



## **CONTRACT MANAGEMENT POLICY**

**2017/2018 FINANCIAL YEAR**

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## 1. TERMS AND DEFINITION

Contract	The written agreement entered into between the purchaser and the supplier, as recorded in the contract form signed by the parties, including attachments and appendices thereto and all documents incorporated by reference therein.
Contractor	The party to the contract that is required to provide goods or services according to the terms of the agreement.
Contract Management	The activities necessary to manage a contract throughout all stages in the contract life cycle to ensure that immediate action is taken effectively and efficiently to the change that may occur to the contract
Contract Management system	Computerised / manual system necessary to ensure proper Contract Management control and monitoring of contracts.
Contract Register	Manual system necessary to ensure proper Contract Management control and monitoring of contracts.
Force Majeure	An event beyond the control of the contractor and not involving the contractor's fault or negligence and not foreseeable.
Litigate	The act or process of contesting a lawsuit or seeking redress through the courts.
Parties	Parties that stipulate obligations to one another to ensure that the contract term and condition are fulfilled.
Specification	The statement that provide detailed description of goods, services and works characteristics and identify performance requirements prepared when procuring goods, services and works.
Transversal Contract	Term contracts that are facilitated and arranged by National Treasury or Provincial Treasury for goods and services that are frequently required by Municipality.
Terms of Reference	The statement that define clearly the task directive (methodology), objectives, goals and scope of the

assignment and provide background information, prepared when procuring professional services.

Institution	Unit/Function in the organisation as the role player to the procedures.
Division	Includes the divisional section within the municipality.
Firm Contract Price	Contract prices provide for a fixed price which normally not subject to any adjustment.
Non-Firm Contract Price	Contracts prices that are subjected to changes if they are explicitly included in the agreement based on the economic pricing escalations.

### **Abbreviations**

CRA	Contract Registration Application
CFO	Chief Financial Officer
MCMG	Municipal Contract Management Guideline
CPA	Contract Price Adjustments
BAC	Bid Adjudication Committee
GCC	General Conditions of Contract
GPG	Gauteng Provincial Government
GPT	Gauteng Provincial Treasury
MBD	Municipal Bidding Document
MFMA	Municipal Finance Management Act
MM	Municipal Manager
SCC	Special Conditions of Contract
SCM	Supply Chain Management
SLA	Service Level Agreement
TOR	Terms of Reference
RT	National Treasury Transversal Contract

## **2. INTRODUCTION**

Good contract management is essential for sound financial management and contributes greatly to effective and efficient service delivery. Contract management is concerned with monitoring supplier performance to avoid bid violations (e.g. submission and payment of fictitious invoices and abuse of the variation procedures)

Contract management leads to increased savings and good quality on-time delivery. Furthermore, it is the process that enables both parties to a contract to meet their obligations in order to deliver the objectives required from the contract and invoices building a good working relationship between the parties. Contract management continues throughout the life of a contract and also involves managing proactively to anticipate future needs as well as reacting to situations that arise.

One of the key aims of contract management is to accelerate service delivery in accordance with the signed contract and attainment of value for money while managing risks. Active management of contractual relationship with the contractor will yield optimum efficiencies, effectiveness and economy of the service and balance in cost and risk.

## **3. PURPOSE**

The purpose of the Municipal Contract Management policy is to establish sound and consistent management practices with respect to municipal contracts. It describes the processes and assigns responsibilities to effectively administer contracts from:

- Preparation of contracts;
- Maintenance of contract register;
- Monitoring of payments;
- Control contract variation and price adjustment;
- Assess and monitor performance; and
- Manage contract disputes and close out of contracts.

## **4. TYPES OF CONTRACTS**

### **4.1 Lump Sum (Firm Fixed Price) Contract**

Lump sum contracts are used mainly for assignments in which the content and the duration of the services and the required output of the consultants are clearly defined.

They are widely used for simple planning and feasibility studies, environmental studies, detailed design of standard or common structures, preparation of data processing systems, and so forth.

Payments are linked to outputs (deliverables), such as reports, drawings, bills of quantities, bidding documents and software programs.

Lump sum contracts are easy to administer because payments are due on clearly specified outputs.

## **4.2 Time-Based Contract**

This type of contract is appropriate when it is difficult to define the scope and the length of services, either because the services are related to activities by others for which the completion period may vary, or because the input of the consultants required to attain the objectives of the assignment is difficult to assess.

This type of contract is widely used for complex studies, supervision of construction, advisory services, and most training assignments.

Payments are based on agreed hourly, daily, weekly, or monthly rates for staff (who are normally named in the contract) and on reimbursable items using actual expenses and/or agreed unit prices.

The rates for staff include salary, social costs, overheads, fees (or profit), and, where appropriate, special allowances.

This type of contract should include a maximum amount of total payments to be made to the consultants. This ceiling amount should include a contingency allowance for unforeseen work and duration and provision for price adjustments, where appropriate.

Time-based contracts need to be closely monitored and administered to ensure that the assignment is progressing satisfactorily and payments claimed by the consultants are appropriate.

Again the Guidelines on fees for Consultants issued by the Department of Public Service and Administration should be used as a benchmark to establish the appropriate tariffs, or to determine the reasonableness of the tariffs.

