

Terms and Conditions of Business- Elm Co- Saudi Arabia

1. Interpretation and Definitions

- A. In this Agreement, The following words and expressions shall have the meanings respectively assigned thereto hereinafter or in the text referred to, unless the context requires otherwise:
- 1) ELM Co: means Elm Company, a Saudi Joint Stock Company.
 - 2) The Supplier/Contractor: shall mean the company or the legal entity that has been contracted with by this Agreement.
 - 3) Acceptance Test means:
 - in relation to each Deliverable, the deliverable test for that Deliverable;
 - in relation to each phase of the Project, the phase test for that phase; and
 - in relation to Project, the Project test for the Project;
 - 4) Applicable Laws and Regulations means all applicable laws, enactments, regulations, regulatory policies, guidelines and industry codes which are in force from time to time according to the Applicable Law in this Agreement;
 - 5) Affiliate includes, in relation to either party, each and any subsidiary or holding company of that party and each and any subsidiary of a holding company of that party.
 - 6) Bespoke Software means the software to be developed and delivered by the Supplier in accordance with this agreement in both Source Code and Executable Code.
 - 7) Business Day means a day other than a Friday, Saturday or public holiday in the Kingdom of Saudi Arabia.
 - 8) Consent(s) means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Applicable Laws and Regulations, and all necessary consents and agreements required by any third party for the Supplier to perform its obligations under this Agreement.
 - 9) Control means the power of a person to secure that the affairs of the Supplier are conducted in accordance with the wishes of that person:
 - by means of the holding of shares, or the possession of voting power, in or in relation to the Supplier or any other body corporate; or
 - as a result of any powers conferred by the articles of association or any other document regulating the Supplier or any other body corporate, and a Change of Control occurs if a person who controls the Supplier ceases to do so or if another person acquires Control of it.
 - 10) Data means all forms of data, including any information, text, drawings, records, documents and other materials, which are embodied in any medium (including any electronic, optical, magnetic or tangible medium). Data may be personal data.
 - 11) Deliverables means, in relation to each sub-phase of the Project, a deliverable of that sub-phase to be provided by the Supplier in accordance with the scope of work (SOW).
 - 12) ELM Data means all Data:
 - which is provided to the Supplier or any of its approved subcontractors by or on behalf of ELM Co or any ELM Co Affiliate; or
 - which is generated by the Supplier or any of its approved subcontractors in the course of performing its obligations under this Agreement,
 - and, in each case, to the extent it relates to the business or operations of ELM Co or any ELM Co Affiliate (or where relevant their respective Affiliates). As between the Supplier and ELM Co, ELM Co is to be treated as the owner of ELM Data.
 - 13) Good Industry Practise means that degree of skill, care, prudence, efficiency, foresight and timeliness as would be expected from a leading company within the relevant industry and business sector of the Supplier.
 - 14) Insurance Policies means commercial general liability insurance cover, employer's liability insurance cover and public liability insurance cover.
 - 15) Intellectual Property Rights means patents, rights to inventions, copyright and related rights, trade marks, business names and domain names, rights in get-up, goodwill and the right to sue for passing off, rights in designs, rights in computer software, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets) and all other intellectual property rights, in each case whether registered or unregistered rights and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.
 - 16) Key Personnel means the Supplier personnel identified as key personnel in the scope of work (SOW) or the proposal sent from the Supplier for the Project and any other Supplier personnel identified in writing by the parties as key personnel from time to time (each such Key Personnel being a Key Person).
 - 17) Notice means a written notice or document to which the provisions of clause 10.11 are intended to, and shall, apply;
 - 18) Project means the performance by the Supplier of its obligations in relation to each phase, sub-phase, sub-project and project, and the provision of the Services by the Supplier, in accordance with this Agreement;
 - 19) Project Manager means the key contact person for each of the Supplier and ELM Co appointed by them.
 - 20) Project Plan means the timetable and schedule of responsibilities for the Project based upon the initial Project Plan, to be developed by the Supplier and provided to ELM Co in accordance with the scope of work (SOW).
 - 21) "RFP" means the request for proposal issued by ELM Co to solicit bids from competing bidders in order to award a contract.
 - 22) Services means the Implementation services, the Data Migration Services, the Maintenance Services, the Operations Services, the Knowledge Transfer Services, the Training Services, any other specific obligations of the Supplier described in any phase requirements and/or the services described in the Project Deliverables document and the scope of work (SOW);
 - 23) Source Code means computer programs and/or Data in human-readable form from which Executable Code of software is created, on suitable media in such form that it can be translated or interpreted into that Executable Code together with all technical information and documentation necessary for the use, reproduction, modification, maintenance and enhancement of those programs and/or Data;
- B. The words including and include shall mean including without limitation and include without limitation, respectively.
- C. The Schedules and Appendices to this Agreement form part of it.
- D. If there is any conflict or inconsistency between a term in the main part of this Agreement and a term in any of the Schedules or Appendices or other documents referred to or otherwise incorporated into this Agreement, the term in the main part of this Agreement shall take precedence, unless the Schedule or the Appendix or other document which is incorporated into this Agreement is expressly stated to take precedence over the main part of this Agreement.

