



Education & Skills
Funding Agency



European Union
European
Social Fund

Contract Type	Contract for Services
Funding Period	1 November 2017 – 31 July 2021
Between	the Secretary of State for Education (acting through the Education and Skills Funding Agency)
And	
Funding for	Adult Education Budget (Procured)
Contract Number	

ACCEPTANCE BY THE CONTRACTOR

By accepting this Contract 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 Contract, the Contractor agrees to be bound by this Contract and that he/she is duly authorised to accept this Contract and legally bind the Contractor.

This Contract is made on the date the Contract is digitally signed by the Contractor on the Manage your education and skills funding service.

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 & Skills Funding Agency

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Terms and Conditions

This Contract is made on the date the Contract is digitally signed by the Contractor on the Manage your education and skills funding service between:

CONTRACTOR REGISTERED NAME
AND ADDRESS

THE SECRETARY OF STATE
FOR EDUCATION ACTING
THROUGH THE EDUCATION
AND SKILLS FUNDING
AGENCY, AN EXECUTIVE
AGENCY OF THE
DEPARTMENT FOR
EDUCATION
CHEYLESMORE HOUSE
QUINTON ROAD
COVENTRY
CV1 2WT

Hereinafter called
The Contractor

Hereinafter called
the ESFA

GENERAL TERMS AND CONDITIONS

It is agreed as follows.

1. Definitions

“AEB Services”	Services to Learners paid for through the ESFA’s Adult Education Budget.
“Apprenticeship”	means the training and (where applicable) end point assessment for an employee as part of a job with an accompanying skills development programme.
“Background Intellectual Property”	means any Intellectual Property, other than Foreground Intellectual Property, which is used in performing the Services or comprises part of the Work
“Brokerage”	means the provision by a third party of services, for a fee, to source sub-contractors to provide the Services on behalf of the Contractor.
“Change in Control”	any event where any single person or group of persons acting in concert (within the meaning of The City Code on Takeovers and Mergers) acquires any direct or indirect legal and/or beneficial interest in the

	share capital (as defined in Section 545 of the Companies Act 2006) of the Contractor as a result of which that person or group of persons has a direct or indirect interest in more than 25% of the share capital of the Contractor. It shall also include any change in the top two tiers of the management team;
“Child”	means a person under the age of 18.
“Combined Authority”	means an authority established under section 103(1) of the Local Democracy, Economic Development and Construction Act 2009 or an authority to which a delegation of the Secretary of State’s functions has been made under section 39A of the Greater London Authority Act 1999.
“Commencement Date”	means 1 November 2017.
“Confidential Information”	means any information, including Personal Data as defined by the Data Protection Laws, and any information, however it is conveyed, that relates to the business, affairs, developments, trade secrets, know-how, personnel, and suppliers of the Parties including all IPRs, together with all information derived from any of the above, and any other information clearly designated as being confidential or which ought reasonably be considered to be confidential (whether or not it is marked "confidential").
“Contract”	means the Contract between the above named parties consisting of these Terms and Conditions, the specification and any other documents (or parts thereof) specified in the Contract and any variations to the Contract agreed in writing and signed by both Parties.
“Contract Period”	means the period between the Commencement Date and the Expiry Date, unless terminated earlier on the Termination Date.
“Contractor Personnel”	means all persons employed or engaged by the Contractor together with the Contractor’s servants, agents, consultants and Sub-Contractors (and all persons employed by any Sub-Contractor together with the Sub-Contractor’s servants, consultants, agents, Contractor’s and sub-contractors) used in the performance of its obligations under this Contract;

"Contractor Related Parties"	means any employee, officer, consultant, agent or any other person whatsoever acting for or on behalf of the Contractor or otherwise under the Contractor's control and direction (including but not limited to sub-contractors).
"Controller, Processor, Data Subject, Personal Data, Personal Data Breach, Data Protection Officer"	take the meaning given in the GDPR.
"Crown Body"	means any department, office or agency of the Crown, including Ofsted, the Care Quality Commission, the Charity Commission, the Office for Students, any and all Local Authority or Combined Authority bodies.
"Data Loss Event"	any event that results, or may result, in unauthorised access to Personal Data held by the Processor under this Contract, and/or actual or potential loss and/or destruction of Personal Data in breach of this Contract, including any Personal Data Breach.
"DPA 2018"	Data Protection Act 2018.
"Data Protection Impact Assessment"	an assessment by the Controller of the impact of the envisaged processing on the protection of Personal Data.
"Data Protection Laws"	means the Data Protection Act 2018 and Privacy and Electronic Communications (EC Directive) Regulations 2003 and any other data protection laws and regulations applicable in the UK (or in any relevant part thereof), including the General Data Protection Regulation (EU) 2016/679 or similar and any codes of practice, guidelines and recommendations issued by the Information Commissioner, any replacement body or other relevant supervisory authority, all of which are current at the time of any Data processing by the Service Provider (and in the event of any conflict between the Data Protection Laws and Law, Data Protection Laws shall take precedence).
"Data Protection Legislation"	(i) the GDPR, the LED and any applicable national implementing Laws as amended from time to time (ii) the DPA 2018 to the extent that it relates to processing of personal data and privacy; (iii) all applicable Law about the processing of personal data and privacy.
"Data Subject Request"	a request made by, or on behalf of, a Data Subject in accordance with rights granted pursuant to the

	Data Protection Legislation to access their Personal Data.
“Declaration of Sub-contractors”	the declaration that the ESFA requires a Contractor complete specifying whether or not the Contractor is sub-contracting any of the Services and if so, what Services and the amount of funding that represents.
“Disclosure and Barring Service”	means the non-departmental public body established pursuant to the Protection of Freedoms Act 2012.
“ESFA Data”	Means any data (including metadata), record, document or information howsoever stored which is either: <ul style="list-style-type: none"> (a) communicated by the ESFA, its staff, sub-contractors and agents to the Contractor in writing, orally, electronically or by any other means relating to the Learners and/ or Services provided to the Learners; or (b) is obtained, gleaned, compiled or processed by the Contractor during the course of the Contractor providing the Services relating to or provided to the Learners , including Personal Data for which the ESFA is the data controller including but not limited to ILR Data and e-portfolios.
“Exempt Information”	means any information or class of information (including but not limited to any document, report, contract or other material containing information) relating to this Contract or otherwise relating to the Contractor, which potentially falls within an exemption to FOIA (as set out therein).
“Expiry Date”	means 31 July 2021 or such other later date as is notified in writing to the Contractor by the ESFA in accordance with Clause 2.2.
“FOIA”	means the Freedom of Information Act 2000 and all regulations made there from time to time or any superseding or amending enactment and regulations, and words and expressions defined in the FOIA shall have the same meaning in Clause 7 (Freedom of Information and Confidentiality).
“FOIA Notice”	means a decision notice, enforcement notice and/or an information notice.

“Foreground Intellectual Property”	means any Intellectual Property that arises or is obtained or developed by, or on behalf of, the Contractor in respect of the Work in the course of or in connection with the provision of the Services excluding Learner Files.
“Funding Rules”	means the documents, which set out the detailed requirements with which the Contractor must comply in respect of each Learning Programme, delivered under this Contract as may be amended by the ESFA from time to time; as follows; AEB Services (including 16 – 18 traineeships): https://www.gov.uk/guidance/adult-education-budget-aeb-funding-rules-2020-to-2021
“GDPR”	the General Data Protection Regulation (<i>Regulation (EU) 2016/679</i>).
“High Needs Learner”	means a Learner aged 16 to 18 with high levels of Special Educational Needs and Disability (SEND), supported with top-up funding from the high needs budget, or any young person aged 19 to 25 subject to an Education Health and Care Plan, who requires additional support costing over £6,000;
“ILR Data”	Means individualised Learner record data;
“Indirect Losses”	means loss of profits, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature;
“Insolvency Event”	means, in respect of the Contractor: (a) a proposal is made for a voluntary arrangement within Part I of the Insolvency Act 1986 or of any other composition scheme or arrangement with, or assignment for the benefit of, its creditors; or (b) a shareholders' meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding-up is passed (other than as part of, and exclusively for the purpose of, a bona fide reconstruction or amalgamation); or (c) a petition is presented for its winding up (which is not dismissed within 14 Working Days of its service) or an application is made for the appointment of a provisional liquidator or a

	<p>creditors' meeting is convened pursuant to section 98 of the Insolvency Act 1986; or</p> <p>(d) a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets; or</p> <p>(e) an application order is made either for the appointment of an administrator or for an administration order, an administrator is appointed, or notice of intention to appoint an administrator is given; or</p> <p>(f) it is or becomes insolvent within the meaning of section 123 of the Insolvency Act 1986; or</p> <p>(g) being a "small company" within the meaning of section 382(3) of the Companies Act 2006, a moratorium comes into force pursuant to Schedule A1 of the Insolvency Act 1986;</p>
“Inspectorates”	<p>means one, any or all of the inspectorates: Office for Standards in Education, Children’s Services and Skills (Ofsted), Her Majesty’s Inspectorate for Education and Training in Wales (Estyn), the Quality Assurance Agency for Higher Education, the Office for Students (OFS), and the Care Quality Commission (CQC).</p>
“Intellectual Property”	<p>means any patent, registered design, copyright, database right, design right, topography right, trade mark, trade name, application to register any of the aforementioned rights, trade secret, inventions, right in unpatented know-how, right of confidence and any other intellectual or industrial property right of any nature whatsoever in any part of the world including, without limitation:</p> <p>(a) any renewals, revisions and extensions created or provided by the laws of any country;</p> <p>(b) all rights of action and remedies (including but not limited to an injunction, damages and/or an account of profits) in relation to past infringements; and</p> <p>(c) the right to apply for registration of any such rights in any country of the world;</p>
“Law”	<p>means any law, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning</p>

	of Section 2 of the European Communities Act 1972, regulation, order, regulatory policy, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements with which the Processor is bound to comply.
“Learner”	means any third party including any student, apprentice, trainee or similar to whom the Contractor is required to deliver any of the Services.
“Learner Files” / “Evidence Packs”	means any information relating to a Learner generated by the Contractor, the Learner or a third party for the purpose of the delivery of the Learning Programme.
“Learning Programme”	means a programme of education and/or training delivered by the Contractor under this Contract.
“LED”	Law Enforcement Directive (<i>Directive (EU) 2016/680</i>).
“Local Enterprise Partnership (LEP)”	means a formalised partnership between local authorities to determine local economic priorities and lead economic growth and job creation within its area.
“Minor Breach”	means a delay or non-performance by either Party including any Contractor Related Parties of its obligations under the Contract which does not materially, adversely or substantially affect the performance or delivery of the Service or the provision of a safe, healthy and supportive learning environment.
“Offender Management”	means an officer from the National Offender Management Service who is working directly with an offender serving their sentence in the community.
“OFSTED”	means the Office for Standards in Education, Children’s services and Skills.
“Office for Students (OfS)”	means the government-approved regulatory and competition authority for the higher education sector in England from 1 April 2018.
“Parties”	means the ESFA acting on behalf of the Crown and the Contractor.
“Personal Data”	takes the meaning given in the GDPR

“Premises”	means the location where the Services are to be performed, as detailed in the Contract.
“Processor Personnel”	means all directors, officers, employees, agents, consultants and contractors of the Processor and/or of any Sub-Processor engaged in the performance of its obligations under this Contract.
“Protective Measures”	appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the such measures adopted by it including those outlined in the Terms and Conditions of the Contract.
“Regulated Qualification Framework” or “RQF”	A system for cataloguing all qualifications regulated by Ofqual.
“Regulatory Body”	means those government departments and regulatory, statutory and other entities, committees, ombudsmen and bodies which, whether under statute, rules, regulations, codes of practice or otherwise, are entitled to regulate or investigate the matters dealt with in this Contract or any other affairs of the Contractor or the ESFA, including, without limitation Ofsted.
“Restricted Share Transfer”	any transfer of shares or ownership in the Contractor or its holding company or in the senior management (including shadow directors) of the Contractor or its holding company to a person who had a significant influence as a director and / or a shareholder over another contractor and in respect of which within the last three years the ESFA has terminated one or more contract for similar Services as are being delivered under this Contract or the ESFA would have terminated the Contract had the contractor not pre-emptively terminated the relevant contract.
“Serious Breach”	means any breach defined as a Serious Breach in the Contract or any breach or breaches which adversely, materially or substantially affect the performance or delivery of the Services or compliance with the terms and conditions of the Contract or the provision of a safe, healthy and supportive learning environment or a breach of security that adversely affects the Personal Data or privacy of an individual. Failure to comply with

	legislation, or actions or omissions by The Contractor that endanger the Health or Safety of Learners, Contractor Personnel, and all other persons including members of the public would constitute a Serious Breach.
“Services”	means the services to be provided as set out in the Funding Rules and the Specification.
“Specification”	means the documents setting out the ESFA’s requirements for the Services to be provided under this Contract.
“Sub-Contractor Policy”	means the ESFA’s policy that applies to subcontracting and Sub-Contractors as set out at https://www.gov.uk/guidance/subcontracting-using-funding-to-offer-education-and-training ;
“Sub-processor”	any third Party appointed to process Personal Data on behalf of that Processor related to this Contract.
“Successor Contractor”	means the person nominated by the ESFA to undertake the services substantially the same as the Services after the termination of this Contract.
“Termination Date”	means any date on which this Contract terminates in accordance with Clause 23 (Termination).
“Work”	means all materials created by the Contractor as a result of the provision of the Services including Confidential Information and all designs, drawings, data, specifications and all other technical business and similar information relating to the Services including all readable or computer or other machine readable data or material and any material relating to or comprising software which may be part of the provision of the Services
“Working Day”	a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London.

2. Commencement and Continuation

- 2.1. The Contract shall commence on 1 November 2017 and terminate on the Expiry Date.
- 2.2. The ESFA may, by giving written notice to the Contractor extend the Contract on up to two occasions (up to a maximum of one year on each occasion), up to 31 July 2020 (subject to the Contractor’s performance, continuing availability of funding).

- 2.3. If the Contract Period is extended in accordance with Clause 2.2, the definition of Expiry Date shall be updated accordingly.

3. Contract Management

- 3.1. The ESFA and the Contractor must each nominate a contact for the purpose of dealing with queries and issues under this Contract and advise the other of the contact details.
- 3.2. The Contractor must ensure appropriate members of staff register as users on the user role management system at <https://logon.fasst.org.uk> to enable the Contractor to digitally sign and agree the Contract online. It is the Contractor's responsibility to maintain appropriate user roles on an on-going basis.
- 3.3. The Contractor will inform the ESFA if directors, or any other person who has powers of representation, decision or control, meet the characteristics set out in the Funding higher risk organisations and subcontractor policy <https://www.gov.uk/government/publications/esfa-policy-on-funding-higher-risk-organisations-and-subcontractors>. Failure to inform the ESFA will be a Serious Breach of the Contract.

