



Education & Skills
Funding Agency



European Union
European
Social Fund

Agreement Type Adult Conditions of Funding Grant (Employer)

Funding Period 1 August 2018 to 31 July 2019

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

And

Funding for

Contract Number

ACCEPTANCE BY PROVIDER

By accepting this Agreement via the Skills Funding Service the person taking this action on behalf of the Employer represents and warrants that the Employer has read and understood this Agreement, the Employer agrees to be bound by this Agreement and that he/she is duly authorised to accept this Agreement and legally bind the Employer.

This Agreement is made on the date the Agreement is digitally signed by the Employer on the Skills Funding Service.

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

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

Conditions of Funding (Grant) Employer

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Conditions of Funding (Grant) Employer

This Agreement is made on the date the Agreement is digitally signed by the Employer on the Skills Funding Service

BETWEEN:

- (1) The Secretary of State for Education acting through the Education and Skills Funding Agency, an executive agency of the Department for Education (the ESFA), and
- (2) [name of Employer, registered office and, where appropriate, company registration number] (the Employer)

RECITALS

WHEREAS the ESFA will pay an amount of Funding to the Employer to enable the Employer to provide Learning Programmes to Learners pursuant to the terms of this Agreement.

WHEREAS the Employer shall use the Funding provided pursuant to this Agreement for the Provision of agreed Learning Programmes to Learners in accordance with the terms of this Agreement.

NOW THEREFORE for good and valuable consideration the ESFA and the Employer agree as follows

1 Definitions

“Adult Education Budget” means the Adult Education Budget (AEB) combines all ESFA participation and support funding that is not European Social Fund (ESF), advanced Learner loans or apprenticeships.

“Agreement” means these Conditions of Funding, the attached Appendices to the Conditions of Funding and any documents or parts thereof, policies or guidance specified in this Agreement and any variation to the Agreement agreed in writing and signed by both Parties pursuant to Clause 23 of this Agreement;

“Apprenticeship” means the training and (where applicable) end point assessment for an employee as part of a job with an accompanying skills development programme.

“Confidential Information” means a non-exhaustive list including all designs, data, specifications and all other technical business and similar information relating to the Provision 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 made, originated or developed during the course of or otherwise related to the Provision;

“Crown Employer” 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;

“Department” means the Department for Education, which incorporates its Executive Agency, the ESFA;

“Employer” means the firm, company or organisation with whom the ESFA enters into the Agreement;

“Employer Related Parties” means any employee, officer, consultant, agent or any other person whatsoever acting for or on behalf of the Employer or otherwise under the Employer’s control and direction (including but not limited to sub-contractors);

“Funding Rules” means the documents which set out the detailed requirements with which the Employer must comply in respect of each Learning Programme delivered under this Agreement and which form part of this Agreement as may be amended by the ESFA from time to time, as follows:

- a) Adult Education budget and 16-18 traineeships
<https://www.gov.uk/government/publications/adult-education-budget-funding-rules-2018-to-2019>
- b) Apprenticeships post May 17
<https://www.gov.uk/government/publications/apprenticeship-funding-rules-2018-to-2019>
- c) Apprenticeships pre May 17
<https://www.gov.uk/government/collections/sfa-funding-rules-2016-to-2017>

"Funds" means the monies paid by the ESFA to the Employer pursuant to this Agreement and **"Funding"** shall have the same meaning;

“Inspectorates” 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 Care Quality Commission (CQC) and the Office for Students.

"Law" means any Act of Parliament, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, exercise of royal prerogative, enforceable community right within the meaning of Section 2 of the European Communities Act 1972, regulatory policy, guidance or industry code, judgment of a relevant court of law, or directives or requirements of any Regulatory Body of which the Employer is bound to comply;

“Learners” means the Employer’s employees, or employees of their Supply Chain;

“Learning Programme” means the education and training programmes to be made available to Learners and funded pursuant to this Agreement, as more particularly set out in Appendix 1;

“Maximum Value” means the maximum amount of Funding that an Employer can use to fund that particular Learning Programme under this Agreement;

“OFSTED” means the Office for Standards in Education, Children’s Services and Skills;

“Office for Students” means the government-approved regulatory and competition authority for the higher education sector in England from 1 April 2018;

“Parties” means the ESFA and the Employer;

“Provision” means the education and training made available to the Learners by or on behalf of the Employer and funded under this Agreement, as more particularly set out in Appendix 1

“Register of Apprenticeship Training Providers” means the register maintained by The ESFA of organisations qualified to receive Funding from The ESFA to deliver Apprenticeships from 1 May 2017.

“Register of Training Organisations” means the register maintained by the ESFA of organisations qualified to receive Funding from the ESFA;

“Supply Chain” means any organisation where there is a contractual relationship in direct connection to the Employer’s core business.

2 Term

- 2.1 This Agreement is made for the period commencing 1 August 2018 to the 31 July 2019.

3 Funding and Payment

- 3.1 Allocations in respect of the Provision funded under this Agreement will be made from the 16-18 apprenticeship, the 19+ apprenticeship, the Adult Education, the 16-18 Non-Levy Apprenticeships and the Adult Non-Levy Apprenticeships budgets. The 16-18 Non-Levy Apprenticeships Funding and Adult Non-Levy Apprenticeships Funding detailed in Appendix 1 must only be used to fund apprenticeships and must not be used to fund new starts.
- 3.2 The total amount of Funds which the ESFA agrees to pay to the Employer and the Learning Programmes to which those Funds will be applied are set out in Appendix 1.
- 3.3 All payments by the ESFA will be made via BACS.

3.4 The payment will be split between the relevant specified payment period, namely 1 August 2018 up to the 31 March 2019 and/or the 1 April 2019 up to the 31 July 2019. The ESFA will only pay for delivery in the financial year the delivery takes place; claims made for delivery outside of the relevant financial year will not be paid.

4 Delivery of Provision

4.1 The Provision to be delivered under this Agreement is the delivery of the Learning Programmes as more particularly set out in Appendix 1 of this Agreement. 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, which expressly forms part of this Agreement.

4.2 The Maximum Value of each Learning Programme as shown in Appendix 1 of this Agreement may not be exceeded for any reason except by an agreed variation in writing to the Agreement pursuant to Clause 23. The ESFA will not be liable to make any payment in excess of the Maximum Value of each Learning Programme or as varied pursuant to Clause 23. Where the period of the Agreement is longer than one year, Funding for subsequent years is subject to funds being made available to the ESFA.

4.3 The Provision shall be delivered in accordance with any specific requirements agreed and recorded in this Agreement and the supporting documentation in the attached Appendices to this Agreement which sets out the activity and/or scheduled payment profiles for the Provision agreed by the Parties, which all form part of the terms and conditions of the Agreement.

4.4 The Employer must use the Funding allocated by the ESFA for the purpose of delivering the Provision. Any Funds not used for the intended purpose as set out in this Agreement, or as otherwise agreed, must be returned to the ESFA.