## **4.3 Percentage Contract**

These contracts are commonly used for architectural services. They may be also used for procurement and inspection agents.

Percentage contracts directly relate the fees paid to the consultant to the estimated or actual project construction cost, or the cost of the goods procured or inspected.

The contracts are negotiated on the basis of market norms for the services and/or estimated staff-month costs for the services, or competitive bid. It should be borne in mind that in the case of architectural or engineering services, percentage contracts implicitly lack incentive for economic design and are hence discouraged. Therefore, the use of such a contract for architectural services is recommended only if it is based on a fixed target cost and covers precisely defined services (for example, not works supervision).

#### **4.4 Indefinite Delivery Contract (Price Agreement)**

These contracts are used when Accounting Officers/Authorities need to have "on call" specialized services to provide advice on a particular activity, the extent and timing of which cannot be defined in advance.

These are commonly used to retain "advisers" for implementation of complex projects (for example, dam panel), expert adjudicators for dispute resolution panels, Accounting Officer/Authority reforms, procurement advice, technical troubleshooting, and so forth, normally for a period of a year or more.

The Accounting Officer/Authority and the firm agree on the unit rates to be paid for the experts and payments are made on the basis of the time actually used.

### **5. CONTRACT CREATION**

The contract is created through three key stages of tender namely: pre-tender, tendering and post tender/contract management. All of these must be governed by rigorous governance principles.

The pre-tender stage includes needs assessment, planning and budgeting, development of specifications and selection of the most suitable procurement strategy. The tendering stage includes the invitation to tender, evaluation and adjudication of bids. Post-tender includes contract management, ordering and payment. It is important that efficient governance principles be applied to all these stages of contract creation.

#### **5.1 The Pre-Tender or Demand Management Stage**

Demand planning, procurement planning, items and specification management, and supplier management are critical phases in the pre tendering stage. This stage ensures that goods, services, construction work and other purchases are

properly planned and aligned to the procuring entity's strategy and resource plan. This alignment is critical to ensuring that goods are delivered at the right time, place and price, in the right quantity and of the right quality. It is at this stage that a comprehensive needs analysis is carried out in line with the strategic planning process.

Procurement plans indicate what purchases an institution will undertake in the short, medium and long-term. Proper planning should reduce delivery delays, eradicate recurring contracts and unnecessary extensions, and eliminate the need for emergency procurement. Further, procurement plans should inform suppliers about future opportunities.

## **5.2 The Tendering or Acquisition Management Stage**

This stage includes the invitation to tender, and evaluation and adjudication of bids. To avoid lack of competition and conflict of interest, all potential bidders must have access to the same tender information. Information in the bid documents should include details of the product or service to be procured, specifications, quantities, the timeframe for delivery, realistic closing dates and times, where to obtain documentation, where to submit tenders and a clear, complete and non-discriminatory description of the selection and award criteria. These cannot be altered after the closing date.

Municipalities must have clear procedures for opening the tender box to avoid manipulation of the bids received, this must be done before a public audience and basic information disclosed and recorded in a register. They must also ensure that members of their bid evaluation committees and bid adjudication committees are familiar with and adhere to National Treasury norms and standards when evaluating and adjudicating bids.

## **6. CONTRACT MANAGEMENT LIFECYCLE**

The lifecycle begins with setting direction; high-level objectives and policies for the Municipality. This leads to the identification of needs of the Municipality that can be fulfilled by acquiring goods, works and/or services to fulfil the need. Once the service is acquired, Contract Management comes into effect. An ongoing analysis of municipal needs is critical to ensure that goods, services and works provided are what the municipality and entity really need.

An effective Contract Management life cycle constitutes planning, contract arrangement, administration, performance management and close out. Figure 1 below is an illustration of a typical contract life cycle.



## **6.1 Stage 1: Planning**

This stage refers to consideration of contracts during the planning and budgeting processes. These processes will identify the need for contract creation and timeframes for implementation to ensure that delivery of goods and services occurs as approved in the budget.

During the strategic planning phase of the institution, goods, works and services required to execute the identified functions are determined and captured in the procurement plans.

Accounting Officers are required to submit procurement plans containing all planned procurement for the financial year in respect of the procurement of goods, services and works which exceed R 200 000.00 to Gauteng Provincial Treasury by the 31 July of each year. However, Municipalities are also required to keep records of planned procurement below R200 000.00 for contract reporting and monitoring.

The Procurement Plan document provides detailed information about the description of goods, services and works, estimated value, envisaged date of advertisement, closing of bid and date of award including the responsible office.

Contract Management unit/ function will in consultation with the Acquisition unit be responsible for monitoring contracts in line with the projects listed in the procurement plans and approved budgets.

It is vital for Contract Management unit/function to monitor contracts accordingly with approved procurement plans after award as it can lead to significant improvement on service delivery.

Contract planning should also cover the entire Service Delivery Budget Implementation Plan (SDIBP) period and beyond where applicable.

## **6.2 Stage 2: Contract Arrangement**

This stage refers to the arrangement of signing the contract, making it legally enforceable and formalizing the terms and conditions concluded between parties.

