



EULA

Version Number	2.10
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	Name	Title	Signature	Date
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Version History

Previous version	Significant changes from previous version	Author	Date
1.0	Added cover page and changed numbering in section 4 & a type in 4.2	Managing Director / Head of IT	20/06/2019
1.1	Removed "Software Tools" definition, references to Coventry and removed comma on 29.5	Managing Director / Head of IT	23/07/2019
2.0	Extensive rewrite through legal team @ Boyes Turner	Georgia Shriane, Legal Council	08/09/2019
2.1	Updated section 26 - with details of synced servers/db	Emil Reisser-Weston	18/10/2019
2.2	Added 18.4 warranty for 3rd party resellers	Emil Reisser-Weston	06/04/2020
2.3	Added spaces for company name etc. Updated product names 'Open eLMS' suite	Emil Reisser-Weston	30/11/2020

2.4	Removed reference to Jackdaw Cloud	Emil Reisser-Weston	24/12/2020
2.5	Included ethical clause	Emil Reisser-Weston	17/05/2021
2.6	References to OVH removed for all new customers	Emil Reisser-Weston	13/08/2021
2.7	Address change	Emil Reisser-Weston	15/09/2021
2.8	Added clarification of included support tasks and response times	Emil Reisser-Weston	20/10/2021
2.9	Updated with openalms.ai	Emil Reisser-Weston	20/02/2023

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PREVIOUS VERSION

THIS AGREEMENT is dated _____ and made

BETWEEN:

(1) [·], (the “Client”), registered in England and Wales as company number

_____ and having its registered office at

_____.

(2) **Open eLMS LIMITED** (the “Supplier”) a company registered in England and Wales with company number 04682876, whose registered address is at Kemp House, 124 City Rd, London EC1V 2NX.

1. Interpretation

1.1 In this document the definitions set out in Schedule 1 shall apply.

1.2 A reference to one gender includes a reference to the other genders.

1.3 Words in the singular include the plural and words in the plural include the singular.

1.4 References to “including” or “includes” shall be deemed to have the words “without limitation” inserted after them.

1.5 A reference to a particular law is a reference to it as it is in force for the time being, taking account of any amendment, extension, application or re-enactment and includes any subordinate legislation for the time being in force made under it.

1.6 A reference to a Clause, schedule or annex is a reference to a Clause of, or schedule or annex, to this Agreement.

1.7 Clause and schedule headings do not affect the interpretation of this Agreement.

1.8 Writing or written includes faxes but not email nor any other form of electronic communication.

1.9 The Schedules to this Agreement, together with any documents referred to in them, form an integral part of this Agreement and any reference to this Agreement means this Agreement together with the Schedules and all documents referred to in them, and such amendments in writing as may subsequently be agreed between the parties.

1.10 If any conflict arises between the terms and conditions of this Agreement and any provision of any schedule, the terms and conditions of the added schedule shall prevail.

1.11 A person includes a natural person, corporate or unincorporated body and that person's personal representatives, successors or permitted assigns.

2. e-Learning System Licence

2.1 The e-Learning system which is the subject of this Agreement ("E-Learning System") can comprise any of the following systems and services:

- (A) **Open eLMS**
- (B) **Open eLMS Bespoke**
- (C) **Open eLMS Catalogue**
- (D) **Open eLMS Classroom**
- (E) **Open eLMS Creator**
- (F) **Open eLMS Forms**
- (G) **openelms.ai**

2.2 The Supplier grants, subject to the terms of this Agreement and the Client which directly or indirectly controls, is controlled by, or is under direct or indirect common control of the Client from time to time ("Affiliates") a non-exclusive, non-transferable right to use the E-Learning System for the furtherance of its business.

2.3 The Client may not sell or licence the E-Learning System as a standalone product to third parties on a commercial basis without express written permission from the Supplier.

2.4 The Client and its Affiliates may make such copies of the E-Learning System as are reasonably necessary for use in accordance with this Licence and for the purposes of backup and security.

2.5 Except as permitted by this Agreement, the Client may not:

- (A) disassemble, decompile, reverse translate or in any other manner decode the E-Learning System.
- (B) make adaptations or variations to the E-Learning System without prior consent of the Supplier.

3. E-Learning System Documentation

3.1 The Supplier shall provide to the Client from time to time copies of the operating manuals, user instruction manuals, technical literature and all other related materials in human-readable and/or machine-readable ("Documentation") containing sufficient up-to-date information for the proper use and maintenance of the E-Learning System. Such Documentation may be supplied in electronic form and shall include updates to the Documentation provided under Clause 8.2.

- 3.2 The Client may make such further copies of the Documentation as are reasonably necessary for the use and maintenance of the E-Learning System and for training the Client's personnel in use of the E-Learning System.

4. Hosting

- 4.1 The Supplier has subcontracted its performance of the hosting element of the Services to Microsoft - UK Headquarters, Microsoft Campus, Thames Valley Park, Reading, RG6 1WG.

