



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

---

## **Procurement Practice Guide**

### **The Principal in a construction contract**

**July 2009**

---

## 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>

### 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](mailto: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.
-

# The Principal in a construction contract

---

## Contents

<b>1</b>	<b>Introduction.....</b>	<b>1</b>
<b>2</b>	<b>Identifying and naming the Principal .....</b>	<b>1</b>
	2.1 Who is the Principal.....	1
	2.2 Naming the Principal .....	1
<b>3</b>	<b>The Principal’s obligations and other requirements .....</b>	<b>2</b>
	3.1 Contractual obligations and other requirements .....	2
	3.2 Tender and contract documentation .....	2
	3.3 The tender process .....	2
	3.4 Managing the contract.....	2
<b>4</b>	<b>Delegation of the Principal’s powers .....</b>	<b>3</b>
	4.1 Original authority and delegation .....	3
	4.2 Delegating financial authorities .....	3
<b>5</b>	<b>Possible schemes of delegation.....</b>	<b>4</b>
<b>6</b>	<b>Support available from the Department of Commerce.....</b>	<b>5</b>
	6.1 Office of NSW Procurement.....	5
	6.2 Office of Public Works and Services .....	5
	6.3 Naming the Minister for Commerce as the Principal.....	5



# The Principal in a construction contract

## 1 Introduction

---

The purpose of this Procurement Practice Guide is to provide assistance to the NSW Government agencies that propose to enter into contracts for construction work or associated services, but are not accredited under the [Agency Accreditation Scheme](#), in relation to:

- Identifying and naming the Principal in a contract,
- The Principal's obligations and other requirements;
- Delegation of the Principal's powers; and
- Possible schemes for delegation.

Information about support available to agencies from the Department of Commerce is also provided.

## 2 Identifying and naming the Principal

---

### 2.1 Who is the Principal

The Principal is a generic term used in a contract to refer to the party to the contract that engages the other party (the Contractor) to perform work or provide goods or services. The primary obligation of the Principal is generally to pay the Contractor. The Principal will also have other obligations, as set out in the particular contract.

The legal entities that are bound as Principals by contracts for NSW Government agencies are:

- for agencies that are not corporations: the Crown in right of the State of New South Wales (the State of New South Wales); and
- for corporations, including statutory corporations such as Railcorp, Sydney Water, the Health Administration Corporation, or Area Health Services: the corporation in its own right and name.

### 2.2 Naming the Principal

Following the introduction of the NSW Government Procurement Policy under [Treasury Circular TC 04/07](#), there is no mandated requirement for the Minister for Commerce to be the Principal in contracts for construction projects. The agency responsible for the construction project may nominate a Principal appropriate to the legal entity that is entering the contract.

Where work is to be carried out for an agency that is not a corporation, the Principal should be named in the contract as the 'Minister for XXX for the State of New South Wales', using the appropriate official title of the relevant Minister. Naming the Minister in this way takes advantage of the common law position that a Minister of the Crown, acting in his or her office, is automatically taken as an agent of the Crown and not held personally liable. The agency should ensure that there is no legal or political impediment to naming the particular Minister as the Principal.

Where a Minister is named as the Principal in a contract and a government re-organisation changes the title or role of the Minister, the contract remains valid without the need for amendment, as do any associated delegations of authority made by the Minister.

Where the work is to be carried out for a corporation, naming the Principal as the registered or official name of the corporation may be appropriate.

## **3 The Principal's obligations and other requirements**

### **3.1 Contractual obligations and other requirements**

In addition to the obligations and powers of the Principal created by the contract, there are other requirements that agencies must ensure are effectively performed to ensure the success of a project. These include:

- tender and contract documentation;
- the tender process; and
- management of the contract.

### **3.2 Tender and contract documentation**

When tender and contract documents are prepared, decisions must be made on matters such as:

- identifying who will act on behalf of the Principal, including:
  - the person who will administer the contract (ie. the Principal's Authorised Person who will act on behalf of the Principal under a GC21 Contract); and
  - the person who will confer with the Contractor to try to resolve issues or disputes (ie. the Senior Executive under a GC21 Contract).
- allocating contractual risks, for example:
  - whether the Contractor or the Principal will accept the risk of adverse site conditions;
  - the extent of design responsibility to be allocated to the Contractor;
  - whether the Contractor will be required to pay liquidated damages if the work is completed late; and
  - whether the Principal will arrange insurance, or require the Contractor to do so.

### **3.3 The tender process**

When a Government agency calls tenders, the process adopted must comply with NSW Government policies, including requirements of the *Code of Practice for Procurement* and the NSW Government *Tendering Guidelines*. Tender documents generally set out aspects of the procedure for closing and evaluating tenders, and this forms a 'tender contract' between the Principal and tenderers.

The agency must ensure that:

- funds sufficient to cover the estimated cost are available before tenders are called, so tenders are not sought without a firm intention and capacity to proceed with a contract;
- the tender process is planned and managed to meet the required standards, including maintaining probity, fairness and confidentiality; and
- the accepted tender offers the best value for money.

### **3.4 Managing the 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 powers and obligations 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' on the Internet at:

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

## **4 Delegation of the Principal's powers**

---

### **4.1 Original authority and delegation**

Organisations can only enter into and administer contracts through people who act on their behalf. Authority is generally vested in the Ministers responsible for agencies, or in the chief executive or board if the agency is a corporation.

The Principal is not required by law to personally fulfil all the Principal's obligations under a contract. Where a Principal has entered into a large number of concurrent contracts, this is clearly impractical, and it is expected that the functions of the Principal will be carried out by others acting under the Principal's authority.

