

Good practice in contracting checklist for lead providers and subcontractors



About this checklist

This checklist is based on the effective practice of existing partnerships and information available publicly via the [website](#) of the Skills Funding Agency (the Agency). A second checklist is also available on 'Due Diligence'.

The Agency requires that all arrangements between lead providers (those with a direct contract from the Chief Executive of Skills Funding Agency), and sub-contractors are **confirmed in legally binding contracts**. All contracts, whether or not they are called service level agreements or contracts, need to include some mandatory clauses. Legally binding agreements should be drafted and/or checked by your legal adviser(s). You should also check tax and accounting implications of contracting and subcontracting with your accountant.

This checklist, and the links in it, will help you to write and/or review your draft contract. They include the key aspects you will need to consider.

The list may seem daunting. However, the aim is to be as comprehensive as possible. The checklist format is designed to help you to work on the task systematically.

You should also add any supplementary factors to your contracts which you wish to have agreed in writing.

Tips for successful contracting

- The success of the collaboration depends on both a legally binding contract **and** clear contract management.
- Remember:
 - The lead provider is solely responsible for every aspect of the contract with the sub-contractor and must undertake due diligence checks before the contract is signed – see the Due Diligence Checklist.
 - The Agency must be informed of, and approve, all first level sub-contracting arrangements including any decrease or increase in activity.
 - There are certain clauses which the Agency requires in the contract with the sub-contractor and these are not negotiable; some can be taken directly from the Agency's contract with the lead provider.
 - All parties to the contract need to be clear about the requirements they have of the other party or parties.
- Establish communication channels between partners from the start; if there are any contentious issues, and negotiations on these get stuck or fail, consider using an independent facilitator such as an LSIS adviser to help the process.
- Agreed levels of performance should be the minimum not averages (averages can imply a wide range from outstanding to inadequate).
- In the contract, ensure a balance between compliance and detail, and allow the flexibility to respond to changes in the environment and the market (for example, changes in government policy, and in employer and learner needs).
- The contract should reflect risk-assessed monitoring and control, not over-burdensome micro-managing and excessive audit. It must reflect an approach which prioritises the proper and effective use of public monies for the benefit of learners.
- A complementary and separate quality and operations manual can specify many of the other issues and the detail of 'who does what'. It might cover:
 - issues specific to the providers and their part of the sector;
 - day-to-day contract management – the need for all parties to nominate a key person, and to share information about all key contacts in their organisations; these should include lead people for finance, management information systems (MIS), human resources, health and safety, learner progress and review, employer liaison, safeguarding, and quality improvement;
 - support for learners;
 - management information systems; protocols and deadlines for the exchange of information;
 - arrangements for collaborative quality improvement; at the very least, include the arrangements for continuous self-assessment and quality improvement planning which goes beyond the annual requirement to produce and upload a self-assessment report and plan;
 - health and safety: risk assessment, reporting and respective duties;
 - safeguarding of young people and vulnerable adults;
 - marketing and internal and external communications.

Use this checklist and the Due Diligence Checklist to decide what you include in a quality and operations manual.

Checklist – Good Practice in Contracting

Use with the Due Diligence Checklist to ensure you have covered all factors

The purpose of this checklist is to help a lead provider draw up or cross-check a formal agreement, and a subcontractor to review a draft.

Issue to include in the contract/service level agreement, with key factors to consider	Amend contract (Yes/No) ?	Action(s) <i>What action(s)? Who is responsible? By when?</i>	Completed (Yes/No)?
<p>1. Agreement date and parties; jurisdiction</p> <ul style="list-style-type: none"> a. Include the legal name of the lead provider and sub-contractor – this should be the legal entity. b. Quote the UKPRN. c. Specify the jurisdiction (usually Law of England) 			
<p>2. Definitions</p> <ul style="list-style-type: none"> a. Define specific terms used, for example: “academic year” which means a year running from 1 August in one calendar year to 31 July in the following calendar year. Or you may wish to specify the “calendar year”. b. Identify anything which could be misunderstood in the contract and define it here. c. Include any acronyms in full. d. Specify particular organisations but also make general references to their function: for example ‘Ofsted or other external inspection or regulatory body’; ‘the Skills Funding Agency, or other funding body’ e. You may wish to take definitions from the Agency’s contract with the lead provider to ensure that the definitions are correct and that the contract between the lead provider and subcontractor is aligned with the Agency’s requirements. 			

