Education & Skills Funding Agency

Guidance

Reforms to subcontracting education for learners over 16

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1. Introduction

We undertook a consultation on subcontracting reform in February 2020. The consultation set out 10 proposals for reforming the future arrangements for subcontracting of ESFA funded post-16 education and training. The proposals sought to reduce the overall volume of subcontracted delivery across the sector by eliminating provision that is poorly managed and delivered, and provision undertaken without a clear and defensible educational rationale. It also sought to strengthen our oversight of subcontracted activity.

We published a response to the consultation on 30 June 2020. In that document we set out how we would take each proposal forward and committed to providing greater detail on some aspects of our reforms later in the year. This document provides that additional detail. Set out below is further information about each of the 10 proposals in the consultation, and further clarification on our position in respect of brokerage.

We would like to remind providers that these reforms should be considered as a whole. To be clear, we are not prohibiting or banning all subcontracting. Where it is done well, for the right reasons, and properly overseen, it can enhance the learner experience and add value. However, abuse of subcontracting only serves to limit access for learners. These reforms have been put in place to ensure learners receive the best possible education and training and have oversight of the use of public funds, ensuring these are spent appropriately, providing value for money.

For the avoidance of doubt, in the case of adult education budget (AEB) provision, these reforms apply to providers delivering ESFA AEB (for learners resident in non-devolved areas). In areas where the AEB has been devolved, Mayoral Combined Authority (MCAs)/Greater London Authority (GLA), are responsible for the funding rules (including any rules on subcontracting) which apply in their areas.

2. Further detail in respect of the proposals

2.1 Proposal 1: Publishing educational rationale for your subcontracting position which is approved by those charged with governance.

From 2020 to 2021 contracts, grant agreements and funding requirements stipulate that lead providers should:

- clear about their education rationale for subcontracting
- sign off that strategy/rationale with their board
- publish, by 31 October 2020, their rationale on their website together with a detailed management fee structure and complete list of subcontracting partners

Next steps

For subsequent years, lead providers will be required to review and discuss their strategy and rationale annually and refresh their publication prior to the start of each academic year.

We have set out in annex a guidance provided to those charged with governance (rather than just governors and boards as in the original consultation) on their role in setting the subcontracting strategy and how that differs to the role of the executive, running the provider on a day-to-day basis. We recognise these roles are the same in some organisations.

We will undertake a sampling exercise early in the 2021 calendar year to understand the progress providers have made in developing and publishing their rationale.

Providers should include the link to this information as part of their subcontractor declaration and we will review this as part of our internal arrangements.

2.2 Proposal 2: Distance subcontracting

Effective from August 2021 we will require:

- lead providers who subcontract 16 to 19 provision to seek prior approval for the delivery of geographically distant 16 to 19 study programme provision where the delivery location is outside the lead provider's normal recruitment area
- 16 to 19 subcontracted provision delivered at distance should be rarely undertaken but we recognise there will be some limited circumstances where it is appropriate

We will not require prior approval for other funding streams delivering at geographical distance but would expect providers to assure themselves that any delivery at distance allows the lead provider to meet the requirements of all rules to oversee and manage the subcontractor.

Next steps

Lead providers who subcontract 16 to 19 provision, should make their own assessment about what constitutes distance and in doing so should have documentary evidence of how it will recruit, manage, and oversee that provision through the life of each learner's programme of study.

Lead providers will be expected to produce evidence of approval and arrangements for oversight should ESFA or Ofsted wish to see it and it will form part of our audit standard for subcontracted delivery (see proposal 9). We will challenge lead providers that have not sought advance permission and take action in accordance with provisions that will feature in our 2021 to 2022 arrangements, including intervention agreements and contracts. Providers seeking approval to either continue with 16 to 19 distance subcontracting or to embark upon new distance subcontracting arrangements should submit a written request as set out at annex b to subcontracting.requirements@education.gov.uk.

> Requests to continue with existing arrangements in 2021 to 2022 should be made by 31 May 2021.

Requests for new arrangements should be made with at least 12 weeks' notice prior to the planned start date of delivery.

