



**NHS ENGLAND**  
**GRANT FUNDING AGREEMENT**

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**THIS AGREEMENT** is made on 2<sup>nd</sup> March 2015

**BETWEEN:**

- (1) **THE NHS COMMISSIONING BOARD (OPERATING UNDER THE NAME OF NHS ENGLAND)** whose address is Quarry House, Quarry Hill, Leeds, LS2 7UE ("NHS England"); and
- (2) **OPEN SOURCE SOFTWARE FOUNDATION FOR HEALTH AND CARE C.I.C.**, registered number 9483987, whose address is 10 Queen Street Place, London EC4R 1BE. (the "Grant Recipient").

**BACKGROUND**

- (A) NHS England is a statutory body established by section 1H of the National Health Service Act 2006.
- (B) In accordance with its functions, NHS England is awarding the Grant Funding to the Grant Recipient because the aims and objectives of the Project support the values of the NHS Constitution.
- (C) NHS England, in exercising its powers under the NHS Act 2006, agrees to make the Grant Funding available to the Grant Recipient and the Grant Recipient accepts the Grant Funding on the following terms and conditions.

**1. DEFINITIONS AND INTERPRETATION**

1.1 The following words and phrases shall have the following meanings:

|                                   |  |
|-----------------------------------|--|
| <b>"Agreed Quality Standards"</b> | means the agreed performance standards as set out in Schedule 2;   |
| <b>"Agreement"</b>                | means the terms and conditions set out in this grant funding agreement including all schedules;  |
| <b>"Background IPR"</b>           | means any Intellectual Property Rights, other than Foreground IPR, that are used in the course of or in connection with the Project;   |
| <b>"Commencement Date"</b>        | means the date on which the Grant Funding may be provided by NHS England and as set out at the beginning of the Agreement;   |
| <b>"Completion Date"</b>          | means the date that the Project is completed to the satisfaction of NHS England;   |
| <b>"Confidential Information"</b> | means confidential, commercial, financial, marketing, technical or other information, including (without limitation) information in or relating to Intellectual Property Rights; |
| <b>"Contract Manager"</b>         | means <b>NHS England 111 Futures Programme Manager</b> of NHS England, being   |

|  |                    |  |
|--|--------------------|--|
|  |                    | the contract manager appointed by NHS England in relation to this Agreement or his/her replacement from time to time notified to the Grant Recipient;  |
| <b>"DPA"</b>                                   |                    | means the Data Protection Act 1998;  |
| <b>"Deliverables"</b>                          |                    | means the deliverables to be achieved by the Grant Recipient in the Project as set out in Schedule 2 to this Agreement;  |
| <b>"Environmental Regulations"</b>             | <b>Information</b> | means the Environmental Information Regulations 2004;  |
| <b>"FOIA"</b>                                  |                    | means the Freedom of Information Act 2000;   |
| <b>"Force Majeure"</b>                         |                    | means any event outside the reasonable control of either Party affecting its ability to perform any of its obligations (other than payment) under this Agreement including Act of God, fire, flood, lightning, war, revolution, act of terrorism, riot or civil commotion, strikes, lock-outs or other industrial action, whether of the affected Party's own employees or others, failure of supplies of power, fuel, transport, equipment, raw materials or other goods or services; |
| <b>"Foreground IPR"</b>                        |                    | means any Intellectual Property Rights that arise or are obtained or developed in the course of or in connection with the Project;   |
| <b>"Grant Funding"</b>                         |                    | means the grant set out in Schedule 1 to this Agreement and payable to the Grant Recipient in accordance with this Agreement;  |
| <b>"Grant Funding Period"</b>                  |                    | means the period for which Grant Funding is awarded, as set out in Schedule 1 to this Agreement;   |
| <b>"Grant Recipient"</b>                       |                    | means the individual, organisation or group of organisations that is undertaking the Project;  |
| <b>"Information"</b>                           |                    | has the meaning given under section 84 of the FOIA;  |
| <b>"Intellectual Property Rights" or "IPR"</b> |                    | means patents, trademarks, trade names, design rights, copyright (including rights in computer software and moral rights), database rights, rights in know-how and   |

other intellectual property rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which may subsist anywhere in the world;

**"Maximum Amount"**

means (subject to clause 20.2) the maximum aggregate amount of Grant Funding to be provided by NHS England as set out in Schedule 1;

**"Milestones"**

means the milestones to be achieved by the Grant Recipient in the Project and as set out in Schedule 2 to this Agreement;

