



# **Terms and Conditions**

**FOR THE PROVISION OF SERVICES  
(Business Solutions)**

**June 2013**

## 1 Definitions and interpretation

1.1 The expressions which follow are given these meanings unless the context in which they are used requires a different meaning:

**"Agreement"** means the agreement between Cobalt Water and the Client consisting of the Proposal (incorporating these terms and conditions) and the Client's acceptance of the Proposal;

**"Business Day"** means a day which is not a Saturday, Sunday or a day which has been designated as a bank holiday in Scotland in terms of the Banking and Financial Dealings Act 1971;

**"Cobalt Water"** means Cobalt Water Ltd, company number SC 448118, whose registered office is at Gibbysyard, Auchincruive Country Estate, Ayr, Ayrshire, KA6 5HN;

**"Client"** means the person to whom the Services are to be provided;

**"Default Rate"** means the rate of 4% per annum above the Bank of England's bank rate from time to time in force;

**"EISR"** means the Environmental Information (Scotland) Regulations 2004 and any subordinate legislation made under those Regulations from time to time together with any guidance and/or codes of practice issued by the Scottish Ministers in relation to such legislation;

**"FOISA"** means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under that Act from time to time together with any guidance and/or codes of practice issued by the Scottish Ministers in relation to such legislation;

**"Force Majeure Event"** means and is limited to:

(a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation, earthquakes, riot and civil commotion;

(b) any national shortage of fuel;

(c) war, civil war, armed conflict or terrorism; or

(d) nuclear, chemical or biological contamination,

(e) failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;

(f) any requirement of a Regulator (including any condition applicable to a water services licence or sewerage services licence held by Cobalt Water, or any directions issued to Cobalt Water under section 8(2) or section 11(2) of the Water Services etc (Scotland) Act 2005) compliance with which would be inconsistent with the performance by Cobalt Water of any of its obligations under this Agreement. unless the event arises (directly or indirectly) as a result of any wilful act or default of the affected Party;

**"Good Industry Practice"** means the standard of skill, care and attention which would reasonably and ordinarily be expected from a person of the same discipline experienced in providing services which are the same as, or similar to, the Services;

**"Intellectual Property Rights"** means any of these rights, namely

(a) patents, trade marks, rights in designs, get up, trade, business or domain names, copyrights, including rights in computer software and databases (including database rights and topography rights), in each case whether registered or not and, where these rights can be registered, any applications to register or rights to apply for registration of any of them;

(b) rights in inventions, know-how, trade secrets and other confidential information; and

(c) any other intellectual property rights which may exist at any time in any part of the world;

**"Law"** means (a) any statute or delegated or subordinate legislation (including orders or byelaws),

(b) any enforceable community right within the meaning of section 2(1) of the European Communities Act 1972,

(c) any applicable guidance, notice, direction, determination or code of practice with which Cobalt Water or the Client (as the context requires) is bound to comply and

(d) any applicable judgement or decree of a relevant court of law which is binding authority in Scotland;

**"Materials"** means any and all drawings, reports, models, specifications, bills of quantities, calculations, documents, information and others (including any software used to generate them) used or to be used in connection with the Services;

**"Party"** means a party to this Agreement and **Parties** shall be construed accordingly;

**"Pricing Arrangements"** means the price, payment profile and payment terms specified in section 4 of the Proposal;

**"Programme"** means the programme for the provision of the Services specified in section 3 of the Proposal;

"**Proposal**" means the offer from Cobalt Water to the Client to provide the Services;

"**Regulator**" means any regulator or regulatory body (including the Water Industry Commission for Scotland) to which either Party is subject from time to time or whose consent, approval or authority is required so that either Party can lawfully carry on its business or any part of its business;

"**Required Consents**" means all permissions, consents, approvals, certificates, permits, licences and authorisations of a Regulator required for the performance of any of a Party's obligations under this Agreement;

"**Services**" means the services (including any goods, articles or materials to be supplied, and any works to be carried out) to be provided by Cobalt Water to the Client at the Site as specified in section 3 of the Proposal;

"**Site**" means the site or sites at which the Services are to be provided; and

"**VAT**" means value added tax properly chargeable under the Value Added Tax Act 1994 and any similar tax which may replace the same at any time.