4.5 The Employer must meet the ESFA's requirements, as set out in the Funding Rules, for the provision of information.

4.6 The ESFA will not fund any Provision, or part thereof, that fails to meet the required performance and quality standards as set out in the Funding Rules.

4.7 Where the Employer has failed to deliver the volumes for any Learning Programme set out in Appendix 1 of this Agreement, the ESFA reserves the right in its absolute discretion to reduce the Maximum Value of that Learning Programme. Subject to audit and compliance with this Agreement, the ESFA shall make an appropriate payment to the Employer in respect of the volumes delivered in accordance with this Agreement.

4.8 Where the Employer has failed to deliver the minimum quality standards published by the Department and / or the ESFA for any Learning Programme, the ESFA reserves the right in its absolute discretion to reduce the Maximum Value of that Learning Programme. Subject to audit and compliance with this Agreement, the ESFA shall make an appropriate payment to the Employer in

respect of the part of the Provision delivered in accordance with this Agreement.

- 4.9 The ESFA will restrict delivery of Provision under this Agreement against the Funding available up to the 31 July 2019 as detailed in Appendix 1. Appendix 1 confirms the maximum value available up to 31 March 2019. Where the delivery within this financial year fails to meet the minimum levels of performance or where the delivery in this period would result in the overall maximum value being exceeded, the ESFA reserves the right at its absolute discretion to vary the Agreement accordingly.
- 4.10 The ESFA reserves the right to terminate this Agreement with immediate effect by giving notice in writing if the Employer ceases to be on the Register of Training Organisations or the Register of Apprenticeship Training Providers maintained by the ESFA.
- 4.11 In delivering the Provision to Learners starting onto an Apprenticeship 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 Apprentices recruited on an Apprenticeship 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.
- 4.12 Where the Employer sub-contracts or intends to sub-contract any duties or obligations arising out of this Agreement the Employer 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 Employer is not sub-contracting, then a nil return must be received by the deadline date. The Employer must notify the ESFA of any within year changes to its sub-contractors. The ESFA reserves the right to require the Employer not to enter into, or to terminate, any sub-contract to deliver the Provision under this Agreement.
- 4.13 The Employer must comply with the requirements on sub-contracting delivery of the Provision set out in the ESFA's Funding Rules as amended and updated. Sub-contracting any part of the Agreement shall not relieve the Employer of any obligation or duty attributable to them under the Agreement. The Employer is responsible for all the actions of its sub-contractors connected to or arising out of the delivery of the Provision which it sub-contracts.
- 4.14 The delivery of Provision under this Agreement may only be sub-contracted to one level unless otherwise specified in the Funding Rules when the Employer must obtain the consent of the ESFA in writing.
- 4.15 Where the Employer has sub-contracted any duties or obligations arising out of this Agreement, the Employer 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 Employer enters into a sub-contract for the purpose of performing the Provision, the Employer shall ensure that the sub-contract requires the sub-contractor to comply with the conditions of this Agreement and includes any terms specified in the Funding Rules.

- 4.16 The Employer shall ensure that any sub-contract entered into for the purpose of delivering the Provision funded by the ESFA under this Agreement contains a term providing that the ESFA has the right to enforce the terms of the sub-contract.
- 4.17 The Employer shall ensure that subcontractors are selected fairly and have sufficient capacity, capability, quality and financial standing to deliver the Provision.
- 4.18 Where the Employer enters into subcontracts to deliver the Provision with an aggregate value of more than 50% of the Funding provided under this Agreement in any one year, it must obtain an annual report from its external auditors which provides assurance on the arrangements that the Employer has in place to manage and control its sub-contractors. The report must comply with the guidance issued from time to time by the ESFA. The Employer must supply the ESFA with a certificate signed by its external auditors and an authorised signatory confirming it has received a report providing satisfactory assurance. The ESFA reserves the right to require the Employer to provide a copy of the full report and any associated action plan resulting from recommendations made by their external auditor.
- 4.19 The Employer must ensure appropriate members of staff register as users on the user role management system at <https://logon.fasst.org.uk/> to enable the Employer to digitally sign and agree the Agreement online. It is the Employer's responsibility to maintain appropriate user roles on an on-going basis.
- 4.20 The Employer must consider the criteria set out in the Funding higher-risk organisations and subcontractors document which is published on the ESFA's website <https://www.gov.uk/government/publications/sfa-financial-assurance-higher-risk-providers-and-subcontractors>.

5 Learner Health, Safety and Welfare

- 5.1 The Employer shall ensure so far as reasonably practicable that learning takes place in safe, healthy and supportive environments, which meet the needs of Learners. The Employer shall provide information to the ESFA, as and when specifically requested, to give assurance that adequate arrangements exist for Learner health safety and welfare.
- 5.2 Where part of the learning takes place in an environment outside the direct control of the Employer, the Employer shall take all reasonable steps to ensure that adequate arrangements are in place to ensure the health and safety of Learners.
- 5.3 The Employer shall make arrangements for ensuring that the Provision is provided with a view to safeguarding and promoting the welfare of children receiving education or training at their work place or under the auspices of the Employer in an environment outside the direct control of the Employer. In doing so, the Employer shall have regard to any guidance published, from

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

- 5.4 The Employer shall undertake risk assessments to establish what action is required to safeguard and promote the welfare of all Learners funded by the ESFA, including where necessary the need to undertake appropriate suitability checks in respect of any employees who have regular contact with those Learners. Where risk assessments identify suitability checks are required (in addition to any required by compliance with clause 5.3), information must be sought from the Disclosure and Barring Service. Failure to do so may constitute a Serious Breach of this Contract for Services.
- 5.5 In providing the Provision, the Employer 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.
- 5.6 In providing the Provision, the Employer must comply with the general duty on specified authorities in section 26 of the Counter-Terrorism and Security Act 2015 (the Prevent duty) and must have regard to statutory guidance issued under section 29 of the Counter-Terrorism and Security Act 2015. Failure to do so may constitute a Serious Breach of this Funding Agreement.
- 5.7 In providing the Provision, the Employer must comply with the duty on partners of a panel in section 38 of the Counter-Terrorism and Security Act 2015 (the Channel co-operation duty). Failure to do so may constitute a Serious Breach of this Funding Agreement.
- 5.8 In working with other organisations/bodies, the Employer 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.
- 5.9 The Employer shall, in circumstances where it sub-contracts the management and/or delivery of the Provision under this Agreement, ensure that all the clauses in respect of Learner health safety and welfare are included in its contract with sub-contractors.
- 5.10 The Employer shall inform the ESFA's representative of the death of any Learner which is as 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 the Employer becomes aware of the event.

