



Department  
for Education

# **Subcontracting funding rules for post-16 education and training**

**1 August 2023 to 31 July 2024**

**July 2023**

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## Introduction

This document sets out the subcontracting funding rules for the 2023 to 2024 funding year (1 August 2023 to 31 July 2024) and applies to all providers of education and training who receive AEB, ESF and 16 to 19 funding from Education and Skills Funding Agency.

There are instances where a specific rule, or subsection of a rule is only applicable to a specific funding stream. Where this is the case, we have developed a series of annexes applicable to each individual funding stream. The annexes should be referred to in the context of that specific individual funding stream. Common terminology has been adopted across all funding streams; a glossary of terms has been included at the end of this document. Although this document represents a comprehensive set of subcontracting funding rules across the AEB (for learners in non-devolved areas), ESF and 16 to 19 funding streams it should be viewed in context of the wider funding rules for each individual funding stream. These rules form part of a series of documents that are relevant to subcontracting and subcontractors. Providers should also familiarise themselves with the requirements in relation to subcontracting in the department's Education and skills conditions of funding and/or Education and skills contracts for services.

Providers must ensure they are compliant with all relevant funding rules, these are available on GOV.UK.

## Your policies for subcontracting and fees and charges

2.1: You must have a sound rationale for subcontracting which must enhance the quality of the learner offer. The decision to subcontract must not be motivated by financial gain. The educational rationale for subcontracting must be clear and meet one or more of the following aims:

2.1(a): Enhance the opportunities available to learners.

2.1(b): Fill gaps in niche or expert provision or provide better access to facilities.

2.1(c): Support better geographical access for learners.

2.1(d): Support an entry point for disadvantaged groups.

2.1(e): Support individuals who share protected characteristics, where there might otherwise be gaps.

2.2: You must also set out your full range of fees retained and charges that apply, this must include:

2.2(a): Funding retained for quality assurance and oversight.

2.2(b): Funding retained for administrative functions such as data returns.

2.2(c): Funding retained for mandatory training delivered to subcontractor staff by the lead provider.

2.2(d): Clawback for under delivery or other reasons.

2.2(e): How you will determine that each cost claimed by a subcontractor is reasonable and proportionate to the delivery of their teaching or learning and contributes to delivering high quality learning.

2.3: Your governing body or board of directors and your accounting officer (senior responsible person) must agree your policy for delivery subcontracting.

2.4: The department reserves the right to require an explanation where the funding you have retained as your management fee for a subcontract exceeds 20% of the overall contract but offers little value.

2.5: We expect these policies, including the rationale, to be reviewed by you ahead of each funding year, and signed off by those charged with overall responsibility for your organisation in your governance structure. Once reviewed, the updated policy must be published by 31 October each year.

2.6: You must only use subcontractors for delivery of the provision if:

2.6(a): You have staff with the knowledge, skills, and experience within your organisation to successfully select subcontractors in line with the requirements of these funding rules and your contract with the department, and contract with and actively manage those subcontractors.

2.6(b): Those charged with governance/board of directors and your accounting officer (senior responsible person) determine the subcontractors as being of high quality and low risk to public funds.

2.6(c): You have robust procedures in place to ensure subcontracting does not lead to the inadvertent funding of extremist organisations.

## **Selection and procurement of your subcontractors**

3.1: In accordance with your contract(s)/agreement(s) with the department you must notify [enquiries.ESFA@education.gov.uk](mailto:enquiries.ESFA@education.gov.uk) about any circumstances which might lead to an actual or perceived conflict of interest. For example, where your organisation and your proposed subcontractor have directors or beneficial owners in common. You must:

3.1(a): Not award the contract without our written permission.

3.1(b): Keep as evidence both your request and our reply.

3.2: You must not subcontract, without written permission from the department to any institution or organisation which is not permitted to recruit 16 to 18 year old students and/or 19 to 25 year old high needs students (HNS), for example an 11 to 16 school.

3.3: You must ensure that you comply with current and relevant procurement regulations. If you are a contracting authority, this means that you must comply with the Public Contracts Regulations 2015 (“the 2015 Regulations”). You must ensure that you select

your subcontractor(s) fairly transparently and without discrimination and that you ensure that potential subcontractors have sufficient capacity, quality and business standing to deliver the provision that is being subcontracted.

3.4: If your organisation is a contracting authority as defined by the 2015 Regulations, you must comply with the provisions of the 2015 Regulations when selecting and awarding service delivery to a subcontractor. Each organisation must make its own determination about whether it is a contracting authority or not, taking legal advice, as necessary.