Technology used by Azure includes:

- (A) Anti DDoS Protection <https://azure.microsoft.com/en-us/services/ddos-protection/>
- (B) HPC Cache <https://azure.microsoft.com/en-us/services/hpc-cache/>;
- (C) CDN <https://azure.microsoft.com/en-us/services/cdn/>
- (D) DNS <https://azure.microsoft.com/en-us/services/dns/> ;
- (E) Load Balancer <https://azure.microsoft.com/en-us/products/azure-load-balancing/>

- 4.2 All servers are managed by Microsoft Azure. Physical access is restricted to authorised employees only. No removable media (USBs, portable hard drives, CDs etc.) are allowed in the facility. Access is restricted by security badge control system with video surveillance and security personnel 24/7 on-site. Technicians are onsite 24/7. Rooms are fitted with smoke detection systems.

All Datacentres have emergency power backup.

- 4.3 In the event of an unknown person or persons fraudulently gaining access to a system, the Supplier will make reasonable efforts to identify and collect suitable evidence. Such activity will be subject to the Supplier observing relevant regulatory, licence and legislative obligations including, but not limited to, the Data Protection Act 2018, the General Data Protection Regulation 2016/679 ("GDPR") and any statutory instrument, order, rule or regulation made thereunder, as from time to time amended, extended, re-enacted or consolidated ("Data Protection Legislation.")
- 4.4 The Client will employ reasonable endeavours to ensure that all files uploaded onto servers are virus free and that all virus definitions are up to date.
- 4.5 The Supplier shall employ reasonable endeavours to ensure that all incoming and outgoing emails are virus free and shall ensure that virus definitions are up to date. However, the Supplier makes no guarantee that the Client will never receive a virus through email.
- 4.6 The Supplier will ensure that backups of shared and other servers are taken daily and stored in accordance with the agreed backup schedule (by default a rolling schedule taken daily, weekly, monthly, 3 monthly and 6 monthly).

Backups include:

- (A) All website areas (HTML documents, images, scripts, uploaded databases)
- (B) All data areas (mySQL databases, Oracle and SQLServer databases)
- (C) Configuration data (for example FTP configurations)
- (D) Email / Webmail
- (E) System State

Backups are stored offsite from the main data centre and are stored in an encrypted format.

- 4.7 The Supplier will provide data recovery from backups under the terms of this Agreement a maximum of twice per calendar month. Additional data recovery assistance will be charged for at a cost negotiated before the commencement of the assistance.
- 4.8 The Supplier will remotely restart services or reboot a server on request from the agreed main contact with the Client. The Supplier will perform similar actions without request from the Client if it is the remedy for a current logged fault.
- 4.9 In the event of a server failure that cannot be remotely rectified (for example, severe hardware failure), the Supplier will investigate and attempt to rectify the fault on location in conjunction with Azure disaster recovery teams.
- 4.10 In the event of new or replacement components being required to rectify the fault the Supplier will undertake the immediate procurement of such components and their subsequent installation
- 4.11 All Supplier supplied servers are provided with full licenses where necessary (no commercial licences are required for the current Apache/MySQL/PHP on Debian Linux). The Client is not authorised to (and shall not) upload any software to servers without first obtaining the correct licence. The Supplier will notify the Client if it is believed any unlicensed software is installed.
- 4.12 Access to the Web Server by the Client is permitted. Access will be via SFTP or remote Desktop Services. It is the responsibility of the Client to ensure that usernames and passwords are kept secure.

5. Testing and Installation

- 5.1 The Supplier shall deliver the E-Learning System in a format that is ready to use by the agreed date of installation ("Installation Date"). The delivered E-Learning System should require no further customisation by the Client.

Operations included within the purchase cost of Open eLMS include:

- (A) Importing HR Data from a provided template (including setting up a CRON task to automate this)
- (B) Importing course data from a provided template



(C) Setting up SSO

Operations included with Enterprise installations of Open eLMS include:

1. Setting up a CRON task to automate HR imports from third party systems.
 2. 6 hours training (2 hours manager, 2 hours administrator and 2 hours curriculum developer)
 3. Weekly project management meetings during implementation stage
 4. Monthly account management meetings thereafter
- 5.2 If any delivery is delayed at the request of, or because of the acts or omissions of, the Client, the Installation Date shall be amended to take account of such delay.
- 5.3 No later than 30 days from the Installation Date, the Client shall test whether the ELearning System is in operable condition ("Acceptance Testing"). If the Acceptance Testing is successful, the Client shall promptly notify the Supplier in writing of its acceptance of the E-Learning System ("Acceptance Date").
- 5.4 If the E-Learning System fails to pass the Acceptance Testing, the Client shall, within 14 days from the completion of the Acceptance Testing or any part of these tests, provide a written notice to this effect, giving details of such failure(s). The Supplier shall remedy the defects and deficiencies and the relevant test(s) shall be repeated within a reasonable time.
- 5.5 If such retest demonstrates that the E-Learning System is still not in operable condition then the Client may, by written notice to the Supplier, choose at its sole discretion:
- (A) to fix a new date for carrying out further tests on the E-Learning System on the same terms and conditions. If the E-Learning System fails such further tests then the Client may request a repeat test under this Clause 5 or to proceed under Clause 5.7(B) or Clause 5.7(C);
 - (B) to accept the E-Learning System subject to such changes are agreed as reasonable after taking into account all the relevant circumstances; or
 - (C) to reject the E-Learning System as not being in conformity with the Agreement, in which event the Client may terminate this Agreement.
6. **Change Control**
- 6.1 The Client may from time to time request that the Supplier provides additional services. Such additional services shall be agreed pursuant to the change control procedure in this Clause 6 and the price shall be determined by separate agreement.
- 6.2 The Client may, by giving written notice to the Supplier at any time during the term of this Agreement, request a change to the E-Learning System or the Services or request additional services.
- 6.3 Within seven days, not including weekends or UK public holidays ("Working Days") of receipt of such notice, the Supplier shall, provide a written quote of any charges, as well as an estimated delivery date and, where applicable, any effect that the requested change would have on the Installation Date.