**"NHS Brand Guidelines"**

means the guidelines on the following website: <http://www.nhsidentity.nhs.uk/> to be adhered to by the Grant Recipient during the Project and in relation to any materials arising from the Project;

**"Prohibited Act"**

- (a) offering, giving or agreeing to give NHS England any gift or consideration of any kind as an inducement or reward for:
  - (i) doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with NHS England; or
  - (ii) showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with NHS England;
- (b) entering into this Agreement or any other contract with NHS England where a commission has been paid or has been agreed to be paid by the Grant Recipient or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to NHS England;

- (c) committing any offence:
  - (i) under the Bribery Act 2010;
  - (ii) under legislation creating offences in respect of fraudulent acts; or
  - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other contract with NHS England; or
- (d) defrauding or attempting to defraud or conspiring to defraud NHS England.

**"Project"** means the project to be undertaken by the Grant Recipient as defined in Schedule 2 to this Agreement;

**"Project Manager"** means Director of the Grant Recipient, being the contract manager appointed by the Grant Recipient in relation to this Agreement or his/her replacement from time to time notified to NHS England;

**"Request for Information"** has the meaning in the FOIA or any apparent request for information under the FOIA, or the Environmental Information Regulations;

**"Termination Date"** means the date on which the Grant Funding ceases as set out in Schedule 1 to this Agreement or as subsequently varied by NHS England;

1.2 In this Agreement, save where the context requires otherwise, the following words, terms and expressions shall have the meanings given to them below:

1.2.1 any reference to this **"Grant"** includes any subsequent variations and any supplemental agreement made from time to time by agreement between the Parties;

1.2.2 any reference to **"NHS England"** and/or the **"Grant Recipient"** includes reference to any statutory successors;

1.2.3 any reference to **"Party"** or **"Parties"** means a party or the parties to this Agreement;

1.2.4 words importing any gender include any other gender. Words in the singular include the plural and words in the plural include the singular;

- 1.2.5 the headings and index are inserted for convenience only and shall have no legal effect;
- 1.2.6 references in this Agreement to any Clause, sub-clause or Schedule without further designation shall be construed as a reference to the Clause, sub-clause of or Schedule to this Agreement;
- 1.2.7 references to any statute or statutory provision in this Agreement shall be deemed to refer to those provisions as replaced, amended, extended or re-enacted from time to time whether by instruments, orders, bye-laws, statute or by directive or regulation (which is, in the case of a directive or regulation, intended to have direct application within the United Kingdom and has been adopted by the Council of the European Communities) and all statutory instruments or orders made pursuant to it;
- 1.2.8 the term "**person**" includes any individual partnership, firm, trust, body corporate, government, governmental body, authority, agency or unincorporated body of persons or association;
- 1.2.9 the Schedules to this Agreement are an integral part of this Agreement and reference to this Agreement includes reference to the Schedules;
- 1.2.10 the words "including" and "in particular" shall be construed so as not to limit the generality of any words or expressions in connection with which they are used;
- 1.2.11 in the event of a conflict between the contract conditions set out in this Agreement shall take priority over the Schedules.

## **2. ROLES OF NHS ENGLAND AND THE GRANT RECIPIENT**

The Grant Recipient shall undertake and complete the Project subject to and in accordance with the terms of this Agreement and NHS England shall provide the Grant Funding to the Grant Recipient upon and subject to the terms of this Agreement.

## **3. PURPOSE OF GRANT FUNDING**

- 3.1 The Grant Recipient shall use the Grant Funding only for the delivery of the Project and in accordance with this Agreement. The Grant Funding shall not be used for any other purpose without the prior written agreement of NHS England.
- 3.2 The Grant Recipient shall not make any change to the Project, Milestones or Deliverables without NHS England's prior written agreement.
- 3.3 NHS England may make changes to the Project with the approval of the Grant Recipient, such approval not to be unreasonably withheld or delayed.

- 3.4 Where the Grant Recipient intends to apply to a third party for other grant funding for the Project, it will notify NHS England in advance of its intention to do so and, where such grant funding is obtained, it will provide NHS England with details of the amount and purpose of that grant funding. The Grant Recipient agrees and accepts that it shall not apply for duplicate grant funding in respect of any part of the Project or any related administration costs that NHS England is Grant Funding in full under this Agreement.

