



Education & Skills  
Funding Agency



## **CONTRACT FOR SERVICES EDUCATION AND TRAINING**

**1 August 2014 – 31 July 2017 REVISED**

### **FUNDING AGREEMENT**

**between**

**(i) the Secretary of State for Education (acting through  
the Education and Skills Funding Agency)**

**and**

**(ii) [Provider Name]**

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Schedule 1

## Terms and Conditions

This Contract is made this 1st Day of August 2016 between:

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CONTRACTOR REGISTERED NAME  
AND ADDRESS

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

AND

Hereinafter called  
the Contractor

Hereinafter called  
the ESFA

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## GENERAL TERMS AND CONDITIONS

It is agreed as follows.

### 1. Definitions

<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>“Child”</b>	means a person under the age of 18.
<b>“Combined Authority”</b>	means a legal structure comprising two or more local authorities to undertake certain statutory or delegated functions.
<b>“Confidential Information”</b>	means any information, including Personal Data as defined by the Data Protection Act 1998, 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>“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>“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, any and all Local Authority or Combined Authority bodies.
<b>“Data Protection Laws”</b>	means the Data Protection Act 1998 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, if and when it is in force, the General Data Protection Regulation (EU) 2016/679 or similar and any codes of practice, guidelines and recommendations issued by the Information Commissioner, any replacement body or other relevant supervisory authority, all of which are current at the time of any Data processing by the Service Provider (and in the event of any conflict between the Data Protection Laws and Law, Data Protection Laws shall take precedence).
<b>“Devolution Agreement”</b>	means the agreement between the Government and the Combined Authority devolving certain functions to the Combined Authority.
<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).

<p><b>“Expiry Date”</b></p>	<p>means</p> <p>(a) In relation to AEB Services 31 October 2017; and/or</p> <p>(b) In relation to non-levy Apprenticeship Services (where the Apprentice started on or after 1<sup>st</sup> May 2017), 31<sup>st</sup> December 2017; and/or;</p> <p>(c) In relation to Apprenticeships Services (where the Apprentice started before 1<sup>st</sup> May 2017) 31<sup>st</sup> July 2018; and/or</p> <p>(d) In relation to 16-18 traineeships, 31<sup>st</sup> July 2018</p> <p>Or in each case such later date as is notified in writing by the ESFA.</p>
<p><b>“FOIA”</b></p>	<p>means the Freedom of Information Act 2000 and all regulations made there from time to time or any superseding or amending enactment and regulations, and words and expressions defined in the FOIA shall have the same meaning in Clause 6.</p>
<p><b>“FOIA Notice”</b></p>	<p>means a decision notice, enforcement notice and/or an information notice.</p>
<p><b>"Funds"</b></p>	<p>means the monies paid by the ESFA to the Contractor pursuant to this Agreement and "<b>Funding</b>" shall have the same meaning</p>
<p><b>“Funding Rules”</b></p>	<p>means the documents which set out the detailed requirements with which the Contractor must comply in respect of each Learning Programme delivered under this Contract as may be amended by the ESFA from time to time; as follows.</p> <p>AEB Services (including 16 – 18 traineeships):  <a href="https://www.gov.uk/government/publications/adult-education-budget-funding-and-performance-management-rules-2017-to-2018">https://www.gov.uk/government/publications/adult-education-budget-funding-and-performance-management-rules-2017-to-2018</a></p> <p>Apprenticeship Services</p> <p>Non-levy apprenticeships  <a href="https://www.gov.uk/government/publications/apprenticeship-funding-and-performance-management-rules-2017-to-2018">https://www.gov.uk/government/publications/apprenticeship-funding-and-performance-management-rules-2017-to-2018</a></p> <p>Starts Pre May Apprenticeships  <a href="https://www.gov.uk/government/collections/sfa-funding-rules-2016-to-2017">https://www.gov.uk/government/collections/sfa-funding-rules-2016-to-2017</a></p>

<b>“High Needs Learner”</b>	means a Learner aged 16 to 18, or any young person aged 19 to 25 subject to an Education Health and Care Plan, who requires additional support.
<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 Higher Education Funding Council for England, and the Care Quality Commission (CQC).
<b>“Learner”</b>	means any third party including any student, apprentice, trainee or similar to whom the Contractor is required to deliver any of the Services.
<b>“Learner Files” / “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>“Local Enterprise Partnership (LEP)”</b>	means a formalised partnership between local authorities to determine local economic priorities and lead economic growth and job creation within its area.
<b>“Minor Breach”</b>	shall have the meaning given to it in Clause 21.2
<b>“Offender Management”</b>	means an officer from the National Offender Management Service who is working directly with an offender serving their sentence in the community.
<b>“OFSTED”</b>	means the Office for Standards in Education.
<b>“Parties”</b>	means the ESFA acting on behalf of the Crown and the Contractor.
<b>“Premises”</b>	means the location where the Services are to be performed, as detailed in the Contract.
<b>“Register of Apprenticeship Training Providers”</b>	means the register maintained by the ESFA of organisations qualified to receive Funding from the ESFA to deliver Apprenticeships from 1 May 2017.
<b>“Register of Training Organisations”</b>	means the register maintained by the ESFA of organisations qualified to receive Funding from the

	ESFA other than for Apprenticeships from 1 <sup>st</sup> May 2017
<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 ESFA, including, without limitation OfSTED.
<b>“Serious Breach”</b>	shall have the meaning given to it in Clause 21.3.
<b>“Services”</b>	means the services to be provided as set out in the Funding Rules and the Specification and the definition of Expiry Date.
<b>“Specification”</b>	means the documents setting out the ESFA’s requirements for the Services to be provided under this Contract.
<b>“Termination Date”</b>	means any date on which this Contract terminates in accordance with clause 22.

## **2. Commencement and Continuation**

- 2.1. The Contract shall commence on 1 August 2016.
- 2.2. Subject to clause 2.3 the Contract shall expire on the relevant Expiry Date for the respective Service, or in the event of earlier termination the Termination Date.
- 2.3. The ESFA may extend the Contract for such a period or periods as may be necessary for Learners recruited by the Contractor prior to the relevant Expiry Date, to complete their Learning Programmes and where this provision is so exercised by the ESFA a new Expiry Date for that Service shall be notified by the ESFA in writing and the definition of Expiry Date shall be updated accordingly.

## **3. Contract Management**

- 3.1. The ESFA and the Contractor will each nominate a contact for the purpose of dealing with queries and issues under this Contract and advise the other of the contact details.



- 3.2. The Contractor must ensure appropriate members of staff register as users on the user role management system at [https://secure2.imservices.org.uk/self\\_registration/](https://secure2.imservices.org.uk/self_registration/) to enable the Contractor to digitally sign and agree the Contract online. It is the Contractor's responsibility to maintain appropriate user roles on an on-going basis.

#### **4. Service Delivery**

- 4.1. The Services to be delivered under this Contract are the delivery of the Learning Programmes as set out in Appendix 1, the Summary of Programme Funding. The detailed requirements in respect of each Learning Programme are set out in the Funding Rules as amended from time to time by the ESFA and which for the avoidance of any doubt form part of the terms and conditions of this Contract.
- 4.2. The Services are to be delivered in accordance with the specific requirements of the ESFA, any tender document submitted by the Contractor and the Supporting Documentation as attached at Appendix 1 which sets out the activity and/or scheduled payment profiles for the Services agreed by the Parties, which all form part of the terms and conditions of the Contract.
- 4.3. The Contractor must provide evidence that it has worked in partnership with the LEP to ensure that the delivery of the Services takes account of the LEP's local economic and skills priorities. Where the Contractor is delivering in an area covered by a Devolution Agreement, the Contractor must work with the Combined Authority and the delivery of the Services must take account of the Combined Authority's priorities for education and skills.

#### **5. Assignment and Sub-Contracting**

- 5.1. Where the Contractor sub-contracts or intends to sub-contract any duties or obligations arising out of this Contract, the Contractor must provide the ESFA with details of all sub-contractors bi annually by fully and accurately completing the Declaration of Subcontractors form in accordance with the deadline set out in the Funding Rules. If the Contractor is not sub-contracting then a nil return must be received by the deadline date. The Contractor must notify the ESFA of any within year changes to its sub-contractors. The ESFA reserves the right to require the Contractor not to enter into, or to terminate, any sub-contract to deliver the Services under this Contract.
- 5.2. The Contractor must comply with the requirements on sub-contracting delivery of the Services set out in the ESFA's Funding Rules as amended and updated. Sub-contracting any part of the Contract shall not relieve the Contractor of any obligation or duty attributable to him under the Contract or these conditions. The Contractor is responsible for all the actions of its sub-contractors connected to or arising out of the delivery of the Services which it sub-contracts.