- 6.4 Within 14 Working Days of receipt of the written quote referred to in Clause 6.3, the Client shall inform the Supplier in writing of whether or not the Client wishes the requested change to be made. If the change is required, the Supplier shall not make the requested change until the parties have agreed and signed a written agreement ("Change Agreement") specifying any changes to the terms of this Agreement.

7. Ownership

- 7.1 The parties agree that, except as expressly provided to the contrary, this Agreement does not transfer ownership of, or create any licences (implied or otherwise), in any Intellectual Property Rights in the E-Learning System.
- 7.2 The Intellectual Property Rights in any new bespoke e-Learning courses created by the Client using the E-Learning System shall vest in the Client. The Supplier assigns (by way of present and, where appropriate, future assignment) all such Intellectual Property Rights with full title guarantee to the Client.
- 7.3 The Supplier shall do and execute, or arrange for the doing and executing of, each necessary act, document and thing that the Client may consider necessary or desirable to perfect the right, title and interest of the Client in and to the Intellectual Property Rights assigned under Clause 7.1 and 7.4.
- 7.4 All Intellectual Property Rights in any Client data shall be owned by the Client.
- 7.5 All Intellectual Property Rights in any domain name setup and used specifically for this project shall be owned by the Client.
- 7.6 For the avoidance of doubt, the Supplier shall not:
- (A) Refer to this Agreement in any publicity releases, advertisements or equivalent or any promotional activity without the prior written permission of the Client; or
 - (B) Use the name or any Intellectual Property Rights of the Client for the purpose of advertisement, publicity, demonstration or promotional activity without the prior written permission of the Client.

8. Support Services

- 8.1 The Support Services shall commence on the Acceptance Date. From such date the Supplier will provide the following Support Services in relation to the E Learning System:
- (A) the provision of New Releases;
 - (B) the provision of advice on use; and
 - (C) the remedying of any error in the E-Learning System that causes it to fail to operate in accordance with the relevant Documentation ("Defects").
 - (D) Support help desk
 - (E) Knowledgebase

- 8.2 The Supplier shall supply the Client with new releases of all or any part of the E-Learning System suitable for use by the Client in which previously identified faults have been remedied or to which any modification, enhancement, revision or update has been made, or which provides additional and/or improved functionality and/or performance ("New Release(s)").
- 8.3 The Supplier shall ensure that support is available by telephone (+44 (0)203 929 2051) chat on www.openelms.com and e-mail (support@openelms.com) from 08.00 to 18.00 GMT, Monday to Friday to provide assistance to the Client in respect of the following:
- (A) remedying Defects in the E-Learning System;
 - (B) installation of and remedying Defects in any New Releases; and
 - (C) providing advice on the use of the E-Learning System.
- 8.4 The Supplier shall correct Defects notified to it by the Client in a timely manner appropriate to the seriousness of the circumstances in accordance with the following procedure:
- (A) The Client shall promptly notify the Supplier of all Defects;
 - (B) within 1 hour of such notification, the Supplier shall acknowledge receipt of the notification and shall determine, in consultation with the Client, how seriously the Defect affects the Client's operations;
 - (C) if a notified Defect halts or substantially impairs the Client's operations which use the E-Learning System, the Supplier shall aim to respond in the following manner:
 - (1) **Critical Event:** Critical Impact/System Down. Open eLMS in its entirety is non-functioning.
Response time 1 working hour, resolution target 2 working hours
 - (2) **Major Event:** Significant Impact. A number of key components are not working which seriously impacts use of the service.
Response time 1 working hour, resolution target 4 working hours
 - (3) **Minor Event:** An individual feature of Open eLMS is not working, Work arounds are not possible.
Response time 2 working hours, resolution target 2 working days
 - (4) **Trivial Event:** A problem with Open eLMS for which a work around is possible.
Response time 1 working day, resolution target 4 working weeks
 - (D) If the Defect cannot be corrected within one Working Day then the Supplier shall supply the Client with a reasonable workaround to bypass the Defect until the Defect can be corrected;
 - (E) if a notified Defect, while not halting or substantially impairing the Client's operations, causes those operations to become significantly slowed or causes

substantial inconvenience, the Supplier shall commence work on correcting the Defect within 48 hours of receipt of such notification and shall use correct the Defect as soon as possible; and

