17.8 If a payment due from the Supplier under this clause is subject to tax (whether by way of direct assessment or withholding at its source), the Customer shall be entitled to receive from the Supplier such amounts as shall ensure that the net receipt, after tax, to the Customer in respect of the payment is the same as it would have been were the payment not subject to tax.

17.9 Nothing in this clause shall restrict or limit the Customer's general obligation at law to mitigate a loss it may suffer or incur as a result of an event that may give rise to a claim under this indemnity.

18. WARRANTIES

18.1 The Supplier acknowledges and agrees that the Customer has entered into this Agreement in reliance upon the Supplier's expertise in delivering agile software development projects using the agile methodology described in this Agreement and selecting and supplying goods and services fit to meet the Product Vision and Customer Requirements.

18.2 The Supplier warrants and represents that:

18.2.1 it has full capacity and authority to enter into and perform this Agreement and that this Agreement is executed by a duly authorised representative of the Supplier;

18.2.2 the Increments shall satisfy the applicable Customer Requirements;

18.2.3 the Solution shall satisfy the Product Vision and all of the Customer Requirements;

18.2.4 the Customer will receive good and valid title to all Bespoke Software and Documentation, free and clear of all encumbrances and liens of any kind;

18.2.5 use of the Deliverables does not infringe the Intellectual Property Rights of any third party;

18.2.6 each Increment will perform in accordance with the Software Description throughout the Warranty Period;
18.2.7 the Solution will perform in accordance with the Software Description at Project Completion and throughout the Warranty Period;

18.2.8 the Deliverables will be of satisfactory quality and free from any material defect in design or manufacture;

18.2.9 the Supplier's Personnel will perform the Services in a timely, reliable and professional manner, in conformity with Good Industry Practice;

18.2.10 it is in compliance with, and will perform the Services in compliance with, all applicable Laws;

18.2.11 there has not been included or used any Open-Source Software or anything similar in, or in the development of, the Solution nor does any part of the Solution operate in such a way that it is compiled with or linked to Open-Source Software or anything similar;

18.2.12 each Increment will be tested for Viruses prior to Delivery and Installation and on Project Completion and any identified Viruses will be deleted in accordance with Good Industry Practice; and

18.2.13 any appointee as a member of the Key Personnel will have the expertise and experience set out in Appendix 2 to Schedule 3 and will perform their respective roles, responsibilities, obligations and duties specified in this Agreement timeously.

18.3 The Supplier does not warrant that the Solution will operate uninterrupted or error-free.

18.4 The Supplier shall not in any circumstances be liable under the warranties in clause 18.2 to the extent that it can demonstrate that any failure of the Solution to comply with such warranties was directly attributable to the Customer's Default.

18.5 The Customer warrants and represents that:

18.5.1 it has full capacity and authority to enter into and perform this Agreement and that this Agreement is executed by a duly authorised representative of the Customer; and

18.5.2 during the Project Term the Customer Representative will perform the role, responsibilities, obligations and duties expressed to be on the Customer Representative's part in this Agreement timeously.

18.6 Breach by the Supplier of clause 18.2 and breach by the Customer of clause 18.5 shall be deemed a material breach of this Agreement for the purpose of clause 22.3.2.

18.7 The warranties set out in this clause 18 are in lieu of all other express or implied warranties or conditions, including implied warranties or conditions of satisfactory quality and fitness for a particular purpose, in relation to this Agreement.

19. WARRANTY PERIOD

19.1 Throughout the Warranty Period the Supplier shall, in accordance with this clause 19, make good any Defects in the Solution or the Services.
19.2 The Supplier shall promptly and in any event within [insert number] days (from when the Defect is notified to the Supplier by the Customer or from when the Supplier first becomes aware of it, whichever is the sooner) correct all Defects arising during the Warranty Period at no extra charge to the Customer.

19.3 If the Supplier fails to correct any Defect within the timescale set out in clause 19.2, the Customer may correct the Defect itself or employ a third party to correct it and deduct from the Charges, or recover as a debt due from the Supplier, all reasonable costs incurred by it in so doing.

20. LIABILITY

20.1 Subject to clauses 20.4 and 20.6, the Supplier's liability to the Customer, whether in contract, tort (including negligence or breach of statutory duty) or otherwise, for loss or damage to the Customer's tangible property resulting from the Supplier's (or its agent's or sub-contractor's) breach of this Agreement or negligence shall be limited to a maximum [[aggregate figure of [◆ ]][◆ per event or series or connected events].]

20.2 Subject to clauses 20.1, 20.4 and 20.6, the Supplier's entire liability to the Customer, whether in contract, tort (including negligence or breach of statutory duty) or otherwise, arising out of or in connection with this Agreement shall be limited to a maximum [[aggregate figure of [◆ ]][◆ per event or series or connected events]].

20.3 Subject to clauses 20.4 and 20.6, the Customer's entire liability to the Supplier, whether in contract, tort (including negligence or breach of statutory duty) or otherwise, arising out of or in connection with this Agreement shall be limited to a maximum [[aggregate figure of [◆ ]][◆ per event or series of connected events]].

20.4 Subject to clause 20.6, neither party will be liable to the other party for any indirect, consequential or special loss arising out of, or in connection with, this Agreement.

20.5 The following losses are agreed to be non-exhaustive direct recoverable losses under this Agreement:

20.5.1 the cost of selecting, installing, testing and procuring alternative or replacement services and equipment;

20.5.2 wasted expenditure;

20.5.3 advertising costs necessarily incurred to restrict damage caused to the other party's goodwill arising from a Default;

20.5.4 corruption and/or loss of data including the costs of rectification of the data;

20.5.5 cost of any fines incurred by the other party as a result of breach of any regulatory requirements resulting from a Default and any further costs incurred by the other party to meet additional requirements imposed by the relevant regulatory body as a result of breach of any regulatory requirements arising from a Default; and/or

20.5.6 savings which the other party would have otherwise made.
20.6 Nothing in this Agreement shall exclude or limit:

20.6.1 either party's liability for death or personal injury caused by its (or its agent's or sub-contractor's) negligence or for fraud or fraudulent misrepresentation or wilful abandonment;

20.6.2 any breach of obligations implied by section 12 of the Sale of Goods 1979 or section 2 of the Supply of Goods and Services Act 1982;

20.6.3 the Supplier's liability, whether categorised as direct or indirect losses, to the Customer arising out of a breach of clause [e.g. clause 13 (Confidentiality and Announcements), clause 14 (Data Protection)], [e.g. any claim under any indemnity in this Agreement]; or

20.6.4 any other liability that cannot, as a matter of law, be limited or excluded.

21. INSURANCE

21.1 The Supplier shall at its own cost be solely responsible for taking out and maintaining in force during the term of this Agreement and for a term of six years thereafter:

21.1.1 employer's liability insurance for a minimum amount of cover of [£] million on a single event or series of related events in a single calendar year;

21.1.2 professional indemnity insurance for a minimum amount of cover of [£] million on a single event or series of related events in a single calendar year;

21.1.3 public liability insurance for a minimum amount of cover of [£] million on a single event or series of related events in a single calendar year; and

21.1.4 product liability insurance for a minimum amount of cover of [£] million on a single event or series of related events in a single calendar year.