- 5.3. Services under this Contract may only be sub-contracted to one level unless otherwise specified in the Funding Rules when the Contractor must obtain the consent of the ESFA in writing.
- 5.4. Where the Contractor has sub-contracted any duties or obligations arising out of this Contract, the Contractor shall ensure that there is in place a legally binding sub-contract and send copies of the sub-contract to the ESFA if requested in writing to do so. Where the Contractor enters into a sub-contract for the purpose of performing the Contract, the Contractor shall ensure that the sub-contract includes any terms specified in the Funding Rules.
- 5.5. The Contractor shall ensure that any sub-contract entered into for the purpose of delivering the Services under this Contract contains a term providing that the ESFA has the right to enforce the terms of the sub-contract.
- 5.6. The Contractor shall ensure that sub-contractors are selected fairly and have sufficient capacity, capability, quality and financial standing to deliver the Services.
- 5.7. The Contractor shall make payment to any sub-contractor within 30 days of receiving a valid claim for payment and ensure that any sub-contract entered into for the purpose of delivering the Services under this Contract contains a term giving effect to this requirement.
- 5.8. The Contractor may not assign any rights, duties or obligations under this Contract without the consent of the ESFA.
- 5.9. The Contractor must notify the ESFA in writing if there is a change in its name at least one month prior to the change taking effect
- 5.10. The Contractor must notify the ESFA in writing if there is a change in its ownership at least 12 weeks prior to the change taking effect
- 5.11. The Contractor shall not without the prior written consent of the ESFA assign, novate or otherwise dispose of or deal in any other manner with (including by means of a change in ownership of the Contractor) any or all of its rights, obligations or liabilities under this Contract. The Contractor shall give the ESFA at least 12 weeks' notice of any such plans. The ESFA reserves the right to take whatever actions it deems necessary, including but not limited to terminating the Contract if it considers in its absolute discretion that any, or any proposed, assignment, novation, disposal or other dealing, including any change in ownership of the Contractor, may or would:
  - a. put public funds at risk,
  - b. put at risk the delivery of the Services to students, and/or

- c. The ESFA has any other material concerns about the proposed assignment, novation, disposal or other dealing.
- 5.12. The Contractor must consider the criteria set out in the Funding Higher-risk Organisations and Sub-Contractors document which is published on The ESFA's website  
<https://www.gov.uk/government/publications/sfa-financial-assurance-higher-risk-providers-and-subcontractors#history>.

## **6. Freedom of Information and Confidentiality**

### **6.1. Freedom of Information**

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

6.1.2. The Contractor acknowledges and agrees that the ESFA is required by law to consider each and every request made under FOIA for information.

6.1.3. The Contractor acknowledges and agrees that all decisions made by the ESFA pursuant to a request under FOIA are solely a matter for and at the discretion of the ESFA.

6.1.4. Notwithstanding anything in this Contract to the contrary (including without limitation any obligations of confidentiality), the ESFA shall be entitled to disclose information in whatever form pursuant to a request made under FOIA, save that in relation to any information that is Exempt Information the ESFA shall use reasonable endeavours (but shall not be obliged) to consult the Contractor and shall not:

a) confirm or deny that information is held by the ESFA;

or

b) disclose information requested

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

6.1.5. In relation to information relating to the Contractor or the Contract which the Contractor requests should be exempt under the FOIA. the

Contractor shall indemnify the ESFA for any and all costs (including legal fees) incurred by the ESFA in:

- a) assessing the application of any exemption under FOIA; and/or
- b) responding to any FOIA notice; and/or
- c) lodging any appeal against a decision of the Information Commissioner in relation to disclosure

where such costs are incurred pursuant to efforts by the ESFA to withhold Exempt Information.

6.1.6. The ESFA shall in no event be liable for any loss, damage, harm or detriment, howsoever caused, arising from or in connection with the disclosure under FOIA of any Exempt Information or other information whether relating to this Contract or otherwise relating to the Contractor.

6.1.7. The Contractor shall assist the ESFA as reasonably necessary to enable the ESFA to comply with its obligations under FOIA.

## 6.2. Confidentiality

The Contractor hereby warrants that:

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

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

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

6.4. The provisions of Clauses 6.1 and 6.2 shall not apply to any information:

6.4.1. which is or becomes public knowledge (other than by breach of Clauses 6.1 and 6.2);

6.4.2. which was in the possession of the receiving party, without restriction

as to its disclosure, before the date of receipt from the disclosing party;

- 6.4.3. which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the party making the disclosure, including any requirements for disclosure under FOIA or the Environmental Information Regulations.
- 6.5. Nothing in this Clause 6 shall be deemed or construed to prevent the ESFA from disclosing any Confidential Information obtained from the Contractor:
  - 6.5.1. to any other Crown Body;
  - 6.5.2. to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
  - 6.5.3. to any professional adviser, consultant, contractor or other person engaged by the ESFA directly in connection with this Contract, provided that such information is treated as confidential by the receiving consultant, contractor or any other person;
  - 6.5.4. on a confidential basis to any proposed successor body in connection with any assignment disposal of its rights, obligations or liabilities under this Contract.
- 6.6. In order to ensure that no unauthorised person gains access to any Confidential Information or any data obtained in the course of the Services, the Contractor undertakes to maintain adequate security arrangements that meet the requirements of professional standards and best practice.
- 6.7. The Contractor will immediately notify the ESFA of any breach of security in relation to Confidential Information and all data obtained in the course of the Services and 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 ESFA in any investigation that the ESFA considers necessary to undertake as a result of any breach of security in relation to Confidential Information or data.
- 6.8. The Contractor shall, at its own expense, alter any security systems at any time during the Contract Period at the ESFA's request if the ESFA reasonably believes the Contractor has failed to comply with Clause 6.6.
- 6.9. The ESFA reserves the right to publish details of this Contract and the payments made under it to comply with the Government's transparency requirements.
- 6.10. The provisions of this Clause 6 will apply for the duration of the Contract and after its termination.

## **7. Equality of Opportunity**

- 7.1. The Contractor shall not unlawfully discriminate within the meaning and scope of the provisions of the Equality Act 2010 or any statutory modification or re-enactment thereof or any other statutory provision relating to discrimination in employment or the provision of Services. The Contractor shall take all reasonable steps to ensure the observance of these provisions by all servants, employees or agents of the Contractor and all Sub-Contractors employed in the execution of the Contract. The Contractor will comply with the detailed requirements in relation to equality of opportunity set out in Clauses 7.2 to 7.4.
- 7.2. The Contractor will, in delivering the Services under this Contract, demonstrate that it has had regard to the duties placed on the ESFA and the Contractor by the Equality Act 2010. The Contractor 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 employed to deliver the Services.
- 7.3. The Contractor shall ensure that equality of opportunity is built into all aspects of the Services; the business planning process; and the self-assessment process. The Contractor shall use analysis of data to inform future planning to improve the representation, participation and success of underrepresented and underachieving groups and challenge stereotyping. The Contractor shall use appropriate, specific and measurable objectives. These will be proportionate, relevant and aligned to the Services the Contractor is funded to deliver.
- 7.4. The ESFA may use a variety of equality information and data to support judgements about quality and eligibility for Funding. These may include, but are not limited to: inspection judgements for equality and diversity, judgements from the Equality and Human Rights Commission, and the success and participation rates of different groups of Learners.

## **8. Learner Health, Safety & Welfare**

- 8.1. The Contractor shall ensure so far as reasonably practicable that learning takes place in safe, healthy and supportive environments, which meet the needs of Learners. The Contractor shall provide information to the ESFA, as and when specifically requested, to give assurance that adequate arrangements exist for Learner Health, Safety and Welfare.
- 8.2. Where part of the learning takes place in an environment outside the direct control of the Contractor, the Contractor shall take all reasonable steps to ensure that adequate arrangements are in place to ensure the health and safety of Learners.

- 8.3. The Contractor shall make arrangements for ensuring that the Services are provided with a view to safeguarding and promoting the welfare of Children receiving education or training at the institution or under the auspices of the Contractor in an environment outside the direct control of the Contractor. In doing so, the Contractor shall have regard to any guidance published, from time to time, by the Secretary of State for Education which sets out the expectations in relation to safeguarding practice within further education institutions. References to 'must' in any such guidance shall be treated as 'should' for the purposes of this Agreement, save for any references to legal requirements arising from the Safeguarding Vulnerable Groups Act 2006 in respect of referrals to the Disclosure and Barring Service. Failure to do so may constitute a Serious Breach of this Contract.
- 8.4. The Contractor shall make arrangements for ensuring that the Services are provided with a view to safeguarding and promoting the welfare of High Needs Learners aged 18 to 25 receiving education or training at their institution or under the auspices of the Contractor in an environment outside the direct control of the Contractor. This must include the adoption of safer recruitment procedures. In doing so, the Contractor shall make those arrangements as if such Learners were Children and 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 shall be treated as 'should' for the purposes of this Agreement, save for any references to legal requirements arising from the Safeguarding Vulnerable Groups Act 2006 in respect of referrals to the Disclosure and Barring Service. Failure to do so may constitute a Serious Breach of this Contract.
- 8.5. The Contractor must carry out appropriate disclosure and barring service checks on all overseas applicants for employment where such applicants would be employed to work in regulated activity relating to Children or vulnerable adults (as defined by the Safeguarding Vulnerable Groups Act 2006) if successful, and must seek additional information about an applicant's conduct.
- 8.6. In working with other organisations/bodies, the Contractor shall make arrangements to co-ordinate and co-operate effectively for reasons of Learner health, safety and welfare. In particular, respective responsibilities shall be clearly identified and documented as appropriate, to ensure understanding.
- 8.7. In providing the Services, the Contractor must ensure it actively promotes the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs, and promote principles that support equality of opportunity for all.

