



Scape System Build Limited

And

[Authority to be completed]

Access Agreement

Scape System Build Limited
4th Floor Pearl House
5 Friar Lane
Nottingham
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Scape System Build Ltd is a Local Authority
Controlled company whose shareholders are
Derby City, Derbyshire County, Gateshead,
Nottingham City, Nottinghamshire County
and Warwickshire County Councils

Company Registered in England
Reg No : 05660357. As office address
VAT No: 877 9484 43

Contents

1	Interpretations	3
2	Scope of this Agreement	6
3	Ordering Procedures	6
4	Scape and Scape Fees	6
5	Provision of Information	6
6	Warranties and Representations	7
7	Limitation of Liability	8
8	Confidentiality	9
9	Charges for Deliverables	10
10	Term	10
11	Termination	10
12	Corrupt Gifts and Payments of Commission	11
13	Force Majeure	11
14	Transfer and Sub-contracting	12
15	Amendments to this Agreement	12
16	Communications	12
17	Severability	12
18	Waiver	12
19	Law and Jurisdiction	13
20	Entire Agreement	13

THIS AGREEMENT is made on

BETWEEN

- (1) Scape System Build Limited whose registered office is 4th Floor Pearl House, 5 Friar Lane, Nottingham NG1 6BT (“Scape”); and
- (2) [to be completed] (the “Authority”);

(individually a “Party” and together the “Parties”).

BACKGROUND:

- (A) Scape seeks to enable Authorities whose aims are to improve, by collective action, the delivery of their property function to the benefit of their communities.
- (B) Scape, as a local authority controlled and owned company, is a body which can publicly procure works, goods and services and which has experience in establishing framework arrangements.
- (C) Scape has established framework arrangements for particular types of works and services and Scape may from time to time establish further framework arrangements when it considers appropriate.
- (D) Authorities, individually or collectively may from time to time request that Scape consider establishing Framework Arrangements for particular types of goods and services which Scape in its absolute discretion may or may not decide to establish.
- (E) Scape requires that any Authority which wishes to purchase Deliverables through a Framework Agreement established by it, enters into an agreement with Scape to regulate its relationship with Scape and the call off of Deliverables under that Framework Agreement.
- (F) Authorities wishing to purchase Deliverables through the Framework Agreements established by Scape freely enter into this Agreement.
- (G) It is acknowledged that:
 - a. Scape will make no charge to the Authority and/or the Authority for the establishment of any Framework Agreement;
 - b. Scape may charge a levy on any Deliverables or works purchased under a Framework Agreement and that the Contractor will pay such levy in accordance with the terms of that Framework Agreement; and
 - c. For the avoidance of doubt any levy is not a charge to the Authority and/or the Authority for Deliverables provided by Scape to it under this Agreement or any other agreement.

IT IS HEREBY AGREED as follows:

1 Interpretations

1.1 The following terms and expressions shall have the meanings ascribed to them :

"Agreement" means this agreement, comprising the Clauses and the Schedule.

"Appraisal Form" means the pro forma form provided by Scape to the Authority for assessing the performance of a Contractor.

"Authority" means a Contracting Authority as defined in the Public Contracts Regulations 2006.

"Call Off Agreement" means a contract between a party to a Framework Agreement and the Authority entered into by them pursuant to the terms of a Framework Agreement for the delivery of Deliverables.

"Charges" means the charges payable by the Authority for the performance of Deliverables by a Contractor under a Call Off Agreement.

"Confidential Information" means all information designated as such by either Party in writing together with all other information which relates to the business, affairs, developments, trade secrets, know-how, personnel, Authorities and suppliers of either Party or information which may reasonably be regarded as the confidential information of the disclosing Party.

"Contractor" means a contractor who has entered into a Framework Agreement with Scape the details of which will be as notified by Scape to the Authority from time to time.

"Default" means any material breach of the obligations of either Party (including but not limited to a repudiatory breach or breach of a fundamental term) or any material 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, any Framework Agreement or any Call Off Agreement.

