
22 April 1996

CIRCULAR

**THE
FURTHER
EDUCATION
FUNDING
COUNCIL**

FRANCHISING

To

Principals of colleges
Heads of external institutions
Chief education officers
Heads of higher education
institutions receiving funds from
the Council
Chairmen of governors
Clerks of corporations
Directors of finance

Circular type

Guidance

Summary

Gives guidance on arrangements
for franchised-out/off-site
collaborative provision for 1996-97
and asks colleges to put in place by
the end of the current college year
a control test and a contract with
collaborators

Reference number: 96/06

Enquiries:
Regional offices

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96/06



FRANCHISING

INTRODUCTION

1 This circular provides additional advice on 'franchising' to enable the Council to meet its legal obligations with respect to the use of public funds and to avoid colleges¹ entering into agreements which are beyond their legal powers.

SUMMARY

2 The Council will only accept claims for funding units in respect of franchised provision in 1995-96 where the controls are in place before the end of the teaching year 1995-96. Colleges with franchising arrangements should review and, if necessary, adapt them to ensure that the required controls are in place.

BACKGROUND

3 In recent years, in response to requests for more flexible arrangements and demands for greater efficiency, colleges have developed new ways of delivering education to students. These have resulted in education for students being delivered away from a college's premises by or with the assistance of a third party. A college's involvement with the delivery of this type of provision is less than it would be if the provision were made wholly by the college itself. Examples of the types of arrangements are shown at annex A.

4 The Council has not sought to discourage colleges from making such provision which has been referred to in various Council documents as 'franchising'. In the light of the increased scale of franchised activity and its changing nature, the Council agreed last summer to convene a group to examine the types of practice developing in the sector and to make recommendations for improvement. Many of the group's recommendations were included in *How to Apply for Funding 1996-97*, the guidance given by the Council in December 1995 in relation to applications for funding for 1996-97.

REQUIREMENTS FOR FRANCHISING

5 The Council has monitored both the nature and extent of franchising in the sector to determine how this method of providing education is used in practice. It is concerned that some franchising

arrangements currently in place may not accord with the guidance previously given by the Council, and that some colleges may have entered into agreements beyond their powers.

6 As the Council became aware of the kinds of agreements in place in the sector, it decided to take the advice of its legal advisors as to the legal limits on a college's ability to enter into a franchising arrangement, and the limits on the Council's powers to provide funds for franchised provision. The Council has been advised that:

- in general a college must provide education itself. It is not lawful for it merely to arrange for education to be provided by a third party
- except in the case of students with learning difficulties or where there is a sponsorship arrangement, the Council may not fund the provision of further education outside the further or the higher education sectors. This is so even if a sector college has arranged the education and the students educated are enrolled at a sector college
- it is lawful both for a college to provide education through a third party, and for the Council to fund that provision, if the college is fully in control of the arrangements. In such circumstances, it can be said in law that the college itself is making the provision.

7 The Council is concerned that a number of franchise agreements in place may not display sufficient control to be lawful. The Council is issuing this circular to share with colleges the legal guidance which it has received on the controls which colleges must have in place to ensure that their franchised provision is lawful for them to provide, and within the Council's powers to fund. It re-emphasises earlier guidance given in a number of documents that franchised provision must be under a college's control.

CONTROL CRITERIA

8 In the light of the advice received and in consultation with the Council's legal advisors, a 'control test' and a model contract which satisfies it have been drawn up.

¹ Reference to colleges is used generically; the advice contained in this circular also applies to higher education and external institutions. Higher education institutions are already subject the condition that they shall not franchise further education provision funded by the Council to other colleges and institutions funded by the Council.

The key elements of the control test are:

- a college being able to enrol or reject students as it would do if the students were to be taught on its own site
- a student learning agreement entered into at the time of enrolment which reflects the outcome of initial guidance and assessment for an individual student
- a learning programme and its means of delivery which have been clearly specified by the college
- the college being in control of the delivery of the education
- arrangements for assessing the progress of individual students
- procedure for the college regularly to monitor the delivery of programmes provided in its name.

9 It is also essential that colleges should have a written contract governing their franchise arrangements. This contract must entitle the college to exercise the required control over the franchisee's activity. Each college will itself wish to take its own legal advice before entering into contracts. For its part, the Council commends, for use in all cases, the model contract which accompanies this circular, subject to such modifications as necessary. The model contract is at annex C. Also attached at annex D is a commentary on the model contract. The contract will be sent on a disk to colleges shortly.

10 Whilst the essential elements of this test have been embodied in previous guidance from the Council, colleges are now advised to review, and if necessary adapt, their franchising arrangements to ensure that the required controls are in place. The specific controls which the Council will look for are set out in annex B. Each college which seeks to use Council funds in connection with a franchising agreement should have in place, by the end of the current college year, arrangements which satisfy the control criteria and a contract, at least as comprehensive as the model.

11 Rather than make any changes which may be required to a franchising arrangement, colleges may prefer to enter into a sponsorship arrangement with their franchise partners. Alternatively the partners may wish to seek incorporation within the sector. Advice on sponsorship is available from Sue

Yeomans at the Council's Coventry office, telephone 01203 863041. Advice on incorporation is available from Elaine Carabok at the Council's Coventry office, telephone 01203 863028.

LEVEL OF FUNDING

12 In addition to the arrangements which should be in place to ensure that colleges are making direct provision, a further issue concerning franchising is the number of funding units that colleges are entitled to claim for work-based training. This is causing some difficulty, particularly with respect to the delivery of National Vocational Qualifications (NVQs).

13 In the funding guidance reference is made to the 'learning programme'. This is defined as 'all of a student's learning activities towards their primary learning goal *which involve the use of the resources of the institution at which the student is enrolled*' (emphasis added). Colleges should not claim for an employer's supervision of employees' work for the employer. Direct training or assessment by employers which would satisfy the definition of guided learning hours may be funded so long as it represents additional activity to that which the employer would otherwise have funded.

14 Mindful of these concerns, the Council advised colleges in *How to Apply for Funding 1996-97* that, for 1996-97 provision, they are required to obtain confirmation in writing from the third party that its overall financial contribution to employee training and development would not be reduced as a consequence of the collaboration with the college.

15 There appear to be grounds for examining whether further clarification of what constitutes a guided learning hour is required. Accordingly, this, and related funding issues, have been remitted to the tariff advisory committee for advice. In the meantime, it is a condition of the Council's financial memorandum with each college that Council funds may only be used for provision within the scope of the relevant Act. Where a college claims for funding in excess of its agreement with the Council by more than 30 per cent, the claim is subject to particularly detailed checks with respect to its eligibility. Complete payment may be conditional upon validation provided by a college's external auditor.

PROVISION MADE IN SCHOOLS

16 The Council was concerned about the possible development of arrangements to franchise sixth form provision to schools with 11 to 16 status given the requirement to follow the statutory procedure for a significant change of character should a school wish to have a sixth form. As a result, advice was given in *How to Apply for Funding 1996-97* that colleges considering entering such franchising partnerships with 11 to 16 schools were 'required by the Council to advise the schools to obtain legal advice ... to determine whether this arrangement would require the secretary of state's approval'.

