



Modern Apprenticeship Programme Conditions 2018

Conditions

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1. Defined terms and Interpretation

1.1. In these terms and conditions and the Specification, the words and expressions below will be interpreted to have the means adjacent to them:-

- “Accounting Period”** means the applicable accounting period as identified within CTS/FIPS or by SDS on the SDS Website (as determined by SDS);
- “Achieved Performance Level”** means in respect of the relevant part of the Services in any measurement period, the standard of performance actually achieved by the Provider in the performance of that part of the Service in the measurement period in question (calculated and expressed in the same way as the Performance Level for that part of the Service is calculated and expressed in paragraph 6.7 of the Specification).
- “Apprentice”** See ‘Participant’
- "Audit"** means an audit carried out pursuant to condition 25 of the Conditions
- "Auditor"** has the meaning set out in condition 25.5 of the Conditions;
- “Awarding Body”** means the relevant awarding body for the approved Qualification identified within the ITP.
- “Best Practice”** means in relation to the performance of the relevant obligation, the recommended process or format (as applicable) made available by or on behalf of SDS, to be used by the Provider
- “CTS/FIPS”** means the SDS corporate training system or portal through which information relating to the MA Programme is recorded by and made available to each of the parties. For Participants historically registered as Starts on the Corporate Training System (CTSs), CTS shall continue to be the operable system/portal in relation to those Participants. For all other Participants, the Funding Information and Processing System (FIPS) shall be the operable system/portal and “CTS” and “FIPS” shall be construed accordingly.
- “Change of Control”** has the meaning set out in condition 18.3 of the Conditions

“Conditions”	means these SDS terms and conditions for the provision of MA Services including the appendices and any and all other documentation referred to in these conditions and appendices, (in each case as varied by the Letter of Award);
“Contract Schedule”	means each order for Services submitted by SDS to, and accepted by, the Provider, all in accordance with the ordering procedure set out in the Conditions, which contract schedule shall set out the volumes of Starts and other Participants to whom Services shall relate, and the corresponding charges;
“Controlling Interest”	means: (a) the ownership or control (directly or indirectly) of more than fifty per cent (50%) of the voting share capital of the relevant undertaking; or (b) the ability to direct the casting of more than fifty per cent (50%) of the votes exercisable by the partners, members or shareholders of the relevant undertaking; (c) the right to appoint or remove directors of the relevant undertaking holding a majority of the voting rights at meetings of the board on all, or substantially all, matters
“Core Skills”	means collectively, all of the following: <ul style="list-style-type: none"> • Communication • Numeracy • Problem solving • Working with others • Information Technology
“Data Controller”	has the meaning set out in the Data Protection Legislation from time to time;
“Data Processor” or “Processor”	has the meaning set out in the Data Protection Legislation from time to time;

“Data Protection Legislation”

means the Data Protection Act 1998, the EU Data Protection Directive 95/46/EC, the Regulation of Investigatory Powers Act 2000, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (*SI 2000/2699*), the Electronic Communications Data Protection Directive 2002/58/EC, the Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended or succeeded by the proposed Regulation on Privacy and Electronic Communications); and from 25 May 2018, the GDPR; together with any legislation that, in respect of the United Kingdom, replaces, or enacts into United Kingdom domestic law, the GDPR or the proposed Regulation on Privacy and Electronic Communications and all applicable laws and regulations relating to processing of personal data and privacy whether as a consequence of the United Kingdom leaving the European Union or not, including where applicable the guidance and codes of practice issued by the Information Commissioner;

“Data Subject”

has the meaning set out in the Data Protection Legislation from time to time;

“Employment Losses”

means actions, proceedings, liabilities, costs, losses, damages, claims, demands and expenses (including, without limitation, all legal and professional fees and expenses, on a full indemnity basis);

“FOISA”

means the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 and any subordinate legislation made under each such set of provisions from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government department in relation to such legislation;

“Fraud”

means any offence under any laws creating offences in respect of fraudulent acts or at common law in respect of fraudulent acts in relation to the MA Provider Contract or defrauding or attempting to defraud or conspiring to defraud SDS;

“GDPR”

means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC;

“Group Company”	means the employer, its Subsidiaries or Holding Companies from time to time and any Subsidiary of any Holding Company from time to time;
“Individual Training Plan” or “(ITP)”	means an individual training plan which satisfies the content requirements as detailed in the Conditions;
“Information”	has the meaning set out in the Freedom of Information (Scotland) Act 2002;
“Initial Assessment” or “IA”	<p>means an initial assessment to be conducted by the Provider on the Participant (or proposed Participant, as the case may be). The outcomes of assessment for both the Participant (or proposed Participant, as applicable) and the Provider will be:</p> <ul style="list-style-type: none"> • increased awareness and understanding of needs; • increased knowledge of the options available; • increased ability to make realistic decisions about jobs and training; and • increased ability to plan action and to act on decisions <p>This meaning of 'assessment' does not include assessment of trainees in training for competencies required for the gaining of approved Qualifications or credit towards them. Assessment for such competencies must be carried out by occupationally competent personnel who possess or are working towards the relevant Qualification;</p>
“Insolvency Event”	means any of the events described in condition 36 of the Conditions;
“ITT Response”	means all information supplied to SDS by or on behalf of the Provider in response to SDS' invitation to tender for the provision of the Services to be provided pursuant to the MA Provider Contract, including the ITT response section, the volume bid documentation and all supporting documentation required pursuant to SDS's invitation to tender;
“Letter of Award”	means the letter issued by SDS to each successful economic operator who submitted an ITT Response accepting that economic operator's ITT Response for the Services, the signed duplicate copy of which is returned to SDS;

“MA Provider Contract”	means the agreement constituted between SDS and the Provider by virtue of and subject to the Specification, the Conditions, the provisions of the Invitation to Tender, the Provider’s ITT Response and the Letter of Award and any formal variations thereto to the extent only that they are implemented in accordance with the variation provisions set out in the Specification and the Conditions;
“Modern Apprenticeship Group (MAG)”	means representatives of SDS, Scotland’s Colleges, Scottish Qualification Authority, Scottish Training Federation, Scottish Trades Union Congress and Scottish Government, and/or such alternative Group
“Milestone”	means a measurable and auditable benchmark against which to measure a Participant’s progress towards the achievement of his or her individual training plan, and which may be referred to as a start, milestone or outcome, as applicable;
“Month”	means each calendar month, and where any Contract Schedule commences on any day other than the first day of the calendar month, the first Month shall commence on the commencement day of that Contract Schedule and end on the last day of the next full calendar month;
“National Training Programme” or “NTP”	means the Employability Fund and the Modern Apprenticeship Programme;
“Online System”	means documentation completed and held electronically, with no, or a very few hard copies, and where signatures not obtained but control maintained by allocation of individual secure access rights;
“Outcome”	means full achievement of a target agreed in the ITP;
"Parent Company"	means any company which is the ultimate Holding Company of the Provider and which is either responsible directly or indirectly for the business activities of the Provider or which is engaged in the same or similar business to the Provider. The term "Holding Company" shall have the meaning ascribed by Section 1159 of the Companies Act 2006 or any statutory re-enactment or amendment thereto;
“Participant”	has the meaning set out in condition 2.3.8 of Part One of the Specification;

“Payment Plan”	means the nationally agreed breakdown of each VQ for payment purposes, based on an agreed cluster of activity referred to as a Milestone or payment point;
“Performance Level”	means the performance level to which the relevant part of the Services is to be provided, as set out in paragraph 6.7 of Part One of the Specification;
“Permitted Sub-contractor”	means a party to which the Provider has sub-contracted certain rights and obligations under the Provider Contract and/or Contract Schedule and where the identity of that sub-contractor and the sub-contracting arrangement has been approved by SDS in accordance with condition 27 of the Conditions;
“Personal Data”	has the meaning set out in the Data Protection Legislation from time to time;
“Personal Data Breach”	has the meaning set out in the GDPR, as amended from time to time;
“Provider”	means the economic operator identified as such in the Letter of Award;
“Qualification”	means the qualifications (identified by the awarding body qualification number) in the participant’s ITP/TA, which will be at level two or above;
“Quality Standards”	means the minimum quality standards identified within the SDS Quality Management Framework available on the SDS NTP Provider website, (as may be amended by SDS from time) which the Provider must meet when performing the Services, and includes the SDS quality standards, and any optional alternative quality standards that may be expressly referenced in the SDS Quality Management Framework;
“Quarterly”	means the periods of three months commencing on 1 January, 1 April, 1 July and 1 October respectively;
“Reportable Incident”	means any incident or accident impacting a Participant while undergoing the MA Programme which is reportable pursuant to The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (SI 2013/1471);

“Review”	means the process whereby the Participant, the Provider and where applicable, the employer review the progress being made against the ITP;
“Services”	means all services that the Provider is required to perform pursuant to each Contract Schedule as set out in the Specification;
“Specification”	means the specification of the Services set out in the Invitation to Tender subject to any specific provision in the Letter of Award;
“SQA”	means the Scottish Qualifications Authority, or any replacement body carrying out the same or similar functions;
"Staff"	means all persons employed by the Provider together with the Provider's servants, agents, suppliers and sub-contractors used in the performance of its obligations under the MA Provider Contract;
“Start”	means the entry of a proposed Participant into CTS/FIPS and approved by SDS;
“Subsidiary or Holding Company”	in relation to the employer means "subsidiary" and "holding company" as defined in section 1159 of the Companies Act 2006;
“SVQ”	means ‘Scottish Vocational Qualification’ (or its replacement, as applicable) prescribed from time to time by the Scottish Qualifications Authority (or its functional successor, whomsoever);
‘TUPE’	means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) as amended from time to time;
“Training Agreement” or “TA”	means a document agreed by the trainee, Provider and, where applicable, employer, on an individual basis at the start of training;
‘User Permission’	means the terms and conditions applicable to the use by each of the Provider’s users, of FIPS, details of which are available on the training provider area of the SDS website for Modern Apprenticeships, at https://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system/ as amended from time to time;

“VQ”	means vocational qualification;
"Working Day"	means any day other than a Saturday, Sunday or public holiday in Scotland.

