



## NSW Government Procurement Guidelines

# Construction Procurement Valued to \$1M

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These guidelines were prepared by the Department of Services, Technology and Administration for the NSW Government. These guidelines are an element of the Procurement Policy Framework of the NSW Government. It is available from the [NSW Government Procurement](#) website.

The document shall be updated on an ongoing basis by the Department of Services, Technology and Administration to reflect changes to government tendering policy and procedures. To ensure accurate and up to date information, agencies are advised to access the latest version directly from the website.

For further information on these guidelines contact the NSW Procurement help desk by phone 02 9372 8600 or 1800 679 289 (1800 NSWBUY) or email [nswbuy@services.nsw.gov.au](mailto:nswbuy@services.nsw.gov.au)

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## Related policy and guidelines

[NSW Government Procurement Policy](#)

[NSW Government Code of Practice for Procurement](#)

[NSW Government Tendering Guidelines](#)

[Quality Management Systems Guidelines](#)

[Prequalification of Service Providers Guidelines](#)

[Insurance for Government Construction Projects Guidelines](#)

## Related Instruments

[NSW Public Sector Employment and Management Act 2002](#)

[NSW State Owned Corporations Act 1989](#)

[NSW OHS Act 2000](#)

[NSW OHS Regulation 2001](#)

[NSW Building and Construction Industry Security of Payment Act 1999](#)

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# 1 Introduction

## 1.1 Purpose and scope of guidelines

These guidelines have been developed to assist NSW government [agencies](#), project managers engaged by agencies, and other entities to plan and deliver public sector built assets valued to \$1 million.

The guidelines are issued under the [NSW Government Procurement Policy](#).

The scope extends from project definition to completion. It includes engaging service providers (including expert advisor and design consultants), design and documentation, and contract management at each stage of the design and construction of the works involved. It includes guidance on appropriate procurement system elements, practice, procedures and tools.

The guidelines are not intended to cover long-term maintenance contracts, or goods and services supply contracts, or the specific agency requirements of construction projects.

## 1.2 Context in the NSW Government procurement policy framework

The [NSW Government Procurement Policy](#) aims to achieve value for money and improved [procurement](#) outcomes of NSW government agencies. The [NSW Government Code of Practice for Procurement](#) sets out the responsibilities and standards of behaviour expected of the parties undertaking procurement activities. The Policy, Code of Practice for Procurement, these guidelines and other guidelines documented on the [NSW Government Procurement](#) website form part of the [Procurement Framework](#). [The six step process](#) guides agencies through each stage of the procurement process for the construction of buildings, engineering, maintenance, landscaping and demolition activities.

Agencies are encouraged to use expert advisors and other service providers, including other agencies, to assist them in managing the delivery of [construction](#) projects valued to \$1 million, to the extent that the resources and experienced personnel required are not available in the agency. The agency must have the protocols needed for managing such projects, and they and/or the expert advisors or other agencies used must have an appropriate procurement system, and associated procedures, and use suitably experienced personnel.

## 1.3 Principles applying

The following principles apply to construction project delivery and personnel:

- the standards of behaviour set out in the [NSW Government Code of Practice for Procurement](#) apply to agencies and service providers
- the initiating agency is responsible for the final project outcomes
- the funding of associated work and maintenance of the constructed works must be taken into account in the planning and approval processes
- effective planning is fundamental to [project](#) success, and decisions taken at the earliest stages of project development will have the most impact on the constructed works and its delivery and operation

- the cost of changing a project increases substantially as the planning and delivery progress
- contracts with consultants and contractors (as service providers) should always be documented using standard form conditions (as identified in the guidelines) and project specific documentation developed by appropriately skilled and experienced persons
- agencies must have the appropriate authority to undertake the construction procurement, and the contractual, financial and administrative delegations provided to their officers by a Minister, corporation chief executive or other appropriate legal authority (as defined in agency protocols or provided through another agency). This is to allow for the management/procurement processes including delegates to act for the Principal under contracts, bearing in mind the obligations agencies have under the [Public Authorities \(Financial Arrangements\) Act 1987](#), the [Treasurer's Directions](#) and other legislation
- design and construction management activities must only be undertaken by skilled and experienced agency personnel or expert advisers engaged by the agency
- tenders must not be called for any work until at least a detailed estimate has been prepared of the cost of the work and sufficient funds are available
- contracts must only be entered into with and by appropriate legal entities
- all personnel and organisations involved in the design and construction for the project, including any volunteers, must be appropriately qualified and insured prior to commencing work
- the ownership of new built assets on NSW government land vests in the NSW Government even when funds are donated by others for the assets
- the [NSW Government Procurement Policy](#) applies to all government departments, statutory authorities, trusts and other government entities. State Owned Corporations under the [NSW State Owned Corporations Act 1989](#) are exempt, although they are encouraged to adopt aspects of the Policy that are consistent with their corporate intent
- the [NSW Government Procurement System for Construction guidelines](#) apply to all construction projects when specified by the Principal.

## 1.4 Further assistance

Agencies may obtain assistance with procurement from the [NSW Government Procurement](#) website.

# 2 Project definition

This Section provides assistance in defining a project, including a project [brief](#) and [budget](#). It includes typical planning, investigation, stakeholder input and approval steps necessary to establish the scope and feasibility of the project.

## 2.1 Set up a project team

Before a project can be fully defined, a team needs to be appointed to manage the definition process that is commensurate with the project size and complexity. Project governance needs to be established based on agency protocols, including authorities to approve budgets, the expenditure of funds, the procurement strategy, and defining roles, responsibilities and reporting relationships. The project team would ideally consist of:

- agency or consultant design professionals
- representatives of the users or customers of the service
- major stakeholder representatives
- a skilled and experienced cost estimator
- project/contract manager personnel to advise on procurement matters and manage the related processes.

The members of the team should have sufficient knowledge, people skills, organisational skills and team participation skills to undertake the various activities in defining the project. Specific skills may be covered in the team or through consultants/expert advisers.

## 2.2 Identify and engage stakeholders

The significant project stakeholders need to be identified early and invited to provide their views and input. This may include representatives of local interest and community groups, and would include end user management and personnel, and representatives of relevant authorities such as the local council.

From this group a consultation committee may be established to provide stakeholder input and advice to the agency responsible for the project. These could deal not only with the design and nature of the end product, but with the way the proposed asset will be constructed, funded, maintained and operated. The anticipated cost of liaising with stakeholders must be included in the project cost estimates and budget.

Records would be taken of all contacts with stakeholders, and their input, including their needs and concerns, specifically considered and addressed.

## 2.3 Develop the project definition

Project definition should concentrate on what is needed to give the required outcomes. Initially the definition includes assessing and confirming end user needs, establishing clear project functional and operational requirements, and the early identification of project scope, in a project [brief](#).

Better project definition and early planning reduces the owners' risk, and the potential for project deficiencies in the later stages. For example, if early planning phases are rushed or under-resourced, construction costs may rise due to incomplete, defective or uncoordinated design and/or contract documentation leading to scope creep, variation claims, dispute costs and delay costs.

The brief must be confirmed prior to any development of a subsequent design brief and [concept design](#), or any design development. Late brief changes will involve cost penalties and should be avoided.

Defining the brief and subsequently the concept design would typically include decisions on the following as they relate to the proposed constructed works:

- the location or optional locations
- size of spaces and/or elements and other facility capacities
- interrelationships between spaces and elements
- overall sizes and dimensions
- community infrastructure support required
- services requirements, eg level and type of ventilation/air-conditioning
- fitments to be included, including specialist operational equipment
- the timing for pre-construction and construction and occupation.
- budget

An overall project timetable is also required, allowing appropriate amounts of time for each phase of the project. Not allowing sufficient time will adversely affect the cost and possibly the quality and acceptability of the final product. Contingency allowances would be included in the time targets set, and progressively reviewed and adjusted, to reflect the current stage of project planning and delivery, and the current and future risks.

Potentially, there is a wide range of factors to be considered, with associated risks and potential cost impacts, in defining a project. They will vary considerably depending on the type of project (eg civil engineering or building). The following are factors that often need to be considered with their associated risks:

- land availability and purchases
- site investigations, surveys and preparation
- demolition and enabling works, including site services
- effects on adjoining premises or activities (especially on a site in use)
- temporary accommodation
- site services availability including water, electricity, sewerage, stormwater
- Environmental Impact Statement (EIS) or Review of Environmental Factors (REF) and development approvals.
- performance and purpose of new assets, eg accommodation schedule
- involvement of Aboriginal communities in the development
- technical requirements, such as asset design and use standards
- external works and infrastructure support capacity required
- future expansion allowance
- use of other spare assets

- availability of potential service providers
- funding available, including for pre-construction activities, project management and recurrent operational costs and cost escalation
- critical completion dates.

### **2.3.1 Planning and development**

Planning and development is carried out in NSW under the [Environmental Planning and Assessment Act 1979](#) and [Environmental Planning and Assessment Regulation 2000](#).

The steps involved in the development assessment process are described on the [NSW Department of Planning](#) website. This includes the application lodgement, public consultation, assessment by the relevant council or Minister, approval to begin work, principal certifying authority approval, approval to occupy and a compliance check.

The Department of Planning website also includes copies of planning policies, including [State Environmental Planning Policies](#), and a list of development control plans that may apply to agency projects.

### **2.3.2 Assess external impacts**

There are matters that are not an obvious part of the project that need to be addressed as part of the project. This could include the need for power main or other infrastructure upgrades, special methods of avoiding wider environmental damage, new access roads and approaches to the site, managing any changes in the surroundings and local community, managing health and safety risks of existing users on the site and the public, and the like.

### **2.3.3 Undertake studies**

Specialist experts may need to be engaged to undertake various studies at this early stage to examine the affordability and technical feasibility of the project, explore issues and assist the project team to understand the full nature and scope of the project.

This could include a value management study which involves the identification of requirements that will add value to a project through the consideration of all options, alternatives and innovative ideas. This is achieved at a facilitated workshop, usually run by a specialist facilitator. For details refer to the NSW Treasury Total Asset Management [Value Management Guideline](#).

### **2.3.4 Evaluate operational costs**

Project feasibility may depend on the type and amount of asset operating costs that will apply, such as those for water usage, power usage, asset and public liability insurance, cleaning and maintenance. Different user costs associated with accessing the asset by road and rail may also apply. Operational cost budgets may need to allow for such costs.

### **2.3.5 Identifying potential service providers**

The market conditions applying for consultants and contractors for the type of work involved need to be considered and addressed. For example, shortages of capable contractors or skilled tradespersons may affect the cost and timely completion of the work. Another consideration is the availability of insurance (including for professional indemnity) to consultants and contractors to cover the higher risk work elements (eg structural design engineering work), and whether agency arranged insurance would be more economical and provide better cover.

### **2.3.6 Future development of the constructed works**

Consideration also needs to be given to allowing for the future expansion of the proposed assets, such as providing sufficient sub-structure and making other structural allowance for any future additional accommodation or facilities that are envisaged with the constructed works.

### **2.3.7 Risks associated with the project**

An assessment needs to be undertaken of the project risks involved, including in the design and construction of the asset, and the allowances required for cost and time risks.

The assessment would identify the project-related risks, the impact and likelihood of each risk event to identify the significant risks, and the actions and management measures to be implemented to address the significant risks. It would be reviewed and updated at key stages of the procurement as the risks changed.

It is often the case that smaller projects can involve as much, or more, risk than larger projects. Risks may include work safety (such as near overhead power lines), safety of adjoining structures and users, the possible cost of rectifying existing infrastructure if damaged by the work (eg major water and sewer mains, trunk communications cables and power services), and the cost of alternative accommodation with longer project delivery or with disruptions to an existing operation.

The stakeholders should assist in identifying many of the risks.

Some risks are insurable and an assessment needs to be undertaken at the project definition stage of the insurance required and whether extraordinary insurable and other risks and costs are involved requiring special insurance or other measures. Many risks are addressed by using appropriate procurement procedures and standard contract documents and approaches.