21.2 The Supplier shall, at the inception of this Agreement and as and when each policy of insurance is renewed (and, in any event, on request from the Customer), provide the Customer with suitable evidence of all insurance policies together with evidence of payment of the last premium.

22. TERMINATION

22.1 Without affecting any other right or remedy available to it, the Customer may terminate this Agreement without liability to the Supplier, other than as set out in clause 22.2 on giving written notice at the end of any Agile Period.

22.2 If the Customer terminates this Agreement in accordance with clause 22.1 the Customer will pay to the Supplier:

22.2.1 the sum of [insert amount] [pounds sterling] [euro] [US dollars] being the sum agreed with the Supplier as the cost of redeployment of the Key Personnel by the Supplier;
22.2.2 any non-cancellable costs or commitments reasonably incurred by the Supplier for the performance of the Services in the next [insert number] Agile Periods.

22.3 Without affecting any other right or remedy available to it, either party may terminate this Agreement with immediate effect by giving written notice to the other party if:

22.3.1 the other party fails to pay any amount due under this Agreement on the due date for payment and remains in default not less than [insert number] days after being notified [in writing] to make such payment;

22.3.2 the other party commits a material breach of any other term of this Agreement which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of [insert number] days after being notified [in writing] to do so;

22.3.3 the other party repeatedly breaches any of the terms of this Agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of this Agreement;

22.3.4 the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;

22.3.5 the other party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;

22.3.6 a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that other party other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;

22.3.7 an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over the other party;

22.3.8 the holder of a qualifying floating charge over the assets of that other party has become entitled to appoint or has appointed an administrative receiver;

22.3.9 a person becomes entitled to appoint a receiver over the assets of the other party or a receiver is appointed over the assets of the other party;

22.3.10 a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the other party's assets and such attachment or process is not discharged within [14] days;

22.3.11 any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 22.3.4 to clause 22.3.10 (inclusive);
22.3.12 the other party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business; [or]

22.3.13 [there is a change of Control of the other party [; or]]

22.3.14 any warranty given by the other party in this Agreement is found to be materially untrue or misleading.

23. TERMINATION CONSEQUENCES

23.1 On termination or expiry of this Agreement for any reason:

23.1.1 any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination or expiry, including the right to claim damages in respect of any breach of the Agreement which existed at or before the date of termination or expiry, shall not be affected;

23.1.2 all licences granted under this Agreement shall immediately terminate, except for any licences which are expressly stated to continue in force after termination; and

23.1.3 subject to clause 23.2, each party shall return and make no further use of any equipment, property, Documentation and other items (and all copies of them) belonging to the other party.

23.2 In the event of the termination or expiry of this Agreement:

23.2.1 the Supplier shall deliver to the Customer:

23.2.1.1 all Deliverables (including Object Code and Source Code versions of the Software other than where such Source Code has been deposited in escrow in accordance with clause 9) in their current state of development; and

23.2.1.2 the Software Description for the Customer's review and approval, if requested within [five] Business Days of the date of such termination or expiry; and

23.2.2 the Customer may retain and use for the Permitted Purpose such of the Supplier's Confidential Information as is incorporated in the Deliverables or is reasonably necessary for the Customer to use the Deliverables.

23.3 If the Supplier fails to deliver Deliverables in accordance with clause 23.2, the Customer may enter the Supplier's premises to take possession of them. Until they have been returned or repossessed, the Supplier shall be solely responsible for their safe-keeping.

24. FORCE MAJEURE

24.1 Subject to the exceptions set out in clauses 24.3 and 24.4, if the Supplier is prevented from, or delayed in, performing any of its obligations under this Agreement (other than an obligation to make payment of monies already outstanding) by a Force Majeure Event, then:

24.1.1 the Supplier shall be excused from performance of, and not be liable for any delay or failure to perform under, this Agreement for so long as the Force
Majeure Event continues and to the extent that the Supplier is so delayed or prevented;

24.1.2 as soon as reasonably possible, and in any event within [ ] days after the start of the Force Majeure Event, the Supplier shall notify the Customer in writing of the occurrence of the Force Majeure Event, the date on which the Force Majeure Event started, the likely duration of the Force Majeure Event and the effects on its ability to perform under this Agreement;

24.1.3 the Supplier shall use all reasonable endeavours to mitigate the effects of the Force Majeure Event on the performance of its obligations under this Agreement;

24.1.4 the Customer shall be excused from making any payments for those obligations not performed; and

24.1.5 subject to clause 24.2, as soon as reasonably possible, and in any event within [ ] days after the cessation of the Force Majeure Event, the Supplier shall notify the Customer in writing of the cessation of the Force Majeure Event and shall resume performance of the affected obligations under this Agreement.

24.2 If a Force Majeure Event continues for a period of [ ] days or longer, the Customer may terminate this Agreement immediately on notice to the Supplier and without liability to the Supplier.

24.3 The Supplier cannot claim relief from liability where the Force Majeure Event is caused by its (or its subcontractors') neglect, failure to take reasonable precautions against the relevant Force Majeure Event, wilful act, or is caused by its employee(s), subcontractors or suppliers.

24.4 No Force Majeure Event shall relieve the Supplier of its obligations relating to disaster recovery or from following such disaster recovery procedures as would be reasonably expected of competent persons involved in the provision of services similar to the Services.

25. ANTI-CORRUPTION

25.1 The Supplier undertakes to the Customer that it will comply with, and that the Services will be performed in accordance with, the Anti-Corruption Laws and that it shall not do, nor omit to do, any act that will lead to the Customer being in breach of any of the Anti-Corruption Laws.

25.2 The Supplier shall have in place and comply with its own anti-bribery and corruption policy ("Supplier Anti-Bribery and Corruption Policy") to ensure that the Supplier complies with the Anti-Corruption Laws. If requested, the Supplier shall provide to the Customer a copy of the Supplier Anti-Bribery and Corruption Policy for the Customer's review. The Supplier shall promptly implement any amendments to the Supplier Anti-Bribery and Corruption Policy which the Customer, acting reasonably, considers necessary following its review of the Supplier Anti-Bribery and Corruption Policy to ensure that the Customer complies with the Anti-Corruption Laws.

25.3 The Supplier shall review the Supplier Anti-Bribery and Corruption Policy on a regular basis and shall promptly implement and notify the Customer of any amendments to the Supplier Anti-Bribery and Corruption Policy which it considers necessary for continued compliance with the Anti-Corruption Laws.
25.4 The Supplier shall co-operate with the Customer and promptly provide the Customer with any information or confirmation which the Customer requires from time to time in connection with the obligations of the Supplier pursuant to this clause 25.

25.5 The Supplier shall immediately notify the Customer in writing of any suspected or known breach of the Supplier Anti-Bribery and Corruption Policy or any of the Anti-Corruption Laws.

