

ENGAGEMENT OF CONTRACTORS / CONSULTANTS

Note: There is a difference between consultants and contractors (see below). However, for the purpose of this policy, the term contractor will be used when referring to either a contractor or consultant.

POLICY

The use of contractors in EPD should be undertaken to:

- alleviate short-term staff shortages, and / or
- obtain expertise that is not otherwise available within the Directorate.

Engagement of contractors should be undertaken in accordance with the highest standards of probity and should be, and be seen to be, without prejudice or favour. Consideration should also be given to whether the party should be engaged as employee rather a contractor.

This policy should be read in conjunction with the Whole-of-Government procurement and contract management policies and guidelines available from Shared Services Procurement at <http://shareservices/actgovt/Procurement/>

RATIONALE FOR POLICY

The selection of a contractor is a purchasing activity and involves the procurement of external sources of expert labour to achieve agreed outputs.

The effective selection, engagement and management of contractors, requires a professional and structured approach to ensure best value for money outcomes are achieved.

RESPONSIBILITIES AND ACCOUNTABILITIES

The primary responsibilities and accountabilities in relation to the use of contractors rests with directors and contract managers as follows:

Position	Responsibility
Executive / Managers	<ul style="list-style-type: none">• ensure that staff, being appointed as contract managers have the necessary skills, experience and resources to fulfil the function.
Contract Managers	<ul style="list-style-type: none">• follow all directorate and ACT Government procedures for contract management.

NON-COMPLIANCE

Non-compliance with these procedures may result in a loss to the Directorate, deadlines not being met, functions not completed within prescribed timeframes, and an accountable process not being followed with the potential for contracts not being completed within planned time and cost.

Staff are therefore accountable to the Director-General for the fulfilment of their responsibilities under these procedures. Non-compliance will be taken as a serious matter and may result in disciplinary action or be reflected in performance reviews.

TARGET USERS

These procedural rules are for staff that engage and manage contractors.

PROCEDURES

The following procedures are addressed by these guidelines:

- definition of Contractor and Consultant
- getting approval for using a contractor
- contract manager
- contract manager appointment
- contract manager skills
- funding and resources
- approaching the market
- specification and selection criteria
- selecting the contractor
- conflict of interest
- contracts
- insurance
- ethics and fair dealing
- documentation
- contract management
- contract management plan
- contract analysis
- communication
- risk identification and management strategies
- monitoring performance
- contract delays
- contract variations
- receipt and acceptance of variables
- payment
- dispute resolution
- complaints procedure
- contract extensions
- contract renewal
- securities, performance guarantees and retention moneys
- assignment and novation of contracts
- discharge of contract
- contract termination and cancellation
- liquidated damages
- performance evaluation and debriefing
- product warranties
- defects liability period
- final payment claim and release securities;
- asset register
- contract audit trail

Note that not all of these procedures are applicable for short-term staffing shortage contractors.

Definition of Contractor and Consultant

Contractors and consultants may need to be defined separately for reporting purposes.

A contractor is defined as a person or entity contracted to perform all or part of a new or existing ongoing function to assist the directorate carry out its defined activities and operational functions. Contractors may be required to undertake professional, technical or operational work.

A consultant is a type of contractor who undertakes projects, usually involving the provision of professional recommendations, to assist with management decision-making.

In some cases, the difference between consultants and other contractors is not always clear and should be decided on a case-by-case basis. Generally, however, it is the advisory nature of the work that differentiates consultants from other contractors.

It is important to properly consider all contractors and whether they meet the criteria for a contractor or should be classified as an employee. Further information can be found on the [Fair Work Ombudsman website](#).

Getting Approval for Using a Contractor

Approval to use a contractor should only be given if it is the most efficient and effective approach to deliver outputs. The use of internal expertise must be considered first.

It is important that Divisions consider their contractor needs as early as possible to allow them to meet the Procurement Guideline requirements and associated thresholds.

