



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

Procurement Practice Guide

Contract management

July 2008

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://nswprocurement.com.au/psc/ppg/amendments.aspx>

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.
-

Contract management

Contents

	Contract management	1
1	General management	1
	1.1 Introduction.....	1
	1.2 The Principal in a construction contract	1
	1.3 Authorised persons	1
	1.4 Delegated authorities	2
	1.5 Principal contractor statutory obligations	3
2	Contract records.....	4
	2.1 Contract records	4
	2.2 Bond documents	4
3	Notices	5
	3.1 Service of Notices	5
	3.2 GC21 contracts.....	5
	3.3 Minor Works contracts	5
4	Contract Meetings	5
	4.1 Site Meetings (all contracts)	5
	4.2 Site Meeting Minutes	6
	4.3 GC21 specific meetings and workshops	6
5	Contract management responsibilities	6
	5.1 Generally	6
	5.2 Insurance.....	6
	5.3 Undertakings	7
	5.4 Subcontracting	7
	5.5 Managing payment claims	8
	5.6 Managing variations	8
	5.7 Avoiding delay	8
	5.8 Assessing extension of time claims	9
	5.9 Handling prolongation and disruption claims	9
	5.10 Protection of children and other vulnerable people.....	9
	5.11 Volunteer labour and donated goods	10
6	Statutory Requirements and Codes of Practice	10
	6.1 Compliance with codes.....	10
	6.2 Compliance with statutory requirements	10
	6.3 Documentary evidence of Compliance.....	10
	6.4 Goods and Services Tax	10
	6.5 Security of Payment Act.....	11
	6.6 Long service levy	11
	6.7 Building Code of Australia	11
	6.8 EPA Act.....	12
	6.9 Registration and licences	12
7	NSW Government Guidelines	12
	7.1 Aboriginal participation in construction	12
	7.2 Environmental management	12
	7.3 Industrial relations management	13
	7.4 Occupational health and safety management	13
	7.5 Quality management.....	14
	7.6 Training management.....	17

8	Performance management	17
	8.1 Performance reporting	17
	8.2 Authorisation for access to other records.....	17
9	Disputes	18

Contract management

1 General management

1.1 Introduction

These general principles apply to the standard form contracts for construction work and to the professional services agreements in the *Procurement System for Construction*.

Contract management by an agency (including any project management organisations engaged by an agency) must ensure that:

- the Principal's interests are protected and its obligations are met;
- the contractual obligations of the service provider are met;
- contract milestones are duly discharged;
- key deliverables are received;
- contract related processes are completed;
- any variations, claims, issues, disputes, and any additional funding requirements are managed.

When a project management organisation is appointed, the agency remains responsible for the appropriate administration of each contract. The parties' obligations are largely set out in the contract documents, however, there are those created by law that will not be specified in the documents.

1.2 The Principal in a construction contract

The Principal's primary obligation under a contract is to make payments to the Contractor, in accordance with the terms of the contract. Examples of other duties of the Principal are:

- effecting insurance, if required by the contract;
- responding to payment claims and making payments on time, to avoid the risk, under the *Building and Construction Industry Security of Payment Act 1999* (NSW), of being required to pay the Contractor's claims in full;
- giving instructions to the Contractor as required;
- responding to claims or requests for information from the Contractor;
- bringing or defending proceedings in the event of a dispute, including making decisions on resolution options and risks, and paying any entitlements determined; and
- taking appropriate action in circumstances such as the Contractor's default or insolvency, for example by terminating the contract and pursuing the Principal's subsequent rights.

Comprehensive lists of the Principal's functions under the standard form contracts provided in the NSW Government *Procurement System for Construction* are available for each contract, under the heading '*Contract specific guidance material*'.

Procurement Practice Guide *Principal in a construction contract* provides guidance to assist agencies and their representatives to identify and name the Principal in a contract, understand the Principal's obligations and other requirements and to manage the payment claim proceed for construction contracts.

1.3 Authorised persons

Under the standard form contracts in the NSW Government *Procurement System for Construction* the Principal and the Contractor are required to nominate authorised persons to represent the parties.

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 (including with others' approvals to suit agency protocols) to fulfil their roles under the contract.

GC21 contracts

Under GC21 contracts each party nominates an authorised person and a senior executive (for disputes).