25.6 The Supplier shall ensure that any person employed by it or its sub-contractors or acting on the Supplier's behalf in the provision of the Services complies with the terms of this clause 25. The Supplier shall be responsible for ensuring that terms equivalent to this clause 25 are included within any subcontract it uses in relation to the provision of the Services, such that these terms flow down to the subcontractor.

25.7 The Customer shall have the right to suspend and/or terminate this Agreement for material breach immediately upon written notice to the Supplier, or following such other time period as specified by the Customer, if:

25.7.1 the Supplier, or any person employed by it or acting on its behalf (whether with or without the knowledge of the Supplier) fails to comply with any of the Anti-Corruption Laws or is in material breach of the Supplier Anti-Bribery and Corruption Policy; or

25.7.2 the Customer has a reasonable suspicion that an occurrence as specified in clause 25.7.1 has occurred.

25.8 Regardless of any other provision in this Agreement, the Customer shall not be obliged to do, nor obliged to omit to do, any act which would, in its reasonable opinion, put it in breach of any Anti-Corruption Laws.

26. NOTICES

26.1 Any notice given by one party to another under this Agreement, shall be in writing, delivered by hand or by prepaid first-class or special delivery post to the address given at the start of this Agreement and in all cases marked for the attention of [insert details] in relation to the Supplier and [insert details] in relation to the Customer. Notices under this Agreement cannot be validly served by email.

26.2 Notices delivered by hand shall be deemed to have been served on the day of receipt (unless received after 5.30 pm in which case they shall be deemed to have been served on the next Business Day). Notices sent by prepaid first-class post or special delivery shall be deemed to have been served two Business Days after the date of posting. Either party may vary its address and/or contact for notices by giving notice to the other. This notice must expressly state that the new address is the address for notices and/or the new contact is the contact to whose attention all future notices should be brought, as the case may be.

27. DISPUTE RESOLUTION

27.1 The parties shall first attempt to resolve any Dispute through the Agile Process. If they are unable to do so they will escalate the Dispute using the Dispute Resolution Procedure.

27.2 Nothing in this Agreement shall prevent either party from seeking urgent or interim relief before the courts.
28. ASSIGNMENT AND NOVATION

28.1 The Supplier shall not assign, novate or deal in any way with all or any part of the benefit of, or its rights or benefits under, this Agreement without the prior written consent of the Customer.

28.2 Any purported assignment or novation which does not comply with the terms of this clause 28 shall constitute a material breach of this Agreement and, as between the parties to this Agreement, be null and void. Subject to and upon any assignment or novation permitted by clause 28.1, any successor or assignee or novatee of a party to this Agreement shall in its own right be able to enforce any term of this Agreement as if it were a party.

29. WAIVER AND CUMULATIVE REMEDIES

29.1 The rights and remedies of each party under, or in connection with, this Agreement may be waived only by express written notice. Any waiver shall apply only in the instance, and for the purpose for which, it is given.

29.2 No right or remedy under, or in connection with, this Agreement shall be precluded, waived or impaired by:

29.2.1 any failure to exercise or delay in exercising it;

29.2.2 any single or partial exercise of it;

29.2.3 any earlier waiver of it, whether in whole or in part; or

29.2.4 any of the above in relation to any other right or remedy (be it of similar or different character).

29.3 The rights and remedies arising under, or in connection with, this Agreement are cumulative and, except where otherwise expressly provided in this Agreement, do not exclude rights and remedies provided by law or otherwise.

30. SUB-CONTRACTING

30.1 Subject to clause 30.2, the Supplier shall not sub-contract the performance of any of its obligations under this Agreement without the prior written consent of the Customer.

30.2 The Supplier shall be responsible for all acts and omissions of its sub-contractors as if they were its own.

31. RELATIONSHIP OF THE PARTIES

Nothing in this Agreement is intended to create a partnership, or joint venture or legal relationship of any kind between the parties that would impose liability upon one party for the act or failure to act of the other party, or to authorise either party to act as agent for the other. Save where expressly stated in this Agreement, neither party shall have authority to make representations, act in the name or on behalf of, or otherwise to bind, the other.
32. SEVERANCE

32.1 If any provision of this Agreement is or becomes illegal, invalid or unenforceable, in any respect:

32.1.1 it shall not affect or impair the legality, validity or enforceability of any other provision of this Agreement; and

32.1.2 the parties will use reasonable endeavours to negotiate in good faith with a view to replacing it with a valid and enforceable provision which achieves to the greatest extent possible the same effect as would have been achieved by the illegal, invalid or unenforceable provision but differing from the replaced provision as little as possible.

32.2 If any illegal, invalid or unenforceable provision would be legal, valid or enforceable if some part of it were deleted, such provision shall apply with the minimum modification(s) necessary to make it legal, valid or enforceable.

33. THIRD PARTY RIGHTS

 Except to the extent expressly stated otherwise in this Agreement, a person who is not the Customer or the Supplier shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement. This clause shall not affect any right or remedy of any person which exists, or is available, other than pursuant to that Act.

34. VARIATION OF THE AGREEMENT

Any change to this Agreement shall only be valid if it is in writing and signed on behalf of the parties to this Agreement.

35. ENTIRE AGREEMENT

35.1 This Agreement constitutes the entire agreement and understanding between the parties in respect of its subject matter and supersedes any previous agreement, warranty, statement, representation, understanding or undertaking (in each case whether written or oral) given or made before the date of this Agreement by or on behalf of the parties and relating to its subject matter.

35.2 Each party confirms that it has not relied upon, and (subject to clause 35.3) shall have no remedy in respect of, any agreement, warranty, statement, representation, understanding or undertaking made by any party (whether or not that party is a party to this Agreement) unless that warranty, statement, representation, understanding or undertaking is expressly set out in this Agreement.

35.3 Nothing in this Agreement shall restrict or exclude any liability for (or remedy in respect of) fraud or fraudulent misrepresentation.

36. SURVIVAL OF TERMS AND ACCRUED RIGHTS

Termination or expiry of this Agreement, howsoever caused, shall not affect any provision of this Agreement which is expressly, or by implication, intended to come into effect on, or to continue in effect after, such termination or expiry including the following clauses [e.g. Data protection, IP, Security, Termination and Consequences of Termination, Survival, IP Indemnity, Liability, Insurance, Record Keeping, Dispute Resolution, Governing Law and
37. NON SOLICITATION

For period of 12 months from the Commencement Date neither party will (and each party shall procure that its sub-contractors will not) without the prior written consent of the other party, solicit or employ any person who at the time of such solicitation or the commencement of such employment is, or was during the previous 12 months, an employee of the other party.

38. GOVERNING LAW AND JURISDICTION

38.1 Law

This Agreement and any Dispute or non-contractual obligation arising out of or in connection with it shall be governed by, and construed in accordance with the law of England and Wales.

38.2 Jurisdiction

Subject to clause 27 and the Dispute Resolution Procedure, each party hereby submits to the [exclusive][non-exclusive] jurisdiction of the courts of England over any Dispute.