- 8.5 The Supplier's obligations in respect of the Support Services shall not cover any part of the E-Learning System which has been materially modified by anyone other than the Supplier, except with the Supplier's express prior written permission.
- 8.6 Operations included with Enterprise installations of Open eLMS include:
1. Weekly project management meetings (during implementation
 2. Weekly account management meetings for the first 3 months after implementation, extending to monthly thereafter

9. Supplier Personnel

- 9.1 The Supplier undertakes that its employees and contractors, while on the Site(s) or any other premises of the Client, will comply with all relevant rules and regulations laid down by the Client from time to time for the behaviour of its own employees and contractors, and any other reasonable requirements of the Client. The Supplier shall remove any employee or contractor whom the Client can reasonably demonstrate has failed to comply with such rules, regulations and requirements.
- 9.2 The Client may restrict access to certain areas of its premises or systems on security grounds at its absolute discretion.
- 9.3 The Supplier alone shall be responsible for the supervision, direction, control, wages, taxes, national insurance and benefits of its staff including those providing Support Services. The Supplier assumes full responsibility for their acts and omissions and acknowledges that they are not employees or agents of the Client. The Supplier and the Client acknowledge and agree that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) "TUPE" as amended or replaced, under the terms of this Agreement will not apply in relation to or as a result of the start, implementation, operation or end of this Agreement or any of its provisions.
- 9.4 Should it be alleged or determined that TUPE does so apply in relation to the start, implementation, operation or, as the case may be, end of this Agreement or any of its provisions, then:
- (A) The Supplier and the Client agree to co-operate reasonably to defend, avoid or mitigate any claims arising out of or in connection with any such allegation or determination ("Transfer Claims") whether by an employee, ex-employee, trade union, a representative of an employee or otherwise of either the Supplier or the Client;
 - (B) The Supplier will indemnify and keep indemnified the Client against any claims or losses (including legal costs and expenses) ("Transfer Liability") which may be incurred in relation to or as a result of any such Transfer Claims by any employee of the Supplier against the Client arising out of or in connection with the operation of the Transfer Regulations or as a result of the Client refusing to employ, not

honouring the terms or conditions of employment of, or dismissing any employee of the Supplier who alleges either that they have, or who is deemed by law to have, a contract of employment with the Client (or that any liability arising from any such contract has or is deemed by law to have transferred to the Client by reason of the operation of TUPE.

10. Support Services: Client's Obligations

- 10.1 The Client shall cooperate with the Supplier in any manner reasonably required by the Supplier in order to carry out the Support Services, including provision of reasonably requested information and data, making available suitably qualified employees and contractors of the Client and, subject to the Supplier's compliance with the Client's normal security requirements;
- 10.2 Problems must be reported to the Supplier's support desk by the Client via email or telephone to the appointed account manager or the Supplier's help desk.

11. Confidentiality and Publicity

- 11.1 Each party undertakes to the other to:
- (A) keep confidential all information of commercial value, in whatever form or medium, which has been kept confidential by the party (or any of its Affiliates) from whom the information originates and which has not come into the public domain during the term of this Agreement in breach of any obligation of confidence, including information relating to the E-Learning System or any of its constituent parts, the Source Code relating to the E-Learning System or any such parts, commercial or technical know-how, technology, information pertaining to business operations and strategies, and information pertaining to customers, pricing and marketing "Confidential Information");
 - (B) not to disclose the Confidential Information of the other party in whole or in part to any other person without such other party's written consent save those of its employees who need to have access to it in order for such other party to carry out its obligations under this Agreement; and
 - (C) use the Confidential Information of the other party solely in connection with carrying out its obligations under this Agreement or in connection with its implementation.
- 11.2 The provisions of this Clause 11 shall not apply to the whole or any part of the Confidential Information to the extent that it is:
- (A) already in the party's possession prior to receipt from the other party other than as a result of a breach of this Clause 11;
 - (B) received from a third party not under an obligation of confidence;
 - (C) in the public domain other than as a result of a breach of this Clause 11; or

(D) required to be divulged by any Court, tribunal or governmental authority with competent jurisdiction.

11.3 Each party will make all employees who have access to the other party's Confidential Information aware of the confidentiality of the other party's Confidential Information and the provisions of this Clause 11 and will ensure that they comply with its terms.

11.4 If either party becomes aware of any breach of confidence by any of its employees in relation to the Confidential Information of the other party, it shall promptly notify the other party and give the other party all reasonable assistance in connection with any proceedings which the other party may institute against any such persons.

11.5 The provisions of this Clause 11 shall survive the termination (including expiry) of this Agreement.

12. **Data Protection, Security and Integrity**

12.1 The parties acknowledge that the factual arrangements between them dictate the role of each party in respect of the Data Protection Legislation and the terms "Controller", "Process", "Processor" and "Personal Data" shall have the meanings given to those terms in such Data Protection Legislation.

12.2 Notwithstanding the foregoing, each party agrees that the Supplier shall be a Processor of Personal Data where it is Processing Personal Data in relation to the performance of its obligations under this Agreement and the Client shall be the Controller where it is Processing Personal Data in respect of its day to day activities (as such terms are defined in the Data Protection Legislation).