2. Service

- 2.1 Provision of Services: Each party represents and warrants to the other party that:
- a. it has the power to execute and deliver this Agreement and to perform its obligations under it and has taken all action necessary to authorise execution and delivery and performance of its obligations; and
 - b. this Agreement constitutes legal, valid and binding obligations of that party in accordance with its terms.
- 2.2 The Supplier represents, warrants and undertakes to ELM Co that:
- a. its obligations under this Agreement shall be performed in a timely, reliable and professional manner by a sufficient number of appropriately experienced, qualified, competent and trained personnel and with due skill, care and diligence including Good Industry Practice and in compliance with ELM Co's reasonable instructions to ensure minimal disruption to ELM Co's business;
 - b. it shall perform its obligations under this Agreement in compliance with all Consents (including the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents;
 - c. it shall, and it shall ensure that each of its employees, agents and subcontractors shall, co-operate fully with ELM Co's employees, any ELM Co Affiliate employees and any third party service providers in relation to this Agreement;
 - d. it will comply with all applicable laws, regulations, codes and sanctions relating to anti-bribery and anti-corruption;

- e. it is in compliance with, and will perform the Services and its obligations under this Agreement in compliance with, Applicable Laws and Regulations; and
 - f. ELM Co will receive good and valid title to all Deliverables free and clear of all encumbrances and liens of any kind.
- 2.3 If the Supplier receives notice in writing from ELM Co of any breach by the Supplier of any of the representations, warranties and undertakings contained in clauses 2.2, the Supplier shall, at its cost and expense, remedy that breach promptly and in any event within 10 days after receiving that notice, failing which ELM Co shall be entitled to pursue any rights or remedies which are available to it including, without limitation, termination of this Agreement.
- 2.4 Timescales: The Supplier shall perform the Services in accordance with the approved Project Plan by ELM Co. Time shall be of essence in relation to any of the Supplier's obligations set out in this Agreement.
- 2.5 Progress reviews: Each party shall review with the other the progress of the Services at regular intervals (or such intervals as are set out in Scope of Work). This will include review meetings attended by the Project Manager to review progress generally including actions undertaken and progress made since the previous meeting and any issues relating to the provision of the Services.
- 2.6 Acceptance:
- 2.6.1 The Deliverables shall not be considered accepted unless they are approved by written notice from ELM Co. In case ELM Co does not approve them, then the Supplier shall amend phases and Deliverables to be acceptable within the term of this Agreement.
- 2.6.2 The Deliverable acceptance will be as per the below procedure.
- a. Prior to commencing acceptance testing or quality checking for the Deliverables, the Supplier shall conduct internal tests or quality check to ensure that the Deliverables perform fully in accordance with the ELM Co's specifications, and shall supply the ELM Co with the test results.
 - b. The Supplier shall notify the ELM Co when a Deliverable that is expressly stated in the Agreement to be subject to acceptance is ready for acceptance. The ELM Co shall then review such Deliverable against the Acceptance criteria.
 - c. Each Acceptance Test or quality check will be passed when all the acceptance criteria for that Acceptance Test are met and subject to the acceptance of the entity in whose favour the Project is being executed.
 - d. The Supplier shall ensure that each Acceptance Test or quality check is passed by the required date specified for it in the Project Plan.
 - e. If an Acceptance Test or quality check is passed, ELM Co shall, within ten (10) business days for a sub-phase test and within fifteen (15) Business Days for a phase test or a Project test, sign and issue to the Supplier an acceptance certificate.
 - f. If an Acceptance Test or quality check is not passed either at the first attempt or following any subsequent retest the Supplier shall promptly investigate and rectify all faults to enable that Acceptance Test or quality check to be repeated and passed.
- 2.6.3 The Supplier acknowledges that ELM Co shall have the right to contract or appoint a third party to evaluate and test any Deliverables due under this Agreement at the cost of ELM Co.
- 2.7 Insurance
- 2.7.1 The Supplier shall have liability for and shall indemnify ELM Co for any loss, liability, costs (including reasonable legal costs), damages or expenses arising from any breach by the Supplier, its staff or subcontractors of the terms of this Agreement including any negligent or reckless act, omission or default in the provision of the Services and shall accordingly maintain in force during the term of this Agreement full and comprehensive Insurance Policies.
- 2.7.2 The Supplier shall ensure that the Insurance Policies are taken out with reputable insurers acceptable to ELM Co and that the level of cover and other terms of insurance are acceptable to and agreed by the ELM Co.
- 2.7.3 The Supplier shall on request supply to the ELM Co copies of such Insurance Policies and evidence that the relevant premiums have been paid.