4. Service Delivery

- 4.1. The Services to be delivered under this Contract are the delivery of the Learning Programmes as set out in Appendix 1, the Summary of Programme Funding. The detailed requirements in respect of each Learning Programme are set out in the Funding Rules as amended from time to time by the ESFA and which form part of the terms and conditions of this Contract.
- 4.2. The Services are to be delivered in accordance with the specific requirements of the ESFA, any tender document submitted by the Contractor and the Supporting Documentation as attached at Appendix 1 which sets out the activity and/or scheduled payment profiles for the Services agreed by the Parties, which all form part of the terms and conditions of the Contract.
- 4.3. The Contractor must provide evidence that it has worked in partnership with the LEP and where relevant the Mayoral Combined Authority and /or the Greater London Authority to ensure that the delivery of the Services takes account of the local economic and skills and education priorities.
- 4.4. The Contractor must complete the Learner's qualification on or before the planned end date in the data submitted in the ILR. Where the Contractor misses this date, the ESFA may consider this a Minor Breach of the Contract.

5. Assignment and Sub-Contracting

- 5.1. Where the Contractor sub-contracts or intends to sub-contract any duties or obligations arising out of this Contract, the Contractor must provide the ESFA with details of all Sub-Contractors bi annually by fully and accurately completing

the Declaration of Sub-Contractors form in accordance with the deadline set out in the Funding Rules. If the Contractor is not sub-contracting then a nil return must be received by the deadline date. The Contractor must notify the ESFA of any within year changes to its Sub-Contractors that take place between the submission dates of the Declaration of Sub-Contractors forms. The ESFA reserves the right to require the Contractor not to enter into, or to terminate, any Sub-Contract to deliver the Services under this Contract.

- 5.2. The Contractor must ensure that all sub-contracting arrangements are in compliance with the Subcontracting obligations contained in the Funding Rules and the Sub-contractor Policy.
- 5.3. The Contractor must comply with the requirements on sub-contracting delivery of the Services set out in the Funding Rules as amended and updated. Sub-contracting any part of the Contract shall not relieve the Contractor of any obligation or duty attributable to him under the Contract or these conditions. The Contractor is responsible for all the actions of its sub-contractors connected to or arising out of the delivery of the Services, which it sub-contracts.
- 5.4. Where the Contractor has sub-contracted any duties or obligations arising out of this Contract, the Contractor shall ensure that there is in place a legally binding sub-contract and send copies of the sub-contract to the ESFA if requested in writing to do so. Where the Contractor enters into a Sub-Contract for the purpose of performing the Contract, the Contractor shall ensure that the Sub-Contract includes any terms specified in the Funding Rules.
- 5.5. The Contractor shall ensure that Sub-Contractors are selected fairly following an open and competitive tendering process and have sufficient capacity, capability, quality and financial standing to deliver the Services.
- 5.6. The Contractor will not enter into any agreement for Brokerage in relation to the Services under this Contract.
- 5.7. The Contractor shall ensure that any Sub-Contract entered into for the purpose of delivering the Services under this Contract contains a term providing that the ESFA has the right to enforce the terms of the Sub-Contract.
- 5.8. The Contractor shall make payment to any Sub-Contractor within 30 days of receiving a valid claim for payment and ensure that any Sub-Contract entered into for the purpose of delivering the Services under this Contract contains a term giving effect to this requirement.
- 5.9. The Contractor may not assign any rights, duties or obligations under this Contract without the consent of the ESFA.
- 5.10. Unless specifically authorised in writing by the ESFA, the Contractor may only subcontract the Services to one level. For the avoidance of doubt the Subcontractor will not further sub-contract the Services that have been sub-contracted to it. This is to ensure that the Contractor retains clear and

transparent control of the quality of training provision, and that proper and appropriate measures are in place to manage the Learner experience.

- 5.11. The Contractor will manage and monitor its Subcontractors in accordance with the relevant Subcontract to ensure that the Subcontractors deliver the subcontracted Services to the standard set out in Clause 5 of this Contract.
- 5.12. The Contractor will review annually its sub-contracts, including the rationale for entering into those sub-contracts, and will publish by 31 October 2020 a statement on its public facing website setting out a high level summary of its sub-contracts and the rationale.
- 5.13. Where a Subcontract expires or is terminated for whatever reason, the Contractor will make sure that there is continuity of Services for existing Learners.
- 5.14. The Contractor must consider the criteria set out in the Funding higher risk organisations and subcontractors policy which is published on the ESFA's website <https://www.gov.uk/government/publications/esfa-policy-on-funding-higher-risk-organisations-and-subcontractors>. The Contractor will have both the process it has followed for selecting and appointing Subcontractor(s) available for inspection by the ESFA. This process will consider non-financial as well as financial issues.
- 5.15. Failure to comply with any of the requirements under Clauses 5.1 to 5.14 may result in the ESFA taking such actions as it deems appropriate, which may include, but is not limited to, action under clause 22 (Breach).

6. Change in Control

- 6.1. The Contractor represents and warrants to the ESFA that at the Commencement Date the legal and beneficial ownership of the Contractor is as set out in any tender information or register information supplied by the Contractor and that no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in the Contractor.
- 6.2. The Contractor will inform the ESFA in writing if there is a change in its name at least one month prior to the change taking effect unless to do would put the Contractor in breach of the Law. If that is the case the Contractor will inform the ESFA of the change in name within 10 Working Days of it becoming lawful to do so.
- 6.3. The Contractor will inform the ESFA as soon as reasonably practicable and, in any event 12 weeks before, any Change in Control of the Contractor unless to do would put the Contractor in breach of the Law. If that is the case the Contractor will inform the ESFA of the Change in Control within 10 Working Days of it becoming lawful to do so.

- 6.4. For the avoidance of doubt if there is a change in ownership in the Contractor, this will be considered under Regulation 72 of the Public Contracts Regulations 2015 as it could potentially constitute a contract modification. The ESFA will, upon receipt of a notification under clause 6.3 consider if the requested change is permissible under Regulation 72 of the Public Contracts Regulations 2015. The ESFA may terminate this Contract under clause 23.5.1 where the change is not permissible.
- 6.5. The ESFA may, at any time, request that the Contractor informs them of details of any Change in Control and the Contractor will comply with such a request as soon as reasonably practicable and in any event within twenty (20) Working Days of receipt of the ESFA's request.
- 6.6. The ESFA will consider any Change in Control in the context of all available information including that provided by the Contractor. The ESFA will consider the criteria set out in the Funding higher risk organisations and subcontractors policy which is published on the ESFA's website <https://www.gov.uk/government/publications/esfa-policy-on-funding-higher-risk-organisations-and-subcontractors>.
- 6.7. If the Change in Control or change in name breaches this Contract or any policies referred to in this Contract, the ESFA reserves the right to take action against the Contractor in accordance with clauses 22 (Breach) and 23 (Termination) of this Contract.
- 6.8. If there is a Restricted Share Transfer of the Contractor:
 - 6.8.1 the Contractor will give the ESFA notice of such Restricted Share Transfer;
 - 6.8.2 the ESFA reserves the right to take whatever actions it deems necessary; and
 - 6.8.3 the ESFA may terminate this Contract under clause 23.5.3 (Termination) within three (3) months of the Restricted Share Transfer taking place.

7. Freedom of Information and Confidentiality

7.1. Freedom of Information

- 7.1.1. The Contractor acknowledges and agrees that the ESFA is subject to legal duties under FOIA, which may require the ESFA to disclose on request information relating to this Contract or otherwise relating to the Contractor.

- 7.1.2. The Contractor acknowledges and agrees that the ESFA is required by law to consider each and every request made under FOIA for information.
- 7.1.3. The Contractor acknowledges and agrees that all decisions made by the ESFA pursuant to a request under FOIA are solely a matter for and at the discretion of the ESFA.
- 7.1.4. Notwithstanding anything in this Contract to the contrary (including without limitation any obligations of confidentiality), the ESFA shall be entitled to disclose information in whatever form pursuant to a request made under FOIA, save that in relation to any information that is Exempt Information the ESFA shall use reasonable endeavours (but shall not be obliged) to consult the Contractor and shall not:
- a) confirm or deny that information is held by the ESFA;
- or
- b) disclose information requested,
- to the extent that in the ESFA's opinion the information is eligible in the circumstances for an exemption and therefore the ESFA may lawfully refrain from doing either of the things described in parts (a) and (b) of this Clause.
- 7.1.5. In relation to information relating to the Contractor or the Contract which the Contractor requests should be exempt under the FOIA. The Contractor shall indemnify the ESFA for any and all costs (including legal fees) incurred by the ESFA in:
- a) assessing the application of any exemption under FOIA; and/or
 - b) responding to any FOIA notice; and/or
 - c) lodging any appeal against a decision of the Information Commissioner in relation to disclosure,
- where such costs are incurred pursuant to efforts by the ESFA to withhold Exempt Information.
- 7.1.6. The ESFA shall in no event be liable for any loss, damage, harm or detriment, howsoever caused, arising from or in connection with the disclosure under FOIA of any Exempt Information or other information whether relating to this Contract or otherwise relating to the Contractor.
- 7.1.7. The Contractor shall assist the ESFA as reasonably necessary to enable the ESFA to comply with its obligations under FOIA.

7.2. Confidentiality

7.2.1. The Contractor hereby warrants that:

7.2.2. any person employed or engaged by it (in connection with this Contract in the course of such employment or engagement) shall treat all Confidential Information belonging to the ESFA as confidential, safeguard it accordingly and only use such Confidential Information for the purposes of this Contract; and

7.2.3. any person employed or engaged by it (in connection with this Contract in the course of such employment or engagement) shall not disclose any Confidential Information to any third party without prior written consent of the ESFA, except where disclosure is otherwise expressly permitted by the provisions of this Contract.

7.3. The Contractor shall take all necessary precautions to ensure that all Confidential Information obtained from the ESFA is treated as confidential and not disclosed (without prior approval from the ESFA's Contract Manager) or used other than for the purposes of this Contract by any of its employees, servants, agents or sub-contractors.

7.4. The provisions of Clauses 7.2 and 7.3 shall not apply to any information:

7.4.1. which is or becomes public knowledge (other than by breach of Clauses 7.2 and 7.3);

7.4.2. which was in the possession of the receiving party, without restriction as to its disclosure, before the date of receipt from the disclosing party;

7.4.3. which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the party making the disclosure, including any requirements for disclosure under the Freedom of Information Act or the Environmental Information Regulations.

7.5. Nothing in this Clause 7 shall be deemed or construed to prevent the ESFA from disclosing any Confidential Information obtained from the Contractor:

7.5.1. to any other Central Government Body, Non-Departmental or Quasi Government Body or agency, central or local;

7.5.2. to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;

7.5.3. to any professional adviser, consultant, contractor or other person engaged by the ESFA directly in connection with this Contract,

provided that such information is treated as confidential by the receiving consultant, contractor or any other person;

- 7.5.4. on a confidential basis to any proposed successor body in connection with any assignment disposal of its rights, obligations or liabilities under this Contract.
- 7.6. In order to ensure that no unauthorised person gains access to any Confidential Information or any data obtained in the course of the Services, the Contractor undertakes to maintain adequate security arrangements that meet the requirements of professional standards and best practice.
- 7.7. The Contractor must immediately notify the ESFA of any breach of security in relation to Confidential Information and all data obtained in the course of the Services and must keep a record of such breaches. The Contractor must use its best endeavours to recover such Confidential Information or data however it may be recorded. The Contractor must co-operate with the ESFA in any investigation that the ESFA considers necessary to undertake as a result of any breach of security in relation to Confidential Information or data.
- 7.8. The Contractor shall, at its own expense, alter any security systems at any time during the Contract Period at the ESFA's request if the ESFA reasonably believes the Contractor has failed to comply with Clause 7.7.
- 7.9. The ESFA reserves the right to publish details of this Contract and the payments made under it to comply with the Government's transparency requirements.
- 7.10. The provisions of this Clause 7 will apply for the duration of the Contract and after its termination.

8. Equality of Opportunity

- 8.1. The Contractor shall not unlawfully discriminate within the meaning and scope of the provisions of the Equality Act 2010 or any statutory modification or re-enactment thereof or any other statutory provision relating to discrimination in employment or the provision of services. The Contractor shall take all reasonable steps to ensure the observance of these provisions by all servants, employees or agents of the Contractor and all sub-contractors employed in the execution of the Contract. The Contractor must comply with the detailed requirements in relation to equality of opportunity set out in Clauses 8.2 to 8.4.
- 8.2. The Contractor must, in delivering the Services under this Contract, demonstrate that it has had regard to the duties placed on the ESFA and the Contractor by the Equality Act 2010. The Contractor must take all reasonable steps to ensure the observance of these provisions by all servants, employees

or agents of the Contractor and all sub-contractors employed to deliver the Services.

- 8.3. The Contractor shall ensure that equality of opportunity is built into all aspects of Services; the business planning process; and the self-assessment process. The Contractor shall use analysis of data to inform future planning to improve the representation, participation and success of underrepresented and underachieving groups and challenge stereotyping. The Contractor shall use appropriate, specific and measurable objectives. These must be proportionate, relevant and aligned to the Services the Contractor is funded to deliver.
- 8.4. The ESFA may use a variety of equality information and data to support judgements about quality and eligibility for funding. These may include, but are not limited to: inspection judgements for equality and diversity, judgements from the Equality and Human Rights Commission, and the success and participation rates of different groups of Learners.

9. Learner Health, Safety & Welfare

- 9.1. The Contractor shall ensure so far as reasonably practicable that learning takes place in safe, healthy and supportive environments, which meet the needs of learners. The Contractor shall provide information to the ESFA, as and when specifically requested, to give assurance that adequate arrangements exist for Learner Health, Safety and Welfare.
- 9.2. Where part of the learning takes place in an environment outside the direct control of the Contractor, the Contractor shall take all reasonable steps to ensure that adequate arrangements are in place to ensure the health and safety of Learners.
- 9.3. The Contractor shall make arrangements for ensuring that the Provision is provided with a view to safeguarding and promoting the welfare of Children receiving education or training at the institution or under the auspices of the Contractor in an environment outside the direct control of the Contractor. In doing so, the Contractor shall have regard to any guidance published, from time to time, by the Secretary of State for Education, which sets out the expectations in relation to safeguarding practice within further education institutions. References to 'must' in any such guidance shall be treated as 'should' for the purposes of this Contract, save for any references to legal requirements arising from the Safeguarding Vulnerable Groups Act 2006 in respect of referrals to the Disclosure and Barring Service. Failure to do so may constitute a Serious Breach of this Contract.
- 9.4. The Contractor shall make arrangements for ensuring that the Provision is provided with a view to safeguarding and promoting the welfare of High Needs Learners aged 18 to 25 receiving education or training at their institution or under the auspices of the Contractor in an environment outside the direct control of the Contractor. This must include the adoption of safer recruitment procedures. In doing so, the Contractor shall make those arrangements as if such Learners were Children and must have regard to any guidance published,

from time to time, by the Secretary of State for Education, which sets out the expectations in relation to safeguarding practice within further education institutions as if it applied to those Learners as if they were Children. References to 'must' in any such guidance shall be treated as 'should' for the purposes of this Contract, save for any references to legal requirements arising from the Safeguarding Vulnerable Groups Act 2006 in respect of referrals to the Disclosure and Barring Service. Failure to do so may constitute a Serious Breach of this Contract.

