



Education
Funding
Agency

Funding guidance for young people 2014 to 2015

**Sub-contracting control regulations from 1
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Contents

Sub-contracting control regulations	3
Aim of this document	3
Scope of this document	3
Provision outside the scope of this document	4
Direct delivery definition	4
Sub-contracted delivery	4
Why the EFA require additional controls and procedures in respect of sub-contracted provision	4
EFA penalties for failure to comply with Funding guidance for young people including these sub-contracted control regulations	5
Ineligible provision	5
Management, monitoring and control	5
Advice for heads of directly funded institutions (Accounting Officers) on managing sub-contracted provision	6
Distant sub-contracted delivery	7
Additional controls and procedures for all sub-contracting	8
Procurement	8
Due diligence	9
Contracts	10
Controls over students, tutors and provision	10
Controls over qualifications and curriculum	11
Other EFA-funded students	11
Monitoring (control) visits and spot checks	12
Sub-contractors with multiple institution contracts	13
Declaring sub-contracting provision	13

Sub-contracting control regulations

1. This document is one of four booklets issued by the Education Funding Agency (EFA) that outline the main features of the EFA funding arrangements for young people each year. These are an integral part of the EFA's funding agreements for young people aged 16-19 and those aged 19-24 funded by the EFA. The following documents comprise the complete suite of EFA funding guidance for young people:

- Funding regulations
- Rates and formula
- ILR funding returns
- Sub-contracting controls regulations (this booklet)

Aim of this document

2. This document sets out the Education Funding Agency (EFA) additional compliance and control regulations for all directly funded institutions that use third parties to deliver provision that is funded by the EFA. Directly funded institutions include all institutions that are either directly funded by the EFA or are directly funded by local authorities using EFA funding that includes all maintained schools, academies, free schools, sixth form and FE colleges and independent institutions. Institutions with no third party delivery arrangements will not need to use this document.

3. This document forms part of the funding arrangements between the EFA and all directly funded institutions that have sub-contracted a proportion of their EFA funded provision for young people. Directly funded institutions, depending upon the type of the directly funded institution, agree to apply this compulsory guidance in one of the following documents "Conditions of Funding Agreement", "Conditions of Funding Grant", "Funding Agreement" or in the "Contract for Services"

Scope of this document

4. This document is written to explain the additional management controls and procedures required by the EFA from our directly funded institutions over their individual sub-contracting arrangements. The additional management controls and procedures in this document are compulsory for all directly funded institutions.

5. The eligibility of any provision for EFA funding is covered in separate EFA documents (incorporated into the funding arrangements) and all EFA funded sub-contracted provision must firstly be eligible for funding under these documents.

6. All education and training delivered by organisations without direct funding from the EFA (except schools funded by the EFA through their local authority and arrangements described in paragraph 7 below) should be treated as sub-contracted provision and be subject to the arrangements set out in this document.

Provision outside the scope of this document

7. These regulations do not apply where directly funded institutions agree to collaborate with each other in their individual local delivery arrangements to students. Collaborative arrangements are those where two (or more) EFA directly funded institutions agree to share part of the delivery of education and training to students, where the majority of each student's education and training is delivered by the students home institution and where the home institution records the student on either the ILR or school census for funding purposes.

Direct delivery definition

8. Direct delivery arrangements are where institutions use their own staff in their own buildings. This includes buildings that form part of the institution's own infrastructure that may be rented or leased, usually on a long-term basis.

Sub-contracted delivery

9. Sub-contracted delivery, for the purpose of this document, is characterised as provision delivered away from the main institution sites by a third party organisation with whom the directly funded institution has entered into contractual arrangements for the delivery of a proportion of the education provision funded by the EFA, and for which payments are dependent on student numbers and/or formula funding values

10. The EFA expects the amount of funding retained by the directly funded institution to be proportionate to the costs they incur in the management and administration of the contract, to be determined by the due diligence and risk assessment process.

Why the EFA require additional controls and procedures in respect of sub-contracted provision

11. Some sub-contracting arrangements have created substantial financial and reputation issues for institutions in the past, particularly where the sub-contracted delivery has taken place at a distance from the directly funded institution. One such concern, in particular, is how the funding body has assured the proper use of the public funding where funding is being transferred by publicly funded institutions to the private sector. The EFA expects all sub-contracted delivery to be properly monitored and

controlled by all directly funded institutions and requires no artificial distinctions or distortions in describing delivery arrangements so as to avoid the application of these regulations.