The unit/function responsible for Contract Management will arrange for the signing of the contract as follows:

- Issue a letter of award to the successful bidder according to the delegation policy of the Municipality;
- Arrangement of a Service Level Agreement (SLA) and/ or contract document with the end user;

- Service level agreement made available to a successful bidder to allow deliberations between the contractor and Municipality;
- Ensure that the service level agreement is legally sound and vetted by the Municipal Legal Service prior to signing of the parties;
- The Municipalities will sign the contract before the other party according to the municipal delegation of authority;
- Arranging dates for signing of SLA and applicable contract forms by other parties;
- Capture contract award details in the Contract Management system of the Municipality and Contract Registration Application (CRA);
- Original signed contract resides with Contract Management unit, copy of which will be scanned and archived in Contract Management filing system of the Municipality where applicable;
- A copy of the signed contract is issued to the end-user to prepare requisition for creation of purchase order.

### **6.2.1 Service Level Agreement**

Service level agreements are negotiated agreements for the delivery of specified services between the contractor and the Municipality. The service specifies services or goods required. The level of quantities and quality of service to which both parties agree and designed to indicate and evaluate the quality of the service delivered. Agreement is negotiated at the commencement of a contract and involves understanding of the needs and constraints of both parties.

The purpose of developing SLA's and setting service levels is to enable the Municipality to monitor and control the performance of the service received from the contractor against agreed standards. Service levels should be agreed by both parties and these are:

- Established at a reasonable level in line with the TOR / Specifications which contain the scope of work.
- Prioritised by the Municipality in order of importance and on an agreed scale for example: critical, major, urgent, important, minor, easily monitored, such as objectives, tangible and quantifiable;
- To conclude the SLA within the shortest possible timeframe after the award of a contract as best practice;
- The SLA may be included in the bid document to allow bidders to have ample time to review the SLA;
- Unambiguous and understandable by all parties;
- Open to re-negotiation if justifiable to do so;
- The contractor and the Municipality jointly identify a statement of expectations and ability, the cost of receiving the service and the basis for the calculation of costs.

The contractor is accountable for the quality and performance levels of the services and the availability thereof. One of the principle objectives of a SLA is that both parties understand the basis and intent of the terms and conditions under which the services are to be delivered.

The definitions of terms should be an integral part of the negotiation and discussion process between the two parties. If there are other terms identified during discussions that are not in the list of defined terms, they should be added. Negotiations should include the following conditions:

- Not allow any preferred bidder a second or unfair opportunity;
- Not to the detriment of any other bidder;
- Not lead to a higher price than the bid as submitted.

It must be noted that a SLA is an agreement in its own and it should therefore not be used to change or refine the stipulations contained in the bid documents.

The list of common provisions is not exhaustive and other provisions will need to be drafted to suit the particular contractual arrangement; as a result professional advice should be sought to assist with drafting specific SLA provisions.

### **6.2.2 Legal Vetting of Service Level Agreement / Formal contract**

Prior to signing a formal contract or service level agreement with a contractor, Accounting Officers/Authorities must ensure that such contracts or agreements are legally sound to avoid potential litigation and to minimize possible fraud and corruption.

This must include legal vetting by at least the Legal Services of the Municipality/Entity and such contracts or agreements must be actively managed in order to ensure that both the institution and the contractor meet their respective obligations.

The legal division provides expert advice to Contract Management unit and must be consulted in the following circumstances:

- Vetting of contract documents and service level agreements;
- Dispute resolutions, implementation of contract terms and conditions;
- Contract change of ownership, breach of contract, penalties, terminations, enforcement of indemnities, guarantees and contractual claims.

### **6.3 Stage 3: Contract Administration**

This stage is important in Contract Management and overlaps with monitoring and performance assessment. It encompasses various activities that need to be completed on a day to day basis, including among others:

#### **6.3.1 Contract Register**

All approved contracts are registered in the Contract Management System/Tool to enable easy retrieval and identification of all contractual arrangements.

Contracts that are partially executed, signed by one party, may be registered into the Contract Management System prior to forwarding to other parties for signature. The Contract Management unit/function should ensure that all signatures are obtained and contracts are updated in the system.

Contract registers should be used to monitor contract end dates in order to notify the end user to commence with the procurement strategy on time, at least 6 or 12 months prior to the expiry of the contract.

Effective contract register should have the following characteristics:

- Contract number, name of contractor, description, award date, type of contract, amount, contract period, business unit, project manager, contact details, expenditure, commitment;
- This will simplify the reconciliation or cross-check between the register and the Municipality's financial management information system;
- Expenditure against the contract and value of commitment.

Contract register report will be established detailing status of contracts and the reports to be provided by the 6th of every month to the Head of SCM and CFO on the following:

- Valid contracts in place;
- Contracts due to expire in six or twelve months;
- Contracts extended;
- All expired contracts;
- Contract variation;
- Cancelled contracts;
- Contracts captured on the system; (where applicable)
- Value of commitments;
- Value of accruals.

The Accounting Officer of a Municipality or Municipal Entity must regularly report to the council of the Municipality or the Board of Directors of the entity, as may be appropriate, on the management of the contract or agreement and the performance of the contractor.