Approval must be obtained from the delegate (normally a Deputy Director-General, Executive Director, Director, or the Director-General). The following information must be given to the delegate:

- a specification;
- a description of required contract outcomes;
- detailed consideration of alternatives, including explanations why alternatives were not practicable;
- foreshadowed costs;
- an outline of the proposed selection process; and
- an indication of how contract performance is to be evaluated.

Contract Manager

The contract manager / administrator is the person charged with the daily administrative management of the contract. Primary duties are to plan activities, manage risk, monitor contractor performance and exercise delegated authority. The contract manager or administrator role is an important one ensuring that:

- the Directorate obtains value for money through satisfactory contractor performance, including the achievement of contract milestones;
- both parties meet their contractual obligations;
- the Directorate is only paying for services and products specified in the contract;
- the desired outputs e.g. delivery of services to the community, are achieved;
- disputes are avoided by regular monitoring of performance and open lines of communication; and
- all risks are effectively managed e.g. ensuring the contractor meets occupational health and safety obligations.

Responsibilities of a contract manager may include:

- establishing a contract management plan for the project;
- reviewing the contract management process (including the plan) on a regular basis;
- monitoring changes to circumstances to ensure the contract remains relevant and value for money is achieved throughout the life of the contract;
- providing liaison between internal managers and users, and suppliers to identify and resolve issues as they arise;
- monitoring the contractor's continuing performance against contract obligations;
- providing the contractor with advice and information regarding developments within the Directorate, where such developments are likely to affect the products or services provided;
- providing accurate and timely reporting to the senior management in charge of the project, highlighting significant performance issues or problems;
- ensuring insurance policy(s) terms and conditions provide adequate protection for the Directorate and are maintained throughout the contract period;

- ensuring all products provided are certified as meeting the specifications before the supplier is paid;
- maintaining adequate records (paper and / or electronic) in sufficient detail on an appropriate contract file to provide an audit trail;
- managing contract change procedures;
- resolving disputes as they arise;
- conducting post contract reviews; and
- determining remedies in the event of contract breach.

Contract Manager Appointment

The Directorate is responsible for ensuring that contract managers:

- are appointed with appropriate responsibility and accountability;
- are adequately trained so that they can perform and exercise the responsibility;
- prepare the contract management plan (where relevant);
- monitor the performance of the contractor; and
- act with due care and diligence and observe all accounting and legal requirements.

The contract manager should be appointed by the senior manager in charge of the procurement prior to the execution of the contract. Moreover, where it is practical to do so, the contract manager should be involved at the earliest stage of the procurement, which is the time of writing the specification. Contract management arrangements should be identified and planned including who, how, delegations, reporting requirements and relationships, and specific task responsibilities.

Contract Manager Skills

The contract manager is the representative of the Directorate. The appointment of a contract manager needs to be carefully considered as the responsibility of undertaking the contract management functions of a major project requires a broad range of personal and technical skills.

The skills of the contract manager need to be matched to the particular requirements of the contract. Some of the skills required to undertake contract management functions include:

- strategic skills;
- knowledge of government policies and directions;
- organisational goals;
- project management;
- communication and liaison;
- people management;
- negotiation;
- record keeping and file management;
- decision-making;
- exercise delegated authority;
- research and analytical;
- professionalism;
- management accounting and reporting skills;
- legal;
- technical knowledge; and
- authority.

The contract manager needs to have a level of authority that will ensure the project runs smoothly and that services are not interrupted. Exercising this authority requires judgement to ensure all parties are treated fairly. The contract manager will generally have limited delegation to approve variations that involve extra cost.

Funding and Resources

Funding must be available to undertake the contract. Awareness of the financial resources available will provide a guide for the depth of the contract and will enable the selection process to focus on who can provide the best value for money. Consideration must also be given to whether there are adequate internal resources to manage the process.

Approaching the Market

Procurement activity must be undertaken in accordance with the [Whole-of-Government policies and guidelines](#). Procurement thresholds have been established with different requirements for each threshold, including quotation requirements. (See also DGFI - Procurement of Goods and Services.)

Note: The use of a Whole-of-Government contract is mandated where such a contract exists that meets your requirements.