- 2.7.4 The Supplier shall notify the insurers of ELM Co's interest and shall cause the interest to be noted on the Insurance Policies together with a provision to the effect that, if any claim is brought or made by ELM Co against the Supplier in respect of which the Supplier would be entitled to receive indemnity under any of the Insurance Policies, the relevant insurer will indemnify ELM Co directly against such claim and any charges, costs and expenses in respect of such claim. If the relevant insurer does not so indemnify ELM Co, the Supplier shall use all insurance monies received by him to indemnify ELM Co in respect of any claim and shall make good any deficiency from his own resources.
- 2.7.5 The Supplier shall comply with all terms and conditions of the Insurance Policies at all times. If cover under the Insurance Policies shall lapse or not be renewed or be changed in any material way or if the Supplier is aware of any reason why the cover under the Insurance Policies may lapse or not be renewed or be changed in any material way, the Supplier shall notify ELM Co without delay.
3. Fees
- 3.1 ELM Co shall pay the fees agreed in writing for the relevant Project (the "Fees") in accordance with this Agreement
- 3.2 Subject to clause 3.1 and 3.4, ELM Co shall pay to the supplier the Fees within 90 days after the date the relevant invoice is received from the Supplier through the Supplier Self-Services (SUS) portal: <https://sap.elm.sa/irj/portal>, provided that the invoice is paid in accordance with the payment methods set forth in this Agreement .
- 3.3 If any part of the Fees is subject to a bona fide dispute between ELM Co and the Supplier, the following provisions shall apply.
- a. Any undisputed part of the Fees shall be paid within (90) Days from the date of the receipt of the invoice from the Supplier by ELM Co.
 - b. ELM Co shall notify the Supplier within 90 Days after the date on which the relevant invoice is received of any disputed items and shall as soon as reasonably practicable after it has so notified the Supplier describe in reasonable detail ELM Co's reasons for disputing each item.
 - c. The parties shall seek to reach settlement on the items that are the subject of the dispute in accordance with clause 10.12.
- 3.4 The Supplier shall include on or with each invoice provided to ELM Co under this agreement such details as are necessary or appropriate for ELM Co to verify the accuracy of the invoice and the Supplier's compliance with this Agreement. The Supplier shall maintain complete and accurate records of, and supporting documentation for, all amounts billable to and payments made by ELM Co under this Agreement, in accordance with generally accepted accounting principles applied on a consistent basis, and shall retain the records for each invoice for at least two years from the date that invoice was received by ELM Co.
- 3.5 If any sum of money, including any amount in respect of any liquidated damages or service credit (if applicable), is payable to ELM Co by the Supplier under this Agreement, that sum may be offset by ELM Co against the Fees payable by ELM Co to the supplier as a credit against the next invoice which is issued by the Supplier under this Agreement to ELM Co. If any such amount is payable to ELM Co by the Supplier and there are no more invoices to be issued by the supplier, ELM Co may issue an invoice for the relevant amount to the Supplier which the Supplier shall pay within 30 days after its receipt of that invoice.
- 3.6 Payment shall be capable of invoicing by the Supplier upon the completion of each phase (as agreed in writing between the parties for the relevant Project) and the acceptance of its Deliverables by Elm Co.
- 3.7 With the exception of the value of any materials or Services that ELM Co is explicitly obliged to provide under this Agreement, the amount to be paid to the Supplier under this Agreement shall include all the Supplier's costs, expenditure and expenses of whatever nature, whether or not expressly stated to be covered by the value of this Agreement, including payment of taxes, Zakat and fees of all types.
- 3.8 The Supplier acknowledges that prior to signing this Agreement it has obtained all information and has verified that the prices and Fees included in the Agreement and in any commercial proposal are sufficient for the coverage of all his contractual obligations under this Agreement and all other issues necessary for the execution of the Agreement. The Supplier acknowledges that it has obtained all the information deemed necessary for the provision of the Services under this Agreement.
- 3.9 Taxes: The Supplier shall bear all burdens and costs associated with the execution of its contractual obligations hereunder, including payment of Withholding Tax, Zakat, other taxes and fees of all types. ELM Co shall have the right to deduct the Income Tax prescribed in the Income Tax Law, which was issued by the Royal Decree No (M/1) on 15/1/1425H, from any payments due to the Supplier. Any other tax in any form payable by the Supplier under this Agreement (if any) is included in the agreed Fees and the Supplier shall be liable for and pay all other taxes of any nature whatsoever levied, assessed, charged or collected for or in connection with the performance of its obligations under this Agreement. The Fees are inclusive of tax, Zakat, duty or assessment, including any applicable sales tax, which the Supplier is obliged to pay and/or collect from ELM Co in respect of any supply under this Agreement (including, without limitation, tax on the Supplier's income).

