

ARRANGEMENT

UNDER SECTION 83 GOVERNMENT OF WALES ACT 2006

THIS AGREEMENT is made under section 83 of the Government of Wales Act 2006 on 20th December 2014

BETWEEN:

- (1) **THE WELSH MINISTERS** (*"the Ministers"*) whose principal office is at Cathays Park, Cardiff CF1 3NQ; and
- (2) **THE SECRETARY OF STATE FOR HEALTH** (*"the Authority"*) of Richmond House, 79 Whitehall, London SW1A 2NS

PREAMBLE

- (A) The Ministers and the Authority wish to enter into an arrangement under section 83 of the Act (as defined below) in relation to the exercise of specific functions of the Ministers by the Authority.
- (B) The Authority is a relevant authority for the purpose of section 83(4) of the Act.
- (C) The Authority is procuring various services related to the provision of an electronic staff record system for the benefit of the NHS across England and Wales.
- (D) In order to include Wales within the procurement exercise the Ministers have agreed to give the Authority power to negotiate and procure the option for the Service (as defined below) to be made available in Wales, with a view to the Service being managed by NWSSP (as defined below).
- (E) Subject to and in accordance with the terms of this Agreement, the Parties (as defined below) have agreed that the Authority will perform functions of the Ministers in the manner set out in this Agreement.

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement (including the Preamble):

- "the Act" means the Government of Wales Act 2006;
- "this Agreement" includes the Schedules and the attached Annex;
- "Confidential Information" means all information designated as such by either Party in writing together with all other information which relates to the business, affairs, products, developments, trade secrets, know-how, personnel, customers and suppliers of either Party or information which may reasonably be regarded as the confidential information of the Party who discloses it;
- "the Contract" means the agreement *dated on or about the date hereof between the Authority and the Supplier for the provision and maintenance of an electronic staff record system and services for the benefit of the NHS across England and Wales, as amended from time to time*;
- "the Supplier" means the Party identified as the Supplier in the Contract;
- "the Functions" means those functions of the Ministers which are to be performed by the Authority pursuant to section 83 of the Act and this Agreement (as specified in clause 4.3 and 4.4 and Schedule 1), and "*Function*" means any of those functions;
- "the MoU" means the memorandum of understanding to be entered into by the Authority and Velindre NHS Trust (being the legal entity within which the NWSSP operates);
- "NHS" means the National Health Service;
- "NHS Body" in relation to Wales, means the health service bodies listed in section 7(4) of the National Health Service (Wales) Act 2006 which have been involved in or have exercised Functions in connection with the Contract;

"NWSSP"	means the National Health Service Wales Shared Services Partnership, a provider of non-clinical business services and functions to NHS Wales.
"Party"	means a party to this Agreement, and " <i>the Parties</i> " means both of them;
"Programme Board"	has the meaning set out in Schedule 1 of the Contract;
" <i>the Project</i> "	means the project to specify and procure the Service under the Contract;
"Service Charges"	means the periodic payments payable by the Authority to the Contactor under the Contract;
" <i>the Service</i> "	means the services associated with the provision of an integrated HR and payroll service known as the Electronic Staff Record (ESR) services as more particularly detailed in the Contract; and
"Welsh Government's ESR Lead"	<i>means the person identified as such and representing Welsh Ministers in the governance of the Contract, as set out in Schedule 8.1 of the Contract.</i>

1.2 In this Agreement:

- (a) save where the context requires otherwise, any reference to a "*clause*" or a "*Schedule*", means a clause of or Schedule to this Agreement; and
- (b) any reference to "*the Authority*" includes all officers, and other representatives (including any bodies established to represent the Authority under the Contract) authorised to take any action in relation to the Contract on behalf of the Authority.

2. STATUS OF THIS AGREEMENT

This document records an agency arrangement under section 83 of the Act. It does not create any legally binding or enforceable obligations between the Parties.

3. TERM

This Agreement takes effect on the date hereof and shall continue in force until the Contract expires or is terminated in accordance with the terms of the Contract, unless terminated earlier under clause 9 below.

4. FUNCTIONS TO BE EXERCISED BY THE AUTHORITY

4.1 The Ministers hereby authorise the Authority to exercise the Functions set out in clause 4.3.

4.2 For the avoidance of doubt, so far as any of the Functions set out in clause 4.3 have been exercised previously by the Authority or any other NHS Body on behalf of the Ministers, the Ministers by this Agreement confirm that such exercise of those Functions is agreed to and authorised by the Ministers.

4.3 The Functions exercisable by the Authority pursuant to this Agreement are to:

- (a) specify and procure the Service;
- (b) negotiate and enter into the Contract with the Supplier; and
- (c) manage the Contract;

for the benefit of the NHS in Wales.

