

4.10 SERVICES CONTRACTS AND AGENCY RELATIONSHIPS

INTRODUCTION

- 1 This chapter applies to all service contracts undertaken by Defence and the Defence Materiel Organisation (DMO).
- 2 This chapter addresses some of the special issues that arise under a contract for the provision of services including:
 - identification of an employer/employee relationship;
 - contracting with a natural person;
 - statutory obligations including superannuation, taxation and workers' compensation;
 - agency relationships;
 - the granting of purchasing authority;
 - the granting of financial delegations; and
 - travel arrangements for contracted personnel.

MANDATORY POLICY

- Defence staff and contractors must comply with the following policy documents:
 - the *Financial Management and Accountability Act 1997* (Cth) (FMA Act), the *Financial Management and Accountability Regulations 1997* (Cth) (FMARs), the *Financial Management and Accountability Orders* (FMAO)
 - *Commonwealth Procurement Guidelines 2008* (CPGs)
 - Finance Circular No 2009/05 - *Commitment to spend public money* (FMA Regulations 7 to 13)
 - Defence Chief Executive Instruction (CEI) 2.1 - *Procurement*
 - DMO CEI 2.1 – *Procurement*
 - DMO CEI 2.5 – *Official Travel* (which covers contractor travel)
 - Defence Information Management Policy Instruction 1/2004 – *Telephone and Related Goods and Services*
 - Defence Information Management Policy Instruction 5/2001 – *Defence Information Environment Provision of Defence E-mail and Internet Services*
 - Defence Instruction (General) ADMIN 10-6 – *Use of Defence Telephone and Computer Resources*
- DMO staff engaging External Service Providers (ESPs) must comply with DMI (FIN) 01-0-025 - *Engagement of External Service Providers*
- DMO staff engaging External Service Providers (ESPs) must comply with DMI (Proc) 13-0-001 - *Mandatory Procurement Policy Requirements for all DMO Acquisitions (including Sustainment Procurement) to Contract Signature.*
- A procurement officer must not indicate or act in any way to confirm that the relationship is one of employer-employee where the terms of the contract state otherwise.
- The Contract approval submission must advise the appropriate delegate if the contract is likely to result in an employee/employer relationship.

- **The office of the Inspector General must be contacted where it is suspected that there has been a misappropriation or improper use of public money.**
- **Where an agency relationship is to be created the standard Defence negation of employment and agency clause must be amended to include agency provisions in the contract.**
- **Where Defence facilities and equipment are provided, contractors and their personnel must be advised of any applicable Commonwealth and Defence policies pertaining to their use.**

BACKGROUND

3 Defence enters into many contracts for the provision of services, including:

- consultancy or professional services;
- administrative services;
- maintenance services for Defence equipment;
- medical services
- garrison support services (building maintenance, cleaning etc); and
- legal and other specialist services.

Specialist Standing Offer panels

4 There are a number of existing professional services standing offer panels. Where a standing offer panel exists for a particular requirement, Defence officials should make use of that standing offer for their procurement need wherever practicable. Guidance on provision of services through existing standing offer panel arrangements should be obtained from the area responsible for managing the panel. Paragraph 5 provides contact information for the following professional services standing offer panels:

- Defence Legal panels;
- DMO Legal panel;
- DMO Support Services panel (DMOSS);
- Defence Financial Services panel;
- Defence Infrastructure panel;
- Defence Environment and Heritage panel; and
- Defence Unexploded Ordnance (UXO) panel.

A full list of the Defence and DMO Standing Offer Panels are available on Austender.

5 The Defence Legal panels can be accessed for the provision of legal services, according to the procedure in DEFGRAM 147/2007 – *Engagement of External Legal Service Providers* and the guidance in the Accessing Legal Services Manual available at (http://intranet.defence.gov.au/dsg/sites/LegalResources/docs/Accessing_Legal_Services_060208.pdf).

6 The DMO Legal Panel can be accessed for the provision of legal services, according to the procedure contained in the current DPPI on *Requesting Professional Services from the Office of Special Counsel DMO*.