"Deliverables" means any of the goods, works or services to be provided and/or performed by a Contractor under a Call Off Agreement for the Authority.

"EIR" means the Environmental information Regulations 2004.

"FOIA" means the Freedom of Information Act 2000.

"Force Majeure" shall mean any cause affecting or delaying the performance by a Party of its obligations arising from acts, events, omissions, happenings or non-happenings beyond its reasonable control including (but without limiting the generality thereof) change in governmental regulations not reasonably foreseeable at the time of the execution of this Agreement, fire, flood, or any disaster or an industrial dispute affecting a third party for which a substitute third party is not reasonably available, any act, event, omission, happening or non-happening will only be considered Force Majeure if it is not attributable to the wilful act, neglect or failure to take reasonable precautions of the affected Party, its agents or employees.

"Framework Agreement" means any framework agreement entered into by Scape and a Contractor which Scape has notified to the Authority can be utilised by them for the call off of Deliverables in accordance with their terms and "Framework Agreements" shall be all such agreements collectively; certain terms of Framework Agreements are directly enforceable by Authorities against the Contractor.

“Framework Users Pack” means a pack of information provided to the Authority by Scape in order to facilitate their use of a Framework Agreement, which may include the following:

- An introduction to the Framework Agreement;
- The Framework Agreement;
- The Contractor selection process; and
- Background to Scape.

“Fully Indemnified” means fully indemnified from and held blameless against all actions, reasonable costs, claims, demands, expenses, liability, loss and proceedings in respect of the matter referred to.

"Intellectual Property Rights" means patents, trade marks, service marks, design rights (whether registerable or otherwise), applications for any of the foregoing, copyright, know-how, trade or business names and other similar rights or obligations whether registerable or not in any country (including but not limited to the United Kingdom).

“Management Reports” has the meaning given in Clause 5.1.

"Ordering Procedures" means the ordering procedures required to be followed by the Authority under any particular Framework Agreement in order for the Authority to award a Call Off Agreement; such procedures will be set out in the particular Framework Agreement pursuant to which a Call Off Agreement is to be entered into.

“Scape Fee” means the levy charged by Scape on a Contractor for all Deliverables provided by it under a Framework Agreement.

"Statutory Requirements" means all requirements to be complied with under any Act of Parliament; any instrument, rule or order made under any Act of Parliament; or any regulation or byelaw of any local authority; or of any statutory undertaker which has any jurisdiction with regard to the project or the works, or with whose systems the same are or will be connected; or any regulation, directive or decision of the European Union having the force of law.

“Working Day” means Monday to Friday inclusive, excluding English Public or Bank Holidays.

1.2 As used in this Agreement:

- (a) the masculine includes the feminine and the neuter; and
- (b) the singular includes the plural and vice versa.

1.3 A reference to any statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or similar instrument as amended by any subsequent statute, enactment, order, regulation or similar instrument or as contained in any subsequent re-enactment thereof.

1.4 Headings are included in this Agreement for ease of reference only and shall not affect the interpretation or construction of this Agreement.

- 1.5 References to Clauses and Schedules are, unless otherwise provided, references to Clauses of and Schedules to this Agreement.

In the event and to the extent only of any conflict between the Clauses and the Schedules, the Clauses shall prevail.

2 Scope of this Agreement

Subject to the terms of this Agreement and any particular Framework Agreement, the Authority may (but is not required to) at any time during the term of the Agreement enter into Call Off Agreements pursuant to the terms of any Framework Agreement in accordance with the arrangements referred to in Clause 3.

3 Ordering Procedures

- 3.1 The Authority may at any time during the term of this Agreement order Deliverables from any Contractor in accordance with the Ordering Procedures under any Framework Agreement.
- 3.2 Subject always to Clause 7, the Authority shall fully indemnify Scape in respect of any material losses it may suffer as result of the Authority failing materially to comply with the Ordering Procedures.

