VOLUME 4:

CONTRACTS

AND

CONTRACT MANAGEMENT
29. MANAGING CONTRACTS
Contract management is the process that enables parties to a contract to meet their obligations in order to deliver the objectives required from the contract. It also involves building good working relationships between customer and provider. It continues throughout the duration of a contract and involves proactive management to anticipate future needs and reacting to situations that may arise. The aim of contract management is to obtain the goods or services as agreed in the contract and achieve value for money. This means optimising the efficiency, effectiveness of the services or relationship described by the contract, balancing costs against risks and actively managing the customer-provider relationship. Contract management may also involve aiming for continuous improvements in performance over the duration of the contract.

31.1. CONTRACT MANAGEMENT ACTIVITIES
Contract management activities may broadly be grouped into three areas:

(a) Service delivery management: ensures that the service is being delivered as agreed, to the required level of performance and quality.
(b) Relationship management: keeps the relationship between the two parties open and constructive, aiming to resolve or ease tensions and identify problems early.
(c) Contract administration: handles the formal governance of the contract and changes to the contract documentation.

All three activities must be managed optimally to ensure effective contract management.

Adequate preparation and concluding the correct type of contract are essential foundations for good contract management. The arrangement must be flexible to accommodate change. A key factor is “intelligent customer capability”: the knowledge of both the customer’s and the provider’s business, the service being provided and the contract itself. The capability, which touches all three areas of contract management, forms the interface between supply and demand that is, between the business needs and the provider.

31.2. ELEMENTS OF CONTRACT MANAGEMENT
The elements of contract management include the following:

(a) Ensuring that all relevant documentation setting out the rights and obligations of both parties are in place, and signed;
(b) Ensuring change control, i.e. managing changes to any part of the original agreement;
(c) Measure performance against contract requirements or service level agreements;
(d) Implement corrective action whenever significant/unacceptable deviations against the original agreement occurs; and
(e) Manage the payment system.
31.3. **NOTIFICATION OF ACCEPTANCE**
Successful bidders must be notified by registered post of the acceptance of their bids. With the exception of period contracts, the particulars of the successful bids must be advertised in at least the *Government Tender Bulletin* for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer may determine. The particulars to be published are as follows:

(a) name of the contractor;
(b) the relevant price and delivery method;
(c) the brand name of the product or the name of the manufacturer, and
(d) where applicable, the preferences claimed;
(e) where no bids has been accepted, particulars of the bids received are not made public;
(f) the application to advertise must preferably be lodged with the Government Printer after the letter of acceptance and Service Level Agreement is issued.

31.4. **CONTENT OF CONTRACTS**
The contract concluded must amongst others consist of:

(a) general conditions of contract issued by the National Treasury;
(b) where applicable, special conditions in relation to the specific goods or services procured;
(c) Service Level Agreement
(d) submitted bid documents;
(e) documentation for the claiming of preferential points;
(f) SBD 4;
(g) tax clearance certificate; and
(h) letter of acceptance.

31.5. **GENERAL CONDITIONS OF CONTRACT**
General Conditions of Contract issued by National Treasury must form part of all bid documents and may not be amended.

31.6. **SPECIAL CONDITIONS OF CONTRACT/SERVICE LEVEL AGREEMENT**
The special conditions should include, but is not limited to:

(a) a preamble that serves to explain the rationale for the conclusion of the contract or to provide contextual or background information;
(b) governance protocols;
(c) reporting on performance in terms of the contract or agreement in respect of contracts that extend over a period of time;
(d) a periodic review of the contract or agreement by the parties in respect of contracts that extend over a period of time;
(e) clauses that clearly and unambiguously set out the rights and obligations of the parties, relevant to the specific subject matter in respect of which the contract is entered into;
(f) service levels, if applicable; and
(g) incorporation of other documents as annexures.

31.7. CONTRACTS IN RELATION TO INFORMATION TECHNOLOGY
Contracts relating to information technology must be prepared in accordance with the State Information Technology Act, 1998 (Act 88 of 1988), and any regulations issued in terms of that Act. National Treasury SCM Practise Note 5 of 2009/10 provides guidance to the procedures to be followed when procuring ICT related goods/services through SITA.

31.8. LEGAL VETTING OF CONTRACTS
The AO must ensure that all contracts entered into by the Department are legally sound. Where service level agreements are part of the contract it should be forwarded to Legal Services for vetting.

31.9. ACCESS TO CONTRACTS/INFORMATION
Under normal circumstances, bids (awarded) are not accessible to the public. However, on written request, interested parties may request the following information, if said information has not been published in the Government Tender Bulletin:

(a) Names and addresses of all bidders;
(b) the prices and basis of delivery offered by all bidders;
(c) the brand name of the product and the name of the manufacturer, in respect of the accepted bid (only the accepted bid); and
(d) the preference points claimed by the successful bidder.

Any information requested, if not provided in terms of the Promotion to Information Act), will be furnished at the discretion of the Department and will be guided by the legislation and policy. The Department may withhold information or publication of the information if:

(a) it will impede law enforcement; or
(b) it will not be in the public interest;
(c) it will harm the legitimate interest of the Department;
(d) it might hinder fair competition between suppliers, bidders or contractors; and
(e) a case / matter is sub-judice.