12.3 Each party undertakes to the other that insofar as any Personal Data which it either transmits or authorises a third party to transmit to the other that it has obtained all the necessary consents and authorisations for the receiving party to Process Personal Data in the manner and for the purposes required for the performance of its obligations under this Agreement and that such use of such Personal Data by the receiving party will not breach the Data Protection Laws and that it will not infringe any Intellectual Property Rights or confidentiality undertaking of any third party. Each party shall use such Personal Data (including disclosure of any such Personal Data to third parties) only in accordance with such consents and authorisations as have been received, and as otherwise permitted by law.

12.4 Each party shall:

(A) maintain all notifications under the Data Protection Legislation which are required for the performance of its obligations under this Agreement, including making due notification to the Information Commissioner's Office; and

(B) in the performance of its obligations under this Agreement, comply with the Data Protection Legislation and will use its reasonable endeavours to comply with guidelines and codes of practice issued from time to time by the Information Commissioner and any other Data Protection Legislation.

12.5 Contact Details

- (A) The parties each acknowledge and agree that they may need to Process Personal Data of each party's employees under, or in connection with, this Agreement ("Contact Data") (in their respective capacities as Controllers) in order to (as appropriate): (a) administer and provide the Services; (b) request and receive the Services; (c) compile, dispatch and manage the payment of invoices relating to the Services; (d) manage the Agreement and resolve any disputes relating to it; (e) respond and/or raise general queries relating to the Services; and (f) comply with their respective regulatory obligations.
- (B) Each party shall Process such Contact Data for the purposes set out in Clause 12.4(A) in accordance with their respective privacy policies. The parties acknowledge that they may be required to share Contact Data with their affiliates, group companies and other relevant parties, within or outside of the country of origin, in order to carry out the activities listed in Clause 12.4(A), and in doing so each party will ensure that the sharing and use of this Contact Data complies with Data Protection Legislation.

12.6 Data Processor Obligations

- (A) To the extent that the Supplier Processes Personal Data under this Agreement as a Processor on behalf of the Client (as the Controller), then the Supplier shall:
 - (1) only Process the Personal Data for and on behalf of the Client for the purposes of performing its obligations under this Agreement, and only in accordance with the terms of this Agreement and any documented instructions from the Client;
 - (2) keep a record of any Processing of the Personal Data it carries out on behalf of the Client;
 - (3) unless prohibited by law, notify the Client immediately (and in any event within 24 hours of becoming aware of the same) if it considers, in its opinion (acting reasonably) that it is required by law to act other than in accordance with the instructions of the Client, including where it believes that any of the Client's instructions under paragraph 14.7(A)(1) infringe any Data Protection Legislation.
 - (4) procure that appropriate technical and organisational measures are taken against unauthorised or unlawful Processing of such Personal Data and against accidental loss or destruction of, or damage to, such Personal Data, taking into account the nature of the Personal Data and which are at least sufficient to comply with the obligations imposed on the Client by the Security Requirements under Data Protection Legislation. Where requested by the Client, the Supplier shall provide to the Client evidence of its compliance with such requirements promptly, and in any event within 48 hours of the request;
 - (5) ensure that all such Personal Data shall be collected, processed and used fairly and lawfully and in accordance with Data Protection Legislation;
 - (6) operate adequate security procedures, processes and systems to ensure that unauthorised persons do not have access to any equipment used to

Process such Personal Data or to the Personal Data itself where possible access to Personal Data is restricted to the Account Manager for the Client;

- (7) ensure that any and all use of such Personal Data for marketing purposes shall comply with Data Protection Legislation and, with the provisions of the Privacy and Electronic Communications (EC Directive) Regulations 2003;
- (8) ensure that such Personal Data is not transferred to a country, territory or jurisdiction outside of the European Economic Area which the EU Commission has not deemed to provide adequate protection in accordance with Article 45(1) of the GDPR (as applicable) except with the prior written consent of the Client and in any event in accordance with Data Protection Legislation;
- (9) notify the Client promptly (and in any event within 48 hours) following its receipt of any Data Subject Access Request or ICO Correspondence and shall: (i) not disclose any Personal Data in response to any Data Subject Access Request or ICO Correspondence without first consulting with and obtaining the Client's prior written consent; and (ii) render the Client will all such assistance as the Client may reasonably require to assist in relation to any such Data Subject Access Request or ICO Correspondence
- (10) ensure that any of its Personnel who shall have access to Personal Data shall have entered into appropriate contractually-binding confidentiality undertakings and shall comply with the provisions of this Clause as if they were a party to this Agreement;
- (11) within 30 calendar days of a request from the Client, allow its data processing facilities, procedures and documentation to be submitted for scrutiny, inspection or audit by the Client (and/ or its representatives, including its appointed auditors) in order to ascertain compliance with the terms of this Clause 12, and provide reasonable information, assistance and co-operation to the Client, including access to relevant Personnel and/or, on the request of the Client, provide the Client with written evidence of its compliance with the requirements of this Clause 12;
- (12) not disclose Personal Data to a third party (including a sub-contractor) in any circumstances without the Client's prior written consent, save in relation to Third Party Requests where the Supplier is prohibited by law or regulation from notifying the Client, in which case it shall use reasonable endeavours to advise the Client in advance of such disclosure and in any event as soon as practicable thereafter;
- (13) not sub-contract the performance of any of its obligations under this Agreement without the prior written consent of the Client;
- (14) promptly comply with any request from the Client to amend, transfer or delete any Personal Data. Notwithstanding the foregoing, except to the extent required by any applicable law, upon the earlier of:
 - (a) termination or expiry of this Agreement; and/or

