



Education
Funding
Agency

Funding guidance for young people 2016 to 2017

**Sub-contracting control regulations from
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Sub-contracting control regulations

1. This document is one of 4 main booklets issued by the Education Funding Agency (EFA) that outline the main features of the EFA funding arrangements for young people each year. The regulations set out in this document are an integral part of the EFA's funding agreements for young people aged 16 to 19 and those aged 19 to 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)

2. This document gives notice of 2 significant new restrictions. The first applies to maintained schools and academies that have whole programme sub-contracting arrangements (both local and at a distance) and maintained schools and academies are advised to ensure that they note those changes and take the required actions as set out in paragraphs 24 to 31. The second applies to colleges sub-contracting provision wholly or substantially to a special school for provision for 19 to 25 HNS and colleges are advised to ensure that they note those changes and take the required actions as set out in paragraphs 32 to 36.

3. This document explains the additional management controls and procedures required of EFA funded institutions over their individual sub-contracting arrangements. The additional management controls and procedures in this document are compulsory for all directly-funded institutions.

4. All post-16 EFA funded provision sub-contracted by directly-funded institutions must comply with the eligibility and other requirements set out in the funding regulations and rates and formula guidance. Each directly-funded institution is fully responsible for all aspects of the provision delivered under sub-contracting arrangements, including all aspects of student and programme eligibility, performance and safeguarding of young people. In accordance with funding regulations paragraph 16 no tuition fees may be charged to any student attending any course at an institution receiving either direct or sub-contracted funding from the EFA.

5. All education and training delivered by organisations without direct funding from the EFA should be treated as sub-contracted provision and be subject to the arrangements set out in this document unless it falls within the exceptions in paragraph 8.

Aim of this document

6. This document sets out the 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.

7. 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 agree to apply this compulsory guidance in accordance with one of the following documents “Conditions of Funding Agreement”, “Conditions of Funding Grant”, “Funding Agreement” or in the “Contract for Services.”

Provision outside the scope of this document

8. 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 2 (or more) institutions directly-funded by EFA 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

9. 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 including any that may be rented or leased, usually on a long-term basis.

Sub-contracted delivery definition

10. Sub-contracted delivery, is defined as provision delivered by a third party organisation with whom the institution directly-funded by EFA 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.

11. 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, and to be determined through due diligence and risk assessment processes.

Declaring sub-contracting provision

12. All institutions receiving EFA funding must record sub-contracted provision in line with the published guidance for completion of the school census and of the ILR.

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

13. 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 independent sector. The EFA expects all sub-contracted delivery to be properly monitored and controlled by all directly-funded institutions and requires that no artificial distinctions or distortions in describing delivery arrangements are made so as to avoid the application of these regulations.

EFA intervention

14. In instances where the EFA has concerns about a sub-contracting arrangement between an institution directly-funded by EFA 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, the welfare of the young people involved, their access to the full entitlement of study programmes and student support, 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

15. The EFA reserves the right to take a range of actions (in accordance with the funding agreement/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

16. For non-existent or ineligible sub-contracted 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 also remove the grant-in-aid relationship and require in-year funding recovery. 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 6 previous funding years, in accordance with normal public sector accounting rules for the protection of public funds.

Management, monitoring and control

17. For sub-contracted provision that meets EFA expected quality standards for the delivery of education and /or training but where the institution directly-funded by EFA has failed to apply the necessary management, monitoring and control over the sub-contracted delivery, as set out in this document from paragraph 43, the EFA may move the student numbers and associated funding away from the directly-funded institution. The EFA may also require the institution to discontinue the sub-contracting arrangement either with immediate effect or from the end of the current funding year.

18. Where an institution is deemed to have failed, namely is assessed by Ofsted as overall inadequate or fails to meet 16 to 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.

19. 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

20. Heads and chief executives of directly-funded institutions (accounting officers in grant-in-aid institutions) need to ensure full compliance with this guidance regardless

of whether any funding audit work on the delivery has been commissioned by the funding body. This advice also applies to the lead institution where sub-contractors have multiple contracts for the delivery of EFA funded provision. The lead responsibilities are set out in paragraphs 72 to 74.

21. Institution management are required to satisfy themselves of the following:

- 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
- the controls set out in this document are in place and operating for all sub-contractor arrangements
- they 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

22. When appointing sub-contractors 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.

23. Institution management are also required to satisfy themselves that the detailed guidance in this document from paragraph 58 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.