- 8.8. In providing the Services, the Contractor must comply with the general duty on specified authorities in section 26 of the Counter-Terrorism and Security Act 2015 (the Prevent duty) and the duty on partners of a panel in section 38 of the Counter-Terrorism and Security Act 2015 (the Channel co-operation duty). In doing so, the Contractor will act in accordance with any guidance issued by the Secretary of State in respect of these duties. Failure to do so may constitute a Serious Breach of this Contract.
- 8.9. The Contractor shall not employ or engage, or continue to employ or engage, any person who is subject to a prohibition order made under section 141B of the Education Act 2002 to carry out teaching work (as defined in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012) 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).
- 8.10. Before employing or engaging a person to carry out teaching work in respect of any Learners under the age of 19 and High Needs Learners aged 19 to 25 (as if those Learners were pupils for the purposes of the definition of teaching work in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012), the Contractor shall take reasonable steps to ascertain whether that person is subject to a prohibition order made under section 141B of the Education Act 2002.
- 8.11. The Contractor shall, in circumstances where it sub-contracts the management and/or delivery of the Services under this Contract, ensure that all the provisions in respect of Learner Health, Safety and Welfare in this Clause 8 are included in its contract with Sub-Contractors.
- 8.12. The Contractor shall inform the ESFA of the death of any Learner which is a result of work undertaken whilst in employment and who is undertaking a related Learning Programme. This shall be done by informing the ESFA's representative by telephone or email immediately upon the Contractor becoming aware of the event.
- 8.13. The Contractor shall report all RIDDOR reportable incidents in line with the Regulations, and shall investigate or assess the circumstances of all Learner incidents within the scope of RIDDOR and follow HSE guidance 'Investigating accidents and incidents: A workbook for employers, unions, safety representatives and safety professionals' (HSG245) ISBN 0717628272. The Contractor shall only use persons competent to investigate/assess Learner incidents with a view to identifying the causes of any incident and lessons to be learned.
- 8.14. The Contractor shall also monitor, and act on, any other harm to Learners to the extent that the Contractor could reasonably be expected to do so and/or where the harm could affect the quality of the learning experience. Harm



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

- 8.15. The Contractor shall co-operate with the ESFA and Department for Work and Pensions for the purposes of the Industrial Injuries Disablement Benefit (IIDB) in respect to those Learners to which it applies.
- 8.16. The Contractor and/or the Contractor Related Parties must be able to demonstrate that they have robust record-keeping procedures in respect of health, safety and safeguarding through checks on record keeping undertaken. Failure to do so will constitute a Serious Breach.
- 8.17. Where the Contractor makes a referral to any Local Authority (including referrals to social services) in respect of serious safeguarding concerns (in respect of all Learners up to the age of 18, High Needs Learners aged 19 to 25), the Contractor shall ensure that it notifies the ESFA that a referral has been made.
- 8.18. Where the Contractor makes a referral of an individual for the purposes of determining whether that individual should be referred to a panel for the carrying out of an assessment under section 36 of the Counter-Terrorism and Security Act 2015 of the extent to which that individual is vulnerable to being drawn into terrorism, the Contractor shall ensure it notifies the ESFA that a referral has been made.
- 8.19. Where the Contractor has made a referral or provided information to the Disclosure and Barring Service in compliance with any duties of the Body under the Safeguarding Vulnerable Groups Act 2006, the Contractor shall ensure that it informs THE ESFA that a referral has been made / information has been provided.

## **9. Liability**

- 9.1. The Contractor shall indemnify and keep indemnified the ESFA, their servants, employees, and agents against all loss, damage or liability (whether civil or criminal), claims, demands, costs and expenses incurred by or made against the ESFA, their servants, employees, or agents in respect of any loss or damage or personal injury (including death) which arises out of or in the course of or caused by the negligent act or omission or wilful default of the Contractor, their servants or agents in the delivery of the Service except to the extent (if any) that it was also caused or contributed to by the negligent act or omission or wilful default of the ESFA or their servants or agents.
- 9.2. The Contractor warrants to the ESFA that to the best of its knowledge and belief all works carried out under the Contract will not infringe, in whole or in part, any copyright or any other intellectual property right of any person and

agrees to indemnify the ESFA against any and all claims, demands, proceedings, expenses and losses, including any of a consequential nature, arising directly or indirectly out of any act of the foregoing in relation to any works, where such an act is, or is alleged to be, an infringement of a third party's copyright or other intellectual property right. This warranty and indemnity shall survive the termination of the Contract and shall exist for the life of the copyright or other intellectual property right.

- 9.3. The liability of the Contractor under this clause shall not exceed twice the value of the Contract or £1,000,000 whichever is the greater save that this limit shall not apply to claims in respect of death or personal injury.
- 9.4. The ESFA reserves the right to require the Contractor to secure the provision of an appropriate guarantee in respect of the Contractor's liabilities under this Contract.

## **10. Insurance**

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

## **11. Limitation of Liability**

- 11.1. The ESFA shall not be liable to the Contractor for any indirect or consequential loss, damage, injury or costs whatsoever.

## **12. Access and Monitoring**

- 12.1. The ESFA shall give the Contractor reasonable advance notice in writing of proposed visits to the Contractor or its sub-contractors, to observe the delivery of the Services, by any person who has taken or will take no direct part in the conduct or content of the Services.
- 12.2. For monitoring and evaluation purposes, the ESFA or their representatives, the Secretary of State or their representatives, the National Audit Office, Representatives of the European Commission and the European Court of Auditors, the Inspectorates and HM Treasury shall have the right to visit all or any site(s) and view operations relating to the Services and to inspect relevant documents and interview Learners and the Contractor's staff during these visits in order to:

- a) examine, audit or take copies of any original or copy documentation, accounts, books and records of the Contractor and its sub-contractors that relate to the Contract;
- b) visit, view or assess the design, management and delivery relating to the Contract at any Premises where those operations are carried out (including those of sub-contractors) and conduct relevant interviews, including interviews with Learners, during these visits at any reasonable time;
- c) carry out examinations into the economy, efficiency and effectiveness with which the Contractor has used the ESFA's resources in the performance of the Contract.

12.3. The Contractor shall, if required by any of the representatives stated at Clause 12.2 provide appropriate oral or written explanations.

12.4. The ESFA reserves the right, at any reasonable time, and as it may deem necessary to require the Contractor at its own cost to:

12.4.1. provide evidence of financial resources and the level of turnover sufficient to enable it to continue to perform the Contract;

12.4.2. provide such assurance as the ESFA may require that the delivery of the Services complies with the requirements of the Contract;

12.4.3. obtain a report by an independent accountant of the ESFA's choice on;

12.4.3.1. the financial systems and controls operated by the Contractor or its subcontractors;

12.4.3.2. the accuracy and regularity of Funding claims in respect of payments claimed or received under the Contract;

12.4.3.3. the evidence held by the Contractor or its Sub-Contractors to support delivery of the Services in accordance with the terms of the Contract

The Contractor must agree the instructions for the work with the ESFA. The report and the work required in order to produce the report shall be carried out to the satisfaction of the ESFA, and the ESFA must be able to place reliance on it. The Contractor shall provide a copy of the interim and final report to the ESFA as soon as they are available. The ESFA reserves the right to require the Contractor to publish the report.

- 12.4.4. provide a copy of the Contractor's latest audited Accounts and submit further copies of the audited Accounts as they become available;
  - 12.4.5. submit any claim for payment or management information provided to support a claim for payment to be audited by an independent auditor chosen by the ESFA;
  - 12.4.6. provide any additional evidence to support payments made under this Contract, as the ESFA shall reasonably require.
- 12.5. The Contractor shall in performing the Services comply fully with all relevant rules and regulations of the ESFA in force from time to time especially when on the ESFA's premises.
- 12.6. In addition to the other requirements to provide information set out in this Contract the ESFA reserves the right to request information from the Contractor in order to exercise its responsibilities and/or to fulfill requirements to provide information to the Secretary of State, to account to Parliament and to meet European funding requirements. On occasion, the ESFA will require urgent information from the Contractor.
- 12.7. The Contractor shall provide the ESFA or agents acting on its behalf with the information it requires under clause 12.6 at the times and in the formats specified. This information shall be of sufficient quality to meet the purposes for which it has been requested.
- 12.8. Failure to comply with any request for information under clause 12.6, at all or in the required timescales, will constitute a Minor / Serious Breach of this Contract.

### **13. Funding and Payment**

- 13.1. Subject to clause 13.2 and in consideration of the Contractor delivering the Services in accordance with clause 4, the ESFA agrees to pay the Contractor the amounts set out in Appendix 1 ("the Maximum Contract Value") and such payments are to be made in accordance with the Funding Rules, on condition that the Contractor delivers the Services in accordance with the terms and conditions of the Contract.
- 13.2. Payment will not be made in accordance with clause 13.1 where the ESFA has reasonably concluded that the Contractor is at serious risk of failure to deliver the Services following a review of the quality of the Services by the ESFA.
- 13.3. In the event that the Contractor exceeds its Maximum Contract Value without the prior express authorisation of the ESFA it does so at its own risk. There is no obligation on the ESFA to make any payment in excess of the Maximum

Contract Value unless this has been specifically authorised by the Agency in accordance with clause 13.4, 13.5 or otherwise.

