



Australian Government
Department of Finance and Administration



Developing and Managing Contracts

GETTING THE RIGHT OUTCOME, PAYING THE RIGHT PRICE



Better Practice Guide

February 2007

Foreword

Contracting is an integral part of doing business in the public sector. The delivery of many, if not most, government programmes now involves some contracting with private sector providers. As a result developing and managing contracts is a skill required by public sector entities¹ in the management of the majority, if not all, programmes. However, contract management is not an end in itself and it is important that all contracting decisions and actions focus on the outcomes that entities are seeking to achieve.

The Australian National Audit Office (ANAO) and the Department of Finance and Administration (Finance) have a strong interest in efficient contract management, and have provided a range of publications to assist agencies to understand contract and procurement issues. In 2001, the ANAO published a Better Practice Guide on Contract Management. This new Guide, produced by the ANAO in partnership with Finance, reflects the continued interest in, and need for, guidance in this area.

The Guide includes a discussion on developing a contract, commencing from the point where a decision is made on the engagement of a contractor as a result of a tender or other procurement process. The broader focus of this Guide recognises that the foundations for the effective management of a contract are laid at the time the contract is being developed.

The public sector enters into a large variety of contracts. Contracts can range significantly in value, in duration, and in complexity. As a consequence, the nature and extent of contract management practices will vary depending on the size, nature, complexity and risk profile of each contract. Entities and others involved in managing contracts therefore need to apply judgement about the contract development and management practices that are appropriate to their particular situation.

The Guide does not attempt to address all issues that may need to be considered in a particular circumstance. It identifies the key issues and considerations that entities should be aware of in developing and managing contracts. As such, the Guide is intended to be a general reference document for senior managers, contract managers and stakeholders who are involved in the development and management of contracts. The Guide does not address specific issues that relate to high value, complex contracts such as those involving equipment acquisitions. The Guide also does not address the development and management of projects although a number of the issues and considerations are similar.

Recognising that users of the Guide will have different information needs, the Guide is divided into six parts to allow easy reference to each aspect of contracting activity.

Ian McPhee
Auditor-General

Ian Watt
Secretary
Department of Finance and Administration

¹ In this Guide, the term entities applies to all organisations subject to the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

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Introduction

COVERAGE AND TERMINOLOGY

This Guide covers the phases of the procurement cycle commencing from the selection of a preferred tenderer or contractor through to managing and ending the contract. The Guide is intended to complement other procurement publications which focus on the early stages of the procurement cycle, such as the preparation, issue and evaluation of tenders.

A range of principles, key issues and considerations relevant to the development and management of contracts generally, is outlined in the Guide. They are intended to complement, rather than replace, specific guidance and advice developed by individual entities. For very large, complex contracts such as equipment acquisitions, detailed and tailored guidance will be required.

A number of specific issues associated with the legal processes of contract development or detailed contract clauses needed to avoid or mitigate a range of common risks are mentioned in the Guide but not discussed in detail. This is due to the number of potential issues involved and because of the evolving nature of legal precedent. Contract managers are encouraged to seek professional advice on these issues, as necessary.

The Guide also does not address project management although many of the issues canvassed in the Guide will also apply to the management of projects.

For ease of reference and presentation, the following terms are used in this Guide:

- **Acquiring entity:** the party that enters into the contract and is responsible for its management
- **Contractor:** the party engaged to provide the specified goods or services
- **Contract deliverables:** the goods or services to be delivered by the contractor
- **Public sector entities:** all organisations subject to the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Acts 1997*, and
- **Stakeholders:** the parties that have a legitimate interest in the procurement process. These can include Ministers, senior management of the acquiring entity and of other entities affected by a contract, and end-users of the goods or services to be provided.

STRUCTURE OF THE GUIDE

The Guide is divided into six parts as indicated in Figure 1:

Figure 1: Structure of the Guide

Part 1 – Contracting in the public sector	Summarises the legislation and related policies relevant to public sector contracting. This part also introduces a number of key issues that are relevant throughout the procurement process.
Part 2 – Developing the contract	Outlines issues and considerations involved in the development of a contract.
Part 3 – Formalising the contract	Outlines the issues and considerations that should be addressed in finalising a contract.
Part 4 – Entity arrangements for managing contracts	Discusses issues and considerations relating to the general management of contracts by entities.
Part 5 – Managing individual contracts	Discusses a range of issues and considerations relating to the effective management of individual contracts.
Part 6 – Ending the contract	Outlines issues and options available for bringing a contract to a close.

Each part of the Guide includes a discussion of key issues and considerations relevant to each contracting phase. These are in some instances complemented by case studies or examples illustrating key points, drawn from actual Australian Public Sector experiences. In some cases these have been simplified to better illustrate the point. In other cases a composite case study is presented, to illustrate several points at once. A number of contract management check lists and similar aids are also included throughout the Guide. These should be tailored to the particular circumstances of each entity and the nature and complexity of its contracting activities.

Each part of the Guide is presented, to the extent possible, as a stand alone discussion with cross-references to other parts where appropriate. The Guide also incorporates a comprehensive Index. This should allow readers with particular responsibilities and interests to navigate easily through the Guide.

The ANAO and Finance wish to acknowledge the assistance provided by Strategic Legal Services and Consulting Pty Ltd and Ms Ann Thurley in developing this Guide. A number of entities also provided valuable material and input including the Departments of Defence, Employment and Workplace Relations, Families, Community Services and Indigenous Affairs, Veterans' Affairs, Foreign Affairs and Trade, Family Court of Australia, Centrelink and the Australian National Gallery.

PART 1
**Contracting in
the public sector**



PART 1

Contracting in the public sector

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1. Contracting in the public sector

1.1. INTRODUCTION

Contracting is an integral part of the way the Australian Government conducts business.

Contracting is an integral part of the way the Australian Government conducts business. Contracting activity ranges from straightforward procurements that can be made, for example, using a government credit card or purchase order through to highly complex, innovative long term projects that may involve a number of inter-connected contracting arrangements. The Australian Government is a significant purchaser of goods and services. These purchases comprise thousands of transactions and involve billions of dollars annually.

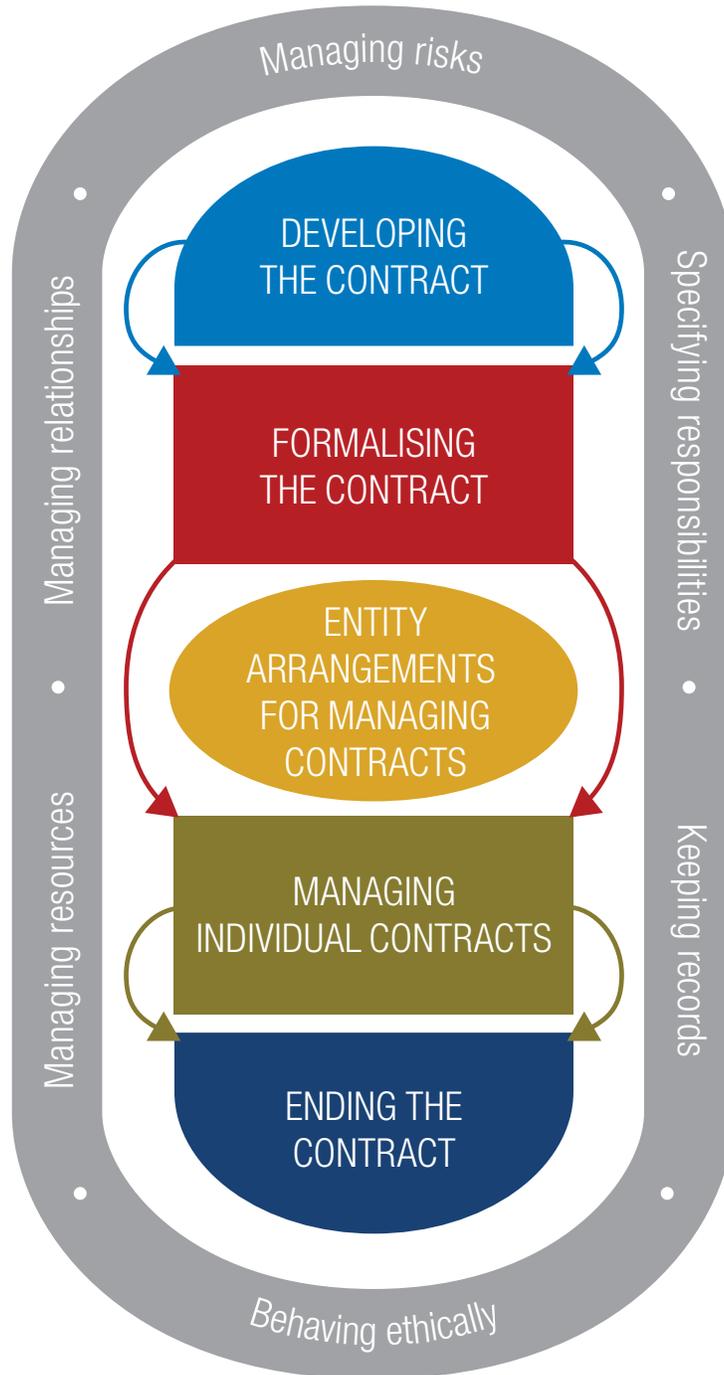
The Australian Government has in place a range of legislation and related policies that set out the framework for contracting. This Part of the Guide provides a summary of, or a reference to, the legislation and policy that can impact on contracting activities.

In addition to the legislative and policy framework, there are a number of factors that are important at all stages of the contracting process. These are:

- managing risks
- managing relationships
- managing resources
- specifying responsibilities
- behaving ethically, and
- keeping records.

Each of these issues is introduced in this Part and discussed in more detail where relevant in Parts 2 to 6 of the Guide. These factors, together with the phases of the procurement cycle addressed by this Guide, are illustrated in Figure 2 below.

Figure 2: Key elements of this Guide



... staff may need a more detailed knowledge of particular legislative and policy requirements, and may require specialist advice on particular issues.

A key provision of the FMA Act is section 44 which requires Chief Executives to promote the efficient, effective and ethical use of the resources for which they are responsible.

There is a range of policy requirements and supporting guidance that addresses various aspects of procurement.

1.2. LEGAL AND POLICY FRAMEWORK

There is a range of legislation and government policy that can be relevant to public sector contracting activities. Those staff involved in contracting should have, at a minimum, a broad understanding of the legal and policy framework, as well as a practical working knowledge of contracting practices that apply to the particular contracting activity in which they are engaged. Depending on the extent and complexity of a person's contracting responsibilities, staff may need a more detailed knowledge of particular legislative and policy requirements, and may require specialist advice on particular issues.

1.3. LEGISLATION

The main legislation directly affecting procurement for a wide range of acquiring entities is the *Financial Management and Accountability Act 1997* (FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

FMA Act

A key provision of the FMA Act is section 44 which requires Chief Executives to promote the efficient, effective and ethical use of the resources for which they are responsible. The FMA Act also authorises the making of FMA Regulations. The Commonwealth Procurement Guidelines (CPGs) are issued by the Finance Minister under the FMA Regulation 7.

CAC Act

Section 47A of the CAC Act enables the Finance Minister to issue directions to the directors of CAC Act entities on matters related to procurement. The CAC Act also authorises the making of regulations for entities governed by the CAC Act. CAC Regulation 9 lists those CAC entities (relevant CAC Act bodies) that are subject to directions issued by the Finance Minister under the CAC Act. The *Finance Minister's (CAC Act Procurement) Directions 2004* (The Directions) requires directors of a relevant CAC Act body to ensure that its officials apply Divisions 1 and 2 of the Commonwealth Procurement Guidelines (CPGs) for a covered procurement.² The Directions also advise CAC Act entities on how to interpret the CPGs in the context of the CAC Act.

A summary of relevant legislation, policy requirements and guidance is outlined at Appendix 1.1.

Procurement policy

There is a range of policy requirements and supporting guidance that addresses various aspects of procurement. Those involved in contracting should be aware of this information and apply it to the particular circumstances. This material comprises:

- the *Commonwealth Procurement Guidelines* (CPGs),³ issued by the Finance Minister, that establish the procurement policy framework within which agencies subject to the FMA Act and certain CAC Act bodies determine their specific procurement practices
- policies on particular matters, for example Privacy, Occupational Health and Safety and Security
- Finance Circulars issued by the Department of Finance and Administration (Finance) which provide advice on key changes and developments in the procurement policy framework, and

2 A covered procurement for relevant CAC Act bodies is a procurement of property or services that is above \$400 000 (or \$6M for construction services) and is not specifically exempted under Appendix B of the Commonwealth Procurement Guidelines (CPGs).

3 Department of Finance and Administration, *Financial Management Guidance No. 1*, January 2005.

- a range of web based and printed material issued by Finance and other entities that provides guidance to agencies and officials in implementing procurement policy.⁴

The procurement policies of CAC entities not subject to the CPGs are the responsibility of each individual entity in the context of their enabling legislation. These entities are encouraged to adopt some or all of the requirements of the CPGs, recognising that they represent good practice.

Entity policies and instructions

The Chief Executives of FMA agencies have the authority to issue legally binding instructions relating to the financial administration of their agency.⁵ These Chief Executive Instructions (CEIs) can be expected to include details of the agency's procurement policies, including contracting policies. It is also generally appropriate for the CEIs to be supplemented by more detailed procurement procedures and practices that cover all phases of the procurement cycle in the context of the agency's particular business environment.

While there is no legislative requirement to do so, it would be expected that the Chief Executive of a CAC entity would also issue policies, procedures and practices that address the entity's procurement responsibilities.

CAC entities are encouraged to adopt some or all of the requirements of the CPGs, recognising that they represent good practice.

1.4. COMMON ISSUES IN CONTRACTING

In addition to the legislative and policy requirements, the following issues are ones that are relevant throughout the procurement cycle. They are discussed here in a generic or introductory manner and are dealt with in more specific terms in the remainder of the Guide. The approach adopted, the resources devoted and the effort required in relation to each of these issues should be determined by the size, complexity, nature and risks of the entity's contracting environment and each individual contract.

Managing risk

Managing risk is an integral part of good management. It is a process that is best embedded into existing practices or business processes.⁶

The management of risks should therefore be an integral part of all aspects of procurement, including the development and management of contracts. This requires the identification of risks and, where appropriate, the implementation of risk treatments⁷ at key points in the procurement cycle. This in turn involves identifying the stages or events where risks are likely to be the highest and/or the adverse effect of an event or occurrence is likely to be the greatest. Wherever possible, the approach to managing risks for individual contracts should be consistent with the entity's broader risk management framework. It should also involve the periodic revision of risk assessments undertaken and the enhancement or modification of risk treatments where required.

Further information about risk management is available in the AS NZS 4360 and the companion Risk Management Guidelines issued by Standards Australia.⁸

The management of risk should be an integral part of all aspects of procurement.

4 Details of this material are included in the References List at the end of this Guide.

5 FMA Agency Chief Executives are authorised to issue CEIs under Section 52 of the FMA Act and Regulation 6 of the FMA Regulations.

6 AS NZS 4360: 2004. Risk Management Standard, Standards Australia/Standards New Zealand.

7 AS NZS 4360: 2004 defines risk treatments as the process of selection and implementation of measures to modify risk.

8 HB 436: 2004, Risk Management Guidelines, Companion to AS NZS 4360: 2004.

Managing relationships

An important element in the formation and management of any contract is the relationship that exists between the parties. Having a professional, constructive relationship with the contractor is a key ingredient in the successful delivery of the outcomes sought by the contract.

The aim of relationship management is to keep the communications between the parties open and constructive, non adversarial and based on mutual understanding. This should assist in preventing problems arising and also with resolving them in a timely manner should they arise. Having a professional, constructive relationship should assist the effective management of performance, particularly under-performance, should it occur. Maintaining a good relationship does not mean that issues of non-compliance or under-performance cannot be discussed and acted upon. It means that there is a greater likelihood that such issues can be discussed and resolved in a cooperative manner.

Relationships will begin to form at the early stages of the procurement cycle. In circumstances where the contract manager is appointed following contract award, the contract manager should seek to build on existing relationships.

Establishing clear lines of responsibility and accountability for all decision-making is another important aspect of successful contracting.

Managing resources

To effectively meet an acquiring entity's contracting responsibilities requires an appropriate level of investment. This requires the contracting function to have senior management support, the ability to access expert advice as necessary and personnel that have relevant skills or the opportunity to obtain them when considered necessary. One of the keys to successful contracting is the availability of personnel with interpersonal, subject matter and project management skills. In addition, the contract manager should be aware of the contractor's capabilities so that the acquiring entity is able to act as an informed client – that is, a client that understands the goods or services being provided and is able to judge whether agreed performance standards are being met.

Specifying responsibilities

Establishing clear lines of responsibility and accountability for all decision-making is another important aspect of successful contracting. Ensuring the necessary authorisations and delegations are in place at the beginning of the contracting cycle is an important prerequisite to ensuring that all contracting decisions and payments are valid and legally appropriate. These instruments should be periodically reviewed and kept up-to-date.

Behaving ethically

All those involved in procurement activities have a responsibility to behave ethically at all times. Ethical behaviour supports openness and accountability in a procurement process and gives suppliers confidence to participate in the Government market place. Ethical behaviour can also reduce the cost of managing risks associated with fraud, theft, corruption, and other improper behaviour, and enhance confidence in public administration.⁹

For those staff employed in entities subject to the *Public Service Act 1999*, the standards of conduct required are contained in the APS Values and the APS Code of Conduct.¹⁰ While formal arrangements, including the engagement of probity advisors and/or auditors, to assist in managing ethical issues can be expected to be put in place at the commencement of the procurement cycle, contract managers and those with broader management responsibilities for contracting activities should be alert to issues and situations that involve judgements about ethical behaviour and practices.

All those involved in procurement activities have a responsibility to behave ethically at all times.

⁹ Department of Finance and Administration, *Financial Management Guidance No. 14, Guidance on Ethics and Probity in Government Procurement*, January 2005, p. 4.

¹⁰ *Public Service Act 1999*, sections 10 and 13.

Keeping records

All records that are created and received in conducting procurement activity, whether paper based or electronic, should be captured in an entity's recordkeeping system(s) in accordance with the entity's general recordkeeping policies and procedures. A systematic approach to recordkeeping at the beginning of a procurement process and throughout the contracting cycle will assist an entity to:

- provide evidence of business conducted and decisions made
- manage legal and other risks, and
- meet its accountability obligations.

As such, keeping good records should be seen as an integral part of, rather than incidental to, contracting activity.

All records that are created and received in conducting procurement activity, whether paper based or electronic, should be captured in an entity's recordkeeping system(s).

APPENDIX 1.1 SUMMARY OF RELEVANT LEGISLATION AND POLICIES

This Appendix provides a summary of relevant legislation and policies that are applicable to contracting activities in the public sector.

Legislation

The *Financial Management and Accountability Act 1997* (FMA Act) and its associated Regulations, the *Financial Management and Accountability Regulations* (FMAR) apply to Departments of State, Departments of the Parliament and agencies prescribed by the FMA Regulations.

Section 44 of the FMA Act requires Chief Executives to promote the efficient, effective and ethical use of the Commonwealth resources for which they are responsible.

Regulation 7 of the FMAR¹¹ provides for the Minister for Finance and Administration to issue *Commonwealth Procurement Guidelines* (CPGs). The CPGs establish the core procurement policy framework. Regulation 8(1) of the FMAR requires officials to have regard to the CPGs when performing duties related to procurement. Other applicable Regulations are:

- FMA Regulation 6 allows Chief Executives to issue instructions (CEIs) on purchasing that focus on the entity's needs. CEIs provide primary operational instructions to acquiring entity officials and are aimed at assisting the officials in carrying out their duties in accordance with legislation and policies in the context of the entity's circumstances and needs
- FMA Regulation 7(3) provides that the CPGs can stipulate requirements relating to the publishing of procurement related information
- FMA Regulation 8(2) requires officials to document their reasons where they do not act in accordance with the CPGs
- FMA Regulation 9(1) requires any persons approving proposals to spend public money to ensure the expenditure is in accordance with the policies of the Commonwealth and will make efficient and effective use of the money and, if the proposal is one to spend special public money¹², is consistent with the terms under which the money is held
- FMA Regulation 10 requires written authorisation from the Finance Minister before approving a proposal to spend public money where there is not sufficient available funds in the current appropriation
- FMA Regulation 12 requires approval for expenditure to be documented as soon as possible after the approval is given, and
- FMA Regulation 13 requires that a person must not enter into a contract, agreement or arrangement involving public money unless a spending proposal has been approved in accordance with Regulations 9 and 10.

The *Commonwealth Authorities and Companies Act 1997* (CAC Act) and associated regulations and Ministerial Orders establish the financial framework for the corporate governance, financial management, reporting, accountability and audit operations of the Australian Government statutory authorities and corporate entities, incorporated under the *Corporations Act 2001*, in which the Australian Government has a controlling interest. These CAC Act obligations are in addition to the requirements of the Corporations Law. Many CAC Act bodies are established under specific Commonwealth legislation and their operational activities are regulated by that legislation in conjunction with other relevant Commonwealth statutes.

¹¹ The FMARs contain a section, Part Three, that relates to commitments to spend public money.

¹² Section 16 of the FMA Act defines special public money as public money that is not held on account of the Commonwealth or for the use and benefit of the Commonwealth.

The CAC Act applies to those Australian Government entities that are legal entities (such as bodies corporate) that:

- are separate from the legal personality of the Commonwealth
- are established for a public purpose by legislation, and
- hold money on their own account.

In the context of procurement and contracting, CAC Act bodies are generally not subject to the CPGs. However, CAC Act bodies listed in the CAC Regulations as subject to section 47A of the CAC Act (relevant CAC Act bodies) can be directed by the Finance Minister to apply the CPGs and the Minister has done so through the *Finance Minister's (CAC Act Procurement) Directions 2004*.

In circumstances where the CPGs are not a requirement, these and other policies provide useful guidance to all CAC bodies on conducting procurement activities.

Other relevant legislation

The actions of officials, including those involved in the contracting process and decisions are governed by a variety of legislation. A brief synopsis of the Acts that are particularly relevant to procurement activities is provided below.

Archives Act 1983

The *Archives Act 1983* provides for the management of Commonwealth records. In brief, the Archives Act:

- regulates the disposal of Commonwealth records
- requires agencies to transfer their records to the National Archives of Australia when they are no longer required by the agency or they are more than 25 years old, and
- establishes a general right of public access (from the Archives) to records that are more than 30 years old.

The National Archives of Australia has issued a number of advices including guidance relating to recordkeeping responsibilities when the delivery of services is outsourced.

Crimes Act 1914 and the Criminal Code Act 1995

The *Crimes Act 1914* provides the framework for a range of offences and criminal procedures, several of which can potentially apply to activities carried out by Commonwealth employees or agents, in relation to public sector administration. For example, disclosure of official information may breach section 70 of the Crimes Act, which makes it an offence for a Commonwealth officer to publish or communicate any fact, or document (except where authorised to do so) which comes into his or her knowledge or possession, and which it is his or her duty not to disclose. Section 79 of the Act places restrictions on activities relating to official secrets.

Criminal law at the Federal level is now codified in the Commonwealth Criminal Code. The *Criminal Code Act 1995* (which incorporates the Criminal Code) contains the major offences against Commonwealth law, which includes fraud (see the Commonwealth Fraud Control Guidelines), theft, abuse of public office, bribery and unauthorised access to, or modification of, restricted data held in a Commonwealth computer to which access is restricted by an access control system.

A Commonwealth employee or agent (including a contractor) may be liable for prosecution under the criminal law if they conduct themselves improperly in the performance of their official functions.

Freedom of Information Act 1982

The *Freedom of Information Act 1982* (FOI Act) provides the public with a legal right of access and appeal rights concerning Commonwealth records and exposes the decision-making process of the Government and its agencies to public scrutiny. Chief Executive Officers are responsible for the proper application of the Act in their organisations.

The FOI Act gives the public a right to:

- access documents (including access by individuals to personal information held about themselves) held by Commonwealth Ministers, their Departments, statutory authorities and other agencies
- ask for personal information to be changed or annotated, and
- appeal against a decision not to grant access to a document, amend or annotate a personal record.

While there may be occasions where information is not disclosed as the result of an FOI request, the general presumption should be that most documents produced can and will be disclosed.

Privacy Act 1988

The *Privacy Act 1988* provides a framework for the protection of personal information that may have been collected by a Commonwealth entity and specifies the minimum legal requirements for collecting, using and protecting a record of such information.

The Act establishes the Office of the Federal Privacy Commissioner, and is the primary Commonwealth legislation providing protection of personal information in the Commonwealth public sector and in the private sector, and regulates the handling of personal information.

Section 14 of the Act contains eleven Information Privacy Principles (IPPs) applicable to the public sector which require that any personal information held in a record or file is:

- accurate, up-to-date, complete and not misleading (IPP7)
- used only for a purpose to which the information is relevant (IPP9) and only for the purpose for which it was obtained, unless an exception is applicable (IPP10), and
- not disclosed to another person, body or agency, unless an exception is applicable (IPP11).

The IPPs also impose on Australian Government entities the obligation to keep personal information secure, maintain its accuracy, and ensure that it is used only if it is complete, and relevant to the issue in relation to which it is used.

Amendments to the *Privacy Act 1988*, which came into effect in December 2001, extended coverage of the Act to the private sector. Under those amendments, Australian Government entities have obligations in relation to the personal information handling activities of their contractors. Schedule 3 to the Act contains 10 National Privacy Principles (NPPs) applicable to private sector organisations.

The IPPs and NPPs deal with all stages of the processing of personal information, and establish standards for the collection, use, disclosure, quality and security of personal information. They also establish rights of access to, and correction of, the information by the individuals concerned.¹³

Public Service Act 1999

The *Public Service Act 1999* provides for the establishment and management of the modern Australian Public Service (APS). The Public Service Act:

- establishes an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public
- provides a legal framework for the fair and effective employment, management and leadership of APS employees
- defines the powers, functions and responsibilities of agency heads, the Australian Public Service Commissioner and the Merit Protection Commissioner, and
- establishes rights and obligations of APS employees.

The Public Service Act sets out the APS Values and the APS Code of Conduct which govern the manner in which APS employees conduct themselves in performing their official duties.

¹³ Office of the Privacy Commissioner: *Information Sheet 12 – 2001 Coverage of and Exemptions from the Private Sector Provisions*, <<http://www.privacy.gov.au/>>; Office of the Privacy Commissioner: *Guidelines to the National Privacy Principles*, <http://www.privacy.gov.au/publications/nppg_01.html>; Office of the Privacy Commissioner: *Information Sheet 14–2001 – Privacy Obligations for Commonwealth Contacts*.

Other legislation

Legislation that can also impact on contracting activities includes:

- *Administrative Decisions (Judicial Review) Act 1977*
- *Copyright Act 1968*
- *Disability Discrimination Act 1992*
- *Electronic Transactions Act 1999*
- *Environment Protection and Biodiversity Conservation Act 1999*
- *Equal Opportunity for Women in the Workplace Act 1999*
- *Human Rights and Equal Opportunity Act 1986*
- *Judiciary Act 1903*
- *Lands Acquisition Act 1989, and*
- *Occupational Health and Safety (Commonwealth Employment) Act 1991*

Procurement policies

The Department of Finance and Administration publishes guidelines called Financial Management Guidance (FMG) on how to comply with relevant legislation and policy requirements. The most important of these guidelines for contract managers are:

- The Commonwealth Procurement Guidelines (FMG No.1)
- Guidance on Confidentiality of Contractors' Commercial Information (FMG No.3)
- Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort (FMG No.6)
- Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts) (FMG No.8)
- Guidance on Complying with Legislation and Government Policy in Procurement (FMG No.10) summarises policies and legislation that may interact with contracting processes. A particularly useful source of information is the Interactive Policy Table, contained in this Guidance
- Guidance on Identifying Consultancies for Annual Reporting Purposes (FMG No.12)
- Guidance on the Mandatory Procurement Procedures (FMG No.13)
- Guidance on Ethics and Probity in Government Procurement (FMG No.14), and
- Guidance on Procurement Publishing Obligations (FMG No.15).

Legal Services Directions

The Attorney-General issues *Legal Services Directions* (the Directions) under the *Judiciary Act 1903* and the *Judiciary Amendment Act 1999*. The Directions are intended to ensure that the quality of the Government's legal work is maintained and the public interest protected. The Directions are also designed to enable the Attorney-General to manage and reduce risks inherent in the provision of legal services to the Australian Government, and to ensure that these services are of a high standard and consistent with the public interest.

The Directions are made as a statutory instrument by the Attorney-General and have the force of law. Failure to comply with them will result in an agency, and the Commonwealth employees responsible, being in breach of the law.