1.2. Except and only to the extent expressly set out in any condition, each condition in the Conditions shall be interpreted in accordance with this condition 1.2.

1.2.1. Capitalised terms in this document shall have the same meanings as those given in condition 1.1.

1.2.2. Condition, schedule and paragraph headings shall not affect the interpretation of the MA Provider Contract.

1.2.3. A person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

1.2.4. A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.

1.2.5. Words in the singular shall include the plural and vice versa.

1.2.6. A reference to one gender shall include a reference to the other genders.

1.2.7. A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.

1.2.8. Except to the extent otherwise stated in these Conditions, a reference to writing or written includes faxes but not email.

1.2.9. Any obligation in the MA Provider Contract on a person not to do something includes an obligation not to agree or allow that thing to be done.

1.2.10. A reference to a document is a reference to that document as varied or novated (in each case, other than in breach of the provisions of this agreement) at any time.

1.2.11. Where there is any conflict or inconsistency between or among the provisions of the MA Provider Contract, such conflict or inconsistency shall be resolved according to the following descending order of priority:

1.2.11.1. any document signed by SDS approving any variations or

dispensations pursuant to condition 6 and/or paragraph 2.7.1 of Part Two of the Specification;

1.2.11.2. the letter of Award;

1.2.11.3. the Microsoft licensing terms and conditions pertaining to each User Permission set out in the Training Provider pages of the SDS website available through <https://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system>;

1.2.11.4. the remaining terms of the FIPS Software User Permission terms and conditions set out in the Training Provider pages of the SDS website available through <https://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system>;

1.2.11.5. SDS Conditions for the Provision of Services;

1.2.11.6. any attachment to the SDS Conditions

1.2.11.7. the Specification;

1.2.11.8. any attachment to the Specification

1.2.11.9. the Contract Schedule;

1.2.11.10. the Invitation to Tender (ITT);

1.2.11.11. the Provider's ITT Response;

1.3. Any reference to 'include' and 'including' shall each be construed without limitation to the words preceding;

1.4. Except to the extent otherwise stated in these Conditions, any right available to SDS shall be exercised at SDS's entire discretion.

2. Conditions

2.1. The arrangements, definitions, terms and conditions set out in and referred to in the Conditions, as revised and updated from time to time by SDS together with the Invitation to Tender, the Specification and the Provider's ITT Response (subject to any amendments thereto in accordance with the terms of the Conditions) shall form part of the MA Provider Contract as if such arrangements, terms and conditions and documents were expressly set out in the MA Provider Contract.

2.2. The Conditions are set out in this document, and are subject to such amendments as are implemented by SDS from time to time. The version applicable at any given time can be found by linking through the SDS NTP providers' website at <http://www.skillsdevelopmentscotland.co.uk/for-training-providers/modern-apprenticeships/modern-apprenticeships-now-on-appscot/> or such alternative website as SDS may advise.

3. Provider's Appointment

3.1. SDS appoints the Provider as a provider of Services in respect of the MA Programme, as further described in the Specification, the Conditions and each Contract Schedule. In addition to the Contract Schedule attached to each

letter of award, the Provider shall be eligible to be considered for the award of additional Contract Schedule(s) for such Services by SDS during the term of the MA Provider Contract in the event that any volume of Starts requires to be reallocated, or additional Starts become available.

3.2. The Provider acknowledges that, in entering into the MA Provider Contract and the Contract Schedule contained in the relevant letter of award, no form of exclusivity or volume guarantee has been granted by SDS for any additional Services to be performed by the Provider.

3.3. The Provider hereby agrees and accepts that in entering into each Contract Schedule (i) it has received all information required by it in order to determine whether it is able to provide the Services to SDS in accordance with the Specification, the Conditions and the ITT Response (as may be formally varied in accordance with the Conditions) and (ii) it is deemed to have satisfied itself in relation to all matters connected with the Services and in regard to its ability to meet all requirements of each Contract Schedule.

4. Duration of the MA Provider Contract

4.1. Subject to condition 4.3 below and any earlier termination in accordance with the Conditions, the MA Provider Contract shall have effect from 1 April 2018 until 31 March 2019.

4.2. Any payments made by SDS to the Provider prior to the date of the MA Provider Contract and made in anticipation of the MA Provider Contract having effect shall be deemed to have been made under the terms and conditions of the MA Provider Contract and the relevant Contract Schedule.

4.3. In the event that any Contract Schedule terminates or expires for any reason under these Conditions, SDS may offer to extend the period of the Contract Schedule for such period and on such terms as SDS shall determine. Any such extension shall relate only to those Participants identified in the extension offer by SDS, who are already entered by the Provider onto FIPS/CTS as Starts as at the date of such termination or expiry (as applicable). Any such offer to extend shall be subject to the Provider confirming its agreement to SDS in writing within the timescale stated by SDS. Subject to such amendments as SDS may include in any offer to extend the period under this condition 4.3, the terms and conditions set out in the MA Provider Contract, and the relevant Contract Schedule shall apply during any such extended period. The terms of the MA Provider Contract shall be deemed to be incorporated into each such Contract Schedule.

5. Ordering Services

5.1. The MA Provider Contract governs the overall relationship of the parties in relation to the Provider's undertakings and sets out the process that SDS shall use to request Services from the Provider under separate Contract Schedules.

- 5.2. SDS shall be entitled (but not obliged) from time to time to request the provision of Services by submitting to the Provider the proposed Contract Schedule containing:-
- 5.2.1. the volume of new Starts who shall commence their respective MA frameworks during the specified contract period;
 - 5.2.2. the volume of Participants continuing with their respective MA frameworks during the specified contract period; and
 - 5.2.3. the financial forecasts relating to the above volumes.
- 5.3. Within 10 calendar days of receipt of each such request, the Provider shall either (i) email the SDS contact identified in the request to confirm to SDS that it shall not be able to provide the requested Services, or (ii) sign its acceptance of the request in the format advised by SDS, and submit the acceptance to SDS in accordance with such instructions as SDS shall specify. Each document containing the Provider's acceptance in the format prescribed by SDS shall form part of the Contract Schedule. A Contract Schedule shall not enter into force, be legally binding or have any other effect unless:-
- 5.3.1. the Contract Schedule contains the information required by SDS;
 - 5.3.2. the Contract Schedule has been signed by the authorised representative of SDS, and the Provider;
 - 5.3.3. the Contract Schedule has been returned to SDS (or posted on FIPS, if permitted by, and in accordance with the express instruction of SDS); and
 - 5.3.4. (subject only to any extended Contract Schedule agreed pursuant to condition 4.3), as at the date the Contract Schedule is signed, the MA Provider Contract has not been suspended or terminated.
- 5.4. Each Contract Schedule:-
- 5.4.1. shall be entered into by SDS and the Provider;
 - 5.4.2. forms a separate contract between SDS and the Provider;
 - 5.4.3. shall be for the period commencing on the commencement date set out in the Contract Schedule and expiring on 31 March 2019; and
 - 5.4.4. shall incorporate the terms of the MA Provider Contract.
- 5.5. Volumes of Starts and ongoing participants referred to in any Contract Schedule are allocated for the period of the Contract Schedule, and cannot be transferred from or to another period.

6. Variations

6.1. SDS reserves the right to amend the MA Provider Contract and/or any Contract Schedule at any time during its currency with the issue of a revised contract and/or Contract Schedule (as applicable) which will have the effect of superseding all prior agreements (where it affects the MA Provider Contract terms) and in the case of a Contract Schedule, each Contract Schedule that is identified as having been replaced:

6.1.1. in respect of the MA Provider Contract, from the date that providers are advised of the changes, and

6.1.2. in respect of each Contract Schedule, on the date SDS advises the Provider of the amendment(s), in writing.

6.2. Without limitation, SDS anticipates that any such changes may relate to:-

6.2.1. Participant eligibility criteria;

6.2.2. periodical review of Participants' progress;

6.2.3. volumes, financial contributions and related policy conditions;

6.2.4. re-entry or transfer of Participants;

6.2.5. travel, lodging, subsistence and/or lodging allowance;

6.2.6. evidence requirements;

6.2.7. changes reasonably required pursuant any change in Data Protection Legislation and/or other change in law; and/or

6.2.8. the administrative procedures and information required to be inputted to CTS/FIPS.

6.3. The Provider must promptly alert an SDS Contract Executive by email in the event that the Provider has no reasonable prospect of fulfilling any forecast relating to:-

6.3.1. the number of Starts;

6.3.2. the number of participants continuing with their MA framework; and/or

6.3.3. the spend,

set out in any Contract Schedule. This does not negate the Provider's obligation to meet the agreed forecasts, and is without prejudice to SDS's rights and remedies.