12. In instances where the EFA has concerns about a sub-contracting arrangement between a directly funded institution and a third party, an assessment will be undertaken to determine if the arrangements comply with the detail, spirit and intention of this guidance. Such an assessment will take into account the funding eligibility, the management and control of the contract and the overall quality of the education and/or training being delivered under the sub-contracting arrangement.

EFA penalties for failure to comply with Funding guidance for young people

13. The EFA reserves the right to take a range of actions (in accordance with the funding contract) where institutions are not compliant with the guidance set out in this document, relating either to ineligible provision or failures in management and control of the provision.

Ineligible provision

14. For non-existent or ineligible sub-contracted funding activity either recorded or claimed by funded institutions, the EFA will seek recovery of funds paid for the ineligible activity or students, including grant-in-aid funding not usually subject to any reconciliation arrangements. This is usually through adjusting lagged funding values but in the case of serious error or irregularity the EFA may remove the grant-in-aid institutions from lagged funding and require in-year funding recovery as set out in Funding ILR Returns book. Where ineligible activity has been recorded in funding returns the EFA will normally recover any funding associated with the ineligible activity for the current year, and up to six previous funding years, in accordance with normal public sector accounting rules for the protection of public funds.

Management, monitoring and control

15. For sub-contracted provision that meets EFA expected quality standards for the delivery of education and /or training but where the directly funded institution has failed to apply the necessary management, monitoring and control over the sub-contracted delivery, as set out in this document from paragraph 25, the EFA may move the student numbers and associated funding away from the directly funded institution and/or also require the institution to discontinue the sub-contracting arrangement either with immediate effect or from the end of the current funding year.

16. Where an institution is deemed to have failed, namely is assessed by Ofsted as overall inadequate or fails to meet 16-18 national minimum standards, or any other quality threshold set out by the DfE/EFA or an institution is in financial failure as assessed by EFA, it will be subject to DfE's intervention policy and recruitment restrictions may be applied. In considering what intervention action may be taken the EFA will consider the sub-contracted provision under the control of the institution to also be treated as inadequate. The institution may not enter into any new, or extend existing, EFA-funded sub-contractor arrangements. The funding agreements set out the action that may follow intervention.

17. For sub-contracted provision that fails to meet the EFA expected quality standards for the delivery of education and /or training the EFA may remove the student numbers and associated funding from all calculations of lagged funding allocations for the directly funded institution and/or also require the institution to discontinue the sub-contracting arrangement either with immediate effect or from the end of the current funding year.

Advice for Accounting Officers of directly funded institutions on managing sub-contracted provision

18. The EFA guidance on the checks expected by EFA-appointed programme and funding auditors over sub-contracted delivery arrangements is made available in this document to the heads and chief executives of institutions (Accounting Officers in grant-in-aid institutions) in order to avoid any of the EFA sanctions set out in the funding arrangements, including the above paragraphs. This advice also applies to the lead institution for all sub-contracted delivery.

19. Institution management (including where operating as the lead institution) are required to satisfy themselves of the following.

- that all sub-contracted delivery arrangements comply with the evidential requirements set out in companion document Funding regulations: Section 6: Evidence of student existence and eligibility.
- that the controls set out in this document are in place and operating for all sub-contractor arrangements.
- that institution management are making appropriate systematic checks to ensure that students enrolled by sub-contractors on their behalf and recorded in their records are correctly described in their own student record system and were actually receiving the scheduled provision described.

20. When appointing subcontractors the institution management must take steps to avoid any conflicts of interest and/or any circumstances (for example, common directorships) which might give rise to an actual or perceived conflict of interest.

21. Institution management are also required to satisfy themselves that the detailed guidance in this document in paragraphs 41 and 50 has been appropriately carried out and for lead institutions that they have ensured there is no risk of double funding for sub-contractors with multiple sub-contracts with directly funded institutions.