- *Principal's Authorised Person* and Principal's senior executive; and
- *Contractor's Authorised Person* and Contractor's senior executive.

Minor Works contracts

Under Minor Works contracts each party nominates a representative (with an agent also acting for the Principal with disputes).

- Principal's Representative and Principal's Agent; and
- Contractor's Representative.

Mini Minor Works contracts

Under Mini Minor Works contracts each party nominates a representative:

- Principal's authorised representative; and
- Contractor's authorised representative.

Consultancy services contracts

Under Consultancy services contracts, valued at over \$30,000, each party nominates a representative:

- Principal's Representative; and
- Consultant's Representative.

1.4 Delegated authorities

The Principal should appoint an employee or other person as a delegate, with authority in accordance with the *Public Finance and Audit Act 1983* (NSW), s12¹, 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.

The Principal must have the necessary systems, administrative procedures, authorities and structure to enable it to plan and implement its contractual obligations. This includes ensuring that payments are made, directions and notices are given, required response times are met in accordance with the conditions of the contract. Only some of the Principal's obligations may be delegated to a private sector project management organisation.

The Public Finance and Audit Regulation (General) 1995 and *Public Finance Audit Act 1983* (NSW) limits the delegation of 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.

The following Schedules of Contractual Authorities are included in the [Procurement System for Construction](#) to assist agencies:

- [Schedule of Contractual Authorities \(GC21 contracts\)](#)
- [Schedule of Contractual Authorities \(Minor Works contracts\)](#)

¹ Specific financial delegation from a Minister / agency is required for the commitment and expenditure of public monies. Administrative and contractual delegations are also required.

- [Schedule of Contractual Authorities \(Mini Minor Works contracts\)](#)
- [Schedule of Contractual Authorities \(Consultant agreements\)](#)

1.5 Principal contractor statutory obligations

Under the Workers Compensation, Pay-roll Tax and Industrial Relations Acts

A Principal or agency has responsibilities as a principal contractor under s175B of the *Workers Compensation Act 2000* (NSW), section 31G-31J of the *Pay-roll Tax Act 1971* (NSW), and section 127 of the *Industrial Relations Act 1996* (NSW) 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 statutory declaration, declaring that these payments have been made, with every payment claim under the contract. These provisions are included in the standard form contracts in the NSW Government [Procurement System for Construction](#).

A *Subcontractor's statutory declaration* form is available on the Internet at:

http://www.nswprocurement.com.au/psc/contract_management/cm_statutory_declaration_subcontractor.doc

Further information on these matters is also available from the Office of Industrial Relations website at www.commerce.nsw.gov.au and the Office of State Revenue website at www.osr.nsw.gov.au.

Under the OHS Act 2000 (NSW)

The Contractor becomes the "principal contractor" as defined in the OHS Regulation 2001 (NSW) unless specifically excluded from that role. Thus, where more than one Contractor is operating at a site, one, and only one, must be appointed principal contractor.

For the regulation to be effective, the Principal or agency must appoint the contractor in control of construction and work sites as a principal contractor under OHS Regulation 2001 (clause 210), with all the responsibilities of a principal contractor and "controller of premises" (under clauses 34 to 44 of 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 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 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 OHS Regulation 2001, 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 & 229)
 - ensuring that each subcontractor provides written safe work method statements before commencing work (clauses 227 & 229)
 - directing and monitoring compliance with the safe work method statements and legislation and taking action to comply (clauses 227 & 229)

- keeping a register of, and other records in relation to, all hazardous and other substances on the work site (clauses 228 & 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) & 210(6) of OHS Regulation 2001).

2 Contract records

2.1 Contract records

Accurate and orderly records are necessary to ensure effective and efficient contract management. Contract records usually:

- demonstrate accountability and openness;
- record the progress of the project and highlight potential issues;
- provide the information required to meet contractual obligations and properly administer and manage the contract; and
- provide the information for the assessment and resolution of claims, issues and disputes.

The various types of contract records include:

- The Bond (or original) copy of the contract documents;
- contract program;
- 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;
- dilapidation reports and building inspection reports;
- photographs;
- minutes of meetings;
- correspondence and communications, and related registers including letters, facsimiles, e-mails, document transmittals, requests for information (RFIs) made and the responses;
- site logbooks, instructions and memos;
- quality, OHS, environmental and other management records;
- regulatory authority approvals, permits and licences for the work; and
- work-as-executed drawings, and operation and maintenance manuals.