1.2 In this Agreement (except where the context otherwise requires):

1.2.1 any reference to a clause or section is to the relevant clause or section of this Agreement;

1.2.2 headings are for the convenience of the Parties only;

1.2.3 the singular includes the plural and vice versa and reference to any gender includes the other genders;

1.2.4 any reference to a person such as a company, a firm or an individual will include other corporate bodies and unincorporated associations and vice versa;

1.2.5 any reference to a statute, statutory provision or subordinate legislation ("legislation") shall be construed as referring to such legislation as amended and in force from time to time and to any legislation which (either with or without modification) re-enacts, consolidates or enacts in rewritten form any such legislation;

1.2.6 any phrase introduced by the terms "including", "include", "in particular" or any similar expression shall be construed as illustrative and shall not limit the sense of the words which precede those terms.

## **2 Commencement and term**

This Agreement shall be deemed to be effective from the date of receipt by Cobalt Water of the Client's acceptance of the Proposal and shall continue in force insofar as and for as long as necessary in order to give effect to the respective rights and obligations of the Parties under this Agreement.

## **3 Access and Site conditions**

The Client shall afford Cobalt Water continuous and uninterrupted access to such parts of the Site and at such times during the Client's normal working hours (or at such other times as the Parties may agree) as are reasonably necessary for the purpose of or in connection with the provision of the Services.

Cobalt Water may with the prior agreement of the Client, use such supplies of electricity, water, gas and any other services as may from time to time be available at the Site, and shall if requested by the Client make reasonable payment for same.

Cobalt Water shall be responsible for the safe reception, unloading and care of plant and equipment to be used in connection with the Services at the Site and shall provide all necessary facilities for the storage, cover and security of such plant and equipment. All such items shall be sited or deposited as directed by the Client.

Cobalt Water shall on completion of the Services remove any such plant and equipment from the Site.

If during provision of the Services at the Site Cobalt Water encounters physical conditions which could not reasonably have been foreseen at the time of preparation of the Proposal and which may materially and adversely affect the provision by Cobalt Water of the Services in accordance with this Agreement, Cobalt Water shall inform the Client forthwith and the Parties shall discuss and agree the proposed methodology for dealing with such physical conditions, including (where relevant) any required variations to this Agreement.

All minerals, metals, objects and other things found on or discovered on, under or around the Site shall (as between Cobalt Water and the Client) be the property of the Client and shall be dealt with as the Client may direct.

## 4 The Services

4.1 In consideration of payment by the Client in accordance with clause 5, Cobalt Water shall provide the Services for the Client at the Site.

4.2 Cobalt Water undertakes to the Client that the Services will be provided using competent and properly trained personnel and in accordance with:

4.2.1 Good Industry Practice;

4.2.2 all Laws and regulatory requirements applicable to the provision of the Services;

4.2.3 all Required Consents;

4.2.4 all policies and working procedures of the Client (including the Client's health and safety policy) made known by the Client to Cobalt Water and all lawful and reasonable directions, instructions and requests made by the Client;

4.2.5 the other terms of this Agreement (including any authorised variations thereto).

4.3 In providing the Services, Cobalt Water shall:

4.3.1 take reasonable care to ensure that it does not interfere with the operations of the Client, its employees or any third party;

4.3.2 only access those parts of the Site that the Client has confirmed may be accessed by Cobalt Water.

4.4 Cobalt Water will supply all equipment and materials necessary for the proper provision of the Services, except for any equipment and materials which the Client has agreed to supply for these purposes.

4.5 Cobalt Water shall ensure that all equipment and materials provided by it in accordance with clause 4.4 conform to the latest relevant British or European Standards specification (where such specification exists), and in providing the Services shall use all equipment and materials (whether provided by it or by the Client) in accordance with the relevant manufacturer's instructions.

