



# Commercial notes

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## PLANNING FOR COMMONWEALTH CONSTRUCTION AND FIT-OUT PROJECTS

This Commercial Note provides a snapshot of some key considerations for Commonwealth entities when planning for a construction project.

The issues highlighted are relevant to all types of building and construction activities undertaken by Commonwealth entities, including fit-out works and refurbishments. The term 'construction' is used to describe the broad range of major and minor building and construction activities.

### GOOD PLANNING – THE KEY TO A SUCCESSFUL PROJECT

#### Why is planning important?

Good planning:

- provides the framework for the project
- identifies key participants and accountabilities
- improves quality
- saves costs and time
- reduces risk.

The best results are achieved when:

- project outcomes are clearly identified and articulated
- planning is thorough, tailored to the project and undertaken early
- there is professional management and performance through the life of the project.

#### Initiating the project planning process

Identify the core project objectives:

- What is required?
- Why it is required?
- When is it required?
- What is the budget?

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Assess what is needed to achieve the project objectives:

- What activities are required?
- Who and what is needed to generate those activities and are they available in the market?
- What options or strategies are available for generating those activities?

Develop the procurement plan to meet the identified objectives and needs:

- Determine the delivery methodology.
  - Decide the delivery model – consider whether any services can be integrated. For example, can you adopt a holistic service model for all or some project needs under a single contract or should you separately engage a builder, a designer and a planner?
  - Decide the type and number of contractors and advisers needed to deliver the whole project.
  - Identify the applicable legal, regulatory and policy requirements.
  - Determine who will be responsible for managing and securing the necessary approvals and when.
  - Decide the strategy for market approach for the contractors and advisers.
- Determine the contract methodology.
  - Decide the contract documents needed to accommodate the identified delivery models.

## **SOME KEY CONSIDERATIONS TO BUILD INTO THE PROJECT PLANNING PROCESS**

### **Determining the project objectives**

Clear project objectives are key to good project outcomes.

The project objectives will direct the choice of project methodology and inform the procurement plan. Examples of issues to consider when deciding the project objectives include the following:

#### ***Does the construction project relate to office space, industrial development or a special-purpose facility?***

The answer to this question will inform the types of services to be procured, the number and types of contractors or advisers to be engaged and the delivery method chosen. For example, a large purpose-built facility for specialised or high-security activities will have different requirements from typical office accommodation and may generate a need for specialist advisers and highly tailored project management and document development.

#### ***Will the project be for a new build or for a refurbishment or fit-out of an existing building or other space?***

Generally, the needs associated with a new build will be much more extensive technically and legally. With a new build it is more likely that expert support and more expansive services will be needed around site selection and suitability, land-use requirements and constraints, geological assessment and survey, environmental and heritage impacts, structural design and construction and sustainability measures and so on.

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***Who will own the land on which the construction is to take place? If a private party owns the land, will the Commonwealth entity lease it?***

Apart from the purely practical considerations around site control, consultation, approvals and the like, this may raise constitutional issues around the extent to which the Commonwealth entity is required to comply with State planning or other local laws.

The need for a lease triggers a related procurement for acquisition of the lease rights. This necessitates more detailed consideration around the form of the approach to the market, the procurement strategy and document and, importantly, the lease document that will protect the construction investment and the Commonwealth entity's tenure, use rights and risk profile over the life of the lease.

*The lease document will need to protect the construction investment and the Commonwealth entity's tenure, use rights and risk profile.*

***What is the market position – the relative positions of the parties given prevailing conditions in the construction industry and the local property market and the nature and value of the project?***

The size, location and type of construction works affect the market opportunities and will play a role in deciding the project framework, the type of documentation and the market approach. For example, a large construction project in a location where the construction market is tight is more likely to stimulate active competition, with contractors being prepared to absorb more risk or offer certain value-adds to secure the project.

A consideration of the market relativities will help to determine the risk apportionment regime adopted. It will also inform the choice of delivery model and the contract type.

