**Delivery Partner Dynamic Purchasing System - Access Agreement**

This **ACCESS AGREEMENT** is made on Date

**BETWEEN:**

1. **The Homes and Communities Agency (trading as Homes England)** of One Friargate Coventry CV1 2GN(“**Homes England**"); and

(2) [**DPS User**] of [Address of DPS User] (“the DPS User”)

**BACKGROUND**

1. Homes England (acting as Central Purchasing Body on behalf of itself and the other contracting authorities defined as Other Customers in Clause 1 of the DPS Agreement) has set up the DPS to procure housing-led development across nine geographical areas. The DPS runs for a period of 10 years from 1st September 2021 or such other period as may be determined by Homes England.
2. Homes England requires that any contracting authorities who wish to procure Development Activities through the DPS enter into this Agreement with Homes England to regulate the use and operation of the DPS.
3. Under this Agreement, the DPS User may enter into Project Agreements for Development Activities in accordance with the provisions of this Agreement and the DPS Agreement

IT IS AGREED as follows:

1. **Interpretation**
   1. The following terms and expressions shall have the meanings ascribed to them:

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| **“Agreement”** | means this access agreement |
| **“Call for Competition Procedure”** | means the competition process through which a DPS User selects a DPS Member from the DPS for the appropriate georgraphic area and development type in accordance with the call for competition procedure in Schedule 4 of the DPS Agreement; |
| **“Confidential Information”** | means all commercial or strategic planning, intentions, modus operandi, finances, proposals, projects, plans and specifications, confidential designs, drawings, data, specifications, manufacturing processes, testing procedures and all other technical, business and similar information relating to a DPS User’s, Homes England's or a DPS Member’s business and affairs (including DPS Information), its customers, employees and suppliers or otherwise relating to this Agreement, DPS Agreement, Project Agreement or Development Activities including all readable data, logic, logic designs, flowcharts, source or object codes, listings, test data, test routines, diagnostic programs, software programs or other material |
| **“Development Activities”** | means the activities falling within the Scope of Activities set out in Schedule 2 of the DPS Agreement |
| **“Direct Losses”** | means all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses save where such Indirect Losses form part of the liability, action, proceedings and/or demand asserted against a person; |
| **“DPS”** | Means the Delivery Partner Dynamic Purchasing System for housing-led development procured by Homes England pursuant to a contract notice published on 24th May 2021 in the UK Find a Tender Service under reference 2021/S 000-011460 |
| **“DPS Agreement”** | means the agreement entered into between Homes England and each of the DPS Members |
| **“DPS Information”** | means any information provided by Homes England to the DPS User in connection with this Agreement including the list of DPS Members, DPS Member contact details, and copies of the relevant DPS Agreements |
| **“DPS Member”** | means a Member as defined in the DPS Agreement |
| **“DPS User”** | means the entity named at the start of this Agreement, which is a Contracting Authority as defined in the Public Contracts Regulations 2015; |
| **“EIR”** | means the Environmental Information Regulations 2004, and any subordinate legislation made under that Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such legislation; |
| **“EIR Exception”** | means any applicable exemption to EIR |
| **“Exempted Information”** | means any Information that is designated as falling or potentially falling within the FOIA Exemptions or the EIR Exceptions |
| **“FOIA”** | means the Freedom of Information Act 2000, and any subordinate legislation made under that Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such legislation; |
| **“FOIA Authority”** | means a public authority as defined by FOIA and / or EIR |
| **“FOIA Exemption”** | means any Information that is designated as falling or potentially falling within the FOIA Exemptions or the EIR Exceptions. |
| **“Indirect Losses”** | means loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or any indirect loss of any nature; |
| **“Information”** | means in relation to:  (i) FOIA, the meaning given under section 84 of the FOIA and which is held by Homes England ora FOIA Authority at the time of receipt of an RFI; or  (ii) EIR, has the meaning given under the definition of “environmental information” in section 2 of EIR and which is held by Homes England or a FOIA Authority at the time of receipt of an RFI; |
| **“Intellectual Property Rights”** | shall include without limitation all rights to, and any interests in, any patents, designs, trademarks, copyright, know-how, trade secrets and any other proprietary rights or forms of intellectual property (protectable by registration or not) in respect of any technology, concept, idea, data, program or other software (including source and object codes), specification, plan, drawing, schedule, minutes, correspondence, scheme, formula, programme, design, system, process logo, mark, style, or other matter or thing, existing or conceived, used, developed or produced by any person; |
| **"Losses"** | means any Direct Loss and/or Indirect Loss suffered or incurred that arise out of or in connection with any or all of the following:  (a) any delay in the procurement of the DPS;  (b) any finding that the DPS or any Project Agreement has not been procured in compliance with the Public Contracts Regulations 2015  (c) any declaration that the award of the DPS or any Project Agreement is ineffective; and  (d) any claim brought by a DPS Member against a person under the DPS Agreement or any Project Agreement;  (e) any failure, act or omission in relation to the procurement of the DPS or any Project Agreement  (f) any misrepresentation misstatement, negligent or other tortious act or omission arising in connection with the procurement of the DPS |
| **“Project Agreement”** | means a Project Agreement as defined in the DPS Agreement; |
| **“Regulations”** | means the Public Contracts Regulations 2015 as amended or updated from time to time; |
| **“Request for Information/RFI”** | shall have the meaning set out in FOIA or any request for information under EIR which may relate to this Agreement, Project Agreement or Development Activities or any activities or business of Homes England / the FOIA Authority |

