



# fact sheet

## for property managers

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### Avoiding common legal pitfalls in contract management

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This fact sheet provides some tips on legal issues to consider in contract management.

#### Understand the contract

A contract is a legally binding agreement containing the rights and obligations of each party. It includes:

- **background provisions** that outline the legal framework underpinning the contract (for example, it may contain indemnity provisions that show how risk is allocated)
- **moving provisions** that govern the day-to-day management of the contract (for example, it may contain clauses on services to be delivered, reports to be provided and payment of invoices)

You need to understand the background provisions and actively manage the moving provisions.

#### Be aware of common legal issues in managing the contract

Every contract is different, but here are some suggestions to avoid some common legal pitfalls:

- **Be aware that there are risks in starting work before the contract is executed:** If work has been done but contract has not actually been executed, disputes can arise about whether there is actually a contract and, if so, what its terms are.
- **Set up a contract management system that takes account of the requirements of the specific contract:** For more complex contracts, there may be unusual steps and requirements that need to be managed.
- **Manage both contractor and entity obligations:** Ensure that the entity identifies its obligations and complies with them within the contract time frames. Entity obligations might typically involve providing information or approvals and making payments.
- **Maintain good records:** If records are incomplete, the entity can be at a significant disadvantage if there is a dispute.
  - Store original documents securely.
  - Keep all contract amendments with the original contract.
  - Maintain complete records of interactions with the contractor.
- **Ensure that contract actions are properly authorised within the entity** and be aware that, even if they are not, the action may still be binding on the Commonwealth.
- **Check that the contractor has delivered the goods or services** before the payment is made.
  - Contracts often contain a clause allowing the entity to defer or reduce payments if the contractor does not perform services to the entity's satisfaction.
  - Be aware that, in some circumstances, if the entity continues to make payments where goods or services are not to the entity's satisfaction, the Commonwealth's rights may be waived.

- **Answer assertions:** If the contractor makes an incorrect assertion and the entity leaves this unanswered, in some circumstances it may imply that the entity accepts the contractor's position.
- **Manage intellectual property (IP) and confidentiality:** In contracts where IP and confidential information are involved, ensure that there is a process for identifying and tracking the information.
- **Check ongoing compliance with insurance obligations annually** in longer-term, higher value/ risk contracts. If the contractor does not renew its insurance policies or if the coverage or the terms of those policies change, the protection the policies afford may be reduced.
- **Manage GST:** Most contracts contain provisions dealing with GST. Even where the most comprehensive GST clause has been inserted into a contract, it is necessary to manage particular GST considerations, particularly for contracts that are cost plus or allow for reimbursement of expenses.
- **Follow up plans:** If substantive obligations are set out in plans, it is important that the entity check that plans are being developed and approved in a timely way, otherwise, when the time comes to implement the plan, there may be nothing to implement.
- **Subcontractors:** Check when it is necessary for the entity to approve the use of subcontractors and what issues should be considered in providing approvals. Remember, however, that the contractual relationship should remain with the principal contractor.
- **Assignments and novations:** These require particular consideration in relation to the identity of the party taking over the contractual obligation and the allocation of responsibility for performance of the contract before and after the assignment or novation. For more information, see AGS Commercial note No 32, 'Novation and Assignment', 15 July 2009, available from the AGS website.

### Contract variations

Contracts can be amended in a variety of different ways. Entities will often enter into formal, written contract variations. However, contracts can be amended even if there is a clause stating that the agreement can only be varied with the written agreement of parties. Contract variations can occur orally (in progress meetings, over the telephone), by conduct (especially failure to act consistently with the contract), by email exchanges or by informal 'letter agreements' kept in 'bottom drawers'. For example, contracts can be amended to include rights or obligations, or prevent parties from exercising contractual rights and obligations, by: as about all relevant circumstances of their disposal.

- **waiver:** the unilateral act (such as express statement or conduct) of one party to the contract can result in a legal right being surrendered
- **oral representation:** Regardless of the existence of a written agreement, parties may impose different rights and obligations on each other from those contained in the original contract through express oral agreement
- **acting inconsistently with the terms of the contract:** Where a party acts inconsistently with the terms of a contract and the other party acts in reliance on that conduct to their detriment, that first party will not be able to assert that the contract has not actually been varied.

To make sure that contracts are not amended or modified inadvertently, an entity should take care to avoid:

- agreeing to an alteration to the price or the requirements in an email exchange
- accepting a schedule change in a progress meeting in such a way as to be precluded from subsequently claiming damages for the delay
- waiving its right to seek damages by accepting goods that do not meet its requirements without reserving its rights.

When to seek specific legal advice

- if you are in dispute with the contractor
- if you are considering termination of the contract
- if you receive a claim from a third party in relation to the contractor's actions
- if you are making a variation to the contract, particularly a more complex contract.

### More information

If you require further information about AGS's contract management advice services, please contact one of our commercial specialists:

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