31.10. MONITORING
Constant monitoring is essential to ensure that contractors meet their contractual obligations and that contracts run with as little disruption as possible. There are several ways in which monitoring may be undertaken:
(a) **Regular site inspections.**
   In respect of a service, where the service is being rendered at the Departmental site or at the contractor’s own site, the Department must visit the site regularly to ascertain whether the service is still being rendered in accordance with the contract.

(b) **Regular meetings**
   The Department should have regular meetings with contractors to discuss contract issues i.e. progress, foreseeable contract problems, price variations etc.

(c) **Reporting**
   (i) Regular reports from contractors as well as the SCM Unit are crucial for efficient contract management. Contractors must be informed via the SLA that reporting must take place on predetermined issues. The timeframes for this reporting must also be known to the contractor prior to the start of the contract.

   (ii) For products a contractor may be requested to report on the following issues:
      
      (aa) Number of orders received;
      
      (bb) Date of orders and from what component;
      
      (cc) Quantities ordered on individual items; and
      
      (dd) Delivery date of orders.

   (iii) The information must be scrutinised and matched with the Department’s records to ascertain whether there are any anomalies in the rendering of the service or delivery of the product.

   (iv) When the Department renews an existing contract or enters into a new contract, these reports play a crucial role in the Demand Management phase as it provides crucial historical / current contract/item information. This in turn has a direct influence on the Acquisition Management phase as it influences the form of bidding used.

   (v) Requirements for service performance reports and management information should be defined before and during contract negotiations, and confirmed during the transition period of the contract. It is likely that information requirements will change during the lifespan of the contract, which should be flexible enough to allow for this. Were possible, use should be made of the provider’s own management information and performance measurement system.

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**30. ENFORCEMENT AND ADMINISTRATION OF CONTRACTS**

**32.1. BREACH OF CONTRACT**

Breach of contract is when one of the parties to the agreement breaches a term thereof and does not comply thereto or indicates that it will not comply with the terms of the agreement.

Breach may be committed in several ways, i.e.:

(a) A supplier may fail to perform on or before the date fixed for performance and the supplier would then be said to be in *mora* (failure to comply in time) in respect of the obligation in question.
Where no definite time for performance is agreed upon, the Department must demand performance within a specified time (must be reasonable in the circumstances) and if the Contractor or service provider has failed to perform in that time, he is regarded as being in \textit{mora} (breach of time aspect).

The supplier may render performance on time, but deviate from the performance required by the agreement. (i.e. use materials of inferior quality).

The supplier may repudiate his obligation(s) in the sense that he/she may, before or after the due date for performance, make it plain by his/her words or actions that he does not intend to perform, or perform properly, in terms of his obligation(s). The test in each case is whether the supplier has acted in such a manner as to lead a reasonable man to the conclusion that he does not intend to fulfil the obligation(s). If a supplier repudiates his obligations after having breached it in some other way, the Department could (if the situation is not amicably resolved) claim relief on the basis of either form of breach.

Where cancellation is considered as a remedy for breach, it is always advisable to obtain legal advice in order to minimise risk to the province. Cancellation should be regarded as the last resort. However should this remedy be used it must be done in consultation with Legal Services.

Cancellation of a contract is usually prejudicial to the Department. Therefore serious thought must be given to the grounds for considering cancellation. Clarity must be reached beforehand on the question of whether the contractor will have a claim against the Department or not, and if so, whether the cancellation may be justified. If a contract is cancelled, the matter must be fully documented and the following be taken into account:

(a) The particular contract condition empowering the action;
(b) What further arrangements will be made for completing the contract? and
(c) Whether additional costs will be recovered from the contractor?
(d) If the additional costs cannot be accurately determined, a careful estimate thereof must be made;
(e) Any claim for the recovery of additional costs must be limited to the minimum actual amounts. Therefore, in such cases, Departments cannot summarily authorise purchasing to the best advantage of the Department, since this might prejudice the recovery of the additional costs from the original contractor. There may be other avenues of action that might result in lower additional costs. As an alternative, a fresh contract may be concluded through the normal bidding procedures. In this process, account must be taken of the time elapsed between the closing of bids and the cancellation of the contract and the effect of the cancellation on the Department’s schedules.

32.2. \textbf{REMEDIES FOR BREACH}

The following remedies should be considered before the cancellation of a contract is contemplated:

\textbf{Specific Performance (Enforcement)}

(a) The most obvious remedy for breach of contract is an order for specific performance, i.e. an order compelling the defaulter to perform what he has undertaken to do or restraining him from what he has
agreed not to do. The court always has discretion to refuse an order for specific performance, for instance where it is impossible for the contractor/service provider to perform; it would produce an inequitable result or would be against public policy. If enforcement is denied it would be possible to claim damages from the contractor/service provider.

**Damages**

(a) An award for damages is an order to pay a sum of money for loss suffered. The primary rule being that the sufferer can claim so as to be put in the economic position he would have occupied if the contract had been properly performed. The aim is to compensate the innocent party for its real pecuniary (monetary) losses. The rules of Unjustified Enrichment must be applied. The onus of proof should as far as possible be placed on the contractor/service provider to make provision for situations where damages might be claimed.