17 The Council's legal advisors take the view that, however much control a college may exercise over such provision, they doubt that education for full-time 16 to 18 year-old pupils provided at a school entirely by school staff can be considered direct provision made by a college. It is their view that such provision would constitute secondary education under section 14 of the Act and that it would not be lawful for Council funds to be used for such a purpose.

18 The Council has no evidence that such arrangements are being made in 1995-96. However, should a college be engaged in this form of franchising, the principal is requested to contact the Council's director of education programmes, Geoff Hall, on 01203 863030.

19 Traditional link courses, the provision of part-time education, and other partnerships between colleges and schools which satisfy the control tests or are only partly funded by the Council will continue to be acceptable.

NEXT STEPS

20 A circular will be issued shortly setting out guidelines for external auditors to satisfy the Council's requirements that funding claims made for 1995-96 have been properly compiled and the data underpinning the claim have been recorded in accordance with the Council's specifications. That circular will also contain a form for external auditors to return to the Council, by 3 February 1997, to accompany the final funding claim. An addendum to the form will be provided for external auditors to certify that the college made arrangements which satisfied the Council's control test by the end of the college year 1995-96.

21 The Council will convene a series of regional meetings on collaborative provision for colleges with significant involvement in franchising in May and June. For further advice and guidance on this circular, colleges are requested to contact their regional office. If detailed points are to be raised, colleges are requested to outline their query by fax in the first instance.



EXAMPLES OF COLLEGE/THIRD PARTY ARRANGEMENTS FOR PROVISION OF EDUCATION

<i>Organisation</i>	<i>Main types of provision</i>
Schools	<ul style="list-style-type: none"> • GNVQs • elements of GCE A level in a subject not offered by the school
External institutions	<ul style="list-style-type: none"> • part-time courses for adults in schools, often delivered out of school hours • provision for adults delivered in adult/community education centres
Community and voluntary organisations	<ul style="list-style-type: none"> • programmes for clients of local authority services such as social services day centres, community care homes, leisure centres, youth clubs • programmes delivered in conjunction with community groups for members of the local community, often leading to qualifications in core skills (eg, literacy, numeracy, information technology) • programmes delivered in conjunction with organisations/associations for a target client group, such as adults with learning difficulties and/or disabilities, people from ethnic minority communities, ex-offenders • programmes delivered in conjunction with representatives of national organisations which validate specialist vocational qualifications in areas such as first-aid training
Employers	
Private	<ul style="list-style-type: none"> • programmes delivered in conjunction with organisations, usually on their premises, for their employees leading to NVQs; examples to date include companies specialising in retailing, chemicals and pharmaceuticals, information technology, hotel and leisure, engineering, food processing, brewing and motor vehicle manufacture
Public	<ul style="list-style-type: none"> • as above; examples to date include health trusts, local authority departments such as social services, environmental health and youth services, government agencies, police forces, dental committees
Private training providers	<ul style="list-style-type: none"> • programmes delivered by private training providers, some of which offer specialist provision in areas such as media, information technology, yachting, languages, diving and equestrianism, often for unemployed adults who are not eligible to follow training and enterprise council (TEC)-funded provision • NVQs delivered for, or in conjunction with, employers, as in the category above
Sports bodies	<ul style="list-style-type: none"> • provision delivered by representatives of national organisations which validate specialist vocational qualifications in sports coaching

COLLEGE COLLABORATIVE PROVISION: CONTROL CRITERIA

ENTRY

Enrolment

Selection and rejection of students shall be at the discretion of the college with rights of appeal in accordance with the college's charter.

Initial Guidance and Assessment (IGA)

Where not undertaken by college staff, the college shall specify:

- a framework in which IGA should take place
- suitable criteria for staff undertaking IGA
- the monitoring it will undertake including direct observation of the process to satisfy itself that the IGA has taken place in accordance with its framework and specification.

Learning Agreement

The learning agreement shall satisfy the requirements specified in the current Council guidance. In the case of work-based NVQs, the delivery of the learning programme shall be sufficiently specified to make clear:

- the balance of work-based training and assessment activity and off-the-job training activity
- the estimated guided learning hours to be delivered to achieve the qualification aim.

ON PROGRAMME

Delivery

The delivery of the learning programme shall be in accordance with the learning agreement subject to variation agreed by the college.

The college shall undertake monitoring activities including direct observation at appropriate intervals, which should:

- be similar to those considered appropriate for external verification or moderation

- be sufficient to ensure student progress can be monitored. 'Benchmark' frequencies of visits to satisfy this criterion would have to be established
- gather regular student feedback through periodic visits and, for example, return of self-assessment forms or by a telephone conversation.

In the main contract between the parties, the college should identify:

- the tutors who will be responsible for the assessment of each candidate's competence
- such trainers who may undertake the specific sessions referred to above
- any other staff relevant to the delivery of the individual student's programme

[Members of staff to whom students may refer if, for example, they have a concern or grievance of some sort, should be specified in the appropriately adapted college charter].

Quality Assurance

- the college should be operating quality assurance procedures likely to satisfy the Council's inspectorate that they have at least a balance of strength and weaknesses
- where the inspectorate has assessed a college's quality assurance arrangements as having weaknesses which outweigh their strengths (grade 4 or 5), the college may not enter into new or extend existing franchising arrangements until the inspectorate is satisfied that the deficiencies have been remedied.

ACHIEVEMENT

Accredited/Approved Centre

- the awarding body accredited/approved centre for the primary learning goal qualification(s) shall normally be the college; this would require college staff to be the internal verifiers on NVQ programmes. Where another approved centre was used, the college would have to monitor its activities.
- compiling portfolios should be subject to college specification and monitoring.

CONTRACT BETWEEN COLLEGE AND COLLABORATOR

There shall be a contract signed by the principal of the college and on behalf of the partner organisation which shall comply at least with the Council's model contract (as amended from time to time) and be in place before any provision is made.

The form of the contract shall be:

- scrutinised in advance of its operation by the college's internal audit committee
- approved by the college finance committee or governing body.

The impact of the contract(s) shall be:

- subject to scrutiny by the college finance committee or governing body which shall consider the risk factors associated with the proposed partnership and agree an appropriate entry in the college's financial forecast.

STRATEGIC PLAN

Where the partnership would represent a significant departure from the college's strategic plan (to be defined in the circular relating to strategic planning information to be shared with the Council in July), the governing body shall approve the departure, the college principal shall seek the views of the appropriate TEC chief executive and inform the Council.

OFF-SITE COLLABORATIVE PROVISION: MODEL CONTRACT

THIS AGREEMENT is made the 199

BETWEEN

(1) [] of []
(‘the College’)

(2) [] of []
(‘the Collaborator’)

Introduction and Recital of Intention

WHEREAS

- (A) The College is a corporation concerned with the provision of education to students.
- (B) The Collaborator is in a position to assist the College in providing education to students.
- (C) The College wishes to provide education to the Students by making use of the services of the Collaborator.
- (D) The College and the Collaborator have agreed that their relationship should be governed by a legally binding contract and the agreed terms of the contract are those set out in this Agreement.

