

Appendix 5: Dynamic Purchasing System Agreement

Dynamic Purchasing System Agreement for the provision *****

THIS DYNAMIC PURCHASING AGREEMENT IS MADE ON THE _____ DAY

(“the DPS Agreement”)

BETWEEN:

Galway City Council and Reform whose offices are located at _____
(“the Contracting Authority”); and

[Insert name of DPS Member] whose principal place of business is at _____ (“the
DPS Member”)

(each a “Party” and together the “Parties”)

WHEREAS:

1. By Request to Participate in Dynamic Purchasing System (“DPS”) advertised in the supplement to the Official Journal of the European Union, OJEU Notice Number _____ of _____ and entitled “*Request for Applications to Participate in a Dynamic Purchasing System for the provision of ******” (“the RFATP”) the Contracting Authority invited Applicants to participate in a DPS agreement for the provision of the Services described in Appendix 1 of the RFATP (the “Services”). References to the RFATP shall include any clarifications in relation to the RFATP issued by the Contracting Authority via the messaging facility on www.etenders.gov.ie (the “Electronic Platform”) between **[insert date]** and **[insert date]** (the “ RFATP Clarifications”). The RFATP (including the RFATP Clarifications) is hereby incorporated by reference into this DPS Agreement.
2. The DPS Member submitted a response to the RFATP dated **[insert date of Application]** (“the Application”). References to the Application shall include any clarifications issued in writing via the Electronic Platform by the DPS Member to the Contracting Authority between **[insert date]** and **[insert date]** (the “Application Clarifications”). The Application (including the Application Clarifications) is hereby incorporated by reference into this DPS Agreement.
3. The DPS Member was appointed to the DPS as a result of the evaluation of its Application in accordance with the RFATP.

1. DEFINITIONS AND INTERPRETATION

“Commencement Date” means _____;

“Contract” means a contract which is awarded in accordance with this DPS Agreement;

“DPS Client” means any party identified in Part 1, paragraph 1.7 of the RFATP who may award Contracts pursuant to this DPS Agreement;

“DPS Term” means the period set out in Clause 2.5 of this DPS Agreement;

“Establishment Date of the DPS” means the date as defined at paragraph 1.6 of the RFATP;

“Month” means a calendar month;

“Prime Contractor” has the meaning set out in Part 1, paragraph 2.5 of the RFATP;

“Subcontractor” has the meaning set out in Part 1, paragraph 2.5 of the RFATP;

Unless otherwise specified herein, a defined term used in this DPS Agreement shall have the same meaning as assigned to it in the RFATP.

- 1.1 To the extent that any specific provision in a Contract is inconsistent or conflicts with any term or condition of this DPS Agreement, the relevant provision of the Contract shall prevail.
- 1.2 Headings are included for ease of reference only and shall not affect the construction of this DPS Agreement.
- 1.3 Unless the context requires otherwise, words in the singular may include the plural and vice versa.
- 1.4 References to any statute, enactment, order, regulation or other legislative instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended, unless specifically indicated otherwise.

2. APPOINTMENT OF DPS MEMBER, SCOPE AND TERM OF THE DPS AGREEMENT

- 2.1 In consideration of payment by the Contracting Authority of the sum of €2.00, the receipt of which is hereby acknowledged by the DPS Member, the DPS Member

accepts its appointment under the provisions of this DPS Agreement and agrees to comply with the terms of this DPS Agreement.