(b) It should be kept in mind that there is a duty on the innocent party (party who wants to claim damages) to mitigate its losses/damages. The sufferer cannot recover damages for losses that he could reasonably have avoided. Thus Departments are requested as far as possible to minimise (mitigate) damages, if and when it occurs.

(c) The parties may include in the contract a provision regulating the amount of damages to which the aggrieved party is entitled on breach. These penalties (also any forfeiture) are governed by the Conventional Penalties Act, 1962. In view thereof, if a contract contains a penalty clause or stipulation, damages may not be claimed in addition to the penalty, nor, unless the contract expressly provides otherwise, *in lieu* of it.

(d) Breach, no matter how serious it is, does not, as such, cancel the agreement. This is so even if the agreement contains a provision that indicates that, on default occurring, the agreement will *ipso facto* become null and void. It is only where the aggrieved party cancels the agreement on account of the breach that it comes to an end. In the absence of cancellation, each party remains liable to carry out or complete their respective performance, although, if the aggrieved party chooses to claim damages in lieu of performance, the defaulter is *pro tanto* (to this extent) relieved of his/her duty to perform.

(e) Generally, cancellation operates retrospectively (*ab initio*). This means that the parties are put in the positions they would have been in, had the contract never been concluded. Each party is relieved of the duty to perform further and is obliged to restore to the other any performance(s) received in terms of the agreement (*restitutio integrem*). There are exceptions to this general rule.
Because cancellation has legal consequences on the reciprocal rights and obligations of the parties, it is available only where the parties have incorporated a cancellation clause in the contract or where the breach is of a sufficiently serious nature. If the breach relates to time, the question is whether time could be said to be ‘of the essence of the contract’.

If the breach consists of a failure to perform according to the strict terms of the agreement, other tests would apply, i.e. is the breach sufficiently serious, does it go to the root of the contract?

Where repudiation of the whole contract is concerned, it is usually regarded as sufficiently grave to justify cancellation. Cancellation clauses frequently contain a rider to the effect that the innocent party may only exercise his right to cancel on account of breach if he has given the defaulter notice of the breach and the latter has failed to remedy it within a certain period. A provision of this sort is binding and, in general, the innocent party must bring himself strictly within its wording if he wishes to enforce his right to cancel. However a notice provision is not applicable where the defaulter has repudiated the agreement (unless the provision expressly says so).

32.3. ELECTION OF REMEDIES
On breach, the innocent party has an election of remedies. If cancellation is not permitted, he may claim specific performance or damages in lieu of performance. In either case, he/she may claim damages for any further losses resulting from the breach. If the contract contains a cancellation clause, or if the breach is sufficiently serious to warrant cancellation, the innocent party has the further alternative of cancellation and damages (including damages for further losses).

In general the aggrieved party is not obliged to cancel where cancellation is permissible. He is entitled to keep the contract alive and seek an order for specific performance or an award of damages in lieu of specific performance. This is so, even where the defaulter repudiates the entire contract prior to the date for performance. The sufferer may ignore the repudiation and claim performance or damages in lieu of performance when the due date arrives.

Before action is taken (relating to breach), the Department must inform the contractor/service provider that action will be taken in accordance with the contract conditions unless he complies with the contract conditions and satisfactorily delivers goods or services within a specified reasonable time. If the contractor/service provider does not perform satisfactorily despite the warning, the Department may consider cancelling the contract concerned and/or enforce other appropriate remedies.
When goods or services do not comply with the provisions or requirements of the contract, or problems are experienced in the execution of the contract, the matter must be brought to the attention of the contractor/service provider in writing.

When correspondence is addressed to the contractor/service provider, reference must be made to the bid or contract number, the item number and the number and date of any relevant invoice, statement or letter received from the contractor/service provider. Otherwise the number and date of the order, a short description of the goods or service and details of the destination if applicable, must be supplied.

Details of all cases where equipment, vehicles, implements, machinery, apparatus, etc. fail during the guarantee period and have to be replaced or repaired, or where the provision of spares or service is unsatisfactory, must be recorded, irrespective of whether the Departments have satisfactorily finalised the matter with the contractor/service provider. The purpose of this requirement is for the Department to keep a record of unsatisfactory performance of services and defective goods/products delivered.

If a contract is cancelled or rejected, the contractor/service provider must be requested to indicate to the Department, within a given time limit, how goods in possession of the Department must be disposed of and warned that if he does not react to the request, the goods will be returned to him at his cost. If he ignores the request, the Department must act accordingly.

When a Department has to buy out goods and services at the contractor's/service provider's expense, the loss to the Department must always be restricted to the minimum since it is difficult to justify the recovery of unreasonable additional costs from the contractor/service provider.

If a contractor/service provider repeatedly mal-performs and his actions cause the Department serious inconvenience, loss or embarrassment, corrective steps should be taken. All substantiated complaints regarding the performance of contractors, including contracts concluded in terms of the delegated powers, must be recorded.

