

# THE SKILLS DEVELOPMENT SCOTLAND CO. LIMITED

## TERMS & CONDITIONS FOR USER ACCESS

1. **Definitions and Interpretation**
- 1.1. The following definitions and rules of interpretation apply to these terms and conditions and may be changed from time to time:
- 1.1.1. **"Agreement(s)"** means the agreement or agreements entered into between SDS and the Contracting Party containing terms and conditions or other rules applicable to either (i) services being provided to SDS by the Contracting Party, or as applicable, (ii) a project being undertaken by the Contracting Party for which SDS is contributing funding or the relevant agreement or agreements entered into between a third party and the Contracting Party containing terms and conditions or other rules applicable to a project being undertaken by the Contracting Party which SDS manages on behalf of the third party;
- 1.1.2. **"Assignment"** is as defined in clause 2.3;
- 1.1.3. **"Authorised User(s)"** is as defined in clause 4.2.10;
- 1.1.4. **"Business Day"** means a day other than a Saturday, Sunday or public holiday in Scotland, when the banks in Glasgow are open for business;
- 1.1.5. **"Claim"** is as defined in clause 11.1;
- 1.1.6. **"Charges"** means the charges payable by the Contracting Party to SDS for each User Access made available to the Contracting Party;
- 1.1.7. **"Contracting Party"** means the party with whom SDS contracts under the Agreement(s), identified in the User Access Application Form or the party with whom a third party contracts under the Agreement(s) identified in the User Access Application Form and **"Contracting Parties"** shall be construed accordingly;
- 1.1.8. **"Customer Data"** means all data, including all text, sound, software, image or video files that are provided to Microsoft through SDS/FIPS by the Contracting Party, or on behalf of the Contracting Party through use of Online Services;
- 1.1.9. **"Effective Date"** means the date SDS approves and accepts the User Access Application Form or the In Year Additions and Amendments Form, which will be the commencement date of the User Access or previous user permission, as notified by SDS to the Contracting Party;
- 1.1.10. **"FIPS"** means the funding information processing system used by SDS;
- 1.1.11. **"FOISA"** is as defined in clause 13;
- 1.1.12. **"Guidance"** means the User Access guidance available at <https://www.skillsdevelopmentscotland.co.uk/for-training-providers/> (as updated by SDS from time to time);
- 1.1.13. **"In Year Additions and Amendments Form"** means the in year additions and amendments form submitted by or on behalf of the Contracting Party to SDS to request additions and/or amendments to a User Access;
- 1.1.14. **"Microsoft Agreements"** means the agreements entered into between Microsoft and SDS in relation to the terms of grant of Microsoft product licences by Microsoft to SDS (including but not limited to the Online Services) dated 20 April 2022;
- 1.1.15. **"Online Services"** means the power apps per app online services product that SDS requires Contracting Parties to have to enable FIPS to be fully operational (as determined by SDS from time to time);
- 1.1.16. **"Product Terms"** means the document(s) (applicable at the date of purchase by SDS of the relevant Microsoft product(s), which date shall be confirmed to the Contracting Party by SDS) providing information about the terms of use of Microsoft products (including Microsoft's online services terms) which are available at <https://www.microsoft.com/licensing/docs> (as updated by Microsoft from time to time);
- 1.1.17. **"Representatives"** is as defined in clause 12.2;
- 1.1.18. **"SDS"** means The Skills Development Scotland Co. Limited (SC202659) having its registered office at Floor 1 Monteth House, 11 George Square, Glasgow G2 1DY;
- 1.1.19. **"T&Cs"** means the terms and conditions set out in this document, as may be amended by SDS from time to time;
- 1.1.20. **"Term"** is as defined in clause 3.1;
- 1.1.21. **"Trade Secret"** means information that is not generally known or readily ascertainable to the public, has economic value as a result and has been subject to reasonable steps under the circumstances to maintain its secrecy;
- 1.1.22. **"Use Rights"** means the prescribed use rights and terms applicable to each of the Online Services products set out and/or referred to by Microsoft in the Product Terms (as updated by Microsoft from time to time) and which for the avoidance of doubt include Microsoft's online services terms, licence model terms, universal licence terms, data protection terms and the other legal terms which are referred to and can be accessed therein (or as otherwise indicated by Microsoft and/or SDS from time to time);
- 1.1.23. **"User Access"** means the right to access and use the FIPS system, including the Online Services, subject to these T&Cs and the Use Rights;
- 1.1.24. **"User Access Application Form"** means the application form submitted by or on behalf of the Contracting Party, requesting a User Access for each named individual in the application form or a previous application form submitted by or on behalf of the Contracting Party, requesting a user permission, known as a user permission application form.
- 1.2. A **"person"** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 1.3. Unless otherwise specified, a reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time and shall include all subordinate legislation made from time to time under that statute or statutory provision and all orders, notices, codes of practice and guidance made under it.