The Directions also:

- promote and preserve the Commonwealth's responsibility to act as a model litigant
- ensure sensitive work involving machinery of government is not outsourced inappropriately
- set threshold limits for counsel fees, and
- provide guidelines for assisting government officials who are involved in legal proceedings.

Protective security

The Australian Government's Protective Security Manual¹⁴ (PSM) is issued by the Attorney-General. The Manual outlines policies and associated guidance, and minimum standards on protective security matters that are applicable to Australian Government agencies.

The PSM provides minimum common standards in protective security for all Australian Government agencies and contractors and their employees performing services for and on behalf of the Australian Government. These minimum standards ensure that there is a consistent approach to protective security within and between agencies.

Part F of the PSM provides agency management with detailed policies, guidance and minimum standards relating to procurements involving protective security functions or considerations.

Reporting requirements

There are a range of reporting requirements and obligations applicable to Australian Government entities undertaking contracting activities. These requirements are generally more detailed for FMA Act bodies than for CAC Act bodies. It is important that entities involved in contracting are aware of, and comply with, these reporting requirements. The main requirements are outlined below.

AusTender

AusTender¹⁵ reporting requirements for FMA agencies and relevant CAC Act bodies are as follows:

- publishing an Annual Procurement Plan containing forthcoming procurements on AusTender
- publishing details of all open approaches to the market, including requests for tender, requests for expressions of interest and requests for inclusion on a multiuse list on AusTender, and
- publishing details of contracts and agency agreements, including panel and standing offer arrangements valued at or over the reporting threshold (\$10 000 for FMA Agencies and \$400 000 for relevant CAC Act bodies) on AusTender.

Senate Order

The *Senate Order for Departmental and Agency Contracts* (the Senate Order) requires Ministers to table letters in the Parliament advising that each of the agencies which they administer had placed a list of contracts on the Internet with access through their web page, by not later than two calendar months after the last day of the financial and calendar year. The list of contracts is to include a list of all contracts entered into by an agency which had not been fully performed, or which had been entered into in the last twelve months and which provided for consideration to the value of \$100 000 or more. In addition, the list of contracts is required to indicate, amongst other things, whether any of the contracts listed contained confidentiality provisions.

Annual Report requirements

The Annual Report requirements¹⁶ state that an agency's Annual Report to Parliament must include:

- a list of each consultancy contract let to the value of \$10 000 or more and the total value of each of these contracts over the life of the contract, and
- a summary statement of competitive tendering and contracting undertaken during the reporting period, or during a previous reporting period for which a contract is still current.

¹⁴ Attorney-General's Department, *Protective Security Manual*, August 2005.

¹⁵ AusTender (<<http://www.tenders.gov.au>>) is the Australian Government Electronic Tender System managed by the Department of Finance and Administration.

¹⁶ Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies, is published annually by the Department of the Prime Minister and Cabinet and is available at <<http://www.pmc.gov.au>>.

Gateway Review Process

The Australian Government has introduced the Gateway Review Process (Gateway) to improve the delivery of major projects. Gateway applies to new projects undertaken by FMA Act agencies, which require Cabinet approval and which satisfy certain financial and risk thresholds.¹⁷

Gateway is a project assurance methodology which involves a series of brief, independent reviews at critical stages in the development and implementation of a project. At key decision points (referred to as Gates) a Gateway Review focuses on the issues that are important to the project at that stage of the project's life. Each review provides high level, action-oriented recommendations. The development and management of contracts within projects may be subject to review under this process. For example, Gate 5 reviews whether the project delivers value for money identified in the business case. Elements of this review may include consideration of the management of any contracts entered into as part of the project.

¹⁷ Further details are contained in Financial Management Guidance No.20, Guidance on the Gateway Review Process – A Project Assurance Methodology for the Australian Government, and Financial Management Reference No.7, Gateway Review Process – A Handbook for Conducting Gateway Reviews.

PART 2 Developing the contract

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2. Developing the contract

2.1. INTRODUCTION

The contract development phase is critical to achieving the outcomes sought by the acquiring entity. It also facilitates the effective management of the contract.

This part of the Guide discusses the issues involved in developing the key elements of a contract.

The contract development phase is critical to achieving the outcomes sought by the acquiring entity. It also facilitates the effective management of the contract.

Contract development can start at various points in the procurement and contracting cycle. In many cases, a draft contract will be part of the request for tender, while in other cases, contract development may only commence later in the cycle, for example, when the actual contractor has been chosen. Most acquiring entities will have a set of standard contracts that can be drawn on in the contract development process. These standard contracts will need to be reviewed and tailored to suit the individual procurement.

Irrespective of when in the procurement cycle that contract development is undertaken, it is better practice to consider risks, resource requirements, the style of the contract and the contract provisions, to ensure the contract meets all legal and policy requirements. It is also important to establish a clear statement of contract deliverables and an effective performance management regime.

Developing the contract will require some level of planning to ensure that all elements of the contract are appropriately considered. This need not be a time consuming task requiring extensive effort. The extent of planning required will depend on the risks involved for the particular contract, its complexity, size, sensitivity and duration. The degree of effort and the costs incurred in developing the contract should be directly commensurate with the benefit that will be obtained through, for example, a reduction in risk and the clearer identification of contract requirements.

Some elements of the contract will be inter-related and these need to be linked when the contract is being developed, for example, payment provisions should be linked to the provisions dealing with contract performance.

Developing the contract will require some level of planning to ensure that all elements of the contract are appropriately considered.

Key tasks

The key tasks involved in developing a contract are:

Identify and manage **risks**.

Obtain **senior management commitment and involvement**.

Identify **resource needs**.

Identify and assign **responsibilities**.

Obtain **stakeholder input**.

Behave ethically.

Determine the form of the contract, including:

- determining the need for a written contract
- the use of standard form contracts
- determining the contract approach
- define contract deliverables, and
- establish a performance management regime.

Keep records.

Depending at what stage of the overall procurement cycle contract development is being undertaken, it may be possible to draw on relevant material developed earlier in the cycle. For example, useful information may be contained in policy documents on the decision to outsource the provision of goods or services, in tender documentation or other plans in place in the acquiring entity. Such material should be reviewed to ensure it is applicable to the current circumstances before it is used as a basis for contract development.

It may be possible to draw on relevant material developed earlier in the procurement cycle.

The following case study demonstrates the benefits of focusing at an early stage on planning the contract.

Case Study: Early planning for contract development

A group of agencies all received business critical services from a contractor under a shared service arrangement. One agency had a lead role in managing the contract. The contract was for a period of five years. Eighteen months before the contract was due to expire, all the agencies considered how best to manage the development of a replacement contract. They were aware that although they shared the same basic needs, there were still many variations in their requirements that would need to be factored into the service specification, and perhaps some conflicting requirements to be resolved. All the in-house expertise associated with the original contract process had since left the agencies.

Services being provided under the existing contract were regularly considered by a cross agency steering committee. The agencies decided to have this steering committee also take responsibility for developing a new services contract, as the steering committee members had practical experience in the services and had specific ideas on some short comings in current service arrangements they wanted addressed in the new contract.

Early planning by the steering committee agreed key project steps and the timetable, arrangements for funding the project, and that staff in the lead agency would undertake the work. Initial discussions by the steering committee also highlighted some of the differing priorities, such as differing views on quality and price.

Practical progress was slow in the next few months, partly due to lack of availability of enough in-house staff time. With 12 months to go, the committee decided to engage external professional assistance to develop the request for tender documentation and manage the tender evaluation. They considered the advantages of this approach to include assurance of resourcing of the project, access to specialist knowledge and experience, and the availability of a neutral adviser to assist in resolution of the varying agency requirements.

This more formal approach encouraged the parties to focus on prompt resolution of issues. It also resulted in key issues and decisions being fully documented (since, for example, the adviser presented options as papers to the steering committee, with decisions recorded in steering committee minutes). The remainder of the project proceeded on schedule. The steering committee met regularly, and members were focused on meeting the agreed project milestones. One last minute difficulty was formal signing of the agreement by each agency. In some cases the correct delegate for an agency had not been identified by the relevant steering committee representative, or had not been kept fully informed of the project. This delayed the final signing while the relevant delegates were briefed and issues they raised were resolved.

Comment: By planning early, developing an overall plan, obtaining the right resources and actively involving the key people, the follow-on contractor was selected and engaged on time, with the desired service quality and at a competitive price.

2.2. IDENTIFY AND MANAGE RISKS

A number of risks that are relevant at the contract development stage may have already been considered earlier in the procurement cycle. These risks or any risk treatments should be reviewed to determine if they remain relevant. For example, there may be particular risks relating to understanding the market that will have bearing on the specification of contract deliverables and related performance management regime.

Risks to successful contract development can arise from a number of sources. These include:

A number of risks that are relevant at the contract development stage may have already been considered earlier in the procurement cycle.

Sources of risk	Examples of risks
Resourcing	<ul style="list-style-type: none"> • Inability to obtain and retain necessary level of resources, including specialist advice • Failure to obtain senior management support and involvement • Insufficient time to develop the contract
Contract deliverables	<ul style="list-style-type: none"> • Contract deliverables described in ambiguous or unclear terms • Inability to obtain stakeholder and/or end-user input and sign-off of contract deliverables
Contract performance measurement	<ul style="list-style-type: none"> • Failure to specify performance indicators that can be cost-effectively measured • Failure to link contract payment to satisfactory performance • Failure to establish cost-effective performance monitoring and assessment arrangements
Contract payments	<ul style="list-style-type: none"> • Having a payment regime that is a disincentive to good performance and/or that is inappropriate to the nature of the contract deliverables • Failure to cap contract expenditure • Failure to establish payment milestones that are linked to contract performance
Other contract provisions	<ul style="list-style-type: none"> • Failure to include relevant legislative and policy requirements in the contract for example, privacy, security, recordkeeping • Failure to include all relevant contract provisions such as contract variations, disputes, termination, including termination for convenience
Conflicts of interest	<ul style="list-style-type: none"> • Failure to identify and address actual or potential conflicts of interest

Risks are not static and need to be kept under review throughout the contract development phase.

Other risks relevant to the particular circumstances will need to be considered. Risks are not static and need to be kept under review throughout the contract development phase. Consideration also needs to be given at the contract development stage to any risks that the style and provisions of the contract may pose to its later implementation and management as well as the impact on other inter-related acquiring entity contracts or activities. For example, the contract may have an impact on other aspects of the acquiring entity's business, or training may be needed in order to effectively use goods or services being delivered under the contract. Without attention being directed towards how the contract will work in practice, it may not meet the needs of either party or become unworkable over time.

All risks identified will need to be addressed and responsibility allocated for risk mitigation or treatments as required.

All risks identified will need to be addressed and responsibility allocated for risk mitigation or treatments as required. As with all aspects of the contracting cycle, judgement will need to be used in deciding on the level of risk assessment undertaken. The level and type of risk involved will generally inform or govern the contract relationship, the style of contract and its later management.

Good Practice Tip: Identifying risks

Identify all potential risks and then assess their likelihood and consequences. Identify risk treatments for those risks where existing controls need to be supplemented.

Involve or consult people who have developed a similar contract.

Involve people from different areas of interest, for example, end-users, the contract management team, administrative staff and subject matter experts.

The following case study discusses a useful approach to assessing contracting risks.

Case Study: Standardised pre-contracting risk assessment

An entity used a wide range of contractors on a regular basis, for example, for IT support, corporate services, professional advice, publicity and promotion, building fit out and alterations. The role of the entity involved significant public access to their facilities. The agency needed to be able to effectively manage high levels of risk without assigning unnecessary resources.

The entity revised its business processes to require a risk assessment before entering into any contracts. The level of risk was determined by a standard risk survey template. For example, the template assessed whether the work of the contractor might pose a risk to the safety of members of the public, the degree of financial risk and so on. The level of risk then informed decisions on:

- which contract form to use, from a set of standard contracts maintained by the entity
- how the contract would be managed and by whom
- the transition in measures necessary, for example, determining the type of briefing incoming contractors should receive on the task, the entity's environment and on issues such as Occupational Health and Safety
- the monitoring and management processes necessary, and
- how the contract was to be evaluated and the process completed.

Determining these issues at the planning stage also allowed the entity to plan their resource requirements for managing the contract.

An Example Contract Assessment at the end of this part can be used to make an assessment of potential areas of risk and complexity for a contract.

An Example Risk Assessment and Treatment Plan is included at the end of this part.

2.3. OBTAIN SENIOR MANAGEMENT COMMITMENT AND INVOLVEMENT

Senior management commitment and involvement in contracting activities is critical in ensuring contracting activities are afforded sufficient priority and recognised as an important business activity.

Senior management commitment and involvement in contracting activities is critical in ensuring contracting activities are afforded sufficient priority and recognised as an important business activity. Senior management also has an important role to play in individual contract development in providing advice on business, technical or other matters when the contract is being drafted.

The level of commitment and involvement should be commensurate with the importance of contracting activity in meeting business objectives. For individual contracts, the extent of senior management involvement will depend on the complexity and sensitivity of the contract, although all contracts will involve management approvals and sign-off. Senior management may also be involved in approving expenditure, conducting consultations with internal and external stakeholders, agreeing to recruit additional staff, or in seeking professional advice.

Good Practice Tip: Gaining management involvement

Invite key managers to a behind the scenes tour, to highlight the importance of the services being contracted and how they will be delivered. For example, for an office fit out contract, this might involve a visit to the area needing fit out, and an example of an office with the type of fit out planned for the area (while being careful to avoid any probity concerns by appearing to favour a particular supplier). These types of activities provide a chance for key stakeholders to gain an understanding of the importance of getting the contract right as well as the practicalities involved in managing the contract.

2.4. IDENTIFY RESOURCE NEEDS

The foundation for contract management is set before the contract is awarded.

The foundation for contract management is set before the contract is awarded. This means it is important to have the appropriate resources available for contract development. Whatever the size and nature of the contract, having the appropriate skills, knowledge and experience available at the correct time underpins sound contract development. For more complex contracts professional advice may be required at appropriate stages on matters such as, defining the contract deliverables, developing technical performance measures and the inclusion of particular contract provisions.

The person or team developing the contract will need a range of skills, or need to have access to them, including interpersonal, project management, financial, human resource skills and knowledge of the industry relevant to the particular contract. Knowledge of Australian Government requirements is also an important attribute. As well as seeking extra skilled staff or professional advice, it may be necessary to provide training where skill gaps are identified. The types of skills needed over the contracting cycle are discussed in more detail in Part Four of the Guide.

Good contract development requires having sufficient time to carry out all the necessary activities such as contract drafting, checking and finalisation. Having time for review at critical steps in the process will also assist in establishing a contract that is workable over its life.

2.5. IDENTIFY AND ASSIGN RESPONSIBILITIES

Responsibility for developing the contract should be clearly assigned and understood by all parties. This may involve assigning different aspects of contract development, such as defining contract deliverables, obtaining stakeholder input and establishing the performance regime.

Responsibility for developing the contract should be clearly assigned and understood by all parties.

A Key Actions and Responsibilities Matrix at the end of this part will assist in identifying important requirements in developing a contract.

2.6. OBTAIN STAKEHOLDER INPUT

There may be a number of stakeholders, or stakeholder groups, that have a role to play in contract development. External stakeholders may include other levels of government, industry bodies, grant recipient organisations, clients who will receive services through the contract and relevant ministers. Internal stakeholders are likely to include end-users and senior management.

Stakeholders may need to be consulted about the specification of deliverables and other matters as the contract is being drafted. To ensure that the specification of deliverables and related performance measures meet stakeholder needs, it is better practice to obtain agreement to the deliverables in the final contract from those stakeholders, particularly end-users. Stakeholder input should be documented and reflected in the final contract where appropriate.

There may be a number of stakeholders, or stakeholder groups, that have a role to play in contract development.

2.7. BEHAVE ETHICALLY

In any dealings with the preferred tenderer or potential contractors and stakeholders during the development of the contract, entity staff should not act in any way that calls into question standards of ethical behaviour.

Following the selection of a preferred tenderer(s) and/or when different staff members are involved in developing the contract, an acquiring entity's procedures should require relevant staff to review their conflict of interest declarations and for any new staff involved in the procurement cycle to sign conflict of interest declarations.

Issues that are most likely to arise during contract development involve actual or potential conflicts of interest. Three common scenarios where a conflict can arise are:

- the offer of gifts or benefits: as a general principle gifts or benefits should not be accepted during this phase as this could be seen as undermining the integrity of the procurement process
- employment by the preferred tenderer: an actual or perceived conflict can arise where the spouse or close family member of the person responsible for developing the contract (contract developer) is employed by the preferred tenderer. As soon as this situation is known, the facts should be advised to the contract developer's supervisor or other appropriate manager so that a decision can be made about the potential implications, and
- offer or acceptance of employment: a related situation is when the contract developer is offered or accepts employment from the preferred tenderer. Such situations would generally require the person concerned to cease to have responsibility for contract development or additional arrangements to be put in place to compensate for the conflict of interest that has arisen.

Entity staff should not act in any way that calls into question standards of ethical behaviour.

As a general rule, entities' approach to potential and actual conflicts of interest should be based on the principles of transparency and disclosure.

The actual task of drafting the contract is critical to obtaining the outcomes sought and involves a number of inter-related tasks and activities.

In most circumstances, it is better practice in the Australian Government context to have a written contract.

2.8. DETERMINE THE FORM OF THE CONTRACT

The actual task of drafting the contract is critical to obtaining the outcomes sought and involves a number of inter-related tasks and activities. The main considerations are discussed below.

Need for a written contract

Before drafting a contract consider whether or not a separate written contract is required or whether some other arrangement will be suitable for the particular circumstances. Instances where a separate written contract may not be required include:

- where the acquiring entity's standard purchase order includes suitable terms and conditions
- simple low value purchases or off the shelf purchases, where, for example, a purchase order could be used
- the purchase of commercially available software which comes with a standard licensing agreement
- using a credit card to purchase goods, and
- low value, low risk short term services, for example, after dinner speakers, or delivery of standard short training modules or awareness sessions. In these situations an exchange of letters may suffice.

Although a separate formal written contract may not be required in some cases, written evidence of the arrangement that has been agreed should be documented. There may also be steps that can be taken to manage the risk that faulty goods or below standard services are provided. For example, if training modules are being provided then supporting written material could be requested beforehand to check quality and suitability.

It may be appropriate to seek professional advice where it is not clear whether or not a written contract is appropriate to the circumstances.

In most circumstances, it is better practice in the Australian Government context to have a written contract. A written contract is generally accepted as the appropriate means of managing procurement risk particularly to specify requirements such as price, performance, duration, termination, confidentiality, risk management and intellectual property. Contracts do not need to be lengthy or complex documents. They do, nevertheless, need to be sufficiently comprehensive to facilitate timely delivery of goods or services that meet specified performance measures and provide value for money.

The need to specify in contractual arrangements the matters listed below, demonstrates the importance of contracts being evidenced in writing:

- **significant expenditure is involved** requiring formal protection of the interests of the parties by documenting the deliverables and basis for payment
- **the specific outcomes and performance measurement** being sought require explanation and the contractor's performance needs to be monitored and managed over time
- **specified, nominated or key personnel** are required by the acquiring entity to undertake the contract obligations
- **termination for convenience** is necessary to enable contracts to be terminated by the acquiring entity at its discretion
- **intellectual property rights** exist in material being provided by either party to the contract and both parties need to agree ownership and rights to use the property
- **confidential information** provided by either party needs to have protection for its use and disclosure in a contract
- **privacy** of personal information collected or disclosed in the course of contracting must be protected in line with the requirements of the *Commonwealth Privacy Act 1988*

- **security matters** such as the need for security clearances for personnel exists or where sensitive information provided under the contract is to be transmitted electronically
- **Commonwealth policy** requires the contractor to comply with particular Commonwealth requirements, for example, recordkeeping in line with the *Archives Act 1983*, audit requirements or compliance with the Protective Security Manual, and
- **the law requires a written contract**, for example, in relation to acquisitions or dispositions of interests in land, dispositions of equitable trusts and assignment of copyright. In this case the requirements of State, Territory and Commonwealth law need to be considered.

Alternative contracting approaches

The contract should provide the basis for a constructive and cooperative relationship between the acquiring entity and the contractor. The type of relationship that the acquiring entity considers will best suit the contracting arrangement will influence the style of contract chosen.¹⁸

Entities generally see benefit in adopting a common approach to their contracting activities that are similar in nature so that prospective contractors and entity staff become familiar with the approach(es) used.

The contract should provide the basis for a constructive and cooperative relationship between the acquiring entity and the contractor.

Standard form contracts

Where the need for a written contract has been identified, acquiring entities may already have developed standard form contracts in long and short forms, and/or for particular types of contracts regularly used, for example, consultancy services. Standard form contracts are useful for the consistency, predictability and efficiency of contract development and other aspects of contracting, such as finalising the contract and its later management. There are benefits for staff who, in using standard form contracts over time, become familiar with their content and the ways they operate and/or can undertake training in regard to the use of the standard form.

It is good practice to have standard form contracts when the entity has common, ongoing contracting requirements. Before making changes or additions to a standard form contract, it may be useful to review information from earlier in the contracting cycle. For example, information contained in the approach to the market, relevant proposal and response documentation together with any information contained in the tender evaluation process to assist with drafting the contract.

These standard form contracts may need modification or additions to suit the circumstances, particularly to describe what is being delivered under the contract. When significant variations to standard form contracts are proposed, it is important that the revised contract still meets legal and policy requirements, and does not inadvertently increase the risks to the acquiring entity. Approval to vary standard contracts should be obtained and consideration given to the need for professional advice.

The use of standard form contracts may not be appropriate in circumstances involving complex, one-off and/or innovative requirements. These situations may require considerable research and original drafting of specific contractual terms and conditions, clauses and schedules.

Standard form contracts are useful for the consistency, predictability and efficiency of contract development and other aspects of contracting, such as finalising the contract and its later management.

Panels and standing offers

Many acquiring entities have standing offers or panels with contractors for the provision of goods or services required on a regular basis, but where the timing and quantities cannot be pre-determined. A standing offer can be held with a single contractor or a panel of contractors. These standing offers ensure the entity has quick and easy access to these goods and services without having to go through the requirements of a tender process for every acquisition. The contractor must provide specified goods or services for a pre-determined length of time, at pre-determined rates on the terms and conditions agreed in the standing offer documents. Legally, these contractors may not

¹⁸ Common contract types include Traditional, Alliance and Partnering.

be under a contract with the acquiring entity, unless the standing offer arrangement is made by way of a deed. Rather the contractor is simply on notice that they may be called upon to provide goods or services during the duration of the panel period. A contract for the supply of particular goods or services required is only formed with the contractor when an order is placed by the acquiring entity for a specific amount of goods, or requirement for service. Some common examples of goods and services under a standing offer include: stationery, office and printing supplies or services, recruitment services, professional services, and building maintenance.

Many acquiring entities have specific policies on how to establish and manage standing offers and panels. The Commonwealth Procurement Guidelines (CPGs) require, amongst other things, that panel arrangements must contain details of the minimum requirements of the services or goods including an indicative or set price for the goods or services.

Multi-use lists

In circumstances where the acquiring entity requires goods or services on a recurring basis, multi-use lists can be a useful vehicle.

In circumstances where the acquiring entity requires goods or services on a recurring basis, multi-use lists can be a useful vehicle. A multi-use list is a list of pre-qualified suppliers who have satisfied specified conditions for inclusion on the list, intended for use in more than one procurement process. Inclusion on a multi-use list may be used either as an essential criterion, as a condition for participation in an open tender or as the basis for selecting participants in a restricted tender process. All contractors that satisfy the conditions for participation for inclusion on a multi-use list must be included on the list as soon as practicable. Inclusion on a multi-use list represents a prequalification for participation in a procurement selection process but is not a procurement selection process in itself.

If there is no multi-use list for the required goods or services, it may be useful for an entity to establish one to save time and costs in the future. Under the CPGs, to establish a multi-use list, the acquiring entity must publish a request for application for inclusion on a multi-use list on AusTender.

Memoranda of Understanding

It is legally not possible for an entity that is part of the Commonwealth of Australia to enter into a contract with another entity that is not a separate legal entity.¹⁹ In recognition of this, it is now a common practice for many entities to enter into Memoranda of Understanding (MOUs) as a useful mechanism to:

- set out the services to be provided by both parties and the responsibilities of each entity for the delivery/receipt of the specified services
- set performance indicators or standards for the specified delivery of services
- formalise arrangements for the custody (as distinct from ownership) of information and materials generated as a result of services provided, and
- formalise arrangements and processes to resolve any disputes between the parties.

Entities should manage MOUs with the same degree of rigour as they manage contracts.

Even though MOUs do not have the same legal status as contracts, entities should manage MOUs with the same degree of rigour as they manage contracts. As MOUs between agencies are administrative and distinct from legal instruments, they should not include provisions such as indemnities, liabilities and warranties that purport to have legal effect.

MOUs can also be a useful mechanism for formalising preliminary agreements between two parties prior to entering into a full contractual relationship. Where the parties are separate legal entities, MOUs are a form of contract. To avoid doubt the MOU should specify which of the provisions of the MOUs are binding or non-binding.

¹⁹ This is based on the common law principle that it is not possible for a legal person to contract with himself or herself.

Good Practice Tip: Don't re-invent the wheel

The Australian Government as a whole has a vast amount of experience in all aspects of contracting and it is very likely that a contract for a similar requirement has already been developed elsewhere in the APS. So ask around, and use existing networks to obtain a copy of another contract and speak to the people involved as a useful source of information for developing a new contract. In doing this, care needs to be exercised to avoid the inappropriate disclosure of commercial-in-confidence information and an agreement should be reached with the 'giving' entity of the basis on which any material can be re-used or adapted.

It can also be useful to obtain relevant contracts from several entities so that similarities and differences can be assessed.

The following case studies provide examples of varying contract styles, and the factors behind the entities' decisions on the pricing arrangement to use.

Case Study: Small value consultancy – fixed price or time and materials

An entity decided to prepare user documentation for their financial and human resource management IT systems. All staff were required to use these systems, but many did so infrequently and had difficulty in recalling the steps to follow. The documentation provided when the system was installed was considered to be too generic, and staff found it hard to locate the transactions they required in the full set of documentation.

A specification of the documentation desired and a set of acceptance criteria was developed. Quotes for the work were sought from four possible providers, identified by a review of the market. A tender was not required as the value of the contract was expected to be less than \$30 000.

There was a very wide variation in the quotes given. Feedback from the potential providers indicated this variation arose from different weightings given to the difficulty and risks involved in preparing the documentation to a relatively subjective quality standard.

Given the relatively small size of the contract, the agency decided the cost of developing and using more objective quality standards was not justified. Instead, the agency sought quotes again, this time for rates on a time and materials basis of work. The lower risks to be carried by the potential providers reduced the unit costs quoted, and made comparisons between providers more consistent. The provider was then chosen based on judgement of costs and references on the total cost and quality of similar projects undertaken by the providers.

An entity standard consultancy contract was used, specifying the general nature of the project, arrangements for agreeing nominated specific tasks, and hourly rates. Once the project was under way and various approaches tested with staff, it turned out that a set of quick reference cards would be sufficient to meet the business objectives of the project.

Comment: Using a time and materials contract made it easier to reduce the overall scope of work than if a fixed price contract had been used. On the other hand, this meant the entity carried the risk of poor performance by the contractor. In other cases it may be preferable to allocate more effort to clarifying the scope, and then use a fixed price contract.

The following case study discusses the use of a collaborative approach in developing a contract for a construction contract.

One of the most critical aspects of any contract is the definition of contract deliverables.

Case Study: Evolving client requirements – collaborative style contract

An entity was entering into a contract for the construction of a new national office, which it planned to occupy in three years time. It was aware that some of its needs were likely to change in that time. Factors with reasonable uncertainty included overall staff numbers, and the inclusion or not in the building of functions with special requirements for air conditioning and security. In addition, the agency was interested in the building having a low environmental impact during construction and operation. It was aware that design options of interest for reduced environmental impact were not yet fully tested, and hence the entity preferred to defer some design decisions if practical.

The entity decided that an effective way to meet these circumstances was to have the opportunity to change the design as the project was under way. The contract specified a base design (which had been used as an important element of the tender selection decision). The contract also specified a collaborative approach to the project between the client, the building designer, the project manager and the building contractors. At a series of check points during the project, the project goals and requirements, and technical options were reassessed. Workshops were held between the parties to ensure the designers and builders were aware of the underlying requirements of the client, and that the client was aware of the technical options and the possible trade-offs. For example, some air conditioning/heating options with lower operating costs would have higher initial capital costs.

By adopting a collaborative approach, the project coped with evolving client requirements and with minimal unproductive debate due to misunderstandings of roles or technical options. There was a shared commitment to cost reduction wherever possible, while still meeting the underlying business needs of the client.