NOW THE PARTIES AGREE AS FOLLOWS

1 Definitions

1.1 In this Agreement the following words and expressions shall have the following meanings:

- ‘**Academic Year**’ means a year running from 1 August in one calendar year to 31 July in the following calendar year;
- ‘**Achievement**’ means achievement of a Qualification by a Student as evidenced by the provision of ‘Achievement Evidence’;
- ‘**Achievement Evidence**’ means evidence produced by the Collaborator to the College in a form satisfactory to the College and comprising either:
 - (a) a copy of the list produced by an external examination body (certified as true and accurate by an authorised representative of the Collaborator) setting out the names of Students who have attained a Qualification; or
 - (b) where the Programme is such that there is no external examination body involved in assessing Students a copy (certified as true and accurate by an authorised representative of the Collaborator) of the certificate awarded by the Collaborator to Students who have attained a Qualification;
- ‘**Agreement**’ means all parts of this Agreement and includes the Schedules and the Appendices incorporated into it;
- ‘**Attendance**’ means the attendance of a Student on a Programme as evidenced by the provision of the ‘Attendance Certificate’;
- ‘**Attendance Certificate**’ means a certificate which records, in relation to each Enrolled Student, that Student’s attendance on or absence from the relevant Programme or that Student’s withdrawal from the Programme (as the case may be);
- ‘**Census Date**’ means 1 November, 1 February and 1 May in each year or such other date as are specified as census dates in the Guidelines;
- ‘**College’s Charter**’ means the charter adopted by the College pursuant to the requirements of the Department for Education and Employment’s *Charter for Further Education* or such other charter as the College adopts from time to time, a copy of the current charter having been provided to the Collaborator;
- ‘**Commencement Date**’ means [insert relevant date];
- ‘**the Council**’ means the Further Education Funding Council for England;
- ‘**Enrolled**’ means, in relation to a Student, a person who has been enrolled in accordance with the terms of this Agreement and in respect of whom the College has notified the Collaborator that such Student has been enrolled with the College, and ‘Enrol’ and ‘Enrolling’ will be construed accordingly;
- ‘**Enrolment Guidelines**’ means the guidelines for enrolment in the form of those attached to this Agreement and initialled by the parties or such other enrolment guidelines as the College notifies in writing to the Collaborator from time to time;
- ‘**Funded Student**’ means a student whose education is intended to be funded in part or in full by the Council;

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- **‘Funding’** means the funding provided to the College by the Council in accordance with the Guidelines in relation to the Programme and the provisions of this Agreement;
 - **‘Guidelines’** means the procedures, rules and requirements from time to time laid down by the Council for use by the College in applying for the Funding the current guidelines being entitled *How to Apply for Funding 1996/1997*;
 - **‘Intellectual Property’** means any intellectual property belonging to the College including, by way of illustration only, copyright in forms, course materials, marketing materials and unregistered trade and service marks made available by the College to the Collaborator in connection with the provision or promotion of the Programme and also including the Trade Marks and the Intellectual Property described in Schedule;
 - **‘Know-How’** means the non-patented practical information and expertise provided by the College to the Collaborator and including, if relevant, the contents of the Quality Manual;
 - **‘Learning Agreement’** means the learning agreement between the College and a Student as specified in Council guidance from time to time;
 - **‘Liability’** means all and any liability, costs, losses, expenses or damages suffered or incurred by the College and all and any claims made against the College;
 - **‘Month’** means a calendar month;
 - **‘Payments’** means the payments due under the terms of this Agreement from the College to the Collaborator in relation to the Programme and the Programmes;
 - **‘Payment Dates’** means [], [] and [] in each Year;
 - **‘Payment Period’** means the periods between [] and [], [] and [] and [] in each Year;
 - **‘Premises’** means the premises listed in Schedule 5 to the Agreement or such other premises as are agreed between the parties from time to time;
 - **‘Price’** means the sums payable by the College to the Collaborator in relation to the Programme which sums are calculated in accordance with Schedule 2 to this Agreement;
 - **‘Programme’** means an individual learning programme provided by the Collaborator which programme is aimed at the Student achieving [name of Qualification or other achievement] and identified in Schedule 2 to this Agreement;
 - **‘Qualification’** means:
 - (a) a qualification awarded by an external examination body to Students who have completed a Programme and met that external examination body’s criteria for awarding the relevant qualification; or
 - (b) where there is no external examination body involved in assessing Students, a qualification awarded by the Collaborator to Students who have completed a Programme and who have met the Collaborator’s criteria for awarding such a qualification, which criteria are those approved by the College from time to time;
 - **‘Quality Manual’** shall mean the College’s statement of quality standards and procedures to be adopted to ensure quality in education delivered to students enrolled at the College;
 - **‘Quality Standards’** shall mean the College’s statement of the quality expected in education delivered by the College as set out in [refer to document]. In the absence of any such statement Quality Standards shall mean the standard expected of a skilled and competent provider of the kind of education which makes up the Programme(s);
 - **‘Student’** means a person who is Enrolled or to be Enrolled and who receives the education and training comprised in a Programme;
 - **‘Trade Marks’** means the registered trade marks belonging to the College or otherwise made available for use by the Collaborator pursuant to this Agreement
 - as listed in Schedule []
 - as notified by the College to the Collaborator from time to time];
 - **‘Tutors’** means the staff of the Collaborator engaged partly or wholly in the provision of the Programme to Students;
 - **‘Units’** means the funding units which are the measure of calculation employed by the Council in the Guidelines in the calculation of the Funding;
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- **'Unit Price'** means the unit price for the first Year of this Agreement specified in Schedule 3 and subsequently such sum as the College will notify to the Collaborator not later than two months prior to each successive anniversary of the Commencement Date;
- **'Year'** means each successive 12-month period commencing on the Commencement Date, or any subsequent anniversary of it.

1.2 In this Agreement, unless the context otherwise requires references to the singular include the plural and vice versa; any reference to a person includes a body corporate and words importing one gender include both genders.

1.3 The headings in this Agreement are for ease of reference only but do not form part of the Agreement and will not be taken into account when construing it.

1.4 References to Schedules, Clauses, Appendices or Conditions are references to schedules, clauses, appendices or conditions of this Agreement.

2 Principal Obligations

2.1 The Collaborator will provide the Programme(s) to the Students on behalf of the College in accordance with the terms and conditions of this Agreement.

2.2 The Programme(s) will be as set out in Schedule 2.

2.3 The College will pay the Collaborator the sums due in accordance with the terms and conditions of this Agreement in relation to each Student provided with a Programme.

3 Duration of the Agreement

3.1 This Agreement will commence on the Commencement Date and continue for the period specified in Schedule 3 unless terminated before that time in accordance with the terms and conditions set out in this Agreement.

[OR

3.2 This Agreement will commence on the Commencement Date and continue for [one] year[s] thereafter. On or before [31 March] in the final year of the Agreement the College may notify the Collaborator that the Agreement is to continue for a further [one] year[s]. The Collaborator shall accept or reject such a continuation within 30 days of notification being made].

4 Payment Terms

4.1 On the Payment Dates the College will pay to the Collaborator such part of the Price due to the Collaborator as relates to each Programme or fraction of a Programme completed in the preceding Payment Period.

4.2 The Price will be calculated in accordance with Schedule 1.

4.3 No payment will be made in relation to the participation in a Programme of any Student who:

- (a) has not been Enrolled in accordance with the provisions relating to enrolment contained in this Agreement; or
- (b) is a person considered under the Guidelines to be fully funded by a source other than the Council or funded by the Council more than once in relation to the same Programme.

