



**New South Wales Government
Procurement System for Construction**

Procurement Practice Guide

Mini Minor Works clause commentary

September 2010

Important notices

Current version

The current version of this Procurement Practice Guide is maintained on the Internet at:

<http://www.nswprocurement.com.au/Procurement-System-for-Construction/Reference-material/Procurement-practice-guides.aspx>

Amendments

Refer to the Procurement Practice Guide Amendments Log which is available on the Internet at:

www.managingprocurement.commerce.nsw.gov.au/ppg/amendments.doc

Copyright

This work is copyright. Apart from any use as permitted under the Copyright Act 1968 (Cwlth), no part may be reproduced by any process without written permission.

© NSW Government 2008

Requests and enquiries concerning reproduction and rights should be addressed to:

NSW Procurement Client Support Centre:

Telephone: 1800 NSW BUY (1800 679 289)

Email: nswp_support@commerce.nsw.gov.au

Using hyperlinks in this document

This Procurement Practice Guide contains embedded hyperlinks and Uniform Resource Locators (URL).

To follow a hyperlink or URL:

- Right mouse click; and
 - Select "Open in web browser" in the drop-down box.
-

Mini Minor Works clause commentary

Contents

Mini Minor Works clause commentary	1
1 Conditions of Tendering	1
2 Tender Form	2
3 Tender Schedules	2
4 General Conditions of Contract	2
5. Contract Information	5
6. Works Description	5

Mini Minor Works clause commentary

1 Conditions of Tendering

1.1 Conditions of Tendering generally

The Conditions of Tendering provide information to assist tenderers to prepare and submit their tenders. They also notify tenderers about relevant NSW Government policy matters. These include a requirement that tenderers comply with the NSW Government *Code of Practice for Procurement*.

1.2 Other procurement policy guideline requirements

The requirements of the NSW Government *Industrial Relations Management Guidelines* are not referenced in the MMW standard form. However, the Conditions of Tendering specify that a tenderer lodging a tender agrees to comply with the industrial relations requirements of the NSW Government *Code of Practice for Procurement* and associated Implementation Guidelines, thereby meeting the requirements of the *Industrial Relations Management Guidelines*.

The NSW Government *Training Management Guidelines* only apply to projects valued at more than \$2.5 million and are therefore not referenced in the MMW standard form.

The requirements of the NSW Government *Aboriginal Participation in Construction Implementation Guidelines* are not included in the MMW standard form. If the project falls into a category for which a Project Aboriginal Participation Plan is required (in accordance with the Guidelines), tenderers should seek guidance from Policy Support Services (contact [Helpdesk](#)) regarding the applicable additional Tender Conditions and Conditions of Contract.

1.3 Provision of information to tenderers

The Conditions of Tendering refer to NSW Government Code of Practice on Procurement and the policy on disclosure of contract information that apply to the Contract, and advise how they may be accessed through the internet.

1.4 Contracting with acceptable legal entities

The Conditions of Tendering state that the Principal only contracts with recognised and acceptable legal entities and that the Principal does not contract with firms under any form of external administration. The Conditions of Tendering also require that tenderers be registered for GST.

A tenderer is required to provide additional information if requested to do so by the Principal.

1.5 Acceptance of tender

The Conditions of Tendering state that a tender a qualification or departure, is not accepted unless the Principal gives an acceptance in writing. This should be done in the Principal's Acceptance.

Because of this Condition, correspondence used to communicate the Principal's Acceptance must include proper references to the Contract title, the Contract number, the tender document and the invitation by the Principal and,

- if accepted without alteration: notification of acceptance of the original tender as submitted; or
- if accepted with alterations: notification of any qualifications, departures or alternatives accepted, and any changes made at the Principal's instigation (eg. changes of scope negotiated after tenders closed) including details (specifying dates) of post-tender correspondence documenting the alterations, and which will form part of the Contract. It may also be desirable to state clearly the qualifications, departures or alternatives offered by the tenderer that are not being accepted.