If the contractor/service provider does not deliver the goods or services within the contract period, the Department may after informing the contractor/service provider, at their own discretion, either deduct an amount as a percentage of the value of the contract amount as a penalty for each day that the delay continues, or instead of such a penalty, claim compensation for any actual damage or loss suffered, provided that where beneficial use of the completed portion is enjoyed, the penalty shall be applied to the value of the outstanding portion only.
32.4. **NEGOTIATING A SETTLEMENT OR AMENDING THE CONTRACT**

Settlement is an agreement whereby a dispute (usually but not exclusively regarding an uncertainty as to the terms of a legal relationship, or even whether or not such a relationship exists at all) is resolved by way of compromise or negotiation. The purpose thereof is to avoid extreme measures such as litigation. It is advisable that in this instance, the Department consults with legal services and where required obtain a legal opinion before making a decision of negotiating or amending a contract.

In the same way the parties to the contract (being the Department and the Contractor) may by consensus/agreement amend the contract or terms thereof. Once again, the Department must consult with legal services and where required obtain a legal opinion in this regard.

For the sake of protecting both parties to the agreement as well as for the purposes of the Auditor-General the settlement or amendment must be in writing and signed by the parties involved or any authorised party representing those parties. These actions are subject to the provisions of the formal contractual requirements between the parties as well as the Common Law of Contract.

32.5 **REMEDIES IN TERMS OF MISREPRESENTATION**

Misrepresentation in this context means that a bidder/service provider/contractor provided certain information or put forward certain facts in his bid or additional documentation knowing that such facts are untrue or incorrect. The bidder would have intended to misrepresent the facts as such misrepresentation would not have been as a result of a *bona fide* mistake by the bidder. This section provides for remedies in the case of misrepresentation.

In order to implement these remedies, the Department has to be sure that the information provided was indeed incorrect. The misrepresentation has factual and not merely an expressed opinion by the Department. The stated fact (misrepresentation) must be sufficiently material so that a reasonable person would have regarded such ‘fact’ as important in deciding whether to enter into the contract or not. Furthermore, to be successful with a claim for misrepresentation, it will have to be shown that the particular fact (or misrepresentation) induced the Department to contract and had the Department known the misrepresented fact(s) it would not have contracted or would have contracted on different terms. If the Department would have contracted even though the facts have been misrepresented, it would not be entitled to the remedy of rescission. However if the Department would have contracted on other terms if it had known that the facts had been misrepresented, the Department may be entitled to the remedy of damages.

Where the Department wishes to rescind the contract and obtain restitution (i.e. both parties return what is due to each other as if the contract had not been initiated), certain rules are applicable. First, on becoming aware of the fact that there has been a misrepresentation, the Department must not do anything, prior to rescission, which would lead the other party reasonably to believe that he intends to abide by the contract and not rescind it: it
must not, for instance, exercise an act of ownership over an article purchased or service rendered etc. Secondly, the Department must communicate its decision to rescind to the supplier/contractor within a reasonable time of becoming aware of the misrepresentation. Failure to follow these rules could be construed as if the Department has waived its right to rescind the contract. After rescission, restitution (restoration to the position one would have been in had the misrepresentation not take place) must take place.

32.6 RECOVERING DAMAGES BY SET-OFF
Set-off consists in the automatic extinction of debts by operation of law on grounds of policy, or a dispositive act whereby one party gives effect to the extinction of the debts by means of a unilateral legal act. This means that the Department may hold back monies due to the Contractor in the event of cancellation by the Department as a result of mal-performance by the Contractor, or for any loss, damage or additional cost the Department incurred due to defective performance by the Contractor. It enhances efficiency by promoting the speedy settlement of debts without the need for a costly and cumbersome duplication of performance. Thus it may be interpreted to be a means of enforcing a claim indirectly.

In order to enforce this remedy the following considerations must be taken into account:
(a) The Department must have suffered damages or incurred a loss directly or consequentially.
(b) Set-off may also be used for damages such as additional cost the Department might have incurred in obtaining the service of a third party to remedy the defects which the current contractor failed to remedy within a reasonable time.
(c) This remedy may also be used to claim for latent defects in the product/service provided by the contractor or for any other defect resulting in the product/service not conforming to conditions / specifications of contract.

In order to use this remedy there are certain requirements that must be met, such as:
(a) The debt must be mutually owed.
(b) It must be iusdem generis (of the same kind). For example: a money debt cannot be set-off against a claim for delivery of property.
(c) The debt must be due and enforceable. Set-off does not operate if the debt is subject to a suspensive condition or only enforceable at a future date.
(d) The debt must be liquidated.

32.7 CANCELLATION AS A RESULT OF FORCE MAJEURE / VIS MAJOR
Force majeure / Vis major may be defined as an act of God, i.e. a natural disaster or some other circumstance beyond the control of the contractor. The force majeure clause is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, or an event described by the legal term act of God (such as
hurricane, flooding, earthquake, volcanic eruption, etc.), prevents one or both parties from fulfilling their obligations under the contract.

Cancellation of a contract entails the termination of the consequences of a valid contract, i.e. performance. This remedy is available only in exceptional circumstances.