[Note: the contract did not need to deal with issues such as benefit sharing, as the savings flowed directly to the client through, for example, lower cost equipment and materials, or in long term operating costs. In fact, some of the professional fees were slightly higher than otherwise to allow for the collaborative approach. However these fees were only a small part of the total project cost].

Comment: The use of a collaborative approach, with a well defined framework for revising the design, gave the entity useful flexibility in their detailed requirements, without adding to project risks.

A common approach is for contract deliverables to be described in terms of the results or outcomes required ...

2.9. DEFINE CONTRACT DELIVERABLES

One of the most critical aspects of any contract is the definition of contract deliverables. Deliverables are often called a statement of work, a statement of requirement, specifications or other similar terms and should explain the goods or services to be provided under the contract.

A common approach is for contract deliverables to be described in terms of the results or outcomes required, particularly in relation to services. The emphasis on results and outcomes rather than on inputs and processes used by the contractor can allow the opportunity for operational flexibility and innovation. This can increase the possibility of achieving the same results at lower cost than if the acquiring entity specified the detailed processes to be used or followed.

Nevertheless, in some situations, a more prescriptive description of the contract deliverables may be appropriate particularly where there is little scope for flexibility in how services will be provided.

The following case study provides two examples of contract deliverables.

Case Study: Specifying contact deliverables

Example 1

Provide office cleaning services at the entity's premises in all capital cities for three years that meet specified performance standards.

Example 2

Conduct a review of the operation of the [...] Scheme over the past three years. Provide a report on (a) the views of key stakeholders on the effectiveness of the scheme and suggestions for any changes, (b) the results of a quantitative analysis of the impact of the scheme in relation to its published three-year objectives, and (c) options for changes to the scheme to reduce administrative costs, together with costs, benefits and possible problems for each option. The report is to be provided within three months and should be of a presentation quality suitable for internal use, and of an accuracy and reliability suited to be used as a basis for policy and budgeting decisions.

Depending on the complexity and nature of the goods or services there may be a short version of the deliverables, followed by more detailed description in schedules to the contract.

The specification of deliverables in most contracts is likely to draw on a number of sources of information to assist with the definition of the results being sought. These include the request for tender, the contractor's proposed and published specifications and other discussions and negotiations.

The statement of deliverables should set out: what needs to be delivered, to what standard and in what timeframe(s). It should be:

- as concise as possible, while at the same time fully describing the requirement
- clear, consistent, unambiguous and not conflict with itself or other contract terms and conditions
- complete, accurate and correct
- feasible and achievable, and
- measurable and verifiable.

Depending on the type of contract requirement it should be written in functional and performance terms rather than technical terms. It should also indicate the relative importance of each contract deliverable or each part of the deliverable where appropriate.

In defining contract deliverables, it can often be important for the contract to reflect the fact that the deliverables may need to be amended over the life of the contract to take account of changing circumstances or requirements. This is particularly the case for many service contracts such as IT services.

In defining service deliverables care needs to be exercised to ensure that contractors do not provide services at a higher level than what is actually required in order to attract a higher level of payment. For example, failing to resolve a client inquiry by telephone because this attracts a lower payment and requiring the client to attend a face to face interview which attracts a higher payment.

The statement of deliverables should set out: what needs to be delivered, to what standard and in what timeframe(s).

Care needs to be exercised to ensure that contractors do not provide services at a higher level than what is actually required.

2.10. ESTABLISH A PERFORMANCE MANAGEMENT REGIME

Establishing an effective performance management regime is often not an easy task. Particular issues and possible ways of addressing them are outlined below.

Performance management regime

Issue	Comment
Developing a suite of balanced performance measures.	<p>Generally, a balanced suite of performance measures will consist of measures that can be measured objectively and those that require some level of subjective judgement; the latter will often be related to the quality of contract deliverables.</p> <p>Subjective measures, in particular, should be expressed in unambiguous language to reduce the risk of misinterpretation and dispute.</p>
Setting and refining performance measures.	In many situations the initial performance indicators and standards will be indicative in nature based on the best available information at the time. Contracts should generally include a process for reviewing and revising indicators and standards of performance during the life of the contract as both parties gain experience about measures that work in practice.
Setting incremental performance measures.	Consider setting a core group of performance measures that will be regularly reported, and then specify additional measures that will be provided on request, for example, when the core indicators suggest problems in performance. This approach reduces the day-to-day work load, while preserving the acquiring entity's access to more detailed performance measures, if needed.

Performance measures need to be sufficiently comprehensive and specific to allow the contract manager to certify that the work meets contractual requirements.

Performance measures

The statement of deliverables should generally be accompanied by performance measures. Performance measures include indicators with related targets, and performance standards. The aim of establishing performance measures is to provide evidence about performance that is collected and used systematically to maintain and assess performance over the life of the contract.

Performance measures need to be sufficiently comprehensive and specific to allow the contract manager to certify that the work meets contractual requirements. They also provide the basis for authorising payments.

The contract should also include performance measures that will alert the contract manager to potential problems, so that remedial action can be taken if needed. In developing the performance regime, the issues discussed in this section need to be considered in order to provide a balanced set of measures that address all aspects of expected performance.

Establishing performance measures requires decisions about:

- what and how often to measure, and
- what indicators and targets, and/or standards will be used.

Selecting performance indicators

Performance indicators need to be selected on the basis that they measure something that is important in achieving contract deliverables and not necessarily those activities or processes that are easy to measure. The performance regime should be reviewed periodically to ensure its ongoing relevance.

Performance indicators need to be selected on the basis that they measure something that is important.

The following two case studies discuss the development of performance indicators.

Case Study: Specifying appropriate performance indicators

For the supply of cleaning services, it may be easy to measure hours worked but the important measure is whether the cleaning undertaken meets agreed hygiene standards.

For the provision of professional advice, it is easy to measure that the advice has actually been received and the time taken to produce it, but it is important to measure whether the advice provided is useful. To do this the acquiring entity will need to set measures that will assess the usefulness of the advice. These could include:

- Does the advice address the issues or questions posed?
- Was the advice timely?
- Did it take account of all the relevant facts?
- Was adequate consultation undertaken?
- Is there evidence of research conducted and analysis of findings? Does it include realistic, achievable recommendations?

Lead indicators should demonstrate whether the desired results will be achieved within the agreed timeframe and also provide early warning of any possible problems.

It can also be important for performance indicators to be established that provide information on future performance – these are generally called lead indicators. Lead indicators should demonstrate whether the desired results will be achieved within the agreed timeframe and also provide early warning of any possible problems.

Case Study: Specifying lead indicators

The acquiring entity could measure the number of clients participating in information sessions as this gives an early indication of the number of clients who might then attend courses to improve their employability.

The acquiring entity could use an indicator to measure changes in complaint levels which may be an early warning that the level of services to clients has declined.

The acquiring entity could require information on spare capacity (for example, computer disk space, number of trained call centre operators available for casual rostering) as a lead indicator of the ability to meet peak service loads.

Setting targets

For performance indicators to be useful a target, or other basis for comparison, needs to be provided to allow a judgement to be made as to whether performance is satisfactory or not.

Targets express quantifiable performance levels or changes of level to be attained. They can focus on overall performance or the factors which contribute to success.

There are many different ways of expressing targets or providing a basis for comparison to assess whether performance is satisfactory or not. In some cases, targets will be expressed as a number or a percentage. In other cases targets will be set to measure the quality rather than the quantity of services provided. Targets can also be set to encourage improved performance, that is, they are challenging or stretching targets.

For performance indicators to be useful a target, or other basis for comparison, needs to be provided.

Targets may need to be reviewed and adjusted during the life of the contract to make them more relevant and useful.

Targets can be established with reference to past performance, performance achieved by other entities providing similar services or based on research of similar circumstances.

It is not always possible to set targets when a performance regime is being established. In this case the process to establish targets during the life of the contract should be included in the contract itself when data and/or experience are available to allow them to be set in a realistic way.

Targets may need to be reviewed and adjusted during the life of the contract to make them more relevant and useful. This should not be done to mask poor performance. Targets could be expressed as:

- a specific number of clients assisted
- the percentage of clients satisfied with the service provided
- the number of interviews conducted with clients that met certain time and content requirements and resulted in an agreed percentage of clients moving to the next step in the process
- resolution of client enquiries being above an agreed percentage of all callers on a daily basis, and
- response time for IT services being between an agreed time span.

When establishing targets, care needs to be taken to ensure that a focus on achieving individual targets does not occur to the detriment of overall performance. For example, client inquiries can be answered within a two minute response target by not properly determining the full extent of the client's problem or by not resolving it. The use of a balanced set of targets can assist in measuring all aspects of performance. As well as measuring response times the acquiring entity could measure increases in complaints or the level of client satisfaction with the advice received.

Establishing standards

Performance standards relate to predefined levels of excellence or performance specifications. They can relate to technical aspects of goods or the quality of services to be provided. Standards can be set by external bodies such as specific standard setting bodies, accreditation agencies or professional bodies. As a first step, acquiring entities should determine whether relevant standards have been developed by an external, standard setting body. Using existing standards can save both time and money and can reduce the risk of disputation with the contractor.

Two examples of how standards of performance can be expressed are provided in the following case study.

The use of a balanced set of targets can assist in measuring all aspects of performance.

Case Study: Specifying standards of performance

Example 1

All physical hazards are to be marked in accordance with Australian Standard AS 1318-1985, known as the SAA Industrial Safety Colour Code.

Example 2

All audit services are to be undertaken in accordance with auditing standards issued by the Auditing and Assurance Standards Board.

To be clear about which standards are to be met, acquiring entities should specify in the contract the particular standard(s) that is to be used. A general statement regarding compliance with industry standards should be avoided. The acquiring entity should also specify whether the standards to be applied were set at a particular date or whether it is the standard that is applicable at the date of assessment.

In some cases, the assessment of whether standards have been met could be undertaken by an independent third party or an accreditation body. This should be specified in the contract. Such an approach has the advantage that those making the assessment are likely to have the requisite technical knowledge and will bring a level of objectivity and independence to the assessment. In such cases the contract should also specify which party will bear the costs involved.

Measures should be considered carefully taking into account the costs and benefits involved.

Costs, data collection and analysis

As measuring performance can be both time consuming and costly, measures should be considered carefully taking into account the costs and benefits involved. Not all aspects of performance will need to be measured or assessed with the same frequency. There may be some measures that will require daily measurement while others may only require assessment at longer intervals, such as quarterly or yearly. Other factors to consider when establishing performance measures include how the data to allow measurement will be collected and the potential burden on clients of that collection, the costs of collecting and analysing it and what assurance the acquiring entity has in regard to its accuracy.

In establishing a performance regime it is important that the potential impact on the price of the goods or services be considered. An overly complex set of measures can result in an increase in the contract price that outweighs the potential benefits.

In addition to the costs of collecting performance data, consideration also needs to be given to the level and type of resources that will be needed to analyse data to determine whether performance is satisfactory or not.

Where the contract deliverables are of a technical nature, relevant technical knowledge may be required to assess whether the deliverables meet the required standard. Where the required expertise does not exist within the acquiring entity, external expert advice may need to be engaged to obtain the necessary level of assurance that performance standards have been met.

The periodic independent testing or certification of performance reports provided by contractors can also be a useful means of obtaining additional assurance to test the accuracy of performance reports submitted by the contractor.

An overly complex set of measures can result in an increase in the contract price that outweighs the potential benefits.

The following case studies discuss the development of performance indicators.

Case Study: Specifying cost-effective performance indicators

Frequency: IT services may be assessed daily through the measurement of the time when the system is not available, or the responsiveness of the helpdesk. On the other hand, client satisfaction with IT services, which is more difficult and costly to measure would generally be assessed on an annual basis.

Where a product is being developed, the acquiring entity may wish to test components critical to success at key points rather than waiting until a final product is delivered.

Cost: A client satisfaction survey may be useful in determining whether services being provided are appropriate, but conducting surveys can be costly and impose a burden on the end-user or client.

Case Study: Standards for helpdesk services

For ongoing, complex services there can be pages of detailed descriptions of service standards, specifying minimum standards. For example, for a telephone help desk, a simplified set of performance standards might include:

Call answering

All calls will have records kept of call time, and elapsed time till the call is answered or terminated. A monthly analysis is to be provided to the contract manager.

For all answered calls a job number will be recorded.

Calls will be categorised by priority according to the protocols specified in Schedule X.

80% of calls to be answered within 60 seconds, and 95% within 180 seconds, on working days 8:00 AM to 6:00 PM.

Any day where this service level is not met is a service shortfall day.

Call resolution

90% of Priority 1 calls should be resolved within 1 hour. Any Priority 1 calls not resolved in 2 hours time shall be escalated to the contract manager.

90% of Priority 2 calls should be resolved within 4 hours. Any Priority 2 calls not resolved in 1 working day shall be escalated to the contract manager.

90% of Priority 3 calls should be resolved within 2 working days. Any Priority 3 calls not resolved in 5 working days shall be escalated to the contract manager.

Service Credits

If in any calendar month there are more than 4 service shortfall days, service credits will apply as specified in Schedule Y.

Comment: This example illustrates a few simple performance measures, such as speed of call answering and speed of call resolution. Each measure can then have several performance standards. For example, the timeliness of call answering has one standard to be met for 80 per cent of calls, and another lower standard to be met for 95 per cent of calls. Having a graduated set of performance standards allows a practical approach to performance management, recognising that perfect service may not be practically achievable or cost-effective.

Good Practice Tip: You get what you measure – so measure the things that are important.

In one (perhaps legendary) case, a key performance measure was the time taken to answer phone calls. The target was met by the contractor simply picking up the phone and hanging up again. What was really wanted was an indicator of how long it took to have a client's actual enquiry answered.

Ensure performance indicators are designed to motivate the contractor to focus on your true requirements.

The Measuring Performance Checklist at the end of this part can help in developing performance measures.

Monitoring and assessment of performance

Contracts requiring ongoing assessment of the performance of the contractor should generally contain provisions for monitoring progress and assessing performance. It will generally be appropriate for such contracts to include provisions that cover: who will undertake performance monitoring, including responsibility for collecting and analysing data; how frequently monitoring will take place; the reporting arrangements and any processes to review the arrangements. However, generally not all aspects of monitoring and assessment will be covered in the contract itself. These may be developed by the acquiring entity as part of a contract management plan or checklist, and are discussed further in Part 4.

Monitoring can be undertaken directly by the acquiring entity, by the contractor or by a third party. Where monitoring is undertaken by the contractor or by a third party, accountability for achieving contract outcomes remains with the acquiring entity.

Direct monitoring by the acquiring entity ensures that the entity has control of the process, and can obtain assurance that is independent of the contractor. Direct monitoring can be used when the necessary data is available and sufficient resources are available in the acquiring entity to undertake monitoring in a timely and effective way.

Monitoring by the contractor is appropriate where the data is embedded in its operating systems and the need for independent assurance is low. However, it can be better practice to obtain some independent assurance regarding contractor performance at regular intervals, through for example, end-user surveys or audits of the data.

If monitoring is undertaken by a third party, the acquiring entity needs to be assured that information used for monitoring purposes is accurate and reliable. Reports from third parties about progress and performance should also be periodically tested through, for example, end-user follow-up.

Monitoring by a third party is more appropriate where particular technical knowledge is needed to assess the data and provide independent assurance for both the contractor and the acquiring entity.

Different approaches to monitoring may be used at different phases in contract delivery or for particular aspects of performance. Whatever monitoring arrangements are determined, they should be cost-effective to implement and manage, and the necessary skills should be available.

Where monitoring is undertaken by the contractor or by a third party, accountability for achieving contract outcomes remains with the acquiring entity.

Monitoring by the contractor is appropriate where the data is embedded in its operating systems and the need for independent assurance is low.

The following case study discusses an approach to monitoring contractor performance.

Case Study: Monitoring call centre performance

In a contract involving services by a call centre, much of the key performance data (such as queuing times, number of calls) will be held within the systems of the contractor. These systems usually have sophisticated analysis and reporting capabilities. So it is most practical in this case to have the data collection and analysis for measures such as call waiting time undertaken by the contractor in accordance with the needs of the acquiring entity. However, assessment of the satisfaction of callers with the politeness of operators might be best undertaken by a third party survey firm. In this case the contract should provide for the contractor to facilitate such a survey (for example by assisting the third party to contact callers). The accuracy of advice given might only be able to be assessed by staff of the acquiring entity, based on recordings of a sample of actual calls. Accordingly the contract would need to make provision for such recordings and associated protection of privacy. In addition, given that the acquiring entity is relying on the contractor's internal systems, it would also be important to ensure the contract allowed for appropriate audit access to those systems to provide confidence that the information provided by the systems was reliable.

In some circumstances it may be appropriate to include arrangements in the contract to deal with causes of contractor non-performance that are legitimately difficult to control.

Legitimate reasons for non-performance

In some circumstances it may also be appropriate to include arrangements in the contract to deal with causes of contractor non-performance that are legitimately difficult to control, such as illness, infrastructure and other failures outside the control of the contractor. Such issues can also include supply chain or power failures and loss of key personnel through illness or resignation.

2.11. KEEP RECORDS

The following key documents would normally have been developed earlier in the procurement process, and may need to be referred to during the contract development stage:

- business case
- overall procurement risk assessment
- procurement plan including the decision on the procurement method and timetable
- probity plan
- tender request documentation, including a draft contract
- tender evaluation plan, including selection criteria
- tender evaluation report
- delegate's decision of preferred contractor

Following is a list of documents that may be created (or refined) and retained as part of the contract development phase.

- risk assessments
- resource plans
- Steering Committee papers and minutes of meetings
- management approvals
- records of meetings and discussions with stakeholders
- professional advice received
- drafts of the contract

APPENDIX 2.1 COMMON CONTRACT PROVISIONS

When drafting a contract it is important to include clauses that protect the interests of the Australian Government. These same clauses frequently also offer protection to the contractor.

The more common provisions (in alphabetical order) generally included in public sector contracts relate to:

- Access and disclosure
- Assistance provided to the contractor
- Commonwealth specific clauses
- Confidential information
- Conflict of interest
- Contract variations
- Disclosure of information (confidentiality)
- Disputes
- Insurance
- Intellectual property rights
- Key personnel
- Liabilities and indemnities
- Payments
- Penalties and incentives
- Securities and guarantees
- Sub-contracting
- Termination and contract end dates
- Transition arrangements
- Warranties and fitness for purpose

Each of these matters is discussed below. The list of common provisions is not definitive and other provisions will need to be drafted to suit the particular contractual arrangement. Where necessary, professional advice should be sought to assist with drafting specific contract provisions.

Access and disclosure

Parliamentary and Ministerial disclosure

To meet its accountability obligations, acquiring entities are expected to disclose information, regardless of any contractual obligations to maintain confidentiality, to the Parliament or its Committees, and to meet its legal responsibilities in relation to Court proceedings.²⁰

FMA agencies also have responsibilities to the responsible Minister that include the provision of information and advice in relation to contracts. The responsibilities and obligations of CAC entities to the responsible Minister will be governed by the entities' enabling legislation.

Contractor access to premises and records

Where a contractor is to be provided with access to the acquiring entity's premises and/or records, the contract should clearly detail the scope of the access rights and the obligations of the parties in relation to such access. The occupational health and safety and security requirements for those people granted access should be covered in the contract. The acquiring entity may retain the right under the contract to withdraw access rights to its premises. The contract should also place obligations on the contractor to ensure that its personnel comply with relevant policies, safety and security requirements. In certain circumstances, entry to the acquiring entity's premises may require personnel to hold either an access pass, or be subject to certain security requirements.

Government contracts generally provide for the acquiring entity and those authorised by it to be permitted to have access to the contractor's and, where relevant, subcontractor's premises and records associated with the contract. Purposes for which the acquiring entity may require access include:

- performance and quality monitoring, including in relation to compliance with Government policies
- as part of the payment, accountability and transparency requirements
- the investigation of whether contract change proposals, particularly costings, are reasonable

To meet its accountability obligations, acquiring entities are expected to disclose information, regardless of any contractual obligations to maintain confidentiality, to the Parliament or its Committees.

The occupational health and safety and security requirements for those people granted access should be covered in the contract.

²⁰ Further guidance, model tender and contract clauses are contained in *Financial Management Guidance No.3*, February 2003.

Tender documentation and contracts should also include clauses to provide access by the acquiring entity and the ANAO to relevant records and information of the contractor and any subcontractors.

Acquiring entities should have their own policies and guidelines for the management of government assistance.

- to protect, register, manage, use or commercialise intellectual property rights, including moral rights, and
- reviewing sub contractor's conditions of engagement and compliance with policies.

Acquiring entity and ANAO access

Tender documentation and contracts should also include clauses to provide access by the acquiring entity and the ANAO to relevant records and information of the contractor and any subcontractors for the purpose of conducting audits.²¹

Assistance provided to the contractor

Contractors are often provided with assistance to facilitate the delivery of goods or services.

There are a number of clauses dealing with assistance provided by the acquiring entity to the contractor. These have a variety of names, including Government assistance and Government Furnished Material (GFM). Assistance provided to the contractor can affect the final price of the contract.

Government assistance includes any equipment, information or data provided to a contractor by the acquiring entity to assist in the performance of the contract. Generally it is better practice to minimise the provision of assistance to contractors. However, in some circumstances it is not possible for a contractor to perform the work required without GFM.

In all cases GFM remains the property of the acquiring entity. The contract should require the contractor to preserve any identification marks on GFM, and to obtain the prior written consent of the acquiring entity before using it for purposes other than the contract, modifying it in any way, transferring possession or control of it, moving it from the original delivery location, or communicating it to any other party.

Where GFM includes intellectual property rights not owned by the acquiring entity, it is important for the contract manager to ensure that the acquiring entity has sufficient rights to the intellectual property to allow the contractor access to them. This should be considered prior to including intellectual property as part of the GFM in the contract.

Acquiring entities should have their own policies and guidelines for the management of government assistance. Where assistance is provided to a contractor, the contract should specify:

- the GFM to be provided
- the place and times for delivery of GFM
- the inspection and testing requirements to be met by the contractor following receipt of GFM
- the party responsible for loss, damage, defective or deficient GFM, and
- clauses detailing the management requirements for the GFM.

Commonwealth specific clauses

Commonwealth specific clauses relate to:

- privacy²²
- occupational health and safety²³
- security²⁴

21 Standard audit and access clauses are available on the Finance website at <<http://www.finance.gov.au>>.

22 The *Australian Government Solicitor's Legal Briefing No.63* of 30 April 2002 contains a model clause to assist entities in discharging their responsibilities under the *Privacy Act 1998*.

23 Comcare OH&S Fact Sheet, *Employers and Contractors*, provides guidance to entities when engaging contractors including matters that should be considered for inclusion in contracts relating to a contractor's compliance with relevant Commonwealth Occupational Health and Safety Acts or regulations.

24 The Protective Security Manual, Part F provides an outline of an entity's security responsibilities when contracting specific entity functions and provides guidance on the handling of official information and performing government functions. This guidance is only relevant to contracts involving protective security functions.

- equal opportunity
- legal services²⁵
- environmental considerations, and
- compliance with specified mandatory requirements or policies relevant to the nature of the contract.

The above clauses in an Australian Government contract should require the contractor to ensure their actions do not breach any Commonwealth, State or Territory law and that they comply with Australian Government policy in these areas.²⁶

Confidential information

Contracts will generally contain clauses relating to how confidential information is to be identified, dealt with, and returned on completion of the contract. In situations that require contractors to protect the confidentiality of information obtained or accessed in meeting their contractual obligations, it is common practice to require the contractor to sign a Deed of Confidentiality.

Conflict of interest

Potential or actual conflicts of interest is an issue that can arise in many contractual situations. As a result, a conflict of interest clause will be included in the contract. In many cases it may be necessary to obtain a separate deed, or undertake investigations to ensure that the contractor (including its employees, subcontractors or agents) is not in a position where their business, or personal interests, could conflict with those of the acquiring entity or other parties assisting the acquiring entity. These clauses typically require all personnel involved in providing services to sign conflict of interest declarations.

Contract variations

The contract should contain formal procedures, specifying the mechanisms to be used if the contract needs to be varied. The procedures and the degree of detail will depend on the complexity, size and duration of the contract. Problems can arise when these procedures are not followed.

Contract variations may occur quite often in contract management and are discussed more fully in Part Four.

Disclosure of information (confidentiality)

Contracting information should not be confidential unless there is a sound reason, informed by legal principle, for maintenance of the confidentiality of that information.

Contract managers should ensure that the contract contains clauses providing for the protection and handling of confidential information. Where information is identified in the contract as being confidential, contract managers should ensure that it is appropriately handled and protected.

For entities subject to the Commonwealth Procurement Guidelines, certain criteria must be met in order for information to be treated as confidential.²⁷ As a general principle, contracts should provide for access to contract-related information by the Parliament and its committees.

Contracts will generally contain clauses relating to how confidential information is to be identified, dealt with, and returned on completion of the contract.

Potential or actual conflicts of interest is an issue that can arise in many contractual situations.

²⁵ Guidance Note No.2 of 2005 issued by the Office of Legal Services Coordination contains model clauses for inclusion in contracts for legal services.

²⁶ Refer to *Financial Management Guidance No.10: Guidance on complying with legislation and Government Policy in Procurement*, January 2005.

²⁷ These tests and guidance on the confidentiality of contractors' commercial information are set out in *Financial Management Guidance No.3*, February 2003. Contract listings placed on agency websites in accordance with the *Senate Order for Departmental and Agency Contracts* requires, amongst other things, the identification of contracts that contain confidential information.

The contract should include provisions clearly specifying the requirements on both parties if a dispute arises during the performance of the contract.

Disputes

The contract should include provisions clearly specifying the requirements on both parties if a dispute arises during the performance of the contract. Time frames and methods of escalation should be addressed. Alternative dispute resolution techniques should also be considered as a means of reducing the need for formal proceedings. Contract provisions that can be used to manage a dispute include:

- setting effective, appropriate, stepped negotiation and resolution procedures that provide for the phased escalation of disputes
- being prepared to negotiate directly and put effective alternative dispute resolution principles into practice, and
- considering the costs and benefits of mediation, expert appraisal or determination and other possible mechanisms.

Insurance

Insurance provisions should generally be drafted in to the contract that:

- takes into account the types and levels of insurance relevant to the nature, value and risks associated with the contract, including those required to adequately implement the contract indemnity provisions, and
- allows the acquiring entity to review relevant evidence to be satisfied that the insurance policies are correct and up-to-date at regular intervals.

Intellectual property rights

Intellectual property rights include various classes of rights protected by legislation including copyright, patents, registered designs and trademarks, together with confidential information and trade secrets protected under common law or by contract. Provisions should be included in the contract to deal with the ownership and rights to use intellectual property rights created within the scope of the contract and outside the contract.

Intellectual property rights can give rise to complex issues and legal advice should be sought where necessary. Some contracts include a provision requiring the contractor to arrange for a deed to be executed between the acquiring entity, the contractor and certain employees and/or certain approved subcontractors to ensure intellectual property rights ownership and licensing rights. This may be necessary where people have access to particularly sensitive information and where they are developing critical intellectual property rights under the contract. Those involved in contract management should have an understanding of the nature of the intellectual property rights that the acquiring entity may hold or will receive under the contract.

Moral rights are created by the *Copyright Act 1968*, and protect the authors of literary, cinematic and creative works by granting enforceable rights of attribution and integrity of authorship. Attribution means that the author is entitled to be acknowledged as the creator of the work. Integrity means that the author is entitled to protect their work from derogatory treatment that is, damage, destruction, distortion or anything that may compromise the reputation of the creator. Moral rights exist in addition to any other intellectual property rights. Accordingly it is prudent to seek a warranty from the contractor that they have obtained valid written consents from all authors (including subcontractors) involved in creating contract material so that the entity's use of the material will not infringe on the authors' moral rights.

Provisions should be included in the contract to deal with the ownership and rights to use intellectual property rights.

Key personnel

In many contracts, for example those dealing with the provision of consultancy services, the skills, qualifications or experience of particular personnel is likely to be critical to the provision of the contract deliverables. In such cases, the names of the specified personnel should be included in the contract. Arrangements to replace them if necessary should also be agreed. This can include the acquiring entity approving replacement personnel. If certain minimum skills, qualifications or experience are required to be held by these key personnel, these should also be stated in the contract. These key personnel provisions will sometimes be linked to the delivery of particular services under the contract, with some flexibility in staffing for other services.

In many contracts, for example those dealing with the provision of consultancy services, the skills, qualifications or experience of particular personnel is likely to be critical to the provision of the contract deliverables.