4.4 No payment will be made in relation to a Student where the Collaborator has failed to notify the College of any relevant Attendance or Achievement by that Student in accordance with the provisions of this Agreement.

4.5 The College will not be under any obligation to make payment to the Collaborator in respect of Students or Units over and above any upper limit on the number of Students or Units (as the case may be) permissible on the Programme(s) which is agreed between the parties as set out in Schedule 4.

4.6 If the College pays the Price to the Collaborator in relation to any Student who is subsequently demonstrated not to be eligible for payment of the Funding by the Council, the College will be entitled to be fully refunded by the Collaborator. At the discretion of the College such refund will either be payable within 30 days of notice by the College to the Collaborator or may be deducted from the price payable in relation to the subsequent Payment Period.

4.7 If in respect of any Funded Student the Council shall for any reason whatsoever (being a reason outside the control of the College) refuse or fail to pay the fees of any Funded Student the College shall be under no obligation to pay any part of the Price relating to that Funded Student to the Collaborator and any part of the Price relating to the said Funded Student shall be fully refunded to the College by the Collaborator in accordance with the terms of clause 4.6 above.

5 Funding

5.1 In order for the College to comply with its obligations to the Council, to obtain Funding and to give effect to the provisions and the spirit of this Agreement, the Collaborator agrees that it will co-operate fully with the College to enable the College to comply with any requirements of the Council, and in particular the Collaborator will procure that all relevant forms, agreements, applications or other documents which are required to be sent to the Council are, if necessary, completed and signed by the relevant authorised officer of the Collaborator.

5.2 The Collaborator will not do anything which will cause the College to be in breach of its obligations under its funding agreement with the Council (as those obligations are set out from time to time in the Guidelines) or which will result in any of the general conditions of funding as set out in the Guidelines not being met by the College.

5.3 The Collaborator will notify the College immediately in writing if at any time after a Student has been Enrolled it becomes aware or suspects that such Student is considered, in accordance with the Guidelines, to be funded publicly by a source other than the Council or to be funded by the Council more than once in respect of the same Programme.

5.4 The College is responsible for ensuring that the Programme(s) is a programme approved by the Secretary of State under Section 3(1) of and Schedule 2 to the Further and Higher Education Act 1992.

6 Provision of Records and Information

6.1 Throughout the term of this Agreement the Collaborator will keep the following records and information:

- (a) a register of attendance of Students who attend a Programme, which register is to be compiled contemporaneously with every session of tuition given as part of a Programme;
- (b) a record of each scheduled tuition session that is cancelled, if any, and a note setting out in full the reasons for cancellation;
- (c) a written note of each complaint made by a Student in relation to any aspect of Programme provision (and including, without limitation, complaints made against Tutors or in respect of the quality of the Programme(s) of any part of it; the

premises at which any part of the Programme(s) is or has been provided or health and safety matters) along with the original of any letter or other document recording or notifying that complaint;

- (d) any other records and information specified elsewhere in this Agreement;
- (e) any other records and information as the College may, from time to time reasonably require the Collaborator to keep, such requirements to be notified in writing to the Collaborator.

6.2 The register of attendance and the record of cancellation referred to respectively in Clauses 6.1(a) and 6.1(b) above will be made available at all times for inspection by an authorised representative or representatives of the College and/or the Council from time to time.

6.3 The note of complaint made by Students and the other documents referred to in Clauses 6.1(c) above must be sent to the College as soon as possible after such complaint is made.

6.4 The information and records referred to in Clause 6.1(d) above must be provided or made available (as the case may be) to the College (or any of its authorised representatives) or to the Council (or any of its authorised representatives) at the time and in the format specified in this Agreement in relation to such information and records, or at such other times and in such other format as the College may reasonably require from time to time by giving written notice of its requirements to the Collaborator.

6.5 The information and records referred to in Clause 6.1(e) above must be provided or made available (as the case may be) to the College (or any of its authorised representatives) or to the Council (or any of its authorised representatives) at the time and in the format reasonably notified by the College from time to time by written notice to the Collaborator.

6.6 Where any records or information are required to be sent to the College in accordance with this Clause 6 or any other clause of the Agreement, such records or information must (unless otherwise stated in this Agreement or by written notice from the College to the Collaborator) be sent to the address and for the attention of the person specified in Clause 24 (Notices) below.

6.7 The Collaborator warrants that all information provided or made available to the College and/or the Council pursuant to this Clause 6 or any other clause of the Agreement will be true and accurate in all material respects.

6.8 The Collaborator further warrants that all information regarding the Collaborator's past experience and other matters which were disclosed to the College in order to enable the College to assess whether to enter into this Agreement (all of which information the Collaborator acknowledges was relied on by the College) was true and accurate in all material respects and that nothing which would reasonably be likely to alter the College's decision to enter into this Agreement was withheld or misrepresented.

7 Control of the Programme(s)

7.1 The College is at all times to be in control of all aspects of the Programme(s). The Collaborator will comply with the College's reasonable requests in respect of any aspect of the Programme(s). Without prejudice to the generality of the foregoing, the Collaborator shall comply with the following obligations.

7.2 Enrolment

7.2.1 The Students will be enrolled as students of the College by the College. The College shall direct the Collaborator as to who is to be a Student and to receive a Programme. The Collaborator acknowledges that it is not the College's agent for the purpose of enrolment and the decision as to whether a person shall be enrolled as a Student is for the College alone.

7.2.2 The College may, in its absolute discretion, from time to time allow the Collaborator to select persons for the College to enrol as Students from a class or classes of person indicated to the Collaborator by the College, provided that should the College exercise this right that shall be without prejudice to the College's right to accept or reject persons for enrolment as Students as it sees fit.

7.2.3 The initial guidance and assessment of Students and potential Students shall be carried out by College staff or by such staff of the Collaborator as the College may direct. The College shall specify the form which the said initial guidance and assessment shall take, including but not limited to the form of the

Learning Agreement which shall be entered into at that time. The terms of the Learning Agreement shall form part of the specification of the Programme(s).

7.3 Provision

7.3.1 The Collaborator will only use Tutors who have previously been approved in writing by the College (such approval not to be unreasonably withheld) and will supply to the College all information which the College reasonably requests in order for it to decide whether to give such approval.

7.3.2 The provision made shall be as specified by the College at Schedule 2. The College shall have the right in its sole and absolute discretion to alter all or any part of the specification set out in Schedule 2 at any time, provided that such right shall not be unreasonably exercised.

7.3.3 The Collaborator must co-operate fully with the College to enable the College to communicate freely with the Students and to allow the Students to take advantage of the facilities (including but not limited to the Programme(s)) offered by the College. In particular the Collaborator must give to each Student, as soon as he/she Enrols, a copy of the College's Charter and must provide a copy of the College's Charter to any Student who requests it, whether before he/she is Enrolled or at any time or times afterwards.

7.3.4 Those members of the Collaborator's staff engaged in the delivery of a Programme shall be under the control of the College and not the Collaborator whilst so engaged. The Collaborator shall procure that the said staff obey the instructions of the College in respect of the Programme(s). The Collaborator shall co-operate fully with the College in this regard, and in particular shall enable the College to investigate any complaint made against any of the Collaborator's staff so engaged and shall co-operate in any such investigation and its outcome. Following appropriate investigation, the College shall be entitled to require the Collaborator to reprimand, or suspend or remove from providing any or all Programme(s), any member of the Collaborator's staff involved with the Programme(s).

