



Skills Funding  
Agency



European Union  
European  
Social Fund

# **DRAFT Conditions of Funding (Grant)**

## **Employer**

Conditions of Funding (Grant) Employer – 2017 to 2018

Skills Funding Agency  
[www.gov.uk/sfa](http://www.gov.uk/sfa).

Agreement Reference Number: **xxxxxx**

# Conditions of Funding (Grant) Employer

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DRAFT

## Conditions of Funding (Grant) Employer

This Funding Agreement is made this 1<sup>st</sup> day of August 2017

### BETWEEN:

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

### RECITALS

**WHEREAS** the SFA 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 SFA and the Employer agree as follows

#### 1 Definitions

**“Apprenticeship”** means a job with an accompanying skills development programme.

**“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 21 of this Agreement;

**“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;

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

**“Funding and performance-management rules”** means the following documents as amended from time 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;

- Adult education budget funding and performance-management rules 2017 to 2018
- Skills Funding Agency: common funding and performance management rules 2016 to 2017 version 3
- Apprenticeships: common funding and performance management rules 2016 to 2017 version 4
- Apprenticeship frameworks funding and AGE performance management rules 2016 to 2017 version 4
- Apprenticeship standards funding rules 2016 to 2017 version 2;

**“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;

**“Parties”** means the Secretary of State for Education, acting through the Skills Funding Agency, an executive agency of the Department for Education 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 Training Organisations”** means the register maintained by the SFA of organisations qualified to receive funding from the SFA;

**“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 2017 to the 31 July 2018.

2.2 The SFA may, by giving written notice to the Employer extend the Agreement annually for a further period of up to two years (subject to the Employer's performance, continuing availability of funding and changes resulting from the implementation of Devolution Agreements).

### **3 Funding and Payment**

3.1 The total amount of funds which the SFA agrees to pay to the Employer and the Learning Programmes to which those funds will be applied are set out in Appendix 1 and Appendix 2.

3.2 All payments by the SFA will be made via BACS.

3.3 The payment will be split between the relevant specified payment period, namely 1 August 2017 up to the 31 March 2018 and/or the 1 April 2018 up to the 31 July 2018. The SFA 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 Conditions of Funding**

4.1 The Provision to be delivered under this Agreement is the delivery of the specified 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 and performance-management rules, as amended from time to time by the SFA, 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 21. The SFA will not be liable to make any payment in excess of the Maximum Value of each Learning Programme or as varied pursuant to Clause 21. Where the period of the Agreement is longer than one year, funding for subsequent years is subject to funds being made available to the SFA.

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 SFA 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 SFA.

4.5 The Employer must meet the SFA's requirements, as set out in the Funding and performance-management rules, for the provision of information.

- 4.6 The SFA will not fund any Provision, or part thereof, that fails to meet the required performance and quality standards as set out in the Funding and performance-management 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 SFA 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 SFA 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 of this Agreement for any Learning Programme, the SFA 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 SFA 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 delivery of this Agreement is restricted to the funding available up to the 31 July 2018 as detailed in Appendix 1. Appendix 1 confirms the maximum value available up to the financial year ending 31 March 2018. Where the delivery within this financial year fails to meet the minimum levels of performance (as set out in the Funding and performance-management rules) or where the delivery in this period would result in the Overall Maximum Value of the Agreement being exceeded, the SFA reserves the right in its absolute discretion to vary the Agreement accordingly.
- 4.10 The SFA 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 maintained by the SFA.
- 4.11 The SFA reserves the right to require the Employer not to enter into or to terminate any sub-contract to deliver the Services under this Agreement.
- 4.12 The Employer must comply with the requirements on sub-contracting delivery of the Services set out in the Funding and performance-management rules as amended and updated. Sub-contracting any part of the Agreement shall not relieve the Employer of any obligation or duty attributable to him 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.
- 4.13 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 SFA if requested in writing to do so. Where the Employer enters into a sub-contract for the purpose of performing the Agreement, the Employer shall ensure that the sub-contract includes any terms specified in the Funding and performance-management rules.