Further information on procurement risk can be found in the NSW Treasury Total Asset Management [Risk Management Guideline](#).

### **2.3.8 Summary project definition report**

A summary report would be prepared that includes the developed project brief or other scope definition, preliminary capital cost estimate, initial overall program, feasibility study with estimated operational costs, together with a risk assessment study.

## **2.4 Budget preparation**

### **2.4.1 Budget components and coverage**

A major responsibility of the project team is the preparation of estimates leading up to a project [budget](#) for the built asset. This is followed by the monitoring against that budget through the course of the project.

The basic principle is that the approved project budget is not exceeded except under exceptional circumstances such as scope and budget changes.

It is important that this is carried out to ensure that all anticipated costs are included. These may include the:

- agency administration, governance costs, reporting, and records management
- investigations, reports, studies including those undertaken by consultants

- local government planning applications and contributions
- design briefing
- contract development & design consultancies (engineers, architects, etc)
- estimating consulting fees
- tendering and service provider selection
- land clearing, demolition; site remediation and other site works
- temporary works, access works and protective structures
- project management
- fixed furniture and equipment
- contract legal costs
- principal arranged insurance premiums
- principal supplied services, products and materials
- accounting costs
- contingency
- escalation costs to allow for inflation. (Note: [The Building Price Index](#) used for building construction cost movement is available from the [NSW Department of Services, Technology and Administration](#) website.

Other costs which may apply are those associated with land acquisition, occupation, loose furniture and equipment.

#### **2.4.2 Estimate and budget stages**

The budget development process will vary based on the circumstances of the project.

The steps involved would normally include the preparation of the following at the indicated steps in the procurement framework:

- an indicative and preliminary budget estimate at step 1. These include all project costs including, usually, a high contingency component corresponding to the many unknowns that are usual at this stage of procurement. This contingency is expected to be less at step 3 when many unknowns become apparent;
- the project budget during step 2, also including consistency with the scope uncertainty and project risks;
- project cost checks during step 4 'contract documentation' up to the preparation of the pre-tender estimate; and
- the full project amount is to be calculated before project award. This is essentially the sum of money available to deliver the project through the construction and operational maintenance ie steps 4 and 5.

The amount of contingency is expected to reduce as a proportion of the budget as the uncertainties reduce during the course of the project. Contingency allowances are made to accommodate project uncertainty and should not be used to fund unplanned project scope increases.

In addition to the capital cost estimates, the costs of energy consumption should be used to develop the best environmental solutions for the design.

The evaluation of the estimates and budget usually requires the services of a quantity surveyor or civil engineering estimator, depending on the nature of the project.

It may be necessary to reduce the scope, service levels and/or standards of the project where the estimated capital cost is too high or to redesign the operational systems proposed where the estimated operational costs exceed the recurrent funding expected or feasible.

## **2.5 Submission for funding approval**

Approval must be sought and obtained from agency senior management (to suit NSW Treasury approvals), in accordance with the agency and project governance protocols, for the funding required and to proceed beyond the project definition stage. This also applies when the project is funded internally or has been donated or provided by another non-Treasury source.

Agencies should ensure that budgets are adequately prepared for inclusion where required in the Infrastructure Statement (also known as Budget Paper No 4). Further information is available from [NSW Treasury](#).

# 3 Procurement strategy

This Section assists in the selection of an appropriate procurement strategy following the project definition. The emphasis is on project and contracting arrangements required for the design and construction.

## 3.1 Procurement strategies generally

A major planning responsibility is to select the procurement strategy that is best suited to the circumstances of the project. The procurement strategy identifies the project and contracting arrangements or method of obtaining services for the design and construction phases of the project (refer to the [NSW Government Procurement Methodology Guidelines for Construction](#)). It provides a description of the proposed project governance, project team roles, team responsibilities, team authorities and reporting procedures, more detailed programs, development and other approval requirements, and procurement method including specific tender processes and the contracting approach.

There are a number of methods for procuring construction works. Each involves choosing a management system and a contract system. These vary depending on the service providers to be used and how risks are allocated between the [Principal](#) and the service providers.

The management approach can range from close agency involvement to a largely 'outsourced' arrangement.

On one hand an agency can directly project manage (possibly with expert adviser assistance) the full design and construction of the works using service providers to cover many of the risks, while managing (and insuring against some of) the remaining agency risks. At the other extreme the agency may arrange for a project manager organisation to manage all the work involved (including through design and construction service providers) and ensure all the organisations involved are allocated appropriate responsibilities and are appropriately insured. There are other options between these extremes such as the agency undertaking the initial development of design and then engaging a project manager organisation to manage the balance of the work.

The risk management with all options includes such matters as managing community expectations, public relations, and other stakeholder expectations and responses.

With any procurement strategy, irrespective of the approach taken, the procuring agency retains responsibility for achieving the project objectives, including the 'owners' risk' with achieving the service outcomes expected with the constructed works.

When considering a procurement method, refer to section [3.2.1, Further Considerations to Aid Method Selection](#), for guidance. The selection process requires experienced judgement, and depends on current market conditions, agency capability to manage service providers and the project together with project requirements and characteristics.

For further information on procurement strategy formulation, refer to the Procurement System for Construction [Procurement Strategy Practice Guide](#).

## 3.2 Management of the project

The selection of an appropriate procurement method includes the management system, for management of the project through all its stages to asset 'hand-over' and occupation. The project management team would normally involve a project manager (agency, private sector or other agency person or team) and/or agency personnel and/or other expert advisers. The team may vary for the planning, design and construction phases.

This includes managing the following:

### 1. Preparation of the project brief

Agencies must have a major input in producing the project brief to ensure it defines the overall project scope, is sufficiently detailed and meets the agency's requirements. This preparation will involve liaison with stakeholders, including end users, the responsible local government authority, and energy and water authorities. A project manager organisation or another agency or other expert advisor may be engaged to provide assistance with the preparation.

### 2. Design

Pre-construction activities, such as planning, investigating detailed service/user needs and the work site, preparation and validation of design options, [concept design](#) development, detailed [design](#) and [documentation](#) may be carried out by in-house agency personnel, other agency personnel, [consultants](#) engaged directly by the agency or another agency, and contractors under D&C or DD&C contracts possibly using their [service providers](#).

It is important that individual designers contributing to the process, such as subconsultants, are managed by a design manager who undertakes or arranges the coordination of the design.

### 3. Calling and evaluating tenders from consultants and contractors and awarding contracts

This is an essential part of project management that should ensure fairness to all potential service providers, process probity and value for money. If the agency does not have sufficient skilled personnel to manage tendering and evaluation, a project manager organisation or other agency would be engaged to assist.

### 4. Managing contract performance and the project budget

Personnel are required to manage the interests and obligations of, and act for, the Principal with each contract. This includes monitoring and ensuring the required performance of service providers. This is an essential agency responsibility. The roles may be undertaken by agency personnel or personnel provided by a project manager organisation engaged by the agency. The activities usually involve directly inspecting the contract output, communicating about the conduct and acceptance of work, managing any variations/claims and costs to suit the budget, and regular [audits](#) of the service providers' management and performance (also [see Section 6, Contract Management](#)). Persons undertaking these tasks need extensive experience in contract management, risk management and management reviews.

Where a project management organisation is used, the engagement of this organisation must be managed by the agency (possibly with expert adviser assistance) to address its owner's interests and obligations.

#### 3.2.1 Further considerations to aid method selection

When selecting a procurement method, the project characteristics, constraints and risks must be considered (including the following) and matched to the various characteristics, advantages and disadvantages of the systems available, to suit the

agency and the overall risks/benefits involved. With regular and more routine projects, one particular option will often clearly be the best.

#### **Agency constraints:**

- available budget and its flexibility, eg different funding sources involved
- available funding contingencies
- project timing and related cash flow requirements
- level of cash flow certainty required
- required time for completion and timing flexibility
- work staging needs and approvals, such as development approvals
- completeness and clarity of brief
- agency influence required with design and early design certainty required
- design standards available for specifying special details, finishes and services, and reducing design risks and facilitating brief preparation
- agency preferences generally, including for inclusion of design/maintenance in construction contracts
- supply and installation of specialist operational equipment and proprietary products involved
- commissioning and occupancy planning, staff induction and training.

#### **Organisational constraints:**

- availability of appropriate in-house agency resources and personnel (including expertise in design, design and construction/contract management, and the availability of agency use of procurement procedures and tools)
- any agency-imposed resource limits and other business rules (eg insurance conditions, licence conditions, procurement policies and the implications of legislation).

#### **Physical constraints:**

- work type, eg new work or refurbishment of existing structure
- existing site characteristics, eg work in occupied premises or to be connected to existing facilities, protection of people on site, including under legislation such as that relating to child protection
- scope and complexity of the work
- location of work site, eg close to or remote from resources, or having other particular local constraints or needs.

To ensure all options are available, early decisions are needed on the management system and delivery system proposed.

### **3.3 Approval of the procurement method**

Approval must be obtained from agency senior management for the procurement method proposed before proceeding beyond this step, in accordance with the governance protocols for the agency and project. The procurement strategy is also part of the approved business case. See the [NSW Treasury Guidelines for Capital Business Cases](#) which, whilst not mandatory for projects under \$1million, are encouraged.

# 4 Tender documentation

This Section provides guidance on the preparation of tender documents for contracts with project managers, other consultants and construction contractors.

## 4.1 Generally

[Request for tender \(RFT\) documents](#) must be prepared to suit the procurement strategy selected.

Contract documents will be required for the engagement of a project manager organisation to manage part or the whole of the project (if not being carried out by the agency). The [Agency Accreditation Scheme](#) applies to projects and programs of work over \$1million, however it is available as a resource to agencies to engage a consultant(s) to prepare design and documentation, and to engage a construction contractor(s).

Generally RFT documents comprise:

- conditions of tendering
- tender form and pricing schedules
- returnable schedules of information
- standard conditions of contract
- descriptions of the work and/or services required, which may include a brief, performance requirements, design information, technical specifications and drawings.

Conditions of tendering do not form part of the contract documents and are included to:

- explain the roles and obligations of all parties in the RFT or tender process
- define what is to be provided for a tender to be conforming, and what/when non-conformances may/would bar consideration of a tender
- define the tender process with the conditions under which it may change
- describe how a tender is to be submitted, and when and where tenders will close ([tender box](#) and [Tender Closing Office](#))
- outline the assessment criteria and their weightings (where needed), and information that will be used in the evaluation of tenders
- where appropriate, encourage tenderers to offer [alternative tenders](#).

Tender documents must be prepared by persons with sufficient expertise, whether from the agency or another agency, or provided by a consultant. Appropriate approvals should be obtained for the tender documents and their use.

Agencies must follow the NSW Government's requirements for tender advertising and [contract disclosure](#).

The contract documents should be based on tried and proven standard contract forms used by the NSW government agencies involved in major construction for the types of contracts involved. These forms would normally use the [NSW Government GC21 General Conditions of Contract](#), [Minor Works \(MW21\)](#) or [Mini Minor Works](#) (which allow for design and construction but require adjustments to include any maintenance), and [standard consultant agreement forms](#) (including for

consultant management services). Templates for [GC21](#), [Minor Works](#) and [Mini Minor Works](#) based contracts and guidance materials are available at the [NSW Government Procurement](#) website.

The [Minor Works General Conditions of Contract](#) (MW21) are generally used for contracts valued at up to \$1million. The [GC21 General Conditions of Contract](#) are used for contracts valued at over \$1million, that are not straightforward, and/or require multiple completion times, closer control over contract work and/or other contract condition enhancements.

A [Mini Minor Works](#) form is available for use with very small (valued under \$150,000) or simple contracts (valued at up to, say, \$250,000). [Consultant agreement/contract forms](#) (including for a consultant project manager services) are also available.

The templates for the above contract systems also include special conditions of contract (preliminaries) and conditions of tendering. The templates and guidance material provide consistent forms and user guides to assist documenters to ensure appropriate tender and contract documents are produced.