#### **4. PAYMENT OF GRANT FUNDING**

- 4.1 Subject to Clause 12 and to the necessary funds being available when payment falls due, NHS England shall pay the Grant Funding at any time to up to and including 31 March 2015, into a bank account nominated by the Grant Recipient in accordance with this Agreement and not exceeding the Maximum Amount. The Grant Recipient agrees and accepts that Grant Funding payments can only be made to the extent that NHS England has available funds.
- 4.2 No Grant Funding shall be paid unless and until NHS England is satisfied that such payment will be used for proper expenditure in the delivery of the Project.
- 4.3 Payment of Grant Funding is conditional upon satisfactory progress with Milestones, Deliverables and compliance with the Agreed Quality Standards. The Grant Recipient must supply any Deliverables and associated documentation as required by NHS England, or Grant Funding payments may be withheld.
- 4.4 The amount of the Grant Funding shall not be increased in the event of any overspend by the Grant Recipient in its delivery of the Project.
- 4.5 The Grant Recipient shall promptly repay to NHS England any money incorrectly paid to it either as a result of an administrative error or otherwise. This includes (without limitation) situations where either an incorrect sum of money has been paid or where Grant Funding monies have been paid in error before all conditions attaching to the Grant Funding have been complied with by the Grant Recipient.

#### **5. USE OF GRANT FUNDING**

- 5.1 The Grant Funding shall be used by the Grant Recipient for the delivery of the Project in accordance with this Agreement.
- 5.2 Other projects, services or activities provided by the Grant Recipient outside of this Agreement must not be subsidised by the Grant Funding associated with this Agreement.
- 5.3 Where the Grant Recipient has obtained grant funding from a third party in relation to its delivery of the Project (including without limitation grant funding for associated administration and staffing costs), the Grant Recipient shall provide NHS England with a breakdown of such grant funding together with a clear description of what that grant funding shall be used for.
- 5.4 Unless agreed in writing by NHS England in advance, the Grant Recipient shall not spend any part of the Grant Funding unless a



nominee of NHS England has been appointed to the board of directors of the Grant Recipient.

- 5.5 Unless agreed in writing by NHS England in advance, the Grant Recipient shall not use the Grant Funding to:

5.5.1 purchase buildings or land; or

5.5.2 pay for any expenditure commitments of the Grant Recipient entered into before the Commencement Date.

- 5.6 Any liabilities arising at the end of the Project including any redundancy liabilities for staff employed by the Grant Recipient to deliver the Project must be managed and paid for by the Grant Recipient using the Grant Funding or other resources of the Grant Recipient. There will be no additional Grant Funding available from NHS England for this purpose.

## **6. PROCUREMENT**

- 6.1 The Grant Recipient agrees that:

6.1.1 it shall comply with the principles of transparency, non discrimination and equal treatment in connection with the procurement of any elements of the Project or any services in respect of which funding is to be provided by NHS England and shall promptly provide to NHS England any information which NHS England may request in order to satisfy itself that the Grant Recipient has done so;

6.1.2 all procurement of works, equipment, goods and services shall be based on value for money. In determining how this requirement should be met, the Grant Recipient must take account of public sector accountability and probity, and shall document the decision-making process.

## **7. DATA PROTECTION**

- 7.1 The Grant Recipient shall (and shall procure that any of its staff involved in connection with the activities under the Agreement shall) comply with any notification requirements under the DPA and both Parties will duly observe all their obligations under the DPA, which arise in connection with this Agreement.

- 7.2 Notwithstanding Clause 7.1, and unless the Grant Recipient gives written notice to NHS England, the Grant Recipient grants NHS England permission to hold their staff contact details as part of a NHS England contacts database. They will be used to contact staff or send them information from other NHS England sources relating to forthcoming events or initiatives which may be of interest. This information will be made available to NHS England staff, staff within the Grant Recipient and staff within other NHS England-funded projects, services or initiatives only for the purposes described above. This data will be held as long as appropriate and in compliance with the DPA.

- 7.3 It is the responsibility of the Grant Recipient to ensure that relevant Project team staff understand NHS England's policy, as set out in Clause 7.2 above in this regard.

## **8. CONFIDENTIALITY**

- 8.1 Notwithstanding Clauses 8.2 and 8.3, and subject to the remaining provisions of this Clause 8, any information or documents received by either Party from the other as a consequence of this Agreement and identified as such shall be treated as Confidential Information. Such Confidential Information is provided by the Parties to each other for the purposes of regulating the relationship between the Parties and ensuring compliance with this Agreement, and for no other purpose.
- 8.2 Neither Party shall, either during the term of this Agreement or after termination of this Agreement, disclose or use Confidential Information other than in accordance with this Agreement or with the written consent of the other Party.
- 8.3 The obligations of confidentiality and other obligations in this Clause 8 shall not extend to any matter which either Party can show:
- 8.3.1 is in, or has become part of, the public domain other than as a result of a breach of the obligations of confidentiality under this Agreement; or
  - 8.3.2 was in its written records prior to the Commencement Date and which is not Confidential Information; or
  - 8.3.3 was independently disclosed to it by a third party entitled to disclose the same; or
  - 8.3.4 was required to be disclosed to its professional representatives or advisers or as may be required by law (including compliance with the FOIA) or any legal or regulatory authority.

