

# Supporting smaller independent training providers in collaborative contracting

## Models for contracting



### Overview

This fact sheet is for providers affected by the introduction of Minimum Levels of Contracting (MCL). Its purpose is to help providers understand the requirements of the Chief Executive of Skills Funding so they can select the most appropriate model for new collaborative contracting arrangements.

The fact sheet is part of a programme of work being undertaken through the Learning and Skills Improvement Service (LSIS).

This document does not constitute legal advice. It is offered as draft guidance. Each provider is advised to take legal advice before entering into any contracting arrangement with third-parties.

### What is required for contracting with the Skills Funding Agency?

The Chief Executive of Skills Funding (the Chief Executive) has a duty to secure the provision of post 19 education and apprenticeships. In the main he fulfils this duty by entering into agreements with providers to deliver education and vocational training services. The Chief Executive will only enter into agreements with organisations who are able to satisfy him, through the approved college and training organisation register (ACTOR) process, that they have the capacity, including financial and organisational capacity, to ensure the delivery of education and training that meets the necessary quality threshold and enables the Chief Executive to fulfil his statutory duty and his obligations in relation to proper use of public funds.

Any organisation with which the Chief Executive enters into a funding agreement will need to be a legal entity (Contract Holder). It must satisfy the Chief Executive that it is capable of complying with the requirements set out in the funding agreement and is able to meet its financial commitments and liabilities.

If the proposed Contract Holder is not currently on ACTOR it will need to go through the ACTOR process.

## What does ACTOR require?

The Contract Holder needs to ensure all requirements of ACTOR are satisfied. Where a new legal entity has been formed, this is particularly important. ACTOR due diligence requirements cover:

- organisational details;
- business standing;
- compliance;
- insurance details;
- reliance on public funding;
- business continuity;
- capability, capacity and resources;
- health and safety;
- awarding organisation details;
- inspection outcomes;
- quality assurance;
- equality and diversity; and
- declarations.

Where the Contract Holder is a new legal entity with no financial track record a costed three year business plan would be required and it is likely that the Chief Executive will require guarantees from the organisations participating in the legal entity.

For further information see: <http://skillsfundingagency.bis.gov.uk/providers/newproviders/>.

The Chief Executive will only have a legal relationship with the Contract Holder, whose responsibility it is to ensure that its obligations and responsibilities under the funding agreement with the Chief Executive are met. It is for the Contract Holder and the organisations with whom it has decided to work in order to deliver those obligations and responsibilities to determine how they will structure their relationship.

## What are the key milestones of the Minimum Contract Levels process?

The Skills Funding Agency has published detailed guidance for providers as part of their Guidance Note 6

(<http://skillsfundingagency.bis.gov.uk/providers/allthelatest/guidancenotes/>). This guidance sets out the context and process for the implementation of Minimum Contract Levels (MCL). Specific key milestones for each provider affected by MCL are:

- 11 January – provide indication of intentions;
- By 28 February – confirm in writing to Skills Funding Agency new arrangements being entered into;
- March – new arrangements reflected in ACTOR submission;
- March – Skills Funding Agency issues updated individual 2011/12 allocations;
- April – new arrangements on ACTOR assessed; and
- May – aggregate allocations of new arrangements confirmed.

Each provider affected by the implementation of MCL will have their own specific considerations when looking at new contracting arrangements, including which model of contracting best meets their needs.

## What are the key features of the set up?

Individual providers need to confirm to the Skills Funding Agency their intended course of action by the end of February 2011.

The Contract Holder will need to register on ACTOR in March 2011, if not already approved.

The Contract Holder will be responsible for all aspects of its relationship with the Chief Executive. It will also be responsible for ensuring that the terms of the contract between itself and any sub-contractors are sufficiently robust to ensure that it can meet its obligations under its agreement with the Chief Executive. The Contract Holder will be responsible for the quality and audit requirements of itself and its sub-contractors. The Contract Holder will be subject to the performance management arrangements of the Skills Funding Agency.

Where the Contract Holder is sub-contracting the delivery of education and training it should consider how it will provide for key areas such as:

- management arrangements;
- governance arrangements;
- administration and systems;
- sub-contracting arrangements;
- cash flow management;
- quality management;
- agreed services such as data reporting; recording learner vacancies or procurement;
- risk management;
- break clauses within any provider agreements; and
- implications for Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

## How long will the set up process take?

It is important that the Contract Holder registers with ACTOR within the time scales specified by the ACTOR process, noting the March 2011 deadline. If the Contract Holder is forming as a new legal entity, then the registration process is likely to take longer. The Contract Holder must be operational for 01 August 2011.