- 9.5. The Contractor must carry out appropriate Disclosure and Barring Service checks on all overseas applicants for employment where such applicants would be employed to work in regulated activity relating to Children or vulnerable adults (as defined by the Safeguarding Vulnerable Groups Act 2006) if successful, and must seek additional information about an applicant's conduct.
- 9.6. In working with other organisations/bodies, the Contractor shall make arrangements to co-ordinate and co-operate effectively for reasons of Learner health, safety and welfare. In particular, respective responsibilities shall be clearly identified and documented as appropriate, to ensure understanding.
- 9.7. In providing the Services, the Contractor must ensure it actively promotes the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs, and promote principles that support equality of opportunity for all.
- 9.8. In providing the Services, the Contractor must comply with the general duty on specified authorities in section 26 of the Counter-Terrorism and Security Act 2015 (the Prevent duty) and must have regard to statutory guidance issued under section 29 of the Counter-Terrorism and Security Act 2015 <https://www.gov.uk/government/publications/prevent-duty-guidance/prevent-duty-guidance-for-further-education-institutions-in-england-and-wales>. Failure to do so may constitute a Serious Breach of this Contract.
- 9.9. In providing the Services, the Contractor must comply with the duty on partners of a panel in section 38 of the Counter-Terrorism and Security Act 2015 (the Channel co-operation duty). Failure to do so may constitute a Serious Breach of this Contract.
- 9.10. Where the Contractor or one of the Contractor Related Parties:
 - 9.10.1. is aware of an incident, or pattern of incidents, which undermines the promotion of British fundamental values as referred to in clause 9.7 or the ability of the Contractor or the Contractor Related Parties to comply with the Prevent duty, or
 - 9.10.2. makes a referral of an individual member of Contractor Personnel for the purposes of determining whether that member of Contractor Personnel should be referred to a panel for the carrying out of an assessment under section 36 of the Counter-Terrorism and Security

Act 2015 of the extent to which that individual is vulnerable to being drawn into terrorism,

- 9.10.3. the Contractor will ensure it notifies the ESFA via the Contact Form: <https://www.gov.uk/government/organisations/education-and-skills-funding-agency> of that incident(s) and/or that a referral has been made.
- 9.11. The Contractor shall not employ or engage, or continue to employ or engage, any person who is subject to a prohibition order made under section 141B of the Education Act 2002 to carry out teaching work (as defined in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012), or an interim prohibition order made under regulation 14 of the Teachers' Disciplinary (England) Regulations 2012 in respect of any Learners under the age of 19 and High Needs Learners aged 19 to 25 (as if those Learners were pupils for the purposes of the definition of teaching work in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012).
- 9.12. Before employing or engaging a person to carry out teaching work in respect of any Learners under the age of 19 and High Needs Learners aged 19 to 25 (as if those Learners were pupils for the purposes of the definition of teaching work in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012), the Contractor shall take reasonable steps to ascertain whether that person is subject to a prohibition order made under section 141B of the Education Act 2002, or an interim prohibition order made under regulation 14 of the Teachers' Disciplinary (England) Regulations 2012.
- 9.13. The Contractor shall, in circumstances where it sub-contracts the management and/or delivery of the Services under this Contract, ensure that all the provisions in respect of Learner Health, Safety and Welfare in this Clause 9 are included in its contract with Sub-Contractors.
- 9.14. The Contractor shall inform the ESFA of the death of any Learner which is a result of work undertaken whilst in employment and who is undertaking a related Learning Programme. This shall be done by informing the ESFA's representative by telephone or email immediately upon the Contractor becoming aware of the event.
- 9.15. The Contractor shall report all RIDDOR reportable incidents in line with the Regulations, and shall investigate or assess the circumstances of all Learner incidents within the scope of RIDDOR and follow HSE guidance 'Investigating accidents and incidents: A workbook for employers, unions, safety representatives and safety professionals' (HSG245) ISBN 0717628272. The Contractor shall only use persons competent to investigate/assess Learner incidents with a view to identifying the causes of any incident and lessons to be learned.
- 9.16. The Contractor shall also monitor, and act on, any other harm to Learners to the extent that the Contractor could reasonably be expected to do so and/or where the harm could affect the quality of the learning experience. Harm

includes (but is not limited to) incidents that cause absence from learning, any loss to the Learner of any physical or mental faculty or any disfigurement and incidents of bullying and harassment.

- 9.17. The Contractor shall co-operate with the ESFA and Department for Work and Pensions for the purposes of the Industrial Injuries Disablement Benefit (IIDB) in respect to those Learners to which it applies.
- 9.18. The Contractor and/or the Contractor Related Parties must be able to demonstrate that they have robust record-keeping procedures in respect of health, safety and safeguarding through checks on record keeping undertaken. Failure to do so will constitute a Serious Breach.
- 9.19. Where the Contractor or one of its Contractor Related Parties refer:
- (a) a safeguarding concern related to sexual violence to Local Authority children's social care/adult social care and/or the police, or
 - (b) an allegation of abuse made against a teacher or other member of staff to the designated officer(s) (at the local authority),

the Contractor must, as soon as practicable, inform the ESFA via the Contact Form: General Enquires at <https://www.gov.uk/government/organisations/education-and-skills-funding-agency>.. Such notification must include the name of the institution, a high level summary of the nature of the incident (without sharing personal information about victims or alleged perpetrators) and confirmation of whether it is, or is scheduled to be, investigated by the Local Authority and/or the police.

- 9.20. Where the Contractor makes a referral of an individual for the purposes of determining whether that individual should be referred to a panel for the carrying out of an assessment under section 36 of the Counter-Terrorism and Security Act 2015 of the extent to which that individual is vulnerable to being drawn into terrorism, the Contractor shall ensure it notifies the ESFA that a referral has been made.
- 9.21. In so far as permitted by Law, where the Contractor has made a referral or provided information to the Disclosure and Barring Service in compliance with any duties of the Contractor under the Safeguarding Vulnerable Groups Act 2006, the Contractor shall ensure that it informs the ESFA via the Contact Form: General Enquires at <https://www.gov.uk/government/organisations/education-and-skills-funding-agency> that a referral has been made / information has been provided.

10. Liability

- 10.1. Neither Party limits its liability for death or personal injury cause by the negligence of itself or any of its servants, employees or agents acting in the course of their employment or in respect of misrepresentations made

fraudulently in respect of any breach of an implied terms in respect of title to goods.

- 10.2. Subject to clause 10.4 the Contractor shall indemnify and keep indemnified the ESFA, their servants, employees, and agents against all loss, damage or liability (whether civil or criminal), claims, demands, costs and expenses incurred by or made against the ESFA, their servants, employees, or agents in respect of any loss or damage or personal injury (including death) which arises out of or in the course of or caused by the negligent act or omission or wilful default of the Contractor, their servants or agents in the delivery of the Service except to the extent (if any) that it was also caused or contributed to by the negligent act or omission or wilful default of the ESFA or their servants or agents.
- 10.3. The Contractor warrants to the ESFA that to the best of its knowledge and belief all works carried out under the Contract will not infringe, in whole or in part, any copyright or any other intellectual property right of any person and agrees to indemnify the ESFA against any and all claims, demands, proceedings, expenses and losses, including any of a consequential nature, arising directly or indirectly out of any act of the foregoing in relation to any works, where such an act is, or is alleged to be, an infringement of a third party's copyright or other intellectual property right. This warranty and indemnity shall survive the termination of the Contract and shall exist for the life of the copyright or other intellectual property right.
- 10.4. The Contractor's liability under clause 10.2 shall be limited as follows:
 - 10.4.1. In accordance with clause 10.1 it shall be unlimited;
 - 10.4.2. Otherwise it shall not exceed twice the value of the Contract or £1,000,000 (one million pounds), whichever is the greater.
- 10.5. Notwithstanding anything to the contrary contained in the Contract, the ESFA's liability whether arising from breach of contract tort including negligence breach of statutory duty or otherwise shall be limited as follows:
 - 10.5.1. In accordance with clause 10.1 it shall be unlimited;
 - 10.5.2. In respect of all other liability falling outside of clause 10.1 arising out of or in connection with its obligations (other than its obligation to pay for the Services) under this Contract and all actions claims demands proceedings costs and expense arising in respect of it to a maximum aggregate value of £100,000 (one hundred thousand pounds). This maximum liability limit shall apply to the whole of the period of the contact term and all claims made within the contract term being the Contract Period and any extension of it in accordance with clause 2 Commencement and Continuation, and any and all claims made within that period.

- 10.6. The ESFA shall not be liable to the Contractor for any Indirect Losses.
- 10.7. The ESFA reserves the right to require the Contractor to secure the provision of an appropriate guarantee in respect of the Contractor's liabilities under this Contract.

11. Insurance

- 11.1. The Contractor shall maintain at its own cost a policy or policies of insurance to cover the liability of the Contractor in respect of any act or default for which it may become liable to indemnify the ESFA under this Contract. The ESFA reserves the right to require the Contractor to insure against any act or default, which arises as a result of fraud or other criminal activity by the Contractor, its employees, agents or sub-contractors. The Contractor must provide copies of any insurance certificates to the ESFA including professional indemnity, employers' liability and public liability insurance following a written request from the ESFA.

12. Access and Monitoring

- 12.1. When appropriate the ESFA shall give the Contractor reasonable advance notice in writing of proposed visits to the Contractor or its sub-contractors, to observe the delivery of the Services, by any person who has taken or will take no direct part in the conduct or content of the Services.
- 12.2. For monitoring and evaluation purposes, the ESFA or their representatives, the Secretary of State or their representatives, the National Audit Office, Representatives of the European Commission and the European Court of Auditors, the Inspectorates and HM Treasury shall have the right to visit all or any site(s) and view operations relating to the provision and to inspect relevant documents and interview Learners and the Contractor's staff during these visits in order to:
- a) examine, audit or take copies of any original or copy documentation, accounts, books and records of the Contractor and its sub-contractors that relate to the Contract;
 - b) visit, view or assess the design, management and delivery relating to the Contract at any Premises where those operations are carried out (including those of sub-contractors) and conduct relevant interviews, including interviews with Learners, during these visits at any reasonable time;
 - c) carry out examinations into the economy, efficiency, and effectiveness with which the Contractor has used the ESFA's resources in the performance of the Contract.

- 12.3. The Contractor shall, if required by any of the representatives stated at Clause 12.2 provide appropriate oral or written explanations.
- 12.4. The ESFA reserves the right, at any reasonable time, and as it may deem necessary to require the Contractor at its own cost to:
- 12.4.1. provide evidence of financial resources and the level of turnover sufficient to enable it to continue to perform the Contract;
 - 12.4.2. provide such assurance as the ESFA may require that the delivery of the Services complies with the requirements of the Contract;
 - 12.4.3. obtain a report by an independent accountant of the ESFA's choice on;
 - 12.4.3.1. the financial systems and controls operated by the Contractor or its subcontractors;
 - 12.4.3.2. the accuracy and regularity of funding claims in respect of payments claimed or received under the Contract;
 - 12.4.3.3. the evidence held by the Contractor or its subcontractors to support delivery of the Services in accordance with the terms of the Contract

The Contractor must agree the instructions for the work with the ESFA and this may include the ESFA discussing the terms of reference directly with the independent accountant where necessary. The report and the work required in order to produce the report shall be carried out to the satisfaction of the ESFA, and the ESFA must be able to place reliance on it. The Contractor shall provide a copy of any draft report at all stages of reporting and the final report to the ESFA as soon as they are available. The ESFA reserves the right to require the Contractor to publish the final report.

- 12.4.4. provide a copy of the Contractor's latest audited Accounts and submit further copies of the audited Accounts as they become available;
 - 12.4.5. submit any claim for payment or management information provided to support a claim for payment to be audited by an independent auditor chosen by the ESFA;
 - 12.4.6. provide any additional evidence to support payments made under this Contract, as the ESFA shall reasonably require.
- 12.5. The Contractor shall in performing the Services comply fully with all relevant rules and regulations of the ESFA in force from time to time especially when on the ESFA's premises.
- 12.6. In addition to the other requirements to provide information set out in this

Contract the ESFA reserves the right to request information from the Contractor in order to exercise its responsibilities and/or to fulfill requirements to provide information to the Secretary of State, to account to Parliament and to meet European funding requirements (where applicable). On occasion, the ESFA will require urgent information from the Contractor.

- 12.7. The Contractor shall provide the ESFA or agents acting on its behalf with the information it requires under clause 12.6 at the times and in the formats specified. This information shall be of sufficient quality to meet the purposes for which it has been requested.
- 12.8. Failure to comply with any request for information under clause 12.6, at all or in the required timescales, will constitute a Minor / Serious Breach of this Contract.
- 12.9. Where the ESFA has undertaken an investigation or received a report from an independent accountant (the cost of which may be recharged to the Contractor) or otherwise, in relation to the Contractor, it may, as a consequence of that investigation or report, impose additional Contract obligations upon the Contractor.
- 12.10. The ESFA (in accordance with <https://www.gov.uk/government/publications/post-16-audit-code-of-practice>), the European Commission, the European Court of Auditors and/or a Crown Body may at any time conduct audits.
- 12.11. The Parties agree that they will bear their own respective costs and expenses incurred in respect of compliance with their obligations under clause 12.9, unless the audit identifies a material breach or malpractice by the Contractor and / or a Contractor Related Party in which case the Contractor will reimburse the ESFA for all the ESFA's reasonable costs incurred in the course of the audit.
- 12.12. If the findings of an audit conducted pursuant to this clause 12 results in the requirement for ILR data to be corrected and re-submitted the Contractor will re-submit the data to the ESFA, as set out in clause 17 (Submission of Learner Data), within two months. Failure to do so will be a Minor Breach of this contract.
- 12.13. The Contractor must comply with any additional Contract obligations imposed under clause 12.9.
- 12.14. If the ESFA assesses that the Contractor has failed to comply with any additional Contract obligations imposed under clause 12.9 within such time as the ESFA deems reasonable, the ESFA may take such actions as it deems appropriate which may include, but is not limited to, under Clause 22.3-22.4 Minor Breach or Clause 22.7-22.10 Serious Breach.

13. Funding and Payment

- 13.1. In consideration of the Services to be provided by the Contractor, the ESFA agrees to pay the Contractor the amounts set out in Appendix 1 of this Contract

on condition that the Contractor delivers the Services in accordance with the terms and conditions of the Contract and provided that the Contractor is not assessed as being at serious risk of failure to deliver the Services under this Contract by the ESFA following any review of the quality of the Services.