- (b) the date on which the Personal Data is no longer relevant to, or necessary for, the performance of the Services,

the Supplier shall cease Processing of all Personal Data and return and/or permanently and securely destroy the same so that it is no longer retrievable (as directed in writing by the Client), along with all copies in its possession or control;

- (15) notify the Client promptly (and in any event within 24 hours) upon becoming aware of any actual or suspected, threatened or 'near miss' Personal Data Breach in relation to the Personal Data (and follow-up in writing) and shall:
 - (a) conduct or support the Supplier in conducting such investigations and analysis that the Supplier reasonably requires in respect of such Personal Data Breach;
 - (b) implement any actions or remedial measures necessary to restore the security of compromised Personal Data; and
 - (c) assist the Client to make any notifications to the ICO and affected Data Subjects;
- (16) comply with the obligations imposed upon a Processor under Data Protection Legislation;
- (17) respond to any request for support, information or action required by the Client within such timescales as notified to it by the Client and where no such timescale is provided respond promptly to ensure that the Client meets its duties under Data Protection Legislation in a timely manner.

12.7 Warranties

12.8 The Supplier acknowledges that the Client has entered into this Agreement in reliance upon the Supplier's expertise in hosting and providing e-learning platforms.

12.9 The Supplier agrees that:

- (A) it has the right to assign or licence (as appropriate) all Intellectual Property Rights in and to the E-learning System and Documentation to the Client;
- (B) the provision by the Supplier to the Client of the E-learning System, New Releases, Services and/or Documentation supplied by the Supplier does not and will not infringe the Intellectual Property Rights of any third party;
- (C) it will perform the Services in a timely, reliable and professional manner, in conformity with good industry practice by a sufficient number of competent staff with appropriate skills, qualifications and experience, and has and will at all times have the ability and capacity to meet such requirements;
- (D) it will perform the Support Services in compliance with all applicable law and regulations;

(E) in respect of New Releases:

- (1) no release issued by the Supplier in accordance with the Support Services will adversely and materially affect the performance or functionality of the E-learning System; and
- (2) the implementation of each release will not necessitate the upgrading or replacement of any computer hardware, or such other hardware, software or equipment which at the date of issue of the release is interfacing with the earlier release.

(F) neither the provision of the Services nor the E-learning System will cause any intentional errors, intentional security holes or malicious code to be introduced into any of the Client's computer system and that the Supplier will not access any part of the Client's computer system which the Supplier is not authorised to access. The Supplier indemnifies the Client for all costs, claims and expenses which the Client may incur as a result of unauthorised access to the Client's computer system by the Supplier or any of its employees or sub-contractors.

(G) at the time of delivery of the E-learning System or New Releases, the Supplier shall ensure that the E-learning System or New Release is tested using commercially available anti virus software, for all known viruses, Trojan, worm, or other software routine or hardware component designed to permit, either automatically or through externally applied controls, unauthorised access or use to disable, erase, or otherwise harm software, hardware, or data.

12.10 Each party warrants that it has full capacity and authority, to enter into and perform this Agreement and that those signing this Agreement are duly authorised to bind the party for whom they sign.

12.11 The Supplier shall ensure at least 99.9% uptime of the Service in monthly intervals.

12.12 The Supplier will undertake planned outages as required. The Client will be notified of planned outages via the system status page on the website plus a post to the updates mailing list. During these planned outages periods the Supplier cannot guarantee availability of the service.

12.13 The Supplier will give the Client advance notice of no less than 7 days prior to the commencement of the downtime

12.14 The Supplier reserves the right to undertake planned outages at any time and without notice to resolve emergency service faults, however the Supplier will endeavour to provide notice of any planned outages that are necessary.

13. Intellectual Property Rights Indemnity

13.1 The Supplier shall indemnify the Client and its Affiliates and shall keep the Client and its Affiliates fully and effectively indemnified against any and all claims, demands, actions, expenses, losses, damages and costs (including legal costs) that may be suffered by or incurred by the Client and its Affiliates or awarded or agreed by the Supplier to be paid to any third party in respect of any claim or action that the provision of the Services and/or

provision of access to and use of the E-learning System infringes the intellectual property rights of any third party (an "IPR Infringement").

13.2 Where an IPR Infringement arises, the Client shall:

- (A) give notice to the Supplier of any IPR Infringement as soon as reasonably practicable upon becoming aware of it;
- (B) give the Supplier the sole conduct of the defence to any claim or action in respect of any IPR Infringement subject to the approval by the Client of any acts or omissions taken in the conduct of such defence or settlement of any such claim if the Client gives notice that it requires such approval;
- (C) not at any time admit liability or otherwise attempt to settle or compromise the said claim or action without the consent of the Supplier; and
- (D) act in accordance with the reasonable instructions of the Supplier and give to Supplier such assistance as it shall reasonably require in respect of the conduct of the said defence including the filing of all pleadings and other court process and the provision of all relevant documents.

