

## Guideline for Use of Standard Government Contracts

### Purpose

This Guideline provides advice for public authority contract managers and administrators about how to use the Procurement Services SA standard contracts.<sup>1</sup> The aim is to assist public authorities to understand key contract terminology and provide guidance about when to use the standard templates and when to seek the assistance of the Crown Solicitor's Office, SAFA and other Government services. This Guideline and the contents of the Annexures are not substitutes for legal advice. Public authorities need to refer specific legal issues to the Crown Solicitor's Office (**CSO**).

### Selecting a contract

There are currently four standard template agreements which government agencies can use with minimal to no legal assistance to document goods and services procurements and minor construction projects.<sup>2</sup>

The terms and conditions in the government's standard contract templates are fair and balanced and should not be amended unless there is a compelling reason. It is recommended that public authorities consult with the CSO or public authority's inhouse legal counsel (if applicable) if a public authority wishes to change or add to the standard terms and conditions of the standard government agreements. If additional clauses are required, they may be included as special conditions (see below).

### Standard Purchase Order Terms and Conditions

The standard Purchase Order Terms and Conditions is suitable for use with Transactional procurements of goods and services.

This template is not mandated for use as some public authorities have their own purchase orders or use an automated ICT system that generates purchase orders.

### Minor Works Agreement

This document is suitable for use for low-risk construction projects valued at less than \$165,000 (i.e. minor works).

### Standard Goods and Services Agreement

Subject to the exceptions set out below, the *Standard Goods and Services Agreement* is suitable for most routine (low-medium risk) and complex (medium risk)<sup>3</sup> goods and

<sup>1</sup> This Guideline does not apply to sales, employment or other non-procurement contracts.

<sup>2</sup> The *Sourcing Policy* provides further advice on where it is suitable to use each of the government's agreement templates based on the applicable complexity classification /level of risk.

<sup>3</sup> "Complex" in this context means medium risk. "Strategic" procurements (high risk) and procurements which are contractually complex should be referred to the Crown Solicitor's Office for bespoke drafting. For the avoidance of doubt, the references to classifications of "transactional", "routine", "complex" and "strategic" procurements in this Guideline relates to the complexity of a particular procurement. Agencies should consider *contractual complexity* as a separate issue when assessing whether the standard contracts are appropriate for use, and legal advice should be sought if in doubt.

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services government procurements. This includes procurements for consultancy services and simple standing offer contracts with the addition of appropriate special conditions.

This template is **not suitable** for use in the following circumstances:

- Construction projects
- Strategic procurements (high risk) for goods and services.
- Multi agency arrangements (these are contracts that enable multiple agencies to purchase under one contract e.g across government panel contracts.
- Across Government information and communications technology contracts e.g. eProjects contracts and tiered procurement contracts.
- Software licensing, software as a service, hosting, subscriptions for applications and other digital resources, software development, software hosting and support arrangements.
- Principal contractor controlled contracts – where a supplier is contracted to manage several procurements of goods and services on behalf of the public authority.
- Joint ventures/partnerships/collaborative research agreements where the joint venturers/partners share the costs, risks and benefits.
- Public Private Partnerships and other forms of alliance contracting.

The following clause banks supplement the *Standard Goods and Services Agreement* template:

- Special Conditions Clause Bank
- Execution Block Bank

Please refer to the User Guide for the *Standard Goods and Services Agreement* in Annexure A for guidance in using the template and the execution block and special conditions clause banks.

### Standard NFP Sector Funded Services Agreement

The *Standard NFP Funded Services Agreement* has been developed in consultation with the Not for Profit Sector to simplify and standardise the contracting process for NFP funded services. The development of this agreement was a policy commitment of the South Australian Government under [DPC Circular 044 – South Australian Funding Policy for the Not-for-Profit Sector](#), and the agreement must be used in accordance with the requirements imposed by DPC Circular 044.

This Agreement is required to be used for all transactional, routine and complex procurements where the NFP organisation is provide services in exchange for up-front block funding. Where payment is based on a fee for service and is paid in arrears, the *Standard Goods and Services Agreement Template* should be used, as far as practicable.

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The following clause banks supplement the *Standard NFP Funded Services Agreement* template:

- Special Conditions Clause Bank
- Execution Block Bank

Unlike for the *Standard Goods and Services Agreement*, the only additional terms that can be included in a contract without specific approval from DTF are those included in the Special Conditions Clause Bank.