Distant sub-contracted delivery

22. There are inherent difficulties for directly funded institutions in exercising the appropriate levels of control over distant sub-contracted provision, thereby increasing the risk of poor provision being delivered and/or funding irregularity. For these reasons the EFA will not normally fund provision sub-contracted by institutions outside their normal recruitment areas. Normal recruitment area means the area from which most EFA funded students travel to learn at the institution and this is explained in companion document Funding Regulations Section 3. For institutions with sub-contractors that recruit students outside their normal recruitment area the advice in this document under the heading: 'Sub-contractors with multiple institution contracts' is intended to assist such institutions in making sure they are only recording eligible students within their funding data returns.

23. If the institution believes there is good reason for the EFA to fund sub-contracted provision of a whole programme to be delivered outside their normal recruitment area then the institution must seek EFA's agreement in principle in advance of delivery. EFA will consider applications made on the distance sub-contracting form available with this document from the website. This must be sent to the EFA territory email address at least 8 weeks before the start of any planned delivery. Until the EFA agreement in principle is made, which may be delayed if the application is not made on a timely basis or the EFA requires further clarification of the application and the EFA decision has been notified to the institution, all distant sub-contracting may be ineligible for funding and any such students included in data funding returns may be excluded by the EFA in current and future funding allocations.

24. A range of relevant factors will be considered by the EFA when deciding whether provision delivered outside their normal recruitment area may be included in funding returns, including but not limited to:

- that the provision must comply with the principles of study programmes as set out in Funding Regulations;
- the extent to which the directly funded institution is involved in delivery (for example teaching part of the programme or just providing financial and quality assurance);
- that the amount of funding retained by the directly funded institution is proportionate to the costs they incur in the management and administration of the contract;
- the extent to which the provision being made available is already available via directly funded institutions in the locality and is accessible to students in the area where the proposed subcontract is to operate;

- 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; and
- the extent of student contact with the parent directly funded institution.

Additional controls and procedures for all sub-contracting

Procurement

25. All institutions must ensure that that they comply with relevant procurement regulations. Each institution must ensure that their sub-contractor(s) have been selected fairly and have sufficient capacity, capability, quality and business standing to deliver the provision that is being sub-contracted. All publicly funded bodies must ensure they comply with relevant UK and European regulations when procuring the services of a sub-contractor.

26. An institution must not contract with any sub-contractor inspected in its own right and found to be inadequate or under-performing by Ofsted. The institution must ensure that their contract allows for immediate or early termination in all such circumstances.

27. Institutions must take all necessary steps to verify any actual or perceived conflicts of interests in potential sub-contractors, and eliminate such sub-contractors from the process.

28. How institutions choose to meet these procurement requirements and monitor them is a matter for them to determine. However, the EFA reserves the right to ask all institutions for additional evidence that support their decisions within this process to resolve any eligibility issues.

29. Institutions remain responsible for checking the details provided by the successful sub-contractor and neither the EFA nor the Secretary of State will accept any liability in respect of the directly funded institution procurement of any sub-contractor.

30. For the delivery of Traineeships using sub-contractors the following **additional conditions** must be met:

- you can enter into a new sub-contracting arrangement with an existing sub-contractors as at 1 June 2013;
- if you want to enter into a new sub-contracting arrangement with a new sub-contractor for traineeships then both the directly funded institution and the sub-contractor must have present Ofsted inspection grade of Outstanding (Grade1) or Good (Grade 2);

- as with the delivery of other study programmes, institutions must not sub-contract to a provider that is graded inadequate for overall effectiveness and /or a provider under a Notice of Concern.

31. Where academies are funded on the basis of their estimates of student numbers (as specified in the Funding Agreement) provision delivered with a sub-contractor will not normally be acceptable if it takes student numbers above the number that would have been the basis of funding had the academy been funded on the basis of the census.

Due diligence

32. Institutions are responsible for carrying out their own due diligence to manage the reputational and other risks of contracting with the proposed sub-contractor. This process will consider non-financial as well as financial issues. The governing bodies of colleges, schools and academies will wish to determine the nature and extent of these procedures but in financial terms they would be expected to include the steps set out below.

33. Contracts should only be awarded to registered companies or charities. The status of companies should be recorded as “active” on the Companies House register.