Specifications and Selection Criteria

Contractors should be provided with a background brief to assist them in preparing their proposals.

A Comprehensive Specification is critical so that all parties know precisely what is expected of them.

Evaluation Criteria must be developed and the specification should also contain a statement detailing requirements of the final report.

Depending on the invitation method it may be appropriate to have a panel or steering committee rather than an individual responsible for the selection decision. An evaluation plan should also be developed that contains criteria weightings and methodology to be used in the evaluation.

Selecting the Contractor

Contractor selection must be undertaken in an open and accountable manner and should ensure value for money. The lowest price bid should not necessarily be the main criteria for selection. A primary concern is that the contractor can achieve the outcome(s) desired.

It is essential that the method of selection chosen is substantiated and that it is consistent with the *Government Procurement Act 2001*. Refer Shared Services Circulars.

Conflict of Interest

Directorate employees and any parties advising the Directorate must disclose any conflicts of interest arising during the procurement process. Potential service providers should also be required to divulge all potential conflicts of interest with their tender and sign a confidentiality agreement, if necessary.

Contracts

It is essential that contractors be engaged under a contract tailored to the particular project. All contracts for engagement of contractors should include Contract Terms and Conditions that have been approved by the ACT Government Solicitor.

All contracts should also specify the Directorate's standard 30-day payment terms.

Insurance

Prior to signing a contract it is essential that the Directorate ensures that contractors have appropriate insurance policy(s) that provide adequate protection for the Directorate and that those policy(s) are maintained throughout the contract period.

Advice on these policies can be obtained from the ACT Insurance Authority.

Ethics and Fair Dealing

The ethical standards outlined in procurement policy on ethical behaviour should be followed when dealing with contractors.

Documentation

All documentation including the bids received must be kept for record and audit purposes.

An Evaluation Plan is to be completed.

The Letter of Acceptance to the successful applicant forms a part of the contract and should be carefully worded. Unsuccessful applicants must be notified of the decision.

Contract Management

Contract management is the last stage of the tendering and contract cycle, and includes all administrative duties associated with a contract after it is executed, including contract review.

The specific nature of contract management varies from contract to contract. At the simplest level it can involve the receipt of goods, a check of the goods against the order and payment of the contractor. On complex and long-term service delivery contracts, contract management may involve:

- active monitoring of day-to-day activities;
- certification of payment;
- negotiation of variations;
- management of disputes;
- liaison with the public; and
- maintenance of records to provide an audit trail.

The Directorate needs to consider and plan for the task of contract management / administration within the initial stages of the purchasing process. The specification should detail performance measures that facilitate effective management of the contract.

Contract Management Plan

The components of the Contract Management Plan include:

1. Analysis of the Contract:
2. Documented Strategies for:
 - communication;
 - performance evaluation;
 - risk management; and
 - contingencies.
3. Schedule of Tasks to be undertaken during the administration of the contract including:
 - key tasks with milestones;
 - responsibilities;
 - schedule of payments;
 - reviews; and
 - performance reports.

4. Contract Completion tasks include:
- review of the contract;
 - planning for handover or transition out requirements; and
 - contract extensions

Refer to Shared Services procurement for further information on [managing a contract](#).

Contract Analysis

Before the contractor commences work under the contract, the contract manager / administrator should:

- read the contract; it may be appropriate to also read the contractor's offer and any related correspondence and file notes;
- note the Directorate's (Principal's) obligations e.g. access to site, payments, and approvals;
- prepare a checklist of major milestones;
- inspect work site prior to commencement e.g. cleaning contracts;
- ensure contractor's insurance policies are current and seek advice if any doubt exists with regard to the terms and conditions, including exclusions, included in a policy;
- ensure performance securities / guarantees have been received;
- inspect contractor's Workplace Health and Safety Plan; and
- establish lines of communication with the contractor.

Communication

Good communication channels within the Directorate are essential. The contractor, too, needs open communication channels to provide input and receive feedback during the performance of the contract.