- 1.4. A reference to **"writing"** or **"written"** includes email.
- 1.5. Any phrase introduced by the terms **"including"** or **"include"** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.
- 1.6. Any obligation in these T&Cs on a person not to do something includes an obligation not to agree or allow that thing to be done.
- 1.7. A reference to a document is a reference to that document as varied or amended from time to time.
- 1.8. References to clauses and schedules are to the clauses and schedules of these T&Cs. Clause and schedule headings shall not affect the interpretation of these T&Cs.
- 1.9. Unless the context otherwise requires, words in the singular shall include the plural and the plural shall include the singular.
2. **Assignment**
- 2.1. Any assignment under clause 2.3 shall be subject to: (i) the Contracting Party completing and submitting the User Access Application Form or In Year Additions and Amendments Form in accordance with the process outlined in the Agreement(s) and/or Guidance, available through the Training Provider pages of the SDS website at <https://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system/> and (ii) SDS accepting and approving the User Access request in the User Access Application Form or In Year Additions and Amendments Form (and not subsequently withdrawing such approval).
- 2.2. The Contracting Party agrees that the submitting of a User Access Application Form through the process outlined in the Agreement(s) and/or Guidance constitutes acceptance of these T&Cs by the Contracting Party, its employees, agents and sub-contractors (if any).
- 2.3. Subject to clause 2.1, SDS assigns its benefit to the User Access (in the number specified in the User Access Application Form or In Year Additions and Amendments Form approved by SDS) to the Contracting Party with effect from the Effective Date (the **"Assignment"**).
- 2.4. The Contracting Party:
- 2.4.1. agrees to comply with and perform all of the obligations under these T&Cs and the Use Rights (and procure, and be responsible for, the compliance and performance of all such obligations by its employees, agents and/or sub-contractors) during the Term;
- 2.4.2. undertakes not to act in a way that would or would be likely to cause SDS to breach any of its obligations under the Use Rights; and
- 2.4.3. agrees to only use (and to procure that where relevant its employees, agents and/or sub-contractors only use) the User Access for the purposes of fulfillment of the Contracting Party's obligations under, and in accordance with, the Agreement(s), under authorised SDS programme(s) (or a third party project where relevant) and in accordance with any and all relevant requirements of law (including European Community Law) and such guidance and instructions relating to FIPS as SDS provides from time to time through the Training Provider pages of the SDS website at <https://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system/> including the Guidance, and for no other purposes whatsoever.
3. **Duration of Assignment and T&Cs**
- 3.1. Subject to clause 3.2, these T&Cs and the Assignment will commence on the Effective Date and shall remain in effect until terminated in accordance with these T&Cs (the **"Term"**).
- 3.2. Notwithstanding clause 3.1:
- 3.2.1. the Contracting Party acknowledges that SDS is using Microsoft products for FIPS and bound by Microsoft's licence cycle terms and contractual arrangements so SDS may be required, and shall be entitled, to suspend and/or terminate, without liability, the Assignment and/or these T&Cs and/or the User Access, at any time, without cause;
- 3.2.2. the Assignment and these T&Cs shall terminate on the expiry of the Agreement(s) unless a replacement agreement (agreed between the parties) immediately replaces such expired Agreement(s); and
- 3.2.3. SDS shall be entitled to terminate the Assignment and these T&Cs without liability, on termination by SDS or a third party (where relevant) of the Agreement(s) or any part thereof (or on termination by SDS of any other contract between the Contracting Party and SDS) due to breach by the Contracting Party and to exercise its rights in terms of these T&Cs in relation to termination.
- 3.3. If the Contracting Party (or its employees, agents and/or sub-contractors) is in breach of the terms of these T&Cs, or in SDS's reasonable opinion is likely to breach the terms of these T&Cs, SDS shall be entitled (at its entire discretion) to: (i) immediately suspend the Assignment; (ii) terminate the Assignment and these T&Cs with immediate effect and/or (iii) treat such breach as a material breach of the Agreement(s) with SDS (or any part thereof) (and/or any other contract between the Contracting Party and SDS) and to exercise its rights in terms of the Agreement(s) (and/or any other contract between the Contracting Party and SDS) in relation to its termination.
- 3.4. Unless otherwise advised by SDS, the User Access shall automatically terminate on termination and/or expiry of the Agreement(s), Assignment and/or these T&Cs (including where the Contracting Party requests termination or cessation of a User Access) and the Contracting Party shall disable access to FIPS and the Online Services promptly and in accordance with such instructions as may be provided by SDS or its agents and shall, if requested by SDS, provide SDS with written confirmation that this has been done.