Liabilities and indemnities

Contract provisions that address liabilities²⁸ and indemnities²⁹ are common in many Australian Government contracts and are designed to assign to one or more parties the liability for damage in the event that a specified risk occurs.³⁰ An indemnity is a contract provision that allocates liability between the parties and is generally expressed in the form of one party indemnifying the other for a particular type of liability.³¹

Indemnity provisions that provide for the acquiring entity, on behalf of the Commonwealth, to accept the risk of specified losses or damage the contractor may incur or suffer, can have significant legal, policy and financial implications including the need in many situations to obtain approval from a relevant delegate for providing an indemnity.³²

Many Australian Government contracts contain an indemnity from the contractor to the acquiring entity that provide for the contractor to be liable for loss, damage or expenses incurred or suffered by the acquiring entity as a result of actions of the contractor. The most significant issue is whether the contractor's liability should be capped or limited. Any decision to cap or limit a contractor's liability should be based on a formal risk assessment. This assessment should be based on the general principle that risks should be borne by the party best placed to manage them, and have regard to the nature and extent of the risks involved.³³

A related area is that of consequential loss.³⁴ The advice of a commercial lawyer with experience in Government contracts should be obtained if there are any issues relating to consequential loss. The starting point under Australian law is that contractors can only ever be liable for losses or damages that are actually proven and which flow from reasonably foreseeable consequences of their actions. If consequential damages are to be limited or excluded a proper risk assessment needs to be conducted and a commensurate benefit obtained from the contractor as a result of the limitation of liability.

A significant issue is whether the contractor's liability should be capped or limited.

28 A liability is a legal obligation to pay or compensate another party. Liabilities can arise from specific clauses in a contract, or as a result of some other action.

29 An indemnity is a legally binding promise by which one party undertakes to accept the risk of loss or damage another party may suffer. For example, to protect the acquiring entity against claims arising from actions of the contractor.

30 Risk management principles and the policy for FMA agencies on the limitation of liability are contained in the Commonwealth Procurement Guidelines.

31 See Australian Government Solicitor *Legal Briefing Number 19 of 26*, July 2006 for a discussion of Indemnities in Commonwealth contracting.

32 Finance Circular 2003-02 of September 2003 and *Financial Management Guidance No.6 Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letter of Comfort* outline the Australian Government's policy applicable to FMA agencies on issuing these instruments including approval, recording and reporting obligations.

33 It is Australian Government policy that the liability of Information and Communications Technology suppliers contracting with FMA Agencies should, in most cases, be capped at appropriate levels with unlimited liability clauses only required when there is a compelling reason. See Finance Circular 2006-03 dated 15 August 2006 and *A Guide to Limiting Supplier Liability in ICT Contracts with Australian Government Agencies*, issued by the Department of Communications, Information Technology and the Arts, August 2006.

34 Consequential loss is loss subsequent to and related to an immediate loss incurred as a result of some injurious act.

Generally strict compliance with all obligations under the contract is required before the contractor is entitled to payment.

The contract should ensure that there is a legal right not to pay the contractor or to vary payments in circumstances where the contractor has not met their obligations.

Payments

Payment clauses specify the quantum and timing of payments as well as any conditions that must be met before the acquiring entity is liable for payments under the contract. Generally strict compliance with all obligations under the contract is required before the contractor is entitled to payment. If it is agreed that entitlements to payment arise prior to full completion of all work under the contract this needs to be clearly specified in the contract.

Straightforward contracts for the acquisition of standard goods and services are suited to one off lump sum payments made on acceptance of the deliverables. Most common consumer contracts, such as the sale and purchase of goods, are concluded in this way.

In more complex contracts, flexible payment mechanisms may provide a better outcome for both the acquiring entity and the contractor, and may justify the cost of putting them in place and administering them. In long, large or complex contracts there can be many more unexpected, or variable elements which may impact on delivery schedules and costs. Having a fixed price contract, payable only on completion of the contract, may not be appropriate for contracts that span several years or phases. The contractor's business requirements need to be balanced with the requirements of the contract and the acquiring entity.

The contract should ensure that there is a legal right not to pay the contractor or to vary payments in circumstances where the contractor has not met their obligations under the contract. This particularly applies where contract deliverables are late, the required quality of work has not been achieved or other specified requirements have not been met.

When drafting payment clauses, all elements relating to how payments will be made should be specified including:

- when
- at what milestones and how much at each milestone
- conditions to be met prior to payment
- what type of invoice will be required, and
- how long, after receiving a correctly rendered invoice, will the payment be made.

There are often standard clauses that cover these issues; however they will need to be tailored to each particular contract.

Payments regimes

Some common types of payment regimes are:

- **Fixed price:** These are typically used for straightforward contracts where the price for the delivery of the goods or services can be accurately determined. These payment regimes specify the exact amount(s) to be paid to the contractor for the successful performance of the contract.
- **Variable price:** These arrangements allow for certain agreed contract costs to be varied over the life of the contract depending on agreed formula or indices. They are often used where contract costs are likely to vary due to factors beyond the contractor's control. This approach might be used in longer duration contracts where there are expected to be changes in the cost of labour or materials, or fluctuations in the exchange rate.
- **Cost or cost reimbursement:** These arrangements allow the contractor to recover identifiable costs incurred during the performance of the contract, provided they do not exceed a pre-determined ceiling. This type of payment regime can be useful when the maximum scope of the work can be estimated but the actual work involved cannot be accurately estimated. It is often used when there is high risk and uncertainty associated with the deliverables, such as when there are significant developmental aspects involved.

- **Variable quantity:** These regimes allow for a maximum contract price to be agreed with such factors as labour rates, overheads and quantities also being agreed by the parties. These agreed rates may be firm or variable. These payment regimes are generally used where the level of labour effort required under the contract cannot be estimated with any degree of certainty.
- **Performance based:** These involve the use of milestones and performance reviews to determine whether the contractor should receive the next portion of the total payment. If properly managed performance based payment regimes ensure that the contractor is providing the required quality on schedule and also help the acquiring entity to detect any potential problems with the contractor's performance prior to completion and final payment.
- **Incentive payments:** These arrangements are intended to promote efficiency and productivity by offering the contractor a financial incentive for performance above that which can usually be achieved by the application of normal effort and skills in circumstances where this will add value to the outcome sought by the acquiring entity. Incentive payment regimes are generally used with milestone or cost reimbursement payment regimes. These payments arrangements are usually determined by reference to formulae contained within the contract, such as key performance indicators. If the specified performance targets are not reached the contractor forgoes any additional payment. Incentive payments may be used in difficult or high risk contracts or to direct effort to particular desired outcomes.

The timing of contract payments and the conditions under which payments will be made need to be specified in the contract.

Timing of contract payments

The timing of contract payments and the conditions under which payments will be made also need to be specified in the contract. Common payment arrangements are:

- **Full payment on contract completion:** This is the most common method of payment and involves payment of the agreed contract price on the successful delivery of all contract deliverables by the contractor.
- **Progress payments:** These are periodic payments to a contractor for work completed, usually tied to time. They are a means of financing the contractor until the final delivery under the contract. They are often used in fixed price contracts when the contract extends over a reasonable period of time. Progress payments should be based on the worth of the work to the acquiring entity. If this cannot be determined, they are usually based on an estimate of the costs incurred by the contractor.
- **Milestone payments:** These are typically progress payments based on certain events being achieved.
- **Advance payments:** These are payments made prior to work being completed on a contract. These payments are usually made when there is a significant capital requirement needed in order to obtain facilities and other resources necessary to commence the work. Payments made in advance, before the supply of any deliverable, should be treated with caution and avoided whenever possible. If unavoidable, these types of arrangements should be protected by enforceable financial securities provided by reputable third parties. The inherent risk posed by advance payments may be mitigated by offering only a partial up-front payment, with the majority of payment to be made upon the successful completion of the contract.

Payments made in advance, before the supply of any deliverable, should be treated with caution and avoided whenever possible.

Penalties and incentives

In developing a contract it is important to understand how the payment and performance regimes will interact. This can involve including incentives to encourage the contractor to perform/deliver the services or goods early or to a higher standard. Alternatively the contract can include penalties for contractor under-performance. There are many ways of approaching incentives and penalties, including liquidated damages regimes, service credits and rebates, and incentive payments.

Liquidated damages regimes are useful in situations where it is reasonably easy to calculate what the loss will be for the delay, or other failure to perform the contract obligation.

Any mechanisms that link payment with performance (either by penalty or incentive) should always be clearly specified in the contract.

Retention arrangements are useful where the contractor needs a significant cash flow in order to be able to do the work, but the overall quality of the work is not easily judged until the deliverables have been provided by the contractor.

Any mechanisms that link payment with performance (either by penalty or incentive) should always be clearly specified in the contract.

Securities and guarantees

Securities and guarantees are useful where significant amounts of money are involved or where a substantial payment is to be made to the contractor prior to the acceptance of the goods or services. In some contractual situations, it may be necessary to obtain separate deeds of guarantee or security. These are commonly in the form of financial securities in which the acquiring entity is entitled under the deed, to obtain financial recompense directly from a third party should the contractor fail to perform its contractual obligations. Another common form of security is performance securities in which another party agrees under a deed that, when required to do so by the acquiring entity, they will complete the performance of the contract on behalf of a defaulting contractor.

Subcontracting

Contract clauses should provide that the contractor retains responsibility for ensuring that subcontractors perform their obligations.

In relation to subcontracting, contract clauses should provide that the contractor retains responsibility for ensuring that subcontractors perform their obligations. In larger, more complex contracts and contracts of longer duration it is important to include provisions that clearly stipulate that the:

- subcontracted work under the contract does not relieve the prime contractor of its contractual liabilities or obligations
- prime contractor is responsible for ensuring that subcontractors comply with mandatory Government policies, and
- contractor is prohibited from subcontracting all work required under the contract.

The contract provisions may also stipulate that the acquiring entity shall approve any proposed subcontractor, prior to final engagement by the contractor.

Termination and contract end dates

All contracts should include a provision that allows the acquiring entity to terminate a contract for convenience. Such a clause incorporates into the contract the doctrine of executive necessity that recognises governments may need to break contracts because of a change of policy or other similar circumstances.

This means that the terminating party does not need to give a reason for the termination and there does not need to have been a default by other party. These clauses usually specify the type and amount of damages that will be payable by the party terminating the contract to the other party.

All contracts should include a provision that allows the acquiring entity to terminate a contract for convenience.

To assist in giving effect to the need for all procurements to achieve value for money, it is good practice for all contracts to specify an end date. In contracts with contract extension options, the end date will generally be a date beyond which any contract extension options can no longer be exercised.

Transition arrangements

In many service delivery contracts it will be necessary for the contract to include transition in and transition out arrangements. These provisions are designed to ensure that there is an orderly introduction of services by the contractor at the commencement of the contract and for effective contract succession at the termination of the contract.

In circumstances where a transition in phase is required, the contract should:

- specify the period of the transition. This may be after a specified period of time or at the date of the achievement of agreed milestones or service levels, and
- detail the contractor's responsibilities during this period. This will often involve the contractor preparing a detailed transition in strategy or plan that requires the approval of the acquiring entity. This document should provide for a formal evaluation or review at the conclusion of the transition in period.

It is also important that the contract specify the contractor's responsibilities at the end of the contract. This may entail the contractor preparing a transition out strategy or plan at a specified time. The date set for its preparation should allow sufficient time for all required actions to be addressed by both the contractor and the acquiring entity before the contract ends. Where the strategy or plan is prepared at the commencement of the contract, provisions should be made for it to be reviewed and updated as necessary before the contract expires.

Warranties and fitness for purpose

Warranty clauses govern the rights and obligations of the contractor and the acquiring entity in relation to defective goods and services. They serve to promote a minimum standard of performance. Warranties may provide contractual rights to reject goods and be paid compensation, or to have defects corrected if the goods and services are to be retained. Generally, contracts should stipulate the time period after the acceptance of goods or services within which the acquiring entity has a contractual right to require the correction or repair of any defects.

Warranty clauses should cover:

- the exact nature of the goods and services under warranty
- the level of warranty that the contractor is required to provide
- the precise remedies available to the acquiring entity, and
- the scope and duration of the warranty.

Some level of warranty is normal for many goods. In many cases there is a typical level of warranty for a category of goods. For example, motor vehicles typically have a three year warranty, and a major building air conditioning plant may have a 10 year warranty.

Consideration should be given as to whether to specify the typical level of warranty for the procurement or whether entity business needs suggest a different level of warranty. Requiring a warranty level more than the current typical level may involve additional costs. Specifying lower levels of warranty may expose the acquiring entity to additional risks and should only be agreed to after consideration of the benefits involved.

Warranty clauses can be either express or implied. Express warranties involve a warranty clause that provides certain remedies for defects and require a contractor to either repair or replace the goods. If goods were retained, the contractor is required to pay a sum of money that is equitable in the circumstances. Implied warranties include the requirement that the product is of merchantable quality and is fit for purpose.

Generally, contracts should stipulate the time period after the acceptance of goods or services within which the acquiring entity has a contractual right to require the correction or repair of any defects.

Warranty clauses can be either express or implied.

EXAMPLE CONTRACT ASSESSMENT

Once a contract is entered into, it can be useful to have an indication of the relative size and complexity of the contract. This assessment can help inform decisions on the appropriate level of planning and resources needed to effectively manage the contract.

This contract assessment is an example of how this assessment can be made in a structured manner using a low, medium or high scale for a range of factors relevant to the particular contract.

Factors	Size and complexity ratings		
	Low	Medium	High
1. Strategic importance to contracting entity	<input type="checkbox"/> Low	<input checked="" type="checkbox"/> Medium	<input type="checkbox"/> High
2. Political importance	<input checked="" type="checkbox"/> Internal	<input type="checkbox"/> Federal	<input type="checkbox"/> Federal + States
3. Breadth of impact on Australian Government entity	<input checked="" type="checkbox"/> Internal	<input type="checkbox"/> Federal	<input type="checkbox"/> Federal + States
4. Extent of impact (for example on stakeholders, clients, users)	<input type="checkbox"/> Low	<input checked="" type="checkbox"/> Medium	<input type="checkbox"/> High
5. Nature of contract deliverable(s)	<input type="checkbox"/> Straightforward	<input type="checkbox"/> Average	<input checked="" type="checkbox"/> Complex
6. Certainty and clarity of contract requirements / specifications	<input checked="" type="checkbox"/> Certain	<input type="checkbox"/> Average	<input type="checkbox"/> Uncertain
7. Degree of Innovation needed	<input type="checkbox"/> Low	<input checked="" type="checkbox"/> Medium	<input type="checkbox"/> High
8. Duration	<input type="checkbox"/> 0-6 Months	<input type="checkbox"/> 6-12 Months	<input checked="" type="checkbox"/> > 12 months
9. Flexibility of Implementation dates	<input type="checkbox"/> Open	<input checked="" type="checkbox"/> Firm	<input type="checkbox"/> Immovable
10. Value	<input type="checkbox"/> <\$2m	<input checked="" type="checkbox"/> \$2m – \$5m	<input type="checkbox"/> >\$5m
11. Security requirements	<input type="checkbox"/> Low	<input checked="" type="checkbox"/> Medium	<input type="checkbox"/> High
12. Contract Sponsor: commitment / priority for this contract	<input type="checkbox"/> High	<input checked="" type="checkbox"/> Medium	<input type="checkbox"/> Low
13. Number of user areas / key decision-makers	<input type="checkbox"/> < 5	<input checked="" type="checkbox"/> 5-10	<input type="checkbox"/> > 10
14. Geographic locations for contributors and deployment	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 2-5	<input type="checkbox"/> >5
15. Overlap with other initiatives	<input checked="" type="checkbox"/> Low	<input type="checkbox"/> Medium	<input type="checkbox"/> High
16. Number of contracting staff	<input checked="" type="checkbox"/> 1-5	<input type="checkbox"/> 5-10	<input type="checkbox"/> More than 10
17. Contracting staff: experience / skills in this type of contract	<input type="checkbox"/> High	<input checked="" type="checkbox"/> Medium	<input type="checkbox"/> Low
18. Client / users: degree of support and enthusiasm for this contract	<input checked="" type="checkbox"/> High	<input type="checkbox"/> Medium	<input type="checkbox"/> Low
19. Client / users: availability to assist in contract award and management	<input type="checkbox"/> High	<input type="checkbox"/> Medium	<input type="checkbox"/> Low
20. Ease of changing suppliers after the contract is let	<input type="checkbox"/> Easy	<input checked="" type="checkbox"/> Moderate	<input type="checkbox"/> Difficult
21. Dependence by contractor on subcontractors	<input checked="" type="checkbox"/> Low	<input type="checkbox"/> Medium	<input type="checkbox"/> High
22. Other (specify)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
23. Other (specify)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
OVERALL size/complexity assessment (based on individual ratings and the relative weight given to each factor)	MEDIUM		

EXAMPLE RISK ASSESSMENT AND TREATMENT PLAN: CONTRACT DEVELOPMENT STAGE

The table below shows a partial sample of a risk assessment and treatment plan for the contract development stage. So far, only some of the risks have been entered; the next steps are to assess the likelihood and impact, possible treatments and decide which treatments to implement. Remember that treatments may have costs, that need to be factored into the project budget, and possibly may affect the choice between suppliers.

What could go wrong or change during contract development?	Likelihood (1)	Impact if it happens (1)	Overall Rating (2)	Preventative Steps (3) What can you do to stop it happening?	Contingency Steps (3) What will you do if it happens anyway?	Decision (4)
Inadequate resourcing of contract development team						
Insufficient access to end users to define their service level preferences						
Suggested performance indicators might be impractical to collect						
Required financial guarantees may not be forthcoming						
... other risks as required ...						

(1) For example High, medium or low (2) Judgement based on combination of impact and likelihood. (3) General responses include transferring the risk (for example, insurance), monitor and respond to the risk as needed, avoid the risk (for example by taking extra steps to avoid the risk happening). (4) Having identified risks and possible responses, what is the entity's **decision** (for example what preventative steps to take, what funding to allow for contingencies; or a considered decision to take no action.)

ACTIONS AND RESPONSIBILITIES MATRIX

The actions and responsibilities matrixes in this Guide bring together information on:

- key actions and decisions
- the main stakeholders
- the key documents, and
- key responsibilities.

The matrix on the following page relates to the contract development stage; there are similar matrixes in the next three parts of this guide for the subsequent stages of contracting.

The matrixes provide an overview of process steps, the role of each stakeholder group in these process steps, and the creation, use and amendment of key records.

The matrixes provide a guide for a generic contracting process. Contract managers are encouraged to prepare a tailored version suited to their particular contract and their entity's accountability framework. These matrixes can assist in ensuring stakeholders have a common understanding of the contracting process as well as their respective responsibilities.

The matrix is organised as follows:

- **Key activities** are listed in the left most column, in approximate sequential order. In some cases there may be some iteration of steps to achieve the required quality
- **Key stakeholders** are listed as column headings above the next set of columns. These vary slightly in the four matrixes, as different stakeholders are involved at different stages. In the following matrix, the term "senior manager" refers to the manager who has direct responsibility for the contract, and whose staff will undertake the necessary work. The term "negotiation team" refers to the person or people who develop the contract and negotiate the contract through to contract signing. The term "contract management team" refers to those responsible for managing the contract after signing. In some cases these roles may be done by the same person; in some cases there may be two teams, with some overlapping membership; and in other cases there may be a complete change over, and
- **Key documents** are identified in the final set of columns (shaded) list used in the contracting process. Again there are some minor variations at the different stages.

For each row of action steps, a symbol is shown in the column for relevant stakeholders and documents indicating who has responsibility for the step, who is involved, and what documentation is used or updated. *For example, in the following matrix, the second action (update risk plan) shows that this is the responsibility of the negotiating team, who update the risk plan, which is approved by the senior manager).*

Looking down each column (one each for key stakeholders and documents) identifies the steps in which they have a particular role or responsibility. *For example, in the following matrix, looking at the column for the risk plan shows it is updated early by the negotiating team, and then used on a number occasions to guide decisions (for example, choosing which stakeholders to involve will be guided by the risk analysis).*

KEY ACTIONS AND RESPONSIBILITIES MATRIX: CONTRACT DEVELOPMENT

<p>This matrix shows the typical sequence of steps for contract development, and the key stakeholder groups and documents involved:</p> <ul style="list-style-type: none">  has responsibility for this step  involved in this step (for example, giving advice, being informed)  gives formal approval  Document is used  Documents are created or updated <p>Action or step:</p>	Senior Management / Minister	Senior manager	User groups	Negotiation team	Contract management team	Specialist advisers	Requirements, plans and procedures for process	Risk plan	Probity plan	Budget and resource plan	Contract – standard provisions	Contract – deliverable specification.	Contract – performance and payments arrangements
Appoint officer to carry the contracting process													
Review and update risks for this stage													
Develop probity plan and requirements													
Brief senior management and obtain support													
Identify key stakeholders and open communication													
Identify and obtain necessary resources (including funding, people, specialist advice)													
Develop plan or check list for contracting process													
Agree roles and responsibilities among parties													
Arrange appropriate delegations and approvals													
Set up recordkeeping system													
Identify all legal and policy requirements to be included in the contract													
Identify and review contract approaches and sample contracts													
Decide contract approach													
Review standard contract provisions for suitability													
Draft contract definition of deliverables													
Draft contract performance and payment clauses													

MEASURING PERFORMANCE CHECKLIST

- Can the measure(s) be objectively assessed?
- Are the measures understood by all parties?
- Do the measures assess all the important aspects of performance, rather than what is easy to measure?
- Do the measures include facets or bases for comparison; are the performance measures allowing judgements to be made about contractor performance?
- Is the performance regime cost effective to administer for both parties?
- Are the skills available to assess whether or not contractor performance is satisfactory?
- Do the measures focus contractor performance on the outcomes to be achieved?
- Do the measures encourage performance improvement over the life of the contract?
- Does contractor performance against the measures provide the basis for making payments?
- Has a process been established to review the performance regime periodically to ensure its ongoing relevance?
- Has consideration been given to the collection and analysis of performance data? For example, is it better to use an independent third party or technical expert?

PART 3
Formalising the contract

contracting
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PART 3

Formalising the contract

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3. Formalising the contract

3.1. INTRODUCTION

This part of the Guide discusses formalising the contract between the acquiring entity and the contractor.

The purpose of this phase is to ensure that the signed contract represents a value for money outcome and is a legally enforceable document between the acquiring entity and the contractor.

For straightforward contracts, formalising the contract is likely to require minimal effort. For more complex contracts, this phase may require considerable planning and effort over a longer period of time.

Negotiation is a common feature of contract finalisation for both straightforward and complex contracts.

Negotiation is a common feature of contract formalisation for both straightforward and complex contracts. Negotiations are not required in all cases but can assist in obtaining overall value for money and in finalising contract terms and conditions such as contract deliverables, developing and agreeing the performance regime and payment arrangements.

In formalising the contract, it is important that the signed contract accurately reflects all discussions and agreements between the parties; and is approved and signed by those with the relevant authority. Once the contract is awarded there may need to be a public announcement, unsuccessful tenderers will need to be advised and debriefed where required, and any complaints addressed.

Key tasks

The key tasks involved in formalising the contract are:

Identify and manage **risks**.

Identify and assign **responsibilities**.

Plan and conduct **contract negotiations**.

Approve and sign the contract.

Announce contract award.

Meet **reporting requirements**.

Debrief tenderers.

Behave ethically.

Address any **complaints**.

Keep records.

It is important that the signed contract accurately reflects all discussions and agreements between the parties.

3.2. IDENTIFY AND MANAGE RISKS

As with other phases of the contracting cycle, there are risks to successfully formalising a contract. Risks assessments conducted at earlier points of the cycle should be reviewed at this stage for relevance.

Risks to successfully formalising the contract can arise from a number of sources. These include:

Sources of risk	Examples of risks
Actions of the acquiring entity	<ul style="list-style-type: none">• Unknowingly entering into a contract• Work commencing before the contract is signed
Contract negotiations	<ul style="list-style-type: none">• Failure to focus negotiations on key outcomes• Failure of negotiating team to understand the extent of their authority• Negotiating team not having sufficient skills and experience and/or having required access to specialist advice• Final negotiated position adversely impacts on the value for money outcome• Agreeing to unnecessary or undesirable outcomes during negotiations• Failure to behave fairly and ethically
Final contract drafting	<ul style="list-style-type: none">• Agreed outcomes not reflected in the final contract• Failure to obtain all necessary approvals by those delegated to give them• Failure to include all necessary contract clauses or including inappropriate clauses• Failure to establish the legal status of the contractor

When finalising contracts, care needs to be exercised not to create a contract orally or by the exchange of non contract documents or letters.

Unknowingly entering into a contract

Care needs to be exercised not to create a contract orally or by the exchange of non contract documents or letters. Care also needs to be exercised so that contracts are not formed or amended by informal means.

Unknowingly entering into a contract can occur, for example, where an acquiring entity instructs a contractor to proceed with work or delivery before a contract is signed. Subsequent attempts to negotiate contract conditions often fail because a contract already exists and both parties are bound by its conditions. This places the acquiring entity at a potential disadvantage because the contractual terms may not have been fully developed or formally recorded and it poses risks to getting the goods and services required. Such oral contracts are uncertain in terms of their operation and precise obligations of the parties are difficult to prove in the event of a dispute.

Even if a contract is not formed because not all the formal requirements are present, the contractor may be entitled to be paid a reasonable price for the work undertaken on the basis of the acquiring entity's instructions to proceed.

Unknowingly entering into a contract can occur before a contract is signed.

The following case study highlights how the actions of an entity can result in an obligation to pay a contractor.

Case Study: Entitlement to payment where there is no contractual obligation

The acquiring entity advertised for tenders to construct a building. A contractor was selected and extensive negotiations were undertaken – but no contract signed. The contractor was asked to provide and submit three detailed plans. The entity then decided not to go ahead with the project and consequently did not pay the contractor's bill for the plans. The case went to court.

The entity argued it did not need to pay the contractor, as there was no contract between them. The court found the contractor was entitled to payment because there was no basis to suggest that the work was undertaken gratuitously and the decision not to proceed was not attributed to any conduct of the contractor.

Comment: When negotiating a contract, requesting a contractor to provide services prior to the commencement of the contract should be done with caution and in exceptional circumstances. If it is necessary to do so, then an additional contract should be drafted outlining the details of the task and remuneration of the contractor.

In some circumstances, (for example, responding to a natural disaster or similar emergency) it may be necessary for a contractor to be engaged and for work to commence urgently prior to having signed a contract. In such cases it is important to document key terms in writing and have these acknowledged by both parties prior to actual work or delivery commencing. An alternative to documenting key terms is to have the contractor commence work at their own risk. In both cases, the terms on which it was agreed to proceed should be settled and formalised as soon as possible.

Negotiation is a common feature of the contracting cycle. The approach used should aim to engender mutual understanding and commitment .

3.3. IDENTIFY AND ASSIGN RESPONSIBILITIES

Responsibility for the various tasks required to formalise the contract should be assigned and understood by all parties.

The Actions and Responsibilities Matrix at the end of this part outlines a typical sequence of steps, the key stakeholders involved and documents produced in formalising a contract.

3.4. CONDUCT CONTRACT NEGOTIATIONS

This section canvasses a number of general negotiation issues and matters specific to finalising the contract.

Negotiation issues

Negotiation is a common feature of the contracting cycle. There are a variety of negotiating styles that can be used and there is no one right approach. The approach used will depend on the resources available, the skills and experience of the personnel involved, what issues are to be negotiated and the timeframe involved. The approach used should aim to engender mutual understanding and commitment to resolve issues in a co-operative manner that leads to a constructive relationship, and to support the achievement of value for money.

Successful negotiations require the personnel involved to have relevant skills and experience. It is better practice to learn the necessary skills through formal training, and further develop them by experience obtained on the job. Managers and staff who are involved in contract negotiations as an integral part of their responsibilities should identify any skills' gaps and address them through professional development activities.

The person or team selected to conduct the negotiations may need to have, for example, communication, problem-solving, technical and financial skills and an understanding of the relevant industry. Professional advisers may also need to be included in the team where the negotiations are likely to be complex, where there may be difficulties in reaching agreement or there is a need for specific expert advice.

Negotiations are more likely to be successful when planning for the negotiations include:

- setting out and agreeing the contract terms and conditions that will be subject to negotiation
- committing the necessary resources in terms of time and funding, including obtaining professional advice where required
- establishing roles and responsibilities of the negotiating team
- ensuring that those involved have the legal authority to act on behalf of the party they represent
- identifying any problems or barriers as well as opportunities, and developing an approach to address these
- defining the objectives and constraints of the negotiation, and
- involving senior management in setting the policy parameters and communicating progress and/or changes in circumstances to them.