- 2.2 This DPS Agreement does not entitle the DPS Member to be consulted in respect of, or awarded any Contract during the DPS Term. The DPS Client(s) may at its or their sole discretion choose not to enter into any Contract pursuant to this DPS Agreement.
- 2.3 The Contracting Authority does not give any guarantee and/or warrant the actual value of any Services and/or number of Contracts (if any) which may be procured in connection with this DPS Agreement and the Parties acknowledge that the DPS Client(s) are not bound to enter into any Contract or other arrangement with the DPS Member as a result of entering into this DPS Agreement. Without prejudice to the foregoing the DPS Member hereby acknowledges that the Contracting Authority intends (but shall be under no obligation) to promote the DPS Agreement and to encourage use of the DPS Agreement by the DPS Client(s) and the DPS Member may be required to provide reasonable assistance in this respect.
- 2.4 This DPS Agreement does not confer exclusivity on any DPS Member. The DPS Clients may at their sole discretion opt to carry out a separate contract award procedure for contracts falling within the scope of this DPS Agreement. In this event, the DPS Client(s) shall observe all obligations at law and shall not afford any advantage to the DPS Member.
- 2.5 This DPS Agreement shall take effect on the Commencement Date and shall expire on the fifth anniversary of the Establishment Date of the DPS as defined at clause 1.6 of the RFATP, unless terminated earlier in accordance with this DPS Agreement.
- 2.6 "Not Used"
- 2.7 The DPS Member agrees that any information relating to this DPS Agreement and/or the performance of this DPS Agreement may be passed by the DPS Clients to the Contracting Authority and that the Contracting Authority may use this information in relation to the provision of the Services and in the analysis and reporting of spend data including the preparation and publishing of reports.

3. DPS AGREEMENT MANAGEMENT

- 3.1 The DPS Member hereby agrees and undertakes to comply with the DPS Agreement management provisions as set out in Annex 1 to this DPS Agreement or as may be notified in writing via the Electronic Platform by the Contracting Authority to the DPS Member from time to time.

- 3.2 The DPS Member shall provide up-to-date documentary evidence that each entity concerned fulfils the compliance and selection requirements as set out in Part 3 of the RFATP no later than five (5) calendar days following receipt of a request from the Contracting Authority.
- 3.3 Subcontractors nominated and relied upon by the DPS Member in their Application for admission to the DPS may not be changed throughout the Term of this DPS Agreement without the prior consent in writing of the Contracting Authority. The DPS Member must set out the rationale for the proposed change in Subcontractor. The responsibility will be on the DPS Member to demonstrate to the satisfaction of the Contracting Authority, including by way of submitting updated documentary evidence as set out in clause 3.2 of this DPS Agreement, that by changing Subcontractor the DPS Member continues to fulfil the compliance and selection requirements specified at part 3 of the RFATP.

4. CONTRACT

- 4.1 This DPS Agreement relates to the provision of the Services.
- 4.2 Where the DPS Member is awarded a Contract further to the procedure set out in accordance with clauses 5 and 6 below, it shall provide the Services to the DPS Client(s) in accordance with the Contract. Subject to the provisions of this DPS Agreement and to the satisfaction of any pre-conditions to the award of a Contract, the successful DPS Member shall be required to enter into the Contract with the DPS Client. In so far as any Contract(s) awarded under this DPS Agreement is in place and for the duration of such Contract(s), the provisions of this DPS Agreement shall continue in force in relation to such Contract(s) after the expiry, completion or termination of this DPS Agreement.

5. PROCEDURE FOR AWARD OF CONTRACTS

- 5.1 On each occasion that a DPS Client or group of DPS Clients propose(s) to award a Contract under this DPS Agreement, the Contracting Authority / DPS Client shall issue by electronic means a Request for Tenders ("RFT") to all DPS Members in accordance with the following procedure (a "Mini-Competition").
- 5.1.1 The RFT shall set out:
- the scope and term of the Contract to be awarded;
 - the specific DPS Client participating in each Mini-Competition;
 - the relevant Award Criteria;

- the deadline (date and time) for the receipt of responses to the RFT (each a “Response”) taking into account the complexity of the Contract and the time needed to prepare an appropriate Response. Responses received after the deadline will not be considered;
- the types and levels of insurance required for the Contract;
- the type of service(s) required by the DPS Client(s);
- the Pricing Matrix that will apply to the relevant Mini-Competition
- any additional conditions (if any) that will apply to the Contract to be awarded in addition to the terms and conditions of the Contract at Appendix 6 of the RFATP.

5.1.2 All Responses to the RFT must be submitted via the Electronic Platform only. Responses received in any other manner including e-mail or hardcopy will not be considered.

5.1.3 Any clarifications issued by the Contracting Authority or the DPS Client, as applicable, in relation to a RFT will be communicated via the Electronic Platform only.

5.1.4 The Contracting Authority/DPS Client may award a Contract following an evaluation of the Responses based on the award criteria set out in Clause 6.1 below

5.1.5 The Contracting Authority/DPS Client reserve the right to issue or seek written clarifications via the Electronic Platform.