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<p>3. Duration of agreement</p> <p>a. Specify exactly for how long the contract will applied, for example: 'Twelve months from... unless terminated in accordance with terms and conditions of the contract'. Include any review points (and diary them up so you remember them!).</p> <p>b. The termination clause is very important and should include all circumstances and notice periods.</p>			
<p>4. Control of the programme(s)</p> <p>a. Specify that the lead provider is solely responsible and will maintain appropriate and robust controls.</p>			
<p>5. Prohibition on further sub-contracting</p> <p>a. It is an Agency requirement that the sub-contractor delivers the programme, and does not subcontract it without specific approval from the Agency. The lead provider can request permission from the Agency for second level sub-contracting; however, permission may not be granted.</p> <p>b. Specify that only the subcontractor should provide the programme(s) for the learners on behalf of the lead provider, and in accordance with the terms of the contract(s).</p>			
<p>6. Break clauses and arrangements for learners if the contract ends</p> <p>a. Termination clauses must be included.</p> <p>b. The Agency requires providers to consider what arrangements will be made for learners and how public funds are to be protected should the sub-contracting arrangement cease, for whatever reason.</p>			

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<p>7. Payment terms</p> <ul style="list-style-type: none"> a. The Agency expects that accurate and valid invoices from the subcontractor are paid within 30 days. b. Specify here, or in the delivery section (see 13 below) when invoices are to be raised. c. Specify details to include on invoices including reference numbers, company details and tax details. d. Payment dates need to be clearly identified and agreed, including the potential need for a reconciliation payment at the end of the contract period. Specify that the lead provider will drawback funding if the contract is not fulfilled. e. Specify audit or monitoring requirements which trigger payments; payments may be related to achievement rates (timely or otherwise). f. Specify circumstances under which payment will be withheld. 			

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<p>8. Distribution of income</p> <p>a. Specify the management fee. In its guidance, the Skills Funding Agency ‘requires the retention of funds to be proportionate to the costs incurred, and expects at least 85% of funding to be spent on delivery’. The overriding principles are those of value for money and that the maximum funding goes to the front-line and on delivery to the learner.</p> <p>b. Your contract may specify financial rewards or penalties for over- or underperformance - of the contract (eg for learner achievements above targets agreed).</p> <p>c. Specify who will pay for specific items such as accreditation costs and any additional costs in programme delivery such as study visits, and the price details of shared services or services provided by the lead provider to the subcontractor. Management fees need to be proportionate to the services provided by the lead provider.</p> <p>d. Include a table or schedule of payments and indication of the ‘triggers’ for payment.</p> <p>e. These need to be subject to the Agency’s terms and reflect the contract between the Agency and the lead provider.</p>			

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<p>9. Funding compliance</p> <p>a. Both parties must comply with the Agency Funding and Audit Guidance, and ensure all relevant forms, agreements, applications or other documents which are required to be sent to the Agency are completed and signed by the relevant authorised officer of the sub-contractor. You may wish to include other financial compliance issues such as agreements to audit by company auditors.</p> <p>b. You may wish to take clauses from the Agency’s contract with the lead provider to ensure that they are correct and that the contract between the lead provider and subcontractor is aligned with the Agency’s requirements.</p>			
<p>10. Records and information</p> <p>a. Specify how appropriate evidence, such as records of both learner attendance and non-attendance, individual learning plans, financial records, are maintained (the format) and made available for audit by the lead provider or by an external organisation such as the Agency.</p> <p>b. Specify how long records must be kept (depending on the contract with the Agency; can be up to seven years) and that lead provider must have access to records held by the sub-contractor.</p> <p>c. Include an access clause which states that access includes but is not restricted to the Agency, Ofsted, Young People’s Learning Agency (YPLA), the lead provider, EU auditors, National Audit Office or any of their agents and awarding bodies. The access includes but is not restricted to premises, staff, learners, and records and being able to receive explanations to any questions they may have.</p> <p>d. Include deadlines for supply of information between partners, and, possibly and if agreed, penalties for late submission.</p>			

