

Single User web Application Services Agreement

This agreement is entered into between **Smart e-Assessor Limited** (Registered in England No. 7408258) whose registered office is The Barn, Fosse Cottage Farm, Street Ashton, Warwickshire, CV23 0PL trading as Smart Assessor (the “**Licensor**”) and the person identified in the invoice as the licensee (the “**Licensee**”) and is subject to the attached license provisions.

In consideration of the mutual obligations set out below **the Parties agree** as follows:

1. Definitions

1.1 In this Agreement, the following words shall have the following meanings unless otherwise expressly stated:

“**Additional Services**” means those optional services referred to in Schedule 1;

“**Agreement**” means The Schedule of Requirements together with these terms and conditions;

“**Application Services**” means the services described in Schedule 1;

“**Charges**” means the charges including: registration and set-up fees, basic license and support fees and per-user fees, as set out or referred to in The Schedule of Requirements, as may be amended by agreement between the parties from time to time;

“**Commencement Date**” means the date of the invoice

“**Confidential Information**” means any and all secret or confidential commercial, financial, marketing, technical information, know-how, trade secrets and other information in written, electronic or any other form or medium, whether disclosed before, on or after the date of this Agreement;

“**Documentation**” means the inter-active on-line information and User guides and other documentation as may be supplied or made available by the Licensor in respect of the Software, as updated, replaced or supplemented from time to time by the Licensor;

“**Enterprise License**” means apprentices and traineeships only

“**Excluded Services**” includes the services, facilities, functionality and other matters set out or referred to in Schedule 1;

“**Force Majeure**” means any event outside the reasonable control of either Party affecting its ability to perform any of its obligations (other than payment) under this Agreement, including without limitation: fire; flood; lightning; war; revolution; terrorism; riot; strike; lock-out or other industrial action; failure of supplies of power, telecommunication network, fuel, transport, equipment, raw

materials or other goods or services;

“Initial Period” means the initial period of time for which the Licensee has agreed to pay the Charges for use of the Application Services in respect of the agreed number of learners, as set out in The Schedule of Requirements.

“Intellectual Property Rights” means any patent, copyright, database right, moral right, design right, registered design, trade mark, service mark, domain name, metatag, know-how, model, unregistered design (and any application for any such right) or other intellectual property right;

“Licensor Materials” means any documentation, materials, software, equipment, data and all other materials and Intellectual Property Rights owned or licensed by the Licensor, including, without limitation, the Licensor’s Web Site, the Licensor’s Application Web Site, the Software and the Documentation;

“Licensor’s Application Web Site” means those portions of the Licensor’s Web Site which provide interfaces to the server-side Software and to which access is available after logging in using the Users Login Details;

“Licensor’s Web Site” means the Licensor Materials which can be accessed using a Browser at the specified url

“Licensor’s Web Site Terms and Conditions” mean the terms and conditions of use and privacy policy (as the same may be updated from time to time) which are accessible within or linked to the Licensor’s Web Site;

“Location” means the address of the Licensee set out in The Schedule of Requirements;

“Parties” means the Licensee and the Licensor;

“Party” means the Licensee or the Licensor;

“Restricted Items” means each of the User Login Details, Licensor’s Application Web Site, the Documentation and the Software (in each case whether in whole or in part);

“Software” means all software or software code (whether compiled or uncompiled) which form a part of the Licensor’s Application Web Site as updated from time to time by the Licensor;

“Support Services” means the services described in Schedule 1;

“**System**” means the minimum system specification listed on the Licensor’s Web Site as updated from time to time by the Licensor;

“**Users**” means: the registered users issued with User Login Detail,

“**Users Login Details**” means the username, password and other information which a User will be required to input in order to be granted access to the Licensor’s Application Web Site.

- 1.2 The headings contained in this Agreement are for convenience of reference only and shall not affect its interpretation.
- 1.3 References to “person” includes an individual, company, public organisations, corporation, firm or partnership.
- 1.4 Words indicating the singular shall include the plural and vice versa. Words indicating a gender shall include each gender.
- 1.5 The words and phrases “including” and “in particular” shall be without limitation to the generality of any preceding words and any preceding words shall not be construed as being limited to a particular class where a wider interpretation of those words and phrases is possible.
- 1.6 References to any statute or statutory provision shall include (i) any subordinate legislation made under it, and (ii) any provision which subsequently supersedes it or re-enacts it (whether with or without modification).
- 1.7 Unless otherwise stated, all sums payable hereunder are exclusive of VAT or any other applicable tax or duty payable upon such sums, which shall be added if appropriate at the rate prevailing at the relevant tax point.

