

CLAYTON UTZ

Head Contract (Guaranteed Maximum Price)

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Overview of Session

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Note: *This briefing provides a high-level summary of certain key features of the Head Contract (GMP). It does not constitute legal advice and should not be relied upon as such*

01

Introduction

Head Contract (GMP)

The Head Contract (GMP) contracting methodology provides an alternative to a traditional Head Contract in situations where market conditions, project location or scope complexity make it challenging for contractors to commit to a fixed price contract but the Commonwealth requires a fixed time contract with a higher degree of cost certainty than that offered by a Managing Contractor Contract

Head Contract (GMP) - Key Features

Broadly consistent with HC template

Structure and terms broadly align with the template Head Contract with specific adjustments to reflect the GMP model, supported by template-specific procurement and contract administration documents

Delivery methods

Flexibility for the Contractor to design and construct, document and construct or construct only, per the standard Head Contract template

Guaranteed Maximum Price

Provides that the Contract Price will not exceed the Guaranteed Maximum Price (with each being adjusted in accordance with the Contract)

Share of savings

If the Contract Price is less than the Guaranteed Maximum Price, the Contractor will be entitled to a share in the saving

Head Contract (GMP) - Key Features

Calculation of Guaranteed Maximum Price

Requires the Tenderer to tender (among other things):

- Works that the Tenderer proposes will be undertaken as:
 - "Contractor's Work" carried out by the Tenderer itself or a Related Body Corporate of the Tenderer, and
 - "Reimbursable Work" carried out by subcontractors
- its proposed Contractor's Work Fee, Guaranteed Maximum Price and Cost Plan

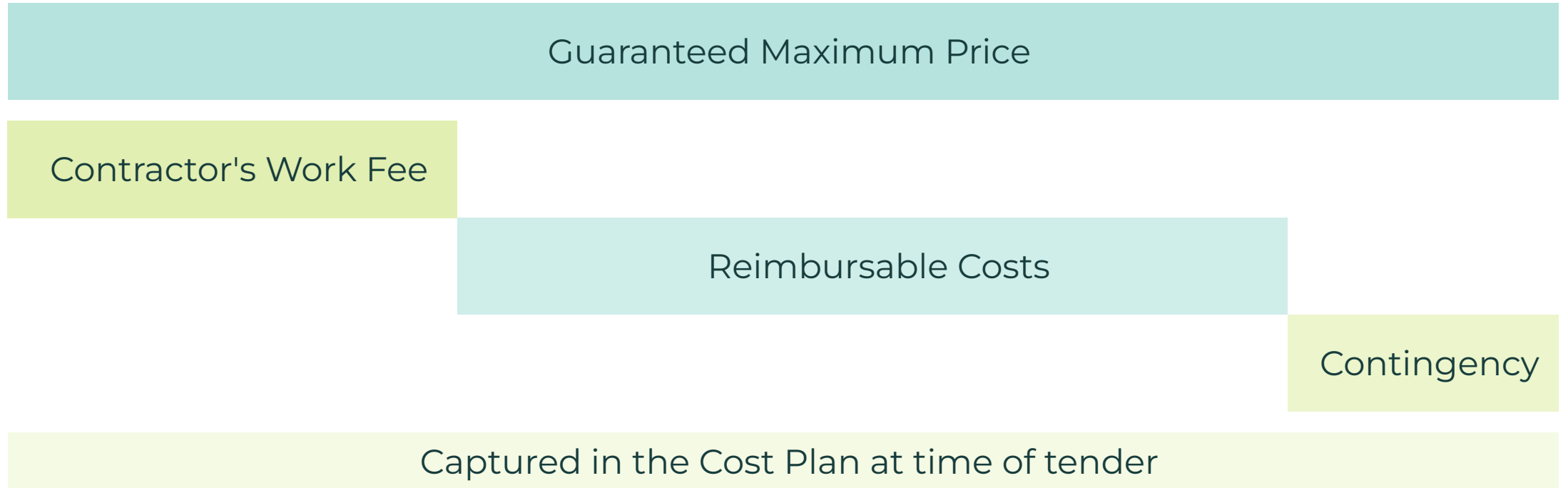
Subcontracts

There is a less prescriptive subcontracting process than the Managing Contractor Contract and no requirement to obtain Contract Administrator consent to subcontract terms or variations

