



Education & Skills  
Funding Agency

<b>Agreement Type</b>	Contract for Services
<b>Funding Period</b>	1 <sup>st</sup> August 2021 to 31 <sup>st</sup> July 2022
<b>Between</b>	the Secretary of State for Education (acting through the Education and Skills Funding Agency)
<b>And</b>	«ProviderName»
<b>Funding for</b>	«FSPGroupList»
<b>Master Contract Number</b>	«MasterContractRef»

**ACCEPTANCE BY THE CONTRACTOR**

BY ACCEPTING THIS CONTRACT VIA THE MANAGE YOUR EDUCATION & 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.

**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

**This Contract is made on the date the Contract is digitally signed by the Contractor on the Manage Your Education & Skills Funding Service between:**

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«ProviderName»

«ProviderAddress»

«ProviderCompanyNo»

AND

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

Hereinafter called  
the Contractor

Hereinafter called  
the Department

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## **PART 1: PRELIMINARIES**

### **1 DEFINITIONS**

<b>“Account Manager”</b>	the person appointed by the Contractor in accordance with Clause 17.2 (Account Manager);
<b>“Agreement Date”</b>	the date of this Contract;
<b>“Apprenticeship”</b>	means the training and (where applicable) end point assessment for an employee as part of a job with an accompanying skills development programme;
<b>“ASBO”</b>	an anti-social behaviour order as defined in the Crime and Disorder Act 1998;
<b>“Awarding Organisation”</b>	an organisation that is regulated by Ofqual or is recognised by QAA as an access validating agency;
<b>“Background Intellectual Property”</b>	means any intellectual property, other than Foreground intellectual Property, which is used in performing the Services or comprises part of the Work;
<b>“Barred List”</b>	means the list of individuals who are barred from engaging in regulated activity with children, adults or both in England and Wales maintained by the Disclosure and Barring Service;
<b>“Brokerage”</b>	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;
<b>“Business Continuity Plan”</b>	any plan prepared pursuant to Clause 5.1, as may be amended from time to time;
<b>“Change”</b>	any change to the Services which will then be progressed through the Change Control Procedure (for the avoidance of doubt excluding a change to this Contract which will be dealt with in accordance with Clause 49 (Amendments to this Contract));
<b>“Change Control Procedure”</b>	means the procedure as set out in Schedule 3 (Change Control Procedure);

<b>“Change in Control”</b>	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;
<b>“Child” or “Children”</b>	shall have the meaning given to it in Section 60 of the Safeguarding Vulnerable Groups Act 2006;
<b>“Combined Authority”</b>	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;
<b>“Confidential Information”</b>	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");
<b>“Contract”</b>	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;
<b>“Contract Manager”</b>	the person appointed by the Department in accordance with Clause 17.1 (Contract Manager);
<b>“Contract Period”</b>	means the period between the Agreement Date and the Expiry Date, unless terminated earlier on the Termination Date;
<b>“Contractor Personnel”</b>	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;
<b>“Contractor Related Party”</b>	means any officer, agent, employee of the Contractor acting in the course of his office or employment including any Sub-Contractors supplied by the Contractor in relation to the Services;
<b>“Contractor System”</b>	the information and communications technology system used by the Contractor in performing the Services including the Contractor’s equipment and related cabling (but excluding the Department System);
<b>“Contracts Finder”</b>	means the Government’s publishing portal for public sector procurement opportunities;
<b>“Convictions”</b>	other than for minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding over orders (including any spent convictions as contemplated by section 1(1) of the Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exemptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order, or is a Barred person in accordance with section 3 of the Safeguarding Vulnerable Groups Act 2006;
<b>“Crown Body”</b>	means any department, office or agency of the Crown, including Ofsted, the Care Quality Commission, the Charity Commission, the Office for Students, Ofqual, any and all local authority or Combined Authority bodies;
<b>“Data”</b>	takes the meaning given in the UK GDPR;
<b>“Database”</b>	the rights in or to the data held in the Contractor’s system in accordance with the Specification;
<b>“Data Controller”</b>	takes the meaning given in the UK GDPR;
<b>“Data Loss Event”</b>	any event that results, or may result, in unauthorised access to Personal Data held by the Data 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;
<b>“Data Processor”</b>	takes the meaning given in the UK GDPR;
<b>“Data Processor Personnel”</b>	means all directors, officers, employees, agents, consultants and contractors of the Data Processor and/or

	of any Data Sub-Processor engaged in the performance of its obligations under this Contract;
<b>“Data Protection Impact Assessment”</b>	an assessment by the Data Controller of the impact of the envisaged processing on the protection of Personal Data;
<b>“Data Protection Laws”</b>	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 Contractor (and in the event of any conflict between the Data Protection Laws and Law, Data Protection Laws shall take precedence);
<b>“Data Protection Officer”</b>	takes the meaning given in the UK GDPR;
<b>“Data Subject”, “Process” and “Processing”</b>	takes the meaning given in the UK GDPR;
<b>“Data Subject Access Request” (SAR or DSAR)</b>	a request made by, or on behalf of, a Data Subject in accordance with rights granted pursuant to the Data Protection Laws to access their Personal Data;
<b>“Data Sub-Processor”</b>	any third Party appointed to process Personal Data on behalf of the Data Processor related to this Contract;
<b>“Department”</b>	means the Secretary of State for Education (acting through the Education and Skills Funding Agency);
<b>“Department Data”</b>	means any data (including metadata), record, document or information howsoever stored which is either: <ul style="list-style-type: none"> <li>(a) communicated by the Department, 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</li> <li>(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 Department is the Data Controller</li> </ul>

	including but not limited to ILR Data, e-portfolios, and learner files;
<b>“Department Policies”</b>	the policies of the Department referred to in Schedule 7 (Security & Department Policies) in force as at the Agreement Date and amended from time to time;
<b>“Department Related Party”</b>	means any officer, agent, worker, employee of the Department acting in the course of his office, engagement or employment in relation to the Services;
<b>“Department System”</b>	means the Department’s computing environment (consisting of hardware, software and/or telecommunications networks or equipment) used by the Department or the Contractor in connection with this Contract which is owned by or licensed to the Department by a third party and which interfaces with the Contractor System or which is necessary for the Department to receive the Services;
<b>“Disclosure and Barring Service” or “DBS”</b>	means the non-departmental public body established pursuant to the Protection of Freedoms Act 2012;
<b>“Dispute Resolution Procedure”</b>	means the procedure for resolving disputes as set out in Clause 18 (Dispute Resolution);
<b>“DPA 2018”</b>	Data Protection Act 2018;
<b>“Earnings Adjustment Statement”</b>	means <a href="https://www.gov.uk/guidance/earnings-adjustment-statements">Earnings adjustment statement (EAS) - GOV.UK (www.gov.uk)</a>
<b>“Exempt Information”</b>	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);
<b>“Exemption Case”</b>	means the case submitted by the Contractor to the Department in accordance with paragraphs 29 - 31 of the Sub-Contracting Funding Rules for permission to exceed the Sub-Contracting Threshold;
<b>“Expiry Date”</b>	means 31 October 2022;
<b>“Financial Year”</b>	means a period of 12 months starting on 1 April and ending on 31 March;

<b>“FOIA”</b>	means the Freedom of Information Act 2000 and all regulations made thereunder 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 25 (Freedom of Information and Confidentiality);
<b>“FOIA Notice”</b>	means a decision notice, enforcement notice and/or an information notice;
<b>“Foreground Intellectual Property”</b>	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;
<b>“Funding”</b>	means the funding paid to the Contractor by the Department in accordance with this Contract and the Funding Rules for the delivery of the Services;
<b>“Funding Agreement”</b>	means the table as set out in Schedule 2 (Payment);
<b>“Funding Rules”</b>	means the documents produced by the Department which set out the detailed requirements with which the Contractor must comply in respect of the Services delivered under this Contract as may be amended by the Department from time to time and as referred to in the Specification (Schedule 1).
<b>“Funding Stream”</b>	means each stream of Funding as set out in Schedule 2 (Payment);
<b>“Funding Year”</b>	means a period of 12 months starting on 1 August and ending on 31 July;
<b>“Good Industry Practice”</b>	means the exercise of that degree of skill, care, prudence, efficiency, foresight and timeliness as would be expected from a leading company within the relevant industry or business sector.
<b>“Guidance”</b>	any applicable guidance or directions with which the Contractor is bound to comply;
<b>“High Needs Learner”</b>	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;

<b>“ICT Environment”</b>	means the Department System and the Contractor System;
<b>“ILR”</b>	means the Individualised Learner Record which is the on-going collection of Learner data undertaken by training providers including the Contractor;
<b>“ILR Data”</b>	means Individualised Learner Record data;
<b>“Incident Response Plan”</b>	means each Party’s operational plan for response to and recovery from Significant Incidents or Emergencies as identified in national, local and community risk registers and in accordance with the requirements of the Civil Contingencies Act 2004;
<b>“Indirect Losses”</b>	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;
<b>“Insolvency Event”</b>	<p>means, in respect of the Contractor:</p> <ul style="list-style-type: none"> <li>(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</li> <li>(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</li> <li>(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 creditors' meeting is convened pursuant to section 98 of the Insolvency Act 1986; or</li> <li>(d) a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets; or</li> <li>(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</li> <li>(f) it is or becomes insolvent within the meaning of section 123 of the Insolvency Act 1986; or</li> <li>(g) being a "small company" within the meaning of section 382(3) of the Companies Act 2006, a</li> </ul>

	moratorium comes into force pursuant to Schedule A1 of the Insolvency Act 1986;
<b>“Inspectorates”</b>	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, the Care Quality Commission (CQC) and the Local Government Ombudsman;
<b>“Intellectual Property Rights”</b>	means any patent, registered design, copyright, database right, design right, topography right, trademark, 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: <ul style="list-style-type: none"> <li>(a) any renewals, revisions and extensions created or provided by the laws of any country;</li> <li>(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</li> <li>(c) the right to apply for registration of any such rights in any country of the world;</li> </ul>
<b>“Law”</b>	means any law, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning 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 Contractor is bound to comply;
<b>“Learner”</b>	means any third party including any student, apprentice (under an Apprenticeship), trainee or similar to whom the Contractor is required to deliver any of the Services;
<b>“Learner Files” / “Learner Records” / “Evidence Packs”</b>	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;
<b>“Learning Programme”</b>	means a programme of education and/or training delivered by the Contractor under this Contract;

<b>“LED”</b>	means the Law Enforcement Directive (Directive (EU) 2016/680);
<b>“Local Enterprise Partnership (LEP)”</b>	means a legal relationship between two or more local authorities by way of partnership or otherwise, created for the purposes of identifying, determining and facilitating economic opportunities that generate economic growth, prosperity and job creation in a particular area;
<b>“Malicious Software”</b>	any software program or code intended to destroy, interfere with, corrupt, or cause undesired effects on program files, data or other information, executable code or application software macros, whether or not its operation is immediate or delayed, and whether the malicious software is introduced wilfully, negligently or without knowledge of its existence;
<b>“Material Change”</b>	means a Change that leads to a demonstrable material increase to the Contractor’s costs or requires a significant Change to the Contract;
<b>“Minimum Standards”</b>	means the minimum quality standards as published by the Department;
<b>“Minor Change”</b>	means a Change during the Contract Period to operational and administrative procedures but which is not a Material Change;
<b>“Minor Breach”</b>	shall mean a delay or non-performance by either Party 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;
<b>“Occasion of Tax Non-Compliance”</b>	<p>(a) any tax return of the Contractor submitted to a Relevant Tax Authority on or after 1 October 2012 is found on or after 1 April 2013 to be incorrect as a result of:</p> <ul style="list-style-type: none"> <li>(i) a Relevant Tax Authority successfully challenging the Contractor under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle;</li> <li>(ii) the failure of an avoidance scheme which the Contractor was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or</li> </ul>

	(b) any tax return of the Contractor submitted to a Relevant Tax Authority on or after 1 October 2012 gives rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax related offences which is not spent at the Agreement Date or to a civil penalty for fraud or evasion;
<b>“Offender Manager”</b>	means an officer from Her Majesty’s Prison and Probation Service who is working directly with an offender serving their sentence in the community;
<b>“Ofsted”</b>	means the Office for Standards in Education, Children’s Services and Skills;
<b>“Ofsted Monitoring Visit”</b>	means an interim type of inspection carried out by Ofsted in accordance with the Further Education and Skills Inspection Handbook ( <a href="https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/612222/FE_Skills_Inspection_Handbook.pdf">Further education and skills inspection handbook - GOV.UK (www.gov.uk)</a> )
<b>“Parties”</b>	means the Department acting on behalf of the Crown and the Contractor;
<b>“Personal Data”</b>	takes the meaning given in the UK GDPR;
<b>“Personal Data Breach”</b>	takes the meaning given in the UK GDPR;
<b>“Personal Data Requiring Sensitive Processing”</b>	takes the meaning given in the UK GDPR;
<b>“Premises”</b>	means the location(s) where the Services are to be performed;
<b>“Prohibited Acts”</b>	means the acts specified in Clause 38 (Prohibited Acts);
<b>“Protective Measures”</b>	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;

<b>“Provision”</b>	the Services that the Contractor is under an obligation under this Contract to deliver in accordance with the Specification (Schedule 1);
<b>“Register of Apprenticeship Training Providers”</b>	means the register maintained by the Department of organisations qualified to receive Funding from the Department to deliver Apprenticeships.
<b>“Regulated Qualification Framework” or “RQF”</b>	a system for cataloguing all qualifications regulated by Ofqual;
<b>“Regulatory Body”</b>	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 Department, including, without limitation Ofsted, the European Commission and the European Court of Auditors;
<b>“Relevant Authority”</b>	any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, officer or public or statutory person of the Government of the United Kingdom or of the European Union;
<b>“Restricted Share Transfer”</b>	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 training provider and in respect of which within the last three years the Department has terminated one or more contract for similar Services as are being delivered under this Contract or the Department would have terminated the Contract had the training provider not pre-emptively terminated the relevant agreement;
<b>“Serious Breach”</b>	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 Law, 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;
<b>“Services”</b>	means the services to be provided in accordance with the Funding Rules and the Specification (Schedule 1);
<b>“Services Start Date”</b>	means the date as set out in the Specification (Schedule 1);
<b>“Significant Incident or Emergency”</b>	an event or occurrence which: <ul style="list-style-type: none"> <li>(i) constitutes an emergency for the purposes of the Civil Contingencies Act 2004; and/or</li> <li>(ii) constitutes an emergency under local and community risk registers; and/or</li> <li>(iii) is designated as a significant or emergency incident under the Incident Response Plan;</li> </ul>
<b>“Skills Advisory Panel” or “SAP”</b>	means a sub-board of a Combined Authority or Local Enterprise Partnership, which brings together local employers and skills providers to establish the skills need for the local area and to ensure alignment of skills provision with that local need;
<b>“SME”</b>	means an enterprise falling within the category of micro, small and medium-sized enterprises defined by the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises;
<b>“Specification”</b>	means the documents contained in Schedule 1 setting out the Department’s requirements for the Services to be provided under this Contract;
<b>“Staffing Information”</b>	as defined in Schedule 5;
<b>“Sub-Contract”</b>	means an agreement entered into between the Contractor and a Sub-Contractor for the purposes of engaging the Sub-Contractor to deliver some or all of the Services on behalf of the Contractor;
<b>“Sub-Contracting Threshold”</b>	means 25% of the Learners in each Funding Stream under this Contract in any given Funding Year;
<b>“Sub-Contractor”</b>	means a person or organisation that has entered into a Sub-Contract with the Contractor;

<b>“Sub-Contractor Declaration”</b>	means the declaration that the Department requires a Contractor to 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;
<b>“Sub-Contractor Policy”</b>	means the Department’s policy that applies to sub-contracting and Sub-Contractors as set out at <a href="https://www.gov.uk/government/publications/post-16-education-subcontracting-using-funding-to-offer-education-and-training">Post-16 education subcontracting: using funding to offer education and training - GOV.UK (www.gov.uk)</a> ;
<b>“Successor Contractor”</b>	means the person nominated by the Department to undertake the services substantially the same as the Services after the termination of this Contract;
<b>“Termination Date”</b>	means any date on which this Contract terminates in accordance with Clause 40 (Termination);
<b>“Transferring Former Supplier Employees”</b>	As defined in Schedule 5;
<b>“UK GDPR”</b>	means the United Kingdom General Data Protection Regulation;
<b>“Voluntary Community and Social Enterprise” or “VCSE”</b>	means a non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives;
<b>“Work”</b>	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;
<b>“Working Day”</b>	a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London.

1.1 In this Contract, unless the context otherwise requires, capitalised expressions shall have the meanings set out in Clause 1 above or the relevant Schedule in which that capitalised expression appears. If a capitalised expression does not have an interpretation in Clause 1 or the relevant Schedule, it shall have the meaning given to it in this Contract.

1.2 In this Contract except where the context otherwise requires:-

- 1.2.1 the masculine includes the feminine and vice-versa;
  - 1.2.2 the singular includes the plural and vice-versa;
  - 1.2.3 a reference to any clause, sub-clause, paragraph, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule or annex of this Contract;
  - 1.2.4 any reference to this Contract or to any other document will include any permitted variation, amendment or supplement to such document;
  - 1.2.5 any reference to any enactment, order, regulation, code, guidance or other similar instrument will be construed as a reference to the enactment, order, regulation, code, guidance or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
  - 1.2.6 references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
  - 1.2.7 a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
  - 1.2.8 headings are for reference only;
  - 1.2.9 words preceding "include", "includes", "including" and "included" will be construed without limitation by the words which follow those words;
  - 1.2.10 the Schedules to this Contract form part of this Contract;
  - 1.2.11 references to the Parties shall be to the parties to this Contract; and
  - 1.2.12 references to months shall mean calendar months.
- 1.3 No review, comment or approval by the Department under the provisions of this Contract will operate to exclude or limit the Contractor's obligations or liabilities under this Contract or the Department's rights under this Contract.

1.4 Precedence of Documentation

In the event of any inconsistency between the provisions of the Terms and Conditions and the Schedules, or between any of the Schedules, the conflict will be resolved according to the following descending order of priority:

- 1.4.1 the Terms and Conditions,
- 1.4.2 Schedule 1 (the Specification);
- 1.4.3 the remaining Schedules,

for the avoidance of doubt, in the event of any inconsistency between this Contract and the Funding Rules, this Contract will take precedence.

## **PART 2: THE SERVICES**

### **2 COMMENCEMENT AND DURATION**

- 2.1 The Contract Period will commence on the Agreement Date and terminate or expire on the earlier of:
  - 2.1.1 the Expiry Date; or
  - 2.1.2 the Termination Date.

### **3 SERVICE DELIVERY**

- 3.1 The Services to be delivered under this Contract are those as set out in Schedule 1 (Specification). The detailed requirements in respect of the Services are also set out in the Funding Rules as amended from time to time by the Department and which form part of the terms and conditions of this Contract.
- 3.2 The Services are to be delivered in accordance with the Specification, specific requirements of the Department, and all other Schedules, which all form part of the terms and conditions of the Contract.
- 3.3 The Contractor will comply (and will ensure that any Sub-Contractor complies) with the Department Policies.
- 3.4 The Contractor will ensure that data relating to Learners including Learner Records is held and saved in a format that can be reasonably accessed by the Department on request.

### **4 DEPARTMENT OBLIGATIONS**

- 4.1 The Department will not wilfully impede the Contractor in the performance of its obligations under this Contract (having regard always to the interactive nature of the activities of the Department and of the Contractor).

### **5 EMERGENCIES AND SIGNIFICANT INCIDENTS**

- 5.1 The Contractor must have and maintain an up-to-date Business Continuity Plan. [Expecting the unexpected - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/expecting-the-unexpected)
- 5.2 The Contractor must at the request of the Department provide whatever support and assistance may reasonably be required by the Department in response to any national, regional or local emergency or incident including at any premises identified by the Department.
- 5.3 The Contractor will ensure that Learners have access to portfolios, e-portfolios, learning materials and other evidence at all times.

## **6 CHANGE IN SERVICE**

- 6.1 Any Change must be dealt with in accordance with the Change Control Procedure in Schedule 3.
- 6.2 Any dispute arising from the operation of the Change Control Procedure must be resolved in accordance with the Dispute Resolution Procedure. Notwithstanding any referral to the Dispute Resolution Procedure the Contractor must nevertheless proceed to implement any Change requested by the Department which is required:
  - 6.2.1 to implement or comply with the orders, directions, guidance, recommendations or advice of a Relevant Authority or the Department's auditors (whether internal or external) or the outcome of a statutory inspection;
  - 6.2.2 to discharge a statutory duty;
  - 6.2.3 to protect the health and safety of or prevent damage to persons, property or the environment;
  - 6.2.4 to prevent acts of fraud or loss of revenue or income to the Department; and
  - 6.2.5 in a Significant Incident or Emergency in accordance with Clause 5 (Emergencies and Significant Incidents) of the Contract.
- 6.3 If a Change requires the Contract to be amended, the Parties must follow the procedure set out in Clause 49 (Amendments to this Contract).

## **7 PERFORMANCE MONITORING**

### **7.1 Contractor Monitoring**

- 7.1.1 The Contractor must put in place the necessary internal control framework, including an internal audit function if appropriate to ensure that it meets its obligations and those of its Sub-Contractors under this Contract.

### **7.2 Department Monitoring**

- 7.2.1 The Department will undertake its own performance monitoring, as set out in Schedule 1 (Specification) and may elect, at its own cost, to undertake further monitoring at any stage during the Contract Period for any purpose, including ensuring that the Services are being provided in accordance with this Contract.
- 7.2.2 The Contractor must use its reasonable endeavours to assist the Department in any performance monitoring exercise under Clause 7.2.1. The Department may notify the Contractor of the outcome of the performance monitoring exercise and the Contractor must have due regard to the Department's comments in relation to the future provision of the Services.
- 7.2.3 Without prejudice to the Department's rights under Clauses 39 (Minor and Serious Breach) and 40.3 (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, or the Department reasonably believes such reports to be fraudulent or erroneous the Department may, by notice to the Contractor, increase the level of its monitoring of the Contractor, or (at the Department'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 must have demonstrated to the reasonable satisfaction of the Department that it will perform (and is capable of performing) its obligations under this Contract, in which case, the following provisions will apply:

- (a) any such notice to the Contractor will specify in reasonable detail the additional measures to be taken by the Department or by the Contractor (as the case may be) in monitoring the performance of the Contractor;
- (b) if the Contractor (acting reasonably) objects to any of the specified measures on the grounds that they are excessive it will notify the Department 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);
- (c) the measures to be taken by the Department 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 Department's receipt of the Contractor's objection, determined pursuant to the Dispute Resolution Procedure; and
- (d) the Contractor will bear its own costs and indemnify and keep the Department indemnified at all times from and against all costs and expenses reasonably and properly incurred by or on behalf of the Department 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.

### **7.3 Contractor Responsible**

7.3.1 The Contractor acknowledges and agrees that, notwithstanding any provision of this Contract which contemplates that the Department will or may from time to time:

- (a) monitor or inspect any performance of the Services;
- (b) check compliance by the Contractor with its obligations;
- (c) confirm or indicate approval of or non-objection to proposals made by the Contractor; or

(d) request that the Contractor makes a Change to the Services; it will always be fully the responsibility of the Contractor, and not the responsibility of the Department, to ensure that the Services are performed in all respects in accordance with the Contractor's obligations under this Contract and no such action by or on behalf of the Department will in any way limit or affect such obligations.