- 7 The DMO Support Services Panel (DMOSS) can be accessed for project, business and technical support services through the DMOSS Business Management System at <http://intranet.defence.gov.au/dmoweb/sites/dmoss/comweb.asp?page=63240>.
- 8 Details on the Defence Financial Services are available from http://intranet.defence.gov.au/find/standing_offer_panels/financial_services_SOP/index.html. The Defence Infrastructure Panel, Defence Environment and Heritage Panel and Defence UXO Panel can be accessed from the Infrastructure Management intranet we site at <http://defweb.cbr.defence.gov.au/im/> via the 'Panel' link.

Templates

- 9 The following four ASDEFCON tendering and contracting templates (ASDEFCON suite) have been developed for use in the procurement of consultancy or professional services related primarily to materiel acquisition and sustainment projects:
- ASDEFCON (*Shortform Services*);
 - ASDEFCON (*Services*);
 - ASDEFCON (*Standing Offer for Services*); and
 - ASDEFCON (*Support*).
- 10 The ASDEFCON suite contains clauses which require contractors to comply with relevant legislation and government policies.¹ For further information on these ASDEFCON tendering and contracting templates refer to chapter 2.3.
- 11 For further information on the Defence tendering and contracting templates for infrastructure development, building maintenance and garrison support services refer chapter 2.3 or the Infrastructure Management intranet web site at <http://defweb.cbr.defence.gov.au/im/>.

EMPLOYER/EMPLOYEE RELATIONSHIP

- 12 The law of employment makes a distinction between a contract of service and a contract for services. The former creates an employer and employee relationship (e.g an individual APS or ADF member and the Commonwealth) whereas the latter is characterised by the law as a contract between the principal (e.g the Commonwealth) and an independent contractor.
- 13 It is Defence policy not to enter into a contract that will create an employee/employer relationship between Defence and any individual engaged under that contract, except for temporary employment contracts (for more information refer to paragraph 21). This is because a contract of employment will impose additional burdens on Defence including implied terms, liability of the employer, the application of legislation, benefits and entitlements, dispute resolution including conciliation and arbitration systems, workers' compensation, occupational health and safety, leave entitlements, the application of unfair dismissal laws, income and other taxes, and superannuation. Chapter 3.14 contains further information on how superannuation, taxation, and workers' compensation legislation applies to Defence contracts. The Contract approval submission must advise the appropriate delegate if the contract is likely to result in an employee/employer relationship.
- 14 A court can rule that an employer/employee relationship exists even if the contract states that it is between an independent contractor and the Commonwealth. While the courts will consider a number of factors (indicators) in deciding whether a person ('the worker') is an employee or a contractor, central to the decision will be the 'totality of the relationship between the parties'.