## **Developing the project methodology**

***The project methodology identifies the technical and legal elements needed to achieve the project objectives***

Aside from procurement and approval issues, most construction projects pass through at least 3 stages:

- identification of the technical requirements (design brief)
- preparation of detailed specifications and drawings
- construction.

Establishing and specifying the detailed technical requirements of any construction project is a critical prerequisite for a successful outcome. Conversely, inadequate handling of technical specifications is one of the most common triggers for dispute. It can significantly erode the risk management regimes incorporated in the legal documents and significantly increase risk for the Commonwealth entity.

*Inadequate handling of technical specifications is one of the most common triggers for dispute.*

The technical specifications underpin the legal framework of the contract, as the specifications provide the triggers and foundations on which the legal mechanisms and remedies rely. No matter how tight the legal constructs in the contract, without the foundation of high-quality works specifications and descriptions of contract deliverables, the benefit of the contract terms can be lost or eroded and the Commonwealth entity can incur unexpected risk and cost.

The technical specifications and works descriptions should be detailed, consistent and free of ambiguity. They should be clear about:

- what is to be delivered
- the standards, performance capability or requirements applicable to each deliverable
- when it is to be delivered
- how it is to be delivered.

The specifications, design and other project deliverables also need to factor in work health and safety considerations. When engaging project consultants it is important to establish their role in advising on and managing work health and safety issues for the project or relevant parts of the project.

It is vital to avoid blurring the line between the general legal contract provisions and the specification. Just as the general conditions of the contract should avoid including specification components, so the specification should avoid including typical contract content.

Care is needed to avoid ambiguity or inconsistency between different parts of the contract and to determine a suitable order of precedence to resolve issues of inconsistency.

### **The procurement plan – issues for consideration**

#### ***Are there any preliminary approvals or reporting or notification requirements?***

There may be a number of compliance considerations relevant to the construction project. For example, current or planned construction projects to which the Building Code 2013 and Supporting Guidelines apply may need to be notified to the Department of Education, Employment and Workplace Relations (DEEWR) and the Commonwealth Property Management Framework may require discussion with the Department of Finance and Deregulation.

If the value of the project is likely to exceed \$9 million, the procurement will need to comply with Div 2 of the Commonwealth Procurement Rules (CPRs). Apart from some limited exceptions, public works estimated to exceed \$15 million need to be referred to the Parliamentary Standing Committee on Public Works. If the value of the project is between \$2 million and \$15 million that Committee should be notified of the project.

Consideration should also be given to whether the project raises environmental or heritage issues that will necessitate consideration of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Other approvals, such as planning and building approvals, also need to be accommodated by the procurement plan.

#### ***Are there any particular considerations around application of laws?***

Depending on the nature of the project and who owns the land, it may be necessary to seek legal advice on the application of certain local laws to the Commonwealth entity. As this involves constitutional advice, regard would need to be had to the Legal Services Directions 2005 and constitutional advice must be sourced in compliance with Appendix A.

#### ***Who should be engaged and when?***

Engaging consultants with suitable expertise to advise on these matters and assist with preparing any necessary documentation is a key factor in achieving a successful outcome. The range of experts will vary depending on the project, but examples are project managers, planners, engineers, architects, cost planners, quantity surveyors, contract administrators, superintendents, sustainability consultants and Building Code of Australia consultants.

The design brief needs to be prepared early on in the process, as it is the vehicle for instructing the designer to prepare the specification and technical drawings. Unless there is in-house capability, the engagement of an appropriate adviser for the design brief will be one of the earliest procurements in a project.

Lawyers need to be engaged early to advise on the process and contract options and develop the legal documents. However, as their role does not extend to development of the specifications and other technical components, it is important that the technical information is developed in time to be incorporated into the legal documents before the approach to the market and to allow enough time for the relevant technical information to be taken into account during the development of the legal documents.