#### **7.4 Quality Management Systems**

7.4.1 The Department will have the right upon reasonable notice and at reasonable times to audit the Contractor's quality management systems (for example ISO 9000 or equivalent standard) and/or any other quality management system to which the Specification refers, including examining and inspecting services and activities on or off the premises owned or occupied by the Contractor to establish the adequacy or accuracy of the quality management system documentation. The Contractor will use all reasonable endeavours to assist the Department in such exercise.

### **8 HEALTH & SAFETY**

- 8.1 The Contractor must comply with all health and safety legislation and Health and Safety Executive working regulations, adopt and maintain safe operating systems of work and appropriate safety policies in order to protect the health and safety of Contractor Personnel, Learners and all other persons including members of the public.
- 8.2 Where part of the Services are provided in an environment outside the direct control of the Contractor, the Contractor must take all reasonable steps to ensure that adequate arrangements are in place to ensure the health and safety of Learners. This shall include but not be limited to, co-ordinating and co-operating with other organisations/bodies with responsibilities being clearly identified and documented as appropriate, to ensure understanding.
- 8.3 The Contractor must report all incidents that are reportable under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 ("RIDDOR") in accordance with those regulations and must 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 must only use persons competent to investigate/assess Learner incidents with a view to identifying the causes of any incident and lessons to be learned.
- 8.4 The Contractor must inform the Department of the death of any Learner during the provision of the Services. This will be done by informing the Department's representative by telephone or email immediately upon the Contractor becoming aware of the death.
- 8.5 The Contractor will, 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 health and safety in this Clause 8 are included in the Sub-Contract with each Sub-Contractor.

## **9 LEARNER WELFARE**

- 9.1 In addition to its statutory health and safety responsibilities as referred to in Clause 8 (Health & Safety) above, the Contractor must ensure that the Services are delivered in safe, healthy and supportive environments, which meet the needs of Learners in accordance with this Clause 9 and Clause 26 (Employees).
- 9.2 Where the Contractor provides residential accommodation for Learners, the Contractor must inform the Department of the provision of such residential accommodation and comply with the requirements of the national minimum standards for residential accommodation for children in Colleges published from time to time by the Secretary of State under section 87C of the Children Act 1989 as if the Contractor were a College (as defined by section 87(10) of the Children Act 1989).
- 9.3 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.
- 9.4 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 [Prevent duty guidance: for further education institutions in England and Wales - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/422221/prevent-duty-guidance-for-further-education-institutions-in-england-and-wales.pdf).
- 9.5 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).
- 9.6 The Contractor will 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.
- 9.7 The Contractor will co-operate with the Department and Department for Work and Pensions for the purposes of the Industrial Injuries Disablement Benefit (IIDB) in respect of those Learners to which it applies.
- 9.8 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.
- 9.9 The Contractor will ensure it notifies the Department via the Contact Form: General Enquiries at [Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/422221/prevent-duty-guidance-for-further-education-institutions-in-england-and-wales.pdf) where a referral has been made by the Contractor or one

of the Contractor Related Parties in either of the following circumstances (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):

9.9.1 a safeguarding concern related to sexual violence to Local Authority children's social care/adult social care and/or the police, or

9.9.2 an allegation of abuse made against a teacher, lecturer or other member of staff to the designated officer(s) (at the local authority).

9.10 The Contractor will ensure it notifies the Department via the Contact Form: General Enquiries at [Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](https://www.gov.uk) of incident(s) and/or where a referral has been made, 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 9.3 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.

9.11 Where it applies

9.11.1 The Contractor must comply with the Modern Slavery Act 2015 and must have in place throughout the Contract Period policies and procedures to ensure full compliance.

9.11.2 The Contractor must ensure that all Sub-Contracts that it enters into include an obligation for the Sub-Contractor to comply with the Modern Slavery Act 2015 with special emphasis on express anti-slavery and anti-human trafficking provisions.

9.11.3 The Contractor shall implement due diligence procedures to ensure that there is no slavery or human trafficking in any part of its supply chain.

9.12 The Contractor will, 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 welfare in this Clause 9 are included in the Sub-Contract with each Sub-Contractor.

## **10 EQUALITY OF OPPORTUNITY**

10.1 The Contractor must 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 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 in the execution of the Contract. The Contractor will comply with the detailed requirements in relation to equality of opportunity set out in Clauses 10.2 to 10.4.

- 10.2 The Contractor will, in delivering the Services under this Contract, demonstrate that it has had regard to the duties placed on the Department and the Contractor by the Equality Act 2010. The Contractor will take all reasonable steps to ensure the observance of these provisions by all servants, employees or agents of the Contractor and all Sub-Contractors engaged in the delivery of the Services.
- 10.3 The Contractor must ensure that equality of opportunity is built into all aspects of Services; the business planning process; and the self-assessment process. The Contractor must 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 must use appropriate, specific and measurable objectives. These will be proportionate, relevant and aligned to the Services the Contractor is funded to deliver.
- 10.4 The Department 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.

## **11 QUALITY ASSURANCE AND RAISING STANDARDS**

- 11.1 The Contractor undertakes to the Department that it and any Contractor Related Party has the resources and skills necessary to carry out the Contractor's obligations pursuant to this Contract.
- 11.2 The Contractor must comply with the Funding Rules published by the Department as amended from time to time and any other requirements, which may from time to time be issued by the Department, Inspectorates, the Awarding Organisations and other Regulatory Bodies and of which the Contractor is made aware.
- 11.3 The Contractor must ensure that all activities carried out pursuant to this Contract will be documented in accordance with any requirements of the Department and must provide such documentation as the Department may request from time to time to ensure compliance with this Clause 11.3.
- 11.4 The Contractor will continuously seek to improve the Services and raise standards to benefit the Learner. The Contractor will have the primary responsibility for improving standards and will need to demonstrate to the Department's satisfaction that it has an effective quality assurance system based on the implementation of its own quality improvement process. The Department reserves the right to require the Contractor to provide the

Department or Ofsted evidence to support the quality improvement processes.

- 11.5 The Contractor must use all reasonable endeavours to:
- (a) minimise dropout rates and deliver high completion and achievement rates and appropriate progression;
  - (b) offer equality of access to learning opportunities and close equality gaps in learning and outcomes;
  - (c) provide good management and leadership of the learning process;
  - (d) deliver value for money and financial probity; and
  - (e) ensure all Sub-Contractors delivering Services under the Contract on behalf of the Contractor comply with the requirements set out in Clauses 11.5(a) to 11.5(d) above.
- 11.6 Failure to meet the requirements set out in Clauses 11.5(a) to 11.5(e) may result in the Department assessing the Contractor to be in Serious Breach of the Contract under Clause 39 (Minor and Serious Breach) of the Contract.
- 11.7 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 [Learner and employer satisfaction data: information for providers - GOV.UK \(www.gov.uk\)](http://www.gov.uk) and in any subsequent updates to these web pages.
- 11.8 Where appropriate, the Contractor must confirm in writing to the Department that their (including Contractor Related Parties) Centre Approval Status for the relevant Services 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 Organisation name(s). The Contractor must notify the Department immediately in writing via the Contact Form: General Enquires at [Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](http://www.gov.uk) if it receives any sanction from an Awarding Organisation, including but not limited to the suspension and/or removal of Centre Approval Status and/or the removal of the ability to register or certificate learners.
- 11.9 The Department can request any Awarding Organisation reports, assessments and notices from the Contractor at any time.
- 11.10 The Department may assess the quality and delivery of the Services and the Contractor’s compliance with the requirements in Clauses 11.5(a) to 11.5(e) during the Contract Period. The Contractor will be informed of the outcome of that process. Where the Department assesses the Contractor to be in Serious Breach of Contract following such assessment the Department will issue a notice in accordance with Clause 39.3.1 of the Contract which, where the Department is not terminating, may:
- (a) require the Contractor to meet improvement indicators to improve the quality of its Services. The Department 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 Department and in agreement with the Contractor;

- (b) agree detailed improvement plans and measures that set out clearly the expected timescale for improvement;
- (c) agree arrangements for more frequent monitoring of quality improvement plans.

## **12 FINANCIAL HEALTH**

12.1 The Department will undertake an assessment of financial health and control ([ESFA financial health assessment - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/esfa-financial-health-assessment)). Should the Department, at its absolute discretion, consider that the outcome of any financial health and/or control assessment is inadequate the Department may, in its absolute discretion take one or more of the following actions:

- (a) require the Contractor to, and the Contractor will, accept and comply with additional Contract obligations relating to the improvement of financial health and/or control arrangements;
- (b) require the Contractor to suspend the recruitment of Learners to the Services and/or cap any growth in Learner numbers;
- (c) 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
- (d) terminate the Contract in accordance with Clause 40.4.2.

12.2 Where the Contractor fails to comply with requirements imposed under Clauses 12.1(a) and/or 12.1(b) the Department will consider termination under Clause 40.4.2.

12.3 Failure to submit accounts for assessment when requested will automatically deem the assessment under clause 12.1 as 'inadequate' and clauses 12.1(a) to 12.1(d) will apply.

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

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

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

- 12.7 The Department 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:
- 12.7.1 the Contractor's up to date management accounts, including financial performance against delivery;
  - 12.7.2 financial forecasts of the Contractor's financial position for the next 12 months;
  - 12.7.3 cash flow forecasts for the next 12 months;
  - 12.7.4 any additional financial information the Department deems necessary.
- 12.8 Where the further information required from the Contractor under Clauses 12.4, 12.5, 12.6 and 12.7 does not provide adequate assurance to the Department then the Department may in its absolute discretion take one or more of the actions set out in Clauses 12.1(a) to 12.1(d).
- 12.9 The Department 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.

### **13 INSPECTIONS**

- 13.1 When the Contractor receives notification from an Inspectorate that the Services are to be inspected, the Contractor will, on request, provide the Department with details of its quality improvement activity, and any other relevant information in accordance with the required timescale of the Inspectorate. The Contractor must notify the Department via the Contact Form: General Enquires at [Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](https://www.gov.uk) of the date of the meeting at which an Inspectorate gives feedback on the inspection and allow the Department's nominated representative to attend the meeting. The Contractor must confirm to the Department in writing the outcome of the inspection within 5 Working Days of receiving the feedback from the Inspectorate.
- 13.2 Ofsted may, at any time during the Contract Period, undertake an inspection of the Contractor. The Department will consider the outcome of any such inspection in the manner set out in Clauses 13.3 to 13.8.

#### **Inadequate in part**

- 13.3 Where Ofsted has assessed the Services to be inadequate in any graded sub-judgement, the Department may, in its absolute discretion take one or more of the following actions:
- (a) require the Contractor to accept and comply with additional Contract obligations relating to the improvement of the Services assessed as inadequate; and/or

- (b) 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
- (c) 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
- (d) reduce, suspend or recover payment to the Contractor in respect of that part of the Services assessed as inadequate; and/or
- (e) terminate the Contract in accordance with Clause 40.4.5.

**Inadequate overall**

13.4 Where the Department is made aware that Ofsted has provisionally assessed the Services to be inadequate overall, the Department may, in its absolute discretion take one or more of the following actions:

- (a) 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;
- (b) commence discussions with the Contractor, and the local authority and/or Combined Authority where appropriate, within whose area the Contractor is located, either with the Inspectorate or not, as part of considering what actions as specified in Clauses 13.5(a) to 13.5(d) inclusive may be taken.

13.5 Where Ofsted has confirmed its assessment that the Services are inadequate overall, the Department may, in its absolute discretion take one or more of the following actions:

- (a) require the Contractor to accept and comply with additional Contract obligations relating to the improvement of the overall Services; and/or
- (b) 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
- (c) 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
- (d) reduce, suspend or recover payment to the contractor; and/or
- (e) terminate this Contract in accordance with Clause 40.4.5 (Termination).

13.6 The failure of the Contractor, as assessed by the Department, to comply with any requirements of Clauses 13.5(a) to 13.5(b) inclusive within such time as the Department may deem reasonable may lead to the Department taking such actions as it deems appropriate which may

include, but is not limited to, terminating the Contract in accordance with Clause 40.4.4 (Termination).

- 13.7 The Department will take action based on the Inspectorate's provisional and confirmed outcomes as in Clauses 13.4 to 13.5 above. Where the Department is made aware that the Contractor has made a complaint about the graded outcome of the overall assessment by Ofsted, the Department will continue to progress action under Clauses 13.4 to 13.5 but will be mindful of the implications arising from the outcome of a complaint. The Department will review any decisions made at such time as outcomes of any complaint are made known.
- 13.8 If an Inspectorate rating is given based on incorrect or fraudulent information or data from the Contractor this will constitute a Serious Breach and the Department may, at its sole discretion, terminate the Contract.

### **Ofsted Monitoring Visits**

- 13.9 Where the Department is made aware that Ofsted has assessed the Contractor as having made "insufficient progress" during their programme of Ofsted Monitoring Visits, the Department may, in its absolute discretion take the following actions:
- 13.9.1 require the Contractor to, and the Contractor shall, accept and comply with additional Contract obligations relating to the improvement of the overall Provision within agreed timescales. Such conditions will include complying with the published recommendations of Ofsted. These conditions will apply until a full Ofsted inspection or further Ofsted Monitoring Visit of the Contractor has taken place; and/or
- 13.9.2 require the Contractor to temporarily suspend the recruitment of Learners; and/or
- 13.9.3 require the Contractor to temporarily suspend the recruitment of Learners via a sub-contracting arrangement with another main provider or employer-provider; and/or
- 13.9.4 require the Contractor to inform all of their existing main providers or employer-providers about the outcome of the Ofsted visit; and/or
- 13.9.5 terminate this Contract in accordance with Clause 40.4.6 (Termination) where Learners may be at immediate risk on the grounds of safeguarding issues and/or the quality of leadership and/or training provision is such that one or more Learner has no reasonable prospect of achieving his or her training objective; and/or
- 13.9.6 terminate this Contract in accordance with Clause 40.4.7 (Termination) if the Contractor has two (2) consecutive Ofsted Monitoring Visits each resulting in one or more "insufficient progress" judgements in relation to one or more themes, and/or

- 13.9.7 remove the Contractor from the Register of Apprenticeship Training Providers if the Contractor has two (2) consecutive Ofsted Monitoring Visits each resulting in one or more “insufficient progress” judgements in relation to one or more themes.
- 13.10 In addition to the actions in Clauses 13.9.1 to 13.9.4 where the Provision relates to Apprenticeship Provision, the Department may, in its absolute discretion take the following actions:
- 13.10.1 require the Contractor to inform all of their existing employers about the outcome of the Ofsted visit;
- 13.10.2 where the Department is made aware that Ofsted has assessed a Sub-Contractor to the Contractor as having made “insufficient progress” during their programme of Ofsted Monitoring Visits, the Contractor is required to ensure that the Sub-Contractor suspends the recruitment of Learners until further notice.

## **14 NOT USED**

## **15 FRAUD AND IRREGULARITY**

- 15.1 The Contractor must notify the Department 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:
- 15.1.1 collusion with members of the staff of the Department or employees of the Department for Education;
- 15.1.2 computer fraud;
- 15.1.3 the submission to the Department of inaccurate, incomplete, misleading or falsified information for the purpose of a claim for funding;
- 15.1.4 fraud involving Awarding Organisations;
- 15.1.5 fraud involving Sub-Contractors;
- provided that nothing in this Clause 15 will require the Contractor to do anything, which may cause it to infringe any Law.
- 15.2 Where the Department has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Contract and payments made hereunder, the Department and /or its agents will have:
- 15.2.1 the right of access to the Contractor’s Premises (or that of any of its Sub-Contractors) at any reasonable time with or without notice to examine and remove or copy all relevant documents and records including electronic records;
- 15.2.2 the right to require the Contractor to provide written authority to enable the Department to obtain such documents, records and/or information directly from third parties; and
- 15.2.3 the right to interview the Contractor’s servants or agents engaged with the delivery of the Contract.

Failure to comply with this Clause 15.2 will constitute a Serious Breach of this Contract.

- 15.3 Where the Department has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Contract and payments made hereunder, the Department may require the Contractor to procure the services of an independent accountant (or other equivalent/appropriate professional) to investigate at the Contractor's cost (or the Department will procure and recharge to the Contractor at its sole discretion).
- 15.4 Where the Department 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 Department and the Contractor, and payments made thereunder, the Department will 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.
- 15.5 Where the Contractor is a registered or exempt charity, the Contractor will inform the Department of any schemes, orders or official warnings issued to them by the Charity Commission. Failure to inform the Department will constitute a Serious Breach of this Contract.
- 15.6 The Parties will co-operate in the identification of Learners who may be unlawfully claiming benefits. The Department 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 Department will provide a named contact or telephone answering machine for receiving such information.

### **PART 3: CONTRACT GOVERNANCE**

#### **16 RELATIONSHIPS**

##### **16.1 Co-operate and Liaise**

- 16.1.1 Subject to any express provisions in this Contract to the contrary each Party agrees to co-operate with the other in good faith with the intent that there shall be a seamless interface between the provision of the Services and the Department's other operations and services. For the purposes of this Clause 16.1.1 "good faith" shall include using reasonable endeavours to avoid unnecessary disputes and claims against the other party.

##### **16.2 Information and Assistance**

- 16.2.1 Subject to any obligation in respect of confidentiality, the UK GDPR and DPA 2018 and Confidential Information, the Parties will use all reasonable endeavours to provide and share information and data reasonably required by the other:
- (a) to enable it to perform its obligations under this Contract;  
and/or

- (b) (in the case of the Contractor) which is reasonably necessary to enable the Department to perform its statutory obligations and other functions insofar as such provision forms part of the Services.

16.2.2 Neither Party will hinder, delay or prevent the other Party in the performance of the other Party's obligations under this Contract.

### **16.3 Enquiries, Investigations and Inspections**

16.3.1 The Contractor must and will ensure that its Sub-Contractors will at all times during the Contract Period and for a period of six (6) years, or such other time period as stated in the Specification (Schedule 1), afterwards fully co-operate with any enquiry, investigation or inspection (whether routine or specific) which in any way concerns, affects or relates to the Services, or any sum claimed or charged in relation to this Contract or to any other contract of the Department. Such enquiry, investigation or inspection may be by, inter alia:-

- (a) the Department;
- (b) the Department's auditors (whether internal or external);
- (c) Regulatory Bodies; and/or
- (d) the Inspectorates.

16.3.2 Such co-operation will include (but not be limited to) the following:-

- (a) providing access to or copies of such files, documents, letters, emails, notes, minutes, records, accounts or any other information (whether held or stored electronically, in hard copy format or otherwise) which relate to the subject or Service (in whole or in part) under investigation;
- (b) providing access to the premises, equipment (including IT hardware and software) or other assets used by the Contractor and/or its Sub-Contractors in the performance of this Contract, such access to be supervised at all times unless the nature of the investigation requires the parties defined at Clause 16.3.1 to be unsupervised, such parties acting reasonably in making such assessment;
- (c) providing access to Contractor Personnel (of whatever seniority) involved in this Contract (including managerial or supervisory staff) or who may be the subject of, or be named in, any enquiry or investigation by the auditors or the ombudsmen (including providing suitable facilities for interviewing such staff);
- (d) maintaining the confidentiality of the enquiry or investigation when requested to do so;
- (e) making such explanations (whether written or oral) as may be necessary for the enquiry or investigation to be satisfied

that the terms and conditions of this Contract, the Funding Rules and the Law are being complied with;

- (f) at all times and without notice allowing access to the Inspectorates, in connection with any complaint, investigation or inspection relating to this Contract or the Services. This will extend to the Contractor's Premises; and to all documentation and information relating to this Contract to which the Contractor has access; and to the Contractor's agents, employees and Sub-Contractors.

16.3.3 Where the Department has undertaken an investigation or received a report from an independent accountant or otherwise, in relation to the Contractor it may, as a consequence of that investigation or report, require the Contractor to, and the Contractor will, accept and comply with additional Contract obligations and will meet the cost of such investigation.

16.3.4 Where the Contractor fails to comply with the contractual obligations imposed under Clause 16.3.3, within such time as the Department deems reasonable, the Department may take such actions as it deems appropriate which may include, but is not limited to, under Clause 39 (Minor and Serious Breach).

16.3.5 The Contractor will in performing the Services comply fully with all relevant rules and regulations of the Department in force from time to time.

16.3.6 The Contractor will, if requested by the Department, co-operate with the Department, at its own expense, in connection with any legal proceedings, adjudication, arbitration, court proceedings or ombudsmen enquiries in which the Department may become involved, arising from breaches of the Department's duties under the Equalities Legislation due to the alleged acts or omissions of the Contractor, its employees, Sub-Contractors or agents.

16.3.7 The Contractor will ensure that the terms of any Sub-Contract include identical provisions to this Clause 16 (Relationships) and will indemnify the Department against any losses, damages or claims it suffers in consequence of a failure to ensure the inclusion of such identical items.

## **16.4 Complaints and Feedback**

16.4.1 The primary responsibility for receiving feedback and investigating complaints promptly and thoroughly in respect of the Services will rest with the Contractor. The Contractor will have procedures in place including but not limited to a complaints framework, which are acceptable to the Department, to gather and act upon feedback and complaints from Learners and/or their representatives and employers and the wider community. The Contractor must also keep a log of the complaints received which will be accessible to the Department upon request.

- 16.4.2 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. The complaints procedure must be published on the Contractor's website and be provided to the relevant parties as part of the Contractor's on-boarding process.
- 16.4.3 The Contractor will be responsible for resolving complaints in accordance with its own procedures and any guidance issued by the Department. Once the Contractor has concluded its investigations, including any appeal, it must inform the complainant in writing of the outcome.
- 16.4.4 Where a complaint has not been resolved to the satisfaction of the complainant the Contractor will advise the complainant of his or her right to complain to the Department ([Complaints procedure - Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/complaints-procedure-education-and-skills-funding-agency)) and co-operate with any investigation carried out by the Department and act on any recommendations made by the Department following the investigation.

## **17 REPRESENTATIVE**

### **17.1 Contract Manager**

- 17.1.1 Without limiting the Department's obligations or rights in respect of such matters the Department will appoint a Contract Manager who may subject to Clause 17.1.2 exercise the rights and powers conferred by this Contract upon the Department.
- 17.1.2 Except pursuant to Clause 49 (Amendments to this Contract), or unless specifically authorised for that purpose, the Contract Manager does not have authority to amend the Contract or to relieve the Contractor of any express obligations under the Contract.

### **17.2 Account Manager**

- 17.2.1 The Contractor will notify the Department in writing of the name, telephone number, e-mail address and the postal address of the person appointed as the Account Manager.
- 17.2.2 The Account Manager may exercise the functions, rights and powers conferred by this Contract upon the Contractor.
- 17.2.3 In the event that the Contractor wishes to change the identity of the Account Manager, it will, subject to Clause 17.2.4 give to the Department not less than 5 Working Days' notice in writing of such change. Such written notice will inform the Department of the name, telephone number e-mail address and postal address of the new Account Manager.
- 17.2.4 In the event that it is not possible or practical for any reason for the Contractor to give notice to the Department in accordance with Clause 17.2.3 the Contractor will notify the Department by

whatever means the Contractor considers appropriate and will confirm such notification in writing within 5 Working Days.

### **17.3 User Role Management System**

17.3.1 The Contractor must ensure that those senior members of staff who are authorised to agree and sign contracts on behalf of the Contractor, submit Funding claims and return data are registered as users of the user role management system at [Skills Funding Agency: Login \(fasst.org.uk\)](https://fasst.org.uk). It is the Contractor's responsibility to maintain appropriate user roles on an on-going basis.