¹ *Commonwealth Procurement Guidelines* paragraph 3.12

- 15 The High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 held that the extent to which one party was subject to the direction and control of the other party in the manner in which they did their work under the contract was a significant factor in determining the parties' relationship. However, there were a number of other relevant factors which included:
- the mode of remuneration of the worker (for example, by results which suggest the worker is an independent contractor, or on an hourly basis which suggests the worker is an employee);
 - who provides and maintains necessary equipment (if it is the worker, this suggests he or she is an independent contractor);
 - the obligation to work (whether, for example, the worker has the right to dictate hours of work and whether the worker may refuse tasks – if so, this suggests the worker is an independent contractor);
 - provision of leave and other entitlements (these are consistent with an employment relationship);
 - place of work (if at the worker's own premises or office, this suggests the worker is an independent contractor);
 - ability of the worker to delegate the work (suggests an independent contractor), or whether the employer has a right to insist that the worker perform the work (suggests an employee);
 - whether income tax is deducted by the employer (however, this factor has changed significantly as the tax laws have changed); and
 - whether the employer has a right to the exclusive services of the worker (if so, this suggests the worker is an employee).
- 16 More recently, the High Court in *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 reviewed the authorities which had considered the distinction between an employee and an independent contractor. The majority of judges confirmed that the distinction between an employee and an independent contractor is "rooted fundamentally in the difference between a person who services his employer in his, the employer's business, and a person who carries on a trade or business of his own". The issue is to be determined by a balanced evaluation of all the incidents of the relationship between the parties. While the degree and nature of the control exercised over the worker is, and remains after *Vabu*, a significant factor, it is not the only relevant factor. The majority held that it is the "totality of the relationship between the parties which must be considered". The High Court quoted with approval the factors noted above from *Brodribb Sawmilling Co* as matters to be taken into account.
- 17 The terms of the contract are an important factor in establishing the intention of the parties. Only where this intention is not supported by the subsequent conduct of the parties will the courts examine in further detail. In such circumstances, a court will not feel bound to accept the status of the parties as specified in the contract if this does not reflect the reality of the relationship between the parties. A clause providing that the contractor is not an employee of Defence will not prevent a court finding that the person was an employee, if other factors in the relationship between the parties point clearly to an employee-employer relationship.
- 18 Where procurement officers are in any doubt as to the potential status of a proposed contractor, specialist advice should be sought from the Office of Special Counsel in DMO or Defence Legal. A procurement officer must not indicate that the relationship is one of employer-employee where the terms of the contract state otherwise.

CONTRACTING WITH A NATURAL PERSON

- 19 A natural person is an individual, rather than a company or partnership, who contracts to provide goods or services to Defence.
- 20 Entering into a contract with a natural person increases the risk of that person being deemed to be an employee of Defence. This has flow-on implications for superannuation, taxation and workers' compensation as discussed in paragraphs 12 and 13 above. As a consequence, wherever possible, **it is strongly recommended that contracts not be entered into with natural persons.**
- 21 If there is a requirement to enter into a contract with a natural person the preferred contracting option is through a temporary employment contract. These contracts apply the conditions of employment detailed in the Defence Employees Certified Agreement. Advice on temporary employment contracts can be obtained by contacting Recruitment Services, Personnel Services Branch, Defence Support Group on (02) 6127 3022.

CREATION OF AN AGENCY RELATIONSHIP WITH CONTRACTORS

- 22 In a contract, an 'Agency Relationship' is created where the contractor is authorised to act, as an agent, for and on behalf of the principal (the Commonwealth). Where the agent undertakes an action within the authority provided for under the contract the Commonwealth is obliged to meet the commitment entered into on its behalf by the authorised agent.
- 23 An agent is an officer, either an appointed external agent or employee, empowered with the authority to represent and make decisions on behalf of an organisation. An agent can enter into contractual relationships with third parties, with its contractor, its employees or subcontractors. This is due to the fact that where an agency relationship is created decisions made by the agent will be binding on Defence, even though Defence's control over the activity will be significantly reduced. Therefore the creation of agency relationships should be avoided where possible. Notwithstanding this policy there may be certain circumstances, particularly in contracts for the provision of services, where it may be appropriate to create a defined agency relationship with a contractor, its employees or subcontractors. For example, agency relationships may need to be established where:
- contracted personnel are granted 'purchasing authority' for Defence;
 - contracted personnel are authorised to exercise financial delegation/s for procurement on behalf of Defence; or
 - contracted personnel are required to spend, manage or control public money.
- 24 In addition to these examples there are Project Manager/Contract Administrator (PMCA) engagements under the Defence Infrastructure Panel. Under these engagements the PMCA acts as an agent to manage the project on the Commonwealth's behalf.

Legislative framework

- 25 The legislative framework in which Commonwealth purchasing authority and financial delegations are exercised is the *Financial Management and Accountability Act 1997* (Cth) (FMA Act), the *Financial Management and Accountability Regulations 1997* (Cth) (FMAR), and the *Financial Management and Accountability Orders 1997* (Cth) (FMAO). This legislative framework regulates, among other things, the spending of public money and imposes obligations on 'officials' who deal with public money and who approve proposals to spend public money. An 'official' under the FMA Act is any person dealing with public monies on behalf of the Commonwealth, including persons involved at any stage of the procurement process.
- 26 Under the FMA Act and the FMAR, a contractor or a contractor's employee will be regarded as an 'official' in Defence or the DMO if they are performing a 'financial task' for their respective Agency. A 'financial task' is defined in the FMARs as a task or procedure, other

than authorised under Section 12 of the FMA Act, relating to the commitment or spending of public money, or the management and control of public money.

