

**THE  
FURTHER  
EDUCATION  
FUNDING  
COUNCIL**

**Franchising and Fees**

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**Supplement to  
Circular 99/37**

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# Franchised Provision: Revised Model Contract

**This Agreement** is made the.....  
(insert date)

## 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 15 May in each year or such other dates 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;
- **'Direct Provision'** is defined in annex B to Circular 99/37;
- **'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

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notifies in writing to the Collaborator from time to time;

- **‘Franchised Provision’** is defined in annex B to Circular 99/37;
  - **‘Funded Student’** means a student whose education is intended to be funded in part or in full by the Council;
  - **‘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 *Tariff 1999-2000 (Circular 99/01) and Funding Guidance 1999-2000 (Circular 99/07)*;
  - **‘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;
  - **‘Non-Profit-Making Body’** means any organisation which is prohibited from making any payment or distribution to its members in money or in kind, other than any payment to reflect bona fide expenses;
  - **‘Payments’** means the payments due under the terms of this Agreement from the College to the Collaborator in relation to the Programme or Programmes;
  - **‘Payment Dates’** means [ ], [ ] and [ ] in each Year;
  - **‘Payment Period’** means the periods between [ ] and [ ], [ ] 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 1 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 [insert title of 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);
  - **‘Secondment Arrangements’** is defined in annex B to Circular 99/37;
  - **‘Student’** means a person who is Enrolled or is to be Enrolled and who receives the education
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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, or people who are under the direct control of the Collaborator as employees, including volunteers, 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;
- **‘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.

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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 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.

4.8 The Collaborator is required to charge a fee to the Student at a rate specified in writing from time to time by the College.

## 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(are) programme(s) 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) or 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) a record of any other franchise agreements entered into by the Collaborator (including the names and addresses of any other franchise partners; those current and all others entered into within three years prior to the commencement of this Agreement); this record to be updated in writing by the Collaborator to each College on each occasion that changes are made to partnership arrangements, including the termination of any agreement; or the onset of any new or extended agreement; or any person who is an associate (as defined by section 435 of the *Insolvency Act 1986*) of the Collaborator;
  - (e) any other records and information specified elsewhere in this Agreement;
  - (f) any other records and information as the College may from time to time reasonably
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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 Clause 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.

6.9 The Collaborator shall confirm to the College where it has entered into agreements with other colleges and the numbers of Units for each of those agreements. The College shall confirm with the other colleges whether it has the largest agreement with the Collaborator, where 'largest' is defined as being the total number of units delivered with the partner organisation. The College with the largest agreement shall have additional responsibilities. These responsibilities shall be set out from time to time in the Guidelines from the Council.

## **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

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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. In addition:

- (a) the Collaborator will provide the College with evidence of the employment relationship between the Collaborator and the Tutors, including where the Tutors are self-employed contractors;
- (b) staff seconded from the Collaborator to the College shall be under the direct control of College management and available to undertake duties other than those relating specifically to the franchised provision.

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). The Collaborator shall ensure that any member of its staff without a contract of employment, including agency, volunteer or contract workers who will provide services for the Collaborator on behalf of the College, has any necessary qualifications, is medically fit and is not barred from employment as a teacher.

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 Quality 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

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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.



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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 with 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 as set out in the Guidelines 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

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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 been 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 prospect of being able to pay its debts within the meaning of sections 267 and 268 of the *Insolvency Act 1986*; or
- (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

for the undertaking of 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.

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.

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

## 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

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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 Intellectual Property and Trade Marks**

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

21.2 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.

21.3 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.

21.4 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.

21.5 The Collaborator acknowledges that:

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

21.6 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.

21.7 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.

21.8 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.

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

21.10 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**

22 The Collaborator undertakes that the resource per Student, net of the effects of any discounting factor which may apply to the provision in accordance with the Guidelines, 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. In addition, that for Secondment Arrangements:

- 
- (i) the resource per member of staff is not less than that which has in the past been devoted to such provision; or
  - (ii) the resource per member of staff which it would have devoted to such provision had it not entered into the franchise Agreement.

23 No part of the Price shall be applied for company-, or organisation-specific training. The College and the Collaborator may not transfer any funding to employers, other than in exceptional circumstances, for the hire of premises and equipment.

## **Notices**

24 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.

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# 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 tutors].

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 Revised Model Contract for Franchising

The model contract for franchising, originally set out at annex C to circular 96/06, has been revised to take account of changes. This commentary is not intended to substitute for a college's own legal advice: it provides a context for the changes.

Changes to the text of the contract are sidelined in the margin and a commentary on those changes is set out below. The paragraph headings and numbering relates to the numbering of clauses in the model contract.

## 1 Definitions

**'Franchised Provision'** is defined in annex B to this Circular.

**'Direct Provision'** is defined in annex B to this Circular.

**'Non-Profit-Making Body'** is any organisation which is prohibited from making any payment or distribution to its members in money or in kind, other than any payment to reflect bona fide expenses. Exemptions from the funding discounting factor of 0.67 apply where the student involved attracts a widening participation uplift or where the provision is community-based by non-profit-making organisations. In defining 'non-profit-making' body, care should be taken concerning the type of organisation, and the type of student and their programme. For example, a student who is in employment and who is studying for a basic health and safety qualification is unlikely to qualify for the exemption.