It is important that contract negotiations are conducted in a professional and structured manner. Addressing the following issues will assist in achieving this objective:

- agreeing on the make-up of the negotiating team of both parties; for example, will professional advisors be on the negotiating team or be available for advice as and when required
- agreeing the location and agenda for each negotiating session
- where a probity advisor has been appointed, obtaining sign-off on the negotiation arrangements
- establishing timeframes in which negotiations of individual issues, as well as negotiations overall, will be conducted
- establishing any interrelationships between individual issues/provisions that are subject to negotiation to ensure these are taken into account during negotiations. For example, there will generally be a relationship between service levels and contract price
- focusing on achieving the objective sought over the life of the contract, rather than on short-term gains
- keeping issues that are not negotiable to a minimum and being prepared to trade-off less important requirements to achieve outcomes that are central to the entity's objectives
- keeping unresolved issues to a minimum and agreeing arrangements for their later resolution, and
- assigning responsibility for taking formal minutes of the negotiations and ensuring minutes are circulated and agreed within specified timeframes.

The person or team selected to conduct the negotiations may need to have communication, problem-solving, technical and financial skills and an understanding of the relevant industry.

It is important that contract negotiations are conducted in a professional and structured manner.

Behave ethically

All negotiations should be conducted in a fair and ethical manner and in such a way that all parties are treated fairly. It is important that no one party is put at a disadvantage and that there should be no suggestion of bias or distrust.

Negotiators should have particular regard to the APS Code of Conduct and Values as well as any agency specific guidelines on behaving ethically. In particular, it is generally accepted that the acceptance of gifts or other benefits during a tender process is not appropriate; this should be made clear at the start of the procurement process and confirmed at the commencement of negotiations.

All negotiations should be conducted in a fair and ethical manner and in such a way that all parties are treated fairly.

Specific negotiations for contract formalisation

At the contract formalisation stage, the first consideration must be whether negotiations are required for the particular contract. In straightforward contracts, with easily defined goods and services and straightforward payment arrangements, there may be little or no value in using time and resources to negotiate.

In the majority of contracts there will be mandatory provisions that relate to legislative or government policy requirements that are not able to be negotiated. However, there are many areas where negotiation is possible. The major reasons for negotiating at the contract development phase include:

- to confirm or to obtain better value for money
- to achieve a full understanding between the parties
- to establish or refine the statement of requirements and/or the performance regime
- to clarify issues or objections to contract provisions, and
- to explore any complex or one-off issues.

In deciding who will conduct negotiations, it is useful to include the person or team who will later manage the contract if possible. Irrespective of its composition, the negotiating team should have an understanding of:

- the contract deliverables
- the basis on which the preferred tender(s) have been selected
- the background to why certain contract conditions are subject to negotiation (often these are as a result of the evaluation of tenders), and
- the context of the requirement in the market place.

Negotiations should aim to achieve the best possible result for the acquiring entity in the circumstances, while recognising that the contractor also needs to be satisfied with the result. If a contractor considers they have been unfairly treated during contract negotiations, this may impact on their contract performance during the life of the contract.

During negotiations acquiring entities should, as far as possible, avoid any suggestion that the preferred contractor is certain to be awarded the contract because this can undermine the effectiveness of the negotiations. It is equally important to maintain confidentiality of issues, responses and the direction of the negotiations, especially where parallel or simultaneous negotiations (discussed below) are being undertaken.

During negotiations acquiring entities should, as far as possible, avoid any suggestion that the preferred contractor is certain to be awarded the contract.

The following case study discusses an example of how contract negotiations were conducted.

Case Study: Final negotiations on a large contract

An entity was nearing the end of the evaluation of tenders for a five year services contract. Of the tenders being evaluated, one was well ahead of the others in terms of overall value for money (including such factors as price, service, and risk factors). However, it was higher priced, with higher service levels.

The tender evaluation team briefed the procurement steering committee, and sought approval to obtain a best and final offer from the most highly ranked tenderer. (The possibility of seeking best and final offers had been explicitly mentioned as an option in the request for tender documentation). An indication was provided to this tenderer of the preferred service level. To encourage the provision of a genuine best and final offer, the tenderer was not advised of their current ranking in the process.

Following final analysis of the offers the tender evaluation team recommended to the steering committee the preferred tenderer, and a list of issues for negotiation. The types of issues being explored in the negotiations included some costs in later years of the contract (which the entity considered should reduce as experience was gained) and a number of partial compliance issues on contract clauses (for example, the RFT had specified that the Commonwealth wished to be able to sub-licence some intellectual property of the contractor, but the contractor did not want to permit sub-licensing).

A list of issues was sent to the contractor so that as many issues as possible could be resolved by correspondence. The remaining substantive issues were then addressed in a one day negotiation session. The result of this was a negotiated form of the offer that could be formally considered for acceptance by the entity.

Comment: Better practice features of this study include carefully following processes set out in the RFT documentation, timely briefing of the steering committee, and obtaining of proper authority for key steps during negotiations. Probity issues can arise when seeking best and final offers and in conducting other aspects of final negotiations. On the one hand, it is important to not give an improper advantage to a tenderer to improve their offer; on the other hand it may be inappropriate to put all tenderers to the effort and expense of revising offers when some are clearly unlikely to be successful. The key principles to follow are to ensure even handed treatment of all involved and careful documentation of decisions.

In the course of any negotiation, it is important that legislative requirements are complied with and there are particular legal issues to be aware of at the contract finalisation stage.

Tenderers should be advised that the negotiations are subject to a formal written contract properly signed and authorised by the appropriate delegate. They should not be advised or otherwise given the impression that they have been awarded the contract until the contract negotiations have been concluded and the final contract is agreed by both parties. While the documentation used to define the requirement or to approach the market should contain clauses making this clear, it should be reaffirmed early in negotiations. Failure to do this could, in some circumstances give rise to legal claims for damages if a contractor is led to believe they will be awarded the contract.

If the negotiations are likely to result in a major change to the original requirements, it may be necessary to give all tender respondents the opportunity to revise their responses. The need for this depends on the circumstances but will generally involve a consideration of the extent and nature of the change to the original requirement. If there is any doubt, specialist advice should be obtained to assist with making the decision.

Tenderers should be advised that the negotiations are subject to a formal written contract properly signed and authorised by the appropriate delegate.

If the negotiations are likely to result in a major change to the original requirements, it may be necessary to give all tender respondents the opportunity to revise their responses.

In negotiations it is important to bear in mind the principles of contract law. A contract requires agreement in law and that agreement is shown by an offer by one party and an acceptance by the other. It is possible that announcing the successful contractor (before the contract is actually agreed and signed) will amount to an acceptance and the formation of a binding contract. This provides no further incentive on the part of the contractor to agree to modify terms or conditions. A party wishing to modify terms may even have lost the ability to do so, or the ability to withdraw from the transaction, even where the contract was formed prematurely or inadvertently.

Care needs to be exercised when considering whether to defer finalising or clarifying particular issues until after the contract has been signed. Generally the acquiring entities bargaining position will be reduced once a contract is signed. Every effort should therefore be made to settle outstanding issues prior to contract signing. Agreement should be reached on how any matters not settled will be finalised.

Parallel negotiations should only be used in significant matters and after obtaining specialist advice.

Parallel negotiations

Parallel negotiations involve undertaking negotiations with two or more tenderers at the same time. Generally such an approach should only be used in significant matters and after obtaining specialist advice. If commenced or conducted inappropriately, parallel negotiations can have serious consequences such as: legal action by the tenderer(s); the need to re-tender and damage to the acquiring entity's reputation.

In view of the risks involved and the time and resources that may be required by the tenderers and the acquiring entity, parallel negotiations should generally only be considered as an option in cases of highly competitive tender responses where it is not possible to determine which tenderer will provide the best value for money, without undertaking parallel negotiations. All participants should have a good chance of becoming the preferred contractor and parallel negotiations should not be used as a means to obtain better conditions from one of the tenderers.

The possibility of parallel negotiations should have been included in the documentation used to approach the market. If such notification has not been given at that time, it would be prudent to obtain specialist advice prior to taking this course of action.

As is the case for other negotiations, parallel negotiations require confidentiality and ethical standards to be maintained. Each tenderer should be treated fairly and if additional information is provided by the acquiring entity, it should be provided to all tenderers.

Parallel negotiations require each tenderer to be treated fairly.

3.5. CANCELLING A PROCUREMENT

Entities may decide not to award a contract and to cancel the procurement process.³⁵ Taking such a decision, particularly when the procurement has involved a tender process, is a serious step with potential legal and management risks that should be considered before any decision is made. For example, cancelling a major procurement may impact on the entity's credibility and discourage participation in future procurements.

Cancellation may, nevertheless, be necessary to protect the integrity of procurement processes and avoid the awarding of a contract where, for example, no tenderer has submitted a tender that meets the specified evaluation criteria.

³⁵ Entities subject to the CPGs can only cancel a procurement when it is determined that awarding a contract is not in the public interest. Examples of situations where this may be the case and a brief discussion about other relevant factors are outlined in *Financial Management Guidance No.13, Guidance on the Mandatory Procurement Procedures*, paragraph 9.3, p. 51.

3.6. AWARDING THE CONTRACT

While the actual process of awarding the contract will be straightforward in many situations, for larger value and/or sensitive contracts, a considerable amount of time and effort may be involved. Irrespective of the particular circumstances, it is important that in finalising each contract all required approvals are obtained and protocols followed. This involves making sure that all necessary matters are covered in the final contract, completing the drafting of the contract, briefing stakeholders as required, obtaining the required approval(s) and arranging for contract signing. Each of these steps is discussed below.

The contract constitutes the record, usually the full record, of an agreement between the two parties that is enforceable by law. In the majority of cases, a contract will represent the entire agreement. In this way the contract effectively supersedes all prior offers, representations, agreements and understandings, whether oral or in writing, relating to the contract. It is better practice for this to be stipulated in the contract itself, particularly, in major contracts that are awarded as a result of a formal tender process.

In finalising a contract, the following documents, where available, should be used as a basis to accurately reflect the parties' agreement:

- any records of agreements made during post tender discussions or negotiations
- the documentation containing the acquiring entity's requirements as contained in its request documentation, including the draft contract terms and conditions, and
- the tenderer's submission (response) which may include the tenderer's preferred terms and conditions.

Good Practice Tips: Contract drafting

It is generally not appropriate for the contract to include the successful tenderer's response in its entirety, particularly as such responses can often include a range of promotional and other material that is not directly relevant to the contract deliverables. It is important however, that all elements of the response that have been used in arriving at the value for money procurement decision are included in the final contract. This will include key deliverables and any other offers made in the tender response.

To avoid any misunderstandings it can be useful to include a precedence of documents clause in a contract that outlines the relative status of the contract and any additional documents that may be incorporated by virtue of them being expressly referenced in the contract. Where this approach is adopted it is also important that the language used in the various documents is consistent.

In circumstances where a contract is the confirmation of detailed and complex negotiations and exchanges of correspondence, it can be of benefit to both parties if the contract explicitly states that the contract provisions supersede and replace any previous agreements, understandings and commitments.

Completing the contract drafting

The steps that generally need to be followed to complete the contract documentation are:

- obtaining all necessary approvals required to comply with legislative and policy requirements³⁶
- carefully reviewing the final document and ensuring all aspects of the contract are completed, including schedules and plans

It is important that in finalising each contract all required approvals are obtained and protocols followed.

The contract constitutes the record of an agreement between the two parties that is enforceable.

³⁶ For FMA agencies important approval requirements are contained in FMA Regulations 10 and 13.

It is important that stakeholders are briefed on progress and/or the outcome of tender evaluations and/or contract negotiations.

- having the final contract checked by legal advisers or other advisers, where appropriate
- notifying the successful contractor and making sure they understand contract signing formally constitutes acceptance of the contract terms and conditions
- arranging physical signing of the document which can involve a formal signing ceremony in some cases, and
- notifying unsuccessful tenderers.

It is likely that such things as insurances, indemnities, and Intellectual Property Rights or deeds have been checked prior to deciding to negotiate with particular tenderers. However, a final check to ensure that all necessary contract provisions have been met and any relevant documentation has been provided should be undertaken before the contract is approved.

Briefing of stakeholders

It is important that stakeholders are briefed on progress and/or the outcome of tender evaluations³⁷ and/or contract negotiations. The purpose of these briefings is two-fold. Briefings provide the opportunity for input from stakeholders on their requirements and expectations. They also provide the contract manager with the opportunity to update stakeholders on any issues or concerns that may impact them.

It is essential that any stakeholder briefing is conducted in a way that is fair and impartial³⁸. Adopting an ethical transparent approach enables business to be conducted fairly, reasonably and with integrity.

Contract approval and signing

The person who signs a contract must have the appropriate authority to do so.

Reminder: Appropriate approval should have been obtained prior to undertaking a procurement process. It is better practice for this to be given by the delegate most likely to sign the contract at the conclusion of the process.

The contract signatory is responsible for entering into a contract agreement or arrangement under which public money will become payable in accordance with the terms of the contract. It is important that the person who signs a contract has the appropriate authority to do so, is fully aware of their responsibilities and is satisfied that all necessary approvals had been obtained and relevant policies have been complied with.³⁹ Identification of the officers who have the necessary authority to enter into contracts to certain financial limits will generally be contained in the acquiring entity's Chief Executive Instructions (or equivalent) or procurement procedures. It is essential that the contract is approved by a person who has the appropriate authority.

It is better practice for the delegate responsible for the contracting process to also actually sign the contract, whenever possible. In some circumstances this may not be possible and in such situations the signatory to the contract needs to make sufficient enquiries, of those that have been involved in earlier stages of finalising the contract to be satisfied that all necessary matters have been appropriately dealt with.

The order in which parties sign the contract has no bearing on the legal status of the document. It is, nevertheless, better practice for the acquiring entity to request a contractor to sign the contract first as this allows the entity to ensure that the final contract has not been varied in any way from that which was agreed between the parties.

It is better practice for the delegate responsible for the contracting process to also actually sign the contract.

³⁷ The need to provide briefings to stakeholders and the probity protocols to be followed should have been included in the tender evaluation plan.

³⁸ Guidance on fairness and impartiality can be found in Paragraph 6.1 of *Guidance on Ethics and Probity in Government Procurement (FMG 14)*.

³⁹ For example, those relating to the expenditure of public moneys (FMA Regulations 9, 10 and 13), limiting the contractors' liability and/or entering into indemnity arrangements with the contractor.

A practice that is sometimes adopted at this stage is for the contract signatories to initial each page of the contract, including all annexures and attachments. There is no legal requirement for this to be done. However, it is important that the final contract is checked carefully for accuracy and consistency and the contract signatories may consider it appropriate to initial each page of the contract as evidence of the contract's completeness. Another practice that is commonly adopted is to bind the contract, thus reducing the risk of inadvertent or deliberate replacement pages being inserted.

Notifying tenderers of contract award

Following the award of a contract, the acquiring entity should promptly inform all tenderers of the decision. On request, the acquiring entity must provide each unsuccessful tenderer with an explanation why its submission was not successful.⁴⁰ The successful tenderer(s) may also request a debriefing. In the case of an expression of interest process or an application for inclusion on a multi-use list, unsuccessful tenderers may request written reasons for rejection. It is better practice for acquiring entities to provide feedback as a matter of course. Some entities schedule debriefing sessions and invite tenderers to attend, leaving it to them to participate if they wish.

Following the award of a contract, the acquiring entity should promptly inform all tenderers of the decision.

Public announcement

Details of the successful contractor are generally made public according to public sector requirements and organisational protocols.⁴¹

In some circumstances, for example, following a high profile procurement process, the Government may wish to publicly announce the award of a contract. Any public announcement of contract award should not be made until the successful completion of all contract negotiations, a contract has been signed by both parties and all unsuccessful tenderers have been notified.

Details of the successful contractor are generally made public according to public sector requirements and organisational protocols.

The public announcement of the award of a contract prior to at least these steps being completed has the potential to undermine the acquiring entity's negotiation position and its legal rights. In exceptional circumstances, where a decision is made that an announcement prior to contract signature is necessary, the announcement should indicate that the award of the contract remains subject to the negotiation of final terms and conditions satisfactory to the acquiring entity.

3.7. DEBRIEF TENDERERS

Debriefing tenderers is an important part of the procurement process and, when done well, benefits both parties. A successful debrief is one that provides feedback to tenderers about the areas where they were more or less competitive. This information can assist the contractor in making submissions for future procurements and government entities by providing potential suppliers with a better understanding of the government's procurement processes.

Debriefing tenderers is an important part of the procurement process.

Constructive feedback also contributes to transparency in the procurement process and provides the market with greater confidence in the fairness of that process.

⁴⁰ The Commonwealth Procurement Guidelines, section 7.25, require relevant entities to follow this practice.

⁴¹ All FMA agencies are required to publicise details of contracts or amendments awarded worth \$10 000 or more in the Australian Government website, AusTender, within six weeks of entering into the agreement, in accordance with the requirements of Finance Management Guidance No. 15, Guidance on Procurement Publishing Obligations, January 2005. Some entities are also required to include details of certain types of contracts awarded in their Annual Reports. The most important requirement in this regard is the requirement for FMA agencies to report the contract price of each consultancy in their Annual Reports as required by the *Requirements for Departmental Annual Reports*, Department of the Prime Minister and Cabinet.

Debriefing should be tailored to the particular procurement and for each tenderer.

The debriefing should focus on matters listed in the approach to the market and should not address any matters not covered by the evaluation criteria.

This section covers:

- advice to tenderers regarding debriefing
- approaches to debriefing
- areas for discussion, and
- providing the debrief.

Advice to tenderers

It is better practice that tender documentation include advice that tenderers may seek a debriefing.⁴² It may also be appropriate for tender documentation or separate advice to tenderers to include the following information:

- the point in the procurement cycle when a debriefing will be available. In most circumstances this will be after contract signature
- in general terms, the issues that the debriefing may be expected to cover, and
- a contact point for tenderers to make arrangements for a debriefing.

Approaches to debriefing

Debriefing should be tailored to the particular procurement and for each tenderer. The amount of detail covered will vary according to the nature of the procurement and the experience the particular tenderer has with the acquiring entity and in government procurement generally. For example, a tenderer that is not familiar with the entity's procurement practices may benefit from being informed about an entity's general procurement arrangements, in addition to details about the particular procurement process that is the main subject of the debriefing.

Debriefing should take place at a mutually convenient time within a reasonable period after the contract is awarded and signed.

In the case of a two-stage procurement process, debriefing can be undertaken for those tenderers not included in a short list of tenderers to be considered in the second stage of the evaluation.

Requests for debriefing will usually arise when unsuccessful tenderers are informed of their elimination from the selection process. It is generally most effective and efficient to debrief all tenderers as quickly as possible at short list or contract award stage.

Unsuccessful tenderers should be debriefed individually in a professional manner. When debriefing unsuccessful tenderers their performance against the evaluation criteria in the request documentation or the areas where their tender response was deficient or not preferred should be addressed.

Debriefing topics

The debriefing should focus on matters listed in the approach to the market and should not address any matters not covered by the evaluation criteria. It may be possible in certain circumstances for legal action to be taken by unsuccessful tenderers if this occurs.

Topics covered in debriefings can include:

- project methodology and/or design issues
- organisation, management and administration
- price
- nominated personnel including the experience and quality of operational, management and other personnel
- experience of the tenderer generally

⁴² The CPGs require FMA agencies and prescribed CAC entities to provide, on request, an unsuccessful tenderer with the reasons why its submission was not successful. On request a debriefing should also be provided to successful tenderers.

- work schedule issues; the acquiring entity's expectations and what it has found achievable in the market, without identifying individual contractors
- vagueness or unacceptability on delivery dates if important to the decision
- facilities and equipment if inappropriate, inefficient or outdated, or if they would increase costs or affect timeframes
- subcontracting the arrangements where inappropriate or inefficient, including where the proposed subcontractor lacked necessary qualifications or experience, or if a proper control system was lacking
- industrial relations and/or occupational health and safety issues
- failure to comply with government policies or requirements
- quality management issues (such as inadequate quality assurance certification or other control methods, or systems people and training), and
- support, warranty or after sales service issues.

Good Practice Tip: Approach to debriefing

The general sequence of events for debriefings is:

- approval of material and approach as necessary by senior management
- send formal advice to unsuccessful tenderers, including an offer to debrief
- await request for debriefing from one or more of the unsuccessful tenderers
- agree time(s), date(s) and venue for debriefing
- prepare debriefing material from tender evaluation report, and
- conduct briefing.

Debriefing meetings should generally be chaired by the most senior officer involved in the procurement and should involve end-user representation where appropriate.

Conducting the debriefing

All debriefs should be carefully planned. In large, complex procurements it may be appropriate to prepare a debriefing plan based on the tender evaluation report. The confidence of tenderers in the procurement process is likely to increase if the debriefing demonstrates that the procurement decision was the result of a fair and considered decision-making process.

Debriefing can be conducted face to face by telephone or video conference. Telephone or video conferencing may be appropriate where long distances make the holding of a face to face meeting uneconomic for the tenderers.

Debriefing meetings should generally be chaired by the most senior officer involved in the procurement and should involve end-user representation where appropriate. Debriefing should not be delegated to staff who do not have the necessary authority, knowledge, experience or sensitivity to conduct it in a professional manner. Inaccurate or inappropriate debriefings may lead to complaints or litigation. It can be useful for at least two acquiring entity staff officers to be present at a debriefing to assist in the debriefing itself and to reduce the risk of misunderstanding about the discussion.

In all cases tenderers should be informed that only their submission, not those of other tenderers, will be discussed.

In all cases tenderers should be informed that only their submission, not those of other tenderers, will be discussed. It is important that during debriefing the differences between the tender submissions and how the particular tenderer might do better in the future are canvassed. In doing this, care should be taken in comparing the tenderer's submission with other submissions as commercial-in-confidence information cannot be disclosed.⁴³ However, non-confidential information relating to the differences between the winning submission and the unsuccessful tenderers bid

⁴³ See, in particular, *Financial Management Guidance No 3: Guidance on Confidentiality of Contractor's Commercial Information*.

It is important that the procuring entity's debriefing team present a fair and balanced view of the tenderer's submission.

can be discussed. For instance, it is not appropriate to provide tenderers with any information that is confidential to other tenderers, and while the acquiring agency may reveal to unsuccessful tenderers the name of the successful tenderer and the total price of the successful tender, it should not generally indicate any cost breakdown.

It is important that the procuring entity's debriefing team present a fair and balanced view of the tenderer's submission. An effective way to do this is to provide tenderers with an assessment against each of the evaluation criteria, noting the weaknesses and strengths of the tenderer's submission. The tenderer should be provided the opportunity to respond to and, where appropriate, discuss issues.

It may also be useful to advise tenderers of the evaluation and management review arrangements followed. This can assist in demonstrating that the final decision was a considered one, was subject to appropriate review and was not the view of any one person.

On completion of the debriefing the tenderer should be provided the opportunity to comment on the procurement process, including any comments they have on probity issues. These meetings can also be useful opportunities to obtain information about a tenderer's areas of interest that may be of assistance in future procurements.

Written debriefs

Written debriefs should cover substantially the same information as would have been discussed in an oral briefing. A copy of the debrief should be retained as part of the entity's records.

Staff involved in finalising the contract need to maintain the highest ethical standards during and after contract negotiations and during contract debriefings.

3.8. BEHAVE ETHICALLY

Staff involved in finalising the contract need to maintain the highest ethical standards during and after contract negotiations and during contract debriefings in particular. Section 3.4 above includes a brief discussion on ethical conduct during contract negotiations.

The issues at section 2.7 relating to the contract development phase are equally applicable when finalising the contract.

3.9. ADDRESS ANY COMPLAINTS

An important element of the Commonwealth Procurement framework is the ability of tenderers to pursue complaints they may have about an entity's procurement processes.

Generally, where entities follow sound procurement practices there should be few or no complaints from tenderers and entities should be in a position to respond to any that are made in an open and transparent manner. It is better practice to have arrangements in place, including the steps a tenderer is able to take if it wishes to lodge a complaint. These arrangements should detail to whom and where the complaint should be addressed, as well as the entity's procedures for responding to any complaints received.⁴⁴

It is important for entities to respond in a timely and constructive manner to any complaints received, whether orally or in writing. In many instances where oral complaints are handled in such a manner, the tenderer will be satisfied with the response provided and will not lodge a written complaint. The entity's response to a complaint should set out the nature of the complaint, outline in general terms the issues that have been raised and address them in specific rather than general terms. The

It is important for entities to respond in a timely and constructive manner to any complaints received.

⁴⁴ Section 7.36 of the CPGs require FMA Act agencies to have in place a process for handling complaints.

entity's response should also advise the complainant of their options should they wish to pursue the complaint further.

In circumstances where a tenderer is not satisfied with an entity's official response, it may be appropriate for an internal independent review to be conducted. Any such reviews should be undertaken promptly and by a person(s) who has experience with the entity's procurement processes.

In the interest of fairness and open and effective competition, it is important that the existence of a complaint does not prejudice a supplier's participation in future procurement activities. Entities should be mindful that contractors may be hesitant to lodge complaints because of concerns about the impact this may have on future procurements.

In some cases tenderers may consider that the complaint has been pursued as far as possible with the acquiring entity but remain dissatisfied with the result. When this occurs they have redress to a number of external bodies.

Tenderers have recourse to the Commonwealth Ombudsman who has extensive powers to investigate a range of administrative matters including procurement related complaints. The Ombudsman has the authority to make recommendations regarding the procurement process and related decisions, but cannot overturn an entity's decision or specifically direct an agency to do so. Contractors may also seek redress through the courts.

It is better practice, where a complaint is referred to an external body, that the entity concerned co-operate fully with any external review or action that may arise as a result of such a referral.

The existence of a complaint should not prejudice a supplier's participation in future procurement activities.

3.10. KEEP RECORDS

The following is a list of documentation that may need to be maintained for this phase of the contracting cycle.

- Risk assessments
- Negotiation checklists or plans
- Professional advice received
- Conflict of interest declarations
- Records of agendas and minutes of negotiation team meetings
- Record of delegate's agreements and approvals
- Copy of the final signed contract, including all schedules and attachments
- Copy of public announcement
- Record of all debriefings, oral or written
- Record of any complaints, oral or written, and decisions about action taken to address them
- Record of correspondence/meetings with complainants

It is better practice that the entity co-operate fully with any external review.

KEY ACTIONS AND RESPONSIBILITIES MATRIX: FORMALISING THE CONTRACT

	Senior Management / Minister	Senior manager	User groups	Negotiation team	Contract management team	Specialist advisers	Preferred contractor	Negotiating strategy	Risk plan	Proby plan	Financial plan	Contract	Announcement documentation
<p>This matrix shows a typical sequence of steps in finalising a contract, the key stakeholder groups involved and documents produced:</p> <ul style="list-style-type: none"> ! has responsibility for this step ↻ involved in this step (for example, giving advice, being informed) 👍 gives formal approval 📄 Document is used 📄 Documents are created or updated (see explanation of this table at the end of Part 2, p. 46) <p>Action or step:</p>													
Review and update risks for this stage		👍	↻	!	↻				📄				
Finalise probity plan and requirements		👍		!		↻			📄	📄			
Ensure all parties are aware of probity requirements	↻	↻	↻	!	↻	↻	↻						
Develop negotiating strategy		👍	↻	!	↻	↻		📄		📄			
Undertake negotiations				!		↻	↻	📄		📄	📄	📄	
Obtain final approval of the agreed contract	👍	↻	↻	!	↻	↻	↻						
Obtain all necessary material approvals	👍	↻											
Develop announcement and signing approach	↻	↻		!			↻						📄
Contract signing	↻	👍	↻				↻			📄			
Enter details in financial and contract system(s); arrange public reporting				!							📄		
Advise and debrief unsuccessful tenders		↻		!						📄			
Announcement		!		↻	↻								📄
Hand over of responsibility to contact management team		↻		!	↻		↻					📄	
Complete and file all contract tendering, evaluation and decision documentation				!	!			📄				📄	📄

PART 4
Entity arrangements for
managing contracts

developing
contracting
managing
formalising
ending

PART 4

Entity arrangements for managing contracts

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4. Entity arrangements for managing contracts

4.1. INTRODUCTION

Entities should have in place management arrangements that are designed to maximise overall value for money of contracting activities.

This part of the Guide discusses entity arrangements for managing contracts. Entities should have in place management arrangements that are designed to maximise overall value for money of contracting activities and enable them to have in place processes that meet all internal and external management and reporting responsibilities in a cost-effective manner. These arrangements should be an integral part of the entity's governance and control environment within which individual contracts are developed and managed.

Key tasks

The key tasks involved in the entity arrangements for managing contracts are:

Identify and manage **risks**.

Establish effective lines of communication with **stakeholders**.

Establish and sustain **contracting capability**.

Establish **systems and procedures**.