IN WITNESS of which the parties or their duly authorised representatives have executed this agreement.
SCHEDULE 1: SOFTWARE

Part 1: Supplier Software

Part 2: Third Party Software
SCHEDULE 2: CUSTOMER SITES, ENVIRONMENT AND RESPONSIBILITIES

Part 1: Customer Sites(s)

[◆ ◆ ]

Part 2: Customer Environment

[◆ ◆ ]

Part 3: Customer Responsibilities

[◆ ◆ ]
SCHEDULE 3: AGILE PROCESS

Part 1: Definitions

1. Definitions

In this Agreement:

"Agile Period" means a Development Sprint or a Deployment Sprint;

"Agile Team" means the following persons:

(a) the Product Owner;

(b) the Scrum Master; and

(c) the Development Team;

"Agile Team Member" means a member of the Agile Team;

"Customer Requirements" means the Product Backlog Items;

"Customer Representative" means the Product Owner;

"Daily Scrum Meeting" means a daily meeting between the members of the Agile Team during the Project Term to discuss:

(a) what has been completed on the previous Business Day;

(b) what will be completed on the current Business Day;

(c) any impediments which may affect delivery of the relevant Sprint; and,

(d) if applicable, the status of any Disputes;

"Deployment Sprint" means a fixed non-extendable period as set out in part 5 of schedule 3, during which Increments are Delivered, Installed and Tested and Training Services are provided by the Development Team in accordance with this Agreement;

"Development Sprint" means a fixed non-extendable period as set out in part 5 of schedule, during which PBIs are developed, tested and delivered in accordance with this Agreement;

"Development Team" means the persons described in appendix 2 to schedule 3 and any replacements from time to time permitted under this Agreement;

"Done PBI" means a PBI for which the Product Owner has confirmed the Increment has met the Definition of Done in accordance with part 7 of schedule 3;


"Minimum Viable Product" means the PBIs identified by the Product Owner as "must have" for each Release;
"Product Backlog" means the latest version of the list of PBIs required to deliver the Product Vision which is prepared and maintained by the Product Owner in accordance with part 4 of schedule 3, that comprises:

(a) the PBIs to be completed, listed in order of priority by the Product Owner;
(b) the Increments developed to date;
(c) the Done PBIs to date;

"Product Backlog Item" or "PBI" means a description of an individual specific functional or non-functional requirement of the Customer for the Software to be developed under this Agreement, specifying:

(a) the intended operation, function, performance or other characteristics of such requirement;
(b) the estimated business value of such requirement;
(c) the estimated Resource Points required to develop such requirement; and
(d) the Acceptance Criteria for determining whether the requirement has been satisfactorily developed;

"Product Backlog Refinement Meeting" means the meeting held by the Agile Team pursuant to paragraph 2 of part 4 of schedule 3;

"Product Owner" means the person described in appendix 2 to schedule 3 and any replacement appointed by the Customer from time to time;

"Product Vision" means the description of the overall goal of the Project set out at appendix 1 to schedule 3;

"Project Completion" means the date on which the notice is given to the Supplier by the Product Owner in accordance with part 5 of schedule 3;

"Project Tools" means the following items:

(a) the Product Vision;
(b) the Product Backlog;
(c) each Sprint Backlog;
(d) the Release Plan;
(e) [the Product Burn Down Chart;]
(f) [the Sprint Burn Down Chart;]
(g) [the Sprint Task Board;] and
(h) [any additional tools];
"Release Planning Session" means a planning meeting between the Product Owner and the Scrum Master and the Development Team to review the allocation of PBIs by the Product Owner to each Release, the proposed Minimum Viable Product for each Release, and the proposed dates for Delivery and Installation of each Release;

"Resource Point" means a unit of measurement of the resource required for completion of a PBI expressed as [small, medium, large, extra large / number of man hours / multiples of individual resource points based on the complexity of the task] [Drafting Note: method and unit to be agreed by parties.];

"Scrum Master" means the person described in appendix 2 of this schedule 3 and any replacement from time to time;

"Sprint" means a Development Sprint and/or a Deployment Sprint as applicable;

"Sprint Backlog" means the document defining the work for the current Development Sprint and specifying:

(a) the list of PBIs to be progressed by the Development Team during the Development Sprint;

(b) the list of tasks required to be carried out by the Development Team in order to complete each PBI;

(c) any amended or additional Acceptance Criteria for each PBI identified by the Development Team at the Sprint Planning Meeting; and

the Definition of Done for each PBI agreed by the Product Owner, the [Scrum Master] and the Development Team at the Sprint Planning Meeting;

"Sprint Meetings" means:

(a) the Product Backlog Refinement Meeting;

(b) the Sprint Planning Meeting;

(c) the Daily Scrum Meeting;

(d) the Sprint Review Meeting; and

(e) the Sprint Retrospective Meeting;

"Sprint Planning Meeting" means a meeting of the Agile Team to scope and plan the current Sprint;

"Sprint Retrospective Meeting" means a retrospective meeting between the Product Owner, Scrum Master and Development Team to review the performance of the completed Sprint and discuss and agree potential improvements for future Sprints; and

"Sprint Review Meeting" means a review meeting between the Product Owner, Scrum Master and Development Team and any stakeholders that wish to attend to demonstrate the output of the Sprint and discuss any issues arising.
Part 2: Product Vision

The Product Vision is set out in appendix 1 to this schedule 3. All activities carried out by the Parties under this Agreement will have regard to, and support delivery of, the Product Vision.

Part 3: Agile Team

1. **Product Owner**

1.1 On the Commencement Date, the Customer will appoint the Product Owner to fulfil the responsibilities set out in paragraph 1.3 of part 3 of this schedule 3 and carry out all activities identified in this Agreement as being a Product Owner activity.

1.2 The Product Owner will:

1.2.1 be the Customer's main representative for all decisions concerning the Project;

1.2.2 be empowered by the Customer to perform his responsibilities (including the giving of approval where required and the sorting of priority of PBIs) without the need to seek prior stakeholder approval or other authorisation from the Customer; and

1.2.3 be empowered by the Customer to give approval for all decisions concerning the Project orally.

1.3 In the performance of the Project, the Product Owner will:

1.3.1 be responsible for ensuring the Product Vision is adhered to;

1.3.2 have the final decision on all questions relating to the inclusion, deletion and priority of PBIs in the Product Backlog;

1.3.3 maintain and update the Product Backlog on a continuous basis by:

1.3.3.1 refining PBIs;

1.3.3.2 deleting PBIs which are no longer required to achieve the Product Vision;

1.3.3.3 adding new PBIs identified as being required to achieve the Product Vision; and

1.3.3.4 reviewing and resetting the priorities assigned to the PBIs;

1.3.4 actively participate in all Sprint Meetings;

1.3.5 lead all Release Planning Sessions;

1.3.6 maintain and update the Release Plan on a continuous basis to reflect changes to the Product Backlog or changes proposed by the Customer to the content or dates of proposed Releases by:

1.3.6.1 reviewing and resetting the allocation of PBIs to proposed Releases in accordance with paragraph 2 of part 8 of this schedule 3;
1.3.6.2 reviewing and resetting the category of PBIs within proposed Releases as either "must have" or "good to have" in accordance with paragraph 2.1.4 of part 8 of this schedule 3;

1.3.7 have the final decision as to whether an Increment meets the Definition of Done for the applicable PBI or PBIs;

1.3.8 have the final decision on all questions relating to the content and timing of Releases;

1.3.9 have the final decision as to whether to continue development under this Agreement; and

1.3.10 use best endeavours to resolve any Disputes in good faith by agreement with the Scrum Master and the Development Team at the applicable Sprint Meeting.