## **9. FREEDOM OF INFORMATION**

- 9.1 Nothing in this Agreement shall prevent NHS England from disclosing any Information whether or not relating to the Project which NHS England in its absolute discretion considers it is required to disclose in order to comply with the FOIA and/or the Environmental Information Regulations and any other statutory requirements whether or not existing at the date of this Agreement, and NHS England reserves the right to make such disclosure without reference to the Grant Recipient.
- 9.2 If NHS England shall at any time notify the Grant Recipient that it has received a Request for Information in respect of which NHS England requires the Grant Recipient's assistance then:-
- 9.2.1 the Grant Recipient shall at its own cost provide and procure that both it and its sub-contractors provide all necessary assistance required by NHS England in order to allow NHS England to comply with the Request for Information within the period or periods when it is obliged to respond to the Request for Information;

- 9.2.2 without limitation to the foregoing the Grant Recipient shall at its own cost within 5 working days of request supply and procure that both it and its sub-contractors supply to NHS England such Information and documents requested by NHS England in such form as reasonably prescribed by NHS England; and
  - 9.2.3 the Grant Recipient shall ensure that all Information produced in the course of the Project in relation to the Project and/or this Agreement is retained for disclosure and shall permit NHS England to inspect such records as required from time to time.
- 9.3 In the event that the Grant Recipient shall at any time receive any Request for Information relating to the Project or this Agreement or any activities or business of NHS England then:-
  - 9.3.1 the Grant Recipient shall supply the Request for Information to NHS England within 2 working days of receipt;
  - 9.3.2 NHS England shall be responsible for determining in its absolute discretion as to whether such Information is obliged to be disclosed; and
  - 9.3.3 the Grant Recipient shall not respond to the Request for Information or disclose any such Information without the prior written consent of NHS England (such consent not to be unreasonably withheld).

## **10. EQUALITY AND DIVERSITY**

- 10.1 The Grant Recipient shall not unlawfully discriminate either directly or indirectly on such grounds as race, colour, ethnic or national origin, disability, sex or sexual orientation, religion or belief, or age and, without prejudice to the generality of the foregoing, the Grant Recipient shall not unlawfully discriminate within the meaning and scope of the Equality Act 2010, the Human Rights Act 1998 or other relevant legislation, or any statutory modification or re-enactment thereof. The Grant Recipient shall take all reasonable steps to ensure observance to these statutes by all servants, employees, agents and consultants of the Grant Recipient and all sub-contractors.
- 10.2 The Grant Recipient will not discriminate directly or indirectly against any person because of their colour, race, nationality, ethnic origin, disability, sex or sexual orientation, religion or belief or age in relation to decisions to recruit, train, promote, discipline or dismiss employees.
- 10.3 The Grant Recipient and any sub-contractor shall adopt a policy to comply with its statutory positive duties to promote race, disability and gender equality as contained within the Equality Act 2010.

## **11. COMMERCIAL EXPLOITATION**

- 11.1 Background IPR is and shall remain the exclusive property of the party owning it (or, where applicable, the third party from whom its right to use it has derived).

- 11.2 Each Party grants to the other, a non-exclusive worldwide royalty-free licence in perpetuity to use and sub-license the Background IPR to the extent that such Background IPR is required in order to make such use of the Foreground IPR as is permitted under this Agreement.
- 11.3 Ownership of Foreground IPR, and the responsibility for its exploitation, rests with the Grant Recipient.
- 11.4 The Grant Recipient grants NHS England free of charge a non-exclusive worldwide royalty-free licence in perpetuity to use and sub-license the Foreground IPR. The Grant Recipient shall make the Foreground IPR available to the NHS.
- 11.5 It is the responsibility of the Grant Recipient to ensure that the Project does not in any way infringe copyright or other Intellectual Property Rights of any third party. The Grant Recipient warrants to NHS England that nothing carried out in relation to or resulting from the Project will infringe, in whole or in part, any Intellectual Property Rights of any other person and agrees to indemnify and hold NHS England harmless against any and all claims, demands and proceedings arising directly or indirectly out of NHS England's publication or use of any know-how or materials arising from the Project where this gives rise to or is alleged to give rise to an infringement of third party Intellectual Property Rights. The indemnity in this clause is not subject to the liability cap in clause 16.