4.4 Without prejudice to the generality of Clause 4.3, the Functions include the activities described in Schedule 1.

4.5 In exercising the Functions, the Authority shall have due regard to, and where appropriate comply with, the requirements of:

- (a) probity and public accountability;
- (b) value for money;
- (c) risk management; and
- (d) protecting the interests of the Ministers.

The Authority warrants to the Ministers that Functions already exercised by the Authority or other NHS bodies have been exercised in compliance with those requirements.

4.6 The Authority shall be responsible for providing the ancillary administrative, professional and/or technical services necessary to enable the Authority to carry out the Functions.

4.7 In consideration of the benefit received under the Contract by the NHS bodies and its personnel in Wales, the Ministers shall be responsible for (and shall reimburse the Authority for) 6.1315% or such other percentage as the Parties may agree from time to time) of the Service Charges, such sum to be calculated and paid in accordance with the provisions of Schedule 2 (to be agreed by the Parties within one month of the date of this Agreement and as the same may be amended by written agreement of the Parties from time to time during the period of the Contract).

5. MANAGEMENT STRUCTURE

5.1 Following the execution of the Contract, the Authority shall establish, a governance structure as more particularly described in Schedule 8.1 to the Contract. This governance structure will include NWSSP acting as representatives of the Ministers, in such governance structure as may be agreed by the parties in the Memorandum of Understanding.

5.2 The Authority shall consult with NWSSP, acting on behalf the Ministers, in relation to the local delivery and implementation of the Contract in Wales as set out in the MOU.

6. ANNUAL AND OTHER REPORTS

6.1 The Authority shall give the Ministers access (via the Programme Board, the Welsh Government's ESR Lead or by any other appropriate method agreed between the Authority and the Ministers) to any reports or other documents prepared, commissioned or received by the Authority or its employees or officers which concern the Contract or any aspect of it, including any annual or other periodic report which the Authority produces regarding the Contract, its management or implementation.

6.2 The Ministers shall treat any documents they receive pursuant to clause 6.1 as Confidential Information for the purposes of clause 11.

7. EXECUTION OF DOCUMENTS

7.1 Subject to obtaining the Ministers' prior approval, where the exercise by the Authority of any Function to which this Agreement applies requires:

(a) the execution under seal of any document, the Authority shall, on behalf of the Ministers, execute such document under its own seal (and "*execution under seal*" includes any process sufficient to achieve execution of a document as a Deed in accordance with the laws of England and Wales); or

(b) the execution of a document otherwise than under seal, the Authority shall make arrangements for an officer of the Authority who has been duly

authorised for that purpose to sign the document for the Authority on behalf of the Ministers.

8. DISPUTE RESOLUTION

- 8.1 If either Party ("*the Notifying Party*") wishes to initiate a dispute ("*the Dispute*") with the other Party at any time in relation to this Agreement the Notifying Party shall give written notice to the other Party specifying the matters in dispute.
- 8.2 Senior officers of both Parties shall meet to attempt to resolve the Dispute within 21 days of notice being given under clause 7.1, except where it is reasonable in all of the circumstances for them to meet sooner, in which case they will meet as soon as reasonably practicable.
- 8.3 If the senior officers are unable to settle the Dispute within 10 days of their first meeting pursuant to clause 8.2, then, unless the Parties agree in writing to extend that period, the Parties shall refer the Dispute to Julie Rogers, Director of Workforce and Organisational Development, Department of Health and Social Services, Welsh Government and the Authority's Senior Responsible Officer for the Project and the Services, who shall meet reasonably promptly to seek to resolve the matter.

9. TERMINATION

9.1 Either Party may terminate this Agreement by giving 6 months' notice in writing to the other Party.

9.2 Where -

- (a) either Party terminates this Agreement by giving notice under clause 9.1; and
- (b) such termination directly causes the termination of the Contract;

that Party shall be responsible for such proportion of any Compensation as it may be fair and reasonable in the circumstances to attribute to the action of that Party in terminating this Agreement.

9.3 In clause 9.2 "*Compensation*" means such compensation or other sums which may become due to the Supplier from the Authority under the terms of the Contract and/or any other costs or liability incurred by the "*Authority*" as a direct result of such termination.

10. AUDIT

- 10.1 The Authority shall keep full and accurate records of all expenditure and costs, reports and other supporting documentation associated with the Contract.
- 10.2 Upon written request from the Ministers (such request not to be made more than once per calendar month), the Authority shall give the Ministers or their authorised agents access to the records kept pursuant to 10.1.
- 10.3 The Authority shall also allow access to its records to the Auditor General for Wales for the purposes of examination and certification of the Welsh Government's accounts.

11. CONFIDENTIALITY

11.1 Each Party ("*the Receiving Party*") shall keep confidential any Confidential Information it receives from the other Party ("*the Disclosing Party*") in connection with this Agreement and shall not disclose such information to any third party without the other Party's prior written consent, except where such disclosure is made pursuant to clause 11.2.