2.2 Bond documents

The Bond is the agreement in writing which evidences the contract and includes documents which determine the parties' rights and obligations. The following documents constitute the Bond for each Contract:

- the exhibited copy of the Tender Documents, including drawings and specification;
- addenda and supplementary notices, if any;
- the original tender;
- post-tender correspondence, if any; and
- the Letter of Acceptance.

The Bond must be stored safely to protect against damage or loss. Particular care should be taken to ensure that the Bond is closely safeguarded and not annotated, interfered with or altered in any way.

The Bond should be retained for eight years from the issue of the Final Payment Certificate. Under the *Limitation Act 1969* (NSW), legal action may be commenced within six years of the date of breach of contract; or from the date when the damage was known or manifest in the case of a tort. For a breach of the *Trade Practice Act 1974* (Cwlth) an action may be commenced at any time within three years after the date of loss or damage.

Copies of the Bond should be prepared for use by the person(s) involved in the management of the contract.

3 Notices

3.1 Service of Notices

A notice shall be deemed to have been given when it is received by the person to whom it is addressed or is delivered to the address of the person last communicated by the person to the person giving the notice, whichever is the earlier.

When the parties agree, an email or facsimile may be regarded as notice in writing under the provisions of the *Electronic Transactions Act 2000* (NSW).

3.2 GC21 contracts

Clause 30.1 requires all notices (whether originating from the Principal or the Contractor) to be sent to the relevant persons and to the correct addresses:

- Notices from the Contractor to the Principal must always be sent to the Principal's Authorised Person. Notices under clause 73.1 or 73.2 should be copied to the Principal's senior executive.
- Notices from the Principal to the Contractor must be sent to the Contractor's Authorised Person at the address provided.

Clause 30.2 requires that all notices must be in writing, and all instructions by the Principal must be in writing or confirmed in writing as soon as practicable, where given orally when urgent action is required.

The names of the relevant persons and their addresses are specified in Contract Information items 4 to 11:

- Office address (for delivery by hand);
- Postal address (for delivery by post);
- Facsimile number;
- e-mail address.

3.3 Minor Works contracts

Clause 1.1 requires that all notices and submissions to the Principal must go to the Principal's Representative.

4 Contract Meetings

4.1 Site Meetings (all contracts)

During the course of a contract the parties must conduct regular site meetings to discuss matters related to the work being carried out to ensure a common understanding of any issues and to facilitate the actions required.

The first meeting should be arranged as soon as possible after the Contract has been awarded. Its purpose is to establish a relationship and to discuss the mechanics under which the contract is to be administered.

Site meetings are generally attended by the Principal's and Contractor's personnel responsible for the administration and management of the contract.

4.2 Site Meeting Minutes

Site meetings minutes must be an accurate record the matters discussed, the issues resolved and the actions agreed by the parties. They must be expeditiously distributed to all parties.

4.3 GC21 specific meetings and workshops

Under GC21 based contracts there is a contractual requirement to hold:

- Start-up workshops
- Monitoring meetings
- Close-out workshop

For assistance in conducting these workshops and meetings refer to Procurement Practice Guide [GC21 meetings and workshops](#).

Start-up workshops

Within 28 days after the Date of Contract, the Principal is obliged to arrange a start-up workshop involving the parties and others concerned with the Works.

The aim of the start-up workshop is to encourage the Principal, the Contractor and others concerned with the Works (eg the Client, Consultants, Subcontractors and Suppliers and, if appropriate, persons such as representatives of government authorities, end users and local community representatives) to work within "a culture of co-operation and teamwork for the management of the Contract".

The meeting should be conducted with this objective in mind, to encourage a free and open discussion of the respective parties' priorities.

Evaluation and monitoring

The Principal and the Contractor are required to meet regularly to evaluate and monitor their performance under the Contract. These meetings are different from site meetings held to discuss matters related to the work being carried out, and are intended to promote co-operation and efficiency.

These meetings are crucial for the identification of project concerns and priorities, and the development of the associated action plans and corrective actions essential for the success of the contract and project. The meetings also provide the means for refocussing the parties and bringing in new stakeholders, especially during long and complex projects.