Firstly, the party responsible for performance must give written notice within 3 days (business days) of the date on which the force majeure / vis major occurred. Where reasonably possible the party responsible for performance must do everything possible to deliver or comply with the terms of the contract. Dates and times allowed for the performance shall be agreed upon by both parties.

Failure to give notice of the force majeure, allows the aggrieved party to the contract the right to refuse amendment of the date and time on which performance was due and that the aggrieved party may exercise the remedies available for breach.

In practice, most force majeure clauses do not excuse a party’s non-performance entirely, but only suspends it for the duration of the force majeure unless the party responsible for the performance (as opposed to the party first affected by the force majeure) agrees in writing to render such performance.

Department may cancel the contract without prejudice to any other rights it might have if the force majeure persists after a period of 21 days. If the Department wishes to have these remedies at its disposal, it must ensure that the contract caters for these provisions.

32.8 INSO LVIENCY

The Department has various rights, which it may exercise in the case of liquidation, sequestration or judicial management of contractors.

When the estate of a contractor is liquidated for whatever reason, a choice must be made in consultation with Legal Services of whether to claim against the estate or not. The risk to the Department is the determining factor and the choice with the smallest degree of risk is preferred. All action must nevertheless be taken in accordance with the relevant National Treasury Regulations.

Where an estate is involved, all claimants accept responsibility for both assets and liabilities. Therefore, if a claim is registered against an estate, the claimant must accept his share of any costs that have to be defrayed.

There are three types of claims against an estate:

(a) "Protected creditors", e.g. the Receiver of Revenue.
(b) "Preference claims", e.g. a bank or a building society having a secured claim over the assets i.e. a notarial bond.

(c) "Concurrent claims", which are all claims that do not fall into the categories of (a) and (b)

The first two categories of claims are paid out in full before the third category is considered, which places the third category in a weak position if a contractor is sequestrated, liquidated or placed under judicial management.

If a firm or person is liquidated /sequestrated, it is regarded in laymen’s terms to something similar to a breach of contract. The liquidator or administrator is given the choice of carrying out the contract or not. In the majority of cases the liquidator or administrator will elect to cancel the contract and a provisional claim against the estate should be registered under the proviso that a final claim will not be submitted if the Department will have to make a financial contribution.

A procuration could be signed in terms of which the liquidator may act on behalf of the Department. If the liquidator indicates that no dividend will be paid out to concurrent claimants the Accounting Officer of the Department concerned may also decide that it would be more economical to write off the relevant amount.

32.9 VARIATION AND WAIVER

Variation is an alteration to the legal consequences of the contract. This may take place only by mutual agreement of the parties, and entails not merely changing the effect of a term, but also removing a term from the contract. On the other hand, waiver is a unilateral act meaning that one party to the contract decides on his own to abandon a right or remedy, which it may have without altering the terms of that contract.

The Department should obtain a legal opinion before engaging in this specific exercise and thoroughly investigate the legal implications of such action. Furthermore, it is of the utmost importance that such agreement to waive or vary the terms of the contract be in writing for the sake of certainty and protection of both parties involved.

32.10 CESSION OF CONTRACTS

Cession of a contract refers to the transfer of rights and obligations in terms of the contract to another party other than the original contracting party. Various reasons may exist why bidders would want to transfer their rights and obligations, the bidder might have merged with another bidder, bidder may be in a position that he cannot effectively render the service and may want to transfer it to another entity.

With cession, the Department should keep in mind that the contract was originally awarded to a specific bidder because of specific reasons, i.e. highest points, lowest price etc. The identity of the bidders is therefore of paramount importance to the Department and care should be taken that the party to which the contract will be
ceded to, complies as far as possible with these requirements, especially if the contract is ceded in the early
stages of the contract period.

Care should be taken if a request to cede a contract within the first three months of conclusion of the contract in
view of problems with firms “fronting” for others and it is with this in mind that it is recommended that approval to
abandon, transfer, cede, delegate, assign or sublet contracts within three months after conclusion thereof shall
only be granted in compelling circumstances, e.g. in the case of the death of the Contractor. Other compelling
circumstances could be sequestration or liquidation, mergers etc.
If approval is granted, the Department must ensure that the necessary documentation is completed by the new
contractor so as to ensure that a complete understanding is reached and that it accepts the terms and conditions
of the contract in writing.

Reasons for the ceding the contract must be recorded and the cessionary's ability to carry out the contract must
be established. Unless it is otherwise in the best interests of the Department, the transfer should not be
approved if the Department would suffer a loss as a result thereof or if there is an increased risk to the
Department.

The same conditions used for the award of the bids concerned must be made applicable to the cession of
contracts. For instance, if the original contract was subject to the provision of surety, the same degree of surety,
or better, must be provided by the cessionary. If this is not possible the reasons for it should be fully documented
and placed on file for audit purposes.

32.11 SERVICE LEVEL AGREEMENT (SLA)
The Service Level Agreement will be more frequently used when a service is provided to the Department, as
opposed to when a product is supplied to the Department.

Even though the agreement may be described as a standard agreement, the Department's rights and obligations
in terms of the Service Level Agreement will be dependent upon the specific service rendered, or product
supplied to the Department. The terms and conditions will have to be adjusted to suit the circumstances of each
contract.