### **6.3.2 Contract Payments**

Payments should be made in accordance with the provisions of the contract after delivery and budget confirmation should be attached by the end user before effecting payments.

Evidence of delivery is required that the end user has certified that the work has been satisfactorily executed and met the required standards of performance, e.g. Goods Received Voucher (GRV), Payments certificates, etc.

Payments for satisfactory performance should not be delayed because this can undermine the relationship with the service provider. All payments due to creditors must be settled within 30 days from receipt of an invoice or, in the case of civil claims, from the date of settlement or court judgment. This implies that amounts owing must be paid within 30 days from receipt of invoice if the goods, works or services were delivered to the satisfaction of the Accounting Officer or delegated authority.

In cases where a discount is not a contract condition and the contractor offers a discount on the invoice, the discount if possible must be utilized for instance by making the payment within the time limit specified on the invoice.

In the event that only part of the invoice is queried, arrangement should be made to pay that portion of the amount payable which is not subject to dispute, and separately take action to remedy the disputed amount.

Payment outside the prescribed period of 30 days from receipt of invoice is deemed to be a contravention and may be reported as such by the Auditor-General as part of its audit finding.

Interest incurred on late payments will be declared fruitless and wasteful and should also be disclosed as such in the Annual Financial Statements.

### **6.3.3 Contract Variation**

It is recognized that, in exceptional cases, an Accounting Officer may deem it necessary to expand or vary orders against the original contract. The reasons for

the variation should be clearly documented and should occur in defined circumstances.

A variation is mostly issued when extra work is added to the project after the contract has been signed. Deliverables and value for money should be assessed.

In order to mitigate against such practices, Accounting Officers/Authorities of Municipalities and Municipal Entities are directed that contracts may be expanded or varied by not more than 20% for construction related goods, services and/or infrastructure projects and 15% for all other goods and/or services of the original value of the contract. Furthermore, any variation beyond the abovementioned thresholds must be reported to Council or the Board of Directors.

An expansion or variation in excess of the threshold where the contract or agreement procured through the Supply Chain Management policy of the Municipality or Municipal Entity may be amended by the parties.

The reasons for the proposed amendment should be tabled in the Council of the Municipality or, in the case of a Municipal Entity the Council of its parent Municipality. The local community should be given reasonable notice of the intention to amend the contract or agreement; including an invite to submit representations to the Municipality or Municipal Entity as stated in Municipal SCM circular 62.

Such reports must include among others, the contract number, description, name of contractor, original contract amount, value and percentage of the variation and the reasons thereof.

End users also need to ensure that contract variations are not of such a level that they significantly change the contract requirement and/or substantial parts of the original transaction. If this is the case, it may be necessary to undertake another procurement process because the revised arrangements are substantially different to those selected through the original procurement. However, the Municipality should be aware of the following impacts associated with amendments, namely, financial resources and litigations.

No variation or modification of the terms of the contract may be made except by a written amendment signed by the contracted parties.

Municipalities should be aware of the impact that variation orders may have and should therefore endeavor to restrict the application to the absolute minimum

through proper planning, comprehensive scope of work/Terms of Reference when inviting bids or quotations.

The Contract Management unit/function will forward the submission to the relevant committee as per municipal delegation authority for approval if consultation with legal services is required.

Upon approval, the Contract Management unit/function will issue a letter of amendment / addendum to the contractor and also inform the end-user to prepare a purchase requisition to create an order.

A contract cannot be varied after the original contract has ceased to exist. The Contract Management unit/function will update the contract register and applicable Contract Management system

#### **6.3.4 Contract secured by other organs of state**

The Municipality or Municipal Entity must obtain approval according to the municipal delegation of authority to procure goods, works and/or services under contracts secured by another organ of state. Accounting Officers should satisfy themselves that the applicable procurement processes were followed by obtaining any other information, including but not limited to, the following documents from the other organ of state:

- The bid advertisement;
- BSC, BEC and BAC appointment letters;
- Bid Evaluation report and minutes;
- Bid Adjudication report / minutes;
- Acceptance letter; and the Service Level Agreement/Contract document.

The Municipality or Municipal Entity must enter into a separate service level agreement (addendum) in line with the specification I Terms of Reference of the goods or services between the consenting service provider and the requesting municipality may not exceed the contract period concluded in the original contract of the organ of the state.

#### **6.3.5 Contract Price Adjustment**

Contractual conditions must stipulate circumstances under which the adjustments shall be considered and the process to be followed.

When prices are subjected to adjustment as a result of escalation in prices of labour and material, the contractor must indicate the various elements of the contract price that will escalate (e.g. labour, transport, fuel, protective etc.). The baseline date and relevant index and index numbers which were used in calculating the price.

Where a firm price is quoted, application for an adjustment of price will not be considered. However, if the increased price is as a result of unforeseen circumstances beyond the control of the contractor and could lead to his/her downfall such application may be considered. (Only statutory increases and cost factors). Such adjustments are to the disadvantage of the Municipality, thus it must be approved by the Accounting Officer or delegated authority.

The contractor will submit a letter to the end-user requesting price adjustments together with documentation substantiating or motivating for the adjustment. The application should be in line with signed terms and conditions of the contract and according to pricing schedule and costs.