- 4.14 The Employer shall ensure that subcontractors are selected fairly following an open and competitive tendering process and have sufficient capacity, capability, quality and financial standing to deliver the Services.
- 4.15 The Employer shall ensure that any sub-contract entered into for the purpose of delivering the Provision under this Agreement contains a term providing that the SFA has the right to enforce the terms of the sub-contract.
- 4.16 The Employer 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 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.
- 4.17 The Employer must consider the criteria set out in the Funding higher-risk organisations and subcontractors document which is published on the SFA's website <https://www.gov.uk/government/publications/sfa-financial-assurance-higher-risk-providers-and-subcontractors#history>

## **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 SFA, 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 adopt recruitment processes that comply with the law and will ensure that vulnerable learners are protected. The Employer will take all necessary actions to comply with current legal Safeguarding requirements including undertaking an adequate risk assessment to establish what checks and action is required where their employees have regular contact with vulnerable learners. Where risk assessments identify further checks are required, information should be sought from the Disclosure and Barring Service. The Employer must review its records and be able to demonstrate to the satisfaction of the SFA that they have robust record-keeping procedures.
- 5.4 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.

- 5.5 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.
- 5.6 The Employer shall inform the SFA'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:
- 5.6.1 informing the SFA's representative by telephone or email immediately the Employer becomes aware of the event.
- 5.7 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.
- 5.8 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.
- 5.9 The Employer shall co-operate with the SFA'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.
- 5.10 The Employer shall ensure that it complies with its duty to have due regard to the need to prevent Learners from being drawn into terrorism in accordance with s26 of the Counter-Terrorism and Security Act 2015 and the guidance published by the Secretary of State

## **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 SFA if it has been acquired wholly or partly with funds provided by the SFA;
- 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 SFA 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 SFA is adequately insured.
- 6.3 The Employer shall inform the SFA if it proposes to dispose of, or change the use of, any Asset that has been financed by the SFA.
- 6.4 The Employer shall not dispose of any Asset financed by monies provided by the SFA unless it has first obtained the written consent of the SFA to such a disposal.
- 6.5 Unless otherwise agreed in writing, where the Employer disposes of the Asset financed by the SFA it shall pay to the SFA the greater of:
- 6.5.1 the amount of funding provided by the SFA 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 SFA 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 SFA, or the equivalent portion of their market value, will become the property of the SFA, 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 SFA reserves the right to decide when interest in Assets financed by the SFA under the terms of this Agreement shall cease.

## **7 Equal Opportunities**

- 7.1 The Employer will, in delivering Provision under this Agreement, demonstrate that it has had regard to the duties placed on the SFA by relevant equality legislation. Legislation, regulation and policy provide a framework within which the SFA 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 will 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 will be proportionate, relevant and aligned to the Provision the Employer is funded to deliver.
- 7.3 The SFA 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 Raising Standards**

- 8.1 The Employer shall deliver the Provision to an acceptable standard of quality, comply with the Funding and performance-management rules published by the SFA as amended from time to time and use all reasonable endeavours;
- 8.1.1 to minimise drop out rates, deliver high completion, achievement and success rates and appropriate progression;
- 8.1.2 to at least meet the minimum quality standards that apply to the Learning Programmes delivered. These minimum quality standards will be set out by the SFA;
- 8.1.3 to ensure competent and qualified staff deliver and assess learning. The Employer shall be responsible for the 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.

Failure to meet the requirements set out in this Clause 8.1 may result in the SFA assessing the Employer to be at serious risk of failing to deliver the Provision.