4.2. IDENTIFY AND MANAGE RISKS

Risks to the effective entity arrangements for managing contracts are likely to arise from the following sources:

Sources of risk	Examples of risks
Roles and responsibilities	<ul style="list-style-type: none"> Unclear and/or misunderstood roles and responsibilities for aspects of contract management Absence of required contract delegations
Systems, procedures and guidance	<ul style="list-style-type: none"> Multiple systems that are not integrated and/or require multiple entry of the same data Systems that are not supported by appropriate procedures and/or guidance material Different systems containing incomplete and/or conflicting contract data
Procurement knowledge and capability	<ul style="list-style-type: none"> A lack of understanding of government and/or entity procurement policies and reporting requirements A lack of experience in the management of contracts A lack of targeted training of procurement activities

4.3. COMMUNICATE WITH STAKEHOLDERS

The effective management of an entity's contracting activities requires establishing and maintaining open and constructive lines of communication with internal and external stakeholders.

Senior managers are important internal stakeholders who will require periodic assurance that the entity's policies are being adhered to and that its reporting and accountability responsibilities are being met. In this regard, better practice entities will have:

- clearly articulated contract reporting and accountability responsibilities, including the individual and/or work areas with primary responsibility for meeting these responsibilities
- incorporated reporting of its compliance with these requirements into its regular management reporting regime, and
- included the oversight of compliance with contracting responsibilities as part of the broader legislative compliance responsibilities of the entity's Audit Committee.

External stakeholders may include the responsible Minister, the Department of Finance and Administration and the entity's portfolio Department. Arrangements should be agreed with all relevant external stakeholders aimed at ensuring that their needs are met. Such arrangements could be expected to include:

- relevant contact points
- the timing and content of briefings and other communications, and
- the preferred mode of communication, for example, face to face meetings, formal correspondence or email.

Senior managers are important internal stakeholders who will require periodic assurance that the entity's policies are being adhered to.

Arrangements should be agreed with all relevant external stakeholders aimed at ensuring that their needs are met.

4.4. ESTABLISH AND SUSTAIN CONTRACT CAPABILITY

As noted earlier in this Guide, contracting is now an integral part of doing business in the public sector and many government programmes involve some level of contracting activity. Having an effective contract management capability will assist entities to:

- obtain value for money from its expenditure on contractors
- meet its internal and external reporting and accountability needs and responsibilities (Part 1 of the Guide details the reporting responsibilities for FMA agencies)
- manage contract liabilities and commitments, and
- manage contract resources as part of achieving its business objectives.

This contract management capability includes having:

- the necessary level of senior management commitment and support
- the capacity to develop and maintain an up-to-date contracting policy and procedural framework
- staff who exercise procurement delegations with experience and knowledge commensurate with the size, nature and complexity of the contracting activities on which they make decisions
- sufficient time and resources to properly manage the contract, including access to specialist skills where needed, and
- individual contract managers with a level of knowledge, skills and experience commensurate with their contracting responsibilities.

Having an effective contract management capability will assist entities to obtain value for money from its expenditure on contractors.

4.5. ESTABLISH SYSTEMS AND PROCEDURES

The maintenance of a Contracts Register, establishing a procurement unit with broad procurement responsibilities and using the Internet and electronic systems are initiatives that many entities have put in place to better manage their contract responsibilities.

Contract registers

Entities generally have found it beneficial to maintain a contracts register that contains details of all contracts.

Entities generally have found it beneficial to maintain a contracts register that contains details of all entity contracts. A contract register can be maintained centrally, with staff in work areas providing details to the work areas responsible for maintaining the register of all contracts entered into. Alternatively, details can be input remotely by individual work areas. The contract register could also consist of a number of sub registers maintained by business or geographically-based work areas that collectively represents the entity's contract register.

As well as assisting in meeting reporting responsibilities, contract registers should be used to monitor contract end dates, and opportunities to exercise contract extensions to assist entities to commence new procurements in a timely manner.

Better practice contract registers will have the following characteristics:

- the register will contain all relevant contract details and be configured to be able to produce reports that can be used to meet the entities' management and reporting responsibilities⁴⁵
- responsibility for maintaining the register will be clearly assigned to an individual(s) or work area(s)
- formal procedures will be promulgated for maintaining the accuracy and completeness of the register. These procedures will provide for a reconciliation or cross-check between the register, the entity's financial management information system and AusTender (where relevant). They should also provide for a periodic quality assurance review of the register
- the automation, to the extent feasible, of the input of data that will limit, or eliminate the multiple input of data into different systems, assist in improving consistency and reduce the incidence of human error
- the provision of links to individual contracts, subject to security and confidentiality considerations
- system access controls designed to ensure unauthorised staff do not have access to, and cannot amend or alter, contract details, and
- the periodic review by internal audit or other review mechanism.

Procurement units

An increasingly common approach is for entities to establish dedicated procurement work areas that have responsibility for contracting activities.

The way entities corporately manage their procurement responsibilities, including the management of contracts, will naturally vary to suit their particular circumstances. Nevertheless, an increasingly common approach is for entities to establish dedicated procurement work areas that have responsibility for contracting activities such as:

- developing and maintaining the entity's procurement policies and procedures and disseminating these to those involved in procurement activities, including the management of contracts
- providing training and ongoing advice and assistance on procurement matters
- monitoring contract activity and encouraging better practices
- co-ordinating the preparation of the Senate Order listing, and
- complying with other reporting requirements.

As noted elsewhere in this Guide, there are an increasing number of legislative and policy considerations that impact on an entity's procurement responsibilities and entities should give careful consideration to the role that procurement units have in assisting entities meet these

⁴⁵ For FMA agencies these responsibilities are outlined in Section 1 of this Guide.

responsibilities. It is likely that the role of these units will change and evolve over time, in line with the entities' procurement and contracting experiences. Some entities see benefit in providing their procurement unit with the authority to review and approve various procurement processes including the entering into contracts, while the procurement units of other entities have an advisory role. The factors that will impact on an entity's decision in this regard include:

- the nature, complexity and risk profile of entities' procurement activity
- the organisational and geographical spread of the entity
- the level of procurement expertise amongst entity staff, and
- the entity's general approach to the management of corporate activities.

Electronic systems can assist in ensuring that contract managers have access to the most recent standard contracts and forms, policies, advice and contract management assistance.

4.6. USING THE INTERNET AND ELECTRONIC SYSTEMS

Electronic communications systems, including internet and intranet facilities can be used to assist in the development and management of contracts.

There are advantages to using electronic contract management systems, for example consistency, efficiency and timeliness. These systems are useful in managing the administrative aspects of contracting and can be particularly useful in organisations that are geographically disparate. These can range from reasonably simple systems holding data about key aspects of contracts entered into including critical dates, to sophisticated proactive electronic contract management systems. These may be off the shelf systems or systems that are specifically designed for the acquiring entity. Developing and implementing these systems can be costly so it is important to understand the level of functionality that may be necessary for a particular acquiring entity's requirements and the benefits likely to be realised through the use of them.

Electronic systems can assist in ensuring that contract managers also have access to the most recent standard contracts and forms, policies, advices and contract management assistance. They can also facilitate awareness of new and emerging issues, potential risks and how to manage them. Electronic systems can also provide a contract management help desk for the provision of information and advice. The easy availability of information encourages better decision-making and improved contract management. It can also provide a forum for communication between contract managers in the entity, enabling them to be aware of other contracts being managed by the agency, to ask questions of other contract managers in the agency, and to share tips and lessons learned.

An efficient way of communication with contractors can be through secure websites. This can be particularly effective where there are multiple contractors who provide similar services, yet the services and their delivery is geographically dispersed. Websites can also be useful for providing general contracting information to contractors.

An efficient way of communication with contractors can be through secure websites.

As an example, a website could have three levels of information, one open to the public, one between all of the contractors and the acquiring entity, and the third between the acquiring entity and individual contractors.

In circumstances where an entity is involved in extensive contracting activity, a cost-benefit analysis should be undertaken to assist in deciding the nature and extent that the Internet can be used to facilitate this activity.

Better practice entities incorporate reporting on contracting activity into their regular management reporting arrangements.

4.7. MANAGEMENT REPORTING ON CONTRACTING ACTIVITY

Contracting activity in many entities represents an important business activity, often involving a significant level of expenditure and the utilisation of substantial in-house resources. As a result, inadequate contract management practices will have a direct adverse impact on an agency's capacity to meet its business objectives.

Better practice entities incorporate reporting on contracting activity into their regular management reporting arrangements. This should involve the development of a number of contracting performance measures and the periodic measurement and reporting against them as an integral part of the entity's management reporting regime. This will assist in reinforcing the importance of good contracting practices and also provide assurance to senior management on the agency's performance in this area, including its compliance with policy and reporting requirements.

Examples of performance measures include:

- establishing benchmarks on targets for key steps in the procurement cycle such as the lead time from the date of a procurement request to the signing of a contract
- the number and percentage of procurements in excess of the relevant threshold that have not been undertaken through open tender
- instances where the agency has departed from the Commonwealth Procurement Guidelines, and
- the number and percentage of procurements that have used panel arrangements or standing offers. Such an analysis can highlight the benefit of establishing such arrangements and the extent of use of existing arrangements.

Better practice entities will also incorporate quality assurance reviews of contracting activities into their control environments.

4.8. QUALITY ASSURANCE OF CONTRACTING ACTIVITIES

Better practice entities will also incorporate quality assurance reviews of contracting activities into their control environments.

Periodic reviews of all or selected aspects of contracting can assist entities in assessing the extent to which their performance represents better practice and are a useful mechanism for identifying procedures and practices that warrant improvement.

Agencies should determine whether quality assurance activity is best undertaken in-house, including by internal audit units, by external parties or by a combination of both approaches.

PART 5
Managing individual contracts

developing
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PART 5

Managing individual contracts

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5. Managing individual contracts

5.1. INTRODUCTION

This part of the Guide discusses the management of individual contracts. The aim of individual contract management is to ensure that deliverables are provided to the required standard, within the agreed time frame and achieve value for money. The management of individual contracts is made easier if the earlier contracting phases have been undertaken in accordance with better practice and the entity has in place a sound contracting governance and control environment.

It is important that contracts are actively managed throughout their life to help ensure contractor performance is satisfactory, stakeholders are well informed and all contract requirements are met.

Contracts should be actively managed throughout their life to help ensure contractor performance is satisfactory, stakeholders are well informed and all contract requirements are met.

Key tasks

The key tasks involved in managing individual contracts are:

Identify and manage **risks**.

Identify and assign **responsibilities**.

Identify and access the **skills** needed.

Identify and involve **stakeholders**.

Manage **relationships**.

Manage **contract start-up**.

Administer the contract.

Manage **contractor performance**.

Negotiate **contract variations**.

Manage contract **disputes**.

Discharge the contract.

Behave ethically.

Keep records.

5.2. IDENTIFY AND MANAGE RISKS

Risks identified previously may be relevant at this stage of the cycle and should be considered along with any risk management plan that has been developed.

Risks to the management of individual contracts can include the following:

Sources of risk	Examples of risks
Contract management capability	<ul style="list-style-type: none"> • Failure to have sufficiently skilled and experienced resources to effectively manage the contract(s) • Lack of recognition of the importance of contract management • Failure to act on contractor under-performance
Contractor performance	<ul style="list-style-type: none"> • Failure to provide contract deliverables on time, to agreed quality standards • Failure to adhere to agreed budget • Failure to comply with all contract provisions, for example, privacy, security, recordkeeping • Fraud and/or unethical conduct by the contractor
Changes in circumstances and/or requirements	<ul style="list-style-type: none"> • Contract changes not dealt with as contract variations • Contractor not prepared to agree to contract variations to accommodate changes in entity requirements • Changes in circumstances not managed in a timely manner
Stakeholder relationships	<ul style="list-style-type: none"> • Stakeholders not consulted and/or kept informed about contract performance • Changes in stakeholder expectations not communicated to contract manager • Differing and/or conflicting stakeholder expectations

Ensuring that any identified risks are dealt with appropriately may require a specific risk mitigation plan to be developed.

Ensuring that any identified risks are dealt with appropriately may require a specific risk mitigation plan to be developed. Such a plan need not be long and cumbersome; it may consist of a simple checklist or it may be a detailed plan that requires periodic review and updating throughout the life of the contract. Where a contract is to be managed by a team over a longer period of time, a plan may assist with coordination among team members and stakeholders. Issues discussed below should be addressed by any plan or checklist developed to guide contract management.

In addition, consideration should be given to the need to develop appropriate contingency plans to address unplanned or unexpected events. Such plans may be required where the consequence of contract failure is critical to a range of stakeholders such as members of the public. Depending on the size, nature and duration of the contract, a contract management plan may be required to assist in managing and administering the contract. Such a plan may be a checklist or a formal plan that addressed in detail the issues discussed in this Part of the Guide.

Consider the need to develop appropriate contingency plans to address unplanned or unexpected events.

The Example Risks and Risk Treatments at the end of this part can be used in developing a risk plan for individual contracts.

Good Practice Tip: Flowchart/document key processes

A useful practice adopted by some entities is to flowchart or map key processes or steps such as payment processes, steps involved in performance assessment and dispute resolution processes.

5.3. IDENTIFY AND ASSIGN RESPONSIBILITIES

Responsibility for the various tasks required to finalise the contract should be assigned and understood by all parties.

Responsibility for the various tasks required to finalise the contract should be assigned and understood by all parties.

The Actions and Responsibilities Matrix at the end of this part outlines a typical sequence of steps, the key stakeholders involved and documents produced in managing a contract.

5.4. IDENTIFY AND ACCESS THE SKILLS AND EXPERIENCE REQUIRED

A range of skills are needed throughout the contracting cycle and the type of skills needed may vary with the different stages of contracting and with the size and nature of the contract. Generally, one person will not have all the contracting skills required over the entire procurement cycle. This means that it is important to be able to second or recruit additional staff, and have access to training and/or professional advice.

The successful management of contracts will generally require skills and experience in the areas outlined below.

Contract management skills and experience

A range of skills are needed throughout the contracting cycle.

Skills and experience

Interpersonal and relationship:	<ul style="list-style-type: none"> • Undertake tasks in a motivated and professional way • Build strong relationships. Understand the parties' culture and ways of working • Encourage cooperation and communicate orally and in writing
Subject matter/ industry knowledge:	<ul style="list-style-type: none"> • Understand the contractual requirement and the market or able to quickly gain relevant knowledge • Objectively assess goods and services and whether performance standards have been met
Project management:	<ul style="list-style-type: none"> • Plan, schedule, organise work, manage tasks, and consult with stakeholders • Motivate and lead people who may not be under the direct control of the contract manager • Establish relationships to get tasks done in a timely way • Use skills available to get the best possible result
Performance management:	<ul style="list-style-type: none"> • Provide feedback both positive and negative • Explain acquiring entity's position and understand legal position in addressing under-performance. Understand contractor's environment
Problem solving:	<ul style="list-style-type: none"> • Have a positive approach to solving problems • Encourage mutual cooperation to address issues • Have the ability to make decisions in circumstances where there may not be full knowledge of all relevant facts in the available timeframe

Skills and experience

Negotiation:	<ul style="list-style-type: none">• Deal with evolving and changing circumstances• Have subject matter knowledge and be able to bring about mutually acceptable agreements• Display professional behaviour• Have relevant training or experience in planning for and conducting negotiations• Manage robust dialogue
Accountability/financial management:	<ul style="list-style-type: none">• Understand and apply relevant laws and accountability requirements and financial arrangements
Human resource management:	<ul style="list-style-type: none">• Manage the team to maximise performance over the long term

Recognise that not all skills are necessarily available in-house or reside in an individual staff member.

If a team is being used to undertake the tasks required at each stage of the contracting cycle, it is important to build the team so that the range of skills required are available. Where a team has already been formed, it is still useful for the team to review both the skills and experience needed to do the work and those available within the team.

Some points to keep in mind when deciding on team members and the skills required are:

- recognise that not all skills are necessarily available in-house or reside in an individual staff member, and
- review the skills needed and available periodically throughout the contracting cycle to ensure they remain relevant. Changes may be needed due to changed circumstances of the contract or as a result of staff turnover.

Assessing whether the required skills are available will involve:

- identifying the skills that are needed
- identifying the skills available and any gaps
- determining how these gaps will be addressed. For example: by using external experts, training of current staff or by recruitment action, and
- taking action to obtain the skills needed.

Review the skills needed and available periodically throughout the contracting cycle to ensure they remain relevant.

The Contract Management Skills Matrix at the end of this part can be used in identifying any skill gaps that may need to be addressed in managing the contract.

The following case study is an example of obtaining the skills necessary to assess contract performance.

Case Study: Identifying skills needed

An entity was renewing its IT services contract. A significant issue on the previous contract was the management of the growth in usage and consequent increases in capacity provided and costs. Under the previous contract, the contractor was required to analyse usage and provide capacity accordingly. The agency had no internal expertise in the complexities of analysing IT usage data. The new contract had increased requirements for the provision of detailed usage data, and of the contractor's suggested capacity management actions. The agency added a new person to its contract management team, whose responsibilities included capacity planning, to enable the agency to make informed, independent judgements on this aspect of the contract.

Comment: While in this case it was decided that in-house expertise was required, for many contracts it will be cost-effective to have access to specialist knowledge on an as required basis through a contract or on a retainer basis.

A critical role for the contract manager is to ensure stakeholders are kept informed about relevant matters and contract developments.

Relationship management underpins overall successful contract management.

It is better practice for entities to adopt a structured approach to managing their relationship with the contractor.

5.5. IDENTIFY AND INVOLVE STAKEHOLDERS

A critical role for the contract manager is to ensure that stakeholders are kept informed about relevant matters and contract developments.

To manage complex contracts with multiple stakeholders it can be useful to establish committees with membership that is representative of stakeholders and end-users. Using committees can provide a structured approach for communicating with relevant parties. Such committees should meet at key points in the contracting cycle and be provided with information and be able to discuss issues, problems or future directions. It may also be appropriate to develop an agreed communication plan or strategy.

Working or reference groups can also assist by providing advice and guidance on various aspects of the contract. For example, an expert reference group could assist with various aspects of contract management where relevant skills are not available in-house.

Where committees or working groups have been established they should be supported and maintained for the agreed period of time, for example, for the life of the contract or for a particular technical phase. Difficulties can arise where these mechanisms are established but then suspended or discontinued without full consideration of the implications for the management of the contract.

Liaison and involvement of stakeholders can also benefit from establishing a communications protocol if one has not already been included in the contract. A communications protocol can set in place arrangements for:

- formal meetings at which minutes are taken and distributed to all parties for agreement
- regular written communications between the parties including letters and emails, and
- progress or performance reports.

Such a protocol can assist to ensure that those who need to know about particular matters are informed in a timely fashion and that all communications flow to the appropriate person.

5.6. MANAGE RELATIONSHIPS

Relationship management underpins overall successful contract management. A sound basis for the relationship should have been established in the earlier contracting phases. If the manager is new to the contractual arrangement, efforts will need to be made to understand the relationship that exists between the contractor and the acquiring entity and to develop a specific relationship for this phase as soon as possible. It is particularly important for the manager to understand the background to the relationship and be aware of any problems or issues that have arisen at earlier stages of the procurement process.

The type of contract, its size and duration as well as the culture of the parties and the personalities of the people involved will influence the relationship between the parties. It is important to establish and maintain a constructive relationship and regular communication. Providing positive and constructive feedback will assist in maintaining such a relationship.

Payments, including those for performance, should also be made without unnecessary delays, in line with acquiring entity procedures. It is also important to listen to the contractor, to identify any problems, address them promptly and explain decisions in an impartial way.

It is better practice for entities to adopt a structured approach to managing their relationship with the contractor. This particularly applies to contracts which involve ongoing service delivery or the

provision of consultancy services that extend over a reasonable period of time. In such contracts the management of the relationship with the contractor could consist of:

- informal, day-to-day discussions and interactions between the contractor, the contract manager and relevant entity staff, and
- formal meetings at pre-determined intervals with nominated personnel from both the acquiring agency and the contractor.

A typical approach to managing relationships adopted in a long-term services contract is outlined below.

Managing relationships

Overall responsibility	Each party nominates one person with the appropriate skills and experience as its representative to be responsible for the co-ordination and management between the parties over the life of the contract.
Weekly performance review meetings	Nominated representatives, including the contractor's service delivery manager and the acquiring entity's contract manager meet formally at least once a week to review performance. This meeting is aimed at discussing and resolving any minor issues relating to the performance of the contract.
Contract management committee	At least quarterly, or otherwise agreed, a formal meeting is held of this committee. The committee comprises senior people from the acquiring entity and the contractor as well as the contractor's service delivery manager and the contract manager. The purpose of the meeting is to formally monitor performance of the contract, consider any ways in which services may be improved, consider any amendments to service levels and resolve, where possible, any issues that remain unresolved from the weekly contract meetings.
Bi-annual senior management meetings	A meeting is held at six monthly intervals between senior executives of both parties. These meetings review matters that have been addressed at contract management committee meetings, review the overall relationship between the parties and consider opportunities for the contractor to contribute to the acquiring entity's business.

Maintaining a good relationship does not mean the terms of the contract are not enforced where this is warranted.

Maintaining a good relationship does not mean the terms of the contract are not enforced where this is warranted. It is about enforcing the terms of the contract in a professional manner based on evidence of contractual performance. Provided the acquiring entity has fulfilled its responsibilities, has provided early warning of performance problems and has maintained a professional relationship, enforcing the terms of the contract should be seen as a reasonable course of action and therefore one that should not adversely affect the relationship between the parties. Acquiring entities must enforce contract conditions as necessary to achieve Australian Government requirements.

Relationships should be managed in a professional manner and be based on cooperation and mutual understanding.

Where performance is being discussed, the contractor should be given the opportunity to present material on any factors that have caused performance difficulties and to discuss any proposed remedial action.

Relationships should be managed in a professional manner and be based on cooperation and mutual understanding taking into account the need for probity and ethical behaviour.

5.7. MANAGE CONTRACT START UP

After a contract has been awarded there are a number of matters that should be addressed to provide the foundation for successful contract management. An early step is to ensure that sufficient resources and senior management support are available to manage the contract.

The contract manager or team must ensure that appropriate delegations and authorisations exist in line with legislative or agency requirements.

It is equally important to understand both the contract provisions and contractual relationships at the outset. In the case where the contract manager has been involved in earlier procurement phases, the manager will already have knowledge of issues relevant to implementation. For example, if the manager has been involved in drafting the contract they are likely to have an understanding of its provisions.

A checklist to assist with Understanding the contract is at the end of this part.

Where the manager's or team's involvement is commencing at the contract start up phase there are a number of activities that will need to be undertaken.

In order to implement the contract, and to manage it, the contract manager or team must ensure that appropriate delegations and authorisations exist in line with legislative or agency requirements. To determine whether authorisations and delegations are appropriate:

- identify the roles and responsibilities of contract management staff, particularly those actions that are undertaken on behalf of the acquiring entity
- identify the source of the authority or delegation required in legislation or agency instructions
- determine the scope of the authority needed and whether existing arrangements are sufficient, and
- establish arrangements to vary authorisations and delegations when circumstances change.

Management of unresolved issues

Issues unresolved at the time of contract signature need to be addressed in a timely way during contract start up.

In many instances, not all issues are resolved at the time of contract signature. These need to be addressed in a timely way during contract start up. These issues can create problems when managing a contract if not properly dealt with at the correct time.

In situations where there are issues that have not been fully resolved at contract signature, the contract manager should:

- identify and record any agreements or arrangements made by the parties relating to this when the contract was negotiated
- identify and record aspects of the contract which have been potentially left for future development, and
- identify and record aspects of the contract which will be subject to some other process, for example, subject to conditions of licences or third party planning or approvals.

The detailed review of the contract at contract start up may also identify issues that require clarification or elaboration in the contract. It is important to address any such issues promptly. This may require a contract variation or exchange of correspondence. Contract variations are discussed later in this part.

The following case study is an example of how an entity addressed the start of a new contract.

Case Study: Contract start up

An entity was about to commence operation of a national contract for the provision of services to the public on behalf of the agency. The entity's state offices would play a major role in monitoring service delivery performance by the contractor's branches in each state. A nationally consistent approach to service delivery was an important government objective.

To help ensure a consistent, mutual understanding of the service standards laid down by the contract, and the arrangements for monitoring performance, a contract commencement event was held involving key staff from the National and State offices of the entity and the contractor.

Contract start up checklist

Once a contract is signed, there are often a number of activities that need to be addressed in order for the contract relationship to be properly established to assist in an effective contract start up.

Aspects that may need to be addressed include:

- reviewing and understanding the conditions of the contract, any schedules and protocols
- developing or reviewing any necessary risk plans
- establishing timelines for the completion of any tasks or actions required to enable the contractor to commence work under the contract
- identifying and/or addressing any unresolved issues
- assessing resource requirements
- allocating responsibilities for key aspects of managing the contract
- developing or updating authorisations and delegations
- organising contractor access to premises and systems
- arranging contractor induction, including cultural, industrial, security and health and safety issues, and
- establishing documentation and recordkeeping requirements and protocols.

Once a contract is signed, there are often a number of activities that need to be addressed for the contract relationship to be properly established.

Transition phase

For some contractual arrangements there will be a transition phase. The duration of this phase can range from a few days to several months. The objectives of this phase are to:

- ensure a smooth transition to the new contractor by minimising the risk of a reduction or loss of services and the impact on end-users and other stakeholders
- establish relationships and systems and procedures that will be used during the life of the contract, and
- complete the transfer of information and/or assets to the contractor.

In complex contractual arrangements the transition phase may require a detailed plan or some other formal documentation to ensure all relevant matters are considered and addressed.

For straightforward contracts there may be a number of one-off tasks that need to be appropriately planned and resourced. In complex contractual arrangements the transition phase may require a detailed plan or some other formal documentation to ensure all relevant matters are considered and addressed. The way the acquiring entity manages the transition phase will generally be an indication to the contractor about the way the whole contract will be managed. If, for example, the entity adopts a lenient approach in respect of the non-achievement of transition targets, the contractor may take this as a signal of how the entity will deal with under-performance generally.

Post transition review

At the end of the transition phase, it is important that a formal assessment be undertaken of overall contract performance. The extent and method adopted will depend on the complexity of contract deliverables and how important the results of the transition are to the success of the contract over its life. For example, where the transition is being used to finalise details of contract deliverables and performance measures, the outcome of the transition will dictate the final form of the contract and how it will operate in practice.

This phase should also be used to review the acquiring entity's contract management arrangements, including resource requirements.

5.8. ADMINISTER THE CONTRACT

Contract administration is an integral and important element of contract management.

Contract administration is an integral and important element of contract management and overlaps with monitoring and performance assessment. It encompasses various activities that need to be completed on a day-to-day basis, including:

- developing and maintaining contact details of key people involved in the contract
- scheduling meetings and other actions required by the contract
- delivery and acceptance of goods or services
- making payments
- maintaining complete records for the contract itself, and
- establishing and maintaining contract documentation.

Contact details

To assist the overall management of long-term contracts, there can be benefits in maintaining up-to-date records of key personnel, stakeholders, end-users and/or experts and their contact details. This can assist in facilitating communications between the parties particularly where there are changes in personnel or where personnel are geographically dispersed.

Scheduling meetings

For most contracts, meetings and particular actions will need to occur at specific times throughout the life of the contract. It is an important element of contract administration that a schedule of meetings for parties to the contract, end-users and stakeholders be established in advance, giving the time, place and purpose of the meeting. The schedule should also list any planned reviews or other key actions.

Delivery and acceptance

Delivery refers to receipt of the contracted supplies into the acquiring entity's possession as specified under the contract. Particular care must be taken with phased delivery. If a contractor fails to deliver supplies by the delivery dates or to the delivery point specified in the contract there may be consequences for the contractor under the contract. The contract manager should ensure that various requirements regarding risk of loss or damage to the goods or services are carried out in

There can be benefits in maintaining up-to-date records of key personnel, stakeholders, end-users and/or experts and their contact details.

accordance with the contract provisions. Contract managers should ensure that, prior to goods or services being delivered, appropriate risk management measures are put in place in relation to the security and storage of goods or services. Where appropriate, the contract manager should also ensure that appropriate insurance coverage for the goods or services has been arranged through the ComCover Insurance or other appropriate scheme.

“Acceptance” is the term used to describe the procedure by which the acquiring entity determines whether the goods or services meet contract requirements. In many contracts, acceptance of the contract deliverables will occur periodically throughout the life of the contract. In services contracts, services may be delivered on a continuing basis.

On delivery, goods or services need to be inspected or reviewed and, where necessary, tested against the standards specified in the contract, before formal acceptance under the contract is completed. In the case of goods the process of inspecting or testing the contract deliverables is easier to apply than it is for services. In the case of services, performance measures such as service levels and compliance with reporting requirements may be part of the acceptance process.

Generally, the contract should set out the process for acceptance. This will usually require the contractor to provide the contract deliverables in the form specified by the contract. This may include providing a formal document to the contract manager and supporting evidence, such as the results of an acceptance testing, that the goods or services meet the contract requirements. The contract will usually set out a period in which the acquiring entity is able to decide whether to accept or reject the goods or services.