7.3.5 Whilst they are receiving a Programme the Collaborator acknowledges that the Students are subject to the rules of the College and entitled to use the facilities and benefits of the College. The Collaborator in particular undertakes that no Student who makes a complaint to the College relating to a Programme shall suffer any disadvantage as a result.

7.3.6 The Collaborator shall ensure that all Students are aware of:

- (a) their status as students of the College,
- (b) their right to complain to the College about any aspect of a Programme,
- (c) how such a complaint may be made, and
- (d) the fact that such complaint cannot lead to action being taken against the Student by the Collaborator.

7.3.7 The Collaborator will notify the College immediately if any Student withdraws from a Programme.

7.3.8 The Collaborator must provide the Programme(s) in accordance with the College's quality assurance arrangements and, in respect of providing the Programme(s), comply at all times with the College's quality assurance processes (as set out in [refer to Operations Manual or other source of arrangements and processes]).

7.3.9 If at any time the Collaborator has not, in the College's reasonable opinion, met the College's quality assurance guidelines or complied with its quality assurance processes then the College will notify the Collaborator of that fact and give reasons for its opinion and the Collaborator will then have an opportunity to remedy the problem provided that if, within a reasonable time after receiving notice from the College, it has not remedied the problem to the College's reasonable satisfaction the College will be entitled to terminate this Agreement immediately upon written notice to the Collaborator. If the Agreement is terminated in accordance with this clause then the provisions as to the consequences of termination as set out in this Agreement will apply.

7.4 Assessment

7.4.1 All aspects of the assessment of the Students shall be carried out in accordance with the directions given from time to time by the

College. The College shall have the right to carry out any such assessments, or any part of such assessments, itself, or to delegate such assessments or any part thereof to the Collaborator's staff.

8 Monitoring and Compliance

8.1 The Collaborator will at all times allow any authorised representative of the College and/or the Council:

- (a) to attend during the provision of any part of a Programme, or during any activity relating to the provision of a Programme; and
- (b) access to premises and every part of such premises where tuition is or has been provided by the Collaborator; and
- (c) access to facilities used in or for the provision or in connection with any part of a Programme;

for the purpose of ensuring compliance with this Agreement; enabling the College to give directions to the Collaborator under Clause 7.1 above; monitoring the standard of any part of the Programme(s) and the way in which it is provided; and/or conducting an audit of the Collaborator's management and/or financial procedures and controls.

8.2 The Collaborator agrees to provide the Programme(s) in accordance with the Quality Standards and so as to comply with any other standards and/or requirements of the College which may be notified in writing to the Collaborator from time to time including, without limitation, those requirements set out in the College's Charter which shall apply, mutatis mutandis, to the Collaborator as it does to the College.

9 Health and Safety and Liability

9.1 The Collaborator will notify the College immediately upon the occurrence of any of the following:

- (a) any incident which may need to be notified by the College to its insurers to enable the College to bring a claim under any of its insurance policies;
- (b) any injury to any person or any loss of or damage to property which occurred during the provision of any part of a Programme or on any premises where a Programme is or has been held or in circumstances where there is any

possibility that the Collaborator and/or the College may be liable, wholly or partly, for such injury, loss or damage.

For the avoidance of doubt, any event to be notified to the College pursuant to this Clause 9.1 must be notified to the College by the quickest means possible in the circumstances and must be followed up as soon as possible by written notice to the College setting out in full all relevant details and parties.

9.2 The College acknowledges that it is directly responsible to each Enrolled Student for compliance with health and safety legislation during delivery of a programme but the Collaborator agrees that it will comply with all relevant requirements relating to health and safety.

9.3 The Collaborator will indemnify the College fully in respect of any Liability which arises as a result of any act of omission on the part of the Collaborator (including, without limitation, any non-compliance with health and safety legislation) except to the extent that such Liability is due to a negligent act or omission on the part of the College.

10 Insurance

10.1 The Collaborator will maintain adequate third party and occupier's liability insurance (with a minimum cover per claim as specified in Schedule 6).

10.2 The Collaborator will maintain adequate insurance to cover the risks specified in Schedule 6. Such insurance will be taken out with a minimum cover per claim as specified in Schedule 6.

10.3 The Collaborator will, upon request by the College, immediately produce to the College a certified copy of all its insurance policies taken out pursuant to this Agreement and satisfactory evidence that all premiums under such policies are paid to date.

11 Co-operation and Reputation

11.1 The College and the Collaborator agree to use their respective best endeavours to meet at least once in each Payment Period on the date and at the place specified in Schedule 7 or on such other dates and/or at such other place as are agreed between them (provided that in the absence of agreement the date and place specified in Schedule 7 will continue to apply) in order to discuss any matters arising from this Agreement and the provision of the Programme(s).

11.2 The Collaborator acknowledges that as Students will be Enrolled with the College, the College's reputation is at stake and, accordingly, the Collaborator agrees that:

- (a) it will not do anything which brings the reputation of the College into disrepute or which is calculated or is reasonably likely to bring the reputation of the College into disrepute;
- (b) it will provide the Programme(s) in accordance with current best working practice subject always to the College's right to direct how the Programme(s) will be provided;
- (c) it will do everything it reasonably can to promote the name and reputation of the College;
- (d) it will comply will all requirements of the College notified to it from time to time in relation to the provision of the Programme(s) or any part of it;
- (e) it will not assign or purport to assign any of its rights under this Agreement nor sub-contract to any third party any part of the provision of the Programme(s);
- (f) it will not do or fail to do anything which materially prejudices or is likely materially to prejudice the ability of the Collaborator to comply with the terms of this Agreement.

11.3 In return for the Collaborator providing the Programme(s) in accordance with the terms of this Agreement the College agrees that it will provide the Collaborator with such reasonable support and assistance as the Collaborator reasonably requests from time to time provided that, for the avoidance of doubt, the College will not be obliged to the Collaborator to provide staff to run or to assist in the provision of any part of the Programme(s) due to the unavailability of Tutors or any other reason.

12 Certification of Attendance and Achievement

12.1 Within [] week(s) following the publication of results of a completed Programme the Collaborator will send to the College the Achievement Evidence in relation to each Student who has attained a Qualification.

12.2 On or before the [15th] day of each Month the Collaborator will send to the College an Attendance Certificate, signed by a duly authorised

representative of the Collaborator, which relates to Attendance during the preceding Month.

13 Students with Additional Support Requirements

13.1 In order to apply for further funding for Students with additional support requirements, as described in the Guidelines, the Collaborator must, in relation to each such Student, submit an additional support assessment form in the form of that attached to this Agreement and initialled by the parties or otherwise notified to the Collaborator by the College from time to time.