## **18 DISPUTE RESOLUTION**

18.1 Any dispute will be dealt with in accordance with this Clause 18.

18.2 In the first instance, a representative of each Party will each use their reasonable endeavours to resolve the dispute. If the dispute cannot be resolved by such representatives within 15 days of the dispute arising, it will be referred to a senior representative of each Party, who will each use their reasonable endeavours to resolve the dispute.

18.3 If a dispute cannot be resolved by negotiation as referred to in Clause 18.2 within 30 days of the dispute arising, either Party may refer the dispute for determination in accordance with the mediation procedure administered by the Centre for Effective Dispute Resolution, the costs of the mediator being split equally between the Parties, who will otherwise bear their own costs.

## **PART 4: IPR DATA AND CONFIDENTIALITY**

### **19 INTELLECTUAL PROPERTY RIGHTS**

19.1 The Parties retain the ownership of each other's Background Intellectual Property. The Contractor will give the Department a non-exclusive royalty-free licence in perpetuity to use its Background Intellectual Property in respect of the Work.

19.2 Subject to Clause 19.3, the Parties agree that all rights, title and interest in any Foreground Intellectual Property Rights shall remain the property of Contractor.

19.3 In consideration of the Department 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 Department 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 Department may reasonably require to be able fully to exploit, develop and commercialise the results of the Services, including, without limitation, the Work.

19.4 The provisions of this clause will apply during the continuance of this Contract and after its termination howsoever arising.

## **20 ASSIGNMENT OF IPR IN DATABASES**

- 20.1 The Contractor hereby assigns to the Department, with full title guarantee, title to and all rights and interest in the information contained in or stored on the Database or shall procure that the first owner of the Database assigns it to the Department on the same basis.
- 20.2 The assignment under Clause 20.1 will either take effect on the Agreement Date or as a present assignment of future rights that will take effect immediately on the coming into existence of the Database, as appropriate.
- 20.3 The Contractor will waive or procure a waiver of any moral rights in the Database assigned to the Department under this Contract.
- 20.4 To the extent that it is necessary for the Department to obtain the full benefits of ownership of the Database, the Contractor hereby grants to the Department and shall procure that any relevant third party licensor will grant to the Department an irrevocable, non-exclusive and global licence to use the Database.

## **21 DEPARTMENT DATA**

- 21.1 The Contractor acknowledges that the Department Data is the property of the Department and the Department hereby reserve all Intellectual Property Rights which may subsist in the Department Data.
- 21.2 The Contractor must perform secure back-ups of all the Department Data and must ensure that up-to-date back-ups, where not in the cloud, are stored off-site in accordance with the Business Continuity Plan. Back-ups stored in the cloud must comply with Data Protection Laws. The Contractor must ensure that such back-ups are available to the Department at all times upon request.
- 21.3 The Contractor must take all necessary steps to ensure that any Department Data which comes into its possession or control is protected in accordance with the UK GDPR and DPA 2018 and appropriate security procedures as set out in Schedule 7 (Security & Department Policies) and in compliance with Good Industry Practice (having regard to the nature of its other obligations under this Contract and under the UK GDPR and DPA 2018).
- 21.4 In the event that the Department Data used in the provision of the Services is corrupted or lost by the Contractor as a result of a breach by the Contractor of Clause 24 (Security), the Department will have the option, in addition to any other remedies that may be available to them either under this Contract or otherwise, to elect either of the following remedies:-
- 21.4.1 the Department may require the Contractor at its own expense to restore or procure the restoration of such the Department Data using the back-up copy referred to in Clause 21.2; or

- 21.4.2 the Department may itself restore or procure restoration of such the Department Data using the back-up copy referred to in Clause 21.2 and will be repaid by the Contractor any reasonable expenses so incurred.
- 21.5 In the event that the Department Data used in the provision of the Services is corrupted or lost solely as a result of an act or omission by the Department the Department will, at its own expense,
  - 21.5.1 require the Contractor to restore or procure the restoration of the Department Data using the back-up copy referred to in Clause 21.2; or
  - 21.5.2 the Department may itself restore or procure the restoration of the Department Data.
- 21.6 The Contractor must:-
  - 21.6.1 not use the Department Data, except as may be required to provide the Services or as instructed by the Department;
  - 21.6.2 not disclose the Department Data to any third party, other than in accordance with the requirements of the UK GDPR and DPA 2018 for the purposes of fulfilling its obligations under this Contract, except with the prior written consent of the Department or as required by this Contract;
  - 21.6.3 undertake its obligations under this Contract in such a manner as to preserve so far as reasonably possible the integrity and prevent any loss, disclosure, theft, manipulation or interception of the Department Data; and/or
  - 21.6.4 upon request provide the Department with full access to the relevant area of any systems of the Contractor or its Sub-Contractors where the Department Data is stored or held for the purpose of viewing, retrieving, copying or otherwise dealing with the Department Data.

## **22 DATA PROTECTION AND PROTECTION OF PERSONAL DATA**

- 22.1 The Parties acknowledge that for the purposes of the Data Protection Laws, the Department on behalf of the Secretary of State for Education is the Data Controller and the Contractor is the Data Processor only for the processing set out in Schedule 6 (i.e. submission of Learner data to the Department). Any other processing of Personal Data undertaken by the Contractor (i.e. Learner enrolment or delivering education & training, e.g. e-portfolios) will be as a Data Controller and not on behalf of the Department. Clauses 22.2 to 22.14 below apply only in relation to the processing of Personal Data on behalf of the Department as set out in Schedule 6, and the only processing that the Data Processor is authorised to do on behalf of the Department is listed in Schedule 6 by the Department and may not be determined by the Data Processor.

- 22.2 The Data Processor must notify the Data Controller immediately if it considers that any of the Data Controller's instructions infringe the Data Protection Laws.
- 22.3 The Data Processor must provide all reasonable assistance to the Data Controller in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of the Data 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.
- 22.4 If requested by the Department's Contract Manager, the Data Processor must, in relation to any Personal Data processed in connection with its obligations under this Contract:
- 22.4.1 process that Personal Data only in accordance with Schedule 6, unless the Data Processor is required to do otherwise by Law. If it is so required the Data Processor will promptly notify the Data Controller before processing the Personal Data unless prohibited by Law;
- 22.4.2 ensure that it has in place Protective Measures, which are appropriate to protect against a Data Loss Event, which the Data Controller may reasonably reject (but failure to reject shall not amount to approval by the Data Controller of the adequacy of the Protective Measures), having taken account of the:
- (a) nature of the data to be protected;
  - (b) harm that might result from a Data Loss Event;
  - (c) state of technological development; and
  - (d) cost of implementing any measures;
- 22.4.3 ensure that:
- (a) the Data Processor Personnel do not process Personal Data except in accordance with this Contract (and in particular Schedule 6);
  - (b) it takes all reasonable steps to ensure the reliability and integrity of any Data Processor Personnel who have access to the Personal Data and ensure that they:
    - (i) are aware of and comply with the Data Processor's duties under this clause;

- (ii) are subject to appropriate confidentiality undertakings with the Data Processor or any Data Sub-Processor;
  - (iii) 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 Data Controller or as otherwise permitted by this Contract; and
  - (iv) have undergone adequate training in the use, care, protection and handling of Personal Data; and
- 22.4.4 not transfer Personal Data outside of the EU unless the prior written consent of the Data Controller has been obtained and the following conditions are fulfilled:
- (a) the Data Controller or the Data Processor has provided appropriate safeguards in relation to the transfer (whether in accordance with UK GDPR Article 46 or LED Article 37) as determined by the Data Controller;
  - (b) the Data Subject has enforceable rights and effective legal remedies;
  - (c) the Data Processor complies with its obligations under the Data Protection Laws 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 Data Controller in meeting its obligations); and
  - (d) the Data Processor complies with any reasonable instructions notified to it in advance by the Data Controller with respect to the processing of the Personal Data;
- 22.4.5 at the written direction of the Data Controller, delete or return Personal Data (and any copies of it) to the Data Controller on termination of the Contract unless the Data Processor is required by Law to retain the Personal Data.
- 22.5 Subject to Clause 22.6, the Data Processor must notify the Data Controller immediately if it:
- 22.5.1 receives a Data Subject Request (or purported Data Subject Request) in relation to processing their data under this Contract only (submission of learner data);
  - 22.5.2 receives a request to rectify, block or erase any Personal Data processed through the submission of learner data. Notification in such cases should be given via the Contract Manager;
  - 22.5.3 receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Laws;
  - 22.5.4 receives any communication from the Information Commissioner or any other Regulatory Body in connection with Personal Data processed under this Contract;

- 22.5.5 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
- 22.5.6 becomes aware of a Data Loss Event.
- 22.6 The Data Processor's obligation to notify under Clause 22.5 will include the provision of further information to the Data Controller in phases, as details become available.
- 22.7 Taking into account the nature of the processing, the Data Processor will provide the Data Controller with full assistance in relation to either Party's obligations under Data Protection Laws and any complaint, communication or request made under Clause 22.5 (and insofar as possible within the timescales reasonably required by the Data Controller) including by promptly providing:
  - 22.7.1 the Data Controller with full details and copies of the complaint, communication or request;
  - 22.7.2 such assistance as is reasonably requested by the Data Controller to enable the Data Controller to comply with a Data Subject Request within the relevant timescales set out in the Data Protection Laws;
  - 22.7.3 the Data Controller, at its request, with any Personal Data it holds in relation to a Data Subject;
  - 22.7.4 assistance as requested by the Data Controller following any Data Loss Event;
  - 22.7.5 assistance as requested by the Data Controller with respect to any request from the Information Commissioner's Office, or any consultation by the Data Controller with the Information Commissioner's Office.
- 22.8 The Data Processor must maintain complete and accurate records and information to demonstrate its compliance with this clause. This requirement does not apply where the Data Processor employs fewer than 250 staff, unless:
  - 22.8.1 the Data Controller determines that the processing is not occasional;
  - 22.8.2 the Data Controller determines the processing includes special categories of data as referred to in Article 9(1) of the UK GDPR or Personal Data relating to criminal convictions and offences referred to in Article 10 of the UK GDPR; or
  - 22.8.3 the Data Controller determines that the processing is likely to result in a risk to the rights and freedoms of Data Subjects.
- 22.9 The Data Processor will allow for audits of its Data Processing activity by the Data Controller or the Data Controller's designated auditor.
- 22.10 Each Party will designate its own data protection officer if required by the Data Protection Laws.

- 22.11 Before allowing any Data Sub-Processor to process any Personal Data related to this Contract (submission of learner data), the Data Processor must:
- 22.11.1 notify the Data Controller's Contract Manager in writing of the intended Data Sub-Processor and processing;
  - 22.11.2 obtain the written consent of the Data Controller's Contract Manager;
  - 22.11.3 enter into a written agreement with the Data Sub-Processor which give effect to the terms set out in this Clause 22 such that they apply to the Data Sub-Processor; and
  - 22.11.4 provide the Data Controller with such information regarding the Data Sub-Processor as the Data Controller may reasonably require.
- 22.12 The Data Processor will remain fully liable for all acts or omissions of any of its Data Sub-Processors.
- 22.13 The Data 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).
- 22.14 The Parties agree to take account of any guidance issued by the Information Commissioner's Office. The Data Controller may on not less than 30 Working Days' notice to the Data Processor amend this Contract to ensure that it complies with any guidance issued by the Information Commissioner's Office.
- 22.15 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 22 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.
- 22.16 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 Education.
- 22.17 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 22 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.

- 22.18 The Data Processor will comply with any further written instructions or additional conditions from the Department's Data Controller in relation to the data processing.
- 22.19 In the circumstances set out in Clause 41.1.7, the Department may elect to take the role of Data Controller.

## **23 SUBMISSION OF LEARNER DATA**

### **23.1 General**

- 23.1.1 The Contractor must supply the Department with data in accordance with the following:
- (a) in line with agreed audit arrangements;
  - (b) in adherence with the UK GDPR and Data Protection Act 2018;
  - (c) to support payments to be made;
  - (d) to enable reconciliation to take place;
  - (e) to support the contract management and allocation processes; and
  - (f) any written request from the Department.
- 23.1.2 The Contractor undertakes to the Department to submit accurate data.
- 23.1.3 Where the Department is concerned about the quality of the data, including the completeness or accuracy of the data, provided by the Contractor, the Department may require the Contractor to supply data more frequently for such a period as the Department will require and the Department may audit, or instruct a third part to audit, at the Contractor's cost, the Contractor's data and controls to gain assurance that the quality improvements have been made.
- 23.1.4 The Department reserves the right to require the Contractor, at its own cost, to carry out such work as the Department deems necessary to improve the quality of data.
- 23.1.5 The Department 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.
- 23.1.6 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 23 will constitute a Serious Breach of Contract in accordance with Clause 39 (Minor and Serious Breach) of this

Contract and may result in payments for this part of the Services to be delayed or withheld.

- 23.1.7 The Contractor must update the course information funded by the Department at “Publish to the course directory” (<https://coursedirectory.nationalcareersservice.org.uk/>).
- 23.1.8 The Contractor must register with UKRLP ([UK Register of Learning Providers \(ukrlp.co.uk\)](http://ukrlp.co.uk)) and Get Information About Schools ([Get information about schools - GOV.UK \(get-information-schools.service.gov.uk\)](http://get-information-schools.service.gov.uk)) and maintain contact details on an on-going basis.
- 23.1.9 The Contractor must publish online the set of information as set out at [What academies, free schools and colleges should publish online - GOV.UK \(www.gov.uk\)](http://www.gov.uk).
- 23.1.10 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 Department.
- 23.1.11 Failure to transmit complete and accurate data to the Department in accordance with this Clause 23 will constitute a Serious Breach of Contract in accordance with Clause 39 (Minor and Serious Breach) of this Contract.

## **23.2 FE Data Submission**

- 23.2.1 Where required, the Contractor must supply the Department data on each individual Learner, in accordance with the data collections framework set out in the ‘ILR specification validation rules and appendices’ as amended and updated, which is published on the Department’s website [ESFA - Online Documentation \(fasst.org.uk\)](http://fasst.org.uk) and in accordance with the ‘*Provider Support Manual*’ as amended and updated.
- 23.2.2 The Contractor must report new starts within 2 months of the Learner starting, or within 3 months of the Learner finishing for all withdrawals and achievements. The Contractor must report all changes by the final collection of the Funding Year.
- 23.2.3 ILR data, supplementary data and Earnings Adjustment Statements must be transmitted to the Department through the Department’s web portal [Submit learner data \(fasst.org.uk\)](http://fasst.org.uk). Access to the Department’s web portal is restricted and the Contractor agrees to comply with the conditions of use regarding the supply of data to the Department set out in this Clause 23.2.3 and in the ‘Individualised Learner Record Specification’ and relevant Provider Support Manual as amended and updated available on the Department’s web site.
- 23.2.4 The Department will confirm the data successfully submitted through Funding Reports [Individualised Learner Record \(ILR\) - GOV.UK \(www.gov.uk\)](http://www.gov.uk) posted on the Department’s web portal after the data has been submitted. The Contractor must correct or

remove data that fails the validation rules as set out in the ILR specification [ESFA - Online Documentation \(fasst.org.uk\)](https://www.fasst.org.uk).

- 23.2.5 Where required, the Contractor must submit supplementary data for delivery that cannot be recorded through the ILR, or to correct data you have recorded in the ILR, following the published guidance [ESFA: European Social Fund \(ESF\) round 2 supplementary data collection - GOV.UK \(www.gov.uk\)](https://www.gov.uk) ("Supplementary Data"). The Contractor must check the accuracy of the submissions on the Supplementary Data on the Submit Learner Data service and any errors must be corrected immediately. All submissions must be supported by evidence.
- 23.2.6 Where required, the Contractor must use the Earnings Adjustment Statement ("EAS") to claim funding that cannot be recorded through the ILR. The funding must be submitted as detailed in the guidance [ESFA - Online Documentation \(fasst.org.uk\)](https://www.fasst.org.uk). The Contractor must check the accuracy of the submissions on the EAS via the Submit Learner Data service and any errors must be corrected immediately. All submissions must be supported by evidence.

## **24 SECURITY**

- 24.1 The Contractor must comply, and will ensure compliance by the Contractor Personnel, with the provisions of Schedule 7 (Security & Department Policies).

## **25 FREEDOM OF INFORMATION AND CONFIDENTIALITY**

### **25.1 Freedom of Information**

- 25.1.1 The Contractor acknowledges that the Department is subject to legal duties under FOIA, which may require the Department to disclose on request information relating to this Contract or otherwise relating to the Contractor.
- 25.1.2 The Contractor acknowledges and agrees that the Department is required by Law to consider each and every request made under FOIA for information.
- 25.1.3 The Contractor acknowledges and agrees that all decisions made by the Department pursuant to a request under FOIA are solely a matter for and are at the discretion of the Department.
- 25.1.4 Notwithstanding anything in this Contract to the contrary (including without limitation any obligations of confidentiality), the Department will 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 Department will use reasonable endeavours (but will not be obliged) to consult the Contractor and will not:

- (a) confirm or deny that information is held by the Department;  
or
- (b) disclose information requested

to the extent that in the Department's opinion the information is eligible in the circumstances for an exemption and therefore the Department may lawfully refrain from doing either of the things described in parts (a) and (b) of this clause.

25.1.5 In relation to information relating to the Contractor or the Contract which the Contractor requests should be exempt under the FOIA. The Contractor will indemnify the Department for any and all costs (including legal fees) incurred by the Department 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 Department to withhold Exempt Information.

25.1.6 The Department will on no account 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.

25.1.7 The Contractor will assist the Department as reasonably necessary to enable the Department to comply with its obligations under FOIA.

## **25.2 Confidentiality**

25.2.1 The Contractor hereby warrants that:

- (a) any person employed or engaged by it (in connection with this Contract in the course of such employment or engagement) will treat all Confidential Information belonging to the Department as confidential, safeguard it accordingly and only use such Confidential Information for the purposes of this Contract; and
- (b) any person employed or engaged by it (in connection with this Contract in the course of such employment or engagement) will not disclose any Confidential Information to any third party without prior written consent of the Department, except where disclosure is otherwise expressly permitted by the provisions of this Contract.

25.2.2 The Contractor must take all necessary precautions to ensure that all Confidential Information obtained from the Department is treated as confidential and not disclosed (without prior approval from the Department's Contract Manager) or used other than for

the purposes of this Contract by any of its employees, servants, agents or Sub-Contractors.

25.2.3 The provisions of Clauses 25.2.1 and 25.2.2 will not apply to any information:

- (a) which is or becomes public knowledge (other than by breach of Clauses 25.2.1 and 25.2.2);
- (b) which was in the possession of the receiving party, without restriction as to its disclosure, before the date of receipt from the disclosing party;
- (c) 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 FOIA or the Environmental Information Regulations.

25.2.4 Nothing in this Clause 25.2.4 will be deemed or construed to prevent the Department from disclosing any Confidential Information obtained from the Contractor:

- (a) to any other Central Government Body, Non-Departmental or Quasi Government Body or agency, central or local;
- (b) to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
- (c) to any professional adviser, consultant, contractor or other person engaged by the Department directly in connection with this Contract, provided that such information is treated as confidential by the receiving consultant, contractor or any other person;
- (d) on a confidential basis to any proposed successor body in connection with any assignment disposal of its rights, obligations or liabilities under this Contract.

25.2.5 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.

25.2.6 The Contractor will immediately notify the Department of any breach of security in relation to Confidential Information and all data obtained in the course of the Services and will keep a record of such breaches. The Contractor will use its best endeavours to recover such Confidential Information or data however it may be recorded. The Contractor will co-operate with the Department in any investigation that the Department considers necessary to undertake as a result of any breach of security in relation to Confidential Information or data.

25.2.7 The Contractor must, at its own expense, alter any security systems at any time during the Contract Period at the

Department's request if the Department reasonably believes the Contractor has failed to comply with Clause 25.2.6.

25.2.8 The Department reserves the right to publish details of this Contract and the payments made under it to comply with the Government's transparency requirements.

25.2.9 The provisions of this Clause 25 will apply for the Contract Period and after its termination.

## **PART 5: WORKFORCE**

### **26 EMPLOYEES**

26.1 The Contractor must 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, or an interim prohibition order made under regulation 14 of the Teachers' Disciplinary (England) Regulations 2012, to carry out teaching work (as defined in regulation 3 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).

26.2 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 will 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.

26.3 The Contractor will 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 will 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 will 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.

26.4 The Contractor will make arrangements for ensuring that the Provision is delivered 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 will make those arrangements as if such Learners were Children and will 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 will 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.

26.5 The Contractor must ensure it takes the following action in respect of all Contractor Personnel and potential Contractor Personnel whom in connection with the Contractor's provision of the Services will or is likely to be in contact with Learners or who will have access to Learners information (other than the Department's employees):

26.5.1 they are questioned as to whether they have any Convictions or ASBOs;

26.5.2 the results are obtained of a background check with the DBS of the most extensive kind available;

26.5.3 to the extent permitted by Law, a copy of the results of such a background check as is referred to in Clause 26.5.2 are provided to the Department on request;

26.5.4 in respect of potential Contractor Personnel from overseas the Contractor must comply with the following guidance [Criminal records checks for overseas applicants - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/guidance/criminal-records-checks-for-overseas-applicants),

the Contractor must take the above action before the relevant Contractor Personnel or potential Contractor Personnel commences any activities in relation to the Services.

26.6 The Contractor must carry out appropriate disclosure and barring service checks on all applicants for employment where such applicants would be employed to work in regulated activity relating to vulnerable adults (as defined by the Safeguarding Vulnerable Groups Act 2006) if successful, and must seek additional information about an applicant's conduct. The Contractor must also ensure that:

26.6.1 no person who appears on a Barred List following the results of a DBS background check shall be employed or engaged in the performance of the Services; and

26.6.2 it and all its Sub-Contractors will comply with all reporting requirements to the DBS.

26.7 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 will ensure that it informs the

Department via the Contact Form: General Enquires at [Education and Skills Funding Agency - GOV.UK \(www.gov.uk\)](https://www.gov.uk) that a referral has been made/information has been provided.

- 26.8 In the event that any Contractor Personnel or any employee of any Sub-Contractor is added to a Barred List, the Contractor must ensure that such member of staff shall cease to be engaged in the Services.
- 26.9 The Contractor will require Contractor Personnel to declare annually whether there has been a change in their circumstances relating to the background checks referred to in this Clause 26. Where the self-declaration indicates a change in circumstances relating to those background checks, the Contractor will:
  - 26.9.1 assess the risk of continuing to engage such member of Contractor Personnel in the delivery of the Services;
  - 26.9.2 request new background checks of such member of Contractor Personnel as required by this Clause 26;
  - 26.9.3 put in place appropriate actions to ensure Learners are safeguarded, including, but not limited to, extra supervision of the member of Contractor Personnel, re-assignment to an area of the delivery of the Services that does not bring the member of Contractor Personnel into regular contact with Learners, or removal from the delivery of the Services of the member of Contractor Personnel, until such time as the Contractor has received the outcome of the background checks required under Clause 26.9.2 and has taken any action required as a result of the outcome of such background checks.
- 26.10 Pending the receipt by the Contractor of the results of the background checks referred to in this Clause 26, Contractor Personnel will not be used in the provision of the Services.
- 26.11 Failure by the Contractor to comply with Clauses 26.5 to 26.10 will constitute a Serious Breach.
- 26.12 The Contractor will provide details of its policies and procedures for recruitment, training, development, supervision and other employment-related policies when requested to do so.
- 26.13 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.
- 26.14 Unless Contractor Personnel transfer to the Department and/or a Successor Contractor under TUPE at expiry or termination of the Contract, the Contractor will retain employment records (or retain the right to access employment records) for seven (7) years following the

last day such Contractor Personnel were engaged in providing Services save for Contractor Personnel in contact with Children and/or with access to information about Children where such records will be retained for fifteen (15) years following such date.