3.10 Penalty

- 3.10.1. In case of any failure in executing this Agreement (including, without limitation, a failure to perform the agreed Services or to develop a specific agreed solution), other than a delay as referred to in clause 3.10.2 below, the Supplier shall be compelled to pay ELM Co a penalty in accordance with the amount specified by ELM Co taking into account any damages that have occurred as result of the Supplier' failure which in all cases will not exceed 10% of the total amount payable under this Agreement.
- 3.10.2. if the Supplier fails to successfully complete the Project or any of its phases or sub-phases by the relevant latest date specified for completion of that phase in the Project Plan, for reasons attributable to itself, the Supplier shall, without prejudice to ELM Co's other rights or remedies, immediately pay to ELM Co a delay penalty. The penalty that the Supplier shall be liable to pay in relation to a phase or sub-phase shall be 4% of the Fees paid or payable in respect of that delayed phase/sub-phase for the first five Business Days and it will increase by 2% for every five further days of delay.
- 3.10.3. If ELM Co applies the penalties mentioned in this article, the Supplier acknowledges that ELM Co shall have the right (at its sole discretion) to deduct such penalty from its obligation for payment to the Supplier or to require that the Supplier shall pay the due penalties within a period not exceeding seven (7) days from the notice date. The Supplier agrees that ELM Co shall also have the right to reduce any payment due to the Supplier from any other project between ELM Co and the Supplier.
- 3.10.4. The payment or deduction of such penalties shall not relieve the Supplier from its obligations and responsibilities as determined in this Agreement. It is hereby agreed between the parties that ELM Co, in addition to applying the penalty, may terminate this Agreement, without written notice to the Supplier, and claim any remedies to which it is legally entitled if the Supplier defaults on the execution of this Agreement and no satisfactory solution is reached between the Parties.
- 3.10.5. The parties hereby agree that the Supplier shall not be held liable for its default, if the delay has occurred because of ELM Co's failure to carry out its obligations as mentioned in this Agreement. The burden of proof shall lie with the Supplier in this case.
- 3.10.6. If the Supplier fails to complete a phase test for a phase successfully by the due date the Supplier shall become liable to pay liquidated damages that meet the Liquidated Damages Cap, The Supplier shall also be deemed to be in material breach of this Agreement and ELM Co shall be entitled to terminate this Agreement in accordance with clause 8.2.
- 3.10.7. If the Supplier fails to complete a phase test for a phase in accordance with the Project Plan at the request of ELM Co, or because of the failure by ELM Co to perform its obligations under this Agreement, the Project Plan shall be extended on a proportionate basis to take account of such delay and the Supplier will not be liable for the delay. The supplier shall bear responsibility for proving such ELM Co failure or acceptance of the delay.