2. Duration

- 2.1 Upon completion of The Schedule of Requirements as agreed with the Licensor the Licensee shall be permitted access and use of Licensor’s Application Web Site and the Software in accordance with this Agreement for the Initial Period from the Commencement Date via the User Login Details provided by the Licensor.
- 2.2 This Agreement shall automatically continue unless either party gives at least 60 days written notice to the contrary to the other party.
- 2.3 If either Party gives notice to end this Agreement in accordance with Clause 2.2, then this Agreement shall terminate after 30 days of notice being received without liability to either Party and the Licensee shall cease to use the Licensor’s Application Web Site and the Software immediately on the 30th day following notice of termination.

3. Grant of License and Support Services

- 3.1 Subject to Clause 2.1, the Licensor grants to the Licensee a non-exclusive, non-transferable, license for Users to access the Licensor's Application Web Site and use of Software and the Documentation for the duration of this Agreement, commencing from the Commencement Date in The Schedule of Requirements.
- 3.2 The Licensor will use reasonable endeavours to operate and maintain the Licensor's Web Site and the Licensor's Application Web Site so that the Users can access the Licensor's Application Web Site in order to use the Application Services, subject to the other terms and conditions set out in this Agreement. The Licensee acknowledges that the connection between the Licensee's Browser and the Licensor's Application Web Site relies upon intermediate networks and systems which are not under the direct control of the Licensor, and the Licensor shall not be responsible for any failure to provide the Application Services or any failure by the Licensee to be able to access the Licensor's Application Web Site or the Software.
- 3.3 The Licensor agrees to provide the Support Services from the Commencement Date for the duration of this Agreement.

4. Licensee Obligations

- 4.1 The Licensee undertakes:
- 4.1.1 not to make available the Restricted Items in whole or in part and in any form, whether for sale or otherwise, to any person without prior written consent from the Licensor;
- 4.1.2 to use the Restricted Items solely for its internal business purposes and not to use them to provide any form of bureau services, managed services, outsourced services, sublicensing, time sharing, rental, facility management, or to process data on behalf of a third party or provide any other form of services or access to the Restricted Items to any third party;
- 4.1.3 not to allow any use of the Restricted Items by any persons other than the registered and trained Users specified in The Schedule of Requirements, as may be varied from time to time by agreement between the parties;
- 4.1.4 to comply at all times with the Licensor's Web Site Terms and Conditions when using the Licensor's Web Site, the Licensor's Application Web Site and the Application Services;
- 4.1.5 not to copy the Restricted Items (other than for normal operation, back-up purposes, or as specifically permitted by the Licensor) nor

otherwise reproduce the Restricted Items (except to the extent permitted by law);

- 4.1.6 not to translate, adapt, vary, or modify the Restricted Items;
 - 4.1.7 not to disassemble, decompile or reverse engineer the Restricted Items (except to the extent permitted by law);
 - 4.1.8 to be responsible for providing and configuring a browser and all hardware, software and network connections necessary for a browser to be able to connect to the internet to access the Licensor's Web Site.
 - 4.1.9 to only access the Licensor's Web Site and the Licensor's Application Web Site using equipment and software specified in the System.
- 4.2 The Licensee shall:
- 4.2.1 notify the Licensor within 30 days of the Commencement Date if the Application Services which have been provided are not provided in accordance with this Agreement. The Licensee will be deemed to accept the Application Services in the event that it has not provided any such notice to the Licensor within such 30 day period.
 - 4.2.2 save in respect of the rights to use the Application Services and Support Services granted by the Licensor under this Agreement, the Licensee agrees to obtain all necessary consents, licenses and permissions which are reasonably necessary in order for the Licensee to use the Application Services and Support Services.
 - 4.2.3 be responsible for ensuring that the Application Services functionality is maintained and used in accordance with the Licensor's user documentation.
 - 4.2.4 ensure that the Licensor's copyright notice [{"© Smart Assessor"}] shall appear on Licensees marketing and advertising collateral, Licensee's website or whenever and wherever User documentation including: correspondence, charts, programmes and tables are produced using the Application Services whether reproduced on paper or other media or electronically;
 - 4.2.5 not infer or imply any endorsement of the Licensee's products by the Licensor;
 - 4.2.6 ensure that the Application Services input fields and any information categories are correct and meet the Licensee's requirements;
 - 4.2.7 ensure that all employee Users are registered and undertake the training provided by Licensor. The Licensor cannot support any user who hasn't been through their training programme.

