

# The Skills Development Scotland Co Ltd

## Employability Fund Rules

**For public funding of Employability Fund Services 2020 - 21 (as currently extended to 2022 with possible extension to 2023)**

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## Introduction

This document sets out The Skills Development Scotland Co. Limited (“**SDS**”) programme rules (“**the Rules**”) for the public funding of services under the Employability Fund, described in the Invitation to Tender, the Rules and each Contract Schedule (“**the Employability Fund Services**”) during the period 1 April 2020 to 31 March 2021, with possible extensions by SDS in one yearly increments to 31 March 2022 and 31 March 2023.

The Rules will apply in respect of all Employability Fund Services and are subject to variation in accordance with the provisions set out in the Employability Fund contract between each Provider and SDS.

### Structure of the Rules

This document is set out in three parts:-

**Part One** contains among other things, details of the Provider’s appointment, the contract period details, details of where to find an up to date version of the Rules, and the overarching payment obligations.

**Part Two** sets out the specific operational rules relating to the Employability Fund.

**Part Three** sets out the more general contractual obligations of Providers and SDS relating to the Employability Fund.

Your attention is drawn to the provisions on how to interpret the Rules, which provisions are contained in rule 4 of Part Three.

### Responsibility for Agents and Sub-contractor

Any duties or obligations or requirements of the Provider will also apply to any Permitted Sub-contractors delivering training, work experience or carrying out any Employability Fund Services, or any employer or organisation providing work experience for Participants and it is the Provider’s responsibility to ensure these Permitted Sub-contractors, employers and/or organisations are aware of and are obliged to comply with SDS requirements and that the Provider has tangible evidence of this compliance e.g. copies of policies, confirmation of Disclosure Scotland checks being undertaken.

### SDS Portal

All Employability Fund Services are processed via the SDS Funding Information and Processing System “FIPS”. FIPS streamlines information sharing between Providers and SDS. As such, Providers are required to use SDS designated FIPS software for applicable Participants in order to record required information on FIPS. The software used by SDS at the time of issuing the Invitation to Tender is provided by Microsoft, although this may change. Use of the software is subject to the licensor terms and conditions which apply to SDS and which SDS shall in part pass through to the Providers when using the software in the form of user obligations (“User Permission”). Details of the User Permission terms and conditions shall be available through the relevant links available in the Employability Fund training/learning provider area of the SDS Provider Web Pages. The costs of each User Permission require to be met by the Providers. Details of the costs of each User Permission are available on the training/learning provider area of the SDS Provider Web Pages relating to FIPS, currently available at <http://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system/>

Details of the Microsoft terms and conditions currently applicable to SDS are available at –

<http://www.microsoftvolumelicensing.com/DocumentSearch.aspx?Mode=3&DocumentTypeId=53&Language=1>

## **PART ONE**

### **1. Operating Rules**

- 1.1. The arrangements, definitions, terms and conditions set out in the Rules, as revised and updated from time to time by SDS together with the Invitation to Tender and Provider's ITT Response (subject to any amendments thereto in accordance with the terms of the Rules) and any and all SDS policy statements relating to the Covid-19 pandemic issued by SDS from time to time shall form part of the EF Contract as if such arrangements, terms and conditions and documents were expressly set out in the EF Contract.
- 1.2. The Rules are set out in this document and are subject to such amendments as are implemented by SDS from time to time. The applicable version can be found by linking through the SDS Provider Web Pages.

### **2. Provider's Appointment**

- 2.1. SDS appoints the Provider as a Provider of Employability Fund Services in respect of the Employability Fund, as further described in the Invitation to Tender, the Rules and the Contract Schedule. In addition to the Contract Schedule attached to the Letter of Award, the Provider shall be eligible to be considered for the award of additional Starts by SDS during the term of the EF Contract in the event that the volumes of Starts required to be reallocated, or additional Starts become available.
- 2.2. The Provider acknowledges that, in entering into this EF Contract and any Contract Schedule, no form of exclusivity or volume guarantee has been granted by SDS for any additional services to be provided by the Provider.
- 2.3. The Provider hereby agrees and accepts that in entering into the EF Contract (i) it has received all information required by it in order to determine whether it is able to provide the Employability Fund Services and (ii) it is deemed to have satisfied itself in relation to all matters connected with the Employability Fund Services and in regard to its ability to meet all requirements of the EF Contract.

### **3. Contract Term**

- 3.1. Subject to:-
  - 3.1.1. any extension in accordance with Rule 3.2;
  - 3.1.2. earlier termination in accordance with the Rules or on one month's notice in writing by SDS to the Provider at any time; and
  - 3.1.3. rule 3.5 belowthe EF Contract shall have effect from 1 April 2020 until 31 March 2021 ("the Contract Term").
- 3.2. SDS shall have two separate opportunities to extend the Contract Term, (i) until 31 March 2022, and (ii) until 31 March 2023, in each case, by emailing the Provider to confirm any such extension, and the term 'Contract Term' shall be construed accordingly. Except as otherwise provided in this EF Contract, the terms and conditions set out in the EF Contract shall apply during any such extended period.
- 3.3. Any payments made by SDS to the Provider prior to the date of the EF Contract and made in anticipation of the EF Contract having effect shall be deemed to have been made under the terms and conditions of the EF Contract. and the relevant Contract Schedule.
- 3.4. Not Used.

- 3.5. SDS may extend the period of the EF Contract in respect of some or all Participants already entered by the Provider onto FIPS as Starts as at the expiry of the Contract Term (as extended, if applicable), subject to the written agreement of the Provider. Except as otherwise provided in this EF Contract, the terms and conditions set out in the EF Contract shall apply during any such extended period.

#### **4. Contract Schedule Process**

- 4.1. The EF 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 Employability Fund Services from the Provider under separate Contract Schedules.
- 4.2. SDS shall be entitled (but not obliged) from time to time to request the provision of Employability Fund Services. Within 10 calendar days of receipt of each such request, the Provider shall either (i) email the SDS assigned Skills Investment Advisor to confirm to SDS that it shall not be able to provide the requested Employability Fund Services; or (ii) complete and submit to SDS, using such process and any such forms as SDS shall identify, full details of the Starts (if any), Outputs, Outcomes and financial forecasts in respect of the request, which completed form shall form part of the Contract Schedule. Each Contract Schedule shall apply from the commencement date set out by SDS in the Contract Schedule, and shall expire at the next occurring 31 March during the Contract Term (unless terminated sooner). For the avoidance of doubt individual Contract Schedules shall not be extended beyond the said 31 March expiry date, in the event that the Contract Term is extended under rule 3.2 or 3.5. A Contract Schedule shall not enter into force, be legally binding or have any other effect unless:-
- 4.2.1. the Contract Schedule contains the information required by SDS;
  - 4.2.2. the Contract Schedule has been signed by the authorised representative of SDS (such execution being entirely at SDS' discretion) and the Provider; and
  - 4.2.3. 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
  - 4.2.4. as at the date the Contract Schedule is signed, the EF Contract has not been suspended or terminated.
- 4.3. Each Contract Schedule: -
- 4.3.1. shall be entered into by SDS and the Provider;
  - 4.3.2. forms a separate contract between SDS and the Provider; and
  - 4.3.3. shall incorporate the Rules.

#### **5. Variations**

- 5.1. SDS reserves the right to amend the EF 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). This will have the effect from the date set out below, of replacing in full all prior agreements (where it affects the EF Contract terms) and in the case of a Contract Schedule, each Contract Schedule that is identified as having been replaced. The effective dates from which each such amendment will be deemed to have taken place are:-
- 5.1.1. in respect of the EF Contract, from the date that Providers are advised of the changes, (which shall be deemed to include changes set out on the SDS Provider Web Pages, unless expressly provided otherwise in the Rules); and
  - 5.1.2. in respect of each Contract Schedule, on the date SDS advises the Provider of the amendment(s), in writing.

- 5.2. Without limitation, SDS anticipates that any such changes may relate to: -
- 5.2.1. the volume of Starts, Outputs and Outcomes and financial profiles, which may be varied having regard to such matters as the relative demand for Employability Fund Services by the Provider in the relevant local area in contrast with other Providers and other areas; and the performance of the Provider;
  - 5.2.2. the administrative procedures and information required to be inputted to FIPS;
  - 5.2.3. evidence requirements;
  - 5.2.4. Participant eligibility;
  - 5.2.5. Referral/progression of proposed Participants;
  - 5.2.6. Changes reasonably required pursuant any change in Data Protection Legislation and/or other change in law;
  - 5.2.7. duration of training;
  - 5.2.8. changes in Quality Standards; and/or
  - 5.2.9. re-entry or transfer of Participants.
- 5.3. 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 the contracted number of Starts and/or spend, contained in any Contract Schedule. This does not negate the Provider's obligation to meet the agreed forecasts and is without prejudice to SDS' rights and remedies.
- 5.4. 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 rule 5.4, SDS shall issue a revised Contract Schedule in accordance with rule 5.1.
- 5.5. Variations to the EF Contract and/or any Contract Schedule which do not meet the requirements of this rule 5 shall not be permitted.

## **6. Payment and Achievement Arrangements**

- 6.1. SDS shall pay the Provider for provision of the Employability Fund Services in accordance with the Rules in respect of the Participants recruited and Outputs and Outcomes achieved in accordance with each Contract Schedule, at the applicable rates published by SDS from time to time in the 'information and guidance' section of the SDS Provider Web Pages.
- 6.2. The Provider shall provide training in the volumes, outputs of services and financial profiles set out in each Contract Schedule (as amended in accordance with the terms of the EF Contract), and to the quality of delivery set out in the EF Contract (including for the avoidance of doubt, the ITT Response).
- 6.3. Young persons allowances (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.

## Part Two

### 1 Employability Fund Services Aims

- 1.1 The Employability Fund Services aim to support employability, vocational training and employment opportunities linked to the local labour market which fall within Stages 2 to 4 of the strategic skills and employability pipeline set out in the table below (“**the Strategic Skills Pipeline**”):

Strategic Skills Pipeline Stage	Nature of Content Expected
Stage 2	Provision should create a foundation upon which individuals can build their employability skills, personal development and core skills.
Stage 3	Provision should support individuals in preparing for and sustaining employment, including entry to Modern Apprenticeships.
Stage 4	SDS approved industry specific provision should directly enable individuals to access sustained employment.

- 1.2 The Provider shall provide every eligible Participant with an individual programme containing the guidance and support that will enable and encourage progression to sustained employment, employment with training (including a Modern Apprenticeship) or further education.
- 1.3 The Individual Training Plan provided by the Provider will be tailored to meet the individual needs of the Participant matched against the demands of the local economy and local employers. Providers will strive to maximise the work experience opportunity for individuals to include, where appropriate, workplace core skills including offering certification of the employability skills developed by the Participant and training for specific industry sectors, as appropriate.

### 2 Eligibility

- 2.1 Subject to Rules 2.2, 2.5 and 2.6, a proposed Participant is eligible for the Employability Fund Services if they: (i) have been assessed as requiring interventions which fall within Stages 2 to 4 of the Strategic Skills Pipeline; and (ii) are within one of the following categories:

- 2.1.1 Those aged 17 and under, who have reached their statutory school leaving date and are: -

2.1.1.1 not in education. (For the avoidance of doubt, those who have an unexpired/unrejected offer of further or higher education are deemed as still “in education”);

2.1.1.2 not employed for more than 16 hours per week; and

2.1.1.3 not in training;

- 2.1.2 With exception for those referred to in Rule 2.6.2, those aged 18 and over who are in receipt of DWP benefit and have been unemployed for a period of 13 weeks or more but not, (for the avoidance of doubt) those in receipt of Universal Credit who are earning;

- 2.1.3 Those who are under threat of redundancy and are within 13 weeks of their notified date of redundancy. The letter of redundancy must be stored with the EFEC as supporting evidence; or

- 2.1.4 Those aged 18 and over, who are not in receipt of benefit and are: -

2.1.4.1 not in education. (For the avoidance of doubt, those who have an unexpired/unrejected offer of further or higher education are deemed as still “in education”);

- 2.1.4.2 not employed for more than 16 hours per week; and
- 2.1.4.3 not in training.

2.2 For those aged 18 and over and in receipt of benefit, the period of unemployment referred to in rule 2.1.2 will not need to be complied with if the proposed Participant:

- 2.2.1 is a young person who has left school within the 52 weeks immediately prior to the referral to the programme and has not worked since leaving school;
- 2.2.2 is a disabled person;
- 2.2.3 is a lone parent, meaning that he/she does not live with a partner, is responsible for a child and is a member of the same household as the child;
- 2.2.4 is a Refugee who has been given permission to remain in the UK and claim benefit;
- 2.2.5 is an ex offender, meaning that he/she has spent time in custody as a prisoner or on remand in custody in the UK;
- 2.2.6 is a resident of a postcode area in one of the 15% most deprived data zones as identified by the Scottish Index of Multiple Deprivation (SIMD);
- 2.2.7 has been made redundant by their last employer and is able to provide a copy of their notice of redundancy;
- 2.2.8 is engaged in a sector based work academy;
- 2.2.9 is a returner to the labour market;
- 2.2.10 is an indirect benefit recipient;
- 2.2.11 is progressing to a higher stage of the programme; or
- 2.2.12 is Care Experienced.

2.3 The Provider is responsible for ensuring that the Participant at all times meets the eligibility criteria and must notify SDS in the event that a Participant is no longer eligible in order to determine whether the individual may continue. SDS shall not be liable for any payments claimed in respect of any participant who was not eligible to participate in the Employability Fund programme for which any claim is made, except to the extent the SDS assigned Skills Investment Advisor has provided prior written approval (to be granted entirely at SDS' discretion). Eligibility under any of criteria 2.1 and 2.2 must be confirmed by the EF Referring Organisation and the Participant in the Participant's Eligibility Confirmation form (which shall be in the form set out at Appendix 2). The Eligibility Confirmation is a mandatory document. If the Participant is under threat of redundancy, the letter of redundancy (which must include the date of redundancy) must be stored with the Eligibility Confirmation form as supporting evidence.

2.4 SDS Individual Training Accounts (ITAs) (and any replacement programme) cannot be used by Participants to fund training delivered as part of the Employability Fund Services or for any elements of the Individual Training Plan. Participants in the Employability Fund Services will be ineligible to apply for SDS ITA funding (or any replacement programme) or to renew an existing account for SDS ITA funding (or any replacement programme) whilst participating in an Employability Fund Services.