6. MANDATORY REQUIREMENT AND AWARD CRITERIA

6.1 Award Criteria for Mini-Competitions

Mini Competition Tenders will be evaluated on the basis of a Qualitative/Cost assessment to determine the Most Economically Advantageous Tender (“MEAT”).

The Award Criteria shall include all, or some, of the following criteria:

No.	AWARD CRITERIA	WEIGHTING RANGE
1	Price	1% - 100%
2	Quality	1% to 100%

- 6.2 The DPS Client will require the DPS Member to whom it has decided to award a Contract to supply up-to-date evidence as set out in Section 3.1 and Section 3.2 of the RFATP. Where the DPS Member cannot provide up-to-date evidence as required in clause 3.2 of this DPS Agreement to demonstrate that each entity concerned meets the compliance and selection requirements specified at paragraphs 3.1 and 3.2 of the RFATP, then the DPS Client may proceed to offer the Contract to the next highest- ranked DPS Member for that Mini Competition.
- 6.3 No enforceable commitment of any kind, contractual or otherwise will exist unless and until a formal written Contract has been executed by or on behalf of the DPS Client.
- 6.4 The Contracting Authority/DPS Client(s) may cancel a Mini-Competition at any time prior to a Contract being executed by the DPS Client. Any notification of preferred bidder status by the Contracting Authority/DPS Client shall not give rise to any enforceable rights by the DPS Member.

7. APPLICABLE LAW AND JURISDICTION

- 7.1 This DPS Agreement and any Contract(s) awarded under it will be subject to the laws of Ireland and to the exclusive jurisdiction of the Irish courts.

8. COMPLIANCE WITH LAWS

- 8.1 The DPS Member shall comply with all applicable laws relating to the discharge of its obligations under this DPS Agreement and any and all Contract(s).

9 TAX CLEARANCE

- 9.1 The DPS Member shall comply with all EU and domestic taxation laws and requirements.
- 9.2 Prior to the award of any Contract, the DPS Member shall promptly supply its Tax Clearance Access Number and Tax Reference Number to facilitate online verification of their tax status by the Contracting Authority or any DPS Client. By supplying these numbers the DPS Member acknowledges and agrees that the Contracting Authority has the permission of the successful Applicant to verify its tax cleared position online. Where relevant, the provisions of this paragraph 9.2 apply equally to Subcontractors.

10. ANTI COMPETITIVE CONDUCT

- 10.1 Without prejudice to the generality of clause 8.1, the DPS Member shall comply with the Competition Act 2002 (as amended, the “2002 Act”). The 2002 Act makes it a criminal offence for Applicants to collude on prices or terms in a public procurement competition.

11. CONFLICTS OF INTEREST

- 11.1 Any actual or potential conflict of interest on the part of a DPS Member (including for the purposes of this clause 11 any employee(s), suppliers agents or Subcontractor) (a “Conflict”) must be fully disclosed to the Contracting Authority and any relevant DPS Client(s) immediately in writing via the Electronic Platform as soon as the Conflict becomes apparent to the DPS Member. In the event of any Conflict, the Contracting Authority and / or the DPS Client(s) may invite the DPS Member to propose means by which the Conflict might be removed. The Contracting Authority and / or the DPS Client(s) will, in their absolute discretion, decide on the appropriate course of action.

12. REGISTERABLE INTEREST

- 12.1 Any registerable interest involving a DPS Member and the Contracting Authority, any DPS Client, member of the Government, member of the Oireachtas (Parliament), or employees of the Contracting Authorities and/or divisions/agencies under the aegis of the relevant Ministers, and their relatives, must be fully disclosed in any Response. In the event of this information only coming to the notice of a DPS Member after the submission of a Response, it must be communicated to the Contracting Authority and / or DPS Client(s) immediately upon such information becoming known. The terms ‘registerable interest’ and ‘relative’ shall be interpreted as per Section 2 of the Ethics in Public Office Act 1995.