## Due diligence requirements

4.1: You must carry out your own thorough due diligence checks when appointing delivery subcontractors and ensure that you continue to undertake and review these checks on an annual/ongoing basis with each of your delivery subcontractors. As a minimum, you must undertake the checks identified in the following paragraphs.

4.1(a) You must review the circumstances and criteria in the funding higher risk organisations and subcontractors' policy (hereafter referred to as "funding higher risk organisations policy") in which the department would consider a provider (including subcontractors) to be a high-risk provider and as a result will not consider funding or agree applications and/or bids for funding from them.

4.1(b): Due diligence checks on subcontractors must apply the criteria in the funding higher risk organisations policy setting out when a provider is high risk and therefore not eligible to be appointed as a subcontractor.

4.1(c): Your contract with any subcontractors should enable your organisation to take appropriate action in line with the funding higher risk organisations policy, not only if your organisation deems it is necessary, but also where the department requires you to take appropriate action.

4.1(d): You must also ensure any subcontractor has the financial ability to deliver the requirements of the subcontract. [This information provides help for you to undertake a financial assessment of the subcontractor](#). You must not contract with brand new companies who are yet to submit their first statutory accounts, unless they are able to thoroughly verify the new company's financial capability.

4.1(e): You must consider the subcontractors credit rating. Where this is above average, you should assure yourself that the subcontractor is available to deliver the needs to the contract, and you are able to manage the risks.

4.2: You must not award or renew a subcontract to any organisation if:

4.2(a): It has passed a resolution (or the court has made an order) to wind up or liquidate the company, or administrators have been appointed or its statutory accounts are overdue.

4.2(b): If a subcontractor does not meet, or continue to meet, the minimum due diligence and financial health checks required (paragraph 4.1 to 4.2(a) above), you

must suspend the right of the subcontractor to recruit new learners. Depending on the circumstances you may be required by the department to terminate the subcontract if you have not already done so.

4.3: You should refer to the list of declared subcontractors to determine if a subcontractor that you intend to use or are using already holds subcontracts with other organisations.

## Entering into a subcontract

5.1: You must not make artificial distinctions or put in place convoluted delivery arrangements in order to avoid the application of these rules. For example, describing the arrangement as a partnership or collaborative arrangement.

5.2: If you have not previously subcontracted provision we fund, you must get our written approval before awarding a contract to a delivery subcontractor and keep evidence of the written approval. See guidance document "[Subcontracting for the First Time – Seeking Written Approval from the Education and Skills Funding Agency](#)".

5.3: You must not enter into any agreement for brokerage.

5.4: You must only award subcontracts for delivery of funded provision to legal entities. If the legal entity is a registered company, it must be recorded as 'active' on the Companies House database. Subcontractors must register on the UK Register of Learning Providers (UKRLP) and hold a valid UK Provider Reference Number (UKPRN) to be eligible to receive funding from us, either directly or through a subcontracting arrangement.

5.6: You must not agree the use of any subcontractor where this would require you to effectively subcontract funding to a second level of subcontractor. In other words, all subcontractors must have a direct subcontract with your organisation.

5.7: You must make sure that learners supported through subcontracting arrangements know about you and your subcontractors roles and responsibilities in providing the learning.

## Subcontracting threshold and exemption cases

6.1: Please note that section 6 does not apply to local authorities.

6.2: If you subcontract more than 25% of the learners (based on ILR data) for AEB or 16 to 19, you must submit an exemption case to the department to obtain the department's agreement.

6.3: You must submit the exemption case, utilising Annex C (of the [Reforms to subcontracting education for learners over 16](#) document), to the department by 31 March each funding year. The exemption case should be sent to [enquiries.ESFA@education.gov.uk](mailto:enquiries.ESFA@education.gov.uk). We will only consider late requests where there is evidence of exceptional circumstances.

6.4: We will consider your request, taking into account the detail you have provided, as well as data and information available both internally and externally. We will consider:

6.4(a): Your subcontracting policy, including your fees and charges policy, and whether this has been signed off by your officers who are charged with governance.

6.4(b): If you subcontract more than £100,000 in a funding year, we will consider the external auditor's report as set out in the subcontracting standard.

6.4(c): Whether the subcontracting is delivering to learners who may not otherwise have access to provision, including there being no alternative provision or the characteristics of the learner mean another lead provider may not be suitable.