4 Scape and Scape Fees

- 4.1 Scape shall provide the following (in addition to granting access to the Framework Agreements) to the Authority free of charge:
- (a) Framework Users Pack (which is provided for information only);
 - (b) Facilitation of the Authority and the Contractor's operation of the Framework Agreements;
 - (c) Introduction to the contents of the Framework Agreements; and
 - (d) Support to the Authority during the course of this Agreement in relation to the use of any Framework Agreement.
- 4.2 Scape shall provide full details of all current Framework Agreements as and when requested by the Authority.
- 4.3 The Authority acknowledges and agrees that Scape will levy the Scape Fee to the Contractors on Deliverables provided by a Contractor to the Authority.

5 Provision of Information

- 5.1 The Authority shall provide management information reports ("Management Reports") to Scape at no charge on a calendar quarterly basis (the first quarter beginning three calendar months after the date of the first Call Off Agreement entered into by the Authority), unless agreed otherwise, covering the period since the date of the previous Management Report and shall include, without limitation, the following details:

- (a) a record of the number of Call Off Agreements issued to or entered into with each Contractor;
 - (b) a record of Deliverables received by the Authority;
 - (c) a record of the Charges paid by the Authority; and
 - (d) a record of any failures by any Contractor to provide Deliverables in accordance with the relevant Call Off Agreement.
- 5.2 If required by Scape, the Authority shall complete Appraisal Forms for each Contractor supplying Deliverables to the Authority. Appraisal Forms shall be provided by Scape to the Authority, which shall complete an Appraisal Form for each Call off Agreement completed in the preceding calendar quarter. All completed forms shall be returned to Scape as part of the Management Report.
- 5.3 Without limiting other remedies that Scape may have, failure to provide the Management Reports may result (at Scape's election) in the suspension of the Authority's use of Framework Agreements where Scape has notified the Authority of the failure and the Authority has failed to provide the required information within 10 Working Days of such notification.
- 5.4 The Authority will not need to supply information where the Authority has not entered into any Call Off Agreements or no Call Off Agreements are currently active in the previous calendar quarter.
- 5.5 The Authority shall obtain for itself at its own responsibility and expense all information necessary for the entry into of Call off Agreements and utilisation of the Framework Agreements. Information supplied to the Authority (including without limitation the Framework Users Pack) by Scape or contained in Scape's publications is for general guidance. The Authority shall satisfy itself by its own investigations as to the accuracy of any such information.

6 Warranties and Representations

- 6.1 Each Party warrants and represents to the other that it has full capacity and authority and all necessary consents to enter into and to perform this Agreement and that this Agreement is executed by the duly authorised representatives of the Parties.
- 6.2 Before using any Framework Agreement, the Authority shall ensure that it has received the relevant Framework Users Pack and has carried out all necessary due diligence upon the information contained within it and is satisfied that the Framework Agreement complies with its requirements.
- 6.3 Scape warrants that it has carried out the procurement of each Framework Agreement with all reasonable skill care and diligence and, where applicable, in accordance with the requirements of the Public Contracts Regulations 2006.
- 6.4 Except as expressly stated in this Agreement, all warranties and conditions, whether express or implied by statute, common law or otherwise (including but not limited to fitness for purpose) are hereby excluded to the extent permitted by law.