- 13.2. The Maximum Value of each Learning Programme as shown in Appendix 1 of this Contract may not be exceeded for any reason. The ESFA will not be liable to make any payment in excess of the Maximum Value of each Learning Programme unless this has been agreed and evidenced by a variation in writing.
- 13.3. Where the ESFA identifies that the Contractor is failing to deliver the value of learning of this Contract it reserves the right in its absolute discretion to reduce the overall maximum value for that Learning Programme.
- 13.4. The ESFA will restrict delivery of this Contract against the funding available up to the 31 July 2021 as detailed in Appendix 1. Appendix 1 confirms the maximum value available up to the financial year ending 31 March 2021. Where the delivery within this financial year fails to meet the minimum levels of performance or where the delivery in this period would result in the overall maximum value being exceeded, the ESFA reserves the right at its absolute discretion to vary the Contract accordingly.
- 13.5. The Contractor shall comply with the Funding Rules published by the ESFA as amended from time to time.
- 13.6. The ESFA reserves the right to give three months' notice to reduce the overall maximum value for any Learning Programme without the need to give a reason.
- 13.7. Payment by the ESFA will be without prejudice to any claims or rights, which the ESFA may have against the Contractor and will not constitute any admission by the ESFA as to the performance by the Contractor of its obligations under the Contract. Prior to any such payment, the ESFA shall be entitled to make deductions or deferments in respect of any disputes or claims whatsoever with or against the Contractor, arising from this Contract or any other Contract between the Contractor and the ESFA.
- 13.8. Where the ESFA carries out a review, investigation or audit of a sample of the evidence which the Contractor is required to provide under the Contract to support the payments made by the ESFA and identifies errors in that evidence which it deems are material, the ESFA reserves the right at its absolute discretion to require the Contractor to, or the ESFA may (itself or via a third party) at the Contractor's cost, carry out 100% audit of all or part of the Services and/or to recover from the Contractor an amount based on the error rate identified and the total value of the Contract. Such amounts may be recovered by making adjustments to data submitted by the Contractor under the Contract, or by raising an invoice for payment by the Contractor, or making deductions from future payments due to the Contractor under the Contract. Failure to settle such amounts by the Contractor will constitute a Serious Breach under Clause 22 (Breach) of the Contract. The decision of the ESFA as to the amount of

recovery under this Clause is final.

- 13.9. Where the ESFA, in accordance with clause 13.8, identifies errors it may at its discretion review the controls and processes to gain assurance the errors will not occur again. Where further assurance work is required this will be at the Contractor's cost (or the ESFA will procure and recharge to the Contractor at its sole discretion). Where a full funding audit results in a "qualified" rating this will constitute a Minor Breach.
- 13.10. The ESFA may implement a reduction in funding as set out in the Funding Rules through a notification and not a variation pursuant to clause 40 (Entire Contract/Amendments).
- 13.11. All payments by the ESFA will be made via BACS.
- 13.12. The ESFA is generally unable to recover any Value Added Tax charged. The maximum sum payable under this Contract, as set out in Appendix 1 includes the cost of the service and any other VAT or taxes to be charged, where they apply.
- 13.13. Under the provision of Item 5A to Group 6 of Schedule 9 of the VAT Act 1994, the supply of education or vocational training funded by the ESFA and the supply by the person providing that education or vocational training, of any goods or services essential to that provision, is considered to be an exempt supply for VAT purposes.

14. Review of Contractual Performance and Reconciliation of Contracts

- 14.1. Where the Contractor receives profile payments from the ESFA, payments will be reconciled to cash earned by actual delivery of the Services or the period to the timetable published in the Funding Rules.
- 14.2. Where the Contractor's actual delivery will result or has already resulted in an overpayment to the Contractor by the ESFA, the ESFA will withhold from, or deduct the amount owed from, payments due to the Contractor under the Contract for current or subsequent months or years accordingly.
- 14.3. Where the Contractor's actual delivery has resulted in an underpayment to the Contractor by the ESFA, the ESFA will adjust the amount due to the Contractor accordingly. This adjustment shall not exceed the overall maximum value set out in Appendix 1 of this Contract.
- 14.4. Should there be an under or over payment to the Contractor, the ESFA may at their absolute discretion require a Contract variation.
- 14.5. A Contract review will take place at the end of the period of this Contract in respect of the Services specified in Appendix 1 of this Contract. The ESFA will notify the Contractor of the actual amount of money, which has been earned against the Services delivered, and compare this to the total profile payments made and to the overall maximum value specified in Appendix 1. At this stage

final cash reconciliation will take place. Any overpayment made to the Contractor by the ESFA will be repayable within 30 days of receiving an invoice. The ESFA reserves the right to reduce future payments to recover any overpayments. The ESFA will pay any outstanding monies owed, up to the overall maximum value specified in Appendix 1 of this Contract, within 30 days of final reconciliation being completed.

- 14.6. The evidence required in respect of each Learning Programme is set out in the Funding Rules and the Contractor must retain such evidence for inspection on demand.

15. Prohibited Activities

- 15.1. The Contractor shall not offer or give, or agree to give, to any member, employee or representative of the ESFA any gift or consideration of any kind as an inducement or reward for doing or refraining from doing, or for having done or refrained from doing, any act in relation to the obtaining or execution of this or any other Contract with the ESFA or for showing or refraining from showing favour or disfavour to any person in relation to this or any such Contract. The Contractor's attention is drawn to the criminal offences created by the Bribery Act 2010. Any offence by the Contractor or its employees or by anyone acting on its behalf under the Bribery Act 2010 in relation to this or any Contract with the ESFA or Her Majesty's Government shall entitle the ESFA to terminate the Contract and recover from the Contractor the amount of any loss resulting from such termination and/or to recover from the Contractor the amount of value of any gift, consideration or commission.
- 15.2. The Contractor shall not enter into any Contract with any political or religious organisation using any funding provided by the ESFA under this Contract if the effect of that Contract would be to promote a particular political or religious point of view.
- 15.3. The Contractor shall not hold itself out as acting on behalf of the ESFA without the ESFA's permission.

16. Data Protection and Protection of Personal Data

- 16.1. The Parties acknowledge that for the purposes of the Data Protection Legislation, the ESFA on behalf of the Secretary of State for Education is the Controller and the Contractor is the Processor only for the processing set out in Schedule 2 (i.e. submission of Learner data to the ESFA). Any other processing of Personal Data (i.e. Learner enrolment or delivering education & training, e.g. e-portfolios) undertaken by the Contractor will be as a data controller and not on behalf of the ESFA. Clauses 16.2 to 16.14 below apply only in relation to the processing of Personal Data on behalf of the ESFA as set out in Schedule 2, and the only processing that the Processor is authorised to do on behalf of the ESFA is listed in Schedule 2 by the ESFA and may not be determined by the Processor.
- 16.2. The Processor shall notify the Controller immediately if it considers that any of

the Controller's instructions infringe the Data Protection Legislation.

- 16.3. The Processor shall provide all reasonable assistance to the Controller in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of the Controller, include:
- (a) a systematic description of the envisaged processing operations and the purpose of the processing;
 - (b) an assessment of the necessity and proportionality of the processing operations in relation to the Services;
 - (c) an assessment of the risks to the rights and freedoms of Data Subjects; and
 - (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal Data.
- 16.4. If requested by the ESFA's nominated contact, the Processor shall, in relation to any Personal Data processed in connection with its obligations under this Contract:
- (a) process that Personal Data only in accordance with Schedule 2, unless the Processor is required to do otherwise by Law. If it is so required the Processor shall promptly notify the Controller before processing the Personal Data unless prohibited by Law;
 - (b) ensure that it has in place Protective Measures, which are appropriate to protect against a Data Loss Event, which the Controller may reasonably reject (but failure to reject shall not amount to approval by the Controller of the adequacy of the Protective Measures), having taken account of the:
 - (i) nature of the data to be protected;
 - (ii) harm that might result from a Data Loss Event;
 - (iii) state of technological development; and
 - (iv) cost of implementing any measures;
 - (c) ensure that:
 - (i) the Processor Personnel do not process Personal Data except in accordance with this Contract (and in particular Schedule 2);
 - (ii) it takes all reasonable steps to ensure the reliability and integrity of any Processor Personnel who have access to the Personal Data and ensure that they:

- (A) are aware of and comply with the Processor's duties under this clause;
 - (B) are subject to appropriate confidentiality undertakings with the Processor or any Sub-processor;
 - (C) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third Party unless directed in writing to do so by the Controller or as otherwise permitted by this Contract; and
 - (D) have undergone adequate training in the use, care, protection and handling of Personal Data; and
- (d) not transfer Personal Data outside of the EU unless the prior written consent of the Controller has been obtained and the following conditions are fulfilled:
- (i) the Controller or the Processor has provided appropriate safeguards in relation to the transfer (whether in accordance with GDPR Article 46 or LED Article 37) as determined by the Controller;
 - (ii) the Data Subject has enforceable rights and effective legal remedies;
 - (iii) the Processor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist the Controller in meeting its obligations); and
 - (iv) the Processor complies with any reasonable instructions notified to it in advance by the Controller with respect to the processing of the Personal Data;
- (e) at the written direction of the Controller, delete or return Personal Data (and any copies of it) to the Controller on termination of the Contract unless the Processor is required by Law to retain the Personal Data.

16.5. Subject to clause 16.6, the Processor shall notify the Controller immediately if it:

- (a) receives a Data Subject Request (or purported Data Subject Request) in relation to processing their data under this Contract only (submission of ILR data);

- (b) receives a request to rectify, block or erase any Personal Data processed through the submission of ILR data. Notification in such cases should be given via the nominated contact;
 - (c) receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Legislation;
 - (d) receives any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data processed under this Contract;
 - (e) receives a request from any third Party for disclosure of Personal Data where compliance with such request is required or purported to be required by Law; or
 - (f) becomes aware of a Data Loss Event.
- 16.6. The Processor's obligation to notify under clause 16.5 shall include the provision of further information to the Controller in phases, as details become available.
- 16.7. Taking into account the nature of the processing, the Processor shall provide the Controller with full assistance in relation to either Party's obligations under Data Protection Legislation and any complaint, communication or request made under clause 16.5 (and insofar as possible within the timescales reasonably required by the Controller) including by promptly providing:
- (a) the Controller with full details and copies of the complaint, communication or request;
 - (b) such assistance as is reasonably requested by the Controller to enable the Controller to comply with a Data Subject Request within the relevant timescales set out in the Data Protection Legislation;
 - (c) the Controller, at its request, with any Personal Data it holds in relation to a Data Subject;
 - (d) assistance as requested by the Controller following any Data Loss Event;
 - (e) assistance as requested by the Controller with respect to any request from the Information Commissioner's Office, or any consultation by the Controller with the Information Commissioner's Office.
- 16.8. The Processor shall maintain complete and accurate records and information to demonstrate its compliance with this clause. This requirement does not apply where the Processor employs fewer than 250 staff, unless:
- (a) the Controller determines that the processing is not occasional;

- (b) the Controller determines the processing includes special categories of data as referred to in Article 9(1) of the GDPR or Personal Data relating to criminal convictions and offences referred to in Article 10 of the GDPR; or
- (c) the Controller determines that the processing is likely to result in a risk to the rights and freedoms of Data Subjects.

16.9. The Processor shall allow for audits of its Data Processing activity by the Controller or the Controller's designated auditor.

16.10. Each Party shall designate its own data protection officer if required by the Data Protection Legislation.

16.11. Before allowing any Sub-processor to process any Personal Data related to this Contract (submission of ILR data), the Processor must:

- (a) notify the Controller's nominated contact in writing of the intended Sub-processor and processing;
- (b) obtain the written consent of the Controller's nominated contact;
- (c) enter into a written agreement with the Sub-processor which give effect to the terms set out in this Clause 16 such that they apply to the Sub-processor; and
- (d) provide the Controller with such information regarding the Sub-processor as the Controller may reasonably require.

16.12. The Processor shall remain fully liable for all acts or omissions of any of its Sub-processors.

16.13. The Controller may, at any time on not less than 30 Working Days' notice, revise this clause by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when incorporated by attachment to this Contract).

16.14. The Parties agree to take account of any guidance issued by the Information Commissioner's Office. The Controller may on not less than 30 Working Days' notice to the Processor amend this Contract to ensure that it complies with any guidance issued by the Information Commissioner's Office.

16.15. Where the Contractor is providing the Services to Learners claiming out of work benefits, the Secretary of State for Work and Pensions (or their successor) is the data controller in relation to Personal Data, which the Contractor is required to provide to the Secretary of State for Work and Pensions. This Clause 16 will be enforceable by the Secretary of State for Work and Pensions in relation to any Personal Data processed by the Contractor on their behalf.

- 16.16. Where the Contractor is providing the Service to Learners who are subject to active management by the Offender Manager in respect of an order or licence, the Secretary of State for Justice (or their successor) is the data controller in relation to Personal Data which the Contractor is required to provide to the Secretary of State for Justice.
- 16.17. Where the Contractor is providing the Services to Learners who are subject to claiming Industrial Injuries Disablement Benefit (IIDB), the Department for Work and Pensions (or their successor) is the data controller in relation to Personal Data, which the Contractor is required to provide to the Secretary of State for Education. This Clause 16 will be enforceable by the Secretary of State for Work and Pensions in relation to any Personal Data processed by the Contractor on its behalf.
- 16.18. The Processor will comply with any further written instructions or additional conditions from the ESFA's Controller in relation to the data processing.

17. Submission of Learner Data

- 17.1. The Contractor must supply the ESFA data on each individual learner, in accordance with the data collections framework set out in the 'ILR specification, validation rules and appendices 2020 to 2021' as amended and updated, which is published on the ESFA's website and in accordance with the '*Provider Support Manual*' as amended and updated <https://guidance.submitlearnerdatabeta.fasst.org.uk/>
- 17.2. The Contractor must supply the ESFA with data in accordance with the following:
- 17.2.1. in line with agreed audit arrangements;
 - 17.2.2. in adherence with the Data Protection Act;
 - 17.2.3. to support payments to be made;
 - 17.2.4. to enable reconciliation to take place; and
 - 17.2.5. to support the contract management and allocation processes.
- 17.3. The Contractor will report within 3 months of a Learner finishing for all withdrawals and achievements. The Contractor will report all changes by the final collection of the Funding Year.
- 17.4. Data collected must be transmitted to the ESFA through the ESFA's web portal <https://submitlearnerdatabeta.fasst.org.uk/> Access to the ESFA's web portal is restricted and the Contractor agrees to comply with the conditions of use regarding the supply of data to the ESFA set out in this Clause 17 and in 'Specification of the Individualised Learner Record for 2020 to 2021 and

relevant Provider Support Manual as amended and updated *from time to time* available via <https://guidance.submitlearnerdatabeta.fasst.org.uk/> .