- 27 It is very important to note that only natural persons can be ‘officials’. This means that where a contractor is a corporation, it will be individual officers or employees of the contractor who will be performing financial tasks on behalf of Defence or the DMO. Officials who fail to comply with any FMA legislation can be subject to criminal penalties, including imprisonment. For this reason it is very important that contractors inform their officers and employees that by performing financial tasks in relation to public money, they become ‘officials’ under the FMA Act.

Granting purchasing authority to a contractor

- 28 Contracted personnel should only be given purchasing authority in limited circumstances, where providing that authority is an efficient, effective and ethical use of Commonwealth resources, such as:
- where outsourced functions performed by a contractor involve the procurement of goods and/or services for Defence or the DMO; or
 - where a professional service provider is performing a task for Defence or the DMO which requires the procurement of goods and/or services for Defence or the DMO.
- 29 Purchasing Authority consists of all those duties and responsibilities that relate to procurement, other than the exercise of financial delegations. These duties and responsibilities may include releasing request documentation, negotiation with contractors, payments to contractors (following the exercising of financial delegations) and contract management.
- 30 The extent to which the contractor or its employees can represent the Commonwealth and enter into legal relationships on behalf of the Commonwealth will depend on the terms and conditions of the contract between the contractor and the Commonwealth.

Granting of financial delegations to a contractor

- 31 The provision of financial delegations to contractors (where the contractor is a natural person) or a contractor’s employees should be minimised consistent with efficient, effective and ethical use of resources, as the Commonwealth retains minimal control over the procurement, while remaining fully accountable for the expenditure of the public monies involved. There may be circumstances in which it is appropriate for a contractor or its employees to exercise financial delegations on behalf of Defence or the DMO. Examples of such circumstances may be where:
- the contract involves management by the contractor of a particular aspect of Defence’s inventory management;
 - the inventory value or range is high;
 - items in the inventory are difficult to obtain, such as long lead items or are exclusively military in nature; or
 - items have specific field use.
- 32 Within DMO there is to be no granting of financial delegations to contractors without SC CEO DMO approval. Further guidance on granting of financial delegations can be found in chapter 1.4.

Granting of drawing rights and use of bank accounts

- 33 Payment of public money cannot be made without a drawing right. In accordance with the FMA Act, drawing rights can only be issued to Ministers or officials except where authorisation is give under FMA Act, section 12. An “official” under the FMA Act is any person who is in an Agency or part of an Agency. This definition therefore includes anyone

dealing with public monies on behalf of the Commonwealth. FMA Act, section 12 requires the Finance Minister's written authorisation before entering into an arrangement involving the receipt, custody or payment of public money by an 'outsider'. An outsider means any person other than the Commonwealth, an official or a Minister. The Finance Minister has delegated to agency Chief Executives, the power to authorise arrangements for the receipt and custody of public money by an outsider, but not the power to authorise arrangements for the payment of public money by an outsider. It is an offence for a person who is an "official" under the FMA Act to deposit public money into a non-official bank account.

- 34 It will therefore be necessary to issue contractors or employees of contractors, with drawing rights if they are given financial delegations or purchasing authority, and are intended to make payments of public money.

Remedies for improper use of public money by contractors

- 35 Where any contracted personnel with purchasing authority, financial delegations or drawing rights are found to have engaged in the misapplication or improper use of public money, they are in breach of the FMA Act and may be subject to the criminal penalties set out in that Act. The office of the Inspector General must be contacted on (02) 6266 4857 where it is suspected that there has been a misapplication or improper use of public money.