## 5 Payment

5.1 In consideration of the provision of the Services by Cobalt Water, the Client will pay Cobalt Water in accordance with the Pricing Arrangements.

5.2 All amounts payable under this Agreement are exclusive of VAT which will be paid by the Client, as appropriate, at the rate for the time being required by Law.

5.3 If any amount due and payable is not paid by the date for payment specified in the Pricing Arrangements, interest on the outstanding amount shall accrue at the Default Rate from that date until payment in full.

## 6 Title and risk

Title in any materials, components and equipment to be supplied by Cobalt Water in connection with the Services shall pass to the Client on the later of delivery to the Site and payment by the Client in accordance with the Pricing Arrangements. Risk in any materials, components and equipment to be supplied by Cobalt Water in connection with the Services shall pass to the Client on delivery to the Site.

## 7 Confidentiality

7.1 Cobalt Water and the Client shall each ensure that all confidential information which comes into its possession or control pursuant to or in the course of the negotiation, implementation or performance of this Agreement relating to the products, services, processes, procedures, operation or management or otherwise to the affairs of the other, including for the avoidance of doubt any such information which is marked as confidential or otherwise designated as confidential (whether orally or in writing) or which by its nature is clearly confidential ("**Confidential Information**") shall not be disclosed to any third party except where disclosure is expressly permitted by the provisions of this Agreement, or with the express prior written consent of the disclosing Party.

7.2 For the avoidance of doubt each Party will be responsible for ensuring compliance by its employees, independent contractors and subcontractors with its obligations under this clause 7.

7.3 Nothing in this clause 7 shall apply:

7.3.1 to the disclosure of any Confidential Information lawfully in the possession of the receiving Party before the disclosure of that Confidential Information to it under or in connection with this agreement;

7.3.2 to any disclosure or use by the receiving Party of Confidential Information to which the other Party has consented in writing;

7.3.3 to any Confidential Information which before it is obtained by the receiving Party is in the public domain, or after it is obtained by the receiving Party enters the public domain, in either case otherwise than as a result of a breach by the receiving Party of its obligations under this clause 7;

7.3.4 to the disclosure of any Confidential Information to any person if and to the extent that the receiving Party is required to make such disclosure to such person, and such disclosure is made in good faith in compliance with any Law (other than FOISA or EISR, in relation to which disclosure of Confidential Information is governed by clause 9), in response to a requirement of a Regulator or pursuant to any judicial or arbitral process or tribunal having jurisdiction in relation to the receiving Party; or

## **8 Personal information**

This clause 8 applies to information which is "personal data" within the meaning of the Data Protection Act 1998. The terms of this clause 8 apply in addition to any other consents the Client may have given Cobalt Water in relation to the use of information about the Client, for example via the privacy policy on our website.

Information which the Client provides or which Cobalt Water holds about the Client (whether or not under this Agreement) may be used by Cobalt Water and those to whom Cobalt Water discloses that information (in terms of clause 8.3) to:

8.1.1 identify the Client when the Client contacts Cobalt Water;

8.1.2 contact the Client (unless the Client has notified Cobalt Water that it does not wish to be contacted) and provide the Client with information or promotional and other offers from Cobalt Water or selected third parties whose products or services Cobalt Water believes may be of interest to the Client.

For these purposes, Cobalt Water may use an automatic scoring system which uses the information provided by the Client, any information Cobalt Water holds about the Client and information from other agencies, including credit reference agencies. Cobalt Water may contact the Client by mail, e-mail, phone, visit, text or multimedia messages;

8.1.3 help run any accounts, services and products Cobalt Water has provided before, now or in the future;

8.1.4 carry out marketing analysis and customer profiling and create statistical and testing information;

8.1.5 help to prevent and detect fraud or loss;

8.1.6 make any disclosures required by Law, a Regulator or a court order;

8.1.7 make disclosures to a Regulator or anyone engaged on behalf of a Regulator;

8.1.8 establish, defend or exercise legal rights or for or in connection with legal proceedings; and

8.1.9 protect the health and safety of the public in an emergency or in the interests of national security.