- 13.4. The Maximum Contract Value may be varied by the ESFA in accordance with the Funding Rules. Any such variation may result in a reduction or an increase in the Maximum Contract Value, in accordance with the Funding Rules. Any such variation will take effect only when notified by the ESFA and Appendix 1 shall be updated accordingly to reflect the variation.
- 13.5. Where the ESFA identifies that the Contractor is failing to deliver the value of learning of this Contract it reserves the right in its absolute discretion to reduce the Maximum Contract Value for that Learning Programme.
- 13.6. The ESFA will restrict delivery of this Contract against the Maximum Contract Value as detailed in Appendix 1 up to the Expiry Date. Appendix 1 confirms the Maximum Contract Value available up to 31 March 2018. Where the delivery of the Services within this financial year fails to meet the minimum levels of performance over that period or where the delivery in this period would result in the overall Maximum Contract Value being exceeded, the ESFA reserves the right at its absolute discretion to vary the Maximum Contract Value accordingly.
- 13.7. In delivering the Services to Learners starting on a Learning Programme on or after 1 May 2017 the ESFA reserves the right to give at least 8 weeks' notice in writing of its intention to cease funding for any new Learners recruited on a Learning Programme from the date specified in the notice. The ESFA will not be liable to make payments in respect of any Learners recruited after the date specified in the notice.
- 13.8. The ESFA reserves the right to give three months' notice to reduce the Maximum Contract Value without the need to give a reason.
- 13.9. Payment by the ESFA shall be without prejudice to any claims or rights, which the ESFA may have against the Contractor and shall not constitute any admission by the ESFA as to the performance by the Contractor of its obligations hereunder. Prior to any such payment, the ESFA shall be entitled to make deductions or deferments in respect of any disputes or claims whatsoever with or against the Contractor, arising from this Contract or any other Contract between the Contractor and the ESFA.
- 13.10. Where the ESFA carries out a review, investigation or audit of a sample of the evidence which the Contractor is required to provide under the Contract to support the payments made by the ESFA and identifies errors in that evidence which it deems are material, the ESFA reserves the right at its absolute discretion to require the Contractor to carry out 100% audit of all or part of the Services and/or to recover from the Contractor an amount based on the error rate identified and the total value of the Contract. Such amounts may be

recovered by making adjustments to data submitted by the Contractor under the Contract, or by raising an invoice for payment by the Contractor, or making deductions from future payments due to the Contractor under the Contract. Failure to settle such amounts by the Contractor will constitute a Serious Breach under Clause 21 of the Contract. The decision of the ESFA as to the amount of recovery under this Clause is final.

13.11. All payments by the ESFA will be made via BACS.

13.12. The ESFA is generally unable to recover any Value Added Tax charged. The maximum sum payable under this Contract, as set out in Appendix 1 includes the cost of the service and any other VAT or taxes to be charged, where they apply.

13.13. Under the provision of Item 5A to Group 6 of Schedule 9 of the VAT Act 1994, the supply of education or vocational training funded by the ESFA and the supply by the person providing that education or vocational training, of any goods or services essential to that provision, is considered to be an exempt supply for VAT purposes.

#### **14. Review of Contractual Performance and Reconciliation of Contracts**

14.1. Where the Contractor receives profile payments from the ESFA, payments will be reconciled to cash earned by actual delivery of the Services or the period to the timetable published in the Funding Rules.

14.2. Where the Contractor's actual delivery, as against the Maximum Contract Value, will result or has already resulted in an overpayment to the Contractor by the ESFA, the ESFA will withhold from, or deduct the amount owed from, payments due to the Contractor under the Contract for current or subsequent months or years accordingly.

14.3. Where the Contractor's actual delivery, as against the Maximum Contract Value, has resulted in an underpayment to the Contractor by the ESFA, the ESFA will adjust the amount due to the Contractor accordingly. This adjustment shall not exceed the Maximum Contract Value as set out in Appendix 1 of this Contract.

14.4. Should there be an under or over payment to the Contractor, the ESFA will consider the underlying causes for that, in accordance with the Funding Rules and, may at its absolute discretion require a Contract variation to amend the Maximum Contract Value.

14.5. A Contract review will take place at the end of the period of this Contract in respect of the Services specified in Appendix 1 of this Contract. The ESFA will notify the Contractor of the actual amount of money, which has been earned against the Services delivered, and compare this to the total profile

payments made and to the overall maximum value specified in Appendix 1. At this stage final cash reconciliation will take place. Any overpayment made to the Contractor by the ESFA will be repayable within 30 days of receiving an invoice. The ESFA reserves the right to set off any amounts owing due to the Contractor under any other contract it has with the ESFA. The ESFA will pay any outstanding monies owed, up to the Maximum Contract Value as specified in Appendix 1 of this Contract, within 30 days of final reconciliation being completed.

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

## **15. Prohibited Activities**

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

## **16. Data Protection and Protection of Personal Data**

- 16.1. The Parties shall ensure that information acquired by the Parties and Sub-Contractors in the delivery of this Contract will at all times comply with the Data Protection Laws, and all personal data acquired by either party from the other shall be returned to the disclosing party on request. Both Parties hereby acknowledge that performance of a duty imposed by the Data Protection Laws shall not constitute a breach of any obligation in respect of confidentiality which may be owed to the other party. The clause shall not affect the ESFA's ability to make a search with a credit reference agency.

16.2. With respect to the Parties' rights and obligations under this Contract the Parties agree that the ESFA is the Data Controller and the Contractor is the Data Processor within the meaning of the Data Protection Laws, as amended from time to time.

16.3. The Contractor shall:

16.3.1. process Personal Data only in accordance with the instructions from the ESFA (which may be specific instructions or instructions of a general nature as set out in the Contract or otherwise notified by the ESFA to the Contractor during the term of the Contract);

16.3.2. process the Personal Data only to the extent and in such manner as is necessary for the provision of the Services or as is required by Law or any Regulatory Body;

16.3.3. implement appropriate technical and organisational measures to protect the Personal Data against unauthorised or unlawful processing and against accidental loss, destruction, damage, alteration or disclosure. These measures shall be appropriate to the harm which might result from any unauthorised or unlawful Processing, accidental loss, destruction or damage to the Personal Data and having regard to the nature of the Personal Data which is to be protected;

16.3.4. take reasonable steps to ensure the reliability of any Contractor Personnel who have access to the Personal Data;

16.3.5. obtain prior written consent from the ESFA in order to transfer the Personal Data to any Sub-Contractor or other third parties for the provision of the Services;

16.3.6. ensure that all Contractor Personnel do not publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by the ESFA;

16.3.7. notify the ESFA within 5 working days if it receives:

16.3.7.1. a request from a Data Subject (meaning an individual who is the subject of Personal Data), to have access to that person's Personal Data; or

16.3.7.2. a complaint or request relating to the ESFA obligations under the Data Protection Laws;



- 16.3.8. provide the ESFA with full co-operation and assistance in relation to any complaint or request made, including by:
  - 16.3.8.1. providing the ESFA with full details of the complaint or request;
  - 16.3.8.2. complying with a data access request within the relevant timescales set out in the Data Protection Laws and in accordance with the ESFA's instructions;
  - 16.3.8.3. providing the ESFA with any Personal Data it holds in relation to a Data Subject (within the timescales required by the ESFA); and
  - 16.3.8.4. providing the ESFA with any information requested by them or their representatives.
- 16.3.9. permit the ESFA or the ESFA's representative (subject to reasonable and appropriate confidentiality undertakings), to inspect and audit the Contractor's Data Processing (within the meaning of the Data Protection Laws) activities (and/or those of its agents, subsidiaries, and sub-contractors) and comply with all reasonable requests or directions by the ESFA to enable the ESFA to verify and or procure that the Contractor is in full compliance with its obligations under this Contract;
- 16.3.10. provide a written description of the technical and organisational methods employed by the Contractor for processing Personal Data (within the timescales required by the ESFA); and
- 16.3.11. provide the ESFA with information about how the Learner Files are stored including details of the location where the Learner Files are kept and the arrangements for their security. the Contractor is required to notify the ESFA of any changes to this information
- 16.3.12. not Process Personal Data outside the European Economic Area without the prior written consent of the ESFA and, where the ESFA consents to a transfer, to comply with:
  - 16.3.12.1. the obligations of a Data Controller (within the meaning of the Data Protection Laws as maybe amended from time to time), under the Eighth Data Protection Principle set out in Schedule 1 of the Data Protection Act 1998 by providing an adequate level of protection to any Personal Data is transferred; and
  - 16.3.12.2. any reasonable instructions notified to it by the ESFA.

- 16.4. Where the Contractor is providing the Services to Learners claiming out of work benefits, the Secretary of State for Work and Pensions (or their successor) is the Data Controller in relation to Personal Data which the Contractor is required to provide to the Secretary of State for Work and Pensions. This Clause 16 will be enforceable by the Secretary of State for Work and Pensions in relation to any Personal Data processed by the Contractor on their behalf.
- 16.5. Where the Contractor is providing the Service to Learners who are subject to active management by the Offender Manager in respect of an order or licence, the Secretary of State for Justice (or their successor) is the Data Controller in relation to Personal Data which the Contractor is required to provide to the Secretary of State for Justice.

## **17. Submission of Learner Data**

- 17.1. The Contractor must supply the ESFA data on each individual learner, in accordance with the data collections framework set out in the 'ILR specification validation rules and appendices 2017 to 2018' as amended and updated, which is published on the ESFA's website <https://www.gov.uk/government/publications/ilr-specification-validation-rules-and-appendices-2017-to-2018> in accordance with the '*Provider Support Manual*' as amended and updated.
- 17.2. The Contractor must supply the ESFA with data in accordance with the following:
- 17.2.1. in line with agreed audit arrangements;
  - 17.2.2. in adherence with the Data Protection Laws;
  - 17.2.3. to support payments to be made;
  - 17.2.4. to enable reconciliation to take place; and
  - 17.2.5. to support the contract management and allocation processes.
- 17.3. Data collected must be transmitted to the ESFA through the ESFA's web portal <https://www.gov.uk/government/publications/ESFA-the-hub> . Access to the ESFA's web portal is restricted and the Contractor agrees to comply with the conditions of use regarding the supply of data to the ESFA set out in this Clause 17 and in 'Individualised Learner Record Specification 2017/16 and relevant Provider Support Manual as amended and updated available on the ESFA's web site (<https://www.gov.uk/government/publications/ilr-specification-validation-rules-and-appendices-2017-to-2018>)

