



**THIS AGREEMENT** is made on the date the Agreement is digitally signed by the Contractor on the Manage your education and skills funding service ("**the Agreement Date**").

**BETWEEN: -**

- (1) **THE SECRETARY OF STATE FOR EDUCATION** acting through the Education and Skills Funding Agency an Executive Agency of the Department for Education of Cheylesmore House, Quinton Road, Coventry, CV1 2WT ("**the ESFA**"); and
- (2) **Provider name, company no (if applicable)** whose registered office is situated at **legal address** ("**the Contractor**").

**RECITALS: -**

- (A) The ESFA and the Contractor entered into a Contract for Services with the ESFA's reference number of **ESFA-XXXX** ("**Original Contract**") for the purposes of delivering Education and Training.
- (B) The ESFA and the Contractor have agreed to vary the terms of the Original Contract as set out in this Agreement.
- (C) The ESFA's reference number for this Variation Agreement is **X**.

**IT IS AGREED** as follows: -

**1. CONSIDERATION**

In consideration of each of the Parties entering into this Agreement (such consideration being agreed by the Parties to be good and valuable consideration, the adequacy and sufficiency of which is hereby acknowledged and agreed), the Parties have agreed to vary the Original Contract in accordance with Clause 38.2 of the Original Contract.

**2. VARIATION OF THE ORIGINAL CONTRACT**

- 2.1 The Parties agree with effect from the Agreement Date the Original Contract shall be varied as set out in Annex 1 attached.
- 2.2 Subject to the variations set out in Annex 1, the Original Contract shall continue in full force and effect in all respects.

2.3 In addition to the amendments set out in Annex 1, the Original Contract shall be construed and interpreted with such further consequential amendments as are necessary to give effect to the amendments set out in Annex 1 of this Agreement, as if such further amendments were also expressly set out in Annex 1.

2.4 Except as expressly provided for in Paragraph 2.3 and Annex 1, the Parties agree that no other liabilities, financial or otherwise, shall accrue to the ESFA because of this Variation Agreement.

### **3. SEVERABILITY**

The provisions of this Agreement are intended by the Parties to be severable in the event that any part of it is held to be illegal or unenforceable (in whole or in part) and such part shall not affect the validity and enforceability of the remaining provisions or the remainder of the affected provision under this Agreement.

### **4. AUTHORITY AND COSTS**

Each party undertakes that it has full power and authority to enter into and shall be responsible for its own costs arising in relation to this Agreement.

### **5. THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

5.1 Subject to Paragraph 0 below, this Agreement is not intended to create any benefit, claim or rights of any kind whatsoever enforceable by any person who is not a party to this Agreement. Accordingly, the Parties confirm that no term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement

5.2 It is the intention of the Parties that any other department, officer or agency of the Crown, may as required from time to time act as the ESFA's agent in enforcing the ESFA's rights under this Agreement.

### **6. GOVERNING LAW AND JURISDICTION**

The Parties agree that this Agreement and any dispute arising under or in any way connected with the subject matter of this Agreement (whether of a contractual or tortious nature or otherwise) shall be governed by and construed in accordance with the laws of England, and the Parties submit to the jurisdiction of the English Courts.

**7. ACCEPTANCE BY THE CONTRACTOR**

- 7.1 By accepting this Agreement via the “Manage Your Education and Skills Funding Service” the person taking this action on behalf of the Contractor represents and warrants that the Contractor has read and understood this Agreement, the Contractor agrees to be bound by this Agreement and that he/she is duly authorised to accept this Agreement and legally bind the Contractor.
- 7.2 This Agreement is made on the Agreement Date.

**SIGNED FOR AND ON BEHALF OF  
THE SECRETARY OF STATE FOR EDUCATION**

acting through the Education and Skills Funding Agency  
by Eileen Milner, Chief Executive of the Education and Skills Funding Agency

*Eileen M. Milner*

## ANNEX 1

### VARIATIONS TO ORIGINAL CONTRACT

Insert a new Schedule 3 into the Original Contract after Schedule 2 as follows:

#### **SCHEDULE 3 ESFA European Social Fund (ESF) Provider Relief Scheme 2 (July-October 2020) for COVID-19 Response**

1. We refer to the Original Contract. Unless otherwise defined, terms defined in the Original Contract and used in this Schedule 3 shall have the meaning set out in the Original Contract.

#### **Background**

2. The purpose of this Variation is for the Parties to set out the agreed terms of payment relief. The ESFA and the Contractor acknowledge that the relief is given in accordance with the policy set out in PPN 02/20 and PPN 04/20 and that both Parties shall act in good faith and work together towards the principles set out in PPN 02/20 and PPN 04/20. The Contractor acknowledges that any relief given to it by the ESFA is at the sole discretion of the ESFA the terms of which the Contractor agrees to abide.
3. The ESFA reasonably anticipates that the Procurement Regulations will apply to this Variation and the Parties shall ensure that there is lawful basis for agreeing the Variation under the Public Contracts Regulations 2015 and/or any applicable procurement rules. Due to the COVID-19 pandemic, this may include in particular justifications under Regulation 72 and Regulation 32 of the Public Contracts Regulations 2015 or such other applicable or equivalent provision.
4. The Original Contract, including any previous variations, will remain effective and unaltered except as amended by this Variation.