- 5.11 The Employer shall investigate or assess the circumstances of all Learner incidents within the scope of RIDDOR. The Employer 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.
- 5.12 The Employer shall also monitor, and act on, any other harm to Learners to the extent that the Employer 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) other incidents that cause absence from learning, any loss to the Learner of any physical or mental faculty or any disfigurement, incidents of bullying and harassment.
- 5.13 The Employer shall co-operate with the ESFA's representative 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.
- 5.14 The Employer and the Employer 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.
- 5.15 Where The Employer or one of its subcontractors refer:
- a. a safeguarding concern related to sexual violence to Local Authority children's social care/adult social care and/or the police, or
 - b. an allegation of abuse made against a teacher or other member of staff to the designated officer(s) (at the local authority),

The Employer must, as soon as practicable, inform the ESFA via email to Enquiries.EFA@education.gov.uk. Such notification must include the name of the institution, a high level summary of the nature of the incident (without sharing personal information about victims or alleged perpetrators) and confirmation of whether it is, or is scheduled to be, investigated by the Local Authority and/or the police.

- 5.16 Where, in compliance with clause 5.6, the Employer 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 Employer shall ensure it notifies the ESFA that a referral has been made.
- 5.17 Where the Employer has made a referral or provided information to the Disclosure and Barring Service in compliance with any duties of the Employer under the Safeguarding Vulnerable Groups Act 2006, the Employer shall ensure that it informs the ESFA that a referral has been made / information has been provided.

6 Disposal of Assets and Change of Use

- 6.1 For the purposes of this section:

- 6.1.1 'Asset' shall mean any property, real or personal, tangible or intangible whose value exceeds £2,500 at the point of disposal;
 - 6.1.2 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;
 - 6.1.3 the use of any Asset shall be considered to have changed if the Employer uses it for any purpose other than for the Provision or connected with the Provision to be delivered under this Agreement;
 - 6.1.4 '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.
- 6.2 The Employer shall ensure that any Asset financed by the ESFA is adequately insured.
 - 6.3 The Employer shall inform the ESFA if it proposes to dispose of, or change the use of, any Asset that has been financed by the ESFA.
 - 6.4 The Employer 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.
 - 6.5 Unless otherwise agreed in writing, where the Employer disposes of the Asset financed by the ESFA it shall pay to the ESFA the greater of:
 - 6.5.1 the amount of Funding provided by the ESFA in respect of the Asset, or
 - 6.5.2 the net proceeds of any disposal of the Asset, or the appropriate proportion thereof.
 - 6.6 If the Employer changes the use of any such Asset it will be treated as a disposal and the Employer shall make a payment to the ESFA in accordance with clause 6.5 above.
 - 6.7 In the event of the Employer 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, unless otherwise agreed in writing.
 - 6.8 The provisions of this Clause 6 shall apply during the term of this Agreement and after its termination howsoever arising. The ESFA reserves the right to decide when interest in Assets financed by the ESFA under the terms of this Agreement shall cease.

7 Equal Opportunities

- 7.1 The Employer must, in delivering Provision under this Agreement, demonstrate that it has had regard to the duties placed on the ESFA by relevant equality legislation. Legislation, regulation and policy provide a framework within which the ESFA will strive to promote equality of opportunity for all Learners, irrespective of their age, race, gender, religion or belief, sexual orientation, gender identity or disability, including physical and learning abilities. The Employer must take all reasonable steps to ensure the observance of these provisions by all servants, employees or agents of the Employer and all sub-contractors employed to deliver the Provision.
- 7.2 The Employer shall ensure that equality of opportunity is built into all aspects of the Provision including, but not limited to, the business planning process and the quality improvement process. The Employer 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 Employer shall use appropriate, specific and measurable objectives. These must be proportionate, relevant and aligned to the Provision the Employer is funded to deliver.
- 7.3 The ESFA shall use a variety of equality information and data to inform and support judgements about the quality of the Provision and 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 Quality Assurance

- 8.1 The Employer shall deliver the Provision to an acceptable standard of quality, comply with the Provider Performance Management Rules published by the ESFA as amended from time to time and use all reasonable endeavours;
- 8.1.1 to minimise dropout rates, deliver high completion, achievement and success rates and appropriate progression;
- 8.1.2 to meet the minimum quality standards published by the Department and / or the ESFA that apply to the Learning Programmes delivered;
- 8.1.3 to ensure competent and qualified staff deliver and assess learning. The Employer shall be responsible for the continuing professional development and training of its staff and for meeting any; legal requirements for its staff delivering the Provision to be qualified and trained;
- 8.1.4 to offer equality of access to learning opportunities and close equality gaps in learning and outcomes;
- 8.1.5 to provide a safe, healthy and supportive environment, which meets the needs of Learners;

- 8.1.6 to provide good management and leadership of the learning process;
 - 8.1.7 to deliver value for money and financial regularity and probity; and
 - 8.1.8 to ensure any sub-contractors delivering the Provision comply with the requirements set out in Clauses 8.1.1 to 8.1.7 above.
- 8.2 Failure to meet the requirements set out in this Clause 8.1 may result in the ESFA assessing the Employer to be at serious risk of failing to deliver the Provision.
- 8.3 The Employer shall have in place its own quality assurance arrangements that demonstrate that it can meet the terms and conditions of this Agreement and evidence these arrangements if required to do so in a form and subject to any other conditions, as from time to time the ESFA or the Department may specify.
- 8.4 If requested by the ESFA, the Employer must make available to the ESFA a report on its own assessment of the quality of the Provision provided by the Employer under this Agreement in a form and subject to any other conditions, as from time to time the ESFA may specify.

Minimum standards

- 8.5 The ESFA may, at any time during the Term, undertake an assessment of the quality and delivery of the Provision which may include analysis of performance against the minimum quality standards, as published by the Department and/or the ESFA. The ESFA will use data supplied in the 2017 to 2018 academic year to measure performance against the national minimum standards for 2017 to 2018 academic year and will use this as an indicator of the quality and delivery of the Provision by the Employer. Where the ESFA assesses that the Provision, in whole or in part, falls below the required standards, the ESFA may, in its absolute discretion, take one or more of the following actions:
- 8.5.1 require the Employer to accept and comply with additional conditions of funding relating to the improvement of the Provision. These conditions will remain in place until the Employer can demonstrate the required improvement to the ESFA's absolute satisfaction; and/or
 - 8.5.2 require the Employer to inform the employer of any Apprentice that the ESFA assesses that the Provision, as it relates to Apprenticeships, in whole or in part, fall below the required standards; and/or
 - 8.5.3 require the Employer to suspend the recruitment of Provision to, and/or to cap any growth in, those Learning Programmes which are identified as below the required standards; and/or

- 8.5.4 give consideration to the Provision which are below the required standards in its allocations when finalising the amount of Funding in any subsequent Agreements between the Parties; and/or
 - 8.5.5 reduce, suspend or recover payment to the Employer in respect of that part of the Provision to which the failure to meet the required standards relate; and/or
 - 8.5.6 terminate this Agreement in accordance with clause 20.2 (Termination) in full, or that part of the Provision failing to meet the required standards.
- 8.6 The failure of the Employer, as assessed by the ESFA, to comply with any requirements of 8.5.1- 8.5.3 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 20.2 (Termination).