6.5: We reserve the right to decline your request, if we do decline it, we will explain why we are declining it. If we decline your request, you must take steps to reduce your subcontracting in any given funding stream to less than 25% by the next funding year.

6.6: If you do not currently subcontract more than 25%, you are still required to review all subcontracted provision. You should ensure you review this, on at least an annual basis, as well as the educational rationale for entering each subcontract and ensure these remain relevant and are supported by your officers who are charged with governance.

## **Terms that must be included in contracts with subcontractors**

7.1: You must put in place a legally binding written subcontracting agreement with the subcontractor before the subcontractor starts delivery of any subcontracted provision. The department does not provide a template for subcontracts. The subcontract must entitle you to exercise management controls over the subcontractor's activity including access by auditors appointed by either your organisation or the department. As a minimum the subcontract must cover the following points:

7.1(a): A list of all services your organisation will provide to them and the associated costs for doing so. This must include:

7.1(a)(i): A list of individually itemised, specific costs that you will charge for managing the subcontractor and how these are reasonable and proportionate to the delivery of subcontracted provision.

7.1(a)(ii): Specific costs for quality monitoring activities and specific costs for any other support activities offered by you to the subcontractor and how these contribute to the delivery of high-quality learning.

7.1(a)(iii): Reference to your delivery subcontracting policy, including your rationale for subcontracting and where it can be found on your website.

7.1(b): A requirement for the subcontractor to give the department and any other person nominated in writing by the department, access to its premises and to all documents related to their subcontracted delivery.

7.1(c): A requirement for the subcontractor to provide you with ILR data so that your organisation's data returns to the department accurately reflect your subcontractor's delivery information.

7.1(d): A requirement for the subcontractor to provide you with sufficient evidence to allow you to assess its performance against Ofsted's common inspection framework; incorporate the evidence it provides you with into your self-assessment report; and guide the judgements and grades within your self-assessment report.

7.1(e): A requirement for the subcontractor to always have suitably qualified staff available to provide the education and training funded by the department.

7.1(i): A requirement for the subcontractor to co-operate with you if the subcontract ends for any reason to make sure that there is continuity of learning.

7.1(j): A requirement for the subcontractor to tell you if evidence of irregular financial or delivery issues arise. This could include, but is not limited to non-delivery of training when funds have been paid; sanctions imposed by an awarding organisation; allegations of fraud; an inadequate Ofsted grade; allegations or complaints by learners, staff members, or other relevant parties.

7.1(k): A requirement for the subcontractor not to use funding to make bids for, or claims from, any European funding on its own behalf or on behalf of the department. The subcontractor must be bound by ESF clauses from your contract being included in the subcontract, even if the provision being subcontracted is not funded by the ESF.

7.1(j): A requirement for the subcontractor to comply with the requirements set out in these funding rules.

7.1(k): Provisions that enable you to terminate the subcontract should your subcontractor fail to meet the required due diligence or financial health requirements/standards.

7.1(l): A requirement for your subcontractor to inform you of any changes which impact its ability to meet the due diligence or financial health/require standards required and that your organisation may as a result be required to terminate the subcontract with them.

7.2: You should take your own legal advice about how best to incorporate these provisions and wider terms and conditions in your subcontracts.

## **Monitoring of your subcontractors and subcontracted provision**

8.1: You are responsible for the actions of your subcontractors connected to, or arising out of, the delivery of the services, which you subcontract. If your subcontractor fails to deliver, you will be responsible for making alternative arrangements for the delivery of education and training, protecting the audit trail, and/or repaying the department.



8.2: You must manage and monitor all your subcontractors to ensure that high-quality delivery is taking place that meets the requirements of the contract you have entered into with the department for the provision of funded delivery (which includes compliance with funding rules). You must ensure safeguarding is rigorously policed.

8.3: It is not acceptable for any staff with a direct or indirect financial interest in the subcontractor to undertake any management control activities This includes signing time sheets or invoices, as well as organising and/or carrying out monitoring activity or visits to check the subcontractor delivery.

8.4: You must carry out a regular and substantial programme of quality assurance checks on the education and training provided by subcontractors including spot checks and face to face interviews with staff and learners. The programme must:

8.4(a): Include verifying that learners exist and meet the eligibility criteria for funding.

8.4(b): Involve direct observation of initial guidance, assessment and delivery of learning programmes, training and/or direct observation of assessment.

8.5: The findings of your assurance checks must be consistent with your expectations and the subcontractor's records.