- 3.5. For the avoidance of doubt (and without prejudice to clause 2.4.3) the Contracting Party shall (and procure that where relevant its employees, agents and/or sub-contractors shall) only use any assigned User Access for the authorised SDS programme or programmes (or a third party project where relevant) under which the User Access is approved (and not subsequently withdrawn) by SDS and for no other reason (including for any other SDS programme) and the Contracting Party acknowledges and agrees that SDS shall be entitled to terminate, suspend and/or remove from the Contracting Party, any User Access in respect of any particular SDS programme, from time to time and prior to the expiry and/or termination of the Agreements, on reasonable notice from SDS (where reasonably practicable in the circumstances).
4. **Conditions of Assignment**
- 4.1. The Contracting Party shall not and shall not attempt to, and shall procure that its employees, agents and/or sub-contractors shall not and shall not attempt to:
- 4.1.1. share the User Access and/or provide the User Access to anyone other than the individual named by the Contracting Party in the User Access Application Form or the In Year Additions and Amendments Form;
- 4.1.2. allow individuals accessing FIPS under a User Access to share its login credentials with anyone else;
- 4.1.3. make any alterations or adaptations to any Microsoft product (including the Online Services) or FIPS;
- 4.1.4. download or otherwise remove copies of software or source code from an Online Service or FIPS;
- 4.1.5. reverse engineer, decompile or disassemble any Microsoft product (including the Online Services) or FIPS;
- 4.1.6. install or use non-Microsoft software or technology in any way that would subject Microsoft's intellectual property or technology to additional obligations;
- 4.1.7. work around any technical limitations in any Microsoft product (including the Online Services) that only allow use in certain ways or restrictions in the Use Rights, these T&Cs or any other applicable documentation;
- 4.1.8. separate and run parts of Microsoft products (including the Online Services) on more than one device or under one User Access, upgrade or downgrade parts of Microsoft products at different times or transfer, distribute, sublicense, rent, lease or lend in whole or in part any of Microsoft products to a third party;
- 4.1.9. use any Microsoft products (including the Online Services) to offer commercial hosting services to third parties;
- 4.1.10. use the Online Services or FIPS: (i) in a way prohibited by law, regulation, governmental order or decree; (ii) to violate the rights of others; (iii) to try to gain unauthorised access to or disrupt any service, device, data, account or network; (iv) to spam or distribute malware; (v) in a way that could harm the Online Services or impair anyone else's use of it; (vi) in any application or situation where failure of the Online Services could lead to the death or serious bodily injury of any person, or to severe physical or environmental damage or (vii) to assist or encourage anyone to do any of the above;
- 4.1.11. create, modify or delete any data from tables of the type designated as "restricted" in the Use Rights.
- 4.2. The Contracting Party shall:
- 4.2.1. obtain the assignment of a User Access from SDS for each individual who shall access FIPS at any time on behalf of the Contracting Party, for the period of the Term, and specify each such individual in a User Access Application Form or In Year Additions and Amendments Form (where relevant);
- 4.2.2. be responsible for ensuring that only the designated authority (as further described in the Guidance) for the relevant SDS programme or funded project requests any User Access (and any reassignment, cessation or termination of a User Access) through the User Access Application Form or the In Year Additions and Amendments Form;
- 4.2.3. submit the User Access Application Form or a In Year Additions and Amendments Form (if relevant) to SDS as required in the Contracting Party's Agreement(s) and/or the Guidance;
- 4.2.4. submit the In Year Additions and Amendments Form with the section headed 'Existing User to be Removed' completed and a specified termination date, in the event that the Contracting Party wishes to terminate the Assignment of a User Access;
- 4.2.5. ensure that all information entered into and submitted in a User Access Application Form or an In Year Additions and Amendments Form is complete, accurate and up to date at all times;
- 4.2.6. monitor compliance of these T&Cs throughout the Term;
- 4.2.7. comply with all laws and regulations applicable to its use of FIPS and the Online Services including laws relating to privacy, data protection, biometric data and confidentiality of communications and be responsible for: (i) implementing and maintaining privacy protections and security measures for components that the Contracting Party provides or controls, (ii) determining whether the Online Services are appropriate for storage and processing of information subject to any specific law or regulation, (iii) using the Online Services and/or FIPS in a manner consistent with legal and regulatory obligations, (iv) responding to any request from a third party regarding the Contracting Party's use of the Online Services and/or FIPS, such as a request to take down content under any applicable laws and (v) making an independent determination as to whether