2.5 The following groups are not eligible for the Employability Fund Services: -

- 2.5.1 An overseas national who is subject to an employment restriction or to a time limit on their stay in Great Britain or both except where the individual is a refugee or overseas national where the Biometric Residence Permit (BRP) which is provided by the Home Office shows they have the right to work regardless of the time shown;
- 2.5.2 A person at the same time on any employment, training or enterprise programme funded by any UK or Scottish Government department or by SDS (subject to any exceptions published by SDS from time to time or otherwise agreed by email from the SDS assigned Skills Investment Adviser in advance and supported with evidence confirming there is no duplication of services or funding);
- 2.5.3 A person in custody as a prisoner or on remand in custody;
- 2.5.4 A person in receipt of Universal Credit and earning; or



2.5.5 An overseas national who is subject to any funding restriction which would apply to the Employability Fund

2.6 Where the proposed Participant is aged 25 or over and has been assessed as requiring interventions which fall within Stage 4 of the Strategic Skills Pipeline and

2.6.1 where the applicable criteria referred to in either rule 2.1.3 or 2.1.4 was met on or after 1 March 2020, and remains applicable, or

2.6.2 the proposed Participant is in receipt of DWP benefit and is unemployed but not, (for the avoidance of doubt) in receipt of Universal Credit and is earning;

the proposed Participant shall be eligible for EF Stage 4 National Transition Training Fund (NTTF) as described in the NTTF guidance available on the SDS Provider Web Pages.

### 3 Employability Fund Services Content

3.1 The Employability Fund Services must facilitate the progression of Participants along the Strategic Skills Pipeline (SSP) into sustainable employment. Employability Fund Services should be differentiated to meet the needs of individual Participants and the job opportunities available and should complement other publicly funded provision available within the Local Employability Partnership (LEP). It should reflect the stage of the SSP that an individual is referred to and meet the following high level expectations:

SSP Stage	Aim	Work experience requirements*	Output measure options**
Stage 2	Build employability skills, personal development and core skills.	Some form of work experience is mandatory, the nature of which can vary.	<ul style="list-style-type: none"> <li>Individual achievement of SCQF credit rated personal development/ employability/ core skill provision of at least 18 SCQF credit points at SCQF Level 3 or above</li> <li>Individual achievement of a Group award where employer opinion is integral to attainment of at least 33 SCQF credit points at SCQF level 3.</li> </ul>
Stage 3	Support individuals to prepare for and sustain employment, including entry to Modern Apprenticeships.	A work experience placement is a mandatory requirement	<ul style="list-style-type: none"> <li>Individual achievement of SCQF credit rated vocational/ employability/ core skill provision of at least 18 SCQF credit points at SCQF Level 4 or above or;</li> <li>Individual achievement of a Group Award where employer opinion is integral to attainment of at least 34 SCQF credit points at SCQF level 4.</li> </ul>
Stage 4 (which includes National Transition Training Fund (NTTF))	Enable individuals to access sustained employment through industry specific training.	Work experience may be incorporated, as appropriate.	<ul style="list-style-type: none"> <li>Achievement of SDS approved industry-led certification as entered on the Individual Training Plan</li> </ul>

\*Work experience includes: work experience placement; work shadowing; work taster; job experience; volunteering experience. Full definitions are supplied in appendix 4 to the Rules.

\*\*Although not mandatory, SDS will continue to encourage the delivery of appropriate certification at every stage of the Employability Fund Services through output payments. For Stage 2 and 3, the

SCQF provides assurance that learning is being measured and is informing progression; reflecting the Scottish Government's position as articulated in the Post 16 reform programme.

3.2 Employability Fund Services must be tailored to meet the individual needs of the Participant while reflecting local employment and economic drivers. Providers must ensure that all Employability Fund Services are delivered in accordance with the following key principles:

3.2.1 The training undertaken by the Participant will be based on a focussed assessment of their needs;

3.2.2 Providers will work with employers, colleges and other partners and Providers to improve the number, variety and quality of suitable progression routes for Participants; and

3.2.3 Participants will be given ongoing support at points of transition.

3.3 Providers shall be obliged to comply with Best Practice guidance relating to the Employability Fund which shall be published from time to time on the SDS Provider Web Pages.

3.4 It is envisaged that qualifications appropriate to a Participant's individual needs will be identified in their Individual Training Plan. However, it is recognised that qualifications will not be a suitable outcome for all Participants and as such they are not a mandatory element of the Employability Fund.

3.4.1 In cases where a Provider believes a qualification is suitable for a Participant and the qualification is not included on the Approved List for Stage 4 to attract an output payment, the Provider may request SDS to add the qualification to the Approved List via their SDS Skills Investment Adviser. The Provider must research the most cost-effective delivery method and submit this as part of their request. If the Participant has any previous experience on the EF (including NTTf) this will be taken into consideration as part of the request.

3.4.2 SDS shall at its sole discretion be entitled to add and remove any qualification from the Approved List for Stage 4 at any time.

3.5 Participation in EF is defined as:

3.5.1 up to 30 hours per week in a combination of training and/or on work experience and, subject to rule 3.5.2,

3.5.1.1 for Participants aged 24 or under at commencement of the EF Stage, a maximum length of stay of 26 weeks on employability and core skills training when combined with a work experience appropriate to the EF Stage (such work experience as is defined in Appendix 4 and which shall, not exceed 240 hours in total), or

3.5.1.2 for Participants aged 25 and over a maximum length of stay of 16 weeks comprising up to 8 weeks (not exceeding 240 hours in total) of employability skills training and up to 8 weeks (not exceeding 240 hours in total) of work experience appropriate to the EF Stage (as defined in Appendix 4).

3.5.2 The 240 hour period referred to in rule 3.5.1.1 may be extended only where (i) the Participant is not in receipt of a DWP benefit, (ii) the Participant has an identified disability, and by virtue only of such disability the Participant requires an extension to the 240 hour period to complete the work experience, (iii) the Provider has, as soon as the Provider ought to be aware that such extension is required, sought the prior written approval from the SDS assigned Skills Investment Advisor for such extension, and submitted evidence of the Participant's identified disability in accordance with such reasonable requirements as the SDS Skills Investment Advisor shall specify following receipt of the request from the Provider, and (iv) SDS has confirmed its approval in writing.

## 4 Referral Process

### 4.1 Referral

The organisations named as Referring Organisations in the table below are responsible for the following: -

- 4.1.1 subject to rule 4.3.3, assessment of individual eligibility, need and suitability to the Employability Fund Services; and
- 4.1.2 completion of the referral documentation prior to any new Start at any Stage of the Strategic Skills Pipeline; and
- 4.1.3 referral to the appropriate Provider.

Referring Organisation	Designated staff
SDS	SDS Regional Operations staff
DWP	DWP Jobcentre staff (work coach, disability employment adviser, assistant work coach)
Local Authorities	The Local Employability Partnerships shall decide which departments within the local authority can make referrals to the Employability Fund e.g. post school departments which come under the umbrella of economic regeneration or community learning and development.
Colleges	Each College shall decide which staff within the College are best placed to make referrals to the Employability Fund both internal and external to the College
EF Providers	Each EF Provider with a current SDS contract for the delivery of the Employability Fund shall decide which staff within the EF Provider can make referrals to the EF.

Client Group	Referring Organisation
An individual who is 17 or under, who has reached their statutory school leaving date and is not in education, employment or training and is case managed by SDS	Stage 2 - SDS only
	Stage 3 and 4 - SDS or College or EF Provider or Local Authority
An individual who is 17 or under who has reached their statutory school leaving date and is not in education, employment or training nor case managed by SDS	SDS or College or EF Provider or Local Authority
An individual who is 18 or over, not in education, employment or training and not in receipt of benefit	SDS or College or EF Provider or Local Authority
An individual of any age who is under threat of redundancy and within the 13 weeks immediately prior to their notified date of redundancy	SDS only
An individual who is 18 or over, unemployed for a period of 13 consecutive weeks or more, in receipt of benefit	DWP only
An individual who is 18 or over who is in receipt of benefit and falls into one of the following categories: left school in the previous 52 weeks; disabled person; lone parent; refugee; sbwa; SIMD; redundant worker; ex offender; returner to the labour market; indirect benefit recipient; progressing to a higher stage of the EF programme.	DWP only

## 4.2 Provider information for Referring Organisations

- 4.2.1 The EF Provider fact sheet is submitted by the Provider to SDS as part of the proposal to offer Employability Fund programme. No later than 7 calendar days after the date of the Provider's written acceptance of each Contract Schedule, the Provider must return to the Provider's local SDS Skills Investment Adviser the EF Provider fact sheet reviewed and updated in respect of the total volumes of Starts awarded within the Contract Schedule.
- 4.2.2 SDS Skills Investment Adviser shall, when satisfied with the content of the EF Provider fact sheet submitted by the Provider, confirm to the Provider SDS's approval. In the event that SDS is not satisfied with the content, the Provider shall amend and resubmit the sheet to the SDS Skills Investment Adviser until such time as SDS has approved the content.
- 4.2.3 The Provider must promptly circulate the SDS approved EF Provider fact sheet to EF referring organisations to alert them to the EF opportunities and aid suitable referrals.
- 4.2.4 In the event of any changes to the Contract Schedule, and in the event that the EF Fact Sheet is no longer accurate, the Provider shall immediately resubmit a revised EF Fact Sheet to SDS' Skills Investment Adviser, and the provisions in Rules 4.2.2 and 4.2.3 shall apply.

## 4.3 Referral documentation confirming eligibility and suitability

- 4.3.1 The Eligibility Confirmation form (which must be in the form set out at Appendix 2) will show the justification for the individual entering the appropriate stage of the Strategic Skills Pipeline and will form the basis of the Individual Training Plan.
- 4.3.2 The Referring Organisation shall complete an assessment of the suitability of the Employability Fund programme for the needs of the individual, for all referrals, and record a summary of each such assessment in an Eligibility Confirmation form (appendix 2). (Guidance for completion is available on the training/learning provider area of SDS Provider Web Pages).
- 4.3.3 Following receipt of the referral, the Provider shall undertake an assessment of the individual to verify the suitability of the recommended stage and/or Outputs for the individual. For the avoidance of doubt, the Provider should not accept the individual in the event that the Provider does not agree with the suitability of the recommended stage and/or Output for the individual.
- 4.3.4 For all 16 and 17 year olds, Referring Organisations must check with SDS if the individual is being case managed by SDS in advance of referring into Stage 2.
- 4.3.5 For all stages, the Provider must hold a copy of the Eligibility Confirmation signed by both the individual and the Referring Organisation as evidence of eligibility and suitability. The Eligibility Confirmation contains a participant declaration. The Provider must advise each proposed Participant of the requirement for the proposed Participant to sign the acknowledgement of the sharing of relevant information and the co-operation undertaking contained in the Eligibility Confirmation. For the avoidance of doubt, where the Eligibility Confirmation is not held before the individual commences any programme or training provided as part of the Employability Fund Services, this shall constitute a breach of the Rules.
- 4.3.6 Following the Provider's assessment pursuant to rule 4.3.3 above it is the responsibility of the Provider to complete the Eligibility Confirmation where indicated, (even if the individual is not starting the Employability Fund programme), and return to the source of the referral within 7 calendar days. Any individual eligible for the Employability Fund programme who is not offered a start date must promptly be given an explanation of the reason for this by the Provider.
- 4.3.7 It is the responsibility of the Provider to ensure that the appropriate Referring Organisation (as detailed in the table included at rule 4.1) has signed section 7 of the Eligibility Confirmation (confirmation of the eligibility and suitability of the individual) prior to the individual starting the Employability Fund programme. The individual must

start the Employability Fund programme within 28 calendar days of signature of the Eligibility Confirmation.

#### 4.4 Entry to the Employability Fund Programme

- 4.4.1 As outlined in rule 4.3.7, the Eligibility Confirmation must be completed prior to any new Start at any stage of the Strategic Skills Pipeline.
- 4.4.2 In respect of identified new Participants aged 18 or over and in receipt of benefit, the Provider shall
  - 4.4.2.1 arrange a pre-entry interview between the new Participant and the Participant's local Jobcentre to assess and confirm the status of the Participant's entitlement to a Training Allowance or Training Credits. (Not every Participant will have this entitlement, e.g. Participants in receipt of Universal Credit will not transfer to a Training Allowance but will remain on their Universal Credit) The pre entry interview must be conducted prior to commencement of the Employability Fund programme; and
  - 4.4.2.2 accurately complete an Employability Fund Start/Leaver Notification form ("SLN") in the form set out in Appendix 5 and send the completed form to DWP within 3 Working Days of the Participant's start date in order to notify DWP of the Participant's start. Any delay in sending this form to DWP may have financial implications for the Participant. A copy of the completed SLN form must be retained by the Provider. SLN forms are available to download from the training/learning provider area of the SDS Provider Web Pages.
- 4.4.3 In respect of identified new Participants aged 19 or over and not in receipt of benefit, the Provider shall encourage the Participant to attend a pre entry interview with the Participant's local Jobcentre to discuss any underlying entitlements. Not every Participant will have an entitlement.
- 4.4.4 The Provider must ensure that Participants are provided with a comprehensive induction programme within 7 calendar days of the Participant commencing their EF training so that the Participant understands what is required of them and others for completion of their training.

#### 4.5 Re-entry

- 4.5.1 If a Participant wishes to re-enter the Employability Fund programme, a new Eligibility Confirmation must be completed as in rule 4.3.2.
- 4.5.2 For Stages 2 and 3, (i) the Provider is able to claim a Recruitment Payment for the re-entrant if he/she re-enters after 28 calendar days of leaving the Employability Fund programme, and (ii) no Recruitment Payment will be made where a Participant re-enters the same stage with any Provider within 28 calendar days of leaving that stage.
- 4.5.3 For each Participant who wishes to enter the Employability Fund programme at the same Stage for a third (or successive) time, the Provider must obtain written approval (which may include approval by email) from the assigned SDS Skills Investment Advisor prior to registering the Start on FIPS. If a 16 or 17 year old wishes to enter the Employability Fund programme at the same Stage for a third or successive time, their needs and suitability must, in addition, be assessed by an SDS adviser.
- 4.5.4 Without prejudice to SDS's other rights and remedies, for any Participant wishing to enter Stage 4 for the second time, SDS may at its entire discretion reject the FIPS assignment where SDS is not satisfied that (i) the Output is appropriate for the Participant, and/or (ii) the eligibility criteria have been met.
- 4.5.5 Any Participant who wishes to re-enter Stage 4 (including NTTf) will have to wait for a period of at least 91 calendar days after their previous Stage 4 leaving date before a new Eligibility Confirmation is completed as in rule 4.5.1. The Provider is able to claim a Recruitment Payment for the Stage 4 re-entrant if he/she re-enters at least 91

calendar days after leaving Stage 4. No Recruitment Payment will be made where a Participant re-enters stage 4 with any Provider within 91 calendar days.