Cobalt Water may disclose information which the Client provides, to other people and organisations, including (but not limited) to:

8.1.10 any of Cobalt Water's group companies from time to time;

8.1.11 any contractor duly appointed by Cobalt Water to process that information on Cobalt Water's behalf, including (but not limited to) any such contractor to which Cobalt Water has outsourced the operation of any part of Cobalt Water's business or of any part of Cobalt Water's systems or which Cobalt Water has appointed to provide services to support Cobalt Water's systems or any other part of Cobalt Water's business;

8.1.12 credit reference and fraud prevention agencies (as further referred to in clause 8.5);

8.1.13 any prospective and/or actual buyer of Cobalt Water's business and/or assets or shares;

8.1.14 a Regulator or anyone engaged on behalf of a Regulator, the courts and emergency services; and/or

8.1.15 Cobalt Water's professional advisers.

From time to time, these other people and organisations may be outside the European Economic Area in countries that do not have the same standards of protection for personal data as the United Kingdom.

Cobalt Water may monitor and record communications with the Client (including phone conversations and e-mails) for quality assurance, compliance and fraud or money laundering detection and prevention.

Cobalt Water may check Client details with one or more licensed credit reference and fraud prevention agencies. Cobalt Water and they may keep a record of this search and the payment details from the Client's account, and share it with other organisations. If any person provides false or inaccurate information and Cobalt Water suspects fraud, this is also recorded. This information may be used by Cobalt Water, and other organisations may search these records to:

- 8.1.16 trace debtors, recover debt, prevent fraud, and manage the Client's accounts or any insurance policies;
- 8.1.17 check the Client's identity to prevent money laundering, unless the Client gives Cobalt Water other satisfactory proof of identity; and
- 8.1.18 carry out statistical analysis about credit, insurance and fraud.

Cobalt Water, and other credit and insurance organisations, may also use technology to detect and prevent fraud. If the Client needs details of those credit agencies and fraud prevention agencies from which Cobalt Water gets, and with which Cobalt Water records, information about the Client, the Client should write to Cobalt Water's Data Protection Manager at Gibbseyard, Auchincruive Country Estate, Ayr, KA6 5HN (or at such other address as may be specified by notice given in accordance with clause 16).

If the Client gives Cobalt Water information on behalf of some other person, the Client confirms that the Client has given that other person the information set out in this clause 8, and that they have agreed to their personal information being used in the way described in this clause 8. If the Client gives Cobalt Water sensitive information about the Client or some other person (such as special needs details for invoices), the Client agrees (and confirms that the relevant subject of the information has agreed) to Cobalt Water processing this information in the way set out in this clause 8.

If the Client is making a joint application or if the Client has told Cobalt Water about some other financial association with someone else, a 'financial association' between the Client and that other person (or people) will be made at credit reference agencies. This will link the Client's financial records with that other person (or people) so that both (or all) of the records will be taken into account in all future applications by either or both (or all) of the Client and that other person (or people). This will continue until one person successfully files a notice with the credit reference agencies asking for the financial association with that other person (or people) to be removed.

## **9 Freedom of Information**

The Client acknowledges that Cobalt Water is a Scottish public authority within the meaning of FOISA and as such is subject to the requirements of FOISA and EISR. If and to the extent reasonably requested to do so, the Client shall cooperate with Cobalt Water to assist Cobalt Water in complying with its obligations under FOISA and EISR.

9.1 The Client acknowledges and agrees that Cobalt Water may, if and to the extent required to do so in terms of FOISA or EISR, disclose any Confidential Information (as defined in clause 7.1) of the Client, or any other information in Cobalt Water's possession which was provided to Cobalt Water by the Client under or in connection with this Agreement or which relates to the Client in any way (the "**Client's Information**").

9.2 Cobalt Water agrees that in any case where it receives a request for information in respect of any of the Client's Information, it will give the Client notice in writing of that request within five (5) Business Days of its receipt thereof, and will give the Client the opportunity to express its views as to whether or not Cobalt Water is required to disclose that information under FOISA or EISR (whichever is applicable). In any case where Cobalt Water decides that it intends to disclose any of the Client's Information pursuant to a request for information, Cobalt Water will give the Client notice in writing to that effect at least five (5) Business Days prior to the date on which it intends to make such disclosure.