6.4. SDS may request the Provider to submit changes to the Contract Schedule concerning such parts of the Contract Schedule as SDS shall specify, including forecasting information. SDS shall be entitled at its entire discretion to accept or reject any submitted variation. In the event of changes agreed

pursuant to this condition 6.4, SDS shall issue a revised Contract Schedule in accordance with condition 6.1.

6.5. Variations to the MA Provider Contract and/or any Contract Schedule which do not meet the requirements of this condition 6 or paragraphs 2.7.1 and 3.2.1 of Part 2 of the Specification shall not be permitted.

6.6. In determining eligible persons for recruitment to the MA Programme, the Provider shall apply such additional and/or alternative eligibility criteria (as applicable) to the participant eligibility criteria set out in the Specification as SDS may advise from time to time either by email from the SDS assigned Skills Investment Advisor or on the training provider area of the SDS website for Modern Apprenticeships.

6.7. SDS will from time to time during the MA Provider Contract, evaluate the number of Participants that have been Started under each Contract Schedule by each Provider since 1 April 2018 against the number of Participants that it was contracted to Start measured across all the Provider's Contract Schedules since that date. Where there is a shortfall, SDS may without prejudice to its other rights and remedies, reallocate the remaining number of Participant places awarded under the relevant Contract Schedules for the period remaining until 31 March 2019 among other providers by amending the relevant Contract Schedules and/or placing an additional Contract Schedule, as applicable. SDS shall consider the achievements of each provider when making any reallocation.

6.8. Where SDS determines that a Contract Schedule is to be so varied, such variation shall be undertaken in accordance with this condition 6. Where any additional volumes are allocated to a Provider pursuant to condition 6.7, these shall be allocated as an additional Contract Schedule, in accordance with condition 5 above.

6.9. The ITT Response may be amended only in accordance with the procedure expressly provided in the Specification.

7. Payment and Achievement Arrangements

7.1. SDS shall pay the Provider for provision of the Services in accordance with the Conditions in respect of the Participants recruited (and approved, where applicable) and Milestones achieved in accordance with the relevant Contract Schedule.

7.2. Subject to any variations made by SDS in accordance with the MA Provider Contract, the Provider shall provide the Services in the volumes, outputs of activity and financial profiles set out in each Contract Schedule, and to the quality of delivery set out in the MA Provider Contract (including for the avoidance of doubt, the Conditions, Specification, the ITT and the ITT Response). In addition, the Provider shall provide the Services to meet the

minimum achievement rate set out in the Contract Schedule at all times.

7.3. Expenses (if any) shown in the Contract Schedule must not be exceeded without prior written approval from SDS, (at SDS's entire discretion) in the form of either an email from SDS or confirmation by SDS within FIPS.

7.4. The Provider shall pay SDS the charge for each User Permission made available to the Provider in accordance with FIPS guidance and information available on the training provider area of the SDS website from time to time, currently available through <http://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system/>, or such alternative website as SDS may advise. SDS shall be entitled to invoice the Provider at any time following the issue of each User Permission to the Provider. The Provider shall require to pay each such invoice within 30 days of the date of issue of the invoice. In the event that the Provider fails to pay any such invoice (or part thereof) in accordance with this condition 7.4, without prejudice to SDS' other rights and remedies, SDS shall be entitled to offset the shortfall against any sums due by SDS to the Provider.

7.5. Providers shall not be entitled to submit any Milestone claim until the Provider is in possession of all the evidence specified in the Specification. All claims for payments must be submitted by the Provider through CTS/FIPS. Where such evidence is not available to SDS (or its agents) on request, and/or such evidence was not in the possession of the Provider at the date of submission of the claim on CTS/FIPS, payment will be at the sole discretion of SDS. SDS shall not accept any evidence other than the evidence referred to in the Specification as support of a claim.

7.6. SDS shall be entitled to withhold any payment claimed until such time as SDS (or SDS' agent) has satisfied itself as to the authenticity, accuracy and/or suitability of the evidence available to support the claim, and in pursuit of such right, shall be entitled to conduct such audit of the supporting evidence as SDS (or SDS' agents) may deem appropriate. Payment of any claim (whether with or without any audit) does not mean that SDS has satisfied itself as regards the authenticity, accuracy and/or suitability of the evidence, and SDS reserves its rights in that regard.

8. Application to Complete MA (or part of MA)

8.1. SDS may, in exceptional circumstances, and entirely at SDS's discretion, authorise completion of any part of a Participant's MA, in the event that the Participant's employment status changes. The Provider may apply to SDS for such authorisation by submitting written details of the Participant's exceptional circumstances to the SDS assigned Skills Investment Adviser. Any such authorisation shall be in the form of an email from the SDS assigned Skills Investment Adviser or confirmation in FIPS.

9. Warranties and Representations

9.1. The Provider warrants and represents to SDS that:-

- 9.1.1. it has full capacity and authority and all necessary consents (including, where its procedures so require, the consent of its Parent Company) to enter into and to perform its obligations under the MA Provider Contract and each Contract Schedule;
- 9.1.2. the MA Provider Contract and each Contract Schedule is executed by a duly authorised representative of the Provider;
- 9.1.3. in entering into the MA Provider Contract or any Contract Schedule it has not committed and shall not commit any Fraud;
- 9.1.4. as at the commencement of the MA Provider Contract, all information, statements and representations contained in the documents submitted in respect of the relevant ITT Response are true, accurate and not misleading save as may have been specifically disclosed in writing to SDS prior to the execution of the MA Provider Contract and it will promptly advise SDS of any fact, matter or circumstance of which it may become aware which would render any such information, statement or representation to be false or misleading;
- 9.1.5. it has not entered into any agreement with any other person with the aim of preventing proposals being made or as to the fixing or adjusting of the conditions on which any proposal is made in respect of the MA Provider Contract;
- 9.1.6. it has not caused or induced any person to enter such agreement referred to in the previous paragraph;
- 9.1.7. it has not offered or agreed to pay or give any sum of money, inducement or valuable consideration directly or indirectly to any person for doing or having done or causing or having caused to be done any act or omission in relation to any other proposal or proposed proposal for the performance of Services relating to MA Programmes under the MA Provider Contract;
- 9.1.8. it has not committed any offence under the Bribery Act 2010;
- 9.1.9. no claim is being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of its knowledge and belief, pending or threatened against it or any of its assets which will or might affect its ability to perform its obligations under the MA Provider Contract;
- 9.1.10. it is not subject to any contractual obligation, compliance with which is likely to have an effect on its ability to perform its obligations under the MA Provider Contract or any Contract Schedule;
- 9.1.11. no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, are threatened) for the winding up of the Provider or for its dissolution or for the appointment of

a receiver, administrative receiver, liquidator, manager, administrator or similar officer in relation to any of the Provider's assets or revenue; and

9.1.12. in the three (3) years prior to the date of the MA Provider Contract:-

9.1.12.1. it has conducted all financial accounting and reporting activities in compliance in all material respects with the generally accepted accounting principles that apply to it in any country where it files accounts;

9.1.12.2. it has been in full compliance with all applicable securities laws and regulations in the jurisdiction in which it is established; and

9.1.12.3. it has not performed any act or omission with respect to its financial accounting or reporting which could have an adverse effect on the Provider's position as an ongoing business concern or its ability to fulfil its obligations under the MA Provider Contract and each Contract Schedule.

10. Corrupt Gifts and Payments of Commission

10.1. The Provider shall not offer or give, or agree to give, to any employee, agent, servant or representative of SDS or any other public body or person employed by or on behalf of SDS or any other public body any gift or consideration of any kind which could act as an inducement or reward for doing, refraining from doing, or for having done or refrained from doing, any act in relation to this MA Provider Contract, any Contract Schedule or any other contract with SDS or any other public body or person employed by or on behalf of SDS or any other public body (including its award to the Provider, execution or any rights and obligations contained in it), or for showing or refraining from showing favour or disfavour to any person in relation to any such contract. The attention of the Provider is drawn to the criminal offences under the Bribery Act 2010.

10.2. The Provider shall, if requested, provide SDS with any reasonable assistance, to enable SDS to perform any activity required by any relevant government or agency in any relevant jurisdiction for the purpose of demonstrating the Provider's compliance with the Bribery Act 2010.

10.3. The Provider shall maintain throughout the period of the MA Provider Contract an anti-bribery policy (which shall be disclosed to SDS) to prevent any staff, Permitted Sub-contractors and agents (if any) from committing an offence under the Bribery Act 2010.

10.4. The Provider warrants that it has not paid commission nor agreed to pay any commission to SDS or any other public body or any person employed by or on behalf of SDS or any other public body in connection with this MA Provider Contract, any Contract Schedule or any other contract with SDS or any other public body or person employed by or

on behalf of SDS or any other public body.

- 10.5. If any breach of this condition 10 is suspected or known, the Provider must notify SDS immediately and email the SDS assigned Skills Investment Advisor.
- 10.6. If the Provider notifies SDS that it suspects or knows that there may be a breach of this condition 10, the Provider must respond promptly to SDS's enquiries, co-operate with any investigation, and allow SDS to audit books, records and any other relevant documentation. This obligation shall continue for 3 years following the expiry or termination of the MA Provider Contract and each Contract Schedule thereunder.
- 10.7. If the Provider, its staff or any person acting on the Provider's behalf, engages in conduct prohibited under this condition 10 or commits any offence under the Bribery Act 2010 SDS may:-
- 10.7.1. terminate the MA Provider Contract and any other contract between the Provider (including a Contract Schedule) or part thereof, and SDS with immediate effect by giving notice in writing to the Provider and recover from the Provider the amount of any loss suffered by SDS resulting from the termination; or
- 10.7.2. recover in full from the Provider and the Provider shall indemnify SDS in full from and against any other loss sustained by SDS in consequence of any breach of this condition, whether or not the MA Provider Contract has been terminated.
- 10.8. Notwithstanding anything to the contrary under the MA Provider Contract, any dispute relating to the interpretation of this condition 10 or the amount or value of any gift, consideration or commission shall be determined by SDS and its decision shall be final and conclusive.
- 10.9. Any termination under this condition 10 will be without prejudice to any right or remedy which has already accrued or subsequently accrues to SDS.