- 8.2 When the Employer receives notification from OFSTED that the Provision is to be inspected, the Employer shall provide the SFA 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 SFA of the date of the meeting at which OFSTED give feedback on the inspection and allow the SFA's nominated representative to attend the meeting if requested. The Employer must inform the SFA of the outcome of the inspection within 5 working days of receiving the feedback from OFSTED.
- 8.3 Where all or any part of the Provision delivered under this Agreement is assessed by OFSTED as inadequate, the SFA will regard the Employer as being at serious risk of failure to deliver the Provision.
- 8.4 The SFA will issue the Employer with a Notice of Concern in the following circumstances:
- 8.4.1 the Employer receives an inadequate OFSTED inspection rating
- 8.4.2 all or any part of the Provision delivered under this part of the Agreement falls below the minimum quality standards or other standards which may be set by the SFA.
- 8.5 The Notice of Concern will set out the reasons for the issue of the Notice of Concern and the actions the SFA requires the Employer to take to address the concerns together with the timescales within which that action must be taken. The Notice of Concern may include additional conditions of funding.
- 8.6 Where the SFA has served a Notice of Concern the SFA has the right to require the Employer to suspend the recruitment of Learners until the Notice of Concern is lifted.
- 8.7 The Notice of Concern and any additional funding conditions will be lifted once the Employer has taken the required action to address the concerns within the timescales set out.
- 8.8 If the Employer fails to take the actions set out in the Notice of Concern within the timescales set out, the SFA reserves the right to amend the Notice of Concern and add additional funding conditions or issue a Notice of Withdrawal of Funding.
- 8.9 In the event that the Employer fails to comply with the Notice of Withdrawal of Funding, the SFA will issue a Confirmation of Withdrawal of Funding.
- 8.10 Once a Confirmation of Withdrawal of Funding has been issued the Employer will be removed from the Register of Training Organisations and the SFA will secure another training provider to deliver the Provision.

- 8.11 The SFA reserves the right to proceed straight to issuing a Notice of Withdrawal of Funding without first issuing a Notice of Concern where he considers that urgent action needs to be taken to improve the quality of the Provision to protect the interest of Learners.
- 8.12 Where appropriate the Employer shall confirm in writing to the SFA that it has formal approval from relevant awarding organisations to deliver the qualifications, which form part of the Provision. The Employer must notify the SFA immediately in writing if it receives any sanction from an awarding organisation.
- 8.13 The SFA 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 21 save that where the SFA 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 SFA without obtaining prior written consent from the SFA, 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 SFA, that no double funding has occurred in respect of the Provision. Where the SFA identifies double funding in respect of the Provision, the Employer will be liable to repay to the SFA any sums paid by the SFA in respect of the Provision for which the Employer has received funding from another source and the SFA reserves the right to deduct such sums from any monies owed or due to the Employer under this Agreement.
- 9.3 The SFA 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 SFA, the Employer shall provide such information in the form needed by the SFA to enable the SFA 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 SFA, inform Learners or others of such financing.

## **10 Data Collection**

- 10.1 The Employer must supply the SFA 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 SFA's website and in accordance with the 'Provider Support Manual' as amended and updated.

- 10.2 The Employer must supply the SFA 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 SFA through the SFA's web portal <https://www.gov.uk/government/publications/sfa-the-hub>. Access to the SFA's web portal is restricted and The Employer agrees to comply with the conditions of use regarding the supply of data to the SFA set out in this Clause 10 and in 'Individualised Learner Record Specification 2017/18' and relevant Provider Support Manual as amended and updated available on the SFA's web site.
- 10.4 Where the SFA is concerned about the quality of the data, including the completeness or accuracy of the data, provided by the Employer, the SFA may require the Employer to supply further data, or data more frequently, for such period as the SFA shall require.
- 10.5 The SFA reserves the right to require the Employer, at its own cost, to carry out such work as the SFA deems necessary to improve the quality of data.
- 10.6 The SFA 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 SFA 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 SFA.

## **11 Data Protection and Protection of Personal Data**

11.1 The Parties shall ensure that they at all times comply with the provisions and obligations imposed by the Data Protection Act 1998 and the Data Protection Principles together with any subsequent re-enactment or amendment thereof in storing and processing personal data. Both Parties hereby acknowledge that performance of a duty imposed by the Act shall not constitute a breach of any obligation in respect of confidentiality which may be owed to the other party. This Clause 11 shall not affect the SFA's ability to make a search with a credit reference agency.

11.2 With respect to the Parties' rights and obligations under this Agreement only, the Parties agree that the SFA is the Data Controller and the Employer is the Data Processor within the meaning of the Data Protection Act 1998.

