



Session 6 – Managing the Procurement

Presented by **Scott Alden**, Partner

28 September 2022

The 2022 Procurement Seminar Series

- Part 1 – Probity in Procurement (19 July 2022)
- Part 2 – Current Issues and Updates in Procurement – (2 August 2022)
- Part 3 – Legal Issues and Risks in Procurement (17 August 2022)
- Part 4 – Open Q&A (30 August 2022)
- Part 5 – Tender Assessment with a focus on Sustainable Procurement (13 September 2022)
- **Part 6 – Managing Procurement (28 September 2022)**
- Part 7 – Prickly Issues in Procurement (11 October 2022)
- Part 8 – Open Q&A (25 October 2022)

If you have any questions about our Australian Government Procurement Series please contact Katarina Szivek, Business Development Specialist on kszivek@hwle.com.au

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
- Note that whilst contracts do not need to be in writing to be enforceable – the CPRs state that contracts should be in written form (CPR 7.4)

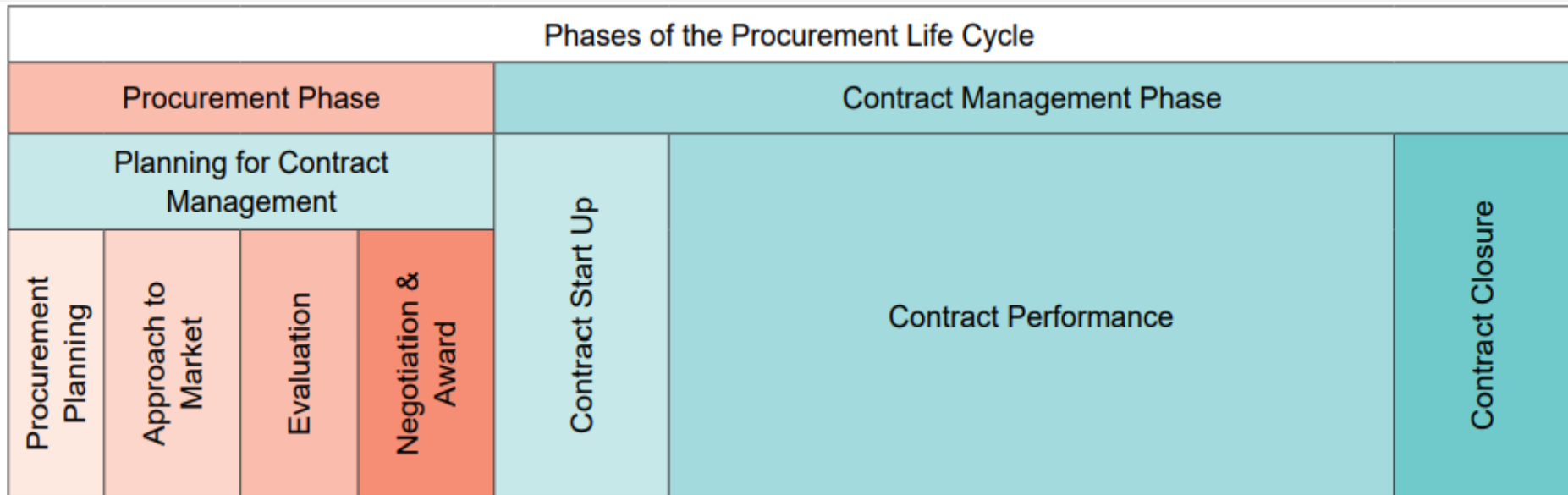
What is contract management?

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 to deliver the objectives of the contract
 - Ensuring the goods or services are provided:
 - On time
 - To the agreed standard
 - At the agreed location
 - For the agreed price
 - More complex contracts may require performance management/continuous improvement

(Dept of Finance Contract Management Manual Dec 2022)

Phases of the Procurement Life Cycle



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?

- The Commonwealth Contracting Suite
 - Designed for procurements <\$1m
 - NCEs – mandatory for procurements < \$200k except in specific circumstances
 - NCEs – encouraged to use \$200k to \$1m
 - CCEs – encouraged to use
 - Not needed:
 - No ATM / contract required – e.g. telephone quote
 - Industry practice to use supplier's terms
 - Mandated WoAG arrangement
 - ICT
 - Construction, specialist scientific equipment or specialist military goods / services
 - Procurement under CPR 2.6
 - Risk assessment suggests need for bespoke
 - Procurement significantly impacted by Prescribe Terms
 - Outside Australia

[RMG-420 Mandatory use of the Commonwealth Contracting Suite for procurement under \\$200k](#)

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
- **Plans:** Transition Plan; Communications and Stakeholder Management; Probity; Fraud Control; Security; Supply Chain Risks Plan (e.g. disruption of supply / modern slavery); Disposal Plan
- **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.

Transition Issues

- Confirm transition in and out obligations
- Obtain transition in and transition out plan and manage the plan
- Prepare timeline including change-over periods
- Identify and confirm resource requirements
- Identify key roles and responsibilities and how these change with the transition
- Note differences between previous and new contract
- Identify who needs to know what details about the new arrangement and confirm communication channels
- Consider training needs of staff if requirements different

Transition Issues (cont.)

- Identify and manage risks
 - Maintaining continuous supply
 - Managing and minimising effects with changes in users
 - Managing outgoing supplier's performance through to end of contract
- Retrieve any CoA assets, documents or information provided to outgoing supplier and provided to new supplier as needed
- Identify any IP issues
- Arrange access for new supplier to facilities and systems including security clearances and terminate access for old
- Identify additional transitional arrangements that may need negotiation with incoming or outgoing
- After final completion arrangements confirmed – approve final payment

Contract management plan

- **Key activities:** e.g. milestones / dates, contract expiry, notice periods, extension options, contract review timings and processes etc
- **Roles and responsibilities:** main individuals, positions, contact details and their responsibilities (both Agency and Supplier)
- **Risk management:** details of risks and how and by whom they will be managed
- **Contract Governance:** stakeholder engagement, contract oversight, process for escalation, internal reporting
- **Supplier reporting:** frequency and content of supplier's reporting and timeframes for acceptance of report including from subcontractors
- **Meetings Schedule:** of meetings and standing agenda items, process for minutes and turnaround times
- **Performance management:** details of how performance will be managed, including KPIs / SLAs, data capture, remedies / abatement
- **Delivery and acceptance:** acceptance process and specifics

Contract management plan (cont)

- **Payment arrangements:** e.g. progress / milestone, payment terms, process re: valid invoicing
- **Specified Personnel:** details including position, supervisor, security clearance
- **Supplier access and security:** access to facilities / information systems; access and storage of assets; access, recording and storage of information or data including personal information
- **Insurance and guarantees:** details of insurance certificates, BGs, Indemnities or STR provided, and expiry and renewal dates and storage location details
- **Contract variations:** details of process for variations and details of delegates
- **Extension options / contract renewal**

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 Cancellation
- Contract Completion

‘Contract Calendar’

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

Managing the Procurement

Variations

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

Managing the Procurement

Variations can arise from

- Unexpected events
- Changes in technology
- Changes in legislation / policy
- Minor changes to entity's requirements
- Changes in key personnel
- Changes in delivery method or location
- Changes to milestone delivery dates
- Fluctuation in demand for goods or services
- Other factors that affect contract delivery

Managing the Procurement

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
- Must report variations on Austender where over reporting threshold of \$10k
- Keep 'working version' of contract

Managing the Procurement

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

Managing the Procurement

Contract Extension

- Can only extend if:
 - Contract contains an unused option to extend
 - It is VFM to extend
 - Contract has not yet expired
- Must report extensions valued at over \$10k
- If extension needed to allow for new procurement – then should only be for the period necessary

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
- Waiver

Post Contract Review

- Did the contract achieve its objectives (time, cost, quality) and if no – why not?
- Record supplier performance
- Assess own performance
- User satisfaction – identify any complaints / issues
- Analyse variations and why they were needed
- Disputes and supplier willingness to resolve
- Review of budget and costs and reasons for any difference
- Was VFM achieved – including assessment against original VFM assessment
- Identify issues in planning, management, administration and processes including how each was addressed and treated
- Discussion of other things that went well, or opportunities for future improvement

Effective Disengagement

- How did the Contract end
 - Performed – Conditions met / effluxion of time
 - Breach and termination
 - Agreement
- Verify all work done and deliverables delivered
- Get CoA material back
- Cancel passes and access
- Transfer IP
- Check defects
- Check warranties
- Notify users and stakeholders of completion
- Retain records
- Document ongoing clauses / obligations
- Document lessons learned

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 standard form contract - 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 Standard Form Contract**
 - 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 e.g. 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 e.g.:
 - 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
- Remember Model Litigant Obligations – [Appx B to the Legal Services Directions 2017](#) ‘the Commonwealth’s obligation to act as a model litigant’



| Any Questions?

Contact



Scott Alden, Partner

Phone: +61 2 9334 8418

Email: salden@hwle.com.au

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

This seminar and accompanying documentation is not intended to be legal advice and should not be relied upon as such.

The copyright of this material is and will remain the property of HWL Ebsworth Lawyers.



HW
LEBSWORTH
LAWYERS

Adelaide | Brisbane | Canberra | Darwin | Hobart | Melbourne | Norwest | Perth | Sydney