1.2 In this Agreement, unless the context otherwise requires, words importing a gender include every gender, references to the singular include the plural and vice versa and words denoting persons include individuals and bodies corporate, governments, governmental bodies, authorities, agencies, partnerships, unincorporated associations and other bodies and vice versa.

1. **Consideration**
   1. In consideration of the warranties, acknowledgement and covenants on the part of the DPS User contained in this Agreement, Homes England grants the DPS User access to use the DPS in accordance with the provisions of this Agreement.
2. **Approval to use the DPS**
   1. The DPS User shall not do anything to prejudice Homes England’s procurement and use of the DPS or the integrity of the Call for Competition Procedure, and, in particular the DPS User shall not amend any of the Project Agreement template contracts set out in Schedule 3 of the DPS Agreement, unless such amendments are for project specific reasons as permitted under the terms of the DPS Agreement.
3. **Warranties, acknowledgements and covenants by the DPS User**
   1. The DPS User warrants to Homes England that it is a body listed as an Other Customer (as defined in the DPS Agreement) on the Other Public Sector Body Landing Page of the DPS.
   2. The DPS User acknowledges that Homes England:
      1. gives no warranty, undertaking or guarantee in respect of the ability of the DPS User to use the DPS or in respect of any Call for Competition Procedure for awarding projects
      2. gives no warranty, undertaking, or guarantee in relation to the performance of the DPS Members
      3. gives no warranty, undertaking, or guarantee in respect of the DPS Information.
      4. reserves the right to determine or change any DPS appointments within the limits allowed by the individual DPS appointments under the terms of the DPS Agreement.
   3. The DPS User acknowledges that all of the DPS Agreements collectively constitute one multi-supplier dynamic purchasing system under the Regulations and that a single DPS Agreement alone may not be used to make a direct award without giving rise to a potential liability to the other DPS Members under the Regulations
   4. The DPS User covenants with Homes England:
      1. that the DPS User shall be the principal contracting authority under any Project Agreement;
      2. to comply with and be bound by the terms of the DPS Agreement and any guidance or instructions issued by Homes England (from time to time) in the use and operation of the DPS;
      3. to use the evaluation criteria set out in schedule 4 of the DPS Agreement (Call for Competition Procedure);

4.5 Without prejudice to the requirement to accept the terms and conditions of this Agreement in order to access the DPS, the DPS User acknowledges and agrees that it’s use of the DPS is deemed acceptance of the terms and conditions of this Agreement.

4.6 The DPS User will on request provide evidence to Homes England of the authority of the person to accept the terms and conditions of this Agreement on behalf of the DPS User.