#### **4.6 Transfer of a Participant**

- 4.6.1 If the Provider is no longer in a position to provide the suitable Employability Fund Services provision in accordance with the Participant's Individual Training Plan, the Provider shall fully co-operate with SDS in the event that SDS seeks to transfer the Participant to another Provider. The new Provider shall treat the transfer as a new referral and shall comply with the provisions of rule 4.3.
- 4.6.2 If the Participant is in receipt of a DWP Training Allowance, the new Provider must use a Change of Circumstance Form in the form set out in Appendix 6 to notify DWP of the Participant's transfer. Change of Circumstance Forms are available to download from the training/learning provider area of the SDS Provider Web Pages.
- 4.6.3 The original Provider must ensure that the new Provider is in receipt of all the necessary documentation to support any follow-on Services and ensure a smooth transition, including the SLN and Change of Circumstance Forms if appropriate.

#### **4.7 Progression to Stage 3 or Stage 4**

- 4.7.1 Subject to rule 4.7.3, if a Participant is progressing to Stage 3 or Stage 4 of the Strategic Skills Pipeline with the same or a different Provider, the Provider must treat this as a new referral and comply with the provisions of rule 4.2. For the avoidance of doubt, if the Provider fails to comply with rule 4.3, SDS shall be entitled to the remedies set out in rule 15. For Participants claiming a DWP benefit, the Provider must contact the Jobcentre to arrange an interview for the Participant with their DWP work coach during the Participant's last week of training prior to progressing to a higher Stage of the Strategic Skills Pipeline to complete a new Eligibility Confirmation for the higher Stage.
- 4.7.2 The Provider must complete a new Individual Training Plan in accordance with rule 5 prior to the Provider claiming the Recruitment Payment for the new stage.
- 4.7.3 Rule 4.7.1 does not apply to Participants claiming a DWP benefit who are progressing to Stage 3 or Stage 4, without any break in training where the combined length of training for all Stages does not exceed the maximum length of stay as outlined in Rules 3.5.1.1 and 3.5.1.2. In respect of Participants in these circumstances, the Provider must complete a Change of Circumstance Form detailing the change in Stage, the change in Provider (where applicable), the date of change and the revised end date of training and send to the appropriate DWP office within 3 calendar days of the change taking effect to ensure that each Participant's DWP allowances/benefits are not affected.

### **5 Individual Training Plan (Appendix 3)**

- 5.1 The Individual Training Plan (ITP) must be designed to support the Participant to take part in and progress through appropriate employability, vocational training and employment opportunities linked to the local labour market, which fall within Stages 2 to 4 of the Strategic Skills Pipeline. Providers may decide how best to format the Individual Training Plan provided it contains all of the information specified in the Best Practice Individual Training Plan set out in Appendix 3 and has been confirmed in advance as suitable by their SDS Contract Manager.
- 5.2 The Individual Training Plan must be drawn up, agreed and signed by the Participant and the Provider within the nine calendar day period following the Participant's start date, and in advance of the Provider registering the Start on FIPS to claim the Recruitment Payment. Where the Individual Training Plan refers to an output for which the relevant training Provider would require an awarding body accreditation, the Provider shall not register the Start on FIPS unless the Provider has appropriate evidence that the training Provider is holding the current accreditation. The Provider shall retain this evidence for audit purposes. Where the accreditation was not in place, an Individual Training Plan does not exist, is incomplete or remains unsigned, or is signed but dated after the Recruitment Payment being claimed, this

shall constitute a breach of the Rules. The Individual Training Plan must be retained by the Provider for audit purposes.

- 5.3 The Individual Training Plan must be drawn up and agreed between the Participant and the Provider, detailing training delivery to be undertaken in order for the Participant to progress towards their agreed Outputs and Outcomes. The Individual Training Plan is a working document which must be completed, promptly updated and renewed (as appropriate) as the Participant progresses through the stages of the Strategic Skills Pipeline.
- 5.4 The appropriate Stage must be specified depending on the participation stage of the Participant, i.e. Stage 2, Stage 3 or Stage 4, in accordance with their referral. The Outcomes and Outputs agreed between the Participant and the Provider will be recorded in the Individual Training Plan and the Provider shall use these to plan appropriate training inputs in discussion with the Participant. Providers must build on existing assessment information and contribute to ongoing identification of needs and ensure that the Individual Training Plan is updated timeously.
- 5.5 In addition to the information detailed in rule 5.4, the Provider shall insert the following details into the Individual Training Plan: the date of the Start, the Participant's anticipated leaving date and actual end date (when appropriate), and work experience plans (including the expected pattern of attendance on work experience). The Individual Training Plan must also include Employability Fund Services hours of attendance (as agreed between the Provider and the Participant), which must be promptly updated if there are any agreed changes in the Participant's attendance pattern.
- 5.6 In completing the information specified in rule 5.4, the Provider must use the comments/details column to categorise the training as personal development, core skills or employability. The Provider must also detail the number of hours that the Employability Fund Services should take to deliver by identifying the number of SCQF credit points that it equates to. Providers should note that in order to qualify for the Output payment provision at Stage 2 and Stage 3, the training/Services must be SCQF credit rated. Where training/Services is not SCQF credit rated, this must be clearly stated in the Individual Training Plan.
- 5.7 A formal review must be carried out by the Provider at least once every 28 calendar days and recorded on the Individual Training Plan. Actual review dates must be entered promptly after they have taken place. Progress towards Outputs and Outcomes and the date on which each Output and Outcome is completed or amended must also be recorded promptly on the Individual Training Plan.

## **6 Entering Participants on Finance and Information Processing System (FIPS)**

### **6.1 National Insurance (NI) Numbers**

- 6.1.1 Referring Organisations are responsible for confirming the Participant's NI number in the Eligibility Confirmation document.
- 6.1.2 Subject to rule 6.1.4, to enter a new Start, Providers must enter the Participant's NI number on FIPS.
- 6.1.3 If the Participant's details have already been entered onto FIPS, the Provider must use the NI number already linked to the Participant. FIPS will then highlight when a new assignment is added, if a Participant is already engaged in an Employability Fund Services
- 6.1.4 If the Participant does not have their NI number and this has not been provided by the Referring Organisation, Providers must refer to FIPS guidance on generating temporary NI numbers and comply with such guidance.

## 6.2 Training Agreement and Equalities Monitoring Form

- 6.2.1 To start a Participant on the Employability Fund Services, an accurate assignment must be created on FIPS and approved by SDS. An assignment cannot be created on FIPS before a Training Agreement has been fully and accurately completed, signed and dated by the Participant and Provider.
- 6.2.2 The Provider shall accurately enter the Participant's details, including without limitation, the unique email address of the Participant, together with details of the content and duration of the Employability Fund Services that the Participant will undertake, on FIPS.
- 6.2.3 For each Participant, the Training Agreement available on the training/learning provider area of the SDS Provider Web Pages, must be fully and accurately completed, and signed and dated by the Participant and Provider within 9 calendar days of the Participant's start date on the Employability Fund Services before the individual will be regarded as a Participant. Before obtaining the signature of the Participant, the Provider shall make a copy of SDS's then current Privacy Notice (available on the same website), available to the Participant and ensure the Participant has an appropriate opportunity to consider its contents.
- 6.2.4 The Provider shall ensure that the Training Agreement is kept accurate and up-to-date and amended to reflect any subsequently agreed variation in content or timescale, and where any variations are made to the Participants NI number, start date, date of birth, output type, the Training Agreement shall be immediately updated, signed and dated by the Participant and Provider and the changes updated immediately on FIPS. Where any variation is made to any other information contained in the Training Agreement such as email address or work experience employer details, the Provider must ensure that the changes are updated on FIPS and recorded on the ITP at the next formal review.
- 6.2.5 For the avoidance of doubt, where a Training Agreement does not exist, where it is inaccurate, where it remains unsigned, or where it is signed more than 9 calendar days after the Participant's start date, this shall constitute a breach of the Rules.
- 6.2.6 The Equality Monitoring Form as set out in paragraph 2.4.4 of Part 3 of these Rules must be given to all Participants at the same time as the TA.

## 7 Participant Terms and Conditions

- 7.1 During the period of a Participant's Employability Fund Services, an allowance, known as Young Persons Allowance, must be paid by the Provider to the following Participants on a weekly basis as follows:
  - 7.1.1 Participants under the age of 18 who are not in education, employment or training and eligible Participants aged 18 who are not in education, employment or training and not in receipt of state benefits must each be paid £55 per week (subject to deductions made pursuant to rule 7.1.3 and in accordance with any guidance provided by SDS) for the duration of their training in a particular Stage of the Employability Fund.
  - 7.1.2 The Young Persons Allowance shall be payable a week in arrears and Providers will be able to reclaim the Young Persons Allowance via FIPS.
  - 7.1.3 If a Participant fails to participate in the training Services as set out within their Individual Training Plan, Providers have the discretion to reduce the weekly allowance paid to the Participant – what is paid to the Participant will be the amount reclaimed from SDS via FIPS.
  - 7.1.4 The Provider shall retain such records as are necessary to confirm payment of the Young Persons Allowance to individual Participants.
- 7.2 Participants shall not be requested or required to make a financial contribution towards the cost of their work experience, training, courses or lodgings and shall not be requested or required to pay any associated fees (such as the fees for obtaining qualifications).



- 7.3 For the avoidance of doubt, the terms of rule 7.2 shall also apply to Participants who leave the Employability Fund Services early (that is, they shall not be requested or required to make any payment towards the costs of their participation in the Employability Fund Services).
- 7.4 Providers must ensure that all Participants are timeously supplied with any protective clothing, books and/or equipment that may be necessary for their participation in the Employability Fund Services at no cost to the Participant.

## 7.5 Travel Costs

- 7.5.1 Subject to Rules 7.5.2 and 7.5.3, the Provider shall pay to each Participant, the Participant's reasonable travel costs where the Participant is in receipt of: -

- 7.5.1.1 Young Persons Allowance (see rule 7.1 for eligible Participants); or
- 7.5.1.2 DWP Training Allowance. (For the avoidance of doubt, Participants participating in a sector based work academy will not be converted to a Training Allowance and as such SDS will not fund associated travel costs for these Participants. Such Participants may apply to DWP directly for reimbursement of their reasonable travel costs).
- 7.5.1.3 Employment Support Allowance, Incapacity Benefit or Income Support in lieu of Incapacity Benefit, who choose not to convert to a Training Allowance.
- 7.5.1.4 Universal Credit and not participating in a sector based work academy (For the avoidance of doubt SDS will not fund associated travel costs for Participants participating in a sector based work academy. Such Participants may apply to DWP directly for reimbursement of their reasonable travel costs)

- 7.5.2 Where the Participant uses their own vehicle, he/she shall be reimbursed based on the cost of public transport for the same journey. Where no equivalent public transport exists, reimbursement shall be paid at £0.22 per mile.

- 7.5.3 Participants referred to in Rules 7.5.1.1, 7.5.1.2 and 7.5.1.4 (but not 7.5.1.3) above will be expected to contribute no more than the first £3 per week towards their own travel expenses.

## 7.6 Lodging Allowance

- 7.6.1 Where the Participant requires to stay away from home in order to participate in any Employability Fund, the Provider shall be liable for the reasonable costs of the Participant's lodgings.

## 8 Recruitment, Outputs and Outcomes

- 8.1 SDS shall, subject to Rules 8.2 to 8.6, pay the Provider the Recruitment Payments, Output Payments and Outcome Payments in accordance with the Funding Model set out in Appendix 1.
- 8.2 As set out in rule 3.3.5 of Part Three of the Rules, Providers shall not submit a claim for payment until they are in possession of the required evidence detailed in rule 8.3 below.
- 8.3 SDS shall not be obliged to make the payments detailed in rule 8.1 unless:
- 8.3.1 In the case of Recruitment Payments, the Participant's Individual Training Plan has been signed and accurately completed and the Participant registered and approved on FIPS.
- 8.3.2 For the following respective stages of the Strategic Skills Pipeline, the Provider has evidence from the awarding body that the Participant has achieved (i.e. training completed and certified by the awarding body) one of the applicable achievements for that stage set out below, (as set out in the Funding Model), and that the achievement corresponds with the content of their Individual Training Plan: -

- 8.3.2.1 In the case of Stage 2 employability, core skills or personal development provision at a minimum of 18 SCQF credit points at Level 3 or employability certification of at least 33 SCQF credit points at SCQF level 3 or above where employer opinion is integral to attainment of the credit rated group award;
  - 8.3.2.2 In the case of Stage 3 employability and/or vocational provision at a minimum of 18 SCQF credit points at Level 4 or employability certification of at least 34 SCQF credit points at SCQF level 4 where employer opinion is integral to the attainment of the credit rated group award;
  - 8.3.2.3 In the case of Stage 4 the qualification as listed on the Stage 4 Approved List
- 8.3.3 In the case of all Outputs, copy certificates are acceptable as evidence for monitoring purposes. Where SQA is the awarding body, evidence of “entry status code 5”, meaning a certificated result with date of certification, is acceptable as evidence for monitoring purposes.
- 8.3.4 In cases where the Participant has progressed into employment, in the event only that:
- 8.3.4.1 the Participant achieves (i.e. training completed and certified by the awarding body) an Output which he/she started before leaving the Employability Fund Services to commence employment;
  - 8.3.4.2 the Output corresponds with the ITP agreed with the Provider, and
  - 8.3.4.3 achievement occurs no later than 13 calendar weeks after the date the Participant left the Employability Fund Services to commence their employment;
- the Provider may claim the Output Payment.
- 8.3.5 In the case of an Outcome Payment for progression to a Modern Apprenticeship, the Provider must satisfy itself that it has complied with the requirements set out in Appendix 10, and provide SDS with a signed declaration (in the form set out at Appendix 10) confirming that the Participant has been entered onto FIPS with a MA start date within 26 weeks of the date that the Participant left the Employability Fund Services and has been engaged in a Modern Apprenticeship for a minimum of 4 weeks.
- 8.3.6 In the case of an Outcome Payment for progression to employment for a minimum period of 4 weeks, the period of employment (when the Participant commences the minimum number of hours set out below) must start within 26 weeks of the date that the Participant left the Employability Fund Services. The Provider shall provide to SDS a declaration (in the form set out at Appendix 11 and signed by the signatories required in the appendix, one of which is the employer/business. For the avoidance of doubt the employer/business is the organisation that pays the Participant.) The declaration shall confirm the Participant’s start date in the job and that he/she has been in the job for either a minimum of 15 hours per week for a minimum of 4 consecutive weeks, or, a minimum of 60 hours in total over 4 consecutive weeks. As an alternative only to the Employer’s signature on the declaration, SDS will accept copies of the Participant’s wage slips which show the name of the employer and clearly confirms the dates and hours of employment or an email from the employer confirming these details.
- 8.3.7 In the case of an Outcome Payment for progression to self-employment for a minimum period of 4 weeks, the period of self-employment must start within 26 weeks of the date that the Participant left the Employability Fund Services. The Provider shall provide to SDS a declaration in the form set out at Appendix 11, together with at least one of the following in respect of the Participant’s business: (i) a completed copy of the form CWF1 as submitted to HMRC; (ii) a certificate of incorporation; (iii) an application to pay class 2 contributions (form CA5601); or (iv) copies of correspondence between the Participant and HMRC (such as a letter of confirmation of registration). In addition, the Provider must supply evidence in the form of bank statements covering the 4 week period for the bank account held in the name of the business or for the personal account used for business purposes. Where the Participant is receiving weekly payments for participation in the New Enterprise Allowance Programme, a letter from the DWP

confirming this and covering the 4 week period will be accepted instead of evidence from the bank.