Access to these documents and user guide material can also be obtained from the [NSW Government Procurement](#) website.

The standard commercial conditions in these contract forms cover matters such as conditions of payment, work quality, insurance, variations, extensions of time, government policy compliance, quality management, OHS management, environmental management, dispute resolution, defect rectification, defaults, contract work suspension and contract termination. These would be used for tender and contract documents, after selecting from the related options available to suit the contract proposed, and adding a brief/design details and/or technical specification and drawings (to suit the design provided by the Principal and required of the service provider).

Other conditions of contract sometimes suggested and used by private sector service providers should only be used with care and expert advice as they may unreasonably favour the interests of the service provider and omit conditions required under the [NSW Government Procurement Policy](#), or include obligations for agencies which are contrary to government policy or legislation relating to public sector management and conduct.

The recommended forms specify the management systems/plans that the service provider should provide for the work. The required plans document the methods the service provider is to use to achieve (and show it is delivering) the specified outcomes and prevent rework. For example, the system/plan used by a design consultant would be to ensure and demonstrate it has considered the necessary inputs into the design and delivered the outputs according to the brief and contract. The NSW government [Quality Management Systems Guidelines](#), based on AS/NZS ISO 9001:2000 Quality Management Systems, provide a basis for the selection of an appropriate system and plans for quality management. The [OHS Management Systems Guidelines](#) should be specified as they have specific requirements for contracts with a value less than \$1M. The [Environmental Management Systems Guidelines](#) may be used for specifying the scope of an Environmental Management Plan.

More detailed guidance on tender processes is available in the [NSW Government Tendering Guidelines](#).

It is noted that contracts with project managers and consultants are often termed 'engagements' or 'agreements' rather than contracts.

Generally, rather than calling open tenders, it is preferable that consultants and contractors are engaged, following a tender process involving tenderers selected

from a prequalified list (under a prequalification scheme) or short-listed (after a pre-registration process) set up by the agency as outlined in the following section.

## 4.2 Parties to a contract

A [contract](#) is usually between two parties and assigns obligations and rights to each party.

The parties to a contract must voluntarily consent to the creation of the contract. Typically, a contract arises when one party (an offeror) makes an offer, and the party to whom the offer is made (an offeree) accepts the offer.

The parties to a contract must understand that the formation of a contractual relationship is being contemplated, and comprehend the general nature of the contract, before it will be created.

In these guidelines the two contracting parties with agency contracts are (1) the [Principal](#) and (2) a project manager organisation, other consultant or contractor as the service provider. These service providers would also enter subcontracts with their service providers.

The Principal must be an entity that is legally capable of entering the contract. For example the Principal could be an agency that is a NSW Government State Owned Corporation or Authority, or a Minister of the Crown for the State of New South Wales.

The project manager organisation, other consultant or contractor must be a recognised and acceptable legal entity with sufficient financial assets to cover its contract risks, and may be a sole trader (individual), partnership, or corporation capable of entering into a contractual relationship.

## 4.3 Authority to represent and act

The standard contract forms, referred to above, and contract documents must require both parties to the contract to nominate a person to act and give (in the case of the Principal) and take (in the case of the service provider) directions on their behalf.

The Principal then nominates a person to fill the role of Principal's representative (or authorised person under [GC21](#), [Minor Works](#) and [Mini Minor Works](#)). That person should be experienced in contract management and have experience in the type of contract awarded. A person skilled in contract management from a project manager organisation or another agency may be nominated. No appointment of such a person will remove the agency's responsibility, under a contract as, or for, the Principal, as 'buyer' of the work and/or services.

## 4.4 Responsibilities

The rights and obligations of the parties to a contract must be clearly described in the contract documents. The terms of the contract should be clear and unambiguous. The [standard contract forms](#) referred above cover the general conditions applying under the types of contracts involved. The applicable options for the contract must be selected and contract specific conditions must be added.

A prime responsibility of the representatives of the parties to a contract is to become conversant with the requirements of the contract. Whilst each comparable

NSW government contract involving construction activities would generally have similar general requirements, each contract is unique.

Under any contract, the Principal's obligations, acting reasonably through its representative, would particularly include:

- compliance with the [NSW Government Code of Practice for Procurement](#)
- appointment of representatives and agents who are able to act under the terms of the contract
- provision of access to the work site (for contracts involving construction)
- timely supply of information and documentation (and possibly other materials, products or services) to the service provider
- timely issue of payment schedules, and making of progress and final payments, for construction contracts in accordance with the [NSW Building and Construction Industry Security of Payment Act 1999](#)
- receipt, secure storage and release when required of any security undertakings or bank guarantees provided by the service provider
- receipt and reasonable assessment of claims for any additional work, and making reasonable attempts to agree on, and help resolve disputed claims and issues, with expert assistance where required.

The obligations of the consultant and contractor (as applicable), in most cases acting through representatives, normally would include:

- compliance with the [NSW Government Code of Practice for Procurement](#) (always included)
- completion of the contract work in the agreed time for the agreed price
- achieving the specified quality without defects or non-conformities
- identification of representatives who have the required authority under the terms of the contract, and who understand the requirements of the contract
- timely provision of progress and final payment claims
- provision of security undertakings or bank guarantees as specified
- provision of reasonable claims for any additional work, and making reasonable attempts to agree on, and assist the resolution of disputed, claims and issues
- compliance with all statutory requirements relevant to the work under the contract
- maintaining current insurance policies as required under the contract
- provision of competent management and technical personnel
- provision of all labour, plant and materials necessary for the performance and completion of the work
- provision and maintenance of all work site facilities to enable the efficient performance of the work (for contracts involving construction)
- cooperation with those other parties entitled to access to the work site and areas adjacent
- development and maintenance of a current contract program
- management of industrial relations with employees in accordance with the relevant awards and agreements, and contract requirements

- maintenance of the welfare, health and safety and of all persons who may be affected by the work, including ensuring that employees (including of subcontractors/subconsultants) are adequately trained, and identify and observe safe working procedures for contracts involving construction in accordance with the [NSW OHS Act 2000](#) and the [NSW OHS Regulation 2001](#)
- co-ordination of all aspects of the work under the contract
- implementation of quality and other management systems and plans for all aspects of the work, as specified.

## 4.5 Project manager tender and contract documents

Where an [agency](#) seeks the services of a project manager organisation to manage the delivery of the constructed works, the tender and contract documents used should clearly specify all the services required. These can range from just managing the development of a project brief and the project definition, and/or the preparation of consultant tender documents, to acting for the Principal in managing consultant and contractor contracts.

Refer to the [NSW Government Procurement](#) website for a template to assist in the development of [project manager tender and contract documents](#). The template includes a comprehensive deliverables list covering the scope of services generally required. This document is designed for larger projects, but can be adapted to apply to project management services for smaller projects.

The obligations of the project manager organisation normally would include:

- compliance with the [NSW Government Code of Practice for Procurement](#) (always included)
- represent the agency's interests with, and manage the involvement of, stakeholders
- develop the project definition report, including the project brief
- ensure the adequacy of tender documents before tenders are called, and participate in and manage the tender processes
- prepare a pre-tender report, including pre-tender estimate
- prepare a report on the tenders received and their evaluation with acceptance recommendations
- prepare, submit and follow up development and planning applications
- provide a report on the consideration and selection of the most appropriate procurement method
- develop consultant services scope descriptions
- review service provider outputs against their services requirements
- provide persons to act as the Principal's representative under contracts and administer contracts
- ensure the required insurance coverage is held by service providers
- monitor and report on service provider performance, and take any necessary corrective action
- instruct variations to service provider work with the authorisation of the agency

- prepare an overall program for the project, and monitor and report on progress relative to the program
- ensure contract requirements, including OHS and other management requirements, are being met
- prepare reports at monthly intervals to the agency on the status of the project, including variation claims made and agreed and forecast end costs and completion dates.

The project manager is expected to advance actively the project and not simply act as an intermediary between the agency and service providers. Refer to the [Managing Project Management Services Engagements Practice Guide](#) for further information.

## 4.6 Consultant tender and contract documents

Refer to the [NSW Government Procurement](#) website for a template to assist in the development of [consultant tender and contract documents](#).

These templates cover a range of commercial contractual requirements and are available in two contract categories, where the estimated value of the services proposed is (1) up to \$30,000, and (2) above \$30,000. The templates cover the use of the subconsultants necessary to assist in the provision of the services.

Whilst the templates provide general requirements and cover the general interests and obligations of the Principal, the agency (possibly using project manager personnel) must complete the specific contract details, including clearly specifying the specific services to be provided.

The services will vary but could include:

- assistance in the development of the project brief and project definition
- providing specialist investigation outputs and advice
- development of a concept design and detailed design with the involvement of all necessary subconsultants, including specialists to undertake any necessary studies
- development of specifications for tender documents for construction
- implementing a quality management system/plan, including design control and verification measures to ensure all the requirements for the services are covered
- ensuring the services comply with all relevant legislation and regulations, including design compliance with the [Building Code of Australia](#)
- specifying and allowing in design for noise level restrictions to be met both with the constructed works and during construction;
- ensuring that design is able to be constructed
- allowing in design for any future extension of the constructed works
- allowing in design for the cost effective and safe operation and maintenance of the constructed works (see [Section 5](#))
- inclusion of the required asset facilities in design eg provision for disabled persons
- implementation of specific energy saving measures in design
- management of specific areas of environmental sensitivity in design

- management of the security and coordination of the design documents
- obtaining approvals from authorities
- arranging cost planning and estimating and comparison with the budget
- advising on trade-offs or scope changes in design to maintain the required project budget and timing
- ensuring the required insurance policies are held by subconsultants
- ensuring documents are promptly submitted at the various stages of the project program
- liaison with the agency and other stakeholders as necessary
- inspection and certification of the compliance of the constructed works eg structural engineering certification and [Building Code of Australia](#) compliance.

Consultant contracts must require compliance with the [NSW Government Code of Practice for Procurement](#).

The role of any project manager organisation in dealing with the other consultants and the other project relationships should also be described in the tender and contract documents.

## 4.7 Designing for safety

Design services also include:

- identifying potential hazards and analysing the associated risks to health and safety with the asset designed, in consultation with appropriately skilled and experienced people
- eliminating the hazards and risks where practicable, or effectively controlling the risks by design or, where this is not practicable, identifying asset operational requirements to control the risks
- establishing and providing a design hazard register for the designed asset to record any hazards not eliminated in the design that may impose a risk to those constructing, using or maintaining the asset.

## 4.8 Insurance for Consultants

Professional indemnity (PI) insurance covers professionals such as project manager organisations, architects, engineers and other consultants for the cost of some claims arising out of the professional services they provide, usually covering costs arising from their negligence and some other acts and omissions.

The NSW government [Insurance for Government Construction Projects Guidelines](#) provide assistance to agencies in deciding on the types and levels of insurance (including PI) cover that need to be specified.

The requirement for professionals providing services involving significant risks to hold professional indemnity insurance (including project manager and consultant organisations) is included in the [standard contract document templates](#) referred to in this Section, with provisions for the levels of cover required allowing for various risk levels.

These templates also include clauses requiring the consultant/contractor to indemnify the Principal for a range of possible costs and losses. The [Insurance for](#)

[Government Construction Projects Guidelines](#) also provide advice on the level of indemnity that consultants could attract and the indemnity they are likely to be able to cover without going beyond their reasonable capacity to cover liability.

## **4.9 Construction tender and contract documents**

### **4.9.1 Conditions of contract**

The selected procurement method and contract systems define the form and standard content of the construction contract documents required, including the extent of the contract design and/or design development responsibilities.

The contract forms required would be selected from the standard contract forms referred to in this Section. They allow for a range of design content options.

The standard conditions applicable would be included in tender documents with a work description, usually including a brief and/or technical specification and drawings.