13. CONFIDENTIALITY

- 13.1 All communications between the Contracting Authority or any DPS Client(s) and the DPS Member must be treated as being strictly confidential. The DPS Member undertakes to comply with all reasonable directions of the Contracting Authority and any DPS Client with regard to the use and application of all and any confidential information and shall comply with the Confidentiality Agreement(s) executed by the DPS Member pursuant to clause 13.2 below. All of the DPS Member's employees and personnel, including Subcontractors and their employees and personnel, who provide the Services may be required, at the absolute discretion of the Contracting Authority and/or the DPS Client(s), to sign a confidentiality agreement in a format as determined by the Contracting Authority and/or the DPS Client(s).
- 13.2 The DPS Member shall execute a Confidentiality Agreement in the form set out at Appendix 7 to the RFATP.
- 13.3 No publicity regarding this DPS Agreement or any Mini-Competition or Contract pursuant to this DPS Agreement is permitted unless and until the Contracting Authority and any relevant DPS Client(s) has given their prior written consent to the relevant communication.

14 NOTICES

- 14.1 Any notice or other written communication to be given under this DPS Agreement shall be delivered through the Electronic Platform, via e-mail or in exceptional circumstances by post. The Parties will from time to time agree primary and alternative contact persons and details for the purposes of this clause 14.
- 14.2 All notices shall be deemed to have been served as follows:
- a. if personally delivered, at the time of delivery;
 - b. if posted by registered post, at the expiration of 48 hours after the envelope containing the same was delivered into the custody of the postal authorities (and not returned undelivered); and
 - c. if communicated by email, on the next calendar day following transmission.

15. GIFTS

- 15.1 The DPS Member shall not offer, give or agree to give to any person holding an office in the Contracting Authority or any DPS Client, any gift or consideration of any kind as an inducement or reward in relation to the obtaining or execution of any Contract. In the event of any breach of this clause 15.1, the Contracting Authority and the DPS Client(s) may terminate this DPS Agreement and any existing Contract(s) respectively and recover from the DPS Member any loss resulting from any such termination.

16. COSTS AND EXPENSES OF DPS AGREEMENT

- 16.1 All costs and expenses incurred by the DPS Member relating to its participation in this DPS Agreement and in any Mini Competition shall be borne solely by the DPS Member. Neither the Contracting Authority nor any DPS Client shall have any responsibility or liability for any costs or expenses of whatsoever nature incurred by the DPS Member in this regard.

17 TERMINATION

- 17.1 This DPS Agreement may be terminated by the Contracting Authority, without liability for compensation or damages, by serving one (1) month written notice to the DPS Member through the Electronic Platform.
- 17.2 The Contracting Authority shall have the right (in addition to any other rights which it has at law) to terminate this DPS Agreement immediately and without liability for compensation or damages on the happening of any of the following events:
- 17.2.1 if the DPS Member commits any serious breach or a series of breaches of any provision of this DPS Agreement and fails to remedy such breach(es) to the reasonable satisfaction of the Contracting Authority, (if the breach(es) are capable of remedy), within 30 days after receipt of a request in writing via the Electronic Platform from the Contracting Authority. Without prejudice to the generality of the foregoing, a failure to comply with the DPS Agreement management provisions as set out in Annex 1 to this DPS Agreement shall be deemed to be a serious breach of this DPS Agreement;
- 17.2.2 if the DPS Member commits any serious breach or a series of breaches of any Contract awarded pursuant to this DPS Agreement and fails to remedy such breach(es) to the reasonable satisfaction of the Contracting Authority and the DPS Client(s), within 30 days after a receipt of a request in writing via the Electronic Platform from the Contracting Authority or any DPS Client.
- 17.2.3 if the DPS Member becomes insolvent, becomes bankrupt, is wound up, enters into examinership, commences winding up, has a receiving order made against it, makes any arrangement with its creditors generally or takes or suffers any similar action as a result of debt, or an event having an equivalent effect;
- 17.2.4 in circumstances where the Contracting Authority becomes aware that any of the exclusion grounds listed in Regulation 57 of the European Union (Award of Public Authority Contracts) Regulations 2016 (SI 284 of

2016) apply to the DPS Member;