- 17.4. Where the ESFA is concerned about the quality of the data, including the completeness or accuracy of the data, provided by the Contractor, the ESFA may require the Contractor to supply data more frequently for such a period as the ESFA shall require.
- 17.5. The ESFA reserves the right to require the Contractor, at its own cost, to carry out such work as the ESFA deems necessary to improve the quality of data.
- 17.6. The ESFA reserves the right to suspend payments to the Contractor under the Contract where data quality gives rise to concern about the accuracy of the data provided by the Contractor.
- 17.7. Failure to transmit complete and accurate data to the ESFA in accordance with this Clause 17 will constitute a Serious Breach of Contract in accordance with Clause 21 of the Terms and Conditions of the Contract.
- 17.8. Where the Contractor is providing the Services to Learners claiming out of work benefits, it must provide data to the Secretary of State with responsibility for unemployment or their nominated representative in accordance with the requirements notified to the Contractor. Failure to transmit complete and accurate data under this Clause 17 will constitute a Serious Breach of Contract in accordance with Clause 21 of the General Terms and Conditions of the Contract and may result in payments for this part of the Services to be delayed or withheld.
- 17.9. The Contractor must update the course information funded by the ESFA at [www.coursedirectoryproviderportal.org.uk](http://www.coursedirectoryproviderportal.org.uk) in accordance with the course directory data requirements which can be found at <https://coursedirectoryproviderportal.org.uk/Help>.
- 17.10. The Contractor shall register with UKRLP and maintain contact details on an on-going basis. (<http://www.ukrlp.co.uk/>).
- 17.11. The Contractor must submit data about any member of its workforce delivering GCSE English and Maths in the format and to the timescales as required by the ESFA.

## **18. Quality Assurance and Raising Standards**

- 18.1. The Contractor undertakes to the ESFA that it has the resources and skills necessary to carry out the Contractor's obligations pursuant to this Contract.
- 18.2. The Contractor shall comply with the Performance Management Rules published by the ESFA as amended from time to time and any other requirements, which may from time to time be issued by the ESFA, OFSTED,

the awarding organisations and other Regulatory Bodies and of which the Contractor is made aware.

- 18.3. The Contractor shall ensure that all activities carried out pursuant to this Contract shall be documented in accordance with the requirements of the ESFA and shall provide such documentation to them as the ESFA shall request from time to time.
- 18.4. The Contractor shall continuously seek to improve the Services and raise standards to benefit the Learner. The Contractor shall have the primary responsibility for improving standards and will need to demonstrate to the ESFA satisfaction that it has an effective quality assurance system based on the implementation of its own quality improvement process. The ESFA reserves the right to require the Contractor to provide the ESFA or OFSTED with evidence to support the quality improvement processes.
- 18.5. The Contractor shall use all reasonable endeavours to:
  - 18.5.1. minimise drop-out rates and deliver high completion and achievement rates and appropriate progression;
  - 18.5.2. meet the minimum quality standards published by the Department and / or the ESFA that apply to the appropriate Services purchased;
  - 18.5.3. ensure competent and appropriately qualified staff deliver and assess learning. The Contractor shall be responsible for the continuing professional development and training of its staff;
  - 18.5.4. offer equality of access to learning opportunities and close equality gaps in learning and outcomes;
  - 18.5.5. provide a safe, healthy and supportive environment, which meets the needs of Learners;
  - 18.5.6. provide good management and leadership of the learning process;
  - 18.5.7. deliver value for money and financial probity; and
  - 18.5.8. ensure all sub-contractors delivering Services under the Contract on behalf the Contractor comply with the requirements set out in 18.5.1 to 18.5.7 above.
- 18.6. The Contractor shall continuously seek to improve the Services and raise standards to benefit the Learner. The Contractor shall have the primary responsibility for improving standards and will need to demonstrate to the ESFA satisfaction that it has an effective quality assurance system based on

the implementation of its own quality improvement process. The ESFA reserves the right to require The Contractor to provide the ESFA or an Inspectorate evidence to support the quality improvement processes.

- 18.7. Failure to meet the requirements set out in clauses 18.5.1 to 18.5.8 may result in the ESFA assessing the Contractor to be in Serious Breach of the Contract under Clause 21 of the Contract.
- 18.8. The Contractor must take all reasonable steps to meet the relevant requirements for data gathering for the FE Choices Performance Indicators as outlined currently at <https://www.gov.uk/government/collections/fe-choices-information-for-providers> and in any subsequent updates to these web pages.
- 18.9. Where appropriate, the Contractor shall confirm in writing to the ESFA that their Centre Approval Status is still current. The written statement will need to confirm approved centre status for the specific Regulated Qualification Framework (RQF) titles and levels, including awarding body name(s). The Contractor must notify the ESFA immediately in writing if it receives any sanction from an awarding body.
- 18.10. The ESFA may assess the quality and delivery of the Services and the Contractor's compliance with the requirements in clause 18.5.1 to 18.5.8 during the term of the Contract. The Contractor will be informed of the outcome of that process. Where the ESFA assesses the Contractor to be in Serious Breach of Contract following such assessment the ESFA will issue a notice in accordance with Clause 21.9 of the Contract which may:
  - 18.10.1. require the Contractor to meet improvement indicators to improve the quality of its Services. The ESFA will meet with the Contractor to discuss and reach agreement on implementation of these actions and improvement indicators and to agree arrangements for monitoring and reviewing progress. In such cases reviews will take place at the frequency specified by the ESFA and in agreement with the Contractor;
  - 18.10.2. agree detailed improvement plans and measures that set out clearly the expected timescale for improvement;
  - 18.10.3. agree arrangements for more frequent monitoring of quality improvement plans.

### **Financial Health**

- 18.11. The ESFA will undertake a desk based assessment of financial health and control. Should the ESFA, at its absolute discretion, consider that the outcome of any financial health and/or control assessment is inadequate, the ESFA may, in its absolute discretion take one or more of the following actions:

- 18.11.1. require the Contractor to, and the Contractor shall, accept and comply with additional Contract obligations relating to the improvement of financial health and/or control arrangements;
  - 18.11.2. require the Contractor to suspend the recruitment of Students to the Services and/or cap any growth in Student numbers;
  - 18.11.3. give consideration to what changes, if any, are required in its allocations when finalising the amount of Funding in any subsequent Contract between the parties; and/or
  - 18.11.4. terminate in accordance with Clause 22.5.2
- 18.12. Where the Contractor fails to comply with requirements imposed under Clauses 18.11.1 and/or 18.11.2, the ESFA shall consider termination under Clause 22.5.3.

### **Ofsted Inspection**

- 18.13. The ESFA may at their discretion agree a programme of support for the Contractor to assist it in taking action to improve the quality of the Services.
- 18.14. When the Contractor receives notification from Ofsted that the Services are to be inspected, the Contractor shall on request provide the ESFA with details of its quality improvement activity, and any other relevant information in accordance with the required timescale of Ofsted. The Contractor must notify the ESFA of the date of the meeting at which Ofsted give feedback on the inspection and allow the ESFA's nominated representative to attend the meeting. The Contractor must confirm to the ESFA in writing the outcome of the inspection within 5 working days of receiving the feedback from Ofsted.
- 18.15. Ofsted may, at any time during the Term, undertake an inspection of the Contractor. The ESFA will consider the outcome of any such inspection as follows:

### **Inadequate in part**

- 18.15.1. Where Ofsted has assessed the Services to be inadequate in any sector specific areas, The ESFA may, in its absolute discretion take one or more of the following actions:
- 18.15.1.1. require the Contractor to accept and comply with additional Contract obligations relating to the improvement of the Services assessed as inadequate; and/or
  - 18.15.1.2. require the Contractor to suspend the recruitment of Learners to, and/or to cap any growth in, the Services which is assessed as inadequate; and/or

- 18.15.1.3. give consideration to the Services which are assessed as inadequate in its allocations when finalising the amount of Funding in any subsequent Contracts between the Parties; and/or
- 18.15.1.4. reduce, suspend or recover payment to the Contractor in respect of that part of the Services assessed as inadequate; and/or
- 18.15.1.5. terminate in accordance with Clause 22.5.5.

### **Inadequate overall**

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

- 18.15.2.1. require the Contractor to accept and comply with temporary additional Contract obligations relating to the improvement of the overall Services, including but not limited to, requiring the Contractor to temporarily suspend the recruitment of Learning and/or temporarily cap any growth in those Learning Programmes which are assessed as inadequate.
- 18.15.2.2. commence discussions with the Contractor and the Local Authority within whose area the Contractor is located, either with Ofsted or not, as part of considering what actions as specified in Clause 18.15.3.1–18.15.3.5 inclusive may be taken.

18.15.3. Where Ofsted has confirmed its assessment that the Services is inadequate overall, the ESFA may, in its absolute discretion take one or more of the following actions:

- 18.15.3.1. require the Contractor to accept and comply with additional Contract obligations relating to the improvement of the overall Services; and/or
- 18.15.3.2. require the Contractor to suspend the recruitment of Apprentices to, and/or to cap any growth in, those Learning Programmes which are assessed as inadequate; and/or
- 18.15.3.3. give consideration to the assessment of inadequate in its allocations when finalising the amount of Funding in any subsequent Contracts between the Parties; and/or
- 18.15.3.4. reduce, suspend or recover payment to the contractor; and/or

- 18.15.3.5. terminate this Contract in accordance with Clause 22.5.5 (Termination).
- 18.15.4. The failure of the Contractor, as assessed by the ESFA, to comply with any requirements of Clauses 18.15.3.1-18.15.3.3 inclusive within such time as the ESFA may deem reasonable may lead to the ESFA taking such actions as it deems appropriate which may include, but is not limited to, terminating in accordance with Clause 22.5.4 (Termination).
- 18.15.5. The ESFA will take action based on Ofsted's provisional and confirmed outcomes as in Clauses 18.15.2– 18.15.3 above. Where the ESFA is made aware that the Contractor has made a complaint about the graded outcome of the overall assessment by Ofsted, the ESFA will continue to progress action under Clauses 18.15.2 - 18.15.3 but will be mindful of the implications arising from the outcome of a complaint. The ESFA will review any decisions made at such time as outcomes of any complaint are made known.