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<p>e. Subcontractors must validate data regularly using DSATs (the Data Self-assessment Toolkit). You may wish to be specific about validation requirements. Issues include: frequency; how errors are reported to you; action plans for rectifying errors. Although it is a well-known statutory requirement, you may still wish to specify that sub-contractors will comply with all data protection legislation.</p> <p>f. All parties should agree that they will keep records confidential.</p>			
<p>11. Requirements to register with UK Register of Learning Providers and the Approved College and Training Organisation Register (ACTOR)</p> <p>a. Lead providers and sub-contractors must be registered and have a UKPRN number. The subcontractor will have to supply information on request to the lead provider so that the lead provider can keep its ACTOR registration up-to-date.</p> <p>b. The ILR captures the UKPRN of all delivery organisations, so that the Agency and Ofsted can clearly identify the delivery organisation as well as the lead provider, which is responsible for completing the ILR.</p> <p>c. The Agency has considered at which level sub-contractors may be required to submit to ACTOR. However, no final decision will be made until the impact of the minimum contract level in 2010/2011 has been evaluated.</p>			
<p>12. Enrolment, and Information, Advice and Guidance</p> <p>a. Specify that appropriate initial guidance and assessment, individual learning plans and signed enrolment forms are required; indicate the timescale within which the signed forms must be sent to the lead provider.</p> <p>b. Learners must be enrolled in the name of the lead provider. They must have a written learning agreement at enrolment: agreed with them, dated and signed by them.</p>			

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<p>13. Delivery of provision, assessment and claiming achievement</p> <p>a. Include who can and who cannot deliver provision, and the basis on which staff are employed. CVs might be supplied and vetted by the lead provider. This section would also include arrangements for learner withdrawals and achievement, and how quickly learners should receive their certificates.</p> <p>b. Include a full statement of the programme(s) to be delivered, with volumes, outcomes, payment dates and requirements to trigger payments, as a separate annex to the contract. These would normally be issued for each programme to be delivered and at appropriate points during the year.</p> <p>c. The annex can be negotiated and agreed at regular and appropriate intervals, either annually or more frequently. It will give the parties a focus to review the contract delivery.</p> <p>d. Remember, the lead provider must be in control of delivery and ensure all processes take place, such as reviews of learner progress, actions to support learners who are not achieving as planned, and the assessment of individual learners.</p> <p>e. You may wish to take clauses from the Agency’s contract with the lead provider to ensure that they are correct and that the contract between the lead provider and subcontractor is aligned with the Agency’s requirements.</p>			
<p>14. Equal opportunities</p> <p>a. State that the sub-contractor must comply with the Race Relations Act 1976 (as amended by the Race Relations (Amendment) Act 2000) , the Special Educational Needs and Disability Discrimination Act 2001 (incorporated into Part IV of the Disability Discrimination Act 1995), and the Equalities Act 2010.</p>			

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<ul style="list-style-type: none"> b. Equality and Diversity should cover positive aspects, such as promoting diversity, as well as compliance with legislation. Ofsted will expect all parties to the agreement to play their part in closing the ‘achievement gap’ – contributing to raising the achievement of any cohort or group of learners which is achieving at a lower level than others. 			
<p>15. Monitoring and compliance</p> <ul style="list-style-type: none"> a. Specify the processes by which the lead provider monitors the subcontractor; these processes should be based on an assessment by the lead provider of the subcontractor and the risks the subcontractor presents. b. Monitoring needs to be proportionate to this risk, not over-burdensome and over-bureaucratic, and should lead to improvements in performance or maintenance of outstanding performance. c. Key processes to monitor include: registration of learners, production of learning plans, assessments of learners, and provision of learning support. For example, lead providers may state that they can attend any part of the sub-contracted provision and access facilities and paperwork. 			
<p>16. Health and safety liability</p> <ul style="list-style-type: none"> a. Specify that the sub-contractor must notify the lead provider of any accidents and of near-misses, and make health and safety records available to the lead provider, including details of risk assessments and actions taken as a result of them. b. Lead providers may wish to specify that sub-contractors take a pro-active approach beyond compliance. c. You may wish to take clauses from the Agency’s contract with the lead provider to ensure that they are clear and that the contract between the lead provider and subcontractor is aligned with the Agency’s requirements. 			