The end-user will submit a request to Contract Management unit for consideration, and calculation should be prepared to justify the escalation or price adjustment thereof.

Approval of the price adjustment should be done within the municipal delegation authority.

The amendment letter will be issued to the contractor and end user on acceptance of the price adjustment.

The contract register will be updated and the applicable Contract Management system.

### **6.3.6 Contract Expiry Notification**

SCM unit in collaboration with Contract Management unit / function is responsible to ensure that timeous arrangement is made to notify end users when a contract is due for renewal within 6 months or 12 months prior to expiry. Communication with the end users must be in writing and documentation must be properly filed.



### **6.3.7 Extension of Contract**

Extension of a contract is undesirable because it often leads to uncontrolled increases in the contract prices and it can also be a contributing factor to circumventing the procurement processes. Lack of proper planning does not constitute a justifiable reason for dispensing with prescribed bidding processes by extending contracts.

Where justifiable reasons are provided for extending a contract, the relevant application may be considered favourably and contractors may be approached by SCM unit with the request to indicate whether they are prepared to extend the contract period.

Approval to extend the contract should be requested before the expiry date of the contract taking into accounts the existing terms and conditions of the contract. It is advisable that when a contract is extended, terms and conditions remain the same

The contract or agreement may be extended by parties but only after the reasons for the proposed extension have been approved by the Municipal Bid Adjudication Committee or within delegated authority.

If a contract is extended with amended price conditions, the reasonableness of the prices must be established.

The applicable Contract Management system must be updated.

Where a contract is not extended, any expenditure incurred is deemed irregular, and should be disclosed accordingly in the Annual Financial Statements.

### **6.3.8 Transversal Contracts**

Transversal contracting enables the Municipality at all levels to purchase goods and services from a central list of approved suppliers who have been vetted for cost and quality.

Participating Municipalities will be responsible for Contract Management, placing purchase orders against transversal contracts, paying suppliers for goods/services rendered satisfactorily according to the terms and conditions of the contract, monitoring and reporting supplier performance.

### **6.3.9 Records Management**

It is important that the updated version of the contract incorporates any variations and correspondence related to the contract document and should be appropriately stored. This provides the basis for effecting payments and the ongoing management of the contract.

All tender documents and contract documents relating to a specific tender must be stored at the Municipality's Records Management Unit.

### **6.4 Stage 4: Contract Performance Management**

Performance management involves, performance monitoring, collecting data on performance, performance assessment, deciding whether performance meets the entity's needs, and taking appropriate action - such as understanding and extending features of good performance, correcting areas of under-performance; or amending contract requirements to meet changing needs.

A contract or agreement procured through the Supply Chain Management policy of a Municipality or Municipal Entity must stipulate the terms and conditions of the contract or agreement, which must include provisions for a periodic review of the contract or agreement once every three years in the case of a contract or agreement longer than three years to determine value for money.

The Accounting Officer/Authority or delegated authority of a Municipality or Municipal Entity must monitor on a monthly basis the performance of the contractor under the contract or agreement

Performance management must be undertaken throughout the life of the contract and for all contracts, whether simple or complex. Along with performance indicators and standards, arrangements for monitoring and assessment should have been set out and agreed in the contract along with remedial action plans on non-performance.

The performance monitoring and assessment arrangements should also have been reviewed at the contract start up stage and any necessary plans, tools or systems developed. Systematic monitoring underpins performance assessment and these do not occur in isolation from one another.

Poor performance should be recorded appropriately after engagement with the contractor. It should be taken into account that if proper record is not kept, such non-performance cannot be deemed a sound reason for passing over such contractor when evaluating future bids. In addition to any contractual or other remedies that may be pursued, the municipality may commence action in

terms of Municipal Supply Chain Management Regulation 15(2) (d), thus the Accounting Officer must:

- Inform the contractor or person(s) by registered mail or by delivery of the notice by hand of the intention to impose the restriction, provide the reasons for such decision and the envisaged period of restriction;
- Allow the contractor and/or person(s) fourteen (14) calendar days to provide reasons why the envisaged restriction should not be imposed;
- If requested, allow the contractor and / or person(s) the right to present evidence in person and consider reasons submitted by the contractor;
- Impose the restriction or amended restriction;
- Inform the contractor and/or person(s) of the decision; and
- Inform the National Treasury within five working days of such restriction, particulars of the person(s) to be restricted, (including, where applicable, names of the restricted persons, identity numbers, trade name of enterprises, company registration numbers, income tax reference numbers and vat registration numbers), the reason(s) for the restriction, the period of restriction and the date of commencement of the restriction.

In practice, performance will be assessed, feedback and reports provided throughout the monitoring process.