Ofsted Inspection

- 8.7 When the Employer receives notification from OFSTED that the Provision is to be inspected, the Employer shall provide the ESFA, on request, with a copy of its quality improvement activity, and any other relevant information in accordance with the required timescale of OFSTED. The Employer 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 Employer must inform the ESFA of the outcome of the inspection within 5 working days of receiving the feedback from OFSTED.
- 8.8 Ofsted may, at any time during the Term, undertake an inspection of the Employer. The ESFA will consider the outcome of any such inspection as follows:

Inadequate in part

- 8.8.1 Where Ofsted has assessed the Provision to be inadequate in any sector specific areas, the ESFA may, in its absolute discretion take one or more of the following actions:
- 8.8.1.1 require the Employer to accept and comply with additional conditions of funding relating to the improvement of the Provision assessed as inadequate. These conditions will remain in place until the Employer can demonstrate the required improvement to the ESFA's absolute satisfaction; and/or
 - 8.8.1.2 require the Employer to suspend the recruitment of Learners to, and/or to cap any growth in, the Provision which is assessed as inadequate; and/or

- 8.8.1.3 give consideration to the Provision which is assessed as inadequate in its allocations when finalising the amount of Funding in any subsequent Agreements between the Parties; and/or
- 8.8.1.4 reduce, suspend or recover payment to the Employer in respect of that part of the Provision assessed as inadequate.

Inadequate overall

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

- 8.8.2.1 require the Employer to accept and comply with temporary additional conditions of funding relating to the improvement of the overall Provision. These conditions will remain in place until the Employer can demonstrate the required improvement to the ESFA's absolute satisfaction;
- 8.8.2.2 require the Employer to temporarily suspend the recruitment of Learners and/or temporarily cap any growth in those Learning Programmes which are assessed as inadequate.
- 8.8.2.3 commence discussions with the Employer and the Local Authority within whose area the Employer is located, either with Ofsted or not, as part of considering what actions as specified in clause 8.8.3.3 – 8.8.3.5 inclusive may be taken.

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

- 8.8.3.1 require the Employer to accept and comply with additional conditions of funding relating to the improvement of the overall Provision. These conditions will remain in place until the Employer can demonstrate the required improvement to the ESFA's absolute satisfaction; and/or
- 8.8.3.2 require the Employer to suspend the recruitment of Students to, and/or to cap any growth in, those Learning Programmes which are assessed as inadequate; and/or
- 8.8.3.3 give consideration to the assessment of inadequate in its allocations when finalising the amount of Funding in any subsequent Agreements between the Parties; and/or
- 8.8.3.4 reduce, suspend or recover payment to the Employer; and/or
- 8.8.3.5 terminate this Agreement in accordance with clause 20.2 (Termination).

- 8.8.4 The failure of the Employer, as assessed by the ESFA, to comply with any requirements of 8.8.1-8.8.3 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 20.2 (Termination).
- 8.8.5 The ESFA will take action based on Ofsted's provisional and confirmed outcomes as in clause 8.8.1 – 8.8.3 above. Where the ESFA is made aware that the Employer has made a complaint about the graded outcome of the overall assessment by Ofsted, the ESFA will continue to progress action under clause 8.8.1-8.8.3 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.
- 8.9 Where appropriate, the Employer shall confirm in writing to the ESFA that it has formal approval from relevant awarding organisations to deliver the qualifications which form part of the Provision. The Employer must notify the ESFA immediately in writing if it receives any sanction from an awarding organisation.
- 8.10 The ESFA acknowledges that all standards and obligations which the Employer must meet in respect of the Provision, are set out in this Agreement and no variations shall be made unless agreed in accordance with clause 23 save that where the ESFA is required by the Secretary of State or otherwise under a legal obligation to make variations without the need to seek the Employer's agreement.

9 European Funding and other Sources of Funding

- 9.1 The Employer must not use the Funding from this Agreement to make bids or claims from any European source of funding on its own behalf in respect of the Provision or on behalf of the ESFA without obtaining prior written consent from the ESFA, which shall not be unreasonably withheld or delayed.
- 9.2 Where the Employer or any of its sub-contractors has access to other funding streams, the Employer will be required to demonstrate, to the satisfaction of the ESFA, that no double funding has occurred in respect of the Provision. Where the ESFA identifies double funding in respect of the Provision, the Employer will be liable to repay to the ESFA any sums paid by the ESFA in respect of the Provision for which the Employer has received funding from another source and the ESFA reserves the right to deduct such sums from any monies owed or due to the Employer under this Agreement.
- 9.3 The ESFA reserves the right to use payments made under this Agreement as match funding for ESF Projects. Where requested to do so on reasonable notice in writing by the ESFA, the Employer shall provide such information in the form needed by the ESFA to enable the ESFA to comply with the requirements of ESF.

9.4 If the Provision has been financed, in whole or in part, by ESF, the Employer shall, if requested to do so by the ESFA, inform Learners or others of such financing.

10 Data Collection

10.1 The Employer 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 2018 to 2019' as amended and updated which is published on the ESFA's website at <https://www.gov.uk/government/publications/ilr-specification-validation-rules-and-appendices-2018-to-2019> and in accordance with the 'Provider Support Manual' as amended and updated.

10.2 The Employer must supply the ESFA with data in accordance with the following:

10.2.1 in line with agreed audit arrangements;

10.2.2 in adherence with the Data Protection Act 1998;

10.2.3 to support payments templates;

10.2.4 to enable reconciliation to take place; and

10.2.5 to support the contract management and allocation processes.

10.3 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 Employer agrees to comply with the conditions of use regarding the supply of data to the ESFA set out in this clause 10 and in 'Individualised Learner Record Specification 2018/19' 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-2018-to-2019>.

10.4 Where the ESFA is concerned about the quality of the data, including the completeness or accuracy of the data, provided by the Employer, the ESFA may require the Employer to supply further data, or data more frequently, for such period as the ESFA shall require.

10.5 The ESFA reserves the right to require the Employer, at its own cost, to carry out such work as the ESFA deems necessary to improve the quality of data.

10.6 The ESFA reserves the right to suspend payments to the Employer under the Agreement where data quality gives rise to concern about the completeness or accuracy of the data provided by the Employer.

10.7 Failure to transmit complete and accurate data to the ESFA in accordance with this clause 10 may result in Funding being withheld, recalculated or recovered.

- 10.8 Where the Employer is delivering Provision 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 Employer. Failure to transmit complete and accurate data under this clause 10 will constitute a breach of the conditions of funding set out in this Agreement and may result in payments for this Provision to be delayed or withheld.
- 10.9 The Employer 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.

11 Data Protection and Protection of Personal Data

- 11.1 In this clause 11, the following words and expressions shall be defined as follows:

Law: means any law, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of Section 2 of the European Communities Act 1972, regulation, order, regulatory policy, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements with which the Processor is bound to comply.

Processor Personnel: means all directors, officers, employees, agents, consultants and contractors of the Processor and/or of any Sub-Processor engaged in the performance of its obligations under this Agreement.

Data Protection Legislation: (i) the GDPR, the LED and any applicable national implementing Laws as amended from time to time (ii) the DPA 2018 to the extent that it relates to processing of personal data and privacy; (iii) all applicable Law about the processing of personal data and privacy.