### **4.9.2 Details of work**

The details and extent of all the work required under the proposed contract must be clearly defined in the tender and contract documents to avoid ambiguity and uncertainty. To avoid risks with obtaining the best value for money and reduce the likelihood of claims from the contractor and extra costs, the original scope of the contract should be clear and not be varied substantially by adding or omitting work.

There are various industry specification standards that provide guidance and template technical specifications for the various technical disciplines, eg [NATSPEC](#) and the [Water Services Specification \(WS-SPEC\)](#).

### **4.9.3 OHS management requirements**

It is essential that all contract documents specify that the service providers use a systematic approach to ensuring that the requirements of the [NSW OHS Act 2000](#) and the [NSW OHS Regulation 2001](#) are addressed. The [standard contract forms](#) referred to in this Section address many of these requirements.

The NSW government [OHS Management Systems Guidelines](#) have been developed to assist service providers set up OHS management systems and plans. These guidelines allow different nominal requirements for contracts valued at under \$1 million to those valued at over \$1 million, and under \$1 million involving OHS risks that require a more rigorous system. For contracts valued at under \$1 million, contractors are required to prepare and implement an acceptable Site-specific Safety Management Plan and Safe Work Method Statements. These are required to identify and specifically address the significant OHS hazards and risks associated with the particular work being undertaken on a site.

### **4.9.4 Environmental**

The [Building Code of Australia](#) provides minimum energy requirements for new buildings and major refurbishment. Building Code of Australia compliance is included as a contract requirement in the [standard contract forms](#) referred to in this Section. The standard contract forms specify that service providers use a systematic approach to environmental management.

#### **4.9.5 Proprietary items**

Brand names or proprietary items should only be used to describe work in tender and contract documents where this is the only satisfactory method of specifying the particular item requirements. If this is done, care must be taken not to exclude any other suitable available proprietary items and to allow specifically for equivalent items to be proposed by contractors. This is the approach taken in the [standard contract forms](#) referred to in this Section.

#### **4.9.6 Building and Construction Industry Long Service Levy**

The [Building and Construction Industry Long Service Payment Act 1986](#) requires contractors, for buildings being erected by the Crown, to pay the Long Service Levy (instead of the Crown paying it, as the Developer).

The Council/Development Authority/Consent Authority may be prevented from issuing the necessary Development Approval/Consent Authority if the levy had not been paid, so it is in the Principal's interest to have it confirmed that the payment has been made. This is covered in the [standard forms of contract](#).

#### **4.9.7 NSW government period contracts**

Agencies should consider arranging materials and equipment purchases under [NSW government current period contracts](#), both through the agency as Principal supplied items for the constructed works, and by nominating suppliers for contractors. These period contracts include items such as carpets, other floor finishes, fencing materials and gates and liquefied petroleum gas. Information on period contracts is available through the [NSW Buy](#) website.

The [standard contract forms](#) referred to in this Section allow for these options.

#### **4.9.8 Insurance requirements**

The [standard contract forms](#) referred to in this Section allow for the usual insurance required of contractors. Principal arranged insurance of the constructed works and public liability are often used by the construction agencies. The conditions require the policies also to cover the Principal/agency where this is possible.

Some agencies may not carry insurance for all their insurable risks, as the cost of insurance for some risks and types of work cannot be justified. Some agencies would have some cover through the [Treasury Managed Fund](#) (the self-insurance scheme owned and underwritten by the NSW Government). The agency's insurance cover should be checked for each project and the cover needed arranged, either through the service provider or by the agency. This is particularly important for the use and maintenance of the assets/works after construction, which is usually not covered by the insurance policies required under the design and construct contracts.

### **4.10 Project budget management**

During the development of design for contract documents, the project scope budget must be managed to ensure it is not exceeded. Particular areas required for management include

- consultant design and other service fees and costs
- contingencies for changes, contractor claims, uncertainties and other risks
- management and supervision fees and other related costs

- authority fees and charges (such as development approval fees, council and other authority charges and licence/approval fees)
- Principal arranged insurance premiums not paid by contractors
- Principal supplied services, products and materials.

## 4.11 Completion time

It is critical that the contract completion time(s) for the work is/are clearly specified in the tender and contract documents, and that the completion time(s) specified and other allowances in the project program are realistic and allow for:

- the needs of the agency with its involvement in the contract
- the actions required of others in supporting and responding to the service provider, including supplying data/documents, products, materials and services
- the availability of the work site and any site restrictions
- extensions of time that are inevitable and allowed for occurrences such as wet weather and other likely unavoidable delays
- the time realistically needed by the service provider, and the likely availability of resources, including labour, materials, plant and finance.

The standard contract forms referred to in this Section allow for the inclusion of liquidated damages, with the exception of [Mini Minor Works](#), and for common law damages to apply, as alternative options to cover the Principal's and/or client's costs if the completion of the contract is delayed due to events controllable by the contractor.

In project planning the agency may need to include a buffer to manage time-based risks with contracts. The contingencies buffer would be set in consultation with appropriately experienced construction practitioners and would not be disclosed in any contract documentation.

# 5 Service provider selection

*This section provides guidance on the selection of project managers, other consultants and construction contractors, including arranging tenders, tender evaluation and contract award.*

## 5.1 Generally

The selection of service providers must be based on the principles and practices outlined in the Procurement section of the [NSW Government Tendering Guidelines](#) (Tendering Guidelines) and the [NSW Government Code of Practice for Procurement](#). These apply to all government procurement. They require the agency to confirm the work can or cannot be done in-house, that sufficient funds are available for the work and that value for money can be achieved with the process proposed, before it embarks on a tender process.

The Tendering Guidelines provide agencies with a structured approach to planning and implementing tender and associated processes, and with information to assist in the choice of appropriate processes. They also provide guidance on how to ensure probity and fairness are achieved through all stages of the tender process. They emphasise the importance of maintaining records to demonstrate process compliance.

Special conditions apply with in-house bids in a tender process. Refer to Treasury Policy Paper [TPP 02-01, Policy Statement on the Application of Competitive Neutrality](#). See also [Premier's Circular PC2006-55, Department of Commerce as a Contractor to Agencies](#) and [Premier's Circular PC2008-40, the Roads and Traffic Authority as a Contractor to Agencies](#).

Refer to the [NSW Government Procurement](#) website for further information on the engagement of consultants.

It is important to note that the agency undertaking a tender process owes a duty of care to each tenderer. Agencies must not use the tender process to "test the market" or determine the "market price" of a part of the project. This is prohibited by the Tendering Guidelines.

Appropriate approvals must be obtained for requesting tenders, confirming the availability of sufficient funds (to suit the pre-tender cost estimate for the work) and the intention to proceed to a contract using the tender documents identified.

Persons involved in the evaluation of tenders should not have, or should declare and avoid, any [conflict of interest](#) with this involvement. After any such declaration, the continuing role of that person in the tender process, if any, would then be determined to ensure that process probity and fairness were maintained. Any conflict of interest and actions taken to manage and avoid the conflict would be documented. Refer to the [Independent Commission Against Corruption](#) (ICAC) for further information on appropriate conduct.

Each agency should have (or engage expert advisors/service providers that can provide) clearly defined, specific and detailed tender process procedures that comply with the requirements described above, and use these procedures in its tender processes.

In exceptional circumstances direct negotiation may be appropriate. Refer to the NSW government [Procurement by Direct Negotiation Practice Guide](#). Reference should also be made to the ICAC [Direct Negotiations - Guidelines For Managing](#)

[Risks in Direct Negotiations](#) to establish if there is a sound basis for direct negotiation. These guidelines can also provide advice on establishing a negotiation protocol and agreeing on a price.

## 5.2 Tender processes

For further information on tendering processes, refer to the [NSW Government Tendering Guidelines](#).

## 5.3 Prequalification schemes and pre-registration

### 5.3.1 General

The cost to agencies and industry is higher when it receives a larger number of tenders to evaluate, as is often the case with open tenders and with large numbers responding to calls for [Expressions of Interest](#) and applications for prequalification schemes.

Agencies should aim for an optimum arrangement that achieves reasonable competition between tenderers, while limiting the amount of unnecessary effort required in providing and evaluating the tenders. The use of existing prequalification schemes and pre-registration processes developed through multistage tendering, and limited tendering, have advantages over open tendering, because a set and limited number of potential service providers can be invited to tender. The prequalified and pre-registered organisations will have been assessed for the necessary basic skills, capacity and capability to undertake the category of work involved. This will not determine their relative capacity/capability as tenderers for a particular contract, which is evaluated in the tender stage of the process.

### 5.3.2 Pre-registration

A pre-registered panel of tenderers would be identified, following the calling for expressions of interest or for proposals for a particular contract, and the evaluation, ranking and short-listing of those expressing interest or providing a proposal for later tendering. This process would not usually be justified for smaller projects.

### 5.3.3 Prequalification

[Prequalification schemes](#) allow all prospective tenderers for particular categories and values of work to apply for prequalification during the life of a scheme or some shorter defined period. Those demonstrating the required capacity and capability are put on a list of prequalified organisations for each work category/value involved. Each selective tender panel of tenderers for a particular tender process is then selected from the applicable list using relative performance, capacity, past tendering opportunities offered and other merit-based selection criteria.

A prequalification scheme needs to be cost effective. A scheme and a prequalification list are only practical and economical when there is a continuing workload in a particular category of work. It is not economical to maintain under-utilised prequalification lists. It is not practical therefore to have prequalification lists for all categories of work.

Where appropriate, prequalification reduces the tendering cost, time and effort overall. It always reduces them for the individual second stage processes. Prequalified service providers generally perform better because of the performance monitoring and feedback involved with prequalification schemes.

NSW construction agencies, including the [Department of Services, Technology and Administration](#), maintain prequalification schemes for project managers, and a range of consultants and contractors for common work categories and values. Information on the [current selections of panels of potential service providers](#) under the Department of Services, Technology and Administration schemes are available from the [NSW Government Procurement](#) website. In some cases a fee may be involved to use a prequalification panel.

Note that in selecting the number of prospective tenderers from a prequalification list as a selective tender panel, one or two reserves are usually also chosen for use in the event that those initially selected and invited decline the opportunity to tender.

## 5.4 Number of potential service providers to invite to tender

The table below provides guidance on the minimum number of quotes or tenders required:

Value	Construction	Construction Related Consultancy (where Pre-qualification Scheme exists)	Other Consultancy	Goods and Services** (no existing State Contract)
Up to \$30,000	1	1	1	1
\$30,000 - 50,000	3	1	3*	3
\$50,000 - 150,000	3	3	3*	3
\$150,000 - 250,000	3*	3	Open Tender*	3
Over \$250,000	Open Tenders*	3	Open Tender*	Open Tender

\* Where a pre-qualification scheme is used, adopt the number specified by the scheme. If not specified in the prequalification scheme, a minimum of 3 is recommended.

\*\* This is in accordance with the State Contracts Control Board general purchasing delegation for non-construction work.

### 5.4.1 Consultants and project managers

These minimum numbers are generally in accordance with [Premier's Circular PC2004-17, Guidelines for Engagement and Use of Consultants](#), although the guidelines particularly apply to consultants that assist in management decision-making.

Where sufficient service providers cannot be obtained, for example in some regional areas, a lesser number can be invited.

### 5.4.2 Contractors

In selecting the number of tenderers for limited tendering or multistage panel, consideration should be given to the cost to tenderers of preparing a tender and minimising the cost overall. For example, the field of tenderers for a process that requires them to arrange design work and estimates from their potential

consultants for the tender, should be smaller due to the additional cost of estimating.

## 5.5 Pre-tender cost estimate

A [pre-tender estimate](#) must be prepared for the proposed contract work (as distinct from the project) and approved by agency senior management in accordance with the agency and project governance protocols before proceeding to request tenders.