## **12. WITHHOLDING, SUSPENDING AND REPAYMENT OF GRANT FUNDING**

- 12.1 NHS England's intention is that the Grant Funding will be paid to the Grant Recipient in full. However, without prejudice to NHS England's other rights and remedies, NHS England may at its discretion withhold or suspend payment of the Grant Funding and/or require repayment of all or part of the Grant Funding if:
  - 12.1.1 the Grant Recipient uses the Grant Funding for purposes other than those for which they have been awarded;
  - 12.1.2 the delivery of the Project does not start within three months of the Commencement Date and the Grant Recipient has failed to provide NHS England with a reasonable explanation for the delay;
  - 12.1.3 NHS England considers that the Grant Recipient has not made satisfactory progress with the delivery of the Project;
  - 12.1.4 the Grant Recipient is, in the reasonable opinion of NHS England, delivering the Project in a negligent manner;
  - 12.1.5 the Grant Recipient obtains duplicate grant funding from a third party for the Project;
  - 12.1.6 the Grant Recipient obtains grant funding from a third party which, in the reasonable opinion of NHS England, undertakes activities that are likely to bring the reputation of the Project or NHS England into disrepute;

- 12.1.7 the Grant Recipient provides NHS England with any materially misleading or inaccurate information;
- 12.1.8 the Grant Recipient commits or committed a Prohibited Act;
- 12.1.9 any member, employee or volunteer of the Grant Recipient has (a) acted dishonestly or negligently at any time and directly or indirectly to the detriment of the Project or (b) taken any actions which, in the reasonable opinion of NHS England, bring or are likely to bring NHS England's name or reputation into disrepute;
- 12.1.10 the Grant Recipient ceases to operate for any reason, or it passes a resolution (or any court of competent jurisdiction makes an order) that it be wound up or dissolved (other than for the purpose of a bona fide and solvent reconstruction or amalgamation);
- 12.1.11 the Grant Recipient becomes insolvent, or it is declared bankrupt, or it is placed into receivership, administration or liquidation, or a petition has been presented for its winding up, or it enters into any arrangement or composition for the benefit of its creditors, or it is unable to pay its debts as they fall due; or
- 12.1.12 the Grant Recipient fails to comply with any of the terms and conditions set out in this Agreement and fails to rectify any such failure within 30 days of receiving written notice detailing the failure.

### **13. SUB-CONTRACTING**

- 13.1 The Grant Recipient remains responsible for ensuring that the Project is provided to the Agreed Quality Standards, Deliverables and Milestones, even if it were to choose to sub-contract for the provision of some or all of the activities covered by this Agreement.
- 13.2 The Grant Recipient shall include in its contracts with suppliers or contractors engaged for the purposes of the Project a written condition undertaking to make payment for the supply of their goods and/or services within 30 days of receipt of the supplier's or contractor's invoice (provided that such goods and/or services have been supplied in accordance with the terms and conditions of the relevant contract).

### **14. REPORTING AND AUDIT**

- 14.1 The Grant Recipient shall:
  - 14.1.1 provide monthly progress reports to NHS England from the date of this Agreement until the 31<sup>st</sup> March 2016;
  - 14.1.2 provide that the Project Manager and/or any other officers of the Grant Recipient as may reasonably be requested by NHS England shall attend such meetings as NHS England may reasonably request with NHS England and any third parties invited by NHS England to review progress in relation to the Project;