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<p>17. Safeguarding</p> <p>a. Specify that appropriate safeguarding policies and procedures must be in place and that these must comply with minimum safeguarding requirements, including appointing a designated person in each organisation, and that there is a process for reviewing safeguarding issues as part of quality improvement.</p> <p>b. Lead providers may wish to specify that subcontractors take a pro-active approach beyond compliance.</p>			
<p>18. Fraud and Irregularity</p> <p>a. Specify that the subcontractor must inform the lead provider of any suspected or proven fraud or irregularity in the delivery of the contract.</p>			
<p>19. Liability</p> <p>a. The subcontractor is responsible for indemnifying the lead provider for loss or damage caused by its negligence or the negligence of other parties which it engages in delivery of the contract.</p>			
<p>20. Prohibited activities</p> <p>a. These include:</p> <ul style="list-style-type: none"> ▪ bribery or inducements ▪ promoting any religious or political beliefs in the delivery of the contract ▪ the subcontractor's representing itself as acting on behalf of the lead provider, without permission. 			

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<p>21. Insurance</p> <p>a. Specify that the sub-contractor must maintain adequate insurance cover and must produce a certified copy of all related insurance policies on request.</p> <p>b. You may wish to take definitions from the Agency's contract with the lead provider to ensure that they are correct and aligned to both that contract and the one between lead provider and subcontractor.</p>			
<p>22. Co-operation and reputation</p> <p>a. Include details of a contract lead person in each organisation. State how often parties agree to meet.</p> <p>b. You may wish to specify that neither party will do anything to bring each other's reputation into disrepute.</p> <p>c. This section may include restrictions on or requirements for marketing materials during and after the agreement period. Specify details of logos (for example, logos of lead provider or ESF) which must be used.</p>			
<p>23. Conflicts of interest</p> <p>a. Both parties should agree to declare these to the other party.</p>			
<p>24. Dispute resolution</p> <p>a. Whilst it is difficult to specify all possibilities, a commitment to solve disputes between the parties by discussion, then - if needed - by referral to a mutually agreed mediator, is strongly recommended.</p>			

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<ul style="list-style-type: none"> b. If you can, give details: for example, about how disputes will be dealt with internally between the respective contract lead people, and between the parties' governing bodies/boards. This can make resolution more likely, and much cheaper as it avoids legal fees! c. Clauses should indicate that dispute resolution is not limited to the agreed processes. 			
<p>25. Learners with additional support needs</p> <ul style="list-style-type: none"> a. You may wish to specify some detail on the requirements to assess learners and provide support. b. Specify how the sub-contractor supplies the relevant additional support assessment form and adheres to the Agency's requirements for funding 			
<p>26. Termination</p> <ul style="list-style-type: none"> a. State that the lead provider can terminate the agreement by written notice if there is a material breach, or if the subcontractor ceases trading or is wound up by reason of bankruptcy or action of its creditors. These clauses might also apply to the lead provider. b. Include how much notice is needed dependent on the circumstance. c. The lead provider needs to ensure that, should the sub-contractor fail and go into administration, that they automatically become a creditor in order to recoup the Agency's funds. d. If the Agency withholds and/or withdraws permission for the sub-contractor then the contract is immediately terminated. 			

