

Guidance

Annex A: Role of those charged with governance in subcontracting

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1. Role of those charged with governance in subcontracting

1.1 Background and context

Earlier this year ESFA ran a consultation seeking views from providers who have an interest in subcontracted delivery to inform our thinking about reforms to subcontracting arrangements. In June we published our [response to the consultation exercise](#).

Over the next 3 years we will be implementing a series of reforms that will strengthen ESFA's oversight of subcontracting in the sector. We recognise that we cannot achieve our aims without the sector itself working towards the same outcomes.

We have been clear from the outset that we wish to see a significant reduction in the overall volume of subcontracted delivery in the sector, and that is why we have asked that all providers review their existing subcontracting activity (2019 to 2020) and take steps to reduce that activity across the following 3 years up to 2022 to 2023, ending on 31 July 2023. We will apply a cap on the volume of subcontracting and will take forward work this academic year to establish the right threshold for that cap and timescales for a staged reduction.

For academic year 2020 to 2021, we have:

- required all providers to publish a clear educational rationale for their subcontracting position on their website alongside their management fee structure and a list of subcontracting partners, by 31 October 2020
- clarified that the use of brokers to source a subcontracting partner is not permitted and will be treated as a breach of contract/funding agreement

As we have set out in our response to the consultation exercise, the other reforms will be introduced over the next 2 to 3 years. We will publish further details about how those changes will be implemented later this year.

1.2 Guidance for those charged with governance

In our response we committed to produce guidance for governors, setting out the core activities that we would expect governors to be involved with in their oversight of the subcontracting policy, rationale, strategy and management of their provider. As not all providers have governors, we have expanded this guidance to cover "those charged with governance". It is important that you take an active role and consider all of these points as this will be assessed as part of the external standard.

Those charged with governance are those with responsibility for overseeing the strategic direction of the provider and obligations related to the accountability of the provider. This includes overseeing the financial reporting process. Those charged with governance can include, but is not limited to:

- college governors/boards
- Executive Board of Directors
- Audit Committee

The activities set out in this short document are not intended to be exhaustive, but highlight key activities that those charged with governance should be engaged in. The core functions and responsibilities of those charged with governance include:

- setting and communicating your provider's strategy, goals, and, where relevant, educational character
- holding executive leaders to account for the educational performance and quality of your provider, and for the performance of staff
- exercising effective control to ensure that funds and assets are protected, and legal obligations are met

Having an oversight of subcontracting activity is an integral part of these core functions.

1.3 Setting the strategy and agreeing the published rationale

Those charged with governance should play a key role in this process which should be undertaken annually to inform the strategy for the forthcoming academic year. There should be a sound rationale and strategy for subcontracting which is aligned to the provider's strategic and operational objectives.

1.4 Core principles and considerations

Subcontracted provision should be an integral part of the curriculum offer of the lead provider. As such, those charged with governance should ensure the curriculum directors have appropriate involvement and oversight.

Subcontracted students are students of the lead provider and the offer for them should be as carefully constructed and scrutinised as for students attending the lead provider.

Subcontracted activity should be by exception to meet one of the following:

- enhance the opportunities available to young people and adults
- fill gaps in niche or expert provision, or provide better access to training facilities
- support better geographical access for learners
- offer an entry point for disadvantaged group

In developing the rationale, those charged with governance should consider what sort of provision should be secured that will provide a more coherent curriculum offer to the community and employers. It should be ensured that the tender specification meets the needs of the lead provider.

- look at your provider's mission statement and strategic objectives and consider how subcontracted activity could support these and add value.
- look through your provider's prospectus. How does the curriculum offer support the economic and social development of the community? What are the gaps that subcontracting could fill?

Subcontracting should not be entered into for financial reasons alone.

Subcontracted provision carries an inherently higher risk than provision delivered on the provider's premises by employees of the provider. As such, there should be appropriately recorded consideration of risks. The risks increase where subcontracted provision is:

- delivered away from the organisation's main premises and increases the further the distance; and
- for the whole of a learner's programme of learning activity

Those charged with governance should also understand and sign off on the provider's position on funding retained. There should be a clear rationale/calculation for the percentage of funding that is retained for the management and oversight of subcontracted provision. This may vary from one subcontractor to another depending upon the amount of administration and oversight required. 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.

1.5 Selection of subcontractors

We expect subcontracted provision to arise from an identified need by the provider, this should form part of the strategy discussion and agreement on the tender specification.

If it is determined that there is a need to subcontract, those charged with governance should satisfy themselves, prior to delivery commencing, that the selection of any subcontractor has been carried out fairly, transparently and in open competition. The selection process should establish the subcontractor's capacity, capability, and all other factors contained in the contract. They should be clear about the criteria for selection and how the preferred subcontractor best met those criteria, including ensuring the appropriate levels of due diligence and financial health checks are conducted.

Those charged with governance should also ensure there is sufficient staff capacity and capability in place to manage the contracts when they are let. The staff managing the contracts should have a detailed knowledge of the contract and other relevant issues, such as service level agreements, requirements in line with ESFA contracts, funding rules and ongoing supplier performance. They should have the appropriate skills (both specific contract management and more general commercial awareness and expertise) with access to relevant training and development and should have the appropriate level of delegated authority to manage the contract effectively.

Subcontractors should only recruit learners once there is a written agreement in place between the lead provider and the subcontractor and not before or after the contract has expired. That agreement should specify the maximum number of learners the subcontractor may recruit.

1.6 Ongoing scrutiny of subcontracted provision throughout the year

All subcontracting must be appropriately recorded in the ILR and be properly declared to us at least twice a year via the subcontractor declarations. Those charged with governance should assure themselves that all subcontracting returns are accurate.

You should expect to receive reports about subcontracted provision at meetings at least quarterly. Reports should include details about:

- the number of students recruited and retained
- the qualifications being undertaken
- key performance indicators (KPIs) including results/progression of students
- how the executive is exercising oversight of delivery and managing the contract
- payments made to subcontractors, including subcontracting income

Those charged with governance should look at the overall volume of its subcontracted delivery in financial terms as part of its financial oversight and ensure that it is a reasonable proportion of total delivery. Those charged with governance need to be clear that they understand the dependency on subcontracting and financial implications of that.

Those charged with governance should also be cognisant of the total volume of subcontracting that any subcontractor they contract with is reasonable and their oversight is proportionate for example subcontractors serving multiples of leads.

Those charged with governance should be assured that students are safeguarded and are able to access financial and learning support in the same way as those attending the lead provider. There should be clear processes in place to handle operational problems and a resolution process to resolve issues as quickly as possible.

There should be an identified lead in the provider's senior management team for subcontracting.

1.7 Annual review and updating the rationale

Those charged with governance should engage in a year-end review of subcontracted activity, using clear, objective, and meaningful metrics - considering the performance of the subcontractor(s), the success rates of subcontracted learners, progression of the learners and the fit with the providers rationale.

This review should then feed into an annual consideration of changes to rationale and existing arrangements.

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