Please refer to the User Guide for the *Standard NFP Funded Services Agreement* in Annexure B for guidance in using the template, the Execution Block and Special Conditions Clause Banks.

### ICT Related Products and Services

There is no standard government agreement for the procurement of ICT related products and services. For ICT related procurements, public authorities will need to consider:

1. Whether it can leverage its purchasing power and the willingness of the supplier to win the government's business, to require the supplier to agree to government's preferred contracting terms; and
2. Whether the operational risk to government, the strategic importance and the value of the procurement warrants the public authority seeking legal advice about appropriate contractual terms.

Where the provision of goods or services (including ICT related products and services) is contractually complex, high value or there is significant operational and/or contractual risk (e.g. strategic procurements), it is recommended that public authorities seek legal advice about appropriate contractual terms (which may include the drafting of a bespoke contract).

### Contract Structure

The *Standard Goods and Services Agreement* and the *Standard NFP Funded Services Agreement* templates have the same basic parts and attachments:

- Execution Page
- Attachment 1 – Agreement Details (i.e. the variable content of the contract)
- Attachment 2 – Standard Terms & Conditions
- Attachment 3 – Glossary of Defined Terms
- Attachment 4 – Special Conditions
- Attachment 5 – Specifications (identified as the "Funded Services" in the *Standard NFP Funded Services Agreement*)
- Attachment 6 – Pricing & Payment (identified as the "Block Funding & Payment

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Details” in the *Standard NFP Funded Services Agreement*)

The *Standard NFP Funded Services Agreement* template also has the following attachment:

- Attachment 7 – Acquittal Form

### Execution Page and Execution Block Bank

Both parties must execute the agreement on the Execution Page. Execution blocks for the Government Party and the Supplier are listed in the *Execution Block Bank*. The appropriate execution blocks for the Government Party and the Supplier need to be inserted in the space provided on the Execution Page.

Government Party	Supplier
<p>There are two forms of execution specified in the Execution Block Bank:</p> <ul style="list-style-type: none"> <li>• execution by affixation of the common seal by the Minister (including if the Minister is entering into the contract on behalf of a government department) or the statutory authority</li> <li>• execution by signature of an authorised officer on behalf of the Minister or statutory authority</li> </ul> <p>If a different form of execution is required, it is recommended that you obtain advice from the CSO.</p>	<p>There are a number of different execution blocks in the Execution Block Bank depending on the type of legal entity:</p> <ul style="list-style-type: none"> <li>• a company</li> <li>• a sole director company</li> <li>• an individual or a sole trader</li> <li>• incorporated association</li> <li>• a partnership</li> <li>• a trustee</li> </ul> <p>If a different form of execution is required, it is recommended that you obtain advice from the CSO.</p>

### Electronic Execution

It is important to be aware of both the practicalities and legalities around use of electronic signatures to ensure contracts (simple agreements) and deeds are binding and enforceable.

The Standard Goods & Services Agreement and NFP Sector Funded Services Agreement are by default, simple agreements.

Unless there is a specific statutory requirement that a simple agreement be signed or witnessed in hard copy, it is possible for public authorities to use electronic signatures to signify a party’s agreement to enter into these agreements<sup>4</sup>. This can occur by a duly authorised officer applying his or her electronic signature, but the public authority should comply with any internal rules within the agency in relation to the execution of contracts.

<sup>4</sup> Please note that a public authority cannot execute deeds electronically and should execute deeds through the application of its common seal in accordance with any relevant legislative requirements relating to application of the seal and execution of documents or where relevant by a Minister entering into the deed in his or her personal capacity for and on behalf of the Crown in Right of the State of South Australia.

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If executing by electronic signature, it is good practice to implement protocols that reflect and follow the process set out in the [Electronic Transactions Act](#) regarding identification, reliability and consent.

Please note that there is some uncertainty in relation to whether *Corporations Act 2001* companies are able to execute agreements electronically.<sup>5</sup> Government contracting parties should require *Corporations Act* counterparties to execute the standard agreements by authorised company officers applying a wet ink signature on a single, static, hard copy of the document (or counterpart).

### Agreement Details (i.e. the variable content of the contract) (Attachment 1)

The variable content of the *Standard Goods and Services Agreement* template and *Standard Not-for-Profit Funded Services Agreement* template is to be inserted into Attachment 1 of the templates. See Annexure A of this Guideline for a description of each item for the *Standard Goods and Services Agreement* and Annexure B of this Guideline for a description of each item for the *Standard Not-for-Profit Funded Services Agreement*.