1.6 Contractor performance and exchange of information

The Conditions of Tendering advise tenderers that information about the Contractor's performance under the Contract may be shared with other NSW Government agencies and

local government authorities, who may use it to consider whether to offer the Contractor opportunities for future work.

If the Contractor's performance is not satisfactory, then it is important to prepare Contractor Performance Reports in accordance with Procurement Practice Guide *Performance management*. These documents will be used to share information about the Contractor's performance.

1.7 Disclosure of contract information

The Tender Conditions draw the attention of tenderers to NSW Government requirements for the disclosure of information about contracts between the Government and the private sector.

2 Tender Form

2.1 Tender Form generally

The Mini Minor Works (MMW) Tender Form will identify several key components of the contract that will be formed upon acceptance of a tender. These include the tender closing details, details of the tenderer, tenderer's contact addresses, the tenderer's offer, the Contract name and the Contract number. The details of the Principal's authorised person are now set out in the Contract Information.

When the tender is accepted by the Principal, the Tender Form will become part of the Contract.

A key field of information to be inserted in the Contract Information when preparing a tender document is the name of the Principal's authorised person. This is the person who will manage the contract. The address details inserted in the Contract Information will be used by the Contractor when sending letters and notices or submitting other information required under the Contract.

The Tender Form contains two alternative versions of the Contract Sum field: one for a lump sum tender and the other to be used for a Schedule of Rates tender. One of these will be deleted by the documenter when preparing the tender document.

3 Tender Schedules

3.1 Tender Schedule – OHS and Environmental Management Information

The tenderers are to submit evidence of satisfactory OHS Management performance and Environmental Management performance when requested to do so.

The NSW Government *Occupational Health and Safety Management Systems Guidelines* require that, for projects undertaken for NSW Government agencies, a condition of any MMW contract is that the Contractor prepare and submit a Site-specific Safety Management Plan and acceptable Safe Work Method Statements for the work. Acceptable Safe Work Method Statements will identify the safety controls that will be in place to minimise the hazards associated with the work.

Further guidance, and guidance for the preparation of acceptable Safe Work Method Statements, is provided in the NSW Government publication *How to prepare Site-specific Safety Management Plans and Safe Work Method Statements*, available on the Internet at:

<http://www.nswprocurement.com.au/Procurement-System-for-Construction/Reference-material/Procurement-Guideline-Documents.aspx>

Where the Works are not being performed for a NSW Government agency, the Principal may choose not to require a Site-specific Safety Management Plan, but Safe Work Method Statements must be prepared in order to comply with the relevant legislation.

4 General Conditions of Contract

4.1 General Conditions of Contract generally

The General Conditions of Contract are briefer than the general conditions and preliminaries contained in other standard form contracts in the NSW Government *Procurement System for Construction* in recognition of the lower risks anticipated in projects to be delivered using the MMW standard form.

Additional clauses may be included by the documenter to suit specific requirements, for example to safeguard children or other vulnerable people cared for or present on the site.

4.2 Clause 1 Definition of 'Business Day'

The Conditions of Contract specifically define the term 'Business Day'. This is to ensure that the Payment clause is consistent with the requirements of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Security of Payment Act).

Other clauses specifying times use the term 'day', which means a calendar day.

4.3 Clause 5 Occupational Health and Safety management

The NSW Government *Occupational Health and Safety Management Systems Guidelines* require all construction contracts to include, as a minimum, requirements for the Contractor to prepare a Site-specific Safety Management Plan and Safe Work Method Statements, no later than three business days prior to commencing work on the site.

These requirements do not in any way relieve contractors of their OHS obligations under statute and the general law.

4.4 Clause 7 Environmental management

The NSW Government *Environmental Management Systems Guidelines* require all construction contracts to include, as a minimum, a requirement for a project Environmental Management Plan, to be submitted no later than three business days prior to commencing work on the site. A standard form Environmental Management Plan is included in the Contract schedules, but if the Works involve a high environmental risk, or interface with other projects of high environmental risk, or are sensitive in terms of the environment, it may not be appropriate to use the MMW standard form.