In practice, agencies are responsible for making suitable arrangements to fulfil the functions and obligations of the Minister or corporation that is formally named as the Principal in a contract. Decisions made in relation to the contract that create a liability for expenditure of public funds must be approved by delegates with appropriate financial and other authorities.

Ministers may delegate their powers to executives and officers in government agencies. With some limitations, those powers may be further sub-delegated within and beyond agencies.

A statutory corporation may appoint persons to exercise authority, on behalf of the organisation, to enter into and administer contracts.

### **4.2 Delegating financial authorities**

Entering into contracts, and exercising some powers under contracts (such as varying the works or approving contract payments), commit the Principal to a financial liability. Under section 12 of the *Public Finance and Audit Act 1983* (NSW), an officer of an authority may only commit or incur expenditure of public moneys within the limits of a written delegation from a person entitled to make the delegation.

Even though money may have been 'committed' to a project in agency records, the officer 'incurring' the liability, for example by entering into (signing or otherwise approving) a particular contract or instructing a variation, must have formal delegated authority.

Authority to commit or incur expenditure of public moneys cannot be delegated to a private sector entity or individual. This limitation must be considered when determining what contractual authorities will be delegated to a private sector project manager.

## 5 Possible schemes of delegation

---

For agencies that are not accredited under the *Agency Accreditation Scheme*, there is a range of options available for delegating authorities to enter into and administer construction contracts. A Minister or corporation that is the named Principal may, for example:

- Delegate all authority, including the power to enter into contracts and incur expenditure, to an accredited agency, and make funds in bulk available to the accredited agency to make payments;
- Delegate a range of authorities to an accredited agency, including the power to incur expenditure (for example by entering into contracts, instructing variations or extending the time for completion) but retain some powers (for example power to terminate the contract or settle substantial disputes); or
- Delegate only selected contractual authorities to another agency or a prequalified private sector project manager, and retain the power to enter into contracts and incur expenditure.

Where delegations of authority to incur expenditure are not already in place, financial authority will need to be delegated to appropriate officers within the agency. Formal instruments and instructions should be issued to allocate responsibilities and delegate associated authorities.

Where financial authority is not delegated to the person administering the contract or responsible for resolving issues, contractual authorities that involve incurring additional expenditure may be exercised only with the formal concurrence of an authorised financial delegate from the client agency. A person with responsibility for making decisions relating to the contract must have timely access to an appropriate financial delegate. If authorisation is delayed, it can lead to contractual claims and associated costs to the agency.

Effective management and communications systems and structures must be established, within the agency and with external contract administration personnel, to ensure timely and effective decision-making on contractual matters.

Schedules of Authorities listing all contractual functions, which may assist in delegating authorities to a project manager, are available in the NSW Government *Procurement System for Construction* as follows:

- GC21 Contracts  
[http://www.nswprocurement.com.au/psc/contract\\_management/cm\\_da\\_gc21.pdf](http://www.nswprocurement.com.au/psc/contract_management/cm_da_gc21.pdf)
- Minor Works Contracts  
[http://www.nswprocurement.com.au/psc/contract\\_management/cm\\_da\\_minor\\_works.pdf](http://www.nswprocurement.com.au/psc/contract_management/cm_da_minor_works.pdf)
- Mini Minor Works Contracts  
[http://www.nswprocurement.com.au/psc/contract\\_management/cm\\_da\\_mini\\_minor\\_works.pdf](http://www.nswprocurement.com.au/psc/contract_management/cm_da_mini_minor_works.pdf)
- Consultancy Services Agreements  
[http://www.nswprocurement.com.au/psc/contract\\_management/cm\\_da\\_consultancy\\_services.pdf](http://www.nswprocurement.com.au/psc/contract_management/cm_da_consultancy_services.pdf)

## 6 Support available from the Department of Commerce

---

### 6.1 Office of NSW Procurement

The NSW Government *Procurement System for Construction*, which includes guidance material, standard form contract documents, supporting information, tools and management systems is available at:

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

Additional support and advice is available from the *NSW Procurement Client Support Centre*.

### 6.2 Office of Public Works and Services

The Department of Commerce, Office of Public Works and Services (OPWS), as an accredited agency, can provide support to agencies on a fee for service basis, as expert adviser, project manager or contract administrator, making use of the Department's expertise and well-developed systems and procedures.

Where an agency requests OPWS to administer a contract on behalf of a Principal other than the Minister for Commerce, the necessary contractual authorities must be formally delegated.

Where OPWS is to make payments to a contractor on behalf of another agency, the agency must agree to funds transfer arrangements that ensure amounts necessary to meet contract payment obligations are available at least one month before the payments are due under the contract.

Information about support available from OPWS is available from:

[Francis.D'lima@commerce.nsw.gov.au](mailto:Francis.D'lima@commerce.nsw.gov.au)

### 6.3 Naming the Minister for Commerce as the Principal

The Minister for Commerce cannot be named as the Principal in contracts for corporations, charities, local government and other entities that are not part of the State Government.

The Minister for Commerce may be named as the Principal in contracts for NSW government agencies, subject to the following conditions:

- The agency has engaged the Department of Commerce as expert adviser in accordance with *Treasury Circular TC 04/07*, or as project manager or contract administrator; and
- There is a written agreement, signed by the Director-General of the relevant agency or appropriate delegate, confirming that the agency:
  - retains all commercial, legal and contractual risks;
  - has funds available for commitment to fund the total cost of the project, including any variations or dispute settlements; and
  - undertakes to ensure sufficient funds are available to meet contract payment obligations one month before the amounts are payable under the contract.