The time for engagement will be influenced by the type of services needed, the size of the works, the location, the project timetable and the prevailing market. The chosen delivery model (for example, an end-to-end solution such as the managing contractor model, a traditional design-and-construct model or a separate design-and-construct model) may also impact the number and timing of engagements.

### *What will be the delivery model and who will the Commonwealth entity contract with?*

Value-for-money considerations, time, the need for special expertise and the preferred risk management profile will inform the approach to selecting the delivery model and contractors. The choice of delivery model is an important step in the project and in the development of the procurement plan.

In choosing a delivery model, considerations include what will:

- facilitate, attain or optimise the project objectives
- best suit the features of the project
- achieve the most suitable balance of control / risk management for the Commonwealth entity
- provide the appropriate risk allocation between parties
- optimise the time, cost and quality results
- provide best value for money.

Some examples of delivery models are briefly discussed below. These are only a few examples and there are other models and variations of these models. There is no 'right', 'wrong' or 'preferred' model for all Commonwealth construction activities. Ultimately the aim is to make a considered decision about which model best delivers the particular project objectives.

### *Direct contracting*

In direct contracting, the Commonwealth entity retains more control and contracts directly with the individual contractors/consultants, although it may still engage a construction manager or project manager to do this on its behalf and manage the trade contracts. A common delivery model is one where the Commonwealth entity arranges the design (usually through the engagement of a designer who delivers the detailed design and technical specification that underpins the construction contract) and the construction is undertaken by a builder to that specification.

### *Design-and-construct model*

With the design-and-construct model, the Commonwealth entity prepares a design brief that outlines the functional and key user requirements (in performance terms) for the works. This is less fully developed than the design documentation required for a construct-only contract. This is then used to procure the engagement of a contractor who will complete the detailed design consistent with the design brief and construct the works described in the design brief.

*Value-for-money considerations, time, the need for special expertise and the preferred risk management profile will inform the approach to selecting the delivery model and contractors.*

### *Relationship contractor model*

A relationship contract is suitable where there is significant uncertainty surrounding a project. It allows a project to be approached on a phased basis. There are a number of different relationship contract forms, including alliance contracting and the managing contractor model.

The managing contractor model involves the appointment of a contractor to manage the design and construction process. The managing contractor is engaged early in the process to manage defining the scope, design and construction of the works, but it may not design and construct the works itself and it may subcontract those obligations. Payment usually consists of a reimbursable component (often covering the actual costs payable to subcontractors to design and construct the works) plus lump-sum components (covering the planning and management services and work performed by the contractor and including an amount for overhead and profit). The managing contractor may also receive incentive payments for achieving cost and schedule targets.

*Procurement will be guided by the Commonwealth Procurement Rules.*

### *Construction-management model*

In this model, the Commonwealth entity engages a construction manager who performs a purely management and coordination role to manage construction works on its behalf. The Commonwealth entity manages the scoping element and engages the designer and the trade contractors directly (although these contracts may be entered into by the construction manager as the Commonwealth entity's agent). The remuneration is usually a fee based on a percentage of the value of the works.

### *How will the Commonwealth entity procure the required services?*

This will be guided by the CPRs.

There are a range of procurement options available. The most common are:

- a multi-stage approach to the market, where an expression of interest is issued as a first stage followed by a prequalified tender
- a single approach to the market.

The CPRs prescribe time limits for each approach to the market for procurement above the relevant thresholds (see para 9.7 of the CPRs). These must be taken into account as a factor in determining which option to use.

A rushed process is less likely to yield the best results, particularly in the construction sphere, where there may be a significant amount of technical detail for tenderers to consider. If sufficient time is available, a multi-stage process can serve to identify genuine and suitable tenderers via an expression of interest and to determine the best candidate from that select group in the second stage (see AGS Fact Sheet 7).