#### **Variation**

5. The following terms shall have the meaning as set out below and shall be incorporated into the Original Contract

<b>“Advance Payment”</b>	means the lower of the following: <ul style="list-style-type: none"><li>• monthly average earnings based on actual earnings data from October 2019 to March 2020 under the Original Contract, multiplied by 4</li><li>• The monthly Original Contract costs the Contractor has submitted as set out at paragraph 7.2 of the European Social Fund Provider Relief Scheme 2 (July – October 2020) Application Guidance;</li></ul>
--------------------------	---

	less earnings from actual delivery under the Original Contract and within the Advance Payment Cap.
<b>“Advance Payment Cap”</b>	Means the Advance Payment capped at: <ul style="list-style-type: none"> <li>• 25% of the Original Contract value over the previous Covid Relief Period and Covid Relief Period 2; and</li> <li>• at 90% of the current total Original Contract value taking into account actual reported delivery under the Original Contract and relief payments being sought under the ESFA ESF Provider Relief Scheme 2 (July to October 2020).</li> </ul>
<b>“Covid Related Hardship”</b>	means the adverse effect the COVID-19 pandemic has had on the Contractor’s ability to meet its contractual obligations under the Original Contract.
<b>“Covid Relief Period”</b>	means any period excluding Covid Relief Period 2 when support from the ESFA is available to the Contractor for Covid Related Hardship.
<b>“Covid Relief Period 2”</b>	means the period from 01 July 2020 until the Relief Scheme 2 Expiry Date.
<b>“ESFA ESF Provider Relief Scheme 2 (July – October 2020)”</b>	The scheme put in place by the ESFA to relieve Covid Related Hardship during the Covid Relief Period 2 as set out in Schedule 3
<b>“Open Book Interim Data”</b>	means the complete and accurate financial and non-financial information which is set out in the European Social Fund Provider Relief Scheme 2 (July to October 2020) Application Guidance Document and is required by the Authority to enable the Authority to understand all COVID--19 related relief, grants, interventions or other measures received by the Contractor from the Government, and to undertake ‘open book’ review.
<b>“Procurement Regulations”</b>	means the Public Contracts Regulations 2015 and the Defence and Security Public Contracts Regulations 2011.
<b>“PPN 02/20” and “PPN 04/20”</b>	means Procurement Policy Notes 02/20 and 04/20 as updated or amended from time to time setting out respectively information and guidance for public bodies on how they may amend payment provisions in contracts or consider other contractual relief in order to assist suppliers to combat the impact of COVID-19 and the relief that will be available to suppliers as they plan and transition towards resuming business as usual. PPN 02/20 can be found at <a href="https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19">https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19</a> and PPN

	04/20 can be found at <a href="https://www.gov.uk/government/publications/procurement-policy-note-0420-recovery-and-transition-from-covid-19">https://www.gov.uk/government/publications/procurement-policy-note-0420-recovery-and-transition-from-covid-19</a>
<b>“Relief Period 2 Payment for Services”</b>	has the meaning given to it in Paragraph 6.3.
<b>“Relief Scheme 2 Expiry Date”</b>	means 31 October 2020, or such other date as may be notified by the ESFA to the Contractor prior to or on 31 October 2020.
<b>“Sub-contractor”</b>	means a person or organisation engaged by the Contractor through a contract to deliver on its behalf the Services or some of the Services.
<b>“Variation”</b>	means the terms set out in this Schedule 3.

6. **Conditions of Funding and Eligibility Criteria** -The ESFA ESF Provider Relief Scheme 2 (July – October 2020) will operate as follows and the Contractor must abide by the following terms:

- 6.1. The Contractor must continue to deliver the Services itself and /or through its Sub-contractors during the Covid Relief Period 2 and to submit Learner Data in accordance with Clause 16 Submission of Learner Data, of the Original Contract which shall include the ILR and the Supplementary Data.
- 6.2. The provisions in Clauses 6.3 to **Error! Reference source not found.** will apply to the calculation of the Advance Payment due to the Contractor during the Covid Relief Period 2.
- 6.3. The ESFA will calculate and pay in accordance with Clause 12 of the Original Contract and European Social Fund funding rates for training and skills provision <https://www.gov.uk/government/publications/sfa-european-social-fund-esf-funding-rates-and-formula> the amount due to the Contractor in respect of the Services that have been delivered during the relevant month in the Covid Relief Period 2 (“Relief Period 2 Payment for Services”).
- 6.4. The ESFA will pay to the Contractor such an amount of the Advance Payment that when added to the Relief Period Payment for Services does not exceed the Advanced Payment Cap.
- 6.5. The ESFA will pay any Advance Payment that is due to the Contractor by BACS transfer.
- 6.6. The Contractor undertakes to pay promptly the wages and salaries of its Contractor Personnel.