7 Limitation of Liability

- 7.1 Neither Party excludes or limits liability to the other Party for death or personal injury or any breach of any obligations implied by Section 12 of the Sale of Goods Act 1979 or Section 2 of the Supply of Goods and Services Act 1982 or for any liability which occurs as result of its fraudulent actions.
- 7.2 Subject always to Clause 7.1, the aggregate liability of either Party for all Defaults during each calendar year of the term of this Agreement whether arising under contract, tort (including negligence) or otherwise in connection with this Agreement shall in no event exceed *£2,500,000. (two million five hundred thousand pounds)*.
- 7.3 Subject always to Clause 7.1, in no event shall Scape be liable to the Authority for:
- (a) loss of profits, business, revenue, goodwill or anticipated savings; and/or
 - (b) indirect loss or damage; and/or
 - (c) consequential loss or damage.
- 7.4 Subject always to Clause 7.8, nothing in this Agreement shall limit the right of Scape to be fully indemnified by the Authority for all costs, expenses incurred directly or indirectly, additional operational and administrative costs and expenses and/or expenditure or charges rendered unnecessary as a result of any Default by the Authority.
- 7.5 The Authority acknowledges that Scape shall not have any liability, either under this Agreement or otherwise, in respect of the provision of Deliverables by any Contractor to the Authority. The suitability of the terms of the Framework Agreements, the Call Off Agreements and the Contractor to perform and/or provide the Deliverables shall be entirely the responsibility of the Authority.
- 7.6 The Authority expressly acknowledges that it has entered into this Agreement freely and with full knowledge of its terms and in particular the provisions of this Clause 7.
- 7.7 The Parties expressly agree that should any limitation or provision contained in this Clause be held to be invalid under any applicable statute or rule of law, it shall, to that extent, be deemed omitted but if any Party thereby becomes liable for loss or damage which would otherwise have been excluded such liability shall be subject to the other limitations and provisions set out in this Agreement.
- 7.8 The Parties shall take all reasonable steps to mitigate any loss for which the relevant Party is entitled to bring a claim against the other Party pursuant to this Agreement and shall take all reasonable steps to minimise and mitigate any effects or circumstances and/or events adversely affecting the performance of their obligations under this Agreement which would otherwise entitle that Party to relief and/or to claim compensation under this Agreement.
- 7.9 Except as provided in Clause 7.1, Scape shall not have any liability to the Authority whether in contract, tort (including negligence) or otherwise in respect of any legal action or other proceedings relating to the subject matter of this Agreement which is commenced more than two (2) calendar years after the date when the Authority first became (or ought reasonably to have become) aware of the facts constituting the relevant cause of action.

7.10 Neither Party will be liable for any claim under this Agreement unless the amount of the individual claim exceeds £750 (seven hundred and fifty pounds). However, if such amount is exceeded, the full amount of each such individual claim shall be payable and not just the excess over £750 (seven hundred and fifty pounds).

8 Confidentiality

8.1 In respect of any Confidential Information it may receive from the other Party or a Contractor (the "Discloser") and subject always to the remainder of this Clause 8, the receiving Party (the "Recipient") undertakes to keep secret and strictly confidential and shall not disclose any such Confidential Information to any third party, without the Discloser's prior written consent provided that:

- (a) the Recipient shall not be prevented from using any general knowledge, experience or skills which were in its possession prior to the commencement of this Agreement;
- (b) the provisions of this Clause 8 shall not apply to any Confidential Information which:-
 - (i) is in or enters the public domain other than by breach of this Agreement or other act or omissions of the Recipient;
 - (ii) is obtained by a third party who is lawfully authorised to disclose such information;
 - (iii) is authorised for release by the prior written consent of the Discloser;
 - (iv) the disclosure of which is required to ensure the compliance of Scape and the Authority with the FOIA and the EIR.

8.2 Nothing in this Clause 8 shall prevent the Recipient from disclosing Confidential Information where it is required to do so by judicial, administrative, governmental or regulatory process in connection with any action, suit, proceedings or claim or otherwise by applicable law or, provided that the disclosure of Confidential Information is subject to a confidentiality undertaking equivalent to that set out in Clause 8.1, to its professional advisers or insurers.

8.3 Each Party acknowledges that the other is or may be subject to the FOIA and EIR. Each notes and acknowledges the FOIA and EIR and both the respective Codes of Practice on the Discharge of Public Authorities' Functions and on the Management of Records (which are issued under the FOIA) and the EIR. Each Party will act in accordance with the FOIA, the EIR and these Codes of Practice (and any other applicable codes of practice or guidance from time to time issued) to the extent that they apply to either Party's performance under this Agreement.