- 4.3 The Licensee warrants to the Licensor that it has full capacity and authority to enter into this Agreement.

5. Licensor's Warranties

- 5.1 The Licensor warrants to the Licensee that:
- 5.1.1 it has full capacity and authority to enter into this Agreement and grant the License;
 - 5.1.2 for a period of 30 days from the Commencement Date, the Application Services when used in accordance with this Agreement and without unauthorised modification, will function materially in accordance with the Documentation supplied on the Commencement Date; and
 - 5.1.3 the Application Services, when used in accordance with this Agreement, will not infringe the Intellectual Property Rights of a third party.
- 5.2 In the event that there is a breach of Clause 5.1.2 or 5.1.3 or any other warranty or indemnity provided in respect of the Software by the Licensor, then upon the Licensee promptly bringing this to the attention of the Licensor, the Licensor will at its sole discretion, either:
- 5.2.1 correct the Application Services or any of the Restricted Items, within a reasonable period of time; or
 - 5.2.2 terminate the Agreement and refund the Charges in respect of the Application Services (after making a reasonable deduction for the period that the Licensee has had the benefit of the Application Services).
- 5.3 The Licensee agrees that Clause 5.2 represents its sole and exclusive remedy in respect of unsatisfactory performance of the Application Services. This Clause operates subject to Clause 7.
- 5.4 The Licensor provides no assurance whatsoever, that the Application Services or the results obtained by using the Application Services are error or defect free or capable of operation with any equipment or software other than the latest version of the browser.

6. Additional Services

- 6.1 Where requested by the Licensee and agreed by the Licensor, the Licensor shall use reasonable endeavours to carry out the Additional Services in accordance with any written proposal.

7. Charges

- 7.1 The Licensee shall pay the Charges to the Licensor in accordance with this Agreement as set out in The Schedule of Requirements

together with VAT at the applicable rate and payment shall be made without deduction, withholding or set off. The Charges are due and payable within 30 days of invoice, charged at rates agreed in The Schedule of Requirements, or as may be agreed from time to time and in respect of each subsequent periodic renewal, in accordance with such renewal notification.

- 7.2 The Licensor shall be entitled to increase the Charges annually, by giving the Licensee no less than 30 days' notice in writing.

8. Intellectual Property Rights

- 8.1 All Intellectual Property Rights in the Licensor Materials shall remain vested in the Licensor and/or its licensors.
- 8.2 The Licensor agrees to indemnify and keep indemnified the Licensee against all damages, losses, costs and expenses (including without limitation reasonable legal fees) resulting directly from a finding by an English Court that the operation, possession or use of the Application Services or the Licensor Materials by the Licensee in accordance with this Agreement infringe the Intellectual Property Rights of a third party in the United Kingdom **provided that** the Licensee:
- 8.2.1 gives notice to the Licensor of any such claim of infringement as soon as it becomes aware of such claim of infringement; and
- 8.2.2 gives the Licensor reasonable assistance (at the cost of the Licensor) in connection with the defence of any such claim of infringement and not admit liability or attempt to settle or compromise such claim without the prior written agreement of the Licensor; and
- 8.2.3 uses its reasonable endeavours to mitigate any damages, losses, costs and expenses resulting from such claim of infringement.
- 8.3 In the event of a claim that the Application Services or the Licensor Materials infringe the Intellectual Property Rights of a third party, the Licensor shall be entitled to:
- 8.3.1 procure the right for the Licensee to continue using such Application Services or Licensor Materials or infringing part thereof; or
- 8.3.2 make such modifications to such Application Services or Licensor Materials or relevant parts thereof so that they become non-infringing without incurring a material reduction in the quality or performance of such Application Services or Licensor Materials; or
- 8.3.3 replace such Application Services or Licensor Materials or relevant parts thereof with non-infringing substitutes provided that such substitutes do not entail a material reduction in the quality or performance of such Application Services or Licensor Materials.