Fixed time

Fixed Date for Completion supported by liquidated damages and specific extension of time entitlements

Head Contract (GMP)



- Guaranteed Maximum Price and Contractor's Work Fee is subject to adjustment in accordance with the Contract
- Reimbursable Costs are subject to adjustment in accordance with terms of subcontracts
- Contingency (which is intended to capture Contractor risks) is not subject to adjustment

The Contract Price

Contract Price

Subject to the Contract, the sum of the Reimbursable Costs and the Contractor's Work Fee

Reimbursable Costs are the aggregate of all amounts properly and actually incurred and payable by the Contractor to subcontractors for the performance of Reimbursable Work in accordance with the relevant subcontract (subject to certain adjustments for Variations and exclusions)

The **Contractor's Work Fee** is the lump sum payable to the Contractor for performing the Contractor's Work specified in the Contract Particulars, as adjusted in accordance with the Contract

The Contract Price and Guaranteed Maximum Price

The Commonwealth will pay the Contractor the Contract Price but, notwithstanding any other provision of the Contract to the contrary, only to the extent that the Contract Price does not exceed the Guaranteed Maximum Price

If the Contract Price is greater than the Guaranteed Maximum Price then:

- the Contractor will still be required to carry out the Contractor's Activities including to achieve Completion in accordance with the Contract, and
- the Contractor will have no entitlement to make any Claim against the Commonwealth arising out of or in connection with the amount the Contract Price exceeds the Guaranteed Maximum Price

Guaranteed Maximum Price

The Contractor warrants that the Guaranteed Maximum Price includes an amount for contingency (being the total amount for contingency specified in the Cost Plan) which:

- includes no more than a reasonable allowance (consistent with best industry practice) to cover the cost of only those risks which the Contractor assumes under the Contract, and which a prudent, competent and experienced contractor would anticipate and provide for in its cost plan in a competitive tender
- does not limit the Contractor's obligations under the Contract

The Contractor has no entitlement to make any Claim against the Commonwealth in respect of that contingency, including for any adjustment to that contingency

Allowances in Contractor's Work Fee and Guaranteed Maximum Price

The Contractor warrants that it has, and it will be deemed to have, done everything that would be expected of a prudent, competent and experienced contractor in:

- assessing the risks which it is assuming under the Contract
- ensuring that it has made sufficient allowances in the Contractor's Work Fee and the Guaranteed Maximum Price to protect it against any of these risks eventuating

Share of Savings

The Contractor shall be entitled to payment from the Commonwealth of the percentage of the Total Savings specified in the Contract Particulars

Total Savings means the amount by which the Guaranteed Maximum Price exceeds the Contract Price, calculated as at expiry of the last Defects Liability Period

Clause 25 sets out the process by which the Total Savings are claimed, assessed and paid



02

Key provisions
of the Head
Contract (GMP)



Contractor's Work and Reimbursable Work

Contractor's Work and Reimbursable Work

Contractor's Work

The Contractor's Activities, other than the Reimbursable Work

Reimbursable Work

That part of the Contractor's Activities for which the Contractor must engage subcontractors, being those Contractor's Activities identified as "Reimbursable Work" in the Cost Plan (if any).