Public Authorities may insert “not applicable” against items that are not required for the specific procurement.

### Standard Terms & Conditions (Attachment 2)

Attachment 2 of the *Standard Goods and Services Agreement* template and *Standard Not-for-Profit Funded Services Agreement* template provides the standard terms and conditions of the contract.

See Annexure A of this Guideline for a description of each clause of the *Standard Goods and Services Agreement* and Annexure B of this Guideline for a description of each clause of the *Standard Not-for-Profit Funded Services Agreement*.

### Glossary of Defined Terms (Attachment 3)

Attachment 3 of the *Standard Goods and Services Agreement* template and *Standard Not-for-Profit Funded Services Agreement* template provides a glossary of all of the defined terms used in Attachment 2 – *Standard Terms & Conditions* and Attachment 4 – *Special Conditions Clause Bank*.

If additional definitions are required, these need to be included as Special Conditions in Attachment 4 – *Special Conditions*.

### Special Conditions (Attachment 4)

Public Authorities should consider if additional terms (i.e. special conditions) need to be

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<sup>5</sup> Note that this uncertainty extends to electronic execution of deeds by Corporations Act companies.

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included in the contract and insert them in Attachment 4.

The CSO has developed clause banks of more common special conditions. These special conditions include:

- purchase orders
- no minimum purchase
- non-exclusivity
- consultancy
- liability
- contract disclosure
- confidentiality and privacy
- privacy
- supplier as a trustee
- Industry Participation Policy
- performance guarantee
- bank guarantee
- child safety
- respectful behaviours
- information sharing
- force majeure
- co-operating with investigations.

See Annexure A of this Guideline for a description of each special condition of the *Standard Goods and Services Agreement* and Annexure B of this Guideline for a description of each special condition of the *Standard Not-for-Profit Funded Services Agreement*.

The *Special Conditions Clause Banks* should only be used in conjunction with the *Standard Goods and Services Agreement* template or *Standard Not-for-Profit Funded Services Agreement* template (as appropriate).

The Special Condition Clause Bank for the *Standard Goods and Services Agreement* template is not exhaustive. If a public authority requires additional agency-specific terms or other terms for a particular arrangement to be governed by the *Standard Goods and Services Agreement*, they may be inserted into Attachment 4.

The Special Conditions Clause Bank for the *Standard NFP Sector Funded Services Agreement* contains all of the additional terms that have been agreed by the government and the NFP sector. Additional terms that are not in the *Special Conditions Clause Bank* for the *Standard Not-for-Profit Funded Services Agreement* may not be included in that Agreement without specific approval from DTF.

The CSO can assist with drafting additional special conditions if required.

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If additional terms are not required insert “*not used*” in Attachment 4.

### Specifications or Funded Services (Attachment 5)

Attachment 5 of the *Standard Goods and Services Agreement* template provides for the detailed Specification for the goods and services. If there is no detailed Specification, then ensure that there is a general description of the goods and/or services and then insert “*not used*” in Attachment 4 or 5 (as appropriate).

Attachment 5 of the *Standard Not-for-Profit Funded Services Agreement* template provides for the detailed Specification of the Funded Services.

Refer to the *Developing a Specification Guideline* for further advice on developing a fit-for-purpose specification.

### Pricing & Payment (Attachment 6)

Detailed pricing information for the procurement should be included in Attachment 6 of the *Standard Goods and Services Agreement* template and the *Standard Not-for-Profit Funded Services Agreement*.

See Annexure C of this Guideline for some examples of detailed pricing information to consider. This includes:

- cost structures (fixed and cost plus)
- price escalation (rise and fall)
- price review
- foreign currencies
- hedges.

It is recommended that CSO advice is obtained in relation to drafting complex cost and payment provisions.

If there is no detailed pricing information, insert “not used” in Attachment 6.

### Acquittal Form (Attachment 7 of the NFP Funded Services Agreement)

The Government Party can attach its preferred acquittal form in Attachment 7 of the *Standard Not-for-Profit Funded Services Agreement*.

## Commercial Considerations and Specification Drafting

### Specification

The contract and its attachments and appendices should be written in plain English and use active sentences, so it is clear which party is responsible for each action.

It is not advisable to repeat obligations throughout the document as this can give rise to

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a lack of certainty as to the applicable contract terms.