The following are the reports to monitor performance of contracts on monthly basis:

**a) Progress Reports**

- The end-user will complete a progress report indicating the stage of contract; achievement of milestones as per contract agreement; response time and deliveries within the contract period; quality of work, payments; poor performance; and actions.
- The progress report will be regularly submitted to the unit/ function responsible for Contract Management for deliberations; recording discrepancies and filing. (Submission of progress reports will be determined by the nature and timeline of the project )

**b) Performance Score Cards**

- The score cards will be applicable to once off purchases for goods and services where the end-user completes a score card after receipt of goods and services rating the performance of the contractor against agreed milestones and ensuring that goods/ services are received within the agreed timelines, acceptable quantity and quality. Furthermore, the score card will compel the end user to comment on the overall performance of the contractor;

- The completed score card will be submitted to Contract Management unit for deliberations; recording and determining the aggregate performance of contractor and where applicable contractor database will be updated. (This implies that score performance cards will apply to once off purchases and progress reports will be used to assess performance of long term projects)

**c) Expenditure Report**

- The Contract Management unit will on a regular basis extract the expenditure report where the contract value will be verified against the progress payments and validity of the contract;
- Discrepancies identified should be communicated timeously to the end-user and CFO to curb irregular expenditure.

**6.4.1 Contract Relationship Management**

It is important to establish and maintain a constructive relationship with the contractor and have regular communication. Providing positive and constructive feedback will assist in maintaining such a relationship.

- |                               |  |
|-------------------------------|--|
| <b>Overall responsibility</b> | • Each party nominates one person with the appropriate skills and experience as its representative to be responsible for the co-ordination and management between the parties over the life of the contract.   |
| <b>Weekly performance</b>     | • Nominated representatives, including the contractor's service delivery manager and the project management meet formally to review performance; aimed at discussing and resolving any minor issues relating to the performance of the contract.   |
| <b>Contract Management</b>    | • At least quarterly, or regularly, a formal meeting is held. The meeting comprises senior representatives from the end user and the contractor. The purpose is to formally monitor performance of the contract, consider any ways in which services may be improved, amendments to service levels and resolve, where possible, any issues that remain unresolved from the weekly contract meetings. |

Relationship management is focused on keeping the relationship between the two parties' open and constructive, resolving or easing tensions and identifying problems early.

Relationships should always be managed in a professional manner and be based on cooperation and mutual understanding taking into account the need for ethical behaviour.

Apart from formal monitoring, and in order to improve trust between the parties to the contract, it is important that the parties maintain regular contacts without waiting for the official reporting deadlines.

#### **6.4.2 Contract Disputes Management**

A contract or agreement procured through the Supply Chain Management system of a Municipality or Municipal Entity must stipulate the terms and conditions of the contract or agreement, which must include provisions providing for dispute resolution mechanisms to settle disputes between the parties.

During the Contract Management phase, a disagreement becomes a dispute when it is not possible for the parties to resolve it without resorting to a formal resolution mechanism. Generally, what a dispute is and when it is deemed to have occurred is defined in the contract, often in a dispute resolution clause.

Many disagreements and disputes arise when the parties cannot agree on issues related to the interpretation of contract provisions, the definition of deliverables, meeting performance standards and/or the effect of unexpected events.

It is important that any possibility of dispute or an actual dispute be recognised at an early stage and addressed as quickly as possible. Avoiding escalation of disagreements can impact on contract deliverables and reduce the costs to both parties.

Where a dispute arises, the Contract Management Unit/function will obtain evidence from both parties and refer the matter to the legal service for opinion. The outcome and recommendation of the dispute will be submitted to the BAC for review and final recommendation to Accounting Officer/Authority for approval.

In the case of non-performance, a letter informing the contractor that contract conditions have not been honoured should be issued affording the contractor at least 14 days to respond. If the contractor does not respond within the specified period, the Municipality shall without prejudice under the contract consider termination of the contract.

### 6.4.3 Forms of Dispute Resolution

The following forms of dispute resolution should be considered as options in the special condition of contracts:

**Negotiation** Negotiating between the Municipality and the contractor is the most common approach to resolving disagreements and disputes. The intention of the negotiation is to reach a mutually acceptable solution, where both sides consider they have gained the best possible result in the circumstances. It is important that one party does not consider they have been unduly pressured to agree to a particular solution as a result of the negotiation as this can lead to an escalation or reappearance of the dispute at a later stage.

**Mediation** Mediation involves the use of a neutral third party to assist in resolving the dispute. The mediator does not impose a decision on the parties in the way a court or arbitrator does, but instead seeks to help the parties resolve the dispute themselves. Mediation is usually regarded as a faster, less formal and less costly process than court proceedings or arbitration.

**Arbitration** The aim of arbitration is to obtain a final and enforceable result without the costs, delays and the formalities of litigation. Arbitration proceedings are private, can be held at a mutually convenient time and the actual proceedings are less complex than litigation.

**Litigation** Litigation is the act or process of contesting a lawsuit or seeking redress through the courts. It can be an expensive and time consuming procedure and is generally taken when other avenues of dispute resolution have not been successful or are not available. Other approaches to resolving disputes or Contractor defaults should therefore be considered prior to litigation

### 6.4.4 Risks Related to Contract Management

Contract risk must be appropriately managed such that:

- All contracts set out risk identification, monitoring and escalation procedures and mechanisms which are in line with the institutions enterprise risk management plan.
- All contracts identify contingency plans for supplier or buyer failure.

- For key suppliers and buyers, the contract manager monitors the financial health, tax compliance and overall performance of the supplier or buyer.
- Contract terms and potential ramifications around key issues including: termination; warranty; indemnity; security; confidentiality; and dispute resolution are understood by the contract manager.