8.4 Each Party agrees that:

- (a) without prejudice to the generality of Clause 8.1(b), the provisions of this Clause 8 are subject to the obligations and commitments of the other under the FOIA and both the respective Codes of Practice on the Discharge of Public Authorities' Functions and on the Management of Records and the EIR;

- (b) where it considers that any information should not be available for disclosure, it will:
 - (i) identify it specifically; and
 - (ii) explain the grounds for exemption from disclosure and the time period applicable to that sensitivity.

8.5 All decisions regarding disclosure of information following a request for information under the FOIA or EIR will be made at the sole discretion of the Party which receives the request (Scape or the Authority as the case may be). Each Party acknowledges that, even where the Authority, the Contractor or Scape has indicated that information is commercially sensitive, Scape or the Authority (as may be) may be required to disclose it under the FOIA or EIR, provided that Scape or the Authority (as the case may be) shall use reasonable endeavours to consult with the other Party or a Contractor (as the case may be) prior to any disclosure.

8.6 Where Scape or the Authority is managing a request as referred to in Clause 8.5, the other Party shall co-operate with Scape or the Authority and shall respond together with copies of any documentation so requested within five (5) Working Days of any request by it for assistance.

9 Charges for Deliverables

The payments due and payable to a Contractor for the performance of any Deliverables for the Authority under the Framework Agreements or any Call Off Agreement shall be as calculated in accordance with the provisions of the relevant Framework Agreement or the relevant Call Off Agreement (as the case may be).

10 Term

This Agreement shall commence on the date of its execution and shall have an initial term of one (1) calendar year. Thereafter, unless earlier terminated, the Agreement shall automatically be renewed on an annual basis.

11 Termination

11.1 *Rights of termination*

- (a) Either Party may at any time by notice in writing to the other Party terminate this Agreement forthwith if the other is in Default of any obligation under this Agreement, or a Framework Agreement or a Call Off Agreement and:
 - (i) the Default is capable of remedy and that Party shall have failed to remedy the Default within thirty (30) calendar days of receipt of written notice to it specifying the Default and requiring its remedy; or
 - (ii) the Default is not capable of remedy.
- (b) This Agreement may be terminated by either Party by giving three calendar months written notice to the other Party.

11.2 *Following Termination*

- (a) Termination of this Agreement (however occurring) shall be without prejudice to any Call Off Agreements executed prior to termination, which shall continue in full force and effect in accordance with their terms.
- (b) Termination of this Agreement (however occurring) shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to either Party.
- (c) The provisions of Clauses 1, 5, 6, 7, 8, 11, 12, 16, 17, 19 and 20 and the provisions of the Schedule shall survive the termination of this Agreement (however occurring).

12 Corrupt Gifts and Payments of Commission

12.1 Neither Party shall:

- (a) offer or give or agree to give any person employed by either Party any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or performance of this Agreement or any other agreement with the other or for showing or forbearing to show favour or disfavour to any person in relation to this Agreement; nor
- (b) enter into this Agreement if in connection with it commission has been paid or agreed to be paid to any person employed by either Party or on behalf of either Party or to the knowledge of either Party, unless before this Agreement is made particulars of any such commission and of the terms and conditions of any agreement for the payment thereof have been disclosed in writing to Scape.

12.2 If there is a breach of this Clause 12 by either Party or by anyone employed by either Party or acting on either Party's behalf (whether with or without the knowledge of either Party) or the commission of any offence by either Party or by anyone employed by either Party or acting on behalf of either Party under the Bribery Act 2010 in relation to this Agreement, the non-breaching Party may summarily terminate this Agreement by notice in writing to the other Party. The non-breaching Party may recover from the other Party the amount or value of any such gift, consideration or commission.