2. **The Scrum Master**

2.1 On the Commencement Date, the Supplier will appoint the Scrum Master to fulfil the responsibilities set out in paragraph 2.3 of part 3 of this schedule 3 and carry out all activities identified in this Agreement as being a Scrum Master activity. Any replacement Scrum Master will only be appointed by the Supplier with the prior written consent of the Customer.

2.2 The Scrum Master will be empowered by the Supplier to perform his or her responsibilities (including the procurement of items required by the Development Team or removal of impediments to the functioning of the Development Team where required) without the need to seek prior stakeholder approval or other authorisation from the Supplier.

2.3 In the performance of the Project the Scrum Master will:

2.3.1 be responsible for leading, enabling and supporting the timely development of the Solution and delivery of the Product Vision;

2.3.2 enable and facilitate collaboration, co-operation and self-organisation between all Agile Team Members and resolution of any issues or Disputes related to the Project;

2.3.3 use the Project Tools to facilitate visibility of the development of the Solution to all Agile Team Members;

2.3.4 facilitate self-organisation of the Development Team;

2.3.5 ensure timely removal of any impediments which may affect the delivery of any Sprint;

2.3.6 lead, facilitate and support all Sprint Meetings (including enforcement of timeboxes for such meetings);

2.3.7 capture and record empirical data reported or generated at Sprint Meetings to facilitate adjustment of forecasts in relation to Sprints and Releases;

2.3.8 if reasonably requested to do so, provide assistance to any Development Team member or the Product Owner;
2.3.9 actively participate in all Release Planning Sessions;
2.3.10 work full time on the Project; and
2.3.11 use best endeavours to resolve any Disputes in good faith by agreement with the Product Owner and the Development Team at the applicable Sprint Meeting.

2.4 Any management authority over the Development Team is expressly excluded from the Scrum Master's role and responsibilities.

3. The Development Team

3.1 On the Commencement Date, the Supplier will appoint the Development Team to fulfil the responsibilities set out in paragraph 3.2 of part 3 of this schedule and carry out all activities identified in this Agreement as being a Development Team activity. Any replacement or additional Development Team member will only be appointed by the Supplier with the prior written consent of the Customer.

3.2 In the performance of the Project, the Development Team will:

3.2.1 be responsible for the design, creation, development, configuration, customisation and integration of the Software to implement the PBIs and deliver the Product Vision;
3.2.2 estimate and notify to the Product Owner the number of Resource Points to be allocated in the Product Backlog for delivery of each PBI;
3.2.3 in each Sprint:
  3.2.3.1 deliver Increments which represent a cumulatively growing subset of the Solution;
  3.2.3.2 test all Increments developed as part of the Sprint in accordance with the Test Plan and any additional tests identified by the Development Team as required or desirable at the Sprint Planning Meeting or otherwise during the Sprint to ensure the Increments meet the Definition of Done;
  3.2.3.3 write the Documentation for the Increments developed during the Sprint and update previous Documentation as required; and
3.2.4 deliver the Minimum Viable Product for each Release on the date specified in the Release Plan for such Release;
3.2.5 use reasonable endeavours to deliver the PBIs designated as "good to have" for each Release on the date specified in the Release Plan for such Release;
3.2.6 advise on integration of the Increments with the Customer Environment; and
3.2.7 carry out the activities specified in part 9 for each Deployment Sprint.

3.3 Each Development Team member shall, as part of the Development Team:

3.3.1 collaborate and co-operate with all Agile Team Members;
3.3.2 in conjunction with the Scrum Master and the Product Owner, use all reasonable
endeavours to remove impediments potentially affecting the delivery of any
Sprint goal and to resolve any Disputes between any Agile Team Members
concerning the Project, including any Disputes that involve themself;

3.3.3 ensure that each Increment and the Solution is designed and developed so as to
minimise the risk of Viruses attacking it or the Customer Environment;

3.3.4 actively participate in all Sprint Meetings and Release Planning Sessions;

3.3.5 work full time on the Project; and

3.3.6 use best endeavours to resolve any Disputes in good faith by agreement with the
Product Owner and the Scrum Master at the applicable Sprint Meeting.

Part 4: Product Backlog

1. Initial Product Backlog

   The initial Product Backlog is set out in appendix 3 to this schedule 3.

2. Product Backlog Refinement Meeting

2.1 The Product Owner will hold a Product Backlog Refinement Meeting before the start of each
Sprint to review, discuss and update the Product Backlog with the Scrum Master and the
Development Team.

2.2 Following review and discussion of the Product Backlog with the Scrum Master and the
Development Team at the Product Backlog Refinement Meeting the Product Owner will:

   2.2.1 amend or split any PBIs which have been identified as requiring amendment in
order to be capable of delivery by the Agile Team;

   2.2.2 delete any PBIs which are no longer required to meet the Product Vision;

   2.2.3 add any new PBIs which have been identified as being required to meet the
Product Vision; and

   2.2.4 review and reprioritise the order of the PBIs.

3. Resource Points

3.1 The Development Team will estimate the Resource Points required for each amended or new
PBI added to the Product Backlog by the Product Owner and notify these to the Product
Owner. The Product Owner may not amend the number of Resource Points estimated by the
Development Team for a PBI (but may dispute any such determination under the Dispute
Resolution Procedure).

3.2 The Product Owner will update the Product Backlog to add the Resource Points notified to
him by the Development Team.
Part 5: Sprints

1. Sprint duration

1.1 The Project will be carried out in a series of [2] week Sprints until either:

1.1.1 the Product Owner confirms in writing to the Supplier that:

1.1.1.1 all PBIs have been completed or deleted as no longer required and there are no outstanding PBIs;

1.1.1.2 the Solution has passed the Acceptance Tests and met all other requirements of the Definition of Done for all completed PBIs and the Solution as a whole; and

1.1.1.3 the Solution has been fully Delivered and Installed;

1.1.2 this Agreement is terminated pursuant to clause 22.