4. Personnel

- 4.1 The Supplier shall ensure that each of the Key Personnel devotes substantially their whole time to the Project. The Supplier shall retain the services of its Key Personnel and will not remove or change any Key Person unless:
 - a. that Key Person is on long term sick leave or ceases to be employed or retained by The supplier or any of its Affiliates;
 - b. the obligations for which the person is designated as a Key Person are completed; or
 - c. with ELM Co's prior written consent.
- 4.2 The Supplier shall ensure that the role of any Key Person is promptly filled and that any replacement will be equally or more qualified and experienced than the Key Person he is replacing and fully competent to carry out the tasks assigned to the Key Person, which he is replacing. Without limiting the foregoing, the Supplier shall ensure that the role of any Key Personnel being replaced is fully covered by a suitable, appropriately qualified and experienced temporary replacement during any period when the role is vacant.
- 4.3 Before assigning replacement Key Personnel in accordance with clause 4.2, the Supplier shall:
 - a. provide ELM Co with a curriculum vitae and any other information about the replacement personnel as reasonably requested by ELM Co; and
 - b. introduce the replacement personnel to ELM Co and provide ELM Co with an opportunity to interview the replacement personnel. ELM Co shall notify the Supplier within three Business Days after being introduced to that replacement personnel if it reasonably objects to the appointment of replacement personnel as a member of the Key Personnel, together with the reasons for its objection, and the Supplier shall ensure that new replacement personnel are introduced to ELM Co within ten Business Days after receipt of that notice.
 - c. All costs associated with the removal or replacement of any Key Personnel shall be borne by the Supplier.
 - d. While considering the fact that it might be difficult for ELM Co to interview all of the Supplier resources, ELM Co however reserves the right to review any of the Supplier's staff profiles for the Project including Key Personnel assigned to the Project, request an interview and approve or reject the profiles.
 - e. Subject and without prejudice to clauses 4.1, 4.2 and 4.3 above, the Supplier must provide a one month notice period to ELM Co prior to the replacement of any key resource/team leads designated to the Project. The Supplier must provide a two weeks' notice period to ELM Co prior to the replacement of any other resources designated to the Project. The Supplier must also ensure that a satisfactory hand-over process is complete before the actual replacement takes place
- 4.4 ELM Co shall have the right to request a replacement for any resource it deems unsatisfactory and the Supplier shall immediately remove such resource from the provision of the Services and ELM Co's premises and ensure a permanent replacement satisfactory to ELM Co at the Supplier's cost within 15 Business Days (with a temporary replacement satisfactory to ELM Co being provided immediately until such time as the permanent replacement commences the relevant work for ELM Co).
- 4.5 The Supplier shall ensure that its personnel comply with ELM Co's reasonable rules, regulations and practices relating to security, health and safety when they are in ELM Co's premises, provided they are made available to them reasonably in advance. If the Supplier is required to enter the premises of a third party on ELM Co's direction, ELM Co shall use reasonable endeavours to ensure that the third party protects the Supplier's personnel as it does its own employees.
- 4.6 ELM Co will not be held responsible if the Supplier could not obtain the issue of any work visa, visit visa or work permit for its resources for whatsoever reason. Also the Supplier recognises that if it could not bring its resources to work in the Project or if there is a delay in the Project for that said reason, ELM Co can enforce clause 3.10.

5. Intellectual property rights

- 5.1 All Intellectual Property Rights in each of the Project Deliverables document, the Deliverables, the hardware documentation, the phase plans and any Source Code used by the Supplier in the performance of its obligations under this Agreement (the "Supplier Provided Materials") shall vest in ELM Co unconditionally and immediately on their creation as the case may be. Accordingly the Supplier assigns to ELM Co with full title guarantee all Intellectual Property Rights (including by way of an assignment of future Intellectual Property Rights) in and to all of the Supplier Provided Materials and including, without limitation, the right to take action for any past, present and future damages and other remedies in respect of any infringement. For avoidance of doubt no pre-existing Intellectual Property Rights in the Supplier Provided Materials shall be transferred to ELM Co and only right to use will be provided to ELM Co (on the basis of a perpetual, irrevocable and non-assignable licence). The Supplier can use source code/modules from previous projects (in which case ELM Co does not own the Intellectual Property Rights) on the condition that:
 - a. ELM Co pre approves such use in writing in advance in its sole discretion on a case-by-case basis;
 - b. the relevant source code together with all relevant documentation and reasonable assistance from the Supplier is provided by the Supplier to ELM Co;
 - c. ELM Co shall have full right to modify and reuse the relevant source code for its own use provided any modifications relate to the Project Deliverables; and
 - d. ELM Co has the right to review the relevant source code to ensure compliance to development guidelines as well as coding quality are met and the Supplier shall promptly at its own cost rectify any failure in such compliance.
- 5.2 The Supplier represents, warrants and undertakes to ELM Co and to each of its Affiliates that:
 - a. it shall ensure that its employees, agents and approved subcontractors unconditionally and irrevocably waive all moral rights which they may have in the Supplier Provided Materials, and any similar or corresponding rights in any jurisdiction, to the extent that a waiver of that type is permitted by applicable law;
 - b. in the development of the Supplier Provided Materials, the Supplier, its employees, agents or approved subcontractors have not and shall not infringe the Intellectual Property Rights of any third party;
 - c. it is, or will be immediately prior to the Delivery of all or any part of the Supplier Provided Materials to ELM Co, be the sole legal and beneficial owner free from any encumbrances, restrictions on transfer to third parties or other third party rights of the relevant Supplier Provided Materials and of all Intellectual Property Rights in the Supplier Provided Materials; and