- 17.2.5 In circumstances where the DPS Member fails to provide up-to-date evidence when requested to do so by the Contracting Authority in accordance with clause 3.2 of this DPS Agreement to demonstrate to the satisfaction of the Contracting Authority that they meet the compliance and selection requirements specified at Part 3 of the RFATP;
- 17.2.6 In circumstances where the DPS Member changes the Subcontractor(s) nominated and relied upon by the DPS Member in their Application for admission to the DPS but fails to demonstrate to the satisfaction of the Contracting Authority, including by way of submitting updated documentary evidence as required in clause 3.2 of this DPS Agreement, that by changing Subcontractor the DPS Member continues to fulfil the compliance and selection requirements specified at Part 3 of the RFATP;
- 17.2.7 in circumstances where the Contracting Authority becomes aware of any conflict of interest on the part of the DPS Member which cannot, in the opinion of the Contracting Authority, be removed by other means; and
- 17.2.8 in circumstances where the Contracting Authority becomes aware of any registrable interest on the part of the DPS Member.
- 17.3 Subject to clause 17.2.2, the termination of a Contract awarded under this DPS Agreement does not affect the validity of this DPS Agreement.
- 17.4 Termination of this DPS Agreement shall not affect any antecedent and accrued rights, obligations or liabilities of either Party, nor shall it affect any provision of this DPS Agreement which is expressly or by implication intended to come into or continue in force on or after such termination.

18. FREEDOM OF INFORMATION

- 18.1 The DPS Member acknowledges that the Contracting Authority and or the DPS client is subject to the Freedom of Information Act 2014 and the European Communities (Access to Information on the Environment) Regulations 2007 to 2014. Information furnished to the Contracting Authority or the DPS client by the DPS Member may be released pursuant to the Contracting Authority's or the DPS client's statutory obligations. If the DPS Member considers that any of the information supplied by it to the Contracting Authority or the DPS client under this DPS Agreement or any Contract should not be disclosed because of its sensitivity it should, when providing the information, indicate this and specify the reason for its sensitivity. The Contracting Authority or the DPS client will consult the DPS Member about this sensitive information before making a decision on any Freedom of Information request received. The Contracting Authority and or the DPS client accepts no liability

whatsoever in respect of any information provided which is subsequently released (irrespective of notification) or in respect of any consequential damage suffered as a result of such obligations.

19. DISPUTE RESOLUTION

- 19.1 In the event of any dispute arising out of or relating to membership of this DPS Agreement (the “Dispute”), the Parties shall first seek settlement of the Dispute as set out below.
- 19.2 The Dispute shall be referred as soon as practicable to [insert DPS Member senior contact] within the DPS Member and to the Professional Services Category Manager within the Contracting Authority respectively.
- 19.3 If the Dispute has not been resolved within fifteen (15) Business Days (or such longer period as may be agreed in writing via the Electronic Platform by the Parties) of being referred to the nominated representatives, then either Party may refer the Dispute to an independent mediator, the identity of whom shall be agreed in advance by the Parties.
- 19.4 If the Parties are unable to agree on a mediator or if the mediator agreed upon is unable or unwilling to act, either Party may within twenty-one (21) days from the date of the proposal to appoint a Mediator or within twenty-one (21) days of notice to either Party that the mediator is unable to act, apply to the Mediator’s institute of Ireland to appoint a mediator.
- 19.5 Any submissions made to and discussions involving the mediator, of whatever nature, shall be treated in strict confidence and without prejudice to the rights and/or liabilities of the Parties in any legal proceedings and, for the avoidance of doubt, are agreed to be without prejudice and legally privileged. The Parties shall make written submissions to the mediator within ten (10) Business Days of his/her appointment.
- 19.6 The Parties shall share equally the cost of the mediator. The costs of all experts and any other third parties who, at the request of any Party, shall have been instructed in the mediation, shall be for the sole account of, and shall be discharged by that Party.
- 19.7 For the avoidance of doubt, the obligations of the Parties under this Agreement shall not cease, or be suspended or delayed by the reference of a dispute to mediation. The DPS Member shall comply fully with the requirements of the Agreement at all times.
- 19.8 If, and to the extent that, any Dispute has not been settled pursuant to the mediation within 30 days of the commencement of the mediation, either party may apply to the Irish courts at any time thereafter.

IN WITNESS WHEREOF this DPS Agreement has been executed by the Parties hereto as of the date first above written.

SIGNED by _____, being an Officer so authorised by the CONTRACTING AUTHORITY in the presence of: _____ Witness	SIGNED by _____, being an Officer so authorised by the DPS MEMBER in the presence of: _____ Witness
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