Contents of clauses relating to the Provision of Services, Use of Services, Remuneration and Limitation of
Liability will have to be negotiated for each contract.

When SLA’s is contemplated it should adhere to the SLA template issued and amended by Legal Services from
time to time.
32.12 CONTRACT PRICE ADJUSTMENTS

Price adjustments, in any form, are incidental to the conclusion of any contract as a result of the period of the contract and the constant change in economic conditions. There are 3 main circumstances for price adjustments:

(a) price adjustments linked to inflationary and statutory adjustments;
(b) price adjustments as a result of rate of exchange variations; and
(c) price adjustments not provided for in a bid/contract. (Extra-contractual price adjustments.)

In the bid invitation, provision must be made for the bidder to indicate if their prices are subject to any escalation. The bidder by means of indices, Consumer Price Index (CPI), Production Price Index (PPI) or fixed period adjustments will indicate such price adjustments. Steel & Engineering Industry Federation of South Africa (SEIFSA), through Statistics South Africa receives the PPI’S and CIP’S for publication. The SBD 3.2 pricing schedule must be utilised for all goods/services that would be subject to price escalations.

For the sake of efficiency, the Department should acquire a breakdown of the price at the conclusion of the contract. This is more convenient and enables determining which part of the price would be subject to such increases or adjustments.

In order for proper contract management to take place in respect of Contract Price Adjustments (CPA), the following questions needs to be asked from the bidder in the bid documents:

(a) Is the price offered, firm for the duration of the contract?
(b) If not firm, indicate details as to non-firm price structures.
(c) Are prices linked to proven cost increases or formula-based adjustments? (formula based price adjustments are Price Production and Consumer Price indices (PPI & CPI) together with the relevant Steel & Engineering Industry Federation of South Africa-SEIFSA).
(d) If formula-based, what indices will be utilised to measure such price adjustment claim during the contract period?

Should Bidders indicate that price adjustment would be subject to the Production Price Index (PPI), they must clearly and accurately indicate details as to what tables in the PPI will be utilised for such price adjustment.

This will form the basis for the entire contract period and if the company later submits a claim, the above will be used as the basis for such claim. It should be indicated to the company that the information is compulsory.

Once the contract is up and running, contractors are compensated for actual, proven additional expenses in connection with the aforesaid indices, provided that the relevant tables and base data of the CPI or PPI is used for the calculation of the bid price. PPI or CPI Tables that were indicated at the bid stage will now be used in order to calculate the differences claimed for.
The importance of requesting the bidder to stipulate whether his price is firm or not is amplified considering that should a bid be accepted, and the bidder did not indicate whether not his prices is firm, such a bidder may after acceptance increase his price. Apart from the fact that a Department may not be able to afford such an increase, it may also lead to an unfair advantage to the bidder when taking into consideration that his price might now be higher than other bidders who competed against him.

It must however be noted that if a bidder gives a firm price, it does not mean that such a price will not be subject to change. A definition of a firm price is as follows:

“Firm prices means prices which are only subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy, or tax which, in terms of a law or regulation is binding upon the contractor and demonstrably have an influence on the prices of any supplies, or the rendering costs of any services, for the execution of the contract.”

Where a bidder does not offer a firm price, such bidder may stipulate the means by which the price will be adjusted. For example: Non-firm prices linked to proven adjustments, prices linked to fixed period adjustments, prices linked to escalation formula adjustments or prices subject to rate of exchange fluctuations.

Bidders may claim price adjustments on different methods and for different reasons. As a bidder’s price consists of various factors/variables, they may wish to claim adjustments on a combination of factors and methods. A Department may, in terms of a special condition, spell out the rules on how and on what basis prices will be adjusted. It is true that firm or non-firm prices may be offered, whilst there is provision for price adjustments by means of a formula.

Where a formula is allowed in the bid documents, the structure of the formula has to be agreed upon. The bidder’s attention must be drawn to the requirement that the values of the variable factors in the formula must be specified in their bids. The relation between these factors must be reasonable.

Price adjustments in accordance with escalation formulae based on inflation indices are allowed on no more than 85% of the price, unless strong reasons to the contrary are provided. The risk attached to price increases in respect of the remaining 15% of the price must be accommodated in the supplier's price.

Where price adjustments based on escalation formulae are accepted and irrespective of stipulations to the contrary elsewhere in the bid documents, variations in the actual costs for whatever reason are for the account of the contractor. This implies that proven cost increases and formula-based adjustments cannot both be entertained at the same time.
32.13 EXTENSIONS AND EXPANSIONS AGAINST THE ORIGINAL CONTRACT

In exceptional circumstances, an accounting officer may deem it necessary to expand or vary orders against the original contract.

The National Treasury Instruction Note 32 on Enhancing Compliance Monitoring & Improving Transparency & Accountability In SCM dated 24 April 2012 requires that any contract expansion / extension must be accordance with the thresholds set by them which is 20% or R20 million in respect of construction related goods related goods, works and/services and 15% or 15 million in respect of all other goods and services, whichever is the lower amount.