For further information see: <http://skillsfundingagency.bis.gov.uk/providers/newproviders/>.

## How is the proportion of provision allocated to each provider?

The Contract Holder enters into a funding agreement with the Chief Executive. The Contract Holder will negotiate the proportion of provision they wish to sub contract for 2011/2012. The arrangements made by the Contract Holder will determine the level of allocation given to each sub-contractor.

One possible approach is for the Contract Holder to use the 2011/2012 allocation that would have been allocated to the organisation it is proposing to sub-contract with, had it not been affected by the minimum contract level. This will help inform decisions as every organisation affected by the MCL will still receive an indicative allocation for 2011/12

The Contract Holder is encouraged to develop robust contracting processes and service level agreements to inform future decisions of funding allocation.

## What are the key features of management arrangements?

The Contract Holder will need to consider a variety of areas with sub-contractors in relation to management arrangements. These may include:

- partnership building planning;
- operational management;
- performance including management information system (MIS) and key performance indicators (KPI) management;
- impact of minimum levels of performance;
- potential for shared services;
- how over and or under performance will be managed;
- quarterly performance management processes and how these relate to the sub-contractors;
- implications of single line budgets and focus on priorities;
- risk and issues management; and
- audit arrangements.

Where the Contract Holder is considering charging a management fee for its services it will need to consider the latest information from the Skills Funding Agency. The Funding Requirements for 2010/2011 require that at least 85% of the funding provided by the Chief Executive must be used for the delivery of education and training.

For further information see: Funding Requirements for 2010/2011 for the relevant programmes - <http://skillsfundingagency.bis.gov.uk/providers/programmes/>

Sub-contractors may wish to consider the following questions when entering into relationships with a Contract Holder:

- what past record has the Contract Holder in the post-16 funded skills arena?
- what benefits can the Contract Holder bring to my business beyond another model?
- what are the contractual constraints on us as a business?
- what level is the management fee been set at?
- how will the management fee be negotiated in years to come?
- what services do we get for the management fee?

### What are the systems and administrative implications for:

Finance	Quality	Workforce	Data and information
<p>Aspects to address might include:</p> <ul style="list-style-type: none"> <li>• guaranteed contract values;</li> <li>• cash flow;</li> <li>• agreement on payment dates;</li> <li>• reconciliation process;</li> <li>• management fees;</li> <li>• financial probity;</li> <li>• VAT and other tax implications.</li> </ul>	<p>The Contract Holder will need to manage control standards and quality and will need a rigorous approach that includes inspection arrangements, Framework for Excellence and self-assessment processes.</p>	<p>Aspects to address might include:</p> <ul style="list-style-type: none"> <li>• workforce planning;</li> <li>• development;</li> <li>• qualification requirements;</li> <li>• TUPE arrangements (analysis and risk assessment).</li> </ul>	<p>Aspects to address might include:</p> <ul style="list-style-type: none"> <li>• data protocols;</li> <li>• transfer of existing learners;</li> <li>• data protection act (DPA);</li> <li>• individual learner records (ILR);</li> <li>• unique provider reference number (UKPRN);</li> <li>• recording apprenticeship vacancies.</li> </ul>

### What contract model?

In all cases the Chief Executive will contract with a legal entity that is a Contract Holder able to provide the required assurances. How providers arrange themselves and how they come to these arrangements is up to them, so long as the Contract Holder is able to meet its obligations under its funding agreement with the Chief Executive. Common models are:

Managing agent	The Contract Holder has a contract with the Chief Executive, and then sub-contracts all of the provision to sub-contractors
Community Interest Companies	The Contract Holder is a company limited by guarantee specifically designed for enterprises such as learning consortia that conduct business or other activity for community benefit, and not purely for private advantage
Consortium	Is led by a third sector infrastructure organisation whilst others operate entirely as membership organisations
Co-operative consortium	Is formed when a group of businesses join together as a co-operative
Acquisition / merger	Is where existing organisations are either being acquired or merged into a lead organisation

## Managing Agent

The managing agent is responsible for the quality of all its subcontracted provision, and takes responsibility for issues such as compliance, data submissions, receiving and distributing payment, inspection and audits.

The lead organisation will need to be a legal entity. Usually the managing agent will not deliver education and training services themselves but may offer a range of other services in addition to acting as a managing agent. The managing agent will charge a management fee for its services to its sub-contractors.

### What are the key features of governance arrangements?

There will be implications for governance where there is a continuation of a legal entity or where a new legal entity has been formed, and the implications may also vary depending on the current legal status of each provider.