# THE SKILLS DEVELOPMENT SCOTLAND CO. LIMITED

## TERMS & CONDITIONS FOR USER ACCESS

the technical and organisational measures for the Online Services and/or FIPS meet the Contracting Party's requirements including any security obligations under applicable data protection legislation and acknowledges and agrees that (taking into account the state of the art, the costs of implementation, and the nature, scope, context and purposes of the processing of its personal data as well as the risks to individuals) the security practices and policies implemented and maintained by Microsoft provide a level of security appropriate to the risk with respect to its personal data;

4.2.8. be responsible for ensuring the security of each User Access and Online Services so as to prevent inappropriate or unauthorised use and promptly notify SDS about any possible misuse of its User Access, accounts or authentication credentials or any security incident related to the Online Services;

4.2.9. be solely responsible for any non-Microsoft software or technology that it installs or uses;

4.2.10. ensure that any security information to access the Online Services and/or FIPS allocated to the individual(s) named in the User Access Application Form or In Year Additions and Amendments Form, as approved by SDS (the "Authorised User(s)") (including without limitation all login and password details) is kept confidential and secure by each Authorised User at all times, and that the information is not accessible by, or disclosed to, anyone other than an Authorised User at any time;

4.2.11. immediately notify SDS in accordance with clause 18 of any breach by the Contracting Party (or any of its employees, agents and/or sub-contractors) of these T&Cs, including full details of the breach;

4.2.12. assist and cooperate with SDS and/or Microsoft to enable SDS to comply with its obligations under the Microsoft Agreements; and

4.2.13. comply with any technical limitations in any Microsoft product (including the Online Services) that only allow the use of product in certain ways.

4.3. The Contracting Party acknowledges that SDS has a limited number of licences to use the Online Services and therefore its ability to assign User Access to training providers is limited. The acceptance by SDS of a request by the Contracting Party for additional User Access (through a User Access Application Form or In Year Additions and Amendment Form) shall be subject to additional charges and a lead in time. SDS reserves the right to refuse the Contracting Party additional User Access.

4.4. The Contracting Party acknowledges and accepts that:

4.4.1. Microsoft may modify or terminate an Online Service in any country or jurisdiction where Microsoft is subject to a government regulation, obligation or other requirement that (i) subjects Microsoft to any regulation, obligation or requirement not generally applicable to business operating there, (ii) presents a hardship for Microsoft to continue operating the Online Service without modification and/or (iii) causes Microsoft to believe that the Online Services or the terms applicable to the Online Services may conflict with any such requirement or obligation;

4.4.2. Microsoft may make changes to its licensing programme that will make it necessary for SDS and/or the Contracting Party to enter into new agreements and/or terms and conditions;

4.4.3. Microsoft products (including the Online Services) are protected by copyright and other intellectual property rights, laws and international treaties. Microsoft: (i) does not transfer any ownership rights in any Microsoft products (including the Online Services) and (ii) reserves all rights not expressly granted.