The purpose of an Environmental Management Plan is to ensure that the environmental risks associated with the project are properly managed. Because of the lower risks anticipated in projects delivered using the MMW standard form, the Contractor is required to adopt as the basis for its Environmental Management Plan the model provided in the Contract Schedule – **Environmental Management Plan**. The Contractor is to update the model to suit the risks associated with the Works, and to take responsibility for managing the environmental risks and opportunities involved in the Works.

4.5 Clause 8 Insurance

The MMW standard form gives scope for the Contract to require the Contractor to provide all necessary insurance. For detailed guidance on checking whether the Contractor's insurance is satisfactory, refer to Procurement Practice Guide *Construction insurance*. Checklists are available for:

- *Works and public liability insurance*; and
- *Workers Compensation insurance*.

Alternatively, the MMW standard form also allows for insurance to be arranged by the Principal (see Contract Information Item 3 to determine if this is the case).

The Department of Services Technology and Administration has negotiated a single policy for insurance of the Contract Works and public liability through its insurance broker. The policy may be used for contracts where the Minister for Commerce is the Principal or the Department of Services Technology and Administration is the project or contract manager.

Details of the operation of the policy and the procedures for managing the insurance are provided in Procurement Practice Guide *Construction insurance*. The Contractor is required to effect and maintain the policy, by paying all premiums invoiced to the Contractor by the insurance broker, until the payment schedule is issued in response to the final payment claim.

Advantages of this arrangement are that the terms of the insurance cover are known and satisfactory and that the Contractor cannot default or cancel payment of the premium and the insurance.

A copy of the policy is available at:

<http://www.nswprocurement.com.au/Procurement-System-for-Construction/Contract-management/Insurance-Policies.aspx>

The policy is **not** available:

- for contracts whose Contract Sum is less than \$50,000;
- where the Works involve „high risk civil works" defined as flood mitigation, dams, weirs, tunnels, bridges, jetties, work under and over water, and similar works;
- where the period from contract award to completion of the last Milestone exceeds 36 months.

If in doubt, contact the *NSW Procurement Client Support Centre*.

The MMW standard form must not be used when the work involves the removal of asbestos or the use of waterborne craft. These activities require special insurance.

4.6 Clause 11 - Time for completion and clause 2.3

There are no liquidated damages in the MMW standard form. If the Principal will suffer loss due to the Works not being completed within the Contract Period, and wishes the contract to provide for the costs to be recovered through deductions from progress payments, then the Minor Works standard form should be used.

The Principal's authorised person may extend the Contract Period for any reason, at any time, by giving a direction under clause 2.3 but this must not be done without considering the impacts. Extensions of time may affect costs, the construction program and/or other contractors.

Generally, extensions of time may be granted if the Works are delayed due to:

- a direction given by the Principal's authorised person, except if it is for the rectification of defects;
- a breach of the Contract by the Principal; or
- an event beyond the control of the Contractor.

4.7 Clause 12 Defects [Post Completion Period]

The MMW Standard Form contract includes a Post Completion Period. The Principal's Authorised Person can direct the Contractor to make good any defects during the Post Completion Period within a specified time.

The Principal's Authorised person must advise the Contractor in writing what the defect is and the time by which it is to be rectified. See *Sample letter X [create sample letter]*. A reasonable amount of time should be given for the Contractor to comply with the direction, considering the nature of the defects and the problems they may cause.

4.8 Clause 13 and Item 6 of Contract Information - Setting payment intervals

MMW Clause 13 requires the documenter to specify the times when a Contractor may make payment claims, in Contract Information Item 6. The most likely option is payment monthly, on the first business day of each calendar month, but the documenter can set terms appropriate to a particular contract.

In setting intervals for making progress claims, documenters must take care to ensure that the dates of claim are sufficiently clear, or claims will be able to be made under the Security of Payment Act. MMW sets out that progress claims are to be assigned to dates, rather than to Milestones or percentage-completion. This ensures that the dates of claim are clear enough that the statutory right to claim payment under the Security of Payment Act is not activated.

4.9 Clause 13.4 Making payments

To comply with the Payment clause, and make sure a debt is not incurred under the Security of Payment Act, the Principal's authorised representative must provide a payment schedule to the Contractor within 10 business days of receipt of a payment claim.