Risk Identification and Management Strategies

Planning for and managing risk is an essential task of the contract manager. The risk management process should be initiated early in the procurement process as part of the Procurement Plan so that the final contractual arrangement reflects the risk management strategies adopted for the project. (See DGFI - Risk Management).

Monitoring Performance

Good monitoring of contractor performance progressively identifies, anticipates and facilitates correction of shortcomings before the Directorate / contractor relationship is adversely affected.

The details of performance monitoring should be specified in the contract. The development and documentation of the performance monitoring provisions is part of the risk management strategy.

The activities a contract manager is expected to perform include:

- progress meetings - where progress meetings take place, contract managers should follow proper meeting procedures by developing appropriate agenda items and maintaining records of proceedings for the information of all parties and to facilitate accountability;
- reports - in some contracts it is appropriate to require the contractor to provide written reports on performance as one of the contract deliverables;

- expediting is the follow-up of contract deliverables that are overdue, checking to ensure that the contractor will honour the original delivery date or encouraging an earlier delivery than originally intended;
- inspection may be necessary to ensure that the goods or services conform to the contract standard;
- quality assurance audit reduces the need for quality control inspection, but inspection may still be necessary for new and untried goods or services, or where formal quality assurance is not a contract condition; and
- service level performance audit to assess service delivery compared to those agreed in the terms of the contract. The audit may be undertaken in-house or by an experienced independent auditor, or a peer review process may be appropriate.

Contract Delays

Delays usually originate with a problem that occurred earlier in the course of performing the contract work.

The contract manager should take action as soon as a potential cause of delay is identified to:

- identify the existence of an actual or anticipated delay;
- determine if the likely delay will impact on delivery or completion;
- decide who is at fault;
- determine the duration of the delay; and
- select the appropriate action to resolve the problem.

Contract Variations

During the contract term, variations may be necessary to the contractual arrangements. Variations can be made by the contractor, or the Directorate.

The contract manager should ensure that a variation is within the scope of the contract and that the nature of the contract is not altered.

It is important to keep in mind that end users or other stakeholders may not be amenable to a variation, therefore they may need to be consulted before the contract manager agrees to a variation.

Where it is proposed to vary the contract, it is preferable that both the Directorate and the contractor agree. Circumstance may arise where the Directorate must insist on a variation; the contract may or may not include provision for a unilateral decision by the Directorate.

If the contract is the provision of services, suitable performance measures will need to be developed to ascertain whether performance has been satisfactory.

Receipt and Acceptance of Variables

The receiving function is important because problems and errors such as quantity shortage, damaged material, wrong items or poor performance may come to light at this stage. As the Directorate makes payment on the satisfactory acceptance of the goods or services, it is important that receipting is done accurately and quickly.

The contract manager has the right to reject and return goods or withhold payment for supplies or services that do not meet the contract standard. The Directorate should also ensure that

miscellaneous fees e.g. freight, insurance, maintenance, etc are only charged in accordance with the agreed conditions of contract.

Acceptance and de-commissioning of completed projects is a more substantial function, particularly for large and complex procurements e.g. in capital works contracts. It involves a formal agreement to the transfer of ownership of the asset from the contractor to the Directorate.

After acceptance, the contract manager should arrange for the release of any securities / guarantees to the contractor. Where contracts stipulate a defects liability period performance securities / guarantees can be progressively released to the contractor.

Payment

The contract manager is responsible for the certification and timely payment of accounts in accordance with the contractual arrangements.

The preferred method of payment is Electronic Funds Transfer (EFT). The contract manager should arrange with the contractor for payment via EFT if this is not a contract condition.

Dispute Resolution

Contractual disputes arise when the parties cannot agree upon areas of contract interpretation. Disputes can occur for example over the interpretation of the contract conditions, the project specification, the performance of either party under the contract, or the effects of unexpected events.

Directorate contracts must include a method(s) of dispute resolution.

Contract Managers can minimise the likelihood of disputes by ensuring that they maintain close liaison with the contractor throughout the contract period and effectively deal with problems when they arise.

Alternative methods for resolving disputes include:

- negotiation;
- mediation;
- expert appraisal;
- arbitration; and
- litigation.