8.6: The prevent duty applies to subcontracted provision. It requires providers to have due regard to the need to prevent people from being drawn into terrorism. All further education 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 subcontracting arrangement.

## **Subcontracting reporting and external audit requirements**

9.1: You must record subcontracted provision in line with the published guidance for the school census and the individualised learner record (ILR) data returns.

9.2: If you return ILR data, in accordance with your funding agreement (s) you must submit a fully completed subcontractor declaration by the dates given to you by the department. This will be at least twice during the funding year. If you do not subcontract you must still provide a nil return to confirm this.

9.3: You must also update your subcontractor declaration if your subcontracting arrangements change during the year. This is done via your MyESF account.

9.3: In accordance with your funding agreement(s), you must meet the ESFA subcontracting standard as detailed in the [subcontracting standard guidance](#), if the aggregate total of all subcontractors delivering provision on your behalf exceeds or is anticipated to exceed £100,000 in any single funding year. Whilst otherwise excluded from these rules, for the purposes of calculation of aggregate total of subcontractor delivery you must include delivery of apprenticeships.

9.5: Where the subcontracting standard applies, you must send a copy of the external auditor's final report including the action plan of agreed recommendations and assurance declaration via ESFA Document Exchange by 31 July. Further information can be found in the [Document Exchange user guide](#). The department will review this as part of our overall assurance arrangements.

9.6: If the department does not receive the auditor's report on the subcontracting standard by 31 July, you as the lead provider will be deemed as non-compliant and funding may be affected/delayed.

## 16 to 19 Annex

For the avoidance of doubt, all funded provision, including enrichment, employment and pastoral (EEP) activity is a funded part of a study programme or T Level. Where the lead provider pays a third party to deliver such activity they are deemed to be a subcontractor. 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.

Where T Level providers are passing T Level Industry Placement Employer Incentive payments on to employers (a short term incentive available during the 2021 to 2022 academic year only), they must complete and upload the employer declaration to the digital tool capturing this information, but do not need to also account for these in the subcontractor declaration. This funding is not included as part of the programme funding allocated for T Levels.

## 10.1 Monitoring of your subcontractors and subcontracted provision

10.1(a): In addition to the measures detailed in 7.1 of these funding rules and your funding agreement, you must monitor your subcontractors to ensure that learners have full access to free funded education and training, including (but not limited to) information about and access to, 16 to 19 bursary and other learner support funding, information, advice, and guidance (IAG) and access to learning support if required.

## 10.2 Controls over learners, tutors, and provision

10.2(a): You must be able to demonstrate that you exercise all the following key controls:

- You can enrol or reject learners as you would do if the learners were to be taught on your own site.
- Learners sign a learning agreement at the time of enrolment; the agreement must reflect the outcome of initial guidance and assessment for an individual

learner and set out their study programme and any learning support to be provided.

- Learners' eligibility for funding is confirmed through an enrolment form and/or learning agreement, which must include your name and your logo, and which is signed by the Learner at the start of their programme.
- A learning programme and its means of delivery has been clearly specified by you.
- There are arrangements for assessing the progress of individual learners.
- There are procedures for you to regularly monitor the delivery of programmes provided in your name throughout the period of the programme.

### **10.3 Subcontractors with contracts with multiple institutions**

10.3(a): You must establish whether any of your subcontractors work with other lead providers.

10.3(b): You must make sure that you are the only provider that is claiming funding for the learners that you are claiming funding for. Learners must not be enrolled at more than one lead provider.

10.3(c): You, as the lead provider must claim all the funding for a funded learner. When a learner is attending different lead providers for different components of their programme of study, the lead provider must record all these components and indicate on the individualised learner record or school census which elements are delivered via a subcontracting arrangement.

10.3(d): All individual learners must have the correct unique learner number recorded.

10.4(e): An exception to rules 10.3(b) and 10.3(c) is where a learner is enrolled on a Diploma in Sporting Excellence in addition to their main study programme.

### **10.4 Distance subcontracted delivery**

10.4(a): Only in exceptional circumstances should institutions make subcontracting arrangements for delivery outside their normal recruitment area. ('normal recruitment area' is defined in the funding regulations guidance).

10.4(b) You must seek approval to continue with or embark on new arrangements for distance subcontracting. Further details about [reforms to subcontracting education for learners over 16](#) including what to include in the request and where to send it is available. We expect to receive this at least 12 weeks prior to the start of delivery for any new requests. Approval to continue with existing arrangements should be sent to the department by 31 March each funding year. We will only consider late requests where there is evidence of exceptional circumstances.