Clauses for inclusion in contracts

- 36 Where an agency relationship is to be created, the standard Defence negation of employment and agency clause must be amended to include agency provisions in the contract. Advice on the clauses necessary to provide Purchasing Authority and Financial Delegations to Contractors should be obtained from the ASDEFCON section within the Directorate of Procurement policy (refer to the current DPPI on *Requesting Professional Services from the Office of Special Counsel DMO*). Specialist contracting advice should be sought prior to entering into an agency relationship.

TRAVELLING ARRANGEMENTS FOR CONTRACTED PERSONNEL

- 37 Where contracted personnel are required to travel in order to perform a contract, Defence contracts can contain clauses that agree to reimburse the contractor for travel, accommodation and living costs incurred up to the standard Defence non-SES travel Allowance rates which have been adjusted to include GST. The Allowance rates are reviewed on a regular basis to take account of the price fluctuations over time. Standard contractual clauses which entitle a contractor to claim travel costs are contained in ASDEFCON (*Services*) and ASDEFCON (*Standing Offer for Services*).

- 38 Where the Allowance rates are provided to contractors, Defence is required, under the agreement with the Department of Education, Employment and Workplace Relations, to include the following restriction on disclosure in the contract:

"Travelling Allowance Rates provided to the Contractor under the Contract have been supplied to the Department of Defence under license by the Department of Education, Employment and Workplace Relations for Defence purposes only. The Contractor shall not make public or disclose the Travelling Allowance Rates to other agencies, organisations or individuals without the prior written consent of the Department of Defence. This clause shall survive the expiration or termination of the Contract and shall apply regardless of whether the Travelling Allowance Rates are or become public knowledge."

- 39 All claims for reimbursement of travel, accommodation and living costs are to be submitted on a valid tax invoice, showing the GST exclusive price, with GST then being charged on the total amount. The total GST inclusive claim for such reimbursement shall not exceed that of the total allowable Defence non-SES travel Allowance rates (for further information on GST see chapter 3.7). Defence will then be able to claim back the amount of GST paid as an input tax credit from the Australian Tax Office.

- 40 Procurement officers are to ensure that contracted personnel, or other contractor employees, are not paid any travel reimbursements directly. Reimbursements may only be paid to the contracted legal entity (i.e. company). This will ensure that Defence cannot be seen as misrepresenting the income of individual contracted personnel.
- 41 Specific advice on taxation matters, including GST and contractor travel, can be obtained from the Defence Taxation Management Office on 1800 806 053.
- 42 For procurement officers within the Defence Materiel Organisation, further guidance on contractor travel policy is contained in DMO CEI 2.5 – *Official Travel*.

OTHER ISSUES

- 43 Other issues that arise in the services environment include:
- applicability of directions under the *Public Service Act 1999* (Cth) (PS Act) and *Defence Force Discipline Act 1982* (Cth) (DFDA Act);
 - compliance with Privacy (refer to chapter 3.14), Confidentiality, Security and Intellectual Property requirements;
 - providing contracted personnel with access to Commonwealth facilities and equipment;
 - the provision of Defence business cards to contracted personnel;
 - Defence reporting requirements for consultancies and contracts for professional services; and
 - knowledge transfer.

Applicability of directions under the Public Service Act and Defence Force Discipline Act

- 44 Defence contractors are not automatically subject to lawful and reasonable directions under the Australian Public Service Code of Conduct or lawful general orders under the DFDA Act.
- 45 If there is a requirement for a contractor to adhere to instructions under the PS Act or DFDA Act (if not already provided for in those Acts), then there is a need to include appropriate provisions in the contract. Specialist advice on appropriate clauses should be sought from the DMO Office of Special Counsel.