8.3.8 In the case of an Outcome Payment for progression to a sustained job/self employment, the Provider shall provide to SDS a declaration (in the form set out at Appendix 12) that the Participant has sustained a Job/self employment. A sustained job/self employment can be claimed for the same Participant if they are in a job/self-employment, but not necessarily the same job/self-employment, 26 weeks after the first job/self employment has commenced. The Achievement Date to be entered onto FIPS must be the first day after the 26 weeks. For progression to a sustained job (where the Participant is not self-employed), such evidence shall take the form of a declaration from the Participant's employer (or employers as the case may be) confirming the Participant's start date in the job and that he/she has been in the job for a minimum of 15 hours per week. In the case of progression to a job, as an alternative only to the Employer's signature on the declaration, SDS will accept copies of the Participant's wage slips which show the name of the employer and clearly confirms the dates and hours of employment or an email from the employer confirming these details. In the case of an Outcome Payment for progression to sustained self-employment, the Provider must, by providing a declaration in the form set out at Appendix 12 together with the evidence referred to in rule 8.3.7 satisfy SDS that the Participant is in self-employment 26 weeks after the date they first entered self-employment.

8.3.9 Not Used.

8.3.10 In the case of an Outcome Payment for a Participant progressing from one stage of the Strategic Skills Pipeline to a more advanced stage, a Provider shall in order to satisfy SDS that the Participant has progressed to a more advanced stage of the Strategic Skills Pipeline provide to SDS a FIPS printout confirming Participant's start date on the more advanced stage of the Employability Fund Services or a letter or email from the destination Provider confirming the Services is recognised at the specified stage of the Strategic Skills Pipeline and the actual start date of the Services. The Individual Training Plan must be signed to confirm the Participant has successfully completed the previous stage prior to progressing to the more advanced stage including any relevant certification. For the avoidance of doubt Community Jobs Scotland is nationally recognised as being in Stage 4 of the SSP.

8.3.11 In the case of an Outcome Payment for a Participant progressing to a form of learning with minimum Output levels that are: -

8.3.11.1 higher than the minimum Output levels for the Stage of Employability Fund Services from which the Participant has progressed, or

8.3.11.2 the same or higher than the minimum Output level for the Stage of Employability Fund Services from which the Participant has progressed, for vocational provision;

the Provider shall, provide to SDS no later than (i) the intake date for the course first occurring after the date that the Participant left the Employability Fund Services, or (ii) 6 months after the date that the Participant left the Employability Fund Services, whichever date is the later, evidence confirming the university or college, the session date and the course that the Participant has been enrolled on. The evidence can take the form of either (i) a letter or an email from the university or college confirming the course that the Participant has been enrolled on and the date on which the Participant started the course or (ii) a copy of the Participant's student card signed by the Participant with the session date and course title clearly identified.

8.4 SDS shall be entitled to amend the requirements relating to the evidence which Providers must submit to SDS in accordance with this rule 8.

8.5 In cases where a Participant has been engaged with more than one Provider, only the Provider with which the Participant was engaged immediately prior to achieving an Outcome, as confirmed in FIPS, shall be entitled to claim an Outcome Payment in respect of that Outcome.

- 8.6 All claims for payment relating to a Participant must be made no later than the last day of the calendar month occurring 15 months after the Participant's leaving date.
- 8.7 The Employability Fund will not provide support to Participants in achieving a self-employment Outcome at any stage of the Strategic Skills Pipeline in respect of any business which SDS may deem from time to time as likely to bring SDS, the Scottish Ministers or the Employability Fund into disrepute.

## 9 Performance Management

For 2019/20, Employability Fund Services achievements will be measured as follows:

### 9.1 Stage 2 Services

- 9.1.1 Starts on the Employability Fund Services relative to the Starts estimate within the Contract Schedule
- 9.1.2 Outputs achieved as a percentage of all Starts on the Employability Fund Services
- 9.1.3 Outcomes achieved as a percentage of all leavers from Stage 2 (including progressions to Stage 3)

### 9.2 Stage 3 Services

- 9.2.1 Starts on the Employability Fund Services relative to the Starts estimate within the Contract Schedule
- 9.2.2 Outputs achieved as a percentage of all Starts on the Employability Fund Services
- 9.2.3 Outcomes achieved as a percentage of all leavers from Stage 3 (including progressions to Stage 4)

### 9.3 Stage 4 Services

- 9.3.1 Starts on the Employability Fund Services relative to the Starts estimate within the Contract Schedule
- 9.3.2 Outputs achieved as a percentage of all Starts on the Employability Fund Services
- 9.3.3 Outcomes achieved as a percentage of all leavers from Stage 4

### 9.4 Not Used.

### 9.5 Periodically throughout the Contract Term, SDS and the LEPs will meet to review the achievements of Providers by assessing the Outputs and Outcomes that they have delivered against those delivered by other Providers within the same LEP area. SDS and the LEPs will have regard to the following criteria in their assessment of the achievements of each Provider:

- 9.5.1 its particular client group;
- 9.5.2 the geography of the area that it serves; and
- 9.5.3 the local labour market of the area that it serves.

### 9.6 Where an assessment is made under rule 9.5 that a Provider has failed to attain a rate of achievement similar to other Providers within the LEP area, without prejudice to SDS's other rights, SDS shall have the right to reallocate Participants to other Providers within the area as they may deem appropriate.

### 9.7 The Provider shall ensure that it meets the minimum Performance Levels set out in rule 23 of section D of Part Three when performing the Services under the EF Contract and each Contract Schedule. Where the Provider fails to meet any Performance Level, without prejudice to any other rights and remedies available to SDS under the EF Contract (including any reallocation and/or further award under this Rule 9), the consequences (if any) set out in rule 23 of section D of Part Three shall apply.

- 9.8 The Provider shall provide such reports and rationales as SDS may request from time to time, in order to measure the Provider's compliance with the Performance Levels.
- 9.9 SDS will from time to time during the period of a Contract Schedule, evaluate the achievements of each Provider by assessing the Achieved Performance Levels that the Provider has delivered against those delivered by other Providers. For the avoidance of doubt, assessment of Achieved Performance Levels shall take account of rationales for failed performance, made available to SDS by the Provider.
- 9.10 SDS will from time to time during the EF Contract, evaluate the number of Participants that have been Started under each Contract Schedule by each Provider against the number of Participants that it was contracted to Start measured across all the Provider's Contract Schedules. Where there is a shortfall, SDS may decide to reallocate the remaining number of Participant places awarded under the relevant Contract Schedules 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.
- 9.11 Where SDS determines that a Contract Schedule is to be varied in accordance with this rule 9, such variation shall be undertaken in accordance with rule 5 of Part One of the Rules (Variations). Where any additional volumes are allocated to a Provider pursuant to this rule 9, these shall be allocated as an additional Contract Schedule, in accordance with rule 4 of Part One of the Rules (Contract Schedule Process).

## **10 Exit from the Employability Fund Services**

- 10.1 A Participant is regarded as having left the Employability Fund Services on the earlier of:
- 10.1.1 the end of the day which is specified as the anticipated leaving date on their Individual Training Plan (as may be amended from time to time in accordance with rule 5 of this Part Two);
  - 10.1.2 the end of the day on which the Participant leaves the Employability Fund Services;
  - 10.1.3 the end of the day on which the Participant is dismissed by the Provider.
- 10.2 For audit purposes, Providers shall keep the current Individual Training Plan of all Participants suitably updated to take account of agreed variations, which shall include the Participant's leaving date.
- 10.3 When a Participant leaves the Employability Fund Services, the Provider shall be responsible for ensuring that FIPS records are updated accordingly to allow accurate recording on a monthly basis. Providers must also notify the Referring Organisation that the Participant has left the Employability Fund Services. If the Participant is 16 or 17 years old, Providers must also immediately inform the Participant's local SDS office and an SDS adviser will then attempt to re-engage with the Participant.
- 10.4 For Participants who are claiming a DWP benefit, the Provider shall give each such Participant and the Jobcentre written notification of the termination of the Participant's Employability Fund Services, specifying the actual end date by updating and delivering to them, the Employability Fund Start/leaver notification within 3 Working Days of the actual end date.
- 10.5 Once a Participant has left the EF, the leaving details must be entered immediately to FIPS by the Provider using the leaving codes set out in Appendix 9.

## **11 Contact with Individuals**

- 11.1 The Provider shall use its best endeavours to request and encourage full co-operation (and attendance, as applicable) by a Participant (or proposed Participant as applicable) in/at any

observation, visit, meeting, online correspondence, survey and/or telephone call with SDS (or its agents) concerning the operation of the Employability Fund as may be requested by or on behalf of SDS from time to time.

## **12 External Verifier Reports**

- 12.1 Each awarding body's External Verifier's Report must be made available to the appointed SDS Skills Investment Advisor, for quality monitoring and compliance purposes, within 7 days of the Provider's receipt of the report in the event that the report contains any formal actions, and otherwise, immediately on demand by SDS.

## **PART THREE**

### **A ITT Response**

#### **1 ITT Response**

- 1.1 The Provider is responsible for ensuring that the Employability Fund Services standards and qualifications conform with the ITT Response at all times, including any amendments agreed in accordance with this rule 1.
- 1.2 The Provider may propose amendments to the ITT Response at any time, but no such amendment to the ITT Response shall be valid for any purpose unless the SDS assigned Skills Investment Advisor has previously agreed to it in writing.
- 1.3 After consultation with the Provider, SDS may at any time specify to the Provider the nature of any amendment to the ITT Response and the date by which the necessary amendment must be implemented by the Provider.

### **B Before Recruiting Participants**

#### **2 Policies, Procedures and Systems**

- 2.1 There are a number of policies, procedures and systems which the Provider must have in place prior to recruiting eligible proposed Participants to the Employability Fund Services. These include: -
  - 2.1.1 Disclosure Scotland checks
  - 2.1.2 Insurance and Liability
  - 2.1.3 Equal Opportunities policy and procedures
  - 2.1.4 Health and Safety policies, procedures and monitoring systems
  - 2.1.5 IT system to access FIPS and to process claims and other information
  - 2.1.6 Handling Information (including data protection, freedom of information and information security).
- 2.2 Disclosure Scotland Checks
  - 2.2.1 Where the Provider undertakes any work which is 'regulated work' in terms of the Protection of Vulnerable Groups (Scotland) Act 2007 (the 2007 Act) with either 'children' (section 97 of the 2007 Act) or 'protected adults' (section 94 of the 2007 Act), by entering into this EF Contract the Provider agrees that it is confirming that it meets and shall continue to meet for the period of the EF Contract, all legal requirements of the 2007 Act.
  - 2.2.2 Where the Provider did not at the date of submission of its ITT Response but does in the future undertake any 'regulated work', as referred to in condition 2.2.1 above, the Provider will inform SDS within 28 days of doing so and the Provider hereby confirms that all legal requirements of the 2007 Act will be met for the period during the EF Contract when it is undertaking 'regulated work'.
  - 2.2.3 Where any of the Provider's employees who undertake 'regulated work', as referred to in condition 2.2.1 above, is the subject of a report made by the Provider to Scottish Ministers (section 5) as the result of allegations of the employee causing 'harm' (section 93 of the 2007 Act), the Provider will advise SDS's Skills Investment Advisor as soon as reasonably practicable that it had cause to make such report.
  - 2.2.4 Where the Provider undertakes work which is 'regulated work', as referred to at condition 2.2.1 above, the Provider will make all of its relevant policies and procedures available to SDS's Skills Investment Advisor on demand or as may be required.

## 2.3 Insurance and Liability

- 2.3.1 The Provider must ensure, for the duration of the EF Contract and each Contract Schedule thereunder, that it has in place an appropriate level of cover (to the satisfaction of SDS) of (1) Employers' Liability Insurance and (2) Public Liability Insurance, except where the Provider is a public body or authority or other person which is exempt from Employers' Liability (Compulsory Insurance) Act 1969.
- 2.3.2 The Provider must ensure, for the duration of the EF Contract and each Contract Schedule thereunder, that it has in place any other insurance cover required by law or which would be likely to be considered necessary by a reasonable person.
- 2.3.3 The Provider must make insurance certificates available promptly to SDS staff on request. Without prejudice to Rules 2.3.1 and 2.3.2, the Provider must give SDS 30 calendar days' notice of alteration or cancellation of insurance policies.
- 2.3.4 SDS shall not be liable for any injury, loss or damage whatsoever or to whomsoever caused by any act, default or omission of a Participant undertaking an Employability Fund Services except to the extent (if any) that any such injury, loss or damage is caused or contributed to by the negligence of SDS staff. The Provider shall indemnify SDS against any payments which SDS shall be liable to make in respect of any injury, loss or damage caused by an act, default or omission of a Participant undertaking an Employability Fund Services for which act, default or omission SDS would not otherwise be liable in terms of this paragraph, provided that the Provider is liable in law for such injury, loss or damage.
- 2.3.5 SDS shall not be liable for any injury, loss or damage whatsoever suffered by a Participant undertaking an Employability Fund Services caused by any act, default or omission of the Provider, the Provider's sub-contractor or agent, whomsoever, except to the extent (if any) that any such injury, loss or damage is caused or contributed to by the negligence of SDS staff. The Provider shall indemnify SDS against any payments which SDS shall be liable to make in respect of any injury, loss or damage caused to a Participant by an act, default or omission of the Provider, the Provider's sub-contractor or agent, for which act, default or omission SDS would not otherwise be liable in terms of this paragraph, provided that the Provider, the Provider's sub-contractor or agent is liable in law for such injury, loss or damage.