### *Choosing a contract model*

A thorough consideration of the technical requirements and the project objectives and constraints combined with an assessment of matters such as the availability of resources and expertise within the Commonwealth entity will help to determine the contract model. There are numerous contract models, including contracts to engineer, procure and construct (EPC); design and construct; design contract and separate construction contract; construction management; managing contractor and Private Finance Initiative (PFI). These in turn can accommodate a range of arrangements. Ultimately the project delivery model chosen will be the main driver for the contract model. Whichever model is chosen, and regardless of whether one contract or several contracts will be required, the deliverables under each contract should be clear.

### Choosing the form of contract

After deciding on a contract model, it is time to consider the form of contract.

In the Commonwealth sphere the most common forms of contract are outlined below.

Approach	Pros and cons
Standard form contract, eg: <ul style="list-style-type: none"> <li>— Standards Australia contracts</li> <li>— Australian Building Industry Contract (produced jointly by Master Builders Australia and the Royal Australian Institute of Architects)</li> <li>— Fédération Internationale des Ingénieurs-Conseils (International Federation of Consulting Engineers) contracts (outside Australia))</li> </ul>	These contracts are not appropriate for Commonwealth entities unless they are amended, as they do not address essential Commonwealth requirements.
Standard form contract tailored to include essential Commonwealth conditions in the annexure	This approach balances the requirements of Commonwealth entities with market acceptance of the standard form contract. However, care is required to ensure consistency between the conditions in the annexure and the general conditions of the contract.
Fully tailored contract	This is the most detailed form of contract. It can be used to change the risk load quite significantly and provide high levels of protection and very targeted tailoring.

In the Commonwealth context the choice is between a modified standard contract and a fully tailored contract.

A modified standard form contract can be acceptable, but there can be particular circumstances where a tailored contract provides the better result.

#### The tailored contract

A fully tailored contract is warranted where a Commonwealth entity:

- has particular project objectives which are best delivered via a tailored contract
- is strategically well-placed in the market to attract compliant tenders and value-for-money pricing in response to this form of contract
- prefers to have a fully considered and tailored document.

#### Standard form contracts

Standard form contracts generally comprise a set of general conditions and make provision for the parties to use an annexure to insert the special conditions relevant to their particular circumstances.

Commonwealth entities may elect to use a standard form contract as the base document for their project because these contracts are well-known in the marketplace and external consultants are familiar with them. However, in almost all cases either the document itself will need to be amended, subject to copyright and licensing arrangements, or amendments must be made via the special conditions in an annexure, not only because of Commonwealth regulatory and policy requirements but also because the standard form contracts adopt a project delivery and risk apportionment regime that may need to be adjusted to meet the Commonwealth entity's portfolio or project objectives.

The amendments required always differ from project to project. This explains why there is no 'off-the-shelf' or 'one-size-fits-all' set of special conditions.

*...in almost all cases standard form contracts need to be amended via the special conditions.*

## COMMONWEALTH POLICIES AND LEGISLATIVE REQUIREMENTS

### General procurement requirements

General policies and considerations that will affect procurement of construction services are summarised below.