2. Sprint Meetings

2.1 During each Sprint the Agile Team will hold the following meetings:

2.1.1 Sprint Planning Meeting;

2.1.2 Daily Scrum Meeting;

2.1.3 Sprint Review Meeting;

2.1.4 Sprint Retrospective Meeting; and

2.1.5 Product Backlog Refinement Meeting.

Part 6: Development Sprints

1. Sprint Planning Meeting

1.1 At the Sprint Planning Meeting for a Development Sprint:

1.1.1 the Product Owner will propose the PBIs to be included in the Sprint Backlog;

1.1.2 the Scrum Master and the Development Team will verify that the Resource Points for the proposed PBIs do not exceed the Maximum Development Sprint Resource Points;

1.1.3 the Product Owner and the Development Team will agree the PBIs to be included in the Sprint;

1.1.4 the Product Owner, the Scrum Master and the Development Team will review and refine the Acceptance Criteria for each PBI and agree the Definition of Done for each PBI;

1.1.5 the Scrum Master and the Development Team will agree a list of the tasks required to be carried out by the Development Team in order to deliver each PBI;
1.1.6 the Scrum Master and the Development Team will create the Sprint Backlog.

2. **Development Sprints**

2.1 During a Development Sprint the Development Team will:

   2.1.1 develop Increments to implement each PBI in accordance with the Sprint Backlog;

   2.1.2 test all Increments developed in accordance with the Test Plan and any additional testing agreed by the Agile Team at the Sprint Planning Meeting or considered necessary by the Development Team during the Sprint;

   2.1.3 update the Sprint Backlog on a daily basis to reflect progress with the development work;

   2.1.4 track its progress by maintaining a Sprint Burn Down Chart and updating this daily.

3. **Sprint Review Meeting**

3.1 At the Sprint Review Meeting for a Development Sprint:

   3.1.1 the Development Team will demonstrate the Increments developed in that Sprint to the Product Owner and the Stakeholders;

   3.1.2 the Product Owner and the Stakeholders will provide feedback on the Increments to the Scrum Master and the Development Team;

3.2 Following the Sprint Review Meeting for a Development Sprint the Product Owner will:

   3.2.1 determine which of the Increments demonstrated at the Sprint Review Meeting are ready for the Customer to carry out Acceptance Tests in accordance with paragraph 2 of part 7 of this schedule 3;

   3.2.2 return to the Product Backlog:

      3.2.2.1 any PBI that has been allocated to, but not developed during, the current Sprint; and

      3.2.2.2 any PBI for which the Product Owner has determined the applicable Increment is not ready to proceed to Customer Acceptance Testing; and

   3.2.3 reset all priorities for outstanding PBIs.

4. **Sprint Retrospective Meeting**

4.1 At the Sprint Retrospective Meeting, the Product Owner, Scrum Master and the Development Team will:

   4.1.1 discuss and agree potential improvements to their technical practices, environment, communication, or organisation for implementation in future Development Sprints; and,
4.1.2 review the appropriateness of any proposed improvements and effectiveness at the next Sprint Retrospective Meeting for a Development Sprint.

5. **Next Sprint**

5.1 Subject to clause 22 (Termination) and paragraph 1.1.1 of part 5 of schedule 3 (Project Completion), the Agile Team shall:

5.1.1 promptly commence the next Development Sprint or Deployment Sprint as applicable; and,

5.1.2 the applicable provisions of this schedule 3 shall apply to them as if they were set out in full and each reference in this schedule 3 to a Development Sprint or a Deployment Sprint is deemed to refer to the next Development Sprint or Deployment Sprint as applicable.

**Part 7: Development Sprint Testing and Definition of Done**

1. **Development Sprint Testing**

   The Development Team will carry out testing of the Increments during each Development Sprint in accordance with the Test Plan.

2. **Customer Testing**

   The Customer will carry out Acceptance Tests of the previous Development Sprint's Increments referred by the Product Owner pursuant to paragraph 3.2.1 of part 5 of this schedule 3, in accordance with the Test Plan, in parallel with the next Sprint and will provide the results of the Acceptance Test to the Product Owner before the end of the next Sprint.

3. **Definition of Done**

3.1 Following completion of the Acceptance Tests by the Customer, the Product Owner will:

   3.1.1 review the results of the Acceptance Tests;
   3.1.2 determine which of the Increments have passed the Acceptance Tests; and
   3.1.3 determine which of the Increments which have passed the Acceptance Tests have also met all other requirements of the Definition of Done.

3.2 The Product Owner will update the Product Backlog to:

   3.2.1 mark PBIs for which the Increments have passed the Acceptance Tests and met all other requirements of the Definition of Done as Done PBIs ready for Delivery and Installation in accordance with the Release Plan;
   3.2.2 return to the Product Backlog any PBIs for which the Increments have not passed the Acceptance Tests or otherwise failed to meet the Definition of Done; and
   3.2.3 reset all priorities for outstanding PBIs,

   in advance of the next Sprint Planning Meeting.
Part 8: Release Planning

1. **Initial Release Plan**

   The initial Release Plan agreed by the Customer and the Supplier is set out in appendix 6 to this schedule 3.

2. **Change to the Initial Release Plan**

   2.1 Subject to paragraph 2.2 of this part 8 of schedule 3, the Product Owner may as he sees fit, from time to time during the Project Term:

   2.1.1 change the allocation of the PBIs to the proposed Releases in the Release Plan;

   2.1.2 substitute a PBI or multiple PBIs for PBIs in a proposed Release with new, or amended, PBIs whose Resource Points or cumulative Resource Points equal or are less than the PBIs removed;

   2.1.3 delete PBIs from a proposed Release; and

   2.1.4 change the designation of PBIs in proposed Releases from "must have" to "good to have" and vice versa.

   2.2 Paragraph 2.1 of this part 8 of schedule 3 applies provided that such changes do not result in:

   2.2.1 the cumulative number of Resource Points required for delivery of the Minimum Viable Product for each Release exceeding the maximum number set out in the Release Plan for such Minimum Viable Product; and/or

   2.2.2 the cumulative number of Resource Points required for delivery of all of the PBIs allocated to each Release exceeding the total number set out in the Release Plan for such Release.

3. **Release Planning Sessions**

   3.1 The Product Owner, the Scrum Master and the Development Team will hold a Release Planning Session at least once every [two] Sprints.

   3.2 At the Release Planning Sessions the Scrum Master and the Development Team will provide feedback to the Product Owner on the current version of the Release Plan.

   3.3 Following the Release Planning Session the Product Owner will update the Release Plan to take account of any issues raised and agreed by the Agile Team at the Release Planning Session.

Part 9: Deployment Sprints

1. **Deployment Sprint Timing**

   1.1 Each Release will be Installed, Delivered and Tested by the Development Team in a Deployment Sprint scheduled in accordance with the Release Plan;
2. **Sprint Planning Meeting**

2.1 **At the Sprint Planning Meeting for a Deployment Sprint:**

   2.1.1 the Agile Team will agree a list of the tasks required to be carried out by the Development Team in order to Deliver, Install and Test the Release and provide the Training Services for the Release;

   2.1.2 the Agile Team will agree a timetable for delivery of the tasks identified within the Deployment Sprint.

3. **Deployment Sprint**

3.1 **In each Deployment Sprint the Development Team will:**

   3.1.1 Deliver and Install the Increments for the applicable Release on the Customer Environment;

   3.1.2 carry out all tests on the Installed Increment in accordance with the Test Plan;

   3.1.3 Deliver all Documentation for the applicable Release; and

   3.1.4 provide Training Services to Customer Personnel for the applicable Release in accordance with the Training Plan.