There is no legal need to have words and digits when describing amounts (e.g. ten (10)) as this can give rise to typographical errors. Choose one way to describe numbers and be consistent throughout the contract.

It is good practice to clarify what is included or excluded in the contract. Avoid attaching the Supplier's Offer (i.e. the response to market approach document) to the contract or referring to it in the Specification as it can be written as a 'sales pitch' and often will include options or recommendations. Attaching a document that does not have clear outputs or responsibilities can increase ambiguity, rather than resolve it. It is more effective to convert the desirable or essential procurement elements from the Offer to the scope and specifications of the contract, using appropriate contract and commercial language.

### Definition of the parties

Contracts should identify the contracting parties by their correct legal name. The 'Government Party' and 'Supplier' details form part of Attachment 1 in the *Standard Goods and Services Agreement* template and *Standard NFP Funded Services Agreement* template.

The party identified as the 'Government Party' in Attachment 1 must be a legal entity with the capacity to enter into legally binding arrangements. Government departments are a part of the State Crown but are not themselves legal entities. Instead, Ministers generally enter into contracts on behalf of their Government department. Statutory authorities that are legal entities may enter into contracts in their own right.

### Counterparty legal entities

It is essential that the correct legal entities are identified in the contract. The contract should include the supplier's full company name, ABN and registered address (not operations address or address where the services will be performed). Ensure the ABN is correctly referenced in the contract by checking at <https://abr.business.gov.au/>. Businesses (or business names) are not legal entities.

If the legal entity is not Australian, determine if there is any other unique identifier that applies such as New Zealand Business Number or UK Company Number.

Trusts are not themselves legal entities. The trustee of a trust is responsible for entering into legal relations on behalf of the trust. If a business is owned by a trust, the counterparty should be identified as 'Trustee for the XYZ Trust trading as ABC Consulting'.

### Subcontractors

Public authorities should consider whether or not to allow the use of sub-contractors by



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suppliers.

Subcontractors will not be parties to the contract. Accordingly, where a contract requires sub-contractors to be approved by the public authority, the same rigour should be applied to clearly identifying subcontractor entities and their ABNs.

When the delivery of goods, services or construction are subcontracted to a third party, public authorities should identify what parts of the contract will be delivered by the subcontracted supplier. Public authorities should determine whether the subcontracting arrangement poses any risks and how the performance of the subcontractor or the quality of the goods or services will be monitored over the lifetime of the contract. If a supplier uses agreed subcontractors to deliver an element of the contract, the supplier remains legally responsible for the delivery of the goods or services by the subcontractor. The supplier will also remain responsible for managing the contract and the involvement of any subcontractors.

The *Risk Management Guideline* and the *Contract Management General Requirements Schedule* provides further guidance regarding subcontracting.

### Contract representatives and address for notices

The representatives of both parties should provide an address for notices. Public authorities should ensure there is sufficient detail to be able to deliver or post notices when required and include an email address at a minimum.

Public authorities should ensure that their contract representatives are aware of their functions and duties under the contract and be provided with the contact details for the counterparty's contract representative.

### Jurisdiction

It is preferable that the laws of South Australia and jurisdiction of the courts of South Australia govern the construction of contracts and deeds entered into by South Australian Government parties. If a counterparty requests that the law of a different jurisdiction applies, please seek advice from the CSO.

### Insurance

It is important to include the most appropriate insurance regime in all contracts.<sup>6</sup> The selection of appropriate insurances should consider which party can best manage particular risks, such as work, health and safety risk during a construction project, or marine loss for goods shipped from overseas.

As outlined in the Procurement Planning Policy, all goods and/or services contracts

<sup>6</sup> Insurances should comply with SAicorp's 'A Guide to the Insurance and Liability Issues', which is available at <https://www.safa.sa.gov.au/SAicorp/contracts-and-limitation-of-liability>

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should include public and product liability and where professional, consultancy or other advisory services are being purchased, professional indemnity insurance.

The minimum requirements are:

### *Standard Goods and Services Agreement:*

Insurance type	Limit
Public liability	Not less than AU\$1,000,000 minimum per loss or occurrence
Product liability	The amount that the supplier has assessed as being required for the type of products being delivered
Workers' compensation	As required by law

If engaging a consultant, the *Standard Goods and Services Agreement* should also include:

Insurance type	Limit
Professional indemnity	The amount that the consultant has assessed as being required for the type of services being delivered

### *Standard NFP Funded Services Agreement:*

Insurance type	Limit
Public liability	Not less than AU\$1,000,000 minimum per loss or occurrence
Professional indemnity	An amount agreed by the Government Party and NFP
Workers' compensation	As required by law

The SAFA [Guide to Insurance Issues](#) provides further guidance on risk exposure and insurance indemnity and liability limits. Advice should also be sought for insurance regarding contract works, assets vehicles, personal accident, fidelity and directors /officer's liability.