Close-out workshop

The close-out workshop is intended to finalise the project evaluation and cooperation process commenced at the start-up workshop and maintained through the evaluation and monitoring meetings. It should reach some consensus as to the effectiveness of the management processes employed on the project and perhaps promote some suggestions for improvement for future contracts.

5 Contract management responsibilities

5.1 Generally

Provisions in the standard form contracts in the [Procurement System for Construction](#) may require the Contractor to submit:

- a program;
- proof of insurance; and
- unconditional undertakings.

5.2 Insurance

The standard form contracts in the [Procurement System for Construction](#) 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) and paid for by the service provider. The insurance must cover both parties and any subcontractors or 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 sub-consultants also have such insurance. With contracts involving professional services involving significant risks, professional indemnity insurance is also required of the service provider and relevant subcontractors and sub-consultants (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 sub-consultants, 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 subconsultants and this is possible, or through a separate personal accident or mortality insurance policy.

For further information refer to Procurement Practice Guide *Construction insurance*.

5.3 Undertakings

An Undertaking is the term used to describe the form of security required under the Contract. It is a promise by a recognised financial institution, such as a bank or insurance company, to pay an amount of money to the Principal on demand.

Provisions in the standard form contracts in the *Procurement System for Construction* stipulate the amount of security required. The Contractor is required to provide the security to the Principal in the form of an unconditional Undertaking, payable on demand, provided by financial institutions on the Contractor's behalf.

Financial institutions listed as being regulated by the Australian Prudential Regulation Authority are acceptable to give the unconditional Undertakings required in the contracts.

5.4 Subcontracting

Provisions in the standard form contracts in the *Procurement System for Construction* require the contractor and consultant to:

- comply with the NSW Government *Code of Practice for Procurement*;
- give the Principal an opportunity to object to the appointment of each subcontractor and sub-consultant; and
- not assign a right or benefit under the contract without the Principal's written consent.

Any objection to a subcontractor or sub-consultant must only be made on reasonable grounds.

As a general rule, an objection to a subcontractor or sub-consultant would only be raised where there is verified information available that shows the proposed subcontractor or sub-consultant 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/sub-consultant, the Principal must respond within the time required, or a reasonable time if no time is specified.

Under the standard contract form conditions the absence of or raising of an objection by the Principal to any subcontractor or sub-consultant 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.

5.5 Managing payment claims

The Principal's obligations to make progress payments are governed by the terms of the contract between the Principal and the contractor or service provider and by the *Building and Construction Industry Security of Payment Act, 1999* (NSW).

The Act provides a statutory right to progress payments for a person (or company) that has undertaken to carry out construction work or to supply related goods and services under a construction contract.

Procurement Practice Guide *Managing payment claims* provides guidance to assist agencies and their representatives to manage the payment claim proceed for construction contracts.

5.6 Managing variations

The general conditions in each standard form of contract define what constitutes a variation in that particular standard form. In general terms, a variation is a change to the work required under the Contract. For a construction contract, a variation is usually defined as a change to the Works. Each standard form contract also includes other provisions relating to variations and their management, which should be read in conjunction with these general principles.

If the Principal's representative instructs (directs) a variation, the Contractor is obliged to carry out the instruction. The Contractor is generally not entitled to change the Works without agreement confirmed in writing by the Principal's representative. A variation should generally be consistent with, or similar in nature to, the work under the Contract.

A variation becomes part of the Contract and all the contract conditions apply to the changed work, including provisions for extensions of time and site conditions (if applicable).

A variation instruction will often lead to claims from the Contractor for additional payment and for an extension to the period for completion. The additional payment may include additional costs for delay, acceleration and/or disruption associated with the variation. Variations are one of the main reasons for cost and time overruns in construction contracts.

It is therefore important to manage variations effectively in order to reduce the risk of exceeding the budget and completing the Works late.

Ideally, to meet the project budget and program, no variations will be directed during the course of the Contract. The scope of the work under the Contract will have been approved by the client agency before the contract is awarded and should not be changed without good reason. Note that it is not a role of the Principal's representative to "improve" the approved design.

Procurement Practice Guide *Managing variations* provides guidance to assist agencies and their representatives to manage the variations for construction contracts.

5.7 Avoiding delay

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.

Procurement Practice Guide *Avoiding delay* provides guidance 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 extensions of time*, and
- *Handling prolongation and disruption claims*.

