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Contract and project management

Some basics

Consultants need to be managed, but not supervised or controlled.

No fail-safe methodology or perfect 'cookbook' approach exists for managing consultants, any more than it does for managing other human relationships. The key is to establish a sound, open working relationship. But a written contract that includes clauses on termination, arbitration, and graduated incentives and penalties can be a useful complement to the relationship.

If you have chosen competent consultants, let them get on with the job. That is why you have employed them, rather than using employees. But in managing them:

- Ensure not only that you have a clear understanding of what is needed, but that you communicate your requirements clearly.
- Appoint a project officer for all formal contact with the consultant to avoid involving 'too many cooks'.
- Ensure that payment schedules are aligned with the milestones specified in the contract.
- Steering committees can be very useful, particularly where there are many stakeholders in the project. But such committees also need to be managed firmly to avoid undue interference in the consultant's main task.

- Insist on regular (e.g. weekly) face-to-face meetings. Have the consultant produce an issues log at each meeting to ensure accountability. But remember, unnecessarily prolonged meetings cost money and send the wrong signal to the consultant about your own professionalism and desire to get the job done on time.
- Maintain 'open door' practices to ensure that communication is always possible.

In other words, treat a consultant as you would a member of staff who is a self-starter, professionally competent and highly motivated. Good consultants also seek regular feedback from clients to ensure that there are 'no surprises' at the end of the project. Their desire for repeat business from you makes them receptive to suggestions, but positively expressed feedback is always the most effective.

Subcontractors employed by consultants should be managed directly by them, not by you. The consultant should also be held fully responsible for the quality of their subcontractors' outputs. In the case of complex projects, it may be worth contracting another consultant separately to act as project manager. Where there is any variation in the scope of the work, it is in both parties' interests to exchange a written record of the change, as a formal contract variation.

Terminating a contract can turn the tables

The Amann Aviation case is an example where termination of a contract backfired.

In March 1987, Amann Aviation won the contract to provide coastal surveillance services in northern Australia. Although it did not at the time have the scale of operations or the expertise or equipment to meet the contract, it was to acquire resources before commencement of the contract in September. Its tender had indicated that acquisition of resources was feasible, but, in practice, it was apparent that the company was not in a position to begin operations by the start-up date. The Commonwealth therefore terminated the contract. In a subsequent court case, damages of over \$5m were awarded against the Commonwealth. (Based on Senate Finance and Public Administration References Committee 1998: 13)

Using the Amann case as an example, Seddon (2004, 1.18) highlights the legal risks involved in terminating a contract. Wrongfully terminating a contract is itself a serious breach of a contract 'which then provides the other party with the right to terminate and seek damages'. Seddon points out that:

'In the Amann Aviation case the mistake made by the Commonwealth was to by-pass the show cause procedure that was written into the contract. The Commonwealth proceeded straight to termination without giving the contractor an opportunity to show cause [why the contract should not be terminated for breach of contract by Amann].' (Seddon 2004: 31, footnote 115)

Seddon (2004: 12) also draws attention to judicial authority supporting the principle that ‘the government is required to adhere to higher standards of conduct than is expected of private sector entities [Government as a “moral exemplar”]’. The principle may be interpreted in particular cases as posing a dilemma for government (Seddon: 15) because it must act both in the interests of the beneficiary (the people it represents), as well as the contractor (a citizen, or a business that could be destroyed if the full force of a contractual remedy were exercised).

Australian Government requirements

There are no specific Australian Government requirements for managing consultants, but clause 6.6 of the CPRs does impose an obligation on officials to act ethically throughout a procurement. Officials should also check their entity’s Accountable Authority Instructions and any other operational guidelines.

The Commonwealth Contract Terms (see RMG no. 420), include a provision C.C.1 that states that the parties agree to ‘communicate openly with each other and co-operate in achieving the contractual objectives’, to ‘act honestly and ethically’, as well as other collaborative commitments.

Tips and traps

- The consultant may not be fully informed about your agency or your area’s role within it. It is worthwhile allocating some time to **educating the consultant** about your agency, including the structure, its major objectives, the political landscape, the culture, common abbreviations or acronyms used, and anything else that will assist in enhancing the quality and timeliness of output.
- For larger projects (or even small, complex ones), it is reasonable to expect the consultant to produce a **project charter** (plan) before starting work. Based on discussion with the client, it should include information like the terms of reference for the project, methodologies and a risk analysis for each component of the project, a budget that includes the payments schedule, a schedule of project meetings, timelines and milestones (often in the form of a Gantt chart), a protocol on any collaborative approaches, details

of specific client and consultant responsibilities, and any other relevant information about the project. The charter then becomes the basic reference document for both parties, and should form the basis for managing the project.

