



Summit programme

- 10.30 Welcome and introductions
- 10.40 MCLs and sub-contracting - where are we now?
- 11.30 Break for refreshments and networking
- 11.50 Managing new relationships - getting due diligence and
- 12.25 Finance and accounting advice for prime and sub-contractors
- 12.55 Data and Funding audit advice for prime and sub-contractors
- 13.10 Break for lunch and networking
- 14.00 Managing disputes and what to do when things don't go to plan
- 14.35 Q&A session - get your questions answered
- 15.00 Impact assessment and final thoughts
- 15.30 Sub-contracting Funding Summit end

Who will you hear from?



Nick Linford
Managing Director of Lsect and author
of *The sub-contracting toolkit*



Dave Hughes
Contract solicitor
Eversheds



Siân Jones-Davies
Associate at Eversheds



Karl Bently
Lead auditor at RSM Tenon



Chris Mantel
National Head of External
Audit at RSM Tenon

Slides will be
emailed this
evening

Meet with the exhibitors and enjoy the refreshments, lunch and ice-cream!



CAPITA

Perspective

Refreshments
and lunch

And you, 100 delegates

When you registered you were asked how much you already know about funding

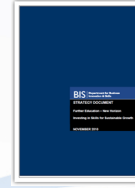


So pretty knowledgeable, but lets see if we can ensure everyone is catered for

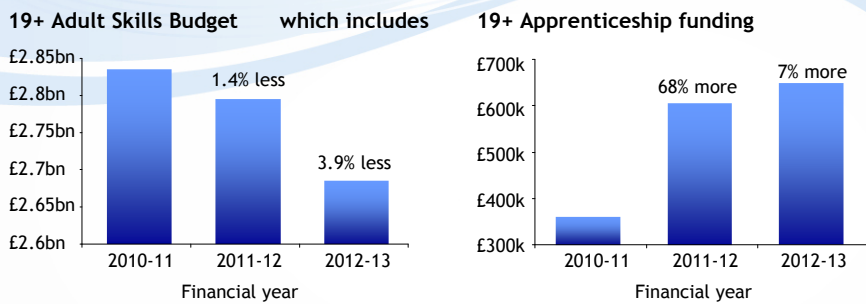
MCL and sub-contracting ~
where are we now?

New Policy Context

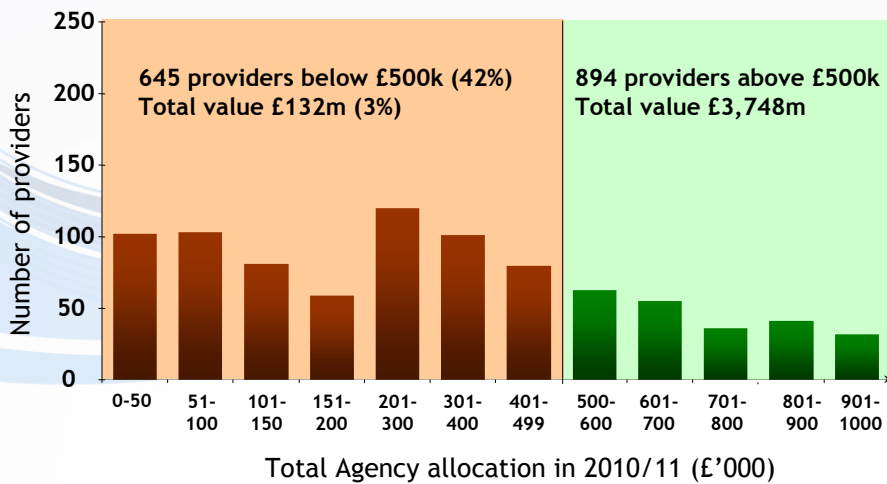
Skills Strategy published November 2010



- FE resource budget reduced by 25% by 2014-15*
- Single Adult Skills Budget and growth in 19+ Apprenticeships
- SFA to make 33% reduction in their administration costs by 2014-15
- Introduction of **£500k Minimum Contract Level (MCL)** for 2011/12 to help Skills Funding Agency reduce administration costs

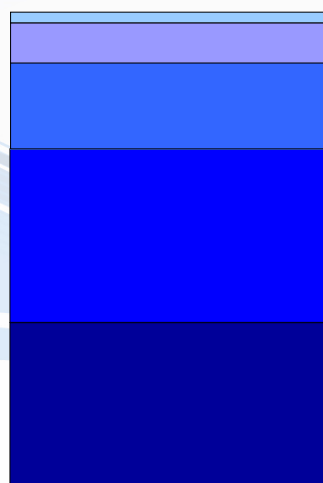


MCL implications for 2011/12



SFA 10/11 allocation spreadsheet (22nd Sept)

But...of the 645 below £500k...