As a minimum, the request should include:

- the extent to which the provision being made available is already available via other lead providers in the locality and is accessible to students in the area where the subcontract operates and why local provision is not meeting the students' needs
- the extent to which the lead provider is involved in delivery (for example teaching part of the programme or just providing financial and quality assurance)
- the amount of funding retained by the lead provider to cover the costs incurred in the management and administration of the contract
- the extent to which a gap in the provision of the type to be delivered under the proposed subcontract has been identified or supported by the local authority or an employer
- the location of delivery and the nature of travel to learn/travel to work patterns
- the extent of student contact with the lead provider
- the oversight arrangements in relation to the delivery of subcontracted provision

We will consider cases submitted and may seek additional information to assist in making our decision. Where arrangements for existing provision are not agreed, appropriate time will be allowed for the provision to wind down to ensure that existing learners are able to complete their programmes.

Where distance arrangements are agreed, providers will be required to ensure that the oversight and management arrangements are in line with our subcontracting controls guidance and updated subcontracting funding rules.

2.3 Proposal 3: Volume controls on the value of provision that can be subcontracted – excludes local authorities and ESF provision

We confirmed that we want to see a staged reduction in the volume of subcontracting across the sector overall and that we would take forward work this academic year to establish the right threshold for setting a cap on the volume of provision that could be subcontracted.

We asked all providers to produce a plan during the 2020 autumn term setting out how they will achieve a reduction in their volume of subcontracted activity over the next 3 academic years, using 2019 to 2020 as the baseline and reducing volumes through to 2022 to 2023. We confirmed we would undertake a random sampling exercise of plans early in the 2021 calendar year, to assist us in our assessment of the scale and pace of reduction of subcontracted activity across the sector.

Next steps

As set out in our response to the consultation, all providers should continue to make reductions to their volume of subcontracted activity across a 3-year period as we set out in our response document. Where this is not in line with one of the following rationales:

a. enhance the opportunities available to young people and adults

b. fill gaps in niche or expert provision, or provide better access to training facilities

c. support better geographical access for learners

d. offer an entry point for disadvantaged groups

> Providers should take steps to withdraw from such arrangements at a pace that does not disrupt existing learners' programmes. If providers feel they are unable to make a reduction, they should submit a written request, by 31 May 2021, as set out at annex c to subcontracting.requirements@education.gov.uk.

As a minimum the request should include:

- the educational rationale for the arrangement(s), supported by those charged with governance
- the management and oversight that is exercised in relation to the delivery of subcontracted provision
- the extent to which the lead provider is involved in delivery (for example providing financial and quality assurance)
- the amount of funding retained by the lead provider to cover the costs incurred in the management and administration of the contract
- the extent to which a gap in the provision of the type to be delivered under the proposed subcontract has been identified or supported by the local authority or an employer
- the extent of student contact with the lead provider

Methodology

We have undertaken an initial analysis of subcontracted activity across the 3 main funding streams, using 2019 to 2020 academic year as a baseline:

- for AEB and 16 to 19 this is based on learner numbers taken from ILR data
- there are complexities in making a comparable assessment about the volume of learners subcontracted in apprenticeships. For apprenticeships we have calculated what percentage of funding received as a lead is being used in subcontracted activity using the financial information in the subcontractor declarations

We will continue to review this data to understand progress and continue working towards a staged reduction. In doing so we will:

Current level of subcontracting	Action we will take
For those providers who are identified as currently subcontracting 25% or more in any funding stream	We will conduct a targeted exercise, writing to providers to request a copy of their reduction plan (if we do not receive an exemption case) to inform the progress that providers have made in their plans for a reduction across the 3 years that we asked for in our response document.
For those providers who are identified as currently subcontracting 25% or more in any funding stream	We will continue to undertake analysis of subcontracted activity each year, to inform the progress that providers have made in their plans for a reduction across the 3 year period.
For those providers who are identified as currently subcontracting 25% or more in any funding stream	Where providers are not reducing to 25% or less, we will reserve the right under our contractual clauses to impose additional conditions in relation to subcontracted provision.
For those providers who are currently under 25%	We will update our funding rules and agreements to make it a requirement for providers who are approaching 25% or over in any given funding stream to seek our prior permission to do so. In getting this permission, providers will be required to set out a case in advance of breaching the 25%. Further guidance in relation to this will be included in the updated funding rules for 2021 to 2022.