Data Protection Impact Assessment: an assessment by the Controller of the impact of the envisaged processing on the protection of Personal Data.

Controller, Processor, Data Subject, Personal Data, Personal Data Breach, Data Protection Officer take the meaning given in the GDPR.

Data Loss Event: any event that results, or may result, in unauthorised access to Personal Data held by the Processor under this Agreement, and/or actual or potential loss and/or destruction of Personal Data in breach of this Agreement, including any Personal Data Breach.

Data Subject Request: a request made by, or on behalf of, a Data Subject in accordance with rights granted pursuant to the Data Protection Legislation to access their Personal Data.

DPA 2018: Data Protection Act 2018.

GDPR: the General Data Protection Regulation (Regulation (EU) 2016/679).

LED: Law Enforcement Directive (Directive (EU) 2016/680).

Protective Measures: appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the such measures adopted by it including those outlined in the Terms and Conditions of the Agreement.

Sub-processor: any third Party appointed to process Personal Data on behalf of that Processor related to this Agreement.

- 11.2 The Parties acknowledge that for the purposes of the Data Protection Legislation, the ESFA on behalf of the Secretary of State for Education is the Controller and the Employer is the Processor only for the processing set out in Appendix 2. Any other processing of Personal Data undertaken by the Employer will be as a Data Controller and not on behalf of the ESFA. Clauses 11.3 to 11.15 below apply only in relation to the processing of Personal Data on behalf of the ESFA as set out in Appendix 2, and the only processing that the Processor is authorised to do on behalf of the ESFA is listed in Appendix 2 by the ESFA and may not be determined by the Processor.
- 11.3 The Processor shall notify the Controller immediately if it considers that any of the Controller's instructions infringe the Data Protection Legislation.
- 11.4 The Processor shall provide all reasonable assistance to the Controller in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of the Controller, include:
- (a) a systematic description of the envisaged processing operations and the purpose of the processing;
 - (b) an assessment of the necessity and proportionality of the processing operations in relation to the Provision;
 - (c) an assessment of the risks to the rights and freedoms of Data Subjects; and
 - (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal Data.
- 11.5 The Processor shall, in relation to any Personal Data processed in connection with its obligations under this Agreement:
- (a) process that Personal Data only in accordance with Appendix 2, unless the Processor is required to do otherwise by Law. If it is so required the

Processor shall promptly notify the Controller before processing the Personal Data unless prohibited by Law;

- (b) ensure that it has in place Protective Measures, which are appropriate to protect against a Data Loss Event, which the Controller may reasonably reject (but failure to reject shall not amount to approval by the Controller of the adequacy of the Protective Measures), having taken account of the:
 - (i) nature of the data to be protected;
 - (ii) harm that might result from a Data Loss Event;
 - (iii) state of technological development; and
 - (iv) cost of implementing any measures;
- (c) ensure that:
 - (i) the Processor Personnel do not process Personal Data except in accordance with this Agreement (and in particular Appendix 2);
 - (ii) it takes all reasonable steps to ensure the reliability and integrity of any Processor Personnel who have access to the Personal Data and ensure that they:
 - (A) are aware of and comply with the Processor's duties under this clause;
 - (B) are subject to appropriate confidentiality undertakings with the Processor or any Sub-processor;
 - (C) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third Party unless directed in writing to do so by the Controller or as otherwise permitted by this Agreement; and
 - (D) have undergone adequate training in the use, care, protection and handling of Personal Data; and
- (d) not transfer Personal Data outside of the EU unless the prior written consent of the Controller has been obtained and the following conditions are fulfilled:
 - (i) the Controller or the Processor has provided appropriate safeguards in relation to the transfer (whether in accordance with GDPR Article 46 or LED Article 37) as determined by the Controller;
 - (ii) the Data Subject has enforceable rights and effective legal remedies;

- (iii) the Processor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist the Controller in meeting its obligations); and
 - (iv) the Processor complies with any reasonable instructions notified to it in advance by the Controller with respect to the processing of the Personal Data;
 - (e) at the written direction of the Controller, delete or return Personal Data (and any copies of it) to the Controller on termination of the Agreement unless the Processor is required by Law to retain the Personal Data.
- 11.6 Subject to clause 11.7, the Processor shall notify the Controller immediately if it:
- (a) receives a Data Subject Request (or purported Data Subject Request) in relation to processing their data under this Agreement;
 - (b) receives a request to rectify, block or erase any Personal Data. Notification in such cases should be given via the ILR;
 - (c) receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Legislation;
 - (d) receives any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data processed under this Agreement;
 - (e) receives a request from any third Party for disclosure of Personal Data where compliance with such request is required or purported to be required by Law; or
 - (f) becomes aware of a Data Loss Event.
- 11.7 The Processor's obligation to notify under clause 11.6 shall include the provision of further information to the Controller in phases, as details become available.
- 11.8 Taking into account the nature of the processing, the Processor shall provide the Controller with full assistance in relation to either Party's obligations under Data Protection Legislation and any complaint, communication or request made under clause 11.6 (and insofar as possible within the timescales reasonably required by the Controller) including by promptly providing:
- (a) the Controller with full details and copies of the complaint, communication or request;

- (b) such assistance as is reasonably requested by the Controller to enable the Controller to comply with a Data Subject Request within the relevant timescales set out in the Data Protection Legislation;
- (c) the Controller, at its request, with any Personal Data it holds in relation to a Data Subject;
- (d) assistance as requested by the Controller following any Data Loss Event;
- (e) assistance as requested by the Controller with respect to any request from the Information Commissioner's Office, or any consultation by the Controller with the Information Commissioner's Office.

11.9 The Processor shall maintain complete and accurate records and information to demonstrate its compliance with this clause. This requirement does not apply where the Processor employs fewer than 250 staff, unless:

- (a) the Controller determines that the processing is not occasional;
- (b) the Controller determines the processing includes special categories of data as referred to in Article 9(1) of the GDPR or Personal Data relating to criminal convictions and offences referred to in Article 10 of the GDPR; or
- (c) the Controller determines that the processing is likely to result in a risk to the rights and freedoms of Data Subjects.

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

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

11.12 Before allowing any Sub-processor to process any Personal Data related to this Agreement, the Processor must:

- (a) notify the Controller in writing of the intended Sub-processor and processing;
- (b) obtain the written consent of the Controller;
- (c) enter into a written agreement with the Sub-processor which give effect to the terms set out in this Clause 11 such that they apply to the Sub-processor; and
- (d) provide the Controller with such information regarding the Sub-processor as the Controller may reasonably require.

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

- 11.14 The Controller may, at any time on not less than 30 Working Days' notice, revise this clause by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when incorporated by attachment to this Agreement).
- 11.15 The Parties agree to take account of any guidance issued by the Information Commissioner's Office. The Controller may on not less than 30 Working Days' notice to the Processor amend this agreement to ensure that it complies with any guidance issued by the Information Commissioner's Office.