- 17.5. Where the ESFA is concerned about the quality of the data, including the completeness or accuracy of the data, provided by the Contractor, the ESFA may require the Contractor to supply data more frequently for such a period as the ESFA shall require and the ESFA may audit, or instruct a third party to audit, at the Contractor's cost, the Contractor's data and controls to gain assurance that the quality improvements have been made.
- 17.6. The ESFA reserves the right to require the Contractor, at its own cost, to carry out such work as the ESFA deems necessary to improve the quality of data.
- 17.7. Without prejudice to any other provision of this clause 17 the ESFA reserves the right to suspend payments to the Contractor under the Contract where data quality gives rise to concern about the accuracy of the data provided by the Contractor.
- 17.8. Failure to transmit complete and accurate data to the ESFA in accordance with this Clause 17 will constitute a Serious Breach of Contract in accordance with Clause 22 (Breach) of the Terms and Conditions of the Contract.
- 17.9. Where the Contractor is providing the Services to Learners claiming out of work benefits, it must provide data to the Secretary of State with responsibility for unemployment or their nominated representative in accordance with the requirements notified to the Contractor. Failure to transmit complete and accurate data under this Clause 17 will constitute a Serious Breach of Contract in accordance with Clause 22 (Breach) of the Terms and Conditions of the Contract and may result in payments for this part of the Services to be delayed or withheld.
- 17.10. The Contractor must update the course information funded by the ESFA at <https://coursedirectory.nationalcareersservice.org.uk/>
- 17.11. The Contractor shall register with UKRLP (<http://www.ukrlp.co.uk/>) and Get Information About Schools (<https://get-information-schools.service.gov.uk/>) where appropriate and maintain contact details on an on-going basis.
- 17.12. The Contractor must submit data about any member of its workforce delivering GCSE English and Maths in the format and to the timescales as required by the ESFA.
- 17.13. The ESFA will monitor and review the data submitted under this Clause 17 (Submission of Learner Data) of this Contract to ensure that payments are made in accordance with the requirements set out in "Financial Assurance: Monitoring the funding rules for apprenticeships and adult skills".
- 17.14. The ESFA will publish monitoring reports on the hub <https://submitlearnerdatabeta.fasst.org.uk/> The Contractor must access the monitoring reports every month and amend any errors for the next submission

by taking the actions specified in the report user guide. Failure to amend the data as required will constitute a Minor Breach of Contract in accordance with Clause 22 (Breach) of the Contract.

- 17.15. If served with notice of a breach, the Contractor must correct data or supply the ESFA with evidence within the period specified in the notice. This evidence can include digital copies of documents such as Learner files, commitment statements or employer declarations. Annotated spreadsheets or notes are not acceptable as evidence.
- 17.16. Where data is incorrect in the final data submission of the academic year the ESFA will recover the payments associated with the incorrect data.
- 17.17. Without prejudice to the ESFA's rights under Clauses 22 (Breach) and 23 (Termination) and to any other express rights under this Contract, where the Contractor has been found to be fraudulent or have recklessly submitted erroneous reports, claims and/or Learner data (including Evidence Packs), or the ESFA reasonably believes such reports to be fraudulent or erroneous the ESFA may, by notice to the Contractor, increase the level of its monitoring of the Contractor, or (at the ESFA's option), of the Contractor's monitoring of its own performance of its obligations under this Contract in respect of the relevant Services the subject of such fraudulent, erroneous or misleading reporting until such time as the Contractor will have demonstrated to the reasonable satisfaction of the ESFA that it will perform (and is capable of performing) its obligations under this Contract, in which case, the following provisions will apply:
- 17.17.1. any such notice to the Contractor will specify in reasonable detail the additional measures to be taken by the ESFA or by the Contractor (as the case may be) in monitoring the performance of the Contractor;
 - 17.17.2. if the Contractor (acting reasonably) objects to any of the specified measures on the grounds that they are excessive it will notify the ESFA in writing within five (5) Working Days of the receipt of the notice of the measures objected to (and of any Changes necessary in order to prevent prejudice to the Contractor's performance of its obligations under this Contract);
 - 17.17.3. the measures to be taken by the ESFA and the Contractor (as the case may be) will be agreed between the Parties or, in the absence of agreement within ten (10) Working Days of the ESFA's receipt of the Contractor's objection, determined pursuant to clause 33 (Dispute Resolution); and
 - 17.17.4. the Contractor will bear its own costs and indemnify and keep the ESFA indemnified at all times from and against all costs and expenses reasonably and properly incurred by or on behalf of the ESFA in relation to such increased level of monitoring save where there is no evidence that the Contractor has been found to have been fraudulent

or to have submitted erroneous reports and the Contractor has been exonerated .

18. Quality Assurance and Raising Standards

- 18.1. The Contractor undertakes to the ESFA that it has the resources and skills necessary to carry out the Contractor's obligations pursuant to this Contract.
- 18.2. The Contractor shall comply with the Funding Rules published by the ESFA as amended from time to time and any other requirements, which may from time to time be issued by the ESFA, Ofsted, the awarding organisations and other regulatory bodies and of which the Contractor is made aware.
- 18.3. The Contractor shall ensure that all activities carried out pursuant to this Contract shall be documented in accordance with the requirements of the ESFA and shall provide such documentation to them as the ESFA shall request from time to time.
- 18.4. The Contractor shall continuously seek to improve the Services and raise standards to benefit the Learner. The Contractor shall have the primary responsibility for improving standards and will need to demonstrate to the ESFA satisfaction that it has an effective quality assurance system based on the implementation of its own quality improvement process. The ESFA reserves the right to require the Contractor to provide the ESFA or Ofsted evidence to support the quality improvement processes.
- 18.5. The Contractor shall use all reasonable endeavours to:
 - 18.5.1. minimise drop out rates and deliver high completion and achievement rates and appropriate progression;
 - 18.5.2. at least meet the minimum quality standards that apply to the appropriate Services purchased. These minimum quality standards will be set out by the ESFA;
 - 18.5.3. ensure competent and appropriately qualified staff deliver and assess learning. The Contractor shall be responsible for the professional development and training of its staff;
 - 18.5.4. offer equality of access to learning opportunities and close equality gaps in learning and outcomes;
 - 18.5.5. provide a safe, healthy and supportive environment, which meets the needs of Learners;
 - 18.5.6. provide good management and leadership of the learning process;
 - 18.5.7. deliver value for money and financial probity; and
 - 18.5.8. ensure all Sub-Contractors delivering Services under the Contract on

behalf of the Contractor comply with the requirements set out in Clauses 18.5.1 to 18.5.7 above.

- 18.6. Failure to meet the requirements set out in Clauses 18.5.1 to 18.5.8 may result in the ESFA assessing the Contractor to be in Serious Breach of the Contract under Clause 22 of the Contract.
- 18.7. The Contractor must take all reasonable steps to meet the relevant requirements for data gathering for the FE Choices Performance Indicators as outlined currently at <https://www.gov.uk/government/collections/fe-choices-information-for-providers> and in any subsequent updates to these web pages.
- 18.8. Where appropriate, the Contractor shall confirm in writing to the ESFA that their Centre Approval Status is still current. The written statement will need to confirm approved centre status for the specific Regulated Qualification Framework (RQF) titles and levels, including awarding body name(s). The Contractor must notify the ESFA via the Contact Form: General Enquires at <https://www.gov.uk/government/organisations/education-and-skills-funding-agency> immediately in writing if it receives any sanction from an awarding body.
- 18.9. The ESFA may assess the quality and delivery of the Services and the Contractor's compliance with the requirements in Clause 18.5.1 to 18.5.8 during the Contract Period. The Contractor will be informed of the outcome of that process. Where the ESFA assesses the Contractor to be in Serious Breach of Contract following such assessment the ESFA will issue a notice in accordance with Clause 22.7 of the Contract which may:
 - 18.9.1 require the Contractor to meet improvement indicators to improve the quality of its Services. The ESFA will meet with the Contractor to discuss and reach agreement on implementation of these actions and improvement indicators and to agree arrangements for monitoring and reviewing progress. In such cases reviews will take place at the frequency specified by the ESFA and in agreement with the Contractor;
 - 18.9.2 agree detailed improvement plans and measures that set out clearly the expected timescale for improvement;
 - 18.9.3 agree arrangements for more frequent monitoring of quality improvement plans.

Financial Health

- 18.10. The ESFA will undertake an assessment of financial health and control (<https://www.gov.uk/government/publications/esfa-financial-health-assessment>). Should the ESFA, at its absolute discretion, consider that the outcome of any financial health and/or control assessment is inadequate, the ESFA may, in its absolute discretion take one or more of the following actions:
 - 18.10.1. require the Contractor to, and the Contractor shall, accept and comply with additional Contract obligations relating to the improvement of

financial health and/or control arrangements;

18.10.2. require the Contractor to suspend the recruitment of Learners to the Services and/or cap any growth in Learner numbers;

18.10.3. give consideration to what changes, if any, are required in its allocations when finalising the amount of funding in any subsequent Contract between the parties; and/or

18.10.4. terminate in accordance with Clause 23.5.4.

18.11. Where the Contractor fails to comply with requirements imposed under Clauses 18.10.1 and/or 18.10.2, the ESFA shall consider Termination under Clause 23.5.6.

18.12. Failure to submit accounts for assessment when requested will automatically deem the assessment under clause 18.10 as 'inadequate' and clauses 18.10.1-18.10.4 will apply.

18.13. Where the outcome of a financial assessment illustrates a deterioration from the previous assessment the ESFA may in its absolute discretion request such further assurance or information from the Contractor as it deems necessary.

18.14. The Contractor must notify the ESFA immediately if it, or any Contractor Related Party, is experiencing or forecasting any financial difficulties and the ESFA may ask for additional financial information to obtain assurance of continuity of delivery of the Services.

18.15. The ESFA may require the Contractor to carry out an independent business review at the Contractor's cost (or for the ESFA to procure and recharge to the Contractor at its sole discretion) if the ESFA has concerns over the financial health of the Contractor.

18.16. The ESFA can at any time require the Contractor at its own cost to provide a copy of the Contractor's latest accounts, any historic accounts as requested, and submit further copies of the accounts as soon as they become available and to provide, upon request:

18.16.1. The Contractor's up to date management accounts, including financial performance against delivery;

18.16.2. financial forecasts of the Contractor's financial position for the next 12 months;

18.16.3. cash flow forecasts for the next 12 months;

18.16.4. any additional financial information the ESFA deems necessary.

18.17. Where the further information required from the Contractor under clauses 18.14, 18.15 and 18.16 does not provide adequate assurance to the ESFA then

the ESFA may in its absolute discretion take one or more of the actions set out in clause 18.10.1-18.10.4.

18.18. The ESFA reserves the right to request that the Contractor provide a guarantee or other form of security on terms that will be notified to the Contractor.

18.19. In addition to the other requirements to provide information set out in this Contract, the ESFA reserves the right to request information from the Contractor in order to exercise its responsibilities and/or to fulfil requirements to provide information to the Secretary of State, to account to Parliament and to meet European funding requirements (where applicable). On occasion, the ESFA will require urgent information from the Contractor.

18.20. The Contractor will provide the ESFA or agents acting on its behalf with the information it requires under clause 18.19 at the times and in the formats specified. This information will be of sufficient quality to meet the purposes for which it has been requested.

Ofsted Inspection

18.21. The ESFA may at their discretion agree a programme of support for the Contractor to assist it in taking action to improve the quality of the Services.

18.22. When the Contractor receives notification from Ofsted that the Services are to be inspected, the Contractor shall on request provide the ESFA with details of its quality improvement activity, and any other relevant information in accordance with the required timescale of Ofsted. The Contractor must notify the ESFA of the date of the meeting at which Ofsted give feedback on the inspection and allow the ESFA's nominated representative to attend the meeting. The Contractor must confirm to the ESFA in writing the outcome of the inspection within 5 Working Days of receiving the feedback from Ofsted.

18.23. Ofsted may, at any time during the Term, undertake an inspection of the Contractor. The ESFA will consider the outcome of any such inspection as follows:

Inadequate in part

18.23.1. Where Ofsted has assessed the Services to be inadequate in any sector specific areas, the ESFA may, in its absolute discretion take one or more of the following actions:

18.23.1.1. require the Contractor to accept and comply with additional Contract obligations relating to the improvement of the Services assessed as inadequate; and/or

18.23.1.2. require the Contractor to suspend the recruitment of Learners to, and/or to cap any growth in, the Services which is assessed as inadequate; and/or

- 18.23.1.3. give consideration to the Services which are assessed as inadequate in its allocations when finalising the amount of Funding in any subsequent Contracts between the Parties; and/or
- 18.23.1.4. reduce, suspend or recover payment to the Contractor in respect of that part of the Services assessed as inadequate; and/or
- 18.23.1.5. terminate in accordance with Clause 23.5.8.

Inadequate overall

- 18.23.2. Where the ESFA is made aware that Ofsted has provisionally assessed the Services to be inadequate overall, the ESFA may, in its absolute discretion take one or more of the following actions:
 - 18.23.2.1. require the Contractor to accept and comply with temporary additional Contract obligations relating to the improvement of the overall Services, including but not limited to, requiring the Contractor to temporarily suspend the recruitment of Learning and/or temporarily cap any growth in those Learning Programmes, which are assessed as inadequate.
 - 18.23.2.2. commence discussions with the Contractor and the Local Authority within whose area the Contractor is located, either with Ofsted or not, as part of considering what actions as specified in Clause 18.23.1.1–18.23.1.5 inclusive may be taken.
- 18.23.3. Where Ofsted has confirmed its assessment that the Services is inadequate overall, the ESFA may, in its absolute discretion take one or more of the following actions:
 - 18.23.3.1. require the Contractor to accept and comply with additional Contract obligations relating to the improvement of the overall Services; and/or
 - 18.23.3.2. require the Contractor to suspend the recruitment of Learners to, and/or to cap any growth in, those Learning Programmes which are assessed as inadequate; and/or
 - 18.23.3.3. give consideration to the assessment of inadequate in its allocations when finalising the amount of Funding in any subsequent Contracts between the Parties; and/or
 - 18.23.3.4. reduce, suspend or recover payment to the contractor; and/or

- 18.23.3.5. terminate this Contract in accordance with Clause 23.5.8 (Termination).
- 18.23.4. The failure of the Contractor, as assessed by the ESFA, to comply with any requirements of Clauses 18.23.3.1- 18.23.3.2 inclusive within such time as the ESFA may deem reasonable may lead to the ESFA taking such actions as it deems appropriate which may include, but is not limited to, terminating in accordance with Clause 23.5.7 (Termination).
- 18.23.5. The ESFA will take action based on Ofsted's provisional and confirmed outcomes as in Clauses 18.22– 18.23 above. Where the ESFA is made aware that the Contractor has made a complaint about the graded outcome of the overall assessment by Ofsted, the ESFA will continue to progress action under Clause 18.23.2 - 18.23.3 but will be mindful of the implications arising from the outcome of a complaint. The ESFA will review any decisions made at such time as outcomes of any complaint are made known.