The amount that the payment schedule identifies is to be paid must be paid by the due date, even if the Contractor proposes to dispute the figure. Otherwise the Contractor can suspend work under the Security of Payment Act.

The Contractor is required to complete and submit with each payment claim the documents set out in Clause 13.3.

The Principal is not required to pay a payment claim until the later of 20 business days after receiving a claim for payment or 5 business days after it has received both a satisfactory Subcontractor's Statement. There is no requirement for a certificate of currency for workers compensation with each claim; there is a requirement only for workers compensation to be checked at the commencement of the the contract – clause 8.

Refer to Procurement Practice Guide *Managing payment claims* for more information on payment obligations and procedures.

4.10 clause 13.8 Retention

The MMW standard form provides for retention if notified in the Contract Information.

Contractor performance reporting should be considered as a means of encouraging contractors to perform.

4.11 Clause 14 Disputes

A dispute occurs if either party is dissatisfied with an act or omission of the other party. The provisions for dispute resolution in the MMW standard form are similar to those in other standard forms in the NSW Government *Procurement System for Construction*.

If a dispute arises:

- The other party is to be notified - including relevant facts and the dispute's contractual basis. The contract stipulates that both parties are to involve Senior Executives, 'Senior Executives' is not a defined term under the Contract, so it should be interpreted to mean that the representatives attempting to resolve the dispute must actually have sufficient authority to do so.
- If the dispute is still unresolved within 21 days, the process of selecting an Expert for determination is to commence. Before referring the dispute to an Expert, advice and assistance must be sought from the Manager, Contract Dispute Resolution Unit####, in the Department of Services Technology and Administration

Each determination of an expert is final and binding. There is no cost-award threshold that allows litigation.

4.12 Clauses 15 and 16 Suspension and Termination

The new clause, 'Termination for the Principal's Convenience' does not require a breach of contract on the part of the Contractor. The Contractor is paid for work done, and a percentage of the unpaid balance. This gives the Principal greater contractual flexibility.

5. Contract Information

This must be completed. Item 3 must specify if the Contractor or the principal is to arrange insurance. Item 4 requires the time for completion is to be set out. If applicable, item 5 must include details of a post completion period and retention amount to apply. Item 6 must specify the times for payment and these must be dates not milestones.

6. Works Description

6.1 Clause W1 – Site name and address

The site name and address must be inserted.

6.2 Clause W 7 Works Description generally

In preparing the technical specification, documenters should bear in mind that the MMW standard form assumes the Contractor is competent and qualified to perform the Works and aware of relevant standards, codes and other matters that would determine how the Works should be performed so they comply with statutory requirements and good industry practice.

The type of work to be managed under a MMW contract should lend itself to specifications that are brief. Notwithstanding the aim of being brief, documenters are responsible for ensuring that the scope and quality requirements for the Works are adequately specified.

Technical specifications should describe all the essential components of the project but should not re-state the content of standards and codes of practice. Rather than being overly

prescriptive, technical specifications should be based on the required performance or function.

Careful wording of the Works Description section may allow the Contractor to be innovative in selecting materials and components to be used in the Works, whilst ensuring that the project objectives are delivered.

If a detailed or lengthy specifications are required, the Minor Works standard form may be more appropriate.

6.3 Clause W6 Hazardous substances

Where the Works involve hazardous substances, care must be taken to ensure the associated risks are addressed. Particular attention must be paid to the requirements for the Safety Management Plan, Safe Work Method Statements and the Environmental Management Plan.

It may be appropriate to use the Minor Works standard form, with its more comprehensive contractual conditions, where hazardous substances are involved.

6.4 Clause W5 Asbestos

Where the Works involve hazardous substances, care must be taken to ensure the associated risks are addressed. Particular attention must be paid to the requirements for the Safety Management Plan, Safe Work Method Statements and the Environmental Management Plan.

It may be appropriate to use the Minor Works standard form, with its more comprehensive contractual conditions, where hazardous substances are involved.