14 Termination

14.1 The College may terminate this Agreement by written notice to the Collaborator if:

- (a) there is a material adverse change in the amount or nature of the Council's funding of the College or Funding is no longer available in respect of a Programme; or
- (b) there is a material breach by the Collaborator of the terms of this Agreement which breach is not capable of remedy; or
- (c) there is a material breach by the Collaborator of the terms of this Agreement which breach is capable of remedy but which is not remedied to the reasonable satisfaction of the College within 14 days after the College has given written notice of the breach to the Collaborator requiring it to be remedied (provided that the notice terminating this Agreement is given by the College within one Month after the expiry of the period during which the breach should have remedied); or
- (d) the Collaborator proposes or enters into an arrangement or composition for the benefit of its creditors or is the subject of any distress execution sequestration or other process levied upon or enforced against any part of the Collaborator's undertaking, property, assets or revenues; or
- (e) the Collaborator (if an individual or in the case of a partnership any partner) is the subject of a bankruptcy petition or has a bankruptcy order made against it or is the subject of an application order or appointment under sections 253, 273 or 286 of the Insolvency Act 1986 or is unable to pay or has no reasonable

- (f) the Collaborator (if a company) is the subject of a petition presented, an order made, a resolution passed or analogous proceedings taken for appointing an administrator of or winding up the company (other than for amalgamation or reconstruction of a solvent company) or stops payment or agrees to declare a moratorium or becomes or is deemed to be insolvent or unable to pay its debts (within the meaning of section 124 of the Insolvency Act 1986) when they fall due; or
- (g) the Collaborator is a company and a notice relating to the striking off of the company is published pursuant to section 652 of the Companies Act 1985; or
- (h) the Collaborator is a company and an encumbrancer takes possession or exercises or attempts to exercise any power of sale or a receiver is appointed of the undertaking assets or revenues of the Collaborator.

Such termination may take effect either immediately or at the end of the Academic Year in which the event entitling the College to terminate this Agreement occurs, as the College shall in its discretion determine. In the latter case this Agreement shall remain in full force and effect until the end of the said Academic Year.

14.2 The Collaborator may terminate this Agreement by written notice to the College if:

- (a) there is a repudiatory breach by the College of the terms of this Agreement which breach is not capable of remedy; or
- (b) there is a material breach by the College of the terms of this Agreement which breach is capable of remedy but which is not remedied to the reasonable satisfaction of the Collaborator within one Month after the Collaborator has given written notice of the breach to the College requiring it to be remedied (provided that the notice terminating this Agreement is given by the Collaborator within one Month after the expiry of the period during which the breach should have been remedied); or
- (c) the College stops payment or agrees to declare a moratorium or becomes or is deemed to be insolvent or unable to pay its

debts (within the meaning of section 123 of the Insolvency Act 1986) when they fall due.

(b) (in the case of the College) to the Council and any other organisation or person having jurisdiction over the College.

Provided that (except in the case of Clause 14.2(a)) the Collaborator shall be obliged to continue to provide the Programme(s) notwithstanding that it has the right to terminate this Agreement in accordance with any provision set out herein (and all of the terms and conditions of this Agreement shall remain in force) until the end of the Academic Year in which the event entitling the Collaborator to terminate this Agreement occurred.

14.3 Any termination of this Agreement will be without prejudice to any right of either party against the other in respect of any antecedent breach of this Agreement.

14.4 Any rights of termination set out above are in addition to any other rights for termination which may be set out elsewhere in this Agreement.

15 Taxation and Other Payments

15.1 All payments to be made by the College to the Collaborator under the terms of this Agreement are inclusive of any value added tax (or like tax of a similar nature).

15.2 The Collaborator is responsible for making all relevant tax payments in relation to the Students and will indemnify the College in respect of any claims or demands that may be made against the College in relation to such payments.

15.3 The Collaborator acknowledges that, for the avoidance of doubt, all Tutors are the responsibility of the Collaborator and are employed by it and that it is responsible, inter alia, for the payment of all wages and the making of national contribution payments in respect of each Tutor. The Collaborator shall indemnify the College against any claims made against the College by any of the Tutors, including but not limited to claims that the employment of the said Tutors has transferred to the College by virtue of the Transfer of Undertakings (Protection of Employment) Regulations or any similar provisions.

16 Confidentiality

16.1 Neither party will (save as required by this Agreement) without the written consent of the other disclose any of the contents of this Agreement or of the commercial arrangements between them save:

- (a) (in the case of both parties) for any necessary disclosure to professional advisers of that party;

17 Improvements

17.1 The Collaborator must inform the College of any suggestions for improvements or enhancements to the Programme(s) (or the way in which it is provided), the curriculum and the Programme material. The College will consider such suggestions and it may, if it so wishes, make use of the suggestions for its own benefit, the benefit of its Students or the benefit of other franchisees.

17.2 The College will use its reasonable endeavours to improve and develop the Programme curriculum and the Programme materials unless such curriculum or such Programme materials were not originally developed by or in conjunction with the College. The Collaborator agrees to implement any changes to the Programme(s), the way it is provided, the Programme curriculum or the Programme materials which may be necessary or desirable as a result of any improvement, enhancement or developments as soon as possible after receiving written notice from the College specifying the changes to be made.

18 Force Majeure

18.1 If the College or the Collaborator is unable to perform any or all of their respective obligations under the terms of this Agreement because of any of the events set out below, then that party will be relieved of its obligations to continue to perform under this Agreement for as long as their fulfilment is prevented or delayed as a consequence of any such event. The events referred to in this paragraph are:

fire, explosion, flood, reduction or unavailability of power, riot, war, national emergency, act of God, malicious damage, theft, non-availability of material, destruction or damage of essential equipment, or any other act, omission, or state of affairs of a similar nature beyond the control of either party.

19 General Provisions

19.1 This Agreement does not constitute a partnership, contract of employment or joint venture arrangement between the College and the Collaborator and the Collaborator must not act or purport to act as an agent of the College.

19.2 The waiver by any party of any breach of any provision of this Agreement will not prevent the subsequent enforcement of that provision. Similarly, the waiver will not be deemed to be a waiver of any subsequent breach of that provision or of any other provision.

19.3 This Agreement and the documents referred to in it contain the entire understanding of the parties and overrides and supersedes any prior promises, representations, undertakings or implications.

19.4 If any provision of this Agreement is invalid for any reason, its invalidity will not affect the remainder of this Agreement which will remain valid and enforceable in all respects.

20 [Jurisdiction] Arbitration

20.1 This Agreement is governed by and should be construed in accordance with English law.

EITHER

20.2 The Parties to this Agreement submit to the exclusive jurisdiction of the English Courts.

OR

20.3 Any dispute or claim arising out of or in connection with this Agreement is to be determined by a sole arbitrator to be appointed by agreement between the parties, or, failing such agreement, within 21 days by [choose arbitral body – eg, the President of the Chartered Institute of Arbitrators/the President of the Institute of Chartered Accountants for England and Wales etc]. The decision of the arbitrator will be final and binding on the parties and the costs of the arbitration will be as determined by the arbitrator.

[21 Restrictive Trade Practices Act

21.1 None of the provisions of this Agreement which are relevant restrictions as defined by the Restrictive Trade Practices Act 1976 will come into effect until the day following the day on which full particulars of this Agreement have been sent to the Office of Fair Trading in accordance with that Act and the parties agree to send such particulars to the Office of Fair Trading within 3 months from the date of this Agreement unless, before this Agreement was entered into, the Office of Fair Trading have considered an Agreement in identical form in relation to one of the College's other franchisees and have declared that it is not registrable under the terms of the Restrictive Trade Practices Act.]