34. The financial health of the proposed sub-contractor must be assessed to ensure that they have the financial standing and capacity to deliver the sub-contract. This will involve obtaining and reviewing their statutory accounts (financial statements), and possible reference to credit agency checks. Extreme caution must be exercised where a credit agency limit is low, or where the company has high levels of borrowing or poor indicators of financial solvency.

35. In addition contracts must not be awarded to companies with:

- risk warnings (i.e., above average risk warning from an agency),
- legal notices (i.e., intention to dissolve, winding up petition/order, compulsory or voluntary liquidation, etc), or
- overdue statutory accounts.

36. Contracts must not normally be awarded to brand new companies:

- who are yet to submit their first statutory accounts, or
- who have a legal relationship with a company falling into categories listed above.

37. In an exception where an institution wishes to contract with a newly established company, it will obtain sufficient information to verify financial capacity, e.g. through a costed business plan.

38. In order to gather information about the proposed sub-contractor institutions may wish to refer to the Register of Training Organisations (TRoTO) maintained by the Skills

Funding Agency. This would provide some assurance that an organisation included on TRoTO has successfully passed a due diligence process and has had their capability to deliver programmes assessed by another funding body.

Contracts

39. As part of showing compliance with this guidance institutions must have a written contract governing their sub-contractor arrangements which clearly sets out the respective responsibilities of both the institution and the sub-contractor. This contract must entitle the institution to exercise the management controls over the sub-contractor's activity, including access by auditors appointed by either the institution or the funding body. Each institution will wish to take its own legal advice before entering into contracts.

Controls over students, tutors and provision

40. Additional controls in respect of subcontracted provision are required for a number of reasons:

- to ensure that the quality of the education provision delivered through a subcontracting relationship is actively managed and monitored by the directly funded institution to the same standards as directly delivered provision
- to ensure that the risks to public funding are actively managed by the directly funded institution
- to protect the reputation of the sector, individual institutions and the EFA

41. The management and control exercised by the directly funded institution must be able to demonstrate the following key elements are in place:

- an institution being able to enrol or reject students as it would do if the students were to be taught on its own site,
- a learning agreement, signed by the student, entered into at the time of enrolment that reflects the outcome of initial guidance and assessment (IAG) for an individual student and sets out their study programme,
- that the student eligibility for EFA funding is confirmed through their individually signed enrolment form and/or learning agreement;
- a learning programme and its means of delivery that have been clearly specified by the institution,
- arrangements for assessing the progress of individual students, and
- procedures for the institution to regularly monitor the delivery of programmes provided in its name.

42. Sub-contractors must not sub-contract the delivery of EFA-funded provision to other organisations or self-employed individuals;
43. The delivery of provision will be by the sub-contractor's directly employed staff. In the case of volunteers, the control will be 'as if they were employed'.
44. It is not acceptable for any management control activities to be undertaken by any institution staff with a financial interest in their sub-contractor. This includes the signing of time sheets or invoices as well as organising and/or performing any monitoring visits about the sub-contractor delivery.
45. If the trainers used normally provide their services as self-employed contractors, the sub-contractor must create an employment relationship with them.

Controls over qualifications and curriculum

46. The directly funded institution should normally be the centre approved by the awarding body for the qualifications being offered by means of sub-contracted provision. The institution should be able to demonstrate that it is monitoring the activities of the approved centre, in particular its relationship with the awarding body, and that it is exercising control over, and making appropriate arrangements for, the quality assurance of all provision.
47. Where the institution is making sub-contracted provision in curriculum areas not normally covered by the institution, it must be able to demonstrate that it can exercise effective control over the provision. In these circumstances the institution should employ an independent person with appropriate expertise in the curriculum area to provide advice on sub-contracted arrangements and undertake the necessary checks on the operation of the arrangements, including monitoring of the quality of provision. This person must not have a financial relationship with the sub-contracted firm or organisation.

EFA-funded students attending more than one institution

48. All the funding for an EFA funded student must be drawn down by that student's 'home' institution. A student cannot enrol at more than one directly funded EFA institution for different components of their programme of study. Where a student is attending different institutions for different components of their programme of study, the home institution should record all these components, and indicate on the individualised learner record (and, for schools and academies, on the census from 2015 to 2016) which elements are delivered via a sub-contracting arrangement (see paragraphs 60 and 61). Institutions should ensure that before any EFA funding is claimed for any sub-contracted students no 'double funding' is being claimed for them, that is, they should be assured that the sub-contracted students are not enrolled, and being funded by the EFA via

another institution. No funding should be recorded for any additional study programmes (such as additional learning aims) for students already enrolled at other funded institutions in the funding year. All individual students recorded for funding purposes must have the correct unique learner number recorded.