- 14.1.3 provide NHS England with such information as NHS England may in its absolute discretion require in connection with the Project from the Commencement Date to the 31<sup>st</sup> March 2016.
- 14.2 The Grant Funding shall be shown in the Grant Recipient's accounts as a restricted fund and shall not be included under general funds.
- 14.3 The Grant Recipient shall keep separate, accurate and up-to-date accounts and records of the receipt and expenditure of the Grant Funding monies received by it.
- 14.4 The Grant Recipient shall keep all invoices, receipts, and accounts and any other relevant documents relating to the expenditure of the Grant Funding for a period of at least twenty four months following the Termination Date. NHS England shall have the right to review, at NHS England's reasonable request, the Grant Recipient's accounts and records that relate to the expenditure of the Grant Funding and shall have the right to take copies of such accounts and records.
- 14.5 The Grant Recipient shall, upon NHS England's reasonable request, comply and facilitate NHS England's compliance with all statutory requirements as regards accounts, audit or examination of accounts, annual reports and annual returns applicable to itself and NHS England.
- 14.6 The Grant Recipient shall closely monitor the delivery and success of the Project throughout the Grant Funding Period to ensure that the Milestones are being met, the Deliverables are being provided and this Agreement is being adhered to.
- 14.7 Where the Grant Recipient has obtained additional grant funding from a third party for its delivery of part of the Project, the Grant Recipient shall include the amount of such additional grant funding in its financial reports together with details of what that additional grant funding has been used for.
- 14.8 The Grant Recipient shall on request provide NHS England with such further information, explanations and documents as NHS England may reasonably require in order for it to establish that the Grant Funding has been used properly in accordance with this Agreement.
- 14.9 The Grant Recipient shall permit any person authorised by NHS England such reasonable access to its employees, agents, premises, facilities and records, for the purpose of discussing, monitoring and evaluating the Grant Recipient's fulfilment of the conditions of this Agreement and shall, if so required, provide appropriate oral or written explanations from them. Any costs reasonably and properly incurred by any person so authorised shall be borne by NHS England.
- 14.10 The Grant Recipient shall provide NHS England with a final report on upon completion of the Project which shall confirm whether the Project has been successfully and properly completed.
- 14.11 The Grant Recipient may be required to participate in additional audit, reporting or continuous improvement processes at such times and in such formats as NHS England deems appropriate.

## **15. PUBLICITY AND BRANDING**

- 15.1 The NHS brand carries very strong levels of credibility, authority and trust. As such, the Grant Recipient must conform fully to the NHS Brand Guidelines in relation to any publicity associated with the Project.
- 15.2 NHS England grants the Grant Recipient during the term of this Agreement a non-exclusive licence to use the NHS England logo in relation to the Project. The Grant Recipient shall not assign or grant sub-licences of this licence or any part of it and shall not use the NHS England logo for any other purpose.
- 15.3 The Project must carry the NHS England logo in all Project materials and the Grant Recipient must always include 'NHS England-funded' when writing or speaking about the Project. The project may also use any agreed branding or logo that is developed in respect of the NHS Code4Health Programme.
- 15.4 The Grant Recipient should exercise care that it spends appropriate amounts of funds on its publicity activities in relation to the Project.
- 15.5 NHS England shall be entitled to require the Grant Recipient to remove all reference to NHS England, and all NHS England branding, if, at NHS England's discretion, it conflicts with NHS Brand Guidelines or any additional advice established by NHS England in due course.
- 15.6 The Grant Recipient is expected to provide a contact for NHS England and grant NHS England access to the material created for the Project at any reasonable time, and to make a serious commitment to disseminating and sharing learning from the Project throughout the community. This may involve participating in events that NHS England arranges or attends to promote or support the initiative and contribute to evaluation activities as appropriate. The Grant Recipient must notify NHS England of all such planned activity. This information should be sent to NHS Open Source Programme Manager.

## **16. LIMITATION OF LIABILITY**

- 16.1 NHS England accepts no liability for any consequences, whether direct or indirect, that may come about from the Grant Recipient running the Project, the use of the Grant Funding or from any withdrawal of the Grant Funding. Subject to Clause 16.3 below, the Grant Recipient shall indemnify NHS England, its employees, agents, officers and sub-contractors in respect of all claims, demands, actions, costs, expenses, losses, damages and all other liabilities arising from or incurred by reason of the actions and/or omissions of the Grant Recipient in relation to the Project, the non-fulfilment of any of the obligations of the Grant Recipient under this Agreement or any of the Grant Recipient's obligations to third parties.
- 16.2 Subject to Clause 16.1, NHS England's liability under this Agreement is limited to the payment of the Grant Funding.
- 16.3 Subject to clause 11.5, the aggregate liability of the Grant Recipient (whether in contract or in tort or otherwise) to NHS England for any loss or damage howsoever caused shall be limited to, and in no

circumstances shall exceed, the portion of the payments received by the Grant Recipient at the date the liability was incurred, or where the Grant Recipient's liability is covered by an appropriate insurance policy, such liability shall not exceed the single incident limit specified in that policy. For the avoidance of doubt, the parties do not exclude or limit their liability for death, personal injury or fraud that occurs as a result of this Agreement.