### **Minimum standards**

- 18.16. The ESFA may, at any time during the Term, undertake an assessment of the quality and delivery of the Services which may include analysis of performance against the minimum quality standards, as published by the Department and / or the ESFA. Where the ESFA assesses that the Services, in whole or in part, fall below the required standards, the ESFA may, in its absolute discretion, take one or more of the following actions:
- 18.16.1. require the Contractor to accept and comply with additional Contract obligations relating to the improvement of the Services; and/or
- 18.16.2. require the Contractor to suspend the recruitment of Learners to, and/or to cap any growth in, those Learning Programmes which are identified as below the required standards; and/or
- 18.16.3. give consideration to the Services which are below the required standards in its allocations when finalising the amount of Funding in any subsequent Contracts between the Parties; and/or
- 18.16.4. reduce, suspend or recover payment to the contractor in respect of that part of the Services to which the failure to meet the required standards relate; and/or
- 18.16.5. terminate this Contract in accordance with Clause 22.5.6 (Termination) in full, or that part of the Services failing to meet the required standards.



18.17. The failure of the Contractor, as assessed by the ESFA, to comply with any requirements of Clauses 18.16.1 - 18.16.4 within such time as the ESFA may deem reasonable may lead to the ESFA taking such actions as it deems appropriate which may include, but is not limited to, terminating in accordance with Clause 22.5.6 (Termination).

18.18. Where the Contractor sub-contracts any part of the Services under this Contract, the Contractor must ensure that the Sub-Contractor is able to meet the minimum quality standards and any other quality threshold required by the ESFA or identified through an inspection by Ofsted. The ESFA may request evidence from the Contractor that the Services delivered by the sub-Contractor meet the requirements of the Contract.

18.19. The Contractor shall for those staff delivering the services be responsible for their professional development and training and meeting any legal requirements to ensure that they are appropriately qualified and trained.

## **19. Fraud and Irregularity**

19.1. The Contractor shall notify the ESFA immediately where it becomes aware of any instance of suspected fraud or financial irregularity in the delivery of the Contract including, but not limited to, cases of:

- 19.1.1. collusion with members of the staff of the ESFA or employees of the Department for Education;
- 19.1.2. computer fraud;
- 19.1.3. the submission to the ESFA of inaccurate, incomplete, misleading or falsified information for the purpose of a claim for Funding;
- 19.1.4. fraud involving awarding organisations; and
- 19.1.5. fraud involving sub-contractors;

provided that nothing in this Clause 19 shall require the Contractor to do anything, which may cause it to infringe any law.

19.2. Where the ESFA has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Contract and payments made hereunder, the ESFA shall have the right of access to the Contractor's premises at any reasonable time with or without notice to examine and remove or copy all relevant documents and records including electronic records and to interview the Contractor's servants or agents engaged with the delivery of the Contract.

- 19.3. Where the ESFA has reasonable cause to suspect that fraud or irregularity has occurred in relation to the delivery of the Contract or any other contract between the ESFA and the Contractor and payments made there under it shall have the right to suspend payments and/or require the Contractor to suspend recruitment of Learners under this Contract and any other Contract between the Parties.
- 19.4. The Parties shall co-operate in the identification of Learners who may be unlawfully claiming benefits. The ESFA may from time to time brief the Contractor as to the co-operation and assistance it reasonably requires including the provision of information regarding fraud by Learners. The ESFA shall provide a named contact or telephone answering machine for receiving such information.

## **20. European Funding and Other Sources of Funding**

- 20.1. Where notified in writing by the ESFA that the Funding under this Contract is required to be used as match funding:
- 20.1.1. The Contractor must follow the match funding rules that are set out in the ESFA's Funding Rules which include the use of the ESF logo.
- 20.1.2. The Contractor must not use the Funding paid under this Contract to support bids or claims that will be used to secure funding from any European source, either on its own behalf or on behalf of the ESFA, including but not limited to as match funding.
- 20.1.3. Where the Contractor or any of its sub-contractors has access to other funding streams, the Contractor or any of its sub-contractors will be required to demonstrate through accounting, management information systems and any other relevant evidence (in the sole discretion of the ESFA or any other body undertaking the audit or monitoring), to the ESFA and anybody set out in clause 12.2 that no double funding has occurred in respect of the Services delivered under the Contract.
- 20.1.4. Where the ESFA identifies double funding in respect of the Services, or any part thereof, the Contractor will be liable to repay to the ESFA any sums paid, or part thereof, by the ESFA in respect of the Services for which the Contractor has received funding from another source and the ESFA reserves the right to deduct such sums from any monies owed to the Contractor under the Contract or any subsequent Contract.

- 20.1.5. The ESFA reserves the right to use payments made under the Contract as match funding for ESF projects. Where requested to do so in writing by the ESFA, the Contractor shall provide such information and in the form as the ESFA specifies to enable the ESFA to comply with the requirements of ESF.
- 20.1.6. The Contractor shall inform Learners or others that the Services delivered have been financed in whole or part by ESF.
- 20.2. The Contractor must ensure that all Learners are aware of the support of the ESF in respect of the Services being delivered under this Contract.

## **21. Breach**

- 21.1. For the purpose of this Clause, the following definitions shall have the meanings set out below:
- 21.2. "Minor Breach" 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;
- 21.3. "Serious Breach" shall mean 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. Failure to comply with legislation, or actions or omissions by the Contractor that endanger the Health or Safety of Learners would constitute a Serious Breach.
- 21.4. For the avoidance of doubt:
- a) neither Party shall be liable for any Minor Breach or Serious Breach under this Clause, which occurs as a direct result of any act or omission by the other Party, its staff or agents;
  - b) in the event of a breach the Party not in breach may enforce the Clauses in the Contract relating to breach even if it has not done so in the event of earlier breaches.

### *Minor Breach*

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

- 21.6. The Party not in breach shall be entitled to serve written notice on the Party in breach, giving full details of the breach and requiring the other Party to remedy the breach within a specified period.
- 21.7. If the Party in breach fails to remedy the Minor Breach within the time specified in notice served under Clause 21.6 or such other period as may be agreed between the Parties it shall constitute a Serious Breach by the Party in breach.

### *Serious Breach*

- 21.8. Without prejudice to any other remedy, in the event of a Serious Breach, which is capable of remedy, the Parties shall adopt the following procedure:
- 21.9. The Party not in breach shall be entitled to serve written notice on the other Party giving full details of the breach and requiring the Party in breach to remedy the breach within a specified time period.
- 21.10. Where the ESFA has served a notice under clause 21.9 the ESFA has the right to require the Contractor to suspend the recruitment of Learners until the ESFA has confirmed that the breach has been remedied.
- 21.11. 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 21.9 or such other period as may be agreed between the Parties the ESFA may cease funding the Contractor in respect of that part of the Service to which the Serious Breach relates.
- 21.12. 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 21.9 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.

## **22. Termination**

- 22.1. The Contractor shall notify the ESFA in writing immediately upon the occurrence of any of the following events:
- 22.1.1. where the Contractor is an individual and if a petition is presented for the Contractor's bankruptcy or a criminal bankruptcy order is made against the Contractor, or it makes any composition or arrangements with or for the benefit of creditors, or makes any conveyance or assignment for the benefit of creditors, or if an administrator is appointed to manage their affairs; or

- 22.1.2. where the Contractor is not an individual but is a firm; or a number of persons acting together in any capacity; if any event in clauses 22.1.1 or 22.1.3 of this condition occurs in respect of any partner in the firm or any of those persons or a petition is presented for the Contractor to be wound up as an unregistered company; or
- 22.1.3. where the Contractor is a company, if the company passes a resolution for winding-up or the court makes an administration order or a winding-up order, or the company makes a composition or management with its creditors, or an administrator, receiver or manager is appointed by the company, a creditor or by the court, or possession is taken of any of its property under the terms of a floating charge.
- 22.2. On the occurrence of any of the events described in this Clause 22 the ESFA shall be entitled to terminate this Contract by notice to the Contractor with immediate effect.
- 22.3. Where the Contractor is an individual, if he shall die or be adjudged incapable of managing his affairs within the meaning of Part VII of the Mental Health Act 1983 the ESFA shall be entitled to terminate this Contract by notice to the Contractor or its representatives with immediate effect.
- 22.4. Either Party may terminate this Contract with immediate effect in the event that in the reasonable opinion of the Party wishing to terminate this Contract, the conduct of the other in performing its obligations under this Contract amounts to a fundamental breach of the Contract, which is incapable of remedy.
- 22.5. The ESFA reserves the right to terminate this Contract with immediate effect by giving notice in writing if:
- 22.5.1. The Contractor ceases to be on the Register of Training Organisations and/or the Register of Apprenticeship Training Providers maintained by the ESFA; and / or
  - 22.5.2. The outcome of any financial health and/or control assessment undertaken in relation to the Contractor is inadequate; and / or
  - 22.5.3. The Contractor fails to comply with requirements imposed under Clauses 18.11.1 and/or 18.11.2; and / or
  - 22.5.4. The Contractor fails to comply with requirements imposed under Clauses 18.15.3.1, 18.15.3.2 and / or 18.15.3.3; and / or
  - 22.5.5. An Ofsted inspection results in the Services in part thereof being assessed as inadequate; and / or