By 2022 to 2023, we do not expect any provider (excluding local authorities and ESF provision) to be subcontracting 25% or more of their provision unless they have written permission from us to do so.

2.4 Proposal 4: Whole programme subcontracting

We confirmed the introduction of the requirement for prior agreement for students whose whole programme of 16 to 19 provision is subcontracted. We said that we would also consider introducing the same requirement for AEB programmes that exceeded a specified guided learning hours (GLH) duration, effective from 2021 to 2022. We have concluded that introducing such a requirement for AEB programmes above a specified length is not practical and we will not be proceeding with this. Although we will not require prior approval for AEB or other funding streams, we would expect providers to assure themselves that any whole programme subcontracting delivery allows the lead provider to meet the requirements of all rules to oversee and manage the subcontractor.

Next steps

Providers seeking approval to either continue with whole programme subcontracting for 16 to 19 provision or to embark upon new whole programme subcontracting for young people should submit a written request as set out at annex d to subcontracting.requirements@education.gov.uk.

> Requests to continue with existing arrangements in 2021to 2022 should be made by 31 May 2021.

Requests for new arrangements should be made with at least 12 weeks' notice prior to the planned start date of delivery.

As a minimum, the request should include:

- the rationale for the arrangement and the management and oversight that will be exercised
- the extent to which the provision being made available is already available via other lead providers in the locality and is accessible to students in the area where the subcontract operates and why local provision is not meeting the students' needs
- the extent to which the lead provider is involved in delivery (for example providing financial and quality assurance)
- the amount of funding retained by the lead provider to cover the costs incurred in the management and administration of the contract
- the extent to which a gap in the provision of the type to be delivered under the proposed subcontract has been identified or supported by the local authority or an employer
- the extent of student contact with the lead provider
- the oversight arrangements in relation to the delivery of subcontracted provision

2.5 Proposal 5: Volume controls on the value of ESFA funds that can be held by a subcontractor

We said: we will monitor the volume/value of aggregate provision held by a single subcontractor and where that is above £3 million we will refer to Ofsted for inspection. We will reserve the right to take steps to reduce the value/volume where we consider the level of exposure to be too high.

Next steps

We expect subcontracting in the system to reduce overall but where there remain high value/volume subcontractors without a lead contract we will:

- review this at key points in the funding year, which may result in:
- a referral to Ofsted for a direct inspection
- direct action, such as requiring leads to reduce volumes with them

In taking action we will consider the oversight of the leads and the quality of subcontracted learner outcomes.

2.6 Proposal 6: Direct contractual relationships between lead providers and third parties providing specialist input

We said that we will require lead providers to have a direct contractual arrangement with a sports club where one is involved in the arrangement, and that there should be no financial transactions between a subcontractor and a sports club.

For 16 to 19 provision, where a sports club or another third party are involved in the delivery or associated activity with a learners' 16 to 19 study programme, lead providers should assure themselves that:

- all facilities are safe, suitable, and fit for purpose
- all safeguarding arrangements are robust
- parties are clear on the dividing line between activities for which ESFA funding is being claimed and activities which do not attract ESFA funding

Where the activities of a sports club or other 3rd party include the:

- option of work experience placements
- professional sports coaches to deliver the sporting excellence programme which includes physical and mental wellbeing, team coaching and competitive game fixtures

These activities are non-qualification hours. As such, this activity should be recorded on the ILR as employment, enrichment, and pastoral (EEP) activity as set out in the 16 to 19 funding guidance.

EEP is a funded part of a study programme, therefore a third party delivering such activity is now determined as a subcontracting arrangement. This arrangement is subject to meeting our subcontracting controls guidance, and the third party should be included in the subcontracting declaration made by the lead provider.

Next steps

We are working with the Football Association (FA) and AoC Sport to develop a good practice guide for sports provision which will be published in spring 2021. We recommend, where required, providers review their own practices against the guide.