[22 Intellectual Property and Trade Marks

22.1 The Collaborator agrees not to infringe any Intellectual Property made available pursuant to this Agreement.

22.2 In order to obtain the necessary authority to use any Trade Marks, the Collaborator undertakes that it will enter into a formal trade mark licence or other necessary agreements if it is asked to do so by the College.

22.3 The Collaborator confirms that any goodwill arising out of the use of the Intellectual Property by him belongs, as between the Collaborator and the College, to the College.

22.4 The Collaborator will not use the Intellectual Property or anything confusingly similar to any part of it for anything other than the provision or promotion of the Programme(s) in accordance with this Agreement.

22.5 The Collaborator acknowledges that:

- the Know-How is confidential
- the contents of the Quality Manual are confidential.

22.6 During the term of this Agreement and for as long afterwards as the Know-How and any other confidential information imparted to the Collaborator by the College remains outside the public domain (otherwise than by reason of any breach of this Agreement), the Collaborator will keep it strictly private and confidential and will not disclose it to any other person, firm or company without the College's prior written consent.

22.7 The Collaborator will immediately notify the College if, during the term of this Agreement or any renewal of it, he becomes aware of any breach of the Intellectual Property or other intellectual property rights made available to him or of the unauthorised disclosure of:

- any Know-How
- the contents of the Quality Manual.

22.8 The Collaborator will not make any application to register any trade or service mark in its own or any other name for use in connection with the provision of the Programme(s) or any part of it.

22.9 Nothing in this Agreement constitutes any warranty or assurance as to the validity or subsistence of any of the Intellectual Property.

22.10 The Collaborator must use the name of the College, and any other name, mark, device or logo

identifying or associated with the College which the College may from time to time specify, on:

- any advertisements or prospectuses relating to the provision of the Programme(s) by the Collaborator
- all Programme materials.]

Additionality

23 The Collaborator undertakes that the resource per Student which it will devote to the provision of education and training the same as or similar in nature to a Programme to that Student will not be less than either:

- (a) the resource per student which it has in the past devoted to such provision; or
- (b) the resource per Student which it would have devoted to such provision had it not entered into this Agreement

whichever is the greater.

24 No part of the Price shall be applied for company-, or organisation-specific training.

Notices

25 Any notice served pursuant to this Agreement shall be properly served if sent by recorded delivery post to:

- (a) (in the case of the College) the College at the address shown in this Agreement and marked for the attention of [];
- (b) (in the case of the Collaborator) the Collaborator at the address shown at the start of this Agreement.

SCHEDULES

SCHEDULE 1

Calculation of the Price

In relation to each Payment Period the Price will be calculated by multiplying the Unit Price by the number of Units concluded during the Payment Period. For the purposes of this calculation a concluded Unit will mean a Unit which has been completed by the Enrolment (as defined in Clause 1.1 of this Agreement), Attendance or Achievement (both as defined in Clause 1.1 of this Agreement) of any Student in a Programme within the Programme in accordance with the provisions of this Agreement and which is regarded by the Council as being so completed.

Illustration

Programme 1 commences on 1st October

10 Students enrol on the Programme and at the relevant Census Date 10 Students participate in the Programme

5 Students conclude the Programme with full achievement within the Payment Period

The Council allocates [a] Units for Enrolment, [b] Units for Attendance and [c] Units for Achievement in respect of the Programme within which the Programme is provided

The Price payable for the Payment Period will be:

$$\begin{aligned}
 & 10 \times [a] \times \text{Unit Price} \\
 + & 10 \times [b] \times \text{Unit Price} \\
 + & 5 \times [c] \times \text{Unit Price}
 \end{aligned}$$

SCHEDULE 2

The Programme(s)

Programme 1

- 1 The Programme shall be education having the primary learning objective of the attainment of [an NVQ level two in retail] for those students who successfully complete the programme.
- 2 The Programme shall consist of [Syllabus, hours of teaching, type of teaching, facilities to be made available, materials to be used etc.]
- 3 The Programme shall be delivered solely by [names of College approved teachers].

4. The Programme shall be delivered solely on the Premises.
5. The awarding body approved centre for the Qualification shall be the [College].
6. The Programme shall comply with the Learning Agreement.

Programme 2

[as above]

SCHEDULE 3

1. The Unit Price for Year 1 is
2. The period of this Agreement (as per clause 3.1 of this Agreement) is [] from the Commencement Date

SCHEDULE 4

Maximum number of Students/Units

SCHEDULE 5

Premises

SCHEDULE 6

Insurance

- (a) Minimum cover per claim
- (b) Risks to be insured against

SCHEDULE 7

Meeting Arrangements

- (a) Meeting date
- (b) Meeting place

Signed by []

Principal of [] College

Signed by []

for and on behalf of the Collaborator as its duly authorised representative

COMMENTARY ON THE MODEL CONTRACT FOR OFF-SITE COLLABORATIVE PROVISION

This commentary is not intended to substitute for a College's own legal advice. In particular the circumstances of off-site collaborative provisions will vary widely from case to case and no one draft contract will be suitable for every example.

Introduction and Recital

This commentary is related to the contract recommended by the Council for off-site collaborative provision and explains its purpose and why the parties have entered into it. Certain definitions contain blanks or words in square brackets. These should be filled in, or the words in the brackets replaced, with the appropriate entry for the specific agreement contemplated. Where a whole clause appears in square brackets it is optional.

Clause 1

This explains the meaning of the terms used in the contract, and how the contract is to be interpreted.

Clause 2

This clause imposes the principal obligations on the parties.

Clause 3

The parties should decide for themselves how long they wish the contract to last. The contract does not contain a mechanism for renegotiating the price paid, so a collaborator might want a fairly short contract so that it can renegotiate the price for a new contract. Colleges need not fear the financial implications of longer contracts as clause 14 gives them the right to terminate a contract early if their funding from the Council is reduced for whatever reason.

Whether a fixed term or a rolling contract is more appropriate is for the College and its Collaborator to decide.

Clause 4

This clause sets out the arrangements for making payments to the Collaborator.

4.1 The College must pay the Collaborator such part of the total price as has fallen due before each Payment Date. Payment dates are set by the parties, although we suggest that for cash flow reasons they should relate to dates on which the College expects to receive funds from the Council.

Only the part of the price which relates to a fraction of a programme completed in that payment period need be paid on each payment date. Thus if, for example, payment dates are set at the end of each term, on the first date the college will pay the part of the price earned by enrolment, and whatever fraction of the attendance units the Autumn term merits. At the end of the Spring term the Collaborator will be paid for that term's share of attendance units and at the end of the Summer term the collaborator will receive the remaining attendance units and any achievement units.

4.2 The price for the contract is calculated using Units, in much the same way as the Council's funding is calculated. In effect the College sets its own Unit price, and the Collaborator earns units by providing the programme. Although the contract as drafted takes the number of units earned by the Collaborator by any particular activity as being the same as the Council deems the College earns from that activity, the parties could change the contract and set different numbers if they chose, for example to increase the reward for achievement at the expense of the reward for attendance. Care must be taken, however, as of course the funding the College receives from the Council will continue to be calculated in accordance with the Council's own allocation of units.

4.5 This paragraph ensures that the number of students to be paid for by the College is kept below whatever level the College has set.

Clause 5

This clause ensures that the College will be able to apply for Council funding in respect of the programmes to be delivered. However the responsibility for ensuring that the course is one which the Council can fund must remain with the College, as in law it is the College which is providing the programmes.

