

Managing the Procurement

Presented by Scott Alden, Partner

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The 2021 Procurement Seminar Series

- Planning a perfect procurement – 17 July 2021
- Probity in Procurement – 17 August 2021
- Current Issues and Updates in Procurement - 7 September 2021
- Legal Issues and Risks in Procurement – 28 September 2021
- Tender Assessment – 19 October 2021
- Innovations in procurement – 9 November 2021
- **Managing the Procurement – 30 November 2021**
- Top Ten Issues for 2021/2022 – 21 December 2021

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To view the recordings of sessions already delivered, please visit <https://hwlebsworth.com.au/recordings-government-procurement-webinar-series-2021/>

Why Do We Manage Contract?

To Ensure

- Goods / Services provided, or works delivered in accordance with the contract
 - This means ensuring all parties to a contract meet their respective obligations under the contract

Contract Management

Setting the Contract Management Tone Early

- Two Stereotypical Approaches
 - “The Bottom Drawer”
 - The Overly Contractual Approach
- Consistency is key
- Continuity of personnel important
- Deliver the right message to the other side clearly and early
- Detailed and easy to navigate records are your friend

What Is The Contract?

- Waterfall / Traditional
- Performance Based
- Adversarial / Collaborative (Relationship) / Alliance / ECI (Agile)
- How is it Structured – What's included
- Consistency

Contract Management Prerequisites

- **Who are we dealing with?** Get it Right
- **Do We Know What We Are Managing? - Contract documentation:** particularly the executed contract agreement, conditions of contract, specifications, and letter of acceptance
- **Insurance requirements:** ensuring a copy of required insurance certificates of currency are held, and maintained current
- **Bank Guarantees:** to be secured from the contractor where they are provided for in the contract. These should be unconditional guarantees of the value stated in the contract

Contract Management Prerequisites

- **Approvals:** held for all planning matters, service authorities etc.
- **OHS / WHS / Quality / Environmental:** documentation and systems have been reviewed and confirmed
- **Program:** Update and confirm
- **Key Personnel:** Confirm
- **Risks:** have been assessed and any risk management plan which has been developed as part of the tender process has been reviewed to identify, monitor and manage all risks over the life of the project in order to achieve project objectives and a vfm outcome

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Roles and Responsibilities / Governance

Roles

- Contract Manager
- Principal (Principal's Rep / Superintendent)
- Project Manager / Contract Manager
- Contract Team
- Contractor (Contractor's Rep)
- Independent Valuer

Contract Management Manual

Contents for Contract Management Manual

- Commencement of Contract
- Contract Calendar
- Communication
- Meetings
- Notices
- Confidential Information
- Issue Resolution
- Dispute Resolution
- Contract Records
- Variations to contracts
- Performance monitoring, auditing and review
- Deliverables, Timing and Quality
- Payments
- Contract extension
- Default and cancelation
- Contract Completion

‘Contract Calendar’

- What events / reminders should you set yourself in a Contract?

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Variations

- They are adjustments to work
- VFM is required
- Must be approved
- Can be:
 - Principal directed
 - Contractor requested
 - Urgent

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Variations

- From a Procurement Perspective every variation is a direct negotiation / sole source
- VFM and market testing must be considered on that basis
- Proportionality must be considered
- Consistency with terms of contract, original specification and original scope of work critical
- Compliance with all procurement steps and delegations also critical

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How to Minimise Variations

- Quality of documentation
- Conduct effective negotiations including careful review of tenderer's qualifications / omissions / assumptions
- Promptly supplying information (e.g. documents and drawings)
- Promptly providing site possession and maintenance access
- Keeping good records
- Promptly issuing clear directions for variations
- Promptly reinstating damage which is the Principal's responsibility
- Avoiding interference with Contractor's work
- Providing prompt direction concerning defective work
- Undertake critical and researched evaluation of Contractor claims
- Promptly approve valid variations
- Promptly extend contract time when justified
- Carry out Principal functions in a timely manner and properly

Claims

COMMON CLAIMS

- Out of Scope / Variation
- Time
- Defects
- Latent Conditions

GO TO THE CONTRACT

- Is a Notice Required?
 - Was it sent
 - Did it comply – person / place / form
- Is there a Bar / Time or Other
- Does the claim qualify
 - Is it a Latent Condition?
 - Is the cause of delay qualifying and is it on critical path?

