



New South Wales Government Procurement System for Construction

Procurement Practice Guide

Avoiding delay

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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:

<http://www.nswprocurement.com.au/psc/ppg/amendments.pdf>

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Avoiding delay

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Avoiding delay

1 Introduction

There is a risk that actions of the Principal may delay the completion of a construction contract. They may also entitle a contractor to compensation payments. The first and most effective step to minimise exposure to delay claims from contractors is to avoid or minimise delay caused by the Principal.

The underlying causes of delay by the Principal are often:

- inadequate specification of the Principal's requirements, and
- lack of sufficient experienced contract management staff and/or ineffective management systems.

In addition, the Principal can cause delay by:

- giving instructions or taking other actions which cause delays;
- failing to promptly exercise the Principal's powers under the Contract; or
- failing to meet the Principal's obligations under the Contract, or failing to do so promptly.

The Principal may be liable for delay caused by any person acting for or on behalf of the Principal, including employees or agents such as project managers.

The purpose of this Procurement Practice Guide is to assist agencies, project managers and those carrying out contract administration functions on their behalf to avoid causing unnecessary delays to completion of contracts.

If delays occur and claims are made by contractors as a result, refer to the following Procurement Practice Guides:

- *Managing extension of time claims*, and
- *Handling prolongation and disruption claims*.

2 Specification and Documentation

2.1 How delay can occur

If the Principal's requirements are not adequately specified, variations may need to be instructed to ensure the finished product meets the owner agency's expectations.

If documentation provided by the Principal is of poor quality, a contractor may need to make numerous requests for information to resolve ambiguities and inconsistencies. These may result in the Principal instructing variations.

Variations frequently lead to delays, particularly if additional work is involved. In addition, there is a risk that the Principal will cause delays by not promptly responding to notified ambiguities or giving necessary instructions. In instances where there are high numbers of queries or instructions, staffing levels may be inadequate, resulting in mistakes and/or delays in contract administration.

2.2 Avoiding or minimising delay

It is critically important that the Principal's documentation is of a high standard, clearly definitive, unambiguous and complete. Tenders should not be called with inadequate or incomplete documentation.

Principals should develop standards and procedures to be followed in preparing tender documentation, including:

- allowing sufficient time;
- allocating sufficient properly qualified and experienced personnel;

- reviewing specifications and tender documentation before tenders are called; and
- rectifying any inadequacies found through the documentation review.

If the Principal's documentation is found to be inadequate after a contract is awarded, the Principal should:

- be prepared to respond quickly to the contractor's requests for information;
- ensure there are staff available with sufficient knowledge, experience and delegated authority to respond promptly and appropriately to issues raised by the contractor;
- if necessary, assign additional or more experienced staff to managing the contract;
- avoid adopting a negotiating position that incorrectly insists the Principal's documentation is satisfactory.

3 Staffing and Management

3.1 How delay can occur

Delay may be caused by ill advised or untimely actions or decisions taken by the Principal's staff or agents as a result of:

- lack of sufficient properly qualified and experienced personnel;
- insufficient delegation of authority; or
- unwieldy or unclear administrative systems, including lines of communication between the project manager and the client agency.

The risk of delay is increased when inadequate staffing and management systems combine with poor specification and documentation. An inexperienced senior manager or financial delegate may, for example, spend several days deliberating over whether to authorise a variation worth \$20,000 when each day's delay may incur \$10,000 in delay costs. Even if the cost is reduced, or the extra work abandoned, delay costs payable to the contractor may exceed any savings made.

There is additional potential for delay when a project manager who is not an employee of the Principal is involved. This may arise through:

- inadequate delegations (delegations either not made, or too limited);
- the Principal's delegated decision-maker not being immediately accessible to the project manager;
- lack of access to agency information;
- lack of willingness, on the part of the project manager, to make difficult decisions or forceful recommendations, particularly when commitment of additional funds is involved;
- lack of confidence in the project manager by the Principal's senior executives or financial delegates, which may lead to a reluctance to rely on brief submissions, and demands for redrafts and resubmissions or supporting submissions from agency personnel.

3.2 Avoiding or minimising delay

Adequate numbers of properly qualified and experienced personnel, with full support of senior management, must be provided to administer contracts. If delays are occurring because agency staff do not have appropriate knowledge and experience, then they should be replaced, supplemented or supported by people who are competent and knowledgeable. Counselling or warning a staff member who has demonstrated inability to cope with some facet of contract administration will not

reduce the Principal's liability to an affected contractor, or significantly reduce the Principal's future risk.

The Principal should have in place reliable business and contract management systems, *designed to be quick*. This may be assisted by:

- adopting procedures that encourage the use of electronic communication;
- establishing clear lines of communication that ensure the project manager (who is responsible for delivering the project on time and on budget) is involved in making decisions;
- appointing a dedicated project officer within the agency who will be responsible for expediting decisions and providing information required by the project manager.