9. Confidentiality

- 9.1 All Confidential Information disclosed or obtained as a result of this Agreement shall be kept confidential by the Parties and neither Party shall use or disclose such Confidential Information. Where such Confidential Information is disclosed by a Party to its employees, agents or sub-contractors, it shall be subject to confidentiality obligations equivalent to those set out in this Agreement. Each Party shall procure that any such employee, consultant, sub-contractor or agent complies with such obligations.
- 9.2 The obligations of confidentiality shall not extend to any disclosure of Confidential Information which either Party can show:
- 9.2.1 is necessary for the proper performance of its obligations under this Agreement;
 - 9.2.2 has been carried out with the prior consent of the other Party;
 - 9.2.3 is in, or has become part of, the public domain other than as a result of a breach of the obligations of confidentiality under this Agreement; or
 - 9.2.4 was in its records prior to the Commencement Date (other than from the disclosing Party); or
 - 9.2.5 was independently disclosed to it by a third party entitled to disclose the same; or
 - 9.2.6 is required to be disclosed under any applicable law, or by order of a court or governmental body or authority of competent jurisdiction.

10. Data Protection

- 10.1 Each Party shall be responsible for its own compliance with the Data Protection Act 1998.
- 10.2 The Licensee shall be the data controller (as defined in the Data Protection Act 1998) of the data input into the Application Services by Users which relates to the Licensee's Users. The Application Services include a facility allowing the Licensee to export certain data relating to the Licensee's Users from the System. For the avoidance of doubt, the Licensee is the data controller of this data.
- 10.3 The Licensee hereby provides its consent to Licensor to collect data regarding the Licensee's use of the Application Services for any

purpose connected with this Agreement, including, for example, assessing User satisfaction.

- 10.4 Where one Party acts as the data processor of personal data controlled by the other (as such terms are defined in the Data Protection Act 1998) it agrees that it will only process the personal data for the purposes referred to in the Licensors Web Site Terms and Conditions or in this Agreement,

11. Limitation of Liability

- 11.1 Neither Party shall be liable in any circumstances to the other Party for consequential, special or indirect losses, or the following losses whether direct or indirect: loss of profits; loss or delay in payment of government grants; loss of revenue; economic loss; loss of business or contracts; loss of anticipated savings or goodwill; harm to reputation; loss of data; (or any losses arising from a claim by a third party for any of the above losses); whether arising under contract, statute, tort (including without limitation, negligence), or otherwise.
- 11.2 Nothing in this Clause shall exclude or restrict the Licensee's obligation to pay the Charges.
- 11.3 The Charges have been calculated on the basis that each Party will exclude and limit its liability as set out in this Agreement, and the Parties therefore agree that the limitations and exclusions of liability in this Agreement are reasonable.
- 11.4 The Licensor will not be liable for:
- 11.4.1 any failure to comply with the provisions of this Agreement if such default is attributable to any extent to the acts or omissions of: the Licensee; the Licensee's agents, employees or contractors; including without limitation, the failure of the Licensee to perform its obligations under this Agreement;
- 11.4.2 any consequences arising from the Licensor complying with the Licensee's instructions or requirements; or
- 11.4.3 any consequences arising from the Licensee failing to secure any necessary consents, licenses or permissions; or
- 11.4.4 any consequences arising from the Licensee or the Users failing correctly to enter information into the System.