14 Universities (exempt)

55 College (exempt)

115 only have ESF funding
(non-recurrent and many exempt)

235 have 16-18 Appren

219 have no Appren

Of which 149 only TtG
and 33 only have ASL

7 providers with 19+ Appren

Also, National Employer Service providers exempt

Where are we now on MCL?

SFA Guidance Note 7 (April 2011)

“On 24th March the Minister confirmed MCL policy would apply to 16-18 Apprenticeship provision”

But a lot of **additional exemptions** also announced:

- ~ Where a risk of specialist provision being lost
- ~ Where new arrangements would be less efficient
- ~ Where there was no “sensible or suitable sub contracting or consortia arrangements”

Requests for exemptions needed to be made by 3rd May

Where are we now on sub-contracting?

“Removed the maximum delivery threshold”

“there may be an increase in the volume and breadth of subcontracting which can present additional risks”

“All lead providers must have a legally binding agreement with each of their sub-contractors”

“all sub-contractors must be registered on the UKRLP, and may in future also need to be on ACTOR”

“The SFA will not accept any liability in respect of the suitability of the subcontractor”

“second level sub-contracting requires permission”

“further guidance will be published later this year”

Find out about a potential partner

~ Allocations spreadsheet (22nd Sept <http://tinyurl.com/2u4n4gm> and 15th Dec <http://tinyurl.com/3ajecbm>)

~ Framework for Excellence <http://tinyurl.com/26w85ex>

~ Ofsted www.ofsted.gov.uk

~ UK Register of Learning Providers www.ukrlp.co.uk

~ ACTOR <http://tinyurl.com/33bpclx>

~ New MI Library <http://tinyurl.com/38p6ojz>

~ Companies House <http://tinyurl.com/5afua>

Official guidance (being updated)

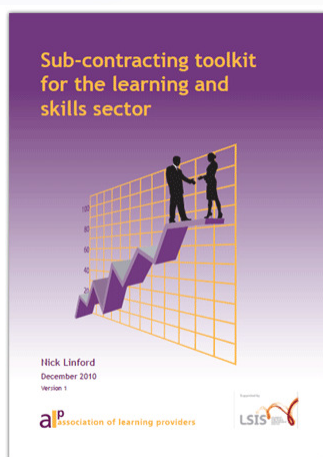
Skills Funding Agency Guidance Note 6 v2
Latest policy on Minimum Contract Levels for 20011/12
<http://tinyurl.com/2ugc9t5>

2010/11 Apprenticeship Funding Requirements v2
Sub-contracting Requirements (Section 8)
<http://tinyurl.com/2w5ltke>

2009/10 LSC Funding Guidance v4.2
ILR Funding Compliance Advice & Audit Guidance (Section 6)
<http://tinyurl.com/yzvxx2w>

2008/09 ILR Funding Compliance Advice and Audit Guidance
Advice on Provision Delivered with a Partner Provider (Section 3)
<http://tinyurl.com/3a6wcq2>

Sub-contracting toolkit



- ~ New policy context
- ~ Implications
- ~ Risk and Reward
- ~ Working principles
- ~ Handy guides (funding, data, performance)
- ~ Contract contents

Download at www.lsect.co.uk/toolkit.asp

Sub-contracting resources from LSIS



<http://www.excellencegateway.org.uk/page.aspx?o=314233>

Managing New Relationships *Getting due diligence and contracting right*

Dave Hughes, Eversheds LLP
davehughes@eversheds.com
17 May 2011



Managing New Relationships

Introduction

- The importance of getting it right
- Due diligence
- Formation of the contract:
 - contract management and control
 - quality
 - payment
 - information
 - disputes, termination and consequences thereof
- Pro-active Contract Management
- Later: Audits & Dealing with Disputes



Managing New Relationships

The Importance of Getting it Right

- Increase in sub-contracting arrangements and interested parties
- Get it right first time:
 - anticipate and avoid problems on both sides
 - reduces chances of audit issues / claw back
 - provide structure for effective relationship