26.15 When requested by the Department on reasonable grounds, the Contractor will cease to use any Contractor Personnel specified by the Department in the provision of the Services. For the purposes of this clause Contractor Personnel will include non-executive directors.

26.16 The Contractor must ensure that:

26.16.1 there will be at all times a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience. This obligation will include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absences and anticipated and actual peaks in demand for each of the Services; and

26.16.2 all Contractor Personnel receive such training and supervision as is necessary to ensure the proper performance of the Services under this Contract.

26.17 The Contractor must inform the Department 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 Sub-Contractors document. [ESFA policy on funding higher risk organisations and subcontractors - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/442222/ESFA_policy_on_funding_higher_risk_organisations_and_subcontractors_-_GOV.UK_(www.gov.uk).pdf). Failure to inform the Department will be a Serious Breach of the Contract.

26.18 Where the contract value is greater than £10,000,000, the Contractor will consider the use of Apprenticeships in the delivery of the Services.

26.19 The Contractor must ensure that there are set up and maintained by it and by all Sub-Contractors involved in the provision of the Services, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). The Contractor must ensure that the terms and implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form. The Contractor must provide copies of such policies to the Department, on the Department's request.

## **27 KEY STAFF**

27.1 The Contractor will use its reasonable endeavours to ensure continuity of staff, knowledge and skills and inform the Department immediately of any change to the top two tiers in its senior leadership team.

## **28 TUPE**

28.1 Where there are Transferring Former Supplier Employees (as defined in Schedule 5 (TUPE)) between the Previous Contractor and the Contractor, the provisions set out in Schedule 5 (TUPE) to this Contract will apply.

## **29 RE-PROVISION OF THE SERVICES**

29.1 The Department and the Contractor will act on the basis that TUPE applies on expiry or termination of the Contract where the Department is proposing re-provision for services which are substantially the same as the Services. For the avoidance of doubt this Clause 29 does not apply where the Contractor will be providing the Services in the following Funding Year.

29.2 During the period of three (3) months preceding the expiry of the Contract or within 21 days after the Department or the Contractor has given notice to terminate the Contract, the Contractor will disclose to the Department and will permit the Department to disclose to any new provider or potential new provider of the services which are substantially the same as the Services, the Staffing Information provided that prior to so doing any such provider will have executed in writing a confidentiality undertaking in favour of the Contractor.

29.3 During the period of three (3) months preceding the expiry of this Contract or within 21 days after the Department or the Contractor has given notice to terminate the Contract, the Contractor must, subject to the provisions of the UK GDPR and Data Protection Law, provide and thereafter keep updated at monthly intervals, to the Department and to the Successor Contractor information equivalent to the relevant personnel documentation and the Staffing Information 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 Department will have executed in writing a confidentiality undertaking in favour of the Contractor.

29.4 The Contractor must 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.

29.5 The Contractor must immediately prior to the future transfer date provide to the Department or the Successor Contractor a complete and accurate list of the Staffing Information and identification details of all employees whom it reasonably believes will be future transferring employees.

29.6 Within a period of 21 days following the expiry or termination of this Contract the Contractor must provide to the Department or the Successor Contractor in writing final pay details of the future transferring employees.

29.7 The Contractor warrants that it will supply complete and accurate information pursuant to Clauses 29.2, 29.3, 29.5 and 29.6 in all material respects and the Contractor will indemnify and keep the Department

indemnified fully now and in the future in respect of all or any costs whether arising in contract or under any relevant Law suffered or incurred by the Department or the Successor Contractor nominated by the Department 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 29.2, 29.3, 29.5, and 29.6, and/or the provision of assistance and/or failure to provide assistance under Clause 29.4 of this Contract.

29.8 After receiving notice of the termination of this Contract and for six (6) months preceding expiry of this Contract the Contractor will promptly notify the Department or the Successor Contractor:

29.8.1 of the period of notice given by the employment of any employee whom the Contractor reasonably believes will be a future transferring employee; and

29.8.2 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 Staffing Information and their relevant personnel documentation.

29.9 The Contractor warrants that it will supply the required information completely and accurately in all respects at the time of supply and will indemnify and keep the Department and/or any Successor Contractor indemnified in respect of all and any costs suffered or incurred by the Department or the Successor Contractor by reason of any proceedings, claim or demand arising out of or in connection with:

29.9.1 any claim against the Department 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

29.9.2 any claim against the Department or the Successor Contractor by any future transferring employee whose name is not included on the list provided by the Contractor pursuant to Clause 29.5 so far as it relates to the dismissal of such future transferring employee within two Months of the Department or Successor Contractor becoming aware of the transfer of such future transferring employee.

29.10 For the purposes of Clause 29.9, in the event that the Department 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 will be deemed to be costs suffered or incurred by the Department or Successor Contractor and included within the indemnity provided by the Contractor.

29.11 The Department or Successor Contractor will be entitled to recover from the Contractor in full any legal, accountancy and other costs actually and reasonably incurred by the Department or Successor Contractor in connection with the costs and liabilities indemnified by the Contractor.

29.12 This Clause 29 will continue in effect for six (6) months following the expiry or termination of this Contract.

## **PART 6: PAYMENT AND AUDIT**

### **30 PAYMENT, FUNDING AND AUDIT**

#### **30.1 Payment, Funding and Audit provisions**

- 30.1.1 In consideration of the Services to be provided by the Contractor, the Department agrees to pay the Contractor the amounts set out in Schedule 2 of this Contract on condition that the Contractor delivers the Services in accordance with the terms and conditions of this Contract.
- 30.1.2 The Contractor must use the Funding solely for the purpose of delivering the Services as set out in this Contract.
- 30.1.3 The Contractor will comply with the Funding Rules published by the Department as amended from time to time.
- 30.1.4 The Department reserves the right to impose additional Contract 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 Department are being used effectively and efficiently or to require the Contractor to address concerns about its financial viability.
- 30.1.5 The payment of Funding by the Department will be without prejudice to any claims or rights, which the Department may have against the Contractor and will not constitute any admission by the Department as to the performance by the Contractor of its obligations under this Contract. Prior to any such payment of Funding, the Department 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 agreement between the Contractor and the Department.
- 30.1.6 The Department shall be entitled to terminate, pursuant to Clause 40.4.10 this Contract on written notice if the Contractor does not recruit and/or data returns reveal that no Learners have been enrolled for the funding year to which this Contract relates. Where the Department terminates the Contract under this Clause 30.1.6, the Department will withdraw the allocation of Funding for the Funding Year and will take action to recover Funds where payments have already occurred.
- 30.1.7 Where the Department identifies errors which it deems to be material in the data that the Contractor is required to provide under the Contract to support the payment of Funding, the Department reserves the right at its absolute discretion to require the Contractor at the Contractor's cost to carry out a 100% audit of all or part of the Services by a deadline specified by the Department

and / or to require the Contractor to repay Funding equivalent to the full amount of the Funding that has been wrongly claimed or paid. If only a sample of the Services has been audited, the Department reserves the right to calculate an error rate based on the said sample and claim repayment from the Contractor of an extrapolated amount based on the error rate identified and the total value of the Funding paid to the Contractor under this Contract.

30.1.8 Without prejudice to any other provisions in this Contract, at the Department's discretion, such amounts as are identified as being recoverable under Clause 30.1.7, 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 by 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 39 (Minor and Serious Breach) of this Contract. The decision of the Department as to the amount of recovery under this Clause 30.1 (Payment, Funding and Audit provisions) is final.

30.1.9 Where the Department, in accordance with Clause 30.1.7, 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 Department 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.

30.1.10 All payments by the Department will be made via BACS.

#### **Tax Compliance**

30.1.11 The Department may ask the Contractor to provide information which demonstrates how the Contractor complies with the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax in respect of that consideration.

30.1.12 The Department may terminate this Contract if:

- (a) in the case of a request mentioned in Clause 30.1.11 the Contractor:
  - (i) fails to provide information in response to the request within a reasonable time; or
  - (ii) provides information which does not demonstrate either how the Contractor complies with Clauses 30.1.11 and 30.1.14 or why those clauses do not apply to it;
  - (iii) it receives information which demonstrates that is not complying with its obligations under the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax.

30.1.13 The Department may supply any information which it receives under Clause 30.1.11 to HMRC.

30.1.14 If, during the Contract Period, an Occasion of Tax Non-Compliance occurs, the Contractor will:

- (a) notify the Department in writing of such fact within 5 Working Days of its occurrence; and
- (b) promptly give the Department:
  - (i) details of the steps it is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors it considers relevant; and
  - (ii) such other information in relation to the Occasion of Tax Non-Compliance as the Department may reasonably require.

## **31 REVIEW OF CONTRACTUAL PERFORMANCE AND RECONCILIATION OF CONTRACTS**

### **31.1 In-Year Reconciliation**

31.1.1 Reviews of contractual performance and reconciliation will be carried out in accordance with part 1B of Schedule 1 (Specification and Monitoring).

31.1.2 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.

### **31.2 Performance**

31.2.1 Performance will be monitored in accordance with the provisions of part 1B of Schedule 1 (Specification and Monitoring).

31.2.2 The Department will be able to share allocations and performance information with Combined Authorities, Crown Bodies and LEPs.

## **32 CONTRACTOR'S RECORDS AND AUDIT**

### **32.1 Maintenance of Records**

**32.1.1** The Contractor must, and will procure that any Contractor Related Parties, maintain a full record of all incidents relating to data protection, health, safety and security, including CCTV, which occur during the Contract Period. The Contractor will make the aforementioned records available for inspection by the Department upon reasonable notice, and will present a report of them to the Department as and when requested.

### **32.2 Auditor**

32.2.1 The Department (in accordance with [Post-16 audit code of practice - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/531212/Post-16_audit_code_of_practice_-_GOV.UK_(www.gov.uk).pdf)), the European Commission,

the European Court of Auditors and/or a Crown Body may at any time conduct audits for the following purposes:-

- (a) to establish that the Contractor has used the Funding (and proposed or actual variations to the Funding in accordance with this Contract) in the delivery of the Services and/or the costs of all suppliers (including Sub-Contractors) of the Services;
- (b) to verify the Contractor's claims for Funding;
- (c) to review the integrity, confidentiality and security of the Department Data as well as the Department's access to the Department Data;
- (d) to review the Contractor's and/or a Contractor Related Party's compliance with the DPA 2018, the FOIA in accordance with Clauses 21 (Department Data) and 25 (Freedom of Information and Confidentiality) and any other Law applicable to the Services;
- (e) to carry out the audit and certification of the Department's accounts;
- (f) to verify the accuracy and completeness of any management information delivered or required by this Contract;
- (g) to ensure that the Contractor and/or a Contractor Related Party is complying with the Department Policies and any British or equivalent European standards and any other audit that may be required by any Relevant Authority

such audits may be based on current or preceding years or preceding contracts.

32.2.2 The Department will use its reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt the Contractor or delay the provision of the Services.

32.2.3 Subject to the Department's obligations of confidentiality, the Contractor and/or a Contractor Related Party must on demand provide the Department (and/or its agents or representatives) with all reasonable co-operation and assistance in relation to each audit, including:-

- (a) all information requested by the Department within the permitted scope of the audit;
- (b) reasonable access to any premises and any equipment used (whether exclusively or non-exclusively) in the performance of the Services;
- (c) access to the Contractor's and/or a Contractor Related Party's systems;
- (d) access to Contractor Personnel; and

- (e) provision of any accounting records as referred to in Section 386 of the Companies Act 2006 and/or financial records as the Department may require which if the Contractor is not a company may include similar accounting records as are referred to in Section 386 of the Companies Act 2006.
- 32.2.4 The Contractor will implement all measurement and monitoring tools and procedures necessary to measure and report on the Contractor's (including for the avoidance of doubt a Contractor Related Party's) performance of the Services.
- 32.2.5 The Department will endeavour to (but is not obliged to) provide at least ten (10) Working Days' notice of its intention to conduct an audit. The Department may carry out audit visits with or without prior notice at its discretion.
- 32.2.6 The Parties agree that they will bear their own respective costs and expenses incurred in respect of compliance with their obligations under this clause, 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 Department for all the Department's reasonable costs incurred in the course of the audit.
- 32.2.7 If the findings of an audit conducted pursuant to this Clause 32 results in the requirement for ILR data to be corrected and re-submitted the Contractor must re-submit the data to the Department, as set out in Clause 23 (Submission of Learner Data), within two months. Failure to do so will be a Minor Breach of this contract.
- 32.2.8 If the Department identifies that:-
  - (a) the Contractor has failed to perform its obligations under this Contract in any material manner, without prejudice to any other remedy that the Department has, the Parties will agree and implement a remedial plan. If the Contractor's failure relates to a failure to provide any information to the Department about the Funding, proposed Funding or the Contractor's costs, then the remedial plan will include a requirement for the provision of all such information;
  - (b) there has been any under or over payment it will be dealt with in accordance with Clause 30.1 (Funding and Payment).
- 32.2.9 The Contractor must permit records referred to in this Clause 32 (Contractor's Records and Audit) to be examined and copied from time to time by the Department's auditor and inspectors and their representatives and other representatives of the Department.

### **32.3 Retention**

- 32.3.1 The records referred to in this Clause 32 (Contractor's Records and Audit) will be retained for a period of at least six (6) years,

subject to any requirements for a longer retention period set out in the Funding Rules, after the end of the Contract Period.

### **32.4 Information on Termination or Expiry**

32.4.1 Upon termination or expiry of this Contract the Contractor must (and will ensure that the Sub-Contractors will) comply with all reasonable requests of the Department to provide information relating to the Contractor's costs of providing the Services.

### **32.5 Confidentiality of Information**

32.5.1 All information referred to in this Clause 32 (Contractor's Records and Audit) is subject to the obligations set out in Clause 25.2 (Confidentiality) and Clause 25.1 (Freedom of Information).

32.5.2 For the purposes of the examination and certification of the Department's accounts and/or any examination of the economy, efficiency and effectiveness with which the Department has used its resources, the National Audit Office, internal or external auditor may examine such documents premises, systems and staff as he may reasonably require which are owned, held or otherwise within the control or employ of the Contractor or Sub-Contractors (who must ensure that any person acting on its behalf who has such documents and/or other information will also provide access) and may require the Contractor to produce such oral or written explanation as he considers necessary.

32.5.3 Where the Department appoints an independent third party to undertake, exercise or carry out any of the rights or powers contained in this Clause 32 (Contractor's Records and Audit) the Department must ensure that such independent third party enters into a Confidentiality Agreement with the Contractor simultaneously with its appointment.

## **33 SUBSIDY CONTROL**

33.1 The Contractor should satisfy itself, if the Subsidy Control Rules apply to the Funding received in relation to the Services delivered under this Contract. Guidance on this can be found at [Complying with the UK's international obligations on subsidy control: guidance for public authorities - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/guidance/complying-with-the-uk-international-obligations-on-subsidy-control-guidance-for-public-authorities).

33.2 Where the rules on Subsidy Control apply, the Contractor will collect and retain appropriate records and will supply those records to the Department on its request.

33.3 The Department 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 Department will confirm to the Contractor in writing the exact percentage of the contribution.

33.4 Where Department requires the Contractor to obtain a contribution towards the cost of the Services under Clause 33.3 above, the Contractor must provide evidence that the contribution has been received.

33.5 In the event that any funding paid under this Contract is deemed to constitute unlawful subsidy control the Department reserves the right to require immediate repayment of any such funding.

## **PART 7: CORPORATE GENERAL**

### **34 SUB-CONTRACTING**

34.1 The Contractor may enter into Sub-Contracts provided it does so in compliance with Schedule 1 (Specification and Monitoring) and Schedule 9 (Sub-Contracting).

34.2 Notwithstanding any arrangements the Contractor has entered into with any Sub-Contractor, the Contractor shall not be relieved or excused of responsibility or liability under this Contract nor shall performance of its obligations be affected by the appointment of any Sub-Contractor.

34.3 If the Contractor does not Sub-Contract, the Contractor must still provide a nil return via the Subcontractor Declaration to confirm this.

34.4 Failure to comply with any of the requirements under Clauses 34.1 to 34.3 may result in the Department taking such actions as it deems appropriate, which may include, but is not limited to, action under Clause 39 (Minor and Serious Breach).

### **35 INDEMNITIES AND LIABILITY**

#### **35.1 Contractor Indemnity**

35.1.1 The Contractor will be responsible for, and will release and indemnify the Department, its employees and agents on demand from and against all liability from:

- (a) death or personal injury caused by its negligence or that of its employees, agents or Sub-Contractors (as applicable);
- (b) breach of statutory duty;
- (c) third party actions, claims or demands brought against the Department as a direct consequence of the Contractor's breach of this Contract;
- (d) fraud or fraudulent misrepresentation by it, its employees, agents or Sub-Contractors (as applicable);
- (e) loss of or damage to property;  
to the extent which the same may arise out of, or in consequence of:
- (f) the performance or non-performance by the Contractor of its obligations under this Contract; and
- (g) In all other respects, any negligent act, default or breach of statutory duty in connection with the performance or non-

performance by the Contractor of its obligations under this Contract.

### **35.2 Contractor Not Responsible**

35.2.1 The Contractor will not be responsible for or obliged to indemnify the Department for any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Department or by the breach by the Department of its obligations under this Contract.

### **35.3 Limitation of Indemnity**

35.3.1 Subject to Clause 35.9, an indemnity by either Party under any provision of this Contract will be without limitation to any indemnity by that Party under any other provision of this Contract.

### **35.4 Responsibility for Related Parties**

35.4.1 The Contractor will be responsible as against the Department for the acts or omissions of the Contractor Related Parties as if they were the acts or omissions of the Contractor and the Department will be responsible as against the Contractor for the acts or omissions of Department Related Parties as if they were the acts or omissions of the Department.

### **35.5 Notification of Claims**

35.5.1 Where either Party (the “Indemnified Party”) wishes to make a claim under this Clause 35 (Indemnities and Liability) against the other (the “Indemnifying Party”) in relation to a claim made against it by a third party (a “Third Party Claim”), the Indemnified Party will give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

### **35.6 Conduct of Claims**

35.6.1 The Indemnifying Party may at its own expense and with the assistance and co-operation of the Indemnified Party have the conduct of the Third Party Claim including its settlement and the Indemnified Party will not, unless the Indemnifying Party has failed to resolve the Third Party Claim within a reasonable period (and the Indemnified Party has notified the Indemnifying Party in writing that it is of the opinion that such reasonable period has expired), take any action to settle or pursue the Third Party Claim.

### **35.7 Costs of Claims**

35.7.1 The Indemnifying Party may, if it wishes to have conduct of any claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the claim by the Indemnifying Party.

35.7.2 The Contractor’s liability to the Department pursuant to this Clause 35 (Indemnities and Liability) will be, for the avoidance of doubt, without prejudice to any other right or remedy available to the Department under this Contract.

### **35.8 No Limit on Liability**

35.8.1 Neither Party excludes or limits its liability to the other Party for:

- (a) death or personal injury caused by its negligence, or that of its employees, agents or Sub-Contractors (as applicable); or
- (b) any breach of any obligations implied by Section 12 of the Sale of Goods Act 1979 or Section 2 of the Supply of Goods and Services Act 1982; or
- (c) fraud by it, fraud by its employees, fraud by its agents or Sub-Contractors (as applicable); or
- (d) the matters covered by the indemnities in Clause 19 (Intellectual Property Rights); or
- (e) sums due under Clause 28 (TUPE) and/or Clause 29 (Re-Provision of the Services); or
- (f) any breach of the DPA 2018.

### **35.9 Contractor Limit on Liability**

35.9.1 Subject to Clause 35.2 (Contractor Not Responsible) and 35.8 (No Limit on Liability) the liability of the Contractor for the Contract Period will be Ten Million Pounds (£10,000,000) in aggregate in respect of all claims, losses or damages, whether arising under any indemnity from tort (including negligence), breach of contract or otherwise under or in connection with this Contract.

### **35.10 Contractor Aggregate Liability**

35.10.1 If the aggregate liability of the Contractor under Clause 35.9 (Contractor Limit on Liability) is equalled or exceeded at any time during the Contract Period, it will entitle the Department at its discretion to terminate this Contract pursuant to Clause 40.5 (Termination).

### **35.11 Department Limit on Liability**

35.11.1 With regard to the Department the total aggregate liability for the Contract Period will be one million pounds (£1,000,000) and for the avoidance of doubt, this will be in addition to:

- (a) its obligation to pay the Funding as and when it falls due in accordance with this Contract; and
- (b) any pension liability which becomes payable in accordance with the Annex to Part B of Schedule 5 (TUPE) and is claimed.

### **35.12 Indirect Loss**

35.12.1 Neither Party will be liable to the other Party for any Indirect Loss or indirect damage.

### **35.13 Additional Clauses**

35.13.1 The Parties expressly agree that if any limitation or provision contained or expressly referred to in this Clause 35 (Indemnities and Liability) is held to be invalid under any Law, it will be deemed omitted to that extent, and if any party becomes liable for loss or damage to which that limitation or provision applied, that liability will be subject to the remaining limitations and provisions set out in this Clause 35 (Indemnities and Liability).

35.13.2 Nothing in this Clause 35 (Indemnities and Liability) will act to reduce or affect a Party's general duty to mitigate its loss and for the avoidance of doubt including any circumstances under which a party has the benefit of an indemnity under this Contract.

### **35.14 No Double Recovery**

35.14.1 Neither the Department nor the Contractor will be entitled to recover compensation or make a claim under this Contract in respect of any loss that it or they has or have incurred to the extent that the Party has already been compensated in respect of that loss pursuant to this Contract or otherwise.

## **36 INSURANCE**

### **36.1 Requirement to Maintain**

36.1.1 Without prejudice to its liability to indemnify the Department under Clause 35 (Indemnities and Liability) the Contractor must take out and maintain in force or procure the taking out and maintenance of the Required Insurances and any other insurances as may be required by Law. The insurances will be effective in each case no later than the date on which the relevant risk commences.

36.1.2 The Required Insurances referred to in Clause 36.1.1 will amount to:

- (a) ten million pounds (£10 million) in respect of public liability cover in respect of each and every occurrence;
- (b) ten million pounds (£10 million) in respect of employer's liability cover in respect of each and every occurrence; and
- (c) five million pounds (£5 million) in respect of professional indemnity cover in respect of each and every claim.

36.1.3 The Department reserves the right, at any time, to request evidence that the Required Insurances are in force.

## **37 CHANGE IN CONTROL**

37.1 The Contractor represents and warrants to the Department that at the Agreement 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.