The Contractor must not subcontract any Reimbursable Work to a Related Body Corporate of the Contractor

Subcontracting of Reimbursable Work

The Contract does not prescribe the subcontracting process to be undertaken by the Contractor in procuring Reimbursable Work. However, the Contractor must:

ensure that all subcontract documentation is prepared, and all procurement processes for subcontractors are conducted:

- consistently with the principles in the Commonwealth Procurement Rules
- with the highest standards of probity, fairness and equal opportunity
- in accordance with all other Statutory Requirements

use its best endeavours to ensure no tenderer engages in any collusive tendering or arrangement or conduct with any other tenderers which in any way could have the effect of reducing the competitiveness of the tender process

Subcontracting of Reimbursable Work

The Contractor must provide to the Contract Administrator:

- a complete, executed copy of each subcontract
- an updated copy of any amended subcontract (including any instrument of amendment or document relevant to any amendment) as soon as possible after any amendment is finalised between the Contractor and the relevant subcontractor

to ensure that the Contract Administrator holds complete and current copies of all subcontracts

Termination of subcontracts

If the Contractor terminates a subcontract (including where an event analogous to an Insolvency Event occurs in relation to a subcontractor), the Contractor:

- must engage another subcontractor to complete the Reimbursable Work the subject of the terminated subcontract, and
- to the extent permitted by law, will not be entitled to make (nor will the Commonwealth be liable upon) any Claim arising out of or in connection with the terminated subcontract, other than for Reimbursable Costs



Adjustments to the Guaranteed Maximum Price and the Contractor's Work Fee

Adjustments to the Guaranteed Maximum Price

Clause 1.3(i) of the Conditions of Contract sets out the circumstances in which the Guaranteed Maximum Price will be adjusted, and the basis for each adjustment

The Guaranteed Maximum Price will be adjusted if:

- the Reimbursable Costs or the Contractor's Work Fee are adjusted for Variations
- the Contractor is otherwise entitled to an adjustment to the Contractor's Work Fee
- the Contract Administrator makes a determination under clause 9.9(b)(i) or 9.10 of the Conditions of Contract with respect to a Defect
- where clause 8.18 of the Conditions of Contract applies, the Contractor provides an imported item specified in the Cost Plan

Adjustments to the Guaranteed Maximum Price for Variations

There is a Variation to the Contractor's Work or Reimbursable Work



The Guaranteed Maximum Price will be increased or decreased by an amount equal to the amount of the adjustment to the Contractor's Work Fee or the Reimbursable Costs (as applicable) determined under clause 11.3 or 11.8(b) of the Conditions of Contract (as applicable)

Valuation of Variations – Contractor's Work Fee

Where a Variation requires more or less Contractor's Work, the adjustments to the Contractor's Work Fee will be as agreed between the parties under clause 11.2(a) of the Conditions of Contract or, if clause 11.2(a) does not apply:

- valued in accordance with the Table of Variation Rates and Prices (to the extent applicable)
- if not applicable, a reasonable amount agreed between the parties or, failing agreement, determined by the Contract Administrator

to which (in the case of an increase) will be added an additional percentage for non-time related on-site overheads and preliminaries and off-site overheads and profit plus any reasonable costs incurred by the Contractor as a result of the Variation delaying the Contractor

Valuation of Variations – Reimbursable Costs

Where a Variation requires more or less Reimbursable Work, the adjustments to the Reimbursable Costs will be:

- as agreed between the parties under clause 11.2(a) of the Conditions of Contract
- if clause 11.2(a) does not apply, the amount of the cost properly and actually incurred or saved, or which ought reasonably to have been incurred or saved, by the Contractor as determined by the Contract Administrator

The adjustments to the Reimbursable Costs will be deemed to be in full satisfaction of all Claims in respect of such further work (notwithstanding that the amounts actually payable by the Contractor to relevant subcontractors in respect of such Reimbursable Work may be more or less than the amount of the adjustment)

Adjustments to the Guaranteed Maximum Price following adjustment of the Contractor's Work Fee

Contractor's Work Fee is otherwise adjusted



The Guaranteed Maximum Price will be increased or decreased by the sum of:

- the amount of the adjustment to the Contractor's Work Fee
- if the relevant event or circumstance requires more or less Reimbursable Work, the amount of the cost properly and actually incurred or saved or which ought reasonably have been incurred or saved, by the Contractor in undertaking the Reimbursable Work as determined by the Contract Administrator