Consideration	Description	Action
<b>Commonwealth Procurement Rules (CPRs)</b>	These regulate the conduct of procurements. Procurement tasks may be contracted out. CPR requirements will need to be incorporated into the contract with the procuring entity. For general guidance see <a href="http://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/index.html">http://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/index.html</a> .	Will require certain provisions to be included in both the tender documents and the contract.
<b>Probity considerations</b>	There are a range of probity considerations for construction projects.	See AGS Fact Sheet 9.
<b>Procurement On-Time Payment Policy for Small Businesses</b>	In contracts with small businesses, correctly rendered invoices for payments up to \$5 million must be paid within 30 days and interest must be paid on overdue invoices for contracts up to \$1 million.	See Department of Finance and Deregulation model contract clauses (Finance Circular 2012/02).
<b>Australian industry participation</b>	For procurements (including of construction services) by <i>Financial Management and Accountability Act 1997</i> (Cth) (FMA Act) entities that are anticipated to exceed a value of \$20 million, the entity must approach the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE). DIISRTE will determine on a case-by-case basis whether an Australian Industry Participation Plan is required, depending on specific considerations.	See DIISRTE model tender clauses ( <a href="http://www.innovation.gov.au">www.innovation.gov.au</a> ).
<b>National Waste Policy</b>	Among other things, this policy aims to reduce the generation of waste and ensure that waste is managed in a safe and environmentally sound manner. It applies to all procurements.	Contract should require compliance with the National Waste Policy.
<b>Social inclusion policies</b>	For construction projects valued above \$6 million in an area with a significant Indigenous population, tenderers are required to develop an Indigenous Training, Employment and Supplier Plan as part of their tender response pursuant to the Indigenous Opportunities Policy.	Clauses will be required in the contract. Consultation with DEEWR is required at planning stage where thresholds are met.
<b>Equal opportunity</b>	For all construction procurements the Workplace Gender Equality Agency applicable policy will apply. This prohibits Commonwealth entities from procuring goods or services from parties that do not comply with their obligations (if any) under the <i>Workplace Gender Equality Agency Act 2012</i> (Cth).	See Workplace Gender Equality Agency model tender and contract clauses ( <a href="http://www.wgea.gov.au">www.wgea.gov.au</a> ).
<b>Legal Services Directions</b>	Agencies should be mindful of their requirements under the Legal Services Directions. In particular, the Legal Services Directions should be followed on issues of constitutional immunity and submission to the jurisdiction of State tribunals.	
<b>Other policies</b>	These include the Protective Security Policy Framework, the Australian Government Foreign Exchange Risk Management Guidelines, the National Public Private Partnership Policy and Guidelines, and the Australian Government Competitive Neutrality Guidelines for Managers.	

## Construction-specific policies

Once the contract model is chosen, there are some specific Commonwealth issues that must be considered in drafting the tender and contract package. These include the considerations outlined below.

Consideration	Description	Action
<b>Public Works Committee</b>	Public works with an estimated value over \$15 million must (with limited exceptions) be referred to the Parliamentary Standing Committee on Public Works. The committee will prepare a report and the House of Representatives, on considering that report, may resolve for the works to proceed (see <a href="http://www.finance.gov.au/property/public-works-committee/index.html">www.finance.gov.au/property/public-works-committee/index.html</a> ).	No specific provisions are required in the contract, as this referral is a preliminary step before any approach to the market. Sometimes 'concurrent documentation' of the works might be possible in conjunction with the Public Works Committee approval process.
<b>Building Code 2013</b>	All FMA Act entities are required to apply the Building Code 2013 (Building Code) and Supporting Guidelines. The Building Code broadly covers building and construction activities, but there are some activities that are not covered by the Building Code. These are described in the Supporting Guidelines. All directly funded projects are covered, and indirectly funded projects will be covered if they are above certain thresholds in terms of value and proportionate contribution. The intent of the Building Code is to lift the behavioural standards of the building and construction industry and to emphasise high ethical standards in construction-related activities, including procurement and tendering. The Supporting Guidelines set out the obligations of the Commonwealth and other parties. They reflect and build on the principles in the Building Code.	Draft tender documentation and contract in accordance with the Building Code and Supporting Guidelines must include the applicable model clauses. The Building Code, Supporting Guidelines and model tender and contract documentation are published on DEEWR's website ( <a href="http://deewr.gov.au/building-code-2013">http://deewr.gov.au/building-code-2013</a> ).
<b>Fair Work Principles</b>	All FMA Act entities and <i>Commonwealth Authorities and Companies Act 1997</i> (Cth) (CAC Act) bodies whose operations are predominantly non-commercial (specifically those listed in Sch 1 to the <i>Commonwealth Authorities and Companies Regulations 1997</i> through a direction issued by the Minister for Finance and Deregulation) must apply the Fair Work Principles where the value of the construction procurement is \$9 million or more. These principles are designed to ensure that Australian Government procurement decisions promote fair, cooperative and productive workplaces for the benefit of employees. There are additional requirements relating to cleaning services.	See model tender and contract clauses on DEEWR website ( <a href="http://www.deewr.gov.au">www.deewr.gov.au</a> ).
<b>Work health and safety</b>	The <i>Work Health and Safety Act 2011</i> (Cth) (WHS Act) imposes health and safety obligations on a range of people and entities, including designers, and may extend to the parties engaged by a Commonwealth entity to undertake building and construction work. The States and Territories have committed to passing harmonised legislation to mirror the Commonwealth Act; however, this has not yet occurred in all jurisdictions (as at January 2013).	Take care to ensure that the obligations set out in any contract are consistent with the WHS Act and applicable State or Territory laws and associated regulations and codes (see AGS Fact Sheet 21). Consideration should also be given to whether a 'principal contractor' is required for the project.