Pre-tender estimates for routine work could be prepared by experienced agency personnel by comparing the work with work of a similar nature and/or estimating costs based on overall unit rates, such as \$ per linear or square metre, rather than by using a full detailed elemental cost analysis. The assistance of expert estimators such as consultant quantity surveyors would be required with determining estimates for more complicated or unfamiliar work and for assessing factors where they are relevant, such as market capacity, unusual input factor cost forecasts (labour, materials, and equipment) and regional considerations.

## 5.6 Tender planning considerations

The [Tendering Guidelines](#) emphasise other important matters that should be considered when planning tender processes. Critical issues are discussed below.

### 5.6.1 Preparation of a tender evaluation plan

A Tender Evaluation Plan (TEP) should be prepared for each tender process before tenders are called.

The TEP describes the people to be involved and the evaluation and approval process proposed, including the particular evaluation criteria (to suit the conditions of tendering) to be used and how they will be used, how probity and fairness will be ensured, and how value for money will be assessed and achieved.

Where a single consultant or contractor organisation is invited to submit a tender, a full TEP is usually not required. In these cases it remains for the agency to ensure in evaluating the tender that the services and work proposed meet the contract conditions and that value for money is achieved.

### 5.6.2 Tender documents

For all tender processes the party seeking tenders (and managing the [RFT](#)) must prepare a set of tender documents. They include the conditions of tendering and proposed contract conditions.

### 5.6.3 Duration of the tender period

The duration of the tender period must be sufficient to allow competitive and responsive tendering. It should allow sufficient time for tenders/prices from potential subconsultants, subcontractors and suppliers. Refer to the [Tendering Guidelines](#) for information on the minimum tender period.

Agencies must comply with the requirements of [Premier's Memorandum PM2007-01, Public Disclosure of Information Arising from NSW Government Tenders and Contracts](#).

### 5.6.4 Advertisement of tenders

Possible tenderers should be made aware of the opportunity to tender with open tendering through the [NSW Government eTendering System](#) and/or advertisements in newspapers local to the work site and to the likely tenderers' areas of operation,

in accordance with [Premier's Memorandum PM2010-08, Government Advertising Guidelines](#).

To enable potential subcontractors, suppliers and subconsultants to submit tenders to prospective tenderers on a selective tender panel or pre-registered panel, it is usual to display or advertise the names of these selected tenderers, and to make a set of tender documents available for inspection. The [NSW government eTendering](#) website lists proposed and current contract details, and can make tender documents available for inspection. Agencies can have their tender process and contract details added to this list.

### **5.6.5 Meetings with prospective tenderers**

During the tender period there may be a need to meet with the prospective tenderers. This will generally only occur where the work is more complex and needs discussion, special issues arise, important matters need to be emphasised, and/or it is advantageous to have all tenderers receive explanations and/or inspect the work site on the one occasion. Where such meetings are held, all prospective tenderers must be included. If the subject matter addressed were crucial to preparing a tender, attendance would be made mandatory however mandatory meetings should be an exception.

Any explanations should, where possible, refer exclusively to the tender documents, and should not be in conflict with or add to the tender documents, except where they are then formally amended with written addenda. The meetings must be minuted if they cover substantial issues, and the minutes forwarded to all prospective tenderers and incorporated into the tender documents as an addendum.

### **5.6.6 Contact person and clarification of tender documents**

A single contact person must be nominated in the tender documents to act for the Principal in the tender process. Tenderers may ask the Principal, through the nominated contact person, to clarify any parts of the tender documents that they find unclear or ambiguous. If a tenderer's question indicates that clarification of the documents is required, all prospective tenderers must be advised of the clarification by way of an addendum.

### **5.6.7 Closing of tenders**

Tenders must close at a place and time and on a day that will give all tenderers a reasonable opportunity to lodge a tender. Competitive tenders must close in a secure tender box. Tender boxes, whether physical, through facsimile equipment or electronic, and subsequent tender handling processes must ensure that tender confidentiality is maintained before and after close of tenders.

The tender box must be opened on time in the presence of, and the tenders received and recorded by, a minimum of two people who are aware of, and have undertaken to ensure, the confidentiality required. The security of information contained in the tenders must be ensured when opening the tender box and handling the tenders received. The accuracy of the tenderer legal entity names and ABN numbers, and content, condition (including the circumstances with any late tenders) and status of the tenders recorded must be ensured.

Refer to the [NSW Government Tendering Guidelines](#) and [NSW Government Code of Practice for Procurement](#) for guidance on the situations where late tenders may be considered while still ensuring the integrity of the process is maintained as required.

## 5.7 Tender evaluation

### 5.7.1 Evaluation

Refer to the [NSW Government Tendering Guidelines](#) for information on the evaluation of tenders.

### Financial Checks

The Department of Services, Technology and Administration has arranged and administers for all agencies, contracts with a consultant that can be used by agencies to assess the financial capacity of tenderers. Various set criteria are used for the assessments and other checks may also be used to suit agency needs. The details may be obtained from the [NSW Government Procurement](#) website.

Some trading entities do not have the legal capacity to enter contracts. Refer to the [NSW Government Tendering Guidelines](#) for guidance on what are acceptable and unacceptable legal entities.

### 5.7.2 Low tender warning

Where the preferred tender is priced significantly below the pre-tender estimate of the work (usually by more than 10%), it must be ensured that acceptance is only recommended where the tenderer confirms in writing that it fully understands the nature and extent of the work, and that its price allows for all its obligations under the proposed contract. It must also be checked and confirmed by the evaluators that the organisation has the capacity and resources to complete the work, without being financially distressed, without placing an undue burden on the contract managers, and without a significant risk of compromising the product, service or other work quality.

### 5.7.3 Meetings with tenderers

Tender evaluations may necessitate communications and meetings with one or more tenderers in contention to clarify tender details and resolve issues. Where a meeting is required to resolve substantial matters, senior evaluation personnel and tenderer representatives would normally attend. All clarifications would be confirmed in writing whether they involved a meeting or otherwise.

At least two people involved in the evaluation should be present at any such meetings to confirm process probity and fairness are maintained. Formal records should be taken of all such meetings covering the substantial matters involved.

### 5.7.4 Alternative tenders

Where the conditions of tendering allow them, any alternative tenders submitted should be considered with the conforming tenders to identify the preferred tenderer.

Any confidential [intellectual property](#) identified in the tenders with alternatives and otherwise must be kept confidential.

### 5.7.5 Evaluation report

The evaluation would be summarised in an evaluation report including a recommendation to accept a tender or list tenderers (with prequalification and pre-registration) to the approving authority applicable under agency protocols.

With tender processes involving larger (possibly for construction contracts valued at over \$1,000,000 and consultant contracts valued over \$250,000) and more

critical contracts, or where the relativity or nature of the tenders received is less certain, or where the process was not fully complying or unusual or complex, the evaluation report should be reviewed by a committee of, say, three experienced senior personnel, before referring the recommendation for approval. The review would question, verify and concur with (or otherwise, where a new report would be sought dealing with any concerns) the appropriateness, fairness and best value outcome of the tender process.

## **5.8 Contract award**

### **5.8.1 Award**

A contract is normally brought into being with the service provider by a written unconditional acceptance of its tender, with any agreed and documented adjustments, in a letter of award or acceptance issued by the Principal.

If new conditions are included in the letter of award, it is a counter offer that is subject to the acceptance of the proposed service provider before a contract is brought into being (and may not be accepted). Any such conditions should be confirmed as agreed adjustments before any letter of award is issued.

In some cases the agency may require a formal instrument of agreement (such as a deed of agreement) signed by both the parties. If required, the form of the instrument must be specified in the conditions of tendering.

The availability of the work site and the agency's preparedness for any other necessary actions required must be confirmed before any letter of award is issued. With construction contracts, any delay in giving possession of the work site or with any other actions by the Principal required may justify delay claims, extra contract payments and additional cost claims, and extensions of the time for completion of the contract work. Late action by the Principal with consultant contracts may also increase payments and delay completion.

The letter of award must clearly define the contract documents by referring to:

- the accepted tender, including the completed tender schedules, and the applicable parts of the tender documents, including the general and special conditions of contract, and any other documents, including technical specification and drawings
- any addenda issued during the tender period
- any post tender correspondence involved documenting agreed adjustments.

The original copies of all the documents forming the contract, including the letter of award and accepted tender, (sometimes referred to as the Bond Copy with construction projects) must be kept in a secure location for the duration of the contract and for eight years from the date of the final payment certificate. Copies of these documents are used in the management of the contract.

### **5.8.2 Notification of unsuccessful tenderers**

After a contract is awarded, the unsuccessful tenderers must be notified in accordance with the NSW government requirements.

In the case of a multi-stage tender process, the names and addresses of the shortlisted or prequalified entities must be disclosed. Unsuccessful tenderers and the accepted price should be displayed on a notice board where tenders closed

and/or electronically displayed on the [eTenders website](#) or otherwise disclosed. Unsuccessful tenderers applicants and respondents not prequalified or pre-registered must also be notified of the process outcomes.

On request, an unsuccessful tenderer is entitled to be debriefed on the strengths and weaknesses of its tender relative to the evaluation criteria, and the general basis of the selection decision. Details of other tenders and their evaluation must not be disclosed in the debriefings.

Tenderer complaints about a tender process should be directed to the agency responsible for the tender process, and the agency must have procedures in place for promptly and adequately investigating and responding to such complaints. The [standard conditions of tendering](#), in the standard contract conditions referred to in [Section 4](#), also invite tenderers to raise their complaints with the Chairperson, [State Contracts Control Board](#).

For further details on contract awards, debriefing unsuccessful tenderers and addressing tenderer complaints refer to the [NSW Government Tendering Guidelines](#) available from the [NSW Government Procurement](#) website. For further information on disclosure refer to [Premier's Memorandum PM2007-01, Public Disclosure of Information Arising from NSW Government Tenders and Contracts](#) and the [2009 Government Information \(Public Access\) Act](#).

# 6 Contract management

This section covers the major responsibilities of the parties following the formation of a contract with a project manager, other consultant or construction contractor.

## 6.1 General management

Contract management by an agency (possibly using a project manager organisation) is to ensure that the contractual obligations of the service provider are met, contract-related processes are completed (such as contract administration, design, construction, post-construction activities, service provision and/or manufacture/supply), the Principal's interests are protected and obligations are met, and that any changes and additional funding requirements are managed. Even where a project manager organisation is appointed, the agency remains responsible for the appropriate administration of each contract. Most of the parties' obligations are set out in the contract documents, however, there are some created by law that will not be stated in the contract.

Both parties to the contract have contract administration process roles. Under [GC21](#) based contracts the nominated authorised persons (and senior executives with disputes) represent the parties. Under [Minor Works \(MW21\)](#), [Mini Minor Works](#) and [standard consultant agreement](#) based contracts each party nominates a representative (with an agent also acting for the Principal with disputes). Refer to the standard forms outlined in [Section 4](#).

The personnel in these positions should have the necessary skills, knowledge and experience for the roles involved; and be capable of developing good working relationships with their counterparts. They must be given the necessary authority to fulfil their roles under the contract.

The Principal should appoint an employee or other person as a delegate, with authorities in accordance with the [Public Finance and Audit Act 1983](#) s12 (specific financial delegation from a Minister/agency is required for the commitment and expenditure of public monies, and administrative and contractual delegations are also required), to appoint its representatives and define their authorities. The appointed representatives (included with some approvals from the delegate or others to suit agency protocols) would then have the authority to, and would, act for the Principal under the contract.

For the Principal to discharge its contractual obligations (including where assisted by a project manager organisation) it must have the necessary systems, administrative procedures, authorities and structure to enable it to plan and implement the processes involved. This includes ensuring that payments are made, directions and notices are given, required response times are met and all other actions are taken in accordance with the conditions of the contract. Only some of these actions can be contracted out to a private sector project manager organisation and this must be addressed by the agency. The [Public Finance and Audit Act 1983](#) and [Public Finance and Audit Regulation 2010](#) limit those that may be given the authority to commit and incur the expenditure of public monies.

Where the Principal does not meet its contractual or other legal obligations, it will be exposed to claims under the contract and other legal actions.