The acquiring entity may also be able to give conditional acceptance, and this should be regulated by the terms of the contract. Where conditional acceptance is agreed by the acquiring entity, the contractor will normally be required to remedy any defects identified in the acceptance process within a specified period of time. If the contractor fails to do this, the acquiring entity may be entitled to have remedial work performed at the contractor’s expense or be able to reduce the amount payable to the contractor.

If goods or services are accepted and are subsequently found to be defective, the acquiring entity’s remedies may be limited to relying on any warranties in the contract.

Payments

Contract payments should only be made in accordance with the provisions of the contract. They should only be made where the contract manager is satisfied that the provisions have been fulfilled. Before payments are made evidence is required that the delegate has certified that goods and services have been received and have met the required standard of performance.

It is also important that payments for satisfactory performance are made in line with the timeframes set out in the contract. Payments for satisfactory performance should not be delayed because this can undermine the relationship with the contractor.

Payments should be made following receipt of a correctly rendered invoice or other statement of expenditure. All necessary authorisations and approvals should have been obtained prior to making payment.

Contract documentation

It is important that the most up-to-date version of the contract incorporating any variations is formally evidenced in writing and appropriately stored. This provides the basis for making payments and the ongoing management of the contract.

It is likely by the contract management phase that a system for maintaining documents for the particular contract will already have been established. If this is not the case, a recordkeeping system containing all appropriate documentation should be established in accordance with the entity’s recordkeeping policy and practices. If a system already exists it should be reviewed to ensure that

Goods or services need to be inspected on delivery or reviewed and, where necessary, tested against the standards specified in the contract.

Contract payments should only be made in accordance with the provisions of the contract.

The most up-to-date version of the contract incorporating any variations should be formally evidenced in writing and appropriately stored.

it is appropriate to the contractual arrangement. Any additional recordkeeping requirements should be identified and any gaps in documentation addressed.

The following case study highlights a situation where good recordkeeping paid off.

Case Study: The benefits of good recordkeeping

An entity was considering an extension of a major contract (in accordance with an option under the contract). All staff associated with the original tender process and initial operation of the contract had moved to other jobs. An external consultant was engaged to assist in deciding whether the extension option should be exercised and then negotiating the extension. The consultant reported that the meticulous recordkeeping of the original contract manager had resulted in major savings in the updated contract. The records provided evidence of the effectiveness (or otherwise) of previous contract clauses, of successful approaches to managing services that could be included in the updated contract, and evidence of early problems that strengthened the agency's negotiating position in exercising the option to extend the contract.

Performance management must be undertaken throughout the life of the contract and for all contracts, whether straightforward or complex.

Systematic monitoring underpins performance assessment and they do not occur in isolation from one another.

5.9. MANAGE CONTRACTOR PERFORMANCE

Performance management involves:

- performance monitoring – collecting data on performance
- performance assessment – deciding whether performance meets the entity's needs, and
- taking appropriate action – such as understanding and extending features of good performance, correcting areas of under-performance; or amending contract requirements to meet changing needs.

Performance management must be undertaken throughout the life of the contract and for all contracts, whether straightforward or complex. Along with performance indicators and standards, arrangements for monitoring and assessment should have been set out and agreed in the contract along with action that would result for non performance.

Clear links should have been established in the contract between payments for performance and the effect of non-compliance or under-performance on those payments and the intent to invoke penalties contained in the contract if necessary.

The performance monitoring and assessment arrangements should also have been reviewed at the contract start up stage and any necessary plans, tools or systems developed.

Systematic monitoring underpins performance assessment and they do not occur in isolation from one another. In practice, performance will be assessed and feedback and reports provided throughout the monitoring process.

Monitoring

Monitoring focuses on collecting and analysing information to provide assurance to the acquiring entity that progress is being made in line with agreed timeframes and towards providing the contract deliverables. As discussed in Part Two, monitoring can be undertaken directly by the acquiring entity or through a third party arrangement.

Whether monitoring is undertaken directly by the acquiring entity or indirectly by another party, final accountability for accepting contract deliverables remains with the acquiring entity. Information provided by a third party or the contractor for monitoring purposes should be reviewed and audited, as necessary, to ensure its accuracy and reliability. It can also often be tested through consulting end-users regarding the goods and services they have received.

While the broad arrangements for actual monitoring over the life of the contract should generally have been set out in the contract itself, they may need further or more detailed explanation at contract start up or during the transition in phase. The level and formality of any approach to monitoring needs to be governed by the complexity of the contract and/or the degree of risk involved. In some cases the approach to monitoring may be set out in a checklist, in others, a plan setting out detailed monitoring arrangements may be needed.

It is important to focus monitoring activity on key deliverables; very detailed monitoring can be costly and can unduly shift the focus away from achieving contract outcomes. This may mean establishing priorities for what will be measured at specific time intervals. Collecting too much information is also costly and the acquiring entity may not have the resources to analyse it to assess performance adequately.

Having a systematic approach to monitoring which includes the sort of information required and when it is required, can assist in identifying any potential problems and allow early remedial action to be taken. It also allows timely reporting to senior management and other stakeholders. Obtaining relevant information and data may need to be supported by management information systems or data bases. Some information may be able to be provided electronically.

Monitoring activity should be focused on key deliverables.

Good Practice Tip: Schedule key dates and milestones

It can be useful in the monitoring of contract performance to diarise or maintain a listing of all key dates and milestones. This information should be made available to all staff involved in managing the contract and to the contractor.

It is important to collect and analyse all relevant information needed to assess performance. After analysing the information, feedback should be provided to the contractor in a professional and constructive manner (and in line with any communications protocol that exists). This is discussed further under the performance assessment section.

The following case study discusses a situation involving too many performance indicators.

Case Study: Too many performance measures

An entity had specified comprehensive performance information to be provided under the contract. The contractor fully complied with the requirement. Each month the contract manager received by email a report of nearly 100 pages of detailed statistics on all aspects of the contract for the previous month. After the first few months, the report was only used as the basis for authorising payments. It was not useful for a higher level assessment of performance or of potential problems, as it contained so much information, with no analysis or indication of whether corrective action had been taken on any service shortfalls. The contract manager negotiated the addition of appropriate management summaries to give an understanding of the overall performance and evidence of effective management by the contractor.

It is important to collect and analyse all relevant information needed to assess performance.

Details of areas that need to be monitored include:

- specific goods or services provided on time to the required quality
- client or user satisfaction
- performance against contract requirements, and
- invoicing and payments.

In addition to data collected for the purpose of measuring performance, assessment of a contractor's performance can also be assisted by other information sources such as records or minutes of meetings and discussions, reports from third parties, stakeholder, end-user and client surveys, site visits and observations, complaints, reported delays and the need for contract variations.

Performance assessment

Performance assessment is undertaken on the basis of information collected during the monitoring process. It is important that during this process feedback is provided in relation to good and poor performance, and that any performance problems are addressed promptly.

The basis for performance assessment should have been set out in the contract.

The basis for performance assessment, that is, indicators with related targets, and standards should have been set out in the contract. Where performance information is difficult to establish at the contract development stage, it may require further development over the life of the contract. The contract provisions should have been framed to allow this. Developing indicators further during contract management can draw on actual results achieved, research and feedback from stakeholders.

For performance management to be most effective, responsibility needs to be shared between the contractor and the acquiring entity. From the acquiring entity's point of view, the primary responsibility for performance rests with the contract manager or team. It is in their interest to work actively and positively with the contractor to achieve outcomes in a value for money way. Performance management should ensure that standards and targets are met on time and within budget. It should also contribute to, not distract from, the contractor delivering contract outcomes.

Revisions will need to be made if data being collected is not providing adequate information to assess performance, performance measures have not been fully developed or are found not to be suitable for the particular contract. It is important not to change arrangements to mask poor performance by the contractor or a lack of skill by the acquiring entity. Judgement will need to be exercised to determine whether changes or reinterpretations are needed.

Contract managers need to have assurance that the information used to assess performance, and to make or withhold contract payments, is accurate.

Contract managers need to have assurance that the information used to assess performance, and to make or withhold contract payments, is accurate. This material will also be used to inform senior management and other stakeholders regarding progress. Inaccurate information may mean that an actual understanding of performance is not being obtained and/or poor performance is being masked.

Once information is collected it should be analysed to allow an assessment of specific or related matters. For example, under-performance may trigger the application of service credits or some similar action. Satisfactory performance may trigger payments of regular fees or milestone payments.

It is possible at this stage that technical advice may be needed to assess particular aspects of performance, for example, compliance with specified standards for construction work, or whether IT systems deliver the required functionality.

Good Practice Tip: Accessing professional advice

In managing the contract, if professional advice is likely to be required, consider pre-arranging access to this advice through a retainer or other similar arrangement. This can speed up access to advice when needed, and provide some continuity of understanding of the context in which the advice is required.

Reports provided to senior management and other stakeholders should be a balanced account of performance achieved and any identified shortcomings. If there are identified shortcomings, proposed action and a timeframe to address them should be included in reports to senior management.

Honest and balanced feedback should be provided to the contractor. Where performance is satisfactory or above standard, positive feedback to the contractor can be beneficial to maintaining the relationship. It is also at this stage that any bonus or incentive payments linked to performance should be made in line with contract provisions.

In cases where performance problems have been identified they should be dealt with promptly. This means discussing the issues with the contractor in a professional manner as soon after they arise as possible. When performance problems are addressed as a normal part of contract management, it should not have an ongoing negative impact on the relationship between the acquiring entity and the contractor.

In some cases, informal remedial action may need to be undertaken. In other cases, more formal action for under-performance may need to be taken and this is discussed below.

Under-performance

In many cases contracts are completed without problems but contract managers need to be prepared to address any problems promptly as they arise in accordance with agreed procedures.

Many contract performance problems can be avoided by managing the relationship well. Under-performance can be minimised by having a performance regime that allows prompt and ongoing feedback, particularly in relation to critical timeframes or deliverables. The contract manager needs to be aware of any signs of potential under-performance and be able to address them, to the extent possible, before they become serious. Addressing under-performance in this way can avoid the problem worsening and/or the contractor being confronted by a problem that the acquiring entity has known about for a period of time. Providing the contractor with early warning may mean that it is easier to address the issues at low cost and with minimal disruption.

At the early stages of under-performance, agreeing informal remedial action will often be the best approach. Such action could include replacing or using additional personnel, reporting back more frequently on progress, modifying processes or systems or clarifying the entity's requirements.

Depending on the seriousness of the under-performance, the action taken may need to be more formal and could include:

- withholding payments until performance returns to an acceptable level
- involving senior management from both parties in formal discussions or written communications
- developing strategies to address the problem and formally documenting them, and tracking whether they are working in practice, and
- implementing other formal mechanisms included in the contract.

Formal approaches to end contracts, including for under-performance, are dealt with in the section on discharging the contract in Part 6.

Reports provided to senior management and other stakeholders should be a balanced account of performance achieved and any identified shortcomings.

Many contract performance problems can be avoided by managing the relationship well.

At the early stages of under-performance, agreeing informal remedial action will often be the best approach.

The following case study discusses a situation involving 'hidden' under-performance.

Provisions to allow and regulate contract variations should be a standard feature of all contracts.

Case Study: Hidden under-performance

An entity had contracted out a help desk function for services to staff. The contract specified expected resolution times for calls logged with the help desk. The monthly performance indicators showed satisfactory performance, but the biannual staff satisfaction survey showed a marked drop in satisfaction with resolution times.

The contract manager investigated and found that the contractor was using the contractually specified measure of resolution time, based on when the call was logged in a register by the help desk. However, the contractor had been encouraging staff to log requests to an e-mail address. When the help desk was busy, there could then be a long delay before the emails were entered into the help desk register. The automated reporting system used the date of entry to the register as the start time – not the time the email arrived. This meant delays experienced by the help desk clients were not properly reflected in reports on performance. Taking this into account showed significant under-performance.

The contract manager treated this as two areas of under-performance.

Firstly, the contractor was obliged to improve resolution times to those specified, which meant some increase in staffing of the help desk.

Secondly, it appeared there was either deliberate or inadvertent manipulation of the performance measure. This was a breach of a contract provision specifying a high level of professional care and conduct. Given the ambiguities of the cause of the concern, and otherwise satisfactory service the contract manager handled the problem with a personal discussion with the contractor expressing the agency's disappointment with the episode. This was followed up with correspondence setting out the key facts and expectations for the future.

Comment: Under-performance issues sometimes do have ambiguities about underlying causes and intentions. It is still important to act to avoid a continuation of problems. Failing to do so can be seen as de-facto agreement to a situation.

5.10. NEGOTIATE CONTRACT VARIATIONS

It is possible to inadvertently amend a contract by oral agreement or conduct.

Provisions to allow and regulate contract variations⁴⁶ should be a standard feature of all contracts. The ability to vary the contract should be directed or controlled by the acquiring entity and should only occur in defined circumstances. It is accepted practice for the variation mechanism to provide for variations to be agreed between the acquiring entity and the contractor in writing through a formal amendment of the contract. In some circumstances it is possible to inadvertently amend a contract by oral agreement or conduct, even where there is a contract provision expressly requiring a formal process to be followed. It is therefore important that those involved in managing and administering the contract do not agree to informal contract amendments.

Any proposed variations should be assessed to ensure that they do not breach Australian Government legislation or policy. Variations should be undertaken in line with the procedures set out in the contract or specific entity procedures. These procedures may cover explicit authorisation and reporting arrangements for contract variations, particularly for large, complex contracts of long duration.

⁴⁶ The terms contract variations and contract amendments are often used interchangeably.

The reasons for the variation should be clearly documented. Variations should not be used to mask poor performance or serious underlying problems and the effect on original timeframes, deliverables and value for money should be assessed. If the effects are significant, senior management and other stakeholders may need to be consulted and/or advised.

Changes to contractual arrangements have the potential to affect the scope and viability of the contract for either or both parties and making substantive variations to a contract will require some of the actions and issues involved in developing the original contract. They should therefore be planned accordingly. Acquiring entities should be alert to the risk that multiple changes made to a contract over a period of time may shift the overall allocation of contract risk or transfer particular risks to the acquiring entity. It is important to analyse all consequences of a proposed contract amendment and make sure there are no unintended effects of the change.

Contract managers also need to ensure that the contract variations are not of such a level that they significantly change the contract requirement and/or substantial parts of the original transaction. If this is the case, it may be necessary to undertake another procurement process because the revised arrangements are substantially different to those selected through the original procurement. The determination of when the contract has been so substantially changed so that it becomes a new contract can be a difficult matter of judgement. It is fundamentally a procurement decision that may require specialist advice. To assist contract managers in making judgements on this matter some entities set a dollar threshold, for example, 25 per cent of the original contract value, as a guide in determining whether or not a new procurement must be undertaken.

Changes to contractual arrangements have the potential to affect the scope and viability of the contract for either or both parties

Contract variations checklist

Key issues to consider in managing contract variations include:

- following the procedures required by the contract
- assessing the reasons for the proposed variation and whether these may indicate an emerging or actual performance problem
- assessing the impact of the proposed variation on the contract deliverables, particularly whether the variation or the work it represents is actually required and whether it was part of the original contract deliverables
- determining the effect the proposed amendment will have on contract price
- considering the authority for making the variation
- properly documenting details of the variation and its impact, and
- meeting any reporting requirements such as updating the entity's contract register and including details in AusTender, where appropriate.

Contract managers need to ensure that contract variations are not of such a level that they significantly change the contract requirement.

5.11. MANAGE CONTRACT DISPUTES

While a sound understanding by both parties of their contractual responsibilities and professional relationship management should reduce the potential for disagreements and disputes to arise over the life of the contract, they can still occur.

As a general rule, a disagreement becomes a dispute when it is not possible for the parties to resolve it without resort to a formal resolution mechanism. Generally, what a dispute is and when it is deemed to have occurred is defined in the contract, often in a dispute resolution clause.

As a general rule, a disagreement becomes a dispute when it is not possible for the parties to resolve it without resort to a formal resolution mechanism.

Many disagreements and disputes arise when the parties cannot agree on issues related to the interpretation of contract provisions, the definition of deliverables, meeting performance standards and/or the effect of unexpected events. These disagreements may be of a minor nature and can be readily resolved. It is important that any possibility of dispute or an actual dispute be recognised at an early stage and addressed as quickly as possible. Avoiding the escalation of disagreements can impact on contract deliverables and reduce the costs to both parties.

However, where a dispute arises, the contract manager's role is to protect the Australian Government's interests in all cases.

The forms of dispute resolution can include negotiation, mediation, arbitration, or litigation. These are discussed under separate headings below.

Negotiations should be undertaken by a person(s) who has the appropriate authority and skills.

Negotiation

As discussed in Part 3, the need to negotiate may arise throughout the procurement cycle. The importance of negotiation skills was also discussed under the skills heading above.

Negotiating between the acquiring entity and the contractor is the most common approach to resolving disagreements and disputes. At this stage of the contracting cycle, the intention of the negotiations is to reach a mutually acceptable solution, where both sides consider they have gained the best possible result in the circumstances. It is important that one party does not consider they have been unduly pressured to agree to a particular solution as a result of the negotiation as this can lead to an escalation or reappearance of the dispute at a later stage.

At the early stages of a potential dispute it is generally preferable to attempt to resolve the matter by first discussing the issues with the contractor. These discussions may take place in the course of regular meetings between the parties or as separate discussions. Such an approach may mean that it is possible to resolve any disagreements and prevent a formal dispute arising.

When these informal arrangements do not result in a resolution of the issue, invoking the dispute resolution provisions of the contract will need to be considered. When this step is taken, careful preparation and planning needs to be taken, including determining the need to obtain specialist advice and assistance.

Irrespective of the approach adopted, negotiations should be undertaken by a person(s) who has the appropriate authority and skills and care needs to be exercised to ensure the outcome does not contravene any legal or policy requirements. It is also important that details of all discussions and negotiations are recorded and a record maintained of all agreements reached.

Mediation

Mediation involves the use of a neutral third party to assist in resolving the dispute.

Mediation involves the use of a neutral third party to assist in resolving the dispute. The mediator does not impose a decision on the parties in the way a court or arbitrator does, but instead seeks to help the parties resolve the dispute themselves. Mediation is usually regarded as a faster, less formal and less costly process than court proceedings or arbitration. There are a number of commercial organisations who maintain registers of mediators, and who can be approached to appoint a mediator for a dispute.

Arbitration

The aim of arbitration is to obtain a final and enforceable result without the costs, delays and formalities of litigation. Arbitration proceedings are private, can be held at a mutually convenient time, the actual proceedings are less complex than litigation and the arbitrator can be a person who is able to provide technical expertise relevant to the contract.

It is, nevertheless, an adversarial procedure with the possibility that neither party will be satisfied with the outcome and it may be costly. Other possible drawbacks that should be considered before entering into arbitration include: the difficulty in selecting an agreed arbitrator; the expertise of the arbitrator for the particular case; uncertain appeal rights; and the lack of legal precedence.

Litigation

Litigation is the act or process of contesting a lawsuit or seeking redress through the courts. It can be an expensive and time consuming procedure and is generally taken when other avenues of dispute resolution have not been successful or are not available. Other approaches to resolving disputes or contractor defaults should therefore be considered prior to litigation. Appropriate legal and other professional advice should be obtained prior to considering and commencing litigation. The *Legal Services Directions 2005* issued by the Attorney-General outline certain requirements that apply to FMA and CAC entities when considering or conducting litigation. This includes the Commonwealth and its agencies acting as model litigants.

Litigation can be an expensive and time consuming procedure and is generally taken when other avenues of dispute resolution have not been successful or are not available.

5.12. BEHAVE ETHICALLY

Once a contract is signed, the risk of unethical behaviour still exists, although the circumstances in which ethical issues may arise are likely to be different to the earlier stages of the procurement cycle. The relationship with the contractor is a critical element of achieving the required outcomes and issues associated with ethical behaviour are likely to arise in this context.

Judgements on ethical issues will often involve a number of potentially competing considerations including:

- the need to uphold the APS Values and Code of Conduct
- the need to achieve the contract outcomes
- the need to maintain constructive working relationships with the contractor
- whether the appearance of an actual or potential conflict of interest exists, and
- whether reasonable and cost-effective mitigation arrangements can be put in place that address any actual or potential conflicts of interest.

Judgements will also need to be made in the light of the particular circumstances that exist at the time. For example, the periodic offer of lunch with the contract team could be seen as an appropriate way to build relationships. However, it may not be appropriate at a time when the acquiring entity is in negotiations about a significant variation to the contract or towards the end of the contract when a new procurement process is under way.

Unethical behaviour may also be less visible, and therefore harder to detect and address, during the life of a contract. For example, where the contract manager is accepting lower standards of service delivery in exchange for personal benefit such as attendance at sporting events, it may be difficult to detect.

One common approach is to require all offers of gifts or benefits, no matter how small or seemingly harmless to be disclosed to the contract manager's supervisor or other nominated senior manager.

Issues involving offers or acceptance of employment briefly discussed at section 2.8 are also relevant during the contract management phase.

Unethical behaviour may also be less visible, and therefore harder to detect and address, during the life of a contract.

The following case study outlines two scenarios involving employment-related conflicts of interest.

Case Study: Managing conflicts of interest

Scenario 1

At the mid point of a large, complex contract, David, the son of the contract manager accepted long-standing employment with the contractor. The contractor was a large company and David's responsibilities did not involve any direct involvement in the provision of services to the acquiring entity.

The acquiring entity decided that this situation could be effectively managed by taking the following actions:

- requiring the contract manager to provide formal advice of his son's employment arrangement
- requiring the contractor to confirm in writing that David had no direct involvement in providing services under the contract; and requiring the contractor to advise the acquiring entity if this situation changed, and
- formally reminding the contract manager that information in relation to the contract should only be conveyed to others on a strictly 'need to know' basis.

Scenario 2

At the mid point of a large, complex contract, Carol, the partner of the contract manager was appointed by the contractor to a senior management position within the company. One of Carol's responsibilities was to oversight the contractor's responsibilities for the provision of services to the acquiring entity. The contract did not require the contractor to consult the acquiring entity about such appointments.

The acquiring entity argued that the contractor had created a potential conflict of interest situation and therefore should have been consulted before making the appointment. The contractor countered that because Carol was involved in a management capacity and not directly involved in providing the services the situation could be effectively managed and were not prepared to change Carol's responsibilities.

Despite the potential effect on the contract and consideration of various mitigation strategies, including the greater involvement of another manager in managing the contract, the acquiring entity decided that another contract manager should be appointed to manage the contract.

The contractor accepted this experience could have an impact on future relationships and agreed to a contract variation requiring the contractor to consult the acquiring entity before engaging key people that could give rise to a potential or actual conflict of interest.

5.13. KEEP RECORDS

The following is a list of documents that may need to be created and retained during the contract management phase.

- Risk assessments
- Contract management plan or checklists
- Analysis of contract conditions
- All substantive communications with the contractor
- Evidence of insurances, indemnities, deeds and/or licences required under the contract
- Records of briefings of stakeholders and/or management team members
- Transition plans
- Record of agencies' minutes, meetings, discussions relating to the contract
- Contract lists, schedules of tasks and meetings
- Records of payments
- Records of performance reports, analysis, discussions, performance assessments, feedback and of any non-compliance or under or non performance
- Variations to the contract
- Records of any disputes and related discussions or negotiations
- Assistance or expert advice received

Documents that may need to be created and retained during the contract management phase include risk assessments, variations to the contract, and records of any disputes and related discussions or negotiations.

EXAMPLE RISKS AND RISK TREATMENTS: CONTRACT MANAGEMENT

Contract management risks will often be included in a risk assessment undertaken at the commencement of the procurement cycle. Where this is the case, the risks should be reviewed and updated as necessary once the contract is signed. Risks to successful contract management are likely to arise from a number of sources. These include:

Sources of risk	Examples of risks	Examples of risk treatments
Contract management capability	<ol style="list-style-type: none"> 1. Failure to have sufficiently skilled and experienced resources to effectively manage the contract(s) 2. Lack of recognition of the importance of contract management 3. Failure to act on contractor under-performance 	<ul style="list-style-type: none"> • Recruit staff with relevant skills • Provide training to address skills' gaps • Obtain expert advice or assistance in relevant areas • Set priorities in relation to funding • Stage project stages over financial years • Brief senior management about the contract and any issues • Discuss and establish roles and responsibilities • Have monitoring plans or checklists in place • Ensure all staff understand their responsibilities in relation to performance management • Establish and maintain a sound relationship with the contractor • Hold regular meetings with the contractor to discuss progress and any problems • Agree on remedial action • Provide positive feedback when warranted • Identify any problems at an early stage • Provide any negative feedback in a professional manner
Contractor performance	<ol style="list-style-type: none"> 1. Failure to provide contract deliverables on time, to agreed quality standards 2. Failure to adhere to agreed budget 3. Failure to comply with all contract provisions e.g. privacy, security, recordkeeping 4. Fraud and/or inefficient conduct by the contractor 	<ul style="list-style-type: none"> • Establish a shared understanding of the contract and the responsibilities of each party • Monitor contractor performance regularly including of deliverables and all contract conditions • Hold specific performance review meetings • Only make payments for satisfactory performance • Ensure proper documentation and recordkeeping to provide necessary evidence to underpin actions or non-compliance • Ensure risk assessment specifically addresses fraud and/or discuss alleged fraud with in-house fraud control unit • Review the need to end the contract for breaches of conditions or non-performance • Seek relevant advice on possible causes of action to end the contract

EXAMPLE RISKS AND RISK TREATMENTS: CONTRACT MANAGEMENT (continued)

Sources of risk	Examples of risks	Examples of risk treatments
Changes in circumstance and/or requirements	<ol style="list-style-type: none"> Contract changes not dealt with as contract variations Contractor not prepared to agree to contract variations to accommodate changes in entity requirements Changes in circumstances not managed in a timely manner 	<ul style="list-style-type: none"> Only discuss possible changes with those who have the authority to agree on changes Document all proposed contract changes and keep a central record of them Seek advice on when a contract variation is necessary Liaise at an early stage to foreshadow the need for changes Ensure proposed changes are possible within the existing contract Discuss any proposed changes at the appropriate level both an enquiring entity and contractor's organisation and have them agreed Explain reasons behind the need for changes Negotiate any changes to payments or conditions to bring about changes Establish roles and responsibilities and priorities schedule tasks with the future and hold regular meetings
Stakeholder relationships	<ol style="list-style-type: none"> Stakeholders not consulted and/or kept informed about contract performance Changes in stakeholder expectations not communicated to contract manager Differing and/or conflicting stakeholder expectations 	<ul style="list-style-type: none"> Maintain informal and formal contact with important stakeholders Provide regular tailored briefings at the appropriate level of detail to ensure stakeholders are kept informed Invite, record and discuss feedback from stakeholders Discuss competing requirements with stakeholders and negotiate a compromise

CONTRACT MANAGEMENT SKILLS MATRIX

	Level of Proficiency needed	Effort needed at required proficiency	Effort available in team at required proficiency	Gap	How to fill gap (for example training, recruitment, ad-hoc advisers etc)
Contract specific skills					
Specific subject matter/industry knowledge					
Involvement in similar contracts					
Knowledge of specific client groups					
General contract management skills					
Project management					
Interpersonal and liaison					
Negotiation					
Performance Analysis					
Problem resolution/problem solving					
Team management/team motivation					
Secretariat support					
Visual presentation – graphs and diagrams					
Budgeting, financial management					
Legal aspects of contracting and procurement					
Document management					

Suggested process: 1. Tailor the list of skills relevant to managing the specific entity contract. 2. In the context of the particular contract, assess the level of proficiency and effort needed for each skill. For example, a nationwide contract for a new style of service delivery will need a higher level of proficiency in problem solving than a straightforward office cleaning contract. The effort needed can be shown, for example, as days/year. 3. Assess both the effort available of current team members with the required proficiency. 4. Assess the gap between need and availability, and identify how to fill the gap.