Managing New Relationships

Due Diligence

- Absolutely vital to effective sub-contracting:
 - standards (**19**) in funding guidance:
 - satisfactory financial health
 - current/previous contracts and reason(s) for termination
 - has sufficient capacity and systems to deal
 - lead provider's responsibility but sub-contractor's can assist
 - sub-contractors should carry out own checks



Managing New Relationships

Due diligence (2)

- Prepare audit trail of investigations
 - SFA right to ask for "evidence" including
 - details of sub-contract
 - data sharing protocols
 - business case
 - Only rarely do we see such evidence being prepared in practice
- Receipt of funding may depend on this!



Managing New Relationships

Formation of the Contract: Key Areas

- Contract Management & Control
 - Compliance with instructions:
 - Enrolment
 - Provision
 - Assessment
 - Additional Services
 - Make it clear who is responsible for contract management



Managing New Relationships

Formation of the Contract: Key Areas (2)

- Monitoring and Quality
 - Clear quality standards & performance levels
 - link to published prospectus / information
 - Audit & inspection rights
 - lead provider, appointed auditors and SFA
 - Contract/performance review meetings



Managing New Relationships

Formation of the Contract: Key Areas (3)

- Payment Provisions
 - Clear payment amounts (or formulae) and details of payment dates
 - Clear invoicing requirements
 - How to deal with disputed invoices



Managing New Relationships

Formation of the Contract: Key Areas (4)

- Information Provisions
 - Creation and maintenance of records required
 - Enrolment, Attendance, Achievement
 - Oblige provision of information
 - Avoid simple rights to request
 - Provide specific details of the information required (what, when and how frequently)



Managing New Relationships

Formation of the Contract: Key Areas (5)

- Dispute Resolution
 - Set out how disputes should be resolved
 - Ensure reporting requirements provide enough information to spot areas of concern
 - Importance of ADR pre-termination
 - follow any escalation procedures first
- More details on disputes later



Managing New Relationships

Formation of the Contract: Key Areas (6)

- Duration and Termination Provisions
 - Duration a critical issue for sub-contractors
 - Termination:
 - Is it necessary? Can you resolve dispute?
 - Significant changes in funding requirements
 - “Material breach” & “Persistent breach”
 - Right to remedy?
 - Insolvency



Managing New Relationships

Formation of the Contract: Key Areas (7)

- Consequences of Termination
 - Time of termination
 - Continuation of delivery
 - Maintaining quality
 - Recovery of materials and learner data
 - Enrolment, Attendance, Achievement



Managing New Relationships

Pro-active Management Going Forward

- Once contract is in place, follow it to avoid nasty surprises:
 - Ensure contract liaisons on both sides are pro-active and gatekeepers are informed
 - Arrange and attend meetings regularly
 - Jointly review performance and compliance by both parties
 - Be comfortable discussing areas of concern with each other early



Managing New Relationships

Summary: Key Tips

- Undertake/facilitate due diligence
- Discuss learning provision in detail in advance
- Ensure detailed contract mirrors understanding
- Take particular care over programme detail and standards, payment, information provision, disputes and termination
- Pro-actively manage the contract and the relationship throughout each year
- Discuss any areas of concern openly as soon as possible



www.eversheds.com

© EVERSHEDES LLP 2011. Eversheds LLP is a limited liability partnership.

RSM Tenon

Chris Mantel
External Audit

**Finance and accounting advice
for prime and sub-contractors**

RSM Tenon

Finance and accounting advice

- Regularity opinion
- Management considerations
- Implications when it goes wrong

RSM Tenon

Regularity matters

“In our opinion in all material respects the funds have been applied to the purposes intended by Parliament”

Regularity:

Used in accordance with the FE Funding Bodies and College’s statutory and other duties

Propriety:

Used in a way that is expected of public servants, avoiding personal gain, extravagance or unreasonable expenditure

RSM Tenon

Management Considerations

- Risks identified and managed
 - Communication
 - Documentation
 - Actions
- Robust due diligence processes
 - References
 - Financial information and assessment
- Robust contracts
- Robust controls

RSM Tenon

Implications when it goes wrong

- Accounting approach
 - Establish funds involved and account accordingly
 - Assess whether funds repayable to funding bodies are recoverable from partners (debt or simply written off)
 - Where material, make reference in the financial statements
 - No issue in the statutory accounts

RSM Tenon

Implications when it goes wrong

- Regularity approach
 - Establish funds involved
 - Assess whether funds repayable to funding bodies are recoverable from partners
 - Understand why issue arose
 - Is it weakness in control framework?
 - Fraud?
 - Conflict of interest?
 - What actions have been taken?