- Consultants will tend to feel aggrieved if they do additional work, but are then not paid for it. It is therefore important to ensure that a consultant does not undertake more work than is actually required without prior written agreement from the client. The contract itself should contain a clause that precludes the consultant from undertaking additional work without formal agreement (see, for example, Commonwealth Contract Terms clause C.C.2). Any changes to the contract should be agreed formally in the form of a **variation to the contract**. A trap for the unwary is an informal discussion or agreement between a client and a consultant which is not treated at the time as a formal variation because of the spirit of cooperation that may exist, or because it does not seem to be important enough. Nevertheless, it always pays to record any agreement that implies a change in scope in the work being undertaken, even if only apparently minor. Such notes (including emails) should be filed as part of the normal record-keeping process.
- Where a variation is made to the scope or terms and conditions of a consultancy, care should be taken to ensure that the **change is defensible** against a claim that it did not allow for an appropriate level of competition, or consider 'value for money'. Such a claim could be made if the change were to alter the nature or size of the original contract to a significant extent. An alternative supplier could argue that they would have been able to offer a more competitive bid had the original tender requirement included the variation. Where a change is significant, it may be judicious to let a separate contract for the work involved. If in doubt, seek legal advice.
- The term '**sign off**' to a consultant means acceptance by the client of an output, in satisfaction of the contract. Once a stage of the project has been 'signed off', the consultant is entitled to expect that no further work needs to be done on it unless a variation to the contract is agreed. If necessary, offer a conditional sign-off when you need to reserve your position for some reason.

- For large or complex projects, it is important to keep an **issues log** to record major issues that arise. The task of keeping a log can be allocated to the consultant by agreement, or, better still, specified as a requirement in request documentation. The log should form the basis of discussion during project meetings, and can be used for accountability purposes or to resolve disputes. Issues can be divided into ‘open’ (current) issues and ‘closed’ (resolved) issues. As open issues are resolved, they are moved (cut and pasted in electronic form) to the ‘closed’ table to maintain a historical record. The following is an example.

Exhibit 7.1. Sample issues log A: Open issues

No.	Date	Open issue	Resolution	Date
21	12 Jul	Budgetary implications of recommendations need to be assessed before Additional Estimates	13 Jul meeting: keep under review	
28	14 Jul	Consultant requested to attend special meeting with another agency	20 Aug: difficulties in arranging meeting due to inter-agency policy differences	
51	15 Oct	Consultant asked to confirm that project is on track, and that no extra work was being done that would lead to a claim for additional fees	15 Oct: on track 23 Dec: reconfirmed	

Exhibit 7.2. Sample issues log B: Closed issues

No.	Date	Closed issue	Resolution	Date
1	15 Jan	Consultant requires clarification of process for claiming expenses	15 Jan: agreed that tax invoices to be submitted to Mr Smith	15 Jan
2	23 Jan	Consultant raised problems regarding data base	23 Jan: agreed that Ms Jones will check data 25 Feb: IT section requested to provide software to enable transfer of revised data to consultant 26 Feb: consultant confirms receipt of data	26 Feb
3	12 Feb	etc.	etc.	

- Tender submissions and contracts normally specify the personnel to be engaged on a project. But consultants may leave a firm, or they may be engaged on another job by the time the project begins. Should you insist that only the originally **nominated personnel** be used? If you entered into the agreement because you knew the personnel nominated and wanted their particular skills, the answer is probably ‘yes’, if that is still feasible. Where this factor is important, seek a contractual guarantee (perhaps combined with monetary penalties for non-performance) at the time of selection of the consultant. Clause C.C.14 of the Commonwealth Contract Terms requires a supplier to seek the prior written consent of the client before replacing specified personnel.
- Project managers are pivotal to the success of any consultancy. They need to be across all of the key issues, understand the broader political context in which the client operates, possess business skills, and have good people skills. Some large firms have on occasion, however, used **inexperienced personnel** with little or no supervision in the role of project manager, presumably because of shortages of experienced staff. However, it is not the client’s role to provide a training ground for project managers. If you are concerned about the skills possessed by the project manager, raise the issue as soon as possible with the firm’s partner responsible for the job.
- Consultants measure jobs in terms of ‘**(consulting) days**’: the number of days (e.g. 7.5 hours per day) required to finish the work. Six days means six days of a consultant’s overall time. It does not mean six days from the time of agreement to proceed with the work (elapsed time). Often there is considerable down-time during a job while a consultant waits for information to come in: for example, survey returns, or client-furnished data. Further, most consultants need to be engaged on several projects at the same time to earn sufficient income, unless the projects are large. Agencies that make best use of consultants are usually those that understand that consultants rarely work on a single issue. Consultants should certainly be expected to be responsive to your needs, but don’t expect them to be dedicated solely to your project unless you have a prior agreement to this effect.