- 22.5.6. the ESFA assesses that the Services delivered under this Contract, in whole or part, are below the minimum standards.
- 22.6. In addition to the rights of termination under any other clauses of this Contract, either Party shall be entitled to terminate this Contract in respect of all or part of the Service provided under the Contract by giving to the other not less than three months' notice to that effect without the need to give a reason for termination.
- 22.7. Termination under this Clause 22 shall not prejudice or affect any right of action or remedy, which shall have accrued or shall thereupon accrue to the Parties under this Contract.
- 22.8. Where the Contractor goes into administration or liquidation, the ESFA must be assumed to be a creditor of the Contractor. The Contractor must take steps to ensure that the ESFA is provided with details of the administrator or liquidator and receives notification of any creditors meetings. The ESFA will confirm whether in fact it is a creditor within 8 weeks of being notified that the Contractor is in administration or liquidation.
- 22.9. The Contractor shall upon termination of the Contract immediately deliver up to the ESFA all correspondence, documents, specification papers and other property belonging to the ESFA, which may be in its possession or under its control.
- 22.10. Notice of termination of the Contract under Clauses, 21 or this Clause 22 shall result in the Contractor being removed from the Register of Training Organisations and the Register of Apprenticeship Training Providers maintained by the ESFA.
- 22.11. The Contractor must not recruit new Learners after notice of termination of the Contract has been given. The ESFA will not be liable to make payments in respect of any Learners recruited in breach of this Clause.

### **23. Transfer of Responsibility on Expiry or Termination**

- 23.1. The Parties agree that if upon termination of this Contract or any part of the Service being provided under the Contract, circumstances arise in which the Transfer of Undertakings (Protection of Employment) Regulations 2006 are applicable, the Parties shall in good faith co-operate with each other in the disclosure of information and the provision of other assistance and comply with the provisions of Clause 1 in Schedule 1 of the Contract so as to facilitate such outcome in relation to the relevant employees as may be acceptable to the Parties.

- 23.2. The Parties agree that on termination or expiry of this Contract for any reason, the continuity of the Services is of paramount importance. The Contractor shall do its utmost to minimise disruption caused to Learners and to assist the implementation of any contingency plan proposed by the ESFA either prior to or after the termination or expiry of this Contract, to deal with the effects of such termination or expiry in so far as it is practicable to do so.
- 23.3. On termination or expiry of this Contract for any reason the Learner Files will become the property of the ESFA. The Contractor shall allow the ESFA his servants or agent to have access to its premises to remove Learner Files or otherwise comply with a request by the ESFA to transfer Learner Files to any third party nominated by the ESFA.
- 23.4. The Contractor shall, at no cost to the ESFA, promptly provide such assistance and comply with such timetable as the ESFA may reasonably require for the purpose of ensuring an orderly transfer of responsibility for provision of the Services (or its equivalent) upon the expiry or other termination of this Contract. The Contractor shall use all reasonable endeavors to ensure that its employees and its sub-contractors are under a similar obligation. The ESFA shall be entitled to require the provision of such assistance both prior to and after the expiry or other termination of this Contract.
- 23.5. Such assistance may include, (without limitation) delivery of documents and data in the possession or control of the Contractor or its sub-contractors, which relate to performance, monitoring, management and reporting of the Learning Programme, including the documents and data, if any, referred to in the Schedules.
- 23.6. The Contractor undertakes that it shall not knowingly do or omit to do anything which may adversely affect the ability of the ESFA to ensure an orderly transfer of responsibility for provision of the Services.

## **24. Force Majeure**

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

## **25. Public Reputations of the Parties/Press Releases**

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

## **26. Branding and logos**

- 26.1. The Contractor shall comply with the requirements of the endorsement identity, available on the Education and Skills Funding Agency identity guidelines website at <https://brand.skillsfundingagency.bis.gov.uk/>; on all and any promotional materials or activities in relation to the Services. This shall include but not be limited to prospectuses, direct mail advertising, TV and radio advertising, merchandising or any other literature or products.
  - 26.1.1. The Contractor shall be given access to any logos and statements, which it is required to use. The Contractor will be required to use logos and statements in accordance with the terms of use and should not alter or amend such logos or statements. Logos and statements are only to be used in relation to the Services under this Contract. Any breach of this clause 26 or the requirements or terms of use of which the Contractor is made aware shall constitute a serious breach under the Clause 21 of the General Terms and Conditions of this Contract.
  - 26.1.2. The Contractor may also be required to use logos from other co-branding or co-funding participants and must comply with any terms which apply to the use of such logos.
- 26.2. The Contractor must ensure that the terms of this Clause 26 are contained in any sub-contract of the Services.

## **27. Retention of Documents**

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



Documents to support claims must be retained for a minimum of three years after the European Commission has made its final payment. For the 2007-13 ESF Programme this is expected to be until at least 31 December 2022 and for the 2014-20 ESF Programme until at least 31 December 2030.

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

## **28. Status of Contract**

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

## **29. Waiver**

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

## **30. Third Party Rights**

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

## **31. Notice**

- 31.1. Any notice or other document to be given under this Contract shall be in writing and shall 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 by facsimile or other electronic media to a Party at the address or relevant telecommunications number for such Party or such other address as the Party may from time to time designate by written notice to the other
- 31.2. All such notices and documents shall be in the English language. Any notice or other document shall 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 or on the day of delivery or where notice is given by facsimile or other electronic media, on the working day following the delivery or transmission provided that a printed report is obtained confirming successful transmission or if the addressee acknowledges receipt. To prove the giving of a notice or other document it shall be sufficient to show that it was despatched.

## **32. Governing / Jurisdiction**

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

## **33. Dispute Resolution**

- 33.1. Any dispute, difference or question arising between the Parties either during the currency of the Contract or afterwards shall be referred to the nominated contacts for the ESFA and the Contractor for discussion and review in order to try to resolve the same.
- 33.2. In the event of the nominated contacts being unable to resolve the relevant issue, either party may request in writing that the matter is referred to the ESFA's nominated representative and the Contractor's representative nominated for this purpose (jointly "the Dispute Resolution Panel") for formal review and consideration. Any request for referral to the Dispute Resolution Panel must include details of the dispute and any proposals to resolve it.
- 33.3. The Dispute Resolution Panel will meet within 28 days of receiving a request for referral made in accordance with clause 33.2 above.

## **34. Feedback and Complaints**

- 34.1. The primary responsibility for receiving feedback and investigating complaints promptly and thoroughly in respect of the Services shall rest with the Contractor. The Contractor shall have procedures in place, which are acceptable to the ESFA, to gather and act upon feedback and complaints from Learners and/or their representatives and employers and the wider community.
- 34.2. The Contractor must ensure that Learners are made aware of its procedure for dealing with complaints and that the procedure is clear and accessible to Learners who wish to complain.
- 34.3. The Contractor shall be responsible for resolving complaints in accordance with its own procedures and any guidance issued by the ESFA.
- 34.4. Where a complaint has not been resolved to the satisfaction of the complainant the Contractor will advise the complainant of his or her right to

complain to the ESFA and co-operate with any investigation carried out by the ESFA and act on any recommendations made by the ESFA following the investigation.

## **35. State Aid**

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

## **36. Intellectual Property Rights**

### **36.1. Definitions**

#### **“Background Intellectual Property”**

Any Intellectual Property, other than Foreground Intellectual Property, which is used in performing the Services or comprises part of the Work;

#### **“Confidential Information”**

Includes 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;

#### **“Foreground Intellectual Property”**

Is 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;

### **“Intellectual Property”**

Is any patent, registered design, copyright, database right, design right, topography right, trade mark, trade name, application to register any of the aforementioned rights, trade secret, inventions, right in unpatented know-how, right of confidence and any other intellectual or industrial property right of any nature whatsoever in any part of the world including, without limitation:

- (a) any renewals, revisions and extensions created or provided by the laws of any country;
- (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
- (c) the right to apply for registration of any such rights in any country of the world;

### **“Work”**

Means all materials created by the Contractor as a result of the provision of the Services including Confidential Information.

36.2. In consideration of the ESFA making the payments to the Contractor in connection with the Services the Contractor hereby grants (and, where relevant, shall procure from any necessary third parties the grant) to the ESFA a non-exclusive, irrevocable, worldwide, royalty-free licence (with the right to license others) of any of the Contractor’s Foreground Intellectual Property that the ESFA may reasonably require to be able fully to exploit, develop and commercialise the results of the Services, including, without limitation, the Work.

36.3. The provisions of this Clause shall apply during the continuance of this Contract and after its termination howsoever arising

## **37. Disposal of Assets and Change of Use**

37.1. In respect of Assets whose value exceeds £2,500 including VAT the following provisions shall apply.

37.2. For the purposes of this section:

- a) ‘Asset’ shall mean any property, real or personal, tangible or intangible;
- b) an Asset shall be considered to have been financed by the ESFA if it has been acquired wholly or partly with Funds provided by the ESFA;

- c) the use of any Asset shall be considered to have changed if the Contractor uses it for any purpose other than for the provision or connected with the provision of Services under the Contract;
- d) 'the appropriate proportion thereof' shall be the proportion represented by the amount of Funding provided by the ESFA to acquire, develop or improve an asset in relation to the entire price paid for its acquisition, or its market value when its development or improvement have been completed.

