



## Federation of Awarding Bodies

# The End Point Assessment Contract - Key issues

*19 October 2017*

### **BINDMANS LLP**

236 Gray's Inn Road  
London WC1X 8HB

T: +44 20 7833 4433

E: [info@bindmans.com](mailto:info@bindmans.com)

W: [bindmans.com](http://bindmans.com)

### **SPEAKERS**

Selman Ansari

# Introduction:

- A lot of regulatory uncertainty
- The ESFA has now issued conditions for AAOs but these are a lot less comprehensive than the Ofqual conditions
- Expect continued regulatory uncertainty as the ESFA Conditions are updated
- A lot of commercial uncertainty also - a number of different scenarios in the market
- Caution needed:
  - Arrangements need to strike a balance between too rigid (not providing for regulatory change) *or* too loose (not providing for commercial certainty)
  - Regulatory arrangements may change in response to commercial arrangements being entered into

# The ESFA Conditions

- Released on 5 September 2017
- Condition 6:

The information you give us at the time of your application to the register must remain current and valid. Should there be any change in this information which reasonably impacts on your ability to deliver end-point assessment you must inform us immediately at [apprentice.assessment@education.gov.uk](mailto:apprentice.assessment@education.gov.uk)

Depending on the nature of that change, we will review your listing on the register.

- Condition 23:

The terms of the contract between you and the provider also needs to be clear that you are delivering the end-point assessment on behalf of the employer and that the provider is acting as our agent in passing the payment (either from the employer's apprenticeship service levy account or funded by us) that you are due through to you. This does not make you a delivery subcontractor of the provider.

# Parties

- Currently digital funding payments to AAOs can only be done through the Training Provider (and not the Employer)
- This may change as ESFA's digital accounts are developed
- This makes for potentially complex, three party, arrangements
- Suggestion in FAB-Bindmans' Guide to Contractual Clauses is to have an agreement between the AAO and the Training Provider, and to provide 'third party rights' to the Employer

# Third party rights I - legal background

- Allowed for by the Contracts (Rights of Third Parties) Act 1999
- Third parties who are not signatories to a contract may be able to enforce its terms
- Contract must (i) identify the third party, (ii) give a benefit to the third party, and, (iii) intend to confer that benefit to the third party

## Third party rights II - commercial considerations

- Realistically, does the employer have a greater or smaller role in the delivery of the apprenticeship?
- Employer could have little more role than as payer of EPA fees
- Consider whether employer's need third party rights, or, if they need to be parties to contract

# Service Schedule

- Service agreements often structured so that obligation to provide “the Service” is in the main body of the agreement but Schedule contains definition of what the Service is
- Service Schedule should contain meat of obligations and requires careful drafting
- Do a ‘walk through’ of the EPA provision in each case and ensure that all the requirements of the EPA are adequately detailed in the Service Schedule
- Many disputes about service provision will focus on the terms of the Service Schedule

# Sub-contracting EPA services

- ESFA has been disapproving of the sub-contracting of EPA services
- Regulatory position is that only an organisation that is on the Register of Apprenticeship Assessment Organisations can provide EPAs
- Unclear what evidence will be needed to demonstrate sufficient control of sub-contractors and/or agents
- Maybe an issue to raise with EQA organisation or Ofqual (even if Ofqual not EQA for the relevant assessment)

# Charges sheets and moving documents I

- Certain parts of the contract may need updating, even if the regulatory regime remains the same
- Sensible to separate these parts of the contract into stand alone documents and incorporate them by reference into the contract
- This can be tricky! Court may rule wholly onerous and unexpected charges or terms as outside of the contract
- Useful, in particular, for statement of Charges; not just to cover any annual increase in charges but to add new scenarios that may require different charges

# Charges sheets and moving documents II

- Can be done by including charge sheets and/or moving documents in a link that is stated in the contract as being kept updated
- Contract can state the criteria for change e.g. annual revision of prices in line with stated prices index
- Vaguer criteria for change may be more susceptible to challenge e.g. 'changes in accordance with any regulatory changes from time to time' (although beware of Severance clause that allows for the modification or deletion of clauses not in line with the regulatory regime)
- Moving document can be used for policies and procedures but may not be correct vehicle for reflecting major regulatory or commercial change

# Termination, duration and obligation to supply

- A flexible termination or duration clause may be a better way of dealing with regulatory and/or commercial uncertainty
- This could follow the natural length of each relevant apprenticeship (this might be a two year commitment)
- Termination for purely commercial reasons may constitute abuse of dominant position, or, invite regulatory action
- If there is no obligation to supply (i.e. there is no obligation on the AAO to make itself available to provide EPA services), the EPA contract becomes 'at will' for the AAO
- A contract's worth may be determined by how quickly it can be terminated without fault

# Limitation of liability

- Another potential indicator of a contract's worth is how much a party will be liable for if they breach it
- Two aspects of limitation of liability: (i) what is being limited, and, (ii) how much the limitation limits liability to
- Unfair Contract Terms Act will apply to limitation clauses; including application of a 'reasonableness test'
- Think carefully about how much a breach of contract might be worth. If there is only one AAO in a given sector or in relation to a given standard, a breach may be worth a significant amount

# Dispute resolution

- A breach of contract is remediable by agreement or, ultimately, by a court judgment
- Default position, if no agreement, is court action
- This is costly (not just financially), time consuming and is often not worthwhile in relation to very many breaches
- Better to include a 'dispute resolution' clause which sets out a mechanism for parties to try and resolve disputes before being obliged to go to court
- Complexity and length of procedures should be carefully considered

## Freedom to choose training providers and discrimination

- Starting point: there is a general right to choose who to contract with
- Certain AAOs may be in a ‘dominant position’ under Competition Law
- Dominance restricts the dominant party’s right to act ‘abusively’
- Establishing dominance generally requires complicated economic evidence which needs to be thoroughly analysed by the court or tribunal. However, recent **Socrates Training v Law Society** was considered under ‘fast track’ procedure

---

For additional information please contact:

**Selman Ansari, Senior Consultant**

Public Law and Human Rights

E: [s.ansari@bindmans.com](mailto:s.ansari@bindmans.com)

**BINDMANS LLP**

236 Gray's Inn Road London WC1X 8HB

T: +44 20 7833 4433 | E: [info@bindmans.com](mailto:info@bindmans.com) | W: [bindmans.com](http://bindmans.com)

# Thank you!

Information provided is for illustrative purposes only and does not constitute legal advice.

© Bindmans LLP 2017

Bindmans LLP is a limited liability partnership, registered in England and Wales. Our registration number is OC335189 and its registered office is 236 Gray's Inn Road, London, WC1X 8HB. Our VAT number is GB 234 2718 76. Bindmans LLP is authorised and regulated by the Solicitors Regulation Authority