5.8 Assessing extension of time claims

There are risks that failure to accurately assess delays to completion of a construction contract will result in:

- unnecessary extensions to the completion time;
- excessive delay-related costs; or
- disputes about a contractor's entitlements to extensions of time or delay costs.

The first and most effective step in managing these risks is to avoid or minimise delays caused by the Principal. Procurement Practice Guide *Avoiding delay* suggest strategies to minimise the risks.

Ongoing monitoring of progress and accurate assessment of delays that occur will assist in minimising the adverse consequences.

Procurement Practice Guide *Managing extensions of time* provide guidance to assist agencies and their representatives to assess claimed delays to completion of construction contracts and grant appropriate extensions of time.

5.9 Handling prolongation and disruption claims

If claims for delay costs resulting from prolongation or disruption by the Principal are not handled appropriately, there are risks that excessive costs will be incurred or contract disputes will occur.

Procurement Practice Guide *Handling prolongation and disruption claims* provides guidance to assist agencies and their representatives to respond appropriately to claims from construction contractors for additional costs for prolongation or disruption.

5.10 Protection of children and other 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 such as schools, hospitals and other facilities where children would be present.

Such personnel restrictions would also apply where other vulnerable people are on or adjacent to work sites.

This requirement is recognised in the Procurement System for Construction standard form contracts. Where the contract requires protection of children and other vulnerable people the Contractor must use the *Prohibited Employment Declaration* available at: www.kids.nsw.gov.au.

5.11 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.

6 Statutory Requirements and Codes of Practice

6.1 Compliance with codes

The NSW Government *Code of Practice for Procurement* imposes obligations upon the Principal as well as the Contractor. The Code is available on the Internet at:

www.treasury.nsw.gov.au/procurement/cpfp_ig

6.2 Compliance with statutory requirements

The Contractor is liable for compliance with all statutory requirements unless, because of the nature of the requirements, only the Principal can comply. If a particular statutory authority refuses to accept a notice from a Contractor and requires that notice to be provided by the Principal, then the Contractor cannot be made to give that notice.

The Contractor is responsible for the giving of all notices necessary to comply with Statutory Requirements and the payment of all necessary fees, charges and other imposts, other than those notices and imposts to be given or paid by the Principal under the Contract.

The Contract Documents should include information about any statutory notices given or statutory costs paid by the Principal prior to the award of the Contract.

6.3 Documentary evidence of Compliance

The Principal will not agree that Completion has been achieved until all original documents evidencing statutory approvals are received from the Contractor. Otherwise, the Principal runs the risk of being unable to operate, or occupy, the new facility because of lack of approval.

6.4 Goods and Services Tax

The standard form contracts provided in the *Procurement System for Construction* have incorporated the provisions of the *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth). All Australian construction contractors should be familiar with the GST provisions and how the Act applies to their businesses. They may not all be familiar with the concept of a Recipient Created Tax Invoice (RCTI).

The need for RCTIs arises as explained below in simplified form:

- The Act requires that a tax invoice be created in respect of every business transaction that occurs between a payee and payer.
- The tax invoice raises a commitment for the payee to forward the relevant amount of GST to the Taxation Office.
- Except for excluded items, the amount of GST is directly related to the invoiced amount (1/11th of that amount).
- Once this tax commitment is raised, it is administratively difficult to adjust it.
- Because of the payment provisions of the Contract, the amount claimed by the Contractor as a progress claim is not necessarily the amount that the Principal will pay in respect of that claim. It may be reduced in accordance with Clause 63.
- It is therefore preferable for the Principal to raise the tax invoice after the Scheduled Amount has been confirmed.

It is important that the Contractor is aware that a tax invoice must not be raised by the Contractor with the payment claim.

A Principal wishing to issue RCTIs must obtain the authority to do so from the Tax Office.

A Principal not wishing to issue RCTIs, or not having the authority to do so, will need to develop with the Contractor a procedure that ensures that the tax invoice issued by the Contractor represents the amount that the Principal intends to pay.

Although there is provision in the contracts for the Principal to withhold tax in accordance with the Pay As You Go provisions of the tax system, it would be extremely unlikely that a construction contract would be awarded to a business that was not registered for GST.