#### 6.4.5 Penalties

Penalties between the Municipality and the contractor may include:

- Penalties: In accordance with paragraph 22 of the General Conditions of Contract, the Municipality/Entity will have the right to enforce the penalty clause on goods, works and services where the contractor fails to perform in accordance with contractual obligations.
- These penalties usually vary according to several factors, including the type of breach and its severity, duration, frequency, and effect on customers.
- The benefit of this approach is that the penalties are clear, agreed on, and more easily enforceable than a general claim for damages.

Some of the risks involved with contracts and penalty clauses to be applied per nature of contract:

Risk	Penalty clause
Late delivery	<ul style="list-style-type: none"> <li>• Where deliveries are made (after the agreed delivery date), the purchaser has the right to enforce the penalty clause by deducting from the contract price a sum calculated on the delivered price of delayed goods or unperformed services using the ruling prime interest rate calculated for each day of the delay until actual delivery of performance</li> <li>• In case of a delay in excess of 4 weeks, the Municipality is entitled to declare the order null and void without any cost being charged for this. The statutory cases of force majeure are considered to be reasons to suspend the agreement if they make the execution of the order impossible and in so far the supplier notifies the Municipality in writing within 5 days.</li> </ul>
Non delivery	<ul style="list-style-type: none"> <li>• Termination of the contract if delivery does not take place within 4 months or cancellation of the order. (To reduce open ended commitments)</li> </ul>

	<ul style="list-style-type: none"> <li>In the event of non- delivery, and upon comprehensive justification that the contractor has been engaged to remedy the unsatisfactory performance, the Municipality may impose as a penalty, a sum calculated on the delayed goods or unperformed services using the current prime interest rate calculated for each day of the actual performance</li> </ul>
Inferior quality	<ul style="list-style-type: none"> <li>Enforcement of contract conditions</li> <li>Settlement of disputes</li> </ul>
Inability of contractor to perform as required	<ul style="list-style-type: none"> <li>Performance securities should be applied. The contract should dictate what must happen with the security if the contract is not to be completed and the Municipality suffered losses, the performance security shall be utilized to compensate for any loss. The SCC must specify the performance security amount.</li> </ul>
Buy out transactions from transversal contracts	<ul style="list-style-type: none"> <li>When the time provided for the contractor to respond to the claim of non- performance has lapsed, the Municipality can buy out and any difference in cost must be recovered from the contractor</li> </ul>
Sub-contractors not performing	<ul style="list-style-type: none"> <li>Disputes must be resolved between the main contractor and his sub-contractors</li> <li>Liability and obligations are under the contractor</li> <li>Enforce Termination of default</li> <li>Prohibit supplier from rendering any goods, service, and works in organ of state - Restrict supplier on the National Treasury 's Central Supplier Database</li> </ul>
Skills not transferred in terms of consultants services	<ul style="list-style-type: none"> <li>The Municipality shall deduct from the contract price a percentage as a penalty for not transferring skills or for underperformed service.</li> </ul>
Breach of contract	<ul style="list-style-type: none"> <li>Termination of default and recover any loss which the Municipality suffered as a result of arranging another contract</li> </ul>
Contractor unfairly benefited using wrong	<ul style="list-style-type: none"> <li>Misrepresentation of preference points should constitute termination of contract if it is justifiable and will be defendable in the court of law</li> </ul>



preference points	<ul style="list-style-type: none"> <li>• Impose a penalty of a percentage of the monetary value of the contract</li> </ul>
Prohibition of State employees doing business with state	<ul style="list-style-type: none"> <li>• No contracts must be awarded to state employees</li> </ul>

#### 6.4.6 Transfer and Ceding of Contracts

The General Conditions of Contract section 19.1 dictate that the supplier shall not assign, in whole or in part, its obligations to perform under the contract except with the purchaser's prior written consent.

The Special Conditions of Contract should stipulate the conditions under which transfers/cessions shall be considered and the processes to be followed under such circumstances.

Applications for transfers/cession shall be completed and signed by both the transferor and the transferee and countersigned by two parties.

Full reasons for the transferring of the contract must be provided and the transferee's ability to carry out the contract must be established and reported to the Accounting Officer or delegate.

Unless it is otherwise in the best interest of the Municipality, it is unlikely that it will transfer will be approved if the Municipality would suffer a loss as a result thereof or if there is an increased risk to the Municipality.

The principle of fairness dictates that should the contract be transferred to another provider it must be checked whether the number of preference points scored is at least the same or more than that scored by the original contractor. Thus it should be indicated if the transfer would have had an influence on the award. However the circumstances leading to the transfer must be pointed out and taken into consideration.

The contractor will raise the issue with the user division in writing where after the user division must comment on the viability of the transfer/cession and submit the request to the SCM unit/CSC.

If the transfer/cession is not viewed favourably for a justifiable reason, the SCM unit must inform the contractor of the decision in writing and provide the user division with the copies of the correspondence for filing purposes.

If the transfer/cession is viewed favourably, the SCM unit must involve Legal Services for the purposes of drawing up the transfer/cession documentation.