Our subcontracting funding rules and contracts will be updated to make these direct contractual relationships a requirement. As such, we expect providers to consider the sorts of formal arrangements to put in place with clubs and other third parties for the 2021 to 2022 academic year.

2.7 Proposal 7: Introducing one set of funding rules for subcontracting

We confirmed that we will seek greater alignment of the rules and ahead of the 2021 academic year we will publish a single set of subcontracting rules that will contain the rules that apply across all provision types, and annexes by funding stream where particular rules apply. Where we can, we will seek to simplify and reduce the number of rules. In addition, we will be ensuring all related subcontracting pages are published in one place on GOV.UK to ensure all information related to subcontracting is stored in one place.

Next steps

We will publish the 2021 to 2022 subcontracting funding rules in spring 2021.

These will cover all post-16 provision excluding apprenticeships. Due to the involvement of the employer, including apprenticeships overcomplicates the one set of subcontracting rules. As such, apprenticeship subcontracting funding rules will remain within the overall apprenticeship funding rules document.

2.8 Proposal 8: Publishing information about funding retained

We confirmed we would extend the requirement to publish information about funding retained and charges applied by lead providers, to include 16 to 19 provision. We do not expect that figure to exceed 20% in any subcontracting relationship. This information should be published alongside your policy for subcontracting.

Next steps

We will be introducing one requirement which will apply to all funding streams ahead of the 2021 to 2022 academic year, this will be included in the one set of rules in spring 2021.

As set out in our response document, we expect providers to set out the full range of funding retained and charges that they apply including:

- funding retained for quality assurance and oversight
- funding retained for administrative functions such as data returns
- funding retained for mandatory training delivered to subcontractor staff by the lead provider
- clawback for under delivery or for other reasons

The link to where this information is published should already be included as part of a provider's subcontractor declaration and we will review this as part of our internal arrangements. We will reserve the right to challenge and potentially act with providers where we learn of cases where the funding retained exceeds 20% and offers little value.

We are also exploring directly collecting this information as part of the subcontractor declarations in the future.

2.9 Proposal 9: Introducing an externally assessed standard for management of subcontracting

We confirmed we will introduce an externally assessed standard for subcontracting which would effectively act as a license to practice once introduced.

Next steps

Prior to the consultation taking place, we required a copy of an external audit certificate in relation to providers subcontracting arrangements by 31 July each year, if they subcontract £100k or more of apprenticeships funding and/or £100k in AEB/ESF.

This year we have requested copies of all reports and action plans. Moving forward, our funding rules have been updated to reflect that we now expect the report and associated action plan to be sent to us. In addition, we have updated our guidance and certificate on GOV.UK to ensure better returns and allow key information to be captured.

We have analysed all 2019 to 2020 reports and action plans received to date, to inform the creation of an externally assessed standard and ensure we have oversight of the subcontracting market.

The current requirement specifies that a provider is in scope if they subcontract £100k or more of apprenticeships funding and/or £100k in AEB/ESF. We have aligned declaration years for 2020 to 2021 and the future which means we will now require an external audit report from providers who subcontract £100k or more of apprenticeship, AEB and ESF money as an overall aggregate amount.

We will be extending the requirement for a provider to send us an external audit report if they subcontract £100k or more, to include 16 to 19 provision from 2021 to 2022, this will be reflected in our rules.

Summary of changes and transition from report to standard

Year	Current requirement – External audit report	Externally assured standard
2019 to 2020	ESFA require a copy of the report by 30/09/2020 if: 1) subcontract £100k or more of apprenticeship funding, 2) and/or 3) subcontracts £100k or more of AEB/ESF funding. ESFA reserve the right to request copies of the report and associated action plan.	In development, utilising intelligence from the external audit report contents and working with internal/external stakeholders.
2020 to 2021	Requirement for AEB, ESF and apprenticeship provision to send certificate, report, and associated action plan to ESFA by 31 July 2021. Guidance and funding rules updated to reflect that it will now be £100k or more across all 3 funding streams. Updated certificate to ensure the ESFA has access to the correct information.	It is our intent to develop and publish the draft standard by 31 July 2021.
2021 to 2022	We will include this requirement in the 16 to 19 funding rules and the requirement will then become if you subcontract out £100k or more of apprenticeship, AEB, ESF or 16-19 funding (rather than looking at individual funding stream level) you must get an external audit report and certificate. These must be sent to ESFA by 31 July 2022.	The standard will be introduced, and we expect providers to start working toward this. It will not be subject to any external validation in this transitional year.
2022 to 2023	This requirement will be replaced by the externally assessed standard.	First year of being externally validated prior to ESFA accreditation of standard.