- 37.2 The Contractor will inform the Department 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 Department of the change in name within 10 Working Days of it becoming lawful to do so.
- 37.3 The Contractor will inform the Department as soon as reasonably practicable and, in any event 12 weeks before any Change in Control of the Contractor takes effect unless to do would put the Contractor in breach of the Law. If that is the case the Contractor will inform the Department of the Change in Control within 10 Working Days of it becoming lawful to do so.
- 37.4 For the avoidance of doubt if there is a Change in Control 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 Department will, upon receipt of a notification under Clause 37.3 consider if the requested change is permissible under Regulation 72 of the Public Contracts Regulations 2015. The Department may terminate this Contract under Clause 40.4.9 where the Change in Control is not permissible.
- 37.5 The Department 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 Department's request.
- 37.6 The Department will consider any Change in Control in the context of all available information including that provided by the Contractor. The Department will consider the criteria set out in the Funding higher-risk organisations and Sub-Contractors document which is published on the Department's website [ESFA policy on funding higher risk organisations and subcontractors - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/424242/ESFA_policy_on_funding_higher_risk_organisations_and_subcontractors_-_GOV.UK.pdf).
- 37.7 If the Change in Control or change in name breaches this Contract or any policies referred to in this Contract, the Department reserves the right to take action against the Contractor in accordance with Part 8 of this Contract (Termination and Exit Management).
- 37.8 If there is a Restricted Share Transfer of the Contractor:
- 37.8.1 the Contractor will give the Department notice of such Restricted Share Transfer at the earliest possible time that it is lawful for the Contractor to do so;
  - 37.8.2 the Department reserves the right to take whatever actions it deems necessary; and
  - 37.8.3 the Department may terminate this Contract under Clause 40.4.9 (Termination) within three (3) months of the Restricted Share Transfer taking place.

## **38 PROHIBITED ACTS**

- 38.1 The Contractor will not offer or give, or agree to give, to any member, employee or representative of the Secretary of State for Education 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 Contract or any other contract with the Department or for showing or refraining from showing favour or disfavour to any person in relation to this Contract or any such contract.
- 38.2 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 Contract or any contract with the Department or Her Majesty's Government will entitle the Department 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.
- 38.3 The Contractor must not use any Funding provided by the Department under this Contract for any of the purposes set out in paragraphs 15 and 16 of the Cabinet Office: Guidance for General Grants [Grants-Standard-SIX-Grant-Agreements.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/444444/Grants-Standard-SIX-Grant-Agreements.pdf).
- 38.4 The Contractor will not hold itself out as acting on behalf of the Department without the Department's permission.

## **PART 8: TERMINATION AND EXIT MANAGEMENT**

### **39 MINOR AND SERIOUS BREACH**

39.1 For the avoidance of doubt:

- (a) This Clause 39 is subject at all times to the provision of Clause 40 (Termination) below;
- (b) neither Party will 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;
- (c) 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**

39.2 Without prejudice to any other remedy, in the event of a Minor Breach, the Parties will adopt the following procedure:

- 39.2.1 The Party not in breach will 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. In addition, where the Contractor is in breach, the Department may

require the Contractor to suspend the recruitment of Learners, and/or may cap any growth while the breach is being remedied.

- 39.2.2 If the Party in breach fails to remedy the Minor Breach within the time specified in a notice served under Clause 39.2.1 or such other period as may be agreed between the Parties it will constitute a Serious Breach by the Party in breach.

### **Serious Breach**

39.3 Without prejudice to any other remedy, in the event of a Serious Breach, which is capable of remedy, the Parties will adopt the following procedure:

39.3.1 The Party not in breach will 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. In addition, where the Contractor is in breach, the Department may require the Contractor to suspend the recruitment of Learners, and/or may cap any growth while the breach is being remedied.

39.3.2 Where the Department has served a notice under Clause 39.3.1 the Department has the right to require the Contractor to suspend the recruitment of Learners and/or to suspend payments to the Contractor until the Department has confirmed that the breach has been remedied.

39.3.3 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 39.3.1 or such other period as may be agreed between the Parties the Department may cease funding the Contractor in respect of that part of the Service to which the Serious Breach relates.

39.3.4 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 39.3.1 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.

## **40 TERMINATION**

40.1 On the occurrence of any of the events described in this Clause 40 the Department will be entitled to terminate this Contract by notice to the Contractor with immediate effect.

40.2 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 Department will be entitled to terminate this Contract by notice to the Contractor or its representatives with immediate effect.

- 40.3 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 Serious Breach of the Contract, which is incapable of remedy. For the avoidance of doubt this will include but not be limited to:
- 40.3.1 an Insolvency Event affecting the Contractor occurs; or
  - 40.3.2 if Regulation 73(1) (b) of The Public Contracts Regulations 2015 applies to the Contractor; or
  - 40.3.3 the Contractor commits one or more Prohibited Acts; or
  - 40.3.4 any other Contractor breach has occurred that is incapable of remedy.
- 40.4 The Department reserves the right to terminate this Contract with immediate effect by giving notice in writing if the Contractor:
- 40.4.1 ceases to be on the Register of Apprenticeship Training Providers maintained by the Department; and/or
  - 40.4.2 The outcome of any financial health and/or control assessment undertaken in relation to the Contractor is inadequate; and/or
  - 40.4.3 The Contractor fails to comply with requirements imposed under Clauses 11.10(a) and/or 11.10(b); and/or
  - 40.4.4 The Contractor fails to comply with requirements imposed under Clauses 13.3, 13.4 or 13.5; and/or
  - 40.4.5 An inspection results in the Services in part or overall thereof being assessed as inadequate; and/or
  - 40.4.6 In accordance with Clause 13.9.5 an Inspectorate monitoring visit results in the Services being assessed as having made “insufficient progress” and in the reasonable view of the Department Learners may be at immediate risk on safeguarding grounds, and/or the quality of leadership and/or training provision is such that one or more Learner has no reasonable prospect of achieving his or her training objective; and/or
  - 40.4.7 in accordance with Clause 13.9.6 the Contractor has had two consecutive Ofsted Monitoring Visits resulting in one or more “insufficient progress” judgements; and/or
  - 40.4.8 Receives a “qualified” rating in two consecutive full funding audits; and/or
  - 40.4.9 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
  - 40.4.10 In accordance with Clause 30.1.6 does not recruit and/or data returns reveal that no Learners have been enrolled for the funding year to which this Contract relates; and/or

- 40.4.11 the Contractor fails to provide information as set out in Clause 30.1.12 and/or the Department receives information which demonstrates that the Contractor is not complying with its obligations under the Income Tax (Earnings and Pensions) Act 2003 and all other statutes and regulations relating to income tax; and/or
- 40.4.12 The Contractor commits a Serious Breach of Clause 34; and/or
- 40.4.13 The Contractor commits a Serious Breach of Clause 38.3.
- 40.5 The Department will be entitled to terminate this Contract forthwith on the grounds set out in Clause 35.10. In the event of any termination in accordance with Clause 35.10, the Exit Arrangements set out in Clause 42 (Exit Arrangements) and Schedule 8 (Exit Arrangements) will apply.
- 40.6 This Contract will be voidable where, following an evaluation of the last three (3) years' Data Submissions relating to any other contract with the Department, the Department concludes that the Contractor was in Serious Breach of that contract or contracts and if the Department 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.
- 40.7 If the circumstances set out in Clause 40.6 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 57.1.2.
- 40.8 If the Department terminates another contract with the Contractor this Contract will be terminated forthwith unless the Department confirms in writing that the Contract is to remain in force.
- 40.9 In addition to the rights of termination under any other clauses of this Contract, either Party will 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.
- 40.10 Termination under this Clause 40 will not prejudice or affect any right of action or remedy, which shall have accrued or shall thereupon accrue to the Parties under this Contract.
- 40.11 Where the Contractor goes into administration or liquidation, the Department must be assumed to be a creditor of the Contractor. The Contractor must take steps to ensure that the Department is provided with details of the administrator or liquidator and receives notification of any creditors meetings. The Department will confirm whether in fact it is a creditor within 12 weeks of being notified that the Contractor is in administration or liquidation.
- 40.12 The Contractor must upon notice of termination of the Contract make available upon request to the Department all Learner files (including but not limited to e-portfolios), correspondence, documents, specification

papers and other property belonging to the Department, which may be in its possession or under its control.

40.13 Notice of termination of the Contract under this Clause 40 will result in the Contractor being removed from the Register of Apprenticeship Training Providers.

40.14 The Contractor must not recruit new Learners, including Learners that have transferred from another provider, after notice of termination of the Contract has been given. The Department will not be liable to make payments in respect of any Learners recruited in breach of this clause.

## **41 CONSEQUENCES OF TERMINATION AND EXPIRY**

### **41.1 Accrued Rights**

41.1.1 The termination of this Contract howsoever arising is without prejudice to the rights, duties and liabilities of either Party accrued prior to termination. The clauses of this Contract which expressly or impliedly have effect after termination or expiry will continue to be enforceable notwithstanding termination in accordance with Clause 57 (Continuing Obligations).

41.1.2 On or before the Expiry Date (except where the Contractor will be responsible for delivering the Services in the subsequent Funding Year) or Termination Date, the Contractor must ensure that all documents or computer records in its possession, custody or control including but not limited to e-portfolios, which contain information relating to the Services including any documents in the possession, custody or control of a Sub-Contractor are made available upon request to the Department.

41.1.3 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 Department Data, with another organisation unless the Department 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 Department.

41.1.4 The Contractor hereby grants the Department a non-exclusive licence to access the Contractor's Premises from the date of a notice of termination for such periods as may be reasonably necessary to enable the Department to retrieve the information referred to in Clause 41.1.2. The Department will exercise the rights provided under this clause where the Contractor has failed to comply with Clause 41.1.2 and the obligations set out in Schedule 8 (Exit Arrangements).

41.1.5 The termination or expiry of this Contract shall be without prejudice to rights of either Party accrued prior to the Termination

Date or Expiry Date and shall not affect the continuing rights of the Parties under any provision of the Contract that either expressly or by implication has effect after the Termination Date or the Expiry Date.

- 41.1.6 The Department reserves the right to retain Funding that would otherwise be paid to the Contractor prior to the Expiry Date or Termination Date and/or to demand repayment of Funding, as relevant, in order to reconcile what has already been paid to the Contractor under Schedule 2 (Payments) with the amount the Contractor is entitled to under this Contract (including the Funding Rules).
- 41.1.7 Where this Contract is terminated or expires, the Department may elect to take the role of Data Controller to secure and protect Learner Files, Learner Records and/or Evidence Packs, including e-portfolios until the Learner information can be transferred to a new Contractor, the Learner, or destroyed in accordance with defined retention periods. If the Department elects to assume this role, the Contractor shall co-operate fully to facilitate this.

## **42 EXIT ARRANGEMENTS**

- 42.1 The Department and the Contractor must, unless the Contractor will be responsible for delivering the Services in the following Funding Year, comply with the exit arrangements set out in Schedule 8 (Exit Arrangements) and any current Exit Plan.
- 42.2 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 Department relating to this. For the avoidance of doubt the Department 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 Date or Expiry Date of this Contract and the Contractor's Exit Plan should reflect this. The Department will not be liable for any costs prior to or after the Termination Date or Expiry Date incurred by the Contractor in complying with this Clause 42.2.
- 42.3 Unless the Department otherwise requires, during the time between service of a notice of termination of this Contract in whole or in part and such termination taking effect, the Contractor must take all steps, which are necessary and consistent with its continuing obligations, to mitigate any losses, costs, liabilities and expenses which the Contractor may incur as a result of the termination, including to:
  - 42.3.1 cancel all capital and recurring cost commitments in connection with the provision of the Services on the most cost-effective terms without fettering the Department's access to Department Data and the Database;
  - 42.3.2 terminate all relevant contracts or the relevant parts of relevant contracts with its Sub-Contractors in connection with the provision

of Services on the most favourable terms as can be achieved in the particular circumstances, having first ascertained from the Department whether such contracts are required to be transferred to the Department or any Successor Contractor instead; and

- 42.3.3 reduce labour costs by the redeployment or release of Contractor's Personnel to the extent possible in the circumstances.
- 42.4 If the Contractor does not fulfil its obligations in accordance with Clause 42.3, the Department will not pay any sums in excess of those which the Department would have paid had such action been taken.
- 42.5 If the Contractor does not co-operate with the Department in relation to exit in accordance with this Clause 42 and the Department incurs additional expenditure of any description as a result, the Department reserves the right to require the Contractor to reimburse the Department for this additional expenditure.

## **PART 9: GENERAL PROVISIONS**

### **43 PROVISION OF INFORMATION**

- 43.1 The Department may share information provided by the Contractor under this Contract and information about the Contractor or Contract, with other Government departments, Crown Bodies, Inspectorates, Combined Authorities and local authorities.
- 43.2 In addition to the other requirements to provide information set out in this Contract, the Department 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 Department will require urgent information from the Contractor.
- 43.3 The Contractor must provide the Department or agents acting on its behalf with the information it requires under Clause 43.2 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.
- 43.4 Failure to comply with any request for information under this clause, at all or in the required timescales, will constitute a Minor / Serious Breach of this Contract.

### **44 SERVICE OF NOTICES**

- 44.1 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.

44.2 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 it will be sufficient to show that it was despatched.

## **45 ENTIRE CONTRACT**

### **45.1 Prior Representations Superseded**

**45.1.1** Except where expressly provided in this Contract, this Contract constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Contract.

### **45.2 Acknowledgements**

**45.2.1** Each of the Parties acknowledges that:

- (a) it does not enter into this Contract on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Contract or not) except those expressly repeated or referred to in this Contract and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it will be any remedy available under this Contract; and
- (b) this clause will not apply to any statement, representation or warranty made fraudulently, or to any provisions of this Contract which was induced by fraud, for which the remedies available will be all those available under the Law governing this Contract.

## **46 NO AGENCY**

### **46.1 No Partnership or Employment**

**46.1.1** Nothing in this Contract will be construed as creating a partnership or as a contract of employment between the Department and the Contractor.

### **46.2 Power to Bind**

**46.2.1** Save as expressly provided otherwise in this Contract, the Contractor must not be, or be deemed to be, an agent of the

Department and the Contractor will not hold itself out as having authority or power to bind the Department in any way.

#### **47 EXERCISE OF STATUTORY AUTHORITY**

47.1 Nothing in this Contract will be construed as a fetter or restriction on the exercise by the Department of its statutory functions.

#### **48 PUBLIC RELATIONS AND PUBLICITY**

48.1 The Contractor must by itself, its employees or agents and procure that its Sub-Contractors must:

48.1.1 inform the Department of any communications with representatives of the press, television, radio or other communications media on any matter concerning this Contract; and

48.1.2 not use or make use of the Department's name, logo or other branding without the prior written approval of the Department, which should not be unreasonably delayed or withheld.

#### **49 AMENDMENTS TO THIS CONTRACT**

49.1 This Contract will not be amended unless such amendment has been agreed in writing. For the avoidance of doubt this will include any amendments required to effect a Change agreed in accordance with Clause 6 (Change in Service) and the Change Control Procedure (Schedule 3).

#### **50 WAIVER**

50.1 No term or provision of this Contract will be considered as waived by any Party to this Contract unless a waiver is given in writing by that Party.

50.2 No waiver under Clause 50.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Contract unless (and then only to the extent) expressly stated in that waiver.

#### **51 SEVERABILITY**

51.1 If any term, condition or provision contained in this Contract is held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Contract.

## **52 LAW AND JURISDICTION**

52.1 This Contract is governed by the Laws of England and Wales and, subject to Disputes which are properly referred to and resolved in accordance with the Dispute Resolution Procedure, the Parties submit to the exclusive jurisdiction of the courts of England and Wales.

## **53 INTEREST ON LATE PAYMENTS**

53.1 The Parties will pay interest on any amount payable under this Contract not paid by the required date, from that date to the date of payment at the rate of 4% above the base lending rate published by the Bank of England. The Parties agree that this clause constitutes a substantial remedy for the purposes of the Late Payments of Commercial Debts (Interest) Act 1998. For the avoidance of doubt, the Contractor will have no right to claim interest on corrections issued by the Department.

## **54 MITIGATION**

54.1 The Department and the Contractor will at all times take all reasonable steps to minimise and mitigate any loss for which the relevant Party is entitled to bring a claim against the other Party pursuant to this Contract and to take all reasonable steps to minimise and mitigate any effects or circumstances and/or events adversely affecting the performance of its obligations under this Contract which would otherwise entitle that Party to relief and/or to claim compensation hereunder.

## **55 FURTHER ASSURANCE**

55.1 Each Party must do all things and execute all further documents necessary to give full effect to this Contract.

## **56 THIRD PARTY RIGHTS**

56.1 No term of this Contract is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Contract.

## **57 CONTINUING OBLIGATIONS**

57.1 Save as otherwise expressly provided in this Contract:-

57.1.1 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

57.1.2 the termination or expiry of this Contract will not affect the continuing rights or obligations of the Department 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 of termination for a period of six (6) years, or such time period as set out in the Specifications (Schedule 1) for European Social Fund direct and match funding, after such expiry or termination:

Clause	Description
15	Fraud and Irregularity
16.4	Complaints and Feedback
18	Dispute Resolution
19	Intellectual Property Rights
20	Assignment of IPR in Databases
21	Department Data
22	Data Protection and Protection of Personal Data
25	Freedom of Information and Confidentiality
26	Employees
29	Re-Provision of the Services
30	Payment, Funding and Audit
32	Contractor's Records and Audit
35	Indemnities and Liability
36	Insurance
41	Consequences of Termination and Expiry
42	Exit Arrangements
48	Public Relations and Publicity
Schedule 5	TUPE
Schedule 6	UK GDPR and Data Protection
Schedule 7	Security & Department Policies
Schedule 8	Exit Arrangements

### **SCHEDULE 3: CHANGE CONTROL PROCEDURE**

1. The Parties acknowledge that Changes to the Contract may be necessary to reflect operational and administrative procedures during the Contract Period and that such Changes will be advised to the Contractor.
2. The Contractor will use reasonable endeavours to incorporate Changes implemented by the Department within the current Funding.
3. The Department may implement a Change on giving the Contractor reasonable notice provided that such Change does not amount to a Material Change that extends the scope of the Service(s).
4. If a Change amounts to a Material Change, the Department will give the Contractor written notice of the proposed Material Change and will give the Contractor 10 Working Days to respond to the Department with any comments including on the scope of the proposed Material Change and any impact on the Funding.
5. The Department will consider any comments made by the Contractor under paragraph 4 and will notify the Contractor of whether or not it intends to implement the Material Change and if it does, of the terms of the Material Change. The Department's decision in relation to a Change is final.
6. The Department may implement a Change by communicating the Change through the Department's publications, Update or Inform, or through updates to Funding Rules and other related documents on GOV.UK. The Contractor will subscribe to alerts from GOV.UK so they are made aware of Changes.
7. For the avoidance of doubt the Department may implement a reduction in Funding as set out in the Funding Rules through a notification and not a Change or deed of variation, such a notification will be deemed to be an amendment under Clause 49 (Amendments to this Contract).

**SCHEDULE 4: CONTRACTOR'S RESPONSE/PROPOSALS**

## SCHEDULE 5: TUPE

### TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006 AND PENSIONS ASPECTS

#### Staff Transfer

#### 1 DEFINITIONS

In addition to the Definitions contained in Clause 1 (Definitions) of this Contract, in this Schedule 5 (TUPE), the following definitions will apply:

<b>“Contractor’s Final Contractor Personnel List”</b>	a list provided by the Contractor of all Contractor Personnel who will transfer under the Employment Regulations on the Service Transfer Date;
<b>“Contractor’s Provisional Contractor Personnel List”</b>	a list prepared and updated by the Contractor of all Contractor Personnel who are at the date of the list wholly or mainly engaged in or assigned to the provision of the Services or any relevant part of the Services which it is envisaged as at the date of such list will no longer be provided by the Contractor;
<b>“Employment Regulations”</b>	means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended or replaced or any other Regulation implementing the Acquired Rights Directive 77/187/EC
<b>“Former Contractor”</b>	a Contractor supplying services to the Department before the Relevant Transfer Date that are the same as or substantially similar to the Services (or any part of the Services) and will include any Sub-Contractor of such Contractor (or any Sub-Contractor of any such Sub-Contractor);
<b>“Notified Sub-Contractor”</b>	a Sub-Contractor identified in the Annex to this Schedule to whom Transferring Former Contractor Employees will transfer on a Relevant Transfer Date;
<b>“Replacement Sub-Contractor”</b>	a Sub-Contractor of the Successor Contractor to whom Transferring Contractor Employees will

	transfer on a Service Transfer Date (or any Sub-Contractor of any such Sub-Contractor);
<b>“Relevant Transfer”</b>	a transfer of employment to which the Employment Regulations applies;
<b>“Relevant Transfer Date”</b>	in relation to a Relevant Transfer, the date upon which the Relevant Transfer takes place;
<b>“Service Transfer”</b>	any transfer of the Services (or any part of the Services), for whatever reason, from the Contractor or any Sub-Contractor to a Successor Contractor or a Replacement Sub-Contractor;
<b>“Service Transfer Date”</b>	the date of a Service Transfer or, if more than one, the date of the relevant Service Transfer as the context requires;
<b>“Staffing Information”</b>	<p>in relation to all persons identified on the Contractor’s Provisional Contractor Personnel List or Contractor’s Final Contractor Personnel List, as the case may be, such information as the Department may reasonably request (subject to all applicable provisions of the DPA 2018), but including in an anonymised format:</p> <ul style="list-style-type: none"> <li>(a) their ages, dates of commencement of employment or engagement, gender and place of work;</li> <li>(b) details of whether they are employed, self employed contractors or consultants, agency workers or otherwise;</li> <li>(c) the identity of the employer or relevant contracting Party;</li> <li>(d) their relevant contractual notice periods and any other terms relating to termination of employment, including redundancy procedures, and redundancy payments;</li> <li>(e) their wages, salaries, bonuses and profit sharing arrangements as applicable;</li> <li>(f) details of other employment-related benefits, including (without limitation) medical insurance, life assurance, pension or other retirement</li> </ul>

benefit schemes, share option schemes and company car schedules applicable to them;

- (g) any outstanding or potential contractual, statutory or other liabilities in respect of such individuals (including in respect of personal injury claims);
- (h) details of any such individuals on long term sickness absence, parental leave, maternity leave or other authorised long term absence;
- (i) copies of all relevant documents and materials relating to such information, including copies of relevant contracts of employment (or relevant standard contracts if applied generally in respect of such employees); and
- (j) any other “employee liability information” as such term is defined in regulation 11 of the Employment Regulations;

**“Transferring Former Contractor Employees”**

in relation to a Former Contractor, those employees of the Former Contractor to whom the Employment Regulations will apply on the Relevant Transfer Date; and

**“Transferring Contractor Employees”**

those employees of the Contractor and/or the Contractor’s Sub-Contractors to whom the Employment Regulations will apply on the Service Transfer Date.

## **2 INTERPRETATION**

Where a provision in this Schedule imposes an obligation on the Contractor to provide an indemnity, undertaking or warranty, the Contractor will procure that each of its Sub-Contractors will comply with such obligation and provide such indemnity, undertaking or warranty to the Department, Former Contractor, Successor Contractor or Replacement Sub-Contractor, as the case may be.

**PART A: NOT USED**

**ANNEX TO PART A: NOT USED**

## **PART B: Transferring Former Contractor Employees at commencement of Services**

### **1 RELEVANT TRANSFERS**

- 1.1 The Department and the Contractor agree that:
- (a) the commencement of the provision of the Services or of any relevant part of the Services will be a Relevant Transfer in relation to the Transferring Former Contractor Employees; and
  - (b) as a result of the operation of the Employment Regulations, the contracts of employment between each Former Contractor and the Transferring Former Contractor Employees (except in relation to any terms dis-applied through the operation of regulation 10(2) of the Employment Regulations) will have effect on and from the Relevant Transfer Date as if originally made between the Contractor and/or Notified Sub-Contractor and each such Transferring Former Contractor Employee.
- 1.2 The Department will procure that each Former Contractor will comply with all its obligations under the Employment Regulations and will perform and discharge all its obligations in respect of all the Transferring Former Contractor Employees in respect of the period up to (but not including) the Relevant Transfer Date (including the payment of all remuneration, benefits, entitlements and outgoings, all wages, accrued but untaken holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions and pension contributions which in any case are attributable in whole or in part in respect of the period up to (but not including) the Relevant Transfer Date) and the Contractor will make, and the Department will procure that each Former Contractor makes, any necessary apportionments in respect of any periodic payments.