13.3 The Supplier shall reimburse the Client its costs incurred on an indemnity basis in complying with the provisions of Clause 13 above.

13.4 The Supplier shall immediately notify the Client if any claim or demand is made or action brought against the Supplier for any IPR Infringement which may affect the performance of this Agreement.

13.5 In the event of an IPR Infringement, the Supplier may at its option and expense and subject to the consent of the Client, (such consent not to be unreasonably withheld, conditioned or delayed):

- (A) procure for the Client the right to continue using the materials, documentation or works affected in accordance with the terms of this Agreement; or
- (B) modify or replace the infringing part of the materials, documentation or works affected (without detracting from its overall scope or specification) provided that the terms of this Agreement shall apply mutatis mutandis to such modified or replaced materials, documentation or works; or

13.6 If Clauses 13.5.1 or 13.5.2 cannot be accomplished on reasonable terms, terminate this Agreement in order to avoid further infringement.

13.7 The obligations of the parties under this Clause 13 shall survive the expiry or the termination of this Agreement for whatever reason.

14. **Limitation of liability**

14.1 Subject to any express contractual terms of this Agreement, in no event shall the Client or the Supplier be liable to the other party for:

- (A) loss of profits;
- (B) loss of business;
- (C) depletion of goodwill or similar losses;
- (D) loss of anticipated savings;
- (E) loss of goods; or
- (F) loss of use.

- 14.2 The Supplier's maximum aggregate liability under this Agreement in respect of a single claim or a series of related claims, whether arising under contract, negligence, misrepresentation, or statute and whether arising out of or in connections with the provision of the E-Learning System or other goods and/or services under this Agreement, shall be limited to the total subscription fees paid by The Client to the Supplier in the 12 months preceding the date of the incident giving rise to the claim or series of claims.
- 14.3 Nothing in this Agreement shall limit or exclude the liability of either party for death or personal injury resulting from negligence, fraud, fraudulent misrepresentation, breach of any of the obligations under the Sale of Goods Act 1979 or the Supply of Goods and Services Act 1982, which may not be excluded by contract, or in relation to any liability which cannot be excluded or limited by law.
- 14.4 The parties expressly agree that should any limitation 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.

15. **Assignment**

- 15.1 The Client may at any time assign, transfer, mortgage, charge or deal in any other manner with any or all of its rights and obligations under this Agreement. The Client may subcontract or delegate in any manner any or all of its obligations under this Agreement to any third party or agent.
- 15.2 This Agreement is personal to the Supplier and the Supplier shall not assign, transfer, mortgage, charge, subcontract, declare a trust of or deal in any other manner with any or all of its rights and obligations under this Agreement without the prior written consent of the Client (such consent not to be unreasonably withheld or delayed).
- 15.3 In the event that the Client consents in writing to the Supplier sub-contracting any of its duties under this Agreement, the Supplier shall remain liable for any acts or omissions of subcontractor(s) as if they were its own.

16. Duration

- 16.1 The initial term of these Terms ("Initial Term") will commence upon acceptance of these terms ("Effective Date") and will terminate on the third anniversary of the Effective Date. Each 12-month period after the Effective Date will be defined as a "Service Year".
- 16.2 Following the expiration of the Initial Term, these Terms shall automatically renew and continue on an annual basis until such time as either party terminates these Terms.

17. Termination

- 17.1 Either party may terminate these Terms following the expiration of the Initial Term by providing 90 days' written notice prior to the end of the Service Year of its intent to terminate the Terms.
- 17.2 We may terminate these terms by notice at any time if you are in material or persistent breach of any provision of these terms.
- 17.3 Any notice of termination must be in writing and sent to the email address set out in accordance with Clause 22.

18. Entire Agreement

- 18.1 This Agreement constitutes the whole agreement between the parties and supersedes any previous arrangement, understanding or Agreement between them relating to the subject matter of this Agreement.
- 18.2 Each party acknowledges that, in entering into this Agreement it does not rely on any statement, representation, assurance or warranty ("Representation") of any person (whether a party to this Agreement or not) other than as expressly set out in this Agreement.
- 18.3 Each party grants the other the right to use its name, logo, and a description of the association or partnership in marketing, promotional materials, public announcements, press releases, case studies, advertisements, and other forms of public communication. This right is granted solely for the purpose of highlighting the existence of the association between the parties and their respective roles in the collaboration.

Both parties agree to seek prior written approval from the other party before making any public statements or using any materials that include proprietary information or non-public details of the association, except for high-level, factual descriptions stating the use of the supplier's product by the client.

- 18.4 Each party agrees that the only rights and remedies available to it arising out of or in connection with a Representation shall be for breach of contract as provided in this Agreement.
- 18.5 In accordance with the Consumer Protection (Distance Selling) Regulations 2000, we offer a 14-day refund\cooling off policy for purchases made through selected partners/third party advertising platforms.