11.3 The Employer shall:

11.3.1 process Personal Data in respect of its Learners only in accordance with the instructions from the SFA (which may be specific instructions or instructions of a general nature as set out in the Agreement or otherwise notified by the SFA to the Employer during the term of the Agreement);

11.3.2 process the Personal Data only to the extent and in such manner as is necessary for the delivery of the Provision or as is required by Law or any Regulatory Body;

11.3.3 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;

11.3.4 take reasonable steps to ensure the reliability of any of the Employer's Personnel who have access to the Personal Data;

11.3.5 obtain prior written consent from the SFA in order to transfer the Personal Data to any sub-contractors or other third Parties for the delivery of the Provision;

11.3.6 ensure that all 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 SFA, for the avoidance of doubt third party does not include the Employer's employees, contractors or agents;

- 11.3.7 notify the SFA within 5 working days if it receives:
  - 11.3.7.1 a complaint or request relating to the SFA's obligations under the Data Protection Legislation;
- 11.3.8 provide the SFA with full co-operation and assistance in relation to any complaint or request made, including by:
  - 11.3.8.1 providing the SFA with full details of the complaint or request;
  - 11.3.8.2 complying with a data access request within the relevant timescales set out in the Data Protection Legislation and in accordance with the SFA's instructions;
  - 11.3.8.3 providing the SFA with any Personal Data it holds in relation to a Data Subject (within the timescales required by the SFA); and
  - 11.3.8.4 providing the SFA with any information requested by the SFA;
- 11.3.9 permit the SFA or the SFA's representative (subject to reasonable and appropriate confidentiality undertakings), to inspect and audit the Employer's data processing activities (and/or those of its agents, subsidiaries, and sub-contractors) and comply with all reasonable requests or directions by the SFA to enable the SFA to verify and/ or procure that the Employer is in full compliance with its obligations under this Agreement;
- 11.3.10 provide a written description of the technical and organisational methods employed by the Employer for processing Personal Data (within the timescales required by the SFA); and
- 11.3.11 not Process Personal Data outside the European Economic Area without the prior written consent of the SFA and, where the SFA consents to a transfer, to comply with:
  - 11.3.11.1 the obligations of a Data Controller 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
  - 11.3.11.2 any reasonable instructions notified to it by the SFA.

## **12 Branding and Logos**

- 12.1 The Employer shall when receiving funding from the SFA for any Learning Programme, meet the requirements of the endorsement identity, available on the SFA's identity guidelines website <https://brand.skillsfundingagency.bis.gov.uk/> on all and any promotional materials or activities in respect of the Provision. This shall include but not be limited to prospectuses, direct mail advertising, TV and radio advertising, merchandising or any other literature or products.
- 12.2 The Employer shall be given access to the current SFA logos and/or statements, which are to be used. This right may include but not be subject to the use of logos from other co-branding or co-funding participants. Details will be available from the SFA's website or communications team.
- 12.3 This access, when granted, shall be limited to the use of the current logos and/or statements and under no circumstances will the Employer be allowed to amend or alter the logos and/or statements, nor use it for anything not covered by this Agreement.
- 12.4 Clause 12.1 shall also apply to the Employer's sub-contractors in carrying out its responsibilities under this Agreement.
- 12.5 In respect of the Provision, the SFA may seek consent in writing to use Employer's trademarks and logos. The Employer agrees not to unreasonably withhold its consent and in giving such consent may impose reasonable conditions in respect of the use by the SFA of its trademarks and logos with which the SFA will comply.

## **13 Feedback and Complaints**

- 13.1 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 SFA, to gather and act upon feedback and complaints from Learners and/or their representatives and other employers and the wider community.
- 13.2 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.
- 13.3 The Employer shall be responsible for resolving complaints in accordance with its own procedures and any guidance issued by the SFA.
- 13.4 Where a complaint has not been resolved to the satisfaction of the complainant the Employer will advise the complainant of his or her option to complain to the SFA using the SFA's complaints procedure and co-operate

with any investigation carried out by the SFA or their representatives and act on any recommendations made by the SFA following the investigation.

## **14 Retention of Documents**

- 14.1 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.
- 14.2 Where any payments made under this Agreement for the Provision have been used as match-funding as notified in writing by the SFA 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.
- 14.3 Confirmation of the document destroy date will be notified in writing by the SFA. Without prejudice to any of the other rights under the Agreement to recover funds, the SFA 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.
- 14.4 The provisions of this Clause shall apply during the continuance of this Contract and after its termination howsoever arising.