- A **steering committee** is sometimes used to oversee the work of the consultant. The establishment of a steering committee may be desirable where several stakeholders wish to be closely involved in the project, or the extent of the work warrants it. However, individual members of such committees can, on occasion, become caught up with unnecessary detail, or may insist on directing the consultant to pursue cherished but possibly irrelevant lines of inquiry that result in ‘mission creep’. Consultants are often exasperated by steering committees whose members do not bother reading (let alone commenting on) drafts or documentation supplied during the project. At other times, steering committees may spend their time going through drafts page by page, more concerned with grammar and punctuation than with content. There appears to be no easy solution to such problems, but it helps if the Chair of the committee is experienced. The Chair should possess sufficient authority to maintain members’ focus on the main objectives of the consultancy, and should ensure that necessary decisions are taken, and approval (‘sign-off’) given, as stages of the project are completed successfully by the consultant. It also helps if the client’s project officer and the consultant work together to caucus members of the steering committee out of session: committees often feel more comfortable taking decisions if their members are already ‘familiar’ with issues or solutions because they have already been explained to them beforehand. Meetings of the client, the project officer, the consultant and the Chair of the committee immediately before steering committee meetings can be very useful in discussing tactics and in briefing the Chair on the key issues.
- Insistence on adherence to public service **hierarchies** can be counterproductive. One consultant recalls working for a non-Commonwealth government agency whose CEO barred the project manager from attending meetings of the steering committee because he was too junior. Because only the senior manager was allowed to attend, it was difficult to keep in touch with a lot of the committee’s thinking, or to develop a cooperative approach to the project.
- Prior agreement to **settle disputes** in a non-adversarial manner is an integral part of a collaborative arrangement. Where relationships have broken down badly, however, it may be worth considering mediation or even arbitration. Provision for such eventualities should be made in the contract.

- One public service official encountered a **recalcitrant consultant** who often promised delivery of a draft in the evening, but would normally deliver it only the next day. Faced with a time-critical deadline, the officer informed the consultant that he would wait in the office that night until the report was delivered. While the tactic was successful, it came at some personal cost to the officer concerned. An alternative approach might be to ensure that the contract contains sufficient flexibility in terms of imposing monetary penalties (or awarding benefits) in order to manage such situations.
- Despite popular belief in some quarters, consultants get little satisfaction from being **engaged unproductively**, whether they are paid or not. One consultant recalls being instructed by his partner to stop attending the many general, unfocused meetings called by the public service client. The partner agreed that the consultant was adding little value to the project by attending meetings of marginal relevance, despite recovering in fees the time spent doing so. Equally important in the decision was the fact that the consultant was working unreasonable hours because he was unable to meet deadlines for deliverables due to the time spent in meetings.
- An important benefit of using skilled consultants is that they can act as a sounding board, or provide new ideas. Despite some misconceptions among public servants, there is nothing wrong with **testing ideas**—even differing viewpoints within the agency—with a consultant. But it is important to first have consensus and clarity of purpose about the final output that is to be achieved by the consultant.
- In the absence of an obvious methodology, or where information is scarce, a first, ‘knee-jerk’ response in the public service is often to **conduct a survey**. But surveys are not always necessary, or even the best means of obtaining data. (Sometimes an enthusiastic consultant or client will wish to collect information out of interest, rather than out of necessity.) Before agreeing to incur the costs of a survey (including the time taken), insist on the consultant specifying exactly the issues or hypotheses which are to be tested, the specific statistical tests which will be used to determine confidence in the results, how each of the intended questions to be asked will be used to test a hypothesis, and why existing information cannot be used.

Even if a survey is found to be necessary, the process of justifying it will help to sharpen its focus, and avoid inclusion of unnecessary questions. Further, Australian government agencies proposing to conduct a survey of 50 or more businesses need to seek clearance through the Australian Bureau of Statistics' Statistical Clearing House: www.sch.abs.gov.au.