### 5. Re-assigning User Access

5.1. Subject to the reassignment restrictions set out in clauses 5.2 and 5.3, the Contracting Party (acting through its designated authority in accordance with the Guidance) may request SDS to reassign the User Access to another user (other than the individual named in the User Access Application Form) by submitting a In Year Additions and Amendments Form including details of the replacement user and associated details inserted, in accordance with the Guidance. Acceptance and approval by SDS of a reassignment request from the Contracting Party shall be at SDS' sole discretion.

5.2. The Contracting Party acknowledges that a User Access cannot be reassigned on a short-term basis, and the Contracting Party shall not request for a User Access to be reassigned by SDS, within 90 days of (i) the grant of that same User Access by SDS and/or (ii) its reassignment, unless the reassignment is due to temporary reallocation to cover a user's absence or the unavailability of a device that is out of service. Reassignment of a User Access for any other purpose must be for the remaining Term.

5.3. In the event that SDS approves reassignment of a User Access, the Contracting Party shall promptly, block access and remove any related software from the former user's device.

5.4. Subject to clauses 5.1 to 5.3, the Contracting Party shall not assign or in any way transfer, dispose of, distribute, sub-license, rent, lease, license, lend, sub-contract or use the rights and/or obligations it assumes in relation to the User Access or Online Services for use by any other person or to any third party's IT systems (unless otherwise advised by SDS to do so).

5.5. SDS may assign or novate these T&Cs in whole or in part. If requested by SDS, the Contracting Party shall enter into a novation agreement, as soon as reasonably practicable after SDS's request, with SDS and the relevant entity, in such form as SDS shall reasonably specify in order to transfer SDS's rights and obligations under these T&Cs to such entity.

### 6. IT Support Services

If the Contracting Party discovers a technical issue and/or problem with FIPS, the Online Services, or requires IT support of any kind in relation to the User Access or would like further information and/or advice in relation to the Use Rights, the Contracting Party shall, as soon as is reasonably practicable, inform SDS via the online help form available through the Training Provider pages of the SDS website at <https://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system/fips-customer-support-request-form>.

### 7. Charges

7.1. The Contracting Party shall pay SDS the Charges for each User Access in accordance with the Agreement(s) and/or Guidance, as set out in the Training Provider pages of the SDS website at <https://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system/>.

7.2. SDS shall be entitled to invoice the Contracting Party for the Charges at any time following the Assignment of a User Access to the Contracting Party and thereafter invoices shall be issued annually for the period 1 April to 31 March in each year.

7.3. The Contracting Party agrees to pay each such invoice within 30 days of the date of issue by SDS.

7.4. In the event that the Contracting Party fails to pay any invoice issued by SDS under this clause 7 (or part thereof) in accordance with the Agreement(s) and/or Guidance, without prejudice to SDS' other rights and remedies, SDS shall be entitled to:

7.4.1. charge interest on the overdue amount at the rate of 4 per cent per annum above the base rate for the time being of the Royal Bank of Scotland plc accruing on a daily basis from the due date up to the date of actual payment; and/or

7.4.2. offset the shortfall against any sums due by SDS to the Contracting Party.

### 8. Verifying Compliance

8.1. The Contracting Party must keep accurate and complete records relating to all use of FIPS and the Online Services by the Contracting Party (including its employees, agents and/or sub-contractors) and agrees that SDS and/or Microsoft shall be entitled to verify the Contracting Party's compliance with these T&Cs and/or the Use Rights during normal business hours and in a manner that does not interfere unreasonably with the Contracting Party's obligations under the Agreement(s).

8.2. The Contracting party shall (and shall procure that its employees, agents and/or sub-contractors shall): (i) cooperate with and/or assist SDS, Microsoft and/or any independent auditor engaged to carry out a verification of SDS and/or the Contracting Party; (ii) promptly provide the verifying party with any information reasonably requested in furtherance of such verification including without limitation visible access to systems running the Online Services and evidence of User Access; and/or (iii) complete, and/or assist SDS in completion of, any self-audit process (including without limitation Microsoft's self-audit process which Microsoft may require as an alternative to a third party audit for the purposes of determining compliance).