Complaints Procedure

It is a required characteristic of Directorate contracts where the services being provided are delivered to, or impact on, the public that the contract has a complaints handling mechanism. This should include recording the nature of the complaint, date, the name and address of the complainant and notes of any action taken.

Contract Extensions

Some contracts contain optional extension clauses, enabling the Directorate to extend the contract without re-inviting public tenders. Consideration should be given to the relative benefits of extension versus re-tendering or other renewal mechanisms.

Contract Renewal

The process of renewal should be initiated in sufficient time to ensure the new contract is awarded and the new contractor is ready to commence at the completion of the current contract. The

renewal process should be undertaken where there is an ongoing need for the contracted delivery of goods or services and the option of extension is unavailable or unacceptable. However, where renewal has not been possible in sufficient time to finalise a new contract, a limited extension of the current contract may be appropriate with approval of the appropriate delegate. The extension should not exceed the period reasonably required for finalising the new contract.

The current contractor should be advised of the renewal process and of any variations in the scope of the requirement.

Securities, Performance Guarantees and Retention Moneys

Securities and / or guarantees are incorporated into contracts to ensure the due and proper performance of a contract. They provide an incentive to the contractor to satisfy its contractual obligations.

The contract manager is responsible for ensuring that the contractor submits the required form of financial securities detailed in the contract, and provides as secure storage arrangements as possible.

Assignment and Novation of Contracts

During the course of a contract it may be necessary to assign or novate the contractual arrangement. The process of assignment or novation allocates different contractual obligations on the parties.

Assignment is the act by which one party to a contract transfers their rights or interests (not obligations) to another person.

Novation is the making of a new contract in substitution for an earlier one. Under a novation, a third party will take over the rights and obligations of an original party whose rights and obligations are being novated.

The novation or assignment agreements must be in writing.

Discharge of Contract

The most natural way in which a contract may be discharged is by each party actually completing their contractual obligations. A contract may otherwise be discharged:

- *by mutual agreement* - the contract may be discharged without any party performing its part of the contract;
- *upon termination for breach of contract* - where a party breaks a fundamental or important obligation imposed by a contract. The injured party has the right of action for damages against the party in default. The injured party is also entitled to treat the contract as terminated and therefore discharged where the other party renounces the contract or makes its performance impossible;
- *incapable of performance* - where the non-fulfilment has not resulted in the contract being incapable of further performance, and does not amount to a major breach of the contract the injured party may sue for damages for any loss suffered, but is not released from further performance of the contractual obligations;
- *by contractor's default* - it is important to follow the process as outlined in the contract when treating a contractor as being in default; if the correct procedure is not followed at the correct time, the Directorate may be unable to obtain the necessary remedy; and
- *by frustration such as impossibility of performance* - brought about by the discontinuance of circumstances contemplated by the parties, which will completely frustrate the contract. The causes of impossibility include matters such as the death of one party, the winding up of one

party, bankruptcy or the appointment of a receiver to one party, outbreak of war preventing performance, or by legislation.

Contract Termination and Cancellation

Where a contract is to be terminated or cancelled, the Directorate must ensure preservation of the Directorate's interests. Contract managers considering the termination or cancellation of any contract should seek contractual advice.

Show Cause – The show cause notice procedure may only be relied upon when the contract provides for it. The procedure does not exist otherwise than as a term of the contract, and then only in accordance with the procedure set out in the contract.

Where a contractor is in breach of the contract the Directorate can call upon the contractor to show cause why the contract should not be terminated.

The letter of show cause should be delivered to the contractor's address for notices specified in the Contract and be sent by registered mail or hand delivered. The contractor should be required to respond to the letter within the number of days, required by the 'show cause' clause in the contract, from receipt of the notice.

Termination - A contract may be terminated by the Directorate, on account of default by the contractor, or under the provisions of a "break clause" in the contract. Upon termination of the contract, further performance of the contract ceases but other provisions for recovery of losses, damage, etc by the Directorate or for compensation to the contractor remain in operation.