- For good reason, government agencies sometimes seek to achieve a transfer of knowledge from the consultant to themselves by including their own staff on the project team to work alongside the consultant. Unless such **nominated staff** are actually made available (and have the right skills), however, there is a high risk that the project will be delayed. Further, the consultant may have bid for the job on the basis that the client would contribute a certain amount of staff resources. If these resources are not made available, or are not suitable for the task, consultants may seek a variation to the contract to reflect the fact that they need to commit more of their own resources.
- At least one Commonwealth entity has encountered potential problems with consultants and contractors being employed over **extended periods of time**. In one case, all of the entity's employees working in the area had left over time, so the consultant effectively became the only repository of corporate knowledge. In other cases, consultants have been provided with necessary training (at taxpayer cost) as projects have progressed, in order to upgrade their skills to requisite standards. Such situations may reflect short-term needs or expediency, but they also raise questions about the employment of consultants rather than use of permanent staff. There is also the risk of the consultant effectively becoming a de facto employee, so that the entity becomes liable for superannuation contributions and other legislative provisions.
- Consultants' **invoices** are usually presented after delivery of 'milestone' outputs, or at the end of the month in the case of reimbursable expenses. Let the consultant know how you want invoices prepared: detailed accounts show more clearly what you are paying for. Good consultants will automatically provide a fair degree of information as a means of engendering trust. But unless you have a need for specific detail, don't ask for too much. The purpose is to satisfy accountability requirements. An invoice

broken down into broad headings such as project meetings, report preparation, project management, air fares, taxi fares, etc., can usually provide sufficient information.

- For contracts valued up to \$1 million, it is standard to provide for **payment** no later than 30 days after the date of receipt by an NCCE of a correctly rendered invoice. However, it is permitted to arrange for payment within a shorter period (Department of Finance 2014, RMG no. 417). If possible, arrange for your finance area to pay your consultant in less than 30 days. If you don't think that this will help create a better working relationship, ask yourself how you would feel if your salary was always paid 30 days in arrears.
- There is always the danger that a **risk management** plan, once produced, will be filed away and forgotten due to a misplaced feeling of having accomplished the 'task' merely by considering the issue. This danger can be ameliorated by ensuring that project management meetings include as a regular agenda item the review, and any updating, of the plan. The risk management plan itself should record the specific person responsible for implementing each of the mitigation strategies, what resources are to be utilised, the timetable for implementation, and the review mechanism. Incorporation of the risk management plan in the project charter (see above) is a useful way of keeping it in mind.
- Most public service guides to using consultants stress the need for **ethical behaviour**. Given the fairly general nature of this advice, it may not always be treated with the sense of immediacy that it deserves. A more pragmatic perspective is to ensure that all action taken during the course of a project is consistent with the *Public Service Act 1999*. Clause 6.6 of the CPRs further specifies the behaviour required of officials throughout a procurement.

Table 7. Contract and project management: Risks and mitigation

Type of risk	Likely consequence	Mitigation strategy
Consultant begins work before the contract is issued	<ul style="list-style-type: none"> • Claims for unauthorised work • Possible legal action by consultant for perceived breach of contract 	<ul style="list-style-type: none"> • Avoid providing any encouragement to the consultant to start work before contract execution • Seek legal advice if problems are expected • Where time is short, consider a separate formal contract covering preliminary work
Unauthorised increase in scope of work	<ul style="list-style-type: none"> • Unanticipated increase in cost • Contract disputes • Possible legal action 	<ul style="list-style-type: none"> • Maintain an issues log • Insist on regular, documented meetings and/or progress reports • Issue formal contract amendments for all agreed variations
Inadequate contract administration	<ul style="list-style-type: none"> • Cost increases • Failure of the project • Contract disputes • Possible legal action • Loss of intellectual property 	<ul style="list-style-type: none"> • Maintain an issues log • Use trained staff • For large or complex projects, consider mediation, or use another consultant to manage the project • Track and report intellectual property issues
Failure to fulfil contract conditions, including delivery on time	<ul style="list-style-type: none"> • Contract disputes • Possible legal action • Client's needs not met 	<ul style="list-style-type: none"> • Maintain an issues log • Foster collaborative and open working relationship • Insist on regular, documented meetings and/or progress reports • Issue formal contract amendments for all agreed variations to work • Maintain strict control over payments according to observable milestones • Where quantifiable loss occurs, consider seeking liquidated damages
Client fails to take decisions, or to provide nominated staff	<ul style="list-style-type: none"> • Project delay • Possible budget over-run • Possible variation to contract, or legal action 	<ul style="list-style-type: none"> • Ensure that decisions are taken quickly, including 'sign-off' on satisfactory delivery of outputs • Appoint Chair of steering committee who has authority and experience • Ensure that staff nominated to work alongside the consultant are available and possess relevant skills

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.