8.3. Without prejudice to any other rights SDS has under these T&Cs (including suspension and/or termination of the Assignment for breach) if any verification reveals any unlicensed use or distribution, then (subject to any other requirement or instruction by Microsoft or SDS) within 30 days: (i) the Contracting Party must obtain,

and pay SDS for, sufficient User Access from SDS (the cost of which shall be confirmed by SDS at that time) and (ii) reimburse SDS for any costs SDS incurred in relation to verifying the Contracting Party's compliance, including without limitation: (i) any costs SDS is required to pay and/or reimburse Microsoft in connection with Microsoft's verification of SDS or the Contracting Party and/or (iii) any charges in connection with SDS being required to obtain additional licenses (or otherwise) from Microsoft.

### 9. Privacy

9.1. The Contracting Party shall comply with any data protection obligations under the Agreement(s) and all relevant legislative requirements in its use of FIPS and the Online Services. SDS' privacy notices in connection with the processing of personal data relating to these T&Cs are available through the SDS website at: <https://www.skillsdevelopmentscotland.co.uk/about/policies/privacy/>.

9.2. The Contracting Party acknowledges that:

9.2.1. personal information collected by Microsoft and its agents in relation to the Contracting Party's use of the User Access may be transferred, stored and processed in the United States or any other country in which Microsoft or its contractors maintain facilities and will be subject to the privacy terms specified in the Use Rights; and

9.2.2. Microsoft products (including the Online Services) are subject to U.S. export jurisdiction. Where applicable the Contracting Party must comply with all applicable international and national laws, including the U.S. Export Administration Regulations, the International Traffic in Arms Regulations and end-user, end use and destination restrictions by U.S. and other governments related to Microsoft products, services and technologies.

### 10. Indemnities

10.1. SDS agrees that in the event that: (i) it considers, acting reasonably, the Online Services to be no longer fit for purpose or (ii) SDS is required to terminate or suspend the Assignment to the Contracting Party due to Microsoft's termination or suspension of the Microsoft Agreements (or any part thereof) with SDS, without cause, it shall be entitled, at SDS' entire discretion, to provide the Contracting Party with an alternative process to enable the Contracting Party to store and submit the required data to SDS for the remainder of the Term. Use of such alternative process shall be subject to such reasonable additional terms and guidance as SDS may advise.

10.2. The Contracting Party shall indemnify, keep indemnified and hold harmless SDS against any and all liabilities, costs, expenses, damages and losses that SDS suffers or incurs from and including the Effective Date as a result of the Contracting Party's failure (or the failure of the Contracting Party's employees, agents and/or sub-contractors) to perform or satisfy the obligations it assumes under these T&Cs, except to the extent that such losses, damages or costs arise as a result of SDS' failure to perform or satisfy its obligations in relation to the User Access prior to the Effective Date.

10.3. The entire liability in any year of SDS to the Contracting Party, under these T&Cs, whether in contract, delict (including negligence or breach of statutory duty) or otherwise, arising out of or in connection with these T&Cs shall be limited to an amount equal to 100% of the Charges paid or payable to SDS for the User Access by the Contracting Party in that year. Nothing within this clause 10.3, limits or excludes SDS' liability for fraud or fraudulent misrepresentation, death or personal injury caused by its negligence (or the negligence of its personnel, agents or sub-contractors), breach of any obligation as to title implied by statute or any other liability which may not be excluded by law.

10.4. Nothing in these T&Cs shall prejudice any rights and/or remedies SDS' has or may have against the Contracting Party in relation to contracts, licences and/or user permissions commencing prior to the Effective Date.

10.5. **The Contracting Party acknowledges that:**

10.5.1. all copies of and/or references to Microsoft documents (including the Product Terms) are considered by SDS to be correct as at 1 May 2022 but may be subject to change by Microsoft without notice;

10.5.2. SDS accepts no liability or responsibility for any loss suffered by the Contracting Party as a result of reliance by the Contracting Party upon the accuracy of the Microsoft documents and/or websites referenced and/or set out in these T&Cs. The Contracting Party further acknowledges that the responsibility to ensure the accuracy and completeness of all Microsoft documents and websites referenced herein and compliance with the same, including all Use Rights, Product Terms, relevant duties, conditions, responsibilities and/or liabilities vests at all times with the Contracting Party;

10.5.3. without prejudice to the Contracting Party's obligation under clause 2.4, when complying with the Use Rights, the Contracting Party shall comply with the obligations on the "Customer" and shall notify SDS as soon as reasonably practicable in accordance with clause 18 if the Contracting Party has not complied with, or believes it is unable to comply with, any obligation of the "Customer" under the Use Rights; and

10.5.4. the provisions in these T&Cs relating to the actions of Microsoft and/or the operation of the Use Rights and/or Product Terms are for information purposes only and are no substitute for the Contracting Party reading and seeking independent legal advice on these T&Cs, the Use Rights and Product Terms.