If a project manager is engaged, it is important that the Principal's senior executives and financial delegates trust that person. This trust can be fostered by:

- ensuring that those personnel are knowledgeable and experienced in construction and, desirably, have specific knowledge of the provisions of the particular contract being used;
- engaging competent project managers with a proven record of good performance (for example through the Department of Commerce Prequalification Scheme);
- involving the Principal's senior personnel in the process of selecting the project manager, or at least in choosing the selection criteria;
- evaluating tenders from project managers on the basis of relevant performance criteria, supported by evidence including, for example, referee reports or examples of past submissions.

If the Principal's senior executives or financial delegates are not prepared to rely on the project manager's advice, for example if the project manager recommends payment of a contractor's claim, then procedures must be in place for the Principal to obtain additional advice *quickly*.

4 Instructions or actions that may cause delay

4.1 How delay can occur

Generally in a GC21 Contract, under clause 4.3, the Contractor must comply at its own cost with an instruction given by the Principal except where otherwise expressly provided in the Contract (for example in relation to Variations).

GC21 clause 52 empowers the Principal to instruct Variations to the Works. A Variation can cause delay to Completion by:

- extending the working time beyond the original Date for Completion;
- delaying or interfering with other work.

In a GC21 Contract, delay may be caused by the Principal giving instructions to the Contractor:

- **Clause 10.4.2:** in respect of Temporary Work,
- **Clause 10.5.6:** in respect of work methods, and
- **Clause 25.4:** to take steps to achieve Scheduled Progress;
- **Clause 57:** to suspend work. Note that if the need for suspension arises from the Principal's own act or omission, delay arising from suspension is at the risk and cost of the Principal. If not, then the delay is at the Contractor's risk.

There are other actions that the Principal is entitled to take under the Contract that may cause delay to Completion. An example is where the Principal authorises early use under GC21 clause 68.1 and this delays or disrupts the Contractor.

4.2 Avoiding or minimising delay

Before giving an instruction or taking action under a contract, the Principal should check that the instruction will not unnecessarily cause delay.

For example, before instructing a Variation, the Principal should consider estimates of the time implications of the Variation. GC21 clause 52.3 empowers the Principal to require the Contractor to advise its price and its effect (if any) on time for Completion of a proposed Variation. The Contractor should always be required to provide these details before a Variation is instructed. Ideally, the price and effect on time should be agreed in writing before a Variation is formally instructed.

If a Variation is instructed for the Contractor's convenience, the Principal should normally require, as a condition of approving the Variation, that there will be no associated extension of the time for Completion or payment for delay or disruption.

Suspension of the Contractor's work under the Contract should only be instructed in exceptional circumstances. In order to minimise delay and disruption, an instruction to suspend work should specify precisely the part of the work that must be suspended. An instruction for suspension should, wherever possible, be either for a fixed period or until some specified event occurs.

5 Delay in exercising the Principal's powers under the Contract

5.1 How delay can occur

Delay in issuing an instruction may cause a delay to completion, either because the instructed activity was on the critical path or because the delay moves it onto the critical path.

A simple example of the latter is a variation that would take 10 days and could readily be performed concurrently with other work. Assume that the start of a critical path activity is dependent on completion of both the variation and the other work. If the variation is not instructed until 6 days before that other work is completed, then completion will be delayed by 4 days.

Under a GC21 Contract, delays may occur when the Principal:

- **Clause 10.4.2:** gives instructions in respect of Temporary Works;
- **Clause 10.5.6:** gives instructions in respect of work methods;
- **Clause 36.13:** is required to decide whether to have the Works reinstated by the Contractor following significant damage or destruction;
- **Clause 41.5:** instructs a Variation as a result of Site Conditions;
- **Clause 44.2:** instructs a Variation as a result of a Fault in the Principal's Documents;
- **Clause 45.4:** notifies an objection to Contractor's Documents that have been provided for consideration;
- **Clause 50.5:** instructs a Variation to make good a defect resulting from design;
- **Clause 52:** instructs a Variation;
- **Clause 53:** instructs a Variation as a result of changes to Statutory Requirements; or
- **Clause 57.2:** instructs resumption following suspension.

Note that, in a GC21 Contract, the risk of the Principal causing delay when a Variation is instructed is higher if no Valuer is engaged.

If a Valuer is engaged, any delay to Completion caused by delay in beginning to carry out a Variation is at the risk and cost of the Contractor. If no Valuer is engaged, and agreement on the cost and time effects is not reached, the Contract

states that the Contractor must not begin to carry out the Variation until instructed to do so by the Principal. In this case, delay to Completion caused by delay in beginning to carry out the Variation will be at the risk and cost of the Principal.

Administrative arrangements can cause delay in exercising the Principal's powers, for example because of:

- disagreement among the Principal's staff as to whether the instruction is essential (for example, whether a variation is unavoidable);
- delay in securing additional funds, if required (for example for a variation);
- lack of sense of urgency in contract and financial administration, or
- inefficient negotiation with a contractor over the cost and time impacts.