Providing contractors with access to Commonwealth facilities

- 46 Many Defence contracts, particularly contracts for the provision of services, allow contractors, their employees or subcontractors to access Commonwealth facilities in order to perform the contract. Where access to Commonwealth premises will be allowed under a contract, contractual provisions should be included that clearly detail the scope of the access rights and any obligations that are placed on the Commonwealth or the contractor in relation to that access. Issues that should be addressed include:
- the facilities to which the contractor, its employees or subcontractor will have access;
 - the period over which the access will be granted;
 - any approvals that must be obtained prior to access being granted;
 - the timeframes in which the approvals must be obtained;
 - any safety or security requirements;
 - the names and/or categories of personnel who may be granted access;
 - removal of equipment for repair or other purpose; and
 - contractors escorting any person on Defence property.

- 47 Standard access clauses are contained in ASDEFCON (*Services*) and ASDEFCON (*Support*). Guidance on security issues associated with the provision of access is contained in chapter 3.9.
- 48 Where Defence facilities and equipment are provided, contractors and their contracted personnel must be advised of any applicable Commonwealth and Defence policies pertaining to their use. Policies that may apply include:
- Defence Instruction (General) ADMIN 10-6 – *Use of Defence Telephone and Computer Resources*;
 - Defence Information Management Policy Instruction 1/2004 – *Telephone and related goods and services*; and
 - Defence Information Management Policy Instruction 5/2001 – *Defence Information Environment provision of Defence email and internet Services*.

Use of Defence Communications

- 49 Where contracted staff avail themselves of departmental communication tools, such as telephone, facsimile and email, the contractors must clearly identify themselves as ‘contractor to Defence’, to reduce the possibility of being confused as either a civilian or military employee.

Provision of Defence business cards to contractors

- 50 A Defence contractor, its employees or subcontractors should not be permitted to obtain or use a Defence business card. This policy applies even where the contractor, an employee of the contractor or a subcontractor is performing tasks as an integral part of a Defence project team or is acting as an agent of Defence.
- 51 Where a Defence contractor, an employee of the contractor or a subcontractor is performing tasks as an integral part of a Defence project team, the title of the position being performed may be included on their company provided business card where:
- the name of the contracting company is clearly identified on the business card; and
 - authorisation is provided by a Defence officer at the Senior Executive Service level.

Defence reporting requirements

- 52 Commonwealth reporting requirements require procurement officers to identify whether contracts are for the procurement of consultancy services. In addition, monthly reporting requirements require procurement officers to distinguish between Consultants, Professional Service Providers and other Contracted Services. For further information on this issue and other aspects of reporting refer to chapter 5.8.

Avoiding conflicts of interest

- 53 Due to the nature of contracts for the provision of services, care needs to be taken to avoid conflicts of interests arising during, or as a result of, the performance of a contract. Guidance on avoiding conflicts of interest is provided in chapter 3.13.

Knowledge transfer

- 54 Knowledge transfer refers to the transfer of knowledge, information and expertise from an External Service Provider (ESP) to Defence.² Where knowledge transfer has been identified as a requirement of a service contract, this requirement should be clearly and precisely described in the Statement of Work (SOW). This allows potential tenderers to fully evaluate the scope of work and price their tender accordingly.

² MAB Audit *Efficiency and Effectiveness of the use of Consultants and PSP in Defence, Recommendation 1b*

KEY REFERENCES

- ***Financial Management and Accountability Act 1997 (Cth)***
- ***Financial Management and Accountability Regulations 1997 (Cth)***
- ***Financial Management and Accountability Orders 1997 (Cth) (FMA Orders)***
- ***Commonwealth Procurement Guidelines***
- ***Department of Finance and Deregulations - Finance Circular No 2009/05 - Commitment to spend public money (FMA Regulations 7 to 13)***
- ***Defence CEI 2.1 – Procurement***
- ***DMO CEI 2.1 – Procurement***
- ***DMO CEI 2.5 - Official Travel***
- ***Defence Instruction (General) ADMIN 10-6 – Use of Defence Telephone and Computer Resources***
- ***DMI (FIN) 01-0-025 - Engagement of External Service Providers.***
- ***DMI (PROC) 13-0-001 - Mandatory Procurement Policy Requirements for all DMO Acquisitions (including Sustainment Procurements) to Contract Signature***