Cancellation - A contract may be cancelled in whole or in part by mutual agreement of the two parties. Upon cancellation all future rights and obligations of both parties cease in respect of the part cancelled. If it is intended to cancel a contract, for reasons other than contractor default, agreement must first be reached with the contractor to cancel on mutually acceptable terms, with both parties agreeing to release the other from further responsibility under the contract. A formal agreement on mutual release is desirable.

Particular care must be taken in negotiations with the contractor to avoid any action that could result in a claim by the contractor for breach of contract.

Liquidated Damages

Liquidated damages is a sum of money, agreed upon between the parties to a contract as damages for breach of contract, to be paid by the party at fault to the party who is innocent.

The contractual arrangement may provide for payment of agreed damages by the contractor when completion is not within the contract or extended contract time. These payments are known as liquidated damages. The contractual arrangement will record the amount to be paid for each day, week or other period for which the services are not provided or completion is delayed.

Performance Evaluation and Debriefing

While it is the ongoing and main responsibility of the contract manager to evaluate the contractor against the requirements of the contract, it is also necessary to assess the extent to which the contract has achieved the Directorate's objectives. The evaluation of contractor performance should be continued throughout the contract and at completion.

The evaluation determines the degree of success by comparing the contract outputs with the original desired outcomes. This can often be complicated by changes in expectations, policies or requirements during the contract period. The contractor is responsible for achieving the outputs required by the contract, it is not the contractor's fault if the required outputs do not result in achievement of the Directorate's objectives.

Product Warranties

A contractor may provide or pass on a manufacturer's warranty in relation to commercial goods delivered under the contractual arrangement. The warranty will be for a specific period of time e.g. for a number of months, hours or kilometres.

The contract manager should monitor any goods that may need replacement or repair.

Defects Liability Period

The Defects Liability Period stated in the contract usually commences on the date of Practical Completion. The contractor is responsible for the rectification of any omissions or defects existing at the date of practical completion. The contractor may be directed to rectify any omission or defect in the work under the contract at any time during the defects liability period specified in the contract.

Final Payment Claim and Release of Securities

The contractor should lodge a final payment claim within 28 days after the expiration of the defects liability period including all moneys the contractor considers to be due from the Directorate under the contract.

Upon certification of this claim, the Directorate would release any retention moneys or security held against the contract within 14 days.

Assets Register

Any assets delivered as a result of the contract need to be capitalised in accordance with Directorate's Director-General Financial Instructions.

Contract Audit Trail

Contract managers should maintain comprehensive and accurate records in relation to responsibilities, claims, payments, negotiations, agreed changes, incorrect deliveries, poor service and other significant activities. Some of these records may be held electronically. These records are important in establishing and maintaining an audit trail and helping others involved in monitoring and managing the contract to understand what arrangements have been put in place and why.

The *Territory Records Act 2002* sets out standards for the disposal and custody of ACT Government documents, including records that document tender and contract activities. This includes records in any format, for example electronic records, files, cards and plans.

For further information regarding disposal schedules and retention periods refer to the Directorate's Records Management Program available on the Intranet.

Reporting Responsibilities

Executive are responsible for:

- ensuring that either a copy of the notifiable contract (with agreed confidential text removed), or sufficient details of the contract is placed on the Contracts Register, accessible from the Shared Services Procurement website, within twenty-one (21) days of execution (*Government Procurement Act, Section 30*);
- reporting to the relevant Legislative Committee on a six-monthly basis on the notifiable contracts that were published with agreed confidential text removed (*Government Procurement Act, Section 39*); and
- reporting on contracts with a value of \$25,000 or more in the Directorate's Annual Report (Refer to the Annual Report Directions).

Where a variation to the contract occurs the reporting responsibilities above apply to the variation.

REFERENCES

Source	Description
FMA	s31
FMA Regs/FMOs	n/a
Other legislation/regs	Government Procurement Act 2001 Government Procurement Regulation 2007
Related DGFIs	Delegation of Authority Procurement of Goods and Services
Related Guidelines	EPD Financial Delegations ACT Government Procurement Framework Procurement Policy Circulars