19. Severance

- 19.1 If any court or competent authority finds that any provision of this Agreement (or part of any provision) is invalid, illegal or unenforceable, that provision or part provision shall, to the extent required, be deemed to be deleted, and the validity and enforceability of the other provisions of this Agreement shall not be affected.
- 19.2 If any invalid, unenforceable or illegal provision of this Agreement would be valid, enforceable and legal if some part of it were deleted, the parties shall negotiate in good faith to amend such provision such that, as amended, it is legal, valid and enforceable, and, to the greatest extent possible, achieves the parties' original commercial intention.

20. Third-Party Rights

- 20.1 The Client and any of its Affiliates may enforce the terms of this Agreement subject to and in accordance with the provisions of this Agreement and the Contracts (Rights of Third Parties) Act 1999.
- 20.2 It is agreed that it is intended to confer a benefit on the Client and its Affiliates by making the E-Learning System and Services available to them in accordance with this Agreement, provided that the rights of such Affiliates under this Agreement shall only be enforceable by the Client on their behalf. The Client will owe no duty to enforce such rights and it may conduct or compromise any relevant proceedings as it sees fit.
- 20.3 Except as expressly provided in Clause 21.1 a person who is not a party to this Agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.
- 20.4 The rights of the parties to terminate, rescind or agree any variation, waiver or settlement under this Agreement is not subject to the consent of any person that is not a party to this Agreement.

21. Force majeure

- 21.1 Neither party shall be in breach of this Agreement nor liable for delay in performing, or failure to perform, any of its obligations under this Agreement if such delay or failure results from events, circumstances or causes beyond its reasonable control, and in such circumstances the affected party shall be entitled to a reasonable extension of the time for performing such obligations, provided that if the period of delay or non-performance continues for 180 days or more, the party not affected may terminate this Agreement by giving 30 days' written notice to the other party.

22. Notices

- 22.1 Any notice or other communication required to be given under this Agreement, shall be in writing and shall be delivered personally, or sent by pre-paid first-class post or recorded delivery or by commercial courier, to each party required to receive the notice or communication as set out below or as otherwise specified by the relevant party by notice in writing to each other party.

22.2 Any notice shall be deemed to have been duly received:

- (A) if delivered personally, when delivered;
- (B) if sent by pre-paid first-class post or recorded delivery, at 9.00 am on the second Business Day after posting; or
- (C) if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed.

22.3 A notice required to be given under this Agreement shall not be validly given if sent by email.

23. General

23.1 No failure or delay by a party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.

23.2 No variation of this Agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

23.3 Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties, constitute any party the agent of another party, nor authorise any party to make or enter into any commitments for or on behalf of any other party.

24. Governing Law and Jurisdiction

24.1 This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

24.2 The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non contractual disputes or claims).

This Agreement has been entered into on the date stated at the beginning of it.

Signed for and on behalf of the Client by :
Name:

Position



Signature

Date

25. Business requirements specification

The Supplier is contracted to host and deliver to the Client a fully functioning e-Learning System for use in a professional services environment. The E-Learning System shall be password protected and be accessible at the www.e-learningwmb.com/hosting/clientname location, by any standard browser and operating system listed below manufactured in the last 6 years:

25.1 Client Computer Specification

- (A) PC or Mac
- (B) Windows 7 or above, Mac OS X 10.5 (Leopard) or above, Modern Linux variant.
- (C) 32-bit colour graphics.
- (D) Keyboard and mouse

25.2 Mobile Specification

- (A) Smartphone running latest IOS/Android
- (B) Mobile Chrome, IE or Safari browser

25.3 Browsers

- (A) Microsoft Internet Explorer 10 or above.
- (B) Microsoft Edge any version
- (C) Firefox 3 or above.
- (D) Safari version 4 and above.
- (E) Google Chrome any version
- (F) Client-side JavaScript enabled for admin pages.
- (G) Opera

25.4 Bandwidth

- (A) Minimum bandwidth: 256 kbps
- (B) If using video uploads: 512 kbps

25.5 Server & Database Replication



In the event of the webserver provider's service being temporarily stopped - Open eLMS have implemented a synchronised website which should take over from the primary website. An additional server also synchronises the databases as an additional back up.

Details of the servers and their locations are:

Server 1: Primary

Address: <https://lms.e-learningwmb.co.uk/>

Provider: Microsoft Azure

Location: UK, London

IP: 78.144.1.23

Type: Dedicated

Designation: Primary

Services: MYSQL, Apache2, Mail server, iterative backups

Server 2: Secondary Website

Provider: Microsoft Azure

Location: Cardiff, Wales

IP: 78.144.1.22

Type: Dedicated

Designation: Secondary

Services: MYSQL, Apache2

Should the primary website go down, then users will automatically get redirected to the secondary website (this can take 2 minutes to propagate.)

A beta version of the E-Learning System will be supplied to the contractor in advance of final delivery to enable an internal review, and the Supplier will undertake reasonable amends to the system based on feedback supplied, within the terms of this agreement.

Upon delivery of the completed E-Learning System the Supplier will provide all necessary supporting documentation for satisfactory operation of the E-Learning System



26. Installation process

