

# Contract Documentation, Delegation and Risk

Procurement Practices Manual

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# FORWARD

Physical assets comprise a significant segment of public sector resources. Those assets under the control and stewardship of public sector agencies are held and used to meet Government policy objectives through the provision of goods and services.

Effective asset management is essential in an environment where there are competing demands for Government resources.

The publication *Contractual Documentation, Delegation and Risk* is one of a suite of building construction procurement practices publications which set down mandatory requirements and best practices for Government major building construction works.

The aim of these publications is to provide information which will assist agencies to manage the Government's "building construction risk" and to present a consistent common view to industry for Government building construction projects.

*Contractual Documentation, Delegation and Risk* provides the mandatory requirements to be included in building construction contracts, primarily when using the Crown Solicitor's Building Construction Request for Tender documentation and *Australian Standard General Conditions of Contract AS 2124-1992* (as amended by the *Guide to the Completion of Annexures to AS 2124-1992*). However, it also provides general guidance information for agencies in preparation of other contract documentation as provided for under the Treasurer's Instruction 1206 and 1207. It provides a structured reference to be followed when preparing contract documentation.

The latest revision of the Crown Solicitor's pro forma building construction Request for Tender is located on the Purchasing website at [www.purchasing.tas.gov.au](http://www.purchasing.tas.gov.au)>Buying for Government>Resource Library>Forms>Requests for Tender, Requests for Quotation, Contracts and Requisitions. The latest revision of the *Guide to the Completion of Annexures to AS 2124-1992* is available from each agency's Procurement Reference Group member. Further information is available from the Procurement and Property Branch of the Department of Treasury and Finance.

For all other documentation, the Crown Solicitor's advice and guidance must be sought to ensure that the contracts are appropriately amended to reflect the Government's procurement, confidentiality and contractual policies

## List of Abbreviations

CAPM	Client Agency Project Managers
CIP	Capital Investment Program
PIP	Project Initiation Process
SAMP	Strategic Asset Management Plan
VM	Value Management
PSCPW	Parliamentary Standing Committee for Public Works
WHS	Workplace Health and Safety
ADR	Alternative Dispute Resolution

**Note:** The following information is specific to the use of the Crown Solicitor’s Building Construction RFT and *Australian Standard General Conditions of Contract AS 2124-1992* (as amended by the *Guide to the Completion of Annexures to AS 2124-1992*). However, the information may be referred to provide general guidance in relation to other contract standards that may be utilised by agencies in accordance with the Treasurer’s Instruction 1206 and 1207. Agencies should refer all procurement documentation, if not utilising the Crown Solicitor’s pro forma documentation, to the Crown Solicitor’s advice and guidance must be sought to ensure that the contracts are appropriately amended to reflect the Government’s procurement, confidentiality and contractual policies

## I. OVERVIEW

### I.1 Introduction

Infrastructure assets only assist in the delivery of services. It is therefore imperative that any building construction project satisfies the output needs of the agency. The design for a building construction project must reflect the service delivery needs of the functions to be accommodated in the building. Detailed planning and evaluation of project solutions will assist in establishing the most appropriate means of meeting the service delivery requirements.

The greatest potential for identifying and achieving capital and recurrent savings is in the early planning phases of a project. Significant savings can be realised through careful consideration of the need and the most appropriate means of servicing the need. This may require the involvement of specialist consultants. However, the investment of fees at the inception of a project will show worthwhile dividends in the form of project cost savings.

The decision to proceed with the preparation of contract documentation for the construction of a new building or for the redevelopment of existing facilities should derive from the agency’s Strategic Asset Management Plan (SAMP). A SAMP is an overview document and before a build solution is contemplated, it is necessary to ensure that the output needs will be met by the proposal and that another, less costly, solution is not available. The *Project Initiation Process (PIP)*, published by the Department of Treasury and Finance (1997), is the process followed to determine the most appropriate means of service delivery involving asset procurement.

The PIP incorporates Value Management (VM) and may require a VM consultant to assist in developing the available options. A project should proceed to design and construction only after the PIP determines that a build option should be pursued, Budget Committee endorsement has been received, and Cabinet approval given for Capital Investment Program (CIP) funding.

The aim of this publication is to provide information which will assist agencies to manage the Government’s “building construction risk” and to present a consistent common view to industry for Government building construction projects.

#### I.1.1 Value Management Overview

VM is a structured, systematic and analytical process that seeks to ensure that all necessary functions are provided at the lowest total cost consistent with required levels of quality and performance. Underlying VM is the principle that there is always more than one way to satisfy a need and that a rigorous and structured examination of the alternatives will identify the most acceptable solution.

The VM process has been tailored to suit public sector needs and is set out in the following steps:

- identify and rank the functions required, together with their relative cost and worth, and establish benchmarks;
- sort the required functions into process-related groups;
- generate value improvement options through considering innovative and alternative means of achieving the required functions; and
- short-list viable options and develop them for evaluation.

### 1.1.2 VM Study

The continuation of the VM study, through the design and documentation phases, is a major contribution to maximising value for money over the life of the building.

Once the requirement for a build option has been established and funding is approved, a VM consultant may be required to continue the VM process. The VM process will further identify such issues as site options and functional organisation. Value for money is optimised by extending the VM study to include critical points in the project procurement process.

These are typically:

- . client brief;
- . schematic design; and
- . design development.

### 1.1.3 Consultants

The design and preparation of contract documentation requires the engagement of a team of consultants to perform this task on behalf of the procuring agency. The consultants required for the procurement process vary depending on the project size, nature and complexity. Reference should be had to Treasurer's Instruction 1216 and to the *Best Practice for the Engagement of Consultants*, published by Treasury as part of the *Procurement Practices Manual*.

## 1.2 Issues

The project design and contract documents need to reflect the following principles:

- Government must be seen to **achieve maximum benefit** in its spending of public funds.
- Government must be seen to be **fair and equitable** in its dealings with the private sector.
- Government must **exercise probity** in dealing with contractors at all times.
- To achieve probity, agencies will need to have procedures and processes that ensure that:
  - . all services purchased from the building industry represent value for money;
  - . dealings with the building industry are fair and equitable; and
  - . the processes and procedures will bear public scrutiny.
- Encourage service delivery options that are innovative, including:
  - . solutions developed in conjunction with the private sector;
  - . using optimum technology to achieve desired outcomes; and
  - . "end use" planning to provide alternative uses for built assets.
- Provide an audit trail of the design documentation processes.
- Depending on the size, nature, complexity and planned longevity of the proposed facility, the project budget should provide for:
  - . life-cycle costing;
  - . estimates of maintenance and operation costs;
  - . post occupancy evaluations; and

- . design of operation and maintenance plans.
- Project budgets should also allow contingency funding to carry out the recommendations of post-occupancy evaluations.

## **I.3 Design, Documentation and Contract Administration**

### **I.3.1 Design**

The contract documents are the culmination of all risk allocations. The contract documents must manage the risk for the client and allow the contractor to understand and assess and price his risk. The contract documents reflect the client's need to provide the agency outputs, including spatial and functional requirements, quality of the facility, useful life requirements, maintenance and operating costs (including energy efficiency).

### **I.3.2 Documentation**

A completed set of contractual documents should consist of four distinct and separate parts if it is to satisfy the requirements of the tender process and adequately serve the administration of the contract.

These parts are:

- the Conditions of Tender;
- the Tender form;
- the Conditions of Contract including any annexures to the conditions of contract; and
- the Specification.

These parts should be included in all Government building construction contract documents. Reference should be had to the Crown Law approved Request for Tender (building and construction version) pro-forma documentation which is located at [www.purchasing.tas.gov.au](http://www.purchasing.tas.gov.au) >Buying for Government> Resource Library>Forms>Requests for Tender, Requests for Quotation, Contracts and Requisitions.

This document, which is the approved Request for Tender for use for the majority of building construction procurement, should only be varied or amended in consultation with the Crown Solicitor.

### **I.3.3 Contract Administration**

Standards Australia has produced various Conditions of Contract for use in the building construction industry. The most commonly used of these for the purposes of Tasmanian Government procurement is *General Conditions of Contract AS 2124-1992*. All parties involved in any contract should familiarise themselves with the relevant documentation, to gain an understanding of the formalities required to be followed.

The contract is between the Principal and the contractor. To build the project as it is specified in the contract documents is the responsibility of the contractor. The Superintendent ensures that the conditions of contract are adhered to by the contractor and the Principal.

The Client Agency Project Manager (CAPM) is not recognised in the contract, but the role is to ensure, on behalf of the Principal, that both the Principal and the Superintendent are performing their respective duties under the contract. These duties include the Superintendent assessing the contractor's progress payments and the Principal making progress payments to the contractor based on the Superintendent's assessments.

To ensure that the conditions of contract are being followed requires setting up and managing contract administration systems and procedures within the client agency, or, if they already exist, to ensure that they function and are followed.

The Principal in the contract is the Crown in Right of Tasmania. As *AS 2/24-1992* requires the Principal to perform some duties, a specific person must act on behalf of the Principal. This is usually the person who signs the contract and is the person who should be kept informed of the condition and progress of the contract by the Superintendent and the CAPM.

If the agency's Minister signs the contract, it is usual for the Head of Agency to keep the Minister informed and the CAPM and the Superintendent report to the Head of Agency. These officers would also report to the Head of Agency when the Head of Agency acts on behalf of the Principal as the Principal's Representative.

A contract functions effectively with or without a Principal's Representative. When the Minister signs the contract and carries the responsibility for the role of the Principal and the Head of Agency needs to keep the Minister informed of the contract, consideration should be given to formalising the role of the Head of Agency within the contract as the Principal's Representative. This enables the Head of Agency to perform most of the Principal's responsibilities. When the Head of Agency signs the contract and is responsible for the role of the Principal, a Principal's Representative may not be needed.

The duties of the Principal, the Superintendent and the contractor are set down in *AS 2/24-1992*. Delegation of duties from the Principal to the Principal's Representative and/or the Superintendent is set out in this manual at Section 3, Delegations.

The major risks associated with the contract are described in this manual at Section 2, Managing Contractual Risk.

## 2. MANAGING CONTRACTUAL RISK

### 2.1 Introduction

Risk is an inherent part of any business process. Every Government agency is exposed to risk in achieving its corporate objectives, and the procurement process brings with it a particular range of risks. Risk management is now accepted as an essential part of the corporate planning process and has been formalised with the introduction of the *Australian and New Zealand Risk Management Standard AS/NZS 4360–2004*. This code sets out a structured approach to risk identification, classification, analysis and treatment and it is recommended that all asset managers become familiar with the code.

The *Contract Documentation, Delegation and Risk* manual cannot provide a formal risk management analysis of all risks that may occur, leading up to and during the contract phase of the procurement process. Rather it is intended as a guide in identifying the commonly encountered major risks and their consequences. It also sets out to define the normally accepted responsibilities and delegations for managing these risks and gives guidance to agency managers in ensuring that these responsibilities are being met and the risks are being properly managed.

While every effort has been made to identify major risks that may be encountered during the pre-tender and contract phases of the procurement process, the list of risks cannot be exhaustive. At the beginning of all projects, project managers should carry out a formal risk management identification and analysis exercise on the project and adopt appropriate risk treatment strategies. This risk management plan will need to be updated throughout the course of the project.

As a general principle, risk should be allocated to those best able to manage it. For example, the risk of assessing ground conditions on a site should not be left to tenderers if there is no possibility of them making a reasonable assessment of conditions during the tender period. In this case, proper geotechnical investigation by the agency or its consultant, before tenders are called, is the correct way of managing the significant financial risk of encountering unknown ground conditions.

### 2.2 Definitions

#### 2.2.1 Client Agency Project Manager (CAPM)

The CAPM is the officer in the client agency responsible for all day-to-day matters relating to the project. These functions will include the engagement and management of the project consultants and the management of agency responsibilities within the contract. This manual is specifically written from the perspective of the client agency project manager. However, much of the information contained in the manual will also be applicable and useful to others involved with the project.

#### 2.2.2 Principal

The “Principal” means the Principal named in the Annexures to the *Australian Standard General Conditions of Contract AS 2124–1992*.

### 2.2.3 Principal's Representative

The "Principal's Representative" is the person named in the Annexure to AS 2/24-1992 part A, in accordance with Clause 24A of the Annexure, Part B. The Principal's Representative will undertake the duties, discretions and authorities vested in the Principal.

### 2.2.4 Superintendent

The "Superintendent" means the person stated in the Annexure to AS 2/24-1992, Part A, as the Superintendent or other person from time to time appointed in writing by the Principal to be Superintendent and notified as such in writing to the Contractor by the Principal and, so far as concerns the functions exercisable by a Superintendent's Representative, includes a Superintendent's Representative.

### 2.2.5 Superintendent's Representative

The "Superintendent's Representative" means a person appointed in writing by the Superintendent under Clause 24 of AS 2/24-1992.

### 2.2.6 Contractor

The "contractor" means the person bound to execute the work under the contract.

## 2.3 Project Briefing, Design and Documentation Phase

### 2.3.1 Engagement and Management of Consultants

The preparation of the functional brief, the project brief and the design/documentation phase is normally carried out by consultants. When engaging consultants, there is risk involved of incorrect briefing and commissioning, and best practice procedures need to be followed to manage the risk. For the project outcome to satisfy the output need, it is essential that the right consultant is engaged. It is also important that the quality of documentation is high, as inadequate documentation presents a very significant risk that can lead to contractual disputes, additional costs and delay to completion of the project.

For information on best practice for engaging and managing consultants, refer to Treasurer's Instruction 1216 and the *Best Practice for the Engagement of Consultants* manual issued by the Department of Treasury and Finance.

### 2.3.2 Maintenance and Life-Cycle Costing

Every facility has operating and maintenance costs associated with it. These costs continue throughout the economic or functional life of the building and typically equal about 80 per cent of the combined capital and operating cost. Concentration on initial capital cost at the expense of total life-cycle costs is a significant long-term risk on most projects.

For risk management of operating and maintenance, refer to the *Building Maintenance* manual issued by the Department of Treasury and Finance.

### 2.3.3 Inadequate Site Information

The absence of adequate site information on geotechnical conditions, site boundaries and existing services is a major risk that can lead to significant extra costs on a project and extensions to the contract period. Generally, it is unreasonable to expect tenderers to make assumptions on these risks during the tender period. Therefore, adequate investigations should

always be carried out by or on behalf of the client, before completion of the contract documentation.

The responsibility for assessing the need for site investigations and surveys, and for arranging these, normally rests with the project consultant. However, the CAPM should seek confirmation in writing from the consultant that the need for these investigations has been thoroughly assessed and that all required investigations have been completed. This confirmation would normally come at the end of the schematic design stage.

### 2.3.4 Site Contamination

Planning authorities have been advised to request environmental site assessments of potentially contaminated sites when:

- a potentially contaminated site is being redeveloped or rezoned for a more sensitive use; and
- a site is identified as potentially posing a risk to health and/or the environment.

It is recommended that a proposed site not be allowed until it can be demonstrated through the site assessment process that the site is suitable for its proposed use. A qualified person (*the environmental consultant*) undertakes the environmental site assessment and is normally also responsible for undertaking or the coordination of risk assessment, remediation and management of contamination issues at the site.

The Environment Division of the Department of Primary Industry, Parks, Water and Environment provides a service whereby the environmental site assessment report is reviewed against contemporary standards, and if found to comply, a letter of endorsement (a site “sign-off”) is provided to the party that commissioned the assessment works.

Alternatively, a third party reviewer may provide this endorsement. Appointing a third party reviewer may be appropriate when:

- there is not a planning requirement for site “sign-off”; and
- parties associated with the sale and development of a property require assurance that the works undertaken by *the environmental consultant* have been completed in accordance with contemporary standards.

It is recommended that a site “sign-off” or third party review is obtained for all sites undergoing redevelopment that have historically hosted potentially contaminating activities (a list of potentially contaminating activities is available on the Internet and can be found by going to [www.environment.tas.gov.au](http://www.environment.tas.gov.au)). The attainment of this type of endorsement reduces the risk of:

- future liability associated with site contamination;
- possible delays to the project if remediation or specialised waste management is required; and
- adverse impacts to worker safety arising from unidentified contamination.

Agencies should arrange for a contamination assessment early in the procurement process and the potential for contamination on a site should be considered prior to calling for design and construction tenders.

Please note that, outside of the “sign-off” process the Director of Environmental Protection Authority may require the remediation of sites that are causing or are likely to cause environmental harm under current provisions in the *Environmental Management and Pollution Control Act 1994*.

### 2.3.5 Aboriginal Sites

Under Section 14 of the *Aboriginal Relics Act 1975*, anyone who intends to disturb, damage or destroy an Aboriginal site must obtain a permit from the Minister for Environment, Parks and Heritage. A permit must be obtained before commencing any excavation or disturbance on the site.

Should a project site be confirmed as an “Aboriginal Site”, the developing agency must employ an archaeologist, approved by the Tasmanian Aboriginal Land Council, to carry out archaeological excavations to satisfy the permit requirements.

### 2.3.6 Existing Contract Commitments on Sites and Services

On existing sites, contracts may be in existence for extensions to buildings, building services or long-term maintenance. The CAPM needs to ensure that his team of consultants checks that the services on a site to be extended or redeveloped are not subject to existing contractual constraints. Failure to discover such constraints can lead to costly and time-consuming contractual disputes.

### 2.3.7 Copyright when Extending Existing Designs

Copyright for Government work is always vested in the Crown. However, the re-use of designs for extensions or new facilities by different consultants from the ones that prepared the original design can risk copyright infringement. This issue is not a simple one and the CAPM should seek advice from the Office of the Crown Solicitor on the copyright conditions relating to the particular project being considered.

## 2.4 Pre-Tender Phase

### 2.4.1 Financial Capacity of the Principal

The *Australian Standard Code of Tendering AS 4120–1994* states that the Principal should call tenders for a project only when fully committed to proceed and the required funding is approved and available.

Before an agency advertises a project for tender, it should obtain a project cost estimate prepared by the project quantity surveyor based on the tender documents. If authorised funding is less than the cost estimate, tenders must not be called and the project must be reassessed. The tender process must not be used as an estimating service to evaluate the financial feasibility of a project.

The risk of the Principal being unfunded is managed by the agency. The agency should request and receive written confirmation from Treasury that funding has been provided.

### 2.4.2 Property Ownership

The date by which the contractor is given possession of the site is stipulated in the Conditions of Contract. This date is expressed in terms of a number of days after “contract notification”. Failure by the Principal to comply will place the Principal in “substantial breach of contract”. The contractor can then claim all “on-site” and “off-site” overheads associated with the full period in which the contractor was unable to obtain access to the site. In addition, the contractor can claim “extension of time” costs for this period.

Alternatively, the contractor could claim “time at large”, which results in the need to re-negotiate the contract, usually to the disadvantage of the Principal.

To avoid this risk, property ownership must be fully resolved prior to the tender process. Under no circumstances should the project be advertised for tender before the Principal has vacant possession of the site.

### **2.4.3 Statutory Compliance**

Statutory compliance for building construction projects comprises “planning approval” and “building approval”. Statutory requirements bind the Crown to obtain planning and building approval from the relevant local authority before work on site can be commenced.

The project consultant is responsible for obtaining “planning approval” from the local authority. This approval must be obtained before commencing the design development and documentation phases of the project. At the end of the schematic design stage, the CAPM should request written confirmation from the consultant that “planning approval” has been received. Receipt of “planning approval” should also be included on the pre-tender check list.

Arranging for “building approval” (also known as a “building permit”) is the responsibility of the Building Contractor. Following the acceptance of the tender, and signing of the contract, the CAPM should obtain confirmation from the builder that a “building permit” application has been lodged, together with all required copies of documentation.

### **2.4.4 Tasmanian Heritage Council Approval**

Where works are to be carried out on a building or site listed on the Tasmanian Heritage Register, approval must be obtained from the Tasmanian Heritage Council as part of the planning approval process. The *Historic Cultural Heritage Act 1995*, administered by the Tasmanian Heritage Council, requires that the heritage value of the buildings and sites on the Register is protected. The Council is an autonomous body responsible to the Minister for Environment, Parks and Heritage.

To avoid conflict with the Tasmanian Heritage Council when works on a listed building are planned, it is important to liaise with the Council at the earliest stage of conception of the project. Where a building or site is not on the Register but clearly has a heritage value, consultation with the Council is still strongly advised, to avoid the risk of costly changes to the project being required by the Council at a later stage.

### **2.4.5 Parliamentary Standing Committee on Public Works Approval**

Approval of the Parliamentary Standing Committee on Public Works (PSCPW) is mandatory for all projects in excess of \$5 million. Failure to allow for this process in the project timetable can lead to extensive delays and additional costs.

For information on PSCPW approval, consult the information on the *Parliamentary Standing Committee on Public Works* on the Purchasing website at [www.purchasing.tas.gov.au](http://www.purchasing.tas.gov.au).

## 2.5 Contract Phase

### 2.5.1 Breach of Contract and Time Limits

The Principal being inadvertently placed “in breach of contract” is a major risk in procurement contracts. This risk is minimised through the following processes.

A Government building construction contract is a commercial arrangement which is formalised in writing through AS 2124–1992 and the Annexures. The conditions of contract provide confidence to the parties that the contractual or legal problems which arise during a typical construction project will be resolvable through reference to the terms of the construction contract. The CAPM needs to ensure that the latest revision of the conditions of tender and the conditions of contract are included in the contract documentation. The latest revision of the Crown Solicitor’s pro forma building construction Request for Tender is located on the Purchasing website at [www.purchasing.tas.gov.au](http://www.purchasing.tas.gov.au)>Buying for Government>Resource Library>Forms>Requests for Tender, Requests for Quotation, Contracts and Requisitions. The latest revision of the *Guide to the Completion of Annexures to AS 2124–1992* is available for each agency’s Procurement Reference Group member. Further information is available from the Procurement and Property Branch of the Department of Treasury and Finance.

Conditions of contract are referred to when a contractual problem cannot be resolved by less formal means. For the contract to perform its function as a legal document, it is necessary that the Superintendent’s contractual correspondence is written in terms of the conditions of contract. The CAPM must ensure that this is occurring whenever copies of contractual correspondence, such as extension of time notification, are received from the Superintendent.

Under the terms of the contract, it is the responsibility of the Principal to notify the contractor of the name and address of the Superintendent. This formal notification is required in order to make the Superintendent’s correspondence to the contractor legally binding. If there is to be a Superintendent’s Representative, then it is the responsibility of the Superintendent to notify the contractor of the name and address of the Superintendent’s Representative, so as to formalise his role in the contract. Similarly, any changes in Superintendent or Superintendent’s Representative during the contract must be formally notified to the contractor in writing. The CAPM must check and ensure that all the proper notifications have occurred.

*Australia Standard General Conditions of Contract AS 2124–1992 User Guide SAA HB42–1992* is the handbook produced by Standards Australia for users of AS 2124-1992. The handbook assists in the administration of AS 2124–1992 by providing an explanation on the application of each clause. The Annex to this handbook provides examples of over 80 of the most often used notices required in the administration of AS 2124–1992.

The handbook is an essential tool for all Superintendents administering Government contracts. The use of the contract notices in the Annex when corresponding with the contractor will provide the Superintendent with uniformity of correspondence, a check on clause numbers which must be referred to and the legally correct wording. The CAPM should also retain a copy of this handbook and ensure that the Superintendent is adhering to its requirements. Advice may also be sought from the Crown Solicitor.

The Principal must ensure that there is a Superintendent to the contract at all times and that in exercising his functions under the contract, the Superintendent:

- a) acts honestly and fairly;
- b) acts within the time prescribed under the contract or, where no time is prescribed, within a reasonable time; and
- c) arrives at a reasonable measure or value of work and quantities of time.

The CAPM should ensure this on the Principal's behalf.

The CAPM should also ensure that the Superintendent is keeping himself informed of all issues affecting the contract and reporting to the Principal all significant discovered risks.

### 2.5.2 Contract Insurances

AS 2124–1992 and the Annexures describes the insurances that are required on all projects. Insurance of the works and public liability insurance can generally be effected by either the contractor or the Principal. For all Government major works projects, it is a mandatory requirement that the Principal controls these policies, but the contractor pays the premiums. The process is described in Treasurer's Instruction 1221. The contractor is required under the contract conditions to insure his employees.

AS 2124–1992 puts the onus on the party effecting the insurance to produce evidence to the satisfaction of the other party that the insurance is effected and maintained. This is required before the contract can commence. To ensure compliance, this function must be delegated from the Principal to the Superintendent and is discussed later under Section 3, Delegations.

### 2.5.3 Delegations of the Principal and Superintendent

It is important that the processes for delegations and notification of delegations are strictly adhered to. Even minor errors may place the Principal in breach of contract or substantially weaken the Principal's position if a contract dispute arises. For details of the required delegation processes, refer to the Section 3, Delegations.

### 2.5.4 Payment of Claims

It is essential that the contractor's claims for payment, once certified by the Superintendent, are processed promptly by the agency. Failure to make payment within the time limits set out in the conditions of contract will place the Principal in breach of contract.

Payment of claims should not be reduced or withheld in anticipation of a dispute with the contractor on a particular matter.

Conversely, claims should never be overpaid. Overpayment of claims brings with it a significant risk of there being no practical redress for incomplete work at the end of the contract. At the beginning of the contract, the CAPM should emphasise to the Superintendent that all claims must be assessed strictly on their merits and overpayment avoided in all cases.

Agencies should ensure that they are aware of the requirements of both the *Building and Construction Industry Security of Payment Act 2009* and also the Treasurer's Instructions 1230.

### 2.5.5 Contractor Insolvency

Although insolvency of the contractor is not a common occurrence, it is still a major risk in procurement as, when it does occur, it can lead to significant consequences in cost and time.

To minimise the risk of contractor insolvency, Treasury undertakes a financial check on contractors as part of the contractors' register. This is done before registration and every two years thereafter. An agency must not award a tender to a contractor unless the contractor has been financially checked through the prequalification process or, where an exemption from using a prequalified contractor has been obtained, a full financial check has been undertaken. When engaging contractors prequalified under the National Prequalification System for Non-residential Building, agencies **must** undertake an assessment of the financial capacity of the preferred contractor prior to referring the evaluation to the Procurement Review Committee.

Despite the above, the risk of a contractor becoming insolvent during a project still remains.

Bankruptcies, when they occur, usually happen suddenly. Under no circumstances should monies be paid to a contractor if he has ceased trading. The Crown Solicitor must be involved immediately and under his guidance, AS 2124–1992 and the Annexures, followed to terminate the contract. It is the CAPM’s responsibility to ensure that the correct procedures are initiated.

Contractors may over-claim their “progress claims” to improve their cash-flows. Also, Superintendents may overvalue completed works when assessing contractors’ “progress claims”. This can result in overpayment to the contractor and, in the event of bankruptcy, leave insufficient funds to complete the works under a new contract. Also, the cost to another contractor to complete the works will be greater than the cost allowed by the bankrupt contractor. Therefore, any monies owing to the insolvent contractor may be needed by the Principal to complete the contract within the original contract price.

When bankruptcy occurs, it is good risk management to engage a quantity surveyor to accurately cost the works completed and the cost of the remaining works under a new contract. This allows an assessment to be made of the monies that may be payable to the bankrupt’s creditors.

Security or retention moneys, usually 5 per cent of the contract sum, is provided to, or arranged by the contractor with, the Principal at the commencement of the contract. Security and retention moneys ensure the due and proper performance of the contract. In a bankruptcy, these may be required to offset the costs of another contractor setting up to complete the contract as well as the additional cost of completing the works. Security monies/retention moneys should therefore not be returned or released until all costs are known. Mandatory requirements in relation to performance security and/or retention moneys for building construction are contained in the Treasurer’s Instruction 1228.

The Office of the Crown Solicitor has advised that:

*“Although it is difficult to safeguard against the eventuality of bankruptcy, every attempt should be made to look and watch for signs of pending bankruptcy, to avoid over-claiming under the contract.”*

### **2.5.6 Security of Payment – subcontractors**

AS 2124–1992 requires the Principal to pay the contractor and for the contractor to pay his subcontractors. It is also a mandatory requirement of the contract that the contractor provide, to the Superintendent, a statutory declaration stating that all subcontractors have been paid all monies due. The signing of a false statutory declaration is a criminal offence.

The risk involved when the contractor delays payment to the subcontractors is that the subcontractors may become insolvent and proceed legally against the contractor. This may result in delays to the project as new subcontractors are employed, resulting in additional costs to the contract. The subcontractors may also appeal to the Minister responsible for the contract and this may have political ramifications.

The prequalification process for contractors and the requirement for back-to-back conditions of contract for all subcontracts over \$100 000 contribute significantly to security of payment. However, the requirement for statutory declarations is the principal tool for achieving payment of subcontractors. The Superintendent must ensure that the statutory declaration is received before processing any progress claim submitted by the contractor. If the contractor does sign a false statutory declaration, the matter must be referred to the Office of the Crown Solicitor. The CAPM should check periodically with the Superintendent that statutory declarations are being received with each progress claim from the contractor.

Agencies should also ensure that they are aware of the requirements of the *Building and Construction Industry Security of Payment Act 2009*.

### 2.5.7 Workplace Health and Safety (WHS)

Workplace safety is about reducing risk. The *Work Health and Safety Act 2012* sets out mandatory work health and safety requirements relevant to a workplace.

The *Work Health and Safety Regulations* as well as various Codes of Practice and Interpretive Guidelines detail specific requirements for specific industries and/or risk areas and agencies should be aware of the obligations imposed by the *Construction Work Code of Practice* on agencies as well as the obligations and requirements imposed on other parties such as consultants and contractors. Agencies should also be aware of the requirements of other codes of practice on specific hazards and control measures relevant to the construction industry including:

- Demolition Work;
- Excavation Work;
- Managing the Risk of Falls at Workplaces;
- Managing Noise and Preventing Hearing Loss at Work;
- Preventing Falls in Housing Construction;
- Confined Spaces;
- Hazardous Manual Tasks;
- How to Manage and Control Asbestos in the Workplace; and
- How to Safely Remove Asbestos.

Detailed information on these requirements is available from the Worksafe Tasmania website at [www.worksafe.tas.gov.au](http://www.worksafe.tas.gov.au). If an agency is in doubt about its legal obligations under the Act, it should seek advice from Crown Law.

Treasury administers a prequalification system for contractors permitted to tender for Government work. A requirement for inclusion on the register is an undertaking by the applicant contractor that it will comply with and ensure that all employees, subcontractors and agents comply with the provisions of the *Work Health and Safety Act 2012*, and all other acts, regulations, local laws and bylaws, and codes of practice which are in any way applicable to the performance of the contractor's services. However, it is an agency responsibility to ensure and/or, where necessary, to monitor compliance of its engaged consultants and contractors on a project by project basis.

### 2.5.8 Contractual Disputes

Disputes must be dealt with, by the Principal, strictly in accordance with the requirements of AS 2124–1992 and the Annexures. It is especially important to adhere to the time limits set down in the contract. Ignorance of these limits will put the Principal at risk of “breach of contract”.

Dispute resolution is time-consuming for all parties. Every means should be utilised to resolve a contractual issue before it reaches the dispute stage.

When a dispute cannot be resolved to the satisfaction of both parties, it may be referred to arbitration or litigation. A far less costly alternative is mediation or alternative dispute resolution, and these processes should be considered before proceeding to arbitration or litigation. Rather than determine blame, mediation sets out to resolve the dispute. In most cases this involves a mutually acceptable sharing of costs and it results in a far more amicable solution without excessive court costs.

For detailed recommendations regarding dispute resolution, refer to Section 5, Resolution of Contractual Disputes.

## 3. DELEGATIONS

### 3.1 General

Generally, all building contracts with a value of \$250 000 or more are required to go to open tender. Other than maintenance contracts, the majority of these contracts will have AS 2124-1992 and the Annexures as their contract conditions.

AS 2124-1992 was drafted by a committee made up from all sectors of the building industry. As a result, the risk allocation within the document is equitable to both parties to the contract. The parties to the contract are the Principal and the Contractor.

The Annexures to AS 2124-1992 have been drafted by the Crown Solicitor. The RFT and the Annexures should only be varied or amended in consultation with Crown Law.

### 3.2 The Roles of the Principal and the Superintendent

The management of the contract is assigned to the Superintendent, who is engaged by the Principal. Therefore the Principal has a contractual responsibility to ensure that at all times there is a Superintendent and that in exercising the functions of the Superintendent under the contract, the Superintendent:

- acts honestly and fairly;
- acts within the time prescribed under the contract or, where no time is prescribed, within a reasonable time; and
- arrives at a reasonable measure or value of work, quantities or time.

The contract assigns to the Superintendent the dual role of acting as agent for the Principal in conveying the Principal's instructions to the Contractor, and as certifier for the purpose of certifying reasonable measures or values of work, quantities or time, such as progress payments, extensions of time, costs for contract variations and the completion of contract stages. The contract does not permit the Principal to interfere in the Superintendent's determinations and only has redress against the Superintendent under common law, that is, under the contract. The Principal does not have the right to countermand the Superintendent's determination in his role as certifier.

The obligations of the Superintendent are set down in the contract. However, under the contract, the Principal retains full legal responsibility for the Superintendent's actions. The contractor cannot proceed against the Superintendent. The contractor must proceed against the Principal for any breach of contract.

AS 2124-1992 sets down the duties of the Superintendent and obligate the Principal to ensure that the Superintendent performs his role in the manner stated in the contract. This enables the contractor to assess his exposure to risk and price his tender accordingly.

The Superintendent must ensure that the decisions which he makes as a certifier are not influenced by the Principal or the Contractor. He is not bound to investigate the facts himself and, provided he does so honestly and fairly, he can take into account the findings and opinions of others, especially other independent persons.

### 3.3 The Need to Delegate

The need to delegate functions is recognised in *AS 2124–1992* and the Annexures. Although the Principal delegates his powers and functions under the contract, this does not prevent him from exercising these powers and functions in his own right. The Principal remains responsible for the actions, within the contract, of those to whom he has delegated functions. The contractor can bring charges of breach of contract to the Principal only.

*AS 2124–1992* imposes obligations on the Principal and gives the Principal rights to exercise powers under the contract. There are many such obligations and powers, although not all functions are obligatory.

The Principal in a building construction contract is normally a Minister or a Head of Agency. Neither would exercise all the powers allocated to the Principal and would normally delegate some of these powers to the Principal's Representative and the Superintendent in the contract.

Determining and implementing which contractual duties should be delegated, and to whom, is the responsibility of the Agency. What is delegated will depend on the person named as the Principal and his availability for involvement in the contract, as well as depending on agency policy, such as monetary delegations.

In delegating functions, the Principal must ensure that the persons undertaking the functions have the capability to fulfil the requirements of the functions and protect the Principal against a "breach of contract". In delegating functions, the Principal must ensure that both an audit trail and the integrity of the contractor payment process are maintained.

Under the contract, the Contractor must be notified, in writing, of the functions and powers delegated and to whom. This notification usually forms part of the tender documents but may be amended from time to time as necessary. Refer to *AS 2124–1992* and the Annexures.

It is expected that in Government contracts the Principal will delegate most functions.

## 4. CONTRACT DOCUMENTATION

### 4.1 General

Poor tendering documentation exposes the Government to risks, and the quality of the tender documents is therefore critical to successful tendering. The documents are the basis of the contract between the Government and the successful tenderer and must accurately reflect the physical, financial, contractual and time parameters of the service required.

The project specification writer is responsible for preparing the non-technical sections of the project specification and for including these in all contract documentation. These sections not only reflect the mandatory requirements of Government, but provide uniformity in the documentation which is presented to industry.

### 4.2 Mandatory Sections

The following sections must be included in the Request for Tender unaltered and in accordance with the up-to-date version of the Crown Solicitor's pro forma Request for Tender document when using *AS 2124–1992*. For all other documentation, the Crown Solicitor's advice and guidance must be sought to ensure that the contracts are appropriately amended to reflect the Government's procurement, confidentiality and contractual policies.

These parts of that document may only be varied or amended in consultation with the Crown Solicitor:

- . the Conditions of Tender;
- . the Conditions of Contract including Annexures C and D to the conditions of contract *Australian Standard General Conditions of Contract AS 2124–1992*; and
- . the Tender form.

The Conditions of Tender reflect both the requirements of the Treasurer's Instructions and *AS 4120–1994*. These conditions indicate the minimum requirements of Government from the tenderers.

The tender form is the form required by agencies to be completed by all tenderers.

The Annexures Part C and D to *AS 2124–1992* contain information on the supplementary conditions of contract and reflects agreements made between Government and the building industry and advice received from the Crown Solicitor.

Note: Delegations of contractual responsibilities need to be specified in the contract documents. Agencies must consider contractual delegations in relation to their particular agency delegations. Delegations are discussed in more detail in Section 3, Delegations.

The following Parts will need to be completed by the persons tasked with preparing the Request for Tender:

- . the Tender Form;
- . the Annexure to the Australian Standard General Conditions of Contract – Part A and Part B; and
- . the Specification.

The Annexure Part A and Part B to *AS 2124–1992* are required to be completed in accordance with the *Guide to the Completion of Annexures to AS 2124–1992*. These components of the Annexure contain information such as the name of the Principal, the name of the

Superintendent, the relevant timing for various clauses within AS 2124–1992, the amount of insurance required information as well as information on the amendments to AS 2124–1992.

The wording of the remaining section, being the Specification is discretionary.

### **4.3 Annexures and Amendments to AS 2124–1992 and Supplementary Conditions of Contract**

The annexures, amendments and supplementary conditions of contract have been developed by the Crown Solicitor for use with AS 2124–1992.

During the drafting of AS 2124–1992, the Standards Australia Committee was mindful of the requirements that the conditions be considered to be fair and reasonable, that they present a balanced allocation of risk between the Principal and the Contractor and that they be suitable for use by both the private and the public sectors.

There are, however, some important differences between the way the private sector Principals and the public sector Principals operate. Whilst conscious of the need for as much uniformity as possible, it is Government's view that there are changes needed to the published document in order to meet the special conditions agreed between Government and industry. The Annexures have been developed to meet the needs of the Principal, that is, the Crown in Right of Tasmania, and cover such issues as:

- the Crown's contract confidentiality policy requirements;
- replacement of some procedures in the Australian Standard with procedures more appropriate to Government;
- adjusting the exposure of the Principal in some clauses; and
- mandatory use of principal nominated insurance;
- goods and services tax requirements; and
- security of payment legislation.

## 5. RESOLUTION OF CONTRACTUAL DISPUTES

### 5.1 General

When two parties enter into a contract, differences can occur that require dispute resolution procedures. It is preferable that a dispute is resolved by the contracting parties. However, when this fails, the dispute must be resolved with the assistance of third parties.

Clause 47 of AS 2124–1992, Dispute Resolution deals with contractual disputes. The alternatives given in this clause specify the processes of resolution. Failure to follow the requirements of the clause, especially the specified time limits, can result in a breach of contract.

The alternatives in Clause 47 state that if there is a failure in resolving the dispute, the parties should explore and, if possible, agree on other methods that may lead to resolution of the dispute. If all other measures fail, then the dispute will need to be resolved through arbitration or litigation.

The Crown Solicitor has recommended the use of Alternative I due to its flexibility.

The objectives of both parties to the dispute should always be a timely resolution with an equitable outcome at low cost to the parties. This is best achieved through genuine discussion and negotiation by the parties, and this method of resolving disputes must always be encouraged.

Minor disagreements are usually resolved at the contract Superintendent level and do not escalate into a formal dispute. When a disagreement cannot be resolved by the Superintendent, it needs to be escalated into a formal contractual dispute. This is executed by the aggrieved party, which is usually the contractor. Disagreements between the Superintendent and the contractor must be resolved promptly. To ensure this, the Superintendent may need to induce a formal dispute to resolve an issue in a timely manner. The requirements of Clause 46.2 (b) of AS 2124–1992 should be particularly noted in this respect. The Superintendent must issue a “proscribed notice” in accordance with the wording in this clause to limit the time within which the contractor may dispute a direction of the Superintendent. If the correct form of notice is not used, then the contractor can dispute the direction at any time up to 28 days after the end of the defects liability period.

Genuine discussion and negotiation involves a time commitment. As AS 2124–1992 specifies that at every dispute conference each party should be represented by a person having authority to agree to resolution of the dispute, this requires senior staff to be involved. But it is in the best interest of the project and the parties to assign resources for an early resolution. Also, Clause 47 of AS 2124–1992 specifies time constraints that must be met.

If genuine negotiation fails, the parties should jointly identify the common grounds between them and those matters on which agreement could not be reached, giving reasons where appropriate. This will assist the alternative avenues of dispute resolution which must then be pursued. The goal should always be to mitigate or eliminate the excessive costs of the more formal and generally more adversarial processes, of arbitration or litigation, which rarely satisfy the financial interests of either party.

Alternative dispute resolution (ADR) usually only functions when both parties remain genuinely interested in reaching a resolution to the dispute.

Some of the methods used in ADR are:

- . expert appraisal;
- . mediation; and
- . mini-trials.

## 5.2 Expert Appraisal

This form of ADR involves seeking an impartial view of the dispute, from an accomplished and experienced expert within the relevant building construction field. This view can be sought by either party, or individually by both parties. The party seeking the advice has the disadvantage of the time and cost involved in obtaining this information unless an agreement can be reached to share costs equally. The advice is non-binding but has the possibility of resolving the dispute.

The expert appraisal should be in writing, to allow it to be used as substantive evidence if the dispute is not resolved and needs to proceed to other forms of ADR.

## 5.3 Mediation

Mediation is an ADR process in which, rather than expert opinion being given, a process of discussion occurs collectively with both parties, through a mediator. In a confidential environment, the mediator facilitates the establishment of grounds for a resolution that can be reached by the parties without coercion by the mediator. The process involves the mediator making suggestions which are not binding on the parties in any way. Only when agreement is reached are the parties bound to the outcome.

The mediator is the catalyst to discussion, operating by questioning each party and attempting to ensure that each party clearly and precisely questions their own position, in an attempt to reach a mutually acceptable settlement. It must be emphasised that the mediator does not in any circumstances make a decision on the merits of the cases being presented by the parties involved, and that the mediation process does not result in any allocation of responsibility or blame. Mediation can only succeed if the parties involved reach a mutually acceptable agreement. If at the end of the mediation process agreement is not reached, resolution of the dispute would normally then proceed to arbitration or litigation. Agreement to mediation, by any of the parties involved, does not prejudice their right to proceed to arbitration or litigation if they are not satisfied with the process or outcome of mediation.

Mediation in Australia has had a high success rate, with the costs of the process being much less than those of arbitration and litigation. It is recommended that the costs of the mediation process should be shared equally between the parties involved and that written agreement for this arrangement should be obtained before proceeding with mediation. Most if not all issues at mediation should involve a mediation hearing lasting no longer than one day. Protracted mediation hearings tend to be counter-productive in achieving equitable outcomes.

Since 1998 there is now a body of qualified and experienced mediators and arbitrators within the construction industry. These experts include architects, structural engineers, quantity surveyors, building surveyors and legal practitioners. The Institute of Arbitrators and Mediators Australia (IAMA) can provide a list of qualified Mediators and Arbitrators in Tasmania. Contact the Secretary, IAMI Tasmania. There are also mediators and arbitrators available from the Master Builders Association/Department of Consumer Affairs and Fair Trading, within the Panel of Experts, Mediators and Arbitrators. This panel may be contacted through the Master Builders Association.

## 5.4 Mini-Trials

Mini-trials are more formal than mediation and are the most formal dispute resolution process which is available to avoid arbitration or litigation. They are normally adopted where a significant dispute exists between the decision makers of both parties.

Mini-trials are not formal trials. Rather, they are a structured information-exchange process.

An advocate from each of the disputing parties presents his party's case to a panel. The panel is comprised of one person designated by each of the disputing parties and a neutral person. The persons on the panel from the disputing parties are authorised to make a decision on behalf of their party. After the parties' advocates have presented their evidence, the panel meets to negotiate a settlement.

## 5.5 Arbitration or Litigation

Should ADR fail, then there is no alternative to seeking a binding decision by arbitration or litigation. This will normally only occur when a very important principle of contract is involved that may set a precedent, or where the sum involved in the dispute is very significant. In all such cases, advice should be sought from the Office of the Crown Solicitor before proceeding to arbitration or litigation.

## 5.6 Conclusion

Negotiation is the most appropriate method of resolving a dispute. If the parties cannot agree to a settlement, ADR techniques should be considered. ADR requires that both parties have a genuine desire and will to have the dispute resolved. Its techniques allow the parties to settle disputes in a creative manner that takes into account the long-term relationship between the parties.

Arbitration and litigation should be regarded as the absolute last resort for dispute resolution.

## 6. MINOR WORKS CONTRACTS

Minor Works contracts are projects with a value of less than \$250 000. These works are treated as a simple contract, where time is not generally critical, variations can be kept to a minimum and contingency and provisional sums do not form part of the contract.

Due to their low capital value, these contracts have few progress payments. These payments are processed and paid more quickly than for Major Works. Minor Works contracts are generally let to smaller contractors due to their lower overheads and, therefore, more competitive tender prices are realised. These contractors, however, are dependent on prompt payment to maintain their cash flow.

Treasurer's Instruction 1206 sets out mandatory requirements in relation to procuring for all minor works projects. Additional information is available on the Purchasing website at [www.purchasing.tas.go.au](http://www.purchasing.tas.go.au).

One of the requirements for Minor Works is that agencies comply with AS 4905–2002.

The highest cost risk area in building contracts is insurance of the works. It is essential that the special conditions of contract for Minor Works include appropriate insurance clauses. Treasury has negotiated a single policy whereby contractors are able to effect insurance through Treasury's insurance broker and maintain it by payment of the necessary premiums. It is mandatory that this policy be used for all major works building construction projects and for all minor works building and construction projects with a value of \$50 000 and above, unless a risk assessment undertaken by the agency indicates that the use of the policy is not warranted. Information on the policy and on the process that agencies must follow is contained in Treasurer's Instruction 1221.

## 7. APPENDICES

### Procurement Practices Information

The following publications will constitute the complete *Procurement Practices Manual*. These can be found at [www.purchasing.tas.gov.au](http://www.purchasing.tas.gov.au)>Buying for Government>Resource Library>Publications.

### Published Booklets

*Best Practice for the Engagement of Consultants*, March 1998

*Best Practice for the Maintenance of Building Assets*, June 1998

*Contract Documentation, Delegation and Risk*, December 1998

*Tasmanian Annexure to the National Code of Practice for the Construction Industry*