12. Termination

- 12.1 Either Party may terminate this Agreement immediately upon notice in writing to the other Party in the event that the other Party commits a breach of its obligations under this Agreement and:

- 12.1.1 such breach is material and cannot be remedied; or
- 12.1.2 such breach is material and possible to remedy and that other Party fails to remedy such breach within thirty (30) days of having been required in writing to remedy such breach.
- 12.2 Either Party may terminate this Agreement immediately upon notice in writing to the other Party in the event that the other Party shall present a petition or have a bona fide petition presented by a creditor for its winding up, or shall convene a meeting to pass a resolution for voluntary winding up, or shall enter into any liquidation (other than for the purposes of a bona fide reconstruction or amalgamation), shall call a meeting of its creditors, or shall have a receiver of all or any of its undertakings or assets appointed, or shall be deemed by virtue of the relevant statutory provisions under the applicable law to be unable to pay its debts.
- 12.3 The Licensor shall be entitled to terminate the License contained in Clause 3.1 immediately in the event that the Licensee is in breach of its obligations in Clause 4, or the Licensee fails to pay the Charges when due.

13. Consequences of Termination

- 13.1 The termination of this Agreement shall be without prejudice to the rights and remedies of either Party which have accrued up to the date of termination.
- 13.2 On termination of this Agreement the Licensee shall immediately return to the Licensor all of the Licensor's property (including without limitation Confidential Information) in its possession at the date of termination and the Licensee shall cease to use the Application Services and if requested shall return the Documentation and all updates, upgrades or copies in any form received from the Licensor or made in connection with this Agreement.
- 13.3 Upon termination of this Agreement, all licenses granted by the Licensor and its licensors, to the Licensee, will have five working days to print or extract any required data from the solution.

14. Force Majeure

- 14.1 If either Party (the "**Affected Party**") is prevented from complying with its obligations due to Force Majeure, it shall not be in breach of this Agreement or otherwise liable to the other Party (the "**Unaffected Party**") by reason of any delay in performance or non-performance of any of its obligations due to such events.
- 14.2 If such Force Majeure persists for a continued period of 3 months, then the Unaffected Party shall be entitled whilst the Force Majeure

persists, to terminate this Agreement immediately upon notice to the Affected Party.

15. Assignment and Sub-contracting

15.1 The Licensee shall not assign, delegate, sub-contract, transfer or otherwise dispose of any of its rights or responsibilities under this Agreement without the prior written consent of the Licensor.

15.2 The Licensor shall be permitted to assign, delegate, sub-contract, transfer or otherwise dispose of any of its rights or responsibilities under this Agreement without the prior written consent of the Licensee.

16. Contracts (Rights of Third Parties) Act 1999

16.1 The Parties to this Agreement do not intend any third party to have any benefit under this Agreement. The Parties therefore agree that no third party shall have the right to enforce any term of this Agreement.

17. No Partnership

17.1 Nothing in this Agreement shall create, or be deemed to create, a partnership or joint venture or relationship of employer and employee or principal and agent between the Parties to this Agreement.

18. Variations

18.1 No variation of this Agreement shall be effective unless it is in writing and is signed by an authorised representative of each Party.

19. Severability

19.1 If at any time any part of this Agreement or a clause of this Agreement becomes void or unenforceable under any applicable law it shall be deemed to be deleted from this Agreement and the remaining provisions of this Agreement shall continue unaffected.

20. No Waiver

20.1 No provision of the Agreement shall be waived unless agreed to be waived by both Parties in writing. If any provision is waived, then that waiver shall operate for that instance only and not future instances, unless agreed otherwise by both Parties in writing.

21. Entire Agreement

21.1 This Agreement contains the entire agreement between the Parties with respect to the subject matter of this Agreement (the “**Subject Matter**”) and supersedes all other written and oral communications between the Parties relating to the Subject Matter. The express terms, conditions and warranties in this Agreement are in lieu of all warranties, conditions, terms, representations, statements, undertakings and obligations whether express or implied by statute, common law, custom, usage or otherwise all of which are hereby excluded to the fullest extent permitted by law. The Parties hereby confirm that they have not relied upon any representations, communications or other matters which have not been expressly stated in this Agreement. Notwithstanding any provision to the contrary, nothing in this Agreement limits or excludes either Party’s liability for fraudulent misrepresentations.

22. Law and Jurisdiction

22.1 This Agreement and any dispute or claim arising in connection with it shall be governed by the laws of England and shall be subject to the exclusive jurisdiction of the English Courts to which the Parties irrevocably submit.

Schedule 1.