11. Best Practice

- 11.1. Any document, form and/or guidance made available by SDS relating to the MA Programme shall be considered a Best Practice document, form and/or guidance (as applicable). In performing the Services under each Contract Schedule, the Provider shall ensure that any process and/or format used shall comply in all material respects with Best Practice. Where any form and/or guidance contains information which is identified either in the form/guidance or the Conditions as mandatory, such information must be provided.

12. Conflicts of Interest

12.1. The Provider shall take appropriate steps to ensure that neither the Provider nor any Staff are placed in a position where (in the reasonable opinion of SDS) there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Provider or Staff and the duties owed to SDS under the provisions of the MA Provider Contract.

12.2. The Provider shall promptly email or write to the SDS assigned Skills Investment Advisor, to provide full particulars to SDS if such conflict referred to in condition 12.1 above arises or is reasonably foreseeable to arise.

12.3. SDS reserves the right to terminate the MA Provider Contract between SDS and the Provider (or any Contract Schedule thereunder) (or part thereof) without penalty to SDS, immediately by giving notice in writing to the Provider and/or to take such other steps it deems necessary where, in the reasonable opinion of SDS, there is or may be an actual conflict, or a potential conflict, between the pecuniary or personal interests of the Provider and the duties owed to SDS under the provisions of the MA Provider Contract. The action of SDS pursuant to this condition shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to SDS.

13. Safeguard Against Fraud

13.1. The Provider shall safeguard SDS's funding of the MA Provider Contract against Fraud generally and, in particular, Fraud on the part of the Provider or its Staff. The Provider shall immediately notify SDS, and email the assigned SDS Skills Investment Advisor or assigned SDS Compliance Officer, if it has reason to suspect that any Fraud has occurred or is occurring or is likely to occur, providing details of same.

14. Contract Schedule Performance

14.1. The Provider shall perform all Contract Schedules entered into with SDS in accordance with:-

14.1.1. the requirements of the MA Provider Contract; and

14.1.2. the terms and conditions of the respective Contract Schedules.

15. Data Protection

15.1. In respect of the Personal Data that the Provider processes pursuant to the MA Provider Contract, the Provider and SDS agree that SDS is the Data Controller and that the Provider is the Data Processor in respect of such Personal Data.

15.2. The Provider shall in relation to any Personal Data it processes pursuant to the MA Provider Contract:

- 15.2.1. comply with its obligations under the Data Protection Legislation, including, from 25 May 2018, Article 28 of the GDPR;
- 15.2.2. process such Personal Data only on behalf of SDS, only for the purposes of performing the Services pursuant to the MA Provider Contract and for no other purpose, and only in accordance with written instructions contained in the MA Provider Contract, including the SDS Information Security and Data Handling Requirements contained in appendix 8 to the Specification (and/or such other written instructions given by SDS from time to time) and shall immediately inform SDS, if in the opinion of the Provider, an instruction infringes the requirements of any Data Protection Legislation;
- 15.2.3. not otherwise modify, amend or alter the contents of such Personal Data or disclose or permit the disclosure of any of the Personal Data to any third party unless specifically authorised in writing by SDS in the form of an email from the SDS assigned Skills Investment Advisor;
- 15.2.4. at all times comply with the provisions of the Seventh Data Protection Principle set out in Schedule 1 of the Data Protection Act 1998 and from 25 May 2018, Article 32 of the GDPR and, in so doing, 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, and if and when requested, provide a written description of the technical and organisational methods employed by the Provider for processing Personal Data (in accordance with such process and timescales set out by SDS from time to time) and the Provider shall provide reasonable assistance to SDS in implementing its own technical and organisational measures;
- 15.2.5. from 25 May 2018, keep a record of all processing activities in relation to such Personal Data in accordance with Article 30(2) of the GDPR;
- 15.2.6. without undue delay and in any event within 24 hours of becoming aware, notify SDS's data protection officer in writing of any Personal Data Breach and shall provide all reasonable assistance to SDS in relation to its obligation to notify the Information Commissioner and any affected Data Subjects. In particular the Provider shall;
- 15.2.6.1. specify the date and all other relevant circumstances of such Personal Data Breach or suspected breach and thereafter promptly, at the Provider's expense, provide SDS with all such information as SDS requests in connection with such incident including describing the nature of the Personal Data Breach including, where known, the categories and approximate number of

Data Subjects concerned; the categories and approximate number of personal data records concerned; the measures taken or proposed to be taken by the Provider to address the Personal Data Breach, including measures to mitigate any adverse effects;

15.2.6.2. take such steps as SDS requires it to take to mitigate the detrimental effects of any such incident on any of the Data Subjects and/or on SDS; and

15.2.6.3. otherwise co-operate with SDS in investigating and dealing with such incident and its consequences.

15.2.7. take reasonable steps to ensure the reliability of any of the Provider's Staff who have access to such Personal Data and to ensure that such Staff have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality, and to provide training at its own expense to its Staff on compliance with Data Protection Legislation in relation to their handling of Personal Data;

15.2.8. ensure that only those of the Provider's Staff who need to have access to such Personal Data are granted access to such data and only for the purposes of the performance of the Services pursuant to the MA Provider Contract and all of the Provider's Staff required to access such Personal Data are informed of the confidential nature of such Personal Data and comply with the obligations set out in this condition 15;

15.2.9. not publish, disclose or divulge any of such Personal Data to any third party (including for the avoidance of doubt the Data Subject itself) unless directed to do so in writing by SDS;

15.2.10. email the SDS assigned Skills Investment Advisor (within 7 calendar days) if it receives;

15.2.10.1.a request from a Data Subject to have access to that person's Personal Data or any other request to exercise the Data Subject's rights in relation to Personal Data;

15.2.10.2.a complaint or request relating to SDS's obligations under the Data Protection Legislation;

15.2.10.3.a legally binding request for disclosure of such Personal Data from a law enforcement authority (unless prohibited by applicable law); or

15.2.10.4.any other communication relating directly or indirectly to the processing of any Personal Data in connection with the MA Provider Contract;

- 15.2.11. provide SDS with full co-operation and assistance in relation to any complaint or request made in respect of any such Personal Data, including by:
- 15.2.11.1. providing SDS with full details of the complaint or request;
 - 15.2.11.2. assisting SDS in complying with a data access request within the relevant timescales set out in the Data Protection Legislation but strictly in accordance with SDS's instructions;
 - 15.2.11.3. providing SDS with any Personal Data it holds in relation to a Data Subject making a complaint or request within the timescales required by SDS; and
 - 15.2.11.4. providing SDS with any information requested by SDS;
- 15.2.12. permit SDS or its external advisers or auditors (subject to reasonable and appropriate confidentiality undertakings) to inspect and audit the Provider's data processing activities and operations and those of its agents, subsidiaries and sub-contractors and comply with all reasonable requests or directions by SDS to enable SDS to verify and procure that the Provider is in full compliance with its obligations under the MA Provider Contract; and
- 15.2.13. promptly and at its own expense assist SDS in complying with any obligations under the Data Protection Legislation in respect of any Personal Data that the Provider processes for the purposes of providing services under the MA Provider Contract, including carrying out privacy impact assessments and consulting with the Information Commissioner regarding processing which is the subject of a privacy impact assessment and/or assisting SDS or its auditors in carrying out audits of the Provider's activities and operations; and
- 15.2.14. not transfer Personal Data outside the European Economic Area or to an international organisation without the prior written consent of SDS in the form of an email from either the assigned SDS Skills Investment Advisor or SDS's Information Security officer; and, where SDS consents to such transfer, to comply with:
- 15.2.14.1. 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 that is transferred;
 - 15.2.14.2. from 25 May 2018, the obligations on a Data Controller or Data Processor under Chapter V of GDPR which may permit such transfers on the basis of an adequacy decision from an appropriate body pursuant to Article 45 of the GDPR, or subject to appropriate safeguards as set out in Article 46 of the GDPR, or where binding

corporate rules have been put in place pursuant to Article 47 of the GDPR, or where other specific derogations set out in Article 49 of the GDPR are available to permit such transfer; and

15.2.14.3.any reasonable instructions confirmed in an email from either the SDS assigned Skills Investment Advisor, or SDS's Information Security officer.

15.2.15. Condition 15.2.14 shall not prevent the Provider from disclosing Personal Data outside the European Economic Area or to an international organisation where the Provider is required to do so by law. In such circumstances, the Provider will inform SDS of that legal requirement in writing before transferring such Personal Data, unless that law prohibits the Provider from so doing on important grounds of the public interest.