Adjustments to the Contractor's Work Fee

Delayed Site access
(clause 2.3(a)(ii))

Latent Conditions
(clause 7.4(a)(ii))

Statutory
Requirements
(clauses 8.4(c)(ii) & (d))

Valuable,
archaeological or
special interest items
(clause 8.15(d)(ii))

Pandemic
Adjustment Events
(clauses 8.23(d)(i)B & (ii))

Inspections and tests
(clause 9.5)

Delay damages
(clause 10.10(b))

Suspension
(clause 10.11(b)(ii)B)

Acceleration
(clause 10.14(b)(i))

Defence's Security
Alert System
(clauses 18.4(e)(ii) & (iii))

Special Conditions

Clause 1.1 of the Conditions of Contract



Financial Reporting and Forecasting

Monthly Report

The Contractor must provide the Contract Administrator with a monthly report which includes (amongst other things):

- a prospective quarterly forecast, with a detailed breakdown on a month-by-month basis, of the anticipated cashflow for the Reimbursable Work
- detailed particulars of the risks, opportunities, issues or matters which may impact on the accuracy of that forecast
- any adjustments that have been made to the Guaranteed Maximum Price under clause 1.3(i) of the Conditions of Contract in the preceding month
- the amount of the Guaranteed Maximum Price (as adjusted under the Contract) as at the date of the monthly report
- the aggregate of the amounts paid to the Contractor as at the date of the monthly report

Cost Allocation and Forecast Reconciliation Advice

For the purposes of assisting the Commonwealth to report on an accrual basis, the Contractor must, with each payment claim under clause 12.2 of the Conditions of Contract, provide the Contract Administrator with a reconciliation of the amounts claimed in the payment claim against the forecast provided in the monthly report and, if there is any difference between the two amounts, the Contractor must provide:

- an explanation for that difference by reference to the risks, opportunities, issues and matters in the forecast
- the steps the Contractor has and will take to address and otherwise manage the cause and impacts of such difference

Contractor's obligation to keep Contract Administrator informed

The Contractor warrants that it will keep the Contract Administrator fully and regularly informed as to all matters affecting or relating to the Contractor's Activities or the Works, including any matter which may change or which has changed the possible levels of expenditure by the Commonwealth under the Contract

Payment

Payment by the Commonwealth

The Commonwealth will pay the Contractor the amount stated as then payable by the Commonwealth to the Contractor in the payment statement as follows:

**Reimbursable Costs payable to subcontractors
(including Retention Monies)**



Paid into Trust Account and held by the Contractor on trust for subcontractors

Contractor's Work Fee and any other amounts payable to the Contractor under the Contract



Paid by the Commonwealth to the Contractor

Trust Deed for use with the Head Contract (GMP)

The template Trust Deed for the Head Contract (GMP) is based on an amended form of the template Trust Deed for use with the Managing Contractor Contract

The Trust Deed entitles the Contractor to make payments from the Trust Account:

- to the Beneficiaries
- to a Retention Monies Trust Account where it is otherwise required to do so in accordance with a Statutory Requirement
- to the Contractor provided that the Contract Administrator is provided a statement setting out details of the Contractor's entitlement and the Contract Administrator certifies the Contractor's entitlement to payment

The Trust Deed provides that the Contractor will be entitled to any interest earned

The Conditions of Contract also set out obligations in respect of audit, reconciliation and reporting in relation to the Trust Account

Clause 3 of the template Trust Deed for use with the Head Contract (GMP); clauses 3.10(b)(i) and 12.25 of the Conditions of Contract

Retention Monies

Clause 12.25(a)(iii) of the Conditions of Contract provides that the Contractor must:

- where required by a Statutory Requirement, pay Retention Monies paid into the Trust Account into the applicable Retention Monies Trust Account, and
- pay any Retention Monies which are not subject to any such Statutory Requirement to the relevant subcontractors within 2 business days of such amounts becoming then payable under the relevant subcontract