- d. the Supplier Provided Materials are and shall be original works of authorship of it or of its employees, agents or subcontractors.
- 5.3 The Supplier shall execute, or ensure the execution of, and enforce all deeds and documents and do, or ensure the doing of, all things as ELM Co may require to vest all Intellectual Property Rights in the Supplier Provided Materials in ELM Co.
- 5.4 If any claim is made, or in the Supplier or ELM Co's reasonable opinion is likely to be made, against ELM Co that the Supplier Provided Materials, Deliverables or the Services infringe or allegedly infringe the Intellectual Property Rights or other rights of a third party, then the Supplier shall promptly and at its cost and expense either:
 - a. modify or replace the infringing part of the Supplier Provided Materials, Deliverables or Services to avoid the infringement or alleged infringement but in such a way that it complies with the representations and warranties in this Agreement in relation to all and every part of the Supplier Provided Materials, Deliverables and the Services; or
 - b. procure for ELM Co the right to continue using, developing, modifying or maintaining the Supplier Provided Materials, Deliverables and the Services (or any part thereof) in accordance with the terms of this Agreement; or
 - c. replace the relevant Supplier Provided Materials, Deliverables and Services with non-infringing alternatives acceptable to ELM Co.
- d. If the Supplier is unable to take the action described in clause 5.4 within a reasonable period (not exceeding 30 days) ELM Co shall be entitled, without prejudice to its other rights or remedies, to terminate this Agreement immediately by serving Notice on the supplier and the supplier shall promptly refund to ELM Co that part of the Fees (if any) already paid to the Supplier.
- 5.5 Where ELM Co is responsible for providing third party items (including software or hardware), ELM Co shall obtain any necessary licences and Consents for ELM Co, the Supplier, and the Supplier's personnel to use such items for the purposes of this Agreement.
- 5.6 IP Indemnity: (i) The Supplier agrees to defend ELM Co at the Supplier's expense against any third party claim that the Deliverables supplied by the Supplier infringe that third party's Intellectual Property Rights and to indemnify ELM Co against all costs, damages and legal fees that a court finally awards or that are included in a settlement approved by the Supplier.
- 5.7 The indemnity in clause 5.6 shall not apply to any third party claim to the extent that such claim arises directly:
 - a. from any changes made by ELM Co to Supplier Provided Materials made after the relevant final acceptance date for the stream to which those the Supplier Provided Materials relate without the consent of the Supplier (the Supplier shall not unreasonably withhold or delay its consent to any such change); or
 - b. as a result, of the use of the Bespoke Software in a manner that does not comply with the requirements of the relevant software documentation.
 - c. This clause 5 shall remain in full force and effect notwithstanding any termination of this agreement.
- 6. Confidentiality and use of information**
- 6.1 Each party shall, in relation to the other's Confidential Information: (a) keep it secret and confidential; (b) use it only for purposes connected to this Agreement; (c) disclose it only to such employees, directors, agents and Affiliates as need to know on condition that they are informed by the disclosing party of its confidential nature and such party shall procure that they deal with it on terms no less onerous than in this clause 6; (d) not otherwise disclose it to third parties without the other party's prior written consent; and (e) make copies of it only to the extent necessary for the purposes of this Agreement.
- 6.2 Permitted disclosure: The obligations of confidentiality in clause 6.1 shall not prevent any disclosure of information which: (a) is in, or has become part of, the public domain other than by a breach of this Agreement; (b) becomes available to the disclosing party in a lawful manner from a third party who, to the best of the disclosing party's knowledge, is lawfully entitled to disclose the same; (c) can be proven was independently developed by or for the disclosing party; (d) is required to be disclosed under any applicable law, stock exchange requirement, or by order of a court or governmental body or authority of competent jurisdiction, provided that, to the extent it is permitted to do so, the disclosing party notifies the other party as soon as reasonably possible on becoming aware of the obligation to disclose; or (e) is disclosed with the other party's prior consent.