## 6.2 Project OHS planning and implementation

Under the [standard construction contract forms](#) referred to in [Section 4](#), soon after contract award, a contractor is required to document and implement an [OHS management plan](#) for its design and construction work to cover and describe how it will fulfil its responsibilities for OHS on the work sites and otherwise. As outlined in [Section 4 \(OHS management requirements\)](#), the scope of the plan will depend on the scope of the work and the specific contractual arrangements.

As outlined in [Section 6](#), under these standard form conditions the main construction contractor is appointed by the Principal as the “principal contractor” and “controller of premises” under the [NSW OHS Regulation 2001](#).

An OHS management plan should also be documented and implemented to address how the agency (and any project manager organisation used) will meet its OHS responsibilities with the contract.

This should include:

- risk assessment
- responsibilities for each of the agency/manager site personnel
- site safety induction requirements (usually the role of the Principal Contractor)
- surveillance and auditing of the service provider activities including any design
- management of OHS records
- site safety committees, where applicable, (usually the role of Principal Contractor)
- personal protection equipment
- identifying, assessing and controlling safety hazards and risks associated with the contract management work, including to employees, and work site users/neighbours (eg school children, hospital patients, visitors and the public).

This plan should be coordinated with contractors’ plans and the roles under contracts.

Where the agency undertakes the construction work directly as or through a construction manager, it would be the “principal contractor” and “controller of premises” under the [NSW OHS Regulation 2001](#). In this case the scope of the agency plan would be far more extensive, and equivalent to the OHS management plan required of a construction contractor undertaking similar work. Taking on a construction manager role within an agency is high risk and should only be done by those having the appropriately qualified/experienced staff.

## 6.3 Managing work quality

The terms of most contracts, including the standard contract forms referred to in [Section 4](#), require consultants and contractors to manage their work quality by using a specified quality management system, including a management plan and/or inspection and test plans (ITPs). Refer to the [Quality Management Systems Guidelines](#) for examples of these ITPs and the requirements for management system and plans.

Under the quality management system requirements, the service provider is required to demonstrate to the Principal, with documentary evidence and

inspection and testing, that it is meeting its contractual and quality management obligations. This would involve ITP activities and output as a minimum. With more complex contracts it would involve formal audits by the contractor of the quality management system/plan implementation, and audits by the Principal where provided under the contract, or various reviews by both parties focussing on specific areas of the implementation.

Inspection and test plans document and identify opportunities for inspection at 'witness points' and 'hold points'. A 'witness point' is a specified event where the service provider is required to advise an inspector, and the Principal's representative where specified, that the work will be available for inspection. A 'hold point' is similar, except that the work cannot continue until the inspector, and Principal's representative where specified, have viewed the work and verified it conforms, eg steel reinforcement and formwork is appropriate prior to a concrete pour. Hold points should be limited to high risk activities as any delay in inspection by the Principal may result in a delay to the contract.

The extent of the involvement of the Principal's representative must be determined during the planning for the contract, and specified in the tender and contract documents. During construction, and depending upon the level of skill and competence displayed by the service provider, the amount of this inspection and other surveillance by the Principal's representative would be reduced or increased to suit the risks involved and service provider performance evident.

The Principal's representative should inform the service provider formally as soon as unsatisfactory work is identified, or other improvements were required from the service provider.

A service provider may have an integrated management system that not only deals with quality management, but also covers OHS and environmental management requirements.

Information on audits on implementation is available in the [Quality Management Systems Guidelines](#).

## 6.4 Meetings with service providers

During the course of a contract it is usual for the parties to meet regularly to review progress and performance, ensure a common understanding of any issues and to facilitate the actions required. This is often a contract requirement (such as a start-up workshop, monitoring and close-out meetings under [GC21](#) based contracts). Such meetings are essential to ensuring a good working relationship between the parties, their cooperation and the efficient administration of the contract.

For an initial or start-up meeting or workshops, topics for discussion may include (as applicable):

- the roles of the relevant personnel and their work and after hours contact details
- the work program and milestones, and work management to suit the program
- site access issues and any restrictions on the site during construction
- location and frequency of further meetings
- site access availability and working hours

- design management, including the system for managing drawings and changes to design
- communications management such as use of 'requests for information' (RFI) and agreed response and processing system, and the processes for the instruction of variations and documentation of agreements to, and disputing of, claims and variation prices/time
- evidence of each service provider's constructed works, public liability, workers' compensation and professional indemnity insurance cover
- methods used to confirm the contractor and its subcontractors are meeting employment conditions, awards and agreements
- site specific OHS management, including the identified hazards, significant risks, service provider's management system/plan/SWMS, OHS inductions, and proposed inspections, reviews and surveillance
- the process for verifying and accepting the work, services and deliverables
- service provider's quality management system/plan/ITPs, including proposed inspections, surveillance, and audits/reviews of the system/plan and its implementation
- service provider's identification of, and any agreement/objection by the Principal to, proposed subcontractors/subconsultants
- management of contract records
- the interfaces with local utilities and site services
- service provider's environmental management plan and waste management approach, including proposed inspections, surveillance, and reviews of the plan and its implementation
- community relations and public information management
- service provider's electronic funds transfer details for payments
- procedures for managing any variations and extensions of time.

## **6.5 Principal contractor obligations under the Workers Compensation Act, Pay-roll Tax Act and Industrial Relations Act**

A Principal or agency has responsibilities as a principal contractor under s175B of the [Workers Compensation Act 1987](#), section 31-32 of the [Payroll Tax Act 2007](#), and section 127 of the [Industrial Relations Act 1996](#) on entering into a contract with a service provider.

The Acts hold the agency liable for the payment of a service provider's workers' compensation premiums, pay-roll tax and employee remuneration liabilities in certain circumstances. These risks are managed by having each service provider sign a Subcontractor's Statement, declaring that these payments have been made, with every payment claim under the contract. This is the approach taken in the [standard contract forms](#) referred to in [Section 4](#), though some forms require a statutory declaration instead of the Statement.

The [Subcontractor's Statement form](#) is available through [WorkCover NSW](#).

## 6.6 Principal contractor obligations under the OHS Act 2000

As allowed in the [standard construction contract forms](#) referred to in [Section 4](#), the Principal or agency must appoint contractors in control of construction and work sites as a principal contractor under the [NSW OHS Regulation 2001](#) (clause 210), with all the responsibilities of a principal contractor and “controller of premises” (under clauses 34 to 44 of the [NSW OHS Regulation 2001](#)) involved. These responsibilities particularly apply:

- when the cost of the construction work exceeds \$250,000
- with demolition work and asbestos removal work that requires a licence (regardless of the cost of the work), where licensed work includes demolition, restricted demolition, friable asbestos removal and bonded asbestos work (see clause 317 of the [NSW OHS Regulation 2001](#) for more information about licensed work and other definitions, as there are some exemptions with asbestos-related work)
- where high risk construction work (see clause 209 of the [NSW OHS Regulation 2001](#) for a definition, which includes most substantial construction work) is undertaken (regardless of the cost of the work).

The responsibilities of a principal contractor on the work site, under the [NSW OHS Regulation 2001](#), at all times include:

- ensuring OHS induction training is undertaken (clause 213)
- preparing, maintaining, updating and making available an OHS management plan to deal with its responsibilities (clauses 226 and 229)
- ensuring that each subcontractor provides written safe work method statements before commencing work (clauses 227 and 229)
- directing and monitoring compliance with the safe work method statements and legislation and taking action to comply (clauses 227 and 229)
- keeping a register of, and other records in relation to, all hazardous and other substances on the work site (clauses 228 and 229).

If the agency does not appoint a principal contractor, the owner is taken to be the principal contractor and has the responsibilities described above (clauses 210(4) and 210(6) of the [NSW OHS Regulation 2001](#)).

## 6.7 Subcontracting

The [standard contract forms](#) referred to in [Section 4](#) (and generally most other forms also) require the contractor and consultant to:

- not assign a right or benefit under the contract without the Principal’s written consent
- give the Principal an opportunity to object to the appointment of each subcontractor and subconsultant
- comply with the [NSW Government Code of Practice for Procurement](#).

Any objection to a subcontractor or subconsultant must only be made on reasonable grounds.

As a general rule, an objection to a subcontractor or subconsultant would only be raised where there is verified information available that shows the proposed

subcontractor or subconsultant does not have the capacity, capability or past performance required to undertake the work required.

On receipt of a notification from the service provider of a proposed subcontractor/subconsultant, the Principal must respond within the time required, or a reasonable time if no time is specified.

Under the [standard construction contract forms](#) conditions, the absence of or raising of an objection by the Principal to any subcontractor or subconsultant does not relieve the service provider from any liability or obligation. The service provider remains responsible for all subcontractors' and subconsultants' actions and omissions, and indemnifies the Principal against loss or damage arising out of these actions and omissions.

## 6.8 Service provider insurance

The insurance requirements for contracts are covered in the standard contract form general conditions of contract in [Section 4](#). They require insurance of the constructed works (with construction covering loss and damage) and public liability insurance (covering death and injury to persons, and loss and damage to the property of third parties) to be taken out (arranged either by the service provider or the Principal, but paid for by the service provider) covering both parties and subcontractors/ subconsultants.

The contract forms also require the service provider to take out the workers' compensation insurance required under NSW law, and ensure that all subcontractors and subconsultants also have such insurance. With contracts for professional services involving significant risks, professional indemnity insurance is also required of the service provider and relevant subcontractors and subconsultants (such as designers) to cover the main liabilities and thereby reducing the related risks (with any losses and damage not otherwise covered) to the Principal and agency.

Where the service provider arranges the insurance, the insurance cover provided must be checked to ensure that it complies strictly with the contract requirements. A check is also required that the currency of all insurance is maintained over the time periods required.

Self-employed sole trader service providers, particularly including subcontractors and subconsultants, without employees engaged in work under a contract, and who are thus not able to be covered by workers' compensation insurance under the law, must be insured against the results of sickness, accidents, injury and death either by the relevant contractor or consultant under its insurance, where the sole trader is a subcontractor or subconsultant and this is possible, or through a separate personal accident or mortality insurance policy.

Further guidance is available in the [Insurance for Government Construction Projects Guidelines](#).

## 6.9 Contract claims and variations

Variations under a contract may be categorised as one or a combination of the following:

- unavoidable variations (non-discretionary)
- variations for the convenience of the Principal (discretionary)
- variations for the convenience of the contractor or consultant

Service providers may also make claims for additional payments and time extensions for other reasons, such as the unavoidable impacts of unexpected events or circumstances not related to or covered by a variation.

Dealing with variations, particularly large value variations, needs to be carried out in accordance with the requirements consistent with negotiating a contract and in accordance with the relevant agency delegations. Refer to the [Procurement by Direct Negotiation Practice Guide](#) and the [Service Provider Selection](#) guidance on the [NSW Government Procurement](#) website for further information.

The Principal should have an estimate prepared prior to the request and receipt of the contractor's quote.

**Unavoidable variations** are variations that are necessary in order to minimise the adverse effects of unexpected events or circumstances. Unavoidable variations might not result in a change to the constructed work. Examples of unavoidable variations are:

- a variation to minimise the increase in cost or other adverse impact of a latent or unforeseen condition (frequently unforeseen site conditions) where dealing with the condition is not the responsibility of the service provider
- a variation to overcome a fault, ambiguity or discrepancy (other than an omission or lack of completeness which is the responsibility of the contractor) in the Principal's design or other documents
- a variation to overcome a change in statutory requirements or other conditions (as allowed under the contract) that occurs after tenders closed.

Service providers may make claims for such variations and for related or other acts and omissions of the Principal that cause delay and/or additional cost to the service providers (such as those arising from unforeseen site conditions not covered by a variation).

**Variations for the convenience of the Principal** are variations instructed by the Principal such as a change in requirements. They are not unavoidable or for the convenience of the service provider. Such variations that appear to reduce the work may increase the contract price or not involve a reduction equal to the value of the work omitted, because of the inefficiencies and possible disruption involved with the change.