Clauses 12.5(a)(iii) and 12.25(a)(ii) of the Conditions of Contract

Retention Monies Trust Account Administration

The Contractor must ensure that:

- any Retention Monies Trust Account is established and administered, and
- all Retention Monies are paid into and out of the Retention Monies Trust Account

in accordance with applicable Statutory Requirements and the requirements of the Contract

03

Procurement of the Head Contract (GMP)

Procurement of the Head Contract (GMP)

'Split' in Contractor's Work and Reimbursable Work

- Tenderers will have the opportunity in their Cost Plan to propose the work to be carried out as "Reimbursable Work" or "Contractor's Work"
- the Tenderer may propose that its insurance costs, Approved Security costs and disbursements (including transport costs, travel costs, accommodation expenses and meal allowances) will form part of the Contractor's Work Fee or the Reimbursable Costs and must clearly identify this in the Cost Plan
- the Contractor's Work Fee must include all profit, on and off-Site overheads and preliminaries
- to the extent that the Tenderer proposes to self-perform any work, or engage a Related Body Corporate of the Tenderer to perform any work, that work will be "Contractor's Work" and the cost of that work must be included in the tendered Contractor's Work Fee

Procurement of the Head Contract (GMP)

The Tenderer's proposed Cost Plan for the Works must as a minimum:

- identify in detail all work required for, and all risks which could be encountered in, Completion of the Works, which a prudent, competent and experienced contractor would anticipate and provide for in its cost plan for the Contractor's Activities
- identify each package of the work which the Tenderer proposes will be "Reimbursable Work" together with a detailed break-up of the anticipated Reimbursable Costs by reference to each separate package of Reimbursable Work (including a budget and detailed break-up for each such package)
- provide a detailed break-up of the proposed Contractor's Work Fee by reference to each package of the work which the Tenderer proposes will be "Contractor's Work"
- for each imported item to be provided by the Tenderer, provide the details set out in item 6(d) of Tender Schedule G – Financial
- provide a detailed break-up of the proposed amount for contingency
- **specify the proposed Guaranteed Maximum Price**

Procurement of the Head Contract (GMP)

Share of Savings

Clause 25 of the Conditions of Contract provides for the Contractor to be paid a percentage of the Total Savings (being the amount by which the Guaranteed Maximum Price exceeds the Contract Price, calculated at expiry of the last Defects Liability Period)

The Tenderer should provide its proposed percentage of Total Savings for the purposes of clause 25 of the Conditions of Contract

Tender Schedule G will note that the Commonwealth's expectation is that the percentage of Total Savings for the purposes of clause 25(a) of the Conditions of Contract will be within the range specified by the Commonwealth in Tender Schedule G

Procurement of the Head Contract (GMP)

The Head Contract (GMP) Tender Documents otherwise broadly align with the procurement of a standard Head Contract with minor other specific adjustments to reflect the GMP model, including:

- Tender Schedule C – Previous Performance to require that Tenderers have regard to the delivery method in the Head Contract (GMP) in selecting relevant projects
- Tender Schedule D – Program and Minimum Resource Schedule to provide that the tendered program should show all individual procurement activities for any Reimbursable Work, including tender periods and review periods

No Provisional Sum Work

- Under a standard Head Contract, works:
 - which cannot be priced prior to award
 - which the Commonwealth may elect to not proceed withmay be nominated as "Provisional Sum Work"
- The Head Contract (GMP) has been structured on the basis that any such works will form part of the Reimbursable Work (and if the Commonwealth does not wish to proceed with these works, they will be omitted by way of a Variation).
- Alternatively, these items may be addressed by way of Special Condition
- Accordingly, there are no Provisional Sum Work provisions in the Head Contract (GMP)

Approved Security and insurance amounts

The value of the Approved Security to be provided by the Contractor under the Head Contract (GMP) will be either a dollar amount or a percentage of the Guaranteed Maximum Price

The amount of cover under the Contractor's Construction Risks Insurance will be either a dollar amount or a percentage of the Guaranteed Maximum Price

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