5.2 Avoiding or minimising delay

To minimise delay in issuing variations and other instructions, the project manager and the Principal's staff must:

- be aware of the necessity to maintain project momentum and make decisions promptly,
- maintain efficient decision making processes;
- where necessary, prioritise the work of developing and issuing variations and other instructions in light of the likely effect on completion, based on analysis of the construction program, and
- negotiate effectively with contractors.

For a GC21 contract it is desirable to engage a Valuer. If no Valuer is engaged, the Principal should ensure that instructions to proceed are issued promptly if agreement is not reached on the cost and time effects of a Variation.

If the Principal has an objection to Contractor's Documents that is likely to require extensive revisions to correct the Fault, or to involve lengthy discussions, the Principal should notify the Contractor of the objection as soon as practicable. The Contractor should be notified in ample time before the Contractor proposes to use the documents for the Works. Under a GC21 Contract, the Contractor is required to submit Contractor's Documents at least 21 days before proposing to use them, and the Principal's notification of objection should be in sufficient time before those 21 days have passed.

An instruction for suspension should, wherever possible, be for a fixed period, or until some specified event occurs. If it is unavoidable that a suspension be for an indefinite period, the Principal should monitor the reasons for the suspension, and instruct resumption as soon as those reasons no longer apply.

6 Delay or default in fulfilling the Principal's obligations under the Contract

6.1 Delay or Default by the Principal

The Principal's obligations under a contract will generally include undertaking certain actions within prescribed times. If those times are not met, completion may be delayed and the contractor may be entitled to an extension of time and perhaps associated costs.

Examples of the Principal's obligations under a GC21 Contract are:

- **Clause 38.1:** to give possession of Site, sufficient to allow Design and construction to start, within 14 days of award of contract;
- to supply information, documents or instructions:

- **Clause 25.9:** identified in the Contract Program, by the time identified in the Contract Program or the time that could reasonably have been anticipated at the time the tender was received,
- **Clause 42.2:** required to resolve ambiguities, inconsistencies or discrepancies notified by the Contractor, by the time the Contractor proposes to use the documents concerned (which, in the absence of other information, can be assumed to be 21 days after the ambiguity is notified),
- **Clause 47.2:** requested by the Contractor for setting out the Works, if the Principal has or can reasonably obtain that information, as soon as practicable;
- **Clause 30.2:** to confirm an oral instruction in writing as soon as practicable;
- **Clause 32.4:** to provide lists of Prequalified Contractors within a reasonable time of receiving a request from the Contractor; and
- **Clause 36.5:** to give written approval to insurers and terms and conditions of insurance policies within a reasonable time of a request from the Contractor.

Unless otherwise stated, the Principal must act within a “reasonable” time. The Principal’s obligation under clause 3 to “cooperate” would include responding to requests from the Contractor within a reasonable time.

In addition, amendments to the General Conditions or requirements described in the Preliminaries (i.e. Special Conditions) or Technical Specification, particularly those specifying procedures, may require the Principal to act, or to ensure that its consultants act, within a certain time. The Principal may be in breach of contract if these requirements are not met.

6.2 Avoiding or minimising delay

To avoid or minimise delays, the Principal should:

- check, before awarding a contract, that the site will be available for the contractor, and if necessary delay awarding the contract;
- ensure that all survey information necessary for setting out the Works is available at the time the contract is awarded;
- establish a management system involving agency staff, consultants and other contractors, to ensure documents are provided promptly and within times that will not put the Principal in breach of contract;
- ensure that designers and consultants are required to respond promptly to any requests for information and if they cause delay, warn them immediately that if the delay causes the Principal to be in breach of contract, they will be held liable for any costs that arise;
- ensure there is a timetable for the production of Principal’s Documents, that it is consistent with the construction program, maintained during the course of the contract, and complied with;
- deal promptly with notifications of ambiguity, inconsistency or discrepancy and maintain a tracking system to ensure that responses are timely and not overlooked;
- avoid, as far as possible, imposing limitations on subcontractors;
- if use of Prequalified Contractors is specified, ensure that lists of suitable contractors exist for each category specified;
- deal promptly with insurance policies and certificates of currency submitted by contractors. Guidance and checklists for checking insurance policies are available on the Procurement System for Construction [Insurance](#) web page;

- attend specified quality management Hold Points for quality management at the time requested;
- deal promptly with submissions such as the Project OHS Management Plans, Project Environmental Management Plans, Project IR management details, Project Training Management Plan and Project Aboriginal Participation Plans.

Where it appears likely that delays could occur, the Principal and its agents must take care that their actions do not give a contractor justification for prolongation claims. Where it is apparent that a delay will occur, it may be possible to mitigate damages by giving the contractor warning of the likely delay and its duration.