Other Ofsted Visits

- 18.24. Ofsted may undertake other visits in addition to inspections. Where these visits result in a published report, the ESFA may require the Contractor to take actions within a specified timescale to address the identified weaknesses in the published report.
- 18.25. A failure by the Contractor to take the action required under Clause 18.24 will be considered a Serious Breach under Clause 22 (Breach) of this Contract.

19. Fraud and Irregularity

- 19.1. The Contractor shall notify the ESFA immediately where it becomes aware of any instance of suspected fraud or financial irregularity in the delivery of the Contract including, but not limited to, cases of:
- 19.1.1. collusion with members of the staff of the ESFA or employees of the Department for Education;
 - 19.1.2. computer fraud;
 - 19.1.3. the submission to the ESFA of inaccurate, incomplete, misleading or falsified information for the purpose of a claim for funding;
 - 19.1.4. fraud involving awarding organisations
 - 19.1.5. fraud involving sub-contractors,
- provided that nothing in this Clause 19 shall require the Contractor to do anything, which may cause it to infringe any law.

- 19.2. Where the ESFA has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Contract and payments made hereunder, the ESFA shall have the right of access to the Contractor's premises at any reasonable time with or without notice to examine and remove or copy all relevant documents and records including electronic records and to interview the Contractor's servants or agents engaged with the delivery of the Contract.
- 19.3. Where the ESFA has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Contract and payments made hereunder, the ESFA may require the Contractor to procure the services of an independent accountant or equivalent professional to investigate at the Contractor's cost (or the ESFA will procure and recharge to the Contractor at its sole discretion).
- 19.4. Where the ESFA has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Contract or any other contract between the ESFA and the Contractor and payments made there under it shall have the right to suspend payments and/or require the Contractor to suspend recruitment of Learners under this Contract and any other Contract between the Parties.
- 19.5. The Parties shall co-operate in the identification of Learners who may be unlawfully claiming benefits. The ESFA may from time to time brief the Contractor as to the co-operation and assistance it reasonably requires including the provision of information regarding fraud by Learners. The ESFA shall provide a named contact or telephone answering machine for receiving such information.

20. Additional Contractual Obligations

- 20.1. The ESFA reserves the right to impose additional contractual obligations where it considers it is necessary to do so to secure the delivery of education and training of a reasonable quality by the Contractor, or to ensure that the resources provided by the ESFA are being used effectively and efficiently or to require the Contractor to address concerns about its financial viability.

21. European Funding and Other Sources of Funding

- 21.1. Where notified in writing by the ESFA that the funding under this Contract is required to be used as match funding:
 - 21.1.1. The Contractor must follow the match funding rules that are set out in the ESFA's Funding Rules, which include the use of the European Social Fund (ESF) logo.
 - 21.1.2. The Contractor must not use the funding paid under this Contract to support bids or claims that will be used to secure funding from any

European source, either on its own behalf or on behalf of the ESFA, including but not limited to as match funding.

- 21.1.3. Where the Contractor or any of its sub-contractors has access to other funding streams, the Contractor or any of its sub-contractors will be required to demonstrate through accounting, management information systems and any other relevant evidence (in the sole discretion of the ESFA or any other body undertaking the audit or monitoring), to the ESFA and anybody set out in clause 12.2 that no double funding has occurred in respect of the Services delivered under the Contract.
 - 21.1.4. Where the ESFA identifies double funding in respect of the Services, or any part thereof, the Contractor will be liable to repay to the ESFA any sums paid, or part thereof, by the ESFA in respect of the Services for which the Contractor has received funding from another source and the ESFA reserves the right to deduct such sums from any monies owed to the Contractor under the Contract or any subsequent Contract.
 - 21.1.5. The ESFA reserves the right to use payments made under the Contract as match funding for ESF projects. Where requested to do so in writing by the ESFA, the Contractor shall provide such information and in the form as the ESFA specifies to enable the ESFA to comply with the requirements of ESF.
 - 21.1.6. The Contractor shall inform Learners or others that the Services delivered have been financed in whole or part by ESF.
- 21.2. The Contractor must ensure that all Learners are aware of the support of the ESF in respect of the Services being delivered under this Contract.

22. Breach

22.1. For the avoidance of doubt:

- a) neither Party shall be liable for any Minor Breach or Serious Breach under this Clause, which occurs as a direct result of any act or omission by the other Party, its staff or agents;
- b) in the event of a breach the Party not in breach may enforce the Clauses in the Contract relating to breach even if it has not done so in the event of earlier breaches.

Minor Breach

- 22.2. Without prejudice to any other remedy, in the event of a Minor Breach, the Parties will adopt the following procedure:
- 22.3. The Party not in breach shall be entitled to serve written notice on the Party in breach, giving full details of the breach and requiring the other Party to remedy the breach within a specified period.
- 22.4. If the Party in breach fails to remedy the Minor Breach within the time specified in notice served under Clause 22.3 or such other period as may be agreed between the Parties it shall constitute a Serious Breach by the Party in breach.
- 22.5. In addition, where the Contractor is in breach, the ESFA may require the Contractor to suspend the recruitment of Learners, and/or cap any growth while the breach is being remedied.

Serious Breach

- 22.6. Without prejudice to any other remedy, in the event of a Serious Breach, which is capable of remedy, the Parties shall adopt the following procedure:
- 22.7. The Party not in breach shall be entitled to serve written notice on the other Party giving full details of the breach and requiring the Party in breach to remedy the breach within a specified time period.
- 22.8. Where the ESFA has served a notice under clause 22.7 the ESFA has the right to require the Contractor to suspend the recruitment of Learners until the ESFA has confirmed that the breach has been remedied.
- 22.9. In the event that a Serious Breach of the Contract by the Contractor cannot be remedied within the period specified in the notice served under Clause 22.7 or such other period as may be agreed between the Parties the ESFA may cease funding the Contractor in respect of that part of the Service to which the Serious Breach relates.
- 22.10. In the event that any Serious Breach cannot be remedied at all or within the period specified in the notice served in accordance with Clause 22.7 or such other period as may be agreed between the Parties, the Party not in breach may at its sole discretion terminate the Contract or that part of the Service to which the breach relates with immediate effect on notice in writing to the other Party.

23. Termination

- 23.1. The Contractor shall notify the ESFA in writing immediately upon the occurrence of any of the following events (“Insolvency Events”):

- 23.1.1. where the Contractor is an individual and if a petition is presented for the Contractor's bankruptcy or a criminal bankruptcy order is made against the Contractor, or it makes any composition or arrangements with or for the benefit of creditors, or makes any conveyance or assignment for the benefit of creditors, or if an administrator is appointed to manage their affairs; or
 - 23.1.2. where the Contractor is not an individual but is a firm; or a number of persons acting together in any capacity; if any event in Clauses 23.1.1 or 23.1.3 of this condition occurs in respect of any partner in the firm or any of those persons or a petition is presented for the Contractor to be wound up as an unregistered company; or
 - 23.1.3. where the Contractor is a company, if the company passes a resolution for winding-up or the court makes an administration order or a winding-up order, or the company makes a composition or management with its creditors, or an administrator, receiver or manager is appointed by the company, a creditor or by the court, or possession is taken of any of its property under the terms of a floating charge.
- 23.2. On the occurrence of any of the events described in this Clause 23 the ESFA shall be entitled to terminate this Contract by notice to the Contractor with immediate effect.
- 23.3. Where the Contractor is an individual, if he shall die or be adjudged incapable of managing his affairs within the meaning of Part VII of the Mental Health Act 1983 clause the ESFA shall be entitled to terminate this Contract by notice to the Contractor or its representatives with immediate effect.
- 23.4. Either Party may terminate this Contract with immediate effect in the event that in the reasonable opinion of the Party wishing to terminate this Contract, the conduct of the other in performing its obligations under this Contract amounts to a fundamental breach of the Contract, which is incapable of remedy.
- 23.5. The ESFA reserves the right to terminate this Contract with immediate effect by giving notice in writing if the Contractor:
- 23.5.1. if Regulation 73(1) (b) of The Public Contracts Regulations 2015 applies to the Contractor; and/or
 - 23.5.2. A Change in Control is proposed or has taken place which is not permissible under Regulation 72 of the Public Contracts Regulations 2015; and/or
 - 23.5.3. within three (3) months of a Restricted Share Transfer in accordance with clause 6.8.3; and/or
 - 23.5.4. The outcome of any financial health and/or control assessment undertaken in relation to the Contractor is inadequate; and / or

- 23.5.5. Where the Contractor receives a “qualified” rating in two consecutive full funding audits;
 - 23.5.6. The Contractor fails to comply with requirements imposed under Clauses 18.10.1 and/or 18.10.2; and / or
 - 23.5.7. The Contractor fails to comply with requirements imposed under Clauses 18.23.3.1 and / or 18.23.3.2; and / or
 - 23.5.8. An Ofsted inspection results in the Services in part or overall thereof being assessed as inadequate; and / or
- 23.6. In addition to the rights of termination under any other clauses of this Contract, either Party shall be entitled to terminate this Contract in respect of all or part of the Service provided under the Contract by giving to the other not less than three months’ notice to that effect.
- 23.7. This Contract will be voidable where, following an evaluation of the last three (3) years’ data submissions relating to any other contract with the ESFA, the ESFA concludes that the Contractor was in Serious Breach of that contract or contracts and if the ESFA had known at the time of awarding and / or entering into this Contract that the Contractor had committed a Serious Breach, it would not have awarded and / or entered into this Contract.
- 23.8. If the circumstances set out in Clause 23.7 arise and the Contract is declared void, the parties will be deemed to have subsequently entered into a new legally binding agreement that includes the provisions set out in the table at Clause 39.
- 23.9. If the ESFA terminates another contract with the Contractor this Contract will be terminated forthwith unless the ESFA confirms in writing that the Contract is to remain in force.
- 23.10. Termination under Clause 23 shall not prejudice or affect any right of action or remedy, which shall have accrued or shall thereupon accrue to the Parties under this Contract.
- 23.11. Where the Contractor goes into administration or liquidation, the ESFA must be assumed to be a creditor of the Contractor. The Contractor must take steps to ensure that the ESFA is provided with details of the administrator or liquidator and receives notification of any creditor’s meetings. The ESFA will confirm whether in fact it is a creditor within 8 weeks of being notified that the Contractor is in administration or liquidation.
- 23.12. The Contractor shall upon termination of the Contract immediately deliver up to the ESFA all correspondence, documents, specification papers and other property belonging to the ESFA, which may be in its possession or under its control.

- 23.13. For the avoidance of doubt, after notice of termination and/or an Insolvency Event affecting the Contractor, the Contractor must not share any information about Learners, including but not limited to ESFA Data, with another contractor unless the ESFA provides written authorisation for the Contractor to do so. In addition, the Contractor shall not recruit Learners from another contractor that has been issued with a notice of termination and/or in relation to whom an Insolvency Event has occurred, without the permission of the ESFA.
- 23.14. The Contractor must not recruit new Learners after notice of termination of the Contract has been given under Clauses 18.10, 22 or this Clause 23. The ESFA will not be liable to make payments in respect of any Learners recruited in breach of this Clause.

24. Transfer of Responsibility on Expiry or Termination

- 24.1. The Parties agree that if upon termination of this Contract or any part of the Service being provided under the Contract, circumstances arise in which the Transfer of Undertakings (Protection of Employment) Regulations 2006 are applicable, the Parties shall in good faith co-operate with each other in the disclosure of information and the provision of other assistance and comply with the provisions of Clause 1 in Schedule 1 of the Contract so as to facilitate such outcome in relation to the relevant employees as may be acceptable to the Parties.
- 24.2. The Parties agree that on termination (in whole or in part) or expiry of this Contract for any reason, the continuity of the Services is of paramount importance. The Contractor shall do its utmost to minimise disruption caused to Learners and to assist the implementation of any contingency plan proposed by the ESFA either prior to or after the termination or expiry. The Contractor is required to ensure it performs its obligations to assist in the orderly transition of the Services from the Contractor to the ESFA and/or any Successor Contractor in the event of termination (including partial termination) or expiry of this Contract. This will include the transition of the Services to a follow-on contract with the same Contractor if applicable. In so far as it is practicable to do so the ESFA will not be liable for any costs incurred by the Contractor in complying with this clause 24.2.
- 24.3. On expiry or termination of this Contract for any reason, the Contractor shall do its utmost to minimise any disruption to Learners and shall co-operate fully with any reasonable requests made by the ESFA relating to this. For the avoidance of doubt the ESFA will be entitled to request that where the Contractor cannot complete Learners that it will co-operate in transferring the Learners to a new provider even if this is prior to the termination or expiry of this Contract. The

ESFA will not be liable for any costs prior to or after incurred by the Contractor in complying with this clause 24.3.

24.4. Three (3) months prior to the Expiry Date of the Contract (or where the Contract is terminated within the timescale notified by the ESFA, the Contractor will upon request:

24.4.1. provide for transfer to the ESFA and/or the Successor Contractor of all knowledge reasonably required for the provision of the Services which may, as appropriate, include information, records and documents including that relating to configuration of software; and

24.4.2. provide the ESFA and/or Successor Contractor with reasonable access to such members of the Contractor's or its Sub-Contractors' personnel as have been involved in the, development, provision or management of the Services and who are still employed or engaged by the Contractor or its Sub-Contractors.

24.5. On termination or expiry of this Contract for any reason the Learner Files will become the property of the ESFA. The Contractor shall allow the ESFA his servants or agent to have access to its premises to remove Learner Files or otherwise comply with a request by the ESFA to transfer Learner Files to any third party nominated by the ESFA.

24.6. The Contractor shall, at no cost to the ESFA, promptly provide such assistance and comply with such timetable as the ESFA may reasonably require for the purpose of ensuring an orderly transfer of responsibility for provision of the Services (or its equivalent) upon the expiry or other termination of this Contract. The Contractor shall use all reasonable endeavours to ensure that its employees and its sub-contractors are under a similar obligation. The ESFA shall be entitled to require the provision of such assistance both prior to and after the expiry or other termination of this Contract.

24.7. The Contractor will:

24.7.1. with respect to learning or training in progress, document the current status and stabilising for continuity during transition;

24.7.2. provide assistance and expertise as necessary to examine all governance and reports in place for the provision of the Services;

24.7.3. answer all reasonable questions from the ESFA and/or its Successor Contractor regarding the Services;

24.7.4. agree with the ESFA and/or the Successor Contractor a plan for the migration of the ESFA Data to the ESFA and/or the Successor

Contractor. The Contractor will fully co-operate in the execution of the agreed plan, providing skills.

- 24.8. Such assistance may include, (without limitation) delivery of documents and data in the possession or control of the Contractor or its sub-contractors, which relate to performance, monitoring, management and reporting of the Programme, including the documents and data, if any, referred to in the Schedules.
- 24.9. The Contractor undertakes that it shall not knowingly do or omit to do anything which may adversely affect the ability of the ESFA to ensure an orderly transfer of responsibility for provision of the Services.