## 2.4 Equal Opportunities and Fair Work Practices

- 2.4.1 Under the Equality Act 2010, SDS has a Public Sector Equality Duty to promote equality of opportunity in its products and services, including the Employability Fund. The Provider must ensure that in delivering the Employability Fund no acts of discrimination take place (as defined within the Equality Act 2010), and that they take steps to ensure equality of opportunity with respect to the recruitment and achievement of different customer groups.
- 2.4.2 The Provider must: -
  - 2.4.2.1 and its sub-contractors must have, and comply with, an equal opportunities policy covering its own staff and its Participants (where there are at least 5 staff members). Providers must be able to demonstrate how the policy is implemented and monitored. Providers must make all Participants aware of the policy prior to commencing the programme, and ensure they understand how to raise any concerns about bullying and/or harassment;
  - 2.4.2.2 include at least 1 equality action within their quality action plan which outlines how they intend to improve the diversity of their Employability Fund programme, for example through their recruitment process; by providing staff with relevant development in equality topics; by supporting the needs of Participants; or through taking positive action targeting specific customer groups. The Provider should seek to continuously improve their equality outcomes by providing



evidence of how they will measure, analyse and evaluate the impact of their programme in relation to different customer groups.

Using your equality monitoring information and other data sources demonstrate how this evaluative information improves the delivery of the Employability Fund Services as part of your quality assurance (continuous improvement process)

For more detailed information on identifying key actions and providing evidence to support equality actions please refer to the Equality Support guide

<https://www.skillsdevelopmentscotland.co.uk/media/45855/ntp-equality-support-guide-2019.pdf>

- 2.4.2.3 commit to actions within the Provider's quality action plan, which will include actions to demonstrate the Provider's continuous improvement regarding equality outcomes as set out in paragraph 3.4 below to accurately reflect the requirements set out in the ITT;
- 2.4.2.4 ensure that for the duration of the EF Contract, all Provider staff undertake best practice continuing professional development relating to equality and diversity, which is appropriate and proportionate to the Provider's workforce, and which meets all legal requirements that apply in Scotland. The Provider shall provide to SDS promptly on demand, evidence of all Services undertaken by the Provider to meet this undertaking;
- 2.4.2.5 ensure that it at all times takes appropriate positive action in marketing to participants as Starts (and their parents/carers), particularly with a view to improving representation where there is clear imbalance in provision, targeting gender, disability, ethnicity and people who have been in care; and
- 2.4.2.6 take steps to monitor and evaluate its own performance in relation to efforts made to improve the Employability Fund programme participation and achievement of people from under-represented groups, particularly in relation to gender representation, disability, ethnicity and people who have been in care.

2.4.3 Prior to the Participant commencing the Employability Fund programme, the Provider shall make each Participant aware of its equal opportunities policy and what to do if the proposed Participant or Participant (as the case may be) feels he or she is being bullied or discriminated against.

2.4.4 Equalities monitoring information as set out in Appendix 7 must be recorded and disposed of in accordance with the requirements set out in the appendix. The Provider agrees not to access any such equalities monitoring information uploaded by the Provider, SDS or any third party to FIPS.

## 2.5 Health and Safety

2.5.1 The Provider's obligations regarding Health & Safety are set out in detail within the SDS NTP Health, Safety and Wellbeing Standard for Learning Providers and its subsidiary documents. The Standard and its subsidiary documents may be found in the Health, Safety and Wellbeing Requirements section of the SDS Provider Web Pages, within the health and safety section. The Provider must read these documents and ensure that it fully complies with all applicable requirements, including retaining appropriate documentary evidence.

2.5.2 Providers shall have responsibility for the health & safety of Participants as if they were employees of the Provider.

2.5.3 Providers shall have in place for the duration of the EF Contract and each Contract Schedule thereunder: -

- (a) a named, competent person to advise on health and safety issues;

- (b) documented policies, procedures and any other additional arrangements which are necessary in order to meet the detailed obligations described within the SDS NTP Health, Safety and Wellbeing Standard for Training Providers and its subsidiary documents;
- (c) up to date documentation/other evidence of compliance with health, safety and wellbeing requirements. These documents and /or other evidence must be made available to SDS promptly upon request;

#### 2.5.4 Other health, safety and wellbeing requirements

2.5.4.1 If an incident occurs whilst a Participant is conducting Services identified in their Individual Training Plan or which are relevant to the Employability Fund Services, the Provider must follow the requirements of the Incident Reporting and Investigation Procedure..

2.5.4.2 The condition in 2.5.4.1 is without prejudice to any statutory duty of any person to make notification of a death, injury, case of disease or dangerous occurrence.

2.5.4.3 The Provider shall ensure that in matching Participants to Employability Fund Services and in ensuring their well-being in Provider premises or on Placement appropriate health monitoring shall be undertaken, including medical examinations, if required.

2.5.4.4 The Provider shall take appropriate actions to ensure that all Participants understand the necessity of disclosing medical conditions in order to comply with legislation and to remain safe in the workplace and that their colleagues are also safe in the workplace. Evidence of having done so must be retained in accordance with rule 21 of this Part Three, for the duration of each Contract Schedule, and made available to SDS staff promptly on request. All information so obtained must be securely stored and disclosed only as appropriate and with the Participant's consent, where appropriate.

2.5.4.5 The Provider shall have a separate written contract with the Subcontractor and include clauses covering:

- the health, safety and wellbeing duties which have been delegated to the Subcontractor;
- Participant induction;
- the requirement that Employers' Liability Insurance is in place at all times;
- the reporting to the Provider of incidents involving Participants;
- access to subcontractor premises for all authorised SDS staff.

#### 2.5.5 SDS Information Technology Requirements

2.5.5.1 In carrying out its obligations in terms of the EF Contract, the Provider shall conform to SDS information technology requirements (including the SDS Information Security Policy for NTP Providers attached at appendix 15) for the processing of claims and other information specified by SDS from time to time. SDS reserves the right to vary its information technology requirements in line with the development and updating of its systems. SDS shall endeavour to give the Provider reasonable and prior notification on the relevant area of the SDS Provider Web Pages, , where appropriate. Where the Provider has an obligation to delete, destroy or dispose of any Personal Data relating to a Participant, it shall not access such Personal Data on FIPS (where such access

is available) except in so far as the Provider requires to for the purposes of administering the Employability Fund Services, complying with its obligations in the EF Contract or any applicable law.

## 2.5.6 Online Information System

2.5.6.1 Providers who propose to operate their own On-Line System to administer the Employability Fund Services shall be required to notify SDS in advance. SDS will advise on timescales for testing and evaluation of the system. In such cases, the Provider shall require to meet SDS requirements in relation to the use of an On-Line System. The Provider shall comply with the SDS Information Security Policy for NTP Providers attached at appendix 15 in relation to the Provider's use of its own Online System.

## 2.6 Funding Information and Processing System (FIPS)

2.6.1 Funding for the Employability Fund Services will be administered through FIPS in accordance with SDS requirements.

2.6.2 The Provider shall record all relevant information on FIPS timeously and ensure that all required fields are accurate and up to date at all times.

2.6.3 In order to use FIPS as prescribed in this EF Contract, the Provider shall from such date as SDS shall specify, require to obtain a User Permission for each user of the FIPS software for the remaining period of the EF Contract. All information relating to the User Permission including the applicable terms and conditions, applicable charges and guidance on the process for requesting/granting/amending User Permissions shall be made available by SDS to the Provider or, at SDS' discretion, through the relevant links available in the Employability Fund training/learning provider area of the SDS Provider Web Pages. Further conditions or guidance may also be set out in the Provider letter of award for the EF Contract.

## 2.7 Other SDS Software/Systems

2.7.1 In the event that SDS requires you to use any other software/systems when performing the Services, you shall supply such information to SDS as we may reasonably require to facilitate access to the software/systems. In addition you shall ensure that (i) you promptly notify SDS of any changes where the information is no longer accurate (ii) you, your staff and agents who may have access to the software/systems comply at all times with any end user conditions that may be made available to you in relation to such software/systems, and (iii) you notify [SDSQualityAssurance@sds.co.uk](mailto:SDSQualityAssurance@sds.co.uk) immediately in the event of any failure by you, your staff or agents to comply with any such conditions.

## 2.8 My World of Work

2.8.1 The Provider shall use best endeavours to encourage each Participant to register on the SDS My World of Work web service at <http://www.myworldofwork.co.uk/> (or such alternative address as SDS may use from time to time) during the Participant's induction to the Employability Fund programme and if unsuccessful at that time, during the Participant's training. From time to time, SDS shall carry out checks to compare the number of each Provider's Participants registered on FIPS against the number registered on My World of Work.

2.8.2 My World of Work hosts a database of learning opportunities available in Scotland. If a Provider wishes to add any of their courses to this database, they must do this using the SDS Course management tool available on the Employability Fund training/learning provider area of the SDS Provider Web Pages.

## 2.9 Modern Apprenticeships and Graduate Apprenticeships

2.9.1 The Provider shall use best endeavours to inform Participants of SDS' Modern Apprenticeship and Graduate Apprenticeship schemes as potential alternative career pathways, where appropriate including signposting to <https://www.apprenticeships.scot/>

## 2.10 Fair Work Practices

2.10.1 The Provider shall take appropriate action when marketing its employability fund Services to Participants, to promote the benefits of fair work practices in the work place. Best practice guidance is available at: <http://www.gov.scot/Publications/2015/10/2086/0> (or such alternative website as SDS may advise from time to time). Providers are expected to include within this promotional Services, reference to any wage rates agreed by any relevant industry bodies.

## 2.11 Handling Participant and Other Information

2.11.1 To perform the Employability Fund Services and to demonstrate EF Contract compliance it will be necessary for the Provider to hold personal information on Participants to keep Participant records. It will also be necessary to complete and retain forms and information. In addition to the Provider's other obligations, the Provider shall use all reasonable endeavours to ensure that all such information and records are readily located and identifiable, and are stored safely and securely, and shall promptly make all such information and records available to SDS staff as requested by SDS from time to time.

## 2.12 Information Security (See Appendix 15 for full policy)

2.12.1 The Provider shall have due regard to the security of information and will comply with SDS Information Security Policy and Procedures set out in Appendix 15, as amended by SDS from time to time, including the encryption of data being transferred electronically.

## 2.13 FIPS Passwords

2.13.1 The Provider shall complete a FIPS ID & password delegated authority form at the request of SDS on an annual basis. Should the named person(s) on the form submitted change during the contract period, the Provider must submit another form, advising of the new contact(s). The Provider shall at all times adhere to the guidance issued by SDS and ensure that FIPS passwords are reviewed regularly and updated for changes in staff and/or contacts. When a named member of staff leaves, the Provider must notify the appropriate division of SDS immediately.

## 2.14 Application of the Rules

2.14.1 The Provider shall provide each Participant recruited with, and only with, a programme of training to which he or she is entitled according to the criteria set out in the Rules. All Employability Fund Services shall be provided in a manner acceptable to SDS.

2.14.2 The Provider shall ensure that every element of the Employability Fund Services including any work experience, provided by the Provider or carried out on the Provider's behalf or at its instance by other persons (referred to in the EF Contract as "sub-contractors"), complies with the Rules.

## 2.15 Workforce Matters

2.15.1 The Public Sector in Scotland is committed to the delivery of high quality public services and recognises that this is critically dependent on a workforce that is well rewarded,

well-motivated, well-led, has access to appropriate opportunities for training and skills development, is diverse and is engaged in decision making. These factors are also important for workforce recruitment and retention, and continuity of service. Public Bodies in Scotland are adopting Fair Work Practices, which include: -

- 2.15.2 A fair and equal pay policy that includes a commitment to supporting the living wage, including for example being a Living Wage Accredited Employer;
- 2.15.3 Clear managerial responsibility to nurture talent and help individuals fulfil their potential, including for example, a strong commitment to Modern Apprenticeships, Foundation Apprenticeships and Graduate Level Apprenticeships and the development of Scotland's young workforce;
- 2.15.4 Promoting equality of opportunity and developing a workforce which reflects the diversity of the population of Scotland in terms of age, gender, gender identity, ethnicity, sexual orientation and disability;
- 2.15.5 Support for learning and development;
- 2.15.6 Stability of employment and hours of work, and avoiding exploitative employment practices, including for example no inappropriate use of zero hours contracts, where use of such contracts is a proportionate and reasonable response to a legitimate business requirement;
- 2.15.7 Flexible working (including for example practices such as flexi-time and career breaks) and support for family friendly working and wider work life balance; and
- 2.15.8 Supporting progressive workforce engagement, for example Trade Union recognition and representation where possible, otherwise alternative arrangements to give staff an effective voice;
- 2.15.9 Gender balance and wider representative workforces; and
- 2.15.10 Respect; treating each employee with respect and value diversity within the workforce.

2.16 Further information on SDSs' Fair Work Practices is as follows: -

- 2.16.1 SDS's Corporate Plan includes SDS's ambition to become an exemplar of Fair Work, in line with the work of the Fair Work Convention (<http://www.fairworkconvention.scot/>). This includes our commitment to fair pay and reward as a Scottish Living Wage accredited employer – <http://scottishlivingwage.org/> and [http://scottishlivingwage.org/accredited/skills\\_development\\_scotland](http://scottishlivingwage.org/accredited/skills_development_scotland);
- 2.16.2 SDS aims to be an employer of choice in its employment practices and employee benefits (<http://www.skillsdevelopmentscotland.co.uk/careers/working-at-sds/>);
- 2.16.3 SDS develops its young workforce through its Young Talent Programme: <http://www.skillsdevelopmentscotland.co.uk/careers/young-talent-programme/>);
- 2.16.4 SDS's equality outcomes are highlighted in SDS's Equality Mainstreaming Report: - [http://www.skillsdevelopmentscotland.co.uk/media/43248/0597\\_update-to\\_0357-equality-mainstreaming-report.pdf](http://www.skillsdevelopmentscotland.co.uk/media/43248/0597_update-to_0357-equality-mainstreaming-report.pdf))

In order to ensure the highest standards of service quality in the EF Contract, the Provider shall take a similarly positive approach to fair work practices when performing its Services, as part of a fair and equitable employment and reward package and shall comply with all undertakings provided in the Provider's ITT response in relation to fair work practices (subject to any amendments agreed by the parties and reflected in the award letter and/or any formal variation).