RSM Tenon

Implications when it goes wrong

- Regularity approach (continued)
 - Investigation
 - Special external review?
 - Hindsight (should issue have been anticipated)?
 - What warning signs were there and what was missed?
 - Good use of funds, Value for money?
 - Operating outside of the regulations
 - Everything done to mitigate loss to the public purse?
 - Qualified regularity opinion?

RSM Tenon

Regularity matters

“In our opinion in all material respects the funds have been applied to the purposes intended by Parliament”

Regularity:

Used in accordance with the FE Funding Bodies and College’s statutory and other duties

Propriety:

Used in a way that is expected of public servants, avoiding personal gain, extravagance or unreasonable expenditure

RSM Tenon

Safeguards

- Communication, Communication, Communication!!
- It may not impact you but it may be important to another part of the college!
- Do not simply accept assurances at face value!
- Document concerns and always liaise with Finance!
- Unusual behaviour or trends for partner delivery or recruitment may indicate a bigger problem, investigate early to gain assurance!

RSM Tenon

Questions?

RSM Tenon

Keeping me happy aka Data and funding audit advice for prime and sub-contractors

Karl Bentley
RSM Tenon

RSM Tenon

Background

90's flashback – franchising used to be big business
Some colleges were up to 60% franchised activity
Led to investigations by the FEFC
Police and SFO involvement
Tough questions from the Public Accounts Committee
Led to far more prescriptive guidance being issued starting with 96/06
Circular 99/37 was the main guidance on franchising for a number of years
One of the reasons why funding audit was introduced in 2001
More franchising problems turned up in the early years of the LSC
Enhanced guidance
Did anyone see TES this week? £4.2 million contract pulled due to irregularities...

RSM Tenon

What auditors look for

Aretha wanted

R-E-S-P-E-C-T

What I want you as College's to have is....

C-O-N-T-R-O-L

(and yes I am a Joy Division fan)

RSM Tenon

Control Framework

Do you have a signed and dated contract in place before provision commences?

Do you know what, where and who is delivering the provision?

Do you know who is accrediting the provision (classic indicator of something going wrong is continual changes in awarding body)

Have you set out all the documentary requirements e.g. enrolment forms and registers before provision commences?

RSM Tenon

What should you be doing

- Spot visits both announced and more importantly unannounced
- Have a timetable set up of when you're going – ideally each partner should be visited once a term
- Is the class running as planned?
- Check the register has been completed when you arrive
- Check if the attendance pattern is reflected by what you see e.g. always 10-12 learners on the register but only 5 when you visit
- Get every learner in the class you attend to provide their name, date of birth and signature
- Check that the resources in the room are reasonable i.e. enough chairs in the room for every learner on the register

RSM Tenon

Spot visits

- Talk to the tutor, is it the one you were expecting to see, if not why and is it one covered by your contract?
- Talk to the learners – do they know what course they're on and that they are part of your College?
- Get the curriculum involved to check the quality of the provision
- If it's provision that you don't offer you need to engage someone to review it for you (and don't use the sub-contractors staff – they may be slightly biased)
- And whatever checks you do make sure you document them

RSM Tenon

Where and when provision takes place

Where your partners operate at large distances from the prime contractor then go and visit

Where it's delivered on evenings and weekends then go and visit

Experience has found that provision that is far away or at times outside of the normal working day don't get looked at

So if you don't want to travel or work late don't allow provision that is geographically remote or at a time you're not willing to visit – get this in your contract

RSM Tenon

Data issues

Do you check all your enrolment forms carefully?

Incomplete forms from partners should be returned without processing – don't try to second guess what the form should say

How active is MIS/CIS in the set up and monitoring of courses especially where the work is Employer Responsive?

Once input does the form data sense? Remember provision can start once a signed contract is in place

Do you use DSATs including Employer Responsive?

We see many strange things from the data...

Do you check that the location of the learner and the delivery postcode make sense?