## **15 Access and Monitoring**

- 15.1 The SFA 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.
- 15.2 For monitoring, assessment, audit and evaluation purposes, the SFA, the Secretary of State and his agents, Department for Education, the Department for Work and Pensions, the National Audit Office, Representatives of the European Commission and the European Court of Auditors, the Inspectorate 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 SFA 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.
- 15.3 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:

- 15.3.1 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;
  - 15.3.2 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;
  - 15.3.3 carry out examinations into the economy, efficiency and effectiveness with which the Employer has used the SFA's resources in the delivery of the Provision.
- 15.4 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 15.2.
- 15.5 The SFA will allow the Employer to provide extracted records for inspection, in the first instance, however the SFA's position is reserved on seeking full documentation, or further information, pursuant to clause 15.3 and 15.4.
- 15.6 The Employer shall, if required by any of the representatives stated at Clause 15.2 provide appropriate oral or written explanations relevant to the delivery of the Provision.
- 15.7 The SFA reserves the right, at any reasonable time, and as it may deem necessary to require the Employer at its own cost to:
- 15.7.1 provide evidence of financial resources and the level of turnover sufficient to enable it to continue to deliver the Provision;
  - 15.7.2 obtain a report by an independent accountant of the SFA's choice on the financial systems and controls operated by the Employer in respect of payments claimed or received under the Agreement;
  - 15.7.3 provide a copy of the Employer's latest audited Accounts;
  - 15.7.4 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 SFA.

## **16 Review of Performance and Reconciliation of Funding**

- 16.1 For the purposes of this Agreement and the Funding and performance-management 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 and performance-management rules.

- 16.2 Where the Employer's actual delivery will result or has already resulted in an overpayment to the Employer by the SFA, the SFA 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 SFA will require the repayment, within 30 days, of any overpayment identified by the SFA.
- 16.3 Where the Employer's actual delivery has resulted in an underpayment to the Employer by the SFA, the SFA will adjust the amount due to the Employer accordingly. This adjustment shall not exceed the Overall Maximum Value set out in Appendix 1.
- 16.4 Should there be an under or over payment to the Employer, the SFA may, at its absolute discretion require a variation to the Agreement.

## 17 Freedom of Information and Confidentiality

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

**“Confidential Information”** 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").

The Employer hereby warrants that:

- 17.2.1 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 SFA as confidential, safeguard it accordingly and only use such Confidential Information for the purposes of this Agreement; and
- 17.2.2 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 SFA, except where disclosure is otherwise expressly permitted by the provisions of this Agreement.

- 17.3 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.
- 17.4 The provisions of clauses 17.2 and 17.3 shall not apply to any information:
- 17.4.1 which is or becomes public knowledge (other than by breach of this Clause 17);
  - 17.4.2 which was in the possession of the receiving party, without restriction as to its disclosure, before the date of receipt from the disclosing party;
  - 17.4.3 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.
- 17.5 Nothing in this Clause 17 shall be deemed or construed to prevent the SFA from disclosing any Confidential Information obtained from the Employer:
- 17.5.1 to any other Central Government Body, Non-Departmental or quasi Government body or agency, central or local;
  - 17.5.2 to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
  - 17.5.3 to any professional adviser, consultant, contractor or other person engaged by the SFA directly in connection with this Agreement, provided that such information is treated as confidential by the receiving consultant, contractor or any other person;
  - 17.5.4 on a confidential basis to any proposed successor body in connection with any assignment disposal of its rights, obligations or liabilities under this Agreement.
- 17.6 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.
- 17.7 The Employer will immediately notify the SFA of any breach of security in relation to Confidential Information and all data obtained in the course of the delivery of the Provision and will keep a record of such breaches. The Employer will use its best endeavours to recover such Confidential Information or data however it may be recorded. The Employer will co-operate with the SFA in any investigation that the SFA considers necessary to

undertake as a result of any breach of security in relation to Confidential Information or data.