Notice of significant new restrictions on sub-contracting activity affecting maintained schools and academies

24. The EFA has reviewed the increasing volume of sub-contracting activity undertaken by maintained schools and academies. We have concluded that the legislation on pupil registration and attendance means that the practice of sub-contracting the whole of a young person's programme by maintained schools and academies must cease as soon as is practicable. All such arrangements must cease in their entirety by the end of the 2017 to 2018 academic year.

25. The reason that we require this activity to cease is to ensure maintained schools and academies are compliant with the Education (Pupil Registration) (England) Regulations 2006. These regulations apply to academies and maintained schools, cover the age range up to 18 and state that a school's roll can only include 'pupils at the school'. Section 3 of the Education Act 1996 defines 'pupil' as someone 'for whom education is being provided at the school'.

26. The Regulations and the 1996 Act make clear that pupils should physically attend the school for at least some of the time. Although schools have powers to

arrange some educational activities away from their premises, these are not intended to allow the whole of a pupil's education to be delivered somewhere, and by someone, other than the school. This means that all whole programme sub-contracted provision is in breach of the regulations.

27. We will continue to allow sub-contracted provision in maintained schools and academies provided it is compliant with this regulation, ie the pupils under the sub-contracted arrangement attend the school 'at least some of the time'. Our expectation, and for these purposes our definition of what is meant by 'at least some of the time' is that students will be attending the school or academy for an element of their programme throughout the academic year. Attendance at the school or academy should be at least once a week for the provision not to be considered whole programme sub-contracted activity.

28. We therefore expect maintained schools and academies to cease sub-contracting of the whole of a student's programme as soon as possible. We recognise that there may be circumstances where this is not possible immediately without significantly disrupting a young person's programme of study.

29. No new contracts for whole programme sub-contracting arrangements should be entered into from the end of July 2016. Any existing contracts for 2016 to 2017 may continue for that year and we will consider wind down arrangements in exceptional cases for 2017 to 2018 on a case-by-case basis.

30. All schools and academies with whole programme sub-contracting arrangements for 2016 to 2017 must inform us of those arrangements by the end of September 2016. In addition, schools or academies wishing to continue those arrangements for 2017 to 2018 (only) should set out their case to the EFA. We will consider any whole programme sub-contracted provision in 2017 to 2018 that has not been approved for wind down to be ineligible for funding.

31. For the avoidance of doubt, this restriction only applies to whole programme sub-contracting arrangements. We do not propose to prohibit collaboration with local partner schools, or sub-contracting with other local partners for some elements of a student's programme, where this is serving their educational needs and is managed and monitored in line with this guidance.

Sub-contracting 19 to 25 high needs provision to special schools

32. In 2014 the DfE legislated to restrict local authorities in their funding of special schools in respect of 19 to 25 year old students. This restriction effectively prevents special schools from routinely enrolling young people aged 19 to 25. This was in support of the objective of the SEND reforms to prepare young people for adulthood. Allowing students to potentially remain in a single setting from age 5 to 25 could

severely prejudice their chances of preparing for employment and independent living, and would simply push back the 'cliff edge' described by many parents when their children leave education. Requiring young people to move into further education if their Education, Health and Care (EHC) plans are continued post-19 is far more likely to prepare them for adulthood. This provision, where appropriate, should include opportunities to experience the world of work, develop independent living skills and make independent choices and decisions in an adult context.

33. We do not expect colleges to enter into sub-contracting arrangements with special schools for the whole, or for a substantial proportion of a students' programme where they are aged 19 to 25. Where such arrangements are currently in place, there should be no further recruitment by colleges or schools on this basis and the arrangement should be wound down. Special schools have the option if they wish to set up a legally and financially separate entity to make provision for 19 to 25 year olds as advised in the [High needs funding: operational guide 2016 to 2017](#) on GOV.UK.

34. Colleges that currently have such arrangements with special schools are required to provide details to the EFA by the end of 30 September 2016 and to indicate the wind down period required for that arrangement, which should be no longer than 2 years.

35. Arrangements may continue between colleges and special schools for part of a students' programme, where appropriate, for example where this is serving the student's educational needs, eg to access a sensory room or speech and language therapy. Such arrangements should not be for more than one day per week.

36. We will also continue to allow students to stay on for another year at a special school to finish a course of secondary education started before they were 18.