The SCM unit must facilitate the signing of the transfer/cession by all parties, must forward a copy to the user division and the contractor and must file the original signed transfer/cession documentation appropriately.

If the transfer/cession is not approved the original contractor will still be accountable to execute the contract.

#### **6.4.7 Termination of the Contract and Exit from the Relationship**

Contract termination is the last resort to be sought by Municipality when dealing with disputes and non-performance. It should be taken into consideration that solving disputes through courts usually costs a lot of time and money.

Termination of a contract may be considered for a variety of reasons, such as non-compliance with contract conditions, delayed deliveries, bribery, death or sequestration/liquidation of the contractor.

If termination is considered, the following factors must be addressed to the Bid Adjudication Committee:

- The particular contract condition empowering the action for the purpose of resolving any dispute;
- What further arrangements will be made for completing the contract;
- Whether additional cost will be recovered from the contractor; and
- Payment of work already executed prior to cancellation of the contract.

The contract should contain detailed provisions on the mechanism to terminate all or part of the contract and exit from the relationship.

Under the following conditions, Municipalities may consider their rights to terminate the contracts through delegated authority if they are appropriately drafted:

- Failure to meet the service performance targets for critical services on a repeated basis;
- Failure to meet a certain number of service performance targets during a specified period or supplier has engaged in corrupt and fraudulent practices during the bidding process or the execution of the contract;
- Material breach of terms and conditions with the breach being either irreparable or not having been remedied within a specified period;

- Major financial difficulties being encountered by the contractors (e.g. under liquidation);
- Failure to meet mandatory requirements or failure to acquire certain accreditation or licence or approval during the life of the contract.

Exit provisions should be included in the contract to cover specific rights that will be required for termination, such as:

- The continued provision of the services following the notification of termination.
- The right of Municipalities or the new contractors, if necessary, to approach key members of the contractor's staff and to offer them jobs so as to retain the delivery capability;
- The right to perform inventory check of assets owned by Municipalities;
- The right to transfer ownership of assets and equipment upon termination and
- The migration of data and systems and the provision of relevant information to Municipalities or the new contractor.

Contracts must include the possibility to be terminated. This will normally include the details of timing including periods of notice (exit clause) and direction on the payment upon termination. The contract or agreement will have stated the initial term with specified period after which either party may terminate or renew the agreement, provided both parties agree to the terms and conditions.

Termination of a contract is usually detrimental to the Municipality; therefore, serious thought must be given to the grounds for considering termination with legal assistance.

The Contract Management System must be updated by cancelling the contract on the system and contract register.

## **6.5 Stage 5: Close Out**

This stage refers to the necessary actions to end or reconsider the contractor for future agreement and associated performance review. The activities associated with closing the project down, whether in accordance with the contract or as a result of early termination.

At the completion of the contract, the end-user will provide the contract close out report indicating overall performance of the contractor; stage of contract; achievement of milestones against the original contract agreement and timelines, payments; poor performance; action and other observation.

The close out report will be submitted to Contract Management team for deliberation; filing purposes; recording discrepancies and where applicable a

register and appropriate contract system will be updated. A close out report is applicable to contracts irrespective of contract period.

Different activities of course are associated with the different forms that contract termination can take. In the case of more complex, long-term or construction contracts ending in accordance with the original contract plan, best practice requires the need for evidence that the contract has been completed to the satisfaction of all parties. This is normally carried out in two stages;

- To ascertain internally that there are no outstanding matters and,
- To secure agreement from contractor(s) that, apart from agreed ongoing liabilities, the contract(s) has ended.

The aim of the closure procedure is to provide a mechanism for managing the closure of the contract following the end of any retention or guarantee periods and the resolution of all other outstanding matters. The procedure is designed (where and if applicable) to:

- Ensure completion of all administrative matters;
- Record that all technical issues have been completed;
- Determine the extent of any liquidated damages to be deducted from the contract price;
- Record the end of the retention and guarantee periods and the date of the final inspection carried out;
- Record the date of release of retention and/or bank guarantees;
- To agree a statement of specific limits on continuing contractual obligations after completion of work and any ongoing obligations following the end of guarantees or maintenance periods;
- Transfer any assets, including data and intellectual property, and any loan items;
- Transfer operational systems to the successful contractor;
- Record the process of final contract payments and a summary of the financial payments made and received;
- Summarise claims made against or received from the contractor;
- Ensure the retention of records relating to the contract to counter any subsequent claims that may be brought. The Limitation sets out the general periods for six years or twelve years according to the type of contract within which an action may be brought.

On completion of this activity, agreement should have been reached on all technical and commercial aspects of the contract. The agreement should require the signature of the parties to a document which records the acceptance of the work or service, the obligations fulfilled and the price paid or to be paid.

Another important activity conducted at this stage, particularly in the case of high value, large contracts, is the preparation of a post-contract project report. This may follow a formal post-contract review, undertaken to assess the business benefits or losses from carrying out the procurement, how those benefits may be further enhanced and/or costs and risks reduced and how the losses can be recouped and turned to benefits.

The review should also gather the lessons that can be learnt from the management processes and procedures followed during the contract and implemented in the future. The review should include the views of all stakeholders and the report should relate to the costs and benefits set out in the original business