- 6.3 Return/destruction: Each party shall, on written request, either return or destroy the other party's Confidential Information in its possession except that each party shall be entitled to keep copies or records for archive, legal or tax purposes (and such copies shall continue to be Confidential Information and subject to the obligations of confidentiality in this Agreement).
- 7. Limitations of contractual liability**
- 7.1 The Supplier shall be liable in all cases to Elm Co any or/and all damages arising from or in relation/ connection to this Agreement.
- 7.2 Personal injury, death and fraud: Despite any provision to the contrary, nothing in this Agreement limits or excludes either party's liability to the extent it relates to: death or personal injury caused by its negligence or the negligence of its employees, agents or subcontractors; fraud or fraudulent misrepresentation; or any liability, which may not be lawfully limited or excluded .
- 7.3 Liability for indirect loss: Neither party shall be liable however that liability arises, for consequential or indirect losses unless it is caused by its negligence, fraud or fraudulent misrepresentation.
- 7.4 Liability for loss of profit etc: Without prejudice to clause 7.3, neither party shall be liable however, that liability arises for loss of profits unless it is caused by its negligence, fraud or fraudulent misrepresentation.
- 7.5 Reasonableness: both parties agree that the limitations and exclusions of liability contained in this Agreement are reasonable in view of the nature and extent of the obligations accepted by each party under this Agreement and the level of the fees and charges and that this clause 7 shall prevail over all other clauses in this Agreement.
- 8. Termination**
- 8.1 ELM Co shall be entitled to terminate this Agreement at any time, by giving 30 days prior written notice to the Supplier. In such case, ELM Co shall pay the value of the works, which have been completed and accepted as per terms and conditions of this Agreement. In addition, in the case of an advance payment being paid to the Supplier before the implementation of the Agreement at any stage, the Supplier must return all such amounts paid.
- 8.2 Without prejudice to Article (3.10), ELM Co may terminate this Agreement or suspend the execution of this Agreement and withdraw the Project from the Supplier and re-offer the tender of the required work and services at the expense and the cost of the Supplier immediately by serving Notice to the Supplier and without the need of obtaining judicial decision in any of the following cases:
 - a. the Supplier is in material breach of this Agreement, and either that breach is incapable of remedy or the Supplier shall have failed to remedy that breach within five Business Days after receiving a Notice from ELM Co requiring it to remedy that breach;
 - b. if the Supplier is unable to pay its debts as they fall due or becomes insolvent or an order or an application is made or a resolution is passed or documents are filed with a court for the administration, winding-up or dissolution of the Supplier (otherwise than for the purposes of a solvent amalgamation or reconstruction) or an administrative or other receiver, manager, liquidator, administrator, trustee, supervisor or similar officer is appointed in relation to the Supplier or over all or any of the assets of the Supplier or notice is given of the intention to make such an appointment or a moratorium is sought or declared in respect of the Supplier or the Supplier enters into or proposes any composition or arrangement with its creditors generally, or takes any step with a view to rescheduling or restructuring any of its indebtedness or anything analogous to the foregoing occurs in any applicable jurisdiction;
 - c. if it was proved that the Supplier, directly or indirectly, gave gifts, advance, reward, or promise to any of ELM Co's employees or to any other person that is related to this Agreement;
 - d. in accordance with clause 3.10.6;
 - e. In accordance with clause 10.10; and
 - f. if there is a Change of Control of the Supplier.
- 8.3 Any termination of this agreement shall not affect any accrued rights or liabilities of either party, nor, in the case of ELM Co, any accrued rights of any Affiliate of ELM Co, nor shall it affect the coming into force or the continuance in force of clauses 1, 3, 5, 6, 7, 8, 9 and 10.
- 9. Data protection**