Departments are required to forward motivations for all expansions/extensions in excess of these thresholds above to the Provincial Treasury within 10 working days after the Accounting Officer has granted approval for the expansion and / or extension for reporting purposes. The Provincial Treasury will scrutinise such reports and only take appropriate action where deemed necessary. Such reports sent to the Provincial Treasury will be assessed on a case by case basis against policy and prescripts. The Provincial Treasury will only provide a written response if any findings of risk, non-compliance, and budgetary threat are noted.

The above is not applicable to transversal term contracts facilitated by the Provincial Treasury and specific terms contracts as in such contracts, orders are placed as and when commodities are required and that at the time of awarding the contract, required quantities are not known.

33. CONTRACT MANAGEMENT (APPLICABLE TO ALL CONTRACTS)

Contract management can be defined as maintaining control or influence over the contractual agreement between the Department and the contractor including the administering and regulating of the agreement. The relevant line function unit assumes responsibility for contract management whilst the SCM Unit takes responsibility for maintaining original contract documentation and monitoring contracts in terms of renewals, transfers, terminations, amendments and price adjustments.

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<tr>
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## CONTRACT ADMINISTRATION STEPS

### STEP 1 – Assign contract administrator

Personnel assigned to perform contract administration activities are referred to as a “contract administrator”. The person assigned as contract administrator must be made aware of the expectations and requirements of the position. A contract administrator must:

1. Have sufficient knowledge of contracting principles as it relates to their responsibilities in administering the contract.
2. Communicate with both the contract manager and supplier on contractual issues.
3. Maintain records or logs for archiving purposes at the completion of the contract.

### STEP 2 – Maintain relationship with contract manager

Although the quantum of contract administration activities may differ depending on the magnitude of the contract, it is critical that the contract administrator involves the contract manager (if the contract management responsibility has been assigned to another official) in the contract administration activities. The contract manager remains the liaison between the Department and the successful bidder.

### STEP 3 – Establish the fundamentals material to the specific contract

Once a bid is awarded, the contract administration responsibilities should be reviewed with the person assigned to the role. Any additional contract administration activities specific to the transaction should be identified and specified.

### STEP 4 – Communication is key

A key factor in successful contract administration is communication. It is essential for contract administrators to understand the provisions of the bid document, have the ability to communicate contract obligations to all parties involved, and maintain control over the contract performance.

### STEP 5 – Post-award orientations

Prior to commencing services it is important that the contract administrator, bidder and contract manager meet to ensure a clear and mutual understanding of all contract requirements and to identify and resolve potential problems prior to any contract performance.

### STEP 6 – Open and maintain contract administration file

The contract administration file should consist of the following dividers:

1. Cover page
2. Index page
3. Complete copy of bid document with all attachments to the involved parties.
4. Signed contract, attachments and addendums
5. Key departmental staff and supplier personnel contacts, their responsibilities and authority.
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8. Contract payment process, including review time and processing time requirements to avoid payment penalties.
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11. Amendments, variations or extensions.
12. Resolving disputes or any other contractual issues.
14. Health and Safety clearances and notices
15. Public notices (general day to day notices to the public)
16. Logistical requirements (assessment of equipment and human resources)
17. Logistics plan
18. Logistical clearances (copies of permits, vehicle licences, access control of staff and contractors)
19. Tax clearances
20. Declarations of interest
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24. Compliance notices (all related Government programs)
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28. Project closure
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### THE DO’S AND DON'TS OF CONTRACT ADMINISTRATION

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   b. Notifying responsible parties when funds can be disencumbered.

10. Channelling any contract disputes immediately to the Departmental principles and legal services.

11. Keeping an accurate auditable paper trail of contract administration.

12. Ensure compliance by the contractor and contract manager with regards to external and/or applicable procedures not specifically defined in the contract.

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All officials who perform contract administration functions not only need to understand how to administer a contract but are also expected to adhere to and conduct business by maintaining the same ethical standards as if they were a buyer.

Contract administrators must:
4. Conduct themselves in a professional manner, refraining from mixing outside friendships with business.
5. Accurately account for expenditures and property received.
6. Be aware that perceptions can override reality.
7. Involve the department’s SCM, management and legal services when questions arise regarding acceptable or unacceptable behaviour when dealing with suppliers.

RECORD KEEPING

Good record keeping

The Department is responsible for maintaining records in sufficient detail to allow anyone to review documentation and understand how the procurement was requested, conducted, awarded and administered.

Contract administrators must maintain good record keeping activities and ensure the records are turned over or archiving at the completion of the contract term.

The records maintained by the contract manager must be incorporated into the contract file and retained for compliance and/or auditing purposes.

According to sections 11 and 12 of the National Archives Act, 2001 (Act 36 of 2001) – public records must be maintained for 20 years.
Record retention requirement

The Department is reminded of the examination and audit requirements as prescribed requiring transaction documentation to be retained for three (3) years after payment of the last invoice unless a longer period is required in the contract.