## **10 Intellectual property**

The Intellectual Property Rights in the Materials shall remain vested in Cobalt Water. Notwithstanding the foregoing, and subject to the payment of any amounts due to Cobalt Water by the Client under this Agreement, the Client shall have and Cobalt Water hereby grants an irrevocable, royalty-free, non-exclusive licence to copy, use and reproduce the Materials and the designs contained within them for any purposes relating to the Client's interest in the Site or a part of the Site, except in relation to any extension of the Client's interest in the Site. The Client shall not assign (whether wholly or partly) the licence granted under this clause without the prior written consent of Cobalt Water.

Cobalt Water shall provide to the Client such copies of the Materials as the Client may require, subject to payment in advance of reasonable copying, administrative, delivery and other charges or disbursements.

The Client consents to licences in the same terms as the licence referred to in clause 10.1 being granted by Cobalt Water (in its sole discretion) to any third party acquiring the Client's interest in the Site or a part of the Site, or having or obtaining a heritable or tenancy interest in an adjoining or other site.

Cobalt Water expressly retains in its favour and in favour of its nominees all moral rights which it has or may have as author of the Materials under the Copyright Designs and Patents Act 1988.

Cobalt Water shall not be liable for any use of the Materials for any purpose other than that for which they were prepared by Cobalt Water or on its behalf.

For avoidance of doubt, the provisions of this clause 10 shall survive termination of this Agreement for any reason whatsoever.

## **11 Liability**

11.1 Subject to clause 11.2, Cobalt Water shall not be liable to the Client:

11.1.1 as a result of breach of this Agreement, in respect of loss of revenue, loss of profit, loss of contract, business interruption, or any consequential or indirect loss of any nature whatsoever, howsoever caused; or

11.1.2 for any loss or damage resulting from defects (including latent defects) in any equipment or materials provided by the Client in connection with the Services;

11.1.3 for any direct loss or damage in excess of £5 million Sterling per event or series of related events, whether caused by breach of contract (including this Agreement), negligence or breach of statutory duty or arising in any other way.

11.2 The limits and exclusions of liability set out in clause 11.1 do not apply to liability for death or personal injury, loss caused by fraud, or any other loss which by Law cannot be excluded or limited.

## **12 Insurance**

12.1 Cobalt Water shall, at all times while this Agreement is in force, effect and maintain with insurers authorised and regulated by the Financial Services Authority under the Financial Services and Markets Act 2000:

12.1.1 public liability insurance;

12.1.2 employer's liability insurance; and

12.1.3 civil liability insurance (including professional indemnity insurance), in the case of public liability with an aggregate level of cover of not less than £5 million Sterling for any one event and unlimited as to the number of events; in the case of employer's liability with an aggregate level of cover of not less than £10 million Sterling for any one event and unlimited as to the number of events; in the case of professional indemnity insurance with an aggregate level of cover of not less than £5 million for all claims in the aggregate in any one period of insurance. Cobalt Water shall, upon request, produce to the Client documentary evidence that the above insurances are and remain in place.

## **13 Termination**

13.1 Either Party (the "**Terminating Party**") shall be entitled to terminate this Agreement forthwith by notice to the other Party if:

13.1.1 the other Party (the "**Defaulting Party**") commits any material breach of any term of this Agreement and which (in the case of a breach capable of being remedied) the Defaulting Party shall not have remedied within thirty (30) Business Days of receipt by the Defaulting Party of written notice from the Terminating Party requiring the Defaulting Party to remedy the same; or

13.1.2 the Defaulting Party shall convene a meeting of its creditors, or if a proposal shall be made for a voluntary arrangement within Part I of the Insolvency Act 1986, or a proposal for any other composition scheme or arrangement with (or assignment for the benefit of) its creditors shall be made; or

13.1.3 the Defaulting Party shall be unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986; or

13.1.4 a trustee, receiver, administrative receiver, administrator, judicial factor, manager or similar officer is appointed in respect of all or any part of the business or assets of the Defaulting Party; or

13.1.5 if a petition is presented or a meeting is convened for the purpose of considering a resolution, or other steps are taken, for the winding up of the Defaulting Party or for the making of an administration order (otherwise than for the purpose of an amalgamation or reconstruction) or if the other Party is the subject of a moratorium; or

13.1.6 the Defaulting Party is the subject of any event in any country outside Scotland where it has assets which is analogous to any of the events described in clauses 13.1.2 to 13.1.5 (both inclusive).