15.3. The Provider shall, and the Provider shall use all reasonable endeavours to ensure that each of the Permitted Sub-Contractors shall, comply at all times with the Data Protection Legislation and shall not perform its obligations under the MA Provider Contract and each Contract Schedule in such a way as to cause either SDS or the Provider to breach any obligations under the Data Protection Legislation. The Provider shall not breach the Data Protection Legislation. The Provider shall immediately email either the SDS assigned Skills Investment Advisor or the SDS assigned Compliance officer in the event that it becomes aware of any breach of the Data Protection Legislation by the Provider or any of the Permitted Sub-Contractors in connection with the MA Provider Contract. The Provider shall not subcontract the processing of any Personal Data it processes for the purposes of providing the services under the MA Provider Contract except where such subcontractor is a Permitted Sub-Contractor and has entered into a written agreement with such Permitted Sub-Contractor which meets the requirements of the Data Protection Legislation and which imposes on the Permitted Sub-Contractor the same obligations in respect of the processing of Personal Data as are imposed on the Provider under the MA Provider Contract. The Provider shall remain fully liable to SDS for any acts or omissions of the Permitted Sub-Contractor under such agreement.

15.4. Where the Provider also processes Personal Data relating to Participants otherwise than directly for the purposes of performing its obligations under the MA Provider Contract, the Provider acknowledges that it is likely to be a Data Controller in its own right and that it is solely responsible for its own compliance with the Data Protection Legislation in that regard.

15.5. The Provider shall, at all times during and after the period of the MA Provider Contract (including each Contract Schedule), indemnify SDS and

keep SDS indemnified against all losses, damages, costs or expenses and other liabilities (including legal fees) incurred by, awarded against or agreed to be paid by SDS arising from any breach of the Provider's obligations under this condition 15 except and to the extent that such liabilities have resulted directly from SDS's instructions.

16. Freedom of Information

16.1. The Provider acknowledges that SDS is subject to the requirements of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (together "FOISA") and shall assist and cooperate with SDS to enable SDS to comply with its Information disclosure obligations.

16.2. The Provider shall and shall procure that its Permitted Sub-contractors and agents shall at its cost:-

16.2.1. transfer to SDS all requests for Information that it receives as soon as practicable and in any event within four calendar days of receiving a request for Information;

16.2.2. provide SDS with a copy of all Information in its possession, or power in the form that SDS requires within 7 calendar days (or such other period as SDS may specify) of SDS's request; and

16.2.3. provide all necessary assistance as reasonably requested by SDS to enable SDS to respond to the request for Information within the relevant time for compliance set out in FOISA.

16.3. SDS shall be responsible for determining in its absolute discretion and notwithstanding any other provision in or pursuant to the MA Provider Contract or any other agreement, whether the Information and/or any other Information is exempt from disclosure in accordance with the provisions of FOISA, and may at its absolute discretion disclose to a third party any Information relating to or provided by or on behalf of the Provider.

16.4. In no event shall the Provider respond directly to a request for Information unless expressly authorised to do so by SDS.

17. Publicity

17.1. Unless otherwise directed by SDS, the Provider shall not make any press announcements or publicise the MA Provider Contract in any way without SDS's prior written consent in the form of an email from the SDS assigned Skills Investment Advisor.

17.2. SDS shall be entitled to publicise details of the MA Provider Contract and each Contract Schedule (including any examination of the MA Provider Contract and/or any Contract Schedule by the Auditor or otherwise).

17.3. The Provider shall not do anything which may damage the reputation of SDS, any Scottish Minister, or the MA Programme, or bring SDS any Scottish Minister or the MA Programme into disrepute.

18. Termination

18.1. SDS may without penalty terminate the MA Provider Contract and/or any Contract Schedule, or part thereof (as specified by SDS in the relevant notice), by serving written notice on the Provider with effect from the date specified in such notice:-

18.1.1. where in the opinion of SDS, the Provider has failed to comply with any term of the MA Provider Contract (including any Contract Schedule);

18.1.2. where, in the opinion of SDS, the Provider is unable to perform its obligations in terms of the MA Provider Contract (including any Contract Schedule),

18.1.3. in the event that SDS ceases to be engaged in the performance or support of the MA Programme;

18.1.4. where (in the reasonable opinion of SDS), there is a material detrimental change in the financial standing and/or the credit rating of the Provider which adversely impacts on the Provider's ability to perform Services referred to in the MA Provider Contract (including any Contract Schedule);

18.1.5. where the Provider has any accreditation from any Awarding Body withdrawn or it is not renewed (in each case whether temporarily or otherwise);

18.1.6. where the Provider fails to timeously (i) notify SDS of any hold placed on any accreditation by an Awarding Body; (ii) notify SDS of any sanction which may impact on a Participant achievement, and/or (iii) provide a copy of any Awarding Body External Verifier's report containing any action;

18.1.7. where any quality accreditation or recognition of the Provider is withdrawn or not renewed (in each case whether temporarily or otherwise);

18.1.8. where the Provider and/or any of its directors, staff, Permitted Sub-contractors or representatives conducts themselves in a manner which brings or is likely to bring SDS, any Scottish Minister, or the MA Programme into disrepute. This shall include any instance where the Provider and/or any of its directors, staff, Permitted Sub-contractors or representatives is charged with any criminal offence deemed to be a serious criminal offence by SDS, at SDS' entire discretion;

18.1.9. where the Provider is a company and an Insolvency Event as

described in condition 36 has occurred in respect of the Provider;

18.1.10. where SDS terminates any other contract between the Provider and SDS as a consequence of breach on the part of the Provider,

18.1.11. where SDS becomes aware of any breach of any other agreement entered into between SDS and the Provider at any time (whether expired or extant, and whether before or after the date of the MA Provider Contract), which breach (or breaches) would entitle (or would have entitled) SDS to terminate such agreement;

18.1.12. if SDS reasonably considers that the MA Provider Contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9) of The Public Contracts (Scotland) Regulations 2015 (as may be amended or replaced from time to time);

18.1.13. if the Provider fails to comply in the performance of the MA Provider Contract with legal obligations in the fields of environmental, social and employment law;

18.1.14. if SDS has reasonable cause to believe that at the time of contract award, the Provider was in one of the situations referred to in regulation 58(1) of The Public Contracts (Scotland) Regulations 2015, including as a result of the application of regulation 58(2) of those regulations, and should therefore have been excluded from the procurement procedure;

18.1.15. if SDS has reasonable cause to believe that the Provider has committed an act or engaged in an activity listed in regulation 58(8) of The Public Contracts (Scotland) Regulations 2015, as read with regulation 58 paragraphs (13) – (17), in which case SDS shall also consider and apply any relevant guidelines or policy notes which may be issued by the Scottish Government from time to time (which shall include, but not be limited to, any guidelines or policy notes relating to blacklisting practices); or

18.1.16. if SDS has reasonable cause to believe that the MA Provider Contract should not have been awarded to the Provider in view of a serious infringement of the obligations under the Treaties (as defined in the European Communities Act 1972) and the Directive 2014/24/EU that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of the Treaty on the Functioning of the European Union.

18.2. SDS may without penalty terminate the MA Provider Contract and/or any Contract Schedule, by serving one month's written notice on the Provider at any time.

18.3. The Provider shall email the SDS assigned Skills Investment Advisor immediately if a third party acquires a Controlling Interest in the Provider where such third party does not at the date of the MA Provider Contract hold such a Controlling Interest (but disregarding for this purpose any change in the ownership/control of voting share capital, voting rights or powers or appointment/removal of directors where such change relates to the ultimate holding company or other parent undertaking of the Provider) ("**Change of Control**"). SDS may terminate the MA Provider Contract and/or any other contract between the Provider and SDS (or any Contract Schedule), or part thereof to the extent specified by SDS, without penalty to SDS by giving notice in writing to the Provider with immediate effect within six (6) months of:-

18.3.1. being notified that a Change of Control has occurred; or

18.3.2. where no notification has been made, the date that SDS becomes aware of the Change of Control;

but shall not be permitted to terminate where SDS approved the Change of Control prior to its implementation, in writing.

18.4. If SDS terminates the MA Provider Contract (or any part thereof) for breach, it shall be entitled to terminate any other contract between the Provider and SDS, without penalty, by serving written notice on the Provider with effect from the date specified in such notice.

18.5. SDS's rights of termination under this condition 18, are available to SDS in addition to any other rights of termination provided under the MA Provider Contract.

18.6. For the avoidance of doubt, SDS shall be entitled to rely on any extraneous evidence of the Provider's non-compliance with any provision within the MA Provider Contract.

18.7. The Provider shall be entitled to terminate the MA Provider Contract and any Schedule thereunder by serving written notice on SDS in the event that SDS makes any material change to these terms and conditions (which shall be deemed to include any change that materially increases the costs incurred by the Service Provider in providing the Services). The date of termination shall be the date which SDS confirms as the date on which the relevant change to the terms and conditions takes effect (or the date occurring 4 weeks after the date on which the date of the relevant change is confirmed, whichever is the later), and the Provider's notice shall require to be given (in accordance with condition 32) prior to such date, failing which the Provider's right of termination under this condition 18.7 shall elapse.

18.8. In the event that SDS exercises any of its suspension or termination

rights, or any of its other remedies for breach pursuant to this MA Provider Contract, SDS shall be entitled to require the Provider to deliver to SDS immediately on demand, all the evidence required under the Conditions to support all outstanding claims for payment under any or all Contract Schedules. SDS shall be entitled to satisfy itself, acting reasonably, that all supporting evidence is available, complete and accurate before SDS makes any payment in respect of any such claim.

18.9. Adoption by SDS of any remedy pursuant to this MA Provider Contract shall not prejudice SDS's other rights and remedies arising before or after the adoption of such right.