1. Application Services

- 1.1 A hosted solution available for use by candidates, assessors, Internal Quality Assurers, External Moderators and Administrators via secure logins and passwords.
- 1.2 The solution will be branded in line with the Licensee logo as part of the initial setup as defined in The Schedule of Requirements.
- 1.3 The initial setup will also include importing QCF standards into the system and branding of the software. Training to key users of the system. Mandatory training is included in our price list and access to our online training courses. Employer standards and assessment plans in PDF format will be imported.
- 1.4 The Licensor will hold a regular backup of the system and the data stored in the database. When learners complete their course of learning and their license is terminated the Licensor will provide the Licensee with a soft copy of the portfolio for data storage. Learner data will be retained within the Smart Assessor software solution for 3 years from their completion date providing the Licensee is still in contract with the Licensor.

Termination

- 1.5 The solution is licensed on an annual recurring revenue model and will automatically renew for another 12 months unless you notify the licensor in writing no later than 60 days from the expiry of your annual license that you do not wish to renew. If we do not receive 60 days' notification in writing, then the renewal will be binding for another 12 months. I

Hosting after Termination

- 1.6 Smart Assessor can retain a working copy of the e-portfolio software for archived learner's access purposes only after this contract has been terminated or expired at an annual cost of £2,000 for less than 250 users, £3,500 per annum for more than 250 and less than 1000 users. For more than 1000 learners there will be an additional annual cost will be £3 per learner per year.

- 1.7 In addition to 1.6 if you have any 'active' learners remaining in the site that you do not wish to archive you will be given the option to keep these learners active at an additional annual cost of £65 per learner.

If you chose not to renew at the end of the annual contract, and do not wish to enter into a hosting option, you will have an additional 5 days from the anniversary date in which to extract your data after which time the site will close.

- 1.8 Smart Assessor no longer offer single use 'bundle' licenses. For clients who have already purchased 'bundle' licenses these licenses must be allocated to active learners within 12 months of purchase. In addition to the individual license cost there is an annual hosting charge of £2,000 for less than 250 users and £3,500 per annum for more than 250 and less than 1000 users, if you no longer wish to continue to use Smart Assessor you will be required to give the Licensor 60 days' notice of termination before your anniversary date, during which time you can download your e-portfolio from the system before it closes.

1.9 Your site will close 5 days after the anniversary date. If you would like to continue to have access to the e-portfolio refer to clause 1.6 and 1.7 Hosting after Termination

2. Support Services

2.1 Support will only be provided to the trained personnel of the solution.

2.2 Any support requests will need to be made from the provided URL. The Licensee will need to clearly state the issue as explained on the request ticket. The Licensor will either respond via online ticketing within a 24-hour period. The licensor will then endeavour to resolve the issue ASAP depending on the complexity of the issue.

3. Excluded Services

3.1 The Licensor will not have responsibility of the content and accuracy of the data stored in the system – either candidate or company information and any evidence uploaded into the solution.

3.2 The Licensor will not be held responsible and cannot support the use of any data that has been exported from the system to be used in other applications.

4. Additional Services

4.1 Training to third party persons or companies can also be supplied, please contact your account manager for details. We train auditors, External Verifiers, candidates, sales staff and employers using the system at an additional cost to the Licensee. The Licensor recommends that the Licensee demonstrates the software solution to their chosen Awarding Bodies to seek approval from their External Verifier(s) at an early stage. In the unlikely event that, after the delivery of any training to External Verifiers, there are issues regarding using the software solution for certification purposes the Licensor is willing to work closely with the Licensee and the Awarding Body to resolve them at no additional charge to the Licensee.

4.2 Additional licenses can also be purchased at any time for use by additional candidates. This can either be arranged and paid for in advance or billed at the end of the first month of use.

4.3 Developments to the solution can be requested for by the Licensee at any time. These need to be made in writing. Depending on the request it will be chargeable if it is a bespoke request for the solution. Alternatively, it may be included in routine upgrades to the solution. Any bespoke developments will need to be agreed between the Licensor and Licensee via a written proposal, which will outline costs, payment terms and timescales for the development. As it is a hosted solution bespoke developments must be rolled out in accordance to suit all users of the solution, and must be planned and announced in advance.

4.4 Deleted data will be investigated at the request of the client through the online ticketing system, if we can restore this data you will be charged £60 per hour if this proves to be the fault of the user.