13 Force Majeure

13.1 Subject to Clause 13.2 and 13.3, neither Party shall be relieved from any liability under this Agreement to the extent that by reason of an event of Force Majeure it is not able to perform its obligations under this Agreement.

13.2 Neither Party shall be entitled to any compensation or other payment by reason of the occurrence of an event of Force Majeure.

13.3 If an event of Force Majeure substantially prevents a Party from carrying out its obligations under this Agreement for more than 3 calendar months, either Party may terminate this Agreement on written notice to the other Party.

14 Transfer and Sub-contracting

This Agreement is personal to the Parties and neither Party shall assign, novate, sub-contract or otherwise dispose of its rights and or obligations under this Agreement or any part of it without the previous consent in writing of the other Party.

15 Amendments to this Agreement

This Agreement shall not be varied or amended unless such variation or amendment is agreed in writing by a director of Scape and by a duly authorised representative of the Authority on behalf of the Authority.

16 Communications

- 16.1 Except as otherwise expressly provided no communication from one Party to the other shall have any validity under this Agreement unless made in writing by or on behalf of Scape or as the case may be by or on behalf of the Authority.
- 16.2 Any notice or other communication whatsoever which either Party hereto is required or authorised by this Agreement to give or make to the other shall be given or made either by hand or by post in a prepaid first class envelope , or (but to be confirmed by post in a prepaid first class envelope) by facsimile transmission or by e-mail, addressed to the other Party at the address specified in the Schedule, and if (a) that letter is not returned as being undelivered and (b) confirmation of fax transmission or transmission of a delivery receipt has been received, the that notice or communication shall be deemed for the purposes of this Agreement to have been given or made after two days, for a letter, or four hours, for facsimile transmission, or immediately for an email.

17 Severability

If any provision of this Agreement is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if this Agreement had been executed with the invalid, illegal or unenforceable provision eliminated. In the event of a holding of invalidity so fundamental as to prevent the accomplishment of the purpose of this Agreement, Scape and the Authority shall immediately commence good faith negotiations to remedy such invalidity.

18 Waiver

- 18.1 The failure of either Party to insist upon strict performance of any provision of this Agreement, or the failure of either Party to exercise any right or remedy to which it is entitled under this Agreement, shall not constitute a waiver thereof and shall not cause a diminution of the obligations established by this Agreement.
- 18.2 A waiver of any Default shall not constitute a waiver of any subsequent Default.
- 18.3 No waiver of any of the provisions of this Agreement shall be effective unless it is expressly stated to be a waiver and communicated to the other Party in writing in accordance with the provisions of Clause 16.

19 Law and Jurisdiction

19.1 This Agreement shall be governed by and construed in accordance with the laws of England and Wales and the Parties submit to the exclusive jurisdiction of the English and Welsh Courts.

19.2 This Agreement is binding on Scape and its successors and permitted assignees and the Authority and the Authority's successors and permitted assignees.

20 Entire Agreement

This Agreement constitutes the entire understanding between the Parties relating to the subject matter of this Agreement and, save as may be expressly referred to or referenced herein, supersedes all prior representations, writings, negotiations or understandings with respect to it, except in respect of any fraudulent misrepresentation made by either Party.

IN WITNESS WHEREOF the Parties have executed this Agreement as a deed the day and year first above mentioned

EXECUTED as a DEED by)
SCAPE SYSTEM BUILD LIMITED)
acting by)

Director

Director/Secretary

EXECUTED as a DEED by)
[to be completed])
with the affixing of its COMMON SEAL in the presence of)

Proper Officer

SCHEDULE

ADDRESSES FOR SERVICE OF NOTICES

For Scape:

Scape System Build Limited
4th Floor Pearl House,
5 Friar Lane,
Nottingham NG1 6BT

Tel : 0115 958 3200

Fax : 0115 958 33232

Email: general@scapebuild.co.uk

Contact : Alan Coole

For Authority

[To be completed]

SAMPLE