## **17. FORCE MAJEURE**

- 17.1 If either Party is affected by Force Majeure it shall immediately notify the other Party in writing of the matters constituting the Force Majeure and shall keep that Party fully informed of their continuance and of any relevant change of circumstances whilst such Force Majeure continues.
- 17.2 The Party affected by Force Majeure shall take all reasonable steps available to it to minimize the effects of Force Majeure on the performance of its obligations under this Agreement.
- 17.3 Save as provided in Clause 17.5, Force Majeure shall not entitle either Party to terminate this Agreement and neither Party shall be in breach of this Agreement, or otherwise liable to the other, by reason of any delay in performance, or non-performance of any of its obligations due to Force Majeure.
- 17.4 If the Party affected by Force Majeure fails to comply with its obligation under Clauses 17.1 and 17.2 then no relief for Force Majeure, including from the provisions of Clause 17.3, shall be available to it and the obligations of each Party shall continue in force.
- 17.5 If the Force Majeure continues for longer than three months either Party may at any time whilst such Force Majeure continues terminate this Agreement by 3 months notice to the other in writing.

## **18. TERMINATION**

- 18.1 Either Party has the right at any time by notice in writing to the other Party to terminate this Agreement if:
  - 18.1.1 (save in relation to a bona fide reorganisation, reconstruction or amalgamation whilst solvent) any order is made or a resolution is passed for the winding up of the other Party, or if an administrative order is made in respect of the other Party or if an administrator or a receiver or an administrative receiver or other similar officer is appointed in respect of the other Party or all or any of its assets, or if the other Party is unable to pay its debts as they fall due or if any voluntary arrangement is proposed under Section 1 of the Insolvency Act 1986 in respect of the other Party; or
  - 18.1.2 the other Party commits any irremediable serious breach of any of the provisions of this Agreement; or
  - 18.1.3 subject to Clause 18.2, the other Party commits any remediable serious breach of any of the provisions of this Agreement and fails to remedy such breach within a period



of 30 days from the service of a written notice specifying the breach and requiring its remedy.

18.2 Neither of the Parties shall have the right to terminate this Agreement under Clause 18.1.3 above until the dispute resolution procedure provided for in Clause 22 below has been exhausted unless the Party allegedly in breach of this Agreement fails to comply or indicates it will not comply in any material way with the dispute resolution procedure.

18.3 Termination of this Agreement, howsoever caused, shall be without prejudice to the rights and liabilities of the Parties accrued prior to termination.

## **19. ASSIGNMENT AND NOVATION**

19.1 This Agreement is personal to both Parties. Except as provided at Clause 13, neither Party shall assign, novate, delegate, sub-contract, transfer, charge or otherwise dispose of all or any of its rights and responsibilities under this Agreement, unless otherwise agreed in writing, other than that NHS England reserves the right to transfer this Agreement to any successor body.

19.2 In any permitted assignment, the assignor shall procure and ensure that the assignee shall assume all rights and obligations of the assignor under this Agreement.

19.3 This Clause is not intended to prevent the Grant Recipient from sub-contracting any of its operations in the normal course of business.

## **20. VARIATION**

20.1 This Agreement shall not be capable of being varied, modified or altered, except by the prior written agreement of both Parties.

20.2 NHS England may at its absolute discretion vary the Maximum Amount following a request from the Grant Recipient or in the event that NHS England decides in its absolute discretion to no longer fund the Project (in whole or in part).

## **21. WAIVER**

No failure or delay by either Party to exercise any right or remedy under this Agreement shall be construed as a waiver of any other right or remedy.

## **22. DISPUTE RESOLUTION PROCEDURE**

22.1 In the event that there is a dispute, and all reasonable steps to resolve the dispute have been taken, between the Grant Recipient and NHS England, then the issue should be referred to the head of the Grant Recipient for the Project and The Open Source Programme Manager, of NHS England, or their nominees.

22.2 In the absence of agreement under Clause 22.1, the Parties may seek to resolve the matter through mediation under the Centre for Effective Dispute Resolution Model Mediation Procedure (or such other appropriate dispute resolution model as is agreed by both Parties).

Unless otherwise agreed, the Parties shall bear the costs and expenses of the mediation equally.

## **23. NOTICES**

- 23.1 Any notice, request or consent under this Agreement shall be in writing and shall be sufficiently served if sent by recorded delivery post, electronic facsimile, or electronic mail to the registered office of the Party to be served.

## **24. GOVERNING LAW AND COMPLIANCE**

- 24.1 These terms and conditions are governed by the laws of England; all matters relating to the terms and conditions will be subject to the exclusive jurisdiction of the courts of England.
- 24.2 If any provision of these terms and conditions is found by a court or other legitimate body to be illegal, invalid or unreasonable, it will not affect the remaining terms and conditions, which will continue in force.
- 24.3 The Grant Recipient must comply with any UK or EU legislation or any international treaty obligations currently in force or introduced during the timescale of the Project that has implications for the delivery of the Project and/or documents they supply and/or the progress with the Deliverables or Milestones. NHS England shall endeavour to inform the Lead Organisation of relevant legislation and supply guidance for compliance. It is the responsibility of the Grant Recipient to inform any sub-contractors accordingly.