1. **Confidentiality**
   1. Each Party recognises that under this Agreement it may receive Confidential Information belonging to the other and to DPS Members.
   2. Each Party agrees to treat all Confidential Information belonging to the other or to DPS Members as confidential and not to disclose such Confidential Information or any other confidential information relating to Homes England, DPS User, DPS Member, DPS Agreement, Project Agreement or Development Activites to any third party without the prior written consent of the other Party (or the relevant DPS Member if applicable) and agrees not to use such Confidential Information for any purpose other than that for which it is supplied under this Agreement or a Call for Competition Procedure.
   3. The obligations of confidence referred to in Clause 5.2 shall not apply to any Confidential Information which:
      1. is in, or which comes into, the public domain otherwise than by reason of a breach of this Agreement or of any other duty of confidentiality relating to that information; or
      2. is obtained from a third party without that third party being under an obligation (express or implied) to keep the information confidential; or
      3. is lawfully in the possession of the other Party before the date of this Agreement and in respect of which that Party is not under an existing obligation of confidentiality; or
      4. is independently developed without access to the Confidential Information of the other Party.
   4. Each Party will be permitted to disclose Confidential Information to the extent that it is required to do so:
      1. to enable the disclosing party to perform its obligations under this Agreement; or
      2. by any applicable law or by a court, arbitral or administrative tribunal in the course of proceedings before it including without limitation any requirement for disclosure under FOIA, EIR or the Code of Practice on Access to Government Information; or
      3. by any regulatory body (including any investment exchange) acting in the course of proceedings before it or acting in the course of its duties; or
      4. in order to give proper instructions to any professional adviser of that Party who also has an obligation to keep any such Confidential Information confidential.
   5. The DPS User shall ensure that all Confidential Information obtained from Homes England or a DPS Member under or in connection with this Agreement:-
      1. is given only to such of its employees or professional advisors engaged to advise it in connection with this Agreement or a Project Tendering Procedure as is strictly necessary for the performance of this Agreement and only to the extent necessary for the performance of this Agreement or the Project Tendering Procedure;
      2. is treated as confidential and not disclosed (without Homes England’s prior written approval) or used by any such staff or professional advisors otherwise than for the purposes of this Agreement;
      3. where it is considered necessary in the opinion of Homes England the DPS User shall ensure that such staff or professional advisors sign a confidentiality undertaking before commencing work in connection with a Project Agreement.
   6. Nothing in this Clause 5 shall prevent Homes England:-
      1. disclosing any Confidential Information for the purpose of:-
      2. the examination and certification of Homes England’s accounts; or
      3. any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which Homes England has used its resources; or
      4. disclosing any Confidential Information obtained from the DPS User:-
      5. to any other department, office or agency of the Crown;
      6. to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
      7. on a confidential basis to a proposed successor body in connection with any assignment, novation or disposal of any rights, obligations or any liabilities under this Agreement; or
      8. to any person engaged in providing any services to Homes England for any purpose relating to or ancillary to this Agreement or any person conducting an Office of Government Commerce gateway review;
      9. provided that in disclosing information under Clause 5.6.1 or 5.6.2 Homes England discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.
   7. Nothing in this Clause 5 shall prevent either Party from using any techniques, ideas or know-how gained during the performance of the Agreement in the course of its normal business, to the extent that this does not result in a disclosure of Confidential Information or an infringement of Intellectual Property Rights.
   8. The obligations in this Clause 5 will survive the expiry or termination of this Agreement for a period of 10 years or, in respect of any particular item of Confidential Information, until such earlier time as that item of Confidential Information reaches the public domain otherwise than by reason of a breach of this Agreement or of any other duty of confidentiality relating to that information.
2. Freedom Of Information
   1. The Parties to this Agreement are FOIA Authorities and are subject to legal duties which may require the release of information under FOIA and / or EIR and that the FOIA Authorities may be under an obligation to provide Information subject to a Request for Information.
   2. The FOIA Authority in receipt of or to receive the RFI (“Relevant FOIA Authority”) shall be responsible for determining in its absolute discretion whether:-
      1. any Information is Exempted Information or remains Exempted Information; and/or
      2. any Information is to be disclosed in response to a Request for Information;

and in no event shall any party, other than the Relevant FOIA Authority, respond directly to a RFI except to confirm receipt of the RFI and that the RFI has been passed to the Relevant FOIA Authority.