### **2 FORMER CONTRACTOR INDEMNITIES**

- 2.1 Subject to Paragraph 2.2, the Department will procure that each Former Contractor will indemnify the Contractor and any Notified Sub-Contractor against any Employee Liabilities arising from or as a result of:
- (a) any act or omission by the Former Contractor in respect of any Transferring Former Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Former Contractor Employee arising before the Relevant Transfer Date;
  - (b) the breach or non-observance by the Former Contractor arising before the Relevant Transfer Date of:

- (i) any collective agreement applicable to the Transferring Former Contractor Employees; and/or
  - (ii) any custom or practice in respect of any Transferring Former Contractor Employees which the Former Contractor is contractually bound to honour;
- (c) any proceeding, claim or demand by HMRC or other statutory Department in respect of any financial obligation including, but not limited to, PAYE and primary and secondary national insurance contributions:
  - (i) in relation to any Transferring Former Contractor Employee, to the extent that the proceeding, claim or demand by HMRC or other statutory Department relates to financial obligations arising before the Relevant Transfer Date; and
  - (ii) in relation to any employee who is not a Transferring Former Contractor Employee and in respect of whom it is later alleged or determined that the Employment Regulations applied so as to transfer his/her employment from the Former Contractor to the Contractor and/or any Notified Sub-Contractor as appropriate, to the extent that the proceeding, claim or demand by HMRC or other statutory Department relates to financial obligations in respect of the period to (but excluding) the Relevant Transfer Date;
- (d) a failure of the Former Contractor to discharge or procure the discharge of all wages, salaries and all other benefits and all PAYE tax deductions and national insurance contributions relating to the Transferring Former Contractor Employees in respect of the period to (but excluding) the Relevant Transfer Date;
- (e) any claim made by or in respect of any person employed or formerly employed by the Former Contractor other than a Transferring Former Contractor Employee for whom it is alleged the Contractor and/or any Notified Sub-Contractor as appropriate may be liable by virtue of this Contract and/or the Employment Regulations and/or the Acquired Rights Directive; and
- (f) any claim made by or in respect of a Transferring Former Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Former Contractor Employee relating to any act or omission of the Former Contractor in relation to its obligations under regulation 13 of the Employment Regulations, except to the extent that the liability arises from the failure by the Contractor or any Sub-Contractor to comply with regulation 13(4) of the Employment Regulations.

- 2.2 The indemnities in Paragraph 2.1 will not apply to the extent that the Employee Liabilities arise or are attributable to an act or omission of the Contractor or any Sub-Contractor whether occurring or having its origin before, on or after the Relevant Transfer Date including, without limitation, any Employee Liabilities:
- (a) arising out of the resignation of any Transferring Former Contractor Employee before the Relevant Transfer Date on account of substantial detrimental changes to his/her working conditions proposed by the Contractor or any Sub-Contractor to occur in the period from (and including) the Relevant Transfer Date; or
  - (b) arising from the failure by the Contractor and/or any Sub-Contractor to comply with its obligations under the Employment Regulations.
- 2.3 If any person who is not identified by the Department as a Transferring Former Contractor Employee claims, or it is determined in relation to any person who is not identified by the Department as a Transferring Former Contractor Employee, that his/her contract of employment has been transferred from a Former Contractor to the Contractor and/or any Notified Sub-Contractor pursuant to the Employment Regulations or the Acquired Rights Directive then:
- (a) the Contractor will, or will procure that the Notified Sub-Contractor will, within five (5) Working Days of becoming aware of that fact, give notice in writing to the Department and, where required by the Department, to the Former Contractor; and
  - (b) the Former Contractor may offer (or may procure that a third party may offer) employment to such person within fifteen (15) Working Days of the notification by the Contractor and/or the Notified Sub-Contractor or take such other reasonable steps as the Former Contractor considers appropriate to deal with the matter provided always that such steps are in compliance with applicable Law.
- 2.4 If an offer referred to in Paragraph 2.3(b) is accepted, or if the situation has otherwise been resolved by the Former Contractor and/or the Department, the Contractor will, or will procure that the Notified Sub-Contractor will, immediately release the person from his/her employment or alleged employment.
- 2.5 If by the end of the fifteen (15) Working Day period specified in Paragraph 2.3(b):
- (a) no such offer of employment has been made;
  - (b) such offer has been made but not accepted; or
  - (c) the situation has not otherwise been resolved,

the Contractor and/or any Notified Sub-Contractor may within fifteen (15) Working Days give notice to terminate the employment or alleged employment of such person.

- 2.6 Subject to the Contractor and/or any Notified Sub-Contractor acting in accordance with the provisions of Paragraphs 2.3 to 2.5 and in accordance with all applicable proper employment procedures set out in Law, the Department will procure that the Former Contractor indemnifies the Contractor and/or any Notified Sub-Contractor (as appropriate) against all Employee Liabilities arising out of the termination of employment pursuant to the provisions of Paragraph 2.5 provided that the Contractor takes, or will procure that the Notified Sub-Contractor takes, all reasonable steps to minimise any such Employee Liabilities.
- 2.7 The indemnity in Paragraph 2.6:
- (a) will not apply to:
    - (i) any claim for:
      - (A) discrimination, including on the grounds of sex, race, disability, age, gender reassignment, marriage or civil partnership, pregnancy and maternity or sexual orientation, religion or belief; or
      - (B) equal pay or compensation for less favourable treatment of part-time workers or fixed-term employees,in any case in relation to any alleged act or omission of the Contractor and/or any Sub-Contractor; or
    - (ii) any claim that the termination of employment was unfair because the Contractor and/or Notified Sub-Contractor neglected to follow a fair dismissal procedure; and
  - (b) will apply only where the notification referred to in Paragraph 2.3(a) is made by the Contractor and/or any Notified Sub-Contractor (as appropriate) to the Department and, if applicable, the Former Contractor, within six (6) months of the Effective Date.
- 2.8 If any such person as is described in Paragraph 2.3 is neither re-employed by the Former Contractor nor dismissed by the Contractor and/or any Notified Sub-Contractor within the time scales set out in Paragraph 2.5, such person will be treated as having transferred to the Contractor or Notified Sub-Contractor and the Contractor will, or will procure that the Notified Sub-Contractor will, comply with such obligations as may be imposed upon it under the Law.

### **3 CONTRACTOR INDEMNITIES AND OBLIGATIONS**

- 3.1 Subject to Paragraph 3.2, the Contractor will indemnify the Department and/or the Former Contractor against any Employee Liabilities arising from or as a result of:
- (a) any act or omission by the Contractor or any Sub-Contractor in respect of any Transferring Former Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Former Contractor Employee whether occurring before, on or after the Relevant Transfer Date;
  - (b) the breach or non-observance by the Contractor or any Sub-Contractor on or after the Relevant Transfer Date of:
    - (i) any collective agreement applicable to the Transferring Former Contractor Employee; and/or
    - (ii) any custom or practice in respect of any Transferring Former Contractor Employees which the Contractor or any Sub-Contractor is contractually bound to honour;
  - (c) any claim by any trade union or other body or person representing any Transferring Former Contractor Employees arising from or connected with any failure by the Contractor or a Sub-Contractor to comply with any legal obligation to such trade union, body or person arising on or after the Relevant Transfer Date;
  - (d) any proposal by the Contractor or a Sub-Contractor prior to the Relevant Transfer Date to make changes to the terms and conditions of employment or working conditions of any Transferring Former Contractor Employees to their material detriment on or after their transfer to the Contractor or a Sub-Contractor (as the case may be) on the Relevant Transfer Date, or to change the terms and conditions of employment or working conditions of any person who would have been a Transferring Former Contractor Employee but for their resignation (or decision to treat their employment as terminated under regulation 4(9) of the Employment Regulations) before the Relevant Transfer Date as a result of or for a reason connected to such proposed changes;
  - (e) any statement communicated to or action undertaken by the Contractor or a Sub-Contractor to, or in respect of, any Transferring Former Contractor Employee before the Relevant Transfer Date regarding the Relevant Transfer which has not been agreed in advance with the Department and/or the Former Contractor in writing;

- (f) any proceeding, claim or demand by HMRC or other statutory Department in respect of any financial obligation including, but not limited to, PAYE and primary and secondary national insurance contributions:
  - (i) in relation to any Transferring Former Contractor Employee, to the extent that the proceeding, claim or demand by HMRC or other statutory Department relates to financial obligations arising on or after the Relevant Transfer Date; and
  - (ii) in relation to any employee who is not a Transferring Former Contractor Employee, and in respect of whom it is later alleged or determined that the Employment Regulations applied so as to transfer his/her employment from the Former Contractor to the Contractor or a Sub-Contractor, to the extent that the proceeding, claim or demand by the HMRC or other statutory Department relates to financial obligations arising on or after the Relevant Transfer Date;
- (g) a failure of the Contractor or any Sub-Contractor to discharge or procure the discharge of all wages, salaries and all other benefits and all PAYE tax deductions and national insurance contributions relating to the Transferring Former Contractor Employees in respect of the period from (and including) the Relevant Transfer Date;
- (h) any claim made by or in respect of a Transferring Former Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Former Contractor Employee relating to any act or omission of the Contractor or any Sub-Contractor in relation to obligations under regulation 13 of the Employment Regulations, except to the extent that the liability arises from the Former Contractor's failure to comply with its obligations under regulation 13 of the Employment Regulations; and
- (i) a failure by the Contractor or any Sub-Contractor to comply with its obligations under Paragraph 2.8 above

3.2 The indemnities in Paragraph 3.1 will not apply to the extent that the Employee Liabilities arise or are attributable to an act or omission of the Former Contractor whether occurring or having its origin before, on or after the Relevant Transfer Date including, without limitation, any Employee Liabilities arising from the Former Contractor's failure to comply with its obligations under the Employment Regulations.

3.3 The Contractor will comply, and will procure that each Sub-Contractor will comply, with all its obligations under the Employment Regulations (including without limitation its obligation to inform and consult in accordance with regulation 13 of the Employment Regulations) and will perform and discharge, and will procure that each Sub-Contractor will perform and discharge, all its obligations in respect of all the Transferring Former Contractor Employees, on and from the Relevant Transfer Date (including the payment of all remuneration, benefits, entitlements and outgoings, all wages, accrued but untaken holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions and pension contributions which in any case are attributable in whole or in part to the period from (and including) the Relevant Transfer Date) and any necessary apportionments in respect of any periodic payments will be made between the Contractor and the Former Contractor.

#### **4 INFORMATION**

The Contractor will, and will procure that each Sub-Contractor will, promptly provide to the Department and/or at the Department's direction, the Former Contractor, in writing such information as is necessary to enable the Department and/or the Former Contractor to carry out their respective duties under regulation 13 of the Employment Regulations. The Department will procure that the Former Contractor will promptly provide to the Contractor and each Notified Sub-Contractor in writing such information as is necessary to enable the Contractor and each Notified Sub-Contractor to carry out their respective duties under regulation 13 of the Employment Regulations.

#### **5 PROCUREMENT OBLIGATIONS**

Notwithstanding any other provisions of this Part B, where in this Part B the Department accepts an obligation to procure that a Former Contractor does or does not do something, such obligation will be limited so that it extends only to the extent that the Department's contract with the Former Contractor contains a contractual right in that regard which the Department may enforce, or otherwise so that it requires only that the Department must use reasonable endeavours to procure that the Former Contractor does or does not act accordingly.

#### **6 PENSIONS**

The Contractor will, and will procure that each Sub-Contractor will, comply with the pensions provisions in the following Annex.

## **ANNEX TO PART B**

### **PENSIONS**

#### **7 INDEMNITY**

The Contractor undertakes to the Department to indemnify and keep indemnified the Department on demand from and against all and any losses whatsoever arising out of or in connection with any liability towards the Transferring Former Contractor Employees arising in respect of service on or after the Relevant Transfer Date which relate to the payment of benefits under and/or participation in an occupational pension scheme (within the meaning provided for in section 1 of the Pension Schemes Act 1993).

#### **8 EMPLOYER OBLIGATION**

The Contractor will comply with the requirements of the Pensions Act 2008, section 258 of the Pensions Act 2004, and Regulation 10 of the Employment Regulations for all transferring staff.

## **PART C: No transfer of employees at commencement of Services**

### **1 PROCEDURE IN THE EVENT OF TRANSFER**

- 1.1 The Department and the Contractor agree that the commencement of the provision of the Services or of any part of the Services will not be a Relevant Transfer in relation to any employees of the Department and/or any Former Contractor.
- 1.2 If any employee of the Department and/or a Former Contractor claims, or it is determined in relation to any employee of the Department and/or a Former Contractor, that his/her contract of employment has been transferred from the Department and/or the Former Contractor to the Contractor and/or any Sub-Contractor pursuant to the Employment Regulations or the Acquired Rights Directive then:
  - (a) the Contractor will, and will procure that the relevant Sub-Contractor will, within five (5) Working Days of becoming aware of that fact, give notice in writing to the Department and, where required by the Department, give notice to the Former Contractor; and
  - (b) the Department and/or the Former Contractor may offer (or may procure that a third party may offer) employment to such person within fifteen (15) Working Days of the notification by the Contractor or the Sub-Contractor (as appropriate) or take such other reasonable steps as the Department or Former Contractor (as the case may be) considers appropriate to deal with the matter provided always that such steps are in compliance with applicable Law.
- 1.3 If an offer referred to in Paragraph 1.2(b) is accepted (or if the situation has otherwise been resolved by the Department and/or the Former Contractor), the Contractor will, or will procure that the Sub-Contractor will, immediately release the person from his/her employment or alleged employment.
- 1.4 If by the end of the fifteen (15) Working Day period specified in Paragraph 1.2(b):
  - (a) no such offer of employment has been made;
  - (b) such offer has been made but not accepted; or
  - (c) the situation has not otherwise been resolved,the Contractor and/or the Sub-Contractor may within five (5) Working Days give notice to terminate the employment or alleged employment of such person.

## **2 INDEMNITIES**

- 2.1 Subject to the Contractor and/or the relevant Sub-Contractor acting in accordance with the provisions of Paragraphs 1.2 to 1.4 and in accordance with all applicable employment procedures set out in applicable Law and subject also to Paragraph 2.4, the Department will:
- (a) indemnify the Contractor and/or the relevant Sub-Contractor against all Employee Liabilities arising out of the termination of the employment of any employees of the Department referred to in Paragraph 1.2 made pursuant to the provisions of Paragraph 1.4 provided that the Contractor takes, or will procure that the Notified Sub-Contractor takes, all reasonable steps to minimise any such Employee Liabilities; and
  - (b) procure that the Former Contractor indemnifies the Contractor and/or any Notified Sub-Contractor against all Employee Liabilities arising out of termination of the employment of the employees of the Former Contractor referred to in Paragraph 1.2 made pursuant to the provisions of Paragraph 1.4 provided that the Contractor takes, or will procure that the relevant Sub-Contractor takes, all reasonable steps to minimise any such Employee Liabilities.
- 2.2 If any such person as is described in Paragraph 1.2 is neither re employed by the Department and/or the Former Contractor as appropriate nor dismissed by the Contractor and/or any Sub-Contractor within the fifteen (15) Working Day period referred to in Paragraph 1.4 such person will be treated as having transferred to the Contractor and/or the Sub-Contractor (as appropriate) and the Contractor will, or will procure that the Sub-Contractor will, comply with such obligations as may be imposed upon it under Law.
- 2.3 Where any person remains employed by the Contractor and/or any Sub-Contractor pursuant to Paragraph 2.2, all Employee Liabilities in relation to such employee will remain with the Contractor and/or the Sub-Contractor and the Contractor will indemnify the Department and any Former Contractor, and will procure that the Sub-Contractor will indemnify the Department and any Former Contractor, against any Employee Liabilities that either of them may incur in respect of any such employees of the Contractor and/or employees of the Sub-Contractor.
- 2.4 The indemnities in Paragraph 2.1:
- (a) will not apply to:
    - (i) any claim for:
      - (A) discrimination, including on the grounds of sex, race, disability, age, gender reassignment, marriage or civil

partnership, pregnancy and maternity or sexual orientation, religion or belief; or

(B) equal pay or compensation for less favourable treatment of part-time workers or fixed-term employees,

in any case in relation to any alleged act or omission of the Contractor and/or any Sub-Contractor; or

(ii) any claim that the termination of employment was unfair because the Contractor and/or any Sub-Contractor neglected to follow a fair dismissal procedure; and

(b) will apply only where the notification referred to in Paragraph 1.2(a) is made by the Contractor and/or any Sub-Contractor to the Department and, if applicable, Former Contractor within 6 months of the Effective Date.

### **3 PROCUREMENT OBLIGATIONS**

Where in this Part C the Department accepts an obligation to procure that a Former Contractor does or does not do something, such obligation will be limited so that it extends only to the extent that the Department's contract with the Former Contractor contains a contractual right in that regard which the Department may enforce, or otherwise so that it requires only that the Department must use reasonable endeavours to procure that the Former Contractor does or does not act accordingly.

## **PART D: Employment Exit Provisions**

### **1 PRE-SERVICE TRANSFER OBLIGATIONS**

- 1.1 The Contractor agrees that within twenty (20) Working Days of the earliest of:
- (a) receipt of a notification from the Department of a Service Transfer or intended Service Transfer;
  - (b) receipt of the giving of notice of early termination or any Partial Termination of this Contract;
  - (c) the date which is twelve (12) months before the end of the Contract Period; and
  - (d) receipt of a written request of the Department at any time (provided that the Department will only be entitled to make one such request in any six (6) month period),

it will provide in a suitably anonymised format so as to comply with the DPA 2018, the Contractor's Provisional Contractor Personnel List, together with the Staffing Information in relation to the Contractor's Provisional Contractor Personnel List and it will provide an updated Contractor's Provisional Contractor Personnel List at such intervals as are reasonably requested by the Department.

- 1.2 At least twenty (20) Working Days prior to the Service Transfer Date, the Contractor will provide to the Department or at the direction of the Department to any Successor Contractor and/or any Replacement Sub-Contractor:
- (a) the Contractor's Final Contractor Personnel List, which will identify which of the Contractor Personnel are Transferring Contractor Employees; and
  - (b) the Staffing Information in relation to the Contractor's Final Contractor Personnel List (insofar as such information has not previously been provided).
- 1.3 The Department will be permitted to use and disclose information provided by the Contractor under Paragraphs 1.1 and 1.2 for the purpose of informing any prospective Successor Contractor and/or Replacement Sub-Contractor.
- 1.4 The Contractor warrants, for the benefit of the Department, any Successor Contractor, and any Replacement Sub-Contractor that all information provided pursuant to Paragraphs 1.1 and 1.2 will be true and accurate in all material respects at the time of providing the information.

1.5 From the date of the earliest event referred to in Paragraphs 1.1(a), 1.1(b) and 1.1(c), the Contractor agrees, that it will not, and agrees to procure that each Sub-Contractor will not, assign any person to the provision of the Services who is not listed on the Contractor's Provisional Contractor Personnel List and will not without the approval of the Department (not to be unreasonably withheld or delayed):

- (a) replace or re-deploy any Contractor Personnel listed on the Contractor Provisional Contractor Personnel List other than where any replacement is of equivalent grade, skills, experience and expertise and is employed on the same terms and conditions of employment as the person he/she replaces;
- (b) make, promise, propose, permit or implement any Material Changes to the terms and conditions of employment of the Contractor Personnel (including any payments connected with the termination of employment);
- (c) increase the proportion of working time spent on the Services (or the relevant part of the Services) by any of the Contractor Personnel save for fulfilling assignments and projects previously scheduled and agreed;
- (d) introduce any new contractual or customary practice concerning the making of any lump sum payment on the termination of employment of any employees listed on the Contractor's Provisional Contractor Personnel List;
- (e) increase or reduce the total number of employees so engaged, or deploy any other person to perform the Services (or the relevant part of the Services); or
- (f) terminate or give notice to terminate the employment or contracts of any persons on the Contractor's Provisional Contractor Personnel List save by due disciplinary process,

and will promptly notify, and procure that each Sub-Contractor will promptly notify, the Department or, at the direction of the Department, any Successor Contractor and any Replacement Sub-Contractor of any notice to terminate employment given by the Contractor or relevant Sub-Contractor or received from any persons listed on the Contractor's Provisional Contractor Personnel List regardless of when such notice takes effect.

1.6 During the Contract Period, the Contractor will provide, and will procure that each Sub-Contractor will provide, to the Department any information the Department may reasonably require relating to the manner in which the Services are organised, which will include:

- (a) the numbers of employees engaged in providing the Services;

- (b) the percentage of time spent by each employee engaged in providing the Services;
- (c) the extent to which each employee qualifies for membership of any occupational pension scheme (within the meaning provided for in section 1 of the Pension Schemes Act 1993); and
- (d) a description of the nature of the work undertaken by each employee by location.

1.7 The Contractor will provide, and will procure that each Sub-Contractor will provide, all reasonable cooperation and assistance to the Department, any Successor Contractor and/or any Replacement Sub-Contractor to ensure the smooth transfer of the Transferring Contractor Employees on the Service Transfer Date including providing sufficient information in advance of the Service Transfer Date to ensure that all necessary payroll arrangements can be made to enable the Transferring Contractor Employees to be paid as appropriate. Without prejudice to the generality of the foregoing, within five (5) Working Days following the Service Transfer Date, the Contractor will provide, and will procure that each Sub-Contractor will provide, to the Department or, at the direction of the Department, to any Successor Contractor and/or any Replacement Sub-Contractor (as appropriate), in respect of each person on the Contractor's Final Contractor Personnel List who is a Transferring Contractor Employee:

- (a) the most recent month's copy pay slip data;
- (b) details of cumulative pay for tax and pension purposes;
- (c) details of cumulative tax paid;
- (d) tax code;
- (e) details of any voluntary deductions from pay; and
- (f) bank/building society account details for payroll purposes.