19. Remedies

19.1. Without prejudice to SDS' other rights and remedies:-

19.1.1. where the Provider submits a claim which the Provider is not entitled to submit, and/or receives payment from SDS which the Provider is not due to receive under the terms of the MA Provider Contract, SDS shall be entitled to recover up to the full amount of such funding from the Provider on demand.

19.1.2. failure to provide the Services (or any part of the Services) entirely in accordance with the MA Provider Contract (which shall include any failure to provide the requisite evidence, and/or failure to demonstrate that any obligation was undertaken in accordance with the requisite timescales set out in the Specification) shall constitute a breach of the MA Provider Contract, which shall entitle SDS to:-

19.1.2.1. suspend any or all payments under any or all Contract Schedules pending full investigation of the Provider's activities by giving written notice to the Provider with effect from the date specified in such notice for the period set out in the notice or such other period notified to the Provider by SDS in writing from time to time;

19.1.2.2. suspend the Provider's appointment under any or all Contract Schedules and the MA Provider Contract;

19.1.2.3. suspend the Provider's right to access CTS/FIPS under any or all Contract Schedules pending full investigation of the Provider's activities, by giving written notice to the Provider with effect from the date specified in such notice for the period set out in the notice or such other period notified to the Provider by SDS in writing from time to time;

19.1.2.4. recover on demand, up to the full amount of all funding paid under any or all Contract Schedules, which sums shall not be (re)payable to the Provider;

19.1.2.5. withhold any or all future payments otherwise payable in

respect of the Participant under any or all Contract Schedules, which sums shall not be (re)payable to the Provider;

- 19.1.2.6. reduce the volume of Starts awarded to the Provider under any or all Contract Schedules (in which event the Provider shall require to execute such amended Contract Schedule(s) as SDS submits to the Provider);
 - 19.1.2.7. serve a notice on the Provider requiring the breach to be remedied (if capable of remedy) within a period specified in the notice, not being longer than 28 calendar days. If the breach has not been remedied by the expiry of the specified period, SDS may then terminate the MA Provider Contract and/or any other contract between SDS and the Provider (or Contract Schedule thereunder) (or part thereof) under condition 18; and/or
 - 19.1.2.8. require the Provider to agree to an action/improvement plan (or Quality Action Plan, as applicable) setting out remedial actions which the Provider requires to take, and a timescale within which such remedial actions must be taken. If the remedial actions have not been properly completed by the expiry of the specified period, or if SDS is, during the specified period, of the reasonable opinion that there is no reasonable prospect of the Provider properly completing the remedial actions within the stated timescale, SDS may terminate the MA Provider Contract and/or any other contract between SDS and the Provider (or Contract Schedule thereunder).
- 19.2. Failure by the Participant to validate all required information referred to in paragraph 2.3.1 of Part One of the Specification to SDS within such timeframe as SDS shall specify, shall entitle SDS to suspend the registration of the Participant as a Start until such time as confirmation is received (within such extended timescales as SDS may specify), failing which the registration may be cancelled by SDS. For the avoidance of doubt, SDS shall have no obligations to the Provider in relation to a proposed Participant who is not registered as a Participant in accordance with that paragraph, (or whose registration is suspended or cancelled) notwithstanding that the Provider (i) has provided training to that proposed Participant and/or (ii) the proposed Participant is registered as a Participant after the date required under that paragraph. This condition 19.2 is without prejudice to SDS' other rights and remedies.
- 19.3. Without prejudice to SDS's other rights and remedies, where a claim has been made and paid by SDS before it has become due but has subsequently become due and SDS has agreed repayment is not required, SDS shall be entitled to charge interest on the amount of the payment at the rate of four per centum per annum above the base rate of the Bank of Scotland from the date of payment until the date that it actually fell due.

19.4. SDS shall be entitled to deduct from any payments due to the Provider in terms of the MA Provider Contract (including any Contract Schedule) or any other contract between SDS and the Provider:-

19.4.1.any sums due by the Provider howsoever and whensoever arising to SDS; and

19.4.2.any sums due to SDS by any person to whom the undertaking of the Provider has been transferred;

or if there are no further claims to be made, (or if otherwise requested by SDS), the Provider will make immediate repayment to SDS of such undue sums.

20. Consequences of Termination and Expiry

20.1. Unless otherwise confirmed in writing by SDS, notwithstanding the Service of a notice to terminate the MA Provider Contract and/or any other contract between SDS and the Provider (or Contract Schedule thereunder) or part thereof, the Provider shall continue to fulfil its obligations under the relevant contract until the date of expiry or termination of the relevant contract as referred to in the notice, or such other date as required under this condition 20.1.

20.2. Termination or expiry of the MA Provider Contract shall not cause any Contract Schedules to terminate automatically. For the avoidance of doubt, all Contract Schedules shall remain in force unless and until they are terminated or expire in accordance with their own terms.

20.3. Termination or expiry of the MA Provider Contract and/or other contract or Contract Schedule (or part thereof), as applicable, shall be without prejudice to any rights, remedies or obligations of either party accrued under the relevant contract prior to such termination or expiry.

20.4. SDS shall not be obliged to make payment to the Provider for any Milestone, achieved after the date of termination.

20.5. Each condition and associated requirement under the Specification, which is either expressed to or by implication is intended to survive termination shall survive the termination or expiry of the MA Provider Contract, including all conditions entitling SDS to recover monies, paragraph 2.6.2.1 of Part Two of the Specification (security of information), condition 15 (Data Protection Act), condition 16 (Freedom of Information), condition 18 (Termination), condition 19 (Remedies), condition 20 (Consequences of Termination and Expiry), condition 21 (Liability), condition 25 (Records,

Audit Access and General Assistance), condition 26 (Confidentiality), condition 34 (Intellectual Property) and condition 35 (Transfer of Undertakings).

20.6. On the termination of the MA Provider Contract or Contract Schedule, or part thereof (as applicable) for any reason, the Provider shall provide such assistance as SDS may require, including at SDS's option, deletion and/or delivery to SDS, or to such person as SDS confirms, of all documents and data (including all Personal Data processed by the Provider as a Data Processor pursuant to condition 15, except where applicable UK or EU law requires that such Personal Data must continue to be stored by the Provider) in the possession, custody or control of the Provider relating to the performance of its obligations pursuant to the MA Provider Contract, so as to facilitate a smooth and swift winding up of business between the Provider and SDS.

20.7. The Provider shall not, following termination of the MA Provider Contract or all Contract Schedules represent that the Provider is contracted to provide training under the MA Programme and shall not, even if previously permitted to do so, use or continue to use any SDS branding.

21. Liability

21.1. Subject to condition 21.2, SDS's total liability to the Provider for any costs and/or losses incurred or suffered by the Provider pursuant to the MA Provider Contract shall be capped at the total funding due to the Provider for performing the Services under the Contract Schedule in relation to which the costs and/or losses have arisen.

21.2. In no event shall SDS limit its liability pursuant to the MA Provider Contract for:-

21.2.1. death or personal injury caused by its negligence, or that of SDS's Staff; or

21.2.2. fraud or fraudulent misrepresentation by SDS or its staff or representatives.

21.3. Except insofar as liability arises from the circumstances set out in conditions 21.2.1 and 21.2.2 above the Provider shall indemnify and keep indemnified SDS in full from and against all claims, proceedings, actions, damages, legal costs, expenses and any other liabilities whatsoever arising out of, in respect of or in connection with the MA Provider Contract and each Contract Schedule including in respect of any death or personal injury, loss of or damage to property, financial loss arising from any information given or omitted to be given by the Provider, or any other loss which is caused directly or indirectly by any act or omission of the Provider. This condition shall not apply to the extent that the Provider is able to demonstrate that such death or personal injury, or loss or damage was not caused or contributed to by its negligence or

default, or the negligence or default of its staff or by any circumstances within its or their control.

22. Severability

- 22.1. If any provision of the MA Provider Contract is held invalid, illegal or unenforceable for any reason, such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if the MA Provider Contract had been executed with the invalid provision eliminated.
- 22.2. In the event of a holding of invalidity so fundamental as to prevent the accomplishment of the purpose of the MA Provider Contract, SDS and the Provider shall immediately commence good faith negotiations to remedy such invalidity.

23. Statutory and other Requirements

- 23.1. In the performance of each Contract Schedule, the Provider shall comply with all relevant requirements of Scots law and, for so long as applicable, European Community law.
- 23.2. The Provider shall be responsible for obtaining all licences, authorisations, consents or permits required in relation to the performance of the MA Provider Contract and each Contract Schedule.
- 23.3. The Provider shall ensure that every element of the MA Programme to be performed by the Provider or carried out on the Provider's behalf or at its instance by other persons, complies with the Specification, the ITT, the ITT Response and the Conditions (subject to any formal variations agreed pursuant to the terms of the MA Provider Contract).

24. Non-Discrimination

- 24.1. The Provider shall not unlawfully discriminate within the meaning and scope of any law, enactment, order or regulation relating to discrimination (whether in race, gender, religion, disability, sexual orientation, and other Protected Characteristic (as defined in the Equality Act 2010), or otherwise).
- 24.2. The Provider shall take all reasonable steps to secure the observance of condition 24.1 by all servants employees and Permitted Sub-contractors of the Provider and all suppliers and sub-contractors employed in the execution of the MA Provider Contract.
- 24.3. This condition 24 is without prejudice to the Provider's obligations relating to equality set out in paragraph 2.2. of part Two of the Specification.