25. Force Majeure

- 25.1. Neither party shall be liable for any delay or failure to meet its obligations under this Contract due to any cause outside its reasonable control, including (without limitation), inclement weather, Acts of God, war, riot, malicious acts of damage, civil commotion, strike, lockout, industrial dispute, refusal of licence, power failure or fire. If performance of the service is substantially prevented for a continuous period of 6 months by virtue of any of the aforesaid events, then either party may terminate this Contract by written notice to the other.

26. Public Reputations of the Parties/Press Releases

- 26.1. Both Parties recognise their respective public reputations and legal responsibilities. Each Party shall use all reasonable endeavours not to harm or compromise these.
- 26.2. The text of any press release or other communication to be published by or in the media concerning the subject matter of this Contract shall require the approval of each Party, which shall not be unreasonably withheld or delayed.

27. Retention of Documents

- 27.1. The Contractor and its sub-contractors shall maintain original invoices; management information returns and all other documents necessary to verify the Services in relation to this Contract for 6 years from the end of the financial year in which the last payment is made.
- 27.2. Where any payments made under this Contract for the Services have been used as match-funding as notified in writing by the ESFA under Clause 20 for an ESF project the Contractor will be required to retain all documents necessary to verify the Services provided by itself or by its sub-contractors. Documents to support claims must be retained for a minimum of three years after the European Commission has made its final payment. For the 2007-13 ESF

Programme this is expected to be until at least 31 December 2022 and for the 2014-20 ESF Programme until at least 31 December 2030.

- 27.3. Confirmation of the document destroy date will be notified in writing by the ESFA. Without prejudice to any of the other rights under the Contract to recover funds, the ESFA will be entitled to recover from the Contractor any sums, which it is required to repay to the European Social Fund as a result of the Contractor's failure to comply with this Clause.
- 27.4. The provisions of this Clause shall apply during the continuance of this Contract and after its termination howsoever arising.

28. Status of Contract

- 28.1. Nothing in this Contract shall have the effect of making the Contractor, the servant or agent of the ESFA, the Contractor (if an individual) represents that he is regarded by both the Inland Revenue and the Department for Work and Pensions as self-employed and accordingly shall indemnify the ESFA against tax, national insurance contributions or similar imposed for which the ESFA may be liable in respect of the Contractor by reason of this Contract.

29. Waiver

- 29.1. No failure or delay on the part of either Party hereto to exercise any right or remedy under this Contract shall be construed or operate as a waiver thereof nor shall any single or partial exercise of any right or remedy as the case may be. The rights and remedies provided in this Contract are cumulative and are not exclusive of any rights or remedies provided by law.

30. Third Party Rights

- 30.1. Save as specifically provided in the Contract none of the terms of this Contract are intended to be enforceable by any Learner or other third party.

31. Notice

- 31.1. Any notice or other document to be given under this Contract must be in writing and will be deemed to have been duly given if left at or sent by first class post by Royal Mail Special Delivery or other fast postal service or electronic media (including but not limited to the Manage Your Education & Skills Funding service) to a Party at the address or relevant telecommunications number for such Party or such other address as the Party may from time to time designate by written notice to the other.
- 31.2. All such notices and documents must be in the English language. Any notice or other document will be deemed to have been received by the addressee two Working Days following the date of despatch of the notice or other document by post or, where the notice or other document is sent by hand on the day of delivery or where notice is given by electronic media, on the Working Day following transmission. To prove the giving of a notice or other document will

be sufficient to show that it was despatched.

32. Governing / Jurisdiction

32.1. This Contract shall be governed by and construed in accordance with English Law.

33. Dispute Resolution

33.1. Any dispute, difference or question arising between the Parties either during the currency of the Contract or afterwards shall be referred to the nominated contacts for the ESFA and the Contractor for discussion and review in order to try to resolve the same.

33.2. In the event of the nominated contacts being unable to resolve the relevant issue, either party may request in writing that the matter is referred to the ESFA's nominated representative and the Contractor's representative nominated for this purpose (jointly "the Dispute Resolution Panel") for formal review and consideration. Any request for referral to the Dispute Resolution Panel must include details of the dispute and any proposals to resolve it.

33.3. The Dispute Resolution Panel will meet within 28 days of receiving a request for referral made in accordance with Clause 33.2 above.

34. Feedback and Complaints

34.1. The primary responsibility for receiving feedback and investigating complaints promptly and thoroughly in respect of the Services shall rest with the Contractor. The Contractor shall have procedures in place, which are acceptable to the ESFA, to gather and act upon feedback and complaints from Learners and/or their representatives and employers and the wider community.

34.2. The Contractor must ensure that Learners are made aware of its procedure for dealing with complaints and that the procedure is clear and accessible to Learners who wish to complain.

34.3. The Contractor shall be responsible for resolving complaints in accordance with its own procedures and any guidance issued by the ESFA.

34.4. Where a complaint has not been resolved to the satisfaction of the complainant the Contractor must advise the complainant of his or her right to complain to the ESFA and co-operate with any investigation carried out by the ESFA and act on any recommendations made by the ESFA following the investigation.

34.5. The Contractor will ensure that it has in place and complies with an effective whistleblowing procedure, approved by the body responsible for the management of the Contractor, whereby staff may raise in confidence concerns about possible malpractice without fear of victimisation, subsequent discrimination or disadvantage. The procedure must be published on the Contractor's public-facing website. The Contractor will regularly review the

procedure, including securing approval from the body responsible for the management of the Contractor of any amended procedure.

35. State Aid

- 35.1. The Contractor must satisfy itself, if the European rules on State Aid apply to the Services delivered under this Contract.
- 35.2. Where the rules on State Aid apply, the ESFA will supply to the Contractor details of the records that the Contractor will need to collect and retain.
- 35.3. The ESFA reserves the right to require the Contractor to obtain a contribution towards the cost of the Services delivered under this Contract from the employer of any Learner. Where a contribution is required, the ESFA will confirm to the Contractor in writing the exact percentage of the contribution.
- 35.4. Where ESFA requires the Contractor to obtain a contribution towards the cost of the Services under Clause 35.3 above, the Contractor must provide evidence that the contribution has been received.
- 35.5. In the event that any funding paid under this Contract is deemed to constitute unlawful state aid the ESFA reserves the right to require immediate repayment of any such funding.

36. Intellectual Property Rights

- 36.1. In consideration of the ESFA making the payments to the Contractor in connection with the Services the Contractor hereby grants (and, where relevant, shall procure from any necessary third parties the grant) to the ESFA a non-exclusive, irrevocable, worldwide, royalty-free licence (with the right to license others) of any of the Contractor's Foreground Intellectual Property that the ESFA may reasonably require to be able fully to exploit, develop and commercialise the results of the Services, including, without limitation, the Work.
- 36.2. The provisions of this Clause shall apply during the continuance of this Contract and after its termination howsoever arising

37. Disposal of Assets and Change of Use

- 37.1. In respect of Assets whose value exceeds £2,500 including VAT the following provisions shall apply.
- 37.2. For the purposes of this section:
 - a) 'Asset' shall mean any property, real or personal, tangible or intangible;
 - b) an Asset shall be considered to have been financed by the ESFA if it has been acquired wholly or partly with funds provided by the ESFA;

- c) the use of any Asset shall be considered to have changed if the Contractor uses it for any purpose other than for the provision of Services under the Contract;
 - d) 'the appropriate proportion thereof' shall be the proportion represented by the amount of funding provided by the ESFA to acquire, develop or improve an asset in relation to the entire price paid for its acquisition, or its market value when its development or improvement have been completed.
- 37.3. The Contractor shall ensure that any Asset financed by the ESFA is adequately insured.
- 37.4. The Contractor shall inform the ESFA if it proposes to dispose of, or change the use of, any Asset that has been financed by the ESFA.
- 37.5. The Contractor shall not dispose of any Asset financed by monies provided by the ESFA unless it has first obtained the written consent of the ESFA to such a disposal.
- 37.6. Where the Contractor disposes of the Asset it shall pay to the ESFA whichever is the greater either the amount of funding provided by the ESFA in respect of the Asset or the net proceeds of any disposal of an Asset, or the appropriate proportion thereof, to the ESFA unless otherwise agreed with the ESFA.
- 37.7. If the Contractor changes the use of any such Asset it will be treated as a disposal and the Contractor shall make a payment to the ESFA in accordance with clause 37.6 above.
- 37.8. In the event of the Contractor being taken over, merging or going into liquidation, all Assets financed by the ESFA, or the equivalent portion of their market value, will become the property of the ESFA.
- 37.9. The provisions of this clause shall apply during the continuance of this Contract and after its termination howsoever arising. The ESFA shall reserve the right to decide when its interest in Assets financed by the ESFA under the terms of the Contract shall cease.

38. Headings

- 38.1. The headings to conditions shall not affect their interpretation.

39. Continuing Obligations

- 39.1. Save as otherwise expressly provided in this Contract:-

39.1.1. the termination or expiry of this Contract will be without prejudice to any accrued rights and obligations under this Contract as at the Expiry Date or the Termination Date; and

39.1.2. the termination or expiry of this Contract will not affect the continuing rights or obligations of the ESFA and the Contractor under the Clauses in the table below and/or under any other provision of this Contract which is expressed to survive expiry or termination or which is required to give effect to such expiry or termination or the consequences of such expiry or termination for a period of six (6) years, or such time period as set out in the Specification (Schedule One) for European Social Fund direct and match funding, after such expiry or termination:

clause	Description
7	Freedom of Information and Confidentiality
10	Liability
11	Insurance
12	Access and Monitoring
16	Data Protection and Protection of Personal Data
18	Quality Assurance and Raising Standards
23	Termination
24	Transfer of Responsibility on Expiry or Termination
26	Public reputations of the Parties/Press Releases
33	Dispute Resolution

40. Entire Contract / Amendments

40.1. The Contract shall comprise the following:

Terms and Conditions

Appendix 1

Funding Rules

Funding Appendix (added as appropriate)

Schedule 1

Schedule 2 - Processing Personal Data and Data Subjects

Schedule 3 - Post 16 Provider Relief for Covid-19 Scheme (if applicable)

Schedule 4 - Post 16 Provider Covid-19 Relief Scheme 2 (if applicable)

40.2. This Contract constitutes the entire Contract between the parties and shall not be varied except by an instrument in writing signed by the Parties.

1.1.11 “Public Sector Employee” means a Transferring Employee who immediately before the Employee Transfer Date was employed by an employer covered by a Public Sector Pension Scheme;

1.1.12 “Public Sector Pension Scheme” means:

- 1) The Teachers Pension Scheme (TPS)
- 2) The Local Government Pension Scheme (LGPS)
- 3) The Principal Civil Service Pension Scheme (PCSPS).

As applicable;

1.1.13 “Relevant Legislation” means any statute or regulations or the EC Treaty (or any directives or regulations made there under);

1.1.14 “Relevant Personnel Documentation” means the information set out in Appendix C;

1.1.15 “Relevant Transferring Members” means:

- 1) Those Transferring Employees who were members of the LGPS or TPS or who were eligible to join the LGPS or TPS;

1.1.16 “Required Information” means the information set out in the Appendix A-F;

1.1.17 “Successor Contractor” means the person nominated by the ESFA to undertake the services substantially the same as the Services after the termination of this Contract;

1.1.18 “Successor Contractor’s Scheme” means:

- 1) The LGPS or TPS or PCSPS; or
- 2) Any other retirement benefit scheme established by the Successor Contractor or to which the Successor Contractor is party,

As applicable;

1.1.19 “Transferring Employees” means those employees of the Previous Contractor or the ESFA who are employed in the performance of services substantially the same as the Services; and “Transferring Employees” shall be construed accordingly; and

1.1.20 “TUPE” means the Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended from time to time

1.2. Transfer of Undertakings (Protection of Employment) on Commencement

1.2.1 The Contractor shall on the Employee Transfer Date become the employer of the Transferring Employee and, whether or not by virtue of TUPE, or as a term of this Agreement, all the respective employer's rights, duties, powers, liabilities and obligations in respect of the contract of employment of the Transferring Employee shall transfer to the Contractor. The Parties shall respectively comply with all the requirements and obligations, which TUPE imposes on a transferor and transferee in respect of such transfer whether or not as a matter of law TUPE applies;

1.2.1.1 For the avoidance of doubt, the Contractor assumes full responsibility for any claims made by a Transferring Employee in respect of their terms and conditions of employment and will indemnify the ESFA and the Previous Contractor in respect of any claim brought by any Transferring Employee which arises from operation of this Clause 1.2; and

1.2.2 Where the Transferring Employee is a Public Sector Employee the Contractor must comply with the Cabinet Office Statement of Practice

1.3. Protection of Pensions – Public Sector Employees

1.3.1. The Contractor shall:

1.3.1.1 In respect of service from the Employee Transfer Date and at a date not later than one month prior to the Employee Transfer Date;

1.3.1.1 (a) Establish, or have become party to an employee's retirement benefit scheme that makes retirement provision which is approved or capable of approval by the Inland Revenue as an exempt approved scheme under Chapter 1 of Part XIV of the Income and Corporation Taxes Act 1988 and capable of receiving a transfer payment from the Public Sector Pension Scheme and certified by the Government Actuary's Department or other actuary to be agreed between the Parties, to be broadly comparable to the Public Sector Pension Scheme ("The Contractor's Scheme"); or

- 1.3.1.1 (b) Have entered into an Admission Agreement in respect of, or otherwise be able to provide a Relevant Transferring Member with membership of, a Public Sector Pension Scheme, where permissible by the rules of that scheme or in accordance with Fair Deal, or
- 1.3.1.1 (c) Establish, or have become party to an employee's retirement benefit scheme that makes retirement provision which is accepted in writing by each individual transferring employee as being adequate for their personal retirement provision.