## **2 EMPLOYMENT REGULATIONS EXIT PROVISIONS**

- 2.1 The Department and the Contractor acknowledge that subsequent to the commencement of the provision of the Services, the identity of the provider of the Services (or any part of the Services) may change (whether as a result of termination or partial termination of this Contract or otherwise) resulting in the Services being undertaken by a Successor Contractor and/or a Replacement Sub-Contractor. Such change in the identity of the supplier of such services may constitute a Relevant Transfer to which the Employment Regulations and/or the Acquired Rights Directive will apply. The Department and the Contractor further agree that, as a result of the operation of the Employment Regulations, where a Relevant Transfer occurs, the contracts of employment between the Contractor and the Transferring Contractor Employees (except in relation to any contract terms dis-applied through operation of regulation 10(2) of the Employment Regulations) will have effect on and from the Service Transfer Date as if originally made between the Successor Contractor and/or a Replacement Sub-Contractor (as the case may be) and each such Transferring Contractor Employee.
- 2.2 The Contractor will, and will procure that each Sub-Contractor will, comply with all its obligations in respect of the Transferring Contractor Employees arising under the Employment Regulations in respect of the period up to (and including) the Service Transfer Date and will perform and discharge, and procure that each Sub-Contractor will perform and discharge, all its obligations in respect of all the Transferring Contractor Employees arising in respect of the period up to (and including) the Service Transfer Date (including the payment of all remuneration, benefits, entitlements and outgoings, all wages, accrued but untaken holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions and pension contributions which in any case are attributable in whole or in part to the period ending on (and including) the Service Transfer Date) and any necessary apportionments in respect of any periodic payments will be made between: (i) the Contractor and/or the Sub-Contractor (as appropriate); and (ii) the Successor Contractor and/or Replacement Sub-Contractor.
- 2.3 Subject to Paragraph 2.4, the Contractor will indemnify the Department and/or the Successor Contractor and/or any Replacement Sub-Contractor against any Employee Liabilities arising from or as a result of:
- (a) any act or omission of the Contractor or any Sub-Contractor in respect of any Transferring Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Contractor Employee whether occurring before, on or after the Service Transfer Date;
  - (b) the breach or non-observance by the Contractor or any Sub-Contractor occurring on or before the Service Transfer Date of:

- (i) any collective agreement applicable to the Transferring Contractor Employees; and/or
  - (ii) any other custom or practice with a trade union or staff association in respect of any Transferring Contractor Employees which the Contractor or any Sub-Contractor is contractually bound to honour;
- (c) any claim by any trade union or other body or person representing any Transferring Contractor Employees arising from or connected with any failure by the Contractor or a Sub-Contractor to comply with any legal obligation to such trade union, body or person arising on or before the Service Transfer Date;
- (d) any proceeding, claim or demand by HMRC or other statutory Department in respect of any financial obligation including, but not limited to, PAYE and primary and secondary national insurance contributions:
  - (i) in relation to any Transferring Contractor Employee, to the extent that the proceeding, claim or demand by HMRC or other statutory Department relates to financial obligations arising on and before the Service Transfer Date; and
  - (ii) in relation to any employee who is not identified in the Contractor's Final Contractor Personnel List, and in respect of whom it is later alleged or determined that the Employment Regulations applied so as to transfer his/her employment from the Contractor to the Department and/or Successor Contractor and/or any Replacement Sub-Contractor, to the extent that the proceeding, claim or demand by HMRC or other statutory Department relates to financial obligations arising on or before the Service Transfer Date;
- (e) a failure of the Contractor or any Sub-Contractor to discharge or procure the discharge of all wages, salaries and all other benefits and all PAYE tax deductions and national insurance contributions relating to the Transferring Contractor Employees in respect of the period up to (and including) the Service Transfer Date);
- (f) any claim made by or in respect of any person employed or formerly employed by the Contractor or any Sub-Contractor other than a Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List for whom it is alleged the Department and/or the Successor Contractor and/or any Replacement Sub-Contractor may be liable by virtue of this Contract and/or the Employment Regulations and/or the Acquired Rights Directive; and

- (g) any claim made by or in respect of a Transferring Contractor Employee or any appropriate employee representative (as defined in the Employment Regulations) of any Transferring Contractor Employee relating to any act or omission of the Contractor or any Sub-Contractor in relation to its obligations under regulation 13 of the Employment Regulations, except to the extent that the liability arises from the failure by the Department and/or Successor Contractor to comply with regulation 13(4) of the Employment Regulations.

2.4 The indemnities in Paragraph 2.3 will not apply to the extent that the Employee Liabilities arise or are attributable to an act or omission of the Successor Contractor and/or any Replacement Sub-Contractor whether occurring or having its origin before, on or after the Service Transfer Date, including any Employee Liabilities:

- (a) arising out of the resignation of any Transferring Contractor Employee before the Service Transfer Date on account of substantial detrimental changes to his/her working conditions proposed by the Successor Contractor and/or any Replacement Sub-Contractor to occur in the period on or after the Service Transfer Date); or
- (b) arising from the Successor Contractor's failure, and/or Replacement Sub-Contractor's failure, to comply with its obligations under the Employment Regulations.

2.5 If any person who is not identified in the Contractor's Final Contractor Personnel List claims, or it is determined in relation to any person who is not identified in the Contractor's Final Contractor Personnel List a Transferring Contractor Employee, that his/her contract of employment has been transferred from the Contractor or any Sub-Contractor to the Successor Contractor and/or Replacement Sub-Contractor pursuant to the Employment Regulations or the Acquired Rights Directive, then:

- (a) the Department will procure that the Successor Contractor will, or any Replacement Sub-Contractor will, within five (5) Working Days of becoming aware of that fact, give notice in writing to the Contractor; and
- (b) the Contractor may offer (or may procure that a Sub-Contractor may offer) employment to such person within fifteen (15) Working Days of the notification by the Successor Contractor and/or any Replacement Sub-Contractor or take such other reasonable steps as it considers appropriate to deal with the matter provided always that such steps are in compliance with Law.

- 2.6 If such offer is accepted, or if the situation has otherwise been resolved by the Contractor or a Sub-Contractor, the Department will procure that the Successor Contractor will, or procure that the Replacement Sub-Contractor will, immediately release or procure the release of the person from his/her employment or alleged employment.
- 2.7 If after the fifteen (15) Working Day period specified in Paragraph 2.5(b) has elapsed:
- (a) no such offer of employment has been made;
  - (b) such offer has been made but not accepted; or
  - (c) the situation has not otherwise been resolved

the Department will advise the Successor Contractor and/or Replacement Sub-Contractor, as appropriate that it may within five (5) Working Days give notice to terminate the employment or alleged employment of such person.

2.8 Subject to the Successor Contractor and/or Replacement Sub-Contractor acting in accordance with the provisions of Paragraphs 2.5 to 2.7, and in accordance with all applicable proper employment procedures set out in applicable Law, the Contractor will indemnify the Successor Contractor and/or Replacement Sub-Contractor against all Employee Liabilities arising out of the termination of employment pursuant to the provisions of Paragraph 2.7 provided that the Successor Contractor takes, or will procure that the Replacement Sub-Contractor takes, all reasonable steps to minimise any such Employee Liabilities.

2.9 The indemnity in Paragraph 2.8:

- (a) will not apply to:
  - (i) any claim for:
    - (A) discrimination, including on the grounds of sex, race, disability, age, gender reassignment, marriage or civil partnership, pregnancy and maternity or sexual orientation, religion or belief; or
    - (B) equal pay or compensation for less favourable treatment of part-time workers or fixed-term employees,

in any case in relation to any alleged act or omission of the Successor Contractor and/or Replacement Sub-Contractor; or

- (ii) any claim that the termination of employment was unfair because the Successor Contractor and/or Replacement Sub-Contractor neglected to follow a fair dismissal procedure; and
  - (b) will apply only where the notification referred to in Paragraph 2.5(a) is made by the Successor Contractor and/or Replacement Sub-Contractor to the Contractor within six (6) months of the Service Transfer Date.
- 2.10 If any such person as is described in Paragraph 2.5 is neither re-employed by the Contractor or any Sub-Contractor nor dismissed by the Successor Contractor and/or Replacement Sub-Contractor within the time scales set out in Paragraphs 2.5 to 2.7, such person will be treated as a Transferring Contractor Employee.
- 2.11 The Contractor will comply, and will procure that each Sub-Contractor will comply, with all its obligations under the Employment Regulations and will perform and discharge, and will procure that each Sub-Contractor will perform and discharge, all its obligations in respect of any person identified in the Contractor's Final Contractor Personnel List before and on the Service Transfer Date (including the payment of all remuneration, benefits, entitlements and outgoings, all wages, accrued but untaken holiday pay, bonuses, commissions, payments of PAYE, national insurance contributions and pension contributions which in any case are attributable in whole or in part in respect of the period up to (and including) the Service Transfer Date) and any necessary apportionments in respect of any periodic payments will be made between:
- (a) the Contractor and/or any Sub-Contractor; and
  - (b) the Successor Contractor and/or the Replacement Sub-Contractor.
- 2.12 The Contractor will, and will procure that each Sub-Contractor will, promptly provide to the Department and any Successor Contractor and/or Replacement Sub-Contractor, in writing such information as is necessary to enable the Department, the Successor Contractor and/or Replacement Sub-Contractor to carry out their respective duties under regulation 13 of the Employment Regulations. The Department will procure that the Successor Contractor and/or Replacement Sub-Contractor, will promptly provide to the Contractor and each Sub-Contractor in writing such information as is necessary to enable the Contractor and each Sub-Contractor to carry out their respective duties under regulation 13 of the Employment Regulations.
- 2.13 Subject to Paragraph 2.14, the Department will procure that the Successor Contractor indemnifies the Contractor on its own behalf and on behalf of any Replacement Sub-Contractor and its Sub-Contractors against any Employee Liabilities arising from or as a result of:

- (a) any act or omission of the Successor Contractor and/or Replacement Sub-Contractor in respect of any Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List or any appropriate employee representative (as defined in the Employment Regulations) of any such Transferring Contractor Employee;
- (b) the breach or non-observance by the Successor Contractor and/or Replacement Sub-Contractor on or after the Service Transfer Date of:
  - (i) any collective agreement applicable to the Transferring Contractor Employees identified in the Contractor's Final Contractor Personnel List; and/or
  - (ii) any custom or practice in respect of any Transferring Contractor Employees identified in the Contractor's Final Contractor Personnel List which the Successor Contractor and/or Replacement Sub-Contractor is contractually bound to honour;
- (c) any claim by any trade union or other body or person representing any Transferring Contractor Employees identified in the Contractor's Final Contractor Personnel List arising from or connected with any failure by the Successor Contractor and/or Replacement Sub-Contractor to comply with any legal obligation to such trade union, body or person arising on or after the Service Transfer Date;
- (d) any proposal by the Successor Contractor and/or Replacement Sub-Contractor to change the terms and conditions of employment or working conditions of any Transferring Contractor Employees identified in the Contractor's Final Contractor Personnel List on or after their transfer to the Successor Contractor or Replacement Sub-Contractor (as the case may be) on the Service Transfer Date, or to change the terms and conditions of employment or working conditions of any person identified in the Contractor's Final Contractor Personnel List who would have been a Transferring Contractor Employee but for their resignation (or decision to treat their employment as terminated under regulation 4(9) of the Employment Regulations) before the Service Transfer Date as a result of or for a reason connected to such proposed changes;
- (e) any statement communicated to or action undertaken by the Successor Contractor or Replacement Sub-Contractor to, or in respect of, any Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List on or before the Service Transfer Date regarding the Relevant Transfer which has not been agreed in advance with the Contractor in writing;
- (f) any proceeding, claim or demand by HMRC or other statutory Department in respect of any financial obligation including, but not limited to, PAYE and primary and secondary national insurance contributions;

- (i) in relation to any Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List, to the extent that the proceeding, claim or demand by HMRC or other statutory Department relates to financial obligations arising after the Service Transfer Date; and
  - (ii) in relation to any employee who is not a Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List, and in respect of whom it is later alleged or determined that the Employment Regulations applied so as to transfer his/her employment from the Contractor or Sub-Contractor, to the Successor Contractor or Replacement Sub-Contractor to the extent that the proceeding, claim or demand by HMRC or other statutory Department relates to financial obligations arising after the Service Transfer Date;
- (g) a failure of the Successor Contractor or Replacement Sub-Contractor to discharge or procure the discharge of all wages, salaries and all other benefits and all PAYE tax deductions and national insurance contributions relating to the Transferring Contractor Employees identified in the Contractor's Final Contractor Personnel List in respect of the period from (and including) the Service Transfer Date; and
- (h) any claim made by or in respect of a Transferring Contractor Employee identified in the Contractor's Final Contractor Personnel List or any appropriate employee representative (as defined in the Employment Regulations) of any such Transferring Contractor Employee relating to any act or omission of the Successor Contractor or Replacement Sub-Contractor in relation to obligations under regulation 13 of the Employment Regulations.

2.14 The indemnities in Paragraph 2.13 will not apply to the extent that the Employee Liabilities arise or are attributable to an act or omission of the Contractor and/or any Sub-Contractor (as applicable) whether occurring or having its origin before, on or after the Service Transfer Date, including any Employee Liabilities arising from the failure by the Contractor and/or any Sub-Contractor (as applicable) to comply with its obligations under the Employment Regulations.

## **ANNEX: LIST OF NOTIFIED SUB-CONTRACTORS**

## SCHEDULE 6: UK GDPR AND DATA PROTECTION

### 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 Department that are subject to this Contract as defined in the Department Personal Information Charter, the ESFA privacy notice and the ILR privacy notice and documentation.</p> <p><a href="http://www.gov.uk">Personal information charter - Department for Education - GOV.UK (www.gov.uk)</a></p> <p><a href="http://www.gov.uk">ESFA: privacy notice - GOV.UK (www.gov.uk)</a></p> <p><a href="http://fasst.org.uk">ILR Specification: ILR Privacy Notice 2021 to 2022 version 1 May 2021 (fasst.org.uk)</a></p>
Duration of the Processing	<p>The duration of the Processing covers the Contract Period.</p> <p><a href="http://fasst.org.uk">Specification of the Individualised Learner Record for 2021 to 2022 (fasst.org.uk)</a></p>
Nature and purposes of the Processing	<p>The nature and purposes of the processing is defined in the ILR privacy notice:</p> <p><a href="http://fasst.org.uk">ILR Specification: ILR Privacy Notice 2021 to 2022 version 1 May 2021 (fasst.org.uk)</a></p> <p>The processing of data in the agreement refers to the submission of ILR data to the Department only. The processing does not include the processing of Personal Data collected from the Learners by the body for the purposes of enrolling Learners onto programmes or delivering education or training.</p> <p>The Contractor will be required to submit the data to the Department as set out in Clause 23 (Submission of Learner Data) of this Contract.</p>
Type of personal data	<p>The Personal Data to be processed is defined in the ILR specification:</p> <p><a href="http://fasst.org.uk">Specification of the Individualised Learner Record for 2021 to 2022 (fasst.org.uk)</a></p>

Description	Details
Categories of data subject	The data subjects are Learners on education or training programmes administered by the Department that are subject to this Contract.
Retention and destruction of the data once the processing is complete UNLESS requirement by (UK) Law to preserve that type of data	<p>The Contractor is required to retain ILR data for 3 years for business operational purposes.</p> <p>For the purposes of the Department as a Data Controller of the data, the Contractor is required to retain the Learner Records data for the funding and audit purposes set out in this Contract for six (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 &amp; Pensions as a Data Controller, where Learner Records data is used as match on the 2014-20 ESF programme, the data must be retained securely until 31<sup>st</sup> 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> <p>The Contractor shall comply with Clause 41 (Consequences of Termination and Expiry) which sets out provisions that will apply to Learner Records after this Contract has been terminated or has expired.</p>

## SCHEDULE 7: SECURITY & DEPARTMENT POLICIES

### Part A: Security

<p>“BPSS” “Baseline Personnel Security Standard”</p>	<p>means the Government’s HMG Baseline Personal Security Standard. Further information can be found at: <a href="http://www.gov.uk/government/baseline-personnel-security-standard">Government baseline personnel security standard - GOV.UK (www.gov.uk)</a></p>
<p>“CCSC” “Certified Cyber Security Consultancy”</p>	<p>is the National Cyber Security Centre’s (NCSC) approach to assessing the services provided by consultancies and confirming that they meet NCSC's standards. See website: <a href="http://www.ncsc.gov.uk/certified-cyber-security-consultancy">Certified Cyber Security Consultancy - NCSC.GOV.UK</a></p>
<p>“CCP” “Certified Professional”</p>	<p>is a NCSC scheme in consultation with government, industry and academia to address the growing need for specialists in the cyber security profession. See website: <a href="http://www.ncsc.gov.uk/certified-professional-scheme">Certified Professional scheme - NCSC.GOV.UK</a></p>
<p>“CPA” “Commercial Product Assurance” (formerly called “CESG Product Assurance”)</p>	<p>is an ‘information assurance scheme’ which evaluates commercial off the shelf (COTS) products and their developers against published security and development standards. See website: <a href="http://www.ncsc.gov.uk/commercial-product-assurance">Commercial Product Assurance (CPA) - NCSC.GOV.UK</a></p>
<p>“Cyber Essentials” “Cyber Essentials Plus”</p>	<p>Cyber Essentials is the government backed, industry supported scheme to help organisations protect themselves against common cyber-attacks. Cyber Essentials and Cyber Essentials Plus are levels within the scheme. There are a number of certification bodies that can be approached for further advice on the scheme; the link below points to one of these providers: <a href="http://www.iasme.gov.uk/governance-self-assessed-apply-now">IASME Governance Self Assessed Apply Now - lasme</a></p>
<p>“Department Data” “Department’s Information”</p>	<p>as defined in Clause 1 (Definitions) of the Contract</p>
<p>“Department”</p>	<p>as defined in Clause 1 (Definitions) of the Contract.</p>

“Departmental Security Standards”	means the Department’s security policy or any standards, procedures, process or specification for security that the Contractor is required to deliver.
“Digital Marketplace / GCloud”	means the online framework for identifying and procuring cloud technology and people for digital projects.
“End User Devices”	means the personal computer or consumer devices that store or process information.
“Good Industry Practice”	as defined in Clause 1 (Definitions) of the Contract.
“Good Industry Standard”	means the implementation of products and solutions, and the exercise of that degree of skill, care, prudence, efficiency, foresight and timeliness as would be expected from a leading company within the relevant industry or business sector.
“GSC” “GSCP” “Government Security Classifications Policy”	means the Government Security Classification Policy which establishes the rules for classifying HMG information. The policy is available at: <a href="http://www.gov.uk">Government Security Classifications - GOV.UK (www.gov.uk)</a>
“HMG”	means Her Majesty’s Government
“ICT”	means Information and Communications Technology (ICT) is used as an extended synonym for information technology (IT), used to describe the bringing together of enabling technologies used to deliver the end-to-end solution
“ISO/IEC 27001” “ISO 27001”	is the International Standard for Information Security Management Systems Requirements
“ISO/IEC 27002” “ISO 27002”	is the International Standard describing the Code of Practice for Information Security Controls.
“ISO 22301”	is the International Standard describing for Business Continuity
“IT Security Health Check (ITSHC)” “IT Health Check (ITHC)” “Penetration Testing”	means an assessment to identify risks and vulnerabilities in systems, applications and networks which may compromise the confidentiality, integrity or availability of information held on that IT system.
“Need-to-Know”	the Need-to-Know principle is employed within HMG to limit the distribution of classified

	information to those people with a clear 'need to know' in order to carry out their duties.
"NCSC"	The National Cyber Security Centre (NCSC) formerly CESG is the UK government's National Technical Authority for Information Assurance. The NCSC website is <a href="https://www.ncsc.gov.uk">National Cyber Security Centre - NCSC.GOV.UK</a>
"OFFICIAL" "OFFICIAL-SENSITIVE"	the term 'OFFICIAL' is used to describe the baseline level of 'security classification' described within the Government Security Classification Policy (GSCP). the term 'OFFICIAL-SENSITIVE' is used to identify a limited subset of OFFICIAL information that could have more damaging consequences (for individuals, an organisation or government generally) if it were lost, stolen or published in the media, as described in the GSCP.
"RBAC" "Role Based Access Control"	means Role Based Access Control. A method of restricting a person's or process' access to information depending on the role or functions assigned to them.
"Secure Sanitisation"	means the process of treating data held on storage media to reduce the likelihood of retrieval and reconstruction to an acceptable level.  NCSC Guidance can be found at: <a href="https://www.ncsc.gov.uk/guidance/secure-sanitisation-of-storage-media">Secure sanitisation of storage media - NCSC.GOV.UK</a>  The disposal of physical documents and hardcopy materials advice can be found at: <a href="https://www.cpni.gov.uk/secure-destruction">Secure Destruction   Public Website (cpni.gov.uk)</a>
"Security and Information Risk Advisor" "CCP SIRA" "SIRA"	means the Security and Information Risk Advisor (SIRA) is a role defined under the NCSC Certified Professional (CCP) Scheme. See also: <a href="https://www.ncsc.gov.uk/guidance/certified-professional-scheme">Certified Professional scheme - NCSC.GOV.UK</a>
"Senior Information Risk Owner" "SIRO"	means the Senior Information Risk Owner (SIRO) responsible on behalf of the DfE Accounting Officer for overseeing the management of information risk across the organisation. This includes its executive agencies, arm's length bodies (ALBs), non-departmental public bodies (NDPBs) and devolved information held by third parties.

<p>“SPF” “HMG Security Policy Framework”</p>	<p>means the definitive HMG Security Policy which describes the expectations of the Cabinet Secretary and Government’s Official Committee on Security on how HMG organisations and third parties handling HMG information and other assets will apply protective security to ensure HMG can function effectively, efficiently and securely. <a href="https://www.gov.uk/government/policy-frameworks/protecting-government-assets">Security policy framework: protecting government assets - GOV.UK (www.gov.uk)</a></p>
<p>“Storage Area Network” “SAN”</p>	<p>means an information storage system typically presenting block based storage (i.e. disks or virtual disks) over a network interface rather than using physically connected storage.</p>

- 1.1 The Contractor will be aware of and comply with the relevant [HMG security policy framework](#), [NCSC guidelines](#) and where applicable Security and Departmental policies which include but are not constrained to the following paragraphs.
- 1.2 Where the Contractor will handle information at OFFICIAL for the Department, the requirements of [Cabinet Office Procurement Policy Note – Use of Cyber Essentials Scheme certification - Action Note 09/14](#) dated 25 May 2016, or any subsequent updated document, are mandated; the Contractor will endeavour to meet the requirements of Cyber Essentials for the 2021/22 Funding Year and present the results to the Department on request. The scope must be relevant to the Services supplied to, or on behalf of, the Department.
- 1.3 The Contractor will follow the Cabinet Office guidance on Government Security Classifications (GCSP) in respect of any Department Data being handled in the course of providing this Service and will handle this data in accordance with its security classification. (In the event where the Contractor has an existing Protective Marking Scheme then the Contractor may continue to use this but must map the HMG security classifications against it to ensure the correct controls are applied to the Department Data).
- 1.4 The Contractor will have in place and maintain physical security to premises and sensitive areas in line with those outlined in ISO/IEC 27002 including, but not limited to, entry control mechanisms (e.g. door access), CCTV, alarm systems etc.
- 1.5 The Contractor will have in place and maintain an appropriate user access control policy for all ICT systems to ensure only authorised personnel have access to Departmental Data. This policy should include appropriate segregation of duties and if applicable Role Based Access Controls (RBAC). User credentials that give access to Departmental Data or systems shall be considered to be sensitive data and must be protected accordingly.
- 1.6 The Contractor will have in place and will maintain procedural, personnel, physical and technical safeguards to protect Department Data, including but not limited to:
  - (a) physical security controls;

- (b) Good Industry Standard policies and processes;
  - (c) malware protection;
  - (d) boundary access controls including firewalls, application gateways, etc;
  - (e) maintenance and use of fully supported software packages in accordance with vendor recommendations;
  - (f) use of secure device configuration and builds;
  - (g) software updates and patching regimes including malware signatures, for operating systems, network devices, applications and services;
  - (h) user identity and access controls, including the use of multi-factor authentication for sensitive data and privileged account accesses;
  - (i) any services provided to the Department must capture audit logs for security events in an electronic format at the application, service and system level to meet the Department's logging and auditing requirements, plus logs shall be:
    - (i) retained and protected from tampering for a minimum period of six months; and
    - (ii) made available to the Department on request.
- 1.7 The Contractor will ensure that any Department Data (including email) transmitted over any public network (including the Internet, mobile networks, or un-protected enterprise network) or to a mobile device shall be encrypted when transmitted.
- 1.8 The Contractor will ensure that any Department Data which resides on a mobile, removable or physically uncontrolled device is stored encrypted using a product or system component which has been formally assured through a recognised certification process agreed with the Department except where the department has given its prior written consent to an alternative arrangement.
- 1.9 The Contractor will ensure that any device which is used to process Department Data meets all of the security requirements set out in the NCSC End User Devices Platform Security Guidance, a copy of which can be found at: [End user device \(EUD\) security guidance - NCSC.GOV.UK](#) and [EUD Security principles - NCSC.GOV.UK](#).
- 1.10 Whilst in the Contractor's care all removable media and hardcopy paper documents containing Department Data must be handled securely and secured under lock and key when not in use and shall be securely destroyed when no longer required, using either a cross-cut shredder or a professional secure disposal organisation. The term 'lock and key' is defined as: "securing information in a lockable desk drawer, cupboard or filing cabinet which is under the user's sole control and to which they hold the keys".
- 1.11 When necessary to hand carry removable media and/or hardcopy paper documents containing Department Data, the media or documents being carried shall be kept under cover and transported in such a way as to ensure that no unauthorised person has either visual or physical access to the material being carried. This Paragraph 1.11 will apply equally regardless of whether the material is being carried inside or outside of company premises. The term

'under cover' means that the information is carried within an opaque folder or envelope within official premises and buildings and within a closed briefcase or other similar bag or container when outside official premises or buildings.