## **C In Training**

### **3 In Training**

3.1 Once a Participant has been recruited to and started in an Employability Fund Services the following policies and actions shall be addressed by the Provider: -

- 3.1.1 Provider Controls and Assurance
- 3.1.2 Payment and Claims
- 3.1.3 Quality Assurance
- 3.1.4 Grievance and Disciplinary Procedures
- 3.1.5 Trade Union Membership

## 3.2 Provider Controls and Assurance

- 3.2.1 The Provider will always have in place management processes and controls to ensure the Provider is meeting their contracted obligations, all of the Provider's staff involved with the Employability Fund Services are aware of all the Employability Fund Services requirements; the Provider promptly identifies and discloses to SDS any actual or potential conflict of interest; and the Provider must ensure that there is clear segregation of duties that provide a check that the Rules are followed. The Provider should, on request, present to SDS an accurate record of their controls in a format determined by SDS.
- 3.2.2 SDS will be entitled to assess the Provider controls (during and after the period of the EF Contract), (accessing the Provider and any sub-contractor premises as deemed appropriate by SDS) and take such action as SDS deems appropriate to establish the extent to which the controls are (or were, as appropriate) operating satisfactorily. The Provider will co-operate fully with SDS in each such assessment and/or action.
- 3.2.3 In the event that the Provider is no longer providing training or assessment services to Participants and has no outstanding claims for payment under the terms of the EF Contract, the Provider will comply with their contracted obligations for the duration of the remaining retention period set out in rule 21 of Part 3 of the Rules.
- 3.2.4 If the Provider has had an EF Contract at any time during the period between 1 April 2019 and 31 March 2020 and an action/improvement plan was in operation under that contract as at the expiry/termination of that contract, any such action/improvement plan will continue to apply to the Provider under the Provider's current EF Contract (as may be extended), unless SDS advises the Provider otherwise in writing in the form of an email from the SDS assigned Skills Investment Advisor.

## 3.3 Payments and Claims

- 3.3.1 A Provider shall require to be a financially viable organisation and have robust financial systems in place. SDS reserves the right, at any time and as it may deem necessary to: -
  - 3.3.1.1 require the Provider to provide such financial and/or other information, including the latest set of the Provider's audited accounts, or such other information as SDS may reasonably require to enable SDS to assess the Provider's continuing financial viability and the Provider's ability to continue to perform its obligations under the EF Contract;
  - 3.3.1.2 require any financial and/or other information provided by the Provider under the EF Contract to be certified by an independent accountant or equivalent; and/or
  - 3.3.1.3 obtain any industry recognised credit reports relating to the Provider to enable SDS to assess the Provider's continuing financial viability and its ability to continue to perform its obligations under the EF Contract and each Contract Schedule and/or
  - 3.3.1.4 call for a report, by an independent accountant, or equivalent on the financial systems and controls operated by the Provider in respect of monies received for the purposes of the Employability Fund Services.
- 3.3.2 Provided always that the Provider has and continues to meet its obligations under the EF Contract, SDS will pay to the Provider, as and when required by, and in accordance with the terms of, the EF Contract, such sums as are then due to the Provider according

to the relevant Contract Schedule. All payments made under the EF Contract are inclusive of any applicable VAT.

3.3.3 Not used.

3.3.4 Without prejudice to SDS' other rights and remedies, where the Provider has been requested to provide documentation in support of a claim for payment and has failed to provide it, SDS shall be entitled to permanently withhold payment of the claim (or such proportion not supported by satisfactory documentation) or where the claim has been paid by SDS to demand immediate repayment of the claim (or such proportion not supported by satisfactory documentation) whereupon the Provider shall immediately repay the amount demanded.

3.3.5 The Provider shall not be entitled to submit a claim for payment in respect of a Recruitment Payment, Output or Outcome until the Provider is in possession of all the required evidence as detailed in rule 8 of Part Two of the Rules. All claims for payments must be submitted by the Provider through 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 FIPS, payment will be at the sole discretion of SDS. SDS shall not accept any evidence other than the evidence referred to in these Rules as support of a claim. Without prejudice to SDS' other rights and remedies, SDS shall be entitled to permanently withhold payment or to recover on demand up to the full amount of all funding already paid in the event that the Provider is unable to demonstrate compliance with these terms for any claim. 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.

3.3.6 Not Used

3.3.7 Signatures on Documentation

3.3.7.1 The Provider shall ensure that all systems and processes are robust with key controls in place to ensure that all signatures on documentation (whether electronic or in hard copy) are genuine.

3.3.7.2 The Provider must ensure that all required signatures are original on all SDS documentation. By original, SDS mean a signature used where there is knowledge of and an intent to sign a specific document.

3.3.7.3 SDS accept wet signatures, stylus signatures and signatures gathered using electronic signature software.

3.3.7.4 SDS do not accept copied and pasted signatures.

3.3.7.5 Typed signatures will only be accepted where these are completed using electronic signature software that provides the Provider with an audit trail. The Provider must retain any electronic signature audit trail with the relevant document and make it available to SDS on request

3.3.7.6 Any irregularity in required signatures may be deemed a breach of your EF Contract

3.3.7.7 SDS constantly monitor and review the use of electronic signatures and may provide updated requirements and guidance from time to time.

## 3.4 Quality Assurance

3.4.1 The Quality Assurance and Improvement Framework sets out standards which are designed to assess the extent to which Providers deliver quality learning and assessment services which are focused on the needs of the Participants and employers. The Provider is required to meet minimum standards and take action to strive for improvements in their delivery. A copy of the current SDS Quality Assurance

and Improvement Framework is available on the Employability Fund training/learning provider area of the SDS Provider Web Pages. The Quality Assurance and Improvement Framework may be amended from time to time by SDS. Any amended version shall be available on the said website.

- 3.4.2 The Provider shall submit to SDS no later than 30th April each year during the Contract Term, a Self Assessment and Quality Action Plan for review and acceptance by SDS, the format of which shall be determined and made available by SDS, to evidence Provider achievement and planned improvement actions against the Quality Standards referred to within the Quality Assurance and Improvement Framework. Subject to any alternative arrangements which SDS may advise in writing, SDS staff shall periodically visit the Provider to review supporting evidence held by the Provider.
- 3.4.3 Except where otherwise confirmed by SDS under paragraph 3.4.2 immediately above, SDS will use each of the Provider's Self Assessment(s) submitted by the Provider and additional appropriate evidence, to assess the Provider against each of the Quality Standards. SDS may examine a range of evidence as indicated within the SDS Quality Assurance and Improvement Framework. SDS will routinely monitor Providers on an ongoing basis in relation to the Quality Standards. SDS will also undertake formal reviews of Providers using a risk based approach. SDS may not formally review all Providers during the period of this EF Contract. SDS will publish its findings on each such review, on the SDS website. Where any Provider is subject to any alternative quality assessment process for example '*How Good is Our College*', the Provider shall be required to meet the requirements of that process
- 3.4.4 , The Provider should ensure your Quality Action Plan is kept up to date and liaise with SDS Assigned Skills Investment Adviser on the progress of improvement actions. If however, following a quality assurance visit, a material change is required to the Quality Action Plan this must be agreed with the Quality Assessor before returning to the Skills Investment Adviser for ongoing quality assurance monitoring.
- 3.4.5 In the event that the Provider fails to achieve a grade of at least satisfactory in relation to any of our quality standards at any time (whether established through SDS's own examination, or through such alternative quality standard assessment), this shall be deemed a breach of the EF Contract. This includes failure to submit a Self – Assessment and Quality Action Plan which is acceptable to SDS; an SDS formal quality review which has one or more grades at weak or unsatisfactory.
- 3.4.6 Not used

### 3.5 Grievance and Disciplinary Procedures

- 3.5.1 The Provider must have a written Grievance and Disciplinary Policy and Procedures document. These procedures must operate in such a way so as to ensure that Participants are treated fairly and reasonably. Participants must be notified of these policies and procedures at the commencement of their Employability Fund Services and must have access to them at all times.
- 3.5.2 Where a serious breach of policy occurs (e.g. an act of violence by a Participant) the Provider may expel the Participant from the Employability Fund Services immediately without notice. The Provider must inform SDS immediately by telephone of the expulsion and the reason for it.

### 3.6 Trade Union Membership

- 3.6.1 Participants may join a trade union, if they are eligible to do so under its rules. The decision to join a trade union is entirely a matter for individual Participants and the Provider shall not seek to influence this decision in any way. Any agreed arrangements that the Provider, its sub-contractors or agent (if any) have with the trade union and which are relevant to Participants must be explained during induction.
- 3.6.2 Participants who join a trade union must be treated in the same manner as all other members of that union, (e.g. given time off to attend legitimate union meetings.)



## **D Standard Conditions**

### **4 Standard Conditions**

#### **4.1 Interpretation**

- 4.1.1 Except only to the extent expressly set out in any rule, each rule (in Parts One, Two and Three) shall be interpreted in accordance with this rule 4.1.
- 4.1.2 Capitalised terms in these Rules shall have the same meanings as those given in Appendix 8.
- 4.1.3 Rule, schedule and paragraph headings shall not affect the interpretation of the EF Contract or a Contract Schedule.
- 4.1.4 A person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 4.1.5 A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 4.1.6 Words in the singular shall include the plural and vice versa.
- 4.1.7 A reference to one gender shall include a reference to the other genders.
- 4.1.8 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.
- 4.1.9 Except to the extent expressly provided in these Rules, a reference to writing or written includes faxes but not email.
- 4.1.10 Any obligation in the EF Contract on a person not to do something includes an obligation not to agree or allow that thing to be done.
- 4.1.11 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.
- 4.1.12 Where there is any conflict or inconsistency between or among the provisions of the EF Contract, such conflict or inconsistency shall be resolved according to the following order of priority:
  - 4.1.12.1 Any and all SDS policy statements relating to the Covid-19 pandemic issued by SDS from time to time;
  - 4.1.12.2 any document signed by SDS approving any variations pursuant to rule 5 of Part One;
  - 4.1.12.3 the letter awarding the EF Contract to the Provider, and the acceptance thereof;
  - 4.1.12.4 the Microsoft licensing terms and conditions that apply to each User Permission set out in the FIPS pages of the SDS Provider Web Pages or such alternative website or location SDS may alert Providers to from time to time;
  - 4.1.12.5 the remaining terms of the FIPS Software User Permission terms and conditions set out in the FIPS pages of the SDS Provider Web Pages or such alternative website or location we may alert Providers to from time to time;
  - 4.1.12.6 any other end user terms and conditions relating to use by the Provider, their staff or agents, of any other software/systems that SDS requires the Provider to use in performing the Services;
  - 4.1.12.7 the terms of the Rules;
  - 4.1.12.8 the Contract Schedule;
  - 4.1.12.9 any appendices to any of the documents;
  - 4.1.12.10 the ITT;
  - 4.1.12.11 the Provider's ITT Response.

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

4.3 To the extent not otherwise specified, any right available to SDS shall be exercised at SDS' entire discretion.

## 5 Warranties and Representations

### 5.1 The Provider warrants and represents to SDS that: -

- 5.1.1 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 EF Contract and each Contract Schedule;
- 5.1.2 the EF Contract and each Contract Schedule is executed by a duly authorised representative of the Provider;
- 5.1.3 in entering into the EF Contract or any Contract Schedule it has not committed and shall not commit any Fraud;
- 5.1.4 as at the commencement of the Contract Term, all information, statements and representations contained in the documents submitted in respect of the 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 EF Contract and it will promptly advise their assigned SDS Contract Executive in writing 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;
- 5.1.5 it has not entered into any agreement with any other person with the aim of preventing tenders being made or as to the fixing or adjusting of the conditions on which any tender is made in respect of the EF Contract;
- 5.1.6 it has not caused or induced any person to enter such agreement referred to in the previous paragraph;
- 5.1.7 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 tender or proposal or proposed tender for services under the EF Contract;
- 5.1.8 it has not committed any offence under the Bribery Act 2010;
- 5.1.9 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 EF Contract and any Contract Schedule which may be entered into with SDS;
- 5.1.10 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 EF Contract and any Contract Schedule which may be entered into with SDS;
- 5.1.11 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
- 5.1.12 in the three (3) years prior to the date of the EF Contract: -
  - 5.1.12.1 it has conducted all financial accounting and reporting Services in compliance in all material respects with the generally accepted accounting principles that apply to it in any country where it files accounts;
  - 5.1.12.2 it has been in full compliance with all applicable securities laws and regulations in the jurisdiction in which it is established; and
  - 5.1.12.3 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 EF Contract.

## 6 Prevention of Bribery

### 6.1 The Provider:

- 6.1.1 shall not, and shall procure that its employees, consultants, contractors, sub-contractors and agents shall not, in connection with this EF Contract commit a Prohibited Act; and

6.1.2 warrants, represents and undertakes that it is not aware of any financial or other advantage being given to any person working for or engaged by SDS, or that an agreement has been reached to that effect, in connection with the execution of this EF Contract or any other contract with a public authority, excluding any arrangement of which full details have been disclosed in writing to SDS before execution of this EF Contract.

6.2 The Provider shall:

6.2.1 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 compliance with the Bribery Act 2010; and

6.2.2 immediately following any request from SDS, certify to SDS in writing (such certification to be signed by a Director or equivalent of the Provider's organisation) compliance with this Rule 6 by the Provider and all persons associated with the Provider or other persons who are supplying services in connection with this EF Contract. The Provider shall promptly provide all supporting evidence of compliance as SDS may reasonably request.

6.3 The Provider shall have an anti-bribery policy (which shall be disclosed to SDS immediately on request) to prevent any of the Provider's employees, consultants, contractors, sub-contractors and agents from committing a Prohibited Act and shall enforce it where appropriate.

6.4 If any breach of condition 6.1 is suspected or known, the Provider must notify SDS immediately.

6.5 If the Provider notifies us that the Provider suspects or knows that there may be a breach of condition 6.1, the Provider must respond promptly to SDS's enquiries, co-operate with any investigation, and allow SDS and/or SDS's representatives to audit books, records and any other relevant documents.

6.6 SDS may terminate this EF Contract by written notice with immediate effect if the Provider, or any of the Provider's employees, consultants, contractors, sub-contractors or agents (in all cases whether or not acting with the Provider's knowledge) breaches condition 6.1.

6.7 Any notice of termination under condition 6.6 must specify:

6.7.1 the nature of the Prohibited Act; and

6.7.2 the date on which this EF Contract will terminate

6.8 Any dispute relating to:-

6.8.1 the interpretation of this condition 6; or

6.8.2 the amount or value of any gift, consideration or commission,

shall be determined by SDS and SDS's decision shall be final and conclusive.

6.9 Any termination under this condition 6 will be without prejudice to any right or remedy which SDS may have.

## 7 **Best Practice**

7.1 Any document, form and/or guidance made available by SDS relating to the Employability Fund Services shall be considered a Best Practice document, form and/or guidance (as applicable). In performing the Employability Fund 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 Rules as mandatory, such information must be provided.

## **8 Conflicts of Interest**

- 8.1 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 EF Contract or any Contract Schedule.
- 8.2 The Provider shall promptly email or write to the SDS assigned Skills Investment Advisor to and provide full particulars to SDS if such conflict referred to in rule 8.1 above arises or is reasonably foreseeable to arise.
- 8.3 SDS reserves the right to terminate the EF Contract and/or any Contract Schedule 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 EF Contract or any Contract Schedule. The action of SDS pursuant to this rule shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to SDS.

## **9 Safeguard Against Fraud**

- 9.1 The Provider shall safeguard SDS's funding of the EF Contract and any Contract Schedule 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.