KEY ACTIONS AND RESPONSIBILITIES MATRIX

<p>This matrix outlines a typical sequence of steps during contract management and the key stakeholder groups and documents involved:</p> <p>Legend</p> <ul style="list-style-type: none">  has responsibility for this step  involved in this step (e.g. giving advice, being briefed)  gives formal approval  Document is used  Documents are created or updated (see explanation of this table at the end of Part 2, page 46) <hr/> <p>Action or step:</p> <p>Commencement</p> <p>Review and update risk assessments</p> <p>Finalise any procedural aspects</p> <p>Ensure all parties understand contract</p> <p>Double check insurances and indemnities</p> <p>Arrange contractor access and others as needed</p> <p>Ongoing operations (for example monthly)</p> <p>Contractor delivers services</p> <p>Contractor invoices</p> <p>Contractor provides performance information</p> <p>Contract manager assesses performance</p> <p>Contract manager makes appropriate payments</p> <p>Contract manager keeps stakeholders informed</p>	Senior manager / steering committee	User groups	Contract management team	Specialist advisers	Contractor	Risk plan	Financial plan	Contract – general conditions and provisions	Contract – service specification	Contract – performance management arrangements	Performance reports and invoices	Steering committee reports (or equivalent)	User group news letter or equivalent		
															
															
															
															
															
															
															
															

KEY ACTIONS AND RESPONSIBILITIES MATRIX (continued)

<p>This matrix outlines a typical sequence of steps during contract management and the key stakeholder groups and documents involved:</p> <p>Legend</p> <ul style="list-style-type: none"> ! has responsibility for this step ↻ involved in this step (e.g. giving advice, being briefed) 👉 gives formal approval 📄 Document is used 📎 Documents are created or updated (see explanation of this table at the end of Part 2, page 46) <p>Action or step:</p>	Senior manager / steering committee	User groups	Contract management team	Specialist advisers	Contractor	Risk plan	Financial plan	Contract – general conditions and provisions	Contract – service specification	Contract – performance management arrangements	Performance reports and invoices	Steering committee reports (or equivalent)	User group news letter or equivalent
	Contract manager resolves problems												
	Formal contract review (for example 3 or 6 monthly)												
	Contract manager collects cyclic performance information (e.g. user surveys)			!									
	Contract manager assesses performance		↻	!	↻	↻							
	Review and update of risk plan			!	↻		📄						
	Report to senior management on status, issues, recommended actions	↻		!			📄	📄			📄	📄	📄
	Complete or schedule actions arising		↻	!	↻	↻		📄					
	Keep stakeholders informed	↻	↻	!	↻	↻							

Note: the above action and responsibility summary is indicative of common arrangements. Details will vary depending on the entity's particular circumstances and the nature of each contract.

UNDERSTANDING THE CONTRACT ACTION LIST

Outlined below are a number of steps and related actions that can be useful in understanding the contract and used as a basis for developing an effective working relationship with the contractor.

- **Analyse the contract and agree the contractor's understanding of the contract:**
 - identify deliverables and how their achievement will be measured
 - ascertain timeframes, particularly any critical deadlines
 - understand payment arrangements, including links between payments and performance
 - identify the roles and responsibilities of both parties, allocate responsibilities within the acquiring entity, and
 - confirm agreement with the contractor, especially in relation to any sensitive matters.

It may be necessary to meet with the contractor to address any issues the contract has specified require resolution during the operation of the contract. A typical example of such a provision is detailed development of the performance regime.

- **Gain an understanding of the background to the contract and the relationship that has been developed with the contractor:**
 - discuss the relationship that has developed with the contractor over the preceding phases of the contracting cycle, and
 - meet with the contractor, as necessary, to further develop the relationship and address issues that may impinge on effective contract management.
- **Establish any required systems for monitoring and reporting, protocols for communication and recordkeeping arrangements:**
 - establish contract management or data collection systems or processes
 - draw up a monitoring plan or checklist covering key timelines, critical deliverables and performance reporting priorities
 - develop any procedures or protocols, and
 - establish recordkeeping arrangements.
- **Obtain or confirm any insurances, indemnities and deeds or licences in relation to intellectual property that have not already been obtained:**
 - ensure that relevant confirmation has been obtained
 - confirm all documentation is up-to-date, and
 - store evidence of these matters appropriately.
- **Brief any team members or stakeholders:**
 - set out meeting arrangements for the life of the contract
 - confirm stakeholder involvement and their requirements for information
 - set up and/or brief any committees or working groups, and
 - brief any members of the contract management team regarding their roles and responsibilities.

PART 6
Ending the contract

developing
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PART 6

Ending the contract

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6. Ending the contract

6.1. INTRODUCTION

This part of the Guide discusses issues involved at the end of a contract.

A contract can be discharged in a number of ways. A contract can end because all obligations under the contract have been fulfilled, that is, the contract has ended by performance. Contracts can also end by mutual agreement or discharge; release; waiver, novation or substitution; and accord and satisfaction. Contracts can also be discharged in other circumstances, including when not all obligations are complete or for convenience through: frustration; discharge by breach; repudiation or termination for convenience. The decision to end a contract when not all obligations are complete or for convenience needs careful consideration regarding who will provide the goods and services to the acquiring entity if there remains a requirement to do so. It may not be possible to identify and retain an alternative supplier quickly, at reasonable value for money and in line with due process. Equally it may not be possible to continue to operate under the current arrangement if satisfactory goods and services are not being supplied. A summary of the ways a contract can be ended is set out at Appendix 6.1.

There can be legal subtleties in some forms of termination, and contract managers are encouraged to obtain appropriate professional advice in unusual or complex situations.

When a contract ends, the acquiring entity needs to undertake a number of steps to complete the contract appropriately. These include: obtaining all necessary contract material, information and clearances, making adequate provision for warranties and the termination of access to premises and systems.

At the completion of any contractual arrangement or as part of the transition to a new arrangement it is better practice to undertake an evaluation of the overall performance of the contractor and of the acquiring entity's management of the contract. Any lessons learned from such an evaluation should inform the development and management of ongoing or future contracting.

There can be legal subtleties in some forms of termination, and contract managers are encouraged to obtain appropriate professional advice in unusual or complex situations.

At the completion of any contractual arrangement or as part of the transition to a new arrangement it is better practice to undertake an evaluation of the overall performance of the contractor and of the acquiring entity's management of the contract.

Key tasks

The key issues involved in ending a contract are:

Identify and manage **risks**.

Finalise **administrative requirements**.

Manage **transition arrangements**.

Conduct an **evaluation**.

Document **lessons learned**.

Keep records.

6.2. IDENTIFY AND MANAGE RISKS

The risks that may arise during contract closure are likely to vary in accordance with the way the contract is ended.

When a contract ends because all obligations have been fulfilled, risks to successful closure include:

- the failure to return all relevant documents, materials and records, and
- non-submission and payment, where applicable, of all invoices.

In the transition to another contractual arrangement, risks can include:

Sources of risk	Examples of risks
Contract materials, information and records	<ul style="list-style-type: none">• Failure to return all required materials, information and records within agreed timeframes and/or in the required format
Payment	<ul style="list-style-type: none">• Failure to agree final payment details• Submission by contractor of an invoice for unforeseen additional costs
Transition arrangements	<ul style="list-style-type: none">• Failure to appropriately manage the transition out by the contractor• Not undertaking arrangements for a new procurement early enough in the contracting cycle• Not managing the process of re-tendering in line with probity requirements, particularly where the existing contractor is re-tendering• Disruption to the provision of goods and services• Not addressing performance problems with an existing contractor who is re-engaged• Not reviewing value for money when contracts are extended

In the transition to another contractual arrangement, risks can include the failure to agree final payment details.

The Actions and Responsibilities Matrix at the end of this part outlines a typical sequence of steps, the key stakeholders involved and documents produced in ending the contract.

6.3. FINALISE ADMINISTRATIVE REQUIREMENTS

The most common way a contract ends is where each party performs according to the terms of the contract, that is, the contract is discharged through due performance.

Contracts for the provision of goods may not specify an end date but obligations under the contract are usually considered to be complete following the delivery and acceptance of the last item(s) required under the contract. Acceptance implies that the goods delivered have met the agreed standards.

Contracts for the provision of services may specify an end date when all contract deliverables have to be provided. The contract ends through due performance if the services are delivered in line with contract standards by the due date. In both goods and services contracts, contract closure should be completed as soon as possible after all obligations have been met.

For contracts where all obligations have been met, when all legal, managerial and administrative actions have been finalised, it is considered that the contract is completed. For straightforward contracts there may be only a few tasks to be undertaken, for example, checking that all invoices have been paid and a final report received from the contractor. In complex contracts there will often be a need to follow detailed transition out arrangements.

The most common way a contract ends is where each party performs according to the terms of the contract.

Steps and related tasks to be considered for in completing the contract are set out below.

Obtain all final reports and clearances from the contractor at the end of contract.

All access arrangements should be terminated at the end of the contract.

Verify all contractual obligations have been successfully met. This can include the need to:

- review the statement of contract deliverables to ensure that goods or services have met contract requirements
- arrange for the return of all required documents, material, information and records used or generated during the contract that are the property of the acquiring entity
- arrange the return of all equipment or other goods provided to the contractor and check that it is in a satisfactory condition
- ensure to the extent possible, that any issues that may result in a claim against the acquiring entity are resolved
- return any financial and other guarantees and securities, including any deeds to the appropriate party
- record any intellectual property rights, including licences and the delivery by the contractor of all material expressions, information embodying intellectual property rights, any relevant documentation, technical data or reports in a form that enables access by the acquiring entity. Any instructions on the use of intellectual property should also be noted
- make appropriate arrangements for the receipt and storage of material and documents returned by the contractor, and
- make all final payments payable under the contract.

Obtain all final reports and clearances from the contractor.

Make arrangements in regard to warranties available under the contract. This can include the need to:

- check the contract for any follow up action that the acquiring entity is entitled to, and
- schedule any agreed checks or service available under the warranty in the contract.

Other areas that may need to be considered because they are legal rights and obligations that may survive after the contract has been discharged include: rights to recover money, indemnities and in some cases guarantees, intellectual property rights and handling information. These may have been covered by survivorship clauses in the contract.

Terminate all access arrangements. This can include the need to:

- ensure all access rights or arrangements to premises and systems are terminated or revoked, and
- ensure any security passes are returned or deactivated.

Undertake post contract analysis, evaluation and reporting. This may include the need to:

- evaluate contract performance
- document lessons learned, and
- update policies or procedures, where required.

Where arrangements addressing the above matters are not fully set out in the contract, a contract variation or a separate agreement may need to be negotiated to address ownership, return of information, system compatibility and costs.

6.4. MANAGE TRANSITION ARRANGEMENTS

Transition refers to the changeover from one contractor to another, from one contractual arrangement to another or the continuation of an existing arrangement on a different basis. The transition phase will generally involve:

- undertaking a new tender process
- re-negotiating the contract with the current contractor, or
- taking up options in the current contract to extend its life, based on assessment of value for money.

The foundations for managing transition to new contractual arrangements should have been addressed in the initial contract or in plans to manage the procurement. The contract or plan should cover transfer of records, information or equipment.

In complex arrangements transition can extend over a significant period of time. This needs to be considered in undertaking a new procurement process so that all the necessary processes are completed prior to the original contract ending. In cases where a new contractual arrangement has not been completed, acquiring entities may seek to continue to operate with the original contractor. If this is being considered, the arrangement should be consistent with the principles of open competition and value for money.

Tender processes will often need to be conducted for a new service provider in parallel with the continued provision of services by the existing contractor. The existing contractor must be treated in the same way as any other tenderer to the extent possible and actual and perceptions of bias in the treatment of tenderers should be avoided. The acquiring entity needs to assume responsibility for such things as briefings to the market, the development of the request for tender and the provision of any information regarding the process. To give effect to the principles of fairness and equity, these tasks should not be undertaken by the existing provider.

Particular care needs to be exercised by the acquiring entity to ensure a systematic and disciplined approach to re-tendering to ensure probity of process and equal access to information by all potential tenderers. Where the existing contractor has access to acquiring entity information systems it is important that the tender evaluation process is undertaken in such a way that they do not have access to any material related to the tender process. This may necessitate the use of separate computer and other facilities to create and store relevant records and information.

Handover arrangements

The handover from the outgoing contractor to a new contractor can be a high risk period and if not managed well can result in a decrease in the level of service provided and in relationships with both contractors becoming strained. There is also a risk that one or both contractors could incur additional unforeseen costs and seek to claim reimbursement from the acquiring entity. It is therefore in the acquiring entity's interests to plan the handover arrangements carefully.

Reminder: The approved transition out strategy or plan prepared by the outgoing contractor should address the key matters and actions that need to be considered and undertaken as part of the handover of service delivery to a new contractor.

Ideally handover arrangements should involve an agreed period of overlap where the new contractor works alongside the outgoing contractor to achieve as seamless a transition as possible. This period should be used by the new contractor to acquire as much information and knowledge about their responsibilities as practicable and be used to transfer ownership and/or custody of materials and assets to the new contractor in accordance with the outgoing contractor's contractual responsibilities.

In complex arrangements transition can extend over a significant period of time.

Handover from the outgoing contractor to a new contractor can be a high risk period.

Where an overlap transition period is not realistic or possible the acquiring entity should take steps to maximise the transfer of information and knowledge to the new contractor.

Where an overlap transition period is not realistic or possible (as will often be the case) the acquiring entity should take steps to maximise the transfer of information and knowledge to the new contractor. This can involve:

- arranging formal and informal discussions between the parties
- arranging for the new contractor to access procedural documents and processes prepared and used by the outgoing contractor
- facilitating the transfer of custody and/or ownership of assets and contract materials to the new contractor, and
- arranging discussions between the new contractor and stakeholders, particularly entity senior management and end-users so the new contractor can obtain a firsthand view of requirements and expectations.

Good Practice Tip: Entity involvement in handover arrangements

While contact between the outgoing contractor and the new contractor is important, the acquiring entity should generally be involved in such discussions. This will assist in ensuring the right messages are being given to the new contractor and allows the acquiring entity to inform the new contractor of its expectations.

Contract evaluation should encompass the overall performance of the contractor and of the acquiring entity.

6.5. EVALUATE CONTRACT PERFORMANCE

Contract evaluation should encompass the overall performance of the contractor and of the acquiring entity. The evaluation of the operation of the contract and of contract outcomes can be very useful in understanding and improving overall contract management, improving contractor performance and can assist in future stakeholder decision-making. An evaluation should be undertaken at the end of all contracts. When a transition from one contract to another is to occur, it is better practice for an evaluation to be undertaken **before** the contract ends so that any problems that have occurred with aspects of the contractual arrangement are identified and, where appropriate, improvements made in future contractual arrangements.

Evaluations can be conducted in-house by the acquiring entity or a third party can be contracted to undertake the evaluation. This latter approach has advantages in providing an independent view of the contracting arrangement. Whatever the approach used, there are some principles that can assist to make the evaluation relevant and useful. These include having:

- clear terms of reference and methodology, data collection and analysis
- clear timeframes and reporting arrangements
- relevant skills in-house or through contracted personnel
- senior management support
- a report in which conclusions are supported by the data, and
- recommendations that provide an indication of their likely benefits.

The evaluation will need to be tailored to the particular circumstances but should consider both the effectiveness and efficiency of the arrangement. For contracts, the evaluation should be a thorough and independent review that is informed by those involved in establishing and managing the contract.

To get the best out of the evaluation, entities should:

- review all aspects of contract performance and its management
- provide feedback to the contractor; this should not be done as part of another procurement process
- report to stakeholders, and
- identify lessons learned.

Potential sources of information that can be used to inform the evaluation include: notes from meetings; performance data; interviews with management and the contractor; client and end-user feedback; quality assurance reports; complaints data; and reports of any disputes. In some cases, particularly for large, complex contracts specific information may need to be collected at the evaluation stage.

When a transition from one contract to another is to occur, it is better practice for an evaluation to be undertaken *before* the contract ends.

Evaluation checklist

The checklist listed below provides a basis for conducting an evaluation of the contract.

- Has the contract facilitated the achievement of the activity identified in the approach to the market?*

Review the requirements set out in the original business case and tender. Assess how these requirements have developed during the life of the contract, then analyse the effectiveness of the contract in achieving the stated requirements. This should involve a comparison of planned and actual milestones and activities carried out under the contract.

- Did the contract achieve its objectives?*
- Were stakeholders' requirements met?*
- Did the contract deliver quality outcomes?*
- How well did the performance regime work?*

Review performance against all standards and indicators set out in the contract. Assess whether the contractor provided all the required goods and services in line with agreed timeframes. Examine monitoring and assessment arrangements, including the performance regime established in the contract to ensure that they assisted with achieving contract outcomes.

- Did the management arrangements established by the acquiring entity facilitate achievement of contract outcomes?*

Examine how the relationship was managed and whether the level of resources and/or skills was sufficient to achieve contract outcomes.

Review performance against all standards and indicators set out in the contract.

The following case study discusses a situation where a contract evaluation was used to improve the new contract.

It is better practice that the findings of any evaluation be analysed to provide lessons learned to underpin both continuing and future contracting activity.

Case Study: Evaluation shapes next contract

An entity's IT services were provided under contract. It evaluated the operation of the existing contract, as part of preparing to issue a new request for tender. The review was conducted by the contract manager, in conjunction with senior staff in operational roles and the Chief Financial Officer. Overall conclusions were:

- the services had been generally provided in accordance with the contract. The contract had focused on minimising the costs of basic services at required service levels, and this had been achieved
- there was scope for fine-tuning a number of detailed contract clauses
- the entity had faced a number of significant changes and new requirements during the three years of the contract, and that the contract had not anticipated this. Accordingly achieving the required changes had been more difficult and expensive than desirable, and
- the agency is now considering options for specifically including flexibility as an objective in the next contract.

Comment: In addition to examining the detailed operation of the contract, the review also considered how well the contract supported the strategic objectives of the organisation.

Lessons learned

It is better practice that the findings of any evaluation be analysed to provide lessons learned to underpin both continuing and future contracting activity. Lessons learned should be documented and provided to the appropriate parties. Any manuals, plans or policies should be reviewed and updated as necessary.

Where a contractor may have a continuing or future relationship with the acquiring entity, relevant findings from the evaluation should be discussed with the contractor.

Feedback to the contractor

Where a contractor may have a continuing or future relationship with the acquiring entity, relevant findings from the evaluation should be discussed with the contractor. This can assist the parties to better understand what is required and give the contractor an opportunity to comment on the findings.

Report to stakeholders

An evaluation report should be provided to relevant stakeholders, for example, senior management. The approach used to inform stakeholders about the evaluation finding should be tailored to suit their particular role in the contract and may include both written and oral briefings. This enables particular attention to be given to significant matters that need to be considered by decision-makers.

6.6. KEEP RECORDS

The following documents may need to be created and stored as part of ending the contract.

- Risk assessment for completing the contract process
- Transition out plan or checklist
- Evaluation plan or checklist
- Final performance reports
- Records of return of security/access passes, Government Furnished Material and Intellectual Property
- Verification of the delivery of all goods and services
- Lessons learned
- Feedback to the contractor, and from the contractor
- Reports to stakeholders

APPENDIX 6.1 WAYS CONTRACTS CAN BE ENDED

The following is a summary of the various ways contracts can be ended.

Mutual agreement: occurs when the parties to the contract mutually agree that they no longer wish to continue with the performance of the contract. Where it is in the interests of both parties to end the contract without all obligations being complete, it is important that relevant policies, authorisation requirements and procedures are followed. In the case where a clause to allow contract termination by mutual agreement is not included in the contract, this may need to be negotiated. It must then be agreed and documented in accordance with legal and policy requirements. Ending a contract by mutual agreement may also arise as a negotiated settlement or compromise reached to settle a dispute between the parties.

Mutual discharge: occurs when both parties agree to cancel the contract while both still have unperformed obligations under the contract. In this case, the promise of one party to abandon rights under the original contract is given in consideration for a similar promise from the other party.

Release: occurs when one party has completed all their obligations under the contract but the other party has not. A release by the party that has performed all its obligations amounts to a unilateral discharge. Generally a release will be in the form of a deed, supported by further consideration by the party still under obligation.

Accord and satisfaction: occurs where one party has performed their obligations and the other has not. The defaulting party is relieved of their obligations in return for doing something that they were not originally bound to do.

Waiver: occurs where one party leads the other to reasonably believe that while strict performance can still technically be demanded, it will not be insisted upon. The most common example of this is where a buyer or seller of goods agrees to defer the delivery date at the request of the other party.

Novation or substitution: occurs when the parties wish to continue the contractual relationship but on different terms to those in the original agreement. Generally, substitution is used where there are continuing liabilities whereas novation is used where a new contract replaces the old contract bringing old liabilities to an end.

Frustration: occurs when the obligations of one or more of the parties become impossible to perform. This can be the result of an unforeseeable event that changes the initial position of one of the parties. The law provides a very narrow definition to the operation of frustration and the events should be so severe as to make performance of contract provisions;

- legally impossible
- practically impossible, or
- radically different from the initial agreement.

In practice, ending a contract through frustration is rare and contracts should contain clauses to deal with unforeseen events.

Discharge by breach (default): can occur in a number of ways, including: late delivery; or failure to meet quality standards. An actual breach occurs when a party fails to perform all or part of the contract by the due date. An anticipatory breach occurs when the threatened non performance would substantially deprive the innocent party of substantially the whole benefit that was intended to be obtained from the contract.

The occurrence of some breaches allows for the contract to be terminated but this is not automatic. For termination to occur the breach should be so serious that future performance of the contract becomes impossible or is so fraught with difficulty so as to warrant the ending of the contractual arrangements.

Damages are the usual remedy for terminating a contract for a breach and are made on the basis that the breach can not be adequately compensated by a single payment of money.

Repudiation: occurs where one party intimates through words or conduct that it does not intend to perform its obligations under the contract. Where the other party communicates acceptance of the repudiation, the contract is at an end and the accepting party can claim damages.

Termination for convenience: occurs in certain circumstances, after giving suitable notice, to terminate a contract for the convenience of the acquiring entity. Careful consideration should be given to exercising this clause. Whether a particular exercise of the rights under this clause is justifiable in law will depend on the circumstances of the case and the precise drafting of the clause. Termination for convenience provisions usually provide for the payment of compensation to the contractor of the costs incurred or unavoidably committed at the date of termination.

In all the above cases, an important point is that ending the contract needs to be fully documented. Normally the agreement to terminate will be given effect by provisions of the original contract, by a deed of termination or by a written settlement that sets out the basis for termination, including any payments owing, and settlement of any outstanding claims or actions.

KEY ACTIONS AND RESPONSIBILITIES MATRIX: ENDING THE CONTRACT

This matrix shows the typical sequence of steps to end the contract, and the key stakeholder groups and documents involved:

- ! has responsibility for this step
- ↻ involved in this step (e.g. giving advice, being informed)
- 👉 gives formal approval
- 📄 Document is used
- 📁 Documents are created or updated
- (see notes at the end of Part 2, page 46 for more explanation)

Action or step:	Senior Management / Minister	Senior manager	User groups	Contract management team	Specialist advisers	Contractor	Evaluation team	Risk plan	Probity plan	Financial plan	Contract	Performance reports	Evaluation report
Verify final contract deliverables			↻	!				📄		📄	📄	📄	
Return of all Commonwealth properties				👉	↻	!			📄				
Return of contractor properties			↻	!	↻	👉			📄				
Check any ongoing licensing or similar arrangements			↻	!	↻	↻			📄	📄			
Confirm any transitional arrangements			↻	!	↻	↻			📄	📄	📄		
Agree evaluation approach		👉	↻	!	↻			📄	📄	📄	📄	📄	
Undertake evaluation	↻	↻	↻	↻	↻	↻	!	📄	📄	📄	📄	📄	📄
Arrange final recordkeeping / archival			↻	!	↻		↻	📄	📄	📄	📄	📄	
Arrange to transfer learnings to other contracts		!	↻	↻		↻	↻						📄

Contract Management Checklist



Contract Management Checklist

This checklist could be used by the contract manager or a senior manager with management responsibility for overseeing a contract or contracts to gain assurance that the necessary governance arrangements are in place at the commencement of the contract. The ongoing management section of the checklist could be used periodically, say every three or six months, to check that the necessary actions are being taken to manage the contract.

Contract commencement

- Does the contract manager have the required level of skills and experience?
- Does the contract manager have a satisfactory level of understanding of the contract and of the relevant subject matter? A detailed checklist on understanding the contract is on page 112.
- Have risks to the management of the contract been identified and risk treatments identified?
- Is it clear who is responsible for implementing/actioning any necessary risk treatments?
- Has responsibility for all aspects of managing the contract been clearly assigned?
- Do delegations exist for the approval of contracts, contract variations and the approval of expenditure?
- Have all stakeholders been identified and arrangements agreed to obtain feedback/ input throughout the life of the contract?
- Have the benefits of flow charting internal processes e.g. dispute escalation arrangements been considered?

Ongoing management

- Are contract payments linked to satisfactory contract performance?
- Have all invoices, and any supporting documents, been checked to ensure they are in accordance with contract requirements and are in order to pay?
- Is timely action taken when contract performance is unsatisfactory?
- Have all variations to the contract been agreed on value for money grounds?
- Have all amendments to the contracts been subject to formal contract variations? Is a record maintained of all contract variations?
- Where the contract has not meet agreed levels of performance, has any actions taken been adequately documented? Where it is decided not to take action, has this decision been properly approved and documented?
- For longer term contracts, has the contract been subject to periodic review?
- Have any disputes been addressed in a timely manner and satisfactory efforts made to resolve them?
- Is the contract being actively managed so that there is reasonable assurance that contract outcomes are being achieved?

Contract extension/renewal

- Do systems/procedures enable the timely consideration of the need for contracts to be extended or renewed?
- Are all contract extensions justified on value for money grounds?
- Are there arrangements in place designed to ensure that probity issues are identified and addressed during contract extension and re-tender processes?

Ending the contract

- Has the contractor delivered all required contract outcomes?
- Has the contractor met all their contractual obligations?
- Has the contractor returned all Commonwealth material, equipment or other resources used or generated during the life of the contract?
- Have all access arrangements been terminated?
- Has an evaluation of the contract been undertaken and, where appropriate, lessons learned been built into future contracting activities?
- Has the contractor's performance been evaluated, properly documented, and feedback provided to the contractor?

Abbreviations

ANAO	Australian National Audit Office
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CEIs	Chief Executive Instructions
CFO	Chief Financial Officer
CFS	Consolidated Financial Statements
CPGs	Commonwealth Procurement Guidelines
Finance	Department of Finance and Administration
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMA Regulations	<i>Financial Management and Accountability Regulations 1997</i>
FMIS	Financial Management Information System
FMOs	Finance Minister's Orders
JCPAA	Joint Committee of Public Accounts and Audit
MOUs	Memoranda of Understanding
OISOs	Online Information Service Obligations

Index and References



References

ANAO Audit Reports:

- Report No.16, 2004–05 *Container Examination Facilities*
- Report No.29, 2004–05 *The Armidale Class Patrol Boat Project*
- Report No.37, 2004–05 *Management of Business Support Service Contracts*
- Report No.40, 2004–05 *The Edge Project*
- Report No.1, 2005–06 *Management of the Detention Centre Contracts – Part B*
- Report No.10, 2005–06 *Upgrade of the Orion Patrol Aircraft Fleet*
- Report No.11, 2005–06 *The Senate Order for Departmental and Agency Contracts (Calendar Year 2004 Compliance)*
- Report No.27, 2005–06 *Reporting of Expenditure on Consultants*
- Report No.32, 2005–06 *Management of the Tender Process for the Detention Services Contract*
- Report No.34, 2005–06 *Advance Passenger Processing*
- Report No.36, 2005–06 *Management of the Tiger Armed Reconnaissance Helicopter Project – Air 87*
- Report No.40, 2005–06 *Procurement of Explosive Ordnance for the Australian Defence Force (Army)*
- Report No.5, 2006–07 *The Senate Order for the Departmental and Agency Contracts (Calendar Year 2005 Compliance)*
- Report No.9, 2006–07 *Management of the Acquisition of the Australian Light Armoured Vehicle Capability.*

Archives Act 1983.

Attorney-General's Department, *Legal Services Directions 2005.*

Attorney-General's Department, *Protective Security Manual August 2005.*

Australian Government Solicitor, *Legal Briefings.*

Australian Public Service Commission, *APS Values and Code of Conduct.*

Comcare, *OH&S Fact Sheets.*

Commonwealth Authorities and Companies Act 1997.

Department of Finance and Administration, *Commonwealth Procurement Guidelines*, January 2005.

Department of Finance and Administration, *Finance Circulars.*

Department of Finance and Administration, *Financial Management Guidance 2 to 15*, November 2002 to January 2005.

Department of Prime Minister and Cabinet, *Requirement for Annual Reports for Departments, Executive Agencies and FMA Act Bodies*, June 2005.

Financial Management and Accountability Act 1997.

Financial Management and Accountability Regulations.

Freedom of Information Act 1982.

Hughes Aircraft Systems International v Airservices Australia (1997), 14GALR1.

JS McMillan Pty Ltd v Australia Government (1997), 419ALR.

Occupational Health and Safety (Commonwealth Employment) Act 1991.

Office of the Privacy Commissioner, *Guidelines to the Privacy Principles*, 2001.

Privacy Act 1998.

Privacy Commissioner, Privacy Information Sheets.

Public Service Act 1997.

Queensland Government, *Better Practice Guide: Negotiation in Purchasing*, August 2004.

Seddon, Nicholas *Government Contracts Federal, State and Local*, Third Edition, The Federation Press, Sydney 2004.

Standards Australia, *Australian Standard – Records Management AS ISO 15459.*

Standards Australia, *Risk Management Guidelines HB 436: 2004.*

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