6.5 Security of Payment Act

The *Building and Construction Industry Security of Payment Act 1999* (NSW), as amended in 2002, 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 expeditiously and within the time provisions of the Act.

This is recognised in the standard form contracts in the *Procurement System for Construction*.

For details of the operation and limits of the Act refer to the *The Security of Payment Information Kit* available at:

www.dpws.nsw.gov.au/Government+Procurement/Security+of+Payment/About+Security+of+Payment+Act.htm.

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.

6.6 Long service levy

The Contractor is required to pay the amount of the Long Service Levy. Details of the amount of the levy can be obtained from the Long Service Payments Corporation website at www.lspc.nsw.gov.au.

The Principal should seek documentary confirmation that the levy has been paid.

6.7 Building Code of Australia

Content to be added

6.8 EPA Act

Content to be added

6.9 Registration and licences

The Principal should protect its interests by requesting evidence of the Contractor's registrations and licences.

A Contractor having the most basic quality management system would maintain a register of vehicles and plant, including details of plant registration and drivers licensed to operate the vehicles and plant.

7 NSW Government Guidelines

7.1 Aboriginal participation in construction

NSW Government Guidelines

The NSW Government has published Aboriginal Participation in Construction Guidelines. These guidelines are available on the Internet at:

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

The provisions of the contract will indicate whether an Aboriginal Participation Plan is to be prepared and implemented by the Contractor in accordance with the Aboriginal Participation in Construction Guidelines.

Implementation

It is not sufficient that the Contractor simply produce documentation on aboriginal participation in construction. The Contractor must also implement and manage its processes in accordance with the plans it has developed.

Demonstration of compliance

The Contractor must also show the Principal, when requested, how it is meeting its obligations to promote aboriginal participation in construction.

The Principal should monitor compliance during the course of the Contract.

7.2 Environmental management

NSW Government Guidelines

The NSW Government has published the Environmental Management Systems Guidelines, which the Contractor must follow in managing environmental impacts under the Contract. The Environmental Management Systems Guidelines are available on the Internet at:

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

Compliance with the Environmental Management Systems Guidelines is additional to any relevant legislation or specific provisions in the Contract.

Environmental Management Plan

The provisions of the contract will indicate whether the Contractor is to submit an Environmental Management Plan.

Environmental management

It is not sufficient that the Contractor simply produce the environmental management documentation. The Contractor must also implement and manage its environmental processes in accordance with the systems and plans it has developed.

The Contractor must also show the Principal, when requested, how its environmental obligations are being managed.

The Principal should monitor compliance during the course of the Contract.

7.3 Industrial relations management

Contractor's responsibility

Where the provisions of the contract require Industrial relations management, the Contractor accepts the task of managing the industrial relations (IR) both on site "and otherwise in connection with the Contract". Although the Contractor may not be seen to be responsible for, say, an industrial dispute at the premises of a subcontract supplier, the Contractor must manage the outcomes of that dispute to avoid delays (and costs) to the project. The Contractor could, for example, switch to another supplier. The Contractor must keep the Principal informed of any such issues.

NSW Government Guidelines

The NSW Government has published Industrial Relations Management Guidelines, which the Contractor must follow in managing industrial relations under the Contract.

The Industrial Relations Management Guidelines are available on the Internet at:

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

Project Industrial Relations Plan

Where a Project Industrial Relations Plan is to be prepared by the Contractor the Principal is responsible for ensuring that the Industrial Relations Plan is in accordance with the Industrial Relations Management Guidelines.

Management of industrial relations

It is not sufficient that the Contractor simply produce the Industrial Relations management documentation. The Contractor must also implement and manage its Industrial Relations processes in accordance with the systems and plans that it has developed.

The Contractor must also show the Principal, when requested, how its Industrial Relations obligations are being managed.

7.4 Occupational health and safety management

Relevant legislation and guidelines

By law the Contractor must comply with current *Occupational Health and Safety Act 2000* (NSW) and the OHS Regulation 2001. The provisions of the contract extends those obligations to:

- compliance with the NSW Government Occupational Health and Safety Management Systems Guidelines; and
- the management of all aspects of occupational health and safety under the Contract.

The Occupational Health and Safety Management Systems Guidelines are available on the Internet at:

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

Appointment of principal contractor

The Contractor becomes the "principal contractor" as defined in the OHS Regulation 2001 unless specifically excluded from that role.