Clause 6

This clause ensures that the Collaborator will keep sufficient records, and allow sufficient access to them, for the College and the Council to be able to check that the programmes have been delivered as claimed. It also provides for the passing on of complaints to the College.

Clause 7

This is a clause of crucial importance, both for ensuring that the arrangement entered into is one which the College has power to enter, and for ensuring that the Council can fund the provision made under the agreement. If the College had less control over the educational provision made under the agreement than is provided by this clause, then it may well be that the agreement would both be beyond the College's powers to enter and beyond the Council's power to fund. For this reason the controls in this paragraph must not be watered down. If a College wishes to enter into a collaborative agreement which does not contain this clause exactly as it is given in the specimen contract it may render the programme ineligible to receive Council funding.

7.2 This clause governs the enrolment process. The College is able to delegate the process of enrolment to the Collaborator but must always retain overall control, including the right to choose who will be enrolled. The enrolment process will take place in a framework set out by the College to which the Collaborator must adhere.

7.3 This clause contains a number of important safeguards for the College. The Collaborator is only to use tutors approved by the College. Just as a College would select its teaching staff carefully, so it will be careful to see that the Collaborator uses only suitable staff to deliver the programmes. This is an important part of the College's responsibilities to its students. It would be acceptable for the College to give the collaborator a list of approved tutors from whom the Collaborator could select, provided that the list was not so extensive ('any member of the Collaborator's staff', for example) as to be no real control on the College's part.

The College also has the right to change the specification of the programmes offered, within the bounds of reasonableness. It will be seen that the programmes are to be specified in some detail, so this provision gives the College the right to control

the programme in considerable detail. The College will be able to require improvements in the programme, for example if new teaching methods appear more suitable than those used by the Collaborator, even if the Collaborator's delivery of the education is generally satisfactory. In other words the College does not have to wait for a breach of this agreement before it can require improvements to the programme.

The clause also contains provisions to ensure that students can take full advantage of their status just as if they were being educated on-site. It is particularly important that students are able to communicate with the college about the programmes, as this will enable the college to identify and correct any weaknesses in the provision made.

Finally, members of staff of the Collaborator are to be under the College's control whilst actually engaged in delivering the programmes. The College is able to give them directions and investigate and act on any complaints made against them. This enables the College to require that the tutors do not commit racial or sexual discrimination, for example, and to take action against them if they do.

7.4 Finally, the College is able to direct how assessment shall be carried out, and to carry out any or all of the assessments itself. It will be noted from Schedule 2 to the contract that in the case of NVQs the College itself is expected to be the awarding body's approved centre, which has implications for when College staff themselves must carry out assessments.

It is important that Colleges actually make use of the controls which the contract gives them. This does not mean, of course, that they must be continually requiring change for its own sake. It does mean that they must require improvement in any aspect of the programme which is not up to the standard which the College would require of its own direct provision. The College should remember that it is fully responsible for the programmes delivered, both to the students and to the Council, and that it is merely making use of the Collaborator as a tool to help the College deliver the programmes.

Clause 8

This clause contains two separate requirements. The first is that the Collaborator will allow the College access to the programmes, so that it can

observe how they are delivered. This, together with the College's right to inspect the records which the Collaborator must keep, will give the College the information it needs to exercise control over the course.

The second requirement is that the standard of the education provided must be in accordance with the College's Quality Standards or any other requirements of the College notified in writing to the Collaborator.

Clause 9

For the sake of the students concerned, it is considered that (as would probably be the case in any event) Colleges should accept primary responsibility for health and safety matters during the actual delivery of the programme, but that Colleges should have the benefit of an indemnity from the Collaborator in respect of any liability which arises from any act or omission of the Collaborator.

Clause 11

The meetings provided for in this clause are intended to enable the parties to discuss their relationship at a strategic level. They are not intended to substitute for regular visits to check that the Collaborator's performance is satisfactory.

This clause also contains general provisions relating to the protection of the College's good name and the provision of support to the Collaborator.

Clause 12

The Collaborator will claim for its funding units by producing the certificates described in this clause as evidence of activity. The College's monitoring visits which it should carry out under clause 8 will enable it to confirm that the certificates and Achievement Evidence are accurate. There is no need for a certificate or evidence in respect of enrolment, as it is expected that the Colleges will use the completed learning agreements as evidence for how many students are enrolled at a Collaborator's establishment.

Clause 13

Colleges will no doubt consider carefully whether it is appropriate to place students who require additional support with Collaborators. If it is thought appropriate then any additional funding to be provided should be agreed in advance on the assessment form referred to in this clause.

Clause 14

This clause contains general provisions for termination of the contract otherwise than by effluxion of time. The Collaborator's right to stop providing the programmes before the academic year end has to be limited, so as to protect the interests of the students. Likewise the College has the right to bring the agreement to an end following a breach either immediately or at the end of that academic year.

Clause 15

It is essential that a college takes expert advice on whether or not VAT will be payable on the charge for the services rendered by the Collaborator. Broadly, unless the Collaborator is another educational establishment such as a university, or a college within the further education sector, VAT will be payable, and will not be recoverable. Hence the model contract provides for the contract price to be inclusive of any VAT.

This clause also contains an indemnity for the College against the Collaborator's staff bringing claims against it, particularly claims relying on the Transfer of Undertakings (Protection of Employment) Regulations. It is unlikely that any such claims would succeed, but the possibility is real enough to be guarded against.

Clause 20

It is for the parties to decide whether they prefer to have an arbitration clause in the agreement or not. Arbitration is normally said to be quicker and cheaper than litigation, although it has to be said that this is not always so. Against this litigation is more final.

Clause 21

It is unlikely that any of the provisions of a collaborative agreement such as this will be restrictive trade practices, but this clause is inserted to protect the parties in case they are. Clearly if the parties think that some of the provisions of the contract might be restrictive trade practices then they should take the required steps to register the agreement with the Office of Fair Trading.

Clause 22

Again, this clause is unlikely to apply in many cases (and if the parties are certain that it does not apply they may delete it). However if there is any

intellectual property made available to the Collaborator this clause will be necessary to protect the College's rights in that regard.

Clause 23

This clause ensures that Collaborators do not reduce the amount of their own resources which they devote to training and education in reliance upon the College's funding. It applies principally to students who are being trained in their own workplace. If it is clear that the clause does not apply to the particular arrangement contemplated it may be omitted.

Schedule 2

The College will specify the programme(s) to be supplied in this schedule. It should do so as fully as possible. The draft contract gives examples of what may be specified, but this should be seen as a minimum rather than a maximum of what is required.

Schedule 3

As presently drafted the unit price for years two and onwards is set by the College alone. It would be reasonable for a College to offer the Collaborator the comfort of an undertaking that it will not set the unit price for subsequent years any lower than the price for year one. Such an undertaking could either go in this schedule or in the definition of unit price in clause 1.

European Public Procurement

Education services are not generally subject to the EC public procurement rules. However, where the value of a college's franchised provision exceeds £108,667 annually colleges must send a notice, in the form specified in Part E of Schedule 2 to the Public Services Contracts Regulations 1993, to the Official Journal of the European Communities no later than 48 days after the award of a contract for franchised provision.







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