12 Feedback and Complaints

- 12.1 The primary responsibility for receiving feedback and investigating complaints promptly and thoroughly in respect of the Provision shall rest with the Employer. The Employer 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 other employers and the wider community.
- 12.2 The Employer 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.
- 12.3 The Employer shall be responsible for resolving complaints in accordance with its own procedures and any guidance issued by the ESFA.
- 12.4 Where a complaint has not been resolved to the satisfaction of the complainant the Employer must advise the complainant of his or her option to complain to the ESFA using the ESFA's complaints procedure and co-operate with any investigation carried out by the ESFA or their representatives and act on any recommendations made by the ESFA following the investigation.

13 Retention of Documents

- 13.1 The Employer and its sub-contractors shall retain original invoices, management information returns and all other documents necessary to verify the Provision in relation to this Agreement for 6 years from the end of the financial year in which the last payment is made.
- 13.2 Where any payments made under this Agreement for the Provision have been used as match-funding as notified in writing by the ESFA under clause 9 for an ESF project the Employer will be required to retain all documents necessary to verify the Provision delivered 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.
- 13.3 Confirmation of the document destroy date will be notified in writing by the ESFA. Without prejudice to any of the other rights under the Agreement to

recover Funds, the ESFA will be entitled to recover from the Employer any sums which he is required to repay to the European Social Fund as a result of the Employers failure to comply with this Clause.

- 13.4 The provisions of this Clause shall apply during the continuance of this Agreement and after its termination howsoever arising.

14 Access and Monitoring

- 14.1 The ESFA shall give the Employer reasonable advance notice in writing of proposed visits to the Employer or its sub-contractors, to observe the delivery of the Provision.
- 14.2 For monitoring, assessment, audit and evaluation purposes, the ESFA, the Secretary of State and his agents, the Department, the Department for Work and Pensions, the National Audit Office, Representatives of the European Commission and the European Court of Auditors, the Inspectorates and HM Treasury shall have the right to visit all or any site(s) and view operations relating to the Provision and to inspect documents that the ESFA or the bodies named in this clause consider relevant to the delivery of the Provision and interview Learners and the Employer's staff during these visits.
- 14.3 The Employer shall, and shall ensure that its sub-contractors shall, permit access at any reasonable time to any of the representatives listed at clause 15.2 in order to:
- 14.3.1 examine, audit or take copies of any original or copy documentation, accounts, books and records of the Employer and its sub-contractors that relate to the delivery of the Provision;
 - 14.3.2 visit, view or assess the design, management and delivery of the Provision 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;
 - 14.3.3 carry out examinations into the economy, efficiency and effectiveness with which the Employer has used the ESFA's resources in the delivery of the Provision.
- 14.4 Where reasonably required, the Employer and its sub-contractors shall provide copies of any documents relevant to the delivery of the Provision required by any of the representatives listed at clause 14.2.
- 14.5 The ESFA will allow the Employer to provide extracted records for inspection, in the first instance, however the ESFA's position is reserved on seeking full documentation, or further information, pursuant to clause 14.3 and 14.4.
- 14.6 The Employer shall, if required by any of the representatives stated at clause 14.2 provide appropriate oral or written explanations relevant to the delivery of the Provision.

- 14.7 The ESFA reserves the right, at any reasonable time, and as it may deem necessary to require the Employer at its own cost to:
- 14.7.1 provide evidence of financial resources and the level of turnover sufficient to enable it to continue to deliver the Provision;
 - 14.7.2 obtain a report by an independent accountant of the ESFA's choice on the financial systems and controls operated by the Employer in respect of payments claimed or received under the Agreement. The Employer must agree the instructions for the work with the ESFA and this may include the ESFA discussing the terms of reference directly with the independent accountant where necessary. The report and the work required in order to produce the report shall be carried out to the satisfaction of the ESFA, and the ESFA must be able to place reliance on it. The Employer shall provide a copy of any draft report at all stages of reporting and the final report to the ESFA as soon as they are available. The ESFA reserves the right to require the Employer to publish the final report;
 - 14.7.3 provide a copy of the Employer's latest audited Accounts;
 - 14.7.4 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.
- 14.8 Where the ESFA has undertaken an investigation or received a report from an independent accountant or otherwise, in relation to the Employer, it may, as a consequence of that investigation or report, impose additional conditions of funding upon the Employer.
- 14.9 The Employer must comply with any additional conditions of funding imposed under clause 14.8.
- 14.10 If the ESFA assesses that the Employer has failed to comply with any additional conditions of funding imposed under clause 14.8 within such time as the ESFA deems reasonable, the ESFA may take such actions as it deems appropriate which may include, but is not limited to, under Clause 19.3-19.4 Minor Breach or Clause 19.5-19.6 Serious Breach.

15 Review of Performance and Reconciliation of Funding

- 15.1 For the purposes of this Agreement and the Funding Rules and any amendments thereto, the Employer shall be treated as receiving Funding and as a 'training organisation and employer' as referred to in the Funding Rules.
- 15.2 Where the Employer's actual delivery will result or has already resulted in an overpayment to the Employer by the ESFA, the ESFA will withhold from, or deduct the amount owed from, payments due to the Employer under the Agreement for current or subsequent months or years accordingly. Where the

Agreement has come to an end, the ESFA will require the repayment, within 30 days, of any overpayment identified by the ESFA.

- 15.3 Where the Employer's actual delivery has resulted in an underpayment to the Employer by the ESFA, the ESFA will adjust the amount due to the Employer accordingly. This adjustment shall not exceed the Overall Maximum Value set out in Appendix 1.
- 15.4 Should there be an under or over payment to the Employer, the ESFA may, at its absolute discretion require a variation to the Agreement.

16 Freedom of Information and Confidentiality

- 16.1 The Employer acknowledges and agrees that the ESFA is bound by, and will act in compliance with, the provisions of the Freedom of Information Act 2000.
- 16.2 Confidentiality

“Confidential Information” means any information including Personal Data as defined by the Data Protection Act 2018, 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").

The Employer hereby warrants that:

- 16.2.1 any person employed or engaged by it (in connection with this Agreement 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 Agreement; and
- 16.2.2 any person employed or engaged by it (in connection with this Agreement 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 Agreement.
- 16.3 The Parties shall take all necessary precautions to ensure that all Confidential Information obtained from the other is treated as confidential and is not disclosed without prior approval or used other than for the purposes of this Agreement by any of its employees, servants, agents or sub-contractors.
- 16.4 The provisions of clauses 16.2 and 16.3 shall not apply to any information:

- 16.4.1 which is or becomes public knowledge (other than by breach of this Clause 16);
 - 16.4.2 which was in the possession of the receiving party, without restriction as to its disclosure, before the date of receipt from the disclosing party;
 - 16.4.3 which must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the party making the disclosure, including any requirements for disclosure under the Freedom of Information Act or the Environmental Information Regulations.
- 16.5 Nothing in this Clause 16 shall be deemed or construed to prevent the ESFA from disclosing any Confidential Information obtained from the Employer:
- 16.5.1 to any other Crown Employer;
 - 16.5.2 to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
 - 16.5.3 to any professional adviser, consultant, contractor or other person engaged by the ESFA directly in connection with this Agreement, provided that such information is treated as confidential by the receiving consultant, contractor or any other person;
 - 16.5.4 on a confidential basis to any proposed successor body in connection with any assignment disposal of its rights, obligations or liabilities under this Agreement.
- 16.6 In order to ensure that no unauthorised person gains access to any Confidential Information or any data obtained in the course of the delivery of the Provision, the Employer undertakes to maintain adequate security arrangements that meet the requirements of professional standards and best practice.
- 16.7 The Employer must immediately notify the ESFA of any breach of security in relation to Confidential Information and all data obtained in the course of the delivery of the Provision and must keep a record of such breaches. The Employer must use its best endeavours to recover such Confidential Information or data however it may be recorded. The Employer must co-operate with the ESFA in any investigation that the ESFA considers necessary to undertake as a result of any breach of security in relation to Confidential Information or data.
- 16.8 The Employer shall, at its own expense, alter any security systems at any time during the period of the Agreement at the ESFA's request if the ESFA reasonably believes the Contractor has failed to comply with clause 16.6.
- 16.9 The ESFA reserves the right to publish details of this Agreement and the Payments made under it to comply with the Government's transparency requirements. The ESFA will use reasonable endeavours to give the Employer prior notice of such publication.

16.10 The provisions of this Clause 16 will apply for the duration of the Agreement and 2 years after its termination.

17 State Aid

17.1 Where the rules on State Aid apply, the ESFA will supply to the Employer details of the records that the Employer will need to collect and retain.

17.2 The ESFA reserves the right to require the Employer to obtain a contribution towards the cost of the Provision from the Employer of any Learner. Where a contribution is required, the ESFA will confirm to the Employer in writing the exact percentage of the contribution.

17.3 Where ESFA requires the Employer to obtain a contribution towards the cost of the Provision under clause 17.2 of this Agreement, the Employer must provide evidence that the contribution has been received.

17.4 In the event that any Funding paid under this Agreement is deemed by the European Commission to amount to or contain state aid that is incompatible with the common market ("negative decision") and further decides pursuant to Article 14(1) of that Regulation that the United Kingdom shall take all necessary measures to recover the aid from the beneficiary ("recovery decision"), the Employer shall, to the extent required by the recovery decision, forthwith repay the Funding to the ESFA without set-off or deduction plus interest.

18 Additional Conditions of Funding

18.1 The ESFA reserves the right to impose additional conditions of funding where it considers it is necessary to do so to secure the delivery of education and training of a reasonable quality by the Employer.

19 Breach

19.1 For the purpose of this Clause, the following definitions shall have the meanings set out below:

19.1.1 "Minor Breach" shall mean a delay or non-performance by either Party, including any Employer Related Parties, of its obligations, in part or in full, under this Agreement which does not materially, adversely or substantially affect the performance or delivery of the Provision, in part or in full, or the provision of a safe, healthy and supportive learning environment; and

19.1.2 "Serious Breach" shall mean any breach which adversely, materially and substantially affects the performance or delivery of the Provision, in part or in full, or the provision of a safe, healthy and supportive learning environment. Serious breach includes but is not limited to:

19.1.2.1 a breach of security that adversely affects the Personal Data or privacy of an individual;

19.1.2.2 failure to comply with Law, or acts or omissions by the Employer that endanger the health or safety of students;

19.2 For the avoidance of doubt:

19.2.1 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; and

19.2.2 in the event of a breach the Party not in breach may enforce the clauses in this Agreement relating to breach even if it has not done so in the event of earlier breaches.

Minor Breach

19.3 Without prejudice to any other remedy, in the event of a Minor Breach, 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.

19.4 If the Party in breach fails to remedy the Minor Breach within the time specified in notice served under clause 19.3, or such other period as may subsequently be agreed in writing between the Parties, it shall constitute a Serious Breach by the Party in breach.

Serious Breach

19.5 Without prejudice to any other remedy, in the event of a Serious Breach, which in the view of the ESFA is capable of remedy, the Parties shall adopt the following procedure:

19.5.1 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.

19.5.2 In the event that a Serious Breach of this Agreement by the Employer is in the view of the ESFA not, or cannot be, remedied within the period specified in the notice served under clause 19.5.1, or such other period as may subsequently be agreed in writing between the Parties, the ESFA may:

- (a) require the Employer to suspend recruitment of Learners, and cap growth of Learning Programmes in future years, to the Provision to which the Serious Breach relates;
- (b) give consideration to the Serious Breach in its allocations when finalising the amount of Funding in any subsequent Agreement(s) between the Parties;
- (c) reduce, suspend or recover payment to the Employer in respect of that part of the Provision to which the Serious Breach relates;

- (d) terminate, in accordance with clause 20 (Termination), in full or in respect of that part of the Provision to which the Serious Breach relates.

19.6 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 19.5.1 or such other period as may be agreed in writing between the Parties, the Party not in breach may at its sole discretion terminate this Agreement or that part of the Provision to which the breach relates with immediate effect on notice in writing to the other Party.

20 Termination

20.1 Without prejudice to any other remedy, on the occurrence of a Serious Breach that is not capable of being remedied the ESFA shall be entitled to terminate this Agreement, in respect of that part of the Provision to which the Serious Breach relates, by notice to the Employer with immediate effect.

20.2 The ESFA shall be entitled to terminate this Agreement on written notice in the circumstances as detailed in clause 8 above (Quality Assurance). The period of notice shall be that which, in all the circumstances, the ESFA deems reasonable.

20.3 The ESFA shall be entitled to terminate this Agreement on written notice in case of the insolvency, liquidation or dissolution of the Employer.

20.4 The ESFA shall be entitled to terminate this Agreement on written notice if the Employer does not recruit or data returns reveal that no Learners have been enrolled for the academic year to which this Agreement relates. Where the ESFA terminates the Agreement under this clause 20.4, the ESFA will withdraw the allocation of Funding for the academic year and will take action to recover Funds where payments have already occurred.

20.5 In addition to the rights of termination under any other clauses of this Agreement, either party shall be entitled to terminate this Agreement in respect of all or part of the Provision delivered under this Agreement by giving to the other not less than three months' notice, in writing, to that effect without the need to give a reason for termination. Where this right is exercised by the Employer it shall be implemented at no cost to the ESFA.

20.6 Once written notice of termination of this Agreement in whole or in part has been provided, the Employer will be removed from the Register of Training Organisations and the Register of Apprenticeship Training Providers maintained by the ESFA and the ESFA will secure another training provider to deliver the Provision

20.7 Termination under this clause 20 shall not prejudice or affect any right of action or remedy, which shall have accrued or shall thereupon accrue to the Parties under this Agreement.

20.8 On termination or expiry of this Agreement for any reason, the Employer 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 Agreement, to deal with the effects of such termination or expiry in so far as it is practicable to do so. The ESFA will not be liable for any costs incurred by the Employer in complying with this clause 20.7.