There are many other types of insurance policies available some of which may, in special circumstances, be appropriate. These include Comprehensive Crime (including Financial Institutions Bond, Electronic and Computer Crime), Advanced Profits, Machinery and Computer Breakdown, Aviation Hull and Liability etc. The requirement for these (and other) policies is exceptional rather than the rule.<sup>7</sup>

## SAFA

The South Australian Government Financing Authority (SAFA) is responsible for arranging insurance protection for government risks, providing risk consulting and advisory services to government and managing South Australia's Building Indemnity Insurance scheme. Public authorities should engage SAFA at an early stage for large,

<sup>7</sup> SAFA Government Contracts - A guide to insurance issues

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complex or high-risk projects, so that these financial limits can be incorporated into the specification, scope of work or other definition statements.

### Indemnities and Liability Cap

The Government's standard agreements do not require the supplier to provide indemnities. Legal advice should be sought to establish whether an indemnity should be included and, if so, in what form.

The standard agreements allow the selection of a default liability cap between one and five times the value of the contract and do not require that the State be named on insurance policies or be provided with a copy of the insurance certificate.

### Performance Framework

Contracts may be either outcome-based or prescribe a process that must be carried out. The performance framework set out in the contract will differ for each contract depending on the procurement objectives. It should enable public authorities to:

- validate when expected performance has been achieved; and
- identify when performance issues require remedy.

Key Performance Indicators (**KPIs**) should be SMART:

- **S**pecific
- **M**easurable
- **A**ttainable
- **R**esults-oriented
- **T**ime based

Service levels are measures of required targets for delivery of services which may attach different consequences for failure or breach.

Public authorities should ensure that KPIs, service levels and deliverables are defined with enough specificity so that there is no ambiguity as to what the KPI is and it must be capable of being achieved by the supplier using ordinary rather than extra-ordinary effort. They should be objectively measurable, rather than subjective, otherwise there can be disagreements between the parties as to whether a KPI, service level or deliverable is in fact achieved or complete. The KPIs, service levels and deliverables must be measured over a defined period (e.g. monthly).

The *Contract Administration and Performance Management Guideline* provides guidance for public authority contract managers and contract administrators on how to effectively manage and administer a contract in order to achieve the intended outcomes and value for money. The Guideline also provides further information and guidance regarding contract management, performance measurement and evaluation.

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### Key Stakeholders

The contract owner should be identified in the planning phase. A contract manager should be appointed early so that they may be involved in contract preparation and negotiation, have input and understanding of the contract management processes and develop the contract management plan as soon as possible. Additionally, other functions or officers within the public authority may also be required to lead, participate, or provide advice through the development of the contract including technical experts, legal units, finance and internal audit.

### Administrative Procedures

Effective contract administration supports accurate recording of contract information and can help inform decisions relating to contract performance. Clear administrative processes and procedures help to ensure all stakeholders are aware of each party's administrative roles and responsibilities. They can be useful for:

- communicating acquittal/accountability/reporting requirements
- establishing record management systems (budget, funding, invoicing, performance, contract variations etc)
- identifying and sending in advance a schedule of meetings (for parties to the contract, end-users and stakeholders etc.), giving the time, place and purpose of the meeting
- identifying and sharing details of any ordering procedures to be followed by users wishing to obtain goods or services under the contract
- ensuring all insurances, warranty periods, guarantees and supplier tax requirements are recorded, and reminders are set to renew or update these documents as required
- ensuring there are copies of any standards or accreditation relevant to the contract
- monitoring compliance with the *South Australian Industry Participation Policy*
- managing complaints and disputes should they arise.

Specific financial administrative processes and procedures can also be established to verify and ensure:

- invoiced goods/items have been delivered and received by the public authority
- invoices are correct and in accordance with the contract
- the supplier has fulfilled the required contractual obligations prior to payment
- payments of correctly rendered invoices are made to the supplier within the time frame stipulated in the contract
- the appropriate delegate has approved the payment and that this is documented
- expenditure is tracked to ensure it does not exceed the value of the contract.