- 17.8 The Employer shall, at its own expense, alter any security systems at any time during the period of the Agreement at the SFA's request if the SFA reasonably believes the Contractor has failed to comply with clause 17.6.
- 17.9 The SFA reserves the right to publish details of this Agreement and the Payments made under it to comply with the Government's transparency requirements. The SFA will use reasonable endeavours to give the Employer prior notice of such publication.
- 17.10 The provisions of this Clause 17 will apply for the duration of the Agreement and 2 years after its termination.

## **18 State Aid**

- 18.1 Where the rules on State Aid apply, the SFA will supply to the Employer details of the records that the Employer will need to collect and retain.
- 18.2 The SFA 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 SFA will confirm to the Employer in writing the exact percentage of the contribution.
- 18.3 Where SFA requires the Employer to obtain a contribution towards the cost of the Provision under clause 18.2 of this Agreement, the Employer must provide evidence that the contribution has been received.
- 18.4 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 SFA without set-off or deduction plus interest.

## **19 Termination**

- 19.1 This Agreement may be terminated;
- 19.1.1 by either Party giving not less than 3 months' notice in writing to the other Party;
- 19.1.2 with immediate effect, by the SFA, on an Event of Insolvency of the Employer;
- 19.1.3 if the statutory post of the SFA ceases to exist and no provision is made to transfer the rights and liabilities to a successor body;

- 19.1.4 by either Party in the event that the other has committed a breach of the conditions of funding set out in this Agreement which is not capable of remedy or which the other party has failed to remedy having been given written notice of such breach and, in the view of the party not in breach, reasonable time to rectify the breach.
- 19.2 For the purposes of Clause 19.1, the term “Event of Insolvency” shall mean the following:
- 19.2.1 an inability, or deemed inability to pay its debts within the meaning of section 123 of the Insolvency Act 1986; or
  - 19.2.2 commencing negotiations with all or any class of creditors with a view to rescheduling any debts or entering into any composition or arrangement with creditors generally; or
  - 19.2.3 an order being made or a resolution being passed, or a notice being issued convening a meeting for the purpose of passing a resolution, or any analogous proceedings are taken for winding up, administration or dissolution; or
  - 19.2.4 any liquidator, trustee in bankruptcy, receiver, administrative receiver, administrator or similar officer being appointed over, or in respect of, any part of the Employer’s business or assets.
- 19.3 On termination of the Agreement the SFA will recover any funds which have not been spent, or for which the required evidence has not been provided, in accordance with this Agreement.
- 19.4 The Employer shall, upon termination of the Agreement within a reasonable time deliver up to the SFA all correspondence, documents, specification papers and other property belonging to the SFA, which may be in its possession or under its control.
- 19.5 Termination of this Agreement for any reason shall not affect any rights and liabilities accrued up to and including the date of the termination.

## **20 Transfer of Responsibility on Expiry or Termination**

- 20.1 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.

- 20.2 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 SFA 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.
- 20.3 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 SFA. The Employer shall allow the SFA, its servants or agent to have access to its premises to remove these files or otherwise comply with a request by the SFA to transfer the files to any third party nominated by the SFA.
- 20.4 The Employer shall, at no cost to the SFA, promptly provide such assistance and comply with such timetable as the SFA 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.
- 20.5 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.
- 20.6 The Employer undertakes that it shall not knowingly do or omit to do anything which may adversely affect the ability of the SFA to ensure an orderly transfer of responsibility for the Provision.

## **21 The Agreement**

- 21.1 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.
- 21.2 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.
- 21.3 The Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement. No person other than the Employer and the SFA shall have any

rights under it and it shall not be enforceable by anyone other than the Employer and the SFA.

- 21.4 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.
- 21.5 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.
- 21.6 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.
- 21.7 The following documents referred to in the Agreement are expressly incorporated in full, unless otherwise specifically stated, into the Agreement;
- 21.7.1 The Funding and performance-management rules as amended from time to time by the SFA;

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 21 of the Agreement.

## **22 Counterparts**

- 22.1 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.

## **23 Governing Law and Jurisdiction**

- 23.1 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.

23.2 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.

## **24 Partnership**

24.1 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.

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