Consideration	Description	Action
<b>Australian Government Building and Construction OHS Accreditation Scheme</b>	The scheme is established by the <i>Fair Work (Building Industry) Act 2012</i> (Cth) and associated Regulations. The purpose of the scheme is to improve health and safety in the building industry. The scheme applies to head contractors who carry out ‘building work’ that meets certain monetary thresholds, such as \$3 million for directly funded projects. For relevant projects, Commonwealth entities are required to engage a head contractor who is accredited under the scheme.	See Federal Safety Commissioner model tender and contract clauses ( <a href="http://www.fsc.gov.au">www.fsc.gov.au</a> ).
<b>Energy Efficiency in Government Operations Policy (EEGO Policy)</b>	New builds and major refurbishments with a floor area of 2,000m <sup>2</sup> or more are required to meet minimum energy performance standards based on the National Australian Built Environment Rating System (see <a href="http://www.nabers.com.au">www.nabers.com.au</a> ). The specific performance standards that must be met in particular circumstances also depend on the proportion of the building occupied by the Commonwealth entity.  The <i>ESD Design Guide for Office and Public Buildings</i> is a useful resource in this regard ( <a href="http://www.environment.gov.au/sustainability/government/publications/esd-design/index.html">www.environment.gov.au/sustainability/government/publications/esd-design/index.html</a> ).	Take care to ensure that, where the EEGO Policy applies, the technical specifications for the project require a standard of construction that enables the prescribed energy efficiency targets to be met.  For more information see <a href="http://www.climatechange.gov.au">www.climatechange.gov.au</a> .
<b>Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)</b>	The EPBC Act provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places. There are 8 matters of ‘national environmental significance’ to which the EPBC Act applies: <ol style="list-style-type: none"> <li>1. world heritage sites</li> <li>2. national heritage places</li> <li>3. wetlands of international importance</li> <li>4. nationally threatened species and ecological communities</li> <li>5. migratory species</li> <li>6. Commonwealth marine areas</li> <li>7. the Great Barrier Reef Marine Park</li> <li>8. nuclear actions.</li> </ol> <p>The EPBC Act also confers jurisdiction over ‘actions’ that have a significant impact on the environment where the actions affect or are carried out by the Commonwealth agency, even if that ‘significant impact’ does not fall within 1 of the 8 matters listed above.</p>	The EPBC Act can affect a broad range of groups including the Commonwealth and its contractors as well as landowners and developers. The proponent(s) should refer projects to which the EPBC Act may apply to the Department of Sustainability, Environment, Water, Population and Communities (SEWPAC) for assessment by the Minister.  For more information see <a href="http://www.environment.gov.au">www.environment.gov.au</a> .

## CONTRACT CONSIDERATIONS

### Role of superintendent

The construction contract will often prescribe a framework for the role of a superintendent. It is an important role and care is needed to ensure that the person appointed possesses technical expertise in the subject matter of the contract and also good contract management skills.

Unless the superintendent is an actual employee of the principal, usually the relationship between the superintendent and the principal is governed by a separate contract (eg a consultancy contract). This creates a direct relationship and will govern the superintendent’s accountabilities to the principal.