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<ul style="list-style-type: none"> e. Ensure that the contract specifies what happens if the relationship breaks down – the points at which there are reviews of the entire contract (at least annually) and the points at which either party can terminate the agreement. 			
<p>27. Employer fees, taxation and other payments</p> <ul style="list-style-type: none"> a. Specify who collects the fees and who retains them (usually the subcontractor). There are potential tax implications to check with your accountant. 			
<p>28. Confidentiality</p> <ul style="list-style-type: none"> a. State that neither party will disclose the contents of the contract except if required as part of the lead provider’s contract with the Agency, for audit requirements, or by the courts. 			
<p>29. Copyright and Intellectual Property</p> <ul style="list-style-type: none"> a. Specify who retains copyright of any resources produced as part of the delivery. b. The agreement should specify who will retain ownership of any learning resources produced by the subcontractor. <i>(As with any issue, if in doubt, please take advice from your legal advisers).</i> 			
<p>30. Quality assurance and improvement</p> <ul style="list-style-type: none"> a. The Agency requires lead providers to monitor quality and performance, and Ofsted will wish to see that they take responsibility for quality assurance AND improvement. b. In the contract include reference to any joint processes such as lesson observation, learner and employer surveys, reviews of performance, and specify how the parties will contribute to collaborative self-assessment and improvement planning. 			

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<p>c. Indicate how information will be supplied to the lead provider so that it can provide information for Framework for Excellence or other standards (see below for examples).</p> <p>d. Specify any quality marks such as the Training Quality Standard, Matrix, Investors in People, ISO 9000, ISO 14000 which subcontractors are required to hold or be working towards.</p> <p>e. You may wish to take definitions from the Agency's contract with the lead provider in terms of performance management to ensure that they are correct and aligned.</p> <p>f. Performance management issues should include:</p> <ul style="list-style-type: none"> ▪ how the subcontractor is involved in the Agency's quarterly or other review processes; ▪ how under- and over-performance are managed; ▪ how changes to contract value (up or down) are managed; ▪ how contract values might be reallocated between the lead provider and the subcontractor and/or between the subcontractor and other subcontractors of the lead provider. <p>g. You may wish to specify some level of detail, for example, that there is a meeting between the lead provider and the subcontractor before and after an Agency quarterly review with the lead provider.</p>			
<p>31. Procedure for changes to the contract</p> <p>a. State that changes can only be agreed in writing and by all parties. Specify the review process here, with dates and/or frequency.</p> <p>b. It could be added that if the Agency changes its contract with the lead provider then the lead provider is able to change its contract accordingly with the subcontractor (mutatis mutandis).</p>			

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<p>32. Key personnel, and their training and updating</p> <p>a. The roles and names of key personnel, including those authorised to agree the contract and any changes, can be noted.</p> <p>b. The lead provider has a responsibility to ensure that the subcontractor’s staff are not only qualified as required by law and good practice but that they are regularly and appropriately trained and updated.</p>			
<p>33. Force majeure and statutory changes</p> <p>a. Include a clause on ‘force majeure – that the contract is void if impossible to enforce and carry out for a reason beyond the control of either party.</p> <p>b. Remember also that statute overrules a contract, so changes enacted by Parliament or in a Statutory Instrument can alter a contract. For example, the Specification of Apprenticeship Standards for England (SASE) is now a statutory requirement.</p> <p>c. You may wish to specify that if part of the contract is held to be void or undeliverable, the other clauses still stand.</p>			
<p>34. Other factors</p> <p>a. Feel confident to specify other issues and to agree them in writing, rather than risk misunderstandings and disputes.</p>			
<p>35. Signatories</p> <p>a. These should be authorised to sign for and on behalf of the parties; include their job title/designation and the date.</p>			

Further references:

Performance Model Briefing, the Role of SLA Models in Business Management, Gill and Hudson (pub. IntercaiMondiale, 2005)
Subcontracting Primer, the ABCs of Agreements between Collaborators, Marie F. Smith (in the Journal of Research Administration, 2004)

How to access further LSIS support:

- **Visit the LSIS Minimum Contract Level Support Programme website:**

<http://www.excellencegateway.org.uk/MCLsupport>

- **Contact the LSIS Regional Development Manager;** their contacts details at time of writing in November 2011 are:

East Midlands - Lorna Freakley: lorna.freakley@lisis.org.uk; 07799 478215

London - Abigail Lammas: abigail.lammas@lisis.org.uk; 07825 933774

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