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Executing the contract

Some basics

The following points set out the basic principles and steps to follow when executing the contract:

- Where appropriate, involve legal and probity advisers at an early stage—ideally as far back as the preparation of a business case for the procurement.
- Exercise caution in discussions prior to signature to avoid ‘drifting’ into an implied or premature contract.
- Consider using trained negotiators in complex or high-value cases.
- Ensure that the entity’s accountability to parliament for financial management and administration is not compromised, particularly through inappropriate use of confidentiality clauses.
- Clear up all outstanding issues before signing.
- Check that all Commonwealth Procurement Rules (CPRs) have been addressed.
- Before signature, check the final draft contract with a legal adviser.
- *Always* sign the contract before the commencement of the consultancy. Until signing has occurred, do not ask the consultant to undertake any work, even on an informal basis.
- Ensure that mandatory Australian Government reporting requirements are fulfilled on time.

Australian Government requirements

Accountability and transparency requirements

Requirements designed to promote the transparency of relevant entities' procurements are outlined in Chapter 7 of the CPRs. The key requirements include:

- Contracts and amendments must be reported on AusTender within 42 days by NCCEs for values above \$10,000 and \$400,000 for CCEs. All standing offers, regardless of value, must be reported on AusTender within 42 days. See clause 7.16 of the CPRs.
- The Senate of the Australian Parliament imposes an additional transparency requirement in the form of a Senate Order (the so-called Murray Motion). The order requires each NCCE to develop an internet listing twice a year that identifies contracts entered into during the preceding calendar or financial year, valued at or above \$100,000 (GST inclusive), along with details relating to each of those contracts. The Department of Finance now publishes the reports on AusTender on behalf of NCCEs. However, ministers are still required to table in the Senate letters of advice that the NCCEs that they administer have placed a list on the internet (RMG no. 403 provides a letter template, as well as detailed administrative information regarding the Senate Order). Letters must be tabled within two months of the end of the reporting period to which they refer.
- A relevant entity's Annual Report must also include procurement information (CPR clause 7.24).
- Accountable authorities are required by sections 19 and 91 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) (and clause 7.24 of the CPRs) to provide an annual report on compliance (and non-compliance) within the PGPA framework. The report must be provided to the Finance Minister as well as the entity's responsible minister. Detailed requirements are set out in Department of Finance (2015) RMG no. 208.

Tips and traps

Contract termination clauses are necessary, but may be of limited use in themselves. For example, one agency signed an IT management contract which contained a termination clause that could be activated under a large number of situations and conditions. (The contractor also supplied all of the entity's hardware as part of the contract.) However, termination of the contract would have left the agency with no IT support unless other contractors could be found to immediately take over a system with which they were not familiar, as well as providing all the equipment. An alternative approach would have been to also include **graduated incentives and penalties** that could be applied progressively if contract performance fell below expected standards.

Table 6. Executing the contract: Risks and mitigation

Type of risk	Likely consequence	Mitigation strategy
Deadlock on details of agreement	<ul style="list-style-type: none"> • Delays in delivery • Need to re-tender • Increased cost 	<ul style="list-style-type: none"> • Include the draft contract in tender documentation • Distinguish between essential and non-essential requirements • Seek legal advice
Failure to ensure agency accountability to parliament	<ul style="list-style-type: none"> • Undue political and media attention • Accountable Authority must report non-compliance 	<ul style="list-style-type: none"> • Familiarisation with CPRs and RMGs
Contract signed before all issues agreed	<ul style="list-style-type: none"> • Disputes during project • Project delay, or non-completion • Possible legal action 	<ul style="list-style-type: none"> • Resolve all issues before signature, possibly through use of a trained mediator • If start time is critical, consult legal advisers about possible two-part contract • Consider long-term benefits of restarting the procurement process instead of continuing
Price and exchange rate fluctuations	<ul style="list-style-type: none"> • Cost over-runs 	<ul style="list-style-type: none"> • Agree pricing schedules • Agree triggers for pricing variations • Hedge exchange rates, if relevant

MANAGING CONSULTANTS

Type of risk	Likely consequence	Mitigation strategy
<p>Legal meaning of contract wording differs from intention</p>	<ul style="list-style-type: none"> • Disputes • Project delay • Legal action 	<ul style="list-style-type: none"> • Check final draft with legal advisers before signature • Ensure from outset the development of a collaborative relationship with the consultant, rather than an adversarial or overly legalistic approach • Include specific evaluation criteria for assessments during and at completion of contract

This text is taken from *Managing Consultants: A practical guide for busy public sector managers*, by Leo Dobes, published 2016 by ANU Press, The Australian National University, Canberra, Australia.