## **10 Contract Schedule Performance**

- 10.1 The Provider shall perform all Contract Schedules entered into with SDS in accordance with:-
  - 10.1.1 the requirements of the EF Contract; and
  - 10.1.2 the terms and conditions of the respective Contract Schedules.

## **11 Data Protection**

- 11.1 Subject to rule 11.2, the parties agree that SDS is the "Data Controller" and the Provider is the "Data Processor" in relation to the collection and processing of all Personal Data (under exception of Data) under the EF Contract ("the Processed Data"). The Provider will act only on SDS's instructions and ensure that there are appropriate technical and organisational measures in place to ensure the security of all Processed Data in accordance with the Data Protection Principles set out in Data Protection Legislation and shall not use any Processed Data for any other purpose nor shall the Provider disclose the same to any third person. The Provider will comply with the provisions of Appendix 14 (Processed Data) in respect of such Personal Data.
- 11.2 In relation to the collection and processing of Personal Data comprising Data only, the parties agree that they are each a "Data Controller" in terms of the Data Protection Legislation and that any sharing of Personal Data comprised in the Data between the Provider and SDS relating to the Employability Fund Services will be on a Data Controller to Data Controller basis. The Provider shall comply with the provisions of the Data Protection Legislation in relation to the Data and shall ensure that it has obtained all permissions required in relation to the Data Protection Legislation to enable it to comply with the requirements of the EF Contract. The

provisions of Appendix 13 (Data Sharing) shall apply in respect of the sharing of any Data in relation to the EF Contract.

- 11.3 The Provider shall, at all times during and after the period of the EF Contract, 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 rule 11 (and the corresponding appendices) except and to the extent that such liabilities have resulted directly from SDS's instructions.
- 11.4 SDS acknowledges that the Provider is reliant on SDS alone for direction as to the extent the Provider is entitled to use and process the Personal Data where the Provider is a Data Processor under the EF Contract. Subject to paragraph 4 of Appendix 14 to these Rules, the Provider shall be entitled to relief from liability in circumstances where the Data Subject makes a claim or complaint with regards to the Provider's actions to the extent that such actions directly result from instructions received from SDS in connection with the Processed Data.

## 12 Freedom of Information

- 12.1 To the extent that either party ("FOISA Party") is subject to the requirements of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (together 'FOISA') the other party shall assist and cooperate with the FOISA Party to enable the FOISA Party to comply with its Information disclosure obligations.
- 12.2 The other party shall and shall procure that its sub-contractors and agents shall at its cost:-
- 12.2.1 transfer to the FOISA Party 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;
  - 12.2.2 provide the FOISA Party with a copy of all Information in its possession or power in the form that the FOISA Party reasonably requires, within 7 calendar days (or such other period as we may specify) of the FOISA Party's request; and
  - 12.2.3 provide all necessary assistance as reasonably requested by the FOISA Party to enable the FOISA Party to respond to the request for Information within the relevant time for compliance set out in FOISA.
- 12.3 The FOISA Party shall be responsible for determining in its absolute discretion and notwithstanding any other provision in or relating to the EF 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 other party.
- 12.4 In no event shall the other party respond directly to a request for information unless expressly authorised to do so by the FOISA Party.

## 13 Publicity

- 13.1 Unless otherwise directed by SDS, the Provider shall not make any press announcements or publicise the EF Contract and/or any Contract Schedule in any way without SDS's prior written consent in the form of an email from the SDS assigned Skills Investment Advisor.
- 13.2 SDS shall be entitled to publicise the EF Contract in accordance with any legal obligation upon SDS, including any examination of the EF Contract by the Auditor or otherwise.
- 13.3 The Provider shall not do anything which may damage the reputation of or bring into disrepute SDS, any of the Scottish Ministers or the Employability Fund.

## 14 Termination

- 14.1 SDS may, without penalty, terminate the EF Contract and/or any Contract Schedule, or part of a Contract Schedule (as specified by SDS in the relevant notice) by serving written notice on the Provider with effect from the date specified in such notice: -
- 14.1.1 where, in the opinion of SDS, the Provider has failed to comply with any term of the EF Contract (including any Contract Schedule);
  - 14.1.2 where, in the opinion of SDS, the Provider is unable to perform its obligations under the EF Contract (including any Contract Schedule);
  - 14.1.3 in the event that SDS ceases to be engaged in the performance or support of the Employability Fund Services or programme;
  - 14.1.4 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 Employability Fund Services referred to in the EF Contract (including any Contract Schedule);
  - 14.1.5 where the Provider fails to immediately notify SDS of (i) any hold placed on any Employability Fund related accreditation by an awarding body; (ii) any withdrawal and/or renewal of any Employability Fund related accreditation by any awarding body, or (iii) any sanction which may impact on a Participant achievement;
  - 14.1.6 where the Provider fails to provide to SDS a copy of any Employability Fund related awarding body External verifier report containing any action;
  - 14.1.7 where any quality accreditation or recognition of the Provider is withdrawn or not renewed (in each case whether temporarily or otherwise);
  - 14.1.8 where any of the circumstances set out in rules 14.8 - 14.10 arise;
  - 14.1.9 where the Provider is a company and an Insolvency Event as described in rule 33 has occurred in respect of the Provider;
  - 14.1.10 where SDS terminates any other contract between the Provider and SDS as a consequence of breach on the part of the Provider;
  - 14.1.11 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 EF Contract) which breach (or breaches) would entitle (or would have entitled) SDS to terminate such agreement; or
  - 14.1.12 if SDS reasonably considers that the EF 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);
  - 14.1.13 if the Provider fails to comply in the performance of the EF Contract with legal obligations in the fields of environmental, social and employment law;
  - 14.1.14 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;
  - 14.1.15 if SDS has reasonable cause to believe that the Provider has committed an act or engaged in any 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
  - 14.1.16 if SDS has reasonable cause to believe that the EF 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.

- 14.2 The Provider shall email the SDS assigned Skills Investment Advisor if a third party acquires a Controlling Interest in the Provider where such third party does not at the date of the EF Contract hold such a Controlling Interest (but disregarding for this purpose any change in ownership/control of voting share capital, voting rights or powers of 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 EF Contract (and/or each Contract Schedule thereunder (or part thereof) to the extent specified by SDS) by giving notice in writing to the Provider with immediate effect within six (6) months of: -
- 14.2.1 being notified that a Change of Control has occurred; or
  - 14.2.2 where no notification has been made, the date that SDS becomes aware of the Change of Control,
- but SDS shall not be permitted to terminate where SDS approved the Change of Control prior to its implementation, in writing.
- 14.3 If SDS terminates the EF Contract (or any part thereof) for breach, it shall be entitled to terminate any other contract between the Provider and SDS by serving written notice on the Provider with effect from the date specified in such notice.
- 14.4 SDS' rights of termination under this rule 14 are available to SDS in addition to its other rights of termination provided under the EF Contract.
- 14.5 For the avoidance of doubt, SDS shall be entitled to rely on any extraneous evidence of the Provider's non-compliance with any provision of the EF Contract.
- 14.6 Where SDS has a right of termination or partial termination, such right shall include a right to reduce any volumes awarded under any Contract Schedule agreed with the Provider.
- 14.7 The Provider shall be entitled to terminate the EF 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 Employability Fund 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 rule 29) prior to such date, failing which the Provider's right of termination under this rule 14.7 shall elapse.
- 14.8 SDS shall be entitled to terminate the EF Contract by written notice with immediate effect if the Provider and/or any of its directors, staff, Permitted Sub-contractors or representatives:-
- 14.8.1 has committed a crime; or
  - 14.8.2 has become involved in any situation or programme which:-
    - 14.8.2.1 tends in SDS's opinion to have a negative effect on the reputation of SDS, any Scottish Minister or the Employability Fund programme or any aspect of SDS's or any Scottish Minister's business;
    - 14.8.2.2 would expose SDS, any Scottish Minister or the Employability Fund programme or any aspect of SDS's or any Scottish Minister's business to disrepute, scandal, ridicule or contempt, or would tend to shock, insult or offend the public in Scotland;
    - 14.8.2.3 reflects unfavourably on the reputation of SDS, any Scottish Minister or the Employability Fund programme or any of SDS's or any Scottish Minister's services, interests or activities; or

14.8.2.4 might affect the supply and/or exploitation of the services, activities and interests of SDS, any Scottish Minister or the Employability Fund programme.

14.9 SDS's decision on all matters arising under rule 14.8 shall be conclusive.

14.10 Examples of acts or conduct considered to be prejudicial to the business of SDS, any Scottish Minister or the Employability Fund programme include:

14.10.1 the posting or publishing on social media or elsewhere of any content that promotes bigotry, racism or discrimination based on race, gender, religion, nationality, disability, sexual orientation or age;

14.10.2 the expression of any political views in a context that could give rise to an association with SDS's or any Scottish Minister's business;

14.10.3 the use of, trade in, or other association with, illegal drugs.

## 15 Other Remedies

15.1 Without prejudice to SDS' other rights and remedies: -

15.1.1 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 EF Contract, SDS shall be entitled to recover from the Provider up to the full amount of funding paid to the Provider on demand.

15.1.2 failure to perform the Provider undertakings entirely in accordance with the EF 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 Rules) shall constitute a breach of the EF Contract, which shall entitle SDS to: -

15.1.2.1 suspend any or all payments under the EF Contract and any other contract the Provider has entered into with SDS, until SDS has concluded a full investigation of the Provider's activities. Except where it may not, in SDS's reasonable opinion, be appropriate to do so, SDS will give the Provider written notice if SDS is going to impose a payment suspension, and shall set out the commencement date for the payment suspension. SDS may also include details of the anticipated duration of the payment suspension in the notice, or advise the Provider about that separately in writing. SDS may extend the duration of the payment suspension if SDS has good reason to do so in order to complete a full investigation.

15.1.2.2 suspend the Provider's appointment under the EF Contract and any other contract the Provider has entered into with SDS. Except where it may not, in SDS's reasonable opinion, be appropriate to do so, SDS will give the Provider written notice if it is going to impose such suspension, and shall set out the commencement date for the suspension. SDS may also include details of the anticipated duration of the suspension in the notice, or advise the Provider about that separately in writing. SDS may extend the duration of the suspension if SDS has good reason to do so in order to complete a full investigation;

15.1.2.3 suspend the Provider's right to access FIPS under the EF Contract and any other contract the Provider has entered into with SDS, until the Provider has concluded a full investigation of the Provider's activities. SDS will give the Provider written notice if it is going to impose a FIPS suspension, and shall set out the commencement date for the FIPS suspension. SDS may also include details of the anticipated duration of the payment suspension in the notice, or advise the Provider about that separately in writing. SDS may extend the duration of the FIPS suspension if SDS has good reason to do so in order to complete a full investigation.



- 15.1.2.4 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;
- 15.1.2.5 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; and/or
- 15.1.2.6 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);
- 15.1.2.7 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 EF Contract and/or any other contract between SDS and the Provider (or Contract Schedule thereunder) (or part thereof) under rule 14; and/or
- 15.1.2.8 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 then terminate the EF Contract and/or any other contract between SDS and the Provider (or Contract Schedule thereunder).

15.2 Without prejudice to SDS' 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.

15.3 Where SDS discovers that the Provider has submitted any inaccurate claims for payment to SDS, SDS shall be entitled, in addition to requiring repayment of those amounts, to apply extrapolation at the rate of inaccuracy identified and to demand repayment of a proportion of claims which are deemed to have been paid erroneously on the basis of such extrapolation.

15.4 Where SDS becomes aware of any breach of any other agreement which SDS entered into with the Provider at any time for the provision by the Provider of services relating to employability fund (or equivalent), and where SDS considers that the Provider is likely to be committing a similar breach of the Provider's EF Contract, SDS shall be entitled to require the Provider to agree to an action / improvement plan in accordance with the process set out in rule 15.1.2.8;

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

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

15.5.2 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.

## 16 Consequences of Termination and Expiry

- 16.1 Unless otherwise confirmed in writing by SDS, notwithstanding the service of a notice to terminate the EF 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 rule 16.1.
- 16.2 Termination or expiry of the EF 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.
- 16.3 Termination or expiry of the EF Contract (or any Contract Schedule, or part thereof) shall be without prejudice to any rights, remedies or obligations of either party accrued under the EF Contract prior to such termination or expiry.
- 16.4 SDS shall not be obliged to make payment to the Provider for any Start, Output or Outcome achieved after the date of termination.
- 16.5 Each rule which is either expressed to or by implication is intended to survive termination shall survive the termination or expiry of the EF Contract including all rules entitling SDS to recover monies, rule 2.12 (information security), rule 11 (Data Protection), rule 12 (Freedom of Information), rule 14 (Termination), rule 16 (Consequences of Termination and Expiry), rule 21 (Records, Audit Access and General Assistance), rule 22 (Confidentiality), rule 31 (Intellectual Property) and rule 32 (Transfer of Undertakings), all in Part Three of these Rules.
- 16.6 On the termination of the EF 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 rule 11, 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 EF Contract, so as to facilitate a smooth and swift winding up of business between the Provider and SDS.
- 16.7 The Provider shall not, following termination of the EF Contract or all Contract Schedules thereunder, represent that the Provider is contracted to provide training under any of the Employability Fund and shall not, if previously permitted to do so, continue to use any SDS branding.

## 17 Liability

- 17.1 Subject to rule 17.2, SDS's total liability to the Provider for any costs and/or losses incurred or suffered by the Provider pursuant to the EF Contract shall be capped at the total funding due to the Provider for Employability Fund Services provided under the Contract Schedule in relation to which the costs and/or losses have arisen.
- 17.2 In no event shall SDS limit its liability pursuant to the EF Contract for: -
- 17.2.1 death or personal injury caused by its negligence, or that of SDS's staff or
  - 17.2.2 fraud or fraudulent misrepresentation by SDS or its staff or representatives.
- 17.3 Except insofar as liability arises from the circumstances set out in Rules 17.2.1 and 17.2.2 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 EF Contract including in respect of any death or personal injury, loss of or damage to property, financial loss arising from any advice 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 rule 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.

## **18 Severability**

- 18.1 If any provision of the EF 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 EF Contract had been executed with the invalid provision eliminated.
- 18.2 In the event of a holding of invalidity so fundamental as to prevent the accomplishment of the purpose of the EF Contract, SDS and the Provider shall immediately commence good faith negotiations to remedy such invalidity.

## **19 Statutory and other Requirements**

- 19.1 In the performance of the Contract Schedule, the Provider shall comply with any and all relevant requirements of Scots Law and for so long as applicable, European Community Law.
- 19.2 The Provider shall be responsible for obtaining all licences, authorisations, consents or permits required in relation to the performance of the EF Contract and each Contract Schedule.
- 19.3 The Provider shall ensure that every element of the Employability Fund Services including without limitation any work experience, provided by the Provider or carried out on the Provider's behalf or at its instance by other persons (referred to in the EF Contract as "sub-contractors"), complies with the Rules.