### 11. Defence of third party claims

11.1. Subject always to: (i) the terms of these T&Cs and (ii) the Contracting Party complying the terms of these T&Cs, SDS agrees it will seek to enforce the rights it has against Microsoft under the Microsoft Agreements (if any) in order to defend the Contracting Party against any claims made by an unaffiliated third party in respect of intellectual property infringement arising from the proper use of the Online Services by the Contracting Party in accordance with these T&Cs (a "Claim").

11.2. The Contracting Party acknowledges and agrees that any Claim made by an unaffiliated third party, and/or corresponding right of the Contracting Party, under clause 11.1 shall be subject to the following conditions and limitations:

11.2.1. clause 11.1 shall not apply to Claims based on: (i) Customer Data, (ii) non-Microsoft software, (iii) modifications made to a Microsoft product (including the Online Services) or service or any specifications or materials the Contracting Party and/or SDS provides; (iv) combination of a Microsoft product or service with a non-Microsoft product, data or business process; (v) use of a Microsoft trademark without express, written consent, or the use or redistribution of a Microsoft product or service (including the Online Services) in violation of these T&Cs (vi) continued use of a Microsoft product or service (including the Online Services) after being notified to stop due to a third party claim or (vii) Microsoft products and/or services provided free of charge;

11.2.2. the Contracting Party must notify SDS promptly of any third party claim relevant to clauses 11.1 and 11.2, give SDS sole control over the defence or settlement and provide all requested information and reasonable assistance in defending the third party claim; and

11.2.3. in no event will SDS or Microsoft be liable for indirect, incidental, special, punitive or consequential damages, or for loss of use, loss of business information, loss of profits, or interruption of business, however caused or on any theory of liability.

11.3. The Contracting Party will defend SDS against any claims made by a person that: (i) any Customer Data or non-Microsoft software hosted on behalf of the Contracting Party infringes that person's patent, copyright, trademark, or other proprietary right or makes unlawful use of its Trade Secret; or (ii) arises from use of an Online Service in violation of applicable laws and regulations; a violation of the legal rights of others; or unauthorised access or disruption of any service, data, account or network in connection with the use of the Online Services.

11.4. The Contracting Party will pay the amount of any adverse final judgment or approved settlement (which must be approved in writing by SDS) resulting from a claim covered by clause 11.3 and reimburse out of pocket expenses of SDS incurred in providing any assistance in defending the claim.

11.5. In the event that any claim under this clause 11 may result in a legal bar prohibiting the Contracting Party's use of a Microsoft product or services (including the Online Services) SDS shall be entitled to terminate the Assignment and these T&Cs in which case the Contracting Party must immediately discontinue use of the Microsoft product or services.

### 12. Confidentiality

12.1. "Confidential Information" is non-public information of SDS and/or Microsoft that is designated "confidential" or that a reasonable person should understand is confidential, including the Use Rights, information relative to the Online Services and use thereof and all product or services pricing. Confidential Information does not

## THE SKILLS DEVELOPMENT SCOTLAND CO. LIMITED TERMS & CONDITIONS FOR USER ACCESS

include information that: (i) becomes publicly available without a breach of these T&Cs, (ii) the receiving party received lawfully from another source without a confidentiality obligation, (iii) is independently developed, or (iv) is a comment or suggestion volunteered about the disclosing party's business, products or services.

12.2. The Contracting Party will take reasonable steps to protect the Confidential Information. The Contracting Party will use Confidential Information only to the extent necessary for the fulfillment of the Contracting Party's obligations under the Agreement(s) through proper use of the User Access in accordance with these T&Cs. The Contracting Party will not disclose Confidential Information to third parties, except to its employees, agents and/or sub-contractors ("**Representatives**") and then only on a need-to-know basis under nondisclosure obligations at least as protective as these T&Cs. The Contracting Party remains responsible for the use of Confidential Information by its Representatives and, in the event of discovery of any unauthorised use or disclosure, must promptly notify SDS.