For the regulation to be effective, there can only be one principal contractor in charge of any one site. Thus, where more than one Contractor is operating at a site, one, and only one, must be appointed principal contractor and "controller of premises" for the purposes of the OHS Regulation 2001.

OHS Management Plans

The provisions of the contract will nominate whether the Contractor is to submit:

- a Project OHS Management Plan; and/or
- a Site-specific Safety Management Plan,

(each as referenced in the OHS Regulation 2001 and in the Occupational Health and Safety Management Systems Guidelines), for its design and construction work.

The Occupational Health and Safety Management Systems Guidelines require a Site-specific Safety Management Plan for all contracts, whilst a Project OHS Management Plan is required for all contracts valued at \$1M or more.

An agency 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.

An agency OHS management plan should include:

- responsibilities for each of the agency/manager site personnel;
- use of site diaries;
- surveillance and auditing of the service provider activities including any design;
- management of OHS records;
- site safety committees (where applicable);
- personal protection equipment;
- reviewing contractor OHS submissions, including OHS management plans and Safe Work Method Statements (SWMS); and
- identifying, assessing and controlling safety hazards and risks associated with the contract management work, including to employees, and work site users/neighbours 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 OHS Regulation 2001 (NSW). 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.

Management of occupational health and safety

It is not sufficient that the Contractor simply produce the OHS management documentation. The Contractor must also implement and manage the safety processes in accordance with the systems and plans that it has developed.

The Contractor must also show the Principal how the OHS aspects of the Contract are being managed.

In order to fulfil its duty of care towards workers on the project, the Principal should use this clause to regularly require the Contractor to demonstrate compliance with good OHS practices.

7.5 Quality management

Managing work quality

Under 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.

Under the standard form contracts in the *Procurement System for Construction* consultants and contractors are required to manage their work quality by using a specified quality management system, including a management plan and/or inspection and test plans (ITPs). The provisions of the contract will nominate whether the Contractor is to submit:

- Quality Management Plan;

- Design Plans; and
- Inspection and Test Plans.

The extent of the involvement of the Principal's representative is 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.

NSW Government Guidelines

The NSW Government relies on service providers that are committed to continual improvement in their efficiency and effectiveness. For this reason, the Government and its agencies seek service providers that take a systematic approach to the management of quality and in so doing better control and improve performance.

The Contractor must follow the NSW Government Quality Management Systems Guidelines when managing quality under the Contract. The Quality Management Systems Guidelines are available on the Internet at:

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

Compliance with the Quality Management Systems Guidelines is additional to any relevant legislation or specific provisions in the Contract.

Quality Management Plan

A Quality Management Plan is a project or contract specific plan developed by the service provider by applying an appropriate quality management system to plan and carry out the work involved, to ensure conformity with the requirements for the project/contract and to manage the quality risks. The Quality Management Plan is used and updated regularly during the life of the project or contract.

A Quality Management Plan would include clearly defined:

- project or contract objectives;
- resources to be used, including management structure/personnel and their training for the work;
- personnel responsibilities and authorities;
- process controls to be used to deal with the work and risks involved, including quality procedures, and ITPs and associated checklists, with methods for measurement/analysis;
- methods to be used to monitor and audit implementation;
- methods to be used to identify nonconformities, and implement corrective and preventive actions; and
- methods to be used for document control and records management, including maintaining, securing/protecting/storing, identifying, retrieving and otherwise controlling records for the periods required and then their disposal.

Design Plans

Design activities require reviews, verification, validation and change control as detailed in AS/NZS ISO 9001:2000, Appendix C and Appendix D. A design plan covering this for the design activities for each phase or stage of the design would be

prepared, implemented and updated by each service provider involved in design as part of its Quality Management Plan.

The design plan would identify the competent personnel to undertake these activities, with their details, qualifications, authorities and responsibilities; the organisation structure involved, showing reporting relationship and technical interfaces, including with the customer and service providers; the design inputs and output processes and documents required; the design reviews, verification, validation and change control required; and the co-ordination and other processes and procedures involved.

Each service provider QMS and QMP must detail the controls they will use for the design processes to be carried out by their service providers to ensure all requirements will be satisfied.

Inspection and Test Plans

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 that verified it conforms.