Variations are valued on the basis of direct cost, plus a margin for overheads and profit, associated with the work added to the contract, less the contractual value (including a margin for overheads and profit) of any work taken out of the contract. Where extra re-work costs, delay costs or disruption costs are caused by or associated with omitted or added work, the actual value of the variation for the work:

- taken out of the contract would be reduced
- added to the contract would be increased

by a reasonable amount or these costs.

**Variations for the convenience of the contractor or consultant** are variations that are requested by the service provider, where the Principal is not obliged to agree to or approve them. It is most important that such variations are not approved unless the service provider agrees as a minimum that:

- the service provider will not be entitled to an additional remuneration (no increase in the contract price) unless any delay benefits the Principal
- the contract work will not be delayed and the service provider will not be entitled to an extension of time unless this benefits the Principal

- the varied work and constructed works will be fit for purpose
- the variation will not result in any other variations being required.

The need for variations will be minimised where the design and other contract documents describing the required end result are clear and well prepared, and based on sound investigation of the work site and work requirements, allowing the service provider to understand and price the work required.

Before a variation is proposed, the Principal's representative and agency should be completely convinced that it is necessary to vary the work. If this is in doubt the action should be fully discussed with senior agency management to confirm a variation is required, whether it can be deferred to a later date and performed more economically by others outside the contract.

Except in emergencies, a variation instruction should not be issued until the cost and time implications are identified and assessed. Variation instructions should not be given orally (spoken) unless absolutely essential, such as in an emergency. Any oral instruction or direction must be confirmed in writing at the earliest opportunity.

The price for a variation adding work to a contract must take into account:

- the direct cost of performing the additional work
- indirect costs involved, such as overheads, off site costs, and any possible inefficiency costs related to prolongation/ acceleration/disruption of the additional work or other work.

Variation instructions are not usually permitted after the completion of all the work under a contract, unless the variation is related to the subsequent rectification of defects, which may arise during the post completion or defects liability period.

Variations are usually priced in an uncompetitive and less than optimum environment, because the service provider is the monopoly provider and any change could disrupt the other work under the contract. This can reduce the value for money achieved with the work added or omitted as a variation. For this reason variations should be avoided where this risk cannot be well managed.

Refer to the [Managing Variations Practice Guide](#) for further information on variations.

## 6.10 Extensions of time

The [standard contract forms](#) referred to in [Section 4](#) require that the service provider must notify the Principal in writing of any delays that may give rise to extensions of time. To justify an extension of time the delay must arise from causes beyond the control of the service provider and result in a delay to work reaching completion by the set date for completion. The notice must be given within a specified period after the event that caused the delay first became apparent.

The status of the work required to achieve "completion" is normally defined in the general conditions of contract. In [GC21](#) and [Minor Works](#) based contracts all known defects and omissions must be rectified before completion.

The types and causes of delay that may give rise to extensions of time are also detailed in the general conditions of contract of the [standard construction contract forms](#) referred to in [Section 4](#).

Refer to the [Managing Extensions of Time Practice Guide](#) for further information.

Examples of typical causes of delay to a contractor and whether or not they may give rise to an extension of time are outlined below.

#### **Cause of delay justifying an extension of time:**

- wet weather on a working day (as defined in the contract)
- wet weather on a non working day that requires clean up on a working day (for the delay related to clean up which would delay completion)
- industry-wide industrial stoppages
- Principal's act or omission causing a delay, such as an untimely provision of information necessary for the contractor's work, which delays completion by the set date for completion.

#### **Cause of delay not justifying an extension of time:**

- wet weather on a non working day, such as a Rostered Day Off, delay to an activity that will not delay completion by a set date for completion
- delay notified after the designated period in which the delay must be notified
- an industrial dispute related only to work on the work site.
- concurrent delays

## **6.11 Contract records**

Accurate and orderly records are necessary to ensure effective and efficient contract management. Contract records would usually be kept that allow:

- accountability and openness to be clearly demonstrated
- the Principal and its representatives to have the information required to meet contractual obligations, and properly administer and manage the contract
- regular and accurate reports to management and the agency on progress and matters for attention
- information to be available for the assessment of claims and the resolution of claims and issues, including those in dispute.

The various types of contract records include:

- bond or original copy of the contract documents
- project control records, detailing such matters as the date of the letter of award, security held, any defects liability or post completion period, any liquidated damages and other set delay payments applying, current contract price, payments made, and variations and extensions of time
- contract program
- site logbooks, instructions and memos
- minutes of meetings
- photographs
- correspondence and communications, and related registers including letters, facsimiles, emails, document transmittals, requests for information (RFIs) made and the responses
- dilapidation reports and building inspection reports

- regulatory authority approvals, permits and licences for the work
- quality, OHS, environmental and other management records
- work-as-executed drawings, and operation and maintenance manuals

## 6.12 Service provider performance

The agency (possibly using a project manager organisation) should have a system for monitoring, reporting on, reviewing and acting on performance for substantial contracts. Performance monitoring and reviewing includes meetings with the service providers to regularly and jointly consider performance under the contract. The system should help the agency and the service provider reach a common understanding of the situation with the contract and the expectations of the other party. Performance monitoring is allowed for in the standard contract forms referred to in [Section 4](#).

Performance reports should be prepared and reviewed with service providers at regular intervals, whenever performance is unsatisfactory, at work completion, to identify matters needing extra attention and to support any action taken on performance deficiencies.

These reports can also be used to assess service provider organisations under a prequalification scheme, in future tender evaluations and in exchanges with another agency considering using the service provider.

Guidance on a common performance report format with standard criteria for assessment are available in the [Contractor Performance Reporting and Exchange of Reports between Government Agencies Guidelines](#) and [Consultant Performance Reporting and Exchange of Reports between Government Agencies Guidelines](#). Refer to the [Procurement System guidelines](#) on the [NSW Government Procurement website](#) for further information.

The system for reporting in the above guidelines allows for the service provider reported on to be given the opportunity to view and respond to the performance report. Whether a report includes an adverse finding on performance or not, it must be kept secure and only made available to persons or organisations that have a right and need to have the information. Any written response by the service provider must be taken into account by the reporter and retained with the copy of the report. Immediate action must be taken with any unsatisfactory performance to address and resolve the problems involved. Where the personnel directly involved are not able to achieve a resolution, action should be taken by the parties' senior personnel not involved in the day-to-day management of the contract.

## 6.13 Disputes

Generally, a dispute first arises under a contract when a disagreement or difference of opinion occurs between the service provider's and the Principal's representative, and one party gives notice to the other party that it wishes to raise this disagreement as a dispute.

The most common dispute that can arise is when a service provider makes a claim for an increase in the contract price and/or time for completion with a variation, which is fully or partly rejected by the Principal's representative.

Disputed claims and issues may arise because of documentation problems, acts or omissions of the parties, and other unforeseen and unavoidable circumstances. The Principal may also raise a claim or issue that is disputed.

Typical circumstances why disputes may arise are where:

- the grounds for the claim are agreed, but the price and/or time are not, possibly where the extent of the extra work involved or any inefficiencies created by a variation is not clear, or the service provider overstates or the Principal underestimates the value of instructed variations or other claims
- the grounds for the claim are not agreed, where a service provider or the Principal misinterpret the clear contract or legal conditions applying
- the grounds for the claim are not agreed, where there are genuine differences in the interpretation by the parties of the contract or legal conditions applying and they are not clear.

Claims and issues in dispute must be handled promptly and the related action must be taken within the time limits required under the contract, or within a reasonable time where no time limit is specified.

The [standard construction contract forms](#) referred to in [Section 4](#) include a dispute resolution process that must be followed before litigation or other remedies may be pursued. This involves the parties' senior executives/agents conferring and trying to reach agreement on a dispute, and if this fails, an expert third party being used to give a decision on each disputed issue.

The necessary steps in the notification of, and response to, claims and issues in the standard forms involve:

- claimant identification of the circumstances giving rise to the claim and the basis of the claim under the contract or in law
- claimant notification of the claim or issue, and all the facts surrounding it and its claimed basis
- assessment by the claimant of the effect on, and/or extent of, any work related to the claim or issue, and any other implications involved
- claimant quantification of the total cost and/or delays and time extensions claimed, where applicable categorised into readily measurable and identifiable costs and delays, and other costs and delays not so readily identifiable
- claimant submission of supporting documentation, providing the justification of the position taken, and any cost and time period claimed (or initially the likely amounts, followed later by confirmation of the amounts)
- assessment of, and response to, the claim or issue by the Principal or service provider, as applicable
- representatives' attempts to agree on the resolution of the claim or issue by negotiation.

The Department of Services, Technology and Administration provides dispute resolution facilitation services for agencies on behalf of the NSW Treasury. It may also be engaged on a fee for service basis to assess and manage disputed claims and issues.

The [Contract Dispute Resolution Practice Guide](#) is also available to assist agencies and their managers. Refer to the [NSW Government Procurement](#) website for further information.

## 6.14 Security of Payment

The [NSW Building and Construction Industry Security of Payment Act 1999](#) gives a claimant a statutory right to make progress payment claims and receive payments, even where the contract has no provisions for such progress payments. Very serious consequences can flow to the project cash flow and budget if progress payment claims from the service provider are not dealt with judiciously and within the time provisions of the Act. This is recognised in the [standard contract forms](#) referred to in [Section 4](#).

For details of the operation and limits of the Security of Payment Act, refer to the [Security of Payment information](#) on the [NSW Government Procurement](#) website.

Agencies and their project managers must make themselves aware of the very short time periods stipulated in the Act and reflected in the [standard contract forms](#) for provision of a 'payment schedule' in response to a progress payment claim, and in the Act for response submissions required under the adjudication process that may be initiated by a claimant under the Act.

## 6.15 Volunteer labour and donated goods

Where volunteer labour is used for a project, the occupational health and safety obligations and liabilities of organisations and persons under NSW law are not altered by a person's volunteer status. The agency should ensure that it is aware of the legal and insurance implications and requirements with using volunteer labour, and that these are appropriately managed.

When goods are donated for a project the agency must ensure that their quality is appropriate and they conform to the project specification for such goods. A supplier bears legal liability for the quality of the supplied goods even though they are not purchased. The donor must be made aware of the quality and other specification requirements. Agencies need to comply with their agency Code of Conduct when handling donations.

## 6.16 Protection of children and vulnerable people

For projects where contact is likely or possible between the workers and children, agencies need to make themselves aware of the requirements of child protection legislation and the restrictions that apply to persons who may be on the work sites, or enter particular related premises, notably schools, hospitals and other facilities where children would be present. Such restrictions would also apply where other vulnerable people are on or adjacent to the work sites. This is recognised in the [standard contract forms](#) referred to in [Section 4](#).

## 6.17 Project budget management

A major challenge of project budget management is to ensure that the costs associated with the work involved are maintained within the approved project budget.

# 7 Project closeout

## 7.1 Operation and maintenance

Agencies should ensure that the provision of operation and maintenance manuals is specified in contracts delivering assets (particularly those involving mechanical and electrical equipment) with more complex operation and maintenance requirements, and that they are then issued to appropriate representatives of the end users of the constructed works. These provisions are usually in the special conditions of contract, and are included in the [standard construction contract forms](#) referred to in [Section 4](#).

The contract should also specify training sessions for, and co-ordinated with, the end users run by the contractor, including a suitable timetable and venue, where more complex asset operation and maintenance requirements are involved. This would, for example, include personnel training in the operation and maintenance of mechanical and electrical equipment, such as a building security system, air conditioning systems, pumps, lifts, or water treatment plant.

## 7.2 Insurance of the constructed works on completion

Arrangements must be made for the insurance of the constructed works or built assets following their handover to the end user/owner/agency for operation.