Admission of the Relevant Transferring Members to The Contractor's Scheme

- 1.3.1.2 Procure that the Relevant Transferring Members shall be automatically admitted to the Contractor's Scheme with effect from the Employee Transfer Date unless any of the Relevant Transferring Members elect within three (3) months of the Employee Transfer Date by notice in writing not to become members of the Contractor's Scheme from such date;
- 1.3.1.3 Invite those Relevant Transferring Members who elect to join the Contractor's Scheme to request that a payment is made from the Public Sector Pension Scheme to the Contractor's Scheme in respect of the retirement benefits accrued in the Public Sector Pension Scheme on behalf of those Relevant Transferring Members;
 - 1.3.1.3.1 Procure that the Contractor's Scheme will accept a cash payment equal to the Transfer Value made from the Public Sector Pension Scheme to the Contractor's Scheme;
- 1.3.1.4 Procure that the Contractor's Scheme will provide [x] years of reckonable service in respect of each year of a Relevant Transferring Member's period of reckonable service under the Public Sector Pension Scheme to those that each Relevant Transferring Member respectively had under the Public Sector Pension Scheme as at the Transfer Date;

Admission of the Relevant Transferring Members into a Public Sector Pension Scheme

- 1.3.1.5 Where the option set out in 1.3.1.1(b), applies ensure that each Transferring Employee may participate, or continue to participate in their respective Public Sector Pension Scheme; and

Continuity of Schemes

- 1.3.1.6 Neither by voluntary act or omission either prevent the Contractor's Scheme from continuing in full force and effect throughout the term of this Contract, or where the Contractor selects the option set out in 1.3.1.1(b)., at any time end the participation of a Transferring Employee of a Public Sector Pension Scheme.
- 1.3.2. Within a reasonable time prior to the Employee Transfer Date the Contractor shall notify each of the Transferring Employees in writing of the terms and conditions upon which they will be employed by the Contractor on and after the Employee Transfer Date and the details of the Contractor's Scheme, or Public Sector Pension Scheme and the proposed organisation of the undertaking after the Employee Transfer Date.
- 1.3.3. The Contractor shall procure that an amendment shall only be made to the Contractor's Scheme which could reduce the value of the benefits of any Relevant Transferring Member which have accrued to the date upon which the power to amend is exercised, if any such amendment is required by legislation or is made with the written consent of the Relevant Transferring Member. The value of the benefits shall make explicit allowance for expected future salary growth as determined by the actuary of the Contractor's Scheme as if the Relevant Transferring Member had continued in employment with the Contractor.
- 1.3.4. At the expiry or termination of this Contract, the Contractor shall procure that the Contractor's Scheme shall offer members of the Contractor's Scheme who were Relevant Transferring Members and whose employment transfers to the Successor Contractor, the option to transfer their accrued pension rights to the Successor Contractor's Scheme on an actuarial basis certified by the actuary as no less favourable than the Transfer Value. The value of such accrued pension rights shall not be reduced because of inadequate funds being available in the Contractor's Scheme.
- 1.3.5. The Contractor shall ensure that on a full or partial wind-up of the Contractor's Scheme, the benefits of any Relevant Transferring Member who is currently employed by the Contractor and accruing benefits immediately before such winding up have been increased to those which could be provided by a past service reserve. The past service reserve is to be calculated with regard to projected final pensionable pay at the assumed date of retirement, or earlier death, or leaving service and not the final pensionable pay at the date of wind-up or earlier date of leaving the Contractor's Scheme and each reserve is to be calculated on a basis determined by the actuary of the Contractor's Scheme.
- 1.3.6. Where any Relevant Transferring Member transfers to a Sub-Contractor engaged in the provision of the Services, the Contractor shall ensure that in any such transfer, the Sub-Contractor shall establish, or have become party to an employee's retirement benefits scheme on the terms set out in clause

1.3.1.1 (“the Sub-Contractor’s scheme”). The Contractor shall procure that the Relevant Transferring Member is invited to join the Sub-Contractor’s scheme on the terms set out in clauses 1.3.1.2 –1.3.1.6 The Contractor shall ensure that the Sub-Contractor’s scheme shall include the conditions set out in clauses 1.3.3, 1.3.4, 1.3.5 and 1.3.6.

1.4. Expiry of Contract

- 1.4.1. The ESFA and the Contractor shall act on the basis that TUPE applies on expiry or termination of the Contract where the ESFA is proposing re-contract for services which are substantially the same as the Services.
- 1.4.2. During the period of 18 months preceding the expiry of the Contract or within 21 days after the ESFA or the Contractor has given notice to terminate the Contract, the Contractor shall disclose to the ESFA and shall permit the ESFA to disclose to any tenderer for services which are substantially the same as the Services, the Initial Staff Information provided that prior to so doing any such tenderer shall have executed in writing a confidentiality undertaking in favour of the Contractor.
- 1.4.3. During the period of three (3) months preceding the expiry of this Contract or within 21 days after the ESFA or the Contractor has given notice to terminate the Contract, the Contractor shall, subject to the provisions of the Data Protection Act 2018, provide and thereafter keep updated at monthly intervals, to the ESFA and to the Successor Contractor information equivalent to the Relevant Personnel Documentation and the Prescribed Particulars in respect of each employee whom the Contractor reasonably believes will be a Future Transferring Employee provided that prior to so doing the Successor Contractor nominated by the ESFA shall have executed in writing a confidentiality undertaking in favour of the Contractor.
- 1.4.4. The Contractor shall make reasonable endeavours to assist the Successor Contractor to communicate with, meet and inform and consult with the employees whom the Contractor reasonably believes will be a Future Transferring Employee and their trade union or other employee representatives for the purposes of complying with TUPE.
- 1.4.5. The Contractor shall immediately prior to the Future Transfer Date provide to the ESFA or the Successor Contractor a complete and accurate list of the Prescribed Particulars and Identification Details of all employees whom it reasonably believes will be Future Transferring Employees.
- 1.4.6. Within a period of 21 days following the expiry or termination of this Contract the Contractor shall provide to the ESFA or the Successor Contractor in writing Final Pay Details of the Future Transferring Employees.
- 1.4.7. The Contractor warrants that it shall supply complete and accurate information pursuant to clauses 1.4.2, 1.4.3, 1.4.5 and 1.4.6 in all material respects and The Contractor shall indemnify and keep the ESFA indemnified fully now and in the future in respect of all or any costs whether arising in contract or under

any Relevant Legislation suffered or incurred by the ESFA or the Successor Contractor nominated by the ESFA by reason of any proceeding, claim or demand arising from or in connection with the provision of information and/or the failure to provide complete and accurate information under clauses 1.4.2, 1.4.3, 1.4.5, and 1.4.6, and/or the provision of assistance and/or failure to provide assistance under clause 1.4.4 of this Contract.

- 1.4.8. After receiving notice of the termination of this Contract and for six (6) months preceding expiry of this Contract the Contractor shall promptly notify the ESFA or the Successor Contractor:
- 1.4.8.1 of the period of notice given by the Contractor or received from any employee whom the Contractor reasonably believes will be a Future Transferring Employee regardless of when such notice is to take effect;
 - 1.4.8.2 of the termination, for whatever reason, of the employment of any employee whom the Contractor reasonably believes will be a Future Transferring Employee; and
 - 1.4.8.3 of any other change to any employee whom the Contractor reasonably believes will be a Future Transferring Employee and their terms and conditions of employment, their Prescribed Particulars and their Relevant Personnel Documentation.
 - 1.4.8.4 The Contractor warrants that it shall supply the Required Information completely and accurately in all respects at the time of supply and shall indemnify and keep the ESFA and/or any Successor Contractor indemnified in respect of all and any costs suffered or incurred by the ESFA or the Successor Contractor by reason of any proceedings, claim or demand arising out of or in connection with:
 - 1.4.8.5 Any claim against the ESFA or the Successor Contractor by any Future Transferring Employee so far as it relates to any act or omission of the Contractor after the Employee Transfer Date and prior to the Future Transfer Date; and
 - 1.4.8.6 Any claim against the ESFA or the Successor Contractor by any Future Transferring Employee whose name is not included on the list provided by the Contractor pursuant to Clause 1.4.5 so far as it relates to the dismissal of such Future Transferring Employee within two Months of the ESFA or Successor Contractor becoming aware of the transfer of such Future Transferring Employee.
- 1.4.9. For the purposes of Clause 1.4.9, in the event that the ESFA or the Successor Contractor incurs costs, liabilities or expenditure in respect of Future Transferring Employees which is greater than would have been the case if the Required Information supplied by the Contractor had been accurate and complete, then such (net) greater costs, liabilities or expenditure shall be deemed to be costs suffered or incurred by the ESFA or

Successor Contractor and included within the indemnity provided by the Contractor.

- 1.4.10. The ESFA or Successor Contractor shall be entitled to recover from the Contractor in full any legal, accountancy and other costs actually and reasonably incurred by the ESFA or Successor Contractor in connection with the costs and liabilities indemnified by the Contractor.
- 1.4.11. This clause 1.4 shall continue in effect for six months following the expiry or termination of this Contract.

APPENDIX A TO CLAUSE 1 SCHEDULE 1

“Initial Staff Information” Means:

1. Number of staff to be transferred;
2. Gender;
3. Date of Birth;
4. Whether disabled for the purposes of the Disability Discrimination Act 1995;
5. Job description;
6. Work Location;
7. Conditioned hours of work per week;
8. Date of commencement of continuous employment and (if different) the commencement date;
9. Relevant Personnel Documentation;
10. Annual salary and rates of pay band/grade including pending increases;
11. Shifts, unsociable hours or other premium rates of pay;
12. Allowance and bonus details over the last twelve (12) Months including date, type, amount and pending allowances/bonuses;
13. Leave entitlement;
14. Any factors affecting redundancy entitlement;
15. Whether currently on maternity leave or other long term leave of absence;
16. Details of all dismissals or terminations of employment within the preceding six (6) Months of anyone previously employed to or engaged in connection with the provision of the Services;
17. Details of all agreements or arrangements (whether or not legally binding) entered into in relation to the staff with any trade union or organisation or body representing employees or with any employee representatives;
18. Details of all trade disputes and industrial action occurring at any time during the preceding twelve (12) Months to which any member of staff was a party;
19. Details of any trade union or organisation or body representing employees.

APPENDIX B TO CLAUSE 1 SCHEDULE 1

“Prescribed particulars” means:

1. Personal Details

Gender;
Date of Birth;
Whether known to be disabled for the purposes of the Disability Discrimination Act 1995, and details of any reasonable accommodation in respect thereof;

2. Employment Details

Job Title;
Staff Number;
Job Description;
Work Location;
Conditioned hours of work per week;
Date of commencement of continuous employment and (if different) commencement date;
Relevant Personnel Documentation;
Notice Periods (for employer and employee);
Annual salary and rates of pay band/grade including pending salary increases;
Shifts, unsociable hours or other premium rates of pay;
Overtime entitlement and details of last twelve (12) Months overtime;
Allowance and bonus details over the last twelve (12) Months including date, type, amount and pending allowances/bonuses;
Provisional details about standing loan/advances on salary or debts;
Existing and future training or sponsorship commitments;
Leave entitlement and accrued leave entitlement including any leave outstanding or expected to be outstanding at the Future Transfer Date;
Annual leave reckonable service date;

Additional employment benefits;
Other payments;
Copies of pay slip data for immediately preceding five (5) Months;
Provisional details of Cumulative Pay (for tax and pension purposes) and cumulative tax paid;
Tax Code;
Voluntary deductions from pay;
National insurance (NI) Number,
NI Contributions rate;
NI benefit start date;

3. Records of Employment Service

Last two appraisal report markings and/or performance assessment details and dates thereof;
Sickness and absence records for two (2) years immediately preceding (including maternity leave);
Details of any current warnings for breach of discipline or poor performances including warning reason, warning date, warning status and start and end date or penalty period.
Details of any other outstanding disputes or grievances including all proceedings before any Employment Tribunal.

4. Method of payment

Instrument of payment;
Bank/building society account details for payroll purposes.

5. Pensions

For pension purposes, the notional reckonable service date;
Pensionable pay history for preceding 3 years;
Percentage of any pay currently contributed under additional voluntary contribution arrangements;
Percentage of pay currently contributed under any added years arrangements.

APPENDIX C TO CLAUSE 1 SCHEDULE 1

“Relevant personnel documentation” means:

1 General Practices and Policies

Maternity, paternity and parental leave (including names of those on long-term leave or maternity leave);

Special leave and career breaks;

Sick leave and pay;

Disciplinary/grievance policy and procedures;

Equal Opportunities policy;

All documents relevant to terms and conditions of employment, including manuals, codes, handbooks, procedure guides, publications and agreements (including collective agreements);

Any other letters or documents or collective agreements affecting terms and conditions of employment;

2 Redundancy

Full details of any practice, policy or procedure which the Contractor has in relation to redundancy and copies of relevant documents.

APPENDIX D TO CLAUSE 1 SCHEDULE 1

“Final pay details” means:

In respect of each Future Transferring Employee, the following information:

- Final Month's copy pay slip data;
- Cumulative pay for tax and pension purposes;
- Cumulative tax paid;
- Tax code.

APPENDIX E TO CLAUSE 1 SCHEDULE 1

“Identification Details” means:

1. In respect of each Future Transferring Employee, the following information:
 - Name
 - Home Address
 - Work Telephone Number
 - Home Telephone Number (where available)
 - Next of Kin

APPENDIX F TO CLAUSE 1 OF SCHEDULE 1

TRANSFER VALUES

Bulk transfer values will be inserted in the Contract prior to signing.

Schedule 2

Processing, Personal Data and Data Subjects

Description	Details
Subject matter of the Processing	<p>The subject matter is the Personal Data of Learners on education or training programmes administered by the ESFA that are subject to this Contract as defined in the ESFA privacy notice and ILR specification and its appendices.</p> <p>https://www.gov.uk/government/publications/esfa-privacy-notice</p> <p>https://guidance.submitlearnerdatabeta.fasst.org.uk/</p>
Duration of the Processing	<p>The duration of the Processing covers the academic year data returns to the ESFA as defined in Appendix A of the ILR specification to enable funding and audit of the learning programmes defined in this Contract.</p> <p>https://guidance.submitlearnerdatabeta.fasst.org.uk/</p>
Nature and purposes of the Processing	<p>The nature and purposes of the processing is defined in the ESFA privacy notice.</p> <p>https://www.gov.uk/government/publications/esfa-privacy-notice</p> <p>The processing of data in the Contract refers to the submission of ILR data to the ESFA only. The processing does not include the processing of Personal Data collected from the learners by the Contractor for the purposes of enrolling Learners onto programmes or delivering education or training, e.g. e-portfolios.</p> <p>The Contractor will be required to submit the data to the ESFA as set out in Clause 17 Submission of Learner Data of this Contract.</p>

Description	Details
Type of Personal Data	<p>The Personal Data to be processed is defined in the ILR specification.</p> <p>https://guidance.submitlearnerdatabeta.fasst.org.uk/</p>
Categories of data subject	<p>The data subjects are Learners on education or training programmes administered by the ESFA that are subject to this Contract.</p>
Retention and destruction of the data once the processing is complete UNLESS requirement under union or member state Law to preserve that type of data	<p>Information on how the data will be supplied to the ESFA is detailed in the ILR specification and its appendices.</p> <p>https://guidance.submitlearnerdatabeta.fasst.org.uk/</p> <p>For the purposes of the ESFA as a data controller of the data, the Contractor is required to retain the data for the funding and audit purposes set out in this Contract for 6 years from the end of the Financial Year in which the last payment is made under this Contract.</p> <p>For the purposes of the Department for Work & Pensions as a data controller, where Learner data is used as match on the 2014-20 ESF programme, the data will be retained securely until 31st December 2030.</p> <p>The Contractor (and any other data controller) is responsible for determining any further need to process the data, including its retention, prior to secure destruction.</p>