- 37.3. The Contractor shall ensure that any Asset financed by the ESFA is adequately insured.
- 37.4. The Contractor shall inform the ESFA if it proposes to dispose of, or change the use of, any Asset that has been financed by the ESFA.
- 37.5. The Contractor shall not dispose of any Asset financed by monies provided by the ESFA unless it has first obtained the written consent of the ESFA to such a disposal.
- 37.6. Where the Contractor disposes of the Asset it shall pay to the ESFA whichever is the greater either the amount of Funding provided by the ESFA in respect of the Asset or the net proceeds of any disposal of an Asset, or the appropriate proportion thereof, to the ESFA unless otherwise agreed with the ESFA.
- 37.7. If the Contractor changes the use of any such Asset it will be treated as a disposal and the Contractor shall make a payment to the ESFA in accordance with clause 37.6 above.
- 37.8. In the event of the Contractor being taken over, merging or going into liquidation, all Assets financed by the ESFA, or the equivalent portion of their market value, will become the property of the ESFA.
- 37.9. The provisions of this clause shall apply during the continuance of this Contract and after its termination howsoever arising. The ESFA shall reserve the right to decide when its interest in Assets financed by the ESFA under the terms of the Contract shall cease.

## **38. Headings**

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

**39. Entire Contract / Amendments**

39.1. The Contract shall comprise the following:

Terms and Conditions

Appendix 1

Funding Appendix (added as appropriate)

Schedule 1

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

## SCHEDULE 1

- 1 Transfer of Undertakings (Protection of Employment) Regulations 2006 and Pensions Aspects





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

1.1.12 “Public Sector Pension Scheme” means:

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

As applicable;

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

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

1.1.15 “Relevant Transferring Members” means:

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

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

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

1.1.18 “Successor Contractor’s Scheme” means:

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

As applicable;

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

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

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

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

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

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

## **1.3. Protection of Pensions – Public Sector Employees**

1.3.1. the Contractor shall:

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

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

1.3.1.1 (b) Have entered into an Admission Agreement in respect of, or otherwise be able to provide a Relevant Transferring Member with membership of, a Public

Sector Pension Scheme, where permissible by the rules of that scheme or in accordance with Fair Deal, or

- 1.3.1.1 (c) Establish, or have become party to an employee's retirement benefit scheme that makes retirement provision which is accepted in writing by each individual transferring employee as being adequate for their personal retirement provision.

### **Admission of the Relevant Transferring Members to the Contractor's Scheme**

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

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

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

## Continuity of Schemes

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

1.3.6. Where any Relevant Transferring Member transfers to a Sub-Contractor engaged in the provision of the Services, the Contractor shall ensure that in any such transfer, the Sub-Contractor shall establish, or have become party to an employee's retirement benefits scheme on the terms set out in clause 1.3.1.1 ("the Sub-Contractor's scheme"). The Contractor shall procure that the Relevant Transferring Member is invited to join the Sub-Contractor's scheme on the terms set out in clauses 1.3.1.2 –1.3.1.6 the Contractor shall ensure that the Sub-Contractor's scheme shall include the conditions set out in clauses 1.3.3, 1.3.4, 1.3.5 and 1.3.6.

#### **1.4. Expiry of Contract**

1.4.1. The ESFA and the Contractor shall act on the basis that TUPE applies on expiry or termination of the Contract where the ESFA is proposing re-contract for services which are substantially the same as the Services.

1.4.2. During the period of 18 months preceding the expiry of the Contract or within 21 days after the ESFA or the Contractor has given notice to terminate the Contract, the Contractor shall disclose to the ESFA and shall permit the ESFA to disclose to any tenderer for services which are substantially the same as the Services, the Initial Staff Information provided that prior to so doing any such tenderer shall have executed in writing a confidentiality undertaking in favour of the Contractor.

1.4.3. During the period of three months preceding the expiry of this Contract or within 21 days after the ESFA or the Contractor has given notice to terminate the Contract, the Contractor shall, subject to the provisions of the Data Protection Act 1998, provide and thereafter keep updated at monthly intervals, to the ESFA and to the Successor Contractor information equivalent to the Relevant Personnel Documentation and the Prescribed Particulars in respect of each employee whom the Contractor reasonably believes will be a Future Transferring Employee provided that prior to so doing the Successor Contractor nominated by the ESFA shall have executed in writing a confidentiality undertaking in favour of the Contractor.

1.4.4. The Contractor shall make reasonable endeavours to assist the Successor Contractor to communicate with, meet and inform and consult with the employees whom the Contractor reasonably believes will be a Future Transferring Employee and their trade union or other employee representatives for the purposes of complying with TUPE.

1.4.5. The Contractor shall immediately prior to the Future Transfer Date provide to the ESFA or the Successor Contractor a complete and accurate list of the Prescribed Particulars and Identification Details of all employees whom it reasonably believes will be Future Transferring Employees.

- 1.4.6. Within a period of 21 days following the expiry or termination of this Contract the Contractor shall provide to the ESFA or the Successor Contractor in writing Final Pay Details of the Future Transferring Employees.
- 1.4.7. The Contractor warrants that it shall supply complete and accurate information pursuant to clauses 1.4.2, 1.4.3, 1.4.5 and 1.4.6 in all material respects and the Contractor shall indemnify and keep the ESFA indemnified fully now and in the future in respect of all or any costs whether arising in contract or under any Relevant Legislation suffered or incurred by the ESFA or the Successor Contractor nominated by the ESFA by reason of any proceeding, claim or demand arising from or in connection with the provision of information and/or the failure to provide complete and accurate information under clauses 1.4.2, 1.4.3, 1.4.5, and 1.4.6, and/or the provision of assistance and/or failure to provide assistance under clause 1.4.4 of this Contract.
- 1.4.8. After receiving notice of the termination of this Contract and for six (6) months preceding expiry of this Contract the Contractor shall promptly notify the ESFA or the Successor Contractor:
- 1.4.8.1 of the period of notice given by the Contractor or received from any employee whom the Contractor reasonably believes will be a Future Transferring Employee regardless of when such notice is to take effect;
  - 1.4.8.2 of the termination, for whatever reason, of the employment of any employee whom the Contractor reasonably believes will be a Future Transferring Employee; and
  - 1.4.8.3 of any other change to any employee whom the Contractor reasonably believes will be a Future Transferring Employee and their terms and conditions of employment, their Prescribed Particulars and their Relevant Personnel Documentation.
  - 1.4.8.4 the Contractor warrants that it shall supply the Required Information completely and accurately in all respects at the time of supply and shall indemnify and keep the ESFA and/or any Successor Contractor indemnified in respect of all and any costs suffered or incurred by the ESFA or the Successor Contractor by reason of any proceedings, claim or demand arising out of or in connection with:
  - 1.4.8.5 any claim against the ESFA or the Successor Contractor by any Future Transferring Employee so far as it relates to any act or omission of the Contractor after the Employee Transfer Date and prior to the Future Transfer Date; and

- 1.4.8.6 any claim against the ESFA or the Successor Contractor by any Future Transferring Employee whose name is not included on the list provided by the Contractor pursuant to Clause 1.4.5 so far as it relates to the dismissal of such Future Transferring Employee within two Months of the ESFA or Successor Contractor becoming aware of the transfer of such Future Transferring Employee.
- 1.4.9. For the purposes of Clause 1.4.9, in the event that the ESFA or the Successor Contractor incurs costs, liabilities or expenditure in respect of Future Transferring Employees which is greater than would have been the case if the Required Information supplied by the Contractor had been accurate and complete, then such (net) greater costs, liabilities or expenditure shall be deemed to be costs suffered or incurred by the ESFA or Successor Contractor and included within the indemnity provided by the Contractor.
- 1.4.10. The ESFA or Successor Contractor shall be entitled to recover from the Contractor in full any legal, accountancy and other costs actually and reasonably incurred by the ESFA or Successor Contractor in connection with the costs and liabilities indemnified by the Contractor.
- 1.4.11. This clause 1.4 shall continue in effect for six months following the expiry or termination of this Contract.

## **APPENDIX A TO CLAUSE 1 SCHEDULE 1**

“Initial Staff Information” Means:

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



## APPENDIX B TO CLAUSE 1 SCHEDULE 1

“Prescribed particulars” means:

### 1. Personal Details

Gender;

Date of Birth;

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

### 2. Employment Details

Job Title;

Staff Number;

Job Description;

Work Location;

Conditioned hours of work per week;

Date of commencement of continuous employment and (if different) commencement date;

Relevant Personnel Documentation;

Notice Periods (for employer and employee);

Annual salary and rates of pay band/grade including pending salary increases;

Shifts, unsociable hours or other premium rates of pay;

Overtime entitlement and details of last twelve (12) Months overtime;

Allowance and bonus details over the last twelve (12) Months including date, type, amount and pending allowances/bonuses;

Provisional details about standing loan/advances on salary or debts;

Existing and future training or sponsorship commitments;

Leave entitlement and accrued leave entitlement including any leave outstanding or expected to be outstanding at the Future Transfer Date;

Annual leave reckonable service date;

Additional employment benefits;

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

### **3. Records of Employment Service**

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

### **4. Method of payment**

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

### **5. Pensions**

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

## **APPENDIX C TO CLAUSE 1 SCHEDULE 1**

“Relevant personnel documentation” means:

### **1 General Practices and Policies**

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

Special leave and career breaks;

Sick leave and pay;

Disciplinary/grievance policy and procedures;

Equal Opportunities policy;

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

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

### **2 Redundancy**

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

## **APPENDIX D TO CLAUSE 1 SCHEDULE 1**

“Final pay details” means:

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

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

## APPENDIX E TO CLAUSE 1 SCHEDULE 1

“Identification Details” means:

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

## **APPENDIX F TO CLAUSE 1 OF SCHEDULE 1**

### **TRANSFER VALUES**

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