Agencies covered by the [Treasury Managed Fund](#) (TMF) (the self-insurance scheme owned and underwritten by the NSW Government) should add the new assets to the agency's asset register in accordance with the [TMF Fund Overview](#). Where assets are to be covered by a commercial insurer, the agency's insurance broker should be advised of the addition and any other change to the insured assets.

# 8 Evaluation

## 8.1 Project appraisal

Following the completion of a significant contract and project a Post Implementation Review should be conducted to evaluate how well the project outcomes matched those expected, and how well the service needs that the project aimed to fulfil are met. The lessons learnt would then be used to benefit future contracts and projects.

Use the NSW Treasury Total Asset Management [Post Implementation Review Guideline](#) as a generic structure for conducting a review.

# Glossary

Agency	A New South Wales Government Department or Declared Authority within the meaning of the <a href="#">NSW Public Sector Employment and Management Act 2002</a> , or an entity established by a separate Act of the New South Wales Parliament, where that entity is expressed to represent the Crown, except (for the purposes of the <a href="#">NSW Government Procurement Policy</a> ) for State-owned Corporations within the meaning of the <a href="#">NSW State Owned Corporations Act 1989</a> .
Alternative tenders	Tenders that offer an alternative to a specified approach in the tender/RFT documents, but that may purport to provide a better value for money or technical solution. The alternative tender may be a solution (be it work, service, technology, method, or the like) that is consistent with the outcome sought by the RFT, but is not the solution anticipated in the RFT documents. For example, it may have different lifecycle cost characteristics or offer different benefits to users. It would have an alternative price and be sufficiently detailed to allow it to be assessed.
Audit	The examination of a random or particular sample of processes to determine whether or not correct plans/procedures are being followed, including a document review or an examination of activities or an examination of documents and activities, to assess their conformity with requirements.
Bid shopping	<p>The practice of trading off one tenderer's prices/rates against another's in order to obtain lower prices/rates. This practice is prohibited by the <a href="#">NSW Government Code of Practice for Procurement</a>.</p> <p>It involves divulging a tenderer's price or rates, or requiring a tenderer to divulge its price or rates to another tenderer before determination of the preferred or winning tender in order to secure a lower price or rates for the contract.</p>
Brief	A statement (and the document containing it) developed by the agency, describing end user, functional and operational requirements for the proposed project, and project quality, performance and scope objectives; also known also as the project or functional brief. A design brief also covers this and design requirements.
Budget	The funds allowed for a project based on a target estimate of the final (or end) cost of the project, including provision for all costs from inception to completion. Also referred to as a project budget. It would be prepared in accordance with NSW Treasury or agency requirements for capital works project budgets.

Conditions of tendering	The rules included in the RFT documents governing the content and lodging of tenders and the conduct of the tender process. Standard conditions include generic rules that apply to all processes, such as tender lodgement details and conditions applying to the treatment of late tenders. Special conditions specific to the RFT would be included, such as how RFT documents will be obtained, and how tenders will be prepared, received and evaluated. Conditions of tendering provide the framework for the tender.
Collusive tendering	<p>Tendering can be considered collusive, and is then prohibited by the <a href="#"><u>NSW Government Code of Practice for Procurement</u></a>, where it involves such practices as:</p> <ul style="list-style-type: none"> <li>• agreements between tenderers or their agents as to who will be the successful tenderer;</li> <li>• any exchange of information between tenderers or their agents prior to the submission of their tenders, designed to reduce the tender process competitiveness and disadvantage the party receiving the tenders; and</li> <li>• agreements between tenderers to fix the prices tendered.</li> </ul>
Concept design	A representation of (and process of developing) the adopted design responding to the requirements of the brief, in a form understood by the stakeholders, where the functional relationships are resolved and the asset form, envelope and fabric are described in line drawings, possibly models and images, or written documents.
Conflict of interest	A situation occurring when an official's private interests may benefit from his or her public actions. Conflicts of interest, either at a personal or agency level, can arise where there is a reasonable expectation of direct or indirect benefit or loss for an individual employee (or agent of the agency) with a particular personal interest that could be influenced, or appear to be influenced, in favour of that interest, in the performance of their duties. The benefit or loss may be financial or non-financial.
Construction	Includes all organised activities concerned with delivering constructed works or built assets, involving demolition, building, landscaping, maintenance, civil engineering, process engineering, heavy engineering and mining.
Consultant	A professional person or organisation that contracts to provide design, management or other services.
Contingency	An allowance for uncertain, foreseen and unforeseen eventualities, generally as a percentage of a target cost or time that reduces as the related risks reduce with progress through the phases of a project.
Contract	An agreement between two or more parties to do something that is legally enforceable. The agreement may be written, oral or inferred by conduct.

Contract documents	The written documents agreed to, as representing the basis of the contract, and that are legally binding between the Principal and a contractor or consultant, which detail the requirements and conditions that are to be met to complete the contract work successfully, generally including the tender documents (with the exception of the conditions of tendering), the tendered documents as accepted, and any contract-related document issued by one party and accepted by the other.
Contractor	An organisation (including a supplier) that contracts with a Principal and is responsible for the performance of the work under the contract.
Design	The process (and product) of converting a brief into a description ready for documentation in drawings, (possibly models and images) and written documents of the form, arrangement, components, materials and finishes to be used to construct an asset. Design involves concept design and design development. Design development is the part of the process after concept design. The term design may also be used to mean design and documentation.
Documentation	The process (and product) of developing sufficient co-ordinated detail from a design of an asset, by way of drawings, models and written documents, to permit the identification of materials, components, their relationships and quantities, quality standards and configuration such that the asset can then be reliably constructed. The term design and documentation may also be used to describe the whole process (and product) of converting a brief into the above.
eTendering	A NSW government Internet-based <a href="#">electronic tendering system</a> for agency use that provides the electronic facility to invite or advertise RFTs, distribute RFT documents, securely receive and open tenders, and provide notices to tenderers.
Expression of Interest (EOI)	The process of seeking an indication of the interest of potential service providers, capable of undertaking specific work and/or services, to provide information on that capability, or a detailed proposal (also called request for proposals (RFP)), to undertake the work and/or services. It is the first stage of a multi-stage tender process.
GC21	<a href="#">NSW Government GC21 General Conditions of Contract</a> which are part of one of the government <a href="#">Procurement System for Construction standard contract forms</a> maintained by the <a href="#">Department of Services, Technology and Administration</a> for agency use.
In-house bid	A tender from a business unit within the purchasing agency. The handling of in-house bids must ensure competitive neutrality. Refer to the Treasury Policy Paper <a href="#">TPP 02-01 Policy Statement on the Application of Competitive Neutrality Policy</a> .

Intellectual property	Material that has intellectual value, usually under copyright, patent right, registered design, trade mark or name or other protected right, and may also be commercially sensitive. In general the Government requires intellectual property created under a contract with an agency to become the property of the Crown. Refer to <a href="#">Premier's Circular PC2005-06, Intellectual Property Management Framework for the NSW Public Sector</a> .
Late tender	A tender received after the required closing date and time.
Management	The planning and interactive controlling of human and material resources to achieve time, cost, quality, performance, functional and scope requirements. It involves the anticipation of changes due to changing circumstances and the making of other changes to minimise adverse effects.
Operation	The phase between the completion of delivery of an asset and its eventual replacement after it has reached the end of its useful life, including its use.
Pre-tender estimate	An estimate of the cost of, or an estimate of the income to be generated through, a proposed contract prepared before the RFT documents are issued and updated as necessary before tenders close for the contract.
Principal	<p>The Principal is a generic term used in a contract to refer to the party to the contract that engages the other party (the Contractor) to perform work or provide goods or services. The primary obligation of the Principal is generally to pay the Contractor. The Principal will also have other obligations, as set out in the particular contract. The legal entities that are bound as Principals by contracts for NSW government agencies are:</p> <ul style="list-style-type: none"> <li>• for agencies that are not corporations: the Crown in right of the State of New South Wales; and</li> <li>• for corporations, including statutory corporations such as Railcorp, Sydney Water, the Health Administration Corporation, or Area Health Services: the corporation in its own right and name.</li> </ul>
Principal's agent	The representative of the Principal authorised to act on behalf of the Principal. A Principal's agent would invite, receive and process tenders and otherwise acts for the Principal in a tender process.
Principal's representative or authorised person	A person appointed by the Principal to exercise some or all of the functions of the Principal under a contract.
Probity	<p>Integrity, uprightness and honesty. There are a number of essential requirements that help promote probity throughout all stages of a tender process. These include:</p> <ul style="list-style-type: none"> <li>• consistency, fairness and impartiality with tenderers;</li> <li>• use of a competitive process;</li> <li>• tender security and confidentiality; and</li> <li>• identification and resolution of conflicts of interest.</li> </ul>

Procurement	All the activities involved in acquiring goods or services either outright or by lease (including disposal and lease termination where applicable). This includes acquiring consumables, capital equipment, real property, infrastructure, other constructed works, and management, design and other professional services.
Project	An undertaking with a defined beginning and objective by which completion is identified. Project delivery may be completed using one contract or a number of contracts.
Qualifications and departures	Conditions set by a tenderer or other non-conformities in its tender that are not consistent with the requirements of the tender documents.
Request for Tender (RFT)	The issuing of an invitation, by advertisement or directly, to respond to tender requirements by lodging a tender. It covers all forms of tendering, including an invitation or request for quotations (RFQ), for offers, for EOI for pre-registration, for applications for prequalification, and for proposals (RFP). Other related terms commonly used include 'call tenders', 'invite tenders', 'call for detailed proposals'.
Request for Tender (RFT) documents	The documents prepared by the party seeking tenders and provided to tenderers, outlining the request for tenders details and requirements, including the conditions of tendering and proposed contract conditions. Also referred to as the tender documents.
Risk management	The systematic application of management policies, procedures and practices to identifying, analysing, assessing, treating and controlling risks, and monitoring the outcomes. Risk management is used to ensure that project objectives and goals are achieved. See the <a href="#"><i>Total Asset Management Risk Management Guideline</i></a> .
Service provider	Includes contractors (including suppliers), subcontractors, consultants (including agencies advising others) and subconsultants, and their service providers, that contract to carry out construction, build assets or provide other products (including goods) and/or services.
Technical specification	A detailed description in the RFT and contract documents setting forth the functional, performance, material and other specific technical requirements for the required contract work, including for constructed works or built assets or other products (including goods) and/or services. Otherwise referred to as a specification.
Tender	Includes a price, bid, offer, quotation, consultant proposal or expression of interest, or the like, and any other information required, lodged in response to a Request for Tender.
Tender Closing Office	The office nominated in the RFT documents as the location where tenders are to be lodged in associated tender box(es).
Tender box	The location, physical or virtual, that receives tenders lodged by tenderers, and maintains them secure and confidential until close of tenders, and the tender opening process occurs.

Tenderer	An entity submitting a tender in response to an RFT.
Tender evaluation	The evaluation of tenders to determine the tender(s) offering the best value or value for money, including evaluating the tenderer's relative capability and past performance and prices/rates where they are involved, for the tendered work.
Tender period	The period between the common initial issue date or date of availability of the RFT documents and the closing date and time for tenders.
Value for money	<p>The benefits of an expenditure of funds considered on the basis of whole-of-life costs and alternative uses of the funds.</p> <p>Relative value for money would be determined with tenders by considering and comparing the benefits each offers for their prices and the other costs involved, taking into account all the factors relevant to the contract outcomes required, such as:</p> <ul style="list-style-type: none"> <li>• price with whole-of-life costs, including cost of disposal;</li> <li>• relevant tenderer experience and previous performance;</li> <li>• tenderer capability, capacity and practices;</li> <li>• tenderer ability to meet requirements;</li> <li>• tender conformity;</li> <li>• product quality proposed;</li> <li>• product reliability proposed;</li> <li>• timeliness of delivery;</li> <li>• certainty of delivery;</li> <li>• innovation;</li> <li>• product servicing proposed;</li> <li>• fitness for purpose; and</li> <li>• value adding components such as meeting the economic, social and environmental objectives, where relevant.</li> </ul>