

Policy Statement: Higher Risk Providers & Persons and Agency Contracting

Date of issue 3 November 2010
Audience Agency staff and providers

Higher Risk Providers & Persons and Agency Contracting

1. The Skills Funding Agency (the Agency), as with the Learning and Skills Council (LSC) before it, has worked well with the vast majority of its learning and training providers. However, a small number of providers have tarnished this otherwise positive relationship, and have achieved financial gain at the expense of both learners and the public purse, whether through ignorance or design. In addition to the operational and financial consequences, such situations require a disproportionate amount of managerial resource to deal with them, and often have a wildly disproportionate impact on the reputation of both the Agency and learning and training providers as a collective group.
2. In the past the Agency and the LSC have endeavoured to prevent such situations from occurring. Nevertheless, new allegations continue to be made and do not appear to be reducing. Given the reduction in both Agency funding and its management resources, it is now considered necessary to “step-up” the Agency’s control over providers and persons who are known to represent a higher level of risk. Where necessary this will result in certain providers not being considered for Agency contracts.
3. The Agency’s intention is that the implementation of this policy will maximise the availability of limited Agency funding, for use by highly professional learning and training providers – to the benefit of the providers, learners, and the public purse.
4. The implementation of this policy will be aligned with other organisational developments, notably single account management and ACTOR (the Approved College and Training Organisation Register). This policy covers all learning providers, including colleges and those seeking to be sub-contractors of direct contractors with the Agency.

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Background

5. The Chief Executive of Skills Funding (the Chief Executive) as the contracting authority in relation to contracts for the provision of education and training must put in place a transparent and fair process for the award of contracts. The criteria for the rejection of tenders or applications must be clearly set out in advance.

6. The Chief Executive has a duty to ensure that public money is safeguarded and used for the purposes that Parliament intended. It is therefore legitimate to include as part of the criteria for selecting a provider to deliver learning matters in relation to providers' financial integrity.

Purpose

7. The purpose of this policy is to document the criteria which would prevent a provider (a bidder) being considered for:

- the award of an Agency contract or other funding agreement;
- an extension or other variation to an existing contract or funding agreement;
- an application to become an approved training organisation.

Criteria for rejection of providers set out in the Public Contracts Regulations 2006

8. Regulation 23 of the Public Contracts Regulations 2006 set out a number of criteria for the rejection of providers.

9. Any bidder must be excluded, if the bidding entity, any of its directors or any other person who has powers of representation, decision or control of the bidding entity has been convicted of any of the following:

- conspiracy that relates to participation in a criminal organisation;
- corruption;
- bribery;
- fraud where the fraud affects the financial interests of the European Communities and falls within the meaning of any of the following:
 - the offence of cheating the Revenue;
 - the offence of conspiracy to defraud;
 - fraud or theft under the Theft Act 1968 and the Theft Act 1978;
 - fraudulent trading under the Companies Act 1985;
 - defrauding Customs;
 - an offence in connection with taxation in the European Community; or

- destroying, defacing or concealing documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968;
- money laundering; or
- any other offence within the meaning of Article 45(1) of the Public Sector Directive (noting that the only offence referred to in Article 45(1) of the Public Sector Directive which does not appear to be covered in the list above is participation in a criminal organisation, rather than conspiracy which relates to participation in a criminal organisation as mentioned above).

10. In addition any bidder can be excluded if that bidder, any of its directors or any other person who has powers of representation, decision or control of the bidding entity:

- is insolvent (if a company) or an undischarged bankrupt (if an individual);
- has been convicted of a criminal offence relating to the conduct of his business;
- has committed an act of grave misconduct in the course of his business;
- has not fulfilled his obligations relating to the payment of social security or taxes;
- is guilty of serious misrepresentation in providing any information to the contracting authority in relation to their prospective bid;
- if relevant, is not properly licensed to provide services in the State in which the bidder is established; or
- is not registered on the appropriate trade register in the Member State in which he is established (a UK or Irish bidder would be deemed to be registered on the professional or trade register if it is established in the UK and is certified as incorporated by the Registrar of Companies).

11. Where a criterion relates to a criminal offence, the Rehabilitation of Offenders Act 1974 (and subsequent amendments) may apply.

Additional criteria for rejection of providers

12. As the provision of education and training is a residual service, the Chief Executive can also include additional criteria for refusing to select bidders on the basis of financial or other irregularities. These criteria are:

- previous activities that have resulted in significant repayment of Agency or Government funding (£100,000 or more);
- failure to repay funding due to the Agency or other Government body;

- two or more instances where the Agency's staff have audited the provision of the bidder and identified significant concerns resulting in a qualified opinion;
- failure to implement the requirements of a Notice to Improve or Financial Notice to Improve (in respect of financial management and control), to the Agency's satisfaction;
- on-going investigation relating to suspicion of fraud or irregularity under an existing contract or funding agreement with the Chief Executive of Skills Funding.

13. The Chief Executive can refuse to select bidders where they have a director who was previously a director, or governor, or a senior employee, or shareholder, in another organisation where one or more of the criteria in this policy statement apply.

14. The Chief Executive can refuse to select bidders where the bidder has a director who was previously one of his or her employees or employed by a predecessor body, or other Government body, who was dismissed for gross misconduct, or who resigned whilst suspended from employment and subject to a disciplinary investigation concerning allegations of gross misconduct.

15. The Chief Executive may make exceptions to applying the above criteria. However, such exceptions should be documented, and approved in the same manner as their application.

Due Process

16. All prospective learning and training providers, including sub-contractors, must be made aware of these additional criteria on which the Chief Executive could refuse to invite a provider to tender; or award a contract; or not accept as an approved training organisation; or not agree for the purpose of sub-contracting.

17. Before excluding a learning and training provider on the basis of the additional criteria, approval must be sought from the National Director of Provider Services, or if unavailable by a nominated deputy. The advice of the Agency's legal advisors shall be sought beforehand. The Chief Executive of Skills Funding should be informed.

18. The learning and training provider concerned shall normally be notified of the outcome in accordance with the relevant timescales associated with the procurement or contract framework being used. Exceptions might be appropriate where an investigation or Police action is taking place or expected.