4. **Sprint Review Meeting**

4.1 **At the Sprint Review Meeting for a Deployment Sprint:**

   4.1.1 the Development Team will demonstrate the Installed Release to the Product Owner and Stakeholders;

   4.1.2 the Product Owner and Stakeholders will provide feedback on the operation of the Installed Release to the Scrum Master and the Development Team; and

   4.1.3 the Development Team will log any Defects identified by the Agile Team or the Stakeholders in the Installed Release.

4.2 **Following the Sprint Review Meeting for a Deployment Sprint:**

   4.2.1 the Product Owner will add any Defects identified at the Sprint Review Meeting as PBIs to the Product Backlog and prioritise remedy of these in accordance with the process set out in part 4 of this schedule 3;

   4.2.2 following allocation of any such Defects to a Development Sprint in accordance with the process set out in part 6 of this schedule 3, the Development Team will remedy such Defects in the course of such Development Sprint.
5. **Sprint Retrospective Meeting**

5.1 At the Sprint Retrospective Meeting, the Product Owner, Scrum Master and the Development Team will:

5.1.1 discuss and agree potential improvements to their technical practices, environment, communication, or organisation, for implementation in future Deployment Sprints; and,

5.1.2 review appropriateness of any proposed improvements and effectiveness at the next Sprint Retrospective Meeting for a Deployment Sprint.

6. **Next Sprint**

6.1 Subject to clause 22 (Termination) and paragraph 1.1.1 of part 5 of schedule 3 (Project Completion), the Agile Team shall:

6.1.1 promptly commence the next Development Sprint or Deployment Sprint as applicable; and,

6.1.2 the applicable provisions of this schedule 3 shall apply to them as if they were set out in full and each reference in this schedule 3 to a Sprint is deemed to refer to the next Sprint.
APPENDIX 1: PRODUCT VISION

The Product Vision is [ ].
APPENDIX 2: AGILE TEAM

The Product Owner will be:

<table>
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<th>Name</th>
<th>Job function</th>
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The Scrum Master will be:

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The Development Team will be:

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<th>Criteria concerning requisite skills, experience and qualifications</th>
<th>Contact e-mail and telephone number</th>
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### APPENDIX 3: INITIAL PRODUCT BACKLOG

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<th>Resource Points</th>
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APPENDIX 4: INITIAL SPRINT PLAN

The Initial Sprint Plan is set out below:

[◆ ◆ ]
APPENDIX 5: TESTING AND DEFINITION OF DONE

Test Plan

[Drafting Note: to include plan for:

- All Supplier testing carried out as part of Development Sprints
- All Customer testing carried out as part of Customer Acceptance Tests
- Approval of Documentation by Customer
- All Supplier testing carried out as part of Installation]

Definition Of Done

The definition of done is as follows:

[Drafting Note: to include:

- All Supplier testing carried out as part of Development Sprints
- All Customer testing carried out as part of Customer Acceptance Tests
- Acceptance Criteria met
- All Documentation written
- All Documentation approved by Customer]
APPENDIX 6: INITIAL RELEASE PLAN

The initial Release plan is set out below:

[◆]
SCHEDULE 4: TRAINING SERVICES
SCHEDULE 5: CHARGES

Part 1: Charges

[Drafting Note: Suggestions are invited for best practice charging mechanism to facilitate pure agile development in manner proposed in Schedule 3. In line with aim of encouraging positive behaviours suggestion is for positive charging mechanisms based on mechanisms which provide for payments/bonuses for delivery rather than deductions for non-delivery. Some suggestions for potential charging mechanisms and comments on these are set out below.

It is anticipated Charges will include a combination of some of the following possible mechanisms:

1. Fixed Sprint Charges

1.1 Fixed sum for performance of Development Sprint

[Drafting Note: one possible model to set this at cost plus narrow margin and provide for majority of Supplier profit element to be paid in Release Charges linked to actual Installation of Increments for specific PBIs.

Aim of this possible model - to ensure Supplier not running at a loss in explorative/flexible phases of project so happy to engage in these aspects of agile process, and to incentivise Supplier to deliver to Release Plan.

Justification of paying for resource time - consulting element of explorative phase and flexible element of customer ability to change mind at any time. Disadvantage - committed to paying for pure resource time regardless of output]

1.2 Fixed sum for performance of Deployment Sprint

[Drafting Note: one possible model to set this to cover cost element of Delivery and Installation Time only, deal with Training Services separately and provide for majority of Supplier profit element to be included in Release Charges linked to actual Installation of Increments for specific PBIs.

Aim of this possible model - to have transparency of charges for separate elements of Deliver, Installation and Training.

Justification of paying for resource time - transparency if breaking down activities into separate Charges. Disadvantage - committed to paying for pure resource time regardless of output]

Payable following end of each Sprint.

2. Variable Sprint Charges

2.1 Variable sum for delivery of completed PBIs in Development Sprint

[Drafting Note: one suggested model might be to agree a price for target PBIs at the Development Sprint Planning Meeting and agree the final price payable for the actual PBIs completed as confirmed by the Product Owner at Sprint Review Meeting.

Aim of this model - Customer is paying for actual delivery rather than resource time.]
Justification - incentivisation for Supplier to deliver PBIs within Sprint.

Potential concerns in relation to effect of this model on Supplier behaviours around setting Acceptance Criteria and Resource Points for PBIs, co-operation with PBI allocation process, level and quality of testing carried out by Development Team during the Development Sprints.

More rigorous possibility for consideration - should payment be for completed PBIs delivered for Customer Acceptance Testing or for Done PBIs which Product Owner has confirmed have met Definition of Done? In latter case the Supplier is more at risk and may not be happy to allow full flexibility of Product Owner and Stakeholders to say “yes, that's what we asked for but we don't actually want it“ at Sprint Review Meeting and not proceed to send the completed PBIs to Customer Acceptance Testing.

NB need to consider whether these charges include elements for time and resource costs only with value elements of delivery paid for under separate Release Charges or also includes elements for value elements of delivery of completed or Done PBIs confirmed during the Sprint.

2.2 Variable sum for Installation of specific PBIs in Deployment Sprint

[Drafting Note: one proposed model to agree a price for the target PBIs to be included in a Release as these are updated at Release Planning Meetings and agree final price for actual PBIs Installed as confirmed by the Product Owner at Deployment Review Meeting.

NB need to consider whether this amount includes elements for time and resource costs only with payment for value and training elements of Installation being paid for separately under Release Charges and/or Training Charges or also includes elements for training and value elements of delivery of Installed Increments]

Payable following end of each Sprint.

3. Release Charges

3.1 Variable sum for delivery of PBIs making up Minimum Viable Product for each Release.

[Drafting Note: elements included will depend on mechanism adopted for payment in relation to Sprints.