The Supplier\Contractor must comply with all applicable cybersecurity controls, laws, and regulations of the Kingdom of Saudi Arabia applicable to the subject matter hereof and to the terms and conditions of Elm Company, which are set out in this link: <https://support.ariba.com/item/view/207214>

10. General Conditions

- 10.1 **Interpretations:** In this Agreement: (a) headings are inserted for convenience of reference only and shall not affect the interpretation or construction of this Agreement; (b) any references to legislation include references to any amending and supplemental legislation; (c) the words and phrases "including" (and any similar words) shall be deemed to be immediately followed by the words "without limitation"; (d) references to clauses, paragraphs, schedules or annexes are to clauses, paragraphs, schedules or annexes of this Agreement unless otherwise stated; (e) references to the singular include the plural and vice versa; and (f) references to a 'person' include an individual, company, firm, partnership, public body, charity or other legal entity.
- 10.2 **Entire agreement:** This Agreement contains the entire agreement between the parties with respect to the subject matter of this Agreement and supersedes all other written and oral communications, arrangements or understandings between the parties relating to such subject matter. The express terms, conditions and warranties in this Agreement are in lieu of all terms, conditions, warranties, representations, statements, undertakings and obligations whether express or implied by statute, common law, custom, usage or otherwise all of which are hereby excluded to the fullest extent permitted by law. The parties hereby confirm that they have not relied on any statement, representations, assurance, warranty, communications or other matter ("Representation") which has not been expressly stated in this Agreement and that the only rights and remedies available to them arising out of a Representation shall be for breach of contract. Despite any provision to the contrary, nothing in this clause or this Agreement limits or excludes either party's liability for fraudulent misrepresentation or fraud.
- 10.3 **Publicity:** Any publicity to be issued or announcement to be made in connection with this Agreement by the Supplier shall only be issued or made subject to ELM Co's prior written consent.
- 10.4 **Third party rights:** A person who is not a party to this Agreement shall not have any rights under or in connection with it.
- 10.5 **Assignment and sub-contracting:** Neither party may subcontract, assign, novate or otherwise transfer this Agreement (in whole or in part) or any of its rights and obligations under this Agreement without the prior written consent of the other party. If ELM Co consents to the Supplier subcontracting any of its obligations under this Agreement to a third party then notwithstanding such subcontracting the Supplier shall remain directly liable to ELM Co for the performance of such obligations.
- 10.6 **Waiver:** No provision of this Agreement shall be waived unless agreed to be waived by both parties in writing. If any provision is waived, then that waiver shall operate for that instance only and not future instances, unless agreed otherwise by both parties in writing. No single or partial exercise of any power or right by a party shall preclude any other or further exercise thereof or the exercise of any other such power or right.
- 10.7 **Severability:** If any provision of this Agreement becomes void or unenforceable under applicable law it shall be deemed to be deleted from this Agreement and the remaining provisions of this Agreement shall continue unaffected. In such circumstances, the parties shall (acting promptly and in good faith) use their reasonable endeavours to agree a replacement for such deleted provision which lawfully achieves the intent of the deleted provision and is as close as reasonably possible to it.
- 10.8 **Variations:** No alteration, variation or addition to this Agreement shall be valid unless agreed in writing by the authorised representatives of each party.
- 10.9 **No partnership:** Nothing in this Agreement (or any proposal or correspondence), is intended to create a legal partnership, joint venture or employment relationship between ELM Co (or any person) and The supplier.
- 10.10 **Force majeure:** ELM Co reserves the right to defer the date for performance of, or payment for, the Services, or to terminate this Agreement, if it is prevented from, or delayed in, carrying on its business by acts, events, omissions or accidents beyond its reasonable control, including strikes, lockouts or other industrial disputes (whether involving the workforce of ELM Co or any other party), failure of a utility service or transport network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or subcontractors.
- 10.11 **Notices:** Any notice given under this Agreement must be in writing, marked for the attention of the Company Secretary, and sent or delivered by internationally recognized express courier, or fax transmission to the other party at its registered office address (or such other address as is notified by such party in writing). Any notice: (a) delivered by hand shall be deemed to have been given when deposited at the appropriate address; (b) sent by courier (as above) shall be deemed to have been given 48 (forty eight) hours after it is sent to the appropriate address; and (c) sent by facsimile shall be deemed to have been given on transmission to the correct number (as evidenced by a fax transmission report generated by the fax machine confirming successful transmission to that number), provided that such notice is confirmed by dispatching a copy of the notice together with a copy of the successful fax transmission report within 48 (forty eight) hours using one of the methods in (a) or (b) above. A notice will be deemed to be served on the date that the recipient acknowledges that it received the notice, if the notice is not sent in compliance with this clause 10.11.
- 10.12 **Dispute resolution:** The parties shall promptly escalate any dispute arising out of or relating to this Agreement in accordance with: (a) the agreed Governance provisions (where the SOW incorporates Governance provisions); or (b) where the SWO does not incorporate Governance provisions, to their relevant representatives as set out in SWO and if the matter is not resolved within 15 (fifteen) days of such referral to a senior member of the management of each party where the parties shall continue to try to resolve the issue within a further 15 (fifteen) days.
- 10.13 **Compliance with law:** Each party shall be responsible for its compliance with any laws, which apply to its business.
- 10.14 **Information Rights:** For the duration of this Agreement, and for a period of seven years from termination or expiry of this Agreement, the Supplier shall maintain full and accurate records, in accordance with all generally accepted accounting principles and Good Industry Practice, including those applicable in Saudi Arabia, in a form to be approved in writing by ELM Co, of all charges, prices, costs and expenses associated with and invoiced in respect of the Services and shall if requested, promptly provide to ELM Co copies of such records and accounts and any other information reasonably requested by ELM Co.
- 10.15 At ELM Co's request and expense, the Supplier shall grant access to ELM Co's staff, agents, auditors and other professional advisers to the premises, records and accounts of the Supplier and its Affiliates and subcontractors, including its and their data processing facilities, and to such of its and their supporting documentation and explanations from staff as is reasonable to ascertain compliance with this Agreement and the adequacy of the Supplier's financial standing. Such access shall be granted during normal business hours and subject to reasonable prior notice from the Supplier except to the extent that such access is required by an applicable regulatory or governmental body or as a consequence of suspected fraud outside of these parameters.

11. Applicable Law

Governing law and jurisdiction: This Agreement and any dispute or claim arising out of or in connection with it shall be governed by the laws and regulations of the Kingdom of Saudi Arabia, and shall be subject to the exclusive jurisdiction of the competent court in the Kingdom of Saudi Arabia in the city of Riyadh.