## **20 Non-Discrimination**

- 20.1 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).
- 20.2 The Provider shall take all reasonable steps to secure the observance of rule 20.1 of this Part Three by all servants employees or Permitted Sub-contractors of the Provider and all suppliers and sub-contractors employed in the execution of the EF Contract.
- 20.3 This rule 20 is without prejudice to the Provider's obligations pursuant to the EO Act set out in Part Two.

## **21 Records, Monitoring and General Assistance**

- 21.1 The Provider shall retain full and accurate records and accounts of the operation of the EF Contract including the services provided pursuant to it, the Contract Schedules entered into with SDS and the amounts paid by SDS until at least the third anniversary of the 31<sup>st</sup> March next occurring after the creation of the record/account. (For example if a record is created on 9/9/21 then the record must be retained until 31/3/25.)
- 21.2 Not used. .
- 21.3 The Provider shall keep the records, evidence and accounts referred to in this rule 21 in accordance with good accountancy practice.
- 21.4 The Provider shall afford SDS or its agents or third party auditors (including representatives 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 EF 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.

- 21.5 The Provider shall provide such records, evidence and accounts (together with copies of the Provider's published accounts) during the term of the EF Contract and for the period referred to in rule 21.1 of this Part Three 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.
- 21.6 The Provider shall on demand provide the Auditor with all reasonable co-operation and assistance in relation to each audit, including:-
- 21.6.1 providing unlimited access to all information requested by the Auditor;
  - 21.6.2 providing unlimited access to sites controlled by the Provider and to equipment used in the performance of the Employability Fund Services;
  - 21.6.3 providing unlimited access to Provider staff, agents, representatives, Participants, and proposed and former Participants; and
  - 21.6.4 providing the Auditor with suitable oral or written explanation as requested.
- 21.7 The Provider shall bear its own costs and expenses incurred in respect of compliance with its obligations under this rule 21, unless the audit reveals a material breach by the Provider of its obligations in which case the Provider shall reimburse SDS for SDS's agents or representatives (as applicable) reasonable costs incurred in relation to the audit.
- 21.8 Where SDS requests, without prejudice to SDS' other rights and remedies (including SDS' rights pursuant to rule 21.12), 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. Where for any reason, the Provider fails to forward any records, accounts and/or supporting documentation in accordance with any request from SDS, SDS shall be entitled to arrange for the transfer and storage directly, and all costs incurred by SDS in that respect shall be payable by the Provider immediately on demand. This condition is not the only option available to SDS and does not prevent or restrict SDS from exercising any other right or remedy that SDS may have.
- 21.9 Where during any document retention period following the expiry of the EF 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 rule 21), the Provider shall promptly email the SDS assigned Skills Investment Advisor confirming same.
- 21.10 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 Scottish the Scottish Ministers, and/or assist SDS and/or the Scottish Ministers (and/or their representatives) in developing policy for employability fund activity.
- 21.11 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 EF Contract.

21.12 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 rule 21, 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 Rules, and (ii) make such original copies otherwise available in accordance with rule 21.

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

21.14 Where any such audit or other SDS investigation reveals any breach of the EF Contract terms 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.

## **22 Confidentiality**

22.1 Subject to rule 22.2 of this Part Three, the Provider must treat the content of the EF Contract and each Contract Schedule as confidential and not disclose the information unless: -

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

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

22.1.3 content has been made publicly available not through breach.

22.2 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.

22.3 SDS shall be entitled, at its entire discretion, to disclose the content of the EF 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.

## **23 Performance Levels**

23.1 In performing its obligations under the EF Contract, the Provider shall: -

23.1.1 perform the services in such a manner as will ensure that the Achieved Performance Level in respect of that performance is equal to or higher than the Performance Levels set out rule 23.3 below; and

23.1.2 provide such records of and management reports summarising the Achieved Performance Levels as SDS may specify from time to time, and within such timescales as may be advised by SDS.

23.2 In the event that any Achieved Performance Level falls short of the relevant Performance Level, without prejudice to SDS's other rights and remedies, the consequences set out in rule 23.3 shall apply.

23.3 The Performance Levels set out in this rule 23.3 shall apply. For the purposes of this rule 23.3 the following terms shall have the following meanings: -

'Month' shall mean each calendar month occurring during the period of each Contract Schedule, and 'Monthly' shall be construed accordingly.

Any reference to 'Contract Schedule' in this rule, is a reference to the Contract Schedule as amended in accordance with the EF Contract from time to time.

### 23.3.1 Performance Level 1 – Fulfilment of contracted starts

<b>How Performance Level will be measured</b>	Measure as a percentage, the number of new Starts properly entered in FIPS in each measurement period against total volume of new Starts forecasted for that period in the Contract Schedule.
<b>Performance Level Action/ Measurement Period</b> (Note that the measurement will be made on the last day of the last Accounting Period within each period measured)	<p>Provider shall ensure that the number of new Starts properly entered on FIPS in that measurement period as a percentage of the total number of new starts forecast for entry on FIPS for that period in the Contract Schedule exceeds 95%.</p> <p>Each of the periods covered by the following Accounting Periods:-            Active Financial Period 1 - 5 (inclusive of periods 1 - 5)            Active Financial Period 1 - 7 (inclusive of periods 1 - 7)            Active Financial Period 1 - 8 (inclusive of periods 1 - 8)            Active Financial Period 1 - 10 (inclusive of periods 1 - 10)            Active Financial Period 1 - 11 (inclusive of periods 1 - 11)            Active Financial Period 1 - 12 (inclusive of periods 1 - 12)</p>
<b>Failure by Provider to meet Performance Level - Consequences</b>	In the event that the Provider fails to meet this Performance Level in any Period, and fails to provide a rationale for such failure which is acceptable to SDS (at SDS' entire discretion), SDS shall be entitled to remove volumes of potential starts awarded under any Contract Schedule which are not registered as 'Starts' under FIPS

### 23.3.2 Performance Level 2 – Fulfilment of contracted spend

<b>How Performance Level will be measured</b>	Measure as a percentage, the total payments properly claimed by the Provider under the EF Contract in each measurement period against total forecasted payments for that period set out in the Contract Schedule.
<b>Performance Level Action/ Measurement Period</b> (Note that the measurement will be made on the last day of the last Accounting Period within each period measured)	<p>The Provider must ensure that the total value of payments properly claimed in the Period measured as a percentage of the total value of payments forecast to be claimed for that Period in the Contract Schedule exceed 95%.</p> <p>Each of the periods covered by the following Accounting Periods:-            Active Financial Period 1 - 5 (inclusive of periods 1 - 5)            Active Financial Period 1 - 7 (inclusive of periods 1 - 7)            Active Financial Period 1 - 8 (inclusive of periods 1 - 8)            Active Financial Period 1 - 10 (inclusive of periods 1 - 10)            Active Financial Period 1 - 11 (inclusive of periods 1 - 11)            Active Financial Period 1 - 12 (inclusive of periods 1 - 12)</p>
<b>Failure by Provider to meet Performance Level - Consequences</b>	In the event that the Provider fails to meet this Performance Level in any Period and fails to provide a rationale for such failure which is acceptable to SDS (at SDS' entire discretion), SDS shall be entitled to reduce the Contract Value set out in the Contract Schedule.

### 23.3.3 Performance Level 3 – Claims progress and FIPS records accuracy

<b>How Performance Level will be measured</b>	Measure percentage of end dates forecast in FIPS which are not properly confirmed in FIPS as actual end dates by the forecasted end date.
<b>Performance Level Action/ Measurement Period</b>	On a monthly basis, the Provider must ensure that the number of actual end dates occurring and entered into FIPS in that Month as a percentage of the number of end dates forecast in FIPS to occur in that Month exceeds 90%.
<b>Failure by Provider to meet Performance Level - Consequences</b>	In the event that the Provider fails to meet the Performance Level in any Monthly period, and fails to provide a rationale for such failure which is acceptable to SDS (at SDS's entire discretion), SDS shall be entitled to remove volumes of potential starts awarded under any Contract Schedule which are not registered as 'Starts' under FIPS

## 24 Assignment and Sub-contracting

- 24.1 The Provider shall not assign, novate, sub-contract or otherwise dispose of any of its rights or obligations under the EF 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).
- 24.2 Where SDS grants consent to the Provider to sub-contract in accordance with rule 24.1, 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.
- 24.3 In respect of any such sub-contracting to which SDS has consented in accordance with rule 24.1:
- 24.3.1 the Provider shall ensure that so far as is possible the terms of the EF 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 EF Contract; and
- 24.3.2 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.
- 24.3.3 SDS reserves the right to see and approve copies of sub-contracts (such approval not to be unreasonably withheld, delayed or conditioned); and
- 24.3.4 no sub-contracting by the Provider under this rule 24 or otherwise, and no approval or consent by SDS in relation thereto shall relieve the Provider of any liability or obligation under the EF Contract.
- 24.4 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.
- 24.5 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 EF 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.

24.6 For the avoidance of any doubt and without limitation to the preceding provisions of this rule 24, the requirements of rule 24 shall apply even where the Provider intends to delegate or sub-contract any of its rights or obligations under the EF Contract and/or any Contract Schedule to an Associated Provider.

24.7 SDS reserves the right to charge an administration charge to reflect its costs incurred in considering, approving and agreeing the terms of any assignment agreed pursuant to this rule 24.8, which charge shall be payable by the Provider within 28 calendar days of request by SDS.

## 25 **Change of Provider Name**

25.1 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.

## 26 **Cumulative Remedies**

26.1 Except as otherwise expressly provided by the EF Contract, all remedies available to either party for breach of the EF 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.

## 27 **Waiver**

27.1 The failure of either party to insist upon strict performance of any provision of the EF 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 EF Contract.

27.2 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 rule 29 (notices).

27.3 A waiver of any right or remedy arising from a breach of the EF Contract shall not constitute a waiver of any right or remedy arising from any other or subsequent breach of the EF Contract.

## 28 **Entire Agreement**

28.1 Except to the extent otherwise expressly provided in the EF Contract:-

28.1.1 the EF Contract (including the ITT Response, any and all policy statements issued by SDS from time to time relating to the Covid-19 pandemic, the award letter from SDS, each Contract Schedule and any other document properly incorporated by reference into the EF 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;

28.1.2 the Provider agrees that in entering into the EF 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 EF Contract.

28.2 Nothing in this rule 28 shall operate to exclude liability for fraud or fraudulent misrepresentation.



## 29 Notices

- 29.1 Except as otherwise expressly provided within the EF Contract, no notice from either SDS or the Provider to the other shall have any validity under the EF Contract unless made in writing by or on behalf of the party sending the communication.
- 29.2 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 rule 29.3 below. Provided the relevant communication is not returned as undelivered, the notice or communication shall be deemed to have been given 3 calendar days after the day on which the letter was posted, or sooner where the other party acknowledges receipt of such letters.
- 29.3 For the purposes of rule 29.2, the address for SDS and the Provider shall be as follows: -
- 29.3.1 for notices to SDS, at SDS' registered address posted on the UK Companies House website as at the date of the notice;
  - 29.3.2 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
  - 29.3.3 where the Provider is not a UK registered company, the Provider's address set out in the SDS award letter for this EF Contract.
- 29.4 Where a Provider is not a UK registered company, the Provider may change its address for service by serving a notice on SDS confirming the change of address, in accordance with this rule 29.

## 30 Marketing and Branding

- 30.1 The Provider must conform to all marketing and brand guidelines issued by SDS and use standard marketing literature issued by SDS.
- 30.2 The Provider will use only approved product and service names in communications with potential Participants and Participants in relation to the Employability Fund Services. No variations to the product and service naming conventions will be allowed and nationally available products and services may only be locally branded in accordance with such instructions as SDS may prescribe.
- 30.3 The Provider may only use the SDS branding, trade mark and other intellectual property rights for the purposes of the EF Contract and shall not use the same after the termination or expiry of the EF Contract or Contract Schedule (as applicable).
- 30.4 The Provider shall be obliged to supply case study information as required by SDS.

## 31 Intellectual Property Rights

- 31.1 All Intellectual Property Rights in any materials solely produced in the performance and during the currency of the EF 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.

## 32 TUPE: Transfer of Undertakings (Protection of Employment) Regulations 2006

- 32.1 The Provider undertakes (i) to organise the delivery of the Employability Fund Services in such a way that there will be no organised grouping of the Provider's employees which has as its principal purpose the carrying out of the Employability Fund Services 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 EF Contract or any Contract Schedule.

32.2 If, on the termination, expiry or reduction in the scope of the EF 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 Employability Fund services 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:

32.2.1 the employment or engagement: and/or

32.2.2 the claimed employment or engagement: and/or

32.2.3 the termination of the employment or engagement: and/or

32.2.4 the claimed termination of employment or engagement,

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

32.3 If SDS asks, the Provider shall promptly enter into an appropriate agreement with any new Provider on the same terms as those in rule 32.2 in order to give effect to rule 32.2 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 rule 33.2 above.

32.4 Nothing in this rule 32 will give rise to the inference that SDS accepts any liability for any person employed by the Provider.

### 33 **Insolvency**

33.1 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 any Employability Fund Services pursuant to the EF Contract: -

33.1.1 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)

33.1.2 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);

33.1.3 where the Provider is a company:

33.1.3.1 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;

33.1.3.2 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);

33.1.3.3 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;

33.1.3.4 a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets;

- 33.1.3.5 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;
- 33.1.3.6 it is or becomes insolvent within the meaning of Section 123 of the Insolvency Act 1986;
- 33.1.3.7 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
- 33.1.3.8 any event similar to those listed in rule 33.1.3.1 to rule 33.1.3.7 occurs under the law of any other jurisdiction.

33.2 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 with full details of what has been provided to Participants and what Outputs and Outcomes have been achieved.

#### **34 Blacklisting Regulations**

34.1 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 2018 by unlawfully processing personal data in connection with any blacklisting activity. Breach of this rule is a material default which shall entitle SDS to terminate the EF Contract (including any Contract Schedule) with immediate effect.

#### **35 Provider Personnel**

35.1 At all times, the Provider shall ensure that: -

35.1.1 each of the Provider's personnel is suitably qualified, adequately trained and capable of providing the applicable services under the EF Contract in respect of which they are engaged; and

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

35.2 The Provider shall remove any of the Provider's personnel who SDS reasonably decides have failed to carry out their 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 to be provided by the Provider.

#### **36 Law and Jurisdiction**

36.1 SDS and the Provider accept the exclusive jurisdiction of the Scottish courts and agree that the EF Contract and each Contract Schedule is to be governed by and construed according to Scots law.