One possible combination would be to have fixed price per Sprint for time and resources at cost plus narrow margin as per para 1 above with value elements of delivery and installation of Increments for PBIs as per Release Plan being covered by the Release Charges with the Supplier's profit element being heavily weighted to the Release Charges to incentivise the Supplier to deliver to the Release Plan.

One proposed model for these Release Charges would be to agree a price for the target PBIs to be included in a Release as these are updated at Release Planning Meetings and agree final price for actual PBIs Installed as confirmed by the Product Owner at Deployment Review Meeting.

A possible basis for calculation of the applicable Release Charges might be the Resource Points or the Business Value for each PBI or a combination of the two.

Aim of this model - to incentivise delivery of Increments for PBIs in line with Release Plan
Justification - bulk of payment is on actual Installation of Release and achievement of value to Customer

3.2 Variable sum for delivery of additional PBIs marked as "good to have" in applicable Release

[Drafting Note: same issues apply as for Minimum Viable Product PBIs. Price needs to provide incentive to Supplier to deliver "good to have" PBIs in addition to Minimum Viable Product and not just write these off as not sufficiently profitable to exert effort for.]

4. Licence Fees

4.1 licence fees for Supplier Software

4.2 licence fees for Third Party Software

5. Training Services Charges

5.1 Training provided as part of Installation

[Drafting Note: option to include these are part of Deployment Sprint Charges or have separate Charges. Fixed price for specified types of training e.g. to different types of Customer personnel - IT staff, administrators, end users - or reference to a Rate Card]

5.2 [Other?]

[Drafting Note: any ongoing training to be provided? E.g. new staff, upgrades, new releases? Deal with under Support and Maintenance Agreement?]

6. [Other?]

6.1 [?]

Part 2: Invoices

1. Information

1.1 The Supplier shall ensure that each invoice contains the following information:

1.1.1 the date of the invoice;

1.1.2 a unique invoice number;

1.1.3 the Agile Period or other period(s) to which the relevant Charges relate;

1.1.4 details of the correct agreement reference;

1.1.5 the dates between which the Services detailed on the invoice were performed;

1.1.6 the methodology applied to calculate the Charges;

1.1.7 any payments due in respect of achievement of a milestone;

1.1.8 the total Charges [gross and net of any applicable deductions] or compensation payable under part 1 of this schedule 5 (as the case may be) and, separately, the
amount of any expenses or disbursements properly chargeable to the Customer under the terms of this Agreement, and, separately, any VAT or other sales tax payable in respect of the same;

1.1.9 a contact name and telephone number of a responsible person in the Supplier’s finance department; and

1.1.10 the banking details for payment to the Supplier via electronic transfer of funds (including name and address of bank, sort code, account name and number).

1.2 The Customer shall only regard an invoice as valid if it complies with this schedule 5. Where any invoice does not conform to the Customer’s requirements set out in this schedule 5, the Customer will return the disputed invoice to the Supplier. The Supplier shall promptly issue a replacement invoice which shall comply with these requirements.
APPENDIX 1: CHARGES
SCHEDULE 6: DISPUTE RESOLUTION PROCEDURE

1. Escalation

1.1 The parties will use best endeavours to resolve any Disputes in good faith as set out below:

1.1.1 first by the Agile Team through the Agile Process;

1.1.2 if a Dispute cannot be resolved through the Agile Process then, within [3] Business Days of escalation of the Dispute to the next level by either party, by the Customer's [senior responsible executive] and the Supplier's [senior responsible executive];

1.1.3 if a Dispute cannot be resolved through the first escalation level then, within [3] Business Days of escalation of the Dispute to the next level by either party, by the Customer's [CEO] and the Supplier's [CEO].

2. Technical Dispute - Expert Referral

2.1 The provisions of this paragraph 2 shall apply to any Dispute relating to any of the matters referred to in appendix 1 to this schedule 6 not resolved in accordance with paragraph 1 above.

2.2 Where a Dispute is to be resolved pursuant to this paragraph 2, the parties will agree to the appointment of an expert with appropriate qualifications and experience to determine the Dispute (the "Expert"). If the parties fail to agree which person should be appointed as Expert within [3] Business Days of such notice or if the person appointed is unable or unwilling to act, the Expert shall be appointed by the [British Computer Society (or such association understood by the parties to have replaced it)].

2.3 The Expert appointed under this paragraph 2 shall act on the following basis:

2.3.1 the Expert shall act as an expert and not as an arbitrator and shall act fairly and impartially;

2.3.2 the Expert's determination shall (in the absence of a material failure by the Expert) be final and binding on the parties;

2.3.3 the Expert shall decide the procedure to be followed in the determination and shall be requested to make its determination in writing within 30 days after his or her appointment or as soon as reasonably practicable thereafter and the parties shall assist and provide such documentation as the Expert shall require for the purposes of the determination;

2.3.4 any amount payable by one party to another as a result of the Expert's determination shall be due and payable within 30 days of the Expert's determination being notified by the parties;

2.3.5 the process shall be conducted in private and shall be confidential; and

2.3.6 the Expert shall determine how and by whom the costs of the determination, including the fees and expenses of the Expert, are to be paid.
3. **Non-Technical Dispute - Mediation**

3.1 The provisions of this paragraph 3 shall apply to any Dispute not resolved in accordance with paragraph 1 above, which does not relate to any of the matters referred to in appendix 1 to this schedule 6.

3.2 If the [CEO] of the Customer and [CEO] of the Supplier are for any reason unable to resolve a Dispute within [3] days of it being referred to them, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties, the mediator shall be nominated by CEDR Solve. To initiate the mediation, a party must serve notice in writing ("ADR Notice") to the other party to the Dispute, requesting a mediation. A copy of the ADR Notice should be sent to CEDR Solve. The mediation will start not later than [insert number] days after the date of the ADR Notice. The mediation shall be conducted in English at [the offices of CEDR in London or [specify]].

3.3 Mediation is without prejudice to the rights of the parties in any future proceedings.

4. **Court Proceedings**

4.1 If the parties are unable to resolve a Dispute by mediation in accordance with paragraph 3 of this schedule 6 within [3] months of appointment of the mediator then either party may commence court proceedings in relation to the Dispute under clause 38.2 of the Agreement.
### APPENDIX 1: EXPERT REFERRAL

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<tr>
<th>Agreement Reference</th>
<th>Issue</th>
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<td>part 4 of schedule 3</td>
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<td>the selection of PBIs to be included as Minimum Viable Product in a Release</td>
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<td>conformity of any Increment with the Definition of Done or Acceptance Criteria</td>
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<tr>
<td>part 7 of schedule 3</td>
<td>whether the Software Description is deficient in its description of any one or more of the elements specified in the definition of the Software Description</td>
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</tbody>
</table>
SCHEDULE 7: [SOFTWARE MAINTENANCE AGREEMENT]

[◆ ]
Executed, but not delivered until the first date specified on page 1, by [CUSTOMER]:

) ) )

Signature

Name (block capitals)

Director

Executed, but not delivered until the first date specified on page 1, by [SUPPLIER]:

) ) )

Signature

Name (block capitals)

Director