### What are the potential risks of this model?

It is likely this will be uncharted waters for most providers and close consideration will need to be given to fully managing all risks. Common risks include:

- cash flow;
- lack of clarity on VAT and taxation;
- inappropriate management fees;
- lack of agreement;
- arrangements for quality assurance;
- agreements over protocols; and
- clarity over ownership.

### Can we reverse arrangements under this model?

It is possible to reverse arrangements within this model. It is best to negotiate and discuss break clauses, run down contracts, exiting procedures and minimum performance levels in the set up process. Providers do need to ensure they have the ability to opt out of arrangements, should the situation arise as part of a risk management strategy.

## Consortium

Learning consortia vary in form and function. Some consortia are led by a third sector infrastructure organisation. Others operate entirely as membership organisations.

Forming a legally separate organisation will be necessary to support consortia to draw down Skills Funding Agency funding. There are different models, including co-operative consortia (see separate fact sheet) and Community Interest Companies. Careful legal advice should be sought to make sure the appropriate form of company or business is chosen to match the circumstances, aims and values of the consortium.

Community Interest Companies (CICs) are one form of enterprise appropriate for consortia. This is achieved by a "community interest test" and "asset lock" which ensures that the CIC is established for community purposes and the assets and profits are dedicated to these purposes. Registration of a company as a CIC has to be approved by the Regulator who also has a continuing monitoring and enforcement role.

Member organisations would need to consult and for many organisations it is likely that an extraordinary general meeting (EGM) or annual general meeting (AGM) would have to have the chance to vote on forming the co-operative. Levels of risk would have to be assessed and responsibility for any losses agreed.

For further information see: <http://www.socialenterprise.org.uk>.

Charitable status could be another option for organisations that have no immediate threat but would like to develop a charitable approach in the future.

### **What are the key features of governance arrangements?**

There would be a new legal entity for the purpose of contracting with the Chief Executive, controlled by its board with membership representing consortium members.

### **What are the potential risks of this model?**

The consortium will need a mechanism to ensure that members contribute to governance, policy and other decisions.

### **Can we reverse arrangements under this model?**

Companies can be dissolved. If a CLC is wound up under the Insolvency Act 1986 any residual assets, after satisfying its creditors, will be transferred to another asset-locked body, such as a charity or another CIC.

## Co-operative consortium

A co-operative consortium is formed when a group of businesses join together as a co-operative. The co-operative provides central services and the members remain independent organisations and retain their assets.

Co-operative consortia are owned and democratically controlled by the members and not by institutional shareholders. They exist to serve their members who shape the decisions their co-operative makes as well as getting the products and services they need. Key values would be: equal ownership between the members, autonomy and independence, one member one vote, control over asset distribution and concern for communities.

Primarily this is a legal process with the partners coming together to form a new co-operative having sought legal advice on the setting up of the new business arrangements. The co-operative will be subject to the performance management arrangements of the Skills Funding Agency.

Member organisations would need to consult and for many organisations it is likely that an EGM or AGM would have to have the chance to vote on forming the co-operative. Levels of risk would have to be assessed and responsibility for any losses agreed.

For further information see: <http://www.uk.coop/about/what-is-a-cooperative>.

### What are the key features of governance arrangements?

There would be a new legal entity for the purpose of contracting with the Skills Funding Agency which would be democratically controlled by its members.

### What are the potential risks of this model?

There might be potential tensions between the need for a collective approach and the independence of member organisations.

### Can we reverse arrangements under this model?

The co-operative can be dissolved. Assets are owned by the co-operative and there needs to be an agreement on how to redistribute assets.



## Acquisition and merger

In this context, two or more organisations are brought together and collectively hold a contract with the Chief Executive in excess of the minimum contract level. Whether it is an acquisition or merger there will be a legal transition from which emerges a single organisation, which holds a contract with the Chief Executive. This single organisation is often a new legal entity.

Acquisition or mergers can take many forms. The set up process is primarily a legal process with partners coming together under a merger or acquisition, having sought legal advice on the setting up of the new business arrangements. The lead organisation and partners need to consider the benefits to the business of going down this route instead of another model.

### What are the key features of governance arrangements?

There will be implications for governance where there is a continuation of a legal entity or where a new legal entity has been formed.

### What are the potential risks of this model?

Providers should consider the risks associated with the acquisition or merger and how best to manage them. Common risks include:

- resources being diverted from existing work to cover the cost of the merger;
- negative impact on public profile if merging with an organisation whose objectives, purposes, means of conducting business or reputation is at odds with its own;
- uncertainty with beneficiaries and staff who may be concerned about the reasons for merging or longer term impact on them.

### Can we reverse arrangements under this model?

This is unlikely and in effect would entail establishing a number of new organisations.