- 20.9 The Employer shall, within 2 Working Days of termination of this Agreement cease using any marks of the ESFA and deliver up to the ESFA all correspondence, documents, student data relevant to continuation of the Provision, specification papers and other property belonging to the ESFA, which may be in its possession or under its control.
- 20.10 On termination of this Agreement (however arising) the accrued rights and liabilities of the Parties at termination shall survive and continue in full force.
- 20.11 On termination of the Agreement the ESFA will recover any Funds which have not been spent, or for which the required evidence has not been provided, in accordance with this Agreement.

21 Transfer of Responsibility on Expiry or Termination

- 21.1 The Parties agree that if upon termination of this Agreement or any part of the delivery of the Provision, 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 so as to facilitate such outcome in relation to the relevant employees as may be acceptable to the Parties.
- 21.2 The Parties agree that on termination or expiry of this Agreement for any reason, the continuity of the Provision is of paramount importance. The Employer 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 Agreement to deal with the effects of such termination or expiry in so far as it is practicable to do so.
- 21.3 On termination or expiry of this Agreement for any reason the files for Learners who are not the Employer's employees will become the property of the ESFA. The Employer shall allow the ESFA, its servants or agent to have access to its premises to remove these files or otherwise comply with a request by the ESFA to transfer the files to any third party nominated by the ESFA.
- 21.4 The Employer 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 the Provision (or its equivalent) upon the expiry or other termination of this Agreement. The Employer shall use all reasonable endeavours to ensure that its employees and its sub-contractors are under a similar obligation. The Employer shall be entitled to require the provision of such assistance both prior to and after the expiry or other termination of this Agreement.

- 21.5 Such assistance may include, (without limitation) delivery of documents and data in the possession or control of the Employer or its sub-contractors, which relate to performance, monitoring, management and reporting of the Provision including the documents and data, if any, referred to in the Schedules.
- 21.6 The Employer 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 the Provision.

22 Provision of Information

- 22.1 In addition to the other requirements to provide information set out in this Agreement the ESFA reserves the right to request information from the College 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 Employer.
- 22.2 The Employer shall provide the ESFA or agents acting on its behalf with the information it requires under clause 22.1 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.
- 22.3 Failure to comply with any request for information under clause 22.1, at all or in the required timescales, will constitute a Minor / Serious Breach of this Agreement.

23 The Agreement

- 23.1 This Agreement constitutes the entire agreement between the Parties in relation to its subject matter and supersedes all previous understandings, commitments, representations, agreements, draft agreements, arrangements, undertakings or prior collateral contracts of any nature made by the Parties, whether written or oral, relating to its subject matter. The Agreement shall not be varied except by an instrument in writing signed by the Parties.
- 23.2 The failure by either Party to enforce at any time or for any period any one of more of the terms and conditions of this Agreement shall not be a waiver of them or of the right at any time subsequently to enforce all terms and conditions of the Agreement.
- 23.3 The Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement. No person other than the Employer and the ESFA shall have any rights under it and it shall not be enforceable by anyone other than the Employer and the ESFA.
- 23.4 Each Party acknowledges and agrees that in entering into this Agreement it has not relied upon, and shall have no rights or remedies (whether in tort, under statute or otherwise) in respect of any statements, collateral or other warranties, assurances, undertakings or representations (whether innocently or negligently made) of any person (whether party to this Agreement or not) in

relation to the subject matter of this Agreement except for those contained in this Agreement.

- 23.5 Nothing in this Agreement excludes or restricts the liability of either Party to the other arising out of pre-contract fraudulent misrepresentation or fraudulent concealment.
- 23.6 Neither Party shall be liable for failure or delay in the performance of its obligations caused by or resulting from force majeure which shall include, but not be limited to, events which are unpredictable, unforeseeable or irresistible, such as any extremely severe weather, flood, landslide, earthquake, storm, lightning, fire, subsidence, epidemic, acts of terrorism, outbreak of military hostilities (whether or not war is declared), riot, explosions, strikes or other labour unrest, civil disturbance, sabotage, expropriation by governmental authorities and any other act or any event that is outside the reasonable control of the concerned Party.
- 23.7 The Funding Rules referred to in the Agreement are expressly incorporated in full, unless otherwise specifically stated, into the Agreement. In the event of there being a conflict, confusion or ambiguity between provisions in the Agreement or any document which is incorporated into the Agreement, the Parties shall work together to identify the conflict, confusion or ambiguity and, where appropriate, effect the necessary variation to the Agreement, pursuant to clause 23.1 of the Agreement.

24 Counterparts

- 24.1 This Agreement may be entered into in any number of counterparts and by the Parties on separate counterparts, all of which taken together shall constitute one and the same instrument.

25 Governing Law and Jurisdiction

- 25.1 This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by, and interpreted in accordance with, English law.
- 25.2 Each party irrevocably submits to the exclusive jurisdiction of the English courts in relation to all matters arising out of, or in connection with, this Agreement.

26 Partnership

- 26.1 Nothing in this Agreement is intended to create a partnership or joint venture or legal relationship of any kind that would impose liability upon one Party for the act or failure to act of the other Party or to authorise either Party to act as agent for the other.

APPENDIX 2 PROCESSING, PERSONAL DATA AND DATA SUBJECTS

Description	Details
Subject matter of the Processing	<p>The subject matter is the personal data of Learners on education or training programmes administered by the ESFA that are subject to this Agreement as defined in the ESFA privacy notice and ILR specification and its appendices.</p> <p>https://www.gov.uk/government/publications/esfa-privacy-notice</p> <p>https://www.gov.uk/government/collections/individualised-learner-record-ilr</p>
Duration of the Processing	<p>The duration of the Processing covers the academic year data returns to the ESFA as defined in Appendix A of the ILR specification to enable funding and audit of the learning programmes defined in this Agreement.</p> <p>https://www.gov.uk/government/collections/individualised-learner-record-ilr</p>
Nature and purposes of the Processing	<p>The nature and purposes of the processing is defined in the ESFA privacy notice.</p> <p>https://www.gov.uk/government/publications/esfa-privacy-notice</p> <p>The Employer will be required to submit the data to the ESFA as set out in Clause 10 Data Collection of this Agreement.</p>
Type of personal data	<p>The personal data to be processed is defined in the ILR specification.</p> <p>https://www.gov.uk/government/collections/individualised-learner-record-ilr</p>
Categories of data subject	<p>The data subjects are Learners on education or training programmes administered by the ESFA that are subject to this Agreement.</p>

Description	Details
<p>Retention and destruction of the data once the processing is complete UNLESS requirement under union or member state law to preserve that type of data</p>	<p>Information on how the data must be supplied to the ESFA is detailed in the ILR specification and its appendices.</p> <p>https://www.gov.uk/government/collections/individualised-learner-record-ilr</p> <p>For the purposes of the DfE as a data controller of the data, the Employer is required to retain the data for the funding and audit purposes set out in this Agreement for 6 years from the end of the financial year in which the last payment is made under this Agreement.</p> <p>The Employer (and any other data controller) is responsible for determining any further need to process the data, including its retention, prior to secure destruction.</p>