Recommended IT and administrative retention periods

Electronic document management systems may require additional documentation filing and retention requirements

34. CONTRACT ADMINISTRATION

The accounting officer must ensure that the supply chain management system of the institution provide for contract management to include, but not limited to:

- Recording of contracts in a contract register;
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- Identification of institutional period contracts that are nearing expiry;
- Evaluation of applications for price adjustments;
- Evaluation of applications for variations, amendments, and cancellations; and
- Invoking of penalty clauses.

Both the user division/line manager and the SCMU have a responsibility towards administrating a contract. In general contract administration responsibilities are as follows:

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According to sections 11 and 12 of the National Archives Act, 2001 (Act 36 of 2001) – public records must be maintained for 20 years.

**Record retention requirement**

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**Recommended IT and administrative retention periods**

Electronic document management systems may require additional documentation filing and retention requirements.
35. SUCCESSION PLANNING
The accounting officer must ensure that the supply chain management system of the institution provide for contract management to include, but not limited to:

- Recording of contracts in a contract register;
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- Evaluation of compliance with transversal contracts in which the institution participates;
- Identification of institutional period contracts that are nearing expiry;
- Evaluation of applications for price adjustments;
- Evaluation of applications for variations, amendments, and cancellations;
- Invoking of penalty clauses; and
- During the contract period as well as thereafter a review process is executed.

36. CONTRACTOR ASSESSMENT
The Department must ensure that the performance of all contractors is assessed during the period of the contract.

At the completion stage of the project/contract, an assessment of the contractor shall be undertaken and this assessment should be available for future reference.

The reliability of the contractor should be monitored in terms of, among others:

a. Capacity and capability to deliver (delivery periods).
b. Quality.
c. Quantity.
d. Attainment of objectives.
e. Other criteria determined by the Department (such as availability of facilities, reliability, flexibility, price, financial stability, response time, technical competence, creativity and innovation) should also be monitored.

Contractors shall be systematically monitored for performance against the same criteria as those used in the registration process for the provider list or the criteria set in the specification/terms of reference, where applicable. In other words was the contractor (chosen from a provider list or a bidding process) able to perform according to the contract conditions.

When contractors do not perform according to the contractual obligations and the Department does not address the matter during the execution of the contract, such non-performance cannot be deemed as sound reasoning for passing over the bid of such supplier/service provider when evaluating future bids.
It is important that all instances of breach of contract and the ensuing actions that were taken must be recorded in a prescribed format so that management information can be extracted for reporting purposes, as required.

### 37. CONTRACT MANAGEMENT MONITORING (COMPLIANCE CHECKLIST)

The Compliance Division in the SCM Unit/PT:PCPO will execute its mandated compliance checks as per the following the checklist:

<table>
<thead>
<tr>
<th>CONTRACT MANAGEMENT AND ADMINISTRATION COMPLIANCE CHECKLIST</th>
<th>COMPLIANCE ISSUE</th>
<th>RISK</th>
<th>RECOMMENDATION</th>
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<td>A contract manager has been appointed to manage the contract</td>
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<tr>
<td>A contract administration has been appointed to administer the contract</td>
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<tr>
<td>A mechanism to escalate disputes has been established</td>
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<tr>
<td>Contract management objectives and requirements have been developed as outlined in the bid documentation</td>
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<tr>
<td>A contract management plan has been developed as outlined in the acquisition planning guideline</td>
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<tr>
<td>A specific risk management plan has been developed</td>
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<tr>
<td>Ensure any relevant legislation, policies and regulations are met e.g. PFMA, CIDB, AO-SCM System, TR's, PTI's, OHS&amp;W legislation, privacy legislation, intellectual property, free trade agreements, trade practices legislation, etc.</td>
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<tr>
<td>Identify any actual or potential conflicts of interest and how these were dealt with</td>
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<tr>
<td>Confirm the identification and mitigation of risks in the existing contract</td>
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<tr>
<td>Adherence to the requirements of the contract management objectives</td>
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<tr>
<td>Confirm monitoring of the performance of suppliers against the contract obligations and key performance indicators</td>
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<td>Confirm authorisation and processing of claims for payment in accordance with the contract</td>
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<td>Confirm maintenance of adequate records (paper and electronic) of all communication interactions with the supplier as appropriate</td>
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<td>Confirm existence of a record of progress against milestones and timeframes</td>
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<td>Confirm record of feedback on supplier performance from stakeholders and customers</td>
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<td>Confirm record/minutes of meetings with the supplier as required</td>
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<td>Confirm existence of regular (e.g., weekly, monthly, quarterly and annual) contract review meetings with the supplier and recording of the outcomes</td>
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<td>Confirm the recording of processed requests and appropriate approvals for variations to the contract in accordance with the contract.</td>
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<td>Resolution of any disputes and performance management issues in a quick and informal manner as required</td>
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<td>Application of dispute resolution and performance management procedures as documented in the contract where required</td>
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<td>Provision of regular performance summary reports to the appropriate senior manager/oversight committee as required</td>
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<td>Confirm regular review of the contract management/project plan</td>
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<td>Recorded reports on the achievement of the intended procurement objectives (as approved in the bid adjudication) during the contract period and at the conclusion (e.g., closure reports).</td>
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<td>Monitor and review the risks identified in the contract management plan or risk management plan</td>
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