13.2 Any termination of this Agreement (however it occurs) shall be without prejudice to any other rights or remedies a Party may be entitled to hereunder or at law and shall not affect any accrued rights or liabilities of either Party. In addition, termination will not affect any provision of this Agreement that is expressly or by implication intended to come into or continue in force on or after such termination.

#### **14 Force Majeure**

14.1 Neither Party will be liable for any delay in performing their obligations under this Agreement where such delay is directly caused by a Force Majeure Event.

14.2 Subject to the Party who is the subject of a Force Majeure Event:

14.2.1 immediately telling the other Party in writing of the reasons for the delay and the likely duration of the delay; and

14.2.2 using reasonable efforts to perform its obligations under this Agreement, the performance of that Party's obligations will be suspended during the period that those circumstances persist and that Party will be granted an extension of time for performance equal to the period of the delay.

14.3 Save where the delay is caused by the act or failure to act of the other Party (in which event the rights, remedies and liabilities of the parties will be those conferred by the other terms of this Agreement and by Law) any costs arising from that delay will be borne by the Party incurring the same.

14.4 If a Force Majeure Event prevails for a continuous period of three months, either Party may terminate this Agreement by giving 14 days' written notice to the other Party.

#### **15 Assignment and Subcontracting**

15.1 Neither Party shall without the prior written consent of the other Party assign, transfer, charge or deal in any other manner with this Agreement or any of its rights under it, or purport to do any of the same.

15.2 Cobalt Water may subcontract with any person or appoint any agent, consultant or contractor to perform any part of this Agreement without the Client's consent.

#### **16 Notices**

16.1 Any notice to be given under this Agreement shall be in writing (other than by email) and shall be sent by delivering it personally or by sending it by first class recorded delivery post to the addresses for Cobalt Water and the Client specified in this Proposal (or to such other address as may be specified by notice given in accordance with this clause

16).

16.2 Any such notice shall be deemed to have been received:

16.2.1 in the case of delivery by hand, when delivered; and

16.2.2 in the case of first class recorded delivery post, on the second Business Day following the day of posting.

## **17 General**

17.1 In the event of any inconsistency or conflict between these terms and conditions, and any other provision forming part of the Proposal, the former shall prevail.

17.2 The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of the remaining provisions of this Agreement.

17.3 This Agreement sets out the entire agreement between the Parties in respect of the subject matter hereof, and supersedes all prior representations, arrangements, understandings and agreements between the Parties relating to such subject matter.

17.4 In entering into this Agreement, neither Party has relied on any representation, arrangement, understanding or agreement (whether oral or in writing) not expressly set out or referred to in this Agreement. Notwithstanding the foregoing, nothing in the Agreement shall exclude liability for fraudulent misrepresentations.

17.5 No failure to exercise, not any delay in exercising, on the part of a Party any right, power or remedy under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or remedy prevent any further or other exercise thereof or the exercise of any other right, power or remedy. Except as otherwise expressly provided in this Agreement, the rights and remedies provided herein are cumulative and not exclusive of any rights or remedies provided by Law.

17.6 Nothing herein contained shall be construed as giving rise to the relationship of partnership or joint venture between the Parties, is intended to or shall to authorise either Party to act as agent for the other, and neither Party shall have authority to act in the name or on behalf of or otherwise to bind the other in any way. The law of Scotland shall apply to this Agreement, and any disputes in connection with this Agreement will be subject to the exclusive jurisdiction of the Scottish courts.