The consultancy contract appointing the superintendent will establish the extent of the services that the superintendent needs to deliver to the principal. These

could be limited to performing the role of superintendent under the construction contract or could require additional services such as general advice, overall project management activities and additional certification. What is important is that the services to be delivered are clearly identified. Where the services include the role of superintendent under the construction contract, the form of the construction contract should be appended to the consultancy agreement or otherwise clearly identified and incorporated by reference so that there is certainty around the detail of the responsibilities of the person appointed as superintendent.

Traditionally the superintendent will perform a range of functions, including:

- acting as the 'agent' or 'representative' for the principal for the purposes of administering or managing the construction contract
- acting as the designated assessor/certifier within the regime created by the construction contract.

The superintendent should perform their duties in line with the construction contract to ensure that risk to the Commonwealth entity is properly managed.

Disputes can arise where a contractor asserts bias on the part of the superintendent in performing their assessment/certification role. To manage this risk it is important that the consultancy contract clearly specifies those functions of the superintendent which are considered to be 'certifying' functions and, in respect of which, the superintendent must act fairly and impartially. The construction contract should also be clear about the available powers and discretions and the degree to which they can be challenged by the contractor.

## Reporting

The type of project will usually inform whether regular reporting will be required and, if so, the frequency, detail and manner of reporting to be required.

Clear details of the reporting requirements should be built into the contract (timing, format, circulation group, etc).

## Managing claims

Contractors may claim for extensions of time in particular circumstances and for delay or disruption costs and may also seek additional fees for variations or in other circumstances. The contract provisions dealing with extensions of time, delay costs and variations need to be carefully risk-assessed and tailored to meet the risk management profile preferred by the Commonwealth entity. This includes considering who can direct or authorise a variation on behalf of the Commonwealth and whether, in the circumstances of the particular project, there are any types of claims that should not be permitted or that should be more or less strictly managed.

The clauses dealing with extensions of time, delay claims and variations affect the value-for-money assessment. This is an area where contractors typically seek to 'soften' the principal's remedies and where there is the potential for substantial unexpected cost liability and disputes to arise.

Matters that may inform a Commonwealth entity's position on the issue of extensions of time include whether there is a hard deadline for completion, the likelihood of triggering events (ie causes) occurring and the gravity of delays. It may be appropriate in some cases to gear the construction contract towards acceleration of the works rather than an extension of time, but the cost consequences of doing so must be carefully considered. It may also be appropriate to limit or exclude delay or disruption costs but permit certain extensions of time.

*The contract provisions dealing with extensions of time, delay costs and variations need to be carefully risk-assessed and tailored.*

In terms of claims for additional fees, Commonwealth entities will need to be mindful of the financial authority of the superintendent or other party tasked with determining whether extensions of time should be allowed or costs approved. Uncapped liabilities need to be assessed as part of the value-for-money assessment. In the case of the Commonwealth of Australia and certain Commonwealth entities, particular approvals may be needed before agreeing to take on these risks.

### Liquidated damages

A Commonwealth entity may consider including liquidated damages in the contract. Often expressed as a dollar amount per day, liquidated damages must be a genuine pre-estimate, determined at the time of contracting, of the loss that will be suffered as a result of delay.

Care should be taken in determining the amount of liquidated damages, as excessive rates may be deemed to be a penalty and therefore may not be enforceable.

### Other remedies

It is desirable to seek legal advice on a transactional basis regarding other remedies or securities that may be recommended for particular projects. Usually, retention moneys or unconditional financial undertakings would be required.

### Defects liability

Depending on the nature of the project, the Commonwealth entity may consider a longer or shorter period of defects liability. This period should allow sufficient time to identify any defects in the works and should be considered on a project-by-project basis.

### Time frames

The particular circumstances of the project will inform the time frames to be stipulated in the contract. These include the need to achieve practical completion by a given deadline and the internal processes around approvals.