25. Records, Audit Access and General Assistance

- 25.1. Subject to condition 25.3 below, SDS funding may be used to match fund European Social Fund (ESF) monies and, the Provider shall assume that all payments made by SDS to the Provider under the MA Provider Contract are ESF funded. As such, the Provider may not use any amount which it is paid under the MA Programme as match funding for any other ESF bid.
- 25.2. The Provider shall retain full and accurate records and accounts of the operation of the MA Provider Contract including the Services provided pursuant to it, the Contract Schedules entered into with SDS and the amounts paid by SDS for a period of at least 3 years following the final payment on the ESF Programme. Unless otherwise advised by SDS, this date is expected to be 31 December 2025 (meaning providers shall retain the information until 31 December 2028).
- 25.3. In the event, and to the extent only, that SDS advises the Provider ((i) in the form of an email from the SDS assigned Skills Investment Advisor, (ii) through a variation to the Conditions, or (iii) via the training provider area of the SDS website for Modern Apprenticeships), that any payments made by SDS to the Provider are **not** ESF funded, the Provider shall only require to retain the information referred to in condition 25.1 until the expiry of (3) years after the date of expiry of the Provider Contract (or as long a period as may be specified by SDS in said email, condition variation or website, as applicable).
- 25.4. The Provider shall keep the records, evidence and accounts referred to in this condition 25 in accordance with good accountancy practice.
- 25.5. The Provider shall afford SDS and/or its agents or third party auditors, (including representatives of the European Commission or the European Court of Auditors or of Audit Scotland) (as applicable) (in any case, "Auditor") immediate and unlimited access to such records, evidence and accounts as may be requested from time to time for the purpose of auditing the Provider's compliance with its obligations under the MA Provider Contract. Such access shall be at the Provider's premises (or the premises of the Provider's agents or Auditors, if such records, evidence and/or accounts are ordinarily stored there) or, if requested by Auditor, at premises identified by the Auditor within Scotland.
- 25.6. The Provider shall provide such records, evidence and accounts (together with copies of the Provider's published accounts) during the term of the MA Provider Contract and for the period referred to in condition 25.1 to the Auditor promptly on request by Auditor. Such provision shall be made at the Provider's premises (or the premises of the Provider's agents, if applicable) or, if requested by Auditor, at premises within Scotland.
- 25.7. The Provider shall on demand provide the Auditor with all reasonable co-operation and assistance in relation to each audit, including:-
- 25.7.1. providing unlimited access to all information requested by the Auditor;

- 25.7.2. providing unlimited access to sites controlled by the Provider and to equipment used in the performance of the MA Programme;
- 25.7.3. providing unlimited access to Provider staff, agents, representatives, Participants, and proposed and former Participants; and
- 25.7.4. providing the Auditor with suitable oral or written explanation as requested.
- 25.8. The Provider shall bear its own costs and expenses incurred in respect of compliance with its obligations under this condition 25 unless the audit reveals a material breach by the Provider of its obligations in which case the Provider shall reimburse SDS or SDS's agents' or representatives' (as applicable) reasonable costs incurred in relation to the audit.
- 25.9. Where SDS requests, without prejudice to SDS' other rights and remedies (including SDS' rights pursuant to condition 25.13), and the Provider's other obligations the Provider shall forward all related records, evidence, accounts and supporting documentation to SDS for retention, and shall complete and sign such documentation as SDS may reasonably require, confirming the details of the records provided. Where any such records are in electronic format, the Provider shall (at the Provider's expense) procure such licence for SDS (and/or its Auditors) as is required to enable access to the records.
- 25.10. Where during any document retention period following the expiry of the MA Provider Contract or any Contract Schedule, the Provider is unable to continue performing any of its obligations which survive expiry (including any obligations to retain the records in accordance with this condition 25), the Provider shall promptly email the SDS assigned Skills Investment Advisor confirming same.
- 25.11. The Provider shall promptly provide such general assistance and information relating to the Provider's Services and business as SDS may reasonably request from time to time which would assist SDS in responding to requests for information relating to providers and/or provider Services that may be requested by or on behalf of the Scottish Ministers, and/or assist SDS and/or the Scottish Ministers (and/or their representatives) in developing policy for modern apprenticeships.
- 25.12. The Provider shall permit duly authorised representatives of SDS unlimited access to interview Participants and/or to examine all records and all other supporting documentation in particular, evidence of assessment relating to the delivery of training. The Provider shall provide SDS with suitable oral or written explanation if requested and shall provide SDS with access to its staff for interviews on matters covered by the MA Provider Contract.

25.13. In the event that SDS and/or any other Auditor wishes access to any of the Provider records, evidence and accounts in accordance with this condition 25, if SDS and/or such Auditor requests, the Provider shall promptly, and within such timescale as SDS may specify, upload/scan (as appropriate) the requested records, evidence and/or accounts onto FIPS in accordance with such instructions as SDS may make available or if requested by SDS, email such records, evidence and/or accounts to SDS. Any such requirement does not negate the obligation on the Provider to (i) retain the original copies of all such evidence, as required under the Conditions, and (ii) make such original copies otherwise available in accordance with condition 25.

25.14. SDS shall exercise its rights in relation to audit, reasonably and proportionately.

25.15. Where any such audit or other SDS investigation reveals any breach of the Conditions and SDS is entitled to recover any sums for any Milestone claim accordingly, the Provider shall not be entitled to submit any alternative or additional evidence in support of such claim, nor submit a fresh claim for the said Milestone.

26. Confidentiality

26.1. Subject to condition 26.2 of this Part Three, the Provider must treat the content of the MA Provider Contract and each Contract Schedule as confidential and not disclose the information unless:-

26.1.1. SDS gives prior written permission to disclose in the form of an email from the SDS assigned Skills Investment Advisor confirming same;

26.1.2. the Provider is required to disclose for any court of law or tribunal or other competent authority; or

26.1.3. the content has been made publicly available not through breach.

26.2. SDS permits the Provider to disclose to its Permitted Sub-contractors only such information as the Permitted Sub-contractor reasonably requires in order to perform its obligations.

26.3. SDS shall be entitled, at its entire discretion, to disclose the content of the MA Provider Contract and each Contract Schedule, and any details relating to the Provider's performance thereunder to such parties, and in such manner, as SDS deems appropriate.

27. Assignment and Sub-contracting

27.1. The Provider shall not assign, novate, sub-contract or otherwise

dispose of any of its rights or obligations under the MA Provider Contract or any Contract Schedule without the prior written consent of SDS (which consent shall be given entirely at the discretion of SDS, and shall require to be in the form of an email confirming same from the SDS assigned Skills Investment Advisor).

27.2. Where SDS grants consent to the Provider to sub-contract in accordance with condition 27.1 SDS reserves the right to withdraw its consent to any Permitted Sub-contractor where it has reasonable grounds no longer to approve of the Permitted Sub-contractor or the sub-contracting arrangement.

27.3. In respect of any such sub-contracting to which SDS has consented in accordance with condition 27.1 :-

27.3.1. the Provider shall ensure that so far as is possible the terms of the MA Provider Contract are properly and reasonably reflected in the terms of any contract with the Permitted Sub-contractor and that so far as is possible each one of them shall at all times be bound by obligations equivalent to the obligations of the Provider under the MA Provider Contract; and

27.3.2. the Provider shall include and maintain provisions in a written contract with each Permitted Sub-contractor, in terms suggested by or acceptable to SDS, which provide that the Permitted Sub-contractor cannot assign the sub-contract to a third party without the Provider's consent (and the Provider shall not grant that consent without the prior written consent of SDS in the form of an email confirming same from the SDS assigned Skills Investment Advisor).

27.3.3. SDS reserves the right to see and approve copies of sub-contracts (such approval not to be unreasonably withheld, delayed or conditioned); and

27.3.4. no sub-contracting by the Provider under this condition 27 or otherwise, and no approval or consent by SDS in relation thereto shall relieve the Provider of any liability or obligation under the MA Provider Contract.

27.4. For the avoidance of doubt, the Provider cannot substitute or permit the substitution of a Permitted Sub-contractor without SDS's consent and as a condition of giving such consent SDS can require the incoming sub-contractor to execute a sub-contract on the same basis.

27.5. SDS shall be entitled, without the need for the consent of the Provider, to assign, novate or otherwise dispose of its rights and obligations under the MA Provider Contract or any part thereof to any other body (including any private sector body) which substantially performs any of the functions that previously had been performed by SDS.

27.6. For the avoidance of any doubt and without limitation to the preceding provisions of this condition 27, the requirements of condition 27 shall apply even where the Provider intends to delegate or sub-contract any of its rights or obligations under the MA Provider Contract and/or any Contract Schedule to a Group Company.

27.7. SDS reserves the right to charge an administration charge to reflect its costs incurred in considering, approving and agreeing the terms of any assignation or novation agreed pursuant to this condition 27, which charge shall be payable by the Provider within 28 calendar days of request by SDS.

28. Change of Provider Name

28.1. The Provider shall, no later than 10 calendar days following any change in the name of its company, or its trading name, inform SDS of same by emailing the SDS assigned Skills Investment Advisor providing full details of the change.

29. Cumulative Remedies

29.1. Except as otherwise expressly provided by the MA Provider Contract, all remedies available to either party for breach of the MA Provider Contract are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.

30. Waiver

30.1. The failure of either party to insist upon strict performance of any provision of the MA Provider Contract, or the failure of either party to exercise, or any delay in exercising, any right or remedy shall not constitute a waiver of that right or remedy and shall not cause a diminution of the obligations established by the MA Provider Contract.