- 6.7. The Contractor further undertakes to pay promptly its Sub-contractors and suppliers.
- 6.8. The Contractor will repay the Advance Payment. ESFA will seek repayment through future actual delivery by the setting off such repayment against the monthly payment to the Contractor from January 2021 to June 2021 in six (6) equal instalments, with the following exceptions:
- (i) Where the value of the actual earnings in a month is less than the repayment amount, we will recover an amount up to 50% of the value of the monthly earnings
  - (ii) ESFA will review the recovery position on a monthly basis to ensure that debts are recovered in the shortest period without causing hardship to any ESF contractor
- 6.9. The Contractor shall:
- 6.9.1. ensure that the Advance payments are promptly and solely applied to the purposes for which they are being paid, which will include making payments of wages and salary to Contractor Personnel and paying the Sub-contractors who are working on the Services to be provided under or in connection with the Contract so as to reduce the adverse effect of Covid Related Hardship;
  - 6.9.2. make available to the ESFA upon request any information (including the Open Book Interim Data) which the ESFA may reasonably require in order to:
    - 6.9.2.1. verify and assure that the Contractor has applied the Advance Payments it has received, including copies of accounts, ledgers, cash-flow forecasts and statements, balance sheets, profit and loss accounts and any other documentary Evidence;
    - 6.9.2.2. verify and assure that monies intended for Contractor Personnel performing the Contract have been properly and promptly paid;
    - 6.9.2.3. pay invoices submitted by the Contractor's Sub-contractors and supply chain immediately on receipt; and
    - 6.9.2.4. undertake 'open book' review
  - 6.9.3. maintain full records and a written audit trail of information as required by Clause 11 (Access and Monitoring) of the Contract and such full records and audit trail shall be made available promptly to the ESFA on request.
- 6.10. The Contractor shall not be entitled to combine its ability to claim Advance Payment under the ESFA ESF Provider Relief Scheme 2 (July – October) with any other government COVID-19 related relief, grant, intervention or

other measure which would result in the Contractor receiving more than one benefit or relief for the same underlying cash-flow issue

- 6.11. The ESFA may at any time and in its sole discretion designate one or more additional Covid Relief Periods by notice to the Contractor from time to time. Any such notice shall specify which, if any, PPN contains the applicable rules and principles for the relevant Covid Relief Period.
- 6.12. The Contractor must continue to return Learner Data through the ILR and Supplementary Data submissions as set out in Clause 16 (Submission of Learner Data) of the Contract during the Covid Relief Period 2. Where the Contractor is unable to provide Evidence that it is continuing to deliver the Services to the ESFA's reasonable satisfaction, the ESFA may cease the payment of Advance Payment and reclaim any payments of the Advance Payment that have already been paid.
- 6.13. The final amount of any Advance Payments received by the Contractor during the Covid Relief Period 2 will be recovered in accordance with Paragraph 6.8.

### **Recovery of Payment**

7. If in the reasonable opinion of the ESFA, the Contractor:
  - 7.1. fails to meet any obligation set out in this Variation;
  - 7.2. takes undue advantage of any relief including but not limited to delaying submitting the Learner Data with the effect that the Advance Payment that is assessed as being due is incorrect;
  - 7.3. fails to act transparently and with integrity; or
  - 7.4. has provided incorrect, inaccurate or misleading information or declarations in its application for the ESFA ESF Provider Relief Scheme 2 (July – October 2020) attached at Annex 1 of this Schedule 3.

The ESFA may take all action necessary under the Original Contract to recover any payment including any payment of Advance Payments made to the Contractor during the Covid Relief Period 2, including without limitation suspending payments under the Original Contract, terminating the Original Contract, retaining or setting-off payment of any amount it owes to the Contractor at any time under the Original Contract or any other contract that the ESFA has with the Contractor.

### **Miscellaneous**

8. The terms of this Variation shall be effective from the Agreement Date and shall expire on the Relief Scheme 2 Expiry Date.



9. Except to the extent set out in this Variation, this Variation shall not constitute a waiver of any right or remedy of the ESFA or the Contractor arising before, during or after this Variation.
10. The ESFA and the Contractor agree that any event arising from COVID-19 shall not give rise to any force majeure or frustration right set out in the Contract to the extent that such rights are mitigated by the payment of Advance Payments.
11. If there is an inconsistency between any of the provisions of this Variation and the provisions of the Contract, the provisions of this Variation shall prevail.

DRAFT