For construction activities (which may include design), Inspection and Test Plans are required indocumenting the procedure to be undertaken and providing evidence (including reviews and verification points) that a particular work process/product or activity conforms to the specified requirements.

Inspection and Test Plans may also be used to incorporate health & safety, environmental and regulatory requirements, and identify and trace nonconforming work. For complex processes ITPs may need to be supplemented with method statements and other documentation.

The content of Inspection and Test Plans is based on the contract drawings, contract requirements and other sources such as standards, legislation and regulatory requirements.

An Inspection and Test Plan would:

- detail the inspections and tests required, including Hold and Witness Points;
- identify acceptance criteria, sampling and testing methods and frequency of sampling/testing;
- identify responsibilities for inspection and testing and product/service approval; and
- detail the records to be provided, including those required for identification and traceability.

Refer to the QMS Guidelines for examples of ITPs.

Quality management

It is not sufficient that the Contractor simply produce the quality management documentation. The Contractor must also implement and manage its quality processes in accordance with the systems and plans it has developed.

The Contractor's records must be sufficiently complete and accurate as to provide the Principal with assurance that specified standards of quality are being attained.

The Contractor must also show the Principal, when requested, how its quality management obligations are being managed.

The Principal should monitor compliance during the course of the Contract.

7.6 Training management

NSW Government Guidelines

The NSW Government has published the Training Management Guidelines, which the Contractor must follow in managing environmental impacts under this contract.

The Training Management Guidelines are available on the Internet at:

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

Other obligations

Compliance with any specific provisions in the Contract and with the government guidelines is additional to any relevant industrial obligations and does not override those industrial obligations.

Training Management Plan

The provisions of the contract will indicate whether a Training Management Plan is to be prepared by the Contractor (as per the Training Management Guidelines).

Training management

It is not sufficient that the Contractor simply produce complying documentation. The Contractor must also implement and manage its processes in accordance with the systems and plans it has developed.

The Contractor must also show the Principal, when requested, how the above obligations are being managed.

The Principal should monitor compliance during the course of the Contract.

8 Performance management

8.1 Performance reporting

The *Procurement System for Construction* includes a Performance Management system to ensure that project managers, consultants and contractors engaged for NSW Government construction contracts have appropriate expertise and capabilities.

The performance of project managers, consultants and contractors is monitored for each contract. The results of performance monitoring are linked to the selection for future tendering opportunities. Poor or inconsistent performance results in limiting opportunities, and good or consistent performance results in extending opportunities. The better the performance, the more opportunities are offered, providing an incentive for service providers to continue improving their performance.

The Stakeholder Performance Review and Reporting system systematically captures and monitors the satisfaction of major stakeholders with project and relationship outcomes, following the completion of construction projects. Key stakeholders have the opportunity to report on a range of performance criteria, for all contracts valued at \$1.0M or more. This system facilitates the development of improved project procurement implementation by identifying opportunities for improving future project relationships and management practices.

For further information refer to Procurement Practice Guide *Performance management*.

8.2 Authorisation for access to other records

Release of information

The NSW Government wishes to share, throughout its various agencies, information relating to the Contractor and the Contractor's performance. The Government does not wish to be constrained in its opportunity to share such information and makes the Contractor aware of this intention.

Use of information

The Contractor is made aware that unsatisfactory performance on this Contract could lead to loss of future opportunities to do business with other Government agencies.

Qualified privilege

If the Principal provides to another party information, such as an unsatisfactory performance report, which is critical of the Contractor, the Contractor could seek retribution under defamation laws. This clause provides the Principal with a defence against the Contractor taking such action.

Release and indemnity

This clause provides the Principal with further protection from legal action by having the Contractor indemnify the Principal against claims arising out of:

- making available the information in a contractor performance report; and
- the use, by another party, of the information in a contractor performance report.

Despite the safeguards written into the above clauses, the Government's objective in sharing contractor performance information among agencies will fail unless the procedures for performance reporting are carefully followed. Details are contained in the NSW Government Contractor Performance Reporting and Exchange of Reports between Government Agencies Guidelines, which are available on the Internet at:

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

9 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.

Provisions in the standard form contracts in the *Procurement System for Construction* include a dispute resolution process that must be followed before litigation or other remedies may be pursued. Generally, 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 Commerce provides disputes 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.

For further information refer to Procurement Practice Guide [Contract dispute resolution](#).