30.2. No waiver shall be effective unless it is expressly stated to be a waiver and communicated to the other party in writing in accordance with condition 32 (Notices).

30.3. A waiver of any right or remedy arising from a breach of the MA Provider Contract shall not constitute a waiver of any right or remedy arising from any other or subsequent breach of the MA Provider Contract.

31. Entire Agreement

31.1. Except to the extent otherwise expressly provided in the MA Provider Contract:-

31.1.1. the MA Provider Contract (including the Specification, the ITT, the ITT Response, the Conditions, the award letter from

SDS, each Contract Schedule and any other document properly incorporated by reference into the MA Provider Contract) constitutes the entire agreement and understanding between the parties in respect of the matters dealt with in it and supersedes, cancels or nullifies any previous agreement between the parties in relation to such matters;

31.1.2. the Provider agrees that in entering into the MA Provider Contract and each Contract Schedule it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or undertaking (whether negligently or innocently made) other than as expressly set out in the MA Provider Contract.

31.2. Nothing in this condition 31 shall operate to exclude liability for fraud or fraudulent misrepresentation.

32. Notices

32.1. Except as otherwise expressly provided within the MA Provider Contract, no notice from either SDS or the Provider to the other shall have any validity under the MA Provider Contract unless made in writing by or on behalf of the party sending the communication.

32.2. Any notice which is to be given by either SDS or the Provider to the other shall be given by letter (sent by hand, post, registered post or by the recorded delivery Service). Such letters shall be addressed to the other party in the manner referred to in condition 32.3. Provided the relevant communication is not returned as undelivered, the notice or communication shall be deemed to have been given three calendar days after the day on which the letter was posted, or sooner where the other party acknowledges receipt of such letters.

32.3. For the purposes of condition 32.2, the address for SDS and the Provider shall be as follows:-

32.3.1. for notices to SDS, at SDS' registered address posted on the UK Companies House website as at the date of the notice;

32.3.2. where the Provider is a UK registered company, the Provider's registered address posted on the UK Companies House website as at the date of the notice; and

32.3.3. where the Provider is not a UK registered company, the Provider's address set out in the SDS award letter for this MA Provider Contract.

32.4. Where a Provider is not a UK registered company, the Provider may only change its address for Service by serving a notice on SDS confirming the change of address, in accordance with this condition 32.

33. Marketing and Branding

- 33.1. The Provider must conform to all marketing and brand guidelines issued by SDS and use standard marketing literature issued by SDS.
- 33.2. The Provider will use only approved product and Service names in communications with potential Participants and Participants in relation to the MA Programme. No variations to the product and Service naming conventions will be allowed and nationally available products and Services will not be locally branded.
- 33.3. The Provider may only use the SDS branding, trade mark and other intellectual property rights for the purposes of the MA Provider Contract and shall not use the same after the termination or expiry of the MA Provider Contract or Contract Schedule (as applicable).
- 33.4. The Provider shall be obliged to supply case study information as required by SDS.
- 33.5. The Provider shall at all times comply with all European Social Fund delivery partner publicity requirements set out currently at: <http://www.gov.scot/Topics/Business-Industry/support/17404/2007-2013PublicityInfo/PublicityGuidancefor2014-2020/esfpublicityrequirements>, (or such alternative address as the European Social Fund may use from time to time) together with any additional publicity requirements SDS may issue from time to time. Included within such publicity requirements is the requirement for the Provider, when marketing the MA Programme to acknowledge SDS and European funding and use the European Social Fund (ESF) logo. The European Social Fund publicity guidelines are updated regularly and the Provider shall ensure that it is at all times compliant with the current version. In addition, where SDS makes available any template or Best Practice document for use by the Provider, containing any European Social Fund reference(s), the Provider shall ensure that each such reference is included within the version used by the Provider.

34. Intellectual Property Rights

- 34.1. All intellectual property rights in any materials solely produced by the Provider in the performance and during the currency of the MA Provider Contract and each Contract Schedule shall vest in the Provider. The Provider shall grant to SDS a perpetual, royalty-free licence to use, copy and modify such materials and shall deliver such materials to SDS if so requested for such purposes.

35. TUPE: Transfer of Undertakings (Protection of Employment) Regulations 2006

- 35.1. The Provider undertakes (i) to organise the delivery of the MA Programme in such a way that there will be no organised grouping of the Provider's employees which has as its principal purpose delivery of the MA Programme and (ii) that where such a grouping exists, to ensure that any such

employees are redeployed elsewhere within the organisation of the Provider (or its subcontractor as the case may be) prior to termination, expiry or any reduction in scope of the MA Provider Contract or any Contract Schedule.

35.2. If, on the termination, expiry or reduction in the scope of the MA Provider Contract or any Contract Schedule, any contract of employment or engagement of any current or former employee of the Provider has effect, or is claimed by such current or former employee to have effect, as if originally made between SDS and such current or former employee or between any new provider of the MA Programme, and such current or former employee, by operation of TUPE or otherwise, then the Provider shall indemnify SDS and any such new provider and keep them indemnified against all and any Employment Losses (whenever they are incurred, and whether or not the claims for such Employment Losses are erroneous or unsuccessful) suffered or incurred by SDS or any such new provider arising out of:

35.2.1. the employment or engagement: and/or

35.2.2. the claimed employment or engagement: and/or

35.2.3. the termination of the employment or engagement: and/or

35.2.4. the claimed termination of employment or engagement

of any such current or former employee by SDS or any such new provider.

35.3. If SDS asks, the Provider shall promptly enter into an appropriate agreement with any new provider on the same terms as those in condition 35.2 in order to give effect to condition 35.2 and the Provider shall indemnify SDS and keep SDS indemnified for and against any losses incurred by SDS which arise from a failure by the Provider to do so, including any losses which may arise under any agreement with or undertaking SDS gives to any new provider which would give the new provider the benefit of condition 35.2 above.

35.4. Nothing in this condition 35 will give rise to the inference that SDS accepts any liability for any person employed by the Provider.

36. Insolvency

36.1. The Provider shall notify SDS in writing (and email the SDS assigned Skills Investment Advisor and SDS assigned Compliance officer) immediately upon the occurrence of any of the following events ("insolvency events") during a period in which the Provider is providing an MA Programme pursuant to the MA Provider Contract:-

36.1.1. where the Provider is an individual, if the Provider becomes apparently insolvent within the meaning of Section 7 of the Bankruptcy (Scotland) Act 1985 as amended (or equivalent in any other jurisdiction);

- 36.1.2. where the Provider is a firm or a number of individuals acting together in any capacity, if such firm or any partner of the firm or any of those persons acting together becomes apparently insolvent within the meaning of Section 7 of the Bankruptcy (Scotland) Act 1985 as amended (or equivalent in any other jurisdiction);
- 36.1.3. where the Provider is a company:-
- 36.1.3.1. a proposal is made for a voluntary arrangement within Part I of the Insolvency Act 1986 or of any other composition scheme or arrangement with, or assignment for the benefit of, its creditors;
 - 36.1.3.2. a shareholders' meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding-up is passed (other than as part of, and exclusively for the purpose of, a bona fide reconstruction or amalgamation);
 - 36.1.3.3. a petition is presented for its winding up (which is not dismissed within 14 calendar days of its Service) or an application is made for the appointment of a provisional liquidator or a creditors' meeting is convened pursuant to Section 98 of the Insolvency Act 1986;
 - 36.1.3.4. a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets;
 - 36.1.3.5. an application order is made either for the appointment of an administrator or for an administration order, an administrator is appointed, or notice of intention to appoint an administrator is given;
 - 36.1.3.6. it is or becomes insolvent within the meaning of Section 123 of the Insolvency Act 1986;
 - 36.1.3.7. being a "small company" within the meaning of Section 382 of the Companies Act 2006, a moratorium comes into force pursuant to Schedule A1 of the Insolvency Act 1986; or
 - 36.1.3.8. any event similar to those listed in condition 36.1.3.1 to condition 36.1.3.7 occurs under the law of any other jurisdiction.
- 36.2. Without prejudice to SDS' other rights and remedies, on the occurrence of an insolvency event, a timescale for the final claim will be agreed by SDS and the Provider; the Provider must provide to SDS records to support its

claims and retain them in a suitable location or pass them to SDS with full details of what has been provided to Participants and details of what Milestones have been achieved.

37. Blacklisting Regulations

- 37.1. The Provider must not commit any breach of the Employment Relations 1999 Act (Blacklists) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, or commit any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities. Breach of this condition is a material default which shall entitle SDS to terminate the MA Provider Contract (including any Contract Schedule) with immediate effect.

38. Provider Personnel

- 38.1. At all times, the Provider shall ensure that:

38.1.1. each of the Provider's personnel is suitably qualified, adequately trained and capable of providing the applicable Services under the MA Provider Contract in respect of which they are engaged; and

38.1.2. there is an adequate number of Provider's personnel to provide the Services properly.

- 38.2. The Provider shall remove any of the Provider's personnel whom SDS reasonably decides has failed to carry out his/her duties with reasonable skill and care. Following the removal of any of the Provider's personnel for any reason, the Provider shall ensure such person is replaced promptly with another person with the necessary training and skills to meet the requirements of the Services.

39. Law and Jurisdiction

- 39.1. SDS and the Provider accept the exclusive jurisdiction of the Scottish courts and agree that the MA Provider Contract (and for the avoidance of doubt, each Contract Schedule thereunder) is to be governed by and construed according to Scots law.