* 1. Subject to clause 6.4 below, all Parties acknowledge that the Relevant FOIA Authority may disclose Information:-
     1. without consulting the other; or
     2. following consultation with the other party and having taken (or not taken, as the case may be) its views into account.
  2. Without in any way limiting 6.2 and 6.3, in the event that the Relevant FOIA Authority receives a RFI, the Relevant FOIA Authority will, where appropriate, as soon as reasonably practicable notify the other Party.
  3. The Parties will assist and co-operate with one another as requested by the Relevant FOIA Authority to enable the Relevant FOIA Authority to comply with its obligations to disclose Information under FOIA and EIR within the prescribed periods for compliance and in particular without limitation will (and shall procure that its agents and sub-contractors will), at their own cost:
     1. transfer any RFI received to the Relevant FOIA Authority as soon as practicable after receipt and in any event within two Working Days of receiving a request for information;
     2. provide all such assistance as may be required from time to time by the Relevant FOIA Authority to enable the Relevant FOIA Authority to comply with its obligations to disclose Information;
  4. Nothing in this Agreement will prevent the Relevant FOIA Authority from complying with any valid order, decision, enforcement or practice recommendation notice issued to it by the Information Commissioner under FOIA and / or EIR in relation to any Exempted Information.

1. **DPS Users also DPS Members**
   1. In the event that the DPS User is also a DPS Member, it shall be cognisant of and fully comply with regulations 21 (Confidentiality) and 24 (Conflicts of Interest) of the Regulations and in particular:
      1. It shall not use Confidential Information belonging to other DPS Members obtained while operating as a DPS User and during a Call for Competition Procedure for its own commercial and/or financial benefit (other than in connection with the specific procurement the subject of the relevant Call for Competition Procedure); and
      2. The DPS User may not also tender as a DPS Member for a project for which it is also procuring as the DPS User i.e. it shall not submit an ‘in-house bid’ in respect of its own Call for Competition Procedure.
2. **Governing Law and Jurisdiction**

This Agreement shall be governed by and construed in all respects in accordance with the laws of England and Wales and the English courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this memorandum of understanding.

1. **Costs and Expenses**

Each party shall be responsible for paying its own costs and expenses incurred in connection with the preparation and execution of this Agreement.

1. **No partnership or agency**
   1. Nothing in this Agreement shall be construed as creating a partnership.
   2. No party shall be deemed to be an agent of any other party and no party shall hold itself out as having authority or power to bind any other party in any way.
2. **Termination** 
   1. This Agreement shall take full force and effect on the date of signature of this Agreement and shall continue until expiry or earlier termination of the DPS Agreement or termination of this Agreement under clause 11.2 of this Agreement.
   2. This Agreement may be terminated by either party with immediate effect upon serving written notice on the other party.
   3. Any Call for Competition Procedure and/or Project Agreement made with a DPS Member after the date of termination of this Agreement will not be made pursuant to the terms of the DPS and it will be the responsibility of the DPS User and the DPS Member to agree the terms of contract between them and to comply with any applicable procurement laws or regulations.
3. **Liabilities**
   1. The DPS User agrees and acknowledges that
      1. Homes England shall have no liability to the DPS User in respect of any Losses provided that nothing in this Agreement is intended to limit or exclude the liability of Homes England:

(a) for death or personal injury resulting from its negligence;

(b) for any damage or liability incurred as a result of fraud or fraudulent misrepresentation by Homes England.

* + 1. In the event that Homes England incurs any Losses arising pursuant to the DPS User’s use or misuse of the DPS or any breach of this Access Agreement by the DPS User, the DPS User shall forthwith reimburse Homes England all such Losses that would not otherwise have arisen but for the DPS User’s use of the DPS or breach of this Access Agreement.

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| **Signed on behalf of Homes England** **by:**  **Authorised Signatory** | **Signed on behalf of [DPS User] by**  **Authorised Signatory[[1]](#footnote-1)**  **Name**  **Job Title** |

1. This **must** be signed by an authorised signatory of the DPS User. [↑](#footnote-ref-1)