Monitoring (control) visits and spot checks

49. Institutions must address all the monitoring, management and control issues over their sub-contracted delivery set out in this document for themselves. The following paragraphs give some advice on the management controls and monitoring required from EFA-funded institutions on their sub-contracted delivery arrangements.

50. Spot-check visits should be carried out regularly in cases where the provision runs throughout the year. In other cases, the scheduled spot-check visits should take account of the pattern of provision so that they are applied to a significant proportion of students on a regular basis. Systematic spot-check visits should involve the institution making unannounced visits in-year to each sub-contractor. A sample of sites must be included for provision being delivered by each sub-contractor, rather than simply revisiting the same site. The checks should be proportionate to the risk and volume of the provision and contract. They should also be undertaken during the year at times that are proportionate to the periods in which funding is being claimed.

51. Institutions should ensure that they meet and interview a sample of students and staff. Students should be asked to name the institution they are enrolled at, and should also be asked if they are at the same time, or have been recently, a student at another EFA-funded institution. Other evidence sought should include marketing material, copies of registers, learning agreements, registration documents for awarding bodies, visit notes from external moderators and evidence of certification.

52. Systematic checks should be used to confirm that the provision exists and is consistent with the institution's expectations and records. The number and characteristics of students should accord with the institution's expectations and records. For example, any obvious mismatch between the apparent and expected age of the students should be investigated.

53. The EFA funded institution must carry out an investigation, at their own cost, if there is any evidence of a subcontractor's irregular financial or delivery activity and report the outcome of the investigation, in writing, to their EFA territorial relationship contact within 10 days of the investigation ending.

54. Monitoring of provision should include checks on eligibility of provision and direct observation of the initial guidance and assessment process and at appropriate intervals, of the delivery of the learning programmes. Monitoring activities should be similar to

those considered appropriate for external verification or moderation, sufficient to ensure that student progress can be monitored, and used to gather regular student feedback.

Sub-contractors with multiple institution contracts

55. Directly funded institutions are advised to establish which of their sub-contractors work with other directly funded EFA institutions. Sub-contracted provision (particularly distance provision) has had the highest number of historic ineligible double funding problems and the EFA regards such arrangements as high risk. The EFA expects any institution with sub-contracted provision to use the advice below to reduce their risk in recording ineligible provision. If double funding occurs then the EFA will treat the distant delivery as ineligible for funding.

56. The EFA regard the best practice for this control activity to be that a sub-contractor should report on a regular basis to each EFA directly funded institution with which it has a sub-contract. The report should confirm the volume and value of all contracts, and to confirm that no individual student is being claimed for from more than one institution. Institutions should find that accurate recording, use and exchange of unique learner numbers (ULNs) simplifies this work in 2014 to 2015.

57. The institution with the largest contract (or the longest historical contract) shall usually be regarded by the EFA as having the main responsibility for the provision where any necessary funding audit work is required. For these purposes, institutions should treat all companies or organisations that are in the same common ownership or control as one sub-contractor,

Declaring sub-contracting provision

58. For this year only the EFA will collect information about estimated subcontracted provision at the start of the year pending full data collection later in the year so that the EFA has an early estimate of the amount of sub-contracting in the sector. All colleges and charitable and commercial providers that plan to enter into or continue with existing local sub-contracting arrangements in the funding year should complete the sub-contracting annex when returning their signed funding agreement. The annex asks for some basic information including the name, address and UKPRN of the sub-contractor(s), the estimated volume of provision and associated funding, and the percentage of funding to be retained by the directly funded institution as a management fee.

59. For all proposed and existing distance sub-contracting, institutions should seek EFA agreement in advance each year as set out in this document.

60. For all institutions that submit an ILR return, sub-contracted provision should be recorded in line with the published ILR guidance.
61. For schools and academies, an additional field will be included in the census returns with effect from 2015 to 2016.



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