**'Secondment arrangements'** is defined in annex B to this Circular.

**'Tutors'** see 7.3.4 below.

## Payment Terms

4.8 The Collaborator is required to charge a fee to the student at a rate specified by the College. Where a fee is to be charged to the student, the partner should set this at a rate specified by the college. This is as set out in Circular 99/09, paragraph 30(b).

## Provision of Records and Information

6.1 (d) The purpose of this clause is to reduce the risk of irregularity where partner organisations are contracting with more than one college or publicly funded body. When contracting with a partner organisation, each college should ask whether the partner is contracting with, or has contracted with, any other college or other publicly funded organisation, such as a training and enterprise council (TEC). Failure by the partner organisation to disclose previous or other contracting arrangements should be regarded as sufficient reason for the immediate termination of the agreement. Colleges should seek reasons for the discontinuation of any previous contracting arrangements a partner organisation may have had with any publicly funded body. Where there are changes to the arrangements undertaken by the partner organisation, it must inform the college in writing, including where any agreement is terminated; or at the onset of any new or extended agreement. When entering into an agreement with a partner organisation, the college should verify independently whether the partner has any extant or recent agreement with another college or publicly funded organisation. The college should obtain business references from those organisations currently or previously contracting with the partner organisation for the provision of education and training activities.

6.9 Where a franchise partner is involved with more than one college, the college with the largest contract (in terms of funding units) will have additional responsibilities. The franchise partner must disclose the size of each of its contracts with other colleges to each partner college so that those colleges may assess the extent of their responsibilities, with particular regard for ensuring that no irregularities occur.

It is expected that the partner organisation shall confirm to each college that it has entered into contracts with other colleges, and the volume of those contracts, in units. The college will confirm with the other colleges whether it has the largest contract with the partner, where 'largest' is defined as being the total number of units delivered with the partner organisation. The college with the largest agreement shall be regarded by the Council as having additional responsibilities for the programme. These responsibilities shall be set out from time to time in guidance from the Council.

## Provision

7.3.1 To comply with the control requirements, the staff used by partner organisations should be staff employed by that organisation or people who are under the same sort of control as if they were employees, for example, volunteers. This does not include members of a national body who are licensed by that national body to carry out training, unless they were directly employed by the partner organisation. If the trainers normally sell their services as self-employed contractors, the partner organisation must create an employment relationship with them which should include a statement of terms and conditions of employment and evidence of taxation under PAYE. The partner organisation must provide the college with evidence of its employment relationship with its tutors.

7.3.4 The Education (Teachers) (Amendment) Regulations 1998 came into force in August 1998. They change the Education (Teachers) Regulations 1993 so that teachers who are engaged by a local education authority (LEA), or work in a school, or a further education college without a contract of employment are brought within the scope of the statutory regulations about qualifications, health, barring and misconduct. Supply and agency teachers who do not have a contract of employment are now covered by the same controls as teachers employed by the LEA, school or college. Agencies, schools and colleges should check that people they propose to provide or use (for example as supply teachers) have any necessary qualifications, are medically fit and are not barred from employment as a teacher. Volunteers and contract workers who provide services for a school, a further education college or for students attending them and who have regular contact with young people under 19 are also brought within the scope of the amended Regulations. Colleges should ensure that checks have been made into the credentials of any agency staff engaged in direct or franchised provision.

## Restrictive Trade Practices Act

Formerly paragraph 21 in the model contract in Circular 96/06. Due to a change in the law since the model contract was first issued, the original clause on Restrictive Trade Practices is no longer needed. Subsequent paragraphs are therefore renumbered.

## Additionality

22 Council funding for franchised provision should not displace other funding or reduce the franchisee's contribution to the training or development of its staff. Written evidence that it has not reduced its actual or planned funding and a statement of corroboration should be sought by the college from the directors of the partner organisation. The partner organisation should be able to satisfy the college and its external auditors that Council funding is providing for additional staff and that the funding is not displacing existing staff costs. For example, evidence might include extended or new contracts for staff to work specifically on the delivery of programmes. Particular care should be taken where there are students who are being trained in their workplace, and other cases where national vocational qualifications are involved.

The college should ensure that the funding units associated with franchised provision are multiplied by a discounting factor of 0.67, other than for exemptions from the discount based on the policy of ensuring that franchising widens participation. These exemptions are set out in full in the circular. The unit price calculation for the partner organisation should take account of the effects of this or any other discounting factor which may apply to the provision in accordance with any changes to the funding guidance.

23 Colleges are not able to transfer any funding to employers for franchised provision, from 1998-99 onwards. This applies to their partner organisations, some of which will be employers providing for their staff, and others of which will be providers working with employers. In exceptional circumstances, the college may approve that a small amount of payment can be made for premises hire or for the use of equipment. Where the partner organisation proposes to make payment to an employer for the use of premises or equipment, the college should consider carefully the need for payment to be made and whether it is prepared to agree that payment should be made. The college should approve the expenditure prior to any payment being agreed between the partner organisation and an employer.