- 1.12 In the event of termination, equipment failure or obsolescence, all Department Data, in either hardcopy or electronic format, that is physically held or logically stored by the Contractor must be accounted for and either physically returned or securely sanitised or destroyed in accordance with the current HMG policy using an NCSC approved product or method. Where sanitisation or destruction is not possible for legal, regulatory or technical reasons, such as data stored in a cloud system, Storage Area Network (SAN) or on shared backup tapes, then the Contractor or Sub-Contractor will protect the Department's information and data until such time, which may be long after the end of the contract, when it can be securely cleansed or destroyed. Evidence of secure destruction will be required in all cases.
- 1.13 Access by Contractor or Sub-Contractor staff to Department Data, including user credentials, shall be confined to those individuals who have a "Need-to-Know" in order to carry out their role; and have undergone mandatory pre-employment screening, to a minimum of HMG Baseline Personnel Security Standard (BPSS); or hold an appropriate National Security Vetting clearance as required by the Department. All Contractor or Sub-Contractor staff must complete this process before access to Department Data is permitted. Any Contractor or Sub-Contractor staff who will be in contact with children or vulnerable adults must, in addition to any security clearance, have successfully undergone an Enhanced DBS (Disclosure and Barring Service) check prior to any contact.
- 1.14 All Contractor or Sub-Contractor employees who handle Department Data must have annual awareness training in protecting information.
- 1.15 The Contractor will, as a minimum, have in place robust Business Continuity arrangements and processes including IT disaster recovery plans and procedures that conform to ISO 22301 to ensure that the delivery of the Contract is not adversely affected in the event of an incident. An incident will be defined as any situation that might, or could lead to, a disruption, loss, emergency or crisis to the Services delivered. If an ISO 22301 certificate is not available, the Contractor will provide evidence of the effectiveness of their ISO 22301 conformant Business Continuity arrangements and processes including IT disaster recovery plans and procedures. This should include evidence that the Contractor has tested or exercised these plans within the last twelve (12) months and produced a written report of the outcome, including required actions.

- 1.16 Any suspected or actual breach of the confidentiality, integrity or availability of Department Data, including user credentials, used or handled in the course of providing this service shall be recorded as an incident. This includes any non-compliance with these Departmental Security Standards for Contractors, or other Security Standards pertaining to the solution. Incidents shall be reported to the department immediately, wherever practical, even if unconfirmed or when full details are not known, but always within 24 hours of discovery. If incident reporting has been delayed by more than 24 hours, the Contractor should provide an explanation about the delay. The Contractor will inform their Contract Manager in writing. Incidents will be investigated by the Contractor with outcomes being notified to the Department.
- 1.17 The Contractor will ensure that any IT systems and hosting environments that are used to handle, store or process Department Data will be subject to independent IT Health Checks (ITHC) using a NCSC approved ITHC provider before go-live and periodically (at least annually) thereafter. The findings of the ITHC relevant to the Service being provided are to be shared with the Department and all necessary remedial work carried out. In the event of significant security issues being identified, a follow up remediation test may be required.
- 1.18 The Contractor or Sub-Contractors providing the service will provide the Department with full details of any actual or future intent to develop, manage, support, process or store Department Data outside of the UK mainland. The Contractor or Sub-Contractor will not go ahead with any such proposal without the prior written agreement from the Department.
- 1.19 The Department reserves the right to audit the Contractor or Sub-Contractors providing the Service within a mutually agreed timeframe but always within seven (7) days of notice of a request to audit being given. The audit will cover the overall scope of the Service being supplied and the Contractor's, and any Sub-Contractors, compliance with this Schedule 7 (Security and Department Policies).
- 1.20 The Contractor and Sub-Contractors will undergo appropriate security assurance activities and will provide appropriate evidence including the production of the necessary security documentation as determined by the Department. This will include obtaining any necessary professional security resources required to support the Contractor's and Sub-Contractor's security assurance activities such as: a Security and Information Risk Advisor (SIRA) certified to NCSC Certified Cyber Security Consultancy (CCSC) or NCSC Certified Cyber Professional
- 1.21 The Contractor will contractually enforce all this Schedule 7 (Security and Department Policies) onto any third-party suppliers, Sub-Contractors or partners who could potentially access Department Data in the course of providing this Service.

## **Part B: Department Policies**

The following code outlines the standards and behaviors expected from suppliers and grant recipients, and reiterate the government's approach to working with suppliers.

[Codes of conduct for suppliers and grant recipients - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/guidance/codes-of-conduct-for-suppliers-and-grant-recipients)

## **SCHEDULE 8: EXIT ARRANGEMENTS**

### **1 DEFINITIONS**

**"Exit Manager"** the person appointed by each Party pursuant to Paragraph 3.3 of this Schedule 8 (Exit Arrangements) for managing the Contractor's obligations under Schedule 8 (Exit Arrangements);

**"Exit Plan"** the plan produced and updated by the Contractor during the Contract Period in accordance with Paragraph 5 of this Schedule 8 (Exit Arrangements);

### **2 OVERVIEW**

2.1 The Contractor is required to ensure it performs its obligations to assist in the orderly transition of the Services from the Contractor to the Department 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. This Schedule 8 (Exit Arrangements) sets out the principles of the exit and service transfer arrangements that are intended to achieve such orderly transition. For the avoidance of doubt, the Contractor will be responsible for the overall management of the exit and service transfer arrangements.

### **3 CONTRACT LIFE OBLIGATIONS**

3.1 The Contractor will draw up an Exit Plan in accordance with Paragraph 5.1.

3.2 The Contractor will (unless otherwise agreed by the Department in writing) procure that all Sub-Contracts and other agreements with third parties used exclusively to deliver the Services to the Department, which are necessary to enable the Department and/or any Successor Contractor to perform the Services in accordance with this Contract or to enable re-provision of the Services, will be assignable and/or capable of novation at the request of the Department to the Department (and/or its nominee) and/or any Successor Contractor upon the Contractor ceasing to provide the Services (or part of them) without restriction (including any need to obtain any consent or approval) or payment by the Department. Where the Contractor uses Sub-Contracts and other agreements to deliver the Services and these agreements are part of framework agreements that the Contractor has with its third party suppliers, the Contractor will provide sufficient information and assistance to enable the Successor Contractor or the Department to enter into an agreement with such supplier directly.

3.3 The Contractor will appoint an Exit Manager. The Contractor's Exit Manager will be responsible for ensuring that the Contractor and its

personnel, agents and Sub-Contractors comply with this Schedule 8 (Exit Arrangements). The Contractor will ensure that its Exit Manager has the requisite authority to arrange and procure any resources of the Contractor as are reasonably necessary to enable the Contractor to comply with the requirements set out in this Schedule 8 (Exit Arrangements).

#### **4 OBLIGATIONS TO ASSIST ON RE-PROVISION OF SERVICES OR TRANSFER BACK TO THE DEPARTMENT**

4.1 On reasonable notice, the Contractor will on request provide to the Department and/or to its potential Successor Contractor, the following material and information in order to facilitate the preparation by the Department of any invitation to tender and/or to facilitate any potential Successor Contractor undertaking due diligence:

- 4.1.1 details of the Services;
- 4.1.2 an inventory of Department Data (including but not limited to e-portfolios and any other Learner Files) in the Contractor's possession or control; and
- 4.1.3 all information relating to Transferring Employees required to be provided by the Contractor under this Contract.

#### **5 EXIT PLAN**

5.1 The Contractor will within six (6) months after the Services Start Date maintain an Exit Plan which sets out the Contractor's proposed methodology for achieving an orderly transition of Services from the Contractor to the Department and/or its Successor Contractor on the expiry or termination of this Contract and which complies with the requirements set out in Paragraphs 5.2 and 5.3 below.

5.2 The Exit Plan will:

- 5.2.1 document how the Services will transfer to the Successor Contractor (which will need to be agreed between the Contractor and the Successor Contractor) and/or the Department, including details of the processes to transfer documentation, Department Data (including e-portfolios and other Learner records), systems migration, security and the segregation of the Department's technology components from any technology components operated by the Contractor or its Sub-Contractors (where applicable);
- 5.2.2 set out procedures to deal with requests made by the Department and/or a Successor Contractor for staffing information pursuant to Clause 29 (Re-Provision of the Services) of the Contract;
- 5.2.3 address each of the issues set out in this Schedule 8 (Exit Arrangements) to facilitate the transition of the Services from the Contractor to the Successor Contractor and/or the Department

with the aim of ensuring that there is no disruption to or degradation of the Services;

- 5.2.4 list software agreements and licence agreements required to deliver the Services.
- 5.3 The Contractor will review and (if appropriate) update the Exit Plan each year to reflect changes in the Services.

## 6 TERMINATION OBLIGATIONS

- 6.1 In addition to the obligations as set out in Clauses 40 (Termination) and 41 (Consequences of Termination and Expiry) of the Contract, the Contractor will comply with all of its obligations contained in the Exit Plan.
- 6.2 Within six (6) months of the Expiry Date (except where the Service will be rolled over to the following Funding Year) or Termination Date:
  - 6.2.1 the Contractor will, subject to the requirement to retain one copy for the purpose of compliance with Clause 57 (Continuing Obligations) and the retention requirements of this Contract, erase from any computers, storage devices and storage media that are to be retained by the Contractor, all Department Data;
  - 6.2.2 the Contractor will return or make available for the Successor Contractor or the Department to use such of the following as is in the Contractor's possession or control:
    - 6.2.2.1 all materials created by the Contractor under this Contract, the IPRs in which are owned by the Department;
    - 6.2.2.2 details of work volumes and staffing requirements over the twelve (12) month period immediately prior;
  - 6.2.3 the Contractor will:
    - 6.2.3.1 with respect to learning or training in progress, document the current status and stabilising for continuity during transition;
    - 6.2.3.2 provide assistance and expertise as necessary to examine all governance and reports in place for the provision of the Services;
    - 6.2.3.3 answer all reasonable questions from the Department and/or its Successor Contractor regarding the Services;
    - 6.2.3.4 agree with the Department and/or the Successor Contractor a plan for the migration of the Department Data to the Department and/or the Successor Contractor. The Contractor will fully co-operate in the execution of the agreed plan, providing skills and expertise of a reasonably acceptable standard; and
  - 6.2.4 each Party will return to the other Party all Confidential Information

of the other Party and will certify that it does not retain the other Party's Confidential Information save to the extent (and for the limited period) that such information needs to be retained by the Party in question for the purposes of providing or receiving any Services.

- 6.3 Except where this Contract provides otherwise, all licences, leases and authorisations granted by one Party to the other in relation to the Services will be terminated with effect from the Expiry Date or Termination Date.

## **7 KNOWLEDGE TRANSFER**

- 7.1 Three (3) months prior to the Expiry Date of the Contract (or where the Contract is terminated within the timescale notified by the Department) the Contractor will upon request:
- 7.1.1 provide for transfer to the Department 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
  - 7.1.2 provide the Department 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.
- 7.2 To facilitate the transfer of knowledge from the Contractor to the Department and/or its Successor Contractor, the Contractor will provide, upon request, a detailed written explanation of the procedures and operations used to provide the Services, the change management process and other standards and procedures to the operations personnel of the Department and/or the Successor Contractor.
- 7.3 The information which the Contractor will provide, at its own cost, to the Department and/or its Successor Contractor pursuant to Paragraph 7.1 above will include:
- 7.3.1 copies of up-to-date procedures and manuals;
  - 7.3.2 agreements with third party suppliers of goods and services which are to be transferred to the Department/Successor Contractor;
  - 7.3.3 key support contact details for third party supplier personnel under contracts which are to be assigned or novated to the Department/Successor Contractor pursuant to this Schedule 8 (Exit Arrangements);
  - 7.3.4 any relevant interface information.

**8 ASSETS, SUB-CONTRACTS AND SOFTWARE**

8.1 Following notice of termination of this Contract, the Contractor will not, without the Department's prior written consent:

8.1.1 enter into or vary any Sub-Contract;

8.1.2 enter into or vary any licence for software in connection with the Services.

**9 CONTRACTOR PERSONNEL**

9.1 The Department and Contractor agree and acknowledge that in the event of the Contractor ceasing to provide the Services or part of them for any reason, Clause 29 (Re-Provision of the Services) of the Contract will apply.

**10 PAYMENT**

10.1 The provisions of Clause 41 (Consequences of Termination and Expiry) of the Contract apply.

## SCHEDULE 9: SUB-CONTRACTING

### General

- 1.1. The Contractor must comply with;
  - 1.1.1. the Funding Rules; and
  - 1.1.2. the Sub-Contractor Policy; and
  - 1.1.3. the Sub-Contracting Funding Rules; and
  - 1.1.4. the Funding Higher Risk Organisations and Subcontractors Policy (hereafter referred to as the “**Funding Higher Risk Organisations Policy**”).
- 1.2. The Contractor must select its Sub-Contractors fairly and without discrimination and must comply with any procurement rules that apply when doing so, including the Public Contracts Regulations 2015 where the Contractor is a contracting authority under those regulations.
- 1.3. The Contractor must ensure that proposed Sub-Contractors are of adequate financial standing and have sufficient capacity and capability to deliver the Services that are to be Sub-Contracted.
- 1.4. When appointing and working with Sub-Contractors the Contractor must have regard to paragraph 8 of the Sub-Contracting Funding Rules in relation to conflicts of interest.
- 1.5. The Contractor must have a direct contractual relationship by way of a Sub-Contract with all of its Sub-Contractors. The Contractor must ensure that its Sub-Contractors do not sub-contract any of the Services further to other suppliers.
- 1.6. The Contractor must not enter into any agreement for Brokerage in relation to the Services under this Contract.

### Requirements for Sub-Contracts

- 1.7. The Contractor must enter into a written Sub-Contract with any supplier that the Contractor is proposing to use as a Sub-Contractor. The Contractor and the Sub-Contractor must enter into the Sub-Contract before the Sub-Contractor commences the delivery of the proposed sub-contracted Services.
- 1.8. The Sub-Contract must include:
  - 1.8.1. terms and conditions substantially the same as those set out in this Contract, including but not limited to the right for the Contractor to terminate the Sub-Contract if the Sub-Contractor does not pass the annual due diligence checks and such other matters as are set out in paragraphs 12-22 of the Sub-Contracting Funding Rules;
  - 1.8.2. payment provisions such that the Contractor must pay the Sub-Contractor within 30 days of receiving a valid invoice;
  - 1.8.3. an obligation on the Sub-Contractor to obtain express written permission from the Contractor before enrolling any Learners;

- 1.8.4. an obligation on the Sub-Contractor to fund and support enrolled Learners for the duration of their Learning Programme;
  - 1.8.5. an obligation on the Sub-Contractor to participate in any rectification plan as appropriate in the event that the Sub-Contractor has committed an act which would constitute a material breach of this Contract (whether or not it is also a breach of the Sub-Contract); and
  - 1.8.6. sanctions on the Sub-Contractor for material breach of the Sub-Contract substantially the same as those set out in this Contract.
- 1.9. Sub-Contracts must be available at all times for the Department to inspect on request.

### **Contractor Obligations**

- 1.10. The Contractor must make payment to any Sub-Contractor within 30 days of receiving a valid invoice in accordance with the required provisions of the Sub-Contract set out at paragraph 1.8.2 of this Schedule.
- 1.11. The Contractor must provide a fully completed Sub-Contractor Declaration via [Manage your Education and Skills Funding](#) (MYESF) on at least two occasions per Funding Year by the dates notified to it by the Department. If the Contractor does not have any Sub-Contractors at the specified date it must submit a nil return. If after submission of its most recent Sub-Contractor declaration the Contractor enters into any Sub-Contract within the Funding Year, it must submit an updated Sub-Contractor Declaration to the Department.
- 1.12. The Contractor must publish a policy statement on its public facing website by 31 October in each Funding Year. The policy statement must accord with the provisions of paragraphs 1 – 4 of the Sub-Contracting Funding Rules.
- 1.13. The Contractor must manage and monitor its sub-contractors in accordance with the relevant sub-contract to ensure that the sub-contractors deliver the sub-contracted Services to the standard set out in Clause 3 (Service Delivery) of this Contract.
- 1.14. The Contractor must inform the Department whenever a Sub-Contractor goes into administration or liquidation.
- 1.15. The Contractor must have a contingency plan in place to ensure that there is continuity of Services for existing Learners in the event of any circumstances that may arise that render a Sub-Contractor unable to deliver the sub-contracted Services including but not limited to the expiry or termination of the Sub-Contract.
- 1.16. The Contractor must ensure that a Sub-Contractor that has committed an act which constitutes a material breach of this Contract (whether or not it is also a breach of its Sub-Contract) participates in any rectification plan as appropriate.
- 1.17. The Contractor must carry out an investigation at its own cost if there is any evidence of a Sub-Contractor having irregular financial or delivery activity and notify the Department of this and of the outcome of any such investigation.
- 1.18. The Contractor must not enter new sub-contracting arrangements or increase the value of existing arrangements if any of the following circumstances apply:

- 1.18.1. Ofsted has rated the Contractor's management and leadership as inadequate;
- 1.18.2. the outcome of the Contractor's annual financial health assessment is inadequate, unless the Department has provided its written consent to the proposed sub-contracting arrangement in advance of a Sub-Contract being entered into;
- 1.18.3. a Sub-Contractor has been inspected and judged to be inadequate by Ofsted; or
- 1.18.4. a Sub-Contractor is subject to ongoing intervention or investigation by the Department.

### **Due Diligence**

- 1.19. The Contractor must carry out its own due diligence checks when appointing subcontractors and must take account of the criteria set out in the **Funding Higher Risk Organisations Policy**.
- 1.20. The Contractor must ensure it refreshes the due diligence checks on its Sub-Contracting arrangements on at least an annual basis, including but not limited to reviewing its Sub-Contracts and the rationale for entering into each Sub-Contract, any fees and charges involved in the delivery of its sub-contracted Services and whether each cost is reasonable and proportionate in accordance with paragraph 12 of the Sub-Contracting Funding Rules.
- 1.21. If a Sub-Contractor does not pass the due diligence requirements set out at paragraphs 12-18 of the Subcontracting Funding Rules, the Contractor must take action in accordance with paragraph 19 of the Sub-Contracting Funding Rules.
- 1.22. The Contractor must refer to the List of Declared Sub-Contractors to determine the aggregate value of all sub-contracts a Sub-Contractor holds. Where any Sub-Contractor holds Sub-Contracts with an aggregate value of £100,000 or greater for any Funding Year the Contractor must comply with paragraph 21 of the Sub-Contracting Funding Rules.
- 1.23. The Contractor must refer to the List of Declared Sub-Contractors to determine the aggregate value of all sub-contracts a Sub-Contractor holds. Where any Sub-Contractor holds Sub-Contracts with an aggregate value of £500,000 or greater for any Funding Year the Contractor must comply with paragraph 22 of the Sub-Contracting Funding Rules.

### **Sub-Contracting Thresholds**

- 1.24. The Contractor must review the value of its Sub-Contracted Services and, subject to paragraph 1.25 of this Schedule, take such steps as are necessary to reduce that value so that by the 2022 to 2023 Funding Year the value of its sub-contracted Services will not exceed the Sub-Contracting Threshold.
- 1.25. The Contractor must, where necessary, produce a plan to reduce the amount of its sub-contracted Services to the Sub-Contracting Threshold and such plan must be produced to the Department on its request.

- 1.26. If the Contractor considers that it cannot reduce the value of its sub-contracted Services to the Sub-Contracting Threshold by 1 August 2022 it must submit an Exemption Case to the Department by 1 May 2022.
- 1.27. The Exemption Case and the Contractor's submission of it must comply with paragraph 30 of the Sub-Contracting Funding Rules.
- 1.28. The Department will consider any submitted Exemption Case in accordance with the provisions of paragraph 31 of the Sub-Contracting Funding Rules and will notify the Contractor as to whether or not the Exemption Case is accepted.
- 1.29. The Department expects that any fee retained by the Contractor as a management fee for a Sub-Contract will not exceed 20% of the overall value of the Sub-Contract. In the event that the management fee is in excess of 20% of the overall value of the Sub-Contract the Department reserves the right to require the Contractor to provide further information in relation to the rationale for the management fee and why it represents good value for money.

### **Financial Thresholds**

- 1.30. Where the annual value in any Funding Year of this Contract exceeds £5 million and the Contractor wants to sub-contract one or more of the Services the following provisions apply:
  - 1.30.1. The Contractor will advertise on Contracts Finder all sub-contract opportunities arising from or in connection with the provision of the Services above a minimum threshold of £25,000 that arise during the Contract Period.
  - 1.30.2. Once a sub-contract has been awarded, the Contractor will update the notice on Contracts Finder with the details of the successful subcontractor.
  - 1.30.3. In addition to any other management information requirements set out in this Contract, the Contractor agrees and acknowledges that it will, at no charge, provide timely, full, accurate and complete SME Management Information ("MI) Reports to the Department which incorporate the following:
    - (a) The total revenue received directly from the Contract
    - (b) The total value of Services under the Contract that have been sub-contracted (including revenues for non-SMEs/non-VCSEs);and
    - (c) The total value of sub-contracted revenues to SMEs and VCSEs.
  - 1.30.4. The SME Management Information Reports will be provided in the correct format as required by the Department and any guidance issued by the Department from time to time.
- 1.31. The Contractor must obtain an annual report from an external auditor if the aggregate total of all its Sub-Contracts exceeds or is anticipated to exceed £100,000 in any single Funding Year. The calculation of aggregate total of Sub-Contractor delivery must include delivery of Apprenticeships.

### **Departmental Rights**

- 1.32. In the event that the Contractor fails to comply with any of the requirements set out in this Schedule the Department reserves the right to take such remedial

action under this Contract as it considers appropriate in the circumstances, which may include but is not limited to requiring the Contractor to terminate an existing Sub-Contract and/ or prohibiting the Contractor from entering enter into any new Sub-Contract to deliver the Services under this Contract.