## **25. GENERAL**

- 25.1 This Agreement constitutes the entire agreement between the Parties relating to its subject matter. Each of the Parties confirms that in entering into this Agreement it has not relied on any statement, representation, warranty, agreement or undertaking of any person (whether a Party to this Agreement or not) other than those expressly set out in this Agreement, and that it will not have any claim, right or remedy arising out of any such statement, representation, warranty, agreement or undertaking.
- 25.2 Each of the terms herein is distinct and severable from the others and if at any time one or more of such provisions is or becomes invalid, unlawful or unenforceable (whether wholly or to any extent), the validity, lawfulness and enforceability of the remaining provisions (or the same provision to any other extent) shall not in any way be affected or impaired.
- 25.3 Nothing in this Agreement shall operate to limit or exclude any liability of one of the Parties in respect of a fraudulent misrepresentation made by that Party to the others.
- 25.4 Neither Party shall act or describe itself as the agent, employee or partner of the other, nor shall it make any commitments on the other's behalf, and nothing in this Agreement is intended to create any agency, partnership or employment relationship.

- 25.5 Except where otherwise specified, the terms of this Agreement shall apply from the date of this Agreement or the start of the Project, whichever is earlier, until the expiry of the Grant Funding Period or for so long as any Grant Funding monies remain unspent by the Grant Recipient, whichever is longer.
- 25.6 The following Clauses under this Agreement shall survive expiry or termination of the Agreement and continue in full force and effect: 7, 8, 11, 14, 15, 16, 21, 22, 23, 24 and 25.

## **SCHEDULE 1**

### **1. THE GRANT**

The amount of monies available as Grant Funding under this Agreement is: £200,000 and the Maximum Amount is therefore £200,000

### **2. GRANT FUNDING PERIOD**

The Grant Funding will be available from 1st April 2014 until 31st March 2015.

### **3. TERMINATION DATE**

The Termination Date is 31<sup>st</sup> March 2015.

## **SCHEDULE 2**

### **DESCRIPTION OF PROJECT, DELIVERABLES, AGREED QUALITY STANDARDS AND MILESTONES**

#### **Description of Project**

NHS England is a commissioning board and therefore is commissioning these not for profit organisations to provide custodianship and delivery services to their members by ensuring a level playing-field for open-source software and that new source code is open and reusable and benefits other ongoing initiatives led by the NHS 111 team.

To ensure that quality urgent and emergency care services are continued to be commissioned it is becoming increasingly critical that various systems are able to integrate and are interoperable. The 'Five Year Forward View' also states that "Across the NHS, urgent and emergency care services will be redesigned to integrate between A&E departments, GP out-of-hours, urgent care centres, NHS 111 and ambulance services"

To enable integration between these various bodies and their various electronic system suppliers, it is critical that communities of practice amongst these various suppliers and aspirant suppliers are encouraged and supported to drive innovation. By providing Critical Care Grant to encourage Open Source platforms, these objectives can be achieved.

Ensuring a level playing-field for open-source software and that new source code is open and reusable will also benefit other ongoing initiatives led by the NHS 111 team such as development of a 5 year strategy for 'Directory of Services' which is a key enabler for the overall Urgent Health and Social Care economy and 'Digital/Online NHS 111'. It is also envisaged an open source platform in NHS 111 will enable and promote patient digital interaction with urgent care system in an agile fashion.

#### **Deliverables & Milestones**

1. Seed funding NHS Open Source Foundation
2. Support and facilitate conversion of proprietary solutions in NHS 111 to open source solutions
3. Supporting the establishment of a Critical Care CIC
4. Supporting other Not for Profit organisations including NHS organisations

#### **Quality Standards**

1. Industry standards shall be used for messaging, information governance and security.
2. All code shall be published under a recognised Open Source Initiative (OSI) licence and made freely available for download
3. All other collateral generated or otherwise produced by this Project shall be published under a Creative Commons licence or the Open Government Licence.

Signed – For and on behalf of NHS England:

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Name ...Tim Kelsey.....

Title...National Director of Patients & Information.....

Date.....

Signed – For and on behalf of Open Source Software Foundation for Health  
and Care CIC:

.....

Name ...[REDACTED].....

Title...[REDACTED].....

Date.....