Contract Mismanagement Can Lead To

- Variation of Contract by Conduct / Oral Agreement
- Collateral Contract
- Quantum Meruit Claim
- Estoppel
- Misrepresentation
- Misleading and Deceptive Conduct

Case Study – Condition precedent not met

- **Development agreement**
- **Term: upon approval of the PPR by Party B, Party B becomes liable to pay party A \$100,000**
 - Document entitled PPR supplied, but did not meet the requirements of a PPR specified
 - No-one at Party B “approved” the document
 - Party A sent an invoice
 - Some time later, Party B paid the money

Is Party B prevented from saying the pre-condition was not met?

- **Lessons**
 - Do not rely upon the title of a document
 - Analyse purported satisfaction of condition precedent

Case Study – Direction to Accelerate

- **Amended AS4000 - Works delayed**
 - Some claimed EOTs not awarded
 - No qualifying causes
 - Not claimed in accordance with the contract
 - Project manager/superintendent meetings re: bringing works to PC on date for PC
 - Contractor later alleged that those meetings amounted to a direction to accelerate – claimed associated costs
 - Contract required all directions to be in writing
 - No written direction to accelerate
- **Lessons**
 - Take care when investigating options
 - Ensure directions are in writing

Case Study – Direction to Vary

- **Project: expanding existing ILDU community**
- **Amended AS4000 – clause 36 amended with procedure for variations**
 - Pre condition to entitlement to claim for variation – notice under clause 36
 - All notices must in writing and reference relevant clause to be valid
 - Resident directed subcontractor to provide additional civil works
 - Works performed
 - Claim rejected by project owner
 - Claim rejected by adjudicator in SOPA adjudication
- **Lessons**
 - Ensure all persons on site comply with communication protocols
 - Ensure directions are in writing

Case Study – Consistent Non-Compliance

- **Development agreement – time critical for principal**
- **Developer to provide completed design for whole building for approval by principal**
 - Design drip fed
 - Works commenced on the basis of staged CC without building design being completed
 - Principal did not object to delays until they become catastrophic
- **Is the principal prevented from relying on the failure to provide the design as a basis to terminate?**
- **Lessons**
 - Act on breaches as and when they arise

The Unfixable

Parties Names

- Get them Right

Claims and Payment Claims

- Include all requirements and submit on time

Time Bars

- Submit on Time

Deeming Provisions

- Respond on Time

Serving Notices

- Follow the exact procedure set out in the contract

Tips for Better Contract Management

Get the Contract Right

- Clear specification. Test “Could an outsider look at the deliverables and judge whether contract requirements met?”
- If any part of the contract / specs required to be finalised post-execution, incorporate project gateways so that the details are agreed before work is done
- Ensure the processes and procedures are suitable for the project
 - Design working group
 - Appropriate reporting mechanisms
- Use performance mechanisms to ensure you get what you want out of a contract. No one wins when a contract fails, so standard termination clauses can be unhelpful.

Tips for Better Contract Management

Follow the Contract

- Understand the contract and its procedures
- Keep things formal
 - make sure the parties' authorised representatives are clearly identified and the lines of communication are strictly followed. Don't let the contractor believe it can rely on approvals, concessions or variations made by an unauthorised person
 - Follow formal contract processes (variations/EOTs) and document accordingly
- Diarise critical dates eg notification requirements. A missed or late notice can leave the contractor at the principal's mercy on pricing and other terms or cause the contractor to miss out altogether
- Ensure notices comply with the contract requirements eg:
 - Clause references
 - Specific contact
- Never let underperformance pass without action, or you may lose your rights to object later

Tips for Better Contract Management – Disputes and Termination

And if it all goes wrong...

- Address disputes as soon as they arise, and escalate to an appropriate management level.
- Follow dispute resolution procedures in the contract and seek legal advice early to avoid prejudicing your position.
- If the worst happens, follow the breach notification and termination provisions to the letter. Termination for non-performance without grounds can leave you exposed to damages for repudiation of contract, even if the other side is in breach.
- Ensure the contract includes effective disengagement provisions. Without these, you could be left with little choice other than to extend a contract despite poor performance or value for money.

Contact



Scott Alden, Partner

Phone: +61 2 9334 8418

Email: salden@hwle.com.au

LinkedIn:

<https://www.linkedin.com/in/scott-alden-5884432b/>

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