12.3. The Contracting Party may disclose Confidential Information if required by law; but only after it notifies SDS (if legally permissible).

12.4. These obligations apply to Confidential Information for a period of five years after the Confidential Information is received.

### 13. Freedom of Information

The Contracting Party acknowledges that SDS is subject to the requirements of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (together "**FOISA**") (as amended and/or replaced from time to time) and shall assist and cooperate with SDS to enable SDS to comply with its information disclosure obligations, including without limitation, providing such information and/or documentation as SDS may require in order to meet its statutory obligations. SDS shall be responsible for determining in its absolute discretion notwithstanding any other provision to the contrary in or pursuant to these T&Cs or any other agreement, whether the information and/or any other information is exempt from disclosure in accordance with the provisions of FOISA, and may at its absolute discretion disclose to a third party any information relating to or provided by or on behalf of the Contracting Party. In no event shall the Contracting Party respond directly to a request for information pursuant to FOISA unless expressly authorised to do so by SDS.

### 14. Waiver

The failure to insist upon strict performance of any provision of these T&Cs, or the failure of a party to exercise, or any delay in exercising, any right or remedy under these T&Cs or by law shall not constitute a waiver of that right or remedy and shall not cause a diminution of the obligations established by these T&Cs. No waiver shall be effective unless it is expressly stated to be a waiver and communicated in writing and signed by the waiving party. A waiver of any right or remedy arising from a breach of the T&Cs shall not constitute a waiver of any right or remedy arising from any other or subsequent breach of the T&Cs nor constitute a waiver of any right or remedy arising from breach or subsequent breach of any other contract (including any licence) between the parties.

### 15. Severance

If any provision or part-provision of these T&Cs (or any document to be entered into or complied with pursuant to or in connection with it) is or becomes illegal, invalid or unenforceable in any jurisdiction, that does not affect (i) the legality, validity or enforceability in that jurisdiction of any other provision of these T&Cs; or (ii) the legality, validity or enforceability in any other jurisdiction of that or any other provision of these T&Cs. In the event that such illegality, invalidity or unenforceability is so fundamental as to prevent the accomplishment of the purpose of these T&Cs, SDS and the Contracting Party shall as soon as reasonably practicable commence good faith negotiations with a view to resolving the position.

### 16. Further Assurance

The Contracting Party shall, and shall procure that its employees, agents and sub-contractors and/or any necessary third party shall, promptly execute and deliver such documents and do all such things, as SDS and/or Microsoft may from time to time reasonably require for the purpose of giving full effect to the provisions of these T&Cs.

### 17. Survival

All provisions of these T&Cs survive termination or expiration of these T&Cs except those requiring performance only during the Term.

### 18. Notices

18.1. Any notice given under these T&Cs shall be in writing and shall be sufficiently served if delivered to SDS by email and to the Contracting Party by hand, first class recorded delivery post or email. Notices shall be sent to: (i) the email address set out in the Agreement(s) or [FIPS.Support@sds.co.uk](mailto:FIPS.Support@sds.co.uk) for notices to SDS and (ii) the addresses shown in the Agreement(s) for the Contracting Party or such address included in the User Access Application Form or In Year Additions and Amendments Form. The parties can change their respective address for notices by telling the other in writing.

18.2. If delivered or sent:

18.2.1. by hand to the correct address, notices shall be deemed given at the time the notice is left at the address;

18.2.2. by first class recorded delivery post to the correct address, notices shall be deemed given two Business Days after the date of posting; or

18.2.3. by pdf to the correct email address without getting an error message, notices shall be deemed given at 9am on the first Business Day after sending.

### 19. Variation

SDS may amend these T&Cs at any time. The amended T&Cs will come into force from the date that the Contracting Party is advised of the changes. SDS may contact the Contracting Party directly to confirm the changes or post the changes on the Training Provider pages of the SDS website at <https://www.skillsdevelopmentscotland.co.uk/learning-providers/fips-funding-information-and-processing-system/>.

### 20. Governing Law and Jurisdiction

SDS and the Contracting Party accept the exclusive jurisdiction of the Scottish courts and agree that these T&Cs are to be governed by and construed according to Scots Law. Nothing in this clause shall limit SDS's right to take proceedings against the Contracting Party in any other court of competent jurisdiction.