10.4(c): Where you do enter into distance subcontracting relationships, you must exercise the same level of management, control, safeguarding of learners and assure yourself you still meet all necessary rules.

## **10.5 Whole programme subcontracting and restrictions for schools and academies**

10.5(a): You must seek approval to continue with or embark on new arrangements for whole programme subcontracting. Further details about [reforms to subcontracting education for learners over 16](#) including what to include in the request and where to send it. We expect to receive this at least 12 weeks prior to the start of delivery for any new requests. Approval to continue with existing arrangements should be sent to the department by 31 March each funding year. We will only consider late requests where there is evidence of exceptional circumstances.

10.5(b): Schools and academies must not subcontract whole study programmes under any circumstances. Legally, being a pupil and attending a school are based on physical presence. 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. Schools and academies can therefore only subcontract provision for learners who attend the institution for at least one element of their programme throughout the academic year and attend the school or academy at least once a week.

10.5(c): You must not enter into subcontracting arrangements with special schools for the whole, or for a substantial proportion of a students' programme where they are aged 19 to 25. Special schools have the option 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.

10.5(d): When a subcontractor wants to appoint and work with a third party, which could include a sports club, it is you as the provider who must have a direct contractual relationship with the third party and not the subcontractor. Third parties must not be appointed or managed by the subcontractor. There must be no financial transactions between a subcontractor and a third party. You must take steps to assure yourself that the third party has facilities that are safe, suitable, and fit for purpose and that safeguarding arrangements are robust and reviewed regularly, at least on an annual basis.

10.5(e): You must take appropriate steps to ensure that both you and the sports club are clear on what activities are suitable for funding and what activities are not suitable for funding.

## 11. ESF annex

11.1: For any subcontracting of ESF in previous funding years, maintain the evidence and audit trail as required by the ESF funding rules, and provide access to it, until at least 31 December 2034. You will be notified of any change to this date.

## 12. Glossary

### **Adult Education Budget**

Where we reference the Adult Education Budget (AEB) this is for learner's 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.

### **Brokerage**

Means the provision by a third party of services, for a fee, to source subcontractors to provide the services on behalf of the contractor.

### **Department**

Means the Secretary of State for Education acting through the Department for Education and/or Education and Skills Funding Agency (ESFA).

### **Distance subcontracted delivery**

Means where the delivery location of the subcontractor is outside the lead provider's normal recruitment area.

### **Exemption case**

Means the case submitted by the lead provider to the department in accordance with paragraphs 6.2 to 6.4 of the subcontracting funding rules for permission to exceed the subcontracting threshold.

### **Funding year**

Means a period of 12 months starting on 1 August and ending on 31 July.

### **Learners**

Means any third party including any student, apprentice (under an apprenticeship), trainee or similar to whom the college is required to deliver any of the services

### **List of declared subcontractors**

Means the register of subcontractors that hold contracts worth at least £100,000 in aggregate with one or more funded providers of post-16 education and training services, including apprenticeships and traineeships.

### **Prevent**

Means the prevent strategy, published by the government in 2011, is part of our overall strategy to reduce the threat to the UK from terrorism by stopping people becoming terrorists or supporting terrorism. In the Act this has simply been expressed as the need to “prevent people from being drawn into terrorism.” [Further details](#) are available on GOV.UK.

### **Subcontractor**

A separate legal entity or an individual (not an employee) that has an agreement (called a subcontract) with you to deliver any element of the education and training we fund. A separate legal entity includes but is not limited to companies in your group, other associated companies and sole traders. An individual could include a person who is a sole trader, self-employed, a freelancer or someone who is employed by an agency, unless those individuals are working under your direct management and control in the same way as your own employees. This does not include relationships between the lead provider and other third parties providing services such as marketing.

### **Subcontract**

An agreement entered into between a lead provider and a subcontractor.

### **Subcontracting**

Any delivery to a learner’s programme of learning by a separate legal entity. It does not matter if this is by a third party recruited to deliver on site (travel to teach), online learning or whether it is described as a service.

### **Subcontracting threshold**

25 % of the learners in each funding stream under an agreement in any given funding year.

### **Those charged with governance**

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. [Further details](#) are available on GOV.UK.

### **Whole programme subcontracting**

Where every element of each individual learner's programme is delivered by the subcontractor.



Department  
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