2.10 Use of brokers

We do not believe that the use of brokers is to the benefit of students or an appropriate way to use public funding. Lead providers should be selecting subcontractors fairly through a clear competitive or procurement policy.

A core principle of subcontracting is that all students in subcontracted provision are the students of the directly funded provider. The directly funded provider cannot delegate responsibility for those students. This includes selection and recruitment. A matching service, where students have been recruited prior to the involvement of the lead, fails to meet this core principle. We believe that brokerage activity encourages organisations seeking ESFA funding to recruit learners in the hope and expectation that they will secure access to funding through such an arrangement at a later date via a matching service, we do not consider this acceptable practice.

We have strengthened our levers to act and will do so where we find cases of provision being subject to brokerage.

The model funding agreements and contracts for the 2020 to 2021 academic year have been updated to reflect this position and are published on GOV.UK.

We will strengthen our subcontracting rules in 2021 to 2022 to clarify the following:

- lead providers should not allow a subcontractor to enrol students without their express written permission to do so, and with a clear agreement between the 2 parties that the students enrolled will be funded and supported for the duration of their programme of study
- organisations that do not have a signed subcontracting agreement with a lead provider for the necessary level of funding should under no circumstances recruit or enrol students to ESFA funded provision. To do so in the hope or expectation of securing a funding route later is to mislead students, who may not be funded
- organisations should not engage the services of a third party or broker to seek to secure funding from a lead provider

3. Next steps

We will continue its work to map out the work required to introduce the reforms set out above. This includes further changes to grant funding agreements and contracts, publishing one set of subcontracting funding rules for all post-16 funding streams (excluding apprenticeships), analysing risk and identifying non-compliance.

With regard to improving the timeliness and accuracy of our data in relation to subcontracting we will continue to develop the subcontractor declaration process. We have aligned our subcontractor declaration years for 2020 to 2021. All providers are now required to report their subcontractor declarations in academic year from 1 August 2020 to 31 July 2021. We opened our collection for this in January 2021 and all providers were required to make a return by Wednesday 17 February at the latest. Where these are not received ESFA will take action. We will then collect the final 2020 to 2021 position in June 2021. These declarations will be used internally to establish trends between 2019 to 2020 and 2020 to 2021 and we will be forensic in our examination of the data and information available to us to hold organisations to account. This includes utilising data available to us to improve our assessment of risk to identify problems earlier and intervene more quickly and decisively.

> Providers who do not think they can reduce their subcontracting should send their case to us by 31 May 2021. Providers who wish to continue with 16 to 19 distance or whole programme subcontracting should make a case to the agency by 31 April 2021. We will assess and respond to any cases made within 12 weeks.

As detailed in our Update Article of 9 September 2020, the Register of Training Organisations (ROTO) is being formally decommissioned on the 31 July 2021. For subcontractors who wish to deliver over £100k they previously have had to be listed on ROTO. We have now established what our interim measures will be until the externally assessed standard is, when it is introduced in 2022 to 2023 . We will pre-define a minimum level of due diligence and set out our expectations for financial monitoring/assessment that lead providers should conduct on their subcontractors. There is already a requirement to this effect. We will simply be more prescriptive to ensure that all subcontractors meet our minimum thresholds and conduct additional internal checks. This is consistent with the reforms in that the direct contractual relationship is between provider and subcontractor. We will be conducting some direct financial health checks on the largest subcontractors. The one set of subcontracting funding rules will be updated to reflect this alongside a further Update article and updates to the GOV.UK page.

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Coronavirus (COVID-19): guidance and support

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