11.2 Either Party may disclose Confidential Information to the extent required by:

- (a) any applicable law or government authority having a statutory right to require such information; and
- (b) any court, arbitrator or administrative tribunal in the course of proceedings before it or to which either Party is a party.

11.3 Before the Receiving Party may disclose any Confidential Information pursuant to clause 11.2 it shall (whenever it may lawfully do so):

- (a) inform the Disclosing Party of the full circumstances of the disclosure;
- (b) consult with the Disclosing Party as to the possibility of avoiding or limiting disclosure;
- (c) wherever reasonably practicable, seek to agree the contents of any unavoidable disclosure with the Disclosing Party prior to making such disclosure; and
- (d) use reasonable endeavours to obtain appropriate assurances as to confidentiality from the body or third party to whom the Disclosing Party's Confidential Information is to be disclosed.

12. VARIATION AND WAIVER

- 12.1 No variation of this Agreement shall be effective unless it is in writing and signed by both Parties.
- 12.2 No waiver of any term, provision or condition of this Agreement shall be effective unless it is in writing and signed by the waiving Party.

13. NOTICES

- 13.1 Any notice or other communication from one Party to the other Party under this Agreement must be given in writing by or on behalf of the Party concerned and must prominently display the following heading:

“Notice in relation Section 83 Agreement for Electronic Staff Record Services”

- 13.2 The address and contact details for the purposes of serving notice under this agreement are as follows:

for the Ministers: [please insert details]; and

for the Authority: Secretary of State for Health, Richmond House, 79 Whitehall, London SW1A 2NS

- 13.3 A notice or other communication given under this Agreement will be deemed to have been properly given as follows:

- (a) if sent by prepaid first class post, on the second Working Day after the date of posting;
- (b) if delivered by hand, upon delivery to the address or on the next Working Day if after 4.00 pm or on a weekend or public holiday; and
- (c) if sent as an attachment to an email, upon transmission or the next Working Day if after 4.00 pm or on a weekend or public holiday.

- 13.4 In clause 13.3 “Working Day” means any day other than Saturday, Sunday, or a public holiday.

IN WITNESS of which this Agreement has been duly executed by the Parties.

Signed: *[Handwritten Signature]*

Name: JULIE ROGERS

Position: DIRECTOR, WORKFORCE AND ORGANISATIONAL DEVELOPMENT.

Acting under the authority of the Minister for Health and Social Services, one of the Welsh Ministers.

THE SEAL of:)

THE SECRETARY OF STATE)

FOR HEALTH)

was hereunto affixed by:

in the presence of:

Authorised signatory:

[Handwritten Signature]

) R.P. DOUGLAS



SCHEDULE 1

Specific Activities included within the definition of "Functions"

Without prejudice to the generality of clause 4.3, the Functions shall include:-

- 1. Placement of an appropriate advertisement in the Official Journal of the European Union ("OJEU") and conduct of a procurement exercise in accordance with the applicable European and UK laws on public procurement;*
- 2. Development of project documentation including (but not limited to) –*
 - 2.1. Project Initiation Document;*
 - 2.2. Outline Business Case;*
 - 2.3. OJEU Notice;*
 - 2.4. Memorandum of Information;*
 - 2.5. Services Specification;*
 - 2.6. Draft ESR Agreement;*
 - 2.7. Pre-Qualification Questionnaire;*
 - 2.8. Preliminary Invitation to Negotiate;*
 - 2.9. Invitation to Negotiate;*
 - 2.10. Appointment Business Case*
 - 2.11. Full Business Case;*
- 3. Engagement with potential suppliers/bidders, evaluation of the responses and bids received in connection with the Project, being –*
 - 3.1. Conducting market engagement sessions with potential bidders between July 2013 and December 2013;*
 - 3.2. Evaluation of expressions of interest; shortlisting 8 potential suppliers from the 12 expressions of interest received;*
 - 3.3. Evaluation of responses to the Preliminary Invitation to Negotiate; resulting in the shortlisting of 3 suppliers on 27/06/14;*

- 3.4. *Engagement with shortlisted suppliers through engagement sessions from 30/06/2014 to 15/08/2014;*
- 3.5. *Evaluation of responses to the Invitation to Negotiate; resulting in IBM UK Limited being identified as the Preferred Bidder ;*
4. *Contract negotiations with the Preferred Bidder;*
5. *Obtaining the appropriate professional support and advice (including legal advice);*
6. *Concluding the Contract with the Supplier including executing the Contract as signatory for and on behalf of the Ministers;*
7. *Management of the transition, operation and enhance phases of the Contract to be undertaken by the Authority in accordance with the Contract.*