Prevent duty

37. The [prevent duty](#), which requires that institutions, when exercising their functions, to have due regard to the need to prevent people from being drawn into terrorism, extends to any sub-contracted provision. It is a condition of funding that all further education and independent training providers must comply with relevant legislation and any statutory responsibilities associated with the delivery of education and safeguarding of learners, and this includes learners receiving provision under a sub-contracting arrangement.

Distant sub-contracted delivery

38. Distant provision is that which is outside the normal recruitment area of the directly-funded institution, that is the area from which most EFA funded students travel to learn at the institution as explained in companion document funding regulations

Section 3. 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, of safeguarding and/or funding irregularity.

39. Distant sub-contracting arrangements, for the whole of a student's programme, should be by exception only and should be discontinued completely in maintained schools and academies as set out at paragraphs 24 to 31 above. For institutions with sub-contractors that recruit students on distant provision the advice in this document from paragraph 72 is intended to assist such institutions in making sure they are only recording eligible students within their funding data returns.

40. If a college or other FE provider believes there is good reason for the EFA to fund, by exception, distant sub-contracted provision of a whole programme then the institution must consider the funding implications and assure itself that the arrangement is compliant with this guidance in advance of any recruitment. The EFA requires institutions to take responsibility for EFA funding to ensure that they and their proposed sub-contractors can comply with these controls regulations before entering into such arrangements and before students are recruited.

41. To satisfy the EFA that appropriate controls are in place the EFA intend to request that funding auditors undertake sample checks of the arrangements in place for such provision. Where the arrangements are found not to be compliant, the EFA reserves the right to take actions in line with penalties set out in this document and/or in the contract/funding agreement clauses. This means that where a funded institution decides that it can justify an exceptional arrangement for the delivery of a student's whole programme at distance it must also evidence the reasons for the arrangement and the required controls and monitoring.

42. A range of relevant factors will be considered by the EFA and funding auditors in deciding whether provision delivered outside the institution's normal recruitment area may be considered compliant with the regulations, including but not limited to:

- 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)
- the amount of funding retained by the directly-funded institution should be 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 sub-contract is to operate

- the extent to which a gap in the provision of the type to be delivered under the proposed sub-contract 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 directly-funded institution

Controls and procedures for all sub-contracting

Procurement

43. All institutions must ensure that they comply with current and 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.

44. An institution must not sub-contract, without written EFA permission, with any provider in the following categories. The contract between the directly-funded institution and the sub-contractor should allow immediate or early termination if these circumstances arise during the contract:

- a sub-contractor that is inspected in its own right and found to be inadequate or under-performing by Ofsted
- a sub-contractor that is subject to intervention by the Skills Funding Agency
- where the institution is not permitted to recruit students in the 16 to 18 age group, for example, an 11 to 16 school

45. 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.

46. 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.

47. 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.

Academies

48. 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

49. 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 must determine the nature and extent of these procedures but in financial terms they would be expected to include the steps set out below.

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

51. 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.

52. In addition contracts must not be awarded to companies with any of the following:

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

53. Contracts should not be awarded to brand new companies who:

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

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

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

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

Contracts for sub-contracted delivery

56. 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

57. Additional controls in respect of sub-contracted provision are required for a number of reasons:

- to ensure that the quality of the education provision delivered through a sub-contracting 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

58. 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 which must include the name and logo of the directly-funded institution
- 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

59. Sub-contractors must not sub-contract any part of the delivery of EFA-funded provision to other organisations or self-employed individuals.

60. The delivery of provision should be by the sub-contractor's directly employed staff. In the case of volunteers, the control will be 'as if they were employed'.

61. It is not acceptable for any management control activities to be undertaken by the sub-contractor or 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 activity or visits about the sub-contractor delivery.

62. 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

63. 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.

64. 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

65. 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 2016 to 2017) which elements are delivered via a sub-contracting arrangement (see paragraphs 11 and 12). All institutions, whether funded directly or through sub-contracting arrangements, should ensure that before any EFA funding is claimed for any sub-contracted students no 'double funding' is being claimed for them. 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

66. 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.

67. 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.

68. 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.

69. 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.

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

71. 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 which may include reviewing examples of student work. 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

72. Directly-funded institutions must 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 and recovery of funds will take place.

73. 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.

74. The institution with the largest contract (or the longest historical contract) shall usually be regarded by the EFA as having the lead 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.



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