Sample audit your records at least once a month from partners to ensure records are valid but also credible i.e. the story they present makes sense

RSM Tenon

Lead College Arrangements

Who else is your sub-contractor working with?

Do you talk to the other providers?

Do you exchange data to ensure that no double funding is taking place?

The provider with the largest contract is the Lead and has a responsibility to work with all the other prime contractors to determine if double funding is taking place

Does your sub-contractor have a contract of their own?

What controls have they got to ensure duplication does not take place?

RSM Tenon

At the end of the course

Once a course has finished don't forget to get all original documentation in from the sub-contractor

It is a requirement of the funding guidance that all relevant documentation is held by the prime contractor

Where photo copies are retained funds can be considered as at risk...

RSM Tenon

What to do if it goes wrong

- Don't lose control and don't panic
- If you're not happy report it to your superiors
- Take a step back and assess the learner file in its totality
- Look at the chain of events – timing of activity
- If you still have concerns the College should consider what actions to take next

RSM Tenon

What have we do as funding auditors?

- The amount of work we do in this area has changed over the years
- As funding auditors we are interested that the data is robust and underlying records support the funding claim
- We check that all partners are correctly flagged in the ILR
- We also need to know that you have a contract in place
- We don't do lots of detailed controls testing like the old ILR audits from 2000-01 to 2003/04

RSM Tenon

Internal Audit

As internal auditors the amount of work we do is prescribed by the College through the annual assurance plan

Should be covered at least once every three years, if it's significant we recommend annual review

Your auditor needs to understand this type of provision in detail if you want it done right

RSM Tenon

What we do as internal auditors

Your internal auditors will look at the controls environment for your partnerships

It's not just about having a contract that has the right clauses

We check for due diligence

We check and test the control environment

We want to see evidence that demonstrates you know what your partners are doing

Only by seeing this can we give an opinion on the quality of controls

Our advice, evidence everything you do to demonstrate you are in control

RSM Tenon

Retained funds

Remember funding follows the learner
Long past the days of 60/40 split for partnership provision
How much do you retain?
How does that compare to the support you put in?
If you make money off partnerships it can be an indicator of something going wrong
Our internal audit review will look at these aspects and give you a view

RSM Tenon

Not always doom and gloom

Last thought....

Partnership provision can be a real asset to a college
It allows you to expand your curriculum offer
Allows access to learners and communities you may have traditionally struggled to access
But.....

YOU NEED TO RETAIN CONTROL

RSM Tenon

Any questions?

Managing disputes and what to do
when things don't go to plan

How to manage disputes effectively

Sian Jones-Davies, Eversheds LLP
sianjones-davies@eversheds.com
17 May 2011



Managing disputes and what to do if things don't go to plan

- Reducing the risk of disputes arising
- Managing disputes effectively



Disputes

Between institution, provider, funding council

- Potential consequences:
 - clawback by the funding council
 - complaints/claims by students
 - complaints/claims by staff
 - litigation between the contracting parties
 - reputational damage
 - management time, legal costs, stress, hassle



Avoiding disputes

From the start

- Have a “good” contract in place
- Follow the paths set out in the contract
- Be clear as to the parties’ respective rights/obligations
- Monitor obligations
- Have regular meetings/maintain a healthy dialogue
- Be clear as to evidence requirements and ensure robust record keeping processes are in place
- Be clear as to payment provisions (when, for what, how, etc)
- Funding council returns



When a dispute is looming

Remember...

- Look at the contract!
- Look at the funding rules/guidance!
- Identify respective legal rights and obligations!
- Follow any dispute resolution mechanism
- Do you need legal/other professional advice?
- Devise a strategy
- Maintain good working relationships with all parties
- Check your insurance cover
- Think about PR
- Think about time and costs of managing disputes



When a dispute is looming

Be proactive (1)

- Don't ignore problems
 - don't assume issues will resolve themselves
 - one party may not be aware that there is an issue
 - longer problems are left, more students (and larger sums of money) may become involved
- Easier to deal with issues when they arise
 - good working relationships still exist
 - prevents students becoming disadvantaged
 - sums will (hopefully) be smaller



When a dispute is looming

Be proactive (2)

- Have the "difficult" conversation
 - not necessary to put everything in writing immediately (can harm relationships to become too legal too quickly)
 - many concerns can be resolved by talking about them
 - even if you are satisfied, consider following up with an e-mail documenting next steps



When a dispute is looming

What if I'm still concerned?

- Put the concerns in writing
 - letters can “raise the temperature”, but they can also make the other party take issues seriously (and form part of the audit trail)
 - think carefully beforehand about what your concerns are and what has caused them
 - identify the key points you want to get across
 - being aggressive is unlikely to lead to a resolution
 - who should raise the concerns?



Other issues

Think carefully about the following

- Look after your students!
- Document management (record keeping v disclosure)
- Contingency planning



Looking after your students

Your no. 1 priority

- Are there any immediate steps you need to take?
- Communication
- Press interest
- Student complaints (deal promptly and effectively under appropriate procedures)



Document management

General record keeping

- What does the contract require?
- All of the evidence required to effect payment should be detailed in the contract, and should meet the funding council's requirements for payment
- Ensure proper record keeping processes are in place, maintained and monitored



Document management

Student records (1)

- Ensure robust record keeping processes are in place
 - who will receive documents?
 - where will documents be stored?
 - how will documents be stored?
 - how long will documents be kept for?
 - how will you know what has been sent and/or received?
 - what inspection rights do you have?



Document management

Student records (2)

- Who will check the documents to ensure they are sufficient and/or compliant?
 - who are the students?
 - where are students located?
 - are tutors the people you expected?
 - are portfolios of appropriate quality?
 - does anything about the documents feel “wrong”?



Document management

Student records (3)

- Students' personal data: ensure compliance with the requirements of Data Protection Act 1998
- NB taking statements from students!



Document management

Records of contact between the parties

- Day to day:
 - minutes of meetings, file notes, e-mails, etc
 - correspondence (eg regarding student withdrawals and repayments)
 - notes of monitoring and/or audit visits



Document management

When concerns arise

- Keep documents safe
- Make sure everyone in your institution knows the importance of retaining documents
- Make sure everyone in your institution exercises caution in creating new documents (including emails!)



Document management

Disclosure

- Record keeping *versus* production of documents
- DPA and FOIA requests
- Disclosure in student complaints and litigation
- Ensure documents withstand external scrutiny!
- Legal privilege



Contingency planning

What if the worst happens?

- Have you considered the possibility of the other party being unable to meet its obligations?
- Providers' financial health (will you get your money?)
- What will happen to your students (eg who will deliver the courses)?
- Thinking about this in advance doesn't tempt fate, but it can make life easier if the worst happens



www.eversheds.com

© EVERSHEDES LLP 2011. Eversheds LLP is a limited liability partnership.

Q&A Session



Questions from online survey

What is 'adequate' insurance for a sub-contractor to have?

Is there a limit to what we can sub contract funding to sub contractors? Is EU procurement applicable to sub contracting funding?

What % would a perfect management fee be?

Should we only sub-contract in the future with organisations on the approved list - ACTOR?

How much discretion can a College have in imposing financial penalties/targets within the terms of the contract?

Should all procedures for sub-contracting YPLA & SFA provision be identical?

Questions from online survey

For those entering into consortium arrangements - what do the panel see as the advantages/disadvantages?

How do I know my subcontracting contract is fit for purpose?

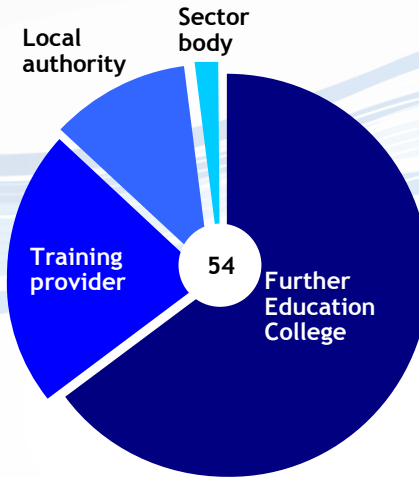
The Due Dilligence process suggested by SFA suggests that subcontract arrangements have gone through an open tender process. Does this have to be the case?

What is the recommended method for calculating payments to sub-contractors?

Impact assessment and final thoughts

Online survey

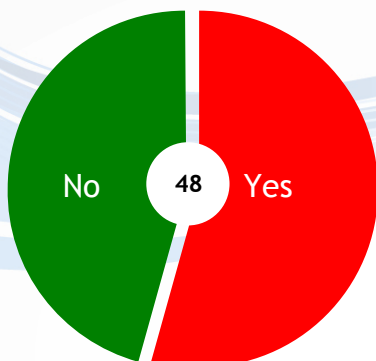
Responses to the pre-conference survey yesterday



And 91% said they were prime contractors

Questions from online survey

If you are a prime-contractor, do you have any concerns about your sub-contractors?

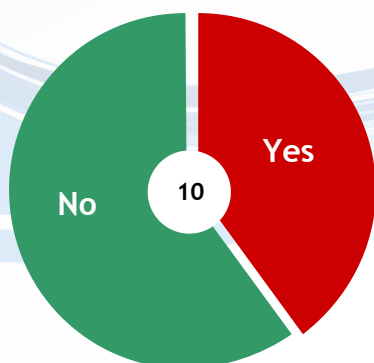


Common reasons for concern:

- Not always delivering what they promise
- Quality and ensuring that they are delivering to our standard.
- Delivery, worries over financial stability
- Late receipt of paperwork/claims for funding
- Adherence to paperwork requirements
- No concerns with existing contractors but concerns about partnering with right new sub-contractors right and getting due diligence / contracts right.

Questions from online survey

If you are a sub-contractor, do you have any concerns about your prime contractor?



Reasons given for concern:

Understanding finances- payment schedules

Lack of standardisation of paperwork and clear guidelines

Not concerns but over zealousness on completion of paperwork for audit purposes

Concerned that lead contractor may not remain in business

Questions from online survey

What are the disadvantages of sub-contracting?

Common themes:

Loss of control to a degree. Risks around quality of delivery.

Managing timely completion, risk management of eligibility for funding, managing quality of learning provided

As the sub we are required to use the larger provider's systems/ resources and often these are poorly managed or just unavailable.

From a sub-contractor's point of view, loss of identity and restriction of opportunities afforded to those with a direct contract

Too many sub-contractors with one prime may reduce quality of provision, create conflict of interest or sabotage a previously good relationship

If not managed properly the quality and performance.

Reduces the funding available to main organisation and can put internal jobs at risk if there is an over reliance on sub-contracting for new curriculum development

Loss of identity

Questions from online survey

What are the benefits of sub-contracting?

Common themes:

Add volume to SFA allocation. Can provide a temporary volume "fix" if recruitment falls, resulting in being unable to use full SFA allocation.

Widening participation and Niche areas of delivery

100% Success Rates (YES! It's TRUE!)

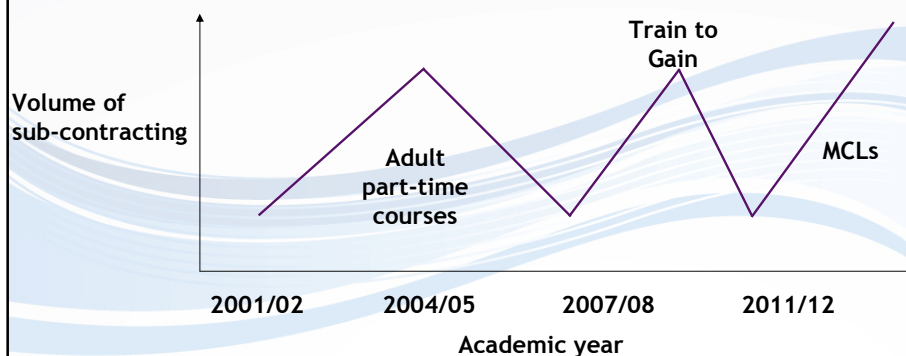
As a smaller provider we have the resource and support of a larger organisation.

Ability to provide a wider offer and enhance geographical coverage

Primes ability to negotiate and pass on substantial discounts on award body fees etc.

Work to the needs of employers and source appropriate provision rather than selling something 'off the shelf'.

History repeating itself?



Risk or reward?

Final remarks

There will be much more sub-contracting in next few years

Risk to public purse inevitably high (risk v reward?)

Proper due diligence and contracting essential

Ongoing review, assessment and audit required

Will the SFA MCL be £1m+ for 2012/13?

Evaluation form

Lsect Summer Training Events: www.lsect.com/summer

Thank you

Sign up for free updates
at www.lsect.com

Lsect
Learning & skills ~ events,
consultancy and training