### Insurance

Requirements relating to insurance will be informed by the nature of the project and of the Commonwealth entity. The contract should clearly state the risks against which insurance must be held and which party is to hold that insurance. These obligations will tie in with any indemnity provisions in the contract that operate to allocate certain risks to one or the other party.

Commonwealth entities do not usually agree to take out insurance under a construction contract. Frequently the risk in the works rests with the contractor under the contract provisions and therefore the contractor is required to take out a range of policies such as public liability insurance, insurance against property damage, workers compensation insurance and professional indemnity insurance. To the extent that the Commonwealth entity has an interest, this will usually be covered by its own insurance arrangements (whether through Comcover or otherwise), but an express contractual obligation for the Commonwealth to insure is usually avoided.

*Commonwealth entities do not usually agree to take out insurance under a construction contract.*

## Indemnity provisions

The indemnity provisions provide a mechanism to manage the allocation of risk under the contract.

The Department of Finance and Deregulation has issued guidance on the requirements relating to indemnities (see Finance Circulars 2011/01 and 2003/02). See also AGS Legal Briefing 93, *Indemnities in Commonwealth contracting*.

The degree to which the Commonwealth entity may agree to an indemnity will be governed by considerations such as:

- whether the contractor has control of the whole site
- the degree of control of the contractor when on a shared site
- the size of the project
- the extent to which the Commonwealth entity is conducting activities near or adjacent to the construction site
- the degree of site control retained by the Commonwealth entity.

Commonwealth entities outside the FMA Act regime also need to consider the CAC Act and their own enabling legislation in relation to uncapped risks.

## Security of payment

All States and Territories have legislation that enables contractors to make payment claims and prescribes the regimes around assessment of those payment claims and the rights and responsibilities each party has in the event of a dispute. The regimes are different in each jurisdiction. However, the Commonwealth entity can seek to assert more control over the processes by including tailored provisions in the construction contract. These provisions may, among other things, authorise persons such as the superintendent to perform functions under the applicable legislation as agent for the Commonwealth entity and stipulate the relevant time frames. The contract may also be drafted to control or limit the parties authorised to nominate an adjudicator to determine a dispute in the event of escalation.

*Commonwealth entities outside the FMA Act regime also need to consider the CAC Act and their own enabling legislation in relation to uncapped risks.*

**Simon Konecny** has nearly 20 years' experience in assisting government with commercial and property matters. His areas of expertise include tenders and outsourcing, building and construction, commercial conveyancing and leasing, land development, related environmental matters, general commercial contracting, contract development, probity and alternative dispute resolution. Simon previously worked in private practice for 5 years in Papua New Guinea, where he provided commercial advice and assistance to a range of companies.

**Andrew Miles** advises on significant commercial projects – in particular, those involving property and construction, including leasing, purchase and sale, planning, property use issues and dealings with property. Andrew also has extensive experience advising in relation to construction matters, funding agreements and procurement matters. He advises on all aspects of commercial risk management, including the role of warranties, indemnities and limitations on liability. Andrew also has expertise in Indigenous property matters.

**Fiona Mackrell** has a strong background in procurement, infrastructure, property development and contract law. She advises on risk analysis; methods of project delivery, including expression of interest and tender processes and drafting of associated documentation including contracts; land use and property management agreements; and funding agreements. In previous experience in a large commercial law firm, she provided advice on project structuring, procurement and negotiation in the context of infrastructure, major construction and engineering projects.

**Robert Cole** has expertise in property law, leasing, securities, construction, tendering and commercial law. Robert has extensive transactional experience including conveyancing, leasing and securities. He has acted in range of Commonwealth contrition projects and prepared construction precedents. Prior to joining AGS, Robert worked in rural Victoria, where he was seconded at a publicly listed gold-mining company and was involved in a range of matters related to settling the company's prospectus, property acquisitions, insurance and capital raising.

## AGS contacts

AGS has a national team of lawyers specialising in construction contracts and